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IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT NO. 81,652

FIFTH DISTRICT COURT OF APPEAL
CASE NUMBER: 92-1038

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

Petitioner,

v.

JOSEPH ALBERT PUMA,

Respondent.

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

AMICUS BREVARD COUNTY'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this appeal, Petitioner, the City of Melbourne, Florida, which was Appellant and defendant below, will be referred to as the "City". Respondent, Joseph Albert Puma, who was Appellee and plaintiff below, will be referred to alternatively as the "Property Owner" or "Mr. Puma". Throughout this brief, each page in the record will be referred to as ("R:____"), and the property that is subject of this litigation will be referred to as the "Subject Property".

SUMMARY OF THE ISSUES

I. UNDER FLORIDA LAW, A CHANGE OF LAND USE TO A FUTURE LAND USE ELEMENT OR MAP IS A LEGISLATIVE ACTION

II. EVEN IF *SNYDER* IS UPHELD BY THE FLORIDA SUPREME COURT, *SNYDER* WAS NOT INTENDED TO APPLY TO COMPREHENSIVE PLAN AMENDMENTS

STATEMENT OF THE CASE

Amicus Brevard County adopts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Amicus Brevard County adopts Petitioner's Statement of the Facts.

SUMMARY OF ARGUMENT

Comprehensive plans are legislative in nature based on case law and specific language in Chapters 125, 166 and 163, Florida Statutes. The intent of Chapter 163, Florida Statutes, was merely to require comprehensive planning by local governments; it was not intended to eliminate local government's legislative and rule-making authority. The decision of the Fifth District Court of Appeal significantly impairs the ability of local governments to plan properly for the future. The lower court decision should be overturned so that counties and cities are allowed to plan within the full range of their legislative discretion as the statutes intended.

The trial court applied the decision in *Snyder v. Board of County Commissioners of Brevard County, Florida*, 595 So.2d 65 (Fla. 5th DCA 1991), *juris. accepted*, 605 So.2d 1262 (Fla. 1992). *Snyder* has been appealed to the Florida Supreme Court. *Snyder* specifically states that comprehensive plan amendments are legislative in nature. Thus, even if *Snyder* is upheld, it does not apply to this case and the standards of review and procedures described therein should not apply to a comprehensive plan amendment.

BRIEF ON THE MERITS

I. UNDER FLORIDA LAW, A CHANGE OF LAND USE TO A FUTURE LAND USE ELEMENT OR MAP IS A LEGISLATIVE ACTION

Comprehensive Plans are legislative actions mandated by Chapter 163, Part II, Florida Statutes (1991). In case law, comprehensive plans have been described as or "likened to a constitution for all future development within the governmental boundary". *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. den.* 529 So.2d 694 (Fla. 1988). Land use planning and zoning are separate and different functions of the sovereign or legislative authority. *Machado*. Thus, case law acknowledges the legislative function of planning.

The statute, Chapter 163, Part II, assumes the legislative nature of the comprehensive planning process. The treatment or acknowledgement of the legislative status of planning is also revealed in the appeal process.

The appeal procedure in Chapter 163, Part II, applies when a property owner or affected landowner objects to a land use designation. The property owner files an administrative appeal detailing how the comprehensive plan amendment fails to meet the requirements of Chapter 163. § 163.3184, Fla. Stat. (1991). A portion of that section provides "any affected person, within 21 days after the publication of the notice, may file a petition with the agency pursuant to s. 120.57[sic]". § 163.3184(9)(a), Fla. Stat. (1991). Further, the statute states, "[i]n this proceeding the local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable". § 163.3184(9)(a), Fla. Stat. (1991). Because the government is exercising its legislative authority, the numerous policy concerns and decisions of the local government will not be overridden. If the amendment meets the statutory minimums of Chapter 163, it is upheld because the local government's decision is presumed to be correct pursuant to Section 163.3184(10), Florida Statutes. Section 163.3184(10)

provides "[t]he local government's determination that the comprehensive plan or plan amendment is in compliance is presumed to be correct". This type of presumption generally applies to review of legislative determinations.

Further evidence of legislative status of comprehensive planning involves the application of the fairly debatable rule. The fairly debatable standard of review has traditionally been applied in those instances where the local government's action is legislative in nature. *See e.g.*, *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla. 1956); *Orange County v. Lust*, 602 So.2d 568 (Fla. 5th DCA 1992); *Palm Beach County v. Allen Morris Company*, 547 So.2d 690 (Fla. 4th DCA 1989), *rev. dismissed*, 553 So.2d 1164 (Fla. 1989). Section 163.3184(9), Florida Statutes, specifically provides for application of the fairly debatable rule in these cases.

Based on the cases cited, if the planning decision is fairly debatable, it must be upheld. Otherwise, courts will be intruding in the policy-making authority of cities and counties throughout the State of Florida. This approach is used because courts are not authorized to act as "super zoning boards". If the Fifth District Court of Appeal's decision is affirmed, the courts are likely to perform a significant portion of the local government's planning duties contrary to the doctrine of separation of powers.

The fairly debatable rule also applies when land development regulations are reviewed through the administrative process. § 163.3213(5)(a), Fla. Stat. (1991). "The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan." This section demonstrates the flaw in *Snyder*. Land development regulations, like zoning decisions, must be consistent with the comprehensive plan and may be adopted <u>subsequent</u> to the adoption

of the local plan. Nonetheless, the statute states unequivocally that the land development regulations are legislative in nature. The *Snyder* court failed to recognize these statutory provisions and held zoning was not a legislative action because zoning actions are subsequent to and implement the comprehensive plan. The court failed to recognize the statutory intent of Chapter 163 and, accordingly, erred in its analysis of the interaction of planning and zoning under Chapter 163.

Another reason to treat planning decisions as legislative is that planning and zoning powers are clearly granted to local governments in Chapter 125 and Chapter 166, Florida Statutes. *See* §§ 125.01(g), (h) and (i), Fla. Stat. (1991), § 166.021, Fla. Stat. (1991), and § 166.041, Fla. Stat. (1991). In 1979, the Florida Supreme Court specifically addressed the power of local government in *Speer v. Olson*, 367 So.2d 207 (Fla. 1978). The court stated:

> The first sentence of Section 125.01(1), Florida Statutes (1975), [Section 125.01(1), Florida Statutes (1991), as amended] grants to the governing body of a county the full power to carry on county government. Unless the Legislature has preempted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

Here, Chapter 163 was not intended to preempt the powers given to local governments in Chapter 125 and Chapter 166, Florida Statutes. Section 163.3161(8), Florida Statutes, states:

> (8) It is the intent of the Legislature that the repeal of ss. 163.160 through 163.315 by s. 19 of chapter 85-55, Laws of Florida, shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land. It is, further, the intent of the Legislature to reconfirm that ss. 163.3161 through 163.3215 have provided and do provide the necessary statutory direction and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers, duties, and responsibilities.

Thus, in drafting the Local Government Comprehensive Planning and Land Development Regulatory Act, Chapter 163, Part II, the Legislature intended to recognize and add to local government powers, not eliminate them.

For all these reasons, based on basic principles of law and statutory powers, the court should recognize the legislative nature of planning and overturn the Fifth District Court of Appeal's decision in this case. The *Snyder* decision incorrectly determined zoning was a quasi-judicial action. The trial court and the Fifth District Court of Appeal, in applying *Snyder* in this case essentially held that planning is no longer a legislative action. This step is unprecedented and unsupported by case law or statute. Accordingly, the lower court should be reversed.

II. EVEN IF *SNYDER* IS UPHELD BY THE FLORIDA SUPREME COURT, *SNYDER* WAS NOT INTENDED TO APPLY TO COMPREHENSIVE PLAN AMENDMENTS

The trial court applied *Snyder v. Board of County Commissioners of Brevard County, Florida*, 595 So.2d 65 (Fla. 5th DCA 1991), *juris. accepted*, 605 So.2d 1262 (Fla. 1992), to facts which involved a comprehensive plan amendment. Amicus Brevard County, Florida, maintains the *Snyder* decision is incorrect and has appealed the decision to the Florida Supreme Court. If *Snyder* is overturned on appeal, it clearly would not apply in this case. However, assuming the *Snyder* case is upheld despite the appeal, Amicus Brevard County addresses the application of that case to these facts. The *Snyder* decision states:

> (1) While enactments of original general comprehensive zoning and planning ordinances and maps, and amendments thereto of broad general application, constitute legislative action establishing rules of law of general application; subsequent governmental action which in substance involves the proper application of the previously enacted general rule of law to a particular instance (*i.e.*, whether involving a petition for rezoning, for a special exception, for a conditional use permit, for a variance, for a site plan approval, or whatever) does not constitute legislative action requiring judicial deferential review as to reasonableness under the powers clause of the state constitution

(Art. II, § 3, Fla. Const.) and the separation of powers doctrine of the United States Constitution.

Comprehensive plan amendments do not involve the application of a general rule of law; comprehensive plan amendments address the alteration of the general land use regulations in the comprehensive plan. The comprehensive plan amendments do not apply a general law to a specific set of facts. Thus, comprehensive plan amendments are legislative actions pursuant to *Snyder*.

In addition, the *Snyder* court held

> [T]he initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the comprehensive plan.

Here, the requested change is <u>to</u> the comprehensive plan. There may be elements of the proposed change which are consistent, but there may be inconsistent elements as well. This situation of partial inconsistency is to be expected and is unavoidable since a <u>change</u> to the comprehensive plan is requested. This standard of proof was not intended to apply to comprehensive plan amendments; it is nonsensical to attempt to apply this procedure to plan amendments. Every plan amendment will be inconsistent in some part; therefore, the standards of review described in *Snyder* cannot be met.

The theory of the *Snyder* court is that the comprehensive plan is a framework of land use regulations. Once that basic plan or rule of law is established, all subsequent actions, pursuant to that plan, lose their legislative nature because the later actions merely implement or administer the general rule of law. Brevard County objects to this theory in general; however, even if it is valid, it does not apply here. This case involves a change in the plan or framework; a change to the rule of law of land use in the City of Melbourne. Changes to the law are, by their

very nature, legislative. Enacting laws is a basic governmental duty and obligation.

Another factor in this case was that the request involved an increase in intensity of use. The Respondent Puma sought to change the land use from single family residential to commercial. The City properly denied the request based on a policy determination that commercial zoning should not continue to encroach into surrounding residential areas.

The comprehensive plan and the future land use element in question was adopted in 1988. This application for a comprehensive plan amendment was filed in 1989. A decision had been made only a year before that residential uses were a proper use and planning goal for this area. That decision was not challenged. Respondent Puma failed to show a change in circumstances on the neighborhood indicating the 1988 decision should be altered in 1989.

The Oregon court addressed a somewhat similar situation in *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1972), which was heavily relied upon by the *Snyder* court. In that case, the *Fasano* court required the property owner to prove the existing land use category was inappropriate. The *Snyder* court uses the exact opposite approach and requires the local government to prove why the proposed change is inappropriate. Thus, the *Snyder* court's representation of, and reliance upon, the *Fasano* ruling is inappropriate and misplaced. Under the *Fasano* ruling, the request in this case was properly denied because the property owner failed to show the existing designation inappropriate.

In addition to the existing statutes and case law, there are valid policy reasons to maintain the status quo and reject the *Snyder* reasoning. The intent of Chapter 163, Part II, Florida Statutes, was to allow local governments to continue exercising their home rule powers and add a requirement to adopt comprehensive

plans. The act was intended to protect the public by allowing controlled growth. This purpose is described below.

> (7) The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.

If *Snyder* is approved and extended to this type of case, the intent and purpose of the Growth Management Act will be defeated. A few of the ramifications could be:

1. Local governments will lose control over the planning process; if the minimum statutory standards are met, any land use request must be approved. Local governments will be unable to plan for <u>future</u> land uses in the community. Overcrowding and uncontrolled population growth may result.

2. Planning changes may be considered quasi-judicial actions. Legislators will not be allowed to speak to their constituents outside the public hearing process when any land use issue arises because of the ban on ex parte communication in quasi-judicial proceedings developed in *Jennings v. Dade County Planning Commission*, 589 So.2d 1337 (Fla. 3d DCA 1991), *rev. den.*, 598 So.2d 75 (Fla. 1992).

3. Failure to recognize the planning and zoning authority of local governments encroaches onto the home rule power and legislative authority of cities and counties. The doctrine of separation of powers will be violated.

4. If the legislative status of a comprehensive plan amendment is determined by the size of the parcel involved, a large number of lawsuits will be required to determine what size parcels must be to trigger treatment as a legislative action.

5. If local governments are required to make findings of fact (contrary to *Odham v. Petersen*, 398 So.2d 875 (Fla. 5th DCA 1981), *approved in part*, 428 So.2d

241 (Fla. 1983), and *Riverside Group, Inc. v. Smith*, 497 So.2d 988 (Fla. 5th DCA 1986), the ramifications for property owners and citizens may be disastrous. For example, the local government may disapprove a comprehensive plan change, but fail to make findings of fact considered adequate by the courts. On appeal, will the courts require the local government to approve the request? In this instance, what happens to the concerns of neighbors who objected to the proposed amendment? If the property owner's request is approved and the findings of fact are inadequate, will the plan amendment fail? Will the property owner automatically lose the land use approval? If this action occurs by court order, the public will have no input or right to be heard. If rehearings are required simply to list findings of fact, vast amounts of time, money and energy will be expended to correct a technical defect. Once again, the public loses.

Thus, if *Snyder* and *Puma* are approved, the court's caseload will increase dramatically, the public will suffer increased costs and be deprived of access to their representatives and the goal of controlled growth by local governments will become impossible to accomplish. Accordingly, the *Snyder* case should not be extended to apply to comprehensive plan amendments. The decision of the Fifth District Court of Appeal in this case should be reversed.

CONCLUSION

The comprehensive plan creates the general framework for laws regarding land use and is established through legislative action of the Board of County Commissioners. Amendments to the plan are likewise legislative acts. To hold otherwise ignores the statutes which denote the legislative nature of comprehensive plans and established case law in the State of Florida. *See* Ch. 163, Part II, Fla. Stat., Ch. 125, Fla. Stat. and Ch. 166, Fla. Stat. *See also*, *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), and *City of Miami*

Beach v. Wiesen, 86 So.2d 442 (Fla. 1956). Without the ability of local governments to exercise some discretion based on the facts of each particular area, the purpose of the Local Government Comprehensive Planning and Land Development Regulation Act will be defeated. Based on the foregoing, Amicus, Brevard County, respectfully requests reversal of the Fifth District Court of Appeal decision below.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ralph Geilich, Esquire, Post Office Box 820, Melbourne, Florida, 32902-0820, and Paul R. Gougelman, Esquire, and Maureen M. Matheson, Esquire, 1825 South Riverview Drive, Melbourne, Florida, 32901, John Copelan, County Attorney, and Barbara S. Monahan, Assistant County Attorney, 115 South Andrews Avenue, Fort Lauderdale, Florida, 33301, Jane C. Hayman, Esquire, and Nancy Stuparich, Esquire, Post Office Box 1757, Tallahassee, Florida, 32302-1757, Sherry A. Spiers, Esquire, Florida Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida, 32399, and Jonathan A. Glogau, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399-1050, this 30 day of July, 1993.

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