097

FILED
SID J. WHITE
AUG 4 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CITY OF MELBOURNE, a municipal corporation in the state of Florida,

Petitioner,

vs.

JOSEPH ALBERT PUMA,

Respondent.
_____/

Case No. 81,652

Fifth District Court of Appeal Case No. 92-1038

BRIEF OF AMICUS CURIAE
BROWARD COUNTY, FLORIDA
IN SUPPORT OF PETITIONER, CITY OF MELBOURNE

JOHN J. COPELAN, JR.
County Attorney for Broward County
BARBARA S. MONAHAN
Assistant County Attorney
Suite 423, Governmental Center
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600
Telecopier: (305) 357-7641

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County has an important interest in the instant case since as a local government, the County is charged, by statute, with the duty and authority to regulate land use within its jurisdiction. For all intents and purposes, by the Fifth District Court of Appeal's per curiam opinion affirming the instant case on authority of Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So.2d 1262 (Fla. 1992) (Fla. case no. 79-720), the court has determined that a property owner's request for a site-specific change to a local comprehensive plan should be conducted as a quasi-judicial proceeding. If this opinion is upheld by the Supreme Court, it will have far-reaching effects on Broward County, as well as all of the local governments within the state of Florida, and will impair its ability to perform the essential function of land use planning.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in City of Melbourne v. Puma, 616 So.2d 190 (Fla. 5th DCA 1993), is of great importance to the future of land use planning and regulation within the state of Florida. In reaching its opinion, the district court of appeal based its per curiam affirmed opinion on the authority of Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So.2d 1262 (Fla. 1992) (Fla. case no. 79-720), which case is in direct conflict with decades of Florida case law. It is well settled in Florida that land use planning and land use regulations are legislative actions which are reviewed by the "fairly debatable" standard. The judiciary should not dictate the outcome of local planning issues to the local governments which would result in a violation of the separation of powers doctrine.

In addition, when reviewing the case at bar, the 1985 enactment of the Local Government Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes (the "Growth Management Act"), must be carefully considered since its purpose and intent are significant. The decision of the Fifth District Court of Appeal is clearly inconsistent with the legislative intent and purpose of the Growth Management Act. The legislature specifically designated local governments as the entities to draft and implement comprehensive plans, knowing full well that local governments would have the knowledge and expertise necessary to maintain land development controls in conformity with adopted

comprehensive plans and to amend those plans in accordance with the guidelines set forth in the Growth Management Act.

If local governments are required to employ, as the Fifth District Court of Appeal's decision dictates, quasi-judicial proceedings to make decisions on site-specific amendments to a comprehensive plan, such requirement will have a negative impact on not only the local government, but on the general public as well, since such proceedings will be costly and time-consuming, and will restrict ex parte communications among the parties.

ARGUMENT

I. THE CASE LAW IN FLORIDA IS WELL SETTLED THAT THE IMPLEMENTATION OF LAND USE REGULATIONS BY LOCAL GOVERNMENTS IS A LEGISLATIVE ACT WHICH REQUIRES DISCRETION AND FLEXIBILITY AND THE SUBSTITUTION OF THE JUDICIARY IN THE ROLE OF POLICY MAKER WITH REGARD TO LAND USE ISSUES IS A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

Until the Fifth District Court of Appeal's decision in Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So.2d 1262 (Fla. 1992) (Fla. case no. 79-720) (hereafter "Snyder"), this Court, and the various district courts of appeal, historically took the position that they would not interfere with the decision of a local government regarding land use regulations if the actions of the local government are "fairly debatable," and would not substitute their judgment for that of the local government unless and until those actions become arbitrary and unreasonable. City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953); City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968); Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So.2d 931 (4th DCA 1987); Machado v. Musgrove, 519 So.2d 629 (3d DCA 1987); Lee County v. Morales, 557 So.2d 652 (2d DCA 1990). In Snyder, the district court of appeal discarded the "fairly debatable" standard and determined that site-specific zoning should be determined through quasi-judicial procedures, and further required the local government to substantiate its findings by clear and convincing evidence.

In the instant case, (hereafter "Puma"), the Fifth District Court of Appeal extended the holding in Snyder even further by determining, through its per curiam affirmed opinion, that a property owner's request for a site-specific amendment to a comprehensive plan should also be conducted as a quasi-judicial proceeding. As in Snyder, once a property owner complies with all local land use regulations and demonstrates the use requested is consistent with the comprehensive plan, then, if the local government is, for any reason, opposed to the requested use, the burden shifts to the local government to prove, by clear and convincing evidence, that public necessity requires a more restrictive use than that requested by the property owner. Snyder, 595 So.2d at 81. Thus, under the district court's approach, land use planning, which has always been a legislative function, will be dictated by the judiciary. The decisions in both Snyder and the present case are incorrect because such an approach clearly constitutes a violation of the separation of powers between the legislative and judicial branches of government. *Fla. Const.* art. II, § 3.

The power to restrict the use of private property to the detriment of the general public involves an exercise of the local government's police powers. Josephson v. Autrey, 96 So.2d 784, 787 (Fla. 1957). This Court has also recognized that land use controls are imposed by the exercise of the legislative authority of the local government through its police powers. Id. at 788. In Josephson, this Court acknowledged that local governments are

charged with the duty and responsibility of developing and implementing land use controls and development regulations.

In determining where a business district ends and a residential district begins, this Court stated that the process of implementing zoning regulations involves a "high degree of legislative discretion and an acute knowledge of existing conditions and circumstances." City of Miami Beach v. Wiesen, 86 So.2d 442, 445 (Fla. 1956). For that reason, this Court and the various district courts of appeal have continued to take the position that they will not interfere with decisions of a local government if the actions of the local government are "fairly debatable," and will not substitute their judgment for that of the local government unless and until those actions become arbitrary and unreasonable. City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953); City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968); Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So.2d 931 (4th DCA 1987); Machado v. Musgrove, 519 So.2d 629 (3d DCA 1987); Lee County v. Morales, 557 So.2d 652 (2d DCA 1990).

This Court has also acknowledged that a property owner's expectations may not always be consistent with or in the best interest of a community as a whole. When a local government imposes land development controls that interfere with, and are contrary to those expectations, an individual property owner may be required to endure regulations restricting the use of his or her property in the interest of the general public. Josephson, 96 So.2d at 787; City of Miami Beach v. Wiesen, 86 So.2d at 445.

Since local governments are charged with the authority to prepare, implement and amend comprehensive plans, the Fifth District Court of Appeal's attempt to substitute its determination in place of the local government is an encroachment on the separation of powers doctrine. The separation of powers doctrine specifically prohibits the court from requiring a local government to zone a parcel of property in a particular manner or to interfere in decisions regarding land use planning, zoning and rezoning unless they are arbitrary or unreasonable. City of Miami Beach v. Weiss, 217 So.2d 836, 837 (Fla. 1969). In quashing the lower court's direction to the City of Miami Beach to rezone the property that was the subject of the lawsuit in City of Miami Beach v. Weiss, this Court stated that:

> [T]he ultimate classification of lands under zoning ordinances involves the exercise of the legislative power, preventing the courts under the doctrine of separation of powers from invasion of this field.

Id. at 837.

In the past, courts have been reluctant to substitute their wisdom in place of local zoning authorities for fear that owners of property would request rezonings on a piecemeal basis and:

> [I]f the subject property be rezoned to business, the property to the north and across the street would have to be treated similarly and on and on as to other property until by a process of 'judicial erosion,' the entire zoning plan would be destroyed.

City of Miami Beach v. Wiesen, 86 So.2d at 446.

This concern is well-founded since local governments are empowered to enact comprehensive plans that incorporate policy determinations and principles upon which local governments must

rely. A comprehensive plan is the foundation which must be established prior to a local government enacting zoning and rezoning regulations, which regulations provide the detailed means through which the principles of the local government's comprehensive plan are given effect, so the local government should be afforded even greater deference with regard to comprehensive plan amendments. In order to avoid the erosion of an entire comprehensive plan or zoning scheme by judicially-required piecemeal amendments, local governments must be permitted to consider not just the effect on a specific piece of property, but whether such modification would jeopardize or materially affect the comprehensive plan as a whole. For these reasons, the courts have been deferential in reviewing land planning decisions of the local governments.

In 1985, when the legislature enacted the Growth Management Act, the legislature placed the burden of land planning on the local governments and stated:

> [I]t is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local government in the establishment and implementation of comprehensive planning programs to guide and control future development.

§ 163.3161(2), Fla. Stat. (1991).

Because of uncontrolled growth and imprudent development in Florida over the past several decades, each modification to a comprehensive plan is of critical concern to the state and local governments. The legislature was fully cognizant of Florida's diminishing resources when it mandated that local governments adopt

comprehensive plans containing, at a minimum, specific provisions for the use of land, water, open space, potable water wellfields, stormwater management, protection of environmentally sensitive lands, and sufficient public services and facilities. § 163.3202, Fla. Stat. (1991).

It is of the utmost importance that local governments be permitted to retain the flexibility and discretion to determine whether, and to what extent, a land use change will impact such significant resources as water, wetlands, infrastructure and other public facilities. The judiciary should not place itself in the position of "second guessing" actions taken by a local government unless and until those actions are not "fairly debatable," and the judiciary should not substitute its judgment for that of the local government unless and until those actions become arbitrary and unreasonable.

II. AN AMENDMENT TO A COMPREHENSIVE PLAN IS A LEGISLATIVE FUNCTION BASED ON POLICY-MAKING DETERMINATIONS, WHICH DETERMINATIONS, PURSUANT TO THE GROWTH MANAGEMENT ACT, MUST CONFORM TO AND BE CONSISTENT WITH THE LOCAL GOVERNMENT'S COMPREHENSIVE PLAN.

In the Fifth District Court of Appeal's decision in Puma, the court cited to Snyder as the basis for its per curiam affirmed opinion. In so doing, in addition to ignoring well-settled case law that has continually held that land use planning is a legislative function, the court totally disregarded the Growth Management Act's process for amendments to comprehensive plans specifically set forth in the statute for large as well as small scale projects. § 163.3187, Fla. Stat. (1992).

By incorrectly applying Snyder to the case at bar, the Fifth District characterizes comprehensive plan amendments as quasi-judicial when, in fact, amendments to comprehensive plans are clearly legislative policy-making decisions. Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So.2d 931 (4th DCA 1987); Rinker Materials Corp. v. Metropolitan Dade Co., 528 So.2d 904 (3d DCA 1987).

In Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So.2d 931 (4th DCA 1987), the Fourth District Court of Appeal reviewed a County zoning decision that allowed the construction of a landfill and resource recovery facility. In so doing, the Fourth District Court of Appeal asserted that "zoning decisions should not only meet the traditional fairly debatable standard, but should also be consistent with the comprehensive

plan," Id. at 936. The court went on to state that the intent of a comprehensive plan is to set general guidelines and principles which "evidences the legislature's intent that local governments be given some flexibility in applying plans," fully cognizant of the fact that a comprehensive plan is the foundation for all other land use regulations and that land use planning is a function of the local legislative body. Id. at 937.

In Rinker Materials Corp. v. Metropolitan Dade Co., 528 So.2d 904 (3d DCA 1987), Rinker filed an original action for declaratory and injunctive relief against the county challenging the enactment of an ordinance amending the comprehensive plan which reclassified 267 acres of land from open land to low-density residential. In determining whether Rinker was precluded from presenting additional evidence because the action was quasi-judicial and therefore limited to the evidence presented on the record, or whether a writ of certiorari should have been filed, the Third District Court of Appeal stated that the filing of an original action for declaratory and injunctive relief was correct because "[i]n enacting the ordinance amending the Dade County Comprehensive Development Master Plan the county commission was performing a legislative function." Id. at 906. Even though the ordinance entailed a site-specific amendment to the comprehensive plan, the court correctly recognized that this was a policy-making determination.

Local government land use policy-making, by statute, begins with the adoption of a comprehensive plan, which is a master planning tool for the local government, but it does not end there.

Counties and cities must further refine their comprehensive plan policies by the adoption of land development regulations, plan amendments, and zoning codes which must be consistent with the comprehensive plan, as well as with state and regional frameworks. §§ 163.3194, 163.3202, Fla. Stat. (1991). These planning tools must remain within the realm of the local policy planning agency. To require local governments to utilize quasi-judicial proceedings to adopt amendments to comprehensive plans will severely impact the daily functioning of local governments and will impede on the local governments' adherence to the statutory mandates of the Growth Management Act.

A typical comprehensive plan may designate a large land area for a generalized land use, such as "residential" or "industrial," as permitted by § 163.3177(6)(a), Florida Statutes (1992). Those generalized land uses permit a great variety of uses within certain density or intensity parameters. The broad and generalized nature of comprehensive plans and comprehensive plan amendments requires the further creation of policies and the exercise of discretion for their implementation. That discretion should be guided by the local governing body acting as legislators, not as judges.

Further, the implementation of modifications to comprehensive plans by a series of quasi-judicial proceedings would largely deny the public access to the comprehensive plan implementation process which is in direct conflict with the mandates of the Growth Management Act, which unequivocally states that the public must

participate in the comprehensive planning process. § 163.3181, Fla. Stat. (1991).

Pursuant to the Third District Court of Appeal's decision in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), ex-parte communications on a matter to be heard in a quasi-judicial proceeding could be a due process violation. Under the Fifth District's reasoning, local elected officials will be isolated from contact with the residents who elected them, except for the two amendments to a comprehensive plan which are permitted each year under the Growth Management Act. § 163.3187, Fla. Stat. (1992). This drastic reduction in access to the local government planning process was clearly not contemplated by the legislature in the Act. §163.3181, Fla. Stat. (1991).

The broad and generalized nature of comprehensive plans requires the creation of policies and the exercise of discretion for their implementation. The creation of these policies and the exercise of such discretion should be guided by the local governing body acting as legislators, not as judges. Extending the holding in Snyder, which determined that site-specific rezoning should be conducted through a quasi-judicial proceeding, to the case at bar to hold that site-specific modifications to a comprehensive plan should also be conducted through a quasi-judicial proceeding will result in costly proceedings, increased litigation, and will result in land use planning being determined virtually by the judiciary.

If local governments are required to employ quasi-judicial proceedings for modifications to site-specific comprehensive plans,

as well as to rezonings, site plan approvals, platting, requests for variances and special exceptions and/or conditional use permits, as suggested by the Snyder holding, the cost to both the local government and the applicant would be excessive, as well as exceedingly time-consuming. Each proceeding would entail the production of evidence, the testimony of witnesses, the cross-examination of witnesses, a verbatim record of the proceedings, and a written statement of the governing body setting forth its findings of fact and conclusions of law. Because modifications to land development regulations are the norm rather than the exception, local governing bodies would be placed in a position of sitting as a judicial tribunal on a routine basis.

Further, the implementation of development regulations by a series of quasi-judicial proceedings would largely deny the public access to the planning process based on the Third District Court of Appeal's holding that ex-parte communication on a matter to be heard in a quasi-judicial proceeding could be a due process violation. Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991).

Under the Fifth District's reasoning, local elected officials will be isolated from contact with the residents who elected them from the time a comprehensive plan is adopted until the land within the jurisdiction is built-out, except during the formal public hearing process for amendments, which are limited to twice a year. This drastic reduction in access to the local government planning

process was clearly not contemplated by the legislature in the Growth Management Act. § 163.3181, Fla. Stat. (1991).

The intent of the legislature, in the enactment of § 163.3181, Fla. Stat., was to provide the public with many avenues with which to address concerns they might have regarding modifications to land development regulations. If the Fifth District Court of Appeal's holding in Snyder that rezonings are quasi-judicial, and the extension to Puma to include site-specific modifications to a comprehensive plan as quasi-judicial, are read together with the holding in Jennings prohibiting ex parte communications, it appears that the intent and purpose of the legislature to include the public in the comprehensive planning process mandated by § 163.3181, Fla. Stat., is being eroded one case at a time.

This Court should therefore reverse the Fifth District's opinion in Puma.

CONCLUSION

Local governments are justifiably alarmed at the potential ramifications of the decision of the Fifth District Court of Appeal to further expand its rationale in Snyder to apply to site-specific modifications to a comprehensive plan. Again, the Fifth District Court of Appeal has placed itself in a position of substituting its judgment for that of the local governing body, which possesses far greater knowledge of the needs of the community. The new standard of review suggested by the Fifth District's holding would have a severe, negative impact on local land use planning. For this reason, and for all of the above and foregoing reasons, the opinion of the Fifth District Court of Appeal should be reversed.

Respectfully submitted,

JOHN J. COPELAN, JR.
County Attorney for Broward County
BARBARA S. MONAHAN
Assistant County Attorney
Suite 423, Governmental Center
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600
Telecopier: (305) 357-7641

By 

BARBARA S. MONAHAN
Assistant County Attorney
Florida Bar No. 844454

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Brief of Amicus Curiae has been furnished by United States Mail to each of the persons stated below, this 3rd day of August, 1993.

By _____
BARBARA S. MONAHAN
Assistant County Attorney

JONATHAN A. GLOGAU, ESQUIRE
Assistant Attorney General
Alexander Building
Room 307
2020 Capital Circle, S.E.
Tallahassee, FL 32301

SHERRY A. SPIERS, ESQUIRE
Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, FL 32399-2100

PAUL R. GOUGELMAN, III, ESQUIRE
MAUREEN M. MATHESON, ESQUIRE
1825 S. Riverview Drive
Melbourne, FL 32901

RALPH GEILICH, ESQUIRE
P.O. Box 820
Melbourne, FL 32902-0820

BSM/gf
puma.p02
08/03/93
#93-816