

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR SARASOTA COUNTY, FLORIDA**

**BDR Investments, L.L.C.**, a Florida  
Limited Liability Company, and **Rodney  
Krebs,**  
Petitioners,

v.

Case No: 2002 CA-16991-NC  
Division A

**SARASOTA COUNTY, FLORIDA**, a  
Political subdivision of the State of Florida and  
**THE BOARD OF COUNTY COMMISSIONERS  
OF SARASOTA COUNTY, FLORIDA,**  
Respondents.

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**SARASOTA COUNTY'S RESPONSE**

Sarasota County responds to the Petition for Writ of Certiorari filed by Petitioners and this Court's Order to Show Cause, and states:

**INTRODUCTION**

This Petition for Writ of Certiorari challenges the decision of the Sarasota County Board of County Commissioners not to rezone the petitioner's property, and instead to retain the *status quo* zoning on the property. This Response will demonstrate that the Board's decision should not be disturbed.

An Appendix was filed with the Petition containing the record of the proceedings before the Board of County Commissioners. Sarasota County will use that Appendix in this Response. It will be cited as "App." The transcript provided by the petitioner at Appendix 2 will be cited as "T."

### STATEMENT OF FACTS AND PROCEEDINGS

The Petitioners are the owners of a 1,280-acre tract (comprising two square miles of land) in the far northwestern corner of Sarasota County. The parcel is designated Rural on the Sarasota County Comprehensive Plan's (the "Plan") Future Land Use Map, and is zoned OUR (open use rural) on the County's zoning atlas. Property zoned OUR qualifies for one residential dwelling unit per ten acres. Several thousand acres of lands to the east and west of the property are likewise designated Rural and zoned OUR. On the north, the land is designated Rural and zoned GU (general utility), and farther to the west is also land designated Rural and zoned GU. South of the property and fronting on Fruitville Road (which is approximately one and one-half to two miles south of the southern boundary of the subject property) land is designated Rural and zoned OUE-1.

The Petitioners sought to rezone their property to OUE-1 (open use estate) to allow the maximum residential density contemplated for Rural-designated land -- one unit per five acres.

The subject property is ten miles east of Interstate 75, and almost ten miles east of the growth boundary established by the Sarasota County Comprehensive Plan. It is less than one mile south of the Sarasota County-Manatee County line, and approximately one mile west of the Sarasota County - Manatee County line. Appendix 1, cover page; Appendix 1, p. 2-4; Appendix 6, p. 4. The subject property and all surrounding properties are vacant, and are used for wellfields and cattle grazing, Appendix 1, p. 3, and a dairy farm. T. p. 4. As noted, the property is designated Rural on the Sarasota County Future Land Use Map. Appendix 1, p. 2. According to the Plan, Objective 1.3 of the

Future Land Use Element is "To preserve and protect agricultural lands." To that end, Policy 1.3.1 is that:

Within the Rural Area, as designated on the Future Land Use Map, the approval of residential development shall acknowledge that the preservation of agricultural lands is a primary function of the Rural Area, and that land management activities associated with agricultural uses may be incompatible with residential development. However, such management activities are considered to be an essential element of the preservation of successful operations on agricultural lands and the continuation of such activities shall take precedence.

And Policy 3.1.5 is that:

Residential development in the Rural Area shall have a maximum density of one dwelling unit per five acres.

Contrary to the Petitioners' claim, the County's professional staff did not find the application to be consistent with the County's comprehensive plan and did not recommend its approval. Planning staff made the following report on the application:

The intent section of the requested OUE (sic. OUR) zone district states in part that "it is the intention of these zoning regulations that such lands not be rezoned to more intensive uses without a clear showing of proved need in the public interest and a clear showing of conformity with the Comprehensive Plan of Sarasota County." This is of particular concern given the size of the subject parcel and the number of dwelling units proposed. Regarding public need, the Applicant has not provided any information with the application to demonstrate the public need for this development. The Comprehensive Plan for Sarasota County discourages development which might be considered urban sprawl, and projects growth based on population projections to be within the Urban Service Area Boundary where urban services and facilities are available, or planned to coincide with growth. There are no central facilities in this area to serve the development proposed. The development represents 256 new wells and septic tanks. App. 1, p. 2.

The application was considered by the Planning Commission on July 11, 2002, and the Planning Commission voted 4-2 to recommend approval if eight stipulations (i.e., conditions) were included in, and imposed on, the rezoning. On October 23, 2002, the Board of County Commissioners considered the application. At the hearing, it was

disclosed by the Petitioners that they desired the rezoning to increase the density not from one unit per five acres, but to one unit per three and one-half acres pursuant to an overlay amendment to the Plan that had been adopted by the County in August 2002, but that was under challenge. Their plan was to develop the subject property in concert with the tract of property that the Petitioners owned along Fruitville Road, all at three and one-half units per acre.<sup>1</sup>

Becky Ayech, a resident of Old Myakka, testified that she had confirmed with County staff that there are already over 1000 five-acre zoned lots available in Old Myakka (located southeast of the subject property in the western part of Sarasota County) that can support the need for housing being urged by the Petitioners. T. p. 90-91. Ellen Richardson, also a resident of Old Myakka, testified that creating five-acre lots in this area would be contrary to the planning efforts going on for Old Myakka. T. p. 97.

After a lengthy hearing, the Board denied the rezoning by unanimous vote. Commissioner Mills' comment was prophetic:

For us to approve something out in the middle of the area like that seems to me to be a bit of a stretch. T. 110.

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<sup>1</sup> The applicability and relevance of the amendment was discussed at some length, and it was recognized by the County and the Petitioners that the amendment was probably not applicable due to the pending challenge. However, two things deserve mention. First, the commissioners explained to the Petitioners and on the record that their intent in the amendment was that only lands zoned OUE-1 at the time of the amendment would qualify for the greater density and that the Petitioners' land was not intended for this purpose. Second, the Petitioners' argument that Gardens Country Club, Inc. v. Palm Beach County, 712 So. 2d 398 (Fla. 4<sup>th</sup> DCA 1998) precludes even consideration of the Plan amendment is incorrect. In Gardens Country Club, the comprehensive plan was only in the legislative process. Hence, Palm Beach County could have decided not to adopt the plan. In contrast, the amendment in this case has actually been adopted. Certainly, the Petitioners see the difference because their expressed plan is to take advantage of the amendment once the challenge is concluded. T. 45.

The Petitioners have challenged the Board's decision with this Petition for Writ of Certiorari.

### SUMMARY OF THE ARGUMENT

The Petition should be denied because the Board of County Commissioners afforded the Petitioners full and adequate procedural due process, observed the essential requirements of law, and made a decision supported by competent and substantial evidence.

### STANDARD OF REVIEW

Because this is an action in certiorari, the court's review is limited to an analysis of three criteria: 1. Whether procedural due process has been accorded; 2. Whether the essential requirements of law have been observed; and 3. Whether the disputed finding is supported for competent, substantial evidence. City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982). The Plaintiff's petition asks the Court to review the County's actions with regard to all the second and third criteria.

The Florida Supreme Court has recently described the appropriate standard of review in certiorari in land use cases in Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001), and in Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001). According to the Court, the circuit court is to conduct a circumscribed review of the proceedings and the record to see if there has been a "miscarriage of justice, nothing more." G.B.V. International, at 844. The circuit court's review is "deliberately circumscribed out of deference to the agency's technical mastery of its field of expertise." *Id.* at 843.<sup>2</sup> In the case of a quasi-judicial land use

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<sup>2</sup> In Dusseau, the Florida Supreme Court explained:

...this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issues before the court is not whether the agency's decision is the 'best'

decision, the initial burden is upon the applicant to demonstrate that the application is consistent with the local government's comprehensive plan and meets the criteria found in the local land development regulations. *Id.* at 842; Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 476 (Fla. 1993). If the applicant satisfies this burden and the local government denies the application, then, and only then, does the burden shift to the local government to "show by competent substantial evidence that the application does not meet the published criteria." G.B.V. International, at 842. The circuit court is to assess whether the local government accorded procedural due process, observed the essential requirements of law, and reached a decision that is supported by competent substantial evidence. *Id.* at 843. As explained in Haines City Community Development v. Higgs, 658 So. 2d 523 (Fla. 1995), a local government observes the essential requirements of law if it applies the correct law. The competent substantial evidence element of the review is far more limited than would be allowed in a typical appeal. A circuit court cannot "comb the record and extract its own factual finding." G.B.V. International, at 845. Nor can the court reweigh the evidence in the record, or assess the relative weight of the evidence that supports the decision against the applicant's evidence that is to the contrary. *Id.*; Dusseau, 794 So. 2d at 1275. In Dusseau, the Florida Supreme Court made this point quite clear:

The [circuit] court's task...is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons'

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decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience – and is inherently unsuited – to sit as a roving 'super agency' with plenary oversight over such matters. Dusseau, 794 So. 2d at 1276

of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended. Dusseau, 794 So. 2d at 1276.

Moreover, as noted above, certiorari is intended to only remedy miscarriages of justice. In G.B.V., the Court explained:

The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists. The writ is discretionary and was intended to fill the interstices between direct appeal and the other prerogative writs. The writ never was intended to redress mere legal error, for common law certiorari -above all- is an extraordinary remedy, not a second appeal. (Footnotes omitted) 737 at 842

Therefore, to constitute an error worthy of further intervention by the court, the error must be so clearly egregious as to constitute a "miscarriage of justice." As defined in Haines City, "The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Haines City 658 So. 2d at 527 (citing Jones v. State, 477 So.2d 566, 569 (Fla.1985) (Boyd, C.J., concurring specially)).

When applying this principle, the Supreme Court in Haines City instructed that the court "should not be as concerned with the mere existence of legal error as much as with the seriousness of the error." Clearly, certiorari is available to cure illegality, and not simply legal error. Haines City, 658 So.2d at 527-28; see also, Lopez v. Miami-Dade County Code Enforcement, (Fla. Cir. Ct., 11<sup>th</sup> Judicial Circuit, Feb. 5, 2002).

In their petition, the Petitioners argue that the Board's decision to deny the requested rezoning is to be strictly scrutinized by the court and that no deference is to be accorded to the Board in this regard. This misstates the standard of review. Board of

County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), the case cited by the Petitioners in support of their proposition, does not hold that rezoning decisions are always to be strictly scrutinized. Snyder directs that only the issue of consistency with the comprehensive plan is to be strictly construed. That is because consistency is one factor in review of zoning decisions. Snyder identified the burden of proof in rezoning cases as follows:

[A] landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. Snyder, 627 So. 2d at 476.

The Court explained that "when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. ... the proposed change cannot be *inconsistent*, and will be subject to the "strict scrutiny" of Machado to insure this does not happen.

"Strict scrutiny", according to Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987) review denied, 529 So. 2d 993 (Fla. 1988) and review denied, 529 So. 2d 994 (Fla. 1988), is associated with only the matter of whether the decision is consistent with the comprehensive plan. The court said:

The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies. Machado v. Musgrove, 519 So. 2d at 632.<sup>3</sup>

<sup>3</sup> See also, Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993) ("strict scrutiny" means strict scrutiny for consistency with the comprehensive plan).

The Machado court also placed the strict scrutiny burden of proof on the *one seeking to make the change*, not on the local government. Quoting from the court's decision:

...where a zoning action is challenged as violative of the comprehensive land use plan *the burden of proof is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan.* Id. (italics added).

In short, strict scrutiny has a place in the review of the Petitioners' rezoning, but the burden (and the scrutiny) is not placed on the County, rather, it is on the Petitioners. Additionally, deference is to be accorded the County because it decided to deny the application and maintain the existing zoning. The Snyder court also addressed this point:

Even where the denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided the governmental body approves some development consistent with the plan and the government's decision is supported by substantial, competent evidence.

Further, we cannot accept the proposition that once the landowner demonstrates that the proposed use is consistent with the comprehensive plan, he is presumptively entitled to this use unless the opposing governmental agency proves by clear and convincing evidence that specifically stated public necessity requires a more restricted use. We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan. As noted in Lee County v. Sunbelt Equities, II, Limited Partnership,<sup>4</sup>:

[A]bsent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The *right* of judicial review does not *ipso facto* ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed. Snyder, 627 So. 2d 475

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<sup>4</sup> 619 So. 2d 996 (Fla. 2d DCA).

On the other hand, no deference is to be accorded to the Petitioners on the issue of consistency. If the Petitioners' application is not strictly consistent with the plan, then the Board's denial must not be disturbed.

The Petitioners also argue that the Board of County Commissioners was constrained to follow only the criteria found in Section 21.5.a of the Zoning Code in reaching its decision. This is simply incorrect. A plain reading of Section 21.5.a of the Zoning Code shows that it is only applicable to the Planning Commission and is to be used as a tool by that advisory board in making its recommendation to the Board of County Commissioners.

In sum, the standard of review established by the Florida Supreme Court is a limited and circumscribed review by the circuit court to determine whether the tests of Vaillant have been satisfied. As will be shown below, the County has satisfied each of the tests. Accordingly, this court should not disturb the County's decision and should deny the Petition.

**2. THE BOARD OF COUNTY COMMISSIONERS OBSERVED  
THE ESSENTIAL REQUIREMENTS OF LAW**

Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995), instructs that this first element of certiorari review consists of two criteria: 1) did the Board apply the correct law; and 2) if the Board did not apply the correct law, was the error serious enough to result in a miscarriage of justice. It is not necessary to consider the second criteria in this case because the Board clearly applied the correct law.

In this case, the applicable law is the Sarasota County Comprehensive Plan, the Sarasota County Zoning Code and Land Development Regulations, the Local Government Comprehensive Planning and Land Development Regulation Act, and the

body of case law associated with zoning and comprehensive planning. The initial burden of proof is upon the Petitioners to demonstrate that the application is consistent with the comprehensive plan and meets the criteria found in the land development regulations Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 476 (Fla. 1993). If the Petitioners satisfied this burden and the County denies the application (as it did) then, and only then, does the burden shift to the local government to show by competent substantial evidence that the application is not consistent with the comprehensive plan, does not satisfy the land development regulations, or that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. Id. As will now be shown, the Board did in fact follow the correct law.

**u. The rezoning was inconsistent with the comprehensive plan.**

As explained above, an applicant for rezoning has the burden to demonstrate strict consistency with each and every goal, objective, and policy of the comprehensive plan. Such a demonstration requires "rigid exactness." Machado, 519 So. 2d at 632. If the applicant fails in this regard, then the rezoning cannot be approved, and to do otherwise would be an *ultra vires* act. Id. The requested rezoning was not strictly consistent with the County's comprehensive plan, and therefore the Petitioners never satisfied their initial burden. Martin County v. Section 28 Partnership, Ltd., 676 So. 2d 532 (Fla. 4<sup>th</sup> DCA) review denied, 686 581 (Fla. 1996) cert. denied, 520 U.S. 1196, 117 S. Ct. 1553 137 L. Ed. 2d 701 (1997)(If the applicant's request for rezoning is not consistent with the comprehensive plan, then the applicant never meets its initial burden under Snyder and therefore, the burden never shifts to the county to show that the refusal to rezone was not

arbitrary, discriminatory or unreasonable.) It follows that the Board observed the essential requirements of law in denying the rezoning for this reason alone.

The requested rezoning was in conflict with several provisions of the Plan. Goal 1 of the Future Land Use Plan is to "preserve agricultural uses consistent with resource protection." Objective 1.3 of the Future Land Use Plan is "to preserve and protect agricultural lands." Policy 1.3.1 provides that within the Rural Area in which the subject property is located "the approval of residential development shall acknowledge that the preservation of agricultural lands is a primary function of the Rural Area."

Furthermore, Policy 2.2.1 of the Future Land Use Element requires that "the approval of all development orders shall be subject to the availability of adequate levels of service for roads, ... potable water, ... storm water management facilities ... as defined in the adopted level of service standards." With respect to road concurrency, the Petitioners clearly did not prove that the rezoning was supported by adequate road capacity. The only evidence on road concurrency was an opinion by County staff that was based on a capacity methodology that was, in the staff person's own words, "arbitrary." T. p. 13. Such a qualified finding, and such a capacity methodology certainly does not satisfy strict scrutiny. White v. Metropolitan Dade County, 563 So. 2d 117 (Fla. 3d DCA 1990).

Policy 2.3.4 of the Future Land Use Element also provides that the land use plan "is intended to provide for the future use of land in Sarasota County and contemplates a gradual and ordered growth." This policy is one of several policies designed to discourage urban sprawl, as is required by the Growth Management Act. One of the most notable examples of urban sprawl is where development occurs "in rural areas at

substantial distances from existing urban areas while leaping over undeveloped lands which are available and suitable for development." F.A.C. Rule 9J-5.006(5)(g)(2). Similarly, sprawl occurs where development exhibits that it is a "premature or poorly planned conversion of rural land to other uses." F.A.C. Rule 9J-5.006(5)(g)(4). Another indicator of prohibited sprawl is where development occurs that "fails adequately to protect adjacent agricultural areas and activities." F.A.C. Rule 9J-5.006(5)(g)(5). And other indicators of sprawl are where development "fails to maximize the use of existing public facilities and services," F.A.C. Rule 9J-5.006(5)(g)(6), or where development "allows for land use patterns or timing which disproportionately increases the cost in time, money and energy, of providing and maintaining facilities and services." F.A.C. Rule 9J-5.006(5)(g)(8). Commissioner Mercier was correct when he noted that:

This is sprawl. It's a premature conversion of rural land to other uses. It's a creation of areas of urban development not functionally related to land uses with the adjacent area. This could be construed that way. But the real fact is it is a quantum leap out there. And it's scattered development of low intensity and low density and single use development. T. p. 114.

The Petitioners' rezoning would have been inconsistent with the Plan and further, would have constituted prohibited urban sprawl according to the above examples, therefore rendering the request inconsistent with both the Plan and the Growth Management Act (The Local Government Comprehensive Planning and Land Development Regulation Act, Laws of Florida, Chapter 85-55, as amended, Florida Statutes, Chapter 163, Part II (2002)). Introducing a two-square mile residential project into the middle of a sea of agriculture would have been in conflict with the Plan's express objective of preserving and protecting agricultural land and agriculture, the "Primary function of the Rural Area." This isolated node of development and population would

have also constituted a classical example of leap-frog development, in violation of the state's urban sprawl rules and the Plan's requirement that growth be "gradual and ordered." Timing-wise, the rezoning would have prematurely introduced residential uses into the middle of a large tract of agriculture. There is no evidence that the eight to nine miles of land to the west of the property is not capable of growing now to provide for an orderly pattern of growth. The population of this area would have been far removed from public services, and as a result, such services would have to be provided at a high cost, contrary to the Plan's policies for adequate public facilities and services. Quite clearly, the application would have been inconsistent with both the County's Plan and the State's Plan.

**b. The rezoning was inconsistent with the County's Zoning Regulations.**

The Petitioners' rezoning was also contrary to the provisions of the Zoning Regulations. The regulations for the OUR zoning district contain the following specific condition with regard to the rezoning of land to a greater density:

*It is intended and anticipated that certain portions, but only portions, of this district may eventually be required for more intensive uses. It is the intention of these zoning regulations that such lands not be rezoned to more intensive uses without a clear showing of proved need in the public interest and a clear showing of conformity with the Comprehensive Plan of Sarasota County. OUR districts are intended for agricultural purposes and uses and to preserve for agricultural uses those lands with agricultural development potential, to the end that man's future need for food and fiber will be met. The regulations discourage non-agriculturally oriented residential development, and prohibit all commercial and industrial development except for certain recreational activities not inappropriate to the district. Sarasota County Zoning Code, §S-7-A. (italics added)<sup>5</sup>*

<sup>5</sup> The Petitioners spent several pages in their Petition arguing that the requirement of a showing of need was either a criteria "cut from whole cloth at the hearing," Petition, p. 30, or is an invalid criteria granting the Board arbitrary and unfettered discretion. Both

Planning Staff's report on this provision was as follows:

This is of particular concern given the size of the subject parcel and the number of dwelling units proposed. Regarding public need, the Applicant has not provided any information with the application to demonstrate a public need for this development. The Comprehensive Plan for Sarasota County discourages development which might be considered urban sprawl, and projects growth based on population projections to be within the Urban Service Area Boundary where urban services and facilities are available, or planned to coincide with growth. There are no central facilities in this area to serve the development proposed. The development represents 256 new wells and septic tanks. App. 1, p. 2.

The Board of County Commissioners' decision was consistent with the Zoning Code as expressed in §5-7. As explained in the Code, the OUR district is intended for agriculture, and lands zoned OUR are expected to be preserved as agriculture. Changes in zoning to more intensive, residential uses should only be made upon "a clear showing of proved need in the public interest and a clear showing of conformity with the Comprehensive Plan." Neither of these criteria is evident in this case. As pointed out by the commissioners, the property is in a sea of agriculture and vacant wellfields. There was no reason why the land could not be preserved in agriculture as intended or developed at the less-dense rural residential density of one unit per ten acres. Nor was it clearly evident that the rezoning of this parcel was critical to address a proven need, or that it was necessary for the public interest. The only reason given by the Petitioners in this regard was that there was a projected need for homes in the north part of Sarasota County. No reason was given why that need could not be satisfied on a site closer to Interstate 75, where the population was expected to be accommodated, where services are

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arguments are meritless. Obviously, the criteria is in the Zoning Code. Furthermore, the showing of need requirement is circumscribed by Zoning Code and the goals, objectives, and policies of the Plan.

available, and where the population could be more easily accommodated with jobs, consumer needs, and public services. The Petitioners' claim that there is a need for homes generally in the north part of Sarasota County clearly does not equate to the Petitioners' site being the only site to accommodate this need. That argument could be made for any property in the north part of Sarasota County, and simply does not justify a mandate to rezone a parcel ten miles from Interstate 75 to a density twice (and possibly three times) its present density.

Unlike the Petitioners, who focus on their particular property and seek to obtain its highest and most profitable use, Sarasota County is under a duty to plan and zone in the best interests of the public. This requires consideration of a myriad of social, demographic, and fiscal factors that pertain not only to the particular property being considered, but also for the unincorporated county as a whole. The Board of County Commissioners, as the zoning authority, must act globally when deciding how particular property should be zoned and what use or density of population is appropriate for a given property at a given point in time. The law recognizes this aphorism. Forde v. City of Miami Beach, 1 So. 2d 642 (1941); City of Miami Beach v. Rosen, 10 So. 2d 307 (Fla. 1942); Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001); Florida Statutes, Chapter 163, Part II (2002)(The Florida Local Government Comprehensive Planning And Land Development Regulation Act (which mandates each local government to adopt a comprehensive plan to prescribe the "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.")).

Moreover, the Petitioners' argument that the Board erred because the Planning Commission recommended that the rezoning be approved is misplaced. It is axiomatic that planning commissions are advisory boards only, and their recommendations are not binding on the county commission, which has ultimate authority to decide whether to rezone property. Broward County v. Capeletti Brothers, Inc., 375 So. 2d 313 (Fla. 4<sup>th</sup> DCA 1979), cert. denied, 385 So. 2d 755 (Fla. 1980); Solomon v. Metropolitan Dade County, 253 So. 2d 886 (Fla. 3d DCA 1971); Riverside Group, Inc. v. Smith, 497 So. 2d 988 (Fla. 5<sup>th</sup> DCA 1986).<sup>6</sup> Nevertheless, the Planning Commission only recommended approval if certain additional conditions were imposed, which supports the Board's finding that the rezoning did not comply with the applicable laws and regulations. The Petitioners overlook that fact. A Board of County Commissioners is certainly not under any obligation to approve a rezoning that must be conditioned with extra, limiting conditions to possibly comply with the law.<sup>7</sup>

In sum, contrary to the Petitioners' claims, the Board of County Commissioners observed the essential requirements of law when reaching its decision to maintain the *status quo* zoning on the Petitioners' property. The present zoning was not unreasonable,

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<sup>6</sup> In their Petition, the Petitioners have argued that "As a matter of law, these findings [that is, the findings of the Planning Commission] are entitled to great weight." That is simply not the law. The findings of Planning Commissions should be considered by, and may support, decisions by the local zoning authority, but they are certainly not conclusive when the zoning authority decides otherwise. None of the cases cited by the Petitioners support their proposition. Rather, they only indicate that the findings of a planning commission or the analysis of professional staff may constitute competent substantial evidence when the record is devoid of evidence that supports the local government's decision.

<sup>7</sup> It also deserves mention that the record shows that the Petitioners' ultimate objective of using the property at one unit per three and one-half acres was not known to

and there are legitimate reasons why the Board of County Commissioners would prefer to maintain that zoning for the subject property. There was no "clear showing" of a need to rezone this *particular* property. And to have rezoned the property would have violated the County's comprehensive plan and the state's growth management rules.

The Board of County Commissioners observed the essential requirements of law. Its decision is in accord with its comprehensive plan and land development regulations, and followed the law as developed and expressed by the courts. Additionally, even if one could find a legal error in the Board's assessment or application of the law, such error has not resulted in a clear miscarriage of justice. The existing zoning for the property is consistent with the Plan and the zoning for the entire surrounding area. There is no argument that the existing zoning does not afford the Petitioners reasonable use of the property, or that the zoning is arbitrary or unreasonable as a matter of law. By the Board's action, the Petitioners have lost nothing. They have the same rights to use their property as they had before.

**3. THE BOARD OF COUNTY COMMISSIONERS' DECISION IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE**

Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001), Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001), and Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000), as well as their progeny, stress repeatedly the mechanical nature of the third criteria of certiorari review, that is, whether the decision is supported by competent substantial

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the Planning Commission. That matter was only disclosed to the Board of County Commissioners.

evidence.<sup>8</sup> A record supports a decision if "legally sufficient evidence" is found. Florida Power & Light, 761 So. 2d at 1092. No weighing of the evidence is expected, nor is the evidence contrary to the decision (or which does not favor the decision) even to be considered.

It is plain to see from the Petitioners' lengthy recitation of the case and argument of facts that the Petitioners are simply remaking the argument they presented at the Board of County Commissioners' hearing. Their hope would be that this court would disagree with the Board on the facts and accept the Petitioners "facts" instead. As pointed out above, that is simply not allowed in certiorari. The law is absolutely and categorically clear that the circuit court's task is to review the record to assess whether the decision in question is supported by competent substantial evidence, not to reexamine all of the evidence in the record and reweigh the evidence that supports the decision against the evidence presented by the challenger and reach its own decision on the evidence. Florida Power and Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000); Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001); Broward County v. G.B.V. International, Ltd., 787 So. 2d 838 (Fla. 2001); City of Sarasota v. Pleasures II Adult Video, Inc., 799 So. 2d 399 (Fla. 2d DCA 2001); Board of County Commissioners of Pinellas County v. City of Clearwater, 440 So. 2d 497 (Fla. 2d DCA 1983); State Department of Highway Safety and Motor Vehicles v. Bello, 813 So. 2d 1023 (Fla. 3d DCA 2002); Miami-Dade County v. Brennan, 802 So. 2d 1154 (Fla. 3d DCA 2002). Petitioners were required to address their challenge to the Board's decision

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<sup>8</sup> For example, see Metropolitan Dade County v. Dusseau, 826 So. 2d 442 (Fla. 3d DCA 2002) (Dusseau after remand), and Town of Manalapan v. Gyongyosi, 828 So. 2d 1029 (Fla. 4<sup>th</sup> DCA 2002).

to deny the rezoning only to the issue of whether or not the Record contained competent substantial evidence that supported the Board's decision. They plainly have not. Instead, they have simply resubmitted their argument and purported evidence to this Court.

In De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957) the Florida Supreme Court defined the term "competent substantial evidence":

"Substantial" has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred. [It is such] relevant evidence as a reasonable mind would accept as adequate to support a conclusion....[I]n employing the adjective "competent" to modify the word substantial, we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view...that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

Stated another way, and specifically in the context of certiorari review, competent substantial evidence is such competent evidence as a reasonable mind would accept as adequate to support the Board's conclusion. See DeGroot, at 916. Substantial evidence is a function of quality and not quantity, and thus a single fact may clearly satisfy this test. Assessing the present case under this test, it is clear that the record contains more than ample competent substantial evidence supporting the Board's decision to retain the rural zoning on the subject property.

It is quite interesting, and the County submits also quite telling, that the Petitioners make no mention whatsoever of the isolated location of the subject property. The record confirms that the property is located ten miles east of Interstate 75, in the very northeast corner of the county. It is ten miles from the urban boundary established by the County. On the aerial photograph supplied by the Petitioners at App. 6, p. 2 of the Record, one can literally count the number homes within two square miles of the subject

property. It is easy because the area is almost completely undeveloped. It is in agriculture. Just looking at that aerial photograph, one would think that a rural zoning district and a preference for agriculture are completely logical, and that it is the least likely place to double the potential density, or to locate more than two hundred-fifty homes. There are far more properties located nine miles to the west that would be better suited for a two hundred-fifty home community than the subject property.

It is also quite interesting that the Petitioners argue strenuously that the amendment to the Plan is not a valid basis for rejecting the rezoning, but at the same time insist that the amendment will give them the ability to convert the rezoning from OUE-1 one unit per five acres to a project at a density of one unit per three and one-half acres. Regardless, however, though the applicability of the amendment was a matter of some concern to the Board of County Commissioners, it was not the only reason why the Board decided to maintain the *status quo* zoning. There were clearly other legitimate reasons for rejecting the rezoning.


Competent substantial evidence in the record supports the Board's finding that the proposed rezoning was inconsistent with the standards of the County's Plan, and failed to satisfy the general criteria commonly considered in rezoning set forth in the County's zoning regulations. Even were one to assume for purposes of argument that the rezoning requested by the Petitioners was consistent with the Plan simply because the OUE-1 zoning district allows a maximum residential density of one unit per five acres compatible with the maximum residential density identified in Policy 3.1.5 of the Plan, the law is clear that the Board has the discretion to decide that that maximum development density should not be allowed as long as it approves some development

consistent with the plan and its decision is supported by substantial, competent evidence. Snyder. The Board has, in the *status quo* OUR zoning, approved development consistent with the Plan, and the record establishes that there is a legitimate reason for not approving this rezoning. The Board has reached a decision supported by competent substantial evidence, and has therefore satisfied the third and final criteria of certiorari.

#### CONCLUSION

The law does not mandate that local governments must rezone property ten miles from their planned population centers to suit the desires of particular property owners who wish to increase their yield on their investments. Nor does it force local governments to approve rezonings like the one requested by the Petitioners. It does, however, insist that rezoning decisions be consistent with legislated plans that have as their foundation the concentration of population in identified urban service areas and gradual and ordered growth. A zoning decision approving double the residential density of development on two square miles of land ten miles away from the legislated plan's urban service area is inherently in conflict with those principles. As explained above, the Board of County Commissioners applied the law and reached a decision that was also supported by good judgment and sound factual evidence. The County afforded procedural due process, observed the essential requirements of law, and reached a decision that is supported by competent substantial evidence. Accordingly, the Petition for Writ of Certiorari should be denied.

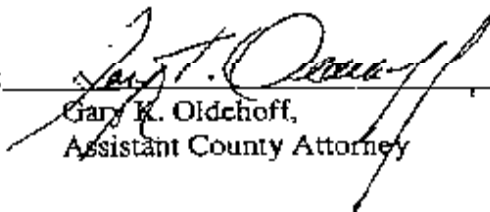
Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished this 30<sup>th</sup> day of December, 2002 by regular U.S. Mail:

Michael J. Furen, Esquire  
Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.  
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By:   
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 Gary K. Oldhoff,  
 Assistant County Attorney