IN THE SUPREME COURT OF FLORIDA

J. GWYNN PARKER and CLARICE P. CALE, as Personal Representatives of the ESTATE of EUNICE P. ANDERSON, deceased, and CENTURY DEVELOPMENT OF TALLAHASSEE, INC.,

Appellants,

vs. CASE NO. 80,230

LEON COUNTY,

Appellee.
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APPELLANTS' REPLY BRIEF

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I. SECTION 163.3215, FLORIDA STATUTES, DOES NOT REPLACE THE OWNER-APPLICANT'S RIGHT TO REVIEW OF DEVELOPMENT ORDERS BY COMMON LAW CERTIORARI.

Appellants contend that § 163.3215 has no application to a property owner's established right to appellate review of a quasi-judicial development order by writ of certiorari. Heretofore such orders have always been considered final and appealable, at least as to the owner-applicant. The certiorari review procedure is efficient and fair and has not been the focus of any public dissatisfaction that would warrant its elimination.

The statute's only purpose is to extend limited standing to parties not previously involved to seek to enjoin the implementation of orders that materially alter land use, density or intensity in violation of the comprehensive plan. The statute simply requires such intervening third parties to promptly present their objections to the government by verified complaint as a prerequisite to court action. However, the owner who has already presented its position in a thorough administrative record is not required to make any further administrative submissions, and may proceed directly to court to review the record and order by writ of certiorari as it has historically done.

The County contends that § 163.3215 eliminates the owner's right of certiorari review for one issue only -- plan inconsistency -- but leaves the certiorari procedure intact as the exclusive remedy for all other issues. Thus, claims of inconsistency with

other applicable ordinances and statutes, inadequacy of supporting evidence, and noncompliance with procedural and substantive due process requirements continue to be reviewable by certiorari under the County's position.

There is no reason offered to explain why an owner's plan inconsistency issue must be bifurcated for delayed and separate review by a second round of administrative proceedings as a mandatory jurisdictional prerequisite to de novo court action; while all other issues in the same case can and must be presented for immediate appellate review on the record by common law certiorari as the exclusive remedy.

The District Court majority strained to invent a rationale, speculating that the initial administrative proceeding was only "free form," and that a second round of administrative proceedings might be desirable to notify the County of a possible court challenge and provide a chance to perfect the administrative record. However, the record and development order have historically been final and immediately reviewable for all issues, including the due process requirement that the order contain sufficient findings and reasons to justify the action taken. If the County is required by due process to express all findings and reasons pertinent to the owner's application in its order, what possible purpose can the subsequent complaint-response procedure serve? The notion that the record and order are final and reviewable for purposes of most substantive issues, evidentiary

sufficiency, and procedural due process, while "free form" on the single issue of plan inconsistency, is illogical and impractical.

Moreover, the County offers no reason why it would need an additional round of administrative proceedings to perfect the administrative record on plan inconsistency issues, if the administrative record would not be binding on anyone in a *de novo* action for injunctive relief as to that issue.

The County's position would create practical difficulties even if the distinction between plan inconsistency issues and other issues were clear cut. However, these issues are not readily distinguishable, because the same evidence is normally pertinent to both plan inconsistency and other issues, and all of the substantive law issues may overlap with adequacy of evidence, the correctness of the standards applied, and compliance with due process issues. As a result, the review procedure required will depend on purely artificial distinctions such as to how the issue is worded, and by which party.

The County's argument in this case illustrates this problem by mislabelling Appellants' claim in an effort to recast it into the language of the statute. Appellants did not challenge the County's development order as inconsistent with the comprehensive plan as the County contends. Rather, they challenged the development order as illegal for failure to apply the zoning code, which contains the specific numerical density standard which governs density rights (20,000 square feet minimum lot size). Appellants allege the comprehensive plan does not even purport to govern their density

rights because (a) the plan provides only general precatory policy guidelines without any specific numerical density standard for Appellants' location; and (b) the ordinance adopting the plan and the plan itself expressly defer to the specific numerical zoning code standard. Appellants' pleadings cite applicable legal authorities to show that the specific numerical standard in the zoning code controls over general policy guidelines in the plan as a matter of law. In essence, Appellants claimed that the general policy guidelines of the comprehensive plan were immaterial to the density rights dispute.[1]

Comparison of the pleading with the statute shows the County is trying to fit a square peg into a round hole. Subsection (1) of

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[1] The Court may refer to the original Petition for Writ of Certiorari (R. 1-35), the Circuit Court's original judgment granting the writ of certiorari (App. 1-7), the Amended Complaint (App. 21-26) and Appellants' counsel's letter (App. 55-61), for citations of authority that further explain and support Appellants' cause of action. See also recent cases affirming the principle that specific density standards govern general guidelines. Colonial Apts. L.P. v. City of DeLand, 577 So.2d 593, 598 (Fla. 5th DCA 1991), review denied, 584 So.2d 997 (Fla. 1991); Park of Commerce Assocs. v. City of Delray Beach, 17 FLW D 2047, n. 1 at 2048 (Fla. 4th DCA, Sept. 2, 1992) (en banc). See also § 163.3202 (1) and (2), Florida Statutes (1989) requiring the County to implement the plan with specific land development regulations, including subdivision regulations. The County's existing (1981) comprehensive plan deferred to the zoning code and did not even mention urban compaction or residential density conformity as a requirement, since these issues were not even raised until 1989, in preparation for the adoption of a new plan in July 1990. (App. 19-20, 37-38).

In any case, the County's contention that the general precatory comprehensive plan policies control over specific numerical standards is a premature attempt to argue the merits of the case, which were not decided or certified by the District Court. Appellants' allegations concerning on the merits are presumed correct for purposes of this appeal.

§ 163.3215 clearly delimits the cause of action available under the statute as one which seeks to "prevent ... local government from taking any action" on an "order ... which materially alters the use or density or intensity of use on a particular piece of property ...." The County cannot take any action a denial order, and the order does not alter anything, so this cause of action cannot arise under subsection (1).

Paragraph (3)(b) of the statute provides that "action under this statute is the sole action available to challenge the consistency of a development order with a comprehensive plan ...." Since Appellants' claim is outside the parameters of subsection (1), it cannot properly be an "action under this statute." Moreover, Appellants do not challenge the "consistency of a development order with the comprehensive plan" as stated above.

The County raised the comprehensive plan as a defense, asserting that some of the plan policies superceded the specific density standard in the zoning code. However, this defensive posture cannot transform the Appellants' cause of action into a "challenge [to] the consistency of a development order with a comprehensive plan" in order to fit it into the statute.

The owner's pleading should frame the issues and determine what kind of challenge is presented. A fair analogy is found in the law concerning removal of actions from state court to federal court. If the plaintiff raises a federal question in its complaint, then the defendant can assert a removal right. However,

the defendant cannot raise a federal question as an affirmative defense and then use that defense as a bootstrap for removal.

By the same reasoning, the County cannot defensively recast Appellants' pleading into a plan inconsistency challenge in order to force it into the contours of § 163.3215. However, that is precisely what the District Court majority opinion has allowed. As a result, a property owner may not even know whether its case involves a plan inconsistency issue until the County's defensive pleading is filed. By then it is too late to comply with the prelitigation procedures of Section 163.3215(4), Florida Statutes. Because the District Court's decision confuses the distinction between plan inconsistency challenges and other issues, the careful property owner will have to file bifurcated proceedings in any case where the plan is involved in any way.[2]

The County argues that the legislative purpose was to provide a "quick and effective" action for review and generally reduce arbitrariness and political influence in the local land use planning process. County's Brief at 17. If so, why would the Legislature have enacted a complex, dilatory and expensive

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[2] The County's Brief adds further confusion on this point. It first argues that the owner must bifurcate proceedings if both plan inconsistency and other issues are presented. County's Brief at pp. 14-15. Then it suggests that § 163.3215 does not require bifurcated proceedings if both types of issues are raised, in an attempt to distinguish cases cited at pp. 16-17 and 32-33 of Appellants' initial brief, such as Planning Commission v. Brooks, 579 So.2d 270 (Fla. 1st DCA 1991), where certiorari was upheld even though plan inconsistency was one of the issues. County's Brief at 22. If the County cannot explain its interpretation of the statute consistently, how can the owner be expected to understand what to do?

procedure that allows the government to use procedural obstacles and gamesmanship to delay or thwart the owner's rights? This procedural delay and uncertainty makes the process subject to more -- not less -- political influence. The public's best protection against arbitrary ad hoc politically influenced land use decisions is the availability of a settled, speedy and efficient remedy in the courts by common law writ of certiorari. The County's interpretation applying § 163.3215 to thwart owners' claims evades rather than advances the fundamental purpose of Chapter 163.

The Legislature never intended to create a procedural quagmire for property owners to lose their rights in. Rather, the sole purpose was to provide a forum for a limited time to those otherwise without redress if the local government's land use plan is violated. The County offers no reason why the Legislature would have abolished the landowner's well established, efficient and practical certiorari review procedure that satisfied everyone, in favor of a hodgepodge bifurcated procedure that serves no purpose and no one understands. No other court has adopted this view. Appellants' case should therefore be allowed to proceed to final hearing on the merits by common law certiorari.

II. IF SECTION 163.3215(4), FLORIDA STATUTES, APPLIED TO APPELLANTS AS OWNER-APPLICANTS, THEN THEY SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF THE STATUTE AND FURTHER COMPLIANCE WAS EXCUSED BY FUTILITY, WAIVER AND INADEQUACY OF THE PROCEDURE TO REMEDY THE COUNTY'S ILLEGAL ACTION. THEIR AMENDED COMPLAINT IS SUFFICIENT TO WITHSTAND THE COUNTY'S MOTION TO DISMISS.

Assuming Appellants were required to submit a verified administrative complaint, the County has not suggested a single legitimate reason for requiring strict compliance in the context of this case. Appellants' counsel's letter dated January 25, 1990, met every possible purpose of a verified complaint and satisfied the requirements of § 163.3215(4), Florida Statutes. The County's proffered arguments on the technical insufficiency of the letter simply ignore the absence of any real purpose to be served.

Absence of verification. The County has not offered any reason why verification would be essential in a case where an owner-applicant seeks review of a denial order. The sole purpose ascribed by the District Court of Appeal for the complaint is to provide notice to the County of a possible court challenge. Notice is effective regardless of whether it is verified. If verification serves no purpose, it should not be required. See Artco-Bell Corp. v. City of Temple, 616 S.W.2d 190, 193-194 (Tex. 1981) (verification requirement in municipal notice of claim provision held invalid as unreasonable obstacle to citizens' pursuit of redress).

Nor does the County explain how verification of a legal argument such as Appellants presented would serve any purpose.

Finally, the attorney's signature is equivalent to verification for any possible purposes of the statute under Section 163.3215(6), Florida Statutes; and verification was supplied later in any event.

The only reason for verification is to protect the owner against frivolous third party claims interposed for purposes of delay, harassment or competitor advantage, as set forth in § 163.3215(6). When the owner itself brings the challenge, verification cannot serve any purpose.

Untimeliness. The letter was timely because it was submitted within 30 days of the Planning Commission's development order. There was no other development order issued.[3]

Even if the subsequent planning staff memorandum were considered a development order, the Appellants' counsel's letter was simply premature and gave the County even greater notice and opportunity to perfect its administrative record than § 163.3215(4) requires.

Lack of discussion of specific comprehensive plan policies. The County contends that the letter was defective because it failed

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[3] The County attempts to characterize its staff memorandum dated February 2, 1990, as a development order. (RA 43). This memorandum contains neither the trappings nor the essential requirements of an order, such as a statement of findings and reasons to support the action taken, nor is it signed by or even issued in the name of the Board of County Commissioners. The sole purpose for the memorandum was to inform the Planning Commission that no administrative remand would be necessary, because Appellants were seeking court review. The County Commissioners' voice vote was likewise not a development order because it did not contain specific findings or reasons, and was not even written as required. Compare Kowch v. Board of County Commissioners, 467 So.2d 340, 341 (Fla. 5th DCA 1985); and Powell v. Board of Public Instruction, 229 So.2d 308, 311 (Fla. 1st DCA 1970).

to discuss the individual comprehensive plan policies that the County relied on to deny the subdivision application. This omission is not fatal, however, because Appellants' contention is that none of the general precatory guideline policies identified by the planning staff controlled their density rights. No belabored policy-by-policy refutation was needed, even if the Planning Commission or the County Commission had identified what plan policies they relied on, which they did not.[4]

The letter did not cite the statute. Assuming that Appellants should have known the statute would apply to their claim, the absence of a citation to the statute in the letter certainly does not impair its effectiveness as notice of Appellants' position on the merits. A party is normally not required to cite a statute in order to obtain relief in modern notice pleading practice. See Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181 (5th Cir. 1980); 61A Am. Jur. 2d Pleadings § 9 (1981); cf. Rule 1.120 Fla. R. Civ. P. (statutes not included in list of matters required to be plead with specificity). The County is simply flyspecking the letter for technical deficiencies rather than directing its argument to any genuine purpose to be served.

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[4] Neither the Planning Commission's development order nor the Board of County Commissioners' voice vote nor the subsequent planning staff memorandum identified any specific plan policy that prohibited the subdivision. The County should not demand greater specificity from Appellants than it afforded to them. However, the County had no need for discussion of individual plan policies in any event because Appellants were arguing that the plan as a whole did not supercede the specific zoning code density standard.

The County showed no prejudice from the procedure followed in this case. In each of the cases cited in its brief, the prelitigation procedure served some practical purpose to put the defendant on notice of a claim that it had not previously considered. The mechanic's lien statute presents a special purpose because the claim must be verified to protect the property owner and other subordinate interests from extortionate third party claims. The verification requirement in Section 163.3215(4) and (6) serves the same purpose in the limited context of third party intervenor challenges to development orders. However, in all of the owner-initiated zoning and land use cases cited, as well as municipal notice of claim cases, the administrative procedures that are conditions precedent to judicial review were deemed satisfied upon a showing of substantial compliance, futility, waiver or inadequacy. The Legislature did not enact any language in § 163.3215 to impair this universal rule of elementary fairness.

The County obviously paid no attention to the Appellants' counsel's letter, and its suggestion that a second submission could have "crystallized the issues" or resulted in approval of the plat is disingenuous. In any event, if the County really wishes to dispute Appellants' allegations of futility, then it must submit this fact issue to the determination of the Circuit Court.[5]

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[5] See State ex rel. City of Miami v. Knight, 138 Fla. 374, 189 So. 425, 427 (1939). The fact issue is whether the County's actions and statements would have led a reasonable owner to believe that further administrative submissions were futile or waived. See Rabinowitz v. Town of Bay Harbor Islands, 178 So. 2d 9, 12-13 (Fla. 1965); City of Miami Beach v. Sunset Islands, 216 So.2d 501, 511

Since Appellants' allegations of substantial compliance, futility, waiver and inadequacy are accepted as true for purposes of a motion to dismiss, the lower courts should not have dismissed this case for noncompliance with the notice requirements of § 163.3215(4). The Amended Complaint states a cause of action and Appellants are entitled to reversal and remand for a ruling on the merits of their claim under state law.

RESPECTFULLY SUBMITTED this 21 day of October 1992.

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(Fla. 3d DCA 1968). See also Brooks v. City of Miami, 161 So.2d 675, 677 (Fla. 3d DCA 1964) (if city demands strict compliance with short claim limitation period, then it must scrupulously avoid any action that might prejudice the claimant in giving of notice; city held estopped because it lulled claimant into believing notice was sufficient).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the counsel listed below, by United States Mail/hand delivery this 21 day of October 1992.

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