015

IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC01-103

CITY OF JACKSONVILLE, et al.

Petitioners,

v.

CHARLES DIXON, JR., et al.

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

RESPONDENTS' AMENDED REPLY BRIEF

PAUL M. HARDEN
Florida Bar No.: 192557
1301 Riverplace Boulevard
Suite 2601
Jacksonville, FL 32207
(904) 396-5731
(904) 399-5461 facsimile
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....5

I. THE FIRST DISTRICT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE FOURTH AND THIRD DISTRICTS.....5

II. THE FIRST DISTRICT COURT OF APPEAL'S DECISION DOES NOT MISAPPLY THE LAW SET FORTH IN RINKER MATERIALS CORPORATION.....8

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

CERTIFICATE OF COMPLIANCE.....11

TABLE OF CITATIONS

CASES **PAGE**

B.B. McCormick and Sons v. City of Jacksonville, 559 So.2d 252 (Fla. 1DCA, 1993).....3

Board of County Commissioners of Broward County v. Snyder, 627 So.2d 469 (Fla. 1993).....4,5,6

City of Homestead v. Levy, 444 So.2d 1074 (Fla. 3DCA 1984).....7

Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000).....4,5,6

Machado v. Musgrove, 519 So.2d 629 (Fla. 3DCA 1987)..3,4,5,6,9,10

Rinker Materials Corporation v. City of North Miami Beach, 286 So.2d 552 (Fla. 1989).....4,8,9

Southwest Ranchers Homeowners Association, Inc. v. County of Broward, 502 So.2d 931 (Fla. 4DCA, 1987).....4,5,6,

Union Camp Corp. v. Seminole Forest Management Dist., 302 So.2d 419 (Fla. 1DCA 1974).....7

STATUTES

§163.3215, Florida Statutes.....2,5

STATEMENT OF THE CASE AND FACTS

Rule 9.120(d), F.R.A.P., clearly states that the petitioner's brief on jurisdiction is limited solely to the issues of the Supreme Court's jurisdiction. The Statement of the Case and Facts filed by the City of Jacksonville (City) seeks to argue the merits of the City's position on the "threshold issue" as to whether the City's Comprehensive Plan allows the placement of a hotel on a parcel of land designated RPI under the City's Comprehensive Plan. Such argument requires the Respondents to place the "facts" cited by the City in context.

In February of 1997, a landowner adjoining the lands of the Dixons filed an application seeking to amend the Future Land Use Map (FLUM) series of the City's Comprehensive Plan to change the designation of the parcel from RPI to CCG and to concurrently rezone the parcel of land for a hotel use. The "FLUM" amendment filed specifically stated the reason for the "FLUM" was:

> In order to develop the subject parcel with a hotel and minor retail, the land use designation must be changed from RPI to CCG. SEE 1DCA APP-EX-C.

The "opinion" was restated in several subsequent documents.

On multiple occasions beginning in April of 1997, the City's Planning Staff issued reports with reference to the rezoning and "FLUM" applications that stated:

> The proposed rezoning provides for uses which are not allowed in this area [hotel], therefore would not be consistent with the Comprehensive Plan adopted under Chapter 650, Comprehensive Planning for Future Development of the Ordinance Code. However, it should be noted there is a companion application for a small-scale land use amendment... SEE 1DCA APP-EX-K.

This opinion of the Planning Department that a hotel use is not allowed in RPI was issued in writing on numerous occasions.

It was not until after the Planning Commission of the City rejected the proposed "FLUM" amendment that the interpretation proposed by the Planning Director and "embraced" by the Trial Court Judge, that a hotel is allowed within the RPI land use category, arose. As a result of the revised Planning Department interpretation, the rezoning allowing a hotel to be built adjoining the Dixons' homes was approved by the City.

The Dixons filed an action for injunctive relief, pursuant to the provisions of §163.3215, F.S. (1997), to challenge the consistency of the approved rezoning with the Comprehensive Plan of the City. The Trial Court ruled against the Dixons on their consistency challenge and denied the requested injunctive relief.

A timely appeal of the Trial Court's ruling was taken to the First DCA. In a unanimous ten (10) page Opinion, the First DCA ruled that as a matter of law, the Comprehensive Plan of the City did not allow a hotel use in the RPI land use category.

The City moved the First DCA for a rehearing and a rehearing *en banc* arguing that the Opinion of the First DCA was in conflict with the opinion issued in B.B. McCormick and Sons v. City of Jacksonville,559 So.2d 252 (Fla. 1st DCA 1993). Interestingly, B.B. McCormick is specifically cited and embraced by the First DCA Opinion. The City's Motion for Rehearing/Rehearing *En Banc* or, in the alternative, Request for Certification as a Matter of Great Public Importance was denied by the First DCA.

The City now seeks discretionary review by this Court, pursuant to the provisions of Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, arguing the decision below is an Opinion that "expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law".

SUMMARY OF ARGUMENT

Far from being a "radical departure" from this Court's previously expressed views on "strict scrutiny" of review of local land use decisions, the Opinion of the First DCA specifically cites case law which the City concedes is the proper scope of review and definition of "strict scrutiny".

The Opinion of the First DCA identifies and approves of the analysis of "strict scrutiny" described in Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987). The Machado case was cited with

approval by this Court in Board of County Commissioners of Broward County v. Snyder, 627 So.2d 469 (Fla. 1993). The Opinion of the First DCA is not in conflict with either Snyder or Machado.

As to legal interpretation on pure issues of law, the First DCA is not constrained by a deferential standard. This is particularly true where as in the case at bar both the City and the landowner initially espoused the interpretation of law ultimately stated by the Opinion of the First DCA.

The law as set forth in Dania and Southwest Ranchers that factual findings supported by competent, substantial evidence may not be disturbed is correctly stated by the City, however competent, substantial evidence relates to factual findings not to pure questions of law. A pure question of law was presented to the First DCA below.

Further, the Opinion of the First DCA is not in conflict with Rinker Materials, but rather correctly applies Rinker Materials by stating the "plain and obvious" meaning of the Comprehensive Plan of the City. The method for review of written documents as set forth in Rinker Materials is the methodology used by the First DCA in its Opinion in this matter.

Finally, the policy argument of the City that it will not be able to "flexibly" provide one opinion on one occasion and another opinion on another occasion is no basis for this Court to accept

jurisdiction. Indeed, the argument of the City that it loses its flexibility to provide certain landowners with preferential interpretations flies in the face of the stated limitation on local government's otherwise broad zoning powers as set forth in Part II of §163, F.S.

The Opinion of the First DCA does not conflict with the longstanding law of this State regarding review by the District Courts of Appeal either on matters of comprehensive planning or construction of written instruments.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE FOURTH AND THIRD DISTRICTS.

Apparently, the position of the City is that the First DCA's Opinion expressly and directly conflicts with four (4) separate decisions: Board of County Commissioners of Broward County v. Snyder, 627 So.2d 469 (Fla. 1993); Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000); Southwest Ranchers Homeowners Association, Inc. v. County of Broward, 502 So.2d 931(Fla. 4th DCA 1987); and Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987). Respondents respectfully disagree.

The City concedes in their brief that the First DCA correctly stated the appropriate standard of review. Such a concession would hardly seem difficult in light of the fact that the Opinion of the

First DCA specifically cites Machado v. Musgrove and quotes the entire text of Machado with regard to the standard of review. Likewise, this Court in Snyder cited Machado in setting forth the appropriate standard of review describing same as strict scrutiny. Board of County Commissioners of Broward County v. Snyder, 627 So.2d 469, 475. It is difficult to understand how the Opinion of the First DCA could expressly and directly conflict with the standard of review principals of Machado and Snyder (which embraces Machado) when the exact language of those cases is cited in the Court's Opinion.

As regards the citation by the City to the law set forth in Dania and Southwest Ranchers, those cases do not deal with the "same question of law" dealt with by the Opinion of the First DCA. Indeed, appellate courts are not entitled to reweigh evidence and must accord great weight to the factual findings of trial courts as set forth in Dania and Southwest Ranchers. However, such deference is not required with regard to a question which is "purely one of law". The Opinion of the First DCA is clear in stating:

> We are instead presented with a question which is purely one of law and we are not constrained by more deferential standards from substituting our judgment for that of the lower tribunal (SEE Page 4 of First DCA Opinion).

The First DCA did not reweigh evidence or disturb factual findings,

but made a *de novo* review of a written instrument. This *de novo* review is no different than the *de novo* review allowed in considering the construction of a city ordinance, See, e.g. City of Homestead v. Levy, 444 So.2d 1074 (Fla. 3DCA 1984); or construction of a statute, Union Camp Corp. v. Seminole Forest Management Dist., 302 So.2d 419 (Fla. 1DCA 1974).

The City describes the actions of the First DCA as "nothing short of a usurpation of the City's authority to administer and interpret its own laws". The City also claims a need for "flexibility in the application and interpretation" of its laws. These complaints are simply a demand for authority to allow them to provide "special interpretations" for the politically powerful or influential. The Opinion of the First DCA identified the danger of such latitude. As expressly stated by the First DCA: to allow such flexibility would cause the goal of certainty and order in future land use decision making to be circumvented. (See First DCA Opinion at Page 5).

The desire of the City to pick and choose on legal interpretations does not change the role of the judiciary. More importantly as to the issue before this court, the desire of the City to pick and choose does not establish a conflict for jurisdictional purposes.

The First DCA did not "rewrite portions of the City's

Comprehensive Plan", but rather read the clear language of a document which is intended to bind all persons in the same way. The Opinion of the First DCA interpreted the clear language of the Comprehensive Plan exactly as the City and the adjoining landowner did in their original interpretation of the Code. It is quite ironic that the City now complains that the First DCA overstepped its bounds in making a purely legal determination consistent with the initial interpretations by the City and the landowner.

Where an issue before the Court of Appeal is one purely of law, there is no need to review the record for competent, substantial evidence. Competent, substantial evidence may support a determination on factual matters, but evidence is of no import on legal interpretations. There was no factual dispute before the First DCA. The First DCA applied the appropriate standard of review and performed its function as a judicial body in interpreting the law.

II. THE FIRST DISTRICT'S DECISION DOES NOT MISAPPLY THE LAW SET FORTH IN RINKER MATERIALS CORPORATION.

Initially, Respondents would point out that the Brief of the City does not identify the "issue of law" set forth in Rinker Materials Corporation v. City of North Miami Beach, 286 So.2d 552 (Fla. 1989) which is "expressly and directly" in conflict with the Opinion of the First DCA. However, as proposed by Rinker, the

Opinion of the First DCA goes to great lengths to consider the plain and ordinary meaning of the Comprehensive Plan of the City. That plain and ordinary meaning does not allow a hotel to be located on a parcel of land which is designated under the RPI land use.

While the City certainly may object to the courts of the State of Florida issuing opinions on matters of law which effect the City, such is the role of the judiciary. The judiciary is the final arbiter of the law in the system of laws that even binds the City.

At its core, the second argument proposed by the City is that the courts should not review legal opinions of local government on zoning matters. Unfortunately for the City, the actions of all zoning authorities are subject to review by the courts of this State, even if that review disturbs the desire of the local government to be "flexible" in providing one interpretation of the laws to one group of people and another to another group of people.

There is no "question of law" dealt with in the Rinker Materials case that is expressly and directly in conflict with the Opinion of the First DCA in this matter. No such conflict is described by the City in its Brief to this Court.

As succinctly stated by the Third DCA in the Machado case:

> Part II of chapter 163, Florida Statutes,

> called the Local Government Comprehensive Planning and Land Development Regulation Act, and the local comprehensive plans which it mandates, are not zoning laws. The statute's requirement that all zoning action conform to an approved land use plan is, in effect, a limitation on a local government's otherwise broad zoning powers. Machado v. Musgrove, 519 So.2d 629, 632.

Everyone, including local governments, must follow the dictates of the land use plan (Comprehensive Plan) when dealing with zoning issues. The legal interpretation of the First DCA with regard to pure matters of law does not constitute a departure from or conflict with any decision of a District Court of Appeal or this Court.

CONCLUSION

The City has presented no decision of another District Court of Appeal or of this Court that is in express and direct conflict with the Opinion of the First DCA in this matter. The Opinion of the First DCA identifies the standard of review used and the City concedes that to be the appropriate standard of review. The First DCA is entitled to render its own opinion without deference to other opinions on matters purely of law. For the foregoing reasons, this Court should not accept jurisdiction on this matter.

PAUL M. HARDEN
Fla. Bar No. 192557
1301 Riverplace Boulevard
Suite 2601
Jacksonville, FL 32207
(904) 396-5731
(904) 399-5461 facsimile
Attorney for Respondents

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Tracey I. Arpen, Jr., Esquire and Karl J. Sanders, Esquire, 117 West Duval Street, Suite 480, Jacksonville, FL 32202 and W.O. Birchfield, Esquire, 50 North Laura Street, Suite 3300, Jacksonville, FL 32202 this 28 day of March, 2001.

ATTORNEY

CERTIFICATE OF COMPLIANCE

I CERTIFY that the typeface used in this brief is Courier New 12-point font and therefore complies with the font requirements of Rule 9.210(a)(2), F.R.A.P.

ATTORNEY