

**IN THE SUPREME COURT
STATE OF FLORIDA**

CASE NO. SC02-815

MIAMI-DADE COUNTY,

Petitioner,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent.

**BRIEF OF AMICI CURIAE
IN SUPPORT OF
PETITIONER MIAMI-DADE COUNTY**

ON REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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LIST OF AMICI CURIAE

1. Builders Association of South Florida, Inc.
2. Latin Builders Association
3. Chamber South
4. Sweet Home Missionary Baptist Church, Incorporated of Miami
5. Greater New Bethel Baptist Church, Inc. of Opa Locka
6. New Birth Baptist Church, Inc.

INTRODUCTION

Amici curiae are two builders' associations, one chamber of commerce and three religious organizations. The religious organizations and members of the builders' associations and the chamber of commerce are property owners whose pending zoning applications could not be considered at public hearing because of the invalidation of the zoning ordinance. Their property rights have been directly and adversely impacted by the Third District's decision. No religious organizations, for example, have been able to obtain approval to construct new or expanded facilities in unincorporated Miami-Dade County because such facilities require approval of a special exception or of a modification of a condition of a prior approval. Hundreds of applicants for zoning hearings have had their requests suspended and their rights impaired since the Third District issued its decision last year.

Miami-Dade County will be referred to herein as the "County." The zoning code provisions that were declared unconstitutional by the Third District will be referred to as the "Ordinance."

Amici file their Brief with the written consent of the parties pursuant to Rule 9.370, Fla. R. App. P.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts in the County's brief.

SUMMARY OF THE ARGUMENT

In *Miami-Dade County v. Omnipoint Holdings, Inc.*, 811 So. 2d 767 (Fla. 3d DCA 2002), the court held that the County's Ordinance for approving special exceptions, unusual and new uses, modifications of conditions and non-use variances lacked precise and objective standards and was, therefore, facially unconstitutional. In so ruling, the court relied upon First Amendment cases that are inapposite and cases that are not persuasive because they preceded the enactment of Florida's Growth Management Act and this Court's decision in *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). The County's Ordinance is not impermissibly vague, but rather is similar to ordinances that have been upheld repeatedly by other courts. The Ordinance derives additional meaning from the state and local comprehensive legislative framework for the management of growth. If broad-based zoning reform is advisable, such changes should emanate from the legislature, not the courts.

ARGUMENT

THE COUNTY ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE

Amici support and adopt the County's argument that the Third District Court of Appeal erred in declaring several provisions of the County's zoning code facially unconstitutional.¹ While the Amici concur that the Third District should not, *sua sponte*, declare a legislative enactment facially unconstitutional on second-tier certiorari review, that error should not be the sole ground for disposing of this case. The Third District held that the County's standards for the grant or denial of special exceptions, unusual and new uses, non-use variances and modifications of conditions are unconstitutionally vague. The standards in question, however, are similar to those contained in zoning codes throughout Florida. This case, therefore, presents an issue that is a matter of great importance and of general public interest that will probably recur. *Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002); *Pleasures II Adult Video Inc. v. City of Sarasota*, 27 Fla. L. Weekly D2637a (Fla. 2d DCA, Dec. 11, 2002).

¹ Amici take no position on the merits of the underlying zoning application and adopt only those portions of the County's brief which address the constitutionality of the Ordinance.

In the absence of a definitive decision of this Court, the opinion of the Third District will cast a cloud on the validity of zoning decisions throughout the state.

The opinion of the Third District relies upon *University Books and Videos, Inc. v. Miami-Dade County*, 132 F. Supp. 2d 1008 (S.D. Fla. 2001), which held that a County ordinance restricting the locations of adult businesses violated the plaintiff's constitutionally protected interest in free speech under the First Amendment. The federal court further held that the discretionary approval of adult businesses permitted under the County's special exception ordinance was an impermissible prior restraint because the ordinance's standards were not "precise and objective." Both the Third District in *Omnipoint* and the district court in *University Books* cited *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). In *Lady J. Lingerie*, the court held that "otherwise-valid zoning criteria" for granting zoning exceptions empowered "the zoning board to covertly discriminate against adult entertainment establishments under the guise of general 'compatibility' or 'environmental' considerations." *Id.* at 1362. The court noted that under First Amendment case law virtually any amount of discretion to deny permission to engage in constitutionally protected expression that exceeds the merely ministerial is suspect. *Id.* (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969)). *See also*

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990) ("[w]hile prior restraints are not unconstitutional *per se* any system of restraint comes to this Court bearing a heavy presumption against its constitutional validity.")²

The Third District noted that the observation in *Lady J. Lingerie* that the City could continue to apply its criteria to applicants who were not entitled to First Amendment protection was "out of sync with Florida law." *Omnipoint Holdings, Inc.*, 811 So. 2d at 769. Florida courts, the Third District reasoned, consistently have declared unconstitutional ordinances that lack objective standards to guide zoning boards in making their decisions. *Id.* (citing *North Bay Village v. Blackwell*, 88 So. 2d 524 (Fla. 1956); *Drexel v. City of Miami Beach*, 64 So. 2d 317 (Fla. 1953); *City of Miami v. Save Brickell Avenue, Inc.*, 426 So. 2d 1100 (Fla. 3d DCA 1983); *Pinellas County v. Jasmine Plaza, Inc.*, 334 So. 2d 639 (Fla. 2d DCA 1976)).

The Florida cases on which the Third District relied are twenty to fifty years old. All of them were decided before the Florida Legislature adopted the Local Government Comprehensive Planning and Land Development Regulation Act, §163.3161-.3246, Fla. Stat. (2002) ("Growth Management Act" or "Act")

² The County in its Brief explains why the First Amendment cases should not be applied generically to zoning matters that do not impinge on First Amendment freedoms. The Amici adopt those arguments.

in 1985. All the cited cases were decided prior to *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993), wherein this Court clarified that zoning decisions are quasi-judicial in character and subject to strict scrutiny on judicial review. The Amici contend that the Third District overlooked the significance of these intervening changes in the law.

Additionally, the criteria that the Third District found indefinite, subjective and fatally flawed, mirror standards contained in countless zoning ordinances throughout the country. At the most elemental level, zoning was devised to prevent incompatibility in land use development. Over time, the law of zoning evolved to encompass, through comprehensive planning and growth management legislation, the protection of the environment and the provision of public facilities and services. Legislative standards that permit a zoning authority to exercise its discretion to protect the environment, manage growth and ensure compatibility are not so vague that they amount to a *per se* license to exercise that discretion arbitrarily. The requirement that such discretionary decisions be consistent with a comprehensive plan and supported by substantial competent evidence in a record that can be subjected to strict judicial scrutiny is the harness that checks unbridled discretion.

Finally, courts and commentators have long been critical of the inequities of what has been called "the zoning game."³ Invariably, the land use experts recommend legislative reforms to enhance predictability while preserving flexibility. The opinion of the Third District suggests that the solution lies in replacing time-honored standards with legislation that is so rigid that it reduces the zoning hearing process to the level of a ministerial act. If reform is warranted, it is respectfully submitted that it is the province of the legislature, rather than the courts, to implement new solutions to the increasingly complex challenges of managing growth in the twenty-first century.

I. Comprehensive Planning and Quasi-Judicial Zoning

The practice of zoning was in its formative years when the United States Supreme Court upheld the constitutionality of zoning ordinances in the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court recognized that the exigencies of urban life required a "degree of elasticity," stating that the application of constitutional guaranties must expand or contract to meet new and different conditions. "In a changing world, it is impossible that it should be otherwise." *Id.* at 387.

³ Richard F. Babcock, *The Zoning Game: Municipal Practices and Policies* (1966).

The *Euclid* decision was rendered in the same year that the United States Department of Commerce published the Standard State Zoning Enabling Act ("SZEА") which became the model for zoning legislation throughout the country. The SZEА proposed the creation of a Board of Adjustment that could grant special exceptions to local zoning regulations that were "in harmony with" the general purpose and intent of the ordinance. *Anderson's American Law of Zoning* §32.01 (4th ed. 1995). Subsequent model zoning ordinances retained the standard that special exceptions or conditional uses be "in harmony with" or "compatible with" the development of the area or with a comprehensive plan for the development of the area. *See American Society of Planning Officials, The Text of a Model Zoning Ordinance* (3d ed. 1966); Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 Wash. U.J.L. & Pol'y 295 (2000).

In the final quarter of the twentieth century increasing emphasis was placed on comprehensive planning as a vehicle to protect the environment and manage growth in burgeoning urban areas. *See Fred Bosselman and David L. Callies, The Quiet Revolution in Land-Use Control* (1971); John M. DeGrove, *Land, Growth and Politics* (1974). Florida was in the vanguard of the planning

movement in adopting the Local Government Comprehensive Planning Act of 1975 and the Growth Management Act in 1985.

Salient provisions of the Growth Management Act were discussed by this Court in *Snyder*, 627 So. 2d at 473-74. The Act requires, for example, that land development regulations and development orders (including special exceptions and other development permits) be consistent with the local government's comprehensive plan. §§163.3194(3), 163.3164, 163.3202, Fla. Stat. (2002). Consistency is defined in the Act as the extent to which land development regulations and orders "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." *Id.*, §163.3194(3).

The foregoing language relies on the concept of compatibility and is considerably less precise and less objective than the compatibility criteria which the Third District invalidated in the proceedings below. The *Snyder* Court, however, did not find the quoted provision constitutionally infirm, but rather accepted it as the linchpin of its holding that zoning decisions should be subjected to strict scrutiny on review to determine if they are consistent with the comprehensive plan.

The *Snyder* Court concluded that rezonings are quasi-judicial, not legislative, in nature, and that the highly deferential "fairly debatable" test initially announced in the *Euclid* case and expressly adopted in *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941) was no longer the appropriate standard for judicial review. The quasi-judicial character of the zoning hearing ensures that decisions will be made after notice and hearing and on the basis of evidence adduced in the record of the proceeding.

Under the Act public facilities and services must be available concurrent with a proposed development at levels of service established in the comprehensive plan. §§163.3177(3)(a), 163.3177(10)(h), 163.3180, Fla. Stat. (2002). A zoning application that does not satisfy this "concurrency" requirement is not consistent (*i.e.*, compatible) with the comprehensive plan and cannot, therefore, be approved. *Id.*, §163.3202(2)(g). The public facilities and services subject to concurrency under the Act (*e.g.*, roads, water and sewer, solid waste disposal, parks and recreation, etc.) mirror the criteria contained in the land development regulations that the Third District invalidated in its opinion.

Since the adoption of the Act, comprehensive plans, land development regulations and development orders are integrally related components of a broad and inclusive regulatory scheme. Florida's comprehensive planning regimen did not exist when the cases cited in the *Omnipoint* decision found certain ordinances unconstitutionally vague as applied. The cases cited by the Third District involve ordinances that were devoid of standards to guide discretionary decisions, *e.g.*, *Pinellas County v. Jasmine Plaza, Inc.* and *North Bay Village v. Blackwell*, or the standards were so broad as to be illusory. *Drexel v. City of Miami Beach* (council to give "due consideration" to traffic); *City of Miami v. Save Brickell Avenue, Inc.* (criteria to be considered may include but not be limited to enumerated factors). The legal and factual circumstances of the foregoing cases differ substantially from the current norm for zoning matters in Florida. Today, both the requested development order and the applicable land development regulation must be consistent with the comprehensive plan, and a reviewing court will apply strict scrutiny in reviewing the record of a quasi-judicial proceeding to determine if substantial competent evidence supports the decision. The Ordinance invalidated by the Third District in this case is a land development regulation under the Act, and, as such, it is a part of an intricate web of growth management legislation. It is submitted that the Third District

erred in holding that the subject land development regulations are facially invalid where the Court gave no consideration to the broader regulatory scheme that subsumes those regulations.

II. The County's Ordinance Is Not Unconstitutionally Vague

The Third District ruled that the County's Ordinance is facially unconstitutional because it does not provide definite, objective criteria and it is fundamentally unfair and unjust. The Ordinance, however, is sufficiently clear and comprehensible to withstand a facial attack.

Legislative enactments are presumed constitutional and doubts as to the validity of a statute are to be resolved in favor of a finding of constitutionality. *Rich v. Ryals*, 212 So. 2d 641 (Fla. 1968). In *Department of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976), this Court reversed a lower court's decision that a statute proscribing "unfair methods of competition and unfair or deceptive acts or practices" was unconstitutionally vague and indefinite. In support of the conclusion that the statute was not so indefinite that one would not know what he may do or not do, the Court quoted with approval from the opinion in *State of Washington v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290 (Wash. 1972):

If a statute fails to give fair warning, it is subject to challenge for vagueness or indefiniteness. But, as Mr. Justice Frankfurter commented, what constitutes indefiniteness is itself indefinite:

“There is no such thing as ‘indefiniteness’ in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. . . . That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject matter of legislation permits. . .

. . .

“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

. . .

“In the field of regulatory statutes governing business activities, greater leeway is allowed in applying the test. . . . Thus statutes which employ special or technical words or phrases well enough known to enable those expected to use them to correctly apply them, or statutes which use words with a well settled common law meaning, will generally be sustained against a charge of vagueness. . . . Furthermore, the United States Supreme Court has treated sympathetically ‘state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression.’

329 So. 2d at 264 (citations omitted). This Court has also held that a less stringent standard as to vagueness is used in examining non-criminal statutes. *D'Alemberte v. Anderson*, 349 So. 2d 164 (Fla. 1977).

The applicant seeking relief under the County Ordinance bears the initial burden of proving by substantial competent evidence that the request will not be adverse to the public interest and will not have an adverse impact on the economy, certain enumerated public facilities and services and density. *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986). The Growth Management Act requires that the local comprehensive plan adopt goals, objectives and policies addressing all of the foregoing standards. The concurrency requirements of the Act mandate the adoption of measurable levels of service for those public facilities and services. Both the County Ordinance and development orders granted pursuant to such Ordinance must be consistent with the comprehensive plan. An applicant need only refer to the County's Comprehensive Development Master Plan for assistance, should any be needed, in understanding the criteria. The Growth Management Act provides a comprehensive land use framework so that persons of common understanding and intelligence need not guess at the meaning of the standards set forth in the

County's Ordinance. *Zerweck v. State of Florida, Commission on Ethics*, 409 So. 2d 57, 60 (Fla. 4th DCA 1982).

The County's Ordinance also contains a standard that the request be compatible with the area and its development. The concept of compatibility has been a guiding principle for planning professionals and an accepted standard in the courts for decades. In *Life Concepts, Inc. v. Harden*, 562 So. 2d 726 (Fla. 5th DCA 1990), the constitutionality of a zoning ordinance limiting the maximum number of occupants of a group home to a number "compatible with surrounding residential uses" was challenged as not sufficiently definite and certain. The Fifth District held that the argument was without merit, commenting that "the word compatible has a plain and ordinary meaning which can be readily understood by reference to a dictionary." *Id.* at 728. The court observed that the dictionary defines compatible as capable of existing or living in harmony, or able to exist together with something else. *Id.* at 728 n.1.

A standard that a conditional use be compatible with the surrounding area was upheld in *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779 (Fla. 2d DCA 1992). The court held that the compatibility standard did not empower the zoning board with unbridled discretion, but rather provided enough specificity to pass constitutional muster.

In *Mann v. Board of County Comm'rs*, 830 So. 2d 144 (Fla. 5th DCA 2002), the court upheld the denial of a rezoning on the basis of inconsistency with policies in the comprehensive plan. The policies specified that land use compatibility, the location, availability and capacity of services and facilities, market demand and environmental features would be used in determining which specific zoning district was most appropriate. The court concluded that these policies were specific enough to be taken into consideration and used as a basis for denial of the rezoning.

The court in *Rectory Park, L.C. v. City of Delray Beach*, 208 F. Supp. 2d 1320 (S.D. Fla. 2002) expressly declined to follow the rationale of the Third District as set forth in *Omnipoint*. In *Rectory Park* the City approved a development under an ordinance that authorized denial of an application where it was determined that the proposed project would not be compatible in terms of building mass and intensity of use with surrounding development. Objectors challenged the approval of the development and relied on *Omnipoint* and the cases cited therein in arguing that the ordinance was facially unconstitutional and vague because it lacked objective criteria. The court disagreed, finding the language of the ordinance sufficiently clear and definite. The court noted that approvals under the ordinance were not left to the City's unrestrained discretion

because, *inter alia*, other standards of the City's comprehensive plan were applicable.

Courts in Florida and other jurisdictions have likewise held that ordinances incorporating compatibility or similar discretionary standards are not unconstitutionally vague. *See Windward Marina, L.L.C. v. City of Destin*, 743 So. 2d 635, 639 (Fla. 1st DCA 1999) (The term "nuisance" as used in city's compatibility standards was not unconstitutionally vague; "It is not possible to define comprehensively 'nuisances' as each case must turn upon its facts and be judicially determined. . . . Impossible standards are not required."); *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985) (standard of "substantial detriment to the public good" is specific enough to instruct the applicant as to his burden of proof and to provide an adequate framework for review); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) (historic preservation ordinance did not grant city commission unbridled discretion when considered with other ordinances and state constitution); *Mayes v. City of Dallas*, 747 F.2d 323 (5th Cir. 1984)(compatibility standard in historic preservation ordinance provided sufficient guidance to satisfy constitution); *Town of Deering v. Tibbetts*, 202 A.2d 232 (N.H. 1964)(determination of what is compatible with the "atmosphere" of the town

takes clear meaning from observable character of district to which it applies); *and see City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964); *Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dept. of Hous. and Community Dev.*, 432 A.2d 710 (D.C. 1981); *Second Baptist Church v. Little Rock Historic Dist. Comm'n*, 732 S.W.2d 483 (Ark. 1987).

The criteria contained in the County's Ordinance do not grant unbridled discretion to the County. The provision of public facilities and services and the maintenance of compatible uses within neighborhoods are among the most important responsibilities of local governments. The constitution does not require that land use regulations be drafted with rigid precision. Such inflexibility would eliminate the opportunity and incentive for creativity in the development of communities and the protection of the environment. As the United States Supreme Court in *Euclid* realized more than 75 years ago, the complexities of modern urban life require a "degree of elasticity" so that the crucial functions of zoning, comprehensive planning and growth management are not reduced to predestination and mere ministerial acts. *Euclid*, 272 U.S. at 387.

III. Zoning Reform and Legislative Prerogatives

Creative development ideas and innovative urban designs have ensured that few developments today can proceed without prior approval of a zoning amendment, exception or variance. Zoning ordinances must be flexible enough to accommodate new ideas and changes in policy. The Third District's opinion in *Omnipoint* illustrates, however, the tension between the need of local governments to be able to deal effectively with changing conditions and the apprehension that too much discretion invites abuse and violates the constitutional prohibition against vagueness.

The substantial competent evidence rule allows the quasi-judicial body to exercise legitimate discretion in making its determinations. A zoning ordinance containing standards that are flexible yet clear can be fully addressed in a quasi-judicial hearing. Both the applicant and the local government have their assigned burdens of proof under the case law. Opportunity exists for all participants to present lay and expert testimony and documentary evidence and to cross-examine witnesses. The decision should be based on the substantial competent evidence in the record that is germane to the articulated standards of the zoning ordinance. Finally, judicial review should be a meaningful, not deferential, application of strict scrutiny.

Some urban planning professionals and land use law commentators perceive a need for zoning reform to make the process more fair, efficient, flexible and certain. See Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. Pa. L. Rev. 28 (1981); Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 Stetson L. Rev. 627 (1996); Graham C. Penn, *Trying to Fit an Elephant in a Volkswagen: Six Years of the Snyder Decision in Florida Land Use Law*, 52 Fla. L. Rev. 217 (2000); Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 Wash. U.J.L. & Pol'y 295 (2000). The experts, however, invariably suggest that zoning reform be implemented through legislative changes, not judicial activism. See, e.g., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (Stuart Meck ed. 2002).

The Third District's opinion in *Omnipoint* effected a dramatic change in zoning in unincorporated Miami-Dade County, necessitating a wholesale rewrite of the zoning code. Under the separation of powers doctrine, such reforms are more appropriate when implemented by legislative bodies aided by study

committees, experts and public hearings. It is submitted, therefore, that the decision of the Third District verges on being an impermissible encroachment upon the authority of the legislative branch and should be reversed. *See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996).

CONCLUSION

The Court is respectfully requested to reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

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Fla. Bar No. 143648

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Amici Curiae was this _____ day of _____, 2003, mailed to Jay W. Williams, Esq., Assistant County Attorney, Miami-Dade County, 111 N.W. First Street, Suite 2810, Miami, FL 33128 and to Ms. Deborah L. Martohue, Hayes & Martohue, P.A., 5959 Central Avenue, Suite 104, St. Petersburg, Florida 33710.

By: _____

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: _____