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

REPLY 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 response to the answer brief of Respondent, THE COUNTY COMMISSION OF BROWARD, a political subdivision of the State of Florida, and in response to the amicus curiae briefs submitted by the Department of Community Affairs, 1000 Friends of Florida, Inc. and the Florida Chapter of the American Planning Association. In this brief, as in their initial brief, the Petitioners will be referred to by name or as "Petitioners." The Respondent will be referred to as the "Respondent" or as the "Commission." 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.

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.

The central theme of Respondent's argument, echoed by the briefs of both amici, is that no distinction should be drawn between small-scale, site specific plan amendments that do not involve text changes and other plan amendments, including large scale amendments – or even the initial adoption of an initial land use plan. Respondent and its supporters argue that all amendments, regardless of scale or singular focus, involve policy formulation as opposed to policy application, and thus they should be subject to a highly deferential standard of review. The problem with that argument, however, is that it fails to acknowledge the primary and crucial distinction between the initial formulation of a comprehensive plan and any amendment which involves revisiting policy issues, on the one hand, and a determination on the other hand as to whether a proposed change is consistent with policies already adopted. By definition, the small-scale amendment of the type at issue here may be considered as such only if it does not involve changing the policies, goals, and objectives of the local government's comprehensive plan. See section 163.3187(1)(c)(1.d), Florida Statutes (1995).

The small-scale application in the present case well illustrates the proper function of a small-scale amendment and the reasons why it is indeed conceptually different from the adoption or amendment of a comprehensive land use plan. At the time Petitioners filed their application under section 163.3187(1)(c), the Commission had already formulated its policy by adopting the comprehensive plan which included goals, policies and measurable objectives to guide decisions on future land use questions. Petitioners were simply asking the Commission to *apply* its existing policies by determining whether the proposed use change would be consistent with those policies.

Petitioners presented competent, substantial evidence that their proposed use would be entirely consistent with the already-adopted land use plan, whereas a continuation of the existing agricultural classification would, because of changes in the area, no longer meet those goals. The compatibility study used by the City of Pembroke Pines in preparing its 1998 conceptual master land use plan, pointed out that agricultural uses could not be sustained at the location of Petitioners' property and other surrounding areas (App.1/A-2, pp.7-8), and in fact the land had never been so used (App.1/A-2, p.23). The study noted that the remaining agricultural parcels were too small and isolated to accommodate a viable agricultural use, and that they would more likely be used for purposes which, while permitted as "agricultural land

use", would be much more objectionable than an employment center development (dog kennels, golf or baseball practice ranges, etc.) (App.1/A-2, pp.10-13). On the other hand, the "employment center" use as defined in the county's land use plan was intended by the County to be compatible with both residential and other less intensive land uses (Objective 3.02.00, App.3/C, p.II-12).

The city's growth management director and a certified land planner both testified that the agricultural use had become incompatible and impractical for this parcel of property, whereas the "employment center" use did meet the goals, objectives and policies of both the city and the county (T.17-30). The county, on the other hand, presented no evidence for continuing the restrictive agricultural land use designation. The county commission's staff had not conducted any study on the question (T.76), nor did it refute Petitioners' evidence that the property's proposed use as an employment center was consistent with the policies, goals and objectives of the county land use plan. Despite the lack of contradictory evidence, Defendant denied the requested change; and unless this Court so declares, no court will have the opportunity to determine whether that decision was supported by competent substantial evidence.

Petitioners' application qualified as a small-scale land use application precisely because (in addition to the property's small size and site-specific nature of the

proposed change) it involved applying the local government's existing goals, policies, and objectives rather than asking the local government to revisit those existing policies.[1] That is fundamentally different from the considerations involved in the initial formulation of a land use plan or amendments to it which would involve a change in the existing goals, policies and objectives of the comprehensive plan.

The Respondent and its supporters attempt to blur the distinction drawn by the Legislature between "text changes" to the goals, policies and objectives of the land use plan and changes to the "future land use map." They argue that the map itself, rather than just being a graphic depiction of the various areas in the county and their permitted uses, is the primary expression of the county's plan and is only "supplemented" by the textual expression of the county's goals, policies and objectives. In fact, the contrary is true. Moreover, that argument does not satisfactorily explain why the Legislature chose to distinguish between the two, permitting small-scale development amendments only in cases where the proposed

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[1] At page four of its brief, Respondent attempts to characterize Petitioners' small-scale amendment as part of an "overall master plan." The record references therein, however, are to an August 25, 1998 hearing dealing with a prior application by the City of Pembroke Pines. The comments were made in response to a Commission member's suggestion that the city present a master plan (App.8/20, p.12), and did not refer to the application before this Court.

amendment does not involve a text change but only proposes a change to the map itself.

Contrary to the Respondent's argument (answer brief at p.13), this Court in Martin County v. Yusem, 690 So. 2d 1288, 1294 (Fla. 1997) did not "expressly reject" Petitioners' argument that a small-scale amendment of the map without a textual change involved application rather than formulation of policy. In the first place, this Court was not addressing a small-scale amendment at all. Secondly, what this Court said was that the county's "policies" were "embodied" in the map. Yusem, 690 So. 2d at 1294. Of course they were. The map was a graphic depiction of the results of the policies adopted in the comprehensive land use plan. But changes can be made to the map, certain properties added to or removed from various land use categories, as long as those changes are consistent with the previously adopted goals, policies and objectives contained in the plan itself. That is precisely what the Legislature recognized when it adopted section 163.3187(1)(c) and provided for a more streamlined and separate procedure for considering proposed changes which affect only the map and not the textual portion of the plan.

There is indeed a fundamental difference between the type of proposed change which is eligible for consideration under section 163.3187(1)(c) and proposed changes which involve policy formulation. The former, involving only application of

existing policy, is much more closely akin to zoning changes and requires the same standard of review as established by this Court in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993).

We agree with the Commission that a bright-line rule would be the most workable (answer brief, pp.19-20), but we propose that the line be drawn differently. If this Court were to declare that all small-scale amendments which qualify under the statute be reviewed in accordance with the Snyder standard, and that all other plan amendments be reviewed under Yusem, uncertainty would be eliminated. If, and only if, the proposed change qualified for special treatment under the statute, the local governing body would treat it accordingly and would conduct a quasi-judicial hearing to determine if the proposed site-specific change to the small parcel's use should be adopted. The agency's decision would be reviewable as set forth by this Court in Snyder and would be upheld only if the decision were supported by competent, substantial evidence. Petitioners respectfully urge this Court to so declare.

CONCLUSION

For the reasons set forth above and in Petitioners' initial brief, 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 has been served by mail this 16th day of August, 2000, to: **EDWARD A. DION, ESQUIRE**, County Attorney, **ANDREW J. MEYERS, ESQUIRE**, Chief Appellate Counsel, and **TAMARA M. SCRUDDERS, ESQUIRE**, Assistant County Attorney, Broward

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