IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NO. __________

JAMES D. YOUNG, SR., and
OLIVIA A. YOUNG,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent,

ON CERTIFICATION OF A QUESTION OF
GREAT PUBLIC IMPORTANCE
FROM THE THIRD DISTRICT COURT OF APPEALS

BRIEF OF PETITIONERS

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<u>STATEMENT OF THE CASE</u>

Pursuant to Article V, Section 3(b)(4), of the Florida Constitution, this Court has decided to review Young v. Department of Community Affairs, 567 So.2d 2 (Fla. 3rd DCA 1990). The following question, answered in the affirmative by the District Court, is of great public importance:

> In an appeal of a development permit by the state land planning agency pursuant to Section 380.07, Florida Statutes (1987), is the burden of persuasion and the burden of going forward on the holder of the development permit?

This case arose when the Department of Community Affairs (the Department) notified Monroe County (the County) that three (3) development orders issued by the County were being appealed to the Florida Land and Water Adjudicatory Commission (the Commission). The April 29, 1988 Notice of Appeal was filed pursuant to Section 380.07(2) of the Florida Statutes and related to county development orders that had been issued on March 14th, 1988. In the Department's Appeal Petition (R-3), Monroe County and Mr. and Mrs. Young were designated as Respondents. In the Petition, the Department asserted that the involved county development orders allowed "illegal" land clearing. The Department requested, in it's petition,

that the Monroe County development orders be reversed as . . . "illegal and violative of the provisions of the Monroe County Land Development Regulations and Comprehensive Plan." The Department requested that the Commission issue a development order or approve development which the Commission found to be in accordance with the Monroe County Land Development Regulations and Comprehensive Plan and the intent of Chapter 380 Florida Statutes. (R-6)

Prior to the final administrative hearing, the Administrative Hearing Officer ruled that the Respondents/Appellees Mr. and Mrs. Young, not the Petitioner/-Appellant Department, had the "burden of proof" in the administrative appeal proceeding. (R-172) At the final administrative hearing, the Administrative Hearing Officer directed the Respondents, Mr. and Mrs. Young to "go forward with the burden of proof". The Youngs, through their undersigned attorney, refused to go forward asserting that the burden of proof was on the Department and that the Youngs were holders of presumptively valid local development orders.

In the entire administrative hearing (R-239-263) there was <u>no evidence submitted</u>. The County development orders that were the subject of the Department's administrative appeal were never submitted or moved into evidence. Based upon the Youngs' refusal to produce any

evidence or any testimony, the Department's appeal was granted. The Administrative Hearing Officer entered a Recommended Order invalidating the County development orders. (R-222-227) The Commission issued a Final Order invalidating the development orders by adopting the Recommendation of the Hearing Officer. (R-264-268)

The Youngs sought review in the District Court of Appeal, which found no error as to the Final Order. As indicated in the certified question, however, the Court was clearly concerned that it had passed on a question of great public importance by holding that both the burden of going forward and the burden or persuasion was properly placed upon the holders of the local development orders.

Section 380.07 of the Florida Statutes gives the Department, as well as the owner, developer or appropriate regional planning agency, the right to apply to the Commission for an invalidation or review of any local development order issued in any Area of Critical State Concern. The local development orders may, within forty-five (45) days after such development order is rendered, be appealed by filing a Notice of Appeal with the Commission. Section 380.031(3) of the Florida Statutes defines a development order as being any order granting, denying or granting with conditions, an application for a development permit. The local development permits subject

to administrative appeal include any building permits, zoning permits, plat approval, rezoning certification, variance or any other action having the effect of permitting development. §380.031(4), Fla. Stat. (1987)

What the present certified question places before this Court is the determination of whether a County's zoning, rezoning, variance or other development order is presumptively valid and remains so until the completion of the Section 380.07 appeal process or whether there is no presumptive validity of the County's zoning, rezoning, variance or other development orders and the mere filing of the Notice of Appeal invalidates the local development order and "converts" the holder of the development order to an "applicant". It _is_ that simple! There are no facts or evidentiary problems to obscure the legal issue.

SUMMARY OF ARGUMENT

The Third District's Opinion is primarily grounded in the First District's case of Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

Until such time as the designated government officials issue a development order, it is fundamental that the applicant for the order carries the ultimate burden of persuasion. Once local county government has reviewed the application, published notice of the public hearings, heard input from the land owner and/or the developer, the adjacent property owners, the public and it's own (extremely) large staff, it is time for final action. This final action is when the county government issues the development order. Within the next forty-five (45) days the final development order rendered by the County is subject to appeal by the owner, developer, appropriate regional planning agencies or the Department. The fundamental mistake made by the Court below (and the Commission in the administrative appeal) was treating the Respondent Youngs as "applicants".

The fundamental question is what party is applying to the Commission to change or reverse or invalidate the development order? It is the development order that is subject to an appeal under Section 380.07(2) Florida Statutes, not the application that was made to the Coun-

ty. Section 380.07(2) of the Florida Statutes states that "the filing of the notice of appeal shall stay the effectiveness of the order . . . until after the completion of the appeal process." Staying the effectiveness of an order is fundamentally different from allowing an unsupported notice of appeal to convert a holder of a presumptively valid development order into an "applicant" for a development permit. In an appeal under Section 380.007 (2) of the Florida Statutes, the central question for purposes of placing the burden of proof is: Who is applying to the Commission?; and, For what are they applying?

The Department is asserting the affirmative position, that the appeal should be granted. Conversely, the Youngs are asserting nothing but their right to the approved development order they already possess. At the state approved law schools, it is taught that legal possession counts for something!

Zoning and the placing of other restrictions on private property has always been a legislative function of elected officials. *See*, §163.3213(5)(b), Fla. Stat. (1987). In fact, local governments deliberations over development permit applications and development orders which grant, deny, or grant with conditions, an application for a development permit, are at least quasi-legislative (if not legislative) functions of local govern-

ment. Records from such proceedings are compiled in informal, non-adjudicatory settings without findings of fact.

What the entire argument comes down to is a very simple proposition. The County spent two and one-half (2 1/2) years reviewing the application for the development orders. The County ultimately issued it's development orders which granted, with conditions, the application for the development. Nearly a month and a half after the development orders were issued by the County (and paid for by the Youngs) the Department exercised its discretion under Section 380.07 of the Florida Statutes and filed a Notice of Appeal with the Commission. The Department applied . . . "for a formal de novo hearing so that the Department may present expert testimony and evidence to establish the facts asserted in its Petition." (emphasis supplied) (R-6)

The appeal (i.e., application for review, invalidation and/or change of the development orders) filed by the Department alleged that the three (3) Monroe County permits allowed "illegal" land clearing which constituted development inconsistent with the Monroe County Land Use Plan and Monroe County Development Regulations. (R-4) The Department totally failed to "present expert testimony and evidence to establish the facts asserted in its Petition". (R-6) The Hearing Officer designated to hear

the Department's appeal ruled that the Respondents, the administrative Appellees, had the duty of going forward with the evidence and carrying the ultimate burden of proof. (R-239-264) This ruling was based upon the conclusion by the Hearing Officer that the Department's Notice of Appeal not only stayed the effectiveness of the development orders, but invalidated them. The Hearing Officer attempted to convert the Youngs from development order holders to applicants for development orders. The administrative appeal Respondent/Appellees, Mr. and Mrs. Young, respectfully refused to go forward with the burden of proof alleging a constitutional due process violation of their rights.

The Department's administrative appeal concluded without any evidence or testimony being offered! (R-260-263) With no testimony (expert or otherwise) and no evidence whatsoever, there was no way for the Department to establish any of the allegations in it's Petition. As unbelievable as it may seem, the Administrative Hearing Officer ruled that the totally unsupported allegations in the application by the Department was enough to allow the Commission to invalidate the development orders issued by the County. (R-222-227) The Commission, with no ". . . expert testimony and evidence to establish the facts asserted . . .", issued a Final Order granting the

Department the relief the Department had applied for. (R-264-268).

In the appeal to the Third District Court of Appeals, there were no documents, exhibits or sworn testimony upon which the Third District could rule. Such documents are required under Rule 9.200(a) Florida Rules of Appellate Procedure. (R-239) In spite of a total lack of ". . testimony and evidence. . ." in the administrative record, the Third District felt it was bound by the decision in Florida Dept. of Transportation v. J.C.W. Co, Inc., 396 So.2d at 778, and based upon this misapplication of case law, the Third District affirmed the Commission's Final Order.

The Third District Court of Appeals (upon the appellants' suggestion) certified to this court that it had, indeed, passed upon a question of great public importance. The Department, the Administrative Hearing Officer, the Commission and the Third District Court of Appeals continue to mis-characterize the legislative language in Section 380.07 of the Florida Statutes to the extent of holding that the Commission's Order was "final agency action" with regard to the original permit application, as opposed to "final agency action" on the appeal. The applicant in Section 380.07 appeals is the Petitioner/Appellant and the relief applied for is in-

validation or revision of a presumptively valid local development order.

In spite of the procedural complexity of the question, the answer is very simple. If the quasi-legislative or legislative acts of local government are not presumptively valid, then should county commissioners continue to think of themselves as local legislative leaders? By putting so much legislative power in the hands of administrative agencies (in allowing the mere filing of an administrative appeal to totally invalidate any local legislative or quasi-legislative action) every citizen is disenfranchised. Unless the final action of local government on a development orders is at least presumptively valid, the voters have lost any ability on a local level to control (by their vote and public participation) the legislative or quasi-legislative actions of their elected officials.

It may be that in some instances an Administrative Hearing Officer from Tallahassee could make a better or more proper determination as to zoning or any other land use restriction than the elected County Commission. However, the voters do not elect the Administrative Hearing Officers. The voters do elect (and sometimes fail to return to office) their County Commissioners. To allow an appeal of a final development order of local government by the owner, developer, regional planning agency or

the Department, and then require the holder of the development order to carry the burden of going forward with proof and the ultimate burden of persuasion, is to hold that local government determinations are presumptively invalid and of no force or effect. It is high time this Court got this constitutional mess straightened out once and for all (of Florida).

ARGUMENT

DEVELOPMENT ORDERS ARE PRESUMPTIVELY VALID IN SECTION 380.07(2) APPEALS.

In 1981 the Second District Court of Appeals construed appeals taken under Section 380.07 of the Florida Statutes to mean that the review of local governing body decisions was merely shifted from the Circuit Court to the Land and Water Adjudicatory Commission. Manatee County v. Estex General Chemical Corporation, 402 So.2d 1251, 1255 (2nd DCA 1981). In Manatee County, the Court made it clear that the Florida Land and Water Adjudicatory Commission in deciding a Section 380.07 Florida Statute appeal cannot . . . "arbitrarily ignore local zoning laws or decisions" because the Commission's determinations in such appeals would always be subject to judicial review. Manatee County, at 1256.

If the mere filing of an appeal under Section 380.07 of the Florida Statues is enough to carry the "burden of proof" and invalidate . . ."local zoning laws or decisions", we have given new meaning to the word "arbitrary"!

In Hayes v. Bowman, 915 S.2d 795 (Fla. 1951) and in Zable v. Pinellas County Water and Nav. Con. Auth., 171 So.2d 376, the Florida Supreme Court was faced with the Trustees of the Internal Improvement Trust Fund's deliberations with bulkheads and dredge and fill applica-

tions. In Hayes and Zable it was the Trustees who had the duty to make the governmental decision. In Section 380.07 of the Florida Statutes appeal context, it is Monroe County that makes the decision on private land use restrictions. In carrying out the duty of elected officials, the Court stated:

> If we are ever to apply the rule that public officials will be presumed to do their duty, it would appear to us to be most appropriate in this instance . . . it is to be assumed that they will exercise their judgment in a fashion that will give due regard to private rights as well as public rights . . . The exercise of their judgment should not be subjected to adverse judicial scrutiny absent a clear showing of abuse of discretion or a violation of law. Hayes, at 802, Zable, at 380.

Should a clear showing of abuse of discretion or violation of law be required before adverse judicial scrutiny, but a mere Notice of Appeal suffice before adverse administrative scrutiny?

Law, with all of its complexity, seems to be an illusive concept when viewed in light of the administrative and judicial proceedings which have occurred in this matter. The administrative agencies and the court below seem to have lost sight of the fact that in this country, law is not a grant of authority from the all powerful sovereign. In this country, law is a restriction on our previously unrestricted rights. This basic concept is

the foundation of our elected representative form of government. Each of us elect legislative leaders to whom, by our vote, we give the power to restrict our previously unrestricted rights. The fundamental concept of the separation of powers of government is that it is only to the legislative branch of government that we give the power to restrict our rights.

The United States Supreme Court, in Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 113, 31 L.Ed. 424 (1972) and Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) has held that rights in property are basic civil rights. Restricting rights in property in the form of zoning or rezoning or variances, (i.e. local development orders under Section 380.032(4) of the Florida Statutes) is a quasi-legislative or legislative function. Set forth below is the procedure dictated by Monroe County Land Development Regulations with regard to applications for development approval. This Court, in General Telephone Company of Florida v. Public Service Commission, 446 So.2d 1063 (Fla.1984), determined the standard of review of quasi-legislative proceedings. In General Telephone Company of Florida v. Public Service Commission, 446 So.2d 1063 (Fla. 1984), this Court directed the State appellate courts to sustain the validity of an administrative rule (quasi-legislative action) "as long as they are reason-

ably related to the purposes of the enabling legislation, and are not arbitrary or capricious". In an appeal of legislative or quasi-legislative actions, the appellate body must consider whether local government has considered all of the relevant factors, is giving actual good faith consideration to these factors and has used reason, rather than whim, to progress from consideration of the factors to a final decision. *See*, Adam Smith Enterprises, Inc. v. State of Florida Department of Environmental Regulation, 553 So.2d 1260, 1273 (Fla. 1st DCA 1989).

The Third District relied extensively on the First District's Opinion in Florida Dept. of Transportation v. J.W.C., Inc., 396, So.2d 778 (Fla. 1st DCA 1981). The Third District cited Florida Dept. of Transportation v. J.W.C. Co., Inc., for the proposition that . . . "We view it as fundamental that an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as **final action** has been taken by the agency." (emphasis added) Id. at 787. In this case, "final action" (the issuance of the permit) on the application for the development permit was taken by Monroe County on March 14th, 1988. The application for the Monroe County development permit was not made to the Department or to the Commission. The application for the

Commission's final agency action (invalidating the County development orders) was made by the Department <u>not</u> the development order holders, Mr. and Mrs. Young.

<u>Florida Department of Transportation v. J.W.C. Company, Inc.</u>, 396 So.2d 778 (Fla. 1st DCA 1981), involved an application for a license or permit, not an appeal of a license or permit after it had been issued and paid for. In a broader sense, however, the case does stand for the proposition that an applicant for agency action carries the ultimate burden of persuasion of entitlement through all proceedings of whatever nature <u>until such time as final action has been taken by the governmental entity to whom the application was made</u>. <u>Id</u> at 787.

In <u>Ceslow v. Bd. of Cty. Com'rs, Palm Beach Cty.</u>, 428 So.2d 701 (Fla. 4th DCA 1983), the Court pointed out that review of the action of an administrative agency not covered by the State Administrative Procedure Act is by Petition to the Circuit Court for Writ of Certiorari. <u>Ceslow</u>, at 702. In <u>Cherokee Crushed Stone, Inc., v. City of Miramar</u>, 421 So.2d 684 (Fla. 4th DCA 1982), the Court held that the Circuit Court's review of agency action is mandatory and the review includes determinations as to whether the administrative agency: accorded procedural due process; observed essential requirements of the law; and supported its findings by substantial competent

evidence. In Ceslow, the administrative agency was the Board of County Commissioners of Palm Beach County and in Cherokee, the administrative agency was the City Commission. In this case, the administrative agency that issued the development permit was Monroe County.

If the review of development permits was merely switched from the Circuit Court to the Florida Land and Water Adjudicatory Commission, why did the burden of proof change so drastically? The development permit was final action taken by the agency. *See*, Florida Dept. of Transportation v. J.W.C. Co., Inc., at 787. There is certainly no doubt that Mr. and Mrs. Young carried the burden throughout all of the proceedings before the local administrative agency. When the development order was issued by local government, the burden shifted. Irregardless of whether review is by common law, certiorari or appeal under Section 380.07 of the Florida Statutes becomes the applicant for administrative action. The applicant, in the appeal, is not the holder of the presumptively valid development orders.

By denying review, this Court allowed the decision in Friends of the Everglades, Inv. v. Zoning Bd, Monroe County, 478 So.2d 1126 (Fla. 1st DCA 1985), review denied 488 So.2d 830 to stand for the proposition that a Section 380.07 appeal is discretionary action. It is not an integral part of a development permit application proce-

dure, but a review of the . . . "ultimate decision of local authorities". . . . *See*, Friends of the Everglades, Inc., v. Board of County Com'rs of Monroe County, 456 So.2d 904, 912 (Fla. 1st DCA 1984) review denied 462 So.2d 1108.

In order for the County to arrive at their "ultimate decision" and issue the development order, there is a complex procedure of broad public participation (including interim appeals). Set out below is a part of the procedures for local development order approval and some of the qualifications of the local officials involved in the process. This complex, expensive and time consuming procedure is totally invalidated under the Commission's Final Order and the Third District's decision. Young at 3.

ORIGINATION OF LOCAL DEVELOPMENT ORDERS

The ultimate issue to be addressed by this Court can be put into perspective by going into the origination of local development orders mandated by the Monroe County Land Development Regulations. Section 9.5-41 of the Monroe County Code applies to all applications for development approval. Section 9.5-42 provides that the application for development approval must be accompanied by a non-refundable fee, and, under Section 9.5-43, a pre-application conference with the Development Review Coor-

dinator may be applied for. Under Section 9.4-43, the substance of a pre-application conference is recorded in a Letter of Understanding prepared by the Development Review Coordinator and signed by the Director of Planning. The minimum qualification for the Director of Planning is a Masters Degree in urban or regional planning or comparable degree from an accredited University. *See*, Monroe County, Fla., Code §9.5-24(a)(3)(1988). It should be noted that an applicant is entitled to rely upon representations made at the conference, if such representations are set forth in the letter of understanding.

Within fifteen (15) days after the application for development approval has been received, a determination of completeness is made by the Development Review Coordinator. The minimum qualification for the Development Review Coordinator is the same as for the Director of Planning but also requires three (3) years experience in planning or zoning, including site plan review <u>and</u> a minimum of one (1) year supervisory experience. *See* Monroe County, Fla., Code §9.5-24(b)(2). If such determination of completeness is not made within fifteen (15) working days, then the application is deemed "complete" and within the next ten (10) days, the Development Review Coordinator makes sure that the application is in compliance with the County's land use regulations. If the

application for development permit is deemed to be in compliance with the land use regulations, then the Development Review Coordinator notifies the applicant and the Secretary of the Planning Commission so that a public hearing may be scheduled no earlier than thirty (30) days following the determination of compliance. *See*, Monroe County, Fla., Code §9.5-44 (1988).

Section 9.5-45 of the Monroe County Code provides the notice requirement for the public hearing held on the application for the development permit. It is quite stringent! The notice must include the date, time and place of the hearing, the address of the hearing and a description of the site of the proposed development so as to identify it for others to locate. The notice must include a summary of the proposal to be considered and the identity of the body (i.e. Planning Commission, Development Review Committee or County Commission) holding the hearing. The notice of the public hearing is given thirty (30) days in advance of the hearing date in newspapers of general circulation in the Lower, Middle and Upper Keys of Monroe County. *See*, Monroe County, Fla., Code §9.5-45(b)(1988). The notice is also posted on the property at least thirty (30) days prior to any public hearing on a water-proof sign of at least four (4) square feet. The sign or signs give the date, time and location of the public hearing and at least one (1) sign

must be visible from all public streets and public ways abutting the property. *See*, Monroe County, Fla. §9.5-45(c)(1988). In addition to the posting of the notice, all owners of real property located within three hundred (300) feet of the property proposed to be developed must be mailed a copy of the notice of the public hearing. *See* Monroe County, Fla., Code §9.5-45(d)(1988). In addition to all of these notices, all organization associations and other interested persons or groups that have registered with the Department of Planning and paid an annual fee to defray the cost of mailing are given notice of the public hearing. *See*, Monroe County, Fla., Code, §9.5-45(e)(1988). And, finally, an affidavit and photographic evidence of the public notice must be provided at the public hearing to show that the applicant has complied with the notice requirements. *See*, Monroe County, Fla., Code §9.45-45(f)(1988).

The hearing procedures for applications for development orders is governed by Section 9.5-46 of the Monroe County Code. Prior to the hearing, any person, upon reasonable request, may examine the application and materials submitted in support or in opposition. At the public hearing (which received such extensive notice) testimony and evidence is given under oath or by affirmation. Any person or persons who have received the extensively circulated notice may appear at the public hearing

and submit evidence, either individually or as a representative of an organization. Those speaking for organizations must present written evidence of their authority to speak with regard to the matter under consideration. Certain minimal due process requirements with regard to relevancy, materiality, repetitious statements, etc. are then addressed and the staff of the Department of Planning presents a narrative and graphic description of the proposed development. The Department of Planning presents a written and oral recommendation including the report of the Development Review Committee.

The Development Review Committee is composed of the Director of Planning, the Development Review Coordinator, the Director of Public Works, the Director of Public Health, the County Engineer, the County Biologist, and any other County employee designated by the County Administrator or the Planning Director. *See* Monroe County, Fla., Code, §9.5-24(c)(1)(1988). After the Development Review Committee report, the party seeking development approval (owner or developer) then goes forward and presents any information that is deemed appropriate. After the owner or developer, the public testimony is heard, first in favor of the proposal and then in opposition to it. After the public testimony the Department of Planning staff responds to any statements made by the owner of developer or any public comment, the owner or

developer then responds to any testimony or evidence presented by the staff or the public. *See*, Monroe County, Fla., Code §9.5-46(c)(3)(1988).

In some types of development applications, if there is a written protest that is signed by the real property owners of twenty (20%) percent or more of the owners of property within three hundred (300) feet of the proposed development, then the application for development may not be approved except by the concurring vote of at least four (4) Commissioners before the full Board of either the Planning Commission or the Board of County Commissioners. *See*, Monroe County, Fla., Code §9.5-46(6) (1988).

Once development approval is granted as set forth above, a building permit must be requested. The provisions of Section 9.5-111, et. seq. cover the procedure for the issuance of a building permit. The development order has two (2) separately issued component parts. The first being a site preparation permit and the second a construction permit. *See*, Monroe County, Fla., Code, §9.5-111(b)(1988). The Director of Planning certifies that the building permit will be in compliance with the Monroe County Land Development Regulations and with any specific land use district or activity concerned. *See*, Monroe County, Fla., Code §9.5-112(c)(1988). The certificate of compliance requires an application to the

Building Official and the Building Official shall, within five (5) days, forward the application to the Director of Planning. The County biologist reviews the application and makes an on-site inspection unless it is waived by the Director of Planning. After consultation with the County biologist, the report is submitted to the Director of Planning and Building Official with a certification that the proposed development complies with the provisions of the plan. *See*, Monroe County, Fla., Code, §9.5-112(e)(1988).

The certificate of compliance must demonstrate compliance with all the environmental standards and the technical, health and safety requirements of the County Code. Based upon this, a site preparation permit is issued. *See*, Monroe County, Fla., Code, §9.5-113(b) (1988). After site preparation, the Director of Planning notifies the Building Official to issue the construction permit.

COMMON SENSE V. CHAPTER 120 FLORIDA STATUTES: DOES THERE HAVE TO BE A CONFLICT?

For forty-five (45) days after the local development is issued the owner, developer, regional planning agency or the Department can file an application or Petition for an administrative appeal under Section 380.07 of the Florida Statutes.

The Third District Court of Appeal was correct in certifying that their decision had passed on a question of great public importance. The extensive County staff, the public notices, the time consuming and expensive procedures for procuring local development orders and permits simply cannot be swept aside by a Section 380.07 Florida Statutes appeal. The legislative and quasi-legislative actions of local government <u>must</u> be considered presumptively valid.

<u>Young v. State Department of Community Affairs</u>, 567 So.2d 3 (Fla.3rd DCA 1990) stands for the proposition that when a Notice of Appeal is filed all of the procedures and determinations of local government are null and void and of no further force and effect. Under the Commission's final ruling on the administrative appeal and the holding of the Third District Court of Appeals, the mere filing of the Notice of Appeal invalidates the local development order and it miraculously converts it's holder into an "applicant".

This administrative appeal was initiated by the Department over two and one-half years ago. To this day there is no evidence, no testimony, no exhibits of any kind. Base upon this legal void, the appeal by the Department was granted and the local development orders were invalidated. In the context of a Section 380.07 Florida Statutes administrative appeal, there is simply

no way to duplicate the pre-application conference: the actions of the Development Review Coordinator and Building Official; the notices to the public, including the posting of the notice on the property, the mailing of the notice, etc. There is certainly no way to duplicate, administratively, the testimony of the members of the public who show up at a public hearing.

To have a line of case law which allows the owner, developer, regional planning agency or the Department to invalidate County development orders by the unsupported allegations of an administrative appeal petition violates common sense as well as due process and the separation of powers. Even in situations where the Department files a "notice of intent" to challenge a local governmental comprehensive plan or plan amendment under Section 163.3-184(10) of the Florida Statutes, the burden of proof is on the Department to show inconsistency or illegality. In such a challenge of proposed county action the legislature stated:

> The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debateable that it is consistent with the plan. *See*, §163.3213(5)(b), Fla. Stat. (1987)

If the legislature provided proposed local governmental action extensive "burden of proof" protection,

then how can the holder of an already issued County development order that constitutes <u>final</u> local governmental action have the order reversed or invalidated by the mere filing of a Notice of Appeal? The basic concept is that the "burden of proof" is on the party applying for or initiating the administrative proceeding whether it is the development permit application or the appeal of an issued development order. The burden is on the party applying for certain action by a certain agency.

CONCLUSION

The roots of the decision to be made in this case can be traced back to 1972 when the Environmental Land and Water Management Act of 1972 was passed. Chapter 380 of the Florida Statutes (1972). The avowed purpose of the legislation is to strengthen local government and to give the Regional Planning Agency and State Land Planning Agency oversight to the local governmental land use planning process. See §380.05(11) Fla. Stat.(1987)

The primary method used by the Legislature to accomplish these tasks was to establish certain state guidelines for development of regional concern or state critical concern and insure that local land use management addressed and followed the state guidelines. *See*, §380.0551(7) Fla. Stat. (1987).

The legislation allows participation in the local legislative process by the state land-planning agency where it pertains to the adoption of a local land use management plan. *See*, Section 380.05(10) of the Florida Statutes. The legislation also provided for discretionary appeals of individual land development orders issued under the duly adopted, state-approved and in force local land use management plan. The state participation in such discretionary review replaced the Circuit Court Certiorari Review previously available for local zoning decisions.

The Legislature did two (2) things by passing Section 380.07 of the Florida Statutes. First, the review of land development decisions was shifted from the Circuit Court to the Land and Water Adjudicatory Commission. Second, the regional planning agencies and state land planning agency were given standing, along with the owner and developer, to contest the validity of the land development decisions. The regional and state agencies arguably had no standing to seek certiorari review in the local Circuit Courts.

The primary challenge to the legislative change in review of land development decisions from Circuit Court judicial review to agency administrative review came nine (9) years ago in Manatee County v. Estex Gen. Chem Corp., 402 So.2d 1251 (Fla. 2nd DCA, 1981). In Manatee County,

there were three (3) counties involved - two (2) as appellants and one (1) as Amicus Curiae. The primary issue asserted by the Counties and the Court's position was stated as:

> Thus, they suggest that the issue of this case is whether the authority to make local zoning decisions will continue to rest with counties and municipalities or will be vested in state government. We cannot agree that the issue here is quite such an apocalyptic one. As Manatee and Sarasota concede, local zoning decisions have always been subject to review by certiorari in the Circuit Court. Manatee County, at 1253.

The presumptive validity of development permits that have already been issued to successful permit holders is, by implication, the same presumptive validity that faced the litigants in the Circuit Court certiorari review process.

The conclusion reached by the Court in Manatee County is extremely persuasive in this proceeding on presumptive validity! The court stated that Chapter 380 review:

> . . . does not remove local land use decisions from the control of local governing bodies. It simply shifts the review of those decisions from the Circuit Court to the Land and Water Adjudicatory Commission. (emphasis added)

* * * *

> Of course, this does not mean that the Adjudicatory Commission can arbitrarily ignore local zoning laws or decisions, and it's orders are always subject to review by the District Courts of Appeal.
> Manatee County, at 1255-1256

The Department and the Commission argue that the decision on the development order was "preliminary" (i.e. more akin to an "intent" to issue). Section 380.07(2) of the Florida Statutes and Manatee County, disposes of the "preliminary action" argument regarding development orders issued by local government. First, the Legislature provided that:

> The filing of the Notice of Appeal shall stay the effectiveness of the order. . . until after the completion of the appeal process. (emphasis supplied). §380.07(2) Fla. Stat.

"Effective" is defined in *Webster's New Collegiate Dictionary* as . . . "being in effect" . . . or . . ."providing or capable of producing a result. *Webster's* explains that the word "effective" . . . "emphasizes the actual production of or the power to produce an effect". The Legislature sees the development order (that has been issued and paid for) as effective. The Section 380.07(2) Florida Statutes appeal must seek "reversal" or "invalidation" or a change in direction or effect of the existing development order. Common sense tells us that reversing or invalidating an effective order implies exertion of a

force. The legal force necessary to invalidate an effective order implies exertion of a force by the party seeking invalidation. The legal force necessary to invalidate an effective development order is a <u>lot</u> more than the unsupported allegations in a Notice of Appeal.

The opinion in <u>Manatee County v. Estex Gen. Chem. Corp.</u>, disposes of the "preliminary action" argument by calling the issued development order a <u>decision</u> [not recommendation] that is <u>not</u> removed by Chapter 380 . . . "from the <u>control</u> of local governing bodies". (emphasis supplied) <u>Manatee County</u>, at 1255. "Decision" should be read as . . . a determination arrived at after consideration. "Control" should be read as . . . power or authority to guide or manage. "Governing" bodies should be read as . . . to exercise continuous sovereign authority over; esp.: to control and direct the making and administration of policy. These definitions are out of *Webster's Dictionary* and we can assume that the Court in <u>Manatee County</u> knew their meaning.

In this case, the governing body's decision, based on literally years of study, research and sound judgment was made null and void by the mere filing of the Notice of Appeal. This allows a distant administrative bureaucracy to arbitrarily supersede the citizenry, their elected county commission and subvert the very foundation of our elected representative form of government. It will

ultimately lead justice into a blind alley from which it may never return.

When (or if) this Court hears oral argument in this case, it is the Petitioner, the Youngs, who must argue first. They initiated this proceeding against a presumptively valid decision of the Third District Court of Appeals. When the Commission hears an appeal initiated by the owner, developer, regional planning agency or the department, it is the Petitioner who seeks change or invalidation that has the burden of proof. It is that simple!

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished on this 20th day of December, 1990 to the offices of:

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