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MAY 21 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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,)
))
_____)

RESPONDENT'S JURISDICTIONAL BRIEF

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

RALPH GEILICH
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Attorney for Respondent

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STATEMENT OF THE CASE AND FACTS

The Petitioner asks this Court to take jurisdiction claiming that this cause involves the important issue of whether an amendment of the City's Comprehensive Plan is a legislative act.

It is the Respondent's position that this cause does not involve the legislative powers of the City Council, but rather it was an attempt by the City's Planning Board and the Lower Court to remedy a grossly discriminatory zoning of a single parcel.

The Lower Court stated the issue clearly in its Order as follows:

"ORDERED that the request of Plaintiff to rezone his property be remanded to the City Commission of the City of Melbourne to either grant the request to rezone his property in accordance with the recommendation of the City Planning and Zoning Board or in the alternative to hold an evidentiary hearing; and if it denies the application that it make findings of fact based on the evidence presented, why the request should not be granted;-----" (Petitioner's Appendix, Tab "C").

Surprisingly, the Petitioner has omitted from its Appendix an important document attached to the Complaint. This document, which was attached to the Respondent's Complaint as Exhibit "B", are the minutes of the Melbourne Planning and Zoning Board recommending the rezoning of Respondent's property upon the ground that to do so would make Respondent's property consistent with the Comprehensive Plan. We have provided this omitted document (Respondent's Appendix Tab "A").

The Respondent owns a 3.9 acre unimproved parcel with

330 foot frontage on U. S. 1. All the Respondent requested from the City was that it rezone his property so that its proposed use would be consistent with the use permitted on all abutting and similar properties. (See aerial view, Respondent's Appendix Tab "B"). Respondent's land occupies one corner of the intersection of Horse Creek and U.S. 1. As shown on the aerial view, the other three corners of the intersection are zoned commercial, and are used for a boat sales yard, a motel and an office building, respectively. On the South, Respondent's property abuts a shopping center and on the West an unimproved multi-family zoned parcel. Respondent's land is zoned low density residential, even though it is situated on busy multi-lane U. S. 1, and is surrounded by commercially zoned or multi-family zoned properties. It would appear that when the Comprehensive Plan was adopted by the City of Melbourne, this parcel was overlooked. For that reason the City Planning and Zoning Board recommended that use of Respondent's parcel be made compatible with surrounding uses and the Board further stated that this would make the use consistent with the Comprehensive Plan. (Respondent's Appendix Tab "A"). Although the application to the City and all of the pleadings refer to this cause as a request to amend the Comprehensive Plan, all the Respondent requested was "request is to change zoning to C-1A". (Comprehensive Plan Amendment Application, Paragraph 10, Exhibit "A", attached to Complaint, Petitioner's Appendix Tab "A").

ARGUMENT

Respondent believes that a request to rezone a single isolated parcel to make its use consistent with the Comprehensive Plan does not qualify as a request to amend a Comprehensive Plan. The Petitioner argues that this is an important issue in that the amendment of the Comprehensive Plan is a legislative act. When the City Council overruled the Local Planning Board, it was not voting to deny a request to amend the Comprehensive Plan, it was, in fact, voting to deny a request to rezone a single parcel. The Respondent submits that this cause involved nothing more than a rezoning of a single parcel and that the City gave no reason for rejecting the City Planning and Zoning Board's recommendation that that parcel's proposed use be made consistent with the Comprehensive Plan.

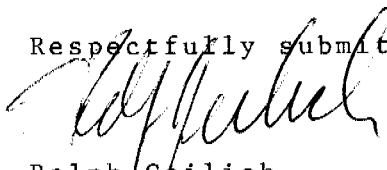
If the Local Planning Board had recommended a change that would affect neighboring owners and further had recommended a change that would be inconsistent with the Comprehensive Plan, then the City justifiably could claim that the Planning Board was trespassing on its Legislative jurisdiction. Here, however, the Planning's recommendation was to make something consistent with the legislative action already taken.

The trial court said to the City - Explain why you do not wish to make the zoning on this single parcel consistent with its neighboring parcels. This was not infringing on the legislative power of the City. There was no intent by the trial court to interfere with the City's legislative powers.

This was a squabble over a single parcel which suffered

from discriminatory zoning. It did not require a legislative action to remedy the situation. The City merely had to adopt the recommendation of the Local Zoning Board.

It is respectfully admitted that the facts in this cause do not furnish the basis for a Supreme Court ruling on the legislative powers of the City.

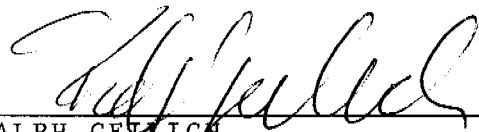
Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail unto Paul R. Gougleman, III, Esquire and Maureen M. Matheson, Esquire, Reinman, Harrell, Graham, Mitchell & Wattwood, P.A., 1825 South Riverview Drive, Melbourne, FL 32901, on this 19th day of May, 1993.



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**APPENDIX TO
RESPONDENT'S JURISDICTIONAL BRIEF**

TAB DOCUMENT

- A** MINUTES OF THE REGULAR MEETING OF
 THE CITY OF MELBOURNE LOCAL PLANNING
 AGENCY/PLANNING AND ZONING BOARD MAY 10, 1990

- B** AERIAL PHOTOGRAPH OF SUBJECT
 PROPERTY AND SURROUNDING AREA.

MINUTES OF THE REGULAR MEETING OF THE CITY OF MELBOURNE LOCAL PLANNING AGENCY /PLANNING AND ZONING BOARD HELD MAY 10, 1990, AT THE HOUR OF 7:30 P.M. IN THE MELBOURNE CITY HALL COUNCIL CHAMBERS

The regular meeting of the Local Planning Agency/Planning and Zoning Board was called to order at 7:30 p.m. by Tom Williams, Chairman, Planning and Zoning Board, and was followed by the Pledge of Allegiance to the Flag and an introduction of the Board.

PRESENT:

Tom Williams	Chairman
William Murphy	Vice Chairman
Leon Tucker	Member
Vineta Raley	Member
Burt Page	Member
Susan Carlson	Member

ABSENT:

Jerry J. Grillo	Member (excused)
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ALSO PRESENT:

Craig Coffey	Planner/P & Z Board Secretary
Paul Gougelman	City Attorney
Rhonda Strauss	Recording Secretary
Bill McCord	Planner
Dominic Mauriello	Planner

3. NO CONFLICTS OF INTEREST WERE DECLARED.4. Moved by Page/Raley to approve the April 26, 1990 Planning & Zoning Board meeting minutesMOTION CARRIED UNANIMOUSLY.UNFINISHED BUSINESS

5. FINAL PLANNING AND ZONING BOARD ACTION (RECOMMENDATION) - COMPREHENSIVE PLAN AMENDMENT CPA-90-2: Requesting a change in land use on a 3.94 acre parcel from a Low Density Residential land use designation to a Mixed Use Commercial/Low Density Residential land use designation located in Rock Point Subdivision, Blocks B and C, lying west of U.S. 1, and south of Horse Creek (Owner/Applicant - Joseph Albert Puma) (P&Z Board- 5/10/90) (City Council - 5/22/90)

Chairman Williams reminded the Board members that this item was not a Public Hearing and was on the agenda because the Board failed to pass a recommendation for this item at the Planning and Zoning Board meeting of April 12.

Mr. Coffey re-familiarized the Board with the property and referenced the letter to the public explaining why this item was on the agenda again. He also stated that staff still supports this amendment because of the proximity of this property to adjacent commercial and U.S. 1 along with the better control staff would have over any environmentally sensitive areas. Mr. Coffey stated staff is proposing a site specific policy for study area 1 with this amendment. The policy is below:

7. Development of the land described in CPA-90-2 lying west of U.S. 1 and south of Horse Creek shall be limited by the following policy:

- a. All wetland areas and a wetland buffer zone of at least 30' landward of the wetland areas shall remain undisturbed except as provided for in objectives 10 and 11 of the Conservation Element.