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IN THE SUPREME COURT OF THE STATE OF FLORIDA

4TH DCA CASE NO.: 93-3025

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MARTIN COUNTY,

Petitioner, CASE NO. 87,078

vs.

MELVYN R. YUSEM, ETC.,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Yusem has devoted nearly three-fourths of his brief to arguing the facts, and trying to point out "misstatements" or "gross misstatements" by the County. Martin County has accurately and objectively stated all of the facts relevant to the certified question. Martin County believes that it will assist the Court best to address the legal arguments raised by Yusem and his amicus first and utilize the remaining space in this brief to respond to as many of Yusem's mischaracterizations of the evidence as are possible. To provide additional assurances to the Court that Martin County has correctly stated the facts of this case, Martin County will cite to the record by page and line, and will provide full quotes whenever space permits.

REPLY ARGUMENT

I. THE ARGUMENTS MADE BY YUSEM AND HIS AMICUS PROCEED FROM MISUNDERSTANDINGS OF FUNDAMENTAL PRINCIPLES OF GROWTH MANAGEMENT LAW AND THE FACTS OF THIS CASE.

Yusem's and his amicus's focus on Yusem's specific property and only the issues of the zoning or future land use map misconstrues the fundamental nature of comprehensive planning. What they fail to understand is that planning examines the plan, not simply the site. To evaluate Yusem's amendment, it was necessary to consider its implications on the area and the existing comprehensive plan. The amendment thus implicated at least an assessment character and development in the 900 acre surrounding area, the present vision and focus in the plan for present countywide growth, and particularly the County's Capital

Improvements Plan and the effect that this amendment would have on that plan.

Pacific Legal Foundation's claims that the County is suggesting a new rule of law is misguided. The Pacific Foundation opines: "The County suggests a new rule, that if the application is intended to change or is not consistent with existing law, it is legislative and not quasi-judicial." However, this is certainly not a "new" rule -it is the rule. The law is axiomatic that legislation determines what future rules shall be for future transactions. Black's Law Dictionary "Legislative act" and "Legislative function" (5th Ed. 1979); West Flagler Amusement Co. v. State Racing Commission, 165 So. 64, 65, (Fla. 1935)(Legislative acts prescribe "what the rule shall be with respect to transactions to be executed *in the future, in order that the same shall be considered lawful.*") A change in the existing law, such as an amendment to a comprehensive plan, is a legislative act because it will be applicable with respect to transactions to be executed in the future, in order that they shall be considered lawful.

The Foundation also argues that the County "would have every application for a zoning change, variance, or special exception be legislative and beyond the significant review of court." Perhaps unknown to the Pacific Foundation, the law is quite clear in Florida that these matters are already generally recognized as quasi-judicial actions, Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993)(rezonings); Park of Commerce Associates v. City of Delray Beach, 636 So. 2d 12 (Fla.

1993)(development orders), and the County has no intention to change this doctrine of law. Each of these is the application of the law (e.g., ordinances relating to special exceptions) rather than the formulation of new law. Thus, if the applicant sought a special exception under the existing ordinance for special exceptions, it would be quasi-judicial if it otherwise met the criteria stated in Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993). On the other hand, if the applicant sought to change the ordinance on special exceptions in order to facilitate a special exception that he desired, the proceeding on the amendment would be legislative.

Applications for zoning change, variance, or special exception are not at odds with existing laws unless they actually seek to change the language in those laws. That is what fundamentally distinguishes these matters from amendments to comprehensive plans, because amendments actually change the existing laws.

The Florida Legal Foundation erroneously assumes that the relief sought by Yusem does not require an amendment to the Martin County Comprehensive Plan, but merely a change in the designation of the property on the County's future land use map. From this incorrect assumption, the Foundation contends that the proceeding before the County Commission was not an amendment to the comprehensive plan but a mere rezoning application.[1] The Florida Foundation obviously lacks an understanding of the Growth

[1] This may be but another argument to try to more closely analogize this case to Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).

Management Act, comprehensive planning in general, the Martin County Comprehensive Growth Management Plan, and the particular facts of this case. The future land use element, and the future land use map, are important and fundamental elements of the comprehensive plan. §163.3177(6)(a), Fla. Stat. (1995). Future land use map designations are neither meaningless nor irrelevant.

It is simply undeniable that Yusem had to amend the Comprehensive Growth Management Plan. This is true regardless of the property's location in the area delineated by the Plan as the primary urban service area. The rural density land use map designation for this property and the 900 acres surrounding it were valid designations in this plan. The existing plan (including the future land use plan for the 900 acre tract) had been duly prepared and adopted in accordance with the Growth Management Act, and approved by the Department of Community Affairs. The Florida Legal Foundation's perception that the future land use map designation on the Yusem property does not coincide with the inclusion of the property in the plan's urban service area, and can therefore be simply disregarded, is the product of its failure to recognize that both future land use maps and the boundaries of the urban service area are future oriented, policy statements and are perfectly valid even if they presently appear to be different. The testimony on this point was clear and undisputed. Henry Iler, the County's Director of Growth Management testified:

> Q. Does that mean you can put rural lands in the Primary Urban Service Districts?
>
> A. You certainly can. This simply means the urban

services to serve those rural lands are not now programmed in our comprehensive plan. It doesn't mean they might not be programmed in the future.

(T. p. 642, l. 13-18)

Robert Pennock, Bureau Chief of the Bureau of Local Planning at the Department of Community Affairs, who oversaw the review of all local plans for compliance with the Growth Management Act, corroborated Mr. Iler's testimony:

Q. .... Is it inconsistent in the Martin County Comprehensive Plan for a wedge of land which is presently designated rural density residential to appear in the Primary Urban Service District?

A. Again, as I was trying to say earlier, it's not necessarily inconsistent because there's many different factors that you have to consider when you're looking at something like that.

Q. Is the very fact that rural density land is designated and located in the Martin County Comprehensive Plan's Primary Urban Service District inconsistent with the Martin County Comprehensive Plan?

A. Obviously not. It's part of the plan, it's in the plan now.

(T. p. 755, l. 8-23)

Linda McCann, Yusem's attorney on the amendment request also agreed that the future land use map designation on the property was not irrelevant:

Q. Linda, you would agree, wouldn't you,... that without the land use change in this case and the change to a density permitted from one unit per two acres to two units per acre, there was no way that the County Commission could have legally approved the PUD that was requested?

A. I would agree with that, yes.

Q. That's patently inconsistent with the comprehensive land use designation.

A. Right.

(T. p. 153, l. 18 - p. 154, l. 3)

II. YUSEM'S CITATION TO THOMAS PELHAM'S ARTICLE MISSTATES MR. PELHAM'S POSITION ON WHETHER COMPREHENSIVE PLAN AMENDMENTS ARE LEGISLATIVE MATTERS

Yusem's misleading citation to an authoritative article written by Thomas Pelham, a leading authority on the Growth Management Act and Florida's land use law, as support for Yusem's proposition that the Fifth District Court of Appeals decision in City of Melbourne v. Puma, 616 So. 2d 190 (5th DCA 1993), is controlling on this important issue, misstates Mr. Pelham's position, which is emphatically to the contrary[2]. The pages cited (282-83), simply discuss the procedural track that Puma took to the Supreme Court. What Mr. Pelham actually said about Puma is:

> Shortly after rendering its *Snyder* decision, the Florida Supreme Court injected another note of confusion into the quasi-judicial debate. Despite the fundamental importance of the issue involved, the court, in an enigmatic, four sentence per curiam opinion, remanded *City of Melbourne v. Puma* to the Fifth District Court of Appeal. Stating that the conflict which had prompted it to take jurisdiction of *Puma* had been resolved by its recent decision in *Snyder*, the Supreme Court remanded *Puma* "for further consideration consistent with our opinion in *Snyder*." .... This directive is puzzling and confusing because *Snyder* dealt with rezoning actions and *Puma* deals with comprehensive plan amendments. Applying the Fifth District's functional analysis of rezonings from *Snyder*, a local comprehensive plan is clearly a legislative action because it is a policy-setting document of general applicability. However, in *Snyder*, although the court stated that action resulting in the formulation of general policies a quasi-judicial act, it

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[2] Certainly, any attempt to imply that Mr. Pelham agrees with the proposition that comprehensive plan amendments are quasi-judicial matters misleads the Court and does Mr. Pelham a disservice.

> then ruled that comprehensive rezonings affecting a large segment of the public are legislative and that rezonings impacting a limited number of persons or property owners are quasi-judicial. In remanding *Puma* based on its decision in *Snyder*, is the court suggesting that local plan amendments, as modifications to a policy-making document, should be categorized as legislative acts? Or is the court indicating that plan amendments should be categorized as either quasi-judicial or legislative based on the number of persons or property owners affected by the amendment? The brief per curiam opinion provides no clues.
>
> ...
>
> Comprehensive plan amendments should be treated as legislative acts for both logical and practical reasons. Logically, as noted above, amendments to a legislatively adopted statement of general policy are legislative acts. Even if the comprehensive plan amendment consists of an amendment to the comprehensive plan's future land use map which is applicable only to a single tract of land, the amendment should be deemed legislative. The future land use plan map alone does not determine or control the uses which can be made of a particular tract of land. Rather, the comprehensive plan as a whole, including the future land use map and all of the other policies of the plan, consists of legislative policies that must be applied to determine what uses can be made of a specific tract of land.

Thomas G. Pelham, "Quasi-Judicial Rezonings: A Commentary on the *Snyder* Decision and the Consistency Requirement", 9 J. Land Use & Envtl. L. 243, 299-301 (1994)

III. YUSEM'S FOCUS ON THE PUD REZONING WHICH HE WOULD HAVE SOUGHT HAD THE PLAN AMENDMENT BEEN ADOPTED, AND ON "DEVELOPMENT ORDERS", MISDIRECTS THE ISSUE, WHICH IS A FUNDAMENTALLY DIFFERENT MATTER - THE AMENDMENT OF A COMPREHENSIVE PLAN

The issue before the court on this certified question is not whether an application for PUD rezoning is a quasi-judicial or legislative proceeding, or whether a purported *"sua sponte"* rezoning is quasi-judicial or legislative. Rather, it is whether

a comprehensive plan amendment is, or is not, a legislative matter. The law has been determined on the issue or rezonings. Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993); see also, Lee County v. Sunbelt Equities, Ltd., 619, So. 2d 996 (Fla. 2d DCA 1993). It has not been on the issue of comprehensive plan amendments. Compare, Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983); Rinker Materials Corp. v. Metropolitan Dade County, 528 So. 2d 904 (Fla. 3d DCA 1987)[3]; Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla.4th DCA 1994), review denied, 654 So. 2d 920 (Fla. 1995); Martin County v. Section 28 Partnership, Ltd., 21 F.L.W. D546 (Fla. 4th DCA February 28, 1996); Sarasota County v. Karp, 662 So.2d 718 (Fla. 2d DCA 1995)(holding comprehensive plan amendments legislative in nature) with Martin County v. Yusem, 664 So. 2d 976 (Fla. 4th DCA 1995); Florida Institute of Technology v. Martin County, 641 So. 2d 898 (Fla. 4th DCA 1994), review denied, 651 So. 2d 1195 (Fla. 1995)(finding comprehensive plan amendments quasi-judicial). Yusem's focus on the principles applicable to rezonings, and the alleged rezoning aspect of this case, or on the

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[3] Pacific Legal Foundation's arguments that Rinker is not applicable to this case simply demonstrates that the Foundation, a California organization, does not understand the fundamental features of Florida's Growth Management law.

The Pacific Foundation contends that Rinker is not authoritative because it involved a challenge to an ordinance. Obviously, under the Growth Management Act comprehensive plans and amendments to comprehensive plans are created by ordinance. See also (Exhibit 62, p. 1-9)(The Martin County Comprehensive Growth Management Plan is amended by ordinance.) The ordinance in question in Rinker was a future land use map amendment for a single parcel of land.

law applicable to "development orders", is misplaced. Neither this case, nor this appeal, are about a rezoning action or a development order. The transcript of the County Commission's action conclusively demonstrates that the Board's action related to the comprehensive plan amendment, not to Yusem's rezoning request.(Exhibit 62) The amendment had to be adopted before the County could consider the PUD. As noted in the previous point, this essential fact was confirmed by Linda McCann, Yusem's attorney. (T. p. 153, l. 18 - p. 154, l. 3) Applications for rezoning and for comprehensive plan amendments are completely different and separate processes. (T. p. 49, l. 6-14)[4]

The amendment of a comprehensive plan is not a "development order". A comprehensive plan is a guideline for future development. It can be likened to a budget as opposed to a checkbook. A comprehensive plan gives no rights in and of itself to present development. That must be established by a development order based on present conditions. In the oft cited case Maracci v. City of Scappoose, 552 P.2d 552, 553 (Or. Ct. App. 1976), the court observed:

> [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.

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[4] The District Court's observation that "The PUD would not have required an amendment of the comprehensive plan" is clearly incorrect. This point is beyond dispute. This error may assist in understanding how the District Court was led to err.

In his brief, Yusem's reference to "development orders" does not define the most important word - "development" - which is defined in the statute as well:

> ...the carrying out of any building activity... the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

§380.04(1), Fla. Stat. (1995)(adopted by reference by §163.3164(6), Fla. Stat. (1995). See, also, Robbins v. City of Miami Beach, 664 So.2d 1150 (Fla. 3d DCA 1995). As is evident from §380.04, Fla. Stat. (1995) actual, physical use or construction on property is the essential feature of "development". It was pointed out in the County's Initial Brief, as well as by the amicus, that there is a critical difference between an amendment to a comprehensive plan, which establishes or reestablishes the future vision or policy, and a development order, which serves to implement or observe that future vision or policy. Development does not occur, nor is it authorized, by merely adopting or amending a comprehensive plan or by designating a property on a comprehensive plan future land use map.

IV. LEGISLATIVE ACTS ARE REVIEWABLE UNDER THE FAIRLY DEBATABLE RULE

As a fall-back argument, Yusem suggests that the standard of review of this action, regardless of the fundamental nature of the challenged action and the time-honored and well reasoned doctrines comprising the present law, should be the "strict scrutiny" rule. Yusem simply wants this Court to abandon existing legal principles to afford him strict scrutiny review in a de novo action. These is

no basis for abandoning well reasoned, time honored doctrine to fashion a remedy for this one litigant.

As just noted, Yusem wrongly refers to the law applicable to development orders in arguing that review is by strict scrutiny. This law does not apply to comprehensive plan amendments. The fairly debatable rule applies. Section 163.3184(8), Fla. Stat. (1995) requires that the plan, as amended, be "in compliance" with the Growth Management Act. The amendment must be supported by adequate data and analysis, §163.3177(6)(a), Fla. Stat. (1995), and must maintain internal compatibility, §163.3177(2), Fla. Stat. (1995). Where the "consistency" of a *development order* with the plan has been defined by the courts, see, Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), review denied, 529 So. 2d 693 (Fla. 1988); Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), the "consistency" of a comprehensive plan amendment has been specifically defined in the statute:

> The Legislature finds that in order for the department to review local comprehensive plans, it is necessary to define the term "consistency." Therefore, for the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan, a local plan shall be consistent with such plans if the local plan is "compatible with" and "furthers" such plans. The term "compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term "furthers" means to take action in the direction of realizing the goals or policies of the state or regional plan. For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plans.

§163.3177(10)(a), Fla. Stat. (1995).

Notably, the Legislature has also specified that in reviewing a comprehensive plan or amendment for compliance with the Act, "the local plan or amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." §163.3184(9)(a), (10)(a), Fla. Stat. (1995). Moreover, the local government's determination that the amendment maintains internal compatibility also must be sustained if it is fairly debatable. §163.3184(10)(a), Fla. Stat. (1995).

Thus, unlike for development orders, the legislature has unequivocally provided the proper standard of review for comprehensive plan amendments - the fairly debatable rule.

Yusem's arguments that these undeniable directives in the statute should be disregarded are absurd. These sections of the statutes apply to amendments to comprehensive plans adopted after the passage of the Act, not, as Yusem contends, to amendments to pre-1985 comprehensive plans. See, e.g., B & H Travel Corporation v. Department of Community Affairs, 602 So. 2d 1362, 1365 (Fla. 1st DCA 1992). Further, §163.3184(9), Fla. Stat. (1995) also provides an administrative "compliance" challenge to a local government's decision not to adopt an amendment. See, City of Jacksonville v. Wynn, 650 So. 2d 182 (Fla. 1st DCA 1995) In such a challenge, the petitioner would claim that without the amendment the plan is not in compliance. Clearly, though he did not avail himself of this remedy, had he done so, the fairly debatable rule would have applied. §163.3184(9), Fla. Stat. (1995).

In this Court's decision in Board of County Commissioners of Brevard County v. Snyder, and in the cases that have followed Snyder, the courts have Court reaffirmed that local land use decisions that are legislative in nature are subject to review under the fairly debatable rule. Snyder, 627 So. 2d at 474; Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla.4th DCA 1994), review denied, 654 So. 2d 920 (Fla. 1995); Martin County v. Section 28 Partnership, Ltd., 21 F.L.W. D546 (Fla. 4th DCA February 28, 1996); Sarasota County v. Karp, 662 So.2d 718 (Fla. 2d DCA 1995). Of course, that holding follows a long line of precedent, and should be followed.

V. THERE IS NO NEED TO ABANDON THE ESTABLISHED PRINCIPLES OF CERTIORARI REVIEW SIMPLY BECAUSE THIS RESPONDENT DISMISSED HIS CERTIORARI PETITION.

Yusem argues that this Court should create a new judicial remedy for quasi-judicial proceedings. The County does not agree that such a departure from established principle is necessary. Less than three years ago, in Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), and Parker v. Leon County, 627 So.2d 476 (Fla. 1993) this Court held that the common law certiorari remedy was the proper means to challenge a quasi-judicial zoning proceeding, and that the strict scrutiny review required by §163.3194, Fla. Stat. (1995) for decisions implementing comprehensive plans is to be made in a certiorari

review.[5] Yusem's arguments that a different form of review is necessary for land use certiorari cases are disingenuous. They are not the result of a careful review of the practical or prudential necessities of certiorari law, but rather are the product of his decision to dismiss his certiorari petition and proceed with this later-filed original action. This Court should not create a new judicial remedy or cause of action merely because of one person's mistake. Every alleged deficiency with certiorari identified by Yusem can be avoided by proper preparation and a careful presentation, which are simple benchmarks for assuring adequate review of any quasi-judicial decision.

VI. THE DISTRICT COURT OF APPEALS HAS DIRECTED THAT YUSEM MAY SEPARATELY PRESENT HIS CLAIM THAT THE COMPREHENSIVE PLAN ITSELF WAS UNCONSTITUTIONAL AS APPLIED TO YUSEM'S PROPERTY.

Yusem's last argument, that other remedies are available, seems more as an afterthought than a well-considered argument. In certifying this case to this Court, the District Court of Appeals also remanded the case to the trial court to consider Yusem's alleged claim that the "comprehensive plan itself was unconstitutional as applied to his property". Martin County v. Yusem, 664 So.2d at 982. Thus, the District Court has already confirmed that other judicial remedies are possible. While amicus,

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[5] This review is conducted in the court's analysis of points two and three of the Vaillant/Haines City test. Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993); City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982); Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).

Dade County's, point that the statutory remedy is the sole remedy available to Yusem to challenge the County's plan or decision to reject the amendment, Martin County would agree that a Key Haven constitutional challenge is available. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982).

VII. PETITIONER, MARTIN COUNTY, HAS ACCURATELY STATED THE FACTS. YUSEM'S FACTUAL ARGUMENTS ARE WITHOUT MERIT.

At this point in the proceedings, there should be little dispute about the salient facts. Further, the certified question also should have narrowed the essential facts to those associated with the comprehensive plan amendment. It is therefore remarkable that Yusem devotes twenty-five pages of his brief to arguing the facts. Martin County is confident that a careful review of the record will show that Martin County's Statement of Facts accurately and objectively states the fundamental facts relevant to analyzing the certified question.

1. The relevant area is the 900-acre rural density tract that Yusem's property lies in the center of.

The area considered by the Board of County Commissioners was the 900-acre rural tract that Yusem's property lies in the center of. Yusem simply refuses to recognize the existence of this area. Over the course of this litigation, Yusem has identified several "areas" that he believes should be considered instead of the area considered by the County. In his Answer Brief, he now claims that the planning area for capital facilities planning is the relevant area. This area comprises 8,000 acres, or 12.5 square miles.

Yusem contends that this 8,000 acre area was identified by Henry Iler, the County's Director of Growth Management, and that Iler testified that the "planning area around Mr. Yusem's property is not 900 acres, but a very large part of the County, which includes intense residential and commercial development" citing (T. 681-689). Henry Iler never so testified. In fact. as the transcript actually demonstrates, Henry Iler testified that the planning area was the 900 acre rural tract:

> Q. (By Mr. Warner): ... What area are we in here?
>
> A. What area do you mean?
>
> Q. The area of the plan. Is it just Mr. Yusem's property on Salerno Road or between Salerno and Cove or what area are you talking about?
>
> A. This is a rural density part of the county.[6]

(T. 686, l. 15-21)[7]

The 900-acre tract was recognized as the relevant area by the District Court of Appeals, Martin County v. Yusem, 664 So. 2d at 976, as well as by the County's staff reports. It is specifically identified on Defendant's Exhibit 1. It was the focus of the Board discussions on May 1, 1990 and October 16, 1990 (Exhibit 31 p.

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[6] Actually, Yusem's counsel conceded that he was focusing his attention on a study area in the Capital Improvement Plan rather than the comprehensive planning area considered by the County. (T. p. 492, l. 12 - p. 493, l. 7).

[7] Yusem also contends that Harry King, the County's Plan Review Administrator, testified that restricting the view to the immediate 900 acres adjacent to his property "is not appropriate for planning purposes." The cited portion to the transcript (p. 490) does not support this baseless statement. Harry King never testified that it was not appropriate to consider the 900 acre tract.

1,3,18,39; Exhibit 62, p. 23,32,33). It was also identified and described by Harry King (T. p. 460, l. 12 - p. 461, l. 1), and David Taylor (T. p. 433, l. 1 - 19; p. 435, l. 9 - p. 437, l. 7)

The Plan also specifically identifies and describes this area as a reserve area for potential future urban development. Henry Iler testified:

> A. [There is] some text in the comprehensive plan which talks about the rural character, and I don't know if I should reference this, but the character of the area was extensively discussed in the staff report and this is simply just the plan's view of what the character of this area and the other rural density lands are.
>
> . . . .
>
> on page 4-14 (Exhibit 62)...
>
> A. There is a paragraph in the middle, it's a large paragraph and it just essentially gives the planning concept for this area.
>
> "It is noted that much of the vacant land total in the mid and western county planning areas - this is in the mid county planning district - is planned for relatively low density residential use and that large tracts of single-ownership residential and non-residential property is awaiting development approval.
>
> "However, Martin County has provided for development potential in these areas as future public services and infrastructure are planned for improvement.
>
> "These areas exist within and at the fringes of planned urban services (Figure 4-5) and reflect a potential reserve area for future urban/suburban development."

(T. p. 641, l. 7 - 642, l. 12)

Yusem also contends that this area was not rural in character and was the subject of significant change. The trial transcript (T. p. 433, l. 1 - 19; p. 435, l. 9 - p. 437, l. 7) and Exhibit 1 (an aerial photograph of the area) conclusively demonstrate that

the area was rural. The alleged "changes" referred to by Yusem at the bottom of page 18 all pertain to properties outside the 900-acre tract. (Exhibit 1)

2. The comprehensive plan does not eliminate policy making or planning discretion when amendments are requested by landowners.

Yusem's contention (or implication) that the County had to adopt his amendment because the Comprehensive Growth Management Plan allegedly contains requirements for amending the Comprehensive Growth Management Plan is simply wrong. The Comprehensive Growth Management Plan does not eliminate or restrict the Board's planning discretion. It merely contains recommendations or guidelines to consider in exercising that discretion. For instance, section 1-11C (Ex. 62, p. 1-8) only provides guidelines to the County staff for preparing its report and recommendation whether the proposed amendment can be approved. The language is quite clear: "*staff can*" - not the Board of County Commissioners can, or the Board of County Commissioners shall.

3. Yusem's reliance on the County's 1982 comprehensive plan is misplaced. Both the Future Land Use Map and the future land use map designation on Yusem's property were based on data and analysis collected and examined in connection with the 1990 Comprehensive Growth Management Plan and are a function of 1990 conditions. Thus, any relevant changes in the area should have been after 1990, not 1982.

Yusem's argument that alleged changes in the area should be considered on the basis of what occurred after 1982 (the year that the County adopted its first comprehensive plan) rather than after 1990 (when the county adopted its present comprehensive plan) is misplaced. The future land use map designation on Yusem's property was established by the County's 1990 Comprehensive Growth

Management Plan, which was adopted in response to the 1985 Growth Management Act, and was selected on the basis of data and analysis relating to 1990 conditions and circumstances, as well as the community's vision of the future in 1990. (T. p. 585 l. 9 - p. 594, l. 3) The Growth Management Act required that new comprehensive plans be adopted after 1985 based on data and analysis of present (post 1985) conditions and future projections, not on past conditions and projections. While the designation was the same in the 1982 plan, this fact neither warrants nor justifies considering changes in the area based on what occurred after 1982. Any changes between 1982 and 1990 were assessed in the data and analysis connected with the preparation of the Future Land Use Element and Future Land Use Map in the 1990 plan.

This distinction eliminates the alleged changes between 1982 and 1990 that Yusem contends justified the amendment[8], and which were already considered when the County selected the future land use map designation on the Yusem property and the 900 acres surrounding it. There were no physical changes in the area between the adoption of the Plan in February, 1990 and the rejection of the amendment in October, 1990.

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[8] These alleged development and changes include the I-95 exchange (approximately three miles away), the reconstruction of Salerno Road, the community college, the approval of the Willoughby development (approximately two miles north), the issuance of the certificate of need, the small shopping center (a grocery store), and the residential subdivisions. The community college, the shopping center, and the residential subdivisions were constructed prior to 1982.

4. The County did not concede the reasonableness of Yusem's amendment.

At page 12 of his brief, Yusem contends that the County conceded the appropriateness of his amendment request in a document to the Department of Community Affairs. However, the record is quite clear that this document was a draft prepared to expedite matters if the Board adopted the amendment. (T. p. 700. l. 24 – p. 711, l. 3). Henry Iler testified that he never saw or concurred in this draft, and that he disagreed with the language which appeared in the document (T. p. 709 l. 23-25), and that his also made his opinions quite clear that is language was not correct (T. p. 710, l. 14-17). See, also, Exhibit 62, p. 26.

5. It is beyond dispute that Yusem brought a certiorari action in response to the County's action and dismissed that petition.

At the top of page 17, Yusem comments on the Fourth District Court's decision that the trial court did not have jurisdiction and could not treat Yusem's action as a petition for certiorari. He now implies that the District Court erred. What Yusem fails to point out in his brief, but what the District Court noted, is that he timely filed a petition for certiorari but dismissed that action in favor of this original action, which was filed after the certiorari deadline. Martin County v. Yusem, 664 So. 2d at 978. Yusem's arguments at this point about the rendition of orders are ludicrous and clearly fly in the face of his own actions.

6. Yusem's references to a Mobil Land Development development are misleading.

At page 19 of his brief, Yusem claims that Mobil Land Development was considering a DRI for property south of the subject

property. In fact, he states that the development "was in the planning stages". This observation is presented to support Yusem's arguments that the County had to adopt the amendment. The observation is extremely misleading. The evidence shows that any such development was nothing more than an idea. The actual exchange relied on by Yusem for this statement is on page 679 and 680 of the trial transcript, where Mr. Iler responded to Yusem's counsel's questions:

> Q. Now, south of Cove Road, who owns all that land south of Cove Road?
>
> A. I believe T, P & J owns a good portion of it.
>
> Q. Mobil Land Development?
>
> A. Yes.
>
> . . .
>
> Q. In 1990 didn't Mobil Land Development have DRI plans that were being reviewed by the county or at least preliminary plans that they were discussing with you for this property south of Cove Road?
>
> A. I believe so.
>
> Q. And you were aware of that?
>
> A. Sure.

(T. p. 679, l. 6 - p. 680, l. 4)

Mr. Iler later clarified his answers:

> Q. Mr. Iler, something has been mentioned about a T, P & J property somewhere in this region.
>
> A. Uh-huh (affirmative)
>
> Q. ... Did you know anything about a T, P & J doing some kind of development in Martin County between 1986 and 1990?
>
> A. I knew that they owned the property and that they, I was told by third parties that they had development

plans.

Q. Did they ever submit an application during that period of time to develop their property to the Growth Management Department?

A. I can't recollect whether they did or did not. It just escapes me whether they did.

(T. p. 711, l. 13 - p. 712, l. 3)

Thus, the only evidence was that Henry Iler knew that Mobil Land Development was thinking of a development. Yusem's implication that there actually was one is extremely misleading. Clearly, there was no actual Mobil Land Development project. There is a vast difference between what is in the mind of a landowner and what is actually approved and developed.

7. Minimal infrastructure exists in the area and is of the type which is compatible with rural uses.

Yusem contends that there is no record corroboration for the County's statement that minimal infrastructure exists in the area and is of the type compatible with rural uses. In support of this statement, the County would call the Court's attention to Exhibit 1; Exhibit 2-A-1; Exhibit 31, p. 18; Exhibit 62, p. 39; and the testimony of Scott Herring and Robert Pontek:

Q. The roadways that existed in 1990, and you may have to refer to some of your exhibits at this point, what were those roadways designed to serve at that time?

A. The roadway network is designed to serve the existing land uses....

(T. p. 790, l. 4-9)

Q. Mr. Herring, the roadways that are planned here, what were they contemplated to serve in terms of the land uses in the surrounding area?

A. In 1990 they were basically serving the existing land use. We were already having problems at that time....

(T. p. 792, l. 15-20)

Q. On October 16th of 1990 would you please tell the Court what the level of service, the level of water capacity availability was on that system, October the 16th of 1990?

A. The system, as far as the water system, was experiencing a difficulty with the total amount of available supply, and the system was experiencing, we were in the process of planning and designing some improvements for the system in the manner of supply as well as infrastructure improvements.

(T. p. 824, l. 15-25)

8. The Department of Community Affairs actually stated "The County should consider abandoning this amendment." in its Objections, Recommendations, and Comments (ORC) report.

At page 22 of his brief, Yusem writes: "One of the grossest examples (but by no means the only) of an outright misrepresentation by the County occurs on page 8, where the County purports to quote the DCA's ORC Report on Mr. Yusem's requested amendment as follows: "The County should consider abandoning the amendment." Please note the "." after the word "amendment". Yusem then goes on to state what he believes is the actual quote. Martin County's quote in its Initial Brief <u>is accurate</u>. In fact, the ORC Report undeniably states **"The County should consider abandoning the amendment."** Exhibit 56, p. 4. Martin County did not misstate this quote. Quite clearly, this is not a gross example of an outright misrepresentation by the County, it is another error in stating the facts by Yusem. The proof is in the exhibit.

9. The ARDPP rules requiring the County to consider growth patterns and to carefully time developments were applicable when the Board decided to reject the amendment.

Martin County has discovered that the page citation at page 4 of its initial brief to the "Active Residential Development Planning Preference" (ARDPP) provisions of the Plan is incorrect. The citation to this fact should have been (T. p. 670, l. 5-20.). The ARDPP rules were in effect at the time of the Board's consideration as well as at the time of the trial. The page cited to by Yusem in his brief (page 644) for the contrary, does not say anything about ARDPP. ARDPP became applicable by virtue of a stipulated settlement agreement reached on October 9, 1990, seven days before the Board meeting. (T. p. 718, l. 18-23). See, also, testimony of Linda McCann, Yusem's attorney and expert in comprehensive planning:

> A. The purpose of ARDPP is to limit development. They don't want, they say they don't want too many more residential units than they have population to use them. So, the ARDPP system had been adopted by Martin County, and they say within each five-year period they want approximately 125 percent of the units needed to serve the anticipated population during that five-year period.

(T. p. 96, l. 10-17)

10. Mr. Pennock testified that this amendment would constitute sprawl and/or leap frog development under the State's urban sprawl rules.

The transcript pages listed by Yusem do not confirm the statements he alleges were made by Mr. Pennock at page 25 of his brief. Mr. Pennock's observation that urban sprawl "already exists in the area" (T. p. 764, l. 24-25) does not contradict the statement made by the County in its brief that Mr. Pennock

"testified that the adoption of this amendment would constitute a failure by the County to discourage urban sprawl and would, therefore violate state law." (Appellant's Initial Brief, p. 11) In fact, the transcript shows at the point cited by Yusem in his brief that Mr. Pennock testified that Mr. Yusem's plans constituted a "continuation" of that sprawl. (T. p. 765, l. 2-3) and would result in "sprawl and/or leapfrog development":

> Q. (By the Court) ... I guess my question now is: If that area in yellow [Yusem's property] is developed at 1.8 or 1.18 --
>
> MR. WARNER: 1.2.
>
> Q. 1.2 per acre, is that sprawl and/or is it a leapfrog development?
>
> A. Well, it is sprawl. If you look at what's on the aerial there, the distance between that parcel and some of these other developments are not that great. We are not talking large distances.
>
> What we have there is a scattered development pattern.
>
> You have rural vacant land or land that's agricultural use, and you have some land that's in urban use [Yusem's intended use]. That's a scattered pattern. That's also a manifestation of sprawl.

(T. p. 763, l. 15 - p. 764, l. 5)

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court reverse the Fourth District Court of Appeals decision that the proceeding in question was quasi-judicial and rule that amendments to comprehensive plans are legislative actions, and remand the case to the lower court to proceed accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to Tim B. Wright, Esq., Attorney for Respondent, 1100 South Federal Highway, P.O. Drawer 6, Stuart, FL 34995-0006; Terrell K. Arline, Esq., Attorney for Amicus Curiae 1000 Friends of Florida, Inc., 926 East Park Avenue, Tallahassee, FL 32302; Sherry Spiers, Assistant General Counsel, Attorney for Amicus Curiae Florida Department of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100; Donna L. McIntosh, Esq., Attorney for Amicus Curiae Seminole County Council of Local Governments, 200 W. First Street, Suite 22, P.O. Box 4848, Sanford, FL 32772-4848; Jane C. Hayman, Esq., Attorney for Amicus Curiae Florida League of Cities, Inc., 201 W. Park Avenue, Tallahassee, FL 32301-7727; Thomas G. Pelham, Esq., Attorney for Amicus Curiae, Florida League of Cities, Inc., 909 East Park Avenue, Tallahassee, FL 32302; Joni Armstrong Coffey, Esq., Attorney for Amicus Curiae Metropolitan Dade County, 111 NW 1st Street, Suite 2810, Miami, FL 33128-1930; Tamara A. McNierney, Esq., Attorney for Amicus Curiae Broward County, 115 S. Andrews Ave., Suite 423, Ft. Lauderdale, FL 33301; Robert A. McMillan, Esq., Attorney for Amicus Curiae Seminole County, 1101 East First Street, Sanford, FL 32771; Michael L. Rosen, Esq., Attorney for Amicus Curiae, Florida Legal Foundation, Inc., P.O. Box 10228, Tallahassee, FL 32302; and James S. Burling, Esq. and Stephen E. Abraham, Esq., Attorneys for Amicus Curiae Pacific Legal Foundation, 2151 River Plaza Dr., Suite 305, Sacramento, CA 95833, this 27th day of June, 1996.

GARY K. OLDEHOFF
Assistant County Attorney