IN THE SUPREME COURT OF FLORIDA

MONTICELLO DRUG COMPANY, and
O'CONNOR DEVELOPMENT CORPORATION,

Plaintiffs, Petitioners,

vs.

CASE NO. 82,038

FIRST DCA CASE NO. 92-0946

LEON COUNTY,

Defendant, Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Petitioner O'Connor Development Corporation seeks review of the decision of the First District Court of Appeal dated May 21, 1993, appearing at 18 F.L.W. D 1307 (App. 1).

Petitioner timely filed a Motion for Rehearing from this decision on June 3, 1993. (App. 2). The First District denied rehearing by order entered June 29, 1993. (App. 3). Petitioner's Notice to Invoke Discretionary Review was timely filed on July 7, 1993. (App. 4).

The First District decision reversed the judgment of the Circuit Court for Leon County. (App. 5).

The First District held that owner-initiated individual parcel rezoning decisions under Florida Comprehensive Planning laws are legislative in nature. Accordingly, a written order with legally sufficient findings and reasons supported by competent evidence is not required. Further, an application amendment withdrawing part of the request is not allowed.

This decision directly and expressly conflicts with decisions of this Court and other District Courts of Appeal on the same question of law, including Lee County v. Sunbelt Equities II, L.P., 18 F.L.W. D 1260 (Fla. 2d DCA, May 14, 1993) (App. 6), and Snyder v. Brevard County, 595 So.2d 65 (Fla 5th DCA 1991), now pending review in this Court, jurisdiction accepted, 605 So.2d 1262 (Fla. 1992).

STATEMENT OF THE FACTS

O'Connor Development Corporation, as agent and optionee, owned or controlled 28 acres of property in Leon County. On behalf of Petitioners below, O'Connor initiated proceedings to rezone 18 acres of the property to Commercial Parkway District and 10 acres to Office and Professional Commercial District.

Although the property was designated in substantial part for General Business (and the remainder as Urban Undesignated), the County planning staff recommended that the rezoning be denied as inconsistent with the comprehensive plan and the land use map which provided for a general commercial area somewhat less in size than the 28 acres requested.

Shortly after the adverse recommendation, the application came before the Board of County Commissioners for decision on September 26, 1989. At the hearing, the Petitioners' representative reduced the scope of the requested rezoning to meet the objections raised by the planning staff. Specifically, Petitioners withdrew the request to rezone 10 acres of the property, and asked that only the 18 acre portion of the property be rezoned for commercial use.

The Board chose not to remand for further review by the Planning Commission, but proceeded to simply deny the application without stating any reasons. No written order was issued providing any factual findings or reasons to support the denial action.

Petitioners sought judicial review, asserting that no possible basis for denial of the reduced application had been presented.

While the case was pending before the Circuit Court, the First District decided Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA

1990). The Parker decision required that an owner-applicant file a verified administrative complaint with the local authority and await a response as a prerequisite to any court action.[1]

The County moved to dismiss Petitioners' action for failure to comply with Parker. The Circuit Court ruled that the County must issue a development order containing findings and reasons sufficient to satisfy procedural due process requirements, and the Circuit Court remanded the case to the County for entry of an appropriate order.

The County responded by stating that its reasons for the denial action were set forth in staff reports relating to the unamended application. Petitioners then filed their verified complaint with the Board, and the case proceeded to resolution of the merits.

The Circuit Court quashed the County's denial action. The Circuit Court reasoned that an owner-initiated single parcel rezoning under the standards of a comprehensive plan was a quasi-judicial action resulting in a reviewable "development order." Since Petitioners reasonably withdrew part of their application, they were entitled to a written development order with findings and reasons for denying rezoning of the 18 acre remainder portion. The Circuit Court also found on the merits that the denial action was arbitrary, unsupported, and illegal, and that Petitioners were entitled to have their amended application approved.

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[1] The Parker case and its companion subsequently held that the County was not required to issue any written order, and that judicial review by writ of certiorari no longer existed. These rulings are presently under review by this Court. See Parker v. Leon County, 601 So.2d 1223 (Fla. 1st DCA 1992), review of certified question granted, Case No. 80,230; and Emerald Acres Investments, Inc. v. Leon County, 601 So.2d 577 (Fla. 1st DCA 1992), review of certified question granted, Case No. 80,288.

The County sought review by writ of certiorari in the District Court of Appeal. Only procedural issues were presented; the merits of the Circuit Court's decision that the denial action was arbitrary, unsupported and illegal were neither argued nor decided.[2]

The First District held that the rezoning application proceedings before the County Board were quasi-legislative; and that no written order was required anyway, citing Emerald Acres Investments, above n. 1, 601 So.2d at 580. See 18 F.L.W. at 1309, and n. 1. The First District apparently determined that since the County was not required to issue any written order, Petitioners' verified complaint was untimely, and the trial court was foreclosed from any consideration of the merits under the Parker - Emerald Acres decisions, which are now under review in this Court. The First District also held that the County Board was not required to consider the amended (downscaled) application.

SUMMARY OF THE ARGUMENT

The First District's decision expressly and directly conflicts with other appellate courts' decisions holding that owner-initiated single parcel rezoning proceedings are quasi-judicial and require a written order with findings and reasons as an element of essential procedural due process.

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[2] The Court's observation 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 Commission" is apparently dicta. The Circuit Court obviously found to the contrary, i.e., that any possible meritorious objections were cured by the amended application. This finding was unchallenged and could not be reviewed by second appeal anyway. See Education Dev. Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989). The District Court was obligated, under Education Dev. Center, above, not to revisit the Circuit Court's judgment of the facts in a zoning case.

ARGUMENT

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH SNYDER v. BOARD OF COUNTY COMMISSIONERS, 595 So.2d 65 (FLA. 5TH DCA 1991), REVIEW PENDING, CASE NO. 79,720 (FLA.) AND LEE COUNTY v. SUNBELT EQUITIES II LTD. PART., 18 F.L.W. D 1260 (FLA. 2D DCA 1993).

Both the Fifth District and the Second District have concluded, contrary to the First District's decision here, that a development order denying an owner-initiated single parcel rezoning on grounds of inconsistency with the comprehensive plan is a quasi-judicial action. The Fifth and Second Districts held that, as a matter of fundamental due process, such proceedings must result in a written order specifying fact findings based on competent evidence and standards in the plan that justify the denial.

The Fifth District's decision in Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991), recognized that the application of legislatively-adopted plan policies to a specific individual and parcel is quasi-judicial action. Id. at 79-80. In such proceedings due process requires:

> . . . [s]pecific written, detailed findings of fact must be entered by the zoning authority to support any decision denying the landowners' requested use of their land. Id. at 80.

The court summarized its reasons as follows, id. at 81:

> Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to

> support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law (i.e., under general comprehensive zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken.

In Lee County v. Sunbelt Enterprises II Ltd. Part., 18 F.L.W. D 1260 (Fla. 2d DCA 1993), the Second District followed the above-quoted reasoning from Snyder and held:

> We believe a fair and workable solution is to adopt the functional analysis of Snyder, which is consistent procedurally with our prior decision in Manatee County v. Kuehnel. That is, we agree that site-specific, owner-initiated rezoning requests are sufficiently judicial in character that final administrative orders are thereafter appropriate for appellate review.
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> * * *
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> The effect of labeling rezoning decisions as quasi-judicial is to refer them to an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches. Because these decisions today are inextricably linked with property rights-related claims, we view this shift toward enforced neutrality as salutary. The evolving law of property rights, exemplified by Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S.Ct. 2886, 120 L.Ed. 798 (1992), does not augur well for local governments who are reluctant to justify their decisions with explicit references to evidence and public policy. If reached under a veil of silence, even honest land-use decisions are vulnerable to charges of arbitrariness or improper motive. 18 F.L.W. at D 1262.

Snyder and Lee County recognize that passage and implementation of the 1985 comprehensive planning law has ushered in an era of fairness and rationality in land use decision making. In making land use decisions, local governments must apply the standards of their comprehensive plan ordinance and other laws, and thus are acting quasi-judicially in deciding individual applications for use of

property under the comprehensive plan standards that govern all individual land use decisions, regardless of form.

The requirement for a written development order specifying what plan standards are applied to an individual application is essential to implement a standard-based decision process. The requirement assures that law, reason and uniformity are observed in applying plan standards to individual land use applications, and also reduces the influence of arbitrary political preferments, ensuring the property owner's access to the courts to correct arbitrary and illegal decisions.

The First District's ruling, in direct and express conflict, relied on pre-comprehensive plan cases and held that such decisions were quasi-legislative, and do not require any written order or supportable findings or reasons, 18 F.L.W. at D 1309:

> The trial judge also erred in determining the Board's action was quasi-judicial in nature. This finding is contrary to decisions of the Florida Supreme Court and this Court, which hold that zoning and rezoning decisions are legislative in character. (citation to pre-comprehensive planning law cases omitted)....
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> In reaching his conclusion, the trial judge relied upon Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991), jurisdiction accepted, 605 So.2d 1262 (Fla. 1992).
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> * * *
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> We decline to adopt the reasoning set forth in Snyder....

The First District cited its prior decision in City of Jacksonville Beach v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984), rev.

den., 469 So.2d 749 (Fla. 1985)[3], that timing of a zoning ordinance was a wholly discretionary legislative judgment. This view was expressly rejected in Lee County, above, 18 F.L.W. at 1265, requiring that timing-based denial be supported by competent substantial evidence and justified by reasons.[4]

The First District also cited an Oregon case in support of its position, yet Oregon follows the view adopted by the Fifth and Second Districts that individual applicant rezonings are quasi-judicial and must be sufficiently supported.[5]

The First District's decision is based entirely upon the faulty premise that proceedings on an individual rezoning application are quasi-legislative and that due process safeguards are inapplicable. If this premise falls and adherence to due process is required, then Petitioners could not be denied the opportunity to modify their application to eliminate part of the relief requested. Compare All-Risk Corp. v. State Dept. of Labor and Emp. Security, 413 So.2d 1200 (Fla. 1st DCA 1982) (abuse of discretion to deny nonprejudicial amendment in administrative proceeding); Key Biscayne Council v. State Dept. of Natural Resources, 579 So.2d 293 (Fla. 3d DCA 1991)

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[3] The Grubbs opinion was authored by the Judge Barfield, who also wrote the opinion below, and who joined the Emerald Acres decision holding that no written order is required.

[4] It is most ironic that the First District would be concerned with any timing issue, since the County's 1980 comprehensive plan horizon was coming to an end at the time of Petitioners' application. There could be no possible claim that the use envisioned by the comprehensive plan should be allowed later, since the end of the plan had been reached.

[5] See Fasano v. Bd. of County Commissioners, 507 P.2d 23 (Ore. 1973). Fasano is a landmark case cited in both Snyder and Lee County.

(same). A claimant or applicant in a judicial type proceeding, as a matter of fundamental fairness, may always withdraw part of the claim or relief sought without having to start the process anew. Due process required that Petitioners' application as reduced in scope be administratively determined, and not ignored on grounds unrelated to the merits.[6]

CONCLUSION

Under Snyder and Lee County, individually-initiated rezoning proceedings are quasi-judicial and must result in an order satisfying due process requirements. The Circuit Court properly remanded the case to the Board for entry of a written order with findings and reasons, then proceeded to decide the case on the merits.

The First District's decision creates express and direct conflict with Snyder and Lee County as to the nature of site application rezoning proceedings and the applicability of due process safeguards, and creates public confusion affecting a multitude of land use decisions, and therefore merits review by this Court.

Finally, the First District's citation to and reliance on the Parker - Emerald Acres decisions establishes an additional basis for conflict since these decisions are pending review in this Court. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

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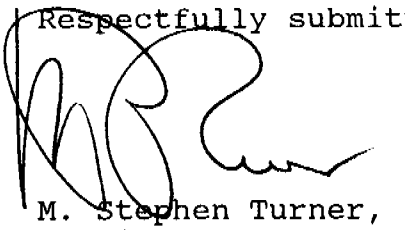
[6] Florida court decisions universally encourage amendments to achieve compromise regardless of how the proceeding is characterized. Even in pre-comprehensive plan decisions where rezoning was deemed quasi-legislative, an applicant was always permitted to downscale its application to resolve objections raised in the course of review. 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). Thus the decision below creates confusion and inconsistency with established practice even before passage of the comprehensive planning law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to David La Croix, Esq., Pennington, Haben Law Firm, 3375-A Capital Circle, N.E. Tallahassee, Florida 32308, by U.S. mail, this 14 day of July 1993.

Attorney