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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE SUPREME COURT STATE OF FLORIDA

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA,

Petitioner,

vs.

JACK R. SNYDER and GAIL K.
SNYDER, his wife,

Respondents.

SUPREME COURT OF FLORIDA
CASE NO: 79,720

FIFTH DISTRICT COURT OF
APPEAL CASE NO: 90-1214

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

RESPONDENTS' BRIEF ON JURISDICTION

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1. 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. Petitioner's motion for rehearing was denied by the same Court on March 20, 1992. The facts of the case are as follows:

Respondents own a one-half acre parcel of land zoned GU (General Use) under the Brevard County Comprehensive Zoning Ordinance. Respondents desire to erect a multi-unit dwelling on their property and petitioned the governmental zoning authority,the Board of County Commissioners of Brevard County, to rezone their land to RU-2-15, medium density multiple-family dwelling zoning classification.

Upon receiving the rezoning application from the landowners, the staff of the Brevard County Comprehensive Planning and Zoning Department (P&ZD) reviewed it and made certain findings in a standard Rezoning Review Worksheet, including (1) that the rezoning request was consistent with the Brevard County Comprehensive Plan; (2) that the proposed zoning was consistent with the Future Land Use designation for this land (residential); (3) the proposed use met all requirements relating to potable water, sanitary sewer, solid waste facilities, parks and recreation; and (4) the proposed rezoning was compatible with surrounding lands zoned GU and RU-2-15.

An advertised public hearing was held before the Planning and Zoning Board. The findings of the P&ZD staff were present. Nearby

residents expressed their opposition to the rezoning. The Planning and Zoning Board recommended approval of the zoning change.

At a subsequent public hearing before the Brevard County Board of Commissioners the Planning and Zoning Board's recommendation was considered and a number of residents spoke against the rezoning request.

The Board of County Commissioners overruled the Planning and Zoning Board's recommendation and denied the rezoning request without giving any reason.

The landowners filed in the circuit court a Petition for Writ of Certiorari alleging that the zoning classification sought by the landowners was consistent with the Comprehensive Zoning Plan as required by section 163.3194(1)(a), Florida Statutes, and that its denial was arbitrary and unreasonable and had no substantial relation to the public health, safety, morals or general welfare and was not according to the essential requirements of law.

A three judge panel of the circuit court, sitting in its appellate capacity, by a two to one decision denied the landowners' petition for certiorari review, thus affirming the denial of the landowners' request to rezone their land.

The landowners filed a petition for certiorari in the District Court of Appeal, Fifth District, to review the circuit court's denial of relief and they claimed that the circuit court departed from the essential requirements of law in failing to require the County Commission to make findings of fact and give reasons for its actions in disregarding the recommendations of its Planning Zoning and Board; and in denying the landowners' request for

rezoning to a land use and a density or intensity of use that was consistent with the future land use plan of the applicable comprehensive plan adopted by the local planning agency in accordance with state law.

The Fifth District Court ruled in favor of Respondents and stated that its scope of review "was limited to a determination as to whether the circuit court afforded the landowners procedural due process and applied the correct law". The Fifth District Court of Appeal reversed the decision of the Circuit Court and the Board of County Commissioners.

After a detailed analysis of the difference between initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public, which the court held to be legislative in character; as compared to rezoning actions which have an impact on a limited number of persons or property owners; on identifiable parties and interests; where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing; and where the decision can be functionally reviewed as a policy application, rather than policy setting, the court found those types of rezonings to be of executive or judiciary or quasi-judicial action, but definitely not legislative in character.

The District Court found the particular proceeding itself to be important in a determination of legislative or quasi-judicial action. The Court found the manner in which the decision was made in the instant case was not legislative in nature because a hearing was held after notice to the parties, and the decision was

contingent on the evidence adduced as at an executive, (administrative), or judicial proceeding. Based on those findings, the Fifth District Court of Appeal found that the application of the fairly debatable, or for that matter, "any other deferential or discretionary standard, is not the correct standard of judicial review where the issue and decision involves the proper application of the legislative rule of law to a particular piece of property." The Appellate Court ruled that the initial burden of proof is on the petitioning landowner to present a prima facie case that the requested zoning change was in conformance with the County's existing comprehensive plan. If the landowner meets that burden (and in this case the Appellate Court found the landowners did meet that burden), then the burden shifts to the planning commission (local government) to show that the rezoning request is inconsistent with the comprehensive plan and adverse to the public interest.

Further, the Court placed a burden on the governmental zoning authority to assure that an adequate record of the evidence is prepared, including the relevant evidence establishing the rezoning applicants' prima facie case. The Court stated all of that evidence should be provided to the reviewing court.

Additionally, the appellate court held that specific, written, detailed findings of fact must be entered by the zoning authority to support any decision denying the landowners' requested use of their land. The Appellate Court applied the standard of strict judicial scrutiny (although they use the term "close judicial scrutiny") in the judicial review of any governmental action

denying or abridging a property owner's right to own and use his property. In order to properly make such a review, the Court found that the governmental agency must state reasons for its action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review. The District Court of Appeal in its ruling did not do away with the fairly debatable rule, but rather held that the fairly debatable rule should be the standard test the Court uses to review legislative acts as opposed to quasi-judicial acts.

2. **SUMMARY OF ARGUMENT/ARGUMENT**

The ruling in this case does not expressly and directly conflict with recent opinions of the Florida Supreme Court and other District Courts. Therefore this case does not provide a basis for the exercise of discretionary jurisdiction. Since the Florida legislature enacted the Local Government Comprehensive Planning and Land Development Regulation Act in 1985, rezonings under that Act are required to be consistent with the local comprehensive plan. Prior to that Act, that was not a requirement. Therefore, written opinions which deal with that Act clearly show that the Florida Courts have adopted a standard of strict scrutiny in reviewing the consistency between a rezoning decision and the local comprehensive plan. The Appellate Court in the instant case also held that the proper test for a court to review governmental action denying or abridging a property owner's right to utilize its land is subject to close judicial scrutiny. That essential test has not been changed by this decision. See Palm Beach County v. Allen Morris Company, 547 So.2d 690 (Fla. 4th DCA 1989), rev.

dismissed, 553 So.2d 1164 (Fla. 1989); Southwest Ranches Homeowners Association v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987); B.B. McCormick and Sons v. City of Jacksonville, 559 So.2d 252 (Fla. 1st DCA 1990); City of Jacksonville v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984); rev. den., 469 So. 2d 749 (Fla. 1985); Norwood-Noland Homeowners v. Dade County, 511 So. 2d 1009 (Fla. 3rd DCA 1987).

The Fifth District Court of Appeal in Snyder also holds that the initial burden is on the landowner to show that his rezoning request is consistent with the comprehensive plan. That holding is consistent with the recent case law in Florida. City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968); St. John's County v.Owings, 554 So.2d 535 (Fla. 5th DCA 1989). Several cases cited by the Petitioner are cases where the denial of the rezoning request was upheld, but if one looks at the actual facts of the cases, it is clear that the requested rezoning did not comply with the existing city, town or county comprehensive plan. S.A. Healy Company v. Town of Highland Beach, 355 So.2d 1813 (Fla. 4th DCA 1978); Machado v. Musgrove 519 So.2d 629 (Fla. 3rd DCA 1987); City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953); Orange County v. Lust, 17 F.L.W. 1162 (Fla. 5th DCA May 8, 1992). For instance in Lachman the Court said to allow the requested hotels and apartments would jeopardize the entire comprehensive zoning plan in the area. None of these cases conflict with Snyder because the basic facts are so different.

Several cases cited by Petitioner are cases where there is no comprehensive plan mentioned as being relevant to the case at all.

In some of those cases that there was no existing comprehensive land use plan. Rezoning cases or cases concerning zoning decisions where there is no comprehensive plan in existence or where compliance with a plan was not mandatory are clearly distinguishable from the more recent cases following the adoption of the 1985 Act by the legislature. Therefore the following cases cited by Petitioner have no bearing on Snyder. City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla. 1956); Marell v. Hardy, 450 So.2d 1207 (Fla. 4th DCA 1984); County of Brevard v. Woodham, 223 So.2d 344 (Fla. 4th DCA 1969), cert. den., 229 So.2d 872 (Fla. 1969); City of Tampa v. Speth, 517 So.2d 789 (Fla. 2nd DCA 1988).

The remaining Supreme Court decisions cited by the Petitioner do not conflict with the Snyder decision. The case of Nance v. Town of Indialantic, 419 So.2d 1041 (Fla. 1982) was essentially an appeal of a variance decision. The Supreme Court states in that case that the fairly debatable test should be used to review legislative-type zoning enactments. Snyder does not disagree with that holding. In fact, Snyder clearly states that for legislative type enactments of zoning laws, zoning codes, comprehensive plans, or elements thereof are in fact legislative enactments to which the fairly debatable rule applies.

The case of Gulf & Eastern Development Corporation v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978) is essentially a due process and notice case. The Snyder decision did not involve questions of proper notice.

The Snyder decision does not conflict with the Supreme Court decision of Schauer v. City of Miami Beach, 112 So.2d 838 (Fla.

1959). That case involved a lawsuit filed to have a zoning ordinance amendment declared invalid. Schauer is not a rezoning case. Snyder does not disagree with Schauer. In fact Snyder states that "...in Florida both of the two local governmental zoning bodies involved with zoning (city councils and boards of county commissioners) act in a true legislative function when originally enacting, and in making substantive amendments to, general zoning and other ordinances..."

Petitioners cite the Supreme Court decision of Josephson v. Autrey, 96 So.2d 784 (Fla. 1957) for the proposition that zoning is a legislative act. That case dealt with a zoning board of appeals and the granting of a use variance. It is not a rezoning/comprehensive plan case. The facts and the questions ruled upon by the Supreme Court in Josephson are inapplicable to the holding and the facts of Snyder.

Petitioner argues that the Fifth District Court of Appeals in Snyder is incorrect in stating there has been a change of circumstances since the adoption in 1985 of Chapter 163, Part II, Florida Statutes. Contrary to Petitioner's contention, the Snyder decision does not state that the comprehensive plan has been raised to the level of a zoning map by the adoption of Chapter 163, Part II. The case simply and clearly states that because of that change in the statutory requirements, the initial burden is on the landowner to show that his or her requested rezoning meets the local government's comprehensive plan, and if that prima facie case is meet, then and only then, does the burden shift to the government to require findings of fact and law to deny the rezoning

request. This concept of shifting the burden of proof to the government to show why the applicant's request is adverse to the public interest is with the Florida Supreme Court held in Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986).

Snyder does not expressly and directly conflict with other Florida decisions by stating that specific findings of fact are required to be made by the local government when denying a rezoning request which on face of the request, meets the applicable comprehensive plan.

First of all the Snyder Court held where landowners are adversely affected by the action of a governmental zoning authority those landowners are entitled to access to the trail and appellate courts of this State for full judicial review of such governmental action. The Court then stated very logically that in order to have effective judicial review, the governmental agency must state reasons for their actions when they deny the owner the use of his land and the governmental agency must make findings of fact and a record of its proceedings sufficient for judicial review. Clearly the requirement to have findings of fact is not new under Florida law. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982); Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989; Andersen v. Mason, 184 So.2d 177 (Fla. 1966); Ryder Truck Lines, Inc. v. King, 155 So.2d 540 (Fla. 1963); and City of Miami v. Lopez, 487 So.2d 1111 (Fla. 3rd DCA 1986).

The Ruling of the Fifth District Court of Appeal in no way affects the local government's authority to zone property under

Chapter 125, Florida Statutes, and Article VIII of the Florida Constitution. Certainly Chapter 163 must be read in conjunction with Chapter 125 and the Constitution. The Snyder decision simply clarifies and makes some clear rulings as to the effect of Chapter 163, Part II, on present day rezoning decisions.

The Snyder decision does not conflict with the procedural requirements of Chapter 163, Florida Statutes, 1991. In fact, the Respondents filed their Verified Complaint with the County within the thirty (30) days as prescribed by Chapter 163 and also filed their Petition for Certiorari with the trial court within the same period of time. The Snyder Court did not address that issue; nor was it an issue which was argued by either party at the circuit court level or district court of appeal level.

3. **CONCLUSION.**

Based on existing case law concerning rezoning cases following the adoption of Part II of Chapter 163, Florida Statutes, the Snyder case does not provide a basis for the exercise of the discretionary jurisdiction.

The arguments of the Petitioner have been rebutted by the Respondents and the Supreme Court should exercise its discretion to decline to review the Snyder decision. The case is not one of great public importance and in fact the Fifth District Court of Appeal declined to certify the case as one of great public interest. The Respondents respectfully request that the Supreme Court decline to exercise its discretionary jurisdiction in this matter.

FRANK J. GRIFFITH, JR., ESQUIRE

<u>CERTIFICATE OF SERVICE</u>

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been served by United States Mail Service upon Robert G. Guthrie, County Attorney, 2725 St. Johns Street, Melbourne, Florida 32940; Jonathan A. Glogau, Esquire, Attorney for the Honorable Robert A. Butterworth, Attorney General of the State of Florida, 111-36 South Magnolia Drive, Tallahassee, Florida 32301; Jane C. Haymen, Esquire, Attorney for Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302-1757; John J. Copeland, Jr., Esquire, County Attorney for Broward County, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301; Paul R. Gougelman, III, Esquire, Attorney for Space Coast League of Cities, Inc. Assistant City Attorney for City of Melbourne, Town Attorney for Town of Indialantic, 1825 South Riverview Drive, Melbourne, Florida 32901; and Maureen M. Matheson, Esquire, Assistant Attorney for Space Coast League of Cities, Inc., Assistant City Attorney for City of Melbourne, Assistant Town Attorney for Town of Indialantic, 1825 South Riverview Drive, Melbourne, Florida 32901 this 10th day of June, 1992.

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