IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-875

VICKI MINNAUGH AND ROBERT MINNAUGH,

Petitioners,

v.

COUNTY COMMISSION OF BROWARD COUNTY, a political subdivision of the State of Florida.

Respondent.

Discretionary Proceedings to Review a Decision by the
Fourth District Court of Appeal, State of Florida
Case No.: 4D99-0751

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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CERTIFICATE OF TYPE SIZE

Counsel for Petitioners certify that the following type size and style is being utilized in this brief:

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QUESTION PRESENTED

WHETHER DECISIONS REGARDING SMALL-SCALE DEVELOPMENT AMENDMENTS PURSUANT TO SECTION 163.3187(1)(c), FLORIDA STATUTES, ARE QUASI-JUDICIAL IN NATURE AND SUBJECT TO A JUDICIAL "STRICT SCRUTINY" STANDARD OF REVIEW.

PREFACE

This brief is submitted on behalf of the Petitioners, VICKI MINNAUGH and ROBERT MINNAUGH, in support of their petition for review of the decision of the Fourth District Court of Appeal rendered March 15, 2000 (copy attached). In this brief, the following abbreviations will be used: the Petitioners will be referred to by name, as "Petitioners," or as the "Landowners," and Respondent, County Commission of Broward County, Florida, will be referred to as the "Commission" or as the "Respondent." The appendix to the certiorari petition filed in the Fourth District Court of Appeal, which consists of nine volumes, will be referred to by the abbreviation "App." followed by volume number, document tab number or letter, and page number if applicable. The transcript of the December 22, 1998 hearing before the Commission, which appears in the appendix at App.2/B, will be by the abbreviation "T." followed by the court reporter's page number. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

JURISDICTIONAL STATEMENT

In its March 15, 2000 opinion in Minnaugh v. County Commission of Broward County, 752 So. 2d 1263, 1266 (Fla. 4th DCA 2000), the Fourth District certified to this Court the following question as one of great public importance:

> Are decisions regarding small-scale development amendments pursuant to section 163.3187(1)(c), Florida Statutes, legislative in nature and, therefore, subject to the fairly debatable standard of review; or quasi judicial, and subject to strict scrutiny?

This Court thus has discretionary jurisdiction to review the Fourth District's decision pursuant to Article V, section 3(b)(4), Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(v).

The same issue has also been certified to this Court by the First, Third and Fifth Districts. This Court has accepted jurisdiction to review the decision of the First District in City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 730 So. 2d 792 (Fla. 1st DCA 1999), rev. granted, 744 So. 2d 453 (Fla. 1999). The Minnaughs submit that this Court should accept jurisdiction in the present case as well because of the importance of this issue.

STATEMENT OF THE CASE AND FACTS

The Petitioners have owned a 4.3 acre parcel of property in Pembroke Pines, Florida, since 1993 (App.1/A-2, p.2). The property is located on Pines Boulevard, within what has been termed the "Pines Boulevard Corridor" between 184th and 196th Avenue. Pines Boulevard is a 200 foot wide principal arterial roadway in the City of Pembroke Pines (App.1/A-2, p.24).

The property had initially been zoned B-3 (general business) by Broward County long before adoption of the Broward County Land Use Plan ("BCLUP"), as was the remaining property along the south side of Pines Boulevard (App.1/A-2, p.24). Petitioners' property is presently designated on the BCLUP for agricultural use only. It has not actually been used for agricultural purposes, but remains vacant awaiting development (App.1/A-2, p.23). Several nearby properties along Pines Boulevard have been designated commercial, and the 30-acre tract immediately to the east of Petitioners' property is in the process of consideration for such redesignation (App.1/A-2, pp.11, 18).

On September 2, 1998, Petitioners filed an application with the Broward County Planning Council (BCPC) to change the land use designation to "employment center (App.1/A-2, p.3)." Petitioners intended to develop their property by erecting an office building incorporating a restaurant, a financial institution and related employment services (App.1/A-2, p.5; T.72). The relief which Petitioners sought was a small-scale amendment to the BCLUP pursuant to section 163.3187(1)(c), Florida Statutes.

On December 22, 1998, a hearing was held before the Commission at which Petitioners presented voluminous documents in support of their position. At the beginning of the hearing, the county attorney announced that the proceedings would

be conducted as a quasi-judicial hearing (T.6). Among their witnesses was the Growth Management Director of the City of Pembroke Pines, who testified that the city had done several studies and had concluded that agricultural land use was inappropriate to the area (App.1/A-2, pp.10-13). The director also testified as to why the "employment center" designation would be the most appropriate land use designation (T.17-30). The city's 1998 Compatibility Study had concluded that the agricultural uses could not be sustained along the Pines Boulevard Corridor (App.1/A-2, pp.7-8).

The Broward County Planning Council had, prior to the December 22 hearing, prepared a staff report which recommended denial of the proposed amendment because it purportedly would create an isolated parcel of employment center use in an area predominately designated agricultural (App.1/A-2, p.28). At the conclusion of the hearing, the Commission voted to adopt that recommendation and to deny the proposed amendment (T.98-99).

Petitioners sought review of the Commission's decision by filing a complaint in Broward County Circuit Court for a writ of common law certiorari (Count I), a writ of mandamus (Count II), and, in the alternative, declaratory and injunctive relief (Count III) (App.1/A-2). Petitioners attached a multi-volume appendix (App.2-9), including the transcript of the Commission hearing (App.2/B). The circuit court judge

did not issue a writ, require or permit a response by the Commission, or conduct a hearing. Instead, in an order dated February 2, 1999, the circuit court simply dismissed Counts I and II, stating that it had considered the "two-stage proceeding" recommended by the Fourth District Court of Appeal *en banc* in Bared and Company, Inc. v. McGuire, 670 So. 2d 153 (Fla. 4th DCA 1996). The order further stated that Count III could proceed using the "fairly debatable" standards of review pursuant to Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) (App.1/A-1).

Petitioners thereafter filed a petition for writ of certiorari in the Fourth District Court of Appeal, on the basis that the trial court had erred in adopting the two-prong jurisdictional test of McGuire, which is applicable only to district court review of circuit court orders not otherwise appealable, and that a circuit court's review of a quasi-judicial action is a matter of right and not discretion, citing Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

Petitioners' second challenge to the circuit court's ruling was based on its use of the improper standard of review. Petitioners argued that approval of small-scale development amendments pursuant to section 163.3187(1)(c), Florida Statutes, and under the facts of this case, was a quasi-judicial proceeding subject to review under the "strict scrutiny" standard, and that the issue had been left open by this Court in Martin County v. Yusem.

In its response to the petition before the Fourth District, the Commission agreed that Petitioners had been denied due process by the circuit court, which applied the incorrect law and should have followed Heggs' standards for review of quasi-judicial actions. However, it agreed with the circuit court that the "fairly debatable" standard of review should apply.

The Fourth District issued its opinion on March 15, 2000, Minnaugh v. County Commission of Broward County, 752 So. 2d 1263 (Fla. 4th DCA 2000). In that opinion, the Fourth District did not address the first issue raised by Petitioners regarding the propriety of the circuit court's reliance upon McGuire in denying the certiorari petition. The Fourth District's opinion focused instead on the method of review of the Commission's decision. It denied the petition based on its finding that the circuit court applied the correct law in concluding that the proper method of review of the Commission's decision was by an action seeking declaratory or injunctive relief, rather than by certiorari.

While recognizing that this Court in Yusem left open the question of whether the deferential "fairly debatable" standard of review applied to small-scale plan amendments under section 163.3187(1)(c), the Fourth District chose to follow the lead of three other district courts of appeal, each of which determined that action on a small-scale development amendment was a legislative, policy-setting function and

thus subject to the same limited judicial review applicable to all comprehensive plans. The Fourth District adopted the holdings of Palm Springs General Hospital, Inc. v. City of Hialeah Gardens, 740 So. 2d 596 (Fla. 3rd DCA 1999); City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 730 So. 2d 792 (Fla. 1st DCA 1999), rev. granted, 744 So. 2d 453 (Fla. 1999); and Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998). The Fourth District also certified the question to this Court as one of great public importance, and the present proceeding is brought before this Court pursuant thereto.

SUMMARY OF ARGUMENT

Petitioners submit that the question certified by the Fourth District Court of Appeal and the other district courts of appeal should be answered by a holding that local government decisions concerning small-scale amendments as defined by section 163.3187(1)(c), Florida Statutes, should be subject to a "strict scrutiny" standard of judicial review. By statutory definition, such proposed amendments to local land use plans affect only small, specific parcels, and they do not involve any changes to land use policies, goals, and objectives already established by local government. As this Court has previously held in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993), local decisions regarding specific application of established goals are

in the nature of quasi-judicial proceedings, which have long been held subject to the strict scrutiny standard.

Moreover, the legislature, following Snyder, specifically carved out small-scale amendments for special treatment. The statutory amendment expedites approval of changes made necessary in areas of rapid growth where, as in the present case, use restrictions have become outmoded as a result of the pattern of development which has taken place. Because of the legislature's elimination of the various levels of administrative review applicable to larger parcels, however, it is all the more imperative that local commissions' decisions be subject to meaningful judicial review to assure that the landowner has received a fair hearing. Absent strict judicial review, there is nothing to prevent local commission decisions from reverting to the totally unsatisfactory situation existing prior to adoption of the Growth Management Act, namely politicized, arbitrary, and inconsistent decisions improperly influenced by pressures from the local electorate.

Where, as Petitioners contend is the case here, there was competent, substantial evidence that a proposed reclassification of a small property is consistent with an established land use plan, a local commission's denial of the proposed change should be submitted to a careful judicial review under the "strict scrutiny" standard, and not the highly deferential "fairly debatable" standard.

Such a rule, answering the question left unanswered in Yusem, would be a logical synthesis of this Court's analysis of quasi-judicial proceedings in Snyder and the legislature's 1995 amendment streamlining approval procedures for small-scale, site specific parcels of land. The legitimate interests of property owners would be served without compromising local government's authority to establish goals, objectives, and principles in its land use planning functions. Petitioners respectfully urge this Court to so hold.

ARGUMENT

DECISIONS REGARDING SMALL-SCALE DEVELOPMENT AMENDMENTS PURSUANT TO SECTION 163.3187(1)(c), FLORIDA STATUTES, ARE QUASI-JUDICIAL IN NATURE AND SUBJECT TO A JUDICIAL "STRICT SCRUTINY" STANDARD OF REVIEW.

As this Court observed in Board of County Commissioners v. Snyder, 627 So. 2d 469, 472 (Fla. 1993), local government zoning decisions were historically subject to a highly deferential standard of review. However, that loose judicial scrutiny, combined with local pressures for preferential treatment, often resulted in inconsistent, sloppy and politically motivated decisions. As a result of increasing calls for zoning reform, numerous states, including Florida, adopted legislation to change the local land use decision-making process. Id. at 473.

In 1975, the Florida Legislature adopted the Local Government Comprehensive Planning Act, ch. 75-257, Laws of Fla., and substantially strengthened that law in 1985 by adopting the Growth Management Act, ch. 85-55, Laws of Fla. The Growth Management Act required each county and municipality to prepare a comprehensive plan for future land use development and to specify the elements which must be included. Section 163.3177(1), (6), Fla. Stat. (1991). The Act further provided that all development and development orders approved by local governments must be consistent with the adopted local plan. Section 163.3202, Fla.Stat. (1991). Any amendments to the plan were required to be submitted to the state land planning agency (Department of Community Affairs). That agency in turn was to submit the proposed amendments to various other state agencies, in an extensive review process. Section 163.3184, Fla. Stat. (1991).

In Snyder, this Court was faced with the question of whether a local board's action on a rezoning application was legislative or quasi-judicial. This Court held that it is the character of the hearing that determines whether or not board action is legislative or quasi-judicial, Snyder, 627 So. 2d at 474. This Court further observed that generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy. This Court also approved the distinction drawn by the lower court between

comprehensive rezonings affecting a large portion of the public, which are legislative in nature, and actions which have an impact on a limited number of persons or property owners and which involve policy application rather than policy setting, which are in the nature of quasi-judicial action. This Court concluded that the board's action in Snyder was in the nature of a quasi-judicial proceeding, properly reviewable by certiorari and subject to the strict scrutiny standard. Snyder, 627 So. 2d at 475.

Several years later, this Court in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) was presented with a certified question as to whether a rezoning decision which had limited impact under Snyder, but nonetheless required an amendment of the local comprehensive land use plan, should still be a quasi-judicial decision subject to strict scrutiny review. In Yusem, the owner of a 54-acre parcel sought to change, rather than to apply, the existing plan. Id. at 1292. This Court concluded that amendments to comprehensive land use plans are legislative decisions, regardless of whether the amendments are being sought as part of a rezoning application in respect to only one piece of property. This Court went on to specifically state, however, that its holding did not apply to small-scale development activities affected by a 1995 legislative amendment to section 163.3187(1)(c), Florida Statutes, which provided

special treatment for comprehensive plan amendments directly related to proposed small-scale development activities.[1]

The legislative amendment to which this Court referred, ch. 95-396, §5, Laws of Fla., enacted less than two years after this Court decided Snyder, streamlined the procedure to allow a future land use map reclassification for small-scale developments of ten acres or fewer and eliminated mandatory Department of Community Affairs review. The statute as amended further provided that a small-scale amendment, to be considered as such, must not involve a text change to the goals, policies, and objectives of the local government's comprehensive plan, but rather must only propose a land use change to the future land use map for a site-specific small-scale development activity. Section 163.3187(1)(c), Fla. Stats. (1995).

The land use change proposed by the Minnaughs for their 4.3 acres met the criteria for a "small-scale amendment" as defined in the statute.[2] The present

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[1] The opinion stated, "We do not make any findings concerning the appropriate standard of review for these small-scale development activities." Yusem, 690 So. 2d at 1293, *fn*. 6.

[2] It did not involve a text change to the goals, policies, and objectives of the BCLUP, sec. 163.3187(1)(c)1. d., Fla. Stat. (1995); the proposed change instead relied upon the plan's specific goals and objectives, since because of changes in the area, the property could not actually be used in a manner consistent with the stated goals for agricultural use, whereas the proposed use would meet those goals (App.1/A-2, pp.8, 25, 31).

proceeding thus calls for an answer to the question left unanswered by this Court in Yusem, namely the appropriate standard of review for small-scale development activities. The Fourth District's answer to that question was simply to adopt the holdings of several other district court of appeal decisions on the same issue which, we submit, were wrongly decided. Principally following Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998), the Fourth District rejected Petitioners' position that the Commission's decision should be viewed as a quasi-judicial proceeding, reviewable by the strict scrutiny standard, as provided for small-scale, site-specific development actions in Snyder.

The Fleeman court reached the broad conclusion that "in all cases, the denial or granting of a small-parcel amendment to a comprehensive plan is a legislative function." Fleeman, 728 So. 2d at 1180. The court found no reason to draw a distinction between small-parcel amendment and any other amendments, voicing the concern that any other conclusion would invite uncertainty as to how small the parcel must be and how many other people must be affected. Id. at 1180. The Fleeman court apparently overlooked the statutory 10-acre standard or misunderstood the purpose of section 163.3187(1)(c) and the difference between long range planning versus allowable site-specific changes to permit small-scale development. Indeed, the legislature had specifically answered the questions which the Fleeman court

believed remained open, since the 1995 amendment specifically defined a small-scale amendment as one involving fewer than 10 acres of land and a "site-specific small scale development activity." Sec. 163.3187(1)(c) 1. d.

The Fleeman court also apparently failed to appreciate the fact that a small-scale amendment, by definition, is an application of policy rather than a formulation thereof. Section 163.3187(1)(c)1.d, Fla. Stat., provides that a "small-scale development amendment" may be considered as such only if it does not involve

> ...a text change to the goals, policies, and objectives of the local government's comprehensive plan, but only proposes a land use change to the future land use map for a site-specific small scale development activity.

The Fifth District's concerns in Fleeman were thus unfounded, since a landowner may not apply for a small-scale amendment in the first place if the proposal would involve any change to the goals, policies, or objectives of the local government's plan or is other than site-specific.

Finally, the Fleeman court erred in reasoning that the very fact that public hearings are required for small-scale amendments is somehow indicative of a legislative rather than a quasi-judicial nature. Fleeman, 728 So. 2d at 1180. The Fleeman court has apparently overlooked the fact that quasi-judicial decisions are

made in public hearings as well. Indeed, site-specific rezonings typically involve multiple public hearings.

Moreover, the legislature has already decided that there is an important difference between large-scale and small-scale amendments, since it requires that large-scale amendments are subject to various levels of review by different agencies at the state level. See section 163.3184(3), Fla.Stat. Small-scale amendments, however, may be determined at the local level without any provision for strict oversight at higher levels of government. Indeed, it was the absence of the various levels of agency review in rezoning proceedings which persuaded this Court in Yusem that a different standard of review should apply to such matters. Small-scale amendments are much more closely akin to rezoning proceedings for this precise reason, since they, too, are evaluated only on the local level.

It is also for this reason that stricter judicial scrutiny is required to review a local government's decision regarding a small-scale amendment lacking such agency scrutiny. If left free from effective judicial oversight, a local agency such as the Commission in the present case, which is subject to the demands and pressures of the local electorate, may deny a landowner's petition even if it is supported by substantial competent evidence and is consistent with the local land use plan. Failing to apply judicial strict scrutiny review to small-scale amendment decisions made by a local

governmental agency would, we submit, constitute a return to the pre-1975 conditions which, as this Court recognized in Snyder, prompted the zoning reform movement in which Florida was at the forefront.

It is instructive to read the 1995 legislative amendment together with the requirements set forth by this Court in Snyder for determining whether a local decision is quasi-judicial. It is apparent that the legislature was deliberately following this Court's lead, since the legislature drew the same distinctions between policy decisions on the one hand, and site specific small-scale amendments on the other, which would involve application rather than setting of policy. These are the same criteria which this Court approved in Snyder:

> Re-zoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action ....

Snyder, 627 So. 2d at 474, quoting with approval Snyder v. Board of County Commissioners, 595 So. 2d 65, 78 (Fla. 5th DCA 1991).

In the present case, the Commission adopted goals, policies, and measurable objectives to guide decisions on future land questions, and it implemented those goals, objectives and policies as part of the BCLUP. Its policy formulation was

already completed when the Minnaughs applied for the land use change, in reliance upon that policy. Indeed, an important purpose of adopting a land use plan is to provide standards to guide property owners as to how they may develop their land. The question presented thus was not whether the goals, objectives and policies were in need of change, but rather whether the proposed use change was consistent with those goals, objectives and policies. The Commission had before it two distinct alternatives, namely whether the property should be classified as "employment center" or "agricultural", based upon the characteristics of the neighborhood and BCLUP established policies.

The Petitioners, supported by the City of Pembroke Pines in their view that the category "employment center" was a compatible use of the property under the plans of both the City and BCLUP, believe the Commission's denial of their proposed use was an arbitrary one. Essentially, there was no evidence to contradict the testimony of Petitioners' land-use experts that their 4.3-acre parcel could not be reasonably used for agricultural purposes, and that their proposed "employment center" use would be completely consistent with the county's land use plan (BCLUP) and an appropriate application of the goals, objectives and policies of that plan. However, Petitioners have been denied effective judicial review, even though the Commission hearing was clearly a quasi-judicial one, to which the judicial strict scrutiny standard should apply.

Petitioners will continue to be denied effective review unless this Court determines that, for the reasons discussed in Snyder, a strict scrutiny standard of review is required for small-scale land use decisions made by local government under the 1995 legislative plan.

CONCLUSION

For the reasons set forth above, this Court should answer the certified question by holding that small-scale development amendments pursuant to section 163.3187(1)(c), Florida Statutes, are quasi-judicial in nature and subject to a judicial "strict scrutiny" standard of review. The decision of the Fourth District should be quashed, and the Petitioners afforded the opportunity for proper judicial review of the Commission's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and attached has been served by mail this 6th day of June, 2000, to: **EDWARD A. DION, ESQUIRE**, County Attorney, **ANDREW J. MEYERS, ESQUIRE**, Chief Appellate Counsel, and **TAMARA M. SCRUDDERS, ESQUIRE**, Assistant County Attorney, Broward County Government Center, 115 South Andrews Avenue, Suite 423, Fort Lauderdale, Florida 33301, Co-Counsel for Respondent; and **WILLIAM S. SPENCER, ESQUIRE**, Ellis, Spencer and Butler, Emerald Hill Executive Plaza, Suite 505, 4601 Sheridan Street, Hollywood, Florida 33021, Co-Counsel for Petitioners.

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