IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO. 2D16-3279
L.T. CASE NO. 14-005608CI-15

PINELLAS COUNTY, FLORIDA, an Independent and Chartered Florida County,

Defendant/Appellant,

v.

THE RICHMAN GROUP OF FLORIDA, INC., a Florida corporation,

Plaintiff/Appellee. /

APPELLANT PINELLAS COUNTY'S REPLY BRIEF

On Appeal from a Final Judgment of the Sixth Judicial Circuit,
In and For Pinellas County, Florida

Jim Bennett
Florida Bar No. 698873

Pinellas County Attorney's Office
315 Court Street
Clearwater, FL 33756
Telephone: (727) 464-3354

Sylvia H. Walbolt
Florida Bar No. 33604
Chris W. Altenbernd
Florida Bar No. 197394
Nicholas A. Brown
Florida Bar No. 90929

CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607-5780
Telephone: (813) 223-7000

Attorneys for Appellant Pinellas County

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

In this brief, the County uses the same citation scheme for the parties and the Record as in the Initial Brief.

The County's Initial Brief is cited as "(IB[page number])." Richman's Answer Brief is cited as "(AB[page number])."

All emphasis is supplied, and all internal citations and quotations are omitted unless otherwise indicated.

SUMMARY OF THE REPLY BRIEF ARGUMENT

Richman's Answer Brief correctly acknowledges "[t]his case is not a typical land use matter . . . ." (AB1). This is a lawsuit claiming a federal constitutional violation by the CPA when it denied a sizeable amendment to a Land Use Plan; it is not a state-law appellate review from the CPA's decision. In fact, despite the ALJ's factual determinations, the CPA was still required to make a legislative, policy decision whether to change this longstanding part of the Plan, and it made a valid, "fairly debatable" decision under Florida law. There accordingly is no need for this Court to reach the federal constitutional issues.

But even if there were a state law violation, that does not establish a violation of Richman's federal constitutional rights, as it has now conceded. The decision was based on rational concerns grounded in the public interest, which is the substantive test for Richman's federal constitutional challenges. Although the CPA surely was influenced by the will of its constituents, settled federal law establishes that such a decision would not contravene the U.S. Constitution, even if that were the only basis for it.

Finally, Richman does not deny that it made a $16,500,000 future lost profits claim for land it knew was environmentally contaminated, without disclosing that fact in this case. That would have necessarily affected its future profits, and controlling precedent required a hearing on this newly-discovered evidence.

ARGUMENT

I. THE LEGISLATIVE POLICY DECISION NOT TO AMEND THE COUNTYWIDE LAND USE PLAN WAS FAIRLY DEBATABLE AS A MATTER OF FLORIDA LAW.

Unlike the typical land use case, Richman did not seek an appellate decision requiring the amendment to be granted as a matter of Florida law. Richman instead sued for damages, asserting it could have developed this Property at a great profit but for the denial of the amendment. It claimed that legislative decision violated its federal substantive due process and equal protection rights.

As a threshold matter, there was not even a violation of Florida law. Neither the Special Act, the CPA's Rules, nor any other Florida authority require amendment of the Countywide Land Use Plan whenever the technical criteria for an amendment are satisfied. (IB19-24). Instead, a legislative, policy decision remained for the CPA to make, just as the ALJ recited. (R. 8461). The CPA's decision to adhere to the Plan was lawful under the highly deferential "fairly debatable" standard governing this legislative land use decision.

In its Answer Brief, Richman relies on this Court's decision in Island, Inc. v. City of Bradenton Beach, 884 So. 2d 107 (Fla. 2d DCA 2004). (AB23-26). But Island does not establish a violation of Florida law here.

Island is expressly based on the undisputed evidence that the existing land use designation there "was ***erroneous*** . . . ." Id. at 108. This Court held the City's

refusal to correct that "erroneous" designation was not "fairly debatable": "Reasonable persons could not differ in concluding that the Appellants were entitled to a small-scale amendment to the comprehensive plan because their property was ***improperly designated*** preservation." Id. Judge Villanti stressed he concurred precisely because that "classification was ***imposed in error***." Id. at 109.

Unlike Island, Richman did not seek to correct an "erroneous" designation. There is no dispute the Industrial Limited designation here is valid. Instead, Richman sought to amend that designation for the express purpose of now developing this sizeable acreage in a very different way than the industrial use previously made of the Property in accordance with the Plan.

Notably, the erroneous designation in Island prohibited all development on the land. Id. at 108. It did not, as here, simply disallow the discrete type of development the applicant desired. It was, moreover, only a "small-scale amendment" for two lots, not a substantial change in the type of use of acres and acres of land. Id.

Richman says the "comprehensive plan in Island did not state that landowners were entitled to amendments if they could show that their property had been improperly designated," and yet approval nonetheless was required. (AB26). Richman thus asks this Court to now equate the satisfaction of the criteria for amendment here to the erroneous land use designation in Island.

That compares apples to oranges. Here, Richman sought to change the Property's *valid* designation, in order to develop this acreage in an *entirely different way* than it historically had been used. In contrast, the Island applicant sought to *correct* an *erroneous* designation that *prohibited all development*, in order to develop the two lots in a way that should have been allowed the first place.

Richman's blending of these very different factual circumstances gives far broader reach to this Court's decision than this Court did itself. To prevent extension of Island's holding based on the unrefuted evidence of an incorrect land use designation there, Judge Villanti stressed in concurring that "if there ever were a case in which the standard were to apply in favor of the landowner, this is that case." Id. at 109. And, the dissent actually would have affirmed the denial of a "small-scale amendment" under the highly deferential "fairly debatable" standard.

The Island Court thus took pains to make clear its decision rested on the unique circumstance that what was being requested there was only to restore the designation to what it always should have been. Nothing in that decision can be stretched to a holding that landowners are absolutely entitled to an amendment to a land use plan whenever the criteria for amendment are satisfied. To have so broadly held would have converted legislative land use decisions into mere quasi-judicial decisions like zoning decisions. This Court did no such thing.

In sum, no Florida decision holds a land use plan always must be amended

upon satisfaction of the specified criteria for an amendment. Absent any such clear decision, the CPA's decision to maintain the status quo under the Plan was "fairly debatable" as a balancing policy decision under the legislative authority expressly granted to it by the Special Act.

Richman correctly notes the Initial Brief inaccurately describes one fact in the hearing officer's recommendation in Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113 (Fla. 2d DCA 1997). The County's counsel apologizes for their error, but emphasize it does not affect the legal point being made: as the ALJ expressly recognized, Save Anna Maria establishes the "ultimate authority of the CPA" to make "a legislative decision, which cannot be delegated to an Administrative Law Judge." (R. 8461). He likewise acknowledged "the CPA is not bound by the balance struck by" him in recommending approval. Id.

Richman asserts "there was nothing left for the CPA to 'balance' " after the ALJ's decision. (AB27). But the ALJ said exactly the opposite, and Richman's argument makes the ALJ's statement meaningless. It also negates the Special Act's grant of legislative authority to the CPA, converting it instead to a mere quasi-judicial function such as a zoning amendment. Instead, even after the ALJ found the amendment could be granted, the CPA was required to make the legislative, balancing determination whether this proposed change to the Plan was, at bottom, in the public interest.

Richman also cites Town of Ponce Inlet v. Pacetta, LLC, 63 So. 3d 840 (Fla. 5th DCA 2011), contending the denial of its requested amendment "is not entitled to deference" because it purportedly was not a result of the " 'routine exercise' of legislative authority . . . ." (AB27). But in Pacetta, the Fifth District specifically contrasted that Board's "perfunctory action" in adopting an "amendment that mirrored the referendum enacted by the electorate" with a "legislative determination that one of multiple available courses of action would best serve the needs of the public," which *would* be entitled to deference. 63 So. 3d at 842.

The latter is exactly what the CPA was doing in deciding to maintain the Plan's longstanding Industrial Limited designation, a balancing decision the ALJ had agreed remained for the CPA. Moreover, there was considerable debate whether eliminating this significant amount of industrial lands would serve the public interest, with both the Planning Council and the requesting City itself disagreeing internally on that issue. (IB3-4, 34). The CPA's legislative decision was no "perfunctory action," and it is entitled to great deference under Florida law.

Richman's focus on the County Attorney's careful legal advice regarding potential pitfalls in denying the amendment does not establish otherwise. The County Attorney expressly agreed with the ALJ that a legislative, balancing determination remained to be made by the CPA, although he advised litigation would likely ensue if the amendment was denied. (IB33-34).

It is not illegal to take legislative action as a policy matter that differs from the conservative, "safe harbor" decision that will avoid litigation. If the County Attorney believed a denial would have been unconstitutional, he certainly would have so advised his client. He said no such thing.

This Court should recognize Richman's argument for what it is: an assertion that whenever the criteria for amending a land use plan are satisfied, that is the end of the matter and the amendment ***must*** be approved as a purely ministerial exercise. This Court should instead hold that the County's legislative decision not to make this significant change to the Plan was "fairly debatable" as a matter of Florida law. That requires reversal of the final judgment, without the need for this Court to reach the issues discussed below. But, they require reversal as well.

II. THE DECISION NOT TO AMEND THE PLAN DID NOT VIOLATE RICHMAN'S FEDERAL SUBSTANTIVE DUE PROCESS RIGHTS.

Richman's brief directly rests on its repeated assertion that the CPA violated Florida law when it purportedly failed to follow the Special Act and its own land use Rules. But it concedes, as it must, that a violation of state law does not establish a federal constitutional violation. (AB35). Instead, even if the decision not to amend the Plan were not "fairly debatable" under Florida law (which it absolutely was), in order to violate the U.S. Constitution, that decision also had to be irrational and not grounded in the public interest. (IB24-34). The constitutional principles discussed in the Initial Brief confirm that is not the case here.

Richman asserts that the County failed to challenge the trial court's factual finding that the CPA's motivation in denying the Amendment was not the preservation of industrial lands. (AB30-31). The County did exactly that when it demonstrated that entirely legitimate reasons—including preservation of scarce industrial lands within the County—were discussed and specifically relied on in making this legislative, policy decision. (IB29-34).

Certainly, the County was concerned about the intense citizen opposition to this substantial change to the Plan and its impact on the community. But even assuming that were the sole reason for its decision, that was a rational basis for its decision under federal constitutional principles. As explained in Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1208 (11th Cir. 2007), "[l]ocal officials undoubtedly act 'rationally' " in responding to "a high number of citizen complaints . . . ."

Richman complains its application for a land use amendment could not be resolved by a "popularity poll of the neighborhood." (AB31, citing Conetta v. City of Sarasota, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981)). But, as shown in the Initial Brief, that notion applies to state law cases addressing quasi-judicial decisions whether a discrete zoning variance or special permit is required. (IB22, 24, 30). Those decisions, including the one reviewed in Conetta, 400 So. 2d at 1053, are entirely different from this legislative, policy decision whether to alter the use of acres and acres of land under a comprehensive land use plan.

Richman has cited no Florida decision precluding a governmental entity from considering the will of its citizens on land use plan issues. Nor has it cited any federal decision saying doing so violates the U.S. Constitution. To the contrary, even in the zoning context, the Eleventh Circuit has expressly held the proposal can be properly evaluated by governmental entities "in light of their constituents' preferences . . . ." Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1579 (11th Cir. 1989). All the more in a comprehensive land use plan case.

Indeed, the Special Act *requires* a public hearing be held before the decision on amending the Countywide Land Use Plan is made. 1988 Act §10(5); 2012 Act §3(§11)(2). Richman's contention that, to satisfy the federal constitution, the CPA nevertheless was required to *ignore* the many people who expressed rational concerns at that hearing about the impact of the proposed development is wrong and would make that hearing a futile exercise.

Richman's repeated assertion that the denial of this amendment violated the County's own Rules setting forth the criteria for amending the Plan also is wrong. By requiring that any Plan amendment "shall be consistent" with the criteria, the Rules establish that such consistency is required in order to *allow* a change to the Plan. But, nothing in the Rules says the Plan must be amended whenever the technical criteria for amendment are satisfied.

Instead, as the ALJ explained, a balancing determination remained for the

CPA. In this regard, the ALJ specifically acknowledged that the Industrial Limited Classification, (R. 827), "is a Countywide Rule directly relevant to a proposed map amendment involving IL lands and must be considered by the CPA in its review of the Amendment." (R. 8460 ¶47). All of this is rendered meaningless by Richman's insistence that nothing remained for the CPA but to rubber stamp the ALJ's recommendation. And even if the Rules did require amendment, that would at most show a violation of state law, not a constitutional violation.

Finally, Richman spends pages distinguishing the facts of federal decisions the County cited in its Initial Brief for the stringent constitutional standard. (AB31-33). But, the factual distinctions Richman touts do not alter the legal import of those principles here. (IB24, 29-34). Just as in Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988), "[a]t worst, the decision here was mistaken and protectionist; it was not irrational, so the claim of a denial of substantive due process fails."

III. THE DECISION NOT TO AMEND THE PLAN WAS NOT AN EQUAL PROTECTION VIOLATION.

In the Initial Brief, the County demonstrated that the test for rationality under an equal protection analysis is the same as the one for substantive due process. (IB36). Accordingly, because the legislative decision not to amend the Plan was both rational and grounded in the public interest, there was no equal protection violation. Id. There is no need to go any further.

Nonetheless, the County further demonstrated that the "class of one" equal protection claim Richman prevailed on cannot stand because no comparators satisfy the rigorous federal constitutional analysis for similarity. (IB36-43). The trial court acknowledged that the "overwhelming neighborhood opposition" here was a "meaningful difference" from Richman's proposed comparators. (R. 7026). This alone precluded any finding of unlawful discrimination, as class-of-one plaintiffs "must demonstrate that they were treated differently than someone who is *prima facie identical in all relevant respects* . . . ." Griffin, 496 F.3d at 1205.

Richman asserts this "meaningful difference" from the comparators should be disregarded because public opposition is not one of the six criteria in the Rules. (AB45). But that would, at most, bear on the issue of whether state law was violated. Federal law is settled that constituent views are a rational basis for decision-making, precluding a finding of unconstitutional discrimination.

Thus, adhering to a valid land use plan because the citizens want that status quo maintained would not violate the U.S. Constitution, even if that were the CPA's sole motivation for its decision. As the Eleventh Circuit put it, "a planning commission . . . is not a judicial forum; it is a legislative body held democratically accountable through precisely the forms of political suasion to which [the developer] objects." Greenbriar 884 F.2d at 1579 (holding "[T]here is no indication that Council members' attention to citizens' concerns in addressing [the

developer]'s zoning plan deprived their decision of a rational basis.").

In an attempt to show discrimination, Richman relies on City National Bank. v. City of Tampa, 67 So. 3d 293 (Fla. 2d DCA 2011), saying this Court would "have to overrule" it to accept the County's arguments. (AB39). Not so.

City National addressed an order granting a motion to dismiss. The standard of review thus *required* this Court to assume the truth of that plaintiff's allegations that it was treated differently than others similarly situated. Here, the issue is whether that was in fact the case. It was not.

For example, Richman disputes the County's description of the agreement in Case 14-10 to reserve part of that property for target employment as "unconditional[]" and "binding." (AB47). But, the very testimony Richman points to demonstrates not only that Richman's own expert called it "binding," but also that the condition was in fact unconditional *as to the developer*, merely allowing *the City* to excuse it if it found target employment elsewhere. (T3:392).

Richman also asserts it "agreed to reserve" 25,000 square feet of office space for targeted employment, citing its corporate representative's trial testimony. (AB47). But, Richman's development agreement does not guarantee that amount of office space, instead expressly *limiting* it to a *maximum* of 25,000 square feet, without identifying any minimum amount. (R. 8676; *see also* 8707, 8714). And, even if Richman had in fact guaranteed that amount of space for target

employment, it still would be far exceeded by the 45,500 square feet minimum amount that was "guarantee[d]" in Case 14-10. (R. 2638-39). There is no "identity" in these projects.

Finally, Richman asserts that the County did not preserve its argument that the decade-long span of time in which other amendments were considered renders them dissimilar because of the changes in land use policy over that period of time. (AB46). The trial court, however, expressly granted Richman's relevance objection when the County sought to adduce that evidence at trial. (IB42). The on-point cases cited by the County makes the relevance clear, and there can be no finding of unconstitutional discrimination for this reason as well.

IV. THE AWARD OF FUTURE LOST PROFITS CANNOT STAND.

Nowhere does Richman dispute that the Property, previously used as an industrial plant, is environmentally contaminated. Its silence is deafening. Instead, it boldly claims this evidence would not change the $16.5 million award of future lost profits if a new trial is granted. (AB50). Richman is wrong.

The trial court found that nothing precluded a timely completion of this project, had the amendment been granted. (R. 7025). Manifestly, environmental concerns could have done so, especially since Richman faced contractual time constraints with respect to the project.

Moreover, in awarding future lost profits, the court expressly relied on the

fact Richman had successfully completed other developments. Id. But, that could not support a future lost profits award here unless those other properties too were contaminated. This significant difference from the properties Richman previously developed precludes the facile assumption it could do so here as well. Further, environmental contamination necessarily affects the amount of any future profits, as it increases the costs of development, if development is possible at all.

Richman faults the County's failure to discover this contamination before trial, saying its Complaint disclosed that environmental testing had been performed. (AB49). But that avails it nothing.

A plaintiff seeking lost future profits must prove that they "were a direct result of the defendant's actions," not other events. River Bridge Corp. v. Am. Somax Ventures, 18 So. 3d 648, 650 (Fla. 4th DCA 2009). Consistent with that burden, Richman's complaint sought future lost profits on the basis it would have successfully developed the Property but for denial of the amendment.

Nobody reading the Complaint as a whole would suspect that serious environmental problems were uncovered during Richman's due diligence. The County was not required to depose Richman's representative to confirm that the testing disclosed in the complaint was not fundamentally at odds with the premise of Richman's future lost profits claim. That is especially the case since Richman sought to recover the costs of that testing, as damages purportedly caused by the

denial of the amendment, and therefore should have produced the testing reports in response to the County's request for all documents supporting that claim.

Further, Richman's assertion that the County should have discovered the fact of this contamination before trial should not be allowed as a matter of policy in these circumstances. Just as "a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him," Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980), here the County had no reason to doubt Richman's claim to the trial court that the Property was completely and readily developable, just like its prior projects.

Such doubt only arose after trial, when a non-party with private knowledge of the Property learned about the damages award in this case. (IB12). Both Florida law and basic principles of fairness required that the County then be given a meaningful opportunity to establish that the newly-discovered evidence would likely have changed the result of the trial. (IB47-50). That is especially so given the fact Richman has never denied the veracity of the newly-discovered evidence showing the Property is environmentally contaminated.

The court's refusal to hold a hearing, as required under decisions of this Court and the Florida Supreme Court, is the only due process violation in this case.

Dated March 27, 2017.

Respectfully submitted,

/s/Sylvia H. Walbolt

JIM BENNETT
Florida Bar No. 698873
jbennett@pinellascounty.org

Pinellas County Attorney's Office
315 Court Street
Clearwater, Florida 33756
Telephone: (727) 464-3354

SYLVIA H. WALBOLT
Florida Bar No. 33604
swalbolt@carltonfields.com
CHRIS W. ALTENBERND
Florida Bar No. 197394
caltenbernd@carltonfields.com
NICHOLAS A. BROWN
Florida Bar No. 90929
nbrown@carltonfields.com

CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607-5780
Telephone: (813) 223-7000

Attorneys for Appellant Pinellas County

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed through the Florida E-Filing Portal, causing e-mail service on this 27th day of March, 2017, to:

Landis V. Curry, III, lance.curry@hwhlaw.com
Scott A. McLaren, scott.mclaren@hwhlaw.com
E.D. Armstrong, III, ed.armstrong@hwhlaw.com
Fred C. Marshall, II, kip.marshall@hwhlaw.com
Hill, Ward & Henderson
101 East Kennedy Blvd., Suite 3700
Tampa, FL 33602
Attorneys for Appellee The Richman Group of Florida, Inc.

/s/Sylvia H. Walbolt
Sylvia H. Walbolt
Fla. Bar No. 33604

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/Sylvia H. Walbolt
Sylvia H. Walbolt
Fla. Bar No. 33604