047

IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA Appellant, vs. JACK R. SNYDER and GAIL K. SNYDER, his wife, Appellee.	CASE NO. 79,720 FIFTH DISTRICT COURT OF APPEAL CASE NO. 90-1214

AMICUS BRIEF FOR OSCEOLA COUNTY IN SUPPORT OF BREVARD COUNTY

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND THE FACTS

For the purposes of avoiding duplication, promoting economy, and limiting factual confusion, Osceola County, amicus herein, adopts the statement of facts and the case as represented by Brevard County in its initial brief.

SUMMARY OF THE ARGUMENT

I. Snyder v. Brevard County, 595 So.2d 65 (Fla.5DCA 1991) holds that decisions of local government to rezone, or refuse to rezone, private real property are not legislative acts and therefore not entitled to the "fairly debatable" standard of judicial review. Amicus, Osceola County, argues in support of Brevard County's position that rezonings are legislative in nature, as they always have been so deemed in Florida, and that no basis exists in law or practical experience to change their classification as legislative. Osceola County asserts that the "fairly debatable" standard and its attendant burden upon the party contesting the rezoning decision, remains the only viable measure of judicial review which respects the separation of powers, allows for judicial scrutiny of governmental decision-making, yet discourages unnecessary litigation. It is also argued that the "fairly debatable" rule should be used in cases which seek a determination of zoning/rezoning consistency with the comprehensive plan.

II. Snyder, supra, would require local governments to provide a full record which includes extensive findings and conclusions for each rezoning decision. Osceola County argues that such a requirement is contrary to Florida Statutes, has no basis in law because rezonings are legislative, and is totally unworkable given the realities of local government resources.

ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT REZONINGS ARE "EXECUTIVE" RATHER THAN LEGISLATIVE IN NATURE AND THEREFORE NOT SUBJECT TO THE FAIRLY DEBATABLE STANDARD OF REVIEW.

As framed by the Snyder Court, the central issue in this appeal is whether a decision of a board of county commissioners to deny a rezoning request is a legislative act. Contrary to decades of case law,[1] the Snyder Court decided rezonings were not legislative in nature but rather "executive". From this one conclusion flows a variety of ramifications such as a shift in the burden of proof, a change in the standard by which rezonings are reviewed, and the process by which rezoning applications would be heard by local governments.

It is not entirely clear what triggered the Snyder Court's radical departure from the long-established principle that rezonings are legislative and entitled to the "fairly debatable" standard of judicial review. It is Osceola County's surmise that

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[1] City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968); Oka v. Cole, 145 So.2d 233 (Fla. 1962).

the advent of the consistency requirements of Florida Statute 163.3194 contributed to the Court's new perspective. Under the consistency doctrine all development orders (which includes, inter alia, rezonings per §163.3164(6) and (7), Fla.Stat.) must be consistent with the county's comprehensive plan. The evolution of the Fifth District's rezoning theories can be traced. In 1980, that Court continued to apply traditional review standards to rezoning actions and consistency determinations. Hoffman v. Brevard County, 390 So.2d 445 (Fla. 5DCA 1980). Then in 1982 Judge Cowart, who sat on the Snyder panel, first revealed his novel idea that rezonings were "executive" rather than legislative and that the fairly debatable rule did not provide sufficient judicial scrutiny, in a dissent to City of New Smyrna Beach v. Barton, 414 So.2d 542 (Fla. 5DCA 1982). In 1985 Judge Cowart further explicated his views on plan consistency and again mentioned his theory that rezonings were "executive action", in a special concurring opinion to City of Cape Canaveral v. Mosher, 467 So.2d 468 (Fla. 5DCA 1985). Clearly, the position advanced by Judge Cowart in Mosher and Barton forms the nucleus of the Snyder rationale. An examination of Judge Cowart's approach indicates a feeling that somehow the statutory primacy of comprehensive planning has relegated zoning to a mere clerical function. Under his theory, rezonings are no longer legislative in nature but virtually ministerial. The only truly legislative act would be that of planning. Rezonings would no longer be afforded deference.

The problem with such an approach is that it has no basis in

either law or the reality of land use regulation. First and most importantly a review of Florida Statutes Chapter 163, Part II reveals absolutely no legislative intent to modify the traditional stature of rezonings, either substantively or procedurally. Rezonings are expressly referenced as "development orders" at §163.3164(6)and(7), Fla.Stat. A statutory procedure for contesting the consistency of a rezoning with the plan is established by §163.3215, Fla.Stat. Nowhere is there any indication that the legislature intended to diminish the status of rezonings in any way. Certainly there is no mention of reducing rezonings from legislative to executive functions or abolishing the application of the fairly debatable rule.

Perhaps some of the confusion is engendered by the consistency requirement itself. The Courts have recently devoted mighty judicial labor trying to figure out how to handle consistency cases with differing results leading to different standards in different appellate districts and different applications of standards within the same district. Southwest Ranches Homeowner's v. County of Broward, 502 So.2d 931 (Fla. 4DCA 1987); Norwood-Norland Homeowners Association v. Dade County, 511 So.2d 1009 (Fla. 3DCA 1987); Machado v. Musgrove, 519 So.2d 629 (Fla. 3DCA 1987); B.B. McCormick & Sons v. City of Jacksonville, 559 So.2d 252 (Fla. 1DCA 1990); St. Johns County v. Owings, 554 So.2d 535 (Fla. 5DCA 1989); Orange County v. Lust, 17 FLW D1162 (Fla. 5DCA 1992) wherein Judge Sharpe succinctly summed up the situation:

> In view of the obvious mass confusion at the appellate level (at least in the Fifth

> District) as to what standard of review the reviewing Court should apply to a zoning case, I hope our Florida Supreme Court will take jurisdiction in an appropriate case and instruct us on these matters. We obviously need some help!

What all this judicial effort overlooks is that there is no reason to invent a new standard of review for rezonings or redefine rezonings, even for rezoning requests concerning a single parcel of land upon which Snyder focuses. No statute or constitutional amendment has been adopted which would change their basic nature. They remain today as they have always been, tantamount to the amendment of the zoning ordinance, a legislative act representing legislative judgment and the exercise of the police power. Walker v. Indian River County, 319 So.2d 596 (Fla. 4DCA 1975); City of Miami Beach v. Schauer, 104 So.2d 129 (Fla. 3DCA 1958); City of Miami Beach v. Weiss, 217 So.2d 836 (Fla. 1969). The issue of whether a rezoning (or denial of a rezoning request) is consistent with the plan can and should be evaluated under the fairly debatable standard the same as it has always been used to judge whether it bears a substantial relation to the health, safety, and welfare. Wolff v. Dade County, 370 So.2d 839 (Fla. 3DCA 1979); Dade County v. Inversiones Rafamar, 360 So.2d 1130 (Fla. 3DCA 1978); City of South Miami v. Meenan, 581 So.2d 228 (Fla. 3DCA 1991).

The Snyder opinion presupposes that in the age of comprehensive planning, rezonings no longer involve the exercise of discretionary judgment by the local governing bodies. This is simply wrong. Rezonings today require the same, or even more,

judgment as ever. One example may be found in Zetrouer v. Alachua County, 408 So.2d 1065 (Fla. 1DCA 1982) wherein the plan allowed a density of 3 - 4 units per acre. The Court held that the county had the discretion to rezone the property to either 3 or 4 units per acre. Also see: Dade County v. Inversiones Rafamar, 360 So.2d 1130 (Fla. 3DCA 1978). Often a parcel may be designated by the plan for a particular land use, say commercial, but when an applicant applies for commercial rezoning it is discovered that commercial usage would be inconsistent with some other provision of the plan such as when a commercial use would be incompatible with neighboring lands, generate unacceptable levels of traffic, or the services and infrastructure necessary to support the proposed project are not available. Often both the use to be rezoned and the intensity of use must be decided upon by the local governing body. A plan designation of commercial may include a choice of use intensities from heavy industrial to residential/professional offices under the zoning regulations. These are not ministerial or "executive" decisions nor are they quasi-judicial. They remain classic legislative policy-making decisions which can, and do, change the complexion of whole communities on a continuing basis.

Notwithstanding the comprehensive planning process, rezonings by necessity remain the primary vehicle by which local government adjusts its land management scheme on a site-specific basis. Osceola County's land regulatory jurisdiction covers approximately 906,157 acres. Obviously, neither the comprehensive plan or the zoning code can fully and carefully consider each lot, piece, and

parcel with the kind of exactitude that a site-specific examination at the time of rezoning requires. Contrary to the Snyder Court's characterization of this process as being virtually clerical, it is the very essence of the legislative function. Each rezoning decision involves a close examination of such factors as the neighboring properties and the impact of the proposed use on them, the traffic circulation network available and impacted by the proposed project, the availability of public services necessary to support the proposed project, the proposed project's probable economic impact, its environmental impact, and how it will affect the County's overall zoning scheme.

It is also apparent from the Snyder opinion that a major influence on the Court is its belief that the rezoning process is thoroughly corrupted by politics. Osceola County respectfully objects to the cynicism of the Snyder Court in portraying rezoning decisions as primarily political:

> Furthermore, rezoning is granted not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and the use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.
>
> In this context, local governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer. Snyder at 73.

There are a myriad of considerations that enter into the

rezoning decision-making process. Most are empirically related to land management goals. The process is dynamic, fluid, and even seemingly chaotic at times. But that is the nature of the legislative process. The Snyder Court is apparently distrustful of any process which does not operate on the clinical, methodical basis that the judiciary does. But it is simply unrealistic to expect the County rezoning process to function in that manner. Until the Snyder opinion, most Florida Courts recognized the realities of the process, as illustrated by Dade County v. McIntosh, 256 So.2d 246 (Fla. 3DCA 1972) wherein the Court, in applying the fairly debatable rule to a rezoning action, observed of the raucous public meeting before the county commission that such hearings are legislative and not to be held to the same standard of technical nicety applicable to judicial proceedings.

Regarding the Snyder Court's characterization of local government as an extortionist, using its "leverage" to "coerce" concessions from helpless developers, the Courts have generally been more pragmatic. For example, in City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. 4DCA 1983) the Court upheld a "transfer of development rights" ordinance which the developer argued was coercive. The Court noted that:

> . . . in this age of site plans, impact studies, impact fees, PUDs, land use plans and required approvals, developers and government play carrot-and-stick with each other all the time. In other words, the game is the same, they have simply changed the name. Hollywood, Inc. at 1338.

If abuses occur or due process is denied, the developer always

has resort to the courts as the need arises. The solution is not to abolish the traditional standard of review by broadly painting all local governments as villainous and the entire zoning process as politically contaminated. And it must be remembered that there is an important third party in every rezoning case - the public. To the extent that local government can use the process to fairly exact from the developer reasonable conditions to mitigate the impacts of his project, rather than the taxpayer, the public is well served.

The Snyder Court seems offended by the fact that often interested citizens, usually neighboring property owners, attend rezoning hearings and make their views known to their elected officials. The courts have had a hard time grappling with this fact, apparently because it is so different from the more detached judicial experience. See: Conetta v. City of Sarasota, 400 So.2d 1051 (Fla. 2DCA 1981); City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4DCA 1974). However, the simple fact is that zoning boards have public hearings so the public can observe and participate. County commissioners are elected to represent the entire public spectrum. Public participation is an attribute of the legislative process. It is not only mandated by law but is a fundamental aspect of democratic government. The better approach on public participation is that used in Board of County Commissioners v. City of Clearwater, 440 So.2d 497 (Fla. 2DCA 1983). In that case, the Court recognized that often the residents of the affected area are the most knowledgeable of the

circumstances and that their objections may be given great weight if the county commission deems their objections credible. If an abusive situation results in manifest injustice it can be reviewed by the courts as needed.

The federal courts are often called upon to review the effects of public participation on the decision-making process in constitutional due process claims. They also take a functional approach to such cases as typified by Greenbriar, Ltd v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989). In that case a developer argued that its rezoning was denied because of political pressure placed upon the city council by citizens in opposition to the rezoning, contrary to due process. The court held that there is nothing inherently inconsistent between an elected official's representation of his constituency and his decision on the merits of a rezoning application:

> Thus, [the developer] points to evidence in the record that Council members were subjected to "political pressure" and that some were "scared of the crowd". Brief of Appellees at 38.16
>
> However, a planning commission or a city council is not a judicial forum; it is a legislative body held democratically accountable through precisely the forms of political suasion to which [the developer] objects. See Couf v. DeBlaker, 652 F.2d at 590 ("Our opinions repeatedly characterize local zoning decisions as 'legislative' in nature"); South Gwinnett Venture v. Pruitt, 491 F.2d at 7 ("local zoning is a quasi-judicial consideration in the absence of arbitrary action"). Council members who evaluate a proposal in light of their constituents' preferences do not necessarily overlook what [the developer] contends to be the "merits" of a particular zoning plan. (17)

> Here, there is no indication that Council members' attention to citizens' concerns in assessing [the developer's] zoning plan deprived their decision of a rational basis. The analysis of the Seventh Circuit is apt:
>
> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic . . . government, operations which are permeated by pressure from special interests . . . The fact 'that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws' . . . does not state a claim of denial of substantive due process. Greenbriar, Ltd., at p. 1579.

The characterization of rezonings as legislative thereby entitling them to review by the fairly debatable rule has long satisfied several important purposes:

1. Contrary to Snyder, it does furnish land owners with a complete opportunity for judicial review. J.H.S. Homes, Inc. v. Broward County, 140 So.2d 621 (Fla. 2DCA 1962).

2. It respects the doctrine of separation of powers between the judiciary and the popularly elected policy-makers. Broward County v. Capeletti Brothers, Inc., 375 So.2d 313 (Fla. 4DCA 1979); Town of Indialantic v. McNulty, 400 So.2d 1227 (Fla. 5DCA 1981).

3. It prevents the Courts from becoming "super zoning boards", S.A. Healy v. Highland Beach, 355 So.2d 813 (Fla. 4DCA 1978), thereby opening a floodgate of litigation by every disappointed zoning applicant or neighborhood opposition group.

By changing the characterization of rezonings from legislative to "executive", removing the fairly debatable rule and shifting the

burden, the Snyder opinion has, in one fell swoop, undermined the whole framework of Florida land use regulatory law as it has existed for decades. The traditional and time-tested doctrines of zoning law should be restored. Whether reviewing a rezoning for consistency with a comprehensive plan or the traditional challenge to its validity, or a combination of the two, the fairly debatable rule continues to be the only standard by which a reviewing Court can judge county zoning actions and maintain the appropriate judicial perspective.

POINT II

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT LOCAL GOVERNMENT HAS THE BURDEN OF PRODUCING A RECORD WITH FINDINGS AND CONCLUSIONS.

The Snyder Court has, for the first time that Osceola County is aware of, imposed a requirement on local government to provide findings, conclusions, and a record for each of its rezoning decisions. While this requirement is perhaps philosophically attractive it has no support in law and is unworkable as a practical matter.

Snyder would require that local government have the burden of supplying "a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy . . . of the reasons given for the result of the action taken". Snyder at p. 81.

The Snyder Court seems to confuse county government for the

Division of Administrative Hearings. First, the burden of physical preparation of the record is upon the party appealing a local governmental decision under §286.0105, Fla.Stat. Obviously, under the "Sunshine Law" (§286.011, Fla.Stat.) minutes of rezoning hearings are maintained and available under the Public Records Act (Chapter 119, Fla.Stat.), as are the rezoning files. Beyond that the burden is squarely, by statute, on the person prosecuting the appeal to supply the record.

Secondly, findings and conclusions are not legally required for legislative action. The reason is that, for purposes of determining the validity of zoning action, it is legally immaterial for what reasons a legislative body votes a particular way, or what motivates a particular officer to vote a particular way. Mailman Development Corp. v City of Hollywood, 286 So.2d 614 (Fla. 4DCA 1973); Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959). What matters is that the zoning action bear a substantial relation to the public health, safety, and welfare. Davis v. Sails, 318 So.2d 214 (Fla. 1DCA 1975). A public official may vote a particular way for all the wrong reasons but the result may nevertheless have a rational basis, just as he may vote a particular way for well motivated reasons resulting in an unconstutional act. Thus,the judicial evaluation of legislative action should not be based on the reasons behind the action taken. The appropriate means by which to adjudicate whether a rezoning, or any other legislative act, bears a substantial relation to the police power is by trial de novo. Town of Orange Park v. Pope, 459

So.2d 418 (Fla. 1DCA 1984). If the plaintiff seeks to also challenge the rezoning's consistency with the comprehensive plan, an action under §163.3215 may be included as a separate count. This would also reconcile the timing problem created by a common-law certiorari petition which requires filing within 30 days of rendition [per Fla.R.App.P. 9.100(c)] and a "§163.3215 consistency action" which, by the terms of that statute, requires the action to be filed only after a 30 day prior notice period has elapsed.

There is also a very practical reason why findings and conclusions are not required. Osceola, for example, is a relatively small Florida county at 107,000 population. However, it customarily processes hundreds of rezonings annually. Simply put, it does not have the resources to meet the burdens placed upon it by the Snyder decision for every rezoning it processes. The staff necessary to prepare and present each rezoning with the judicial exactitude contemplated by Snyder would be prohibitively expensive. And, of course, members of planning and zoning boards are typically unpaid volunteers who are already providing their communities with many hours of their time. The elected members of local government governing boards who must make the final decision are invariably "part time" officers who must also concern themselves with everything from operating libraries to building roads to collecting trash to funding the courthouse. Zoning is simply one component of a huge variety of responsibilities on their agendas, albeit an important one.

CONCLUSION

For the above and foregoing reasons, Osceola County, amicus herein, respectfully requests this honorable Court to reverse the opinion of the Fifth District Court of Appeal in this case by reinstating the fairly debatable standard of review in rezoning cases, whether the judicial review is to determine the fundamental validity of the zoning action or its consistency with the comprehensive plan; and, to reverse Snyder's requirement that local government provide a record of detailed findings and conclusions for rezoning decisions.

Respectfully submitted,

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