IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioner,

Case No. 81,652

-vs-

JOSEPH ALBERT PUMA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Citations to the Respondent Puma's answer brief will be referenced as "(Puma Br: ___)." The Respondent has answered the City's initial eight point brief with two points that don't correlate to the issues raised by the City. The Respondent's point II is almost in the nature of a cross-appeal. The City believes that it would have been easier for all involved to stick to the points raised, and by doing so the Respondent still could have made his arguments. Nevertheless, the City will respond to the points as framed by the Respondent.

RESPONSIVE ARGUMENT

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

Mr. Puma charges that the City has painted "a doleful picture of how interested citizens are deprived of their rights by the decision in Snyder[1] and in this action." (Puma Br: 4). It wasn't difficult to paint that picture, because the picture accurately depicts what exists. Perhaps that is why so many interested parties, such as the Attorney General's Office, the Department of Community Affairs, the Florida League of Cities, the Broward County General Counsel and others, felt a need to file briefs as amicus curiae in this case. The City points out

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[1] Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), jurisdiction accepted, 605 So.2d 1262 (Fla. 1992).

that all of those parties agreed with the concerns raised by and the policy espoused by the City in its initial brief.

The Respondent even appears to agree with the City and the amici curiae in regard to those concerns (Puma Br: 4). Despite his agreement with the concerns of the City, the Respondent sweeps those concerns under the proverbial rug, arguing that the Local Planning Agency ("LPA"), which in most cities (including Melbourne) and counties is the planning and zoning board, can hold the quasi-judicial, evidentiary comprehensive plan amendment public hearing/"mini-trial."

By having the LPA hold the evidentiary hearing, Mr. Puma believes that the City Council will not need to hold such hearings, which is exactly what the Legislature intended. Mr. Puma cites Section 163.3174(4), Florida Statutes, as authority for this idea. That statute neither mandates nor implies that site specific comprehensive plan amendments should be quasi-judicial or that the quasi-judicial public hearing "mini-trial" can be held by the LPA rather than the City Council.

Assuming site specific comprehensive plan amendments to be quasi-judicial in nature, switching the evidentiary hearing from the City Council to the LPA would turn the City Council hearing into a mere rubber-stamp type of proceeding. This is completely contrary to Section 163.3181(2), Florida Statutes, and Rule 9J-5.004, Florida Administrative Code, both of which require broad public participation at both the LPA and City Council levels, including public hearings, opportunity for members of the public

to submit written comments, and an opportunity for members of the public to obtain responses to their comments and questions.

The City notes that in Mr. Puma's argument in favor of his idea he asks "[a]re 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 ..." to present his case to the LPA (Puma Br: 5)(e.s.). The City is confused by this argument.

If the property owner is using his property consistent with the Comprehensive Plan, as noted in the Respondent's foregoing question, why would the landowner file a comprehensive plan amendment application and seek a hearing before the LPA? There is no need to go to the LPA and no need for the plan amendment application.

If, on the other hand, the Respondent is referring to a case in which the landowner is seeking a rezoning of his land, which is not the case at bar, then the proposal would be required to first go to the LPA for "recommendations to the governing body as to the consistency of the proposal with the adopted comprehensive plan ...." §163.3174(4)(c), Fla. Stat.; accord §163.3194(2), Fla. Stat.[2] If the Respondent views that type of hearing as a quasi-judicial proceeding because of Snyder, the Respondent may

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[2] Section 163.3194(2) requires that a "land development regulation" must first be reviewed by the LPA to establish the relationship of the land development regulation to the comprehensive plan. Pursuant to Section 163.3164(23), Florida Statutes (1993), the act of rezoning is by definition a "land development regulation."

be in error. As this Court is well aware,[3] issues of whether non-comprehensive plan amendment development orders are consistent with a comprehensive plan are tried de novo before a trial court in the form of an action for injunctive relief. See §163.3215 (1), (3)(b), Fla. Stat.

Respondent's Point II
THE ACTION OF THE CITY IN REFUSING TO REZONE APPELLEE'S PROPERTY WAS GROSS DISCRIMINATION

A - This is Not a Zoning Case

The Respondent argues that this is a zoning case. He notes: "He [Mr. Puma] wished to change the zoning. The City gave him an Application for Comprehensive Plan Amendment." (Puma Br: 1). In the introduction to his argument Mr. Puma states:

> 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.

(Puma Br: 3-4). In the caption to his Point II, Mr. Puma states that "THE ACTION OF THE CITY IN REFUSING TO **REZONE** APPELLEE'S PROPERTY WAS GROSS DISCRIMINATION." (Puma Br: 6) (e.s.). This is NOT a rezoning case.

Mr. Puma attempted to make these same points before the circuit court which caused nothing but confusion (R: 332-336).

THE COURT: It's not in the courts, but what

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[3] But see Emerald Acres Investments v. Board of County Commissioners, 601 So.2d 577 (Fla. 1st DCA 1992), certified question of great public importance, Case No. 80,288 (Fla. oral argument Apr. 9, 1993); Parker v. Leon County, 601 So.2d 577 (Fla. 1st DCA 1992), certified question of great public importance, Case No. 80,230 (Fla. oral argument Apr. 9, 1993).

you've asked, you asked the City Commission to amend the comprehensive plan -- to amend the future land use map there, and they declined to do so. That's the act that you're asking me to review.

MR. GEILICH: No. What we should have done, we should have asked -- we asked the Planning Board to state that this property should be zoned professional or commercial in accordance with the comprehensive plan. We didn't asked that the comprehensive plan be amended. We asked that the zoning of this lot be amended to conform to the comprehensive plan, ...

* * *

THE COURT: . . . But what you asked the City to do was to amend its comprehensive plan.

MR. GEILICH: No.

* * *

THE COURT: But you keep getting into the merits. What I want to find out here very simply, is the action that you want me to review, the action that the City Commission took in denying your request?

MR. GEILICH: To rezone, not to amend the comprehensive plan.

THE COURT: Ralph, you won't answer my question. My question is, isn't what you asked the City Commission to do -- not what you're asking me to do. But isn't what you're asking the City Commission to do is to amend the [sic] its comprehensive plan?

MR. GEILICH: No, we asked that the zoning -- the fact that we made -- used the wrong language.

* * *

MR. GEILICH: We didn't want the comprehensive plan amended. The comprehensive plan says that this property should be commercial.

THE COURT: No it doesn't. ...

MR. GEILICH: No. The comprehensive plan says that everything on arterial highways should be commercial -- that's the Comprehensive Plan. Then they adopted a Future Land Use Map, which merely continued what had been there before. But that future land use map was at variance with the Comprehensive Plan.[4]

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[4] It should be noted that this type of allegation appears to contest the internal consistency of the plan, that each element should be consistent with all other elements. §163.3177(2), Fla. Stat. The issue of internal consistency, as opposed to consistency

(R:332-336).

Mr. Puma's arguments caused so much confusion that the original order on rehearing was issued in error referring to his "rezoning." As noted in the City's initial brief at 2:

> 4) March 23, 1992: On rehearing Judge Lober reversed his earlier ruling based on Snyder (R: 483-484). The court ruled that the "rezoning" matter should be remanded to the City Council for fact finding and an evidentiary hearing pursuant to Snyder.
> 5) April 22, 1992: The City appealed (R: 485-486).
> 6) May 13, 1992: After the Fifth District Court of Appeal temporarily relinquished jurisdiction (R: 490), the trial court entered an amended order on rehearing (R: 491-492) to reflect that the case related to a change of land use designation on the Future Land Use ("FLU") Map of the City's Comprehensive Plan and not rezoning.

Despite Mr. Puma's protestations this case is NOT a rezoning case! It is a comprehensive planning case. Mr. Puma was handed an application for comprehensive plan amendment by the City and filed that application. Respondent perhaps, does not fully appreciate what would have occurred if he had filed an application for rezoning.

If Mr. Puma had filed a rezoning application to change the zoning from R-1A low density residential to some type of zoning that permitted office development, the proposed rezoning would have been inconsistent with the Comprehensive Plan FLU Map, and the application would have been required to be denied pursuant to Section 163.3194(1)(a), Florida Statutes.

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of a development order or land development regulation with the plan as required by Section 163.3194(1),(2), is a matter to be reviewed through an administrative hearing to determine if a comprehensive plan is "in compliance" with the requirements of state law. §163.3184(1)(b), (9), (10), Fla. Stat.

Mr. Puma could have applied for the rezoning. No one had placed a ball and chain around his leg in an effort to stop him from doing so. Instead, he elected to apply for the change in the Comprehensive Plan FLU Map. Thus, the application acted upon was an amendment to the Comprehensive Plan, and that comports with the determinations of the trial judge (R: 336; 491-492).

Legally, Mr. Puma's arguments that this case "really involves zoning" suggests that he does not fully appreciate the fact that planning and zoning are very different. While it is true that the comprehensive "plan and the zoning ordinances enacted by the governing board are intended to be a closely related, integrated system for controlling land uses,"[5] nothing could be further from reality than the belief that planning and zoning are really the same thing.

> The terms zoning and comprehensive planning never have been interchangeable even though they are related by development of trends and statutory mandate. Although zoning is not devoid of planning, the practice of zoning does not involve the entire planning process from a comprehensive perspective. Comprehensive planning, on the other hand, must be procedurally and substantively complete because it has a direct effect upon all of the property in the city and its development and growth. See O'Loane v. O'Rourke, 42 Cal.Rptr. 283 (Cal.App. 1965).

Florida Zoning and Land Use Planning §1.4, at 15 (Fla. Bar CLE 1983). If the case were otherwise, why would the Legislature have included a development order/land development regulation

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[5] Florida Zoning and Land Use Planning §1.5, at 16 (Fla. Bar CLE 1983).

consistency requirement[6] in Chapter 163, Florida Statutes, requiring that the act of zoning or rezoning must be "consistent" with the local government's comprehensive plan?

B

Mr. Puma makes much of the argument that the LPA made findings supporting the change in land use on the FLU Map. Mr. Puma states that "[n]o testimony was presented to negate the findings of the Local Planning Agency," thereby giving the impression that the City Council arbitrarily rejected the LPA's decision.

That is absolutely ludicrous. First, other than some summary minutes (R: 362-364), no transcript of the City Council meeting was ever made a part of the record. Thus, we are not favored with a full and complete record of what was before the City Council. The record in this case does reflect that <u>at a minimum</u>, the City Council had before it:

1) the Petitioner's application;

2) the Comprehensive Plan;

3) Orientation by the City Planning and Zoning Administrator;

4) Testimony by Sara Stern in opposition to proposal;

5) A packet of information, including photos, a petition, <u>and</u> information supporting her view that the application should be denied;

6) Letter in opposition from John and Sharron Wynn;

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[6] §163.3194(1), (3), Fla. Stat.

7) Testimony by William Washburn in favor of the proposal; and

8) Report of the LPA.

We don't know what the information from Sara Stern was. We do not know what was in the letter from John and Sharron Wynn. Finally, although we have minutes, we do not have a record of what was actually said at the hearing.

We do know that shortly before the close of debate, Mayor Mullins cautioned the Council that "an owner cannot be prohibited from developing to the highest and best use of the property," a comment highly favorable to the Petitioner (R: 364). Yet, shortly thereafter, all members of the Council, voted against the application. This would lead a logical mind to assume that the Council saw something more in these proceedings that just the LPA's recommendations.

The fact remains that we do not have a clear transcript of all of the evidence presented or all of what was said at the Council meeting. "Without knowing the factual context, neither can an appellate court reasonably conclude that the [City Council] so misconceived the law as to require reversal." Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979). If this had been tried as a petition for certiorari, as the Respondent impliedly now argues by suggesting that this was a quasi-judicial proceeding, it seems that without a full record having been prepared below, "[t]he [City Council] should have been affirmed because the record brought forward by

the appellant is inadequate to demonstrate reversible error." Id.

C - There was no discrimination perpetrated by denying the FLU Map amendment

Mr. Puma argues that the decision not to grant the change in the FLU Map designation was "gross discrimination." The City finds this assertion to be incredible.

Mrs. Braz suggested that because of the nature of the Puma Property, either low intensity office or low density residential were uses that were consistent with good land use planning (R: 217; 225-227), and that the low density residential FLU Map designation in the Comprehensive Plan was internally consistent with the rest of the Comprehensive Plan (R: 213-214).[7] Thus, a decision by the City Council consistent with that opinion is not discrimination.

The City's Planning and Zoning Administrator, Peggy Braz, noted that the low density residential designation would allow Mr. Puma to construct up to 24 residential units on the Property (R: 161-163). Mrs. Braz also stated that there was no prohibition in the Comprehensive Plan against an apartment complex being located next to a commercial property along an arterial highway (R: 164). Apartment uses are not unusual along 4 lane roadways. The decision of the City Council is not

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[7] The statement of a City's planner is strong evidence. cf. ABG Real Estate Development v. St Johns County, 608 So.2d 59, 62 (Fla. 5th DCA 1992, cause dismissed, 613 So.2d 8 (Fla. 1993); Hillsborough County v. Westshore Realty, 444 So.2d 35, 26 (Fla. 2d DCA 1983).

discrimination.

The City submitted evidence of a similarly situated parcel of land that had been treated exactly the same as Respondent's Property, and that similarly situated parcel is now being developed. Mrs. Braz pointed to a new project named Madison Riverfront Estates (a/k/a Pineapple Place) which consists of five (5) single-family lots located directly on U.S. 1 1800 feet south of the Property (R: 38). This parcel is designated low density residential. Mrs. Braz noted that, in her view, that parcel was quite similar to the Property (R: 227). To argue that the City's decision with regard to the Puma Property is discriminatory pales in the face of the City's recent decision to designate Madison Riverfront Estates as low density residential. The City fails to see the discrimination.

CONCLUSION

The Petitioner repeats its original prayer for relief. The Petitioner also advises this Honorable Court that substantially identical issues are currently being litigated in the Fourth District Court of Appeal in Florida Institute of Technology v. Martin County, Case No. 93-677 (Fla. 4th DCA final response filed Apr. 26, 1993) and Section 28 Partnership Ltd. v. Martin County, Case No. 93-747 (Fla. 4th DCA appellant's reply brief filed July 27, 1993). Section 28 Partnership involves the denial at a plan amendment transmittal hearing of a site specific comprehensive plan amendment applicable to a full section of land under common ownership. The Florida Institute of Technology case involves a

site specific plan amendment to the land use designation of private property, which amendment was acquiesced in by the property owner but presented to the County Commission as a County staff proposed amendment. The County Commission determined not to pursue the amendment, and the owner filed suit.

Respectfully submitted,

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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, Attorney for Respondent, Post Office Box 820, Melbourne, Florida 32902-0820; Eden Bentley, Esq., Asst. County Attorney, Office of the County Attorney - Building "C," 2725 St. Johns Street, Melbourne, Florida 32940; Sherry Spiers, Esq., Asst. General Counsel, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 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, Florida 33301; Nancy Stuparich, Asst. General Counsel, and Jane Hayman, Asst. General Counsel, Florida League of Cities, P.O. Box 1757, Tallahassee, Florida 32302; Jonathan A. Glogau, Esq., Asst. Attorney General, Attorney General's Office, Alexander Building - Room 307, 2020 Capital Circle, S.E., Tallahassee, Florida 32399, on this 16th day of September, 1993.

PAUL R. GOUGELMAN, III