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

CITY OF JACKSONVILLE'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Both the arguments of the Dixons and the holding of the district court below are premised on their assertion that the language of the City's Comprehensive Plan is unambiguous and therefore not susceptible to differing interpretations. Notably absent from either the Dixons' Answer Brief or the opinion below, however, is any reference to these purportedly "unambiguous" terms. Equally absent is any reference to the language of the Plan that expressly delineates *how* it is to be interpreted. Indeed, the Plan expressly and unambiguously states that each land use category has a "*range* of potentially permissible uses, which are *not* exhaustive, but are intended to be *illustrative* of the character of uses permitted."

"Meaningful" review of local land use decisions does not imply that a local government's interpretation of its own Comprehensive Plan should be subject to *de novo* second-guessing by the judiciary. Neither the Growth Management Act nor Snyder compel such a conclusion. Rather, the ultimate issue of whether a particular development is consistent with the local government's Comprehensive Plan is a question of fact, subject to a *de novo* proceeding before a court of law pursuant to a "strict scrutiny" standard of review. Therein lies the "meaningful review."

Although not conclusive, a local government's contemporaneous construction of its own land use plan is a valuable aid in determining the meaning of

that plan. As this Court has recognized, the judiciary is "inherently unsuited . . . to sit as a roving 'super agency' with plenary oversight in such matters." Dusseau v. Metropolitan Dade County Board of County Comm'rs, 794 So.2d 1270 (Fla. 2001). Judicial deference to such interpretations recognize the "superior technical expertise and special vantage point" of local officials to make such decisions. Application of the "strict scrutiny" standard of review, in contrast, is reserved solely for the issue of consistency – that is, whether the proposed development is consistent with the City's Comprehensive Plan. This determination is inherently dependent upon a fact-specific analysis of the approved development against the goals, objectives and policies of the local government's Comprehensive Plan.

In sum, it is the *development order* – or final zoning decision of the local governing body – that is subject to the strict scrutiny review of the judiciary. In contrast, the local Planning Director's interpretation is subject to the deferential "clearly erroneous" standard of review. This is particularly true where, as here, the express language of the Plan plainly asserts that the permissible uses within each future land use category are illustrative – not exhaustive. Indeed, the decision of the district court below that the Plan unambiguously precludes the development of a hotel in the RPI land use category is, itself, in direct conflict with the plain and ordinary language of the City's Comprehensive Plan.

ARGUMENT

THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE CITY'S COMPREHENSIVE PLAN PRESCRIBING *HOW* IT IS TO BE INTERPRETED UNMISTAKABLY ESTABLISHES THAT THE LISTED USES IN ANY GIVEN LAND USE CATEGORY ARE *NOT* EXHAUSTIVE, BUT MERELY *ILLUSTRATIVE* OF THE CHARACTER OF USES PERMITTED.

Contrary to the assertion of the Dixons, the issue of consistency does not become a pure question of law, subject to multiple *de novo* reviews, simply because a court declares the language of a Comprehensive Plan to be unambiguous. This is particularly true where, as here, the district court's interpretation itself is expressly at odds with the clear and unambiguous language of the Plan.

The Dixons readily acknowledge that a reviewing court examines an administrative interpretation pursuant to the deferential "clearly erroneous" standard of review where the language at issue is susceptible to differing interpretations. (Dixon Brief at 15). They maintain, however, that the doctrine of contemporaneous construction does not apply because the City's Comprehensive Plan clearly and unambiguously declares that a hotel is not an allowable use in the RPI land use category.

No citations or explicit references are made to this purportedly "unambiguous" declaration. The reason for this is simple: no such declaration exists. Rather, the operative language of the RPI land use category provides:

> This is a mixed use category primarily intended to accommodate office, limited commercial retail *and service establishments*, institutional and medium density uses. . . .
>
> In addition to the secondary and supporting uses for all commercial land use categories listed heretofore, veterinarians, filling stations, off street parking, nursing homes, residential treatment facilities, day care centers, and other institutional uses such as libraries, public/private schools, colleges and universities, cemeteries, mausoleums but not funeral homes or mortuaries, private clubs, art galleries, museums, theaters and related uses may also be permitted when sited in compliance with this and other elements of the 2010 Comprehensive Plan and all applicable land development regulations.

(City's App F at 46) (emphasis added).

According to district court's *de novo* interpretation of this language, "the planned development of a hotel cannot qualify as *any* type of permissible use. [in the RPI land use category]. Accordingly, the traditional maxim of construction, *expressio unius est exclusio alterius*, appears altogether applicable." Dixon v. City of Jacksonville, 774 So. 2d 763, 766 (Fla. 1st DCA 2000). This conclusion, however, completely disregards the clear and unambiguous language of the Plan that prescribes *how* it is to be interpreted:

> The character of each land use category is defined by building type, residential density, functional use, and the physical composition of the

> land. **Each category has a *range* of potentially permissible uses, *which are not exhaustive,* but are intended to be *illustrative* of the character of uses permitted.**
>
> . . . .
>
> [Moreover], [n]ot all potential uses are routinely acceptable anywhere within the land use category. Each potential use must be evaluated for compliance with the goals, objectives and policies of this and other elements of the 2010 Comprehensive Plan, as well as applicable federal, State and local land development regulations.

(City's App. F at 41) (emphasis added).

By definition, this non-exhaustive, illustrative range of permissible uses cannot – as a matter of law – categorically exclude the development of a hotel in the RPI commercial land use category; the language clearly contemplates that such a determination is inherently fact-specific, requiring consideration of the particular development's overall consistency with the Comprehensive Plan.

The issue is whether the City's interpretation is inconsistent with the express language of the Comprehensive Plan, *not* whether there is language in the Comprehensive Plan that expressly says what the City interpreted it to mean. If that were the question, it would be a *non sequitur*: there would be no need for an interpretation if anything that is not expressly stated in the Comprehensive Plan is deemed inconsistent with its express language.

Despite the unambiguous language which clearly contemplates fact-specific interpretations, both the Dixons and the opinion below take the position that a local government's Comprehensive Plan can *never* be susceptible to differing interpretations. In the words of the district court:

> Indeed, 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). . . . [W]ere we to adopt the deferential standard applied to the plan by the lower court, the ultimate determination of a planned development would be placed within the discretion of whoever composes the member 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.

Id. at 765.

This conclusion – that the ultimate issue of consistency would be left within the unfettered discretion of an administrative official – completely ignores the remedy afforded by Section 163.3215 to curb such abuses; namely, that an aggrieved third party is entitled to challenge a development order as inconsistent with the local comprehensive plan in a *de novo* proceeding before a court of law**.** In other words, according judicial deference to the contemporaneous construction of the Plan by the person charged with its interpretation does not eliminate "meaningful review," as the Growth Management Act ensures that the final

development order will be strictly scrutinized for consistency with the local government's comprehensive plan.

This is precisely what happened in the case at hand. The Dixons had their day in court. They presented the circuit court with both documentary evidence and expert testimony as to why they believed the development was inconsistent with the City's Comprehensive Plan.[1] The trial judge, however, ruled otherwise, concluding that the evidence established that the subject development order was, in fact, consistent with the City's Comprehensive Plan.

A Comprehensive Plan for future development is just that – a *plan*. Unlike a zoning code, it does not enumerate an exhaustive list of permissible uses. Rather, as the "constitution" for local land use decisions, the Comprehensive Plan serves as the authoritative *guide* to local development activity. As such, it will invariably require fact-specific interpretations. The question, then, is not whether the language is susceptible to differing interpretations, but *how* is the Plan to be interpreted. The plain and ordinary language of the City's Comprehensive Plan leaves no room for doubt here. The decision below impermissibly disregards both the unambiguous

[1] On appeal, however, the Dixons maintained – and continue to maintain – that the issue of consistency is a pure question of law, subject to a *de novo* strict scrutiny standard of review..

directive of the Plan itself and the established decisional law of this Court. See, e.g., Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002).

CONCLUSION

As more fully set forth in the preceding discussion, the decision of the district court below completely disregards the clear and unambiguous language of the City's Comprehensive Plan which prescribes *how* the Plan is to be interpreted and instead substitutes its own interpretation for that of the local government. The decision conflicts with this Court's prior pronouncements on both the permissible scope of judicial review of agency interpretations and the proper application of the "strict scrutiny" announced in Snyder. Accordingly, the City respectfully urges this Court to reverse the decision of the district court and remand with directions to apply the correct law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Paul M. Harden, Esquire, 1301 Riverplace Boulevard, Suite 2601, Jacksonville, Florida 32207; 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; William Birchfield, 9428 Baymeadows Road, Suite 625, Jacksonville, Florida, 32256; Harry Morrison, Jr., Florida League of Cities, P.O. Box 1757, Tallahassee, FL 32302; Keith Hetrick, Florida Home Builders Association, P.O. Box 1259, Tallahassee, FL 32302; Stephen H. Grimes, Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302; and Terrell K. Arline, 1000 Friends of Florida, P.O. Box 5984, Tallahassee, FL 32314, by U.S. mail this _____ day of June, 2002.

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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.

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ATTORNEY