IN THE SUPREME COURT
OF FLORIDA

Coastal Development of North Florida, Inc. and Meadows Incorporated,

Petitioners,

v. Case No. 95,686

The City of Jacksonville Beach, Florida,

Respondent
_____/

RESPONSE OF THE CITY OF JACKSONVILLE BEACH TO THE BRIEF OF AMICUS CURIAE, FLORIDA HOME BUILDERS ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

The City hereby adopts by reference its Statement of the Case and Facts contained in its Answer Brief served herein.

SUMMARY OF ARGUMENT

Amicus Curiae, Florida Home Builders Association, argues here that small-scale amendments to a local government's comprehensive land use plan, enacted pursuant to Chapter 163, Florida Statutes, are "quasi-judicial" decisions subject to "strict scrutiny" judicial review.

This position rests on two fundamentally flawed and demonstrably erroneous premises:(i) that small-scale plan amendments were "specifically exempted" from this Court's decision in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997); and (ii) decisions concerning small-scale comprehensive plan amendments involve the application of policy, not its formulation, thereby rendering the principles and procedures established by this Court in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993), applicable.

In Yusem, 690 So. 2d at 1295, this Court held that "all comprehensive plan amendments are legislative decisions subject to the fairly debatable standard of review," This Court consciously chose not to address the amendments to Chapter 163, specifically §163.3187 (1)(c), Florida Statutes, id. at 1296, n.6, as these provisions were not enacted until several years after Mr. Yusem began his comprehensive plan amendment process, the appeal of

which culminated in this Court's decision. Further, §163.3187(1)(c)1, applies only if the property for which the plan amendment is sought is 10 acres or less, whereas the property at issue in Yusem was 54 acres. Id. at 1289.

Second, Amicus's claim that small-scale plan amendments involve the application of policy not its formulation is directly contrary to this Court's rationale in Yusem which recognizes unequivocally that a decision whether to amend a comprehensive land use plan is no less a legislative, policy decision than the enactment of that plan originally. Any amendment to a comprehensive plan, whether small-scale or otherwise, requires a local government to revisit all of the findings and policy decisions it initially made in developing the plan to determine whether even a small-scale amendment is warranted.

Accordingly, this Court should answer the certified question in the affirmative and affirm that a small-scale plan amendment is a legislative decision subject to judicial review under the fairly debatable standard.

ARGUMENT

DECISIONS REGARDING SMALL-SCALE COMPREHENSIVE PLAN AMENDMENTS ARE LEGISLATIVE DECISIONS SUBJECT TO JUDICIAL REVIEW UNDER THE FAIRLY DEBATABLE STANDARD

Amicus argues that the question certified by the first district in this case should be answered in the negative, despite the holding and rationale of this Court in Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997).

It bases its position initially on the theory that a local government's decision not to approve a "small-scale" comprehensive land use plan amendment, sought pursuant to the provisions of §163.3817 (1)(c), Florida Statutes, should be treated "like a rezoning decision," and, therefore, judicially reviewed pursuant to the principles and procedures established by this Court in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993).

Amicus posits that this Court "specifically exempted" small-scale plan amendments from its holding in Yusem, as somehow supporting its theory, and relies only on this Court's conscious decision not to address the amendments to Chapter 163, 690 So.2d at 1296, n.6, as somehow supporting this claim.

As demonstrated in the City's Answer Brief, (at pages 14-16), Yusem did not address the 1995 amendments to

Chapter 163, appearing at §163.3187(1)(c), for two specific reasons.

First, Mr. Yusem's attempt to have Martin County amend its comprehensive plan for his proposed development began years before Chapter 163 was amended to provide specific treatment for small-scale comprehensive plan amendments. Mr. Yusem's comprehensive land use plan amendment did not proceed, either administratively before the Martin County authorities or in any of the circuit court or district court proceedings, on the basis of §163.3187(1)(c). Accordingly, the "small scale" amendment process was not at issue before this Court.

Second, by its plain terms, the small-scale amendment provisions of §163.3187(1)(c)1, apply only if the property involved is 10 acres or less. The property at issue in Yusem was 54 acres, 690 So. 2d at 1289.

The district court below properly understood Yusem's footnote 6:

> We think that, by the language used in the footnote, the court intended to say only that, because it had not focused on the recent statutory amendment providing for small-scale development amendments, it was leaving to a future day the question of the appropriate standard of review for decisions regarding such amendment requests.

City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 790 So.2d 792, 794 (Fla. 1st DCA 1999).

Accordingly, the only even superficially logical conclusion as to the meaning of Yusem's footnote 6 is simply that this Court was consciously not addressing the provisions of §163.3187(1)(c) and not, as the Petitioners and its amicus inferentially argue, that this Court "explicitly exempted" small-scale comprehensive plan amendments from Yusem's holding.

More fundamentally critical, however, an analysis of this Court's rationale in both Yusem and in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993), conclusively demonstrates that Yusem's holding, that all comprehensive plan amendments are legislative decisions subject to judicial review under the fairly debatable standard, should apply in the "small-scale" plan amendment context.

The decision a local government must make when requested to amend its comprehensive plan, even if the amendment is simply for a specific parcel of property, is a fundamental policy decision, a quintessential legislative function, as it is a local government's "overall plan for managed growth, local services and capital expenditures as

embodied in the future land use map..." Yusem, 690 So.2d at 1291. This Court recognized that even though the local government's decision was based upon the appropriate governmental body holding a hearing to address proposed changes in the land use designation for only a particular piece of property, this still constituted a patently legislative decision:

> Amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to one piece of property.

Id. at 1293.

The district court below understood that this Court's rationale in Yusem recognized that small-scale plan amendments still require a legislative, policy determination by the local government:

> Regardless of the scale of the proposed development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. This will, in turn, require that it consider the likely impact that the proposed amendment would have on traffic, utilities, other services, and future capital expenditure, among other things. That is, in fact, precisely what occurred here. Such considerations are different in kind from those which come into play in considering a rezoning request.

City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 790 So. 2d 792, 794 (Fla. 1st DCA 1999).

This holding that a local government's decision whether to amend its comprehensive plan is different in kind than a decision whether to rezone a particular piece of property, is in total accord with the recognition by this Court in Yusem (citing then Judge Pariente's analysis in dissent in the district court's opinion, 664 So.2d at 981), that "the decision whether to allow a plan amendment involves considerations well beyond the land owner's 54 acres." 690 So.2d at 1294.

In irreconcilable conflict with the theory advanced herein by Amicus, this Court explicitly recognized that the Snyder rezoning analysis is simply not applicable in the comprehensive plan amendment context: under Snyder, the primary focus is on the local government's determination, when one of several different zoning options are consistent with the comprehensive plan, that the current zoning is still preferable. Yusem specifically recognized that Snyder did not deal with the issue of the appropriate standard of judicial review when a local government is being asked to amend its comprehensive plan. Id. at 1292.

Amicus also advances the incredible argument that judicial review of small-scale plan amendments in accordance with the standards announced by this Court in Snyder will add stability and end the confusion in this area of the law. This theory amounts to nothing more than the "functional analysis" explicitly rejected by this Court in Yusem. Instead, this Court adopted a bright line test holding that all comprehensive land use plan amendments are legislative decisions, Yusem, 670 So. 2d at 1293.

Yusem's holding was based upon the nature of the decision by a local government, namely whether to alter or amend its governing document for controlling and managing future growth and development, which is no less a legislative decision than the enactment of a plan initially. This holding should clearly apply to the small-scale amendment process pursuant to §163.3187(1)(c), when the property involved is less than 10 acres, for the same reasons it was held to apply to Mr. Yusem's 54 acres.

The district court below correctly understood that the theory advanced by the Petitioners and its Amicus was not only contrary to this Court's rationale in Yusem, it would clearly undermine the predictability and stability which this Court considered an important goal when adopting the bright-line rule. As the district court recognized, Yusem

expressed "a clear intent to bring predictability to an area of the law in which confusion has been prevalent, by mandating a uniform approach to all comprehensive plan amendment requests. The result we reach here is consistent with that goal; whereas, that urged by the developers would only add to the confusion." 730 So.2d at 794.

The only other district court to address this issue was the fifth district in Fleeman v. City of St. Augustine Beach, 728 So.2d 1178 (Fla. 5th DCA 1998), which reached the identical result as the district court below, holding that small-scale plan amendments are legislative decisions and should be judicially reviewed pursuant to the principles announced by this Court in Yusem.

The fact that Amicus has located one circuit court decision, Grondin v. City of Lake Wales, 5 Fla. L. Weekly Supp. 727 (Fla. 10th Cir. Ct. 1998), which reached a contrary result to that of the fifth district in Fleeman and the first district *sub judice*, only underscores the importance of this Court making explicit in this case that Yusem's unequivocal holding that all plan amendment requests are legislative decisions fully applies to small-scale amendments, thereby eliminating the last vestige of the "functional analysis" condemned in Yusem.

Finally, Amicus argues that regardless of Yusem's rationale, small-scale amendments should be treated like rezoning requests, and therefore subject to the principals and procedures announced by this court in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993), because the small-scale amendments are not subject to the integrated review process applicable to other plan amendments.

Predictably, Amicus points to the fact that this Court in Yusem cited to the multilevel governmental review process for plan amendments as "further support" for its decision that proceedings to consider such amendments are legislative in nature. 690 So. 2d at 1294.

As demonstrated in the City's Answer Brief (at 25-28), the review process for small-scale amendments is different than for other amendments, but this difference does not transform what is a quintessential legislative act into one which is quasi-judicial.

What Amicus fails to address is that the small-scale amendment process itself provides for a different level of administrative review, whereby any affected person may institute an administrative proceeding, subject to the processes of Chapter 120, to challenge a local government's

decision to grant a small scale plan amendment. Section 163.3187(3)(a), Florida Statutes.

The City submits that these statutory provisions governing administrative review of small-scale amendments have as their manifest purpose the granting to local governments more flexibility than is otherwise available; they do not, by any stretch of logic or statutory interpretation, create either new and vested property rights in a land owner seeking a comprehensive plan amendment or eliminate the state's ability to disapprove of any such small-scale amendment if it perceives that the granting of such an amendment violates other provisions of Chapter 163. The administrative review procedures contained in §163.3187(3)(a), provide that the state may intervene in any such proceeding, to ensure compliance with Chapter 163, the identical purpose which the multi-level governmental review process performs in plan amendment requests generally as recognized by this Court in Yusem.

Accordingly, the mere fact that the small-scale plan amendment process is different than for plan amendments generally simply cannot transform a legislative policy decision into one that is quasi-judicial, nor can it change the fundamental nature of what a local government is being

asked to do when faced with a small-scale comprehensive plan amendment request.

Yusem's rationale clearly dictates that all plan amendments, of whatever size, still be deemed to involve the formulation of policy and should, therefore, be judicially reviewed under the fairly debatable standard.

Accordingly, this Court should answer the certified question in the affirmative.

CONCLUSION

This Court's decisions in both Snyder and Yusem clearly recognize the distinction between a rezoning request and a requested amendment to a local government's comprehensive plan for purposes of the proper standard of judicial review. Yusem is explicit in its rejection of the "functional analysis" advocated by Amicus herein, and unequivocally recognized that the analysis involved in judicial review of a local government's rezoning decision is different in kind than when the question involves amending a comprehensive plan.

Yusem's recognition that a requested plan amendment involves policy considerations of far more reaching impact than simply the relatively small piece of property involved, mandates that the certified question be answered in the affirmative.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of the Response to the Brief of Amicus Curiae was typed using Courier New, 12 point font, and was fully justified.

Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. Mail to T. Geoffrey Heekin, Esquire, and S. Hunter Malin, Esquire, Post Office Box 477, Jacksonville, Florida 32201 and Donna E. Blanton, Esquire, Steel, Hector & Davis LLP, 215 S. Monroe Street, Suite 601, Tallahassee, FL 32301 on this 25th day of August, 1999.

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