Case No. SC06-1204

IN THE SUPREME COURT OF FLORIDA

ELIZABETH J. NEUMONT, et al.,
Plaintiffs/Appellants,

v.

STATE OF FLORIDA and
MONROE COUNTY, FLORIDA,
Defendants/Appellees.

On Certification from the United States
Court of Appeals for the Eleventh Circuit
Case No. 04-13610

# REPLY BRIEF OF PLAINTIFFS/APPELLANTS


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## INTRODUCTION

Plaintiffs/Appellants ("Plaintiffs") respectfully file this brief in reply to both the Answer Brief of Appellee, Monroe County, Florida ("Answer Br.") and the Brief of Amici Curiae Florida Association of Counties, Inc., et al. ("Amici Br.").

## ARGUMENT

The U.S. Court of Appeals for the Eleventh Circuit has asked this Court to determine, for purposes of Florida Statutes § 125.66(4)(b), what is "a 'substantial or material change' in a proposed ordinance during the enactment process (that is, the kind of change that would require a county to start the process over)." Initial Brief of Plaintiffs/Appellants ("Initial Br."), Appendix ("App.") A at 6. Plaintiffs argued that such a change "includes any change that would trigger the application of Section 125.66(4)(b) in the first place, namely, a change to the 'actual list of permitted, conditional, or prohibited uses within a zoning category.'" Initial Br. at 8-9. This argument drew from the statute's text, four decades of Florida precedent, the legislative history of the 1995 amendment to Section 125.66, and procedural due process considerations. *See id.* at 12-20. Plaintiffs further argued that a substantial or material change in a proposed ordinance during the enactment process "also includes any change necessary to secure legislative passage of the ordinance." *Id.* at 9. Such a change is, by definition, a "but for" cause of such passage, and the law recognizes that a factor which *causes* a result is a "*substantial* factor." *See id.* at 20-21.

Monroe County, by contrast, is reluctant even to confront the certified question. That is, the County devotes the bulk of its brief to discussing the technicalities of various notice and title requirements, in which the Eleventh Circuit showed no interest. When the County turns to the actual question in this case, it offers a surprising answer. According to the County, "only when the changes occurring during the enactment process render [an ordinance's] *title* inaccurate, misleading or otherwise deficient (i.e., when the *subject* changes), are such changes substantial and material so as to" require a county to start the enactment process anew. Answer Br. at 13-14; *see also id.* at 18. The County equates these concepts with an ordinance's "original general purpose," *id.* at 11 n.6, which is also the standard urged by the amici. *See, e.g.*, Amici Br. at 2-3. But as set out below, that answer is wrong for many reasons.

### A. Text of the Governing Standard

The County expressly agrees with the precept that "a '*substantial or material*' change made during the enactment process would require the enactment process to begin anew." Answer Br. at 18 (emphasis added). Yet at the most basic level, the County's proposed answer to the certified question ignores the precept's key terms. It is obvious that the *substance* of a proposed ordinance may change during the enactment process even if its *title* or *subject* does not. Consider a proposed ordinance whose title and subject comprehend the "regulation of land use in Monroe County." That title would be neither "inaccurate" nor "misleading," *id.* at 14, with respect to

an ordinance that *prohibited* multifamily housing on a single specified parcel; that same title would be neither inaccurate nor misleading with respect to an ordinance that expressly *permitted* such housing on all residential parcels within the county. But who could deny that there is a world of difference—a *substantial* difference—between these two proposals? *Cf. Daytona Leisure Corp. v. City of Daytona Beach*, 539 So. 2d 597, 599 (Fla. 5th DCA 1989) (observing that to prohibit what was previously permitted is to "substantially change" the use of property); *North Beach Medical Center v. City of Fort Lauderdale*, 374 So. 2d 1106, 1109 (Fla. 4th DCA 1979) (contrasting "substantial changes" with "inconsequential, technical" revisions).

This example is not farfetched. The County asserts that the ordinance at issue here was properly noticed as "modifying the existing prohibition on tourist housing use including vacation rentals *in all land use districts*." *Id.* at 20 (quoting Record Excerpts in Eleventh Circuit ("R.E.") Tab F at 13-14).[1] Yet a proposal "modifying" land-use prohibitions in all land use districts could encompass both a *tightening* of the prohibitions to the point of absolutely banning rentals everywhere and (totally the opposite) a *loosening* of prohibitions to the point of virtually authorizing rentals everywhere. Who could deny the *material* difference between these two extremes?

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[1] This assertion seriously misstates the record. The first required notice gave the title of Ordinance 004-1997 as "modifying the existing prohibition on tourist housing use including vacation rentals in *residential districts*." R.E. Tab F at 13. It was only the second required notice that referred to "*all land use districts*." *Id.* at 14. Ironically, therefore, the County cannot prevail even under its own theory.

In short, an answer that looks to an ordinance's *title* or *subject* (or its *original general purpose*) has no basis in the text of the governing standard, i.e., a *substantial or material* change during the enactment process. Therefore, the County's (and the amici's) answer has no support in the four decades of Florida precedent from which that governing standard derives. *See, e.g.*, *McGee v. City of Cocoa*, 168 So. 2d 766, 768 (Fla. 2d DCA 1964) (concluding that a zoning amendment "must conform *substantially* to the proposed changes" (emphasis added)); *Webb v. Town Council*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000) (same).

**B. Text of the Relevant Statutes**

The County attempts to divert the Court's attention from these obvious points with a lengthy discussion of "how § 125.66 works." Answer Br. at 21; *see also id.* at 22-25 (describing, in excruciating detail, the various procedures specified by the statute). That discussion is wholly beside the point. The question before this Court —because it is the question certified by the Eleventh Circuit—is "the kind of [intra-enactment] change that would require a county to start the process over," R.E. Tab A at 6, ***not*** the technical requirements for notices or public hearings at the outset. The parties litigated the latter issues in the federal district court, which ruled in favor of the County. *See* R.E. Tab. F at 11 ("Technical Requirements of [Section] 125.66 Regarding Advertised Notice"). In the Eleventh Circuit, however, the dispute narrowed to whether the County violated Section 125.66 "when it made changes to the

[challenged] Ordinance during the enactment process." App. A at 3. It was regarding *this* question—not the technicalities of notice—that the Eleventh Circuit found "no controlling Florida Supreme Court authority" and sought this Court's help. *Id.*

The County's discussion of Section 125.67 and the technical requirements for an ordinance's title, *see* Answer Br. at 29-31, is likewise irrelevant. Again, the parties litigated these issues in the federal district court. *See* R.E. Tab. F at 14 (rulings on "Failure to Publish the Complete Title of the Ordinance," "Change of Published Title from the First Notice to the Second Notice," and "Failure to Reflect the Actual Title of the Proposed Ordinance or Any Draft of Same"). Again, however, the federal court of appeals did not consider these matters—and did not certify them to this Court. So, if Plaintiff's Initial Brief "omits any reference to § 125.67," Answer Br. at 30 n.35, it is because that statute is not at issue in this case. We can all agree that the statute requires that "[e]very ordinance shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title," § 125.67, and we can all agree that "courts may not disregard" those requirements, Answer Br. at 29 (section heading). But the County does not explain how these uncontroversial principles help the Court determine what is "a 'substantial or material change' in a proposed ordinance during the enactment process." App. A at 6.

In any event, Plaintiff's intepretation of Section 125.66(4)(b) would not render Section 125.67 "virtually meaningless," as the County asserts. Answer Br. at 30.

The latter statute imposes separate and independent requirements that a county must meet in enacting ordinances. These requirements supplement (rather than supplant) the mandates of Section 125.66 (whose very title refers to "enactment procedure"), including the well-established and acknowledged precept that a county is "required to renew the enactment process if 'substantial or material changes' [are] made to the Ordinance during the enactment process." App. A at 5.

In this regard, it is ironic that the County asserts that Plaintiffs' interpretation of Section 125.66 would "re-write the subject statute." Answer Br. at 25. Plaintiffs' interpretation has the merit of being based on the text of the statute, which employs the phrase "actual list of permitted, conditional, or prohibited uses within a zoning category" no fewer than four times. *See* Initial Br. at 12-14. By contrast, an interpretation that focuses on an ordinance's "original general purpose" has no statutory basis whatever, because that phrase *does not appear in* ***any*** *statute*.

In essence, the County reasons that if the enactment of an ordinance satisfies various technical requirements (concerning notice, title, etc.), the ordinance *cannot possibly* have undergone any "substantial or material change" during the enactment process. There is nothing in the rules of logic or of statutory construction to support this reasoning. Indeed, Monroe County's approach would do far more than simply "re-write" the statute: it would write the "substantial or material change" standard out of Florida law altogether.

### C. Legislative History of Section 125.66

The County next asserts that the "legislative history of § 125.66," particularly the enactment of Chapter 95-310, compels a conclusion that a change in the *original general purpose* is what the courts mean by the term *substantial or material* change. Answer Br. at 31. If we understand the County's argument, it is that since the Legislature in 1995 hoped to "reduc[e] the amount of litigation regarding the validity of ordinances based on defects in the enactment procedures," *id.* at 32, ***any*** interpretation that reduces litigation is to be preferred. That is a massive non sequitur.

What the history actually shows is that the Legislature intended to "reduce litigation" by clarifying precisely when heightened notice and hearing requirements were triggered. Former Section 125.66(6) employed a vague and imprecise standard —whether the proposed ordinance "affect[ed] the use of land"—that led to frequent disputes. *See, e.g., 3299 North Federal Highway, Inc. v. Board of County Commissioners*, 646 So. 2d 215, 222 (Fla. 4th DCA 1994), *rev. dismissed*, 699 So. 2d 690 (Fla. 1997). In 1995, the Legislature acted to end the disputes (that is, to "reduc[e] the amount of litigation") by replacing that vague standard with a more precise one: whether the proposed ordinance "changes the actual list of permitted, conditional, or prohibited uses within a zoning category." § 125.66(4)(b). *Cf.* App. E at 11-12 (observing that amicus Florida Association of Counties "strongly supports clarifying the notice and public hearing requirements for zoning ordinances"). Such a replacement

hardly suggests that the Legislature intended to give counties unfettered discretion to make substantial or material changes to a proposed ordinance during the enactment process *if only* the ordinance retained its "original general purpose."

The County then moves to the mechanics of the mandated notice, noting that the Legislature omitted requirements for a "map" and a "brief explanation" of a proposal's subject matter but added the requirement that the notice contain the "title" of the ordinance. Answer Br. at 32-33. Again, these items are wholly irrelevant to the circumstances in which it can be said that there is "a 'substantial or material change' in a proposed ordinance during the enactment process." App. A at 6. Since courts have consistently used the adverb *substantially* to specify both the circumstances in which heightened notice requirements are triggered in the first place and the circumstances in which the enactment process must begin anew, *see* Initial Br. at 12-14, it makes sense that the Legislature revised the statute in 1995 with both situations in mind. We know what the Legislature intended in that regard, for it expressed its intent in the statute's text: those duties are triggered by "changes [to] the actual list of permitted, conditional, or prohibited uses within a zoning category." § 125.66(4)(b).[2]

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[2] The County observes that at "the time Chapter 95-310 was adopted, the Legislature had the benefit of Op. Att'y Gen. Fla. 82-93 [1982]." Answer Br. at 33. But there is no evidence that the Legislature was even aware of the opinion, let alone endorsed it. Also, while the "Legislature is presumed to be cognizant of the *judicial* construction of a statute when making changes to a statute," *id.* at 33 n.37 (emphasis added), that precept is inapplicable on its face to a *non*-judicial opinion of the Attorney General.

### D. Precedent

Monroe County asserts that "Plaintiffs do not cite a single case from any jurisdiction where a change in affected zoning districts during the enactment process has voided a validly enacted ordinance." Answer Br. at 34. That is true in a very trivial sense: if the answer to the certified question were mechanically compelled by existing precedent after the 1995 amendments to the statute, the Eleventh Circuit would not have needed this Court's assistance. Even so, Plaintiffs showed how their interpretation of the term *substantial or material change* is "consistent with precedent," Initial Br. at 15 (section heading), and the County has not contradicted that showing (but for making the obvious point that each cited case involved "different facts").

What the County's hyperbole masks is the undeniable fact that no opinion of the Florida courts uses the term "original general purpose" to define the meaning of a substantial or material change. Likewise, no Florida judicial opinion holds that an ordinance undergoes a substantial or material change during the enactment process only if the ordinance's *title* or *subject* is changed. In short, the County's proposed answer to the Eleventh Circuit's certified question is literally *without precedent*.[3]

Certainly, *Farabee v. Board of Trustees*, 254 So. 2d 1, 4 (Fla. 1971), *cited in* Answer Br. at 39, does not even come close. *Farabee* construed Article III, § 6 of

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[3] To be sure, there is the 1982 opinion of the Florida Attorney General opinion cited in Note 2 above (p. 8). We already explained why that opinion is not persuasive, let alone authoritative, *see* Initial Br. at 22-25, and we will not labor the point here.

the Florida Constitution, which provided (then as now) that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Like its statutory counterpart Section 125.67, that constitutional provision has no relevance to the present case, for the simple (and oft-repeated) reason that Plaintiffs are not asking the courts to "strike down the title of an act." *Farabee*, 254 So. 2d at 4. The opinion in *City of Pensacola v. Shevin*, 396 So. 2d 179, 180 (Fla. 1981), *cited in* Answer Br. at 39, construed the same constitutional provision and is similarly irrelevant.

### E. Procedural Due Process Considerations

In their Initial Brief (at 17-20), Plaintiffs argued that their interpretation of the term *substantial or material change* is compelled by procedural due process considerations. Despite filing a brief nearly double the size of Plaintiffs' brief, the County has no answer to Plaintiffs' due process argument. To the contrary, the County positively embraces examples that wonderfully illustrate how its proposed answer to the certified question would tread underfoot the due process rights of citizens.

Consider the County's example of a proposal "to amend its land development regulations regarding . . . tattoo parlors." For that proposal, "the 'subject' of the ordinance—its original general purpose—would be the 'regulation of tattoo parlors.' " Answer Br. at 27. The County freely concedes that during the enactment process, "specific zoning districts may be added [to] or subtracted [from the] list of zoning

districts where tattoo parlors would be a conditional use, a permitted use, or a prohibited use," and yet the *subject* of the proposed ordinance would remain the same—meaning that under the County's own interpretation, the duty to renew the enactment process would *never* be triggered. Answer Br. at 28. Thus, under the County's own interpretation, tattoo parlors could be designated a *prohibited* use in a particular zoning district through 99% of the enactment process, and yet be designated a *permitted* use in that district in the ordinance as enacted—all at the last minute and without any additional notice or opportunity for the public to be heard.

That result cannot be reconciled with this Court's understanding of the mandates of procedural due process in the land-use and zoning context. If it is "without question that due process requires that an affected landowner be given prior notice and an opportunity to be heard before action is taken by a zoning authority to alter the use to which the owner is permitted to put his land," *Gulf & Eastern Development Corp. v. City of Fort Lauderdale*, 354 So. 2d 57, 59 (Fla. 1978), then how can dramatically changing a use from prohibited to permitted during the enactment process not trigger any additional notice or opportunity to be heard? To ask the same thing, how can a change that is "without question" sufficiently dramatic to trigger due process requirements not be considered a *substantial or material* change?

The County seems to view ordinance enactment procedures as annoying hurdles to be minimized in the service of its uninhibited "legislative efforts." Answer

Br. at 28. But these procedures—including the requirement that the enactment process begin anew in certain situations—have a purpose: they give interested persons "the time to study the proposals for any negative or positive effects they might have if enacted," and they give such persons "notice so that they can attend the hearings and speak out to inform the [county] commissioners prior to ordinance enactment." *Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001); *see also North Beach Medical*, 374 So. 2d at 1108 (notice "must be reasonably sufficient to inform the public of the essence and scope of the proposed changes"). Plaintiffs' answer to the certified question would buttress this purpose; Monroe County's would thwart it.

**F. Public Policy**

In responding to Plaintiffs' argument that a substantial or material change in a proposed ordinance during the enactment process includes any change necessary to secure passage of the ordinance, *see* Initial Br. at 20-21, the County advances public policy arguments about the "legislative process." Answer Br. at 40, 41, 42, 43 n.41. We agree that the Court's answer to the certified question should reflect good public policy, but it is *Plaintiffs'* proposed answer (not the County's) that does just that.

The County begins by arguing that the "legislative process contemplates that municipal and county legislative bodies will make changes and amendments to ordinances, otherwise public hearing and notice requirements would be meaningless." *Id*. at 40. We agree, but the question is not *whether* changes and amendments may

be made in the enactment process—but *what kind of* changes and amendments may be made *without restarting the process*. In this regard, the County has conceded that with respect to land-use ordinances, the legislative process in Florida *also* contemplates that "a '*substantial or material*' change made during the enactment process would require the enactment process to begin anew." *Id.* at 18 (emphasis added).

Thus, it is mere hyperbole for the County to contend that Plaintiffs' interpretation of Section 125.66 would make "the land development ordinance enactment process to be a static one." *Id.* at 41. In truth, Plaintiffs' interpretation would make the process *more dynamic*, for it would foster additional notice and hearings when substantial changes are made (while insubstantial changes proceeded to enactment relatively quickly). In other words, rather than "restrict[ing] a county government's ability to debate and amend its legislative acts," *id.*, Plaintiff's interpretation would foster debate and amendment in *deliberative* fashion. That extra deliberation is to be embraced, not spurned (as the County wishes) in favor of speed and efficiency at the expense of every other value. Indeed, as this Court has explained, the very "purpose of requiring that a proposed ordinance be read at more than one session or meeting is to *prevent undue haste and secure deliberation* by the legislative body before final passage." *Barry v. Garcia*, 573 So. 2d 932, 938 n.8 (Fla. 1991) (emphasis added).

Subdivision (3) of Section 125.66 confirms this point. Though that provision establishes an "emergency enactment procedure" applicable to most ordinances, it

expresses the Legislature's judgment that some ordinances have so much impact on citizens that they *cannot* be adopted on an emergency basis, i.e., any ordinance that "changes the actual list of permitted, conditional, or prohibited uses within a zoning category." In light of this judgment, it is makes eminent sense to say that when such changes are made to a proposed ordinance, they are *substantial or material.*

In this regard, it is useful to address the hypothetical Miami-Dade County ordinance proffered by the amici. *See* Amici Br. at 11-14. Consider a slightly revised scenario under which the ordinance making electrical substations a permitted use did not—in the version originally proposed or subsequently discussed at the first public hearing—affect the "Traditional Neighborhood" district. A resident of such district who stayed until the end of that meeting could reasonably expect not to have electrical substations appearing next to his house as a result of the new ordinance. But that is precisely what could happen—and without *any* additional notices or hearings to indicate this (dare we say) *substantial* change—under the County's and amici's answers to the certified question. That is hardly good public policy.[4]

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[4] Against Plaintiffs' argument that substantial or material changes include changes "necessary to secure legislative passage of the ordinance," the amici contend that "individual motives for an enacting an ordinance should be irrelevant in this context." Amici Br. at 15. This contention misperceives Plaintiffs' argument, which contemplates an analysis not of private motives but of whether a given change "was a 'but for' cause of such passage." Initial Br. at 21; *see also, e.g., id.* at 20 n.7 (examining the *public hearing* transcript to argue that "changes were made to garner the votes of County Commissioners Freeman and London" for final passage).

## CONCLUSION

For the reasons stated here and in Plaintiffs' Initial Brief, this Court should answer the certified question from the Eleventh Circuit by ruling that, for purposes of Florida Statutes § 125.66(4)(b), a "substantial or material change" in a proposed ordinance during the enactment process—that is, the kind of change that requires a county to start the process over—includes both (1) any change to the "actual list of permitted, conditional, or prohibited uses within a zoning category"; and (2) any change necessary to secure legislative passage of the ordinance.

(While Plaintiffs do not believe that oral argument is necessary, they would be pleased to participate if the Court so desires.)

Dated: November 13, 2006.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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