IN THE SUPREME COURT
STATE OF FLORIDA

THE CITY OF JACKSONVILLE,
et al.,

Petitioners,

v. Case No. SC01-103

CHARLES DIXON, JR. et al.,

Respondents.
_____/

FIRST AMENDED BRIEF OF AMICUS CURIAE, 1000 FRIENDS OF FLORIDA, INC., IN SUPPORT OF RESPONDENT, CHARLES DIXON, JR.

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

Terrell K. Arline
Legal Director
1000 Friends of Florida, Inc.
926 Park Avenue
P.O. Box 5984
Tallahassee, FL 32314-5984
Fla. Bar No. 306584
(850) 222-6277
(850) 222-1117 fax

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INTRODUCTION

Amicus curiae, 1000 Friends of Florida, Inc. is a nonprofit corporation and a statewide, growth management advocacy group whose mission is to monitor the implementation of Florida's growth management laws. 1000 Friends of Florida, Inc. files this brief in support of the Respondent, Charles Dixon, Jr. 1000 Friends will take no position on whether the City should have approved the particular development project at issue. However, it will support the First District Court of Appeal's conclusion that consistency with the comprehensive plan is a legal requirement reviewable de novo on appeal pursuant to the strict scrutiny standard of review compelled by this Court in Brevard County v. Snyder, 627 So.2d 467, (Fla. 1993). It will also explain why the courts need not defer to the City's conclusion that the development order is consistent with the comprehensive plan.

The consistency mandate furthers the statutory goals of the Growth Management Act, Chapter 163, Part II, Fla. Stat. (2000), that the local comprehensive plan guide and control local development decisions. Effective judicial review under the standard of strict scrutiny is essential if local governments are to adhere to the legal requirement that they act consistent with the local plan. 1000 Friends believes this Court should affirm the First District.

In this brief, Chapter 163 Part II, Florida Statutes may be referred to as the Growth Management Act or Chapter 163. Respondent, Charles Dixon, Jr. as "Dixon" and Petitioner, City of Jacksonville, as the "City". 1000 Friends of Florida, Inc., may be referred to as "1000 Friends".

STATEMENT OF FACTS AND OF THE CASE

1000 Friends of Florida, Inc. adopts the statement of facts and the case in the brief filed by Respondent, Charles Dixon, Jr.

SUMMARY OF ARGUMENT.

Consistency is a legal requirement mandated by Chapter 163, Part II, Fla. Stat. (2000). It is not a factual finding to be measured by the competent substantial evidence rule. If a local government defies its plan and approves development that is inconsistent with the plan, affected persons can challenge this decision under Section 163.3215, Fla. Stat. (2000). In these proceedings the local comprehensive plan governs the decisions of the local government on applications for development orders.

Precisely because the consistency mandate is a legal imperative and the plan has the force of law, the judiciary is entitled to review consistency issues de novo on appeal. More importantly, every local comprehensive plan is reviewed and approved by the Department of Community Affairs. No plan is effective until the Department has found it to be in compliance with state established minimum criteria. For this reason, the plan as a local ordinance is imbued with state and regional policy, which further argues against relying on a local government's determination that its actions are consistent with the plan.

This Court rejected a more deferential standard of review in Brevard County v. Snyder, 627 So.2d 467 (Fla. 1993), precisely because it wanted to hold local

governments accountable to their plans. This goal is no less compelling than it was in 1993. This Court should affirm the First District in all respects.

ARGUMENT.
CONSISTENCY IS A LEGAL MANDATE SUBJECT TO STRICT SCRUTINY ON REVIEW.

A. Consistency is a conclusion of law reviewed de novo on appeal. The fundamental flaw in the City of Jacksonville's argument is that consistency is not "factual finding". It is a legal imperative imposed on local governments by state law. (City's Corrected Brief on the Merits page 1). The consistency mandate governs the implementation of the local comprehensive plan. Development decisions are *ultra vires* if they are not consistent with the plan. A review of pertinent statutory provisions and the courts' construction of these provisions demonstrate this fundamental principle.

Florida's landmark Growth Management Act, Chapter 163, Part II, Florida Statutes, adopted in 1985, establishes a statewide, integrated process that requires that every local government adopt a comprehensive plan meeting the established minimum criteria set forth in Chapter 163 and Fla. Admin. Code R. 9J-5. The Department of Community Affairs reviews and actually must approve each plan as meeting these minimum criteria. It also determines whether the plan is consistent with the applicable strategic regional policy plan, and whether it furthers the goals,

objectives and policies of the State Comprehensive Plan, which is contained in Chapter 187, Fla. Stat. (2000).

Notably, the plan is not effective until these determinations have been made by the Department of Community Affairs.[1] The Administration Commission has the power to sanction local governments that do not adopt a plan that is in compliance with state law.[2]

Once a local government adopts a comprehensive plan that meets these state-imposed, minimum criteria, the local government is required to adopt appropriate land development regulations to implement the plan. While the Department of Community Affairs is empowered to ensure that local governments adopt implementing regulations, it does not typically review or approve such land development regulations.[3]

What sets Florida's growth management system apart from most other states is that the local comprehensive plan has the force of law. Section 163.3161(5), Fla. Stat. (2000), states as follows:

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[1] Section 163.3189, Fla. Stat. (2000).
[2] Section 163.3184(11), Fla. Stat. (2000).
[3] Section 163.3177, Fla. Stat. (2000) sets forth the various elements that have to be in the plan. Section 163.3213, Fla. Stat. (2000), requires that the plan be implemented through land development regulations.

> *It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.* (Emphasis added).

This statutory mandate that the local governments must follow their plan is repeated in Section 163.3194, Fla. Stat. (2000), which states in part as follows:

> *(1) (a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. . . .*

The following definition of consistency shows that it is a legal imperative, not just a factual finding to be based on the testimony of local planners. Section 163.3194, Fla. Stat. (2000), states:

> *(3) (a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.* (Emphasis added).

Thus, consistency is a requirement of state law. It is not a finding of fact.

Moreover, the consistency mandate is critically important, for it is what gives the

comprehensive plan any real meaning. In addition, the comprehensive plan is adopted as a local ordinance, thereby having the force of law. In this regard, the local comprehensive plan is just like any other law or statute, which the judiciary is constitutionally entitled to review and interpret.

To conclude, the consistency mandate is not a factual finding that is simply weighed under the competent substantial evidence rule. It does not turn on testimony. It is a legal obligation on all local governments imposed by state law. As such, consistency with the plan may be reviewed *de novo* by the courts, and this review is governed by the strict scrutiny standard of judicial review.

B. The Strict Scrutiny Standard of Review. As stated in Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3rd DCA 1987), "the plan is likened to a constitution for all future development within the governmental boundary." If this is true, if the plan is to effectively "guide and control development", the judiciary must be fully engaged to ensure that local governments follow the plan when approving development orders. The judicial review of local decisions on development orders is governed by the strict scrutiny standard.

The requirement to act consistent with the plan, coupled with the meaningful standard of judicial review in the strict scrutiny standard furthers the state's

integrated comprehensive planning process. Fortunately, this Court saw fit in Brevard v. Snyder to recognize this fact when it adopted the strict scrutiny standard of review. A review of the cases leading up to Snyder show the wisdom of this Court's decision.

One of the first cases to struggle with the consistency mandate was City of Cape Canaveral v. Mosher, 467 So.2d 468, 471 (Fla. 5th DCA 1985). There Judge Cowart pronounced a definition of consistency, one designed to further the judiciary's role to ensure local governments acted consistent with their plans. Judge Cowart wrote as follows:

> The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified, by the norm, it is "consistent" with it but if the compared item deviates or departs in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.

Coming on the heals of Mosher to discuss the importance of comprehensive planning and address the meaning of consistency was Southwest Ranches Homeowners Association, Inc. v. County of Broward, 502 So.2d 931, 935 (Fla. 4th DCA 1987), reviewed denied, 511 So.2d 999 (Fla. 1987). There the court stated:

> We believe that the enactment of the comprehensive statutory scheme [Chapter 163] manifests a clear legislative intent to mandate an intelligent uniform growth management throughout the state in accord the statutory scene. This purpose cannot be achieved without meaningful judicial review and lawsuits brought under the planning act. Id at 936. (Emphasis added).

The Fourth District ultimately settled on a more "flexible approach to the determination of consistency" than that espoused by Judge Cowart in Mosher. The court concluded that a lesser standard than Cowart's compelled that the "local governments be given some flexibility in applying the plans". It ruled for the County and held that a landfill was consistent with the plan. Id at 937.[4]

Machado v. Musgrove came next. There the Third District also recognized the importance of the comprehensive plan, and noted that local governments must act consistent with the plan. The court stated as follows:

> A comprehensive land use plan is not a vest pocket tool, for making individual zoning changes based on political vagary. Instead it is a broad statement of a legislative objective to protect human, environmental, social and economical resources and to maintain through orderly growth and development the character and stability of present and future land use and development in this state." Id at 635. (Emphasis added).

The Third District then reviewed the two different approaches to the judicial review of consistency established in the prior cases. It examined the strict definition of the 5th District adopted in Mosher and compared it to the more deferential, flexible standard used by the 4th District in Southwest Ranches.

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[4] We can hear the slight echo of Southwest Ranches call for flexibility in Jacksonville's brief, although the City probably would not admit to even go as far as the 4th District did in that case.

The Third District settled on Judge Cowart's approach. When rejecting the flexible and more deferential standard adopted by the 4th District, the court wrote as follows:

> Whether a proposed development project is consistent with a local comprehensive land use plan and all of its elements is tested on review by a standard of strict scrutiny; the burden is on the applicant for rezoning to show by competent and substantial evidence that the requested rezoning conforms to the legislative plan.

History has shown Judge Cowart to have carried the day. The consistency mandate established in Machado was adopted as the standard by this Court in Board of County v. Commissioners of Brevard County v. Snyder, when this Court pronounced, "review is subject to strict scrutiny".

The strict scrutiny standard of review is utterly critical to the effective enforcement of the consistency mandate. This is because only the citizens of this state can sue under Section 163.3215, Fla. Stat. (2000), to force local governments to act consistent with their comprehensive plan.[5]

While the Department of Community Affairs oversees the adoption and amendment of the comprehensive plan, and it has some limited involvement to ensure that local governments adopt appropriate land development regulations, it is important to realize that the Department is not empowered to challenge local governments that act inconsistent with their adopted plan when approving development.

The Department of Community Affairs does not review development orders

[5] A bill adopted this session extends the right to use Section 163.3215, Fla. Stat. (2000), to developers whose projects are denied. SB 1906.

to ensure they comply with the plan. This burden falls on people like Mr. Dixon. For this reason the judiciary needs to remain fully engaged in the process to ensure that local governments actually follow their comprehensive plans and act consistent with the plan when considering applications for development permits. The limitations on strict scrutiny proposed by Jacksonville would hamper effective enforcement of the plan.

C. Deference to local governments. The not-so-subtle undercurrent of this appeal is that local governments want their deference back. They lost deference when this Court concluded in Brevard County v. Snyder that rezonings were quasi-judicial actions subject to the strict scrutiny standard of review. The City asks this Court to return to the good old zoning days when courts supported local land use decisions as legislative acts, and deferred to local land use decisions through the overly deferential, fairly debatable standard of review.

1000 Friends of Florida implores this Court not to reverse direction. Do not return to the past. The fears of "neighborhoodism and rank political influence on the local decision-making process" discussed by this Court in Snyder supporting the need for effective judicial review is just as big a problem now as it was then. Too much deference encourages elected officials and local planners to apply the plan in an arbitrary fashion or perhaps to just ignore it.

It should be realized that both sides of the development game could sink in a sea of judicial deference. A local government can approve inconsistent development order or deny a consistent one. The effects are the same. The plan is undermined.

An overly deferential standard of review weakens the ability of the citizens to oversee the enforcement of their comprehensive plan. It also deprives the state mandated growth management system of the opportunity to meet the vision that growth is planned in a comprehensive fashion.

Justice Pariente apparently understands the issues. While Broward County v. G.B.V. International, Ltd., 787 So. 2d 838, 849 (Fla. 2001), dealt with the limitations of certiorari review, which is intentionally more deferential than direct appeals, and therefore, not helpful in deciding this instant appeal, the Justice succinctly phrased the strict scrutiny issue as follows:

> . . . our clear intent in Snyder was to enhance the quality of judicial review of zoning decisions by enunciating a " strict scrutiny" standard of review rather than the traditionally deferential review accorded legislative decisions. Our goal was to hold local governmental entities more accountable for their zoning decisions, improve the manner in which zoning decisions are made, institute a meaningful standard of review of zoning decisions, and minimize the chance of arbitrary and inconsistent land use decisions. (Emphasis added).

The Fourth District recently reached this same conclusion, holding that deference to a local government's conclusion of consistency was circumscribed by the strict scrutiny standard and Chapter 163. In Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001), the court upheld the trial court's conclusion that a development order was not consistent with the local plan. After reviewing the rather unambiguous plan policies at issue in that case, the court discussed the issue of judicial deference, concluding as follows:

> Section 163.3194 requires that all development conform to the approved Comprehensive Plan, and that development orders be consistent with that Plan. The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the Comprehensive Plan. Consistency with a Comprehensive Plan is therefore not a discretionary matter. (Emphasis added)[6]

Finally, and perhaps most important, it should be understood that the local comprehensive plan is more than just a compilation of local land use policies. Precisely because it is reviewed and approved by the Department of Community Affairs for compliance with state minimum criteria, the plan is imbued with state

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[6] It should be noted that Pinecrest is currently pending before this Court on the developer's petition for discretionary review. Case No. SC01-2429. If this Court affirmed the First District in this appeal, it would not reverse Pinecrest.

policies. The local plan is, thus, a conduit to further the state policies contained in Chapter 163, Fla. Admin. Code Rule 9J-5 and the State Comprehensive Plan set forth in Chapter 187, Fla. Stat. (2000). The local comprehensive plan is also the means to implement important regional policies contained in the applicable strategic regional policy plans beyond the parochial interests of any single local government.

This fact, that the plan implements state and regional policy is another reason not to expand deference to local governments. The legislature requires the plan to be adopted by local ordinance, and intentionally made this ordinance superior to all others through the consistency mandate. The plan is an ordinance based on state law. It is an ordinance developed through the plan review and approval process by the State of Florida, Department of Community Affairs to ensure the plan meets the requirements of a state statute and administrative rule. No other local ordinance can claim this position. No other local ordinance is subject to state review and approval. Only the local comprehensive plan. Thus, when courts are reviewing a development decision for consistency with the plan, they are not just applying local land use policies. They are also supporting state and regional policies contained in state statutes and administrative rules. For

this reason alone, this Court should reject the City's pleas for deference to its construction of its plan and conclusions of consistency.

CONCLUSION.

The local comprehensive planning process is built around a template created by the Legislature in the Growth Management Act, Chapter 163, Part II, Florida Statutes. The hope of the Act is that through the adoption, implementation and enforcement of local comprehensive plans that meet state imposed, minimum criteria, local governments can "preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions". [7]

The consistency mandate requires that local governments follow their plan when reviewing and approving development proposals. Section 163.3215, Fla. Stat. (2000), builds on this mandate by allowing the citizens of Florida to sue local governments and obtain injunctive relief if they do not act consistent with their plan. The judiciary then oversees this process and ensures that local governments to follow their plans through the application of the admittedly, nondeferential, strict scrutiny standard of review.

The stakes are high in this appeal. They involve the environment, urban sprawl, capital facilities, roads, water, schools. All things planned. 1000 Friends believes the local comprehensive plan can enable us to have a better future. However, we also know that Florida's citizens need the courts to help them enforce the local comprehensive plans. They need the strict scrutiny standard. They need effective judicial review to ensure that the consistency

[7] Section 163.3161(3), Fla. Stat. (2000).

mandate is met and the plan is followed at the local level.

This Court should affirm the opinion of the First District Court of Appeal in all respects.

Respectfully submitted this _____day of April 2002.

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Terrell K. Arline
Legal Director
1000 Friends of Florida, Inc.
926 Park Avenue
P.O. Box 5984
Tallahassee, FL 32314-5984
Fla. Bar No. 306584
(904) 222-6277

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been

served by U.S. Mail to the individuals or entities listed below this _____day of

April 2002.

_____

Terrell K. Arline, Esquire

Copies furnished:

Tracey I. Arpen, Jr.

Assistant General Counsel

117 West Duval Street, Suite 480

Jacksonville, FL 32202

Karl J. Sanders, Esquire

200 N. Laura St., 12th Floor

Jacksonville, FL 32202

Paul M. Harden, Esquire

1301 Riverplace Boulevard

Suite 2601

Jacksonville, FL 32207

Robert Leapley, Jr. Esquire

200 W. Forsyth St., #1400

Jacksonville, FL 32202

Mary Helen Campbell, Esquire

601 E. Kennedy Blvd., #2700

Tampa, FL 33601

William Birchfield, Esquire

9428 Baymeadows Road, Suite 625

Jacksonville, FL 32256

Harry Morrison, Esquire

Florida League of Cities

P.O. Box 1757

Tallahassee, FL 32302

Keith Hetrick, Esquire

Florida Home Builders Ass.

P.O. Box 1259

Tallahassee, FL 32302

Stephen Grimes, Esquire

P.O. Drawer 810

Tallahassee, FL 32302

CERTIFICATE OF COMPLIANCE.

I hereby certify that this brief is typed with Times New Roman, 14 point font, proportionally spaced, that complies with Fla. R. App. P. 9.210(a)(2).

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Terrell K. Arline, Esquire