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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 81,652

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

Petitioner,

vs.

JOSEPH ALBERT PUMA,

Respondent./

RESPONDENT'S ANSWERING BRIEF

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PRELIMINARY STATEMENT

The Respondent, JOSEPH ALBERT PUMA, will adopt the designations used by the Petitioner. Petitioner, CITY OF MELBOURNE, as "City" and Respondent, as "Puma".

FACT
OR WHAT THE PETITIONER FAILS TO MENTION

The Petitioner makes only a cursory mention of the part played by the City Planning and Zoning Board/Local Planning Agency in this controversy:

> "This proposal was recommended by the City staff, and the Planning and Zoning Board/ Local Planning Agency accepted the planning staff's recommendations..." (City Brief, Pg. 5-6).

The above statement omits the fact that the **Planning Agency held a public hearing and made findings of fact**.

Puma owns a 3.9 acre unimproved parcel on U.S. 1. (Its history will be detailed below). He wished to change the zoning. The City gave him an "Application For Comprehensive Plan Amendment." He filed it requesting a change from "Low Density Residential" to "Commercial Low Density (with a site specific policy for professional use, C 1-A)". (Complaint, Ex. "A").

The City Local Planning Agency held a public hearing on April 12, 1990, heard witnesses, pro and con, its Staff recommendations, and at its meeting on May 10, 1990, voted unanimously to recommend the change in "land use designation" to permit a professional office building with restrictions as to the wetlands, providing for a buffer zone and limiting the height to 25 feet. It then made the following findings of fact:

"1) That the Comprehensive Plan will be internally consistent if the proposed amendment is adopted. The proposed amendment will not affect the economic feasibility of policies in the Comprehensive Plan;

2) That no evidence has been presented to indicate that the City budget or environmental, or natural resources of the City will be adversely affected;

3) The proposal appears consistent with the regional and state comprehensive plans when those plans are taken as a whole; and

4) Permitting a Commercial land use will more likely than not cause a lesser degree of lot coverage. Because the property is adjacent to U.S. 1 and near existing commercial developments, the use is compatible with surrounding uses and will provide a buffer to residential areas. The LPA is concerned that wetland areas be protected and that development be adequately set back from Horse Creek. The LPA will require that Conservation Element Objectives 10 and 11 and subordinate policies be fully enforced with regard to any development to this property." (Complaint Ex. "B")

The Recommendation of the Local Planning Agency came before the City Council. The City Planning Officer, Ms. Braz presented the recommendation. One witness spoke in favor and one against, both presenting the same arguments presented to the Local Planning Agency. No testimony was presented to negate the findings of the Local Planning Agency. The City Council, without stating any reason to reject the recommendations or findings, voted unanimously to deny the application. (Complaint, Ex. "C").

THE HISTORY OF THE SUBJECT PARCEL OR WHY IT WAS ZONED LOW DENSITY RESIDENTIAL ON THE FUTURE LAND USE MAP.

Back in 1956, when U.S. 1 in Melbourne was a two-lane highway, the subject property was platted as a single family residential project and in 1972 was zoned the same, and the zoning has not been changed since that time. But the original

platting which ran down to Horse Creek, was rendered useless by the wetlands designation and the 30' buffer zone landward of wetland. The aerial view shows how, with the wetlands and the buffer zone, approximately one-half of the subject parcel has been "taken" for public use. (Appendix "A").

When the Comprehensive Plan was adopted by the City in 1988, it is apparent that this parcel was overlooked, as appears by the zoning of all neighboring parcels. Of the four corners on U.S. 1 crossing Horse Creek, one is a boat sales yard, one is a motel, and on the third corner there is an office building. Only three years before the adoption of the Comprehensive Plan, the City changed the zoning on the southerly border of Puma's property to allow the construction of a large strip shopping center. (Trans. pg. 39). To the west the abutting property is zoned multi-family. North of Horse Creek is an old residential subdivision, but when its residents leave their homes to exit to U.S. 1, they drive by the Professional building marking the corner of the subdivision with U.S. 1. Directly across U.S. 1 is a gas station. (These uses are all shown clearly on the aerial view), When the City adopted the Comprehensive Plan, it zoned all these properties on the Future Land Use Map as they are labeled on the exhibit.

ARGUMENT

This action, in fact, involved a request to change the zoning of a specific parcel to make the zoning consistent with the Comprehensive Plan. The policy of the City as to zoning on arterial highways had been well defined and Puma did not seek a

change in that policy.

Whether or not, Puma was entitled to that relief, was determined properly by the Local Planning Agency, and unless the City Council, could find the Agency's findings were not supported by the evidence, it had to accept its findings or state why it did not, as directed by the Circuit Court.

The City's claim that its policy making authority has been endangered by the decision in this is without merit, because the City and the Amicus Curiae parties have overlooked the part played by the Local Planning Agency.

I.

THE PUBLIC'S RIGHT TO PARTICIPATION IN THE PLANNING PROCESS WAS NOT ENDANGERED BY THE DECISION IN THIS ACTION.

The City paints a doleful picture of how "interested citizens" are deprived of their rights by the decision in Snyder and in this action. It claims that the City Council agendas are not designed to allow proper presentation of the facts by the public. City Brief, Pgs. 39-41.

We agree that the City Council should not hold hearings and take testimony as to site specific amendments to the Comprehensive Plan and we do not believe the Legislature ever intended for the City Council to do so. That is the responsibility of the Local Planning Agency.

The Legislature gave that responsibility to the Local Planning Agency. It provided that:

1. Specifically, the LPA shall be responsible to make recommendations regarding plan amendments.

2. Before making any recommendation to the governing body, the LPA shall hold at least one public

hearing with due public notice.
Sec. 163.3174, (4a) Fla. Stat. 1992.

Are we imposing an undue burden on a small property owner of a specific parcel, seeking to use his property consistent with the Comprehensive Plan, if we require him:

1. To present witnesses and experts at a public hearing before the Local Planning Agency? The Statute mandates that the LPA has general responsibility for the conduct of the Comprehensive Planning program.
Sec. 163.3174 Fla. Stat. 1992.

2. Since the local governing body has the right to ignore the recommendation of the LPA (as claimed by the City) present all his witnesses and experts again at a public hearing before the local governing body, and hope that the latter will give him enough time on its busy agenda to properly present his case; and

3. If the local governing body, after counting the electors, pro and con before it, arbitrarily discriminates against the property owner, is the property owner left without a remedy because the local governing body was making a "policy" decision?

For decades, since the birth of zoning laws in the early part of this century, frequently owners have had to fight against political pressure to establish their property rights. Many were deprived of the proper use of their property by bromides such as "debatable question" or "spot zoning".

Comprehensive Planning was designed to bring order out of chaos. Property owners would have established rights under the Comprehensive Plan. If a projected use was consistent with the Plan, no longer did the owner have to fear uncertain decisions handed down by a political body.

Snyder does not curtail the rights of either the

general public or the property owner. The City claims:

> "If the general public, let alone a property owner/developer or city or county commission, does not know with certainty in advance of a hearing whether the proceeding will be classified as quasi-judicial or legislative, the result could be chaotic. Property owner/developers, the general public, environmental groups, and others, many of whom have limited funds, will not know in advance whether to hire expert witnesses and make a trial-type record, as required in a quasi-judicial hearing." (City Brief, Pg. 36).

Snyder eliminates the "chaotic" predicament envisaged by the City. Everyone will know in advance - be prepared at the public hearing before the Local Planning Board to present your case and make a trial-type record. And if the LPA makes findings of fact, as required, be prepared before the local governing body to argue whether the evidence supports or does not support those findings.

What could be simpler or more just for both the property owner and the general public?

II.

THE ACTION OF THE CITY IN REFUSING TO REZONE APPELLEE'S PROPERTY WAS GROSS DISCRIMINATION.

This Court now has the task of determining the procedure to be followed in seeking relief from zoning decisions. The City requests that this Court reinstate the Trial Court's original November, 1991 judgment which held that there was a debatable question and the City action in denying a zoning change had to be affirmed. (City Brief, P. 44).

Appellee knows of no precedent for an Appellate Court to reinstate a judgment where the Trial Court has granted a rehearing as to its own judgment by rendering a new decision and directing the City to hold an evidentiary hearing.

Whether this Court affirms or reverses Snyder, the fact remains that whatever procedure is determined to be correct, Puma was discriminated against by the arbitrary action of the City Council in denying him the same use of his property as enjoyed by neighboring owners.

What basis did the City Council have to reject the recommendation and findings of the LPA? One witness appeared before it. Sara Stern, a resident of Grandview Shores, the old residential development north of Horse Creek, appeared and made "statements". She stated "Horse Creek is environmentally sensitive". She claimed runoff from paved parking areas will cause the Creek to become closed. The LPA found that there was no evidence that the environment would be adversely affected. (Complaint, Ex. "C").

On such unsupported statements, the City Council rejected the application. When we consider that the City allowed a shopping center to be built abutting Puma's property, that multi-family buildings can be built abutting the westerly side of his property, that his property is on heavily traveled U.S. 1, that the other three corners of Horse Creek and U.S. 1 are commercially used, what rational conclusion can there be but that the City was guilty of gross discrimination against him.

We agree with the Amicus Florida League of Cities that the "integration of principles of planning law and traditional zoning law has caused confusion in the courts and among practitioners." The League believes this Court can clarify the confusion in this appeal. (League Brief, P. 1).

There is a simple solution! Elective governing bodies

should not be allowed to determine the rights of a particular property owner.

We now have comprehensive planning. The local governing body adopts a comprehensive plan. It defines proper use in general areas - all to further the common good. For example, along busy arterial highways, commercial use is permitted. In adopting the plan, it cannot examine each individual parcel to determine if its zoning is consistent with the general plan. Zoning maps quickly can become obsolete in a fast growing state such as Florida.

The individual property owner suddenly finds himself with a property that no longer can be used under the original zoning classification but could be used advantageously if the property were rezoned to be consistent with the general comprehensive plan. He applies to the municipality - call it whatever you like - an amendment to the plan or a change of zoning - what difference does the terminology make to the single property owner?

He appears before the Local Planning Agency and a public hearing is held. Is the proposed use consistent with the Comprehensive Plan? Evidence is presented - witnesses are heard and the LPA makes findings of fact. Everyone has had his day in Court! The LPA make its recommendation.

At this point should the procedure be any different than with any other type of litigation? A trial has been had and a decision made. Should the property owner be subjected to a new trial? An appellate court does not retry the case. Why should

the local governing body? It should review the findings of the LPA and determine if they are substantiated by the evidence. Snyder does not imperil the legislative power of the City Council - it still places the burden on the property owner to show entitlement to relief - but when the property owner meets that burden before the LPA, his rights should not then be denied in a "politicized forum".

The City attempts to justify the City Council action by claiming that the low density residential classification was necessary to protect the integrity of the residential development across Horse Creek (shown on aerial view) (City Brief, P. 9). How by allowing a 25 foot high professional building on the subject property will it affect the "integrity" of the residential subdivision is not explained. On the multi-family parcel abutting Puma's property, and which faces Horse Creek, a 40 foot high apartment building could be erected directly across from the "endangered" subdivision.

Whether it is called an amendment to the Comprehensive Plan or a request for a change of zoning, the fact still remains that Puma has been refused the right to a commercial use of his property in an area permeated by commercial activity. The refusal of the City to allow him anything but single family residential use is grotesque.

FINAL ARGUMENT

We have not belabored this Court with copious references. We believe that the rights of property owners have too long been buffeted by "politicized forums" and that Snyder is a giant step toward protecting those rights. The facts in this

action vividly illustrate the need to offer some relief to a small property owner. Puma bought the subject property in 1980 for $74,000.00 - soon thereafter approximately one-half of his property is rendered unusable by governmental "taking" without compensation (wetlands and buffer zone).

Then, when he wishes to develop the remaining land, he is given a full hearing before the Local Planning Agency. The Agency staff has reviewed the application - the Board hears all witnesses and makes finding of fact and a recommendation. He then appears before the City Council, who ignores the findings of the LPA and arbitrarily rejects the application. He then is compelled to seek relief in Circuit Court followed by an appeal to the District Court of Appeal and then to this Court.

May we respectfully suggest that the procedure proposed by Snyder would allow the owner of a specific site to seek relief without expending more than the value of the property in lengthy and costly litigation.

CONCLUSION

Since the City chose to appeal the order of the circuit court directing it to hold an evidentiary hearing and make findings of fact instead of granting the Appellee's request for rezoning, we respectfully request that the Order of April 23, 1992, and the Order of the District Court of Appeal affirming that Order be affirmed.

Respectfully submitted,

Ralph Gellich
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U. S. Mail to. Paul R. Gougelman, III, and Michael R. Riemenschneider, Attorneys for Petitioner, 1825 South Riverview Drive, Melbourne, FL 32901; Eden Bentley, Esq., Asst. County Attorney, Office of County Attorney, Building "C", 2725 St. Johns Street, Melbourne, FL 32940; Sherry Spiers, Esq., Asst. General Counsel, Dept. of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100; John Copelan, Esq., General Counsel, and Barbara Monahan, Esq., Asst. General Counsel, Broward County General Counsel's Office, 115 S. Andrews Avenue, Suite 423, Ft. Lauderdale, FL 33301; Nancy Stuparich, Asst. General Counsel, and Jane Hayman, Asst. General Counsel, Florida League of Cities, P. O. Box 1757, Tallahassee, FL 32302; Jonathan A. Glogau, Esq., Asst. Attorney General, Attorney General's Office, Alexander Building, Room 307, 2020 Capital Circle, S.E., Tallahassee, FL 32399, on this 23rd day of August, 1993.

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APPENDIX TO
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TAB	DOCUMENT
A	AERIAL PHOTOGRAPH OF SUBJECT PROPERTY AND SURROUNDING AREA.