

045

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 81,652

5th DCA Case No. 92-01038

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

Petitioner,)

v.)

JOSEPH ALBERT PUMA,)

Respondent.)

FILED
SID J. WHITE
MAY 5 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S JURISDICTIONAL BRIEF

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

REINMAN, HARRELL, GRAHAM,
MITCHELL & WATTWOOD, P.A.
1825 S. Riverview Drive
Melbourne, Florida 32901
Telephone: (407) 724-4450

PAUL R. GOUGELMAN, III
Florida Bar No. 316423
MAUREEN M. MATHESON
Florida Bar No. 0750107

Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
JURISDICTIONAL STATEMENT	4
ARGUMENT	5
PRIMA FACIE EXPRESS CONFLICT JURISDICTION EXISTS BECAUSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A CASE THAT IS PENDING IN THE FLORIDA SUPREME COURT.	5
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Coral Reef Nurseries, Inc. v. Babcock Co.,</u> 410 So. 2d 648 (Fla. 3d DCA 1982)	7
<u>Dowling v. State,</u> 605 So. 2d 465 (Fla. 1992)	5
<u>Jollie v. State,</u> 405 So. 2d 418 (Fla. 1981)	5
<u>Rinker Materials Corp. v. Metropolitan Dade</u> <u>County,</u> 528 So.2d 904 (Fla. 3d DCA 1987)	3, 5-7
<u>Snyder v. Board of County Commissioners,</u> 595 So. 2d 65 (Fla. 5th DCA 1991), <u>juris. accepted,</u> 605 So. 2d 1262 (Fla. 1992)	1, 5, 6
<u>State v. Lofton,</u> 534 So. 2d 1148 (Fla. 1988)	5
 <u>STATUTES:</u>	
§§ 163.3161-.3243, Fla. Stat. (1991)	7
 <u>OTHER AUTHORITIES:</u>	
Art. V, § 3(b)(3), Fla. Const.	4
Fla. R. App. P. 9.030(2)(A)(iv)	4

STATEMENT OF THE CASE AND FACTS

At issue in this cause is whether an amendment to a land use comprehensive plan is governed by the rules announced in Snyder v. Board of County Commissioners, 595 So. 2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So. 2d 1262 (Fla. 1992) (Fla. case no. 79,720). The Respondent [hereinafter "the Landowner"] requested the City of Melbourne [hereinafter "the City"] to allow the development of a professional office use on his 3.94-acre property. (App. A, Exhibit A.) The property is designated on the City's Comprehensive Plan Future Land Use Map as "low density residential." (App. B.) The property is zoned for single-family residential use. (App. B.) The City Council voted to deny the Landowner's request. (App. B.)

Thereafter, the Landowner filed suit in circuit court seeking an order directing the City to amend its Comprehensive Plan to permit a professional office use on the subject property. (App. A, at 356.) At trial, the trial court framed the issues as (1) whether the City's Comprehensive Plan "low density residential" designation as adopted with regard to the subject property is contrary to the goals and policies of the Comprehensive Plan; and (2) if the answer is that the "low density residential" designation is not contrary to the goals and policies of the Comprehensive Plan, whether the City's action in retaining the designation of the subject property as "low density residential" in the Future Land Use Element of the Comprehensive Plan was discriminatory and thus not fairly

debatable, so as to deprive the Landowner of the beneficial use of his property. (App. B.)

After a full trial de novo, the trial court ruled in favor of the City. (App. B.) The trial court determined that the City's decision to deny the change of land use on the Comprehensive Plan Future Land Use Map was fairly debatable and that the City's action in designating the property as "low density residential" has a substantial relationship to the public health, safety, and welfare. (App. B.)

The Landowner moved for rehearing. (App. C.) Shortly thereafter, the Florida Fifth District Court of Appeal issued the Snyder opinion. (App. C.) Based on Snyder, the trial court reversed its earlier ruling. (App. C.) The trial court interpreted Snyder as requiring a decision in favor of the Landowner and, in an order dated March 23, 1992, remanded the cause to the City Council either to grant the Landowner's request or to hold an evidentiary hearing pursuant to Snyder. (App. C.)

The City appealed this order to the Florida Fifth District Court of Appeal. (App. D.) After notice of appeal had been filed, the trial court, on its own motion, sought to correct its March 23rd order to reflect that the matter at issue was an amendment to the Comprehensive Plan and not, as had been mistakenly stated in the order, a rezoning. (App. D.) Upon the district court's temporary relinquishment of jurisdiction, (App. F), the trial court entered an Amended Order reciting

that the decision concerned a request to amend the Comprehensive Plan. (App. G.) This is significant because, throughout this case, the Landowner has attempted to characterize the issue as a change of zoning rather than as an amendment to the Comprehensive Plan. (App. E.)

On April 9, 1993, the district court of appeal issued a per curiam decision without opinion affirming the judgment of the trial court. (App. H.) In the decision, the district court cited as controlling authority the Snyder case, which is currently pending review in the Florida Supreme Court. (App. H.) On April 23, 1993, the City filed a timely Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal issued a per curiam decision without opinion that cites as controlling authority a case that is, at present, pending review in the Florida Supreme Court. This Court regards such a decision as constituting prima facie express conflict for purposes of supreme court discretionary jurisdiction. Because express and direct conflict exists, this Court should accept jurisdiction.

In addition to the prima facie grounds for jurisdiction, this case concerns a legal issue of import in Florida land use law that should be addressed by the Court. The importance of this issue is illustrated by the conflict of the instant decision with Rinker Materials Corp. v. Metropolitan Dade

County, 528 So. 2d 904 (Fla. 3d DCA 1987). The fifth district court's citation to Snyder, which concerned a site-specific rezoning, indicates that the fifth district court views the amendment of a comprehensive plan as a quasi-judicial act. The Rinker court, in contrast, specifically distinguished rezonings from comprehensive plan amendments, and held that the amendment of a comprehensive plan is a legislative act. Thus, this Court should resolve the conflict of the district courts on this issue.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(2)(A)(iv).

ARGUMENT

PRIMA FACIE EXPRESS CONFLICT JURISDICTION EXISTS BECAUSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A CASE THAT IS PENDING IN THE FLORIDA SUPREME COURT.

In the present case, the district court of appeal issued a per curiam decision affirming the lower court order. Without any discussion, the decision cited as authority Snyder v. Board of County Commissioners, 595 So. 2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So. 2d 1262 (Fla. 1992). Snyder is currently pending review in this Court in case no. 79,720.

A per curiam decision without opinion of a district court of appeal that cites as controlling authority a decision that is pending review in the Florida Supreme Court constitutes prima facie express conflict for purposes of supreme court jurisdiction. Dowling v. State, 605 So. 2d 465 (Fla. 1992); State v. Lofton, 534 So. 2d 1148 (Fla. 1988); Jollie v. State, 405 So. 2d 418 (Fla. 1981). Therefore, because the district court's order constitutes prima facie express conflict, this Court should exercise its discretionary jurisdiction to review this cause.

In addition to the prima facie express conflict of the district court's decision, the decision conflicts with that of the Florida Third District Court of Appeal in Rinker Materials Corp. v. Metropolitan Dade County, 528 So. 2d 904 (Fla. 3d DCA 1987). This conflict, although not an independent basis for supreme court jurisdiction, nevertheless illustrates why the

case at bar concerns a legal issue of importance in Florida land use law that is deserving of resolution by this Court.

At issue in the present case is whether a site-specific amendment to a comprehensive plan is subject to the rule of Snyder, 595 So. 2d at 65, which holds that site-specific rezonings are quasi-judicial proceedings, and are thus not reviewable by the "fairly debatable" standard. The City's position is that, even if this Court upholds Snyder, Snyder does not apply to a site-specific amendment of a comprehensive plan. This is because any amendment of a comprehensive plan is governed by legislative dictates and policy considerations that are completely distinct from the rezoning of a specific parcel of land. Thus, the City contends that these particular legislative dictates and policy considerations demand the conclusion that a site-specific amendment to a comprehensive plan is a legislative proceeding subject to the "fairly debatable" standard of review. The fifth district court of appeal rejected this contention, however, and, in citing to Snyder, held that an amendment to a comprehensive plan is a quasi-judicial action subject to the same procedures and standard of review as a site-specific rezoning.

In Rinker, 527 So. 2d at 94, the third district court of appeal reached a contrary conclusion. The Rinker court ruled that an amendment to a comprehensive plan is a legislative function. See id. at 905-906. In a footnote, the court specifically distinguished the act of amending a comprehensive

plan, which is a legislative act, from that of rezoning, which is a quasi-judicial act in Dade County. See id. at 906 n.2.

Rinker is pertinent to the present case for three reasons. First, like the present case, Rinker involved a change to a comprehensive plan affecting a specific site. Second, the third district court of appeal has long regarded rezonings in Dade County as quasi-judicial in nature, which is the view adopted by the fifth district court in Snyder. See Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 653 (Fla. 3d DCA 1982). Third, the only real difference between Rinker and the case at bar is that the Rinker plaintiff was challenging an adopted amendment, whereas the instant case involves the denial of an amendment. Thus, Rinker directly conflicts with the ruling in the case at bar.

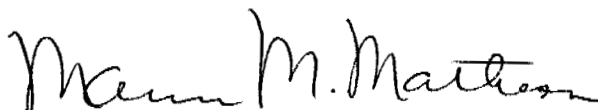
Consequently, unless this Court resolves the conflict, site-specific amendments to comprehensive plans will be treated as legislative acts within the third district and as quasi-judicial acts in the fifth district. Conflict among the district courts in a matter of comprehensive planning is especially troubling because it raises questions about the entire legislative scheme governing comprehensive planning by local governments in Florida. See §§ 163.3161-.3243, Fla. Stat. (1991). Hence, even if this Court upholds the Snyder opinion, this Court should accept jurisdiction in the present case and resolve the conflict and confusion the present case has caused in Florida land use law.

CONCLUSION

This Court has jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioner's argument.

Respectfully submitted,

REINMAN, HARRELL, GRAHAM,
MITCHELL & WATTWOOD, P.A.
1825 S. Riverview Drive
Melbourne, Florida 32901
Telephone: (407) 724-4450

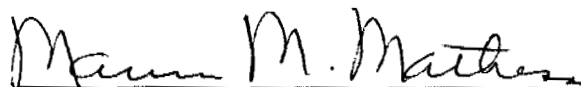


PAUL R. GOUGELMAN, III
Florida Bar No. 316423
MAUREEN M. MATHESON
Florida Bar No. 0750107

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to RALPH GEILICH, ESQUIRE, Attorney for Respondent, Post Office Box 820, Melbourne, Florida 32902-0820, on this 3rd day of May, 1993.



MAUREEN M. MATHESON
Florida Bar No. 0750107