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IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT NO. 79,720

FIFTH DISTRICT COURT OF APPEAL
CASE NUMBER: 90-1214

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA	§
Petitioner,	§
v.	§
JACK R. SNYDER and GAIL K. SNYDER, his wife	§
Respondents.	§

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

OFFICE OF THE COUNTY ATTORNEY
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I. STATEMENT OF CASE AND FACTS

Petitioner, BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, seeks review by the Florida Supreme Court of the decision of the District Court of Appeal, Fifth District, filed December 12, 1991, motion for rehearing denied March 20, 1992.

This case stems from the denial of a re-zoning request by the Board of County Commissioners of Brevard County. The circuit court action was filed as two essentially identical actions, one for declaratory judgment and injunctive relief at Case No. 89-03097-CA-T and the second a petition for writ of certiorari at Case No. 88-18025-CA-J. By order dated June 7, 1989, the circuit court required Respondents, JACK R. SNYDER and GAIL K. SNYDER, to choose one case with which to proceed. Respondents chose to proceed with the petition for writ of certiorari. The circuit court denied the petition for writ of certiorari and upheld the decision of the Board of County Commissioners of Brevard County denying the re-zoning request. The case was then presented to the Fifth District Court of Appeal by petition for writ of certiorari. The district court ruled in favor of Respondents. This request for review followed. The facts are described below.

JACK R. SNYDER and GAIL K. SNYDER (Respondents), own a one-half acre parcel of land zoned GU (General Use) under the Brevard County zoning ordinance. The property is located on Milford Point Drive, a narrow peninsula of land in the Banana River.

On the Future Land Use Map of the 1988 Comprehensive Plan of Brevard County, Florida, the parcel was designated for residential use in an urbanizing service sector, which limited density to twelve units per acre. Respondents requested RU-2-15 zoning (fifteen units per acre) which could be allowed upon extension of the urban service sector.

The Brevard County planning and zoning staff comments indicated that this parcel of land appeared to be located within a 25- to 100-Year Floodplain (App-14-20); therefore, under the Comprehensive Plan, the maximum allowable residential density at this location was two units

per acre due to its environmental sensitivity. Accordingly, the re-zoning request was recommended for denial by the staff (App-20).

Two advertised public hearings were held. The first was held before the Planning and Zoning Board, a body which makes recommendations to the Board of County Commissioners (App-1-3). At the Planning and Zoning Board hearing, citizens and nearby residents expressed concern that the proposed zoning was incompatible with the quiet, exclusively single-family residential nature of the neighborhood. Additionally, the floodplain issue was addressed. The zoning manager stated that the landowners had submitted a topographical map for the record showing the elevation of the subject property. According to the zoning manager, the topographical map indicated that the elevation of the land was "within the purview of taking the parcel out of the 100-Year Floodplain" (App-3). The Planning and Zoning Board recommended approval of the request. However, following the Planning and Zoning Board meeting, it was discovered that the topographical survey in the record was not of the property to be re-zoned. Instead, it described parcels immediately south of the parcels to be re-zoned (*cf* App-45, 46). The only survey in the record describing the property to be re-zoned contained no topographical information (App-46).

At the second public hearing, which was held before the Board of County Commissioners of Brevard County, citizens and nearby residents expressed their concerns regarding the narrowness of the street providing access to the parcel. The street is only twenty feet wide, which is well below the existing standards for county roads. Comments also related to the quiet nature of the neighborhood, incompatibility of the re-zoning request with the existing development, parking problems and the lack of utilities. The Board of County Commissioners reviewed all the facts, determined that RU-2-15 was inappropriate and incompatible with the surrounding area and denied the request for RU-2-15 zoning (App-4-6). Subsequently, Respondents appealed the

decision of the Board of County Commissioners to the Circuit Court of Brevard County, Florida. The circuit court upheld the decision of the Board of County Commissioners of Brevard County and stated:

> "Exhibit 'G' clearly states that the entire parcel is in the 25- to 100-Year Floodplain and that the maximum residential density in that floodplain is two dwelling units per acre. In addition to the above, there was competent substantial evidence before the Board from those who would be affected to support the Board's decision". (App-81, 82)

Respondents thereafter appealed the decision of the circuit court to the Fifth District Court of Appeal. The Fifth District Court of Appeal reversed the decision of the circuit court and the Board of County Commissioners. In doing so, the Fifth District Court of Appeal determined that re-zonings are not legislative actions; that close judicial review of re-zoning decisions applies rather than a fairly debatable standard; that the local government must prove by clear and convincing evidence a public necessity basis for denying the re-zoning, and that findings of fact must be made to deny a re-zoning request which appears to be consistent with the Comprehensive Plan (App-83).

II. SUMMARY OF ARGUMENT

The ruling in this case expressly and directly conflicts with over twenty-eight opinions rendered by the Florida Supreme Court and other district courts holding that zoning decisions are legislative actions reviewed by the fairly debatable standard. It also conflicts with the police powers granted to local governments, violates the Separation of Powers Doctrine and effectively invalidates Sections 163.3161 and 163.3202, Florida Statutes (1991) and Chapter 125, Florida Statutes (1991). Additionally, a severe procedural problem for filing suit in re-zoning cases is created by the instant decision. The question is, should cases be filed as petitions for certiorari or as complaints for injunctive relief under Section 163.3215, Florida Statutes?

III. ARGUMENT

A. The decision in the instant case, determining that re-zoning is not a legislative action, directly and expressly conflicts with the decisions of the Florida Supreme Court and other district courts of appeal.

B. The Fifth District Court of Appeal's opinion directly and expressly conflicts with prior decisions of the Florida Supreme Court and other district courts of appeal holding that the proper standard of review for re-zoning actions is the fairly debatable standard.

C. The instant case expressly and directly conflicts with other district courts of appeal decisions by requiring clear and convincing evidence of a public necessity basis to deny a re-zoning request.

D. This case expressly and directly conflicts with other decisions holding that specific findings of fact are not required to be made by the local government when granting or denying re-zoning requests.

The Fifth District Court of Appeal, in conflict with earlier rulings, has held that re-zoning decisions by local governments do not constitute legislative actions. Following that initial determination, the court ruled that the fairly debatable standard does not apply in reviewing re-zoning actions and that the burden of proof is on the local government to prove by clear and convincing evidence that a specifically stated public necessity requires denial of the re-zoning request. Previously, if there was competent evidence supporting the local government's decision, it would be upheld under the fairly debatable standard. The court would not encroach into the legislative arena, substitute its judgment for that of the zoning authority, and re-zone property. The Fifth District Court's ruling in this case conflicts with this well-established rule of law and is in express and direct conflict with the multiple decisions of the Florida Supreme Court and every district court of appeal. The following cases address issues (A) through (D) and hold that re-zoning decisions are legislative actions reviewed under the fairly debatable standard. In addition, several of these cases also state that findings of fact are not required in this context.

1. *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla. 1982). (Court has limited scope of review of zoning decisions. Fairly debatable standard applies.)

2. *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So.2d 57 (Fla. 1978). (Zoning is a legislative function.)

3. *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959), *rev. denied*, 564 So.2d 488 (Fla. 1990). (Re-zonings are legislative actions.)

4. *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957). (Zoning is a legislative act.)

5. *City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla. 1956). (Re-zoning from single family residential to hotel use is a legislative act. The fairly debatable rule applies.)

6. *City of Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953). (Re-zoning single family lots is a legislative act. It is fairly debatable and must be upheld if for any reason it is open to dispute or controversy.)

7. *City of St. Petersburg v. Aikin*, 217 So.2d 315 (Fla. 1968). (The circuit court cannot substitute its judgment for that of the zoning body.)

8. *Desisto College, Inc. v. Town of Howey in the Hills*, 706 F.Supp. 1479 (Fla. M.D. 1989). (Zoning commissions are not required to make findings of fact or state reasons for the decision. Decisions of zoning commissions are presumed to be valid legislative actions.)

9. *St. John's County v. Owings*, 554 So.2d 535 (Fla. 5th DCA 1989). (The fairly debatable standard applies to legislative rezoning decisions. Regardless of whether appellate court would have viewed the facts differently, *de novo* review is not authorized.)

10. *Orange County v. Lust*, 15 F.L.W. 2903 (Fla. 5th DCA December 7, 1990). (Denial of re-zoning was legislative decision subject to review by the fairly debatable standard.)

11. *Riverside Group v. Smith*, 497 So.2d 988 (Fla. 5th DCA 1986). (No specific findings of fact required in granting application for re-zoning.)

12. *City of New Smyrna Beach v. Barton*, 414 So.2d 542 (Fla. 5th DCA 1982), *rev. denied*, 424 So.2d 760 (Fla. 1982). (Legislative re-zoning decisions are reviewed under the fairly debatable standard.)

13. *Odham v. Petersen*, 398 So.2d 875 (Fla. 5th DCA 1981), *approved* 428 So.2d 241 (Fla. 1983). (There is no requirement for specific findings of fact by quasi-judicial bodies.)

14. *Palm Beach County v. Allen Morris Company*, 547 So.2d 690 (Fla. 4th DCA 1989), *rev. dismissed*, 553 So.2d 1164 (Fla. 1989). (Rezoning decisions are reviewed by the court under the fairly debatable standard.)

15. *Palm Beach County v. Tinnerman*, 517 So.2d 699 (Fla. 4th DCA 1987), *rev. denied*, 528 So.2d 1183 (Fla. 1988). (Zoning actions are legislative. Court order directing re-zoning violates separation of powers doctrine.)

16. *Southwest Ranches Homeowners Association v. Broward County*, 502 So.2d 931 (Fla. 4th DCA 1987). (Rezoning should meet fairly debatable standard and be consistent with the comprehensive plan.)

17. *Marell v. Hardy*, 450 So.2d 1207 (Fla. 4th DCA 1984). (Zoning is the exclusive function of the legislative authorities and courts are not entitled to substitute their judgment for that of the legislative body. Zoning resolutions are reviewed by the fairly debatable standard.)

18. *S.A. Healy Company v. Town of Highland Beach*, 355 So.2d 813 (Fla. 4th DCA 1978). (Zoning is the exclusive function of the zoning authorities and courts are not entitled to substitute their judgment for that of the legislative body.)

19. *County of Brevard v. Woodham*, 223 So.2d 344 (Fla. 4th DCA 1969), *cert. den.*, 229 So.2d 872 (Fla. 1969). (Zoning ordinance will be upheld if it is fairly debatable.)

20. *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991). (Rezoning actions are legislative in nature.)

21. *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987). (Zoning actions are legislative and must be consistent with comprehensive plan. Burden is on party seeking change to prove strict compliance with Comprehensive Plan.)

22. *Metropolitan Dade County v. Fuller*, 515 So.2d 1312 (Fla. 3d DCA 1987). (Fairly debatable standard applies to re-zoning.)

23. *Dade County v. Inversiones Rafamar, S.A.*, 360 So.2d 1130 (Fla. 3d DCA 1978). (Re-zoning is the exclusive function of the zoning authorities and courts are not entitled to substitute their judgment for that of the legislative body.)

24. *Smith v. City of Miami Beach*, 213 So.2d 281 (Fla. 3d DCA 1968), *rev. denied*, 511 So.2d 999 (Fla. 1987). (Re-zonings are legislative; burden is on landowner to show that government's action was arbitrary.)

25. *Lee County v. Morales*, 557 So.2d 652 (Fla. 2d DCA 1990); *rev. den.*, 564 So.2d 1086 (Fla. 1991). (Re-zoning is legislative act; standard of review is whether the action was fairly debatable. Zoning ordinance is not confiscatory absent deprivation of all beneficial use of the land.)

26. *City of Tampa v. Speth*, 517 So.2d 786 (Fla. 2d DCA 1988). (Re-zoning from single family to medium density multiple family zoning is a legislative act subject to fairly debatable standard. City appropriately denied rezoning based on aesthetic and historic character of neighborhood.)

27. *Naples Airport Authority v. Collier Development*, 513 So.2d 247 (Fla. 2d DCA 1987). (Re-zoning is a legislative action reviewed under the fairly debatable standard. If there is substantial competent evidence supporting the decision, it should be upheld.)

28. *B.B. McCormick and Sons v. City of Jacksonville*, 559 So.2d 252 (Fla. 1st DCA 1990). (Burden of proof is on property owner or party contesting re-zoning action.)

29. *Starkey v. Okaloosa County*, 512 So.2d 1040 (Fla. 1st DCA 1987). (It was the county's legislative prerogative to rezone property.)

30. *City of Jacksonville v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984); *rev. den.*, 469 So.2d 749 (Fla. 1985). (Fairly debatable standard applies to legislative rezoning.)

The Fifth District Court of Appeal states there has been a change of circumstance due to the 1985 adoption of Chapter 163, Part II, Florida Statutes, and its requirement for adoption of a Comprehensive Plan. Petitioner contends, to the contrary, that Chapter 163 recognizes the continued authority to re-zone land in Section 163.3161(8), Section 163.3164(7) and (22) and Section 163.3202, Florida Statutes. Chapter 163, Part II, Florida Statutes (1991), merely provides an additional level of review; it does not eliminate zoning. Contrary to the decision of the Fifth District, the Comprehensive Plan has not been raised to the level of a zoning map by the adoption of Chapter 163, Part II.

Next, the Fifth District distinguishes *Schauer*, on the basis that it dealt with a general zoning ordinance, not a re-zoning of a specific parcel. In fact, *Schauer* addressed the re-zoning of a large tract of land from single family to multi-family zoning. The court found that the re-

zoning action was legislative in nature and that the motives of the individual councilmen were irrelevant.

The Fifth District did not consider the majority holdings listed above, but instead relied on cases outside the zoning field or separate concurring opinions such as that in *Barton*. The re-zoning cases were ignored. Instead, variances, conditional use permits, and special use permit cases were used. The Fifth District further ignored Florida precedent in its opinion in favor of out-of-state case law. The Fifth District Court of Appeal is attempting to drastically change the law of the state without the involvement or review of the Supreme Court.

E. The ruling of the Fifth District Court of Appeal invalidates the local government's authority to zone property under Chapter 125, Florida Statutes (1991), and Article VIII of the Florida Constitution.

The instant decision also conflicts with the right to zone property granted to local governments pursuant to Article VIII of the Florida Constitution and Chapter 125, Florida Statutes.

Under the Florida Constitution, Article VIII, counties are entitled to self-government and may act in a manner "not inconsistent with general or special law". Art. VIII, §1(f), Fla. Const. (*See also, Speer v. Olson*, 367 So.2d 207 (Fla. 1978), construing Chapter 125 as giving home rule powers to charter and non-charter counties.) Section 125.01(h), Florida Statutes, authorizes counties to "enforce zoning regulations...as are necessary to protect the public". In adopting the Comprehensive Plan in compliance with Chapter 163, Florida Statutes, Brevard County specifically reserved the right, when reviewing re-zoning requests, to consider the compatibility and character of the area in Policy 1.6 of the Future Land Use Element of the 1988 Brevard County Comprehensive Plan (App-79, 80). It was contemplated that a wide variety of zoning classifications could possibly be considered for a parcel, but not all would be appropriate once an

in depth review of the site occurred. Here, there were twenty-nine potential classifications, but not all the classifications were compatible or appropriate.

The Fifth District Court of Appeal's ruling, in contrast, effectively requires re-zoning approval even though the public may be harmed by incompatible uses, negative impacts on traffic patterns, increased density in floodplains and other damaging effects. The District Court of Appeal has overlooked the 1988 Brevard County Comprehensive Plan and the inherent right of local governments to zone property under Chapter 125, Florida Statutes, Chapter 163, Florida Statutes, and the Florida Constitution. *See e.g., Dade County v. Inversiones Rafamar, S.A.*

F. The decision of the Fifth District Court of Appeal conflicts with the procedural requirements of Chapter 163, Florida Statutes (1991).

The ruling also affects the procedure for filing suits where inconsistency with the Comprehensive Plan is alleged as a result of a re-zoning action. This problem may cause a multiplicity of lawsuits.

The courts of this state have repeatedly held that when non-legislative or quasi-judicial actions are challenged, a petition for certiorari is the appropriate method of challenging the act. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957). *Harris v. Goff*, 151 So.2d 642 (Fla. 1st DCA 1963). *See, Irvine v. Duval County*, 495 So.2d 167 (Fla. 1986), citing *Irvine v. Duval County Planning Commission*, 466 So.2d 357 (Fla. 1st DCA 1985); *Odham v. Petersen*, 398 So.2d 875 (Fla. 5th DCA 1981), *approved* 428 So.2d 241 (Fla. 1983); *G-W Development Corporation v. Village of North Palm Beach Zoning Board of Adjustment*, 317 So.2d 828 (Fla. 4th DCA 1975). Rule 1.630 Fla.R.Civ.P. provides that a petition for common law certiorari shall be filed within thirty days of rendition of the matter sought to be reviewed.

Meanwhile, Section 163.3215, Florida Statutes, is the only method to challenge consistency of a development order (including a re-zoning action) with the Comprehensive Plan. Pursuant to Section 163.3215, Florida Statutes, certain conditions precedent must be met prior to filing a

complaint. Specifically, the complaining party must first file a verified complaint with the local government whose actions are challenged, setting forth the facts upon which the complaint is based. This verified complaint must be filed within thirty days after the allegedly inconsistent action has been taken. The local government, in turn, has thirty days to respond after receipt of the complaint. At this point, a minimum of sixty days has passed since the decision of the local government was rendered. Thereafter, the complaining party may file suit.

Based on the foregoing, it will be too late to file the required petition for certiorari when the conditions precedent (sixty days) under Section 163.3215, Florida Statutes, have been met. If a petition for certiorari is filed on the basis of inconsistent action per the Comprehensive Plan, it may be subject to dismissal since Section 163.3215, Florida Statutes, offers the sole method to challenge inconsistent actions. Meanwhile, an action under Section 163.3215, Florida Statutes, may be subject to dismissal on the basis of untimeliness based on case law holding that a petition for certiorari is the proper method to appeal a quasi-judicial decision. Alternatively, the court's decision requires the property owners to file two suits, one under Rule 1.630, Florida Rules of Civil Procedure, and a second suit under Section 163.3215, Florida Statutes.

Finally, the ruling has great public importance for the public process of re-zoning land. Based on the ruling in this case, and the Third District Court of Appeal opinion in *Jennings*, commissioners are barred from discussing re-zoning items with the applicants or interested citizens outside the public hearing. In *Jennings*, the Third District ruled that in a quasi-judicial proceeding, when the commissioners met with the applicant or the public outside the public hearing, there was a presumption that due process had been denied. When the Fifth District Court subsequently ruled in this case that re-zonings were <u>not legislative</u> actions, re-zonings could be considered quasi-judicial acts subject to the same prohibitions on *ex parte* communications

described in *Jennings*. Therefore, a question arises whether the public's access to elected officials is being denied.

IV. CONCLUSION

Pursuant to the Florida Constitution, Article V, Section 3(b)(3), the Supreme Court has jurisdiction to hear this case based on express and direct conflict of the opinion of the Fifth District Court of Appeal with multiple prior decisions of the Florida Supreme Court and other District Courts of Appeal. The decision also conflicts with the Florida Constitution and Chapter 125, Florida Statutes, by encroaching on the rights of counties and other local governments to re-zone property under the police power and violates the Separation of Powers Doctrine. Finally, this case creates a conflict between case law and the requirements of 1.630 Fla.R.Civ.P. when compared with the requirements of Chapter 163, Florida Statutes (1991), as to the proper method to file suit when an inconsistency with the Comprehensive Plan is alleged following a re-zoning action.

This case presents multiple issues of great public importance which need to be resolved by the Supreme Court to provide consistency in the law throughout the State of Florida.

V. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Frank J. Griffith, Jr., Esquire, P.O. Drawer 6310-G, Titusville, Florida, 32782-6515, this 23rd day of April, 1992.

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