

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' ANSWER BRIEF ON THE MERITS

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EXPLANATION OF REFERENCES

Respondents, Charles Dixon, Jr., et al. will be referred to throughout this brief as the “Dixons.” Both the City of Jacksonville and the City Council of the City of Jacksonville will be referred as the “City.” The Florida Home Builders Association and the Florida League of Cities, Inc. will collectively be referred to as the “FHBA.” The Florida Bar’s City, County and Local Government Law Section will be referred to as the “Florida Bar.” The City, FHBA and Florida Bar will be collectively referred to as the “Opponents.” The First District Court of Appeals that issued the opinion below in this matter will be referred to as the “First DCA.”

References to the First DCA’s opinion filed November 28, 2000, will be denoted in parentheses as “Opinion” followed by the appropriate page number; e.g. (Opinion at 5).

References to the Appendix to the Dixons’ Initial Brief before the First DCA will be denoted in parentheses as “First DCA Appendix” followed by the appropriate Exhibit Letter; e.g. (First DCA Appendix, Exhibit A).

References to the City’s Brief on the Merits will be denoted in parentheses as “City Brief” followed by the appropriate page number; e.g. (City Brief at 5).

References to the Amicus Brief of the FHBA will be denoted in parentheses by “FHBA Brief” followed by the appropriate page number; e.g. (FHBA Brief at 5).

References to the Amicus Brief of the Florida Bar will be denoted in parentheses by “Fla. Bar Brief” followed by the appropriate page number; e.g. (Fla. Bar Brief at 5).

STATEMENTS OF THE CASE AND FACTS

In February of 1997, a developer landowner adjoining the home 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 adjoining the Dixons' homes from Residential Professional Institutional (RPI) land use designation to Community General Commercial (CGC) land use designation and to concurrently rezone the parcel of land to permit a hotel and commercial retail use. The FLUM amendment filed specifically stated the reason for the FLUM application was:

In order to develop the subject parcel with a hotel and minor retail, the land use designation must be changed from RPI to CGC.

(First DCA Appendix, Exhibit C). The interpretation of the developer that the land use change was necessary to develop the hotel was restated in numerous subsequent documents prepared by the developer during the application process.

On multiple occasions beginning in April of 1997, the City's Planning Staff issued reports concurring with and adopting the interpretation of the Comprehensive Plan that a land use change was necessary to allow the development of a hotel next to the Dixons' homes. For example, in the City's Planning Department Report on the initial rezoning and FLUM applications by the developer, the Planning Department provided the expert opinion and Comprehensive Plan interpretation that:

the subject property is located in a Residential Professional Institutional (RPI) future land use category according to the Future Land Use Map (FLUMs) series adopted as part of the Comprehensive Plan. The proposed rezoning provides for uses [(a hotel)] which are not allowed in such area, 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 Small Scale Land Use Amendment, i.e. [Ord. 96 – 1030 (97C-012-3-3-583C)] pending which proposed to change the future land use category from RPI to Community General Commercial (CGC) and if approved, would make the proposed PUD consistent with the FLUMs adopted as part of the Comprehensive Plan.

(First DCA Appendix, Exhibit K).

The Planning Department repeated the Comprehensive Plan interpretation on numerous occasions throughout the FLUM Amendment and rezoning review process. However, after the Planning Commission of the City of Jacksonville rejected the proposed FLUM amendment to CGC, the Planning Department reversed its opinion and interpretation of the Comprehensive Plan and issued the interpretation ultimately accepted by the City and trial court that a hotel is a permitted use within the RPI land use category without the need of a land use map change. As a result of the revised Planning Department interpretation of the Comprehensive Plan, the developer was permitted to proceed with a rezoning of the subject property allowing a hotel use and withdrew the FLUM amendment request. The City approved the rezoning application allowing a hotel next to the Dixons' homes based upon the revised interpretation that a hotel was a permitted use within the RPI land use category.

Subsequent to the City's approval of the rezoning, the Dixons filed an action for injunctive relief, pursuant to Florida Statutes Section 163.3215, to challenge the consistency of the approved rezoning with the Comprehensive Plan of the City. The Trial Court accepted the City's revised interpretation of the Comprehensive

Plan and ruled against the Dixons on their consistency challenge, denying 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 plain and unambiguous language of 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). 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.

This Court has granted discretionary review of the City's petition which argues that the First DCA Opinion applies the incorrect standard of review and fails to give adequate deference to the City's interpretation of the Comprehensive Plan.

SUMMARY OF THE ARGUMENT

The threshold issue in the proceedings below involved the interpretation of the clear, plain and unambiguous language of the Comprehensive Plan. Specifically, the issue was whether a hotel is an allowable land use on lands which are designated Residential Professional Institutional in the Future Land Use Map series of the City of Jacksonville Comprehensive Plan (the "Comprehensive Plan"). Despite the repeated initial opinions to the contrary, the City interpreted the Comprehensive Plan to include a hotel as a permitted use in RPI. The Trial Court accepted the City's second opinion.

Based on the clear, plain and unambiguous language of the Plan, however, the First DCA held that the “circuit court erred in its interpretation of the City’s 2010 Comprehensive Plan, by deciding that a hotel is an appropriate land use within an area labeled as Residential/Professional/Institutional (RPI), and is consistent with the plan’s functional land-use designation.” (Opinion at 2) (emphasis added). Therefore, the First DCA reversed the Trial Court’s finding of consistency and held, as a matter of law, that the local zoning decision was inconsistent with the plain meaning of the Comprehensive Plan.

In reviewing this matter, the First DCA correctly concluded that the interpretation of unambiguous comprehensive plan provision(s) is a question of law that is “easily subject to examination for strict compliance with the plan” and subject to de novo review. (Opinion at 3). Furthermore, where the comprehensive plan provisions are unambiguous, the First DCA correctly concluded that the rule requiring deference to an agency’s interpretation of a law in which it administers is inapplicable. Rather, the well-established non-deferential “strict scrutiny” standard of review used by appellate courts in reviewing comprehensive plan interpretations applies.

In their brief on the merits, the City argues that the First DCA impermissibly “redefined the issue of consistency as a pure question of law, reviewable de novo, and subject to strict scrutiny review that accorded no deference to the City’s interpretation of its own Comprehensive Plan.” In support, the City argues that the issue of consistency is a question of fact, not law. (City Brief at 21). Accordingly, the City argues that First DCA was limited to determining whether competent and

substantial evidence supported the decision of the lower tribunal. (City Brief at 17).

The City, however, oversimplifies the issue of consistency as well as the strict scrutiny standard of review. In actuality, both the Florida Statutes and the relevant case law provide that the issue of consistency may be a question of law subject to de novo review by the District Court. Furthermore, strict scrutiny is not limited to determining whether competent and substantial evidence supports the decision below. A determination of competent and substantial evidence only applies to factual determinations by the court below. Where the issue before the court is purely one of law, strict scrutiny is not limited to a determination of competent substantial evidence. Rather, the definition of strict scrutiny, as adopted by this Court, provides that strict scrutiny is a process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with or adherence to a standard or norm. This is precisely the standard of review applied by the First DCA.

In an attempt to circumvent this non-deferential strict scrutiny standard of review, the City argues that the First DCA's application of the "strict scrutiny" standard of review to interpretations of the Comprehensive Plan conflicts with the well established rule of contemporaneous statutory construction, which requires deference to an agency's interpretation of the statute in which it is charged with administering. (City Brief at 24).

While this conclusion may be true in cases involving ambiguous or conflicting comprehensive plan provisions, it is not applicable in this matter. The

Comprehensive Plan provisions in question are unambiguous and not subject to multiple interpretations. The rule of contemporaneous construction does not apply to interpretations of clear and unambiguous provisions. Rather, the rules of statutory construction required the First DCA to interpret the Comprehensive Plan based on the plain meaning of the language provided.

Essentially, the City is arguing for a general rule overriding the strict scrutiny level of review adopted by this Court and requiring deference to an agency's interpretation of the comprehensive plan unless clearly erroneous, even where the language of the Comprehensive Plan is clear and unambiguous. In support, the City argues that comprehensive plans are complex in nature and, thus, a highly deferential standard of review is necessary to allow flexible land management. This "flexible" approach to land management, however, conflicts with the explicit purpose behind adopting comprehensive plans as well as this Court's rationale for adopting a strict scrutiny standard of review in land use matters. As evidenced by the multiple opinions issued by the City in this case, the City's flexible land management approach would allow for the inconsistent land use practices sought to be avoided by the adoption of comprehensive plans and the strict scrutiny standard of review.

Furthermore, even if the "clearly erroneous" standard of review is applied, the City's interpretation of the Comprehensive Plan in this matter was clearly erroneous and not entitled to any deference. It is "clearly erroneous" to interpret a comprehensive plan contrary to the plain language of that plan.

ARGUMENT

I. Interpretation of the comprehensive plan is a question of law subject to de novo review by the courts.

In matters involving consistency challenges based solely upon the interpretation of a comprehensive plan, neither the City nor the trial court is in a superior position to the appellate court, or this Court for that matter, to evaluate the plain unambiguous language of a comprehensive plan. Rather, the rules of statutory construction and appellate procedure provide that the interpretation of a comprehensive plan is a question of law that can be equally determined by either the Trial Court or the Appellate Court. Accordingly, the First DCA correctly classified this consistency challenge as purely one of law subject to de novo review.

As noted by the First DCA, comprehensive plans and other zoning regulations are equivalent to statutes, ordinances, contracts, or other written instruments and subject to the same rules of statutory construction. (Opinion at 4); see also, Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552, 553 (Fla. 1973); Village of Key Biscayne v. Dade County, 627 So. 2d 1180, 1181 (Fla. 3d DCA 1993). It is well established that the construction of such statutes, ordinances, contracts, and other written instruments is a question of law subject to de novo review unless their meaning is ambiguous. (Opinion at 4); (Fla. Bar Brief at 4).

Similarly, the relevant case law indicates that the interpretation of comprehensive plans and other land use regulations is a question of law subject to de novo review where the language is unambiguous. See, e.g., Windward Marina,

LLC v. City of Destin, 743 So. 2d 635 (Fla. 1st DCA 1999) (conducting de novo review of comprehensive plan language and rejecting City and trial court interpretation of the comprehensive plan); Village of Key Biscayne v. Dade County, 627 So. 2d 1180 (Fla. 3d DCA 1993) (same); City of Homestead, 444 So. 2d 1074 (“Construction of city ordinances are a question of law unless their meaning is ambiguous.”); Rinker Materials Corp., 286 So. 2d 552 (conducting de novo review of municipal ordinance and rejecting city and trial court interpretation). This de novo review is based on the principle that a trial court is not in a superior position to an appellate court to evaluate the plain language of the relevant statute or other written instruments. “Where the decision rests either on a pure matter of law or on documentary evidence that can be evaluated equally well by the appellate and trial courts, the standard of review is de novo.” APPELLATE STANDARDS OF REVIEW, The Florida Bar Journal, Volume LXXIII, No. 11 at page 49.

In its brief on the merits, the City argues that the determination of consistency is a question of fact and, therefore, de novo review is inappropriate. (City Brief at 12-19). According to the City, the only issue on appeal is whether there is competent and substantial evidence to support the lower court’s finding of consistency, including the interpretation of the Comprehensive Plan. (City Brief at 16). The City, however, fails to cite any law supporting the conclusion that consistency determinations are purely questions of fact.

The City’s argument oversimplifies the consistency issue and ignores the threshold issue of the proceedings below – the legal interpretation of the Comprehensive Plan. A brief review of the relevant statutes indicates that

consistency challenges include questions of law, questions of fact, or questions of law as applied to facts. The issue of consistency is defined as:

A development order or land development shall be consistent with the comprehensive plan if the land uses, densities, or intensities, and other aspects of the 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.

§ 163.3194(3)(a), Fla. Stat. (2000). This definition demonstrates that a consistency determination may involve questions of law (determining objectives, policies, land uses, and densities or intensities in the comprehensive plan), questions of fact (determining the specific set of facts unique to the development), or questions of law as applied to a particular set of facts (determining compatibility). In analyzing the consistency issue, a court must initially make a legal determination as to what the plain language of the comprehensive plan requires. Where this legal interpretation forms the entire basis for the consistency challenge, the rules of statutory construction provide that the issue of consistency is purely a question of law subject to de novo review by the appellate courts. In this matter, only the initial threshold determination regarding the legal interpretation of the Comprehensive Plan is at issue. The language of the Comprehensive Plan is unambiguous and there is no dispute as to the underlying facts, conflicting policies within the Comprehensive Plan, or whether the specific aspects of the development are compatible with the Comprehensive Plan. The only issue was whether a specific use, a hotel, is a permitted use under the plain and unambiguous language of the Comprehensive Plan. Accordingly, the First DCA correctly held that the

issue before the court was purely one of law subject to de novo review.

II. Where the plain language of the comprehensive plan is unambiguous, a local agency's interpretation of the comprehensive plan is not entitled to deference and the "strict scrutiny" standard of review applies.

The standard of review in all consistency challenges, including those based solely on questions of law, must be subject to the well-established strict scrutiny standard of review employed by the courts in examining local zoning decisions. This is especially true where, as in this case, a zoning authority approves a land use more intensive than the proposed comprehensive plan. This non-deferential strict scrutiny standard of review is necessary to ensure uniformity in local land use decisions.

In determining the appropriate standard of review for consistency challenges, the Fourth District noted that "[t]he enactment of the comprehensive statutory scheme manifests a clear legislative intent to mandate intelligent, uniformed growth management throughout the state in accord with the statutory scheme. This purpose cannot be achieved without meaningful judicial review in lawsuits brought under the planning act." Southwest Ranchers Homeowners Ass'n, Inc. v. Broward County, 502 So. 2d 931, 936 (Fla. 4th DCA 1987). Where a zoning authority approves a land use more intensive than the proposed plan, the long-term expectations for growth under the plan have been exceeded. Id. at 936. Therefore, review by the courts, including review by the appellate court, must subject the decision of the zoning authority to "strict scrutiny." Id.; Board of County Comm'rs of Broward County v. Snyder, 627 So. 2d 469 (Fla. 1993) (adopting strict scrutiny standard of review).

In determining what this “strict scrutiny” standard of review requires in matters involving purely questions of law, the definition of strict scrutiny adopted by the courts and applied by the First DCA in the case at bar provides clear guidance. In the opinion below, the First DCA noted the strict scrutiny standard of review adopted by this Court as follows:

The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive plan is whether the zoning authority’s determination that a proposed development conforms to each element of the land use plan is supported by competent and substantial evidence. The traditional strict judicial scrutiny applies.

Strict scrutiny is not defined in land use cases which use the phrase, but its meaning can be ascertained from common definition of the separate words. Strict scrutiny implies a rigid exactness, or precision. A thing scrutinized has been subject to minute investigation. Strict scrutiny is thus a process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with or adherence to a standard or norm. It is the antithesis of deferential review.

(Opinion at 3) (citing Machado, 519 So. 2d at 632).

Based on this definition, in cases involving interpretations of the underlying regulations it is evident that judicial review should employ a “process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with or adherence to a standard or norm”. Machado, 519 So. 2d at 632. To that end, in an earlier and similar case involving another erroneous interpretation of the City of Jacksonville’s Comprehensive Plan, the First DCA noted:

Under such circumstances, the explanation offered by the

local body for concluding that the project is consistent with the plan, despite suggestions to the contrary in the language of the plan itself, should not simply be accepted at face value. It should instead be carefully examined in light of the language of the plan, with regard to whether the local government's rationale can be reconciled with the provisions of the plan.

B.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252, 257 (Fla.

1st DCA 1990). This is precisely the standard of review applied by the First DCA:

We cannot agree the City's argument that the standard [of review] is only one of determining whether there was competent and substantial evidence. . . .

Because we conclude that the issue before us is one that is 'easily subject to examination for strict compliance with the comprehensive 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.

(Opinion at 4) (emphasis added).

In an attempt to limit this strict scrutiny standard of review, the City relies upon the unfounded assumption that consistency is a question of fact, not law. As such, the City argues that the strict scrutiny standard of review limits the appellate court to reviewing the record to determine whether the trial court's decision is supported by competent and substantial evidence. (City Brief at 16). In support, the City cites several cases involving consistency challenges based on questions of fact. (City Brief at 16-19). For example, the City cites the Fourth District Court of Appeal's opinion in Southwest Ranchers Homeowners Ass'n, Inc. and notes that "[a]lthough the Fourth Circuit [stat] employed strict scrutiny review, it nevertheless concluded that 'the factual findings of the trial court should be accorded great

weight.”” (City Brief at 20) (quoting from Southwest Ranchers Homeowners Association, Inc., 502 So. 2d at 938 (emphasis added)).

Indeed, the City is correct in summarizing the doctrine that strict scrutiny prevents appellate courts from reweighing evidence and requires courts to give great weight to the factual findings of trial courts. (City Brief at 17). This doctrine and the underlying case law, however, do not deal with the issue in this matter, specifically the interpretation of a clear, plain provision of the Comprehensive Plan where there is no factual dispute.

As discussed above, not all consistency challenges involve questions of fact. Accordingly, the strict scrutiny standard of review cannot be limited only to determining whether there is competent and substantial evidence to support the decision of the lower tribunal. Such competent and substantial evidence may be necessary to support factual determinations, but is of no import in legal interpretations as questions of law. Where the issue is purely one of law, there is no need for an appellate court to review the record for competent and substantial evidence. Contrary to the City’s arguments, the First DCA did not reweigh evidence or disturb factual findings of the court below. Rather, the First DCA made a de novo review of a question of law, the interpretation of the Comprehensive Plan, and correctly applied the strict scrutiny standard of review adopted by this Court in Snyder.

Similarly, the FHBA argues that the de novo review applied by the First DCA creates a different standard of review for challenges brought by an aggrieved party under Florida Statutes Section 163.3215 and challenges brought by a developer on

a local government's denial of a rezoning request under common law writ of certiorari. (FHBA Brief at 14-16). To that end, the FHBA argues that, in certiorari review of a city's denial of a zoning request, the Circuit Court is limited to determining whether the development order is supported by competent and substantial evidence and must give deference to the local interpretation of the regulations at issue. Conversely, according to the FHBA, the First DCA's opinion indicates that, in a challenge brought pursuant to Section 163.3215, the Circuit Court may conduct a de novo review and substitute its judgment for that of the governmental body without regard to the competent and substantial evidence produced below.

Again, however, it is important to note that the First DCA opinion is limited to a question of law, the interpretation of clear and unambiguous comprehensive plan provisions. In such instances, the First DCA correctly held that the standard of review is not only one of determining whether competent and substantial evidence supports the City's interpretation of the Comprehensive Plan. (Opinion at 2). Rather, the Court may substitute its opinion for that of the City or lower court and rule, as a matter of law, that the lower courts interpretation was erroneous.

This is the same standard that applies in certiorari challenges to a City's denial of a development order based solely on a question of law. See, e.g., Windward Marina, 743 So. 2d 635 (conducting de novo review and reversing lower court's and City's interpretation of comprehensive plan as a matter of law). Therefore, the standard of review is equivalent whether a proceeding is brought by an affected party pursuant to Chapter 163 or by a developer under common law

certiorari. Where the issue is one of fact, the courts must review the record for competent and substantial evidence to support the City's determination. Where the issue is purely one of law, both processes permit a de novo review of the lower court's or City's decision subject to the non-deferential strict scrutiny standard of review.

III. Only where the comprehensive plan is ambiguous should the more deferential, clearly erroneous standard of review apply.

Contrary to the well-established rules of statutory construction, the opponents argue that the role of the judiciary in interpreting comprehensive plans should be severely limited. Specifically, the City argues “[i]n accordance with the long-standing principles of deference due to agency interpretations of the law in which they are charged with administering, a local government’s interpretation of its own comprehensive plan should not be interfered with by the courts unless ‘clearly erroneous.’” (City Brief at 19). In support, the City relies upon a well-established rule of statutory construction – the doctrine of contemporaneous construction. This doctrine, however, is irrelevant where the statutory provisions in question are clear and unambiguous. *See, e.g. Houghton v. Payne*, 194 U.S. 88, 100 (1904) (“it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction.”); *Andrews v. Borden Co.*, 143 So. 2d 556, 558 (Fla. 2d DCA 1962)(same).

As discussed above, the same rules that are applied in the construction of state statutes are employed in the construction of comprehensive plans and other local ordinances. *See, e.g., Rinker Materials Corp.*, 286 So. 2d 536. To that end,

the rules of statutory construction provide that statutes must be given their plain and obvious meaning. Id. at 553. Accordingly, where the words used in an act are unambiguous and clearly express the legislative intent, no other rules of construction or interpretation are necessary or warranted. Id.; (Fla. Bar Brief at 4). As noted by the Florida Bar, this Court agreed with this approach and held that “[w]hen interpreting a statute, courts must determine the legislative intent from the plain meaning of the statute. If the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended.” State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996); (Fla. Bar Brief at 4).

In accordance with these principles, the First DCA held that the language of the Comprehensive Plan was unambiguous and, therefore, the plain meaning of the statute controlled. “We reject, moreover, the City’s argument that deference should be given to the City’s interpretation of law which it administers, thereby requiring its approval so long as its construction falls within the range of possible interpretations. . . . We are not of the view that the City’s 2010 Comprehensive Plan is ambiguous, thereby making it susceptible to different interpretations.” (Opinion at 4-5). Rather, as required by the well-established rules of statutory construction, the First DCA interpreted the Comprehensive Plan provisions in question based on the plain and obvious meaning of the language used. The First DCA noted “[i]t is obvious from a plain reading of the above passage that the commercial portion of the mix permits only commercial uses otherwise allowable in the RPI, which, as stated, neither expressly nor by reasonable implication allows hotels.” (Opinion at

7).

In arguing for a more deferential standard of review, the opponents ignore the clear holding of the First DCA. The FHBA argues that “[i]f there is no clear inconsistency with the comprehensive plan, the governmental body’s interpretation should be given deference if its rational can be reconciled with the plan as a whole.” (FHBA Brief at 13) (emphasis added). Similarly, the City notes that “[i]f a Comprehensive Plan or zoning ordinance is capable of being interpreted in two or more different ways, it is error for a court not to give the zoning authorities’ interpretation deference over its own view.” (City Brief at 23) (citing St. Johns County v. Owings, 554 So. 2d 535, 543 (Fla. 5th DCA 1989) (Sharp, J., dissenting) (emphasis added)). Here, the First DCA held there was a clear inconsistency with the Comprehensive Plan and, therefore, the Court was not required to give deference to the City’s interpretation. The language of the First DCA opinion is specific in this respect, “we are not of the view that the City’s 2010 Comprehensive Plan is ambiguous, thereby making it susceptible to different interpretations.” (Opinion at 5). Therefore, the First DCA properly rejected the City’s interpretation of the Comprehensive Plan and applied the plain meaning to the language used in the Comprehensive Plan.

The opponents are essentially arguing for a general rule over-riding the strict scrutiny threshold level of review adopted by this Court and requiring deference to an agency’s interpretation of the comprehensive plan, even where the plan is clear and unambiguous. In support, the opponents allege that the traditional deference provided to the City’s interpretations of the zoning code under the “fairly

debatable” standard of review remained intact after the adoption of the “strict scrutiny” standard of review. (City Brief at 10) (““strict scrutiny’ review of quasi-judicial land use decisions does not displace the long-recognized deference that this court has accorded to an agency’s interpretation of the law in which it administers.”); (FHBA Brief at 11). The opponents argue that deference to the City’s interpretation of the Comprehensive Plan is necessary due to the complex nature of comprehensive plans and the City’s expertise in this area.

These arguments, however, are inconsistent with the rationale provided by the courts in adopting the “strict scrutiny” standard of review and the goals behind creating comprehensive plans. The intent behind adopting a “strict scrutiny” standard of review in land use decisions is clear - reduce the threshold level of deference due to local zoning authorities in reviewing zoning decisions. In adopting the strict scrutiny standard of review, this Court noted:

Historically, local governments have exercised the zoning power pursuant to a broad delegation of state legislative power subject only to constitutional limitations. Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning....

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner.

Snyder, 627 So. 2d at 472. Based on these concerns, this Court ruled that local zoning decisions were quasi-judicial in nature and subject to the “strict scrutiny” standard of review. In doing so, this Court rejected the traditional deference accorded to local agency’s and instead, opted for a more exacting standard of review that is the “antithesis” of deferential review. Snyder, 627 So. 2d 469;

Machado, 519 So. 2d at 632 (noting that strict scrutiny “is the antithesis of deferential review.”).

Despite the opponents’ arguments to the contrary, there is no general rule over-riding the strict scrutiny level of review adopted by this Court in Snyder which requires deference to an agency’s interpretation of the comprehensive plan in which is administers, especially where the language of the comprehensive plan is unambiguous. Although the rules of statutory construction, including the contemporaneous construction doctrine, may provide for additional deference to local agency’s in certain instances, such rules are inapplicable in this case. All of the cases cited by the opponents involve cases in which the provisions in question are ambiguous or the court is forced to make a choice between conflicting provisions and local policy choices. In such instances, it may be appropriate for the Court to defer to the expertise of the City.

Where the language of the comprehensive plan is unambiguous, however, and there is no conflicting policies at issue, there is no need to resort to the expertise of the local government. Furthermore, as noted by the First DCA, the fact that the statute is complicated does not necessarily render the statute ambiguous such that the agency’s technical expertise is necessary to interpret it. (Opinion at 4). Interpreting the plain language of the comprehensive plan is not an issue requiring deference to the City’s expertise.

The opponents also argue that deference to the local authorities is necessary to afford “flexibility” to local governments in applying these complex comprehensive plans. (City Brief at 11); (FHBA Brief at 12); (Fla. Bar Brief at 8).

This argument, however, does not provide a basis for reversing the decision of the First DCA. The City’s argument is nothing more than an attempt by the local government to obtain a virtually unreviewable authority to provide special interpretations of local zoning regulations in the guise of flexible land management.

This “flexible” approach to land management, however, will result in the same inconsistent land management practices rejected by this Court in adopting the strict scrutiny standard of review. The First DCA warned that such “flexible land management” would effectively place the ultimate determination of a rezoning “within the discretion of whoever composes the membership of the governmental body’s planning department at any given time, and the goal of certainty and order in future land-use decision-making would be circumvented.” (Opinion at 5). Indeed, the “flexible” approach requested by the City has led to inconsistent results in this case. Through the course of this matter, the Planning Department has issued two opposite opinions regarding the requirements of the Comprehensive Plan – one rejecting a hotel and one permitting a hotel. This is precisely the type of inconsistent local land practices the courts intended to curtail in adopting the strict scrutiny standard of review.

Furthermore, this “flexible” land management would negate the purpose behind creating comprehensive plans – to ensure orderly growth and balanced development. To that end, the First DCA noted:

Ambiguity in such plans would frustrate one of the cardinal purposes behind their creation: to provide “materials in such descriptive form . . . as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future development of the area.” §163.3177(1), Fla. Stat. (1999)

(emphasis added). Moreover, the flexible interpretation urged by the City thwarts a primary objective of the plan itself: “to insure protection of existing and emerging residential areas from encroachment by intrusive commercial, industrial and public/semi-public uses.”

(Opinion at 5). As evidenced by the multiple opinions issued by the City in this case, the City’s flexible land management approach will lead to the same inconsistent land use practices that occurred prior to the adoption of comprehensive plans and negate the orderly growth and development provided in such plans.

Lastly, even if the highly deferential, clearly erroneous standard of review is accepted by this Court as applicable to interpreting unambiguous statutes, the City’s interpretation of the Comprehensive plan in this matter was clearly erroneous and not entitled to any deference. Under the doctrine of contemporaneous construction, a court must give deference to an agency’s interpretation of an ambiguous statute unless that interpretation is unreasonable or clearly erroneous. (City Brief at 20-22); (FHBA Brief at 13); (Fla. Bar Brief at 5-8). Despite the arguments to the contrary¹, the First DCA carefully considered each element of the City’s interpretation of the Comprehensive Plan and concluded, based on the plain meaning of the language used, that the City’s interpretation of the Comprehensive Plan was unreasonable and erroneous.

¹ The Florida Bar argues that the District Court “failed to even consider” and “totally disregard” the City of Jacksonville’s interpretation of the Comprehensive Plan. (Fla. Bar Brief at 7). A cursory review of the First DCA opinion, however, indicates that the Court did in fact consider the City’s interpretation and went into great detail as to why the City’s interpretation was not supported by the express language of the Comprehensive Plan.

The First DCA noted that:

The lower court and the City interpreted this language [of the Comprehensive Plan] to permit the PUD, because it provides for less than 50 percent commercial use. This conclusion is erroneous. It is obvious from a plain reading of the above passage that the commercial portion of the mix permits only commercial uses otherwise allowable in the RPI, which, as stated, neither expressly nor by reasonable implication allows hotels.

(Opinion at 7). (Emphasis added). The First DCA stated clearly “[t]here is, moreover, no language provided under the Commercial designation which reasonably supports the use of hotel within the later listed RPI subcategory.”

(Opinion at 10). Based on this language, it is clear that the City’s interpretation fails the clearly erroneous standard of review and is not entitled to any deference.

Therefore, even if the doctrine of contemporaneous construction applies, the Court was not required to give deference to the City’s interpretation of the Comprehensive Plan.

CONCLUSION

The First DCA applied the correct standard of review in the proceeding below. The First DCA opinion revolved around the interpretation of the plain language of the Comprehensive Plan. Where the language of a comprehensive plan is clear and unambiguous, the interpretation of a comprehensive plan is a question of law subject to de novo review by the appellate courts.

In reviewing consistency challenges based on interpretations of the comprehensive plan, the courts are bound by the well-established non-deferential strict scrutiny standard of review. Under this standard, reviewing courts must make a detailed examination of City’s and lower court’s interpretation to ensure that it is

in exact compliance with the comprehensive plan. In doing so, the rules of statutory construction require the reviewing court to initially interpret the plan based on the plain and obvious meaning of the language used in the comprehensive plan. Only if this language is ambiguous should the court give deference to the local agency's interpretation of the comprehensive plan.

The opponents attempt to limit the judiciary's role in interpreting comprehensive plans and ask this court to adopt a highly deferential standard of review in cases involving the interpretation of comprehensive plans. Essentially, the opponents ask this Court to find that local interpretations of comprehensive plans are entitled to great weight and must be upheld unless clearly erroneous, even where the language of the plan at issue is unambiguous.

This request is nothing more than an attempt to regain the high degree of deference specifically rejected by this Court in adopting the strict scrutiny standard of review of local zoning decisions. Accepting the City argument would undermine the goals of comprehensive plans and result in the same inconsistent land use practices which occurred prior to the adoption of comprehensive plans and the strict scrutiny standard of review.

For the foregoing reasons, the Dixons respectfully request this Court to reject the opponents' request and uphold the Opinion of the First DCA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Karl J. Sanders, Esq., 200 N. Laura St., 12th Floor, Jacksonville, FL 32202, Tracey I. Arpen, Jr., Esq., 117 West Duval Street, Suite 480, Jacksonville, Florida 32202; Robert Leapley, Jr., Esq. 200 W. Forsyth St., #1400, Jacksonville, Florida 32202; Mary Helen Campbell, Esq., Hillsborough County Attorneys Office, 601 E. Kennedy Blvd., #2700, Tampa, Florida 33601; and W.O. Birchfield, Esq., 9428 Baymeadows Road, Suite 625, Jacksonville, Florida, 32256, Harry Morrison, Jr., Esq., Florida League of Cities, P.O. Box 1757, Tallahassee, FL 32302, Keith Hetrick, Esq., Florida Home Builders Association, P.O. Box 1259, Tallahassee, FL #2302, Stephen H. Grimes, Esq., Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302 and Terrell K. Arline, Esq., 1000 Friends of Florida, P.O. Box 5984, Tallahassee, FL 32314 by U.S. mail this _____ day of April, 2002.

ATTORNEY

CERTIFICATE OF COMPLIANCE

I CERTIFY that the typeface used in this brief is Times New Roman 14-point font, proportionally spaced, and therefore complies with the requirements of Rule 9.210(a)(2), F.R.A.P.

ATTORNEY

