SUPREME COURT OF FLORIDA
Tallahassee, Florida

Appeal No: 95,686

COASTAL DEVELOPMENT OF NORTH FLORIDA, INC., AND MEADOWS INCORPORATED,

Petitioners,
v.

CITY OF JACKSONVILLE BEACH, FLORIDA,

Respondent.

On Appeal from the First District Court of Appeal

PETITIONERS' REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

BARTLETT & HEEKIN, P.A.
T. Geoffrey Heekin
Fla. Bar No.: 328448
S. Hunter Malin
Fla. Bar No.: 0088020
P.O. Box 477
Jacksonville, FL 32201

904/355-7000
904/355-0266 (facsimile)
Attorneys for Petitioners

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Introductory Statement

Petitioners will use the same references set forth in their Introductory Statement of the Initial Brief on the Merits. Further, citations to Petitioners' Initial Brief on the Merits and Respondent's Answer Brief on the Merits will be cited respectively as I. or A. and by page number. For instance, if the citation is to Respondent's Answer Brief on page 4, the citation will be (A.4).

Statement of the Case and Facts

Petitioners limit the following Statement of the Case and Facts to addressing some of Respondent's mischaracterizations of the case and facts.[1] First, Respondent argues that its denial of the proposed small-

[1] In Respondent's Answer Brief on the Merits, Petitioners are consistently labeled "developer" and "corporate developer". The motive for this is self-evident: Respondent is trying to leave a negative impression with this Court that Petitioners are blind to and do not care about the needs of the City and of the public. In actuality, the Petitioners honestly believe that developing the property in a

scale amendment is proper because there is available property for commercial development. (A.3, 17). However, as was shown by Petitioners' experts[2] at the Planning Commission and City Council hearings, there is no surplus of commercial land following the taking of commercial land by the City.[3]

Moreover, contrary to Respondent's argument, single family development along South Third Street has long since become undesirable as evidenced by the fact that no residential homes with driveways accessing the heavily trafficked Third Street, with traffic exceeding

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commercial manner is the best option for all parties and the public at large.

[2] Respondent repeatedly refers to Petitioners' experts as the "paid experts". This is an attempt to undermine the credibility of these experts by implying that the experts were biased because they were paid. Not only were Petitioners' experts completely credible and accurate in their testimony, Petitioners' experts were the only experts to testify. Respondent failed to provide any experts or any other evidence which could be considered "fairly debatable" evidence, much less competent, substantial evidence. Moreover, even if the City were to produce its own experts, it can hardly be argued, using Respondent's own logic, that these City experts are not biased. Specifically, all the members of the planning department are paid and appointed, and ultimately answerable to the voting public. Therefore, there is much more potential for the City's experts to be biased or "strong-armed" into agreeing with the "official position" of the City.

[3] It is noteworthy that while the City argues that there is already property available for commercial development, the City has subsequently rezoned other residential properties in the area to commercial in order to permit commercial development.

35,000 cars per day,[4] have been constructed in the City of Jacksonville Beach in over thirty-seven (37) years. (P. Vol II, Tab Q, p.42). Such a development would create eleven driveways onto A1A, most likely requiring home owners to back out onto A1A, creating a safety hazard and ultimately an irresponsible development project.

Summary of the Argument

Respondent severely mischaracterizes significant arguments set forth in Petitioners' Initial Brief. Respondent incorrectly asserts that Petitioners argue in favor of a functional analysis to land planning. Rather, Petitioners assert that the same standard (competent, substantial evidence) should apply to all small-scale amendments. Significantly, it is Respondent's proposed methodology which will lead to decisions being arbitrarily based on the whims of the public. Without requiring local government to produce competent, substantial evidence, the local government's decisions will be inconsistent.

Moreover, Respondent improperly asserts that the Comprehensive Plan (the "Plan") is a static set of policies. The Respondent's own land use

[4] Critically, A1A is a major highway on the east coast of Florida and is very similar to other major highways such as U.S. 90 in Tallahassee. As such, it is readily apparent that residential development along A1A is not feasible.

code and actions demonstrate that changes to the Plan were anticipated, and have been made.

<u>Legal Argument and Supporting Authority</u>

I. THE RESPONDENT'S MISCHARACTERIZATION OF THE PETITIONERS' ARGUMENTS AND FAILURE TO ADDRESS THE CRITICAL ARGUMENT SHOWS THAT THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

Instead of addressing many of the actual arguments made by Petitioners in their Initial Brief, Respondent seeks to confuse the issues by asserting that Petitioners are making a certain argument and then attacking the argument. By addressing arguments not raised by Petitioners, Respondent has failed to address the real legal arguments raised by Petitioners.

A. Respondent fails to address the statutory distinction between the process for adoption of a large-scale amendment and the process for adoption of a small-scale amendment.

Although Respondent quotes the critical language of Section 163.3187(1)(c), Florida Statutes, Respondent fails to address the reason the Legislature adopted a different procedure for the adoption of a small-scale amendment. Under Section 163.3187(1)(c), Florida Statutes, a small-scale amendment <u>cannot</u> be adopted unless it is <u>both</u> fewer than 10 acres <u>and</u> <u>does</u> <u>not</u> <u>change</u> the <u>goals</u>, <u>policies</u> <u>and</u> <u>objectives</u> of the

local comprehensive plan. Rather, a proposed small-scale amendment may only be adopted if it involves fewer than 10 acres and the request involves only a change to the future land use map (i.e., policy application).[5] Given these critical requirements and distinctions between the text and the land use map, Petitioners respectfully submit that decisions regarding small-scale amendments concern policy application and not policy making.

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[5]Critically, Respondent ignores the important distinction between a change only to the land use map (as Petitioners requested) and a change to the policies and objectives of the Plan. By analogy, assume that a government has a written policy and objective that only fuel efficient vehicles can be used as transportation. As part of the implementation of this policy, the government stated in something akin to a land use map, that only vehicles which obtain thirty-five miles-per-gallon can be used as transportation. Further assume that years later, there is a breakthrough in technology and battery-operated cars are readily available in the market. The new battery-operated car does not conform with the technical requirement in the government's designation (land use map) that the car obtain thirty-five miles per gallon. However, such a car does not change the fuel efficiency policy of that government. As such, should the decision to allow the use of a battery-operated car be considered policy application or policy making? The answer is self-evident: The policy is fuel efficiency; not the mandate of a particular type of car being used as transportation. Therefore, when the government is considering changing its designation to allow for the use of battery-operated cars, it is applying policy, not creating policy.

B. Contrary to Respondent's suggestion, Petitioners have not suggested that a functional analysis be employed in determining the proper review of a decision to deny a small-scale amendment.

The Respondent incorrectly asserts that Petitioners argued that a functional analysis should be employed when determining how to review the local government's decision to deny a small-scale amendment. Simply, this argument is without merit and completely misstates Petitioners' point. The Petitioners' entire argument is for a bright line test; to wit: if the application is for a small-scale amendment, as defined by the Florida Legislature, then judicial review would always be by competent, substantial evidence.

Respondent's argument that small-scale amendments are reviewable by the fairly debatable standard would lead to inconsistent and arbitrary results. Conversely, Petitioners' approach would provide consistent results inasmuch as the grant or denial of a small-scale amendment would always require competent, substantial evidence. If the City is not required to introduce competent, substantial evidence in support of its position (and the application is not otherwise reviewed at the state and regional levels free from influence of the electorate), landowners would always enter hearings not knowing whether the City

would deny a petition without any evidence. Without requiring the City to introduce competent, substantial evidence, decisions would be based on how loudly the public yelled, "if you approve this application, I will not vote for you". By requiring competent, substantial evidence, decisions would be based on the merits of the case and not on what is, or is perceived to be, more politically correct on a given day.

C. Contrary to Respondent's suggestion, Petitioners argue that the competent, substantial evidence test should be used in reviewing decisions to deny an application for a small-scale amendment, rather than the constitutional strict scrutiny test.

Respondent further mischaracterizes Petitioners' argument by claiming that Petitioners argue for a Constitutional strict scrutiny test. (A.11). When Petitioners use the phrase "strict scrutiny," what is meant by this phrase is that the reviewing court must determine whether the local government has met the Snyder standard and produced competent, substantial evidence to support the government's position. Petitioners are not arguing that the Constitutional "strict scrutiny" test should be employed.[6]

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[6] Petitioners fully understand that the test in Snyder was not the Constitutional strict scrutiny test used by the courts to evaluate due process and equal protection issues. Rather, Petitioners are using the phrase "strict scrutiny" interchangeably with the competent, substantial evidence test set forth in Snyder.

D. Petitioners did not suggest that an applicant is entitled to a small-scale amendment regardless of consistency.

Respondent incorrectly suggests that Petitioners are arguing that an applicant is entitled to a small-scale amendment as a matter of right, regardless of whether the plan is consistent with the Plan. Petitioners are not arguing that once consistency is proven, that an applicant is entitled to a small-scale amendment as a matter of right. Rather, Petitioners assert, in accordance with Snyder and, in the context of the plain language of Section 163.3187(1)(c), Florida Statutes, that once an applicant proves that the land in question is both less than ten acres and that the proposed use is consistent with the policies of the local government, it is incumbent upon the local government to prove through the use of competent, substantial evidence that the requested change is either inconsistent with the Plan, or that the status quo is reasonable. Board of County Comm'rs v. Snyder, 627 So.2d 469, 476-77 (Fla. 1993).

The underlying dispute in the instant case is whether Petitioners' proposed small-scale amendment is "consistent" with the Plan. The City, through the use of a paid and appointed non-expert city official's opinion, argues that the proposed change is not "infill" development.

(A.3). Whereas, Petitioners, through the use of four experts (one of whom helped create the Plan), argue that the proposed small-scale amendment does constitute "infill" development and is completely consistent with the Plan. (P. Vol. II, Tabs P & Q). Given this disagreement, it is clear that a determination of whether a proposed small-scale amendment is consistent with the Plan is policy application. Specifically, this is policy application because the City is only comparing the proposed change in the land use map with the stated policies of the City. As such, once Petitioners proved consistency through the use of four experts (all of whom have impeccable credentials), it was incumbent upon the City to produce something other than a paid and appointed city official's opinion that the proposed change is inconsistent with the Plan. Stated differently, the City should have produced competent, substantial evidence (i.e., data, statistics, etc.) that the proposed amendment is inconsistent with the Plan. Critically, once a local government has produced competent, substantial evidence of inconsistency (which was not done in the instant case), then Section 163.3187(1)(c), Florida Statutes, is no longer applicable, even if the land in question is less than ten acres. This is because a proposed small-scale amendment needs to be <u>both</u> fewer than

ten acres and consistent with the policies and objectives of the Plan.[7] See § 163.3187(1)(c), Fla. Stat.

E. Respondent improperly argues that the Comprehensive Plan is not subject to change.

Respondent further argues that a comprehensive plan is a static set of policies which are not subject to change. This argument is without merit. First, according to a case Respondent relies on in its Answer Brief, Chapter 163 is intended "as a general guideline for community growth for a 20- or 25-year period." (A.9) (quoting City of Jacksonville Beach v. Grubbs, 461 So. 2d 160, 162-63 (Fla. 1st DCA 1984)) (emphasis added).

Moreover, Respondent's own Land Use Code shows that the Plan is not meant to be a static set of policies which are not subject to change. Specifically, the Jacksonville Beach Land Use Code provides for a plan

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[7] By requesting that this Court hold that a local government produce competent, substantial evidence to support its position of inconsistency or that the status quo is reasonable, Petitioners are not asking that this Court place a substantial or intolerable burden on local governments. Rather, Petitioners are simply requesting that, given the limited checks and balances provided for in the context of small-scale amendments, the local government be held accountable for its decisions; to wit: that the local government be required to produce competent, substantial evidence to support its position. This is to ensure that the applicant is not subjected to the political whims of the local community; but rather, that there is a real basis for denying an application.

amendment upon a showing of at least one of six enumerated criteria.[8] If the Plan was meant as a static set of policies which are not subject to change, why would the Jacksonville Beach Land Use Code provide criteria and a procedure for such a change? Finally, and contrary to Respondent's argument, if the Plan was meant as a static set of policies which are not subject to change, why has the City itself amended the Plan several times since its adoption?[9]

F. **Respondent misstates the importance of this Court's holding in Yusem that large-scale amendments are**

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[8] As set forth in Petitioners' Initial Brief, Petitioners through the use of several experts and other evidence proved that the proposed small-scale amendment should be adopted by proving five of the six (the sixth criteria not being applicable to the subject property) criteria provided for in Section 34-181 of the Jacksonville Beach Land Use Code. Since, according to the Jacksonville Beach Land Use Code, Petitioners needed to show that only one factor was applicable, Petitioners more than carried their burden of proof.

[9] The adoption, amendment and refinement of the Plan is not unlike the adoption, amendment and refinement of various laws and policies of this State. Through time, as a result of changed circumstances and unforeseen events, laws are created, refined, amended and repealed. Some laws last for 20 years and others are changed in 20 days. It would indeed be bold to suggest that a handful of people could see 20 years into the future all events affecting the growth of a city. Things change in unanticipated ways. A managed growth plan must accommodate these changes. The Jacksonville Beach Land Use Code provides a means to amend or refine the Comprehensive Plan to reflect unforeseen changes.

legislative in nature by virtue of their review on various levels of government.

Finally, Respondent glosses over a principle rationale of this Court's decision in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), which supports Petitioners' position that a decision whether to approve a small-scale amendment is a quasi-judicial proceeding.[10] (A.26-29). Specifically, as set forth more fully in Petitioners' Initial Brief, this Court in Yusem detailed the extensive review process involved in large-scale amendments. In Yusem, this Court concluded that the integrated review process (as contrasted with review only at the local level) ensures that policies and goals of the Growth Management Act are followed. 690 So. 2d at 1294. This is a significant rationale for this Court's holding in Yusem, and it is submitted that this rationale mandates that a different standard of review be applied to small-scale amendments.[11]

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[10]Respondent also incorrectly states that Petitioners were arguing that footnote 6 of the Yusem decision clearly shows that this Court believed that small-scale amendments are not legislative decisions. (A.15-16). Petitioners' are not arguing that footnote 6 of the Yusem decision is dispositive of the issue, but rather footnote 6 shows that the standard of judicial review for small-scale amendments is an open issue, hence this appeal.

[11] Respondent labels this rationale by the Court as "further support" for the Yusem decision rather than a rationale for the Yusem decision. Petitioners respectfully assert that this is nothing more

II. THERE WAS NO FAIRLY DEBATABLE, MUCH LESS COMPETENT AND SUBSTANTIAL, EVIDENCE SUPPORTING RESPONDENT'S DENIAL OF THE PROPOSED SMALL-SCALE AMENDMENT.

As set forth more completely in Petitioners' Initial Brief, Respondent has failed to show by competent, substantial evidence that the denial of the proposed small-scale amendment was proper. Critically, neither Respondent nor the individuals opposing Petitioners called a single expert, testifying witness, or proffered any evidence which could provide anything that would even remotely be considered as competent, substantial evidence.[12] (P. Vol. II, Tab Q). Rather, Respondent asserts that the staff report, the views of the public, and

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than a distinction without a difference. Further, Respondent argues that the procedures set forth in Section 163.3187(3)(a) provide the necessary accountability for the City's position. Critically, under this statute, Petitioners cannot use this procedure to challenge a local government's decision; and the state land planning agency may intervene but is not required to intervene. See 163.3187(3)(a). Unlike the procedures provided for in reviewing a large-scale amendment, there is no mandatory review by multiple levels of government. As such, there is nothing which serves as a mandatory check on a local government to make sure that the local government is accountable for its actions.

[12] Respondent cannot even meet the "fairly debatable" standard which it fervently argues should apply. See Debes, 690 So. 2d at 701 n.4 (stating that when no relevant evidence is presented, the standard of review is irrelevant because the City's position is not even "fairly debatable").

the Plan itself are competent, substantial evidence.[13]

Relying on public opinion makes land use planning a popularity contest leading to arbitrary decisions where significant policy concerns are not at issue. The personal opinions of nearby homeowners and residents do not constitute competent, substantial evidence. See Pollard v. Palm Beach County, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990).

With respect to the staff report, this is merely the unsubstantiated opinion of the planning department. Critically, Petitioners were not given an opportunity to cross-examine the

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[13] The authorities cited by Respondent in its Notice of Supplemental Authority do not support Respondent's argument. In Hillsborough County Board of County Comm'rs v. Longo, 505 So. 2d 470 (Fla. 2d DCA 1987), the county, unlike the Respondent herein, presented its own expert testimony. Moreover, Longo, which was decided before Snyder, was a rezoning case which applied the fairly debatable standard. Thus, in light of Snyder, the reasoning in Longo may not be applicable in any case. The court in Riverside Group, Inc. v. Smith, 497 So. 2d 988 (Fla. 5th DCA 1986), did not provide sufficient detail to show whether the case supports Respondent's position. In Smith, the local government agreed with the developer and the court found that the presentation of the developer and the local government combined constituted competent, substantial evidence. Id. at 988-89 (notably, a member of the public filed the circuit court appeal). Unfortunately, the court did not describe the particular evidence offered by each party. Finally, in Alachua County v. Eagle's Nest Farms, Inc., 473 So. 2d 257, 260-61 (Fla. 1st DCA 1985), the court held that the applicant did not meet his initial burden of production. In the instant case, Petitioners introduced sufficient evidence to shift the burden to Respondent. Respondent failed to meet its burden.

individuals who created the staff report, and the report is not otherwise substantiated with any kind of data, statistics or other real evidence.[14] Rather, this report is nothing more than the nonfactual lay opinion of certain members of the appointed planning department which is full of inherent inconsistencies with existing facts and evidence.

Further, Respondent's argument that the Plan itself is "competent, substantial evidence" is completely nonsensical. Critically, if the Plan itself is competent, substantial evidence, this begs the question why the City has amended the Plan several times since its adoption. Further, as a matter of common sense, a local government cannot rely on the very document being challenged as competent, substantial evidence. As evidenced by the Jacksonville Beach Land Use Code, it was anticipated that changes to the Plan may be required. If the Plan is competent, substantial evidence, then why did the City provide criteria to amend the Plan and why has the City itself amended the Plan.[15]

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[14]Respondent also argues that the comments by Steven Lindorff constitute competent, substantial evidence. First, Steven Lindorff was not present at the City Council hearing. Further, Steven Lindorff's non-expert presentation was nothing more than a recitation of the Staff Opinion. The record is devoid of Lindorff's qualifications, if any. Further, his "opinion" was not supported by any data or analysis. A non-expert opinion unsupported by data and facts is not competent, substantial evidence.

[15] See note 9, supra.

In sum, the City has failed to show why the proposed small-scale amendment is inconsistent with the policies and goals of the Plan, or why the status-quo is reasonable given that there has been no residential development with driveways accessing A1A in the last 37 years. (P. Vol. II, Tab Q, p.42).

Finally, even if this Court were to decide that the "fairly debatable" standard is applicable in reviewing a local government's decision to deny an application for a small-scale amendment, Respondent's position is not even "fairly debatable". The Third District Court of Appeals has stated:

> While we agree that Snyder provides the appropriate standard of review, [citations omitted], the issue is not determinative or even important in our consideration of the case. As we suspect is very often the case, the application of any possible formulation of the showing necessary either to support or to overturn a local government's decision of the present kind, including the "fairly debatable" standard deemed appropriate in Martin County v. Yusem [citations omitted], would yield the same result.

Debes v. City of Key West, 690 So. 2d 700, 701 n.4 (Fla. 3d DCA 1997).[16]

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[16] Respondent tries to distance itself from the opinion in Debes by referring to it as a "spot zoning case" and by stating that there is no indication in Debes that the case involved Section 163.3187(1)(c), Florida Statutes. While Petitioners agree that the opinion in Debes is not a model of clarity, given the unequivocal holding in Snyder, there was no basis or reason for the Debes court to have referred to the

Because Respondent failed to produce any evidence on which a denial of Petitioners' application could be based, the First District's holding should be reversed.

III. THE DISTRICT COURT IMPROPERLY UTILIZED ITS CERTIORARI REVIEW.

Finally, Respondent argues that the District Court properly utilized its certiorari review. (A.42). The substance of this argument is that if a circuit court applies the incorrect law, reversal is appropriate. (A.42-45). However, Respondent is ignoring the clear and unequivocal language of this Court in Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995). This Court held that a District Court should review a circuit court's decision to see if due process was afforded or whether the circuit court's order departed from an essential and clearly established principle of law so seriously that upholding the

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decision in Yusem in discussing the applicable standard of review if this was a zoning case. Furthermore, identical to the facts in the instant case, the facts in Debes clearly show that the Petitioner was trying to amend the designation on the future land use map for the subject property from residential to commercial. See id. at 701. Finally, clearly at least one court agrees that the issue in Debes concerns a small-scale amendment. See Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998) (holding that small-scale amendments are legislative in nature and certifying conflict with Debes).

departure would result in a miscarriage of justice. Id. at 525.

At the time the Circuit Court made its decision, the only applicable legal authority was Yusem, Snyder, Debes and Sections 163.3184-.3187, Florida Statutes. As explained in the Initial Brief, all existing legal authority supported the Circuit Court's decision. As a result of the fact that all then-existing legal authority supported the Circuit Court's decision, the Circuit Court did not violate a clearly established principle of law. It is respectfully submitted that under this appropriate standard of review issue alone, the Circuit Court's decision must be affirmed.

Conclusion

For all of the reasons set forth above and in the Initial Brief, the proper standard for judicial review of a small-scale amendment to the Plan is competent, substantial evidence upon petition for certiorari. Because the Circuit Court did not misconstrue existing law and because the First District erroneously found that small-scale amendment decisions are subject to a fairly debatable standard of review, the First District's Order should be reversed.

BARTLETT & HEEKIN, P. A.

By:______________________________

T. Geoffrey Heekin
Florida Bar No. 328448
S. Hunter Malin
Florida Bar No. 0088020
P.O. Box 477
Jacksonville, FL 32201
904/355-7000
904/355-0266 (facsimile)
Attorneys for Petitioners

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of Petitioners' Reply To Respondent's Answer Brief On The Merits was typed using Courier, 12 point, font, and was fully justified. A three and a half inch floppy disk with a copy of Petitioners' Reply To Respondent's Answer Brief On The Merits has been furnished to the Supreme Court of Florida.

____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Stephen Stratford, Esquire, 1301 Riverplace Boulevard, Suite 1638, Jacksonville, Florida 32207, and to William S. Graessle, Esquire, 219 Newnan Street, 4th Floor, Jacksonville, Florida 32202, via regular United States Mail on September ____, 1999.

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Attorney