FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2137

NEPTUNE BEACH FL REALTY, LLC, a Florida limited liability company,

Petitioner,

v.

CITY OF NEPTUNE BEACH, FLORIDA,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

August 3, 2020

PER CURIAM.

DENIED.

MAKAR and BILBREY, JJ., concur; B.L. THOMAS, J., specially concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring specially.

I concur only because the standard of review created by the Florida Supreme Court in second-tier certiorari review creates an impossible burden and deprives property owners of an appropriate level of judicial review. A recently adopted constitutional amendment has repudiated this deference to local administrative zoning decisions and has forbidden Florida courts from deferring to administrative agencies. The amendment states, "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law *may not defer to an administrative agency's interpretation of such statute or rule*, and must instead interpret such statute or rule de novo." Art. V, § 21, Fla. Const. (emphasis added).

As I stated in my concurring opinion in *Evans Rowing Club v. City of Jacksonville*, under this new provision of organic law, the judicially created second-tier certiorari cases can no longer be applied when reviewing local zoning decisions:

> I concur only because our standard of review is extremely restricted under binding case law, *Miami-Dade Cty. v. Omnipoint Holdings*, 863 So. 2d 195, 199 (Fla. 2003), but I think this precedent should be reconsidered by the Florida Supreme Court in light of the electorate's command that courts no longer defer to administrative agencies in interpreting administrative actions "pursuant to general law." Such deference, which is even magnified by the supreme court's creation of the highly deferential standard of review in second-tier certiorari cases, does not pass constitutional muster under article V, section 21 of the Florida Constitution.
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> . . . .

In land-use cases, the hyper-deferential review of second-tier certiorari is based on the principle that the local decisions on zoning and exceptions are entitled to "deference [as] to the *agency's* technical mastery of its field of expertise, and the inquiry narrows as a case proceeds up the judicial ladder." *Broward Cty. v. G.B.V. Int'l Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) (emphasis added) (footnotes omitted). The precedent of the supreme court establishing that district courts are powerless to conduct plenary review of local zoning decisions is based on the principle that such decisions are inherently *administrative* and "technical" in nature and, therefore, the extremely limited review on appeal, solely by second-tier certiorari, must respect that administrative competence:

> This Court has deferred to the findings of an *agency* fact-finder in the context of zoning and policy determinations, as the *agency* fact-finder in theory has the requisite experience, skill, and perspective to adequately adjudicate *specialized proceedings*. *See Dusseau*, 794 So. 2d at 1276. In the spirit of deferring to the *agency fact-finder in some special cases*, this Court has further concluded that when determining whether the *administrative* decision was founded on competent, substantial evidence, the circuit court may *only* look for facts in the record *that support* the *agency* fact-finder's conclusions. *See, e.g., G.B.V. Int'l*, 787 So. 2d at 845 (concerning review of a zoning decision); *Dusseau*, 794 So. 2d at 1275–76 (also zoning); *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 2000) (also zoning); *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989) (also zoning); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (concerning removal of an employee of the Duval County School Board).
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> [. . . .]

> The substance of cases that involve special issues of zoning or policy decisions greatly differ from those that involve license suspensions for DUI. A court conducting section 322.2615 first-tier certiorari review faces constitutional questions that *do not normally arise in other administrative review settings*.

Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles, 209 So. 3d 1165, 1171–72 (Fla. 2017) (emphasis added).

> The rationale in *Wiggins* has unquestionably now been repudiated. Administrative decisions by nature are now *not* entitled to deference, and courts *must* exercise their independent judgment in reviewing those decisions. This of course does not mean that courts must disregard an administrative agency's expertise and knowledge, but courts cannot allow that expertise and knowledge to become a substitute for judicial review established in Florida's organic law under article V of Florida's Constitution: "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, *any political subdivision* or any municipality." (Emphasis added).

Evans Rowing Club, LLC v. City of Jacksonville, No. 1D19-1851, 2020 WL 3286285, at *2–3 (Fla. 1st DCA June 18, 2020) (B.L. Thomas, J., concurring specially) (emphasis added).

I also wrote in *Evans Rowing Club*, that the new constitutional provision must apply to local zoning decisions, as such decisions are controlled by state general law:

> [T]he organic law now prohibits deference to local zoning decisions because the constitution itself provides that *all* zoning decisions *must* be compliant with *general law*. "The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law . . . . Counties operating under county charters shall have all powers of

local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VIII, § 1(f)-(g), Fla. Const. Article VIII, section 1(i) provides that "Each county ordinance shall be filed with the custodian of state records and *shall become effective at such time thereafter* ***as is provided by general law***." (Emphasis added). And in fact, *every zoning* decision made by local governments carries the imprimatur of state law: "In exercising the ordinance-making powers conferred by s.1, Art. VIII, of the state constitution, *counties* ***shall adhere*** *to the procedures prescribed herein.*" § 125.66(1), Fla. Stat. (2019) (emphasis added). Any reader who simply searches the term "zoning" in the Florida Statutes in the Florida Legislature's excellent "Online Sunshine" website will receive ***176*** returns. *See Online Sunshine*, http://www.leg.state.fl.us/Statutes/index.cfm (last visited May 28, 2020).

Chapter 125, Florida Statutes (2019), provides that the "legislative and governing body of a county shall have the power to carry on county government. To the extent *not inconsistent with general or special law*, this power includes, but is not restricted to, the power to: . . . [p]repare and enforce comprehensive plans for the development of the county." § 125.01(g), Fla. Stat. (2019) (emphasis added). Thus, every administrative action of local government involving land-use decisions cannot be inconsistent with state law. This is certainly logical as county governments are subordinate as "subdivisions" of state governments under article VIII, section 1 of the Florida Constitution. Local governments, therefore, cannot be *superior* to state governments and receive *greater deference* of their land-use decisions than state administrative actions where such decisions are only possible through compliance with state law. *See* Art. V, § 21, Fla. Const. (2019). Such a proposition is illogical and inconsistent with organic law establishing local governments as subdivisions of state government and requiring courts to decline to give deference to an

> administrative decision interpreting state law or state administrative rules.

Id. at *3 (emphasis added).

If we were not bound by the limited standard of review applicable here, I would grant the writ. I again urge the Florida Supreme Court to reconsider its precedent in this area of law in light of the declaration of the people of Florida that courts must exercise their independent judgment in cases involving local zoning decisions which both naturally and procedurally depend on *administrative* determinations. While such decisions may receive quasi-judicial review by local elected bodies, those decisions apply administrative determinations by zoning and planning entities that are, and should be, entitled to no deference in this Court. Thus, the review in circuit court is not analogous to any type of "appeal" but is more analogous to a judicial trial in which the property owner who seeks the special exemption and who has established a *prima facie* entitlement to the exemption shifts the burdens of persuasion and production to the local government that denied the exemption. That decision in the circuit court then should be subject to appeal in this Court in light of Article V, section 21 of the Florida Constitution. For the foregoing reasons, I concur with the opinion while urging the Florida Supreme Court to reconsider its precedent in this area of law.

Paul M. Harden and Zachary Watson Miller, Jacksonville, for Petitioner.

Clifford B. Shepard of Shepard, Smith, Kohlmyer & Hand, P.A., Maitland, for Respondent.