IN THE SUPREME COURT OF FLORIDA

Case No. SC01-103

On Petition for Discretionary Review of a
Decision of the First District Court of Appeal

CITY OF JACKSONVILLE, et al.,

Petitioners,

v.

CHARLES DIXON, JR., et al.,

Respondents.

AMICI CURIAE BRIEF OF FLORIDA HOME BUILDERS ASSOCIATION AND FLORIDA LEAGUE OF CITIES, INC. IN SUPPORT OF CITY OF JACKSONVILLE

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FLORIDA HOME BUILDERS ASSOCIATION

The Florida Home Builders Association (FHBA) is a not for profit corporation and statewide industry association composed of more than 15,000 members, substantially all of whom are engaged in the business of development, home building, and the construction industry in Florida. Members of this association regularly submit applications for development orders and development permits, including rezonings, to local governments and are subject to proceedings under Section 163.3215, Florida Statutes. FHBA members statewide will be affected by the result in this case. FHBA on behalf of its members frequently participates as amicus curiae on issues of statewide significance that affect the home building industry.

FLORIDA LEAGUE OF CITIES, INC.

The Florida League of Cities, Inc. ("League"), is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Under the League's charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members. Members of the League regularly review and issue decisions on applications for

development orders and development permits, including rezonings, as defined in Section 163.3164, Florida Statutes, and are subject to proceedings under Section 163.3215, Florida Statutes. The League's members statewide will be affected by this Court's determination regarding the standard of review applied to a local government's interpretation of its own comprehensive plan.

STATEMENT OF THE CASE AND FACTS

This Court is reviewing the decision of the district court of appeal in Dixon v. City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000). Amici adopt the Statement of the Case and Facts as stated in the City of Jacksonville's Initial Brief.

SUMMARY OF THE ARGUMENT

In this case, the City of Jacksonville rendered a development order that rezoned certain property. Adjoining property owners brought suit to enjoin the implementation of the development order on the premise that it was inconsistent with the City's comprehensive plan. The circuit court denied injunctive relief and the adjoining land owners appealed. In applying the standard of strict scrutiny to reach its decision, the First District Court of Appeal rejected the argument that deference should be given to the City's interpretation of its comprehensive plan, and held that it was presented with a question that was purely one of law. The court ruled that the development order was inconsistent with the comprehensive plan and remanded with directions that the City

be enjoined from implementing the rezoning ordinance.

While they take no position with respect to whether the development order is consistent with the comprehensive plan, Amici will demonstrate that the method by which the court below reached its decision is flawed. The court misinterpreted the doctrine of strict scrutiny to mean that a governmental body must not be given any deference in the interpretation of its own comprehensive plan. In Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), this Court established the principle that the standard of review for rezoning decisions (other than those that affect a large portion of the public) should be by strict scrutiny. This was a departure from the long-standing principle that all rezoning decisions were reviewable by the liberal standard of whether or not they were fairly debatable. While the words "strict scrutiny" may seem to imply an exacting standard, it is clear this Court did not intend to deprive governmental bodies of discretion in interpreting their own comprehensive plan.

In Snyder, this Court stated:

> In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions.

The standard for reviewing a quasi-judicial decision is to determine whether the decision is supported by competent and substantial evidence. DeGroot v. Sheffield,

95 So. 2d 912, 916 (Fla. 1957) (". . . the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination.") Nothing in the Synder decision suggests that in that review, deference should not be given to the governmental body's interpretation of its own comprehensive plan.

Comprehensive plans are detailed and complex by their very nature. The Growth Management Act must include principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the governmental body's jurisdictional area.[1] §163.3177(1), Fla. Stat. (1999). Coordination of the several elements of the comprehensive plan is a major objective of the planning process and the several elements must be consistent. §163.3177(2), Fla. Stat. (1999). The determination of whether an application for a development order is consistent with the comprehensive plan often requires the consideration of many elements of the plan and their relationship to each other. §163.3194(3);(4)(a), Fla. Stat. (1999). Consequently, it is essential that deference be given to the governmental body in the interpretation of its own comprehensive plan.

[1]While all statutory references in this brief refer to statutes as they existed in 1999, none of the statutes have been amended to date.

A developer's only recourse for the denial of an application for rezoning is by way of a petition for certiorari to the circuit court. Parker v. Leon County, 627 So. 2d 476 (Fla. 1993). That review will be conducted under the competent and substantial evidence standard. DeGroot, 95 So. 2d at 916. Under the Growth Management Act, an aggrieved party's recourse from an order authorizing a rezoning change is to file suit for injunctive relief in circuit court in which the court may entertain evidence in addition to that presented to the governmental body. Poulos v. Martin County, 700 So. 2d 163 (Fla. 4th DCA 1997). In that instance, however, the circuit court's review of the governmental body's decision also must necessarily be under the competent and substantial evidence standard, because otherwise there would be a different standard of review depending on whether the rezoning was approved or disapproved. The fact that it is a de novo or new proceeding does not mean, as the court in the instant case apparently believed, that its standard for reviewing the decision of the City of Jacksonville was one of law in which no deference could be given to the City in its interpretation of the comprehensive plan.

Obviously, a development order that authorizes rezoning or construction in violation of explicit restrictions in the comprehensive plan must be quashed. However, when an inconsistency is not plainly apparent, the governmental body's interpretation of its comprehensive plan should be given deference if its rationale can be reconciled with the plan as a whole. If the governmental body's interpretation of the plan can be

said to be reasonable, it should be sustained even though another interpretation might appear to the court to be more reasonable. A court should not be permitted to substitute its judgment for that of the body that enacted the plan and that is changed with its administration.

ARGUMENT

The extent, if any, to which courts should defer to a governmental body's interpretation of its own comprehensive plan has been in doubt for years.

Background

Historically, the courts adopted a highly deferential standard of judicial review of zoning decisions. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941), this Court expressly held that zoning decisions would be upheld as long as they were fairly debatable. Under this standard, zoning decisions may be invalidated only if they are arbitrary and unreasonable. City of Miami Beach, supra; Stengel v. Crandon, 23 So. 2d 835 (Fla. 1945); William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364 (Fla. 1st DCA 1971), cert. den., 261 So. 2d 845 (Fla. 1972).

Responding to criticism of inconsistent zoning practices, Florida adopted the Local Government Comprehensive Planning Act of 1975. Ch. 75-257, Laws of Fla. The law was strengthened in 1985 by the Growth Management Act. Ch. 86-55, Laws

of Fla. Pursuant to the Growth Management Act, each county and municipality was required to adopt a comprehensive plan for future land use.

The Growth Management Act, Section 163.3164, Florida Statutes (1999), contains the following definitions:

> (7) 'Development order' means any order granting, denying, or granting with conditions an application for a development permit.
>
> (8) 'Development permit' includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

Thus, it is clear that all zoning decisions of local government will result in a development order. Furthermore, Section 163.3194(1)(a), Florida Statutes (2001), requires that all development orders be consistent with the comprehensive plan.

Cases Under the Growth Management Act

It was not long before an issue was raised with respect to the standard for reviewing zoning decisions rendered under the Growth Management Act. The court in Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), rev. den., 529 So. 2d 693 (Fla. 1988), held that a challenge to a zoning action on grounds that the proposed project was inconsistent with the comprehensive plan should be reviewed by the so-called standard of strict scrutiny rather than the fairly debatable standard. Subsequently, the Fifth District Court of Appeal also held that a zoning decision was subject to review by strict scrutiny. Snyder v. Bd. of County Comm'rs, 595 So. 2d

65 (Fla. 5th DCA 1991), quashed, 627 So. 2d 469 (Fla. 1993). In that case, the county commission had denied a zoning application, and the court reversed on the ground that the application was consistent with the comprehensive plan. Id. This Court entertained review of the decision of the Fifth District Court of Appeal based upon conflict with several cases that had applied the fairly debatable standard to review of zoning decisions. Bd. of County Comm'rs of Brevard v. Snyder, 627 So. 2d 469 (Fla. 1993).

In Snyder, this Court stated: "The first issue we must decide is whether the Board's action on Synder's rezoning application was legislative or quasi-judicial." 627 So. 2d at 474. The Court reaffirmed the proposition that comprehensive rezonings affecting a large portion of the public are legislative in nature. However, the Court then stated:

> [W]e agree with the court below when it said:
>
> > [R]ezoning 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 . . . .

Id. at 474-75.

Thus, the Court held that Synder's application was in the nature of a quasi-judicial proceeding and properly reviewable by petition for writ of certiorari. Id. The Court went on to hold that even if an application is consistent with the comprehensive

plan, the land owner is not presumptively entitled to a zoning change, but rather that the burden then shifts to the governmental body to demonstrate that maintaining the existing zoning establishes a legitimate public purpose. Id. at 475-76.

Perhaps misled by the common understanding of the words, in this case the court below interpreted "strict scrutiny" to mean that in judicial review no deference should be given to the governmental body's interpretation of its own comprehensive plan. Thus, the court stated:

> Because we conclude that the issue before us in one that is 'easily subject to examination for strict compliance with the plan,' we apply the standard of strict scrutiny to resolve it, a process which involves a detailed examination of the development order for exact compliance with, or adherence to, the comprehensive plan. We reject, moreover, the City's argument that deference should be given to the City's interpretation of a law which it administers, thereby requiring its approval so long as its construction falls within the range of possible interpretations. 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.

774 So. 2d at 765. The Fourth District Court of Appeal reached the same conclusion in Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 198 (Fla. 4th DCA 2001) (pet. for rev. pending), when it said: "We thus reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own comprehensive plan." In the context of land use development, this is incorrect.

In Snyder, when this Court held that the county commission's decision was quasi-judicial in nature and thus subject to strict scrutiny, it did so in rejecting the

contention that it was a quasi-legislative decision reviewable under the fairly debatable standard. The court stated that the term "strict scrutiny," as used in review of land use decisions, must be distinguished from the type of strict scrutiny review afforded in certain constitutional cases and explained: "In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions." 627 So. 2d at 475. The Court went on to point out that upon review, the commission's decision may be affirmed if it is supported by competent and substantial evidence. Id. at 476. This statement was not surprising inasmuch as the courts have long held that the competent and substantial evidence rule is applicable in the review of the quasi-judicial decisions. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); Hernando County v. S. A. Williams, Corp., 630 So. 2d 1155 (Fla. 5th DCA 1993), rev. den., 639 So. 2d 981 (Fla. 1994) (county commission's zoning enforcement decision will be sustained in quasi-judicial proceeding subject to review by strict scrutiny if there is competent, substantial evidence to support its determination). In a case challenging the action of the county commission in denying an application for plat approval, this Court recently explained that the standard of certiorari review is deliberately circumscribed out of deference to the agency's technical mastery of its field of expertise. Broward County v. G. B. V. International, Ltd., 787 So. 2d 838 (Fla. 2001).

Nothing in the Synder opinion says that courts may not give deference to a governmental body's interpretation of its own comprehensive plan. Rather, this Court was changing the characterization of certain zoning decisions that had heretofore been unassailable except upon a showing that the decisions were arbitrary or capricious. By holding that these zoning decisions were now quasi-judicial in nature, rather than legislative, the Court was doing no more than requiring that there had to be competent, substantial evidence supporting the decision before they could be upheld.

In a case that predated Snyder, the court in Southwest Ranches Homeowners Assoc., Inc. v. Broward County, 502 So. 2d 931 (Fla. 4th DCA), rev. denied, 511 So. 2d 999 (Fla. 1987), explained how a review by strict scrutiny was not incompatible with giving deference to a governmental body in the interpretation of its comprehensive plan. In that case, the court reviewed a decision to rezone property to allow the construction of a sanitary landfill that was challenged on the ground that the rezoning appeared to authorize a more intensive use than contemplated by the comprehensive plan. The court held that the determination of whether the rezoning was consistent with the comprehensive plan was subject to stricter scrutiny than the "fairly debatable" standard previously applied to zoning decisions, but rejected the view advocating strict adherence to the plan. Finding that a more flexible approach should be used in the determination of consistency, and that local governments should be afforded some latitude in applying the comprehensive plans, the court approved the construction of

the landfill, declaring: "[W]e agree with the County that managing growth under a comprehensive plan with such a wide array of elements may involve selecting between conflicting goals and priorities." 502 So. 2d at 939.

Why Deference Is Necessary

As this Court knows, city and county comprehensive plans are detailed and complex by their very nature. As explained in Snyder:

> The adopted local plan must include 'principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development' of the local government's jurisdictional area. Section 163.3177(1), Fla. Stat. (1991). At the minimum, the local plan must include elements covering future land use; capital improvements generally; sanitary sewer; solid waste, drainage, potable water, and natural ground water aquifer protection specifically; conservation; recreation and open space; housing; traffic circulation; intergovernmental coordination; coastal management (for local government in the coastal zone); and mass transit (for local jurisdictions with 50,000 or more people). *Id*. §163.3177(6).

627 So. 2d at 473.

Section 163.3177(2), Florida Statutes (1999), mandates that coordination of the several elements of the comprehensive plan shall be a major objective of the planning process and that the several elements of the plan must be consistent. Section 163.3194(4)(a), Florida Statutes (1999), states:

> A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and

> completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.

In order to decide if an application for a development order is consistent with the comprehensive plan, it often will be necessary to consider many elements of the plan and their relationship to each other. If there is no clear inconsistency with the comprehensive plan, the governmental body's interpretation should be given deference if its rationale can be reconciled with the plan as a whole. Stated another way, if the governmental body's interpretation of the plan can be said to be reasonable, it should be sustained even if another interpretation might appear to the court to be more reasonable. Of course, a developmental order that permits construction in violation of explicit restrictions must be quashed. However, where the governmental body approves the development order based upon its consideration of several portions of the comprehensive plan, none of which contains objective criteria that would clearly be violated, the governmental body's interpretation should be upheld.

The principal is well-established that an agency's interpretation of a statute it is responsible for enforcing is entitled to great deference. Verizon Florida, Inc. v. L. Leon Jacobs, Jr., 27 Fla. L. Weekly S137 (Feb. 14, 2002). See, Florida Interexchange Carriers Ass'n v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996) (". . . an agency's

interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court if it is not clearly erroneous.") This principle should be all the more applicable to a governmental body's interpretation of its comprehensive plan because that body enacted the plan in the first place.

The Standard of Review Must Be The Same For All Parties

The faulty view that no deference should be given to a governmental body's interpretation of its own comprehensive plan may have been influenced by the manner in which citizen challenges to development orders come about. Section 163.3215, Florida Statutes (1999), provides that "any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such government from taking any action on a development order which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan." When an aggrieved party files a suit to challenge a development order, the court conducts an evidentiary hearing to determine the consistency issue on its merits in light of the proceedings below but not confined to the matters of record in such proceedings. Poulos v. Martin County, 700 So. 2d 163 (Fla. 4th DCA 1997) (rejecting the contention that a suit under Section 163.3215 is in the nature of appellate review in which the court must base its decision solely on a review of the record created before the county commission.) However, the fact that a hearing before the circuit court is a de novo (new) hearing in which evidence is

developed does not mean that the governmental bodies must no longer be given deference in the interpretation of their comprehensive plans. If there is competent, substantial evidence to support the decision of the governmental body, it should be upheld. Indeed, if a governmental body denies a zoning request on the ground that it is inconsistent with the comprehensive plan, the developer's recourse is a petition for certiorari in which the issue will be whether the development order is supported by competent, substantial evidence. Parker v. Leon County, 627 So. 2d 476 (Fla. 1993). Yet, under the rationale of the court below in the instant case, if a zoning request is approved as being consistent with the comprehensive plan, upon a challenge by an aggrieved party the court may substitute its judgment for the governmental body without regard to the competent and substantial evidence rule. Surely, it cannot be intended that there should be a different standard of review depending on whether the challenge is made by the developer or an aggrieved party, a scheme which might well be unconstitutional for violation of the equal protection clause.

The effect of the Dixon court's interpretation of the application of the strict scrutiny standard of review is to create two different interpretations for how courts apply strict scrutiny in the review of quasi-judicial decisions, depending on whether the quasi-judicial action of the local government on a development order results in a denial or an approval. Any suggestion that this Court by adopting the principle of strict scrutiny in Snyder intended to impose a standard of review different than that in other

quasi-judicial proceedings was dispelled when the Court stated:

> In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions.

627 So. 2d at 475.

CONCLUSION

While they take no position on whether the development order rendered by the City of Jacksonville is consistent with the comprehensive plan, Amici urge this Court to reject that portion of the opinion below holding that deference should not be given to the City's interpretation of its plan.

A court should not be permitted to become the zoning body and substitute its judgment for that of the local governing body when an application for a development order is approved any more than it can do so when the application is denied. Instead, the time has come for this Court to clearly define a bright-line analysis for "strict scrutiny" so that it can be applied uniformly and consistently to all quasi-judicial land use decisions of local government.

Following this Court's decision in Snyder, the test should be that where an inconsistency is not readily apparent, the governmental body's interpretation of its own plan should be given deference if its rationale can be reconciled with the plan as a whole. If the governmental body's interpretation of the plan can be said to be

reasonable, it should be sustained even though another interpretation might appear to the court to be more reasonable. Any other principle amounts to second guessing and constitutes an invasion of the prerogatives of local government.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States Mail to Counsel for Respondents, Paul M. Harden, 1301 Riverplace Boulevard, Suite 2601, Jacksonville, Florida 32207; and W. O. Birchfield, 50 N. Laura Street, Suite 3300, Jacksonville, Florida 32202; Counsel for Petitioners, Tracey I. Arpen, Jr., City of Jacksonville, 117 West Duval Street, Suite 480, Jacksonville, Florida 32202; Karl J. Sanders, Edwards & Cohen, P.A., 200 North Laura Street, Jacksonville, Florida 32202; and Robert Leapley, Jr., 200 W. Forsyth St., #1400, Jacksonville, Florida 32202, this ____ day of March, 2002.

_____
Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the Times New Roman 14-point font, which is proportionately spaced.

_____
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