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IN THE SUPREME COURT OF FLORIDA

O'CONNOR DEVELOPMENT CORPORATION,

Petitioner,

vs.

CASE NO. 82,038

FIRST DCA CASE NO. 92-0946

LEON COUNTY,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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Introduction

This case arises under the Court's conflict jurisdiction, Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. There is direct and express conflict between the decision below, reported at 619 So.2d 361, and the two decisions Board of County Comm'rs of Brevard County v. Snyder, 18 F.L.W. 522 (Fla. 1993) ("Snyder"); and Parker v. Leon County, 18 F.L.W. 521 (Fla. 1993) ("Parker").

The record in this case is contained in the Appendix in support of the County's Petition for Writ of Certiorari to the District Court of Appeal, designated by the symbol (A) and a volume and page number.

STATEMENT OF THE CASE AND FACTS

The background facts and the proceedings below are summarized in the Circuit Court's Final Judgment Granting Writ of Certiorari. (A-I: 1-9). The Complaint after Remand in the Circuit Court (attaching verified administrative complaint) also assists understanding of the facts that are summarized in the Circuit Court's Final Judgment. (A-II: 490-512).[1]

In June 1989, Petitioner O'Connor as developer, agent and optionee, controlled 28 acres of property at the northeast corner of the junction of Bradfordville and Thomasville Roads in Leon County. Through his attorney, W. Taylor Moore, O'Connor applied for a limited use rezoning of the property consistent with the designation on the land use map. O'Connor sought to rezone 18 acres of the property from Agriculture (A-2) to Commercial Parkway District and the remaining 10 acres from A-2 to Office Professional Commercial District, separated by a roadway. (A-I: 41, A-II: 759-63).

The property is located at a major intersection in an area designated on the County's land use map as predominantly General Business (and the remainder Urban Undesignated). This intersection location had been previously designated a commercial district (A-I: 27) and was represented by the planning staff in 1984 to be the

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[1] It is helpful to review the Complaint after Remand and Judgment together, since all disputed matters not expressly rejected in the Final Judgment were presumably resolved in the owners' favor. See, e.g., Data Lease Fin. Corp. v. Barad, 291 So.2d 608, 611 (Fla. 1974). For the Court's convenience these documents are attached to this Brief.

next "commercial node" along Thomasville Road. (A-II: 551). O'Connor had obtained and submitted a market analysis showing substantial unmet demand for the type of commercial development requested at this site. (A-II: 566-70).

The Comprehensive Plan Ordinance No. 80-69 in effect at the time provided that the land use map was a "visual representation" of Plan policies. The map designations were not fixed boundaries, but rather were a "flexible guide" for determining development order applications submitted during the planning period. The procedure was to conform the map designation to the site dimensions or boundaries in an approved development order. (Cir. Ct. findings at ¶s 4-5; A-I: 2; A-II: 643-44).

Without specifying site dimensions, the map designation indicated a suitable location for commercial development in the proximity. Both commercial zoning and commercial development were already established in the vicinity. (Cir. Ct. findings at ¶ 4, 6; A-I: 2).

The history of the application is summarized in the letter of O'Connor's counsel to the Board of County Commissioners dated September 20, 1989, with exhibits. (A-II: 551-572).

The application was referred to the Planning Commission before submission to the Board of County Commissioners (hereafter "the Board") for final action. Planning staff and other departments of the County reviewed and analyzed the application and supporting data for compliance with the plan standards.

The Planning Commission held public hearings concluding on September 13, 1989. (A-III: 679-688). Following the hearing, planning staff prepared a one-page summary report of the Planning Commission's denial recommendation and an attached 13 page report and analysis for the Board's use at the final hearing on September 26, 1989. (Cir. Ct. findings at ¶s 8-9, A-I: 3; A-II: 575-88). The staff's report:

> ... indicated the traffic data was very reasonable (i.e., no appreciable service level decrease), and indicated no detrimental environmental effects. The report noted that a central sanitary sewer could be provided to the site as called for by the site plan. Concern was expressed that the proposal did not provide a buffer area to insulate an existing residence east of the property and that the requested commercial use area exceeded the depth of commercial tracts in the vicinity. However, the requested depth was considered advantageous in allowing development without forcing commercial enterprise closer to Thomasville Road and creating a strip type development.

(Cir. Ct. findings at ¶ 8; A-I: 3).

This staff report was presented to the Board along with other expert reports and data submissions, as evidence for consideration at the final hearing. (A-I: 5-6; A-II: 551-596).

With the final Board meeting less than two weeks away, O'Connor's only opportunity to satisfy the planning staff's reported concerns was to modify or amend the application to reduce the area of requested rezoning at the Board's hearing.[2]

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[2] The County Zoning Code Article XII, Section 12:1(1)(d) prohibited filing another rezoning application for 12 months. (A-I:671). O'Connor had already been delayed for two years at the

At the Board hearing, O'Connor withdrew part of the requested commercial use to reduce its depth consistent with other commercial tracts in the area and provide a larger buffer area. The modified application simply eliminated all proposed office development east of the proposed roadway, leaving 10 acres west of the roadway to serve as an additional buffer. This downscaling amendment eliminated about 40 percent of the proposed development acreage. (Cir. Ct. findings at ¶ 10; A-I: 4).

The amended plan allowed the area east of the proposed roadway to be used for stormwater retention. However, this was not a change from the original plan, which always allowed adequate stormwater provisions in the indicated area incident to the proposed CO use. (A-II: 552-53, 556-59, 592-94, 618-25). The use plan notes are the same for both the original and downscaled applications, except that the notes pertaining to CO use are deleted, and notes explaining the reduced size are added. (Compare A-II: 596 and 574). Since the Planning Commission had not made any objection to the stormwater retention in the original application, the modified application was presented to the Board solely as a reduction in commercial area to resolve the objections that had been presented. (A-II: 598-600, 606-11, 625-27).

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request of County staff while various studies and workshops were conducted. (A-II: 551-52). The County was in the process of drafting a whole new Comprehensive Plan that could affect development standards and feasibility, so that further delay in filing or a delayed refiling would be highly prejudicial.

The planning staff report did not purport to address the application as downscaled. O'Connor therefore suggested that the Board could postpone its decision if any further staff evaluation or review were needed. Members of the Board initially moved and seconded that the decision be postponed for additional evaluation as the Board had done for the previous agenda item. (A-II: 599-603). However, the Board proceeded to receive the evidence directed to the application as amended, and hear public comment; and then proceeded to summarily deny the application without stating any reasons or referring to any standard. (Cir. Ct. findings at ¶s 13 and 21; A-I: 3-4, 7; A-II: 605-39).

The Board never stated that the application amendment was barred by any procedural objection or that the application as amended was not decided on the merits. The transcript of the hearing shows that the Board's motion was simply to uphold the recommendation (subsequently rephrased to uphold the vote) of the Planning Commission. (A-II: 637-38). The Board members did not express their reasons for the action taken, except that the member who ultimately moved for denial disclosed her reasons even before the evidence was submitted: "I just think it's premature. I don't think the neighbors want it." (A-II: 604). The Board's motion and vote did not announce any other reason for denial or unmet

standard, or any public purpose for maintaining the agricultural (A-2) zoning at this location.[3]

O'Connor sought review by writ of certiorari in the Circuit Court.[4]

The various revised pleadings raised due process concerns about the Board's failure to fully and fairly consider the amended application and its purely political decision making. (A-I: 15-16, 109, 113, 243, 259, 272). 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, and asserted that the

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[3] The Circuit Court subsequently noted that citizen opposition is not a legally sufficient basis for denial. (A-I: 4 at fn. 1). The Circuit Court cited Salvation Army v. Bd. of County Commissioners of Dade County, 523 So.2d 611, 614-15 (Fla. 3rd DCA 1988) (it is not the function of the Board to hold a plebiscite on a land use application). Also see e.g. Bailey v. City of St. Augustine, 538 So.2d 50, 52 (Fla. 5th DCA 1989) (citizen objections are not a sound basis to support an arbitrary zoning decision); and Conneta v. City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981) (popularity polling of the neighborhood is not sound basis for denial). This ruling was not contested in the District Court of Appeal.

[4] O'Connor was joined as a petitioner in the Circuit Court by Monticello Drug Company, which owned part of the property included in the amended application. Monticello Drug Company subsequently settled with the County based on a further modified use plan, and sold its portion of the property to Publix Supermarkets, Inc. The District Court of Appeal, however, would not dismiss the case as to Monticello Drug Company upon being advised of the settlement. After the District Court issued its decision below, the County sought to revoke the settlement with Monticello Drug Company. The County's motion to vacate the stipulated judgment in another circuit court case is presently pending. O'Connor has never settled as to his interest, which continues regardless of the resolution of the interest of Monticello Drug Company or its successors as to their portion of the property involved in this case.

Board was entitled to deny the application without having to make any finding or give any reasons. (A-I: 190-91).

The Circuit Court found that the Board had never explained its denial action although it was the entity responsible to decide the development request. The Court accordingly remanded the issue to the Board to afford an opportunity for entry of a development order specifying reasons for the denial action. (Cir. Ct. findings at ¶ 13; A-I: 4-5).

The Board responded to the remand order with a letter to the Court. Although the Board never declined to consider, and had obviously considered the amended application by receiving evidence directed thereto, the Board's letter response to the Court referred only to the planning staff comments as reasons for denial. However, these comments did not address the application as amended. (Cir. Ct. findings at ¶s 13-14, 21; A-I: 5, 7-8).

The Circuit Court deemed the County's letter response as its compliance with the Order of Remand (A-II: 471). Plaintiffs then filed a verified administrative complaint with the County demonstrating that their amended application should be approved. (A-II: 475). The Circuit Court authorized this procedure for the purpose of giving the County a last opportunity either to reconsider its decision on the amended application, or to provide

a supporting basis for the denial of the amended application, before the Court undertook final review on the merits.[5]

The County made no response to the verified administrative complaint as allowed by the Remand Order. (A-I: 5). The case was then set for final hearing on the merits in Circuit Court's appellate capacity. The County requested summary disposition on the record after its remand response. (A-II: 472).

The Circuit Court found that the County had denied procedural due process because the Board had failed to fully and fairly consider the application as reasonably amended. "The County knowingly elected not to extend due process, even upon remand order by the Court." (Cir. Ct. findings at ¶ 21; A-I: 8).

The Circuit Court clearly found that the application amendment was lawful and reasonable and could not be ignored by the County:

> 10. Petitioners reasonably amended their application by presenting an amended limited use site plan to the Board (copy appended). This amendment deleted all the proposed office development east of the proposed roadway and sought commercial use only for about 18 acres of the subject property lying west of the proposed roadway. The remaining 10 acres would continue to be zoned agricultural and serve as a buffer area. Likewise, the depth of requested commercial use was substantially reduced.

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[5] The First District Court of Appeal's requirement for an owner-applicant to submit a verified administrative complaint to challenge a development order was first announced during the pendency of this case, and the Circuit Court was obliged to follow that precedent. See Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990), after remand sub nom. Emerald Acres Inv., Inc. v. Leon County, 601 So.2d 577 (Fla. 1st DCA 1992), and Parker v. Leon County, 601 So.2d 1223 (Fla. 1st DCA 1992), reversed, 18 F.L.W. 521 (Fla. 1993).

* * *

> 19. Petitioners reasonably amended their limited use site plan application by withdrawing a significant part of the commercial use request. There was no rule or policy prohibiting such amendment. This was manifest by the motion and second by Board members to continue the agenda item for 30 days in light of the amendment, and by the absence of any procedural objection by the County Attorney or any other Board members. Furthermore, it is not required that a rezoning request be renoticed upon an amendment reducing its scope. See McGee v. City of Cocoa, 168 So.2d 766, 769 (Fla. 2d DCA 1964); Williams v. City of N. Miami, 213 So.2d 5, 7-8 (Fla. 3d DCA 1964).

(A-I: 3-4, 7). The Circuit Court either expressly or impliedly found the application, as amended to reduce the size of the requested rezoning, was nonprejudicial and effectively resolved any valid objections raised by the planning staff.[6]

The Court concluded that the amended application was "unreasonably denied," and that the Board's denial was "unsupported, arbitrary, and contrary to law." (Cir. Ct. findings at ¶ 21; A-I: 8).[7]

The Circuit Court also concluded that entitlement to the requested use was controlled by the Comprehensive Plan in effect

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[6] The Court findings manifest acceptance of the points discussed in the verified complaint and other pleadings. See A-I: 2-4; A-II: 490-512; and Appendix attached to this Brief. See also Data Lease Financial Corp., cited in fn. 1 above, 291 So.2d at 611.

[7] The Circuit Court's factual findings are not reviewable in the District Court of Appeal. See Education Dev. Center v. City of West Palm Beach, 541 So.2d 106 (Fla. 1989); and City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982), as reaffirmed in Snyder, above, 18 F.L.W. at 525.

when the application should have been lawfully acted upon. (A-I: 8) Accordingly, the Circuit Court ordered that the requested use and development rights pursuant thereto should be treated as if the application had been approved on September 26, 1989, instead of arbitrarily refused. (A-I: 9).

The County petitioned for certiorari review in the District Court of Appeal, but did not challenge the Circuit Court's findings on the merits or dispute the standard applied by the Circuit Court upon review. See Petition for Writ of Certiorari at 17, stating that "the substantive issue of plan inconsistency will not be addressed by the Board in this Petition." The County instead contended that the Board's action was quasi-legislative action entitled to deferential review, and that the issues were not properly before the Circuit Court in any case because of failure to file a verified administrative complaint under § 163.3215(4), Florida Statutes. Petition at 17-18. The County's failure to contest the merits effectively conceded that if the Circuit Court is allowed to decide the merits, then the Court's ruling that the Board's denial was unsupported and arbitrary was correct.[8]

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[8] Failure to brief an issue constitutes abandonment. See City of Miami v. Steckloff, 111 So.2d 446 (Fla. 1959). The only merits-related issue raised in the County's certiorari petition concerned the effect of the new comprehensive plan that was adopted almost a year after the County denied the instant application. The Board recognized that the proposed new plan could not legally govern the application (A-II: 601) and the Circuit Court rejected the County's argument that the 1990 plan could be retroactively applied to justify the denial action. (Cir. Ct. findings at ¶ 22; A-I: 8), citing Gardens Country Club, Inc. v. Palm Beach County, 590 So.2d 488 (Fla. 4th DCA 1992). Accord, see §§ 163.3194(1)(b) and 163.3197, Florida Statutes; and Dade County v. Jason, 278 So.2d

The District Court of Appeal reversed the Circuit Court's judgment on two procedural grounds:

First, the Court held that the denial of the application was a quasi-legislative action for which no procedural due process was required generally, and in particular, no written order specifying reasons or findings supporting denial was required. See decision below, 619 So.2d at 365-66. Since no written order was required, the Court reasoned that the time for filing a verified administrative complaint under the Parker-Emerald Acres decisions began to run on the date of the Board's voice vote, September 26, 1989; and expired thirty days later, so the Circuit Court was barred from reviewing the merits entirely. Id., 619 So.2d n. 1 at 363-64.[9]

The District Court of Appeal also held that the Board could simply ignore the downscaling amendment presented at the hearing. The Court cited to Zoning Code procedures for submission of initial applications to the Planning Commission for a recommendation. The provisions were silent as to any procedure for downscaling amendments of the type presented here. Id., 619 So.2d at 365. The Court overlooked the fact that the Planning Commission had effectively reviewed the application as amended, since that was a part of the original reviewed application; and that the Board

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311 (Fla. 3d DCA 1973) (collecting cases). The District Court of Appeal did not address the issue.

[9] The District Court of Appeal apparently considered this issue to be dispositive because it did not remand the case for reconsideration under a quasi-legislative review standard, but preemptively reinstated the County's denial action as unreviewable.

itself had actually considered the amendment without raising any procedural objection, and apparently determined that remand to the Planning Commission or postponement for further review by planning staff would not serve any purpose. However, by ascribing this basis for the Board's action, the Court concluded that the action was insulated from judicial review as discretionary quasi-legislative action. The opinion did not consider any due process standards that apply to amendments in quasi-judicial actions, such as the nature and justification of the amendment and the absence of prejudice to opposing parties, apparently in the belief that these standards were immaterial under its concept of the action as a quasi-legislative proceeding.[10]

In discussing this issue, the District Court observed that:

> It does not clearly appear that the amended limited use site plan presented to the Board corrected all of the problems or deficiencies noted by the [Planning] Commission.

This observation apparently is based on an unfounded assumption that all comments represented valid and reasonable objections. This observation contradicts the Circuit Court's findings, and relates to a merits issue that not only was

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[10] The County's certiorari petition did not assert this issue as an independent grounds for reversal, but rather mentioned it as an aspect of its argument that due process is not applicable to an application for rezoning under the comprehensive plan.

unbriefed, but was also expressly waived by the County's Petition for Writ of Certiorari.[11]

[11] The County, as Petitioner for Writ of Certiorari in the District Court of Appeal, could not challenge the Circuit Court's findings and had the burden to show that the Circuit Court's judgment was wrong as a matter of law. See Educ. Dev. Center, above, 541 So.2d 106; Vaillant, 419 So.2d 624; and Snyder, 18 F.L.W. at 525 (cited in fn. 7 above). Since the County never challenged the downscaled application on the merits, see fn. 8 above, the District Court's statement on this issue was either unfounded dicta or conflicts with the above-cited authorities.

SUMMARY OF THE ARGUMENT

The District Court of Appeal's decision to reinstate the County's action is premised on its misconception of the nature of the proceedings as quasi-legislative action. However, this Court's recent decision in Board of County Commissioners v. Snyder, 18 F.L.W. 522 (Fla. 1993), clearly established that the County's action was quasi-judicial, reviewable by writ of certiorari for lawful reasons supported by substantial competent evidence.

The Circuit Court properly viewed the proceeding as quasi-judicial and applied the correct standard under Snyder. Even after the Circuit Court proceedings offered the County repeated opportunities to identify evidence or reasons that justified the action taken, the County could only respond that it did not have to justify its action. In the review before the District Court of Appeal, the County made no attempt to justify its decision under the provisions of the comprehensive plan then in effect. This is a glaring example of the type of arbitrary, standardless and politicized individual land use decision that comprehensive planning is supposed to replace.

The District Court holding is also untenable under this Court's recent decision in Parker v. Leon County, 18 F.L.W. 521 (Fla. 1993), holding that the statutory procedure for a verified administrative complaint under § 163.3215, Florida Statutes, applies only to third party intervenors. A land use applicant's proper avenue of review is still by petition for common law writ of certiorari. Accordingly, the filing in this case, which timely sought a writ of certiorari, was entirely proper.

Finally, the District Court's misconception of the nature of the proceedings as quasi-legislative apparently caused it to rule erroneously that the County was free to disregard the application as amended. As an essential aspect of procedural due process in a quasi-judicial action, the County cannot arbitrarily refuse to review an amended application that downscales the requested use to meet objections. This is particularly true in the present context because:

(1) The downscaling was done in response to a staff report analyzing Planning Commission recommendations, to which the applicant had no prior opportunity to respond;

(2) The downscaled application was simply a reduced part of the application already reviewed by staff and forwarded to the Board for decision based on all the record evidence; and the reduction is size could not be prejudicial to any opponent;

(3) The County's Zoning Code does not prohibit a downscaling amendment. The Board's own conduct at the hearing shows that such amendments are lawful, reasonable and customary, as the Circuit Court obviously found. The Board never contended otherwise at its hearing, nor was there any action rejecting the amendment as procedurally improper. Rather the District Court simply invented this reason and construction of the ordinance, even though such construction of the ordinance to prohibit any amendment would be contrary to customary practice and wholly arbitrary, unreasonable and illegal; and violate procedural due process requirements that must be observed in a quasi-judicial proceeding.

ARGUMENT

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

The District Court of Appeal's decision is premised entirely on the assumption that the Board's proceedings were quasi-legislative. This assumption is untenable under this Court's recent decision in Board of County Commissioners v. Snyder, 18 F.L.W. 522 (Fla. 1993), which held that an owner-initiated rezoning proceeding such as presented here, which impacts a limited number of persons or property owners, is contingent upon facts arrived at from alternatives presented at a hearing, and which is functionally a policy application under the standards of the existing plan, must be considered quasi-judicial. Snyder, above, at 524-25 (quoting Fifth District's opinion, 595 So.2d at 78).

The reasoning underlying this decision is that the Legislature's 1985 Comprehensive Planning Act sought to curb the process of abusive, politicized land use decisionmaking on individual applications. The Fifth District Court of Appeal's discussion of this issue in Snyder, apparently approved by this Court, expressed this concern as follows:

> [A]t the inception of zoning most land was zoned according to its then use ... and most vacant land was under-zoned or "short-zoned." ... The burden is thus then placed on the landowner, who wishes to exercise his constitutional right to use his vacant property or make a more intense use of his underzoned land, to first obtain permission from the government. ... [R]ezoning is granted not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding

> acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.
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> [T]he governmental zoning bodies exercising those functions have politicized the "re-zoning" process by forming the issues and considering and determining them at public meetings to which nearby landowners are encouraged to appear and oppose requests for rezoning and issue-forming, fact-finding and decision-making is conducted in politicized forum and atmosphere rather than in a neutral forum by an independent deliberative body determining facts in a detached manner and applying general legislative rules of law impartially to individual cases or specific instances.

Snyder v. Board of County Commissioners, 595 So.2d 65, 73-74 (Fla. 5th DCA 1991), quashed on other grounds, 18 F.L.W. 522 (Fla. 1993). Accord, Lee County v. Sunbelt Equities II L.P., 619 So.2d 996, 1001-02 (Fla. 2d DCA 1993).

As both the Snyder decisions and Sunbelt Equities recognize, there must be due process in individual land use decisions which are important to the lives and fortunes of Florida citizens. This is so regardless of whether decisions are formally labelled as rezonings, variances, exceptions, permits, or some other type of proceeding. In all such cases, the application should be measured against the standards imposed by the existing plan (and implementing map), and adjudicated based on compliance or noncompliance with those existing standards. The government must

be prepared to justify its denial action by presenting a record of competent substantial evidence showing how the plan standards were applied. Adherence to due process forces the government to comply with its own plan standards, and not simply disregard those standards whenever they become politically inconvenient in individual cases.

The First District's decision below expressly rejected the Snyder-Sunbelt rationale, and instead followed its own pre-1985 comprehensive planning act decision, City of Jacksonville v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984), review denied, 469 So.2d 749 (Fla. 1985). The First District's decision below allows the County to maintain the old system of arbitrary, ad hoc, politicized land use decisionmaking that the Legislature intended to replace with rational and uniformly applied standards.

This Court's Snyder decision approves the Fifth and Second Districts' reasoning that the proceedings are quasi-judicial and subject to due process constraints, and disapproves the Grubbs decision on this point, thus eliminating the foundation for the District Court of Appeal's decision in this case. Snyder, above, 18 F.L.W. at 525.

This Court also held that a development order denying a rezoning application is reviewable on the record by writ of certiorari. Snyder, above, 18 F.L.W. at 525 ; accord, Parker v. Leon County, 18 F.L.W. 521.

The Circuit Court's actions in this case were proper in light of the procedure set forth in this Court's Snyder opinion. A

timely petition for certiorari was filed to review the Board's denial action. The County requested dismissal of the case on procedural grounds, alleging failure to comply with § 163.3215(4), Florida Statutes. O'Connor countered that the Board had never entered any development order as required to trigger the statutory procedure. The record illustrates the procedural hodgepodge that would have resulted if the statute were applicable to owner-applicants. However, this Court's Parker decision makes the County's maneuvering on this procedural issue academic.

The Circuit Court was correct under Snyder in requiring the Board to enter some kind of written order. In the first place, the Leon County Comprehensive Plan Ordinance (Ordinance 80-69) and the 1985 Comprehensive Planning Act specifically require an order. See §§ 163.3164(6) and (7), Florida Statutes. Although neither the ordinance nor the statute expressly states that the order must be written, this is implied in order to distinguish it from a purely oral ruling of which no record exists.

Moreover, this Court's procedural rules reflect that the time for bringing a petition for certiorari begins upon rendition of the order to be reviewed. See Rule 1.630(c), Fla.R.Civ.P.; and Rule 9.100(c), Fla.R.App.P. A petition would certainly lie to compel the Board to render a written order that could be reviewed in the Circuit Court.[12]

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[12] The applicant could request a writ of mandamus to compel rendition of the order. However, there is no prejudice if the proceeding is by writ of certiorari. See Rule 9.040 (c) and (d), Fla.R.App.P.

Although this Court has now ruled that factual findings are not required to be expressed in the order, the Circuit Court properly required that there be some kind of written order to satisfy the statute and trigger certiorari review. It required the County to specify its reasons for denying the application (as it surely had discretion to do anyway when the County failed to undertake its burden to explain lawful reasons, by an order for a more definite statement under Rule 1.140(e), Fla.R.Civ.P.). This procedure did not prejudice the County, but rather gave the County every possible chance to express a lawful basis in the record that would justify the denial of the downscaled application.

When the County declined to provide any reasons except those in the planning staff report, the Circuit Court reviewed the record presented, and found that the County's action was arbitrary, unreasonable and unsupported. This is precisely the standard of review required by Snyder and the County has never contended it was improper. Accordingly, the Circuit Court clearly reviewed the County's action under the proper standard, and the District Court of Appeal had no basis to reverse the resulting judgment.

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

The District Court's decision is based in part upon the premise that the Owners' failure to file a verified administrative complaint barred certiorari review in the courts. This premise is now overruled in Parker v. Leon County, 18 F.L.W. 521, so the First District's instant decision must likewise be reversed.

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

Once the proceeding is recognized to be quasi-judicial in nature and subjected to the constraints of procedural due process, then it is obvious that the Board could not arbitrarily refuse to consider the downscaled amended application on the merits. Moreover, the record shows that the Board presumably did consider the amended application.

This issue illustrates why procedural due process is essential if local land use decisions are ever to become orderly and rational. The reduction in size of the requested rezoning occurred in response to late-announced objections as reflected in the staff report following the Planning Commission meeting. There was no opportunity to return to the Planning Commission to attempt to resolve those objections. Rather, the only opportunity to resolve those objections was to present a downscaled application at the

Board hearing to be held less than two weeks later. The staff report was simply evidence presented to the Board at the final hearing along with public comments, all of which the applicants were entitled to satisfy or rebut.

As a fundamental procedural due process right, applicants must be allowed an opportunity to respond to objections after they are made. Otherwise the door is open to all kinds of sharp practices by which the government or third parties can raise last minute objections to which the owner cannot practically or legally respond. In effect, the First District's decision allows due process exclusively to opponents who can object at any time, but not to the individual applicant who cannot respond. An applicant must be given a fair opportunity to revise the application in order to meet objections, as an element of due process required in quasi-judicial proceedings. See Jennings v. Dade County, 589 So.2d 1337, 1340-41 (Fla. 3d DCA 1991), review denied, 598 So.2d 75 (Fla. 1992); Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 652 (Fla. 3d DCA 1982) (notice and opportunity to meet objections are essential due process elements).

As noted in this Court's decision in Snyder, adopting portions of the Fifth District's opinion, the Board's quasi-judicial decision is based on "facts arrived at from distinct alternatives presented at a hearing ...." Id., 18 F.L.W. at 525. The whole purpose for procedural due process is to promote fair resolution of the issues on the merits. To this end, settlements and concessions to meet objections must be freely encouraged. In judicial-type

proceedings, a plaintiff or petitioner can always delete a part of the case or seek less relief at trial, or even on appeal, but is not forced to dismiss its entire case and start over as the price for making such a concession. This Court's procedural rules clearly foreclose such an arbitrary result in court proceedings.

Where an administrative agency arbitrarily refuses a party's nonprejudicial amendment, the courts summarily reverse the action as an abuse of discretion. See generally All-Risk Corp. v. State Dept. of Labor and Emp. Security, 413 So.2d 1200 (Fla. 1st DCA 1982) (abuse of discretion to deny amendment); Key Biscayne Council v. State Dept. of Natural Resources, 579 So.2d 293 (Fla. 3d DCA 1991) (same).

It is routine and customary in land use proceedings that amendments within the scope of the application are proffered and discussed at the Board hearing to achieve compromise or optimal resolution. Zoning boards frequently request applicants to accept less density or more green space to meet the objections presented at the final hearing.

No one at the hearing in this case suggested that the amendment was improper, and the amendment was not refused. On the contrary, Board members initially favored a remand to the Planning Commission for further comment, then proceeded to hear evidence addressing the downscaled application, then voted denial.

The Circuit Court, which carefully reviewed the circumstances of the downscaling amendment in light of its familiarity with local

practice, found the application as amended to be "reasonable" in every aspect.

The County Zoning Code provision cited by the District Court of Appeal, Article XII, § 12.1, Leon County Zoning Code, contains no provision prohibiting a downscaling amendment to an application at any stage of proceedings. That provision reads in part:

> 2. All proposed [changes] ... to the Zoning Map shall be submitted to the Tallahassee-Leon County Planning Department on forms prescribed for the purpose of submitting such amendment for study, public hearing and recommendation. The Planning Department shall place the proposed amendment on the agenda of the Tallahassee-Leon County Planning Commission and shall take all steps necessary for the Planning Commission to hold a public hearing on the proposed amendment.
>
> * * *
>
> 4. After the public hearing the Planning Commission shall transmit a written report of its findings and its recommendations to the appropriate governing body or bodies, within forty-five (45) days from the date of such public hearing.

(A-II: 671-72).

It is difficult to understand how the District Court came to construe this provision as prohibiting any amendment. No such construction was urged by the Board or the County Attorney at the hearing. Moreover, the application <u>was</u> submitted to the Planning Commission and thoroughly reviewed and comments were provided. An amended application seeking a reduced part of the originally requested rezoning is not prohibited, not prejudicial, and cannot simply be ignored consistent with procedural due process.

Subsection 4 of the ordinance expressly states that the Planning Commission's report is issued after public hearing is over. An applicant has no chance to respond to adverse recommendations contained in the Planning Commission's report unless that opportunity is afforded at the final hearing before the Board.

In addition, Subsection 6 of the same provision allows the Board to decide an application even in the absence of a Planning Commission recommendation if waiting for a recommendation would prejudicially delay the application:

> 6. Should the Planning Commission fail to make its report and recommendation within the time limits prescribed, the Governing Body may take such action upon the proposed change or amendment as it deems advisable, based upon the facts available to it.

(A-II: 673). Thus a Planning Commission recommendation is not indispensable, as the District Court apparently felt, but is merely evidence to assist the Board's deliberations, which is not required if it would involve prejudicial delay to the applicant (over 45 days).

In rezoning proceedings the courts normally recognize that a downscaling within the scope of the original application is not a substantial change that requires the owner-applicant to start the whole application process over. See McGee v. City of Cocoa, 168 So.2d 766 (Fla. 2d DCA 1964); Williams v. City of North Miami, 213 So.2d 5 (Fla. 3d DCA 1968) (consideration of downsized application does not even require new public notice); see also Herdeman v. City

of Muskego, 343 N.W.2d 814 (Wisc. Ct. App. 1983) (same, citing land use and municipal law treatises); 83 Am. Jur. 2d Zoning and Planning § 596; and Annot., 96 ALR 449, § 19(a) at 488-89 (changes in zoning proposal which impose additional restraints on property use do not require additional public notice). These authorities reject efforts to defeat a downscaled application based on failure to notice and conduct a new public meeting on the downscaled application. The obvious rationale is that a downscaled application is considered the same as or part of the original application. If the original application has been properly reviewed under the notice and public hearing procedure, then no one is entitled to an additional opportunity to challenge a downscaled version of the same application.

If the Leon County Zoning Code provision cited by the District Court were intended to replace this generally accepted rule based on elementary fairness, it would certainly have to do so in unmistakable language.[13]

The District Court's contrary construction of the ordinance to allow the Board to disregard an application at its whim imposes an extremely prejudicial delay on the owner-applicant. Leon County Zoning Code § 12.1(1)(d) prohibits the applicant from filing a new rezoning application for 12 months. The County may not even accept

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[13] If there were ambiguity, the ordinance must be construed in the applicant's favor, see Mandelstam v. City Comm'n, 539 So.2d 1139, 1140 (Fla. 3d DCA 1988), and should certainly not be construed in any way that could render it unconstitutional under due process standards.

the application after 12 months, but require the applicant to await the next administrative cycle in which rezonings in that geographic quadrant are reviewed. This is extremely prejudicial because preparing a new application involves substantial expense to satisfy engineering and environmental requirements and assure continued economic feasibility. The delay alone is prejudicial, especially where property is lying vacant and unproductive. Finally, the Board's action is especially prejudicial in this case because the County was preparing a new comprehensive plan with more restrictive standards and concurrency requirements. In these circumstances, it would be highly improper to reject a valid application with some arbitrary procedural maneuver, in order to force the applicant to meet the changed standards enacted in the 12 month interval before a new application can be filed. See authorities cited at fn. 8 on pg. 11-12 above.

The District Court of Appeal had no reason to address this issue at all, much less render a decision that is contrary to fairness, established practice and precedent, and due process.

Accordingly, the First District's decision that the County could ignore the Owners' downscaling application under these circumstances substantially changes the universally accepted procedure, without even a briefing on the issue; and opens the door for government to thwart the rational standard-based decisionmaking that the Legislature requires by resort to late-announced objections and unfair procedural maneuvers that evade the plan standards entirely. This is precisely the type of arbitrary action

that procedural due process constraints must operate to curtail, if comprehensive plan standards are ever to be implemented in a fair, orderly and uniform manner as intended by the Legislature and recognized by other Florida courts, and constitutional property development rights are to be given effect under state law.[14]

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[14] A plebescite of neighbors is not an appropriate justification for denial, see citations in fn. 3 on page 7 above. Moreover, the County never attempted to justify its action as a discretionary timing decision. It was the County's burden under Snyder to demonstrate substantial evidence that would justify the denial action, but there is no record evidence that would support the denial of the downscaled application as premature. The property had been commercially zoned 40 years earlier and there was no reason to delay some commercial development. The comprehensive plan is supposed to contain provisions for orderly implementation, see § 163.3177(5), Florida Statutes, so the County must have standards to guide its discretion on phase-in issues. No standard was ever cited that would justify the denial here, and the issue was waived before the District Court of Appeal.

CONCLUSION

The District Court of Appeal's decision is in direct and express conflict with Snyder and Parker and must be reversed for these reasons. In addition, O'Connor was entitled to a decision on the merits of his amended (downscaled) application; and the District Court of Appeal's ruling that the County could ignore the amendment is also erroneous and must be reversed.

The Court should instruct the District Court of Appeal that any review on remand should be strictly limited to the remaining issues argued in the County's Petition for Writ of Certiorari; and that the proper standard of review is that set forth in Snyder, i.e., whether the Circuit Court failed to afford procedural due process and apply the correct law. Snyder, above, 18 F.L.W. at 525, referencing Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982). Unless the County's Petition demonstrates that the Circuit Court departed from this standard, the Circuit Court's final judgment granting writ of certiorari must be upheld.

RESPECTFULLY SUBMITTED this 18 day of October 1993.

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the counsel listed below, by United States Mail, this 18 day of October 1993.

Attorney

David La Croix, Esq.
Pennington Haben Law Firm
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Tallahassee, FL 32317

APPENDIX

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

MONTICELLO DRUG COMPANY, and
O'CONNOR DEVELOPMENT CORPORATION,

Petitioners,

vs. CASE NO. 89-4024

LEON COUNTY,

Respondent.
_____/

JUDGMENT GRANTING WRIT OF CERTIORARI

This cause came before the Court upon final arguments. The Court has fully reviewed the record of the proceedings below and finds as follows:

1. Petitioners own or control property at the northeast junction of Thomasville and Bradfordville Roads in Leon County, Florida. The property consists of about 28 acres in the "A-2" zoning classification, which allowed agricultural and certain residential uses.

2. In June 1989, Petitioners applied for limited commercial use site plan rezoning of the subject property through the designated agent of the owners. The 1981 Leon County Comprehensive Plan was then in effect.

3. The enacting ordinance for the 1981 Comprehensive Plan provided that a development proposal was deemed consistent with the Plan if it involved equal or lesser intensity of use than projected

by the Plan and conformed generally with the overall spirit and intent of the Plan policies. See § 5(c), Ord. 89-60.

4. The 1981 Comprehensive Plan Future Land Use Map designated the Thomasville/Bannerman/Bradfordville Roads intersection as a major activity center for general business use. This designation was not site specific, indicating a suitable location for business use in that proximity. According to the enacting ordinance, this map designation was a visual representation of certain Comprehensive Plan policies. See § 7, Ord. 80-69.

5. The Land Use Map's general business designation for the Bradfordville intersection included the location of the subject property. Petitioners' application also sought a Land Use Map amendment to conform the general business designation to the boundaries of the requested commercial use. Since the map was a flexible guide and not site specific, the prescribed procedure was to conform the map to an approved development proposal. See § 7, Ord. 80-69.

6. The property across from and south of the subject property along both sides of Thomasville Road past Bradfordville and Bannerman Roads was already zoned commercial, and commercial development had already occurred.

7. Petitioners initially applied for all of the subject property to be used commercially. The portion of the property west of a proposed roadway connecting Thomasville and Bradfordville Roads would become zoned "CP" (commercial parkway) for light

commercial use. The area east of the proposed roadway would become zoned "CO" for professional office use. See Supp. App., Tab B-2.

8. After the Tallahassee-Leon County Planning Commission held public hearings on Petitioners' application, the Planning Commission Technical Coordinating Committee issued a report that was presented to the Board of County Commissioners. The report indicated the traffic data was very reasonable (i.e. no appreciable service level decrease), and indicated no detrimental environmental effects. The report noted that a central sanitary sewer could be provided to the site as called for by the site plan. Concern was expressed that the proposal did not provide a buffer area to insulate an existing residence east of the property and that the requested commercial use area exceeded the depth of commercial tracts in the vicinity. However, the requested depth was considered advantageous in allowing development without forcing commercial enterprise closer to Thomasville Road and creating a strip type development.

9. The Planning Commission briefly stated on a one-page memorandum to the Board of County Commissioners its recommendation to deny Petitioners' application. Shortly thereafter, on September 26, 1989, upon noticed hearing, Petitioners' application came to the Board of County Commissioners for decision.

10. Petitioners reasonably amended their application by presenting an amended limited use site plan to the Board (copy appended). This amendment deleted all the proposed office development east of the proposed roadway and sought commercial use

only for about 18 acres of the subject property lying west of the proposed roadway. The remaining 10 acres would continue to be zoned agricultural and serve as a buffer area. Likewise, the depth of requested commercial use was substantially reduced.

11. Petitioners requested that action on their application be postponed to allow evaluation of the amendment. A motion was made and seconded by Board members to continue the action for one month in view of the amendment. The Board then received public input on the application.[1]

12. The pending motion to continue action was then substituted by a motion to uphold the recommendation or vote of the Planning Commission to deny the request. See Transcript, pp. 41-42, Supp. App. Tab E. This substitute motion was approved by the Board. The Board did not issue an order of any kind, nor make any findings of facts to substantiate its action.

13. Petitioners filed for writ of certiorari to review the Board's action. On May 2, 1991, the Court ruled that the Board had not afforded Petitioners due process by making written findings to support denial. In an order drawn by the attorney for the County,

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[1] Among the evidence presented, the developer testified that the amendment made the commercial use request consistent with the depth of other commercial tracts in the area, and buffered the residence on the other side of the proposed roadway. The developer also testified that the adjoining major roadways and nearby commercial uses made the subject property impossible to develop practically for anything other than general business. Several citizens and officers of a homeowners association expressed opposition to the request. This opposition, however, would not constitute lawful basis for denial. See e.g. Salvation Army v. Dade County, 523 So.2d 611, 614-15 (Fla. 3d DCA 1988).

the Court remanded the case back to the Board to set forth in writing its reasons for denial with specificity. The clear intent and sole purpose of this Order was to allow the County opportunity to make any findings which the Board of County Commissioners believed supported their denial of the amended application.

14. On June 25, 1991, the Board forwarded a letter to this Court essentially declining to make any findings. Even though it was the body charged by law to decide Petitioners' development request, the Board refused to delineate findings. The Board asserted that various staff documents and planning commission minutes sufficiently set forth reasons for inconsistency with the Comprehensive Plan.

15. On August 12, 1991, as allowed by the Court, Petitioners filed a Verified Complaint with Leon County alleging that any reasons for denial were insufficient, inapplicable, unreasonable or otherwise contrary to law. The County chose to make no response to this Verified Complaint as the Remand Order would have allowed.

16. On August 21, 1991, Petitioners filed their Complaint After Remand. The County answered, and the case came on for hearing based on the record of proceedings that had been provided by the parties.

17. In considering Petitioners' application for limited use site plan rezoning, Leon County and its Board of County Commissioners were dealing with a discrete proposed use for a

discrete parcel of property based on evidence received in connection with a noticed hearing. The action therefore was quasi-judicial in nature and reviewable by certiorari. It is not part of the legislative function to deal with particular cases, and no challenge was made here to the validity of any ordinance. See e.g., Snyder v. Bd. of Cty. Com'rs. of Brevard County, 16 FLW 3057, 3060-61 (Fla. 5th DCA 1991); Hirt v. Polk County Bd. of Cty. Com'rs., 578 So.2d 415 (Fla. 2d DCA 1991).

18. Florida Statute section 163.3215 does not preclude certiorari relief. This is not "just a consistency challenge;" other issues, including due process, were involved here. See Gregory v. Alachua County, 553 So.2d 206, 208, n. 4 (Fla. 1st DCA 1989). Moreover, no development order was entered as contemplated by the statute. And even if the County's letter to Court after remand were considered a development order, it is not "a development order ... which materially alters the use or density or intensity of use on a particular piece of property." § 163.3215(1). Only such an order would be subject to the statutory remedy. Furthermore, a verified complaint[2] was directed to any possible order, and the County had ample notice and opportunity to respond. In any event, the statute itself allows "injunctive or other relief," which would appear to contemplate certiorari relief where only the parties in the proceeding below are involved.

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[2] Any defect in this Verified Complaint was not substantive and did not affect it.

19. Petitioners reasonably amended their limited use site plan application by withdrawing a significant part of the commercial use request. There was no rule or policy prohibiting such amendment. This was manifest by the motion and second by Board members to continue the agenda item for 30 days in light of the amendment, and by the absence of any procedural objection by the County Attorney or any other Board members. Furthermore, it is not required that a rezoning request be renoticed upon an amendment reducing its scope. See McGhee v. City of Cocoa, 168 So.2d 766, 769 (Fla. 2d DCA 1964); Williams v. City of N. Miami, 213 So.2d 5, 7-8 (Fla. 3d DCA 1964).

20. Petitioners were entitled to have their amended application considered by the Board, as the zoning authority, with specific, written, detailed findings of fact to be made by the Board, and reasons for denial stated by the Board with particularity. See e.g. Snyder v. Bd. of Cty. Com'rs. of Brevard County, supra, 16 FLW 3057, 3062 and notes 65-67.

21. Petitioners were denied due process of law because the Board, as the decision-making authority, failed to make any findings of fact to support denial, or to state reasons for denial with particularity, despite the opportunity afforded by this Court's remand. A letter to the Court generally referencing various comments in staff documents is not acceptable as findings of the Board, particularly where those comments are conflicting and do not take into account the application as amended. Petitioners were denied due process of law because the Board failed to fully

and fairly consider their application as reasonably amended. The County knowingly elected not to extend due process, even upon remand order by the Court. Petitioners showed that their amended application involved a use projected by the Comprehensive Plan, and generally conformed with the Plan's overall spirit and content. Denial of the amended application was unsupported, arbitrary, and contrary to law, and Petitioners are entitled to have their amended application granted by order of this Court. See Snyder v. Bd. of Cty. Com'rs. of Brevard County, supra; Manatee County v. Kuehnee, 542 So.2d 1356 (Fla. 2nd DCA 1989), rev. den. 548 So.2d 683 (Fla. 1989); St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989); Bailey v. City of St. Augustine Beach, 538 So.2d 50 (Fla. 5th DCA 1989), rev. den. 545 So.2d 1366 (Fla. 1989); Hall v. Korth, 244 So.2d 766 (Fla. 3d DCA 1971). See also Rural New Town, Inc. v. Palm Beach County, 315 So.2d 478 (Fla. 4th DCA 1975).

22. The County unreasonably denied and unlawfully delayed Petitioners' development application pursuant to the 1981 Comprehensive Plan. Petitioners' development rights are therefore controlled by that Plan and regulations existing at the time. See Garden Country Club, Inc. v. Palm Beach County, 16 FLW 2959 (Fla. 4th DCA 1991) (planning law is controlled by comprehensive plan in effect when an application should have been lawfully acted upon); City of Margate v. Amoco Oil Co., 546 So.2d 1091 (Fla. 4th DCA 1989) (law at time of the application controls if there is unreasonable refusal or delay).

Accordingly, it is hereby

ORDERED and ADJUDGED as follows:

1. Leon County's action of September 26, 1989, refusing to approve Petitioners' amended application for limited commercial use site plan rezoning is quashed.

2. Petitioners' amended application for limited commercial use site plan rezoning is granted. Said concept plan and Petitioners' development rights pursuant thereto shall be controlled by laws, ordinances, regulations and circumstances in effect when the amended application should have been lawfully reviewed.

3. Leon County, its officials, and persons acting on its behalf shall treat Petitioners' amended limited use site plan, copy of which is appended hereto, as if lawfully approved by the Board of County Commissioners on or about September 26, 1989, and shall extend Petitioners all development rights with respect thereto as if the amended application had been approved at that time.

4. The Court reserves jurisdiction to grant such relief as may be necessary to enforce or effectuate this judgment.

DONE and ORDERED this 24th day of February, 1992.

J. Lewis Hall, Jr.
Circuit Judge

Copies furnished to:

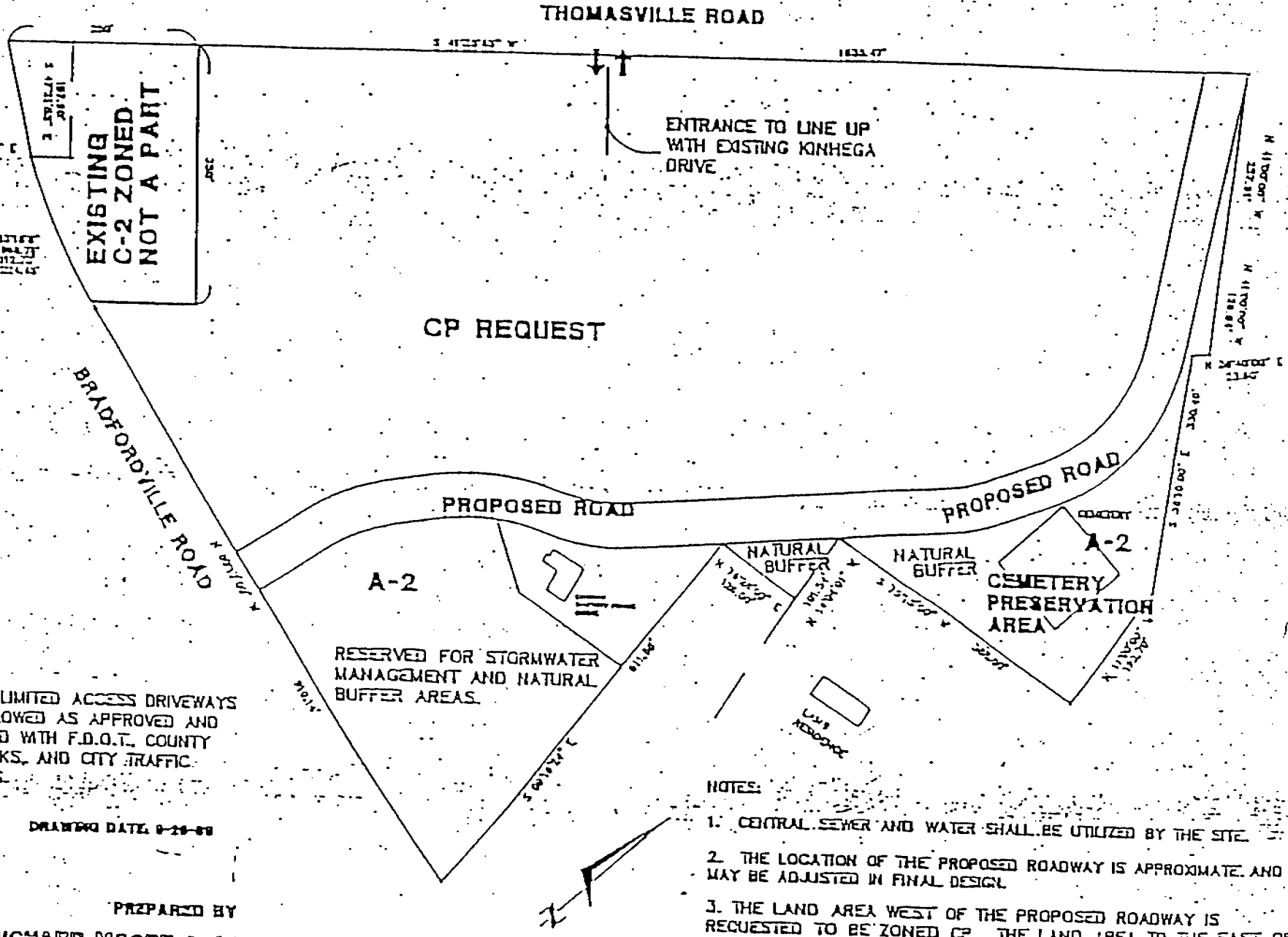
M. Stephen Turner
David LaCroix

Bradfordville Junction

Tallahassee, Florida

Limited Use Site Plan

O'Connor Development Corp.



AMENDED LIMITED USE SITE PLAN

ADDITIONAL LIMITED ACCESS DRIVEWAYS MAY BE ALLOWED AS APPROVED AND COORDINATED WITH F.D.O.T., COUNTY PUBLIC WORKS, AND CITY TRAFFIC ENGINEERING.

DRAWING DATE 9-26-89

PREPARED BY

RICHARD MOORE & ASSOC., INC.

DEVELOPMENT PLANNING • ENGINEERING DESIGN • ENVIRONMENTAL PERMITTING

304 N. MONROE ST., SUITE 3 • TALLAHASSEE, FLORIDA 32301

NOTES:

1. CENTRAL SEWER AND WATER SHALL BE UTILIZED BY THE SITE.
2. THE LOCATION OF THE PROPOSED ROADWAY IS APPROXIMATE AND MAY BE ADJUSTED IN FINAL DESIGN.
3. THE LAND AREA WEST OF THE PROPOSED ROADWAY IS REQUESTED TO BE ZONED CP. THE LAND AREA TO THE EAST OF, AND INCLUDING THE PROPOSED ROAD IS TO REMAIN A-2. THE TOTAL AREA REQUESTED TO BE REZONED IS APPROXIMATELY 19 AC ±.

10

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

MONTICELLO DRUG COMPANY, and
O'CONNOR DEVELOPMENT CORPORATION,

Plaintiffs,

vs.

CASE NO. 89-4024
FL BAR NO. 095691

LEON COUNTY,

Defendant.

COMPLAINT AFTER REMAND

1. By Order of May 2, 1991, this Court remanded this matter to Defendant for specific findings, allowing Petitioners 30 days after receipt of same to file a verified complaint with Defendant, with Defendant having 30 days to respond; Plaintiff was directed to then file the verified complaint and any response by Defendant, whereupon the matter would be determined on the merits.

2. On July 16, 1991 the Defendant responded to the Order of Remand by a letter whose sufficiency Plaintiffs questioned and requested to be clarified.

3. By Order of July 31, 1991, the Court directed that Defendant was bound by the compliance it chose, and allowed 20 additional days for Plaintiffs to file. Plaintiffs understood this to pertain to filing a verified complaint as decided in the May 2 Order on Remand.

4. On August 12, 1991, Plaintiffs filed the Verified Complaint with Defendant well within 30 days from Defendant's compliance development order and within the 20 days allowed in the July 31 Order of the Court. Plaintiffs then awaited the County's response or non-response due in 30 days per the Order of Remand.

5. On August 23, 1991, Defendant file a motion for the Court to proceed without further argument, claiming Plaintiffs had not filed timely pleadings. It is apparent Defendant does not intend to respond to the Verified Complaint. Therefore Plaintiff is now filing the Verified Complaint herewith as directed in the Order of Remand.

6. In addition to the matters set forth in the attached Verified Complaint, the record of proceedings already submitted to the Court shows:

a. The Comprehensive Plan land use map designated the Thomasville/Bradfordville Roads intersection as a major activity center for general business use. (Tab A, pp. 1 15; Tab C, pp. 7, 10).

b. Property west across Thomasville Road from the subject property was already zoned commercial, as was property along both sides of Thomasville Road south of the subject property and across Bradfordville and Bannerman Roads. (Tab A, p. 15; Tab C, pp. 2, 9, 10).

c. Commercial establishments already existed along both sides of Thomasville Road beginning south of Bannerman an Bradfordville Roads and extending northward through the entrance to Killearn Lakes across from the subject property. (Tab C, p. 7).

d. The subject property fronts along Thomasville Road on the north for 1635 feet, and fronts along Bradfordville Road on the east for 910 feet. (Tab B). When the request was considered, Thomasville Road had become a major arterial highway in the area between the

subject property and Velda Dairy Road to the south, with this segment servicing an average of 12,000 cars per day (level of service "A" for this road). Bradfordville Road had become a major collector road with an average of 2,824 cars per day in the segment near the subject property (being at level of service C+). (Tab c, pp. 11-12).

e. Plaintiffs' traffic engineers reported that development pursuant to the modified site plan zoning would not appreciably decrease service levels in the area, would serve existing traffic rather than create traffic, and would intercept peak hour traffic and minimize left turn conflicts. The Planning Commission evaluated this data and considered it very reasonable and also reported that the development would alleviate some congestion from the I-10/Thomasville Road intersection. (Tab A, pp. 3, 10-11, 14; Tab C, p. 12).

f. The Planning Commission reported no detrimental environmental effects and transmitted the Environmental Analysis of Richard Moore, Plaintiffs' engineer, to the Board as part of its report. Stormwater management feasibility was endorsed in writing by the Florida Departments of Transportation and Environmental Regulation and by the County's senior environmental engineer. (Tab A, pp. 2, 3, 6-9; Tab C, p. 13, 15-21).

g. The site plan request, as amended at the Board hearing of September 26, 1989, reduced the depth of requested commercial zoning from 1250 feet to 600 feet. More than 60% of the reduced area was covered by the then existing general business designation on the land use map. (Tab E, Tr. 11, 13). An engineering drawing of the relative dimensions of the amended limited use site plan in relation to the subject property is submitted herewith.

h. John O'Connor, owner/developer, testified at the hearing that the amended request was consistent with the depth of existing commercial zoning across Thomasville Road and to

the south and established a buffer between residential property south and east of the proposed roadway. That property, as well as the property to the north along Thomasville Road, is deed restricted residential, which would prevent any expansion of commercial use. Mr. O'Connor testified that the adjoining major roadways and adjacent commercial uses made the subject property virtually impossible to develop for anything but general business. (Tab E, Tr. 29-32).

i. Plaintiffs' traffic engineer, Rick Hall, testified that his firm's report on acceptable levels of road service after the proposed development included projections form Northhampton and all other approved developments in the County. He also testified that 40% of the trips coming to the site would be captured from passerby traffic, and that the remaining 60% would be redistributed traffic from close-by neighborhoods which already goes up and down Thomasville Road. (Tab E, Tr. 116-21).

j. An independent market study by Kerr and Downs Research in May 1989 was presented to the Board. This expert report established strong need for additional grocery store and retail space in the northeast area of the County north of Capital Circle. The Northeast area has a low retail vacancy rate which will decrease as further residential centers become developed. Bradfordville retail and grocery space is under-represented in relation to its present and expected population and its per square foot of buying power. Compared with other geographic areas in Leon County, the Bradfordville area is commercially undeveloped. (Tab A, Tr. 3, 16-20).

k. Several citizens and officers of a homeowners association expressed opposition to the request. They were against any commercial development along Thomasville Road, or claimed the development was not needed because there were vacancies in other shopping areas. (Tab E, Tr. 32-39).

7. The Board's adopted findings and reasons were legally insufficient and fail to support its denial of the request as amended, and the denial was arbitrary, unreasonable, and contrary to law.

8. The A-2 zoning classification for the subject property is confiscatory in that it deprives the owners of substantially all beneficial or economically viable use of their property and is therefore invalid as applied.

9. Considering the changed conditions in the area, the high traffic volume, the adjacent commercial uses, market conditions and other factors, the subject property cannot practically be developed for agricultural or residential use.

10. Application of agricultural and residential zoning restrictions to Plaintiffs' property is arbitrary, unreasonable, and capricious and without substantial relationship to the public health, safety or welfare and denies Plaintiffs substantive due process.

11. Since the denial of Plaintiffs' amended request for commercial zoning, the County has adopted new development laws, including a new comprehensive plan.

12. Because Plaintiffs' application for commercial zoning was arbitrarily, unreasonably or unlawfully denied, Plaintiffs were denied the opportunity to commence and complete development before any such new laws would apply or to qualify for exemption or grandfather from their effect.

13. Plaintiffs are entitled to proceed with development of their property as if the delay caused by the Board's unlawful action and the judicial proceedings necessary to determine same and secure relief therefrom had not occurred and the intervening regulations had not been imposed by the County.

14. The County should not be allowed through improper action to circumvent Plaintiffs' entitlement to develop their property under existing law.

WHEREFORE, the Court should:

A. Grant certiorari relief quashing the Defendant's development order as without lawful basis found to support denial, and Defendant should be directed to proceed not inconsistent with the Court's Order.

B. Declare that Defendant's denial of Plaintiffs' proposed commercial use was unreasonable, arbitrary, and unlawful, and that continued agricultural or residential zoning of the subject property is confiscatory and otherwise invalid.

C. Enjoin Defendant from imposing a use classification on the property that will not allow reasonable commercial development at least consistent with the amended request.

D. Find that Plaintiffs were prepared to proceed with development and declare they may now proceed under laws and facts existing at the time of Defendant's wrongful denial of their amended request as if the delay occasioned by Defendant's wrongful action had not occurred.

E. To grant such other and supplemental relief as may be necessary to effectuate the Court's Order and Plaintiffs' rights.

Respectfully submitted,

M. Stephen Turner
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820 E. Park Avenue, Bldg. F
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Tallahassee, FL 32302-3300
(904) 681-6810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to DAVID LA CROIX, ESQ., Pennington, Wilkinson, 308 East Park Avenue, this 26 day of August, 1991.

M. Stephen Turner

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IN RE: BRADFORDVILLE JUNCTION SHOPPING CENTER

VERIFIED COMPLAINT

W. Taylor Moore, as agent for Monticello Drug Company and other parties owning or controlling approximately 28 acres at the northeast junction of Thomasville and Bradfordville Roads in Leon County (hereto referred to as "Plaintiffs"), pursuant to the Court's Orders dated May 2, 1991 and July 31, 1991 in Case No. 89-4024, Circuit Court of Leon County, files this verified complaint addressed to the compliance order of the Leon County Board of County Commissioners ("Board") under date of July 16, 1991, and says:

1. Plaintiffs applied for limited use site plan zoning of the subject property. Their request called for CP zoning west of a proposed roadway through the property, and CO zoning east of the roadway. The location was already indicated for general business use on the County's future land use map.

2. By agenda transmittal to the Board, the Planning Commission reported on the request with a recommendation for denial.

3. The request was noticed for and heard by the Board on September 29, 1989. At the hearing, Plaintiffs withdrew their request for CO zoning east of the proposed roadway, presenting an amended use site plan (copy attached) for approximately 40% of the site to remain agriculturally zoned. The reduction in size was in response to the Planning Commission's reported concern for more buffer area and less commercial depth consistent with other commercial zoning and existing uses in the area.

4. The Board elected not to refer the matter back to the Planning Commission for further consideration, but instead heard testimony and received other input and then voted simply to accept the recommendation of the Planning Commission to deny the request.

5. The Board made no findings nor stated any reasons as to why the requested use should be denied, and no order of any kind was entered or furnished to Plaintiffs.

6. The County's Answer to Plaintiffs' Restated Complaint in Case No. 89-4024, denied that all reasons for the Planning Commission's recommendation were identified in its report to the Board and denied that the Planning Commission made any findings. (Answer, para. 16). In an earlier Answer, the County likewise asserted that no findings were made by either the Planning Commission or the Board of County Commissioners, and that the Board's only action was to uphold the Planning Commission's recommendation and not necessarily to adopt any stated reasons or findings. (Answer to Third Amended Complaint, pp. 14-15).

7. As part of Case No. 89-4024, Plaintiffs showed that the Board had failed to comply with the requirements of procedural due process. In denying Plaintiffs' requested land use, the Board interpreted and enforced the Comprehensive Plan ordinances applied to this particular site based on evidence deduced at a noticed hearing. Accordingly, the Board acted in a quasi-judicial capacity[1] and was required to make specific findings and state with

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[1]See Hirt v. Polk County Bd. of County Commissioners, 578 So. 2d 415 (Fla. 2nd DCA 1991); Manatee County v. Kuehnel, 542 So.2d 1356 (Fla. 2nd DCA 1989), rev. den. 548 So.2d 663 (Fla. 1989).

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particularity the reasons for denial. Failure to so proceed denied due process[2] and was reviewable by the Circuit Court,[3] which properly remanded to the Board for specific findings and reasons.[4]

8. In addition, the Circuit Court recognized that the County should not be heard to insist on the time conditions of F.S. §163.3215 for challenging a development order when the County had not provided any kind of development order. A proper development order would have made sufficient findings and stated precise reasons for the action taken to provide a basis for a meaningful challenge. Plaintiffs cannot be expected to guess at what the Board found or why it did not act favorably. Until specifics were clearly expressed in a furnished order, Plaintiffs were unable to frame an appropriate challenge directed to concrete issues defined by the Board and from which it could not recede. This was particularly true since Plaintiffs withdrew a significant part of

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Also see Walgreen Co. v. Polk County, 524 So.2d 1119 (Fla. 2nd DCA 1988), Wilson v. City of Clearwater, 33 Fla. Supp. 145 (Pinellas Cir. Ct. 1975); First City Savings Corp. v. S&B Partners, 548 So.2d 1156 (Fla. 5th DCA 1989); Bailey v. City of St. Augustine, 538 So.2d 50 (Fla. 5th DCA 1989).

[2]See Irvine v. Duval County Planning Commission, 466 So.2d 357, 365-66 (Fla. 1st DCA 1986)(J. Zehmer, dissenting), approved 495 So.2d 167 (Fla. 1986), adopted on remand, 504 So.2d 1265 (Fla. 1st DCA 1986), and authorities cited therein. Also see Hanna v. Palm Beach County Bd. of Adj., 15 F.L.W. C23 (3 judge 15th Cir. 1990)(rambling comments and final vote of Board does not substitute for specific findings).

[3]See cases n.1. See also Gregory v. Alachua County, 553 So.2d 206, 208, n. 4 (Fla. 1st DCA 1989)(challenge of zoning orders on grounds such as procedural due process may be made by common law certiorari).

[4]See Southern Co-op Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), cert. den. 463 U.S. 1208.

the request to cure any possible objection, yet no explanation was forthcoming as to why this was inadequate. Without specific findings and reasons, the Board was not committed to any particular facts and could shift positions depending on what objections were made by Plaintiffs. By the same token, the Court could not possibly extend meaningful review unless it definitively knew what findings supported what reasons for the Board's action. Both the Court and the Plaintiffs, in conformity with due process requirements, were entitled to know the specifics of what facts the Board found existing and why it denied the request.

9. The Circuit Court's Order of Remand required the Board to set forth with specificity the reasons for its determination. By its compliance of July 16, 1991, the Board stated for the first time, contrary to the position taken in this litigation, that the reasons for the Board's determination were reasons contained in the Planning Commissions' report. Nowhere had the Board previously adopted the reasons stated by the Planning Commission in regard to the unamended request or stated that those were the only reasons for its decision. Indeed the County's attorney had denied that the Planning Commission had ever made findings or that the Board had to state any reasons for its action.

10. It is unclear how findings and reasons of the Planning Commission could possibly be dispositive after Plaintiffs' voluntary withdrawal of some 40% of the request. Nevertheless, since the Board has now unequivocally adopted those findings and reasons as its basis, denial of the amended request was clearly

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insufficient, unsupported by competent evidence, unreasonable, and otherwise contrary to law:

A.

Size of business designation on Land Use Map is flexible guide only. It is not sufficient reason to deny request which is consistent with the Plan and conforms to contemplated commercial use.

Section 7 of the Leon County Ordinance 80-69, adopting the 1981 Comprehensive Plan, states that the Land Use Plan Map is intended to be a visual representation of certain policies in the Plan and is to be interpreted as a flexible guide; and that when a development proposal is deemed consistent with the Plan, "the map shall be changed."

Accordingly, a single tract amendment to the Land Use Map should be approved to conform the map to development boundaries of the use allowed. In other words, if the zoning change for this particular piece of property is otherwise consistent with the Comprehensive Plan, the general business designation on the Land Use Map for this general location should be conformed to the actual boundaries of the changed zoning.

Furthermore, the requested depth for commercial use on the subject property would discourage undesirable strip development consistent with Plan policies. As amended, the depth of the requested commercial use conforms to the approximate depth of

existing commercial tracts in the area,[5] and a large preservation area is left to eliminate intrusion into the A-2 district. Deed restrictions on nearby property prevent further expansion of commercial zoning beyond this location (which would violate the Land Use Map anyway).

Denial because the requested area is somewhat larger than the general business area depicted on the Land Use Map is therefore contrary to law.

B.

No inconsistency with Comprehensive Plan Policies

1. Locational policy. The locational policy for general business designation specifies a location "near the center of several neighborhoods, at high access points such as the intersection of arterial streets or expressways." (Staff Analy., p. 9). It was undisputed that the request location was centrally located to several neighborhoods and was near a high access point, i.e. the intersection of an arterial highway and a major collector road carrying large traffic volume. Furthermore, the intersection, including the subject location, is already designated for general business use on the Land Use Map, which per Ordinance 80-69 is a visualization of plan policies. The Land Use Map has therefore already determined this area to be in the center of several neighborhoods at a high access point, and general business

[5]See Williams v. City of North Miami, 213 So.2d 5, 7-8 (Fla. 3rd DCA 1964); McGee v. City of Cocoa, 168 So.2d 766, 769 (Fla. 2nd DCA 1964)(amendment making lesser change than original zoning request, i.e. reducing scope of the request, does not require new notice).

designation is necessarily consistent with the Plan locational policy. The contrary finding is unsupported by the evidence and in violation of law.

2. Element policies. The Board found three element policies were promoted by the request[6] and four were hindered. On balance, the request was deemed inconsistent because it hindered more element policies than it promoted.

However, at least four element policies which the Planning Commission reported as promoted by the request, i.e., those policies aimed at discouraging "strip commercialization", were not included.[7] The Planning Commission found that Plaintiffs' proposed land use "would have the advantage of allowing internal development of the tract without forcing the commercial enterprises closer to the road and creating a strip type development." (Report, p. 11). Yet the staff consistency analysis inadvertently noted the polices

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[6]The following policies were found promoted (Staff Analy. pp. 13, 17):

--Encourage the protection and restoration of historically valued properties.

--Strengthen the ad valorem tax base by attracting appropriate business and industry to the area and encouraging expansion of existing businesses and industry.

--Limit commercial access to arterial thoroughfares.

[7]The relevant plan policies include (Staff Analy. pp. 14, 15, 17, 18):

--Encourage the concentration of commercial development; encourage concentration of commercial activity as an alternative form of development.

--Minimize the amount of additional "strip" commercial development; encourage concentration of commercial activity as an alternative form of development.

--Discourage strip commercial and isolated office, educational, and shopping facilities.

--Discourage "commercial strip" re-zoning.

discouraging strip commercial development as "not applicable" to Plaintiffs' request. Since these promoted policies were not considered in the balancing process, the Board's findings applying the plan element policies were incomplete. When the omitted policies are properly considered, the request is clearly consistent with the Comprehensive Plan element policies (seven policies promoted, four hindered), and the finding of inconsistency is unsupported and contrary to law.[8]

Even disregarding failure to apply the anti-strip commercialization policies, Plaintiffs' request is still consistent with the Comprehensive Plan because the element policies cited as hindered were either inapplicable, inappropriate or unreasonable to apply to the subject property.

The policy relating to preservation of agricultural land is inapplicable because this location is already designated for general business on the Land Use Map and commercial establishments already exist in the area. Furthermore, the amended request clearly preserves a large agricultural perimeter area within the property away from existing roads.[9]

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[8]See F.S. §163.3194(4)(court may consider reasonableness, completeness, and appropriateness of Comprehensive Plan in relation to government action. See also Machado v. Musgrove, 519 So.2d 629, 635 (Fla. 3rd DCA 1987)(court should consider fundamental fairness of plan application, including unreasonableness of its application, incompleteness or internal inconsistency).

[9]See Hall v. Korth, 244 So.2d 766, 767 (Fla. 3rd DCA 1971)(perimeter land in proposed development carrying zoning of adjoining lands outside development clearly protects adjoining property owners).

The policy relating to allowance of adequate land for manufactured housing and mobile homes is unreasonable to apply here. Plainly the area is not suitable for trailers or cheap housing. The existence of adjoining commercial uses, and the existing general business designation for this location on the Land Use Map contradict this policy and make its application unreasonable.

The policy to encourage development in areas already served by sanitary sewer is also inapplicable or unreasonable to apply. Central sewer was required to be available to the subject location as a commitment of development pursuant to the limited use site plan zoning. (P.C. Report, p.9; Zoning Code §6.26). Since the requested zoning would not become effective until the location was served by sanitary sewer, the intent of this policy is promoted. As stated in section 5(c) of Ordinance 80-69, proposals are deemed consistent if they "conform generally with the overall spirit and intent of the policies of the Local Government Comprehensive Plan." There is no sound reason to distinguish between whether the sewer is available before zoning, or whether the zoning is not effective until sewer is available. In any event, significant commercial development has already occurred in the area mooting this policy as to the subject property.

The fourth policy is to allow increased densities in proximity to major arterials, employment centers, and major public facilities in areas presently served by existing public utilities. This policy is inapplicable or unreasonable to apply to the subject

property for the same reasons discussed above. Moreover, the undisputed evidence shows that public utilities such as water and electricity service were serving the area. The policy does not specify that sanitary sewer or every type of utility must be present. Regardless, the policy deals only with allowing increased densities of use, which applies to the population or number of dwelling units per area of land. See Plan definition of "density". Ordinance 80-69, p. 136. The policy does not deal with intensity of use, which applies to commercial and industrial development. Since this policy serves to encourage placement of denser residential development, such as multi-family housing, near existing facilities and utilities, it is inapplicable to the subject commercial request.

In sum, the four element policies found to be hindered are actually inapplicable, unreasonable to apply, or promoted. Since three element policies are acknowledged to be promoted, and in reality at least seven are promoted, and since the Land Use Map reflecting the Plan policies expressly contemplates the commercial suitability of the subject property, the request as amended is in law and actual fact consistent with the Comprehensive Plan.[10]

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[10]See e.g. St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989)(circuit court properly reviewing denial of zoning request determined that the Comprehensive Plan should be reasonably interpreted to allow for commercial zoning).

C.

CP District is Appropriate.

The CP District is intended to apply to areas "suitable for general commercial and office development abutting urban area arterials and rural arterial roadways." Another intent is "to promote a non-cluttered visual appearance along arterial roadways functioning as an entrance to the urban area." Zoning Ordinance §6.15. The existing general business designation on the Land Use Map has determined that the area is suitable for general commercial use, and it is undisputed that Thomasville Road is an arterial roadway which channels traffic from the north into the urban area. Plaintiffs' site plan commits to limited access, moves development to the interior of the property, and enhances traffic movement and safety, in total satisfaction of CP District standards. As both alternate purposes of the CP District are met by the amended request, denial on this basis was unlawful.

D.

Lack of certainty and difficulty of decision are not sufficient reasons.

Although finding that continuation of the existing development pattern in the Bradfordville area is "a valid assumption", the Planning Commission considered the request "premature" because continuation was not a certainty. The Planning Commission also reasoned that a decision was difficult while activities were still under way to assess the "best alternatives" for Bradfordville.

Planning for the future is necessarily based on the valid assumptions. Certainty is not required, and it is an impossible

and illegal standard. In any event, an assumption of continued future growth was not even needed because the unrebutted expert evidence established that commercial underdevelopment existed. Contrary views by members of the public opposing the request were not competent evidence.[11]

Plaintiffs delayed submitting their request for more than two years at the request of the Planning Commission while study criteria were developed. It is unreasonable to expect property owners to postpone use of their property any longer. The difficulty of making a decision in the indefinite future is not a legal basis to deny a land use request.

In reality, lack of certainty or difficulty in making a decision are simply pretext, and not reasons. As reiterated in Machado v. Musgrove, supra, 519 So.2d at 634:

> "The law of Florida is committed to the doctrine of the requirement that zoning ordinances . . . must be predicated upon legislative standards which can be applied to all cases, rather than to the theory of granting . . . the power to arbitrarily decide each case entirely within the discretion of the members (of the Board)."

The real reason for denial of the request was announced early at the September 26th hearing when a commissioner remarked: "I just think it's premature. I don't thing the neighbors want it." (Board Tr., p. 8). Apparently the Board erroneously believed that until all the neighbors (or at least the vocal ones) favored the

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[11] E.g. Bailey v. City of St. Augustine Beach, 538 So.2d 50, 52 (Fla. 5th DCA 1989)(unrebutted expert testimony deemed to establish facts offered; opinions of neighbors were considered public opposition insufficient to defeat the zoning request).

requested land use, it was premature to consider. The law is well-established that objections of residents of surrounding neighborhoods do not constitute a sound basis for denying re-zoning or other land use requests.[12] It is still illegal in this State for popular plebiscite to control land use decisions.

RELIEF REQUESTED

The Board did not find any harm caused by the request, and objections voiced by residents are not competent evidence anyway.[13] The reasons for denial now adopted by the Board are unreasonable, unlawful, and unsupported. For the most part, the reasons are inapplicable because commercial use east of the proposed roadway was withdrawn. Since the request as amended is not in conflict with the Comprehensive Plan, and no public harm was shown, the request as amended should be granted.[14] This is especially true since undisputed evidence showed the impracticality of any other

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[12]See, e.g. Salvation Army v. Metropolitan Dade County, 523 So.2d 611, 614-615 (Fla. 3d DCA 1988). Also see notes 11 & 13.

[13]E.g. Flowers Baking Co. v. City of Melbourne, 537 So.2d 1040 (Fla. 5th DCA 1989) rev.den., 545 So.2d 1366 (Fla. 1989)(objections of local residents on fears of increased traffic are not competent evidence to deny land use application); City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974)(non-expert opinions of citizen protesters regarding adverse environmental impact were speculative and unsubstantiated).

[14]See Hall v. Korth, 244 So.2d 766 (Fla. 3rd DCA 1971); Fishers Island, Inc. v. Dade County, 47 Fla. Supp. 129, 151-52 (Dade Cir. Ct. 1977).

use.[15]

Accordingly, Plaintiffs request the Board to approve their request as amended.

W. Taylor Moore, as agent

STATE OF FLORIDA
COUNTY OF LEON

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, personally appeared W. TAYLOR MOORE, to me known to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same.

Witness my hand and official seal in the County and State aforesaid this 12th day of August, 1991.

Notary Public

Notary Public, State of Florida
My Commission Expires Oct. 23, 1993
Bonded Thru Troy Fain - Insurance Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to David LaCroix, Esq., 308 East Park Avenue, Tallahassee, FL this 12th day of August, 1991. I ALSO CERTIFY that a copy of the foregoing was hand delivered to the Chairman of the Leon County Board of County Commissioners, Leon County Courthouse on this date.

M. Stephen Turner
BROAD AND CASSEL
820 E. Park Avenue, Bldg. F
P.O. Drawer 11300
Tallahassee, FL 32302-3300
(904) 681-6810

[15]See St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989)(unreasonable to deny given existing commercial zoning in the area of a major highway passing through residential neighborhoods). Also see Dugan v. City of Jacksonville, 343 So.2d 103 (Fla. 1st DCA 1977), and City of Hialeah v. Cama Corp., 360 So.2d 1155 (Fla. 3rd DCA 1978), holding denial unreasonable when commercial development already existing on thoroughfare with high traffic volumes.

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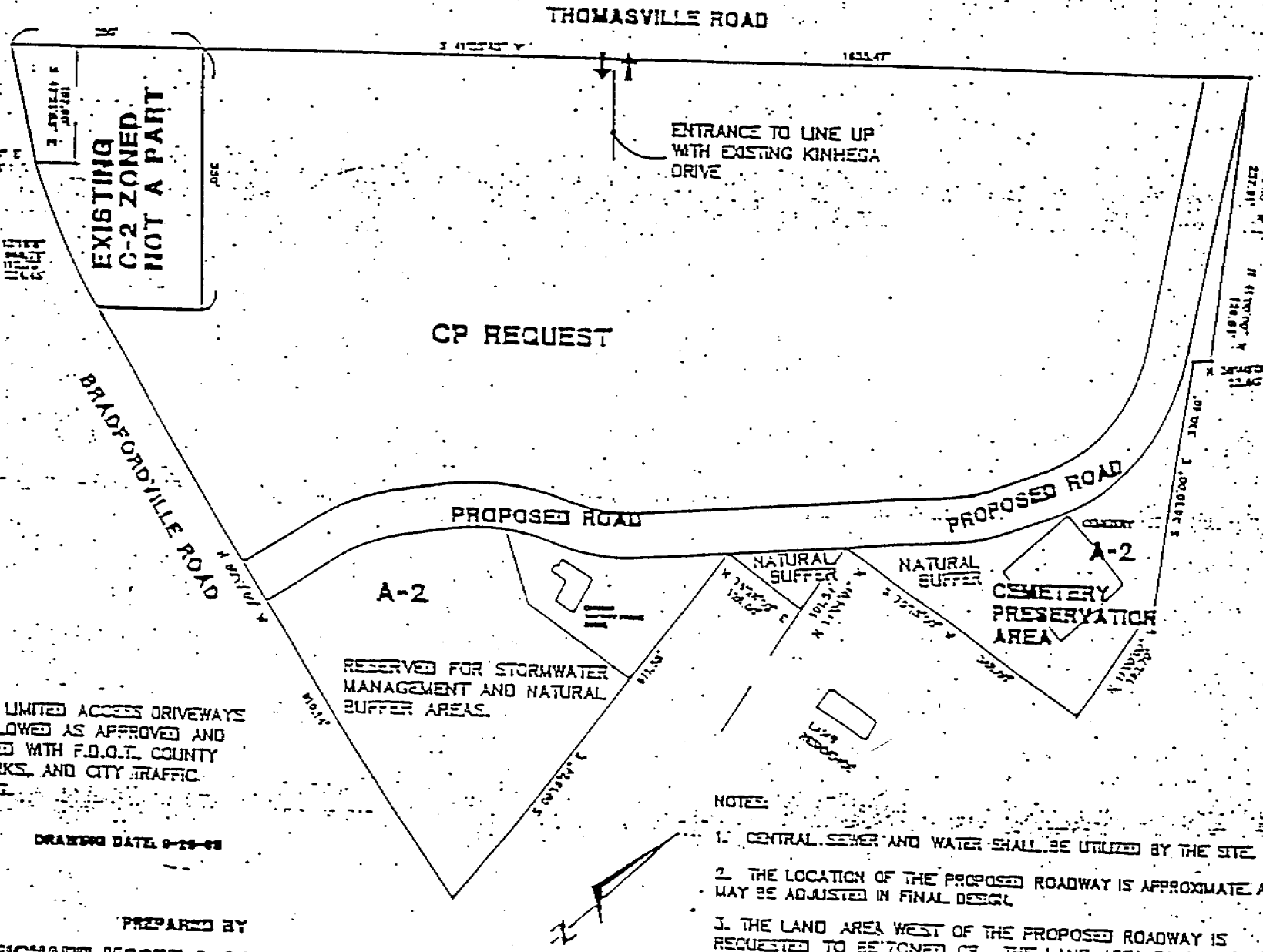
Bradfordville Junction

Tallahassee, Florida

Limited Use Site Plan

O'Connor Development Corp.



AMENDED LIMITED USE SITE PLAN

ADDITIONAL LIMITED ACCESS DRIVEWAYS MAY BE ALLOWED AS APPROVED AND COORDINATED WITH F.D.O.T., COUNTY PUBLIC WORKS, AND CITY TRAFFIC ENGINEERING.

DRAWING DATE: 9-29-03

NOTES:

1. CENTRAL SEWER AND WATER SHALL BE UTILIZED BY THE SITE.
2. THE LOCATION OF THE PROPOSED ROADWAY IS APPROXIMATE AND MAY BE ADJUSTED IN FINAL DESIGN.
3. THE LAND AREA WEST OF THE PROPOSED ROADWAY IS REQUESTED TO BE REZONED CP. THE LAND AREA TO THE EAST OF, AND INCLUDING THE PROPOSED ROAD IS TO REMAIN A-2. THE TOTAL AREA REQUESTED TO BE REZONED IS APPROXIMATELY 19 AC. ±

PREPARED BY

RICHARD MOORE & ASSOC., INC.

DEVELOPMENT PLANNING • ENGINEERING DESIGN • ENVIRONMENTAL PERMITTING

304 E. MONROE ST., SUITE 2 • TALLAHASSEE, FLORIDA 32301 • 904-222-8478

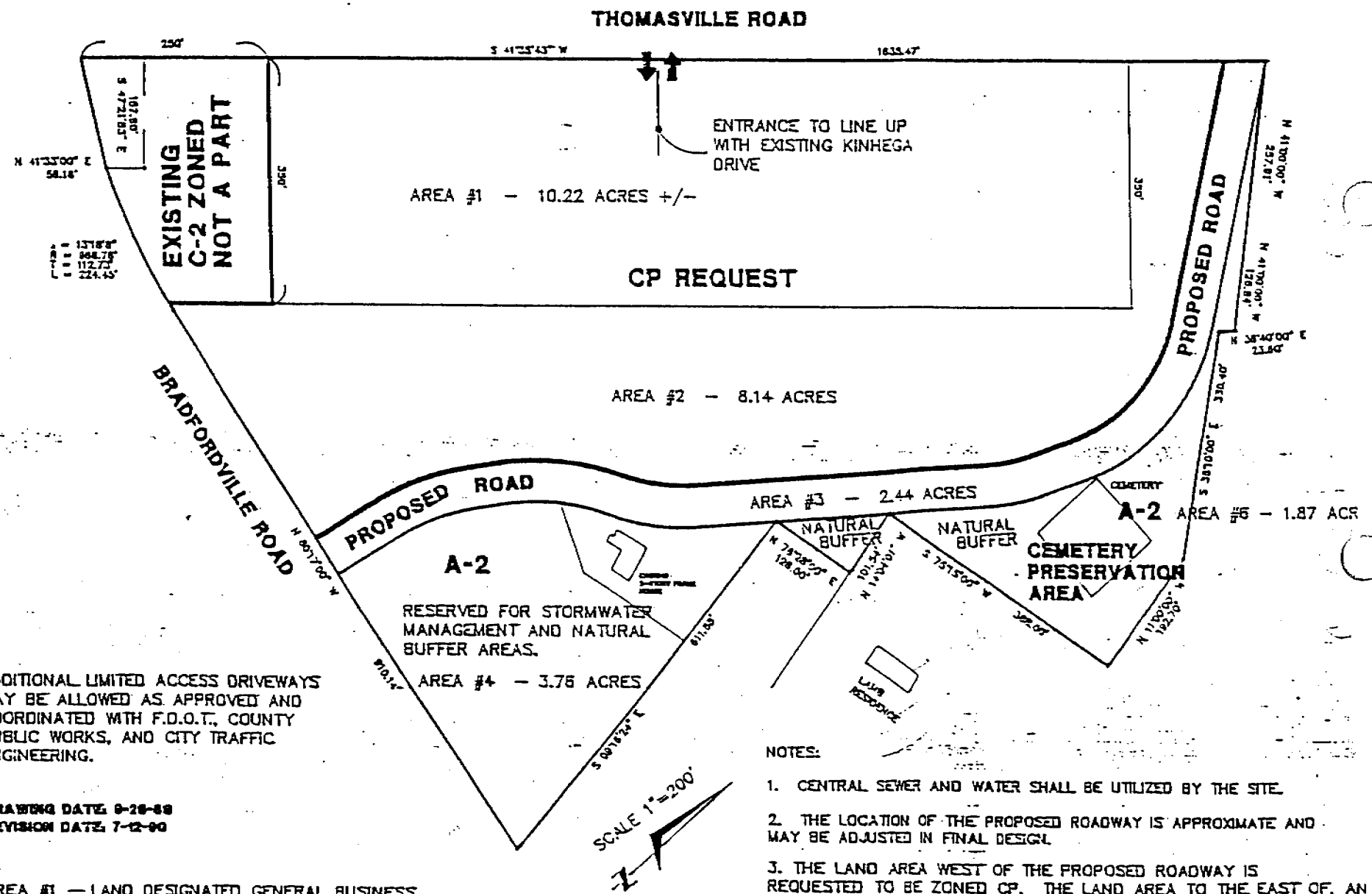
5-11

Bradfordville Junction

Tallahassee, Florida

Limited Use Site Plan

O'Connor Development Corp.



ADDITIONAL LIMITED ACCESS DRIVEWAYS MAY BE ALLOWED AS APPROVED AND COORDINATED WITH F.D.O.T., COUNTY PUBLIC WORKS, AND CITY TRAFFIC ENGINEERING.

DRAWING DATE: 9-26-89
REVISION DATE: 7-12-90

AREA #1 — LAND DESIGNATED GENERAL BUSINESS
AREA #2 — LAND PROPOSED FOR RE-DESIGNATION TO GENERAL BUSINESS
AREA #3 — PROPOSED ROADWAY

NOTES:

1. CENTRAL SEWER AND WATER SHALL BE UTILIZED BY THE SITE.
2. THE LOCATION OF THE PROPOSED ROADWAY IS APPROXIMATE AND MAY BE ADJUSTED IN FINAL DESIGN.
3. THE LAND AREA WEST OF THE PROPOSED ROADWAY IS REQUESTED TO BE ZONED CP. THE LAND AREA TO THE EAST OF, AN INCLUDING THE PROPOSED ROAD IS TO REMAIN A-2. THE TOTAL AREA REQUESTED TO BE REZONED IS APPROXIMATELY 19 AC +

(ADAPTED FROM TAB "D" TO ILLUSTRATE RELATIVE DIMENSIONS)

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