

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

BDR INVESTMENTS, L.L.C., a Florida
limited liability company, and
RODNEY KRERS,

Petitioners,

vs.

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. /

PETITIONER'S REPLY TO SARASOTA COUNTY'S RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

At the outset, it is important for this Court to note that the County makes little attempt to address the substantive arguments raised in the Petition for Writ of Certiorari, spending much of its response on a recitation of the incorrect scope of review, standard of review and relative burdens of the parties to a certiorari action. As will be described in detail below, the County's entire response is premised on a gross misstatement of the governing case law. Further, the County's arguments are premised solely on facts and opinions that are inaccurate and find no support in the record.

II. SCOPE AND STANDARD OF REVIEW

Initially, the County takes issue with the scope of review as described by the Petitioners, arguing that the Circuit Court is empowered only to "conduct a circumscribed review of the proceedings and the record to see if there has been a 'miscarriage

of justice, nothing more." (County's Response at p. 5). The County's recitation of the scope of review is incorrect.

All of the cases cited by the County describe the scope of review in second-tier certiorari proceedings challenging the decision of the Circuit Court in the District Court of Appeals. In fact, the holdings cited by the County describe in detail the distinction between the scope of review applicable to first-tier certiorari review of the Circuit Court as opposed to the scope applicable to second-tier certiorari review by the District Court. The County has set forth the scope of review applicable to second-tier certiorari as applicable to this Court's review and has tailored its entire argument to this misstated scope of review.

The Broward County v. G.B.V. International, Ltd., 787 So.2d 838 (Fla. 2001) decision cited by the County does not, as the County suggests, hold that the circuit court's review is limited to "halt[ing] the miscarriage of justice, nothing more." Id. at 844. Rather, the G.B.V. court compared the two levels of review, finding that it is the review by the District Court that is limited to halting the miscarriage of justice, with the G.B.V. court concluding that "first-tier certiorari review is...akin in many respects to a plenary appeal." Id.

The County next attempts to pervert the "strict scrutiny" standard of review in zoning cases as established by the seminal and oft cited decision of Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 475 (Fla. 1993). The County has

suggested that the "strict scrutiny" standard applies to only one of the issues to be reviewed, "whether the decision [below] is consistent with the comprehensive plan." (County's Response at p. 8). This argument finds no support in the cases cited.

Initially, the Snyder court analyzed whether the Board's action denying the landowner's requested rezoning was legislative, in which case the deferential "fairly debatable" standard would be applicable, or was quasi-judicial, in which case a more stringent standard of review was appropriate. The court concluded that rezoning decisions were quasi-judicial in nature and that in reviewing such decisions, "[w]e also agree with the court below that the review is subject to strict scrutiny." Id. at 474-475. The County's attempt to limit the standard to one specific portion of the inquiry does not find support in any of the cases cited. The County's incredible suggestion that this Court should apply a deferential standard in reviewing rezoning decisions by the County and that the petitioner must prove consistency of the request with the County's comprehensive plan based on a "strict scrutiny" standard flies in the face of the Snyder holding.

III. THE RESPONDENTS DENIED THE PETITIONERS DUE PROCESS AND DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

The Petitioners contend that the Respondents violated Petitioners' due process rights and departed from the essential requirements of the law by basing the denial of the rezoning on the provisions of the County's new "2050 Plan", a plan which was not in

effect at the time of the decision, is not in effect and may never be in effect. Specifically, the Board focused the vast majority of its discussion and questioning on the consistency of the rezoning requested with the perceived "spirit" and "intent" of the 2050 Plan, indicating that it was not the desire of several members of the Board to permit rezonings of properties zoned as OUR to OUE-1 in light of the fact that the 2050 plan permits OUE-1 zoned properties to be developed as a "Conservation Subdivision" with a density bonus. (A. Tab 2, pgs. 17-32, 70-75, 78-84, 87, 109-114). The County has made no argument with regard to this denial of due process and clear departure from the essential requirements of the law. In fact, the County has admitted that the 2050 Plan was a reason for the denial. (County's Response at p. 21).

VI. THE RESPONDENTS DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY BASING THE DENIAL OF THE REZONING ON IMPROPER CRITERIA.

The Petitioners contend that the County departed from the essential requirements of the law by basing their denial of the rezoning on inapplicable and purely subjective criteria. Under the Snyder decision, the Petitioners' burden was met once they demonstrated that the requested rezoning was 1) consistent with the comprehensive plan and 2) complied with all of the procedural requirements of the zoning ordinance. The Petitioners' burden of establishing consistency with the Comprehensive Plan was met with the following findings by the County's own Planning Commission:

1. The proposed change would not be contrary to the land use plan and would not have an adverse effect on the Comprehensive Plan;

* * *

17. All procedural requirements of Sarasota County Ordinance No. 75-38, Section 21, pertaining to amendments, have been met and satisfied. (A. TAB 1, p. 29). (emphasis added)

These favorable findings, combined with numerous and favorable findings by members of the County's professional staff, are competent substantial evidence to support and compel the granting of the Petitioners' rezoning request. See e.g., Allapattah Community v. City of Miami, 379 So.2d 387 (Fla. 3rd DCA 1980).

The County argues, again citing the improper standard of review, that "[t]he requested rezoning was not strictly consistent with the County's comprehensive plan, and therefore the Petitioners never satisfied their initial burden." (County's Response at p. 11; citing, Martin County v. Section 23 Partnership, Ltd., 676 So.2d 532 (Fla. 4th DCA 1996)). Despite the County's implication that the rezoning requested by the Petitioners in the instant case is analogous to the comprehensive plan amendment proposed by the petitioner in Martin County, the Martin County court was careful to draw a distinction between the comprehensive plan amendment process, which was legislative and subject to the fairly debatable test, and quasi-judicial matters like rezonings, which engender strict scrutiny of the Board's action. Id. at 535.

The County then argues that the Petitioners did not prove that the proposed rezoning was consistent with the comprehensive plan,

citing provisions of the comprehensive plan that the County attorney now believes demonstrate an inconsistency. At the outset, this Court should be mindful of the fact that issues not raised before the Board of County Commissioners are not preserved for appellate purposes. See e.g., Keesh v. Yousef, 2002 Fla. App. LEXIS 5450 (Fla. 5th DCA 2002). The County has generated the alleged "inconsistencies" with the comprehensive plan after the fact and the alleged "inconsistencies" are contravened by the record.

The Planning Commission, in recommending approval of the rezoning, made numerous and favorable findings supporting the rezoning. These findings are, as a matter of law, competent and substantial evidence clearly demonstrating that the requested rezoning is consistent with the comprehensive plan. See, Davidson and MacConnell, Florida Zoning Law, Vol. 1, ch. 3(d) et. seq., 1997; Hall v. Knorth, 244 So.2d 766 (Fla. 3d DCA 1971). In contrast to the express findings of the Planning Commission, the County asserts that the County's staff did not find the proposed development consistent with the Comprehensive Plan. The County cites the intent section of the OUR zoning district in support of this contention. (County's Response at p. 3). This Court should be mindful that the staff report cited the intent of the QUE district regulations and, in fact, when the public was invited to comment on the application, Ms. Ayech began her presentation by citing the intent provisions of the ONE regulations. (A. Tab 2, p.

90). The property is zoned OUR, not OUE. The provisions of the OUE district regulations would have been a consideration only if an applicant sought to rezone an OUE parcel. The County takes the liberty of stepping outside of the record and argues, for the first time, that the OUR regulations reflect the relevant inquiry and that, in retrospect, this Court should find that the proposed development was not consistent with what the staff really meant to say. This Court has no record evidence before it as to the OUR regulations and there was no discussion of them before the Board.

Following its recitation of the OUR regulations, the County takes great pains to argue that the proposed development is not consistent with the comprehensive plan despite the overwhelming record evidence to the contrary. The County makes the unfounded statement that the property is "almost ten miles east of the growth boundary established by the Sarasota County Comprehensive Plan." (County Response at p. 2). This statement is both erroneous and misleading. The Property is approximately ten miles east of the Urban Service Area Boundary, which is, by no means, a "growth boundary." The term "Urban Service Area" is defined and described in Policy 2.3.1 of the Future Land Use Element of The Comprehensive Plan and merely indicates that it is the County's intent to focus public infrastructure development within the area. The establishment of the Urban Service Area does not mean, as the

County suggests, that the County has restricted growth outside of the boundary.

Even a cursory review of the Future Land Use Map shows that the requested rezoning was to a district that is an implementing district under the Future Land Use Map. The simple fact is, the Future Land Use Map identifies the Property as "Rural" and the OUE-1 zoning designation is an implementing zone for the Rural Future Land Use Designation. Thus, the County has expressly identified the OUE-1 zoning district and its permitted residential uses and densities as appropriate for the Property. The County's own Planning Commission confirmed this. (A. Tab. 1, p. 29).

The County repeatedly argues that the Property is in a "sea of agricultural land" which is to be protected from residential use. (County's Response at p. 14). This is inaccurate. The rezoning requested sought OUE zoning, which is entirely consistent with agricultural uses. In fact, the intention provision of the OUE district regulations provides that "OUE Districts provide for and encourage activities with small scale agricultural orientation. These districts are intended to be a combination of residential and agricultural activity." (A. Tab 5). The fact is, the OUE district is an agricultural district. Thus, the requested OUE zoning is in keeping with the zoning of the surrounding properties. Further, the Board imposed a condition on the rezoning requiring the recording in the public records of a "Notice of Proximity" on the Property, to put purchasers on notice of the adjacent agricultural

uses. (T. 38-42). Thus, the Board affirmatively addressed the compatibility of the proposed development with purely agricultural uses. Incredibly, the County also attempts to discredit its own Transportation Planning Manager, who testified that the proposed development would not create traffic problems. (A. Tab 2, p. 5-15).

The County further argues that the proposed development is tantamount to "urban sprawl." The County cites, for the first time, sections of the Florida Administrative Code and argues that these sections describe the proposed development as sprawl. It is clear that the requested rezoning would not constitute "urban sprawl." The Florida Department of Community Affairs ("DCA") reviews the comprehensive plans of local governments to determine whether they are "in compliance" with applicable State statutes and implementing administrative regulations (Chapter 163, Part II, Fla. Stat. and Rule 9J-5 F.A.C.). The Sarasota County Comprehensive Plan ("Apoxsee") was reviewed by DCA and found to be "in compliance" (Ordinance No. 96-027). If the density requested by Petitioners and permitted under Apoxsee would constitute "urban sprawl," DCA could not and would not have approved them. Rules 9J-5.005 and 9J-5.006 (5) F.A.C.

The density requested by the Petitioners is allowed by Apoxsee's Future Land Use Map and the Future Land Use Classification of Petitioners' property. "Residential development in the Rural area should have a maximum density of one dwelling unit per five acres." See, Apoxsee, Policy. 3.1.4. The OUE-1

Zoning District requested by the Petitioners is clearly an implementing district for the Rural land use classification of the Property under Apoxsee (Apoxsee, page 9-63). Therefore, approval of the requested rezoning could not constitute "urban sprawl."

Further, the County's 2050 Plan, adopted by the County but not yet effective, included the Petitioner's Property in the Village/Open Space Resource Management Area and designated it as a "Hamlet." This designation would permit a density on the Petitioners' property equal to or greater than the density requested by the Petitioner in the event the Property was developed as a "Hamlet" or a "Conservation Subdivision" (9-RMA-29, 57, 58, 70, 71 and 72). This designation negates the County's contention that the proposed development constitutes urban sprawl. Finally, "urban sprawl" is defined by DCA as "urban development or uses which are located in predominantly rural areas, or rural areas interspersed with generally low intensity or low-density urban uses ..." (Rule 9J-5.003 (134), F.A.C.) (emphasis added). The residential use and density requested by the Petitioners does not constitute an urban development or use. Even a density of two dwelling units per acre does not constitute "urban sprawl." Sunshine Ranches Homeowners Assn. Inc. v. Broward County, et al., 12 FALR 3549, 3563 (1990).

The County also argues that the requested rezoning did not comply with the County's Zoning Regulations, based on the alleged absence of evidence showing a "need" for the proposed development.

(County's Response at p. 14). The "need" inquiry is neither a proper criteria, nor is it sufficiently objective to be a proper criteria even if it were set forth in the regulations. See, Dickinson v. State, 227 So.2d 36 (Fla. 1969).

Here, again, the County steps outside the record to argue that the requested rezoning is inconsistent with the OUR district regulations. Nonetheless, even if the OUR district regulations were a part of the record, the intent provisions are not operative and do not create additional rezoning criteria beyond those set forth in Section 21.5.a. of the zoning regulations. A review of Section 21.5(a) clearly illustrates that there is no requirement that a petitioner demonstrate a "need" for the type of development proposed in the rezoning. (See, A. Tab 7, pgs. 3-4 for a listing of the only proper criteria for a rezoning analysis).¹ Further,

¹ This is clear from a reading of the stated criteria for rezonings, as opposed to the stated criteria for other land use amendments (such as textual changes). Section 21.3 of the Zoning Regulations for Sarasota County sets forth the criteria, in subsection 5(a) for amendments "pertaining to the rezoning of land," which criteria do not include any inquiry regarding the "need" for the rezoning. By contrast, subsection 5(b); setting forth the criteria to be considered for "other proposed amendments of these zoning regulations," indicate that the first criteria to be studied is the "need and justification for the change." (A. Tab 7). Clearly, had the "need" inquiry been appropriate for rezoning analyses, the Board would have included it in the stated criteria, just as the Board did with regard to amendments other than rezonings. Finally, the County argues that the stated criteria are only applicable to the analysis by the Planning Commission. (County Response at p. 10). If the County were correct, there would be absolutely no stated criteria for the approval or denial of a rezoning request before the Board. Obviously, this is not the case.

even if the criteria were proper, a "need" inquiry invites arbitrary and unreasonable decision-making as was evident in the instant cases. The Petitioners cited numerous cases indicating that purely subjective criteria are improper as a legal matter. The County made no argument to the contrary.

In addition, the future land use element or plan of each local government's comprehensive plan must be based on studies including "the amount of land required to accommodate anticipated growth" and "the projected population of the area." Section 163.3177(6)(a) Fla. Stat. This element or plan must be based on "(c) an analysis of the amount of land needed to accommodate projected population, including 1. the categories of land use and their densities or intensities of use, [and] 2. the estimated gross acreage needed by category ..." Rule 9J-5.006(2)(c) F.A.C. The County, in Apoxsee, has determined through such required studies and analyses that the "Rural" land use category and its potential densities are needed to accommodate the County's projected population. (Apoxsee, p. 9-9 to 9-12, 9-43.) Thus, Apoxsee itself establishes a public need for a density on the Petitioners' property equal to that requested by the Petitioners and that the zoning requested is proper to implement Apoxsee's goals, objectives and policies.

Finally, the Petitioners clearly demonstrated a need for the proposed development. The County's own Planning Commission found that there is, in fact, a "need" for the development. (A. Tab 1, p. 29). Further, the Board, through the adoption of the 2050 Plan,

found that a density equal to or greater than that requested by Petitioners is proper for the Property and other properties in the area. Thus, the Board has already found that there is a "need" for significantly higher densities in the area, densities greater than the 1 unit per 5 acres requested by the Petitioners. Finally, Krebs testified, as an expert developer in the area with over 30 years of experience, that there is a need for 5 acre lots in north Sarasota County, and Krebs submitted documentation to support this testimony. (A. Tab 1, pgs. E-24-28; Tab 2, pgs. 48, 49).

By contrast, the County argues that there is evidence of a lack of need, citing lay testimony of two neighboring residents, concluding that "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 that can support the need for housing being urged by the Petitioners." (County Response at p. 4). A review of the transcript illustrates that Ms. Ayech drew her conclusions from an outdated, 1991 study, as well as an alleged hearsay statement from unidentified "County staff," and the unsubstantiated hearsay comments of a third person. (T. p. 90). There is no part of Ms. Ayech's testimony that is competent or substantial. Florida courts have held that hearsay evidence cannot in itself support a finding of fact even if the hearsay evidence is admitted without objection at a hearing. Scott v. Department of Professional Regulation, 603 So.2d 519 (Fla. 1st DCA 1992). Hearsay evidence may only be used for the purpose of

supplementing or explaining other evidence. It is not sufficient in itself to support a finding. Fla. Stat. §120.57(1)(c) 1999; Sideris v. Department of Health & Rehabilitative Services, 661 So.2d 382 (Fla. 1st DCA 1995). As a matter of law, none of the "evidence" cited by the County is competent and substantial and does not undermine the evidence demonstrating a need for the development as set forth in the findings of the Planning Commission and staff report, and supported by the documentation and expert testimony of Rodney Krebs.

The County argues that its opinion, as expressed for the first time in its Response, is more authoritative than the County's own expert staff and Planning Commission. (County's Response at p. 17). Again, the County is disavowing the expertise of its own staff and ignoring the record evidence. This argument does violence to the overwhelming authority standing for the proposition that findings of professional staff are competent and substantial evidence. Hall v. Knorth, 244 So.2d 766 (Fla. 3d DCA 1971).

Finally, the County suggests that the addition of stipulations to the rezoning is evidence that the rezoning is inconsistent with the comprehensive plan.² This argument finds no support in the

² The County asserts 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 the Planning Commission. That matter was only disclosed to the board." (County's Response at p. 17-18, n. 7). The County has, again, misstated the record. In fact, there was no testimony whatsoever indicating that the Petitioners intended to seek a density of 1 unit to 3.5 acres under the 2050 Plan overlay. Rather, when asked

law. It is yet another example of the County's thinly veiled attempt to generate evidence to support the Board's decision in the face of a record wholly devoid of any such support.

V. THE DENIAL OF THE PETITIONERS REQUESTED REZONING WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The County argues that the only focus should be the evidence supporting the Board's decision. The County fails to recognize that there is no evidence that is either competent or substantial to support the Board's action. The Petitioner's discussion of the facts of the case established that the Petitioners met their burden under Snyder. The Petitioners then illustrated the complete absence of any record evidence to support the Board's decision.

In response, the County has, once again, stepped outside the record and engaged in an exposition of how "isolated" the Property is and how "[t]here 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." (County Response at p. 21). There is no record support for such a statement, which is confirmed by the conspicuous absence of a citation for the statement. Here, again, the unfounded and factually unsupported opinions rendered for the first time in the Response cannot somehow retroactively justify the Board's action.

if the Petitioners would stipulate to a restriction to 1 unit per 5 acres, Krebs merely indicated that "I have no way of committing to - if the conservation subdivision rules come in a reasonable and embraceable manner, that it's really something that you want and we want, we may come in. I wouldn't bet on it." (T. 73-74).

CERTIFICATE OF SERVICE

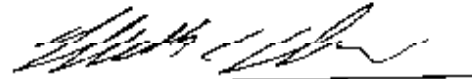
I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to GARY OLDEHOFF, ESQ., 1660 Ringling Boulevard, 2nd Floor, Sarasota, FL 34236, Attorney for the County, Sarasota County, Florida this 21st day of January, 2003.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing PETITIONER'S REPLY TO SARASOTA COUNTY'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI is printed in Courier New 12-point font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.



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