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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 82,038

O'CONNOR DEVELOPMENT CORPORATION,

Petitioner,

vs.

LEON COUNTY,

Respondent.

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE

The Petitioner's Statement of the Case is accepted, except for its characterizations of the Circuit Court and District Court of Appeals opinions, which speak for themselves. The Respondent (hereinafter, "the County") also notes that, although this case was originally styled as having two Petitioners, only one of them actually filed a petition and briefs. The other designated Petitioner, Monticello Drug Company, a Plaintiff in the Circuit Court action, did not join in this proceeding as a Petitioner pursuant to Fla. R. App. P. 9.360(a). Therefore, Monticello Drug Company has accepted the decision of the District Court of Appeals and the denial of the rezoning as it pertains to its lands. Furthermore, as represented in the Petitioner's Initial Brief at page 7, Monticello Drug Company has settled with the County, based on a different plan of development for its lands. Because there is only one Petitioner, the Plaintiffs in the Circuit Court action will collectively be referred to as "the Plaintiffs."

Because the Record before this Court is the Appendix filed with the County's Petition for Writ of Certiorari in the First District Court of Appeal, references made herein to the Record will be made in parentheses by the symbol "A:" followed by the appropriate page number(s).

STATEMENT OF THE FACTS

The Petitioner's Statement of the Facts is accepted with the following corrections and additions:

1. Neither the Record nor the original Circuit Court final judgment demonstrated that the Petitioner owned or controlled any portion of the property requested to be rezoned. That finding was made by the Circuit Court only as to the Plaintiffs, jointly, and it was based on no evidence in the Record. (A: 1) Footnote 4 at the bottom of page 7 of the Petitioner's Initial Brief deals with matters completely outside the Record of this case. There is no evidence anywhere in the Record that the Petitioner owns any portion of the lands in question, either legally or equitably. In fact, the rezoning applications contained in the Record demonstrate that the owners of the various parcels of property involved in the rezoning application were Monticello Drug Company, Hume F. Coleman, Trustee, Mary Alma Roberts Lang, Margaret W. Rogers, and Sara W. Williamson (hereinafter referred to, collectively, as "the applicants"); and the only designated agent for any of these owners/applicants was W. Taylor Moore, Esq. (A: 761-5)

The original Complaint filed herein was filed by all of these applicants, and the Petitioner, O'Connor Development Corporation, was not one of the original Plaintiffs. (A: 11) On November 16, 1989, an Amended Complaint was filed, which was essentially the same as the original Complaint but which substituted one party--the Petitioner herein--for four of the original Plaintiffs. (A: 67) However, this action was brought as a Petition for Writ of

Certiorari, limited to a review of the Record before the County, and nothing in that Record (as well as nothing in the Amended Complaint) demonstrated any legal or equitable interest of the Petitioner in the lands involved.

2. The original rezoning request was to expand the Comprehensive Plan land use map General Business designation so as to include all of the applicants' parcels and to rezone the entire property to the C-2 (commercial) zoning district. (A: 760-66) The application was then amended to be one for rezoning to the Limited Use district. (A: 573) The Limited Use zoning district in the Leon County Zoning Ordinance permits an applicant to propose a rezoning to any other district but with self-imposed use limitations or site plan limitations, or both. (A: 71-2)

The applicants in this case chose to request Limited Use district rezoning in accordance with a site plan for the development which, among other things, required an interior road to be constructed; permitted C-2 district uses north and west of the road; and permitted only those uses allowed in the CO (office) district south and east of the road. (A: 573) After the required Planning Commission public hearing, the applicants changed their request for Limited Use rezoning, filing a different site plan which changed the location of the proposed road; permitted CP (commercial parkway) district uses north and west of the road; included a historic cemetery preservation area south of the proposed road; and limited the rest of the land south and east of the proposed road to uses allowed in the CO (office) district. (A:

574-81)

The applicants' last amended request, made at the public hearing before the County's Board of County Commissioners, was to make further changes to the site plan so as to limit the non-cemetery area south of the road to A-2 district uses; preserve on one parcel an existing residence; and allow a large part of the A-2 area to also be used for stormwater management for all of the commercial development north of the road. (A: 596) Stormwater facilities for commercial development in adjoining commercial districts is not a use permitted in the A-2 district. (A: 577-9) This further revised application still included the entire 28 acres, to be developed under a unified plan of development in accordance with the proposed site plan. (A: 574, 596) No rezoning of the land to the Limited Use district can be only partially implemented by one property owner, since all of the land must be developed in accordance with the site plan approved.

3. Over a period of fifteen months, there were five different Complaints filed in the Circuit Court. (A: 11, 67, 105, 147, 259) In the fifth one of these, titled Restated Complaint, it was argued, for the first time, that the property owners/applicants had been denied procedural due process because the County's Board of County Commissioners would not accept their attempted last-minute revised application and remand it to the Planning Commission for public hearing and recommendation and because the Board of County Commissioners did not make findings or specify any reason for its denial of the rezoning request. (A: 400-2) This claim was not

made in a petition for writ of certiorari filed within thirty days after rendition of the decision sought to be reviewed, but approximately sixteen months after that decision. (A: 11, 275)

4. It is not correct, as stated in Petitioner's Initial Brief at page 7, that "In its Answer, the County acknowledged that no findings had been made nor any reasons for denial given by either the Planning Commission or the Board . . . ." In fact, the various Complaints filed continuously referred to statements in a staff report as findings of fact adopted by the Planning Commission and Board of County Commissioners, which misrepresentations were always denied. (A: 190) The Planning Commission adopted a motion to recommend denial of the application because the rezoning included a larger area for commercial rezoning than shown on the Comprehensive Plan land use map and because the rezoning was inconsistent with the Comprehensive Plan based on a staff analysis; the particular Comprehensive Plan policies with which the rezoning was determined by the Planning Commission to be inconsistent were specifically set out in the 18-page staff analysis; and the specific motion approved by the County's Board of County Commissioners was to adopt the Planning Commission's recommendation and deny the rezoning. (A: 190-1, 385-6)

5. Petitioner's Initial Brief shamelessly suggests that the Circuit Court's remand to the County was related to the last attempted amended rezoning application; that it was intended to require specific reasons for denial as an element of due process for any rezoning application; and that the Circuit Court had

authorized an "administrative complaint" (actually, the verified complaint which is the required condition precedent under Fla. Stat., §163.3215) for the purpose of giving the County a "last opportunity" for specifying reasons for denial.

In fact, the Circuit Court acknowledged that the statutory condition precedent was required [under the law as then set out in Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st DCA 1990)] and that the Plaintiffs had never complied with the requirement; and the Circuit Court attempted to give the Plaintiffs another chance to comply by deciding that it would be a denial of due process if the statutory condition applied before the Plaintiffs were notified of the specific reasons for denial. (A: 416-7) The Court remanded for notice to the Plaintiffs of the exact same Comprehensive Plan policies which the Plaintiffs had identified as the basis for denial in the first petition for writ of certiorari they filed in this case. (A: 11) This was simply an attempt to find some basis for relieving the Plaintiffs of the consequences of failing to comply with the statutory condition precedent.

6. The following portions of the Petitioner's Statement of the Case and Facts are clearly argument, rather than statements of factual matters:

- Footnotes 6 and 7 on page 10 and the sentence to which footnote 6 is appended.

- Footnote 8 on page 11 and the sentence to which it is appended.

- All of the Statement of the Case and Facts following the

second sentence of the third paragraph on page 12, including subsequent footnotes.

Matters included in these portions of Petitioner's Initial Brief will be addressed in the Argument section of this Answer Brief.

SUMMARY OF ARGUMENT

When this case was decided by the District Court of Appeals, the law was decidedly different on the two issues on which the District Court ruled. All other issues and defenses raised by the County should now be considered. In addition, the abandonment of this litigation by all but one party poses additional problems that should be resolved by the Circuit Court on remand.

If all of these issues are resolved by the Circuit Court in favor of the Petitioner, the rezoning application should then be remanded by the Circuit Court to the County, so that the County can make a Record in accordance with the new rezoning standards and review procedures adopted by this Court in Board of County Commissioners of Brevard County v. Snyder, 18 FLW 522 (Fla. October 7, 1993).

ARGUMENT

I. THE COUNTY'S DECISION ON THE REZONING APPLICATION WAS QUASI-JUDICIAL.

II. PETITIONER WAS NOT REQUIRED TO FILE A VERIFIED ADMINISTRATIVE COMPLAINT AS A CONDITION TO CERTIORARI REVIEW IN COURT.

When the Circuit Court's Final Judgment was entered herein, and when the County filed its Petition for Writ of Certiorari with the First District Court of Appeals, and when the District Court of Appeals granted the Writ of Certiorari, the law in the State of Florida--particularly in the First Appellate District--was clearly that rezonings were legislative decisions. Gulf & Eastern Development Corp. v. City of Fort Lauderdale, 354 So. 2d 57 (Fla. 1978); Josephson v. Autrey, 96 So. 2d 784 (Fla. 1957); Thompson v. City of Miami, 167 So. 2d 841 (Fla. 1964); Watson v. Mayflower Property, Inc., 223 So. 2d 368 (Fla. 4th DCA 1969), cert. disch. 233 So. 2d 390 (Fla. 1970); County of Brevard v. Woodham, 223 So. 2d 344 (Fla. 4th DCA 1969), cert. den. 229 So. 2d 872 (Fla. 1969); City of Tallahassee v. Poole, 294 So. 2d 52 (Fla. 1st DCA 1974); Graham v. Talton, 192 So. 2d 324 (Fla. 1st DCA 1966); and Harris v. Goff, 151 So. 2d 642 (Fla. 1st DCA 1963).

When the Circuit Court's Final Judgment was entered, and when the County filed its Petition for Writ of Certiorari with the First District Court of Appeals, and when the First District Court of Appeals granted the Writ of Certiorari, the law established by the First District Court was also clearly that the denial of a development order, because of Comprehensive Plan inconsistency, could only be challenged pursuant to the procedure set out in

Florida Statutes, Section 163.3215, and that compliance with the statutory condition precedent was mandatory. Leon County v. Parker, supra.

While this action has been pending before this Court, this Court adopted the reasoning of the Fifth District Court of Appeals that rezonings affecting a limited number of land parcels are quasi-judicial in nature. Snyder, supra. This Court also recently held, in Parker v. Leon County, 18 FLW 521 (Fla. October 7, 1993), that Fla. Stat., §163.3215, applies only to third-party challengers to a development order approving a development permit. Therefore, the decision of the First District Court of Appeals in this case no longer applies.

Because the law was so clear on these two issues at the time the County filed its Petition for Writ of Certiorari in the First District Court of Appeals, the County focused its Petition on the failure of the Circuit Court to consider the rezoning as a legislative act and on the Circuit Court's failure to require compliance with the condition precedent set out in Fla. Stat., §163.3215; and the County did not argue all of the other defenses raised by it in the Circuit Court action. These other defenses included the following:

. . .

Fourth Defense

The Court lacks jurisdiction over the Defendant, pursuant to Florida Statutes, Section 125.15.

Fifth Defense

Plaintiffs' amended applications were untimely and

could not have been approved by the Board without a public hearing as to such application by Leon County's Planning Commission; since the amended application was submitted after such public hearing had already been held, the amended application could not have been lawfully approved. Plaintiffs' original application should have been withdrawn, and a new application should have been filed.

Sixth Defense

Plaintiffs' application could not have been approved, pursuant to Florida Statutes, Section 163.3194(1)(a), since approval would have been inconsistent with the Leon County Comprehensive Plan.

. . .

Eighth Defense

The Limited Use with Site Plan rezoning application of the Plaintiffs is an alternate elective procedure available to the Plaintiffs under the Leon County Zoning Code, and that part of the application which, independently, might have been consistent with the Leon County Comprehensive Plan could not have been separately approved, since the site plan proposed by the Plaintiffs could not have been arbitrarily divided.

. . .

Tenth Defense

On July 16, 1990, by Ordinance Number 90-30, Leon County adopted a new Comprehensive Plan as mandated by the provisions of Florida Statutes, §163.3167. Any use or development of the Plaintiffs' property must now be in accordance with such new Comprehensive Plan, as required by Florida Statutes, §163.3194(1)(a). Plaintiffs' proposed rezoning has not been submitted by Plaintiffs for review and approval pursuant to the provisions of the new Comprehensive Plan.

Eleventh Defense

The denied rezoning application which is the subject of this litigation was filed by five separate property owners as a combined application covering several parcels of land. Four of such owners are not parties to this litigation. Petitioners, therefore, have failed to join indispensable parties. Alternatively, any relief granted

by the Court must be limited in its application only to the land identified in the application for rezoning as belonging to the Petitioners.

. . .

Defenses

The County's Limited Use rezoning provisions allow a property owner to apply for rezoning with self-imposed limitations on uses or site planning requirements which are not generally applicable in the zoning district requested. (A: 117-8) The County cannot, on its own, impose such limitations and requirements unless they are equally and generally applied to all properties in the same district. (A: 121) The County also cannot, itself, amend such applications or "bargain" with an applicant for different or additional conditions or limitations.

The application filed by the Plaintiffs was for a much larger commercial area than was designated on the County's Land Use Map. (Ex. A: 15; A: 80) The County could not, however, have separated from the application and rezoned to commercial use only that portion of the Plaintiffs' land designated commercial on the Land Use Map, because use of that portion was dependent on the proposed service road and stormwater management area on the remainder, which were integral parts of the Plaintiffs' proposal.

The Plaintiffs have yet to file an application for rezoning for only that portion of their lands designated as commercial on the Land Use Map.

The Plaintiffs have never requested any amendment to the Comprehensive Plan policies upon which the denial of their application was based. Since, pursuant to Florida Statutes, §163.3194(1)(a), all development orders of the County as to the Plaintiffs' property must be consistent with the County's Comprehensive Plan, regardless of the zoning of that property, any issue as to the zoning is moot. Unless the Comprehensive Plan policies are also challenged and found to be invalid, any decision of the Court as to Plaintiffs' zoning would be irrelevant; the County could still not issue site plan approvals, building permits, or any other development orders inconsistent with its Comprehensive Plan.

It is abundantly clear from the Complaint and the record that the Plaintiffs' requested rezoning and land use map change were denied because they were inconsistent

with policies set out in the County's Comprehensive Plan. (Ex. C: 13; A: 8, 58-76) Regardless of any other allegation of the Complaint, the Plaintiffs have not requested any amendment of those controlling Comprehensive Plan policies.

The County's Comprehensive Plan was adopted pursuant to the Local Government Comprehensive Planning Act of 1975. The Act has now been renamed the Local Governmental Comprehensive Planning and Land Development Regulation Act and includes the following pertinent provisions.

> **163.3161 Short title; intent and purpose.--**
>
> (1) This part shall be known and may be cited as the "Local Government Comprehensive Planning and Land Development Regulation Act."
>
> . . .
>
> (5) <u>It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans</u>, or elements or portions thereof, prepared and adopted in conformity with this act.
>
> . . .
>
> (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.
>
> . . .
>
> **163.3164 Definitions.--**
>
> As used in this act:
>
> . . .
>
> (6) "Development order" means any order granting, <u>denying</u>, or granting with conditions <u>an application for a development permit</u>.

(7) "Development permit" includes any building permit, zoning permit, subdivision approval, <u>rezoning</u>, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

. . .

163.3194 Legal status of comprehensive plan.--

(1)(a) After a comprehensive plan or element or portion thereof has been adopted in conformity with this act, all development undertaken by, and <u>all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted</u>.

. . . (Emphasis added.)

The County, therefore, may not rezone properties inconsistently with its Comprehensive Plan, and, regardless of the zoning of any property, it is the Comprehensive Plan which controls its use and development. Therefore, since the Plaintiffs have not established, from the record, that the Comprehensive Plan policies which were the basis for the Board's decision to deny the requested rezoning and land use map change are in any way invalid, any decision of this Court as to the zoning would be moot; still, no development orders could be issued for the Plaintiffs' property which would be inconsistent with the Comprehensive Plan.

To plead and prove a cause of action, therefore, the Plaintiffs must either establish from the record that the County's Comprehensive Plan policies which formed the basis for the rezoning denial are also invalid--which the Plaintiffs have not done--or argue successfully that the County's decision as to Comprehensive Plan inconsistency was in error and that <u>denial</u> of the rezoning is inconsistent with the Comprehensive Plan.

. . .

Should the court, however, reach the merits of the Comprehensive Plan inconsistency determination, there is no basis identified by the Plaintiffs for a reversal of that decision. The case law interpreting the requirements of Chapter 163 is that a proposed development must be in compliance with <u>each</u> element of a Comprehensive Plan; that development order consistency determinations

are reviewed by the Court on a standard of "strict scrutiny"; and that the burden is on the applicant for a development order to show by competent substantial evidence that the proposed development complies with all elements of a Comprehensive Plan. Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1988), rev. den. 529 So.2d 694 (Fla. 1988); Norwood-Norland Homeowners Association, Inc. v. Dade County, 511 So.2d 1009 (Fla. 3d DCA 1987), rev. den. 520 So.2d 585 (Fla. 1988); and Southwest Ranches Homeowners Association, Inc. v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987). The Plaintiffs herein have not established from the record that they carried this burden.

. . .

Regardless of the allegations of the Complaint, the sufficiency of the record, and the Court's determination as to the arguments raised in the Complaint and discussed herein, the process by which the Plaintiffs submitted and twice revised their rezoning application poses a problem in terms of any possible relief the Court might grant. This is because the original application was for rezoning to the C-2 commercial district, while the amended applications were for rezoning to the CP commercial district.

The Leon County Zoning Code requires that every requested amendment to the Zoning Map be submitted to the Planning Commission for review and recommendation, after a public hearing is first held on the amendment with due public notice. (A: 119-20) The only Planning Commission public hearing held as to the Plaintiffs' application was on the application to rezone to C-2. (A: 1-3, 48) When the Plaintiffs amended their application to a request a different rezoning to a different district, either another public hearing should have been held on the application or the amendment should have been refused and required to proceed as a new application. In any event, there has been no compliance with the ordinance requirements for public notice and a Planning Commission public hearing as to the CP rezoning request.

. . .

All of the foregoing discussion assumes that the Comprehensive Plan provisions which formed the basis of denial of the rezoning are still relevant. Such is not the case, however. On July 16, 1990, the Board adopted a complete new Comprehensive Plan, by Leon County Ordinance Number 90-30, in accordance with the requirements of Florida Statutes, §163.3167. (A: 101-

16)

In Florida, the law which applies in regard to the approval or denial of an application is the law in effect at the time the application is acted upon, and not the law in effect when the application is filed. E.g., City of Boynton Beach v. Carroll, 272 So.2d 171 (Fla. 4th DCA 1973), cert. den. 279 So.2d 871 (Fla. 1973); City of Coral Gables v. Sakolsky, 215 So.2d 329 (Fla. 3d DCA 1968), cert. den. 225 So.2d 526 (Fla. 1969); and Davidson v. City of Coral Gables, 119 So.2d 704 (Fla. 3d DCA 1960), cert. disch. 126 So.2d 739 (Fla. 1961). The law that applies when a judicial determination is made by a trial court is the law in effect when the suit is decided, and not the law in effect when the lawsuit is filed. E.g., Broach v. Young, 100 So.2d 411 (Fla. 1958); City of Boynton Beach v. Carroll, supra: and Davidson v. City of Coral Gables, supra.

Similarly, Florida courts have many times held that, on an appeal from a trial court judgment, the applicable law is that in effect when the appeal is decided, and not the law in effect when the final judgment was entered. E.g., Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Rohrsen v. Waco Scaffold & Shoring Company, 355 So.2d 770 (Fla. 1978); Rader v. Variety Childrens Hospital, 323 So.2d 564 (Fla. 1975); Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1967); Board of Public Instruction of Orange County v. Budget Commission of Orange County, 167 So.2d 305 (Fla. 1964); City of Miami Beach v. Prevatt, 97 So.2d 473 (Fla. 1957), cert. den. 355 U.S. 957 (1958); City of Pompano Beach v. Haggerty, 530 So.2d 1023 (Fla. 4th DCA 1988), cert. den. 109 S.C. 1317 (1989); Department of Administration v. Brown, 334 So.2d 355 (Fla. 1st DCA 1976), cert. den. 344 So.2d 323 (Fla. 1977); Fitzsimmons v. City of Pensacola, 297 So.2d 107 (Fla. 1st DCA 1974), cert. den. 304 So.2d 129 (Fla. 1974); and Tsavaras v. Lelekis, 246 So. 2d 789 (Fla. 2d DCA 1971), cert. den. 249 So.2d 687 (Fla. 1971).

These rules apply with regard to zoning litigation, concerning amendments to a zoning ordinance or other controlling law enacted or amended during the pendency of a controversy, unless the amendment would affect a vested substantive right or unless the amendment was adopted in bad faith. E.g., Broach v. Young, supra; City of Miami Beach v. Prevatt, supra; City of Pompano Beach v. Haggerty, supra; Town of Palm Beach v. Royal Palm Beach Hotel, Inc., 298 So.2d 439 (Fla. 4th DCA 1974); City of Boynton Beach v. Carroll, supra; Tsavaras v. Lelekis, supra; and Davidson v. City of Coral Gables, supra.

As stated in Tsavaras v. Lelekis, supra at 790, property owners do not have vested property rights in the zoning ordinances of a local government. There are, of course, many cases holding that there is no vested right in the continuation of existing zoning or land use regulations in the absence of matters creating an equitable estoppel. E.g., City of Miami Beach v. 8701 Collins Avenue, 77 So.2d 428 (Fla. 1954).

Many of the principles discussed above are summed up and applied in City of Gainesville v. Cone, 365 So.2d 737, 739 (Fla. 1st DCA 1979), which held that:

> An owner of property acquires no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against the zoning authority have arisen. City of Miami Beach v. 8701 Collins Avenue, 77 So.2d 428 (Fla. 1954). An estoppel cannot arise so as to create a vested right in a particular zoning category in the absence of the expenditure of money in compliance with the existing zoning. Edelstein v. Dade County, 171 So.2d 611 (Fla. 3d DCA 1965). There is no suggestion of estoppel in the record before us. It appears to be quite incongruous to suggest that while the law is clear that one may not acquire any vested right in the continuation of an existing zoning category, he may upon the filing of a petition for a new zoning category, acquire a vested right in the zoning category. Further, it is clear that a city may adopt an amendment to a land use ordinance even during pendency of a controversy and the controversy must then be determined on the basis of the law as amended. City of Coral Gables v. Sakolsky, 215 So.2d 329 (Fla. 3d DCA 1968). . . .

See, also, City of Boynton Beach v. Carroll, supra at 173, holding that even a building permit which had been properly issued can be revoked based upon a new ordinance, unless an equitable estoppel exists, and that courts must apply new ordinances in effect when a decision is rendered, even though a permit or approval would have been proper when applied for, unless an equitable estoppel can be proved.

The new Leon County Comprehensive Plan, adopted July 16, 1990, by Leon County Ordinance No. 90-30, was not adopted in bad faith; it was, in fact, mandated by Florida Statutes, §163.3167. The effect of the new Comprehensive Plan is that Leon County is prohibited from

issuing any development order inconsistent with the new Comprehensive Plan. Florida Statutes, §163.3194(1)(a). "Development Order" is defined in Florida Statutes, §§163.3164(6) and (7), as including any order granting or denying an application for rezoning, subdivision approval, building permit, or any other permit or approval having the effect of permitting the development of land.

Unless the proposed rezoning which is the subject of this litigation is consistent with the new Leon County Comprehensive Plan, it should not now be approved. Unless the proposed development which is the subject of this litigation is consistent with the new Leon County Comprehensive Plan, Leon County may not issue any further permits or approvals for the development as proposed, even if the zoning is approved. The Leon County Comprehensive Plan does, however, provide for the determination of vested rights as of the date the plan was adopted. Leon County has also adopted, by Leon County Ordinance No. 90-31, a procedure for vested rights applications and their determination.

Based upon the authorities cited herein, this pending controversy should now be decided pursuant to the requirements and limitations of those portions of Chapter 163, Florida Statutes, identified herein, and the newly adopted Leon County Comprehensive Plan. There has been no review, however, of the proposed rezoning pursuant to the new Comprehensive Plan, and the initial determination of whether or not the proposed rezoning is consistent should be made by the zoning authority based on a proper application, rather than by the courts.

In addition to other grounds argued herein, Count I should be denied based on Florida Statutes, Section 125.15, which requires that actions against a county be brought in the name of the County and not against the Board of County Commissioners. See Erickson v. Board of County Commissioners of Sarasota County, 212 So.2d 340 (Fla. 2d DCA 1968). In filing their Second Amended Complaint herein, the Plaintiffs--without basis--changed the style of the case, naming Leon County as the Defendant rather than the Board. Service, however, was made upon the Board, and there has never been filed by the Plaintiffs any motion to add or substitute Leon County as a Defendant, nor has Leon County been served as a Defendant.

Another basis for dismissal is the fact that the lands which were the subject of the rezoning application described in the Complaint are owned by five separate

owners, as shown by the applications filed. (A: 81-5) Only one of such owners is a party to this litigation, and, as far as can be determined by the record below in a certiorari proceeding, four of the affected owners--undeniably necessary parties to this action--have apparently accepted the decision of the Board and have not requested this Court to review or reverse it.

If this matter is remanded to the First District Court of Appeal, the County should be permitted to brief and argue each of these other defenses.

Furthermore, in Snyder this Court established new standards applicable to local governments in the consideration of rezoning applications affecting a limited number of land parcels and for the judicial review of local government decisions on such applications:

> [W]e hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, a landowner's only remaining recourse will be to demonstrate that the existing zoning classification of the property is confiscatory and thereby constitutes a taking.
>
> While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling. . . .

If these standards now apply to this case, the County will be prejudiced in defending its decision on the Plaintiffs' rezoning application because, prior to Snyder, the County did not have to

make a Record to justify its zoning decisions. In this case, the County was not concerned with making a Record, or with the other rezoning and judicial review standards adopted by this Court in Snyder. In Snyder, this Court held:

> . . . Because of the possibility that conditions have changed since [the Snyders'] original application was filed, we believe that justice would be best served by permitting them to file a new application for rezoning of the property. The application will be without prejudice of the result reached by this decision and will allow the process to begin anew according to the procedure outlined in our opinion.

For the many reasons discussed hereinafter, justice would best be served in this case by a similar result.

III. PETITIONER WAS ENTITLED TO DOWNSCALE THE APPLICATION TO MEET RECENT OBJECTIONS, AND THE BOARD WAS REQUIRED TO DECIDE THE DOWN-SCALED APPLICATION AS A MATTER OF DUE PROCESS.

The Petitioner cannot prevail on this issue for several reasons:

No Required Public Hearing and Planning Commission Recommendation

While the Petitioner requests approval of the revised application that was not considered by the County and was not remanded by the County's Board of County Commissioners to the Planning Commission for public hearing and recommendation, as had been requested by the applicants, the process through which the applicants submitted and twice revised their rezoning application prevented any of the revisions from being lawfully approved. This is because the original application was for Limited Use rezoning to the C-2 commercial district, while the amended applications

(including the one considered and denied by the Board of County Commissioners) were for Limited Use rezoning to the CP commercial district.

The Leon County Zoning Code requires that every requested amendment to the Zoning Map be submitted to the Planning Commission for review and recommendation, after a public hearing is first held on the amendment with due public notice. (A: 119-20) The only Planning Commission public hearing held as to the applicants' request was on the application to rezone to Limited Use C-2. (A: 1-3, 48) When the applicants amended their application to request a rezoning to a different district, either another public hearing should have been held on the application or the amendment should have been refused and required to proceed as a new application. In any event, there was no compliance with the ordinance requirements for public notice and a Planning Commission public hearing as to the CP rezoning request.

Florida courts have frequently held that zoning amendments adopted in contravention of required notice and hearing provisions are not voidable, but invalid and void ab initio. E.g., Ellison v. City of Fort Lauderdale, 183 So. 2d 193 (Fla. 1966); Fountain v. City of Jacksonville, 447 So. 2d 353 (Fla. 1st DCA 1984); City of Gainesville v. GNV Investments, Inc., 413 So. 2d 770 (Fla. 1st DCA 1982); City of Sanibel v. Buntrock, 409 So. 2d 1073 (Fla. 2d DCA 1981), rev. den. 417 So. 2d 328 (Fla. 1982); and Malley v. Clay County Zoning Commission, 225 So. 2d 555 (Fla. 1st DCA 1969).

Even notice and hearing requirements set forth in a local

zoning ordinance must be complied with, or the action is void. Gulf & Eastern Development Corp. v. City of Fort Lauderdale, supra, and Florida Tallow Corp. v. Bryan, 237 So. 2d 308 (Fla. 4th DCA 1970). In other words, the only application which had the required, advertised, Planning Commission public hearing was the initial application to rezone the entire 28 acres to C-2, which the applicants virtually admitted was inconsistent with the Comprehensive Plan by their later amendments, in order to make the proposal 'more consistent' with the Comprehensive Plan. (But, as to the C-2 application, the Board of County Commissioners did not receive the required recommendation from the Planning Commission, which only voted on the unadvertised CP request.)

No Finding of Any Property Interest

The Petitioner's due process argument suffers one other fatal flaw. In holding that the Board had deprived the Plaintiffs of due process, the Circuit Court failed to make one significant finding. No person is guaranteed "due process" by either the United States Constitution or the Constitution of the State of Florida. What is guaranteed is that no person shall be deprived of life, liberty, or property without due process. Therefore, to bottom its decision on the due process clause, the Circuit Court had to first find that the Plaintiffs had been deprived of some property right (life and liberty being irrelevant in this case). E.g., 10 Fla.Jur.2d Constitutional Law §367 and cases cited therein.

As discussed hereinafter, no person may acquire a property right in zoning or in a particular zoning district, under Florida

law, absent all of the elements of an equitable estoppel. In this case, the issue of an equitable estoppel was neither pleaded nor tried, and the Circuit Court made no finding of an equitable estoppel. Therefore, since there was no deprivation of any property right, there could not have been any denial of due process.

No Right to Have Successive Amendments Considered

Assuming, however, that the applicants had a property right in a zoning district for which they had applied, the Circuit Court found that the Plaintiffs were deprived of due process by the Board's failure to permit the applicants to further amend their application after all required public hearing advertisements had presumably been given and after the required Planning Commission public hearing had presumably been completed. Again, the Circuit Court cited no authority for this decision--because there is none. The Court simply concluded--without having the full Leon County Zoning Ordinance in the Record and without the issue having been pleaded or tried--that there was no prohibition against such an amendment. The issue, however, is whether there is any requirement to permit such an amendment, rather than the filing of a new application; and there is no such legal requirement. If there were such a requirement, adversely-affected nearby property owners who had to repeatedly attend public hearings on successive amended applications would quickly see to a zoning ordinance change to prohibit such successive amendments.

The Circuit Court also found--again without the issue being

pleaded or tried--that the applicants' further amended application required no further public hearing or advertisement. Had the issue been pleaded, the Board could have briefed the Circuit Court on all of the case law holding that there must be strict compliance with all notice and hearing requirements regarding rezoning applications; that any zoning ordinance amendment enacted without such strict compliance is void ab initio; and that virtually the slightest change in regard to the requested rezoning requires new notices and hearings. E.g., Gulf & Eastern Development Corp. v. City of Fort Lauderdale, supra; Ellison v. City of Fort Lauderdale, supra; David v. City of Dunedin, 473 So. 2d 304 (Fla. 2d DCA 1985); Fountain v. City of Jacksonville, supra; City of Gainesville v. GNV Investments, Inc., supra; City of Sanibel v. Buntrock, supra; Skaggs v. City of Key West, 312 So. 2d 549 (Fla. 3d DCA 1975); Kelner v. City of Miami Beach, 252 So. 2d 870 (Fla. 3d DCA 1971); and Florida Tallow Corp. v. Bryan, supra.

In this case, the CP district request was decidedly different than the C-2 request, but the CP request was never advertised for or considered at a public hearing. The last attempted revision provided for less area to be allowed the CP permitted uses, but it proposed to locate all of the stormwater facilities for an adjacent commercial district in part of the land to be left with only A-2 uses, and such a use is not otherwise permitted in an A-2 district and would have been in excess of the A-2 uses allowed on the site before any amendment. In either event, a new public hearing before the Planning Commission and a recommendation by the Planning

Commission would be required for any ordinance approving the request to be valid.

Due Process Claim Abandoned

There is a further reason, however, why no relief could be granted to the Petitioner on its due process argument and why no such relief should have been granted by the Circuit Court. Following the filing of their Fourth Amended Complaint and the Answer thereto, and following the Circuit Court's remand to the County's Board of County Commissioners, the Plaintiffs filed a Fifth Amended Complaint on August 26, 1991. (A: 490-512) The County filed its Answer and Defenses on October 18, 1991. (A: 523-35) In their Fifth (and last) Amended Complaint, the Plaintiffs made no mention of any denial of due process and abandoned that claim.

Petitioner Not Involved

As noted above, the Petitioner was not one of the rezoning owners/applicants; was not one of the original Plaintiffs; and did not acquire any ownership interest in any of the property (if, indeed, it has one now) until after the Circuit Court action was filed. Since the Petitioner was not one of the rezoning owners/applicants, how could the Petitioner have been deprived of due process by a failure to consider an amended application as to which the Petitioner was not one of the applicants?

Remedy is Only Due Process

Finally, if the Circuit Court was correct in considering an issue which had been abandoned by the Plaintiffs; and if there was

no need for an advertised Planning Commission public hearing on either the amended request the Board of County Commissioners did consider or the further amended request the Board did not consider; and if there was, in fact, some property right of which the Plaintiffs were deprived; and if there exists some due process right to have repeated amendments reprocessed and considered without having to file a new application and pay a new filing fee; and if the Petitioner had been one of the property owners who filed and repeatedly amended the rezoning application; the Circuit Court still would have been in error in the remedy it provided.

If an applicant is denied due process in the review and consideration of a rezoning request, the appropriate remedy is to require that due process be provided. A deprivation of due process should not be the basis for obtaining approval of a rezoning which is inconsistent with an applicable Comprehensive Plan and therefore unlawful, and for which no subsequent development permits could lawfully be issued. No authority has been cited by the Petitioner for the proposition that a denial of procedural due process can somehow convert a rezoning proposal which is inconsistent with a Comprehensive Plan into one which is consistent.

While the Petitioner has attempted to make an argument that the rezoning request was not inconsistent, by categorizing the County's Future Land Use Map as only a 'guide to future development,' that is what all Comprehensive Plans are supposed to be, and all future development must be consistent with such guides. If, as the Petitioner suggests, a rezoning could have been lawfully

approved which included an area of commercial development greater than that shown on the Future Land Use Map as "General Commercial," it would not have been necessary for the applicants to also have requested an amendment to the Future Land Use Map, as they did with each of their requests.

IV. THIS ACTION SHOULD BE REMANDED TO THE CIRCUIT COURT FOR THE DETERMINATION OF UNRESOLVED ISSUES, WITH INSTRUCTIONS TO THE CIRCUIT COURT TO REMAND TO THE RESPONDENT'S BOARD OF COUNTY COMMISSIONERS, IF NECESSARY, TO ALLOW COMPLIANCE WITH BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY V. SNYDER.

As has been argued above, there are numerous issues which have been raised by the County which were never resolved by the First District Court of Appeals, including the following:

1. In filing their Third Amended Complaint in the Circuit Court, the Plaintiffs--without basis--changed the style of the case, naming Leon County as the Defendant rather than the Board of County Commissioners. Service, however, was made only upon the Board, and there was never filed by the Plaintiffs any motion to add or substitute Leon County as a defendant, nor was Leon County ever served as a defendant, nor was there any court order permitting Leon County to be added as a defendant. As held in Warner-Lambert Co. v. Patrick, 428 So. 2d 718 (Fla. 4th DCA 1983), an amended complaint adding a defendant, without court order or consent of opposing counsel, is a nullity.

Furthermore, the Plaintiffs' petition for writ of certiorari had to be filed against the proper defendant within a certain time

period, which had expired by the time of filing the Third Amended Complaint. As held in Lindsay v. H. H. Raulerson Junior Memorial Hospital, 505 So. 2d 577, 578 (Fla. 4th DCA 1987), the addition of a totally separate new party, even on approval of the court, does not relate back to the filing of the initial complaint.

Furthermore, the Petitioner's due process argument was not raised by petition for writ of certiorari within thirty days of the decision, but in an amended complaint sixteen months later.

As in Lindsay, the Complaint in this case, and any amended complaint, should have been dismissed with prejudice for failure to timely file this action against the proper defendant, as well as for failure to obtain approval to add a party and failure to serve the proper party.

2. Because of some confusion over the repeated amendments to the application, none of the amendments received the required, advertised, public hearing and the required Planning Commission recommendationl; and none of the amendments could have been lawfully approved.

3. Regardless of any possible procedural due process deprivation, the rezoning was inconsistent with the County's former Comprehensive Plan; and any development under any of the requested rezonings would have been inconsistent with that Comprehensive Plan.

4. The law that now applies to the use and development of the property involved is the County's current Comprehensive Plan, but the rezoning has not been reviewed and evaluated under that Plan;

and there has not been pleaded or tried any equitable estoppel claim which would prohibit application of the new Comprehensive Plan.

5. Approval of a development permit which is inconsistent with an applicable Comprehensive Plan, and which cannot be lawfully implemented by the issuance of further development permits, is not an appropriate remedy for a procedural due process deprivation.

6. The Record does not show that the Petitioner has any ownership interest in the property involved. In fact, the Record in this certiorari action identifies all of the owners, and the Petitioner is not one of them. The Petitioner's claimed interest appears only by way of an allegation in the Complaint, which is unsupported by the Record.

7. Any judicial approval of <u>any</u> of the various Limited Use rezonings requested by the applicants could not be implemented unless all of the land involved is developed in accordance with the site plan approved as part of the rezoning. Therefore, unless the Petitioner owns <u>all</u> of the land involved, this action is moot.

8. The Petitioner has no standing to raise the issue of denial of procedural due process to the owners/applicants, since the Petitioner was not one of the owners/applicants.

9. Indispensable parties, who were the owners of portions of the property involved--and who are still owners according to the Record in this certiorari action--were not joined as parties.

10. The procedural due process claim was abandoned by the Plaintiffs in their final Complaint in the trial court and cannot

thereafter be resurrected by the Petitioner.

Assuming all of these issues are resolved by the Circuit Court in the Petitioner's favor, based on the Record provided with the Complaint, the Circuit Court should then be instructed to remand the rezoning application to the County for reconsideration pursuant to the standards and criteria established in Snyder. It is not fair to the County and its citizens and taxpayers to be judged based on the Record made in this rezoning when the law at the time did not require the County to make a Record to defend its decision. Such a remand would be consistent with the decision in Snyder allowing the property owner to have his application reconsidered.

CONCLUSION

Based upon the authorities cited and the argument made herein, this cause should be remanded to the Circuit Court for resolution of all outstanding issues and defenses; and, if all of them are resolved in the Petitioner's favor, the rezoning application should be remanded to the County for reconsideration under Snyder, with the County having the opportunity to make a Record as required by Snyder.

DATED this 9th day of November, 1993.

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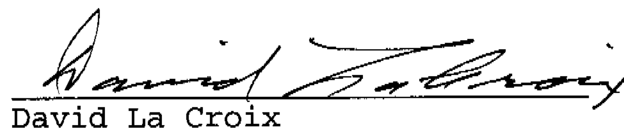
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. first class mail, postage prepaid, to M. Stephen Turner and David K. Miller, Esq., Broad & Cassel, P.O. Box 11300, Tallahassee, Florida 32302, and to W.Taylor Moore, Esq., Post Office Box 507, Tallahassee, Florida 32302-0507, this 9th day of November, 1993.



David La Croix