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IN THE SUPREME COURT OF FLORIDA

Board of County Commissioners
of Brevard County, Florida,

Petitioner,

vs. Case No. 79,720

Jack R. Snyder, et ux.,

Respondents.

BRIEF OF AMICUS CURIAE

FLORIDA HOME BUILDERS ASSOCIATION IN SUPPORT
OF RESPONDENT, JACK R. SNYDER

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STATEMENT OF THE CASE

Jack and Gail Snyder applied for a development order rezoning a half-acre parcel, located in Brevard County, Florida, to permit the construction of medium density multi-family dwellings. Under the Future Land Use Element and Future Land Use Map series included in the Brevard County local comprehensive plan, the parcel was designated to allow the proposed land use and density. Planning and Zoning Department staff ultimately determined the proposed rezoning consistent with the local comprehensive plan and recommended approval of the rezoning. The Planning and Zoning Board held a public hearing and agreed with staff, recommending approval of the rezoning.

At the Brevard County Board of County Commissioners hearing on the proposed rezoning, numerous residents of a nearby neighborhood voiced objections. Despite the Planning and Zoning Board's approval recommendation, the Commissioners denied the rezoning, and did not state reasons for the denial.

The Snyders petitioned the circuit court for a writ of common law certiorari; the court denied the writ. The Snyders then filed a writ of certiorari in the Court of Appeal for the Fifth District. The Fifth District granted the petition, holding that (1) because single-parcel rezoning actions implement local comprehensive plan policies, they are "quasi-judicial" or administrative actions to which strict scrutiny applies on judicial review; and (2) in proceedings on applications to use private property, including rezoning applications, the initial burden is on the landowner to demonstrate his application is consistent with the local

comprehensive plan. Once the landowner has demonstrated prima facie consistency with the local plan, the burden shifts to the local government to prove by clear and convincing evidence that a specifically stated public necessity requires a more restrictive use. The district court quashed the circuit court order denying certiorari, and remanded the case to the circuit court.

The discretionary jurisdiction of this Court was invoked in response to a request by Brevard County. Florida Home Builders Association was granted leave to file an amicus curiae brief in this proceeding.

STATEMENT OF THE FACTS

Amicus Florida Home Builders Association ("FHBA") adopts the facts in this case as presented in the opinion of the Fifth District Court of Appeal, Snyder v. Board of County Commissioners, 595 So. 2d 65 (Fla. 5th DCA 1991).

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

FHBA is a Florida not-for-profit corporation and statewide association of approximately 18,000 builders and developers. FHBA supports reasonable and balanced growth management and actively participated in the legislative adoption of Florida's landmark 1985 Growth Management Act.

Amicus believes that fair and consistent implementation of growth management policies embodied in adopted local comprehensive plans through an orderly and reliable land development regulation

and permitting process is necessary to protect the integrity of local plans, and, ultimately, is key to the Growth Management Act's success.

Accordingly, FHBA supports the opinion of the Fifth District Court of Appeal in Snyder, which insulates local plans from the vagaries of the local political process by application of strict judicial scrutiny to local government development permitting actions. FHBA also supports the test established by the court in Snyder that upon a showing by a property owner of prima facie consistency of a proposed use with the local plan, the burden shifts to local government to establish by clear and convincing evidence a specific public necessity requiring restriction of the proposed use. Like strict judicial review, assigning this evidentiary burden assignment to local governments is necessary to protect the integrity of the comprehensive plan and ensure consistent implementation of that plan through a predictable land development permitting process.

FHBA, therefore, urges this Court to uphold the decision of the Fifth District Court of Appeal in this case.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL IN SNYDER CORRECTLY HELD THAT COURTS SHOULD APPLY STRICT SCRUTINY IN REVIEWING LOCAL GOVERNMENT REZONING ACTIONS.

A. The overall purpose of the Growth Management Act mandates that rezoning actions should be strictly scrutinized.

Since the early 1970's, Florida has wrestled with how best to manage its burgeoning growth. The state's efforts to establish meaningful growth management are well documented by Tom Pelham in his work State Land Use Planning and Regulation. Pelham, State Land Use Planning and Regulation, Lexington Books (1979). Of particular note is that for decades, localities were authorized by general law to adopt comprehensive plans, but these plans were advisory only and not legally binding on local governments, which were free to conduct "business as usual," permitting growth to continue unplanned, unmanaged, and undirected. Pelham, T., Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process, 13 FSU L. Rev. 515 (1985).

In 1975, the Legislature sought to make local comprehensive plans meaningful tools in state growth management by enacting the first local comprehensive planning directive, the Local Government Comprehensive Planning Act ("LGCPA"). For the first time, local governments were mandated to adopt legally binding local comprehensive plans and to implement these plans through adoption of land development regulations consistent with the local plan. Unfortunately, the LGCPA did not define the term "consistent," did

not require local plan internal consistency or local plan linkage or consistency with state and regional growth plans and policies, and lacked an effective means to enforce local plan statutory requirements. Consequently, local planning and development permitting continued largely ad hoc, with local plans becoming "shelf-fillers" rather than serving as effective tools for establishing and implementing local government planning and growth management policies. Environmental Land Management Study Committee, Final Report of the Environmental Land Management Study Committee 18-20, February 1984 (on file, Department of State, Bureau of Archives and Records Management); Rhodes, R., Growth Management in Florida 1985 and Beyond, 13 Florida Environmental and Urban Issues 1 (Jan. 1986).

In response to this obviously defective growth management scheme and pursuant to the recommendations of the Environmental Land Management Committee, the 1984 Legislature passed the State and Regional Planning Act, which directed development and adoption of a state comprehensive plan and regional policy plans which were consistent with the state comprehensive plan. Ch. 84-257, 1984 Fla Laws 1166. The state comprehensive plan was to be composed of goals and policies giving specific policy direction to state and regional agencies, and regional policy plans were to address regional goals and policies, thereby serving as a vital link between state and local government. Rhodes, R. and Apgar, R., Charting Florida's Course: The State and Regional Planning Act of 1984, 12 FSU L. Rev. 583 (1984).

This action was complemented in 1985 by enactment of the Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act" or "Act"), which addressed many LGCPA defects, and significantly and appropriately strengthened the local plan consistency requirement. Pelham, T., Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Process, 13 FSU L. Rev. 515 (1985).

1. Comprehensive plan and plan amendment adoption are policy setting actions to which a deferential judicial review standard appropriately applies.

The 1985 Growth Management Act was enacted to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development, and to encourage and assure planning and development coordination between local, regional and state government. Sections 163.3161(2),(4), Fla. Stat. To this end, the Act requires each local government to adopt a local comprehensive plan "in compliance" with the Act. Section 163.3167(1)(b), Fla. Stat. "In compliance" means that the plan is consistent with the substantive requirements established in Sections 163.3177 and 163.3178, the state comprehensive plan, applicable regional policy plan, and minimum plan criteria adopted by the Department of Community Affairs for review of local plans, Rule 9J-5, Florida Administrative Code. Section 163.3184(1), Fla. Stat. The Act states clear intent that once a local plan has been adopted, development

must not be permitted unless it is consistent with the local plan. Section 163.3161(4), Fla. Stat. Inconsistent development approval or denial actions are subject to judicial challenge. Section 163.3215(1), Fla. Stat. See Jensen Beach Land Co. v. Citizens for Responsible Growth of the Treasure Coast, 17 Fla. L. Weekly D2410 (Fla. 4th DCA Oct. 21, 1992).

a. Local comprehensive plan substantive requirements.

The Growth Management Act requires local comprehensive plans to meet specific, detailed substantive requirements.

Specifically, local plans must contain goals, policies, and objectives addressing specified substantive topics, or "elements", including future land use, capital improvements, traffic circulation, natural resource conservation, and others. Section 163.3177, Fla. Stat. Of the plan elements specified in the Growth Management Act, the future land use element (FLUE) must meet the most detailed substantive standards and criteria to be in compliance with the Act. By statute, the FLUE must designate the proposed future general distribution, location, and extent of specified land use categories, defined according to the specific land use types and specific density or intensity standards applicable to these categories. As part of the FLUE, a future land use map (FLUM) or map series depicting these land use categories must be included and must be supplemented by goals, policies, and measurable objectives. The FLUE also must include population density and development intensity control and distribution

standards, and be based on specific data addressing projected population, amount of land required to accommodate anticipated growth, character of undeveloped land, and availability of public services for proposed future land uses. Section 163.3177(6)(a), Fla. Stat.

These requirements are further supplemented by detailed criteria in Section 9J-5.006, Florida Administrative Code, requiring the FLUE to specifically address land use compatibility, subdivision regulation, drainage and stormwater management, mixed land uses, historic resource protection, and ensure facilities and services will meet local levels of service and will be available concurrent with development impacts -- the "concurrency" requirement. Section 9J-5.006(3)(c), Fla. Admin. Code. The FLUM must depict the proposed distribution, extent, and location of specified generalized land uses, transportation concurrency management areas, and natural resources. Section 9J-5.006(4), Fla. Admin. Code. Together, these criteria ensure that the FLUE and FLUM provide a specific, detailed policy blueprint for the location, distribution, type, density, and intensity of future land uses within the local jurisdiction. As noted, the Snyders' property was determined to be consistent with the County's FLUE and FLUM by County staff and the Planning and Zoning Board.

Local comprehensive plans are reviewed by the Department of Community Affairs (DCA) for compliance with the requirements of the Growth Management Act and Rule 9J-5. As part of its review, DCA determines whether the local plan meets the requirement of

consistency with the state comprehensive plan and applicable regional policy plan. Section 163.3184, Fla. Stat.

b. Comprehensive plan procedural requirements and opportunity for challenge by affected persons.

In addition to detailed substantive requirements, local plans must be adopted pursuant to specific procedural requirements designed to maximize participation in the growth management policy formulation process. The local government must hold at least two public hearings during the plan preparation and adoption process, pursuant to statutorily-prescribed notice requirements, at which members of the public are accorded opportunity to comment on the plan prior to its adoption. Section 163.3184, Fla. Stat. Additionally, interested persons can submit comments to DCA and the other reviewing agencies on a full range of issues during the compliance review process. Section 163.3184, Fla. Stat.

Moreover, once DCA determines the local plan to be in compliance pursuant to Section 163.3184(9), or not in compliance pursuant to 163.3184(10), "affected persons" are accorded standing to challenge the compliance or noncompliance determination. "Affected persons" includes persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of review; as well as the affected local government, and adjoining local governments under specified circumstances. In recognition of the policy-making function of the comprehensive plan adoption process, the group of persons accorded standing under the Growth Management Act is

broadly defined, to provide persons whose interests will be affected by local planning and growth management policies the opportunity to challenge the formulation and adoption of these policies. Environmental Land Management Committee, Final Report of the Environmental Land Management Study Committee 24-26, February 1984.

c. Application of the deferential fairly debatable standard to judicial review of local comprehensive plans.

A comprehensive plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987); Southwest Ranches Homeowners Ass'n v. Broward County, 502 So. 2d 931 (Fla. 4th DCA 1987). The plan should be considered a constitution for all future development within the governmental boundary. Machado, 519 So. 2d at 632, citing O'Loane v. O'Rourke, 231 Cal.App.2d 774, 42 Cal.Rptr. 283, 288 (Cal.App. 1965). Local plans adopted under the Growth Management Act provide detailed, comprehensive, and internally consistent planning and growth management policy documents that have undergone extensive local government review and debate, state agency scrutiny, and been subject to broad public participation and challenge opportunity. See Section 163.3184, Fla. Stat.

The policy-making nature and function of the local comprehensive plan adoption process is recognized in the Act by application of the "fairly debatable" standard of review to

administrative challenges of local comprehensive plan compliance with state standards by affected persons or by DCA[1], and is also applicable to judicial review of challenges to local comprehensive plans. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see also Machado, 519 So. 2d at 632. This deferential standard is appropriate in reviewing a local government's initial policy formulation actions, such as adoption of a comprehensive plan, in which broad and varied and often competing community interests must be weighed and balanced by a local government. Home Builders and Contractors Ass'n v. Department of Community Affairs, 585 So. 2d 965 (Fla 1st DCA 1991); see Hiss v. Department of Community Affairs, 602 So. 2d 535 (Fla. 1st DCA 1992), aff'g Hiss v. Department of Community Affairs, Case No. ACC-90-014 (Admin. Comm'n Final Order June 4, 1991) (plan is internally consistent if its elements do not conflict with each other; all plan objectives and policies do not have to take action in the direction of realizing the other plan objectives and policies.). However, this standard is not appropriate for local government actions, such as rezoning actions, that implement rather than formulate local government policies, in particular cases.

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[1] If DCA determines the plan in compliance, a challenging party has the burden to demonstrate the compliance determination is not fairly debatable. §163.3184(9), Fla. Stat. If DCA determines the plan not in compliance, the local government's determination of compliance is presumed correct, and DCA and affected persons who intervene in support of the plan must demonstrate by a preponderance of the evidence that the plan is not in compliance. The local government's determination that elements of its plans are related to and consistent with each other shall be sustained if the determination is fairly debatable. §163.3184(10)(a), Fla. Stat.

2. Development orders, including rezoning decisions, implement local comprehensive plan policies and thus are subject to stricter judicial scrutiny than the deferential standard applicable to local plan review.

a. Land development regulations establish communitywide regulatory policy and are subject to a deferential standard of judicial review.

Land development regulations are local legislative actions adopted by ordinance to regulate development within the adopting local government. Section 163.3202, Fla. Stat. The Growth Management Act requires local government, within one year after submittal of a revised local comprehensive plan to DCA, to adopt land development regulations that "are consistent with and implement" the adopted local comprehensive plan. Section 163.3202(1), Fla. Stat. Unlike its predecessor, the LGCPA, the Growth Management Act requires local governments to amend existing inconsistent land development regulations to make them consistent with the local plan. Section 163.3194(2), Fla. Stat.

Land development regulations must contain specific detailed provisions to implement the adopted comprehensive plan, and, among other things, must regulate land uses for land included in the land use categories contained in the plan's future land use element. Section 163.3202(2), Fla. Stat. They include zoning, rezoning, subdivision, building construction or sign regulations, and any other regulations controlling land development.[2] Section

[2] The rezoning actions included in this definition refer to communitywide or large parcel rezonings. These stand in contrast to the single-parcel and small rezonings specifically excluded from the land development regulation definition for purposes of administrative challenges under Section 163.3213, Florida Statutes.

163.3164(22), Fla. Stat. Per these provisions, land development regulations regulate such aspects of land development as specific densities, intensities, and types of land uses permitted within future land use categories. Thus, they establish communitywide regulatory policy and constitute the "first level" of implementation of the overarching planning and growth management policies in adopted local comprehensive plans. Section 163.3202(2)(a)-(h), Fla. Stat.

Land development regulations are subject to administrative challenge on the ground they are inconsistent with the local comprehensive plan[3]. Section 163.3213, Fla. Stat. Because land development regulations implement the local comprehensive plan and apply communitywide, the Legislature has labelled them "legislative" and provided that they will not be deemed inconsistent with the plan if their consistency is "fairly debatable." Section 163.3213(4)(b), Fla. Stat.

Of key significance is that the Legislature <u>specifically excluded</u> rezonings from the list of official actions considered "land development regulations" for consistency challenge purposes. Section 163.3213(5)(b), Fla. Stat. This exclusion clearly indicates the Legislature did not intend rezonings which are the subject of individual development orders to be accorded the same deferential

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[3] Land development regulations are consistent with the local plan if the land uses, densities or intensities, and other aspects of development permitted by the regulation are compatible with and further the plan objectives, policies, land uses, densities or intensities. Section 163.3194(3)(a), Fla. Stat.

"fairly debatable" standard accorded land development regulations in consistency challenges. See McPherson, Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans, 61 Fla. Bar. J. 71 (1987).

Under the statute, only "substantially affected persons" as provided under Chapter 120[4] are accorded standing to challenge land development regulations. This statutory standing test is significantly narrower than the "affected person" standard accorded persons challenging adopted local comprehensive plans -- reflecting the narrower, more focused interests affected by adoption of land development regulations than those affected by adoption of broader comprehensive plan policies. Environmental Land Management Study Committee, Final Report of the Environmental Land Management Study Committee 22-25, February 1984.

b. Development orders specifically implement local comprehensive plan policies and land development regulations and thus are subject to a stricter standard of judicial review than the deferential "fairly debatable" standard.

Development orders are defined as "any order granting, denying, or granting with conditions an application for a development permit." Section 163.3164(6), Fla. Stat. Development

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[4] Under case law interpreting Chapter 120, Florida Statutes, "substantially affected persons" for purposes of participating in administrative proceedings are persons who demonstrate that as a result of government action, they will suffer an injury in fact of sufficient immediacy to entitle them to a hearing, and the injury suffered must be of the nature or type against which the statute or rule is designed to protect. Florida Soc'y of Ophthalmology v. Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988).

permits include "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." Section 163.3164(7), Fla. Stat. (emphasis added).

Simply stated, development orders approve or deny development for a particular parcel of land. Development orders issued after local comprehensive plan adoption must be consistent with the plan, Section 163.3194(1), Fla. Stat. They are consistent if the land uses, densities or intensities, and other aspects of development permitted by the order are compatible with and further plan objectives, policies, land uses, and densities or intensities. Section 163.3194(3)(a), Fla. Stat. By the plain terms of these provisions, development orders do not formulate growth management and planning policy or establish communitywide regulatory programs; instead they specifically apply these policies and regulations to individual parcels of land.

The limited discretion attendant to development order issuance or denial is reflected in the narrow standing standard applicable to persons seeking to challenge development order issuance on inconsistency grounds. Under the Act, only an "aggrieved or adversely affected party" may bring suit to enjoin or otherwise prevent development order issuance. Section 163.3215(1), Fla. Stat. To be an "aggrieved or adversely affected party," a person must suffer an adverse effect to an interest protected or furthered by the local comprehensive plan. The interest may be shared with other

members of the community, but must exceed in degree the general interest in community good shared by all persons. Section 163.3215(2), Fla. Stat. To have standing under these provisions, not only must proposed development order issuance adversely affect one's protected interests under the plan, but the person also must suffer a "special injury" beyond that suffered by the general community. In adopting this restrictive standing test, the Legislature accorded only persons having a particular interest in a specific development order for a specific piece of property the opportunity to challenge issuance of that order. Section 163.3213, Fla. Stat.; see Environmental Land Management Committee, Final Report of the Environmental Land Management Committee 21-25, February 1984.

Because development order issuance involves the most specific implementation of local planning and growth management policy, is most removed from local government policy formulation, is challengeable for consistency by only a narrow group of citizens, and affects identifiable specific private interests, to protect the integrity of the plan and ensure consistent application of the plan, judicial review of development order consistency with the local plan should be accorded strict scrutiny. This review standard contrasts to the deferential "fairly debatable" judicial review standard accorded local government policy making actions, such as local comprehensive plan adoption, for which standing is broadly defined to reflect the wide range of community interests affected by plan policy formulation and establishment.

This judicial review construct is consistent with the holding in Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), wherein the court recognized that while local comprehensive plans, as broad policy-setting directives, are subject to the deferential "fairly debatable" judicial review standard, local land use actions (in that case, zoning) that implement plan policies are limited by those policies, and therefore essentially are nondiscretionary actions to which strict judicial scrutiny appropriately applies.[5] Id. at 632-33, 635. Accordingly, the court in Snyder correctly determined the strict scrutiny standard applies to judicial review of rezonings, and this determination should be upheld.

c. The functional effect of local government actions, rather than nomenclature, should determine the appropriate standard of judicial review.

In its brief, Brevard County argues that rezonings are "legislative" actions because they are approved by the local governing body, and, as such, are subject to the deferential "fairly debatable" judicial review standard. (Initial Brief, at 14-22). This argument presents a self-fulfilling prophecy -- if a legislative body acts, its action should always be regarded as

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[5] Of course, a local government could establish guidelines in its plan that preserve desirable future discretion to apply plan policies to development order decisions. For example, a FLUE and FLUM could designate a land area for a certain land use, such as residential, and authorize a range of densities to be determined when a development order is applied for and issued. This approach should be acceptable so long as the local government exercise of discretion and choice of options is guided by clear standards articulated in the plan, and the local government makes findings supporting application of the standards in the individual case.

policy making and therefore accorded great deference by courts. The relevant inquiry regarding the appropriate standard of judicial review, however, is not whether a particular type of local government action historically has been labelled "legislative" or "quasi-judicial," or which type of government body or entity takes an action approving or denying development, but instead, whether the local government action formulates or implements local planning and land development policy.

As noted, local government action that initially formulates and establishes policy necessarily involves the exercise of local government discretion, and, thus, should be accorded deference on judicial review. Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987). Conversely, local government action, even when taken by an elected body, that implements and applies previously formulated plan and regulatory policies and thus involves minimal exercise of discretion, should be subject to strict judicial scrutiny for consistency with the local comprehensive plan. Id.; Fasano v. Board of County Commissioners, 507 P.2d 23 (Ore. 1973).

Allowing the character of the actor, rather than the nature of the action, to determine the judicial review standard for local government rezoning actions woodenly ignores the plan-implementing role of rezoning actions under the Growth Management Act, and places in peril the principle of plan and development order consistency. Adoption of the plan and plan amendments and of land development regulations all enjoy a highly deferential judicial review standard. According even more judicial deference to local

action on development orders could severely jeopardize the integrity of the plan and undermine the strength of the planning-regulatory consistency -- a core tenet of the Growth Management Act.

B. Strict judicial scrutiny in review of local rezoning actions is necessary to protect the integrity of the local comprehensive plan and the stability and reliability of the growth management process.

As a matter of policy, strict scrutiny by courts in reviewing rezoning decisions is necessary to protect comprehensive plan integrity and establish a reliable planning and land development regulation system.

Integrity of local comprehensive plans is protected by strict judicial scrutiny of local government development order issuance, including rezoning approvals, because under this standard local government development decisions are subjected to a "hard look" and will not be upheld unless they clearly are consistent with the plan. See Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987). According local government development order actions deference on judicial review would leave local governments virtually free to approve or disapprove, simply on the basis of "fair debate" and no explanation, almost any development type, density or intensity at any location, thereby rendering local plan policies and land development regulation of little weight or consequence in the planning process. Id. at 634. Acceptance of this standard would destabilize Florida's growth management system and practically

preclude land owners and lenders from relying on an adopted plan that has undergone extensive local and state substantive and procedural discussion and review, and has been exposed to broad third party participation and scrutiny. Section 163.3177, Fla. Stat. Given the rigors of the local planning process, once the plan and related maps are adopted, local development policy is established and property owners must be able to rely on the specific land use designations, densities, and intensities specified in the plan. Obtaining required development orders, including rezonings, should become essentially pro forma once a property owner demonstrates consistency of the proposed development with the land use designation in the local comprehensive plan.

In sum, close judicial scrutiny of local development order actions for plan consistency will help maintain the integrity of the plan and further a core concept of the Growth Management Act, planning and regulatory consistency. Strict scrutiny does not favor or prejudice owners or governments; it will apply equally to consistency challenges of approved (Machado) and denied (Snyder) development orders.

The test also will encourage local governments to seriously consider plan policies and particular land use designations and to draft these policies with more precision, as contemplated by Rule 9J-5, Florida Administrative Code. Precision will enhance process stability and afford owners and lenders more predictability in regard to authorized use of property. Finally, precision and predictability will enable owners, courts, and government to better

define when a legitimate investment-backed expectation solidifies for purposes of vesting approved projects against changing restrictions and assessing legitimate constitutional taking claims. See Lucas v. South Carolina Coastal Council, ____ U.S. ____; 112 S.Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 852 (Brennan, J., dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987); Pennsylvania Central Trans. Co. v. City of New York, 438 U.S. 104 (1978). See also Rhodes, R. and Sellers, C., Vested Rights: Establishing Predictability in a Changing Regulatory System, 20 Stet. L. Rev. 475 (1990-91) n.7.

II. THE COURT IN SNYDER CORRECTLY HELD THAT ONCE A PROPERTY OWNER ESTABLISHES PRIMA FACIE ENTITLEMENT TO REZONING, THE LOCAL GOVERNMENT MUST REBUT THE ENTITLEMENT BY CLEAR AND CONVINCING EVIDENCE SHOWING THAT THE REZONING MUST BE DENIED DUE TO A SPECIFICALLY STATED PUBLIC NECESSITY.

A. The court in Snyder correctly assigned the respective burdens of proof applicable to rezoning challenges.

Issuance of a development order, such as a rezoning, implements a carefully made, thoroughly reviewed, definitive local policy decision. As such, development order decisions are the last step in the growth management process established under the Growth Management Act's statutory framework. Because of the detailed substantive and procedural requirements involved in the local planning process, once plan policies are established, they should provide stable, reliable polestars to direct local development.

To this end, the court in Snyder correctly stated the evidentiary burdens property owners and local governments should

meet in local rezoning consistency challenges. Snyder v. Board of County Commissioners, 595 So. 2d 65 (Fla. 5th DCA 1991). The Snyder test places on a landowner the initial burden of demonstrating consistency of a proposed rezoning with the local comprehensive plan. Thus, the landowner must show that the proposed use is compatible with and furthers the policies set forth in the local plan. Section 163.3194(3)(a), Fla. Stat. This requires a showing that the proposed use does not conflict with the local plan land use designation, and that it affirmatively takes action in the direction of realizing the plans goals and policies. See Section 163.3177(1)(a), Fla. Stat. This is no small burden, and Snyder establishes the type of evidence needed to make a prima facie demonstration of consistency: rezoning applications, planning and zoning staff reports, and records of proceedings before the government bodies reviewing and approving the request. Id. at 80. If the landowner meets this burden, a presumption of consistency, and, consequently, useability of the property for the proposed purpose attaches. This presumption must then be overcome by clear and convincing evidence adduced by the local government demonstrating a more restricted use of the property is justified by a specific public necessity. Id., at 81.

Amicus 1000 Friends of Florida suggests that City of Tampa v. Madison, 508 So. 2d 754 (Fla. 2d DCA 1987), requires that the burden be placed on the landowner in judicial review of rezoning denials to show the denial was inconsistent with the comprehensive plan and, further, that the requested rezoning was consistent.

(Brief of Amicus Curiae 1000 Friends of Florida, at 48). In response to these contentions, FHBA notes the court in Snyder does place the initial burden to prove consistency on the landowner/applicant and only after this burden is met does the burden shift. If an owner establishes his proposed use is consistent with the plan, denial of such use is inconsistent. Moreover, in City of Tampa, the court's holding was based on a determination that the rezoning determination was "fairly debatable" -- the very standard 1000 Friends appropriately argues is inapplicable to challenges of rezonings under the Growth Management Act.

Presumptions can be created by statute by the legislature, or can be created by courts when a social policy of the state is involved. See Insurance Co. of Pennsylvania v. Estate of Guzman, 421 So. 2d 597 (Fla. 4th DCA 1982); 23 Fla. Jur. 2d, Evidence and Witnesses §§80, 85 (1979); Furlow, Presumptions, 14 Admin. L. Rep. 4 (Oct. 1992). The Snyder court's burden of proof test is entirely consistent with case law recognizing the creation of presumptions when a social policy of the state is being implemented. As explained in Insurance Co. of Pennsylvania v. Estate of Guzman, in regard to presumptions implementing a social policy of the state, "when evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Id., quoting Caldwell v. Division of

Retirement, 372 So. 2d 438 (Fla. 1979). Certainly it can be argued that implementation of the Growth Management Act involves implementation of important social policies of the state. Indeed, the Act itself states express intent that "[t]hrough the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare . . . ." Section 163.3161(3), Fla. Stat. Moreover, as previously discussed, implementation of planning policies in a manner that preserves and protects local government comprehensive plan integrity while fostering regulatory predictability should be encouraged in this state.

In addition, the Snyder test, by placing the burden on government to justify a more restricted land use comports with long established case law which requires government in exercising police power to apply the least restrictive means to accomplish its purpose. Corneal v. State Plant Board, 95 So. 2d 1 (Fla. 1957). Interestingly, the 1992 Legislature invigorated this principle by requiring state agencies, in preparing economic impact statements for administrative rules to determine if less intrusive or costly methods exist for achieving the purpose of the proposed rule. Section 120.54(2)(c)6, Fla. Stat. Accordingly, the court's assignment in Snyder of the respective burdens of proof in rezoning challenges should be upheld.

B. The "clear and convincing evidence" standard is appropriate for local government inconsistency demonstrations in rezoning challenges.

Since development orders, including rezoning actions, implement and apply policy, neither the "fairly debatable" nor the "preponderance of the evidence" standards adequately protect local comprehensive plan integrity or private property rights.

Brevard County urges that the deferential "fairly debatable" standard should apply in rezoning decisions. Under this standard, it is incumbent upon the property owner to demonstrate not only consistency of the proposed rezoning with the local comprehensive plan, but also to show by some unspecified but sizeable quantum of evidence that the local government's rezoning decision essentially was groundless. Dade Savings & Loan Ass'n v. City of North Miami, 458 So. 2d 861 (Fla. 3d DCA 1984) (under fairly debatable review standard, if action is one where reasonable people could differ as to its propriety, the decision will not be disturbed by a reviewing court). The effect of this "hands off" standard is to uphold local government rezoning actions under almost any conceivable set of circumstances, if there is some debatable reason for the action. As noted, this "back to the future" standard, which was rejected in Machado, is inappropriate in local government development order actions under the Act, including rezonings, which involve specific, precise application of established, detailed land use policies to specific parcels of property under specific circumstances. Moreover, this highly deferential burden appears to ignore the clear, precise directive in the Growth Management Act that

development orders not only be compatible with but also further comprehensive plan policies. Section 163.3194(3)(a), Fla. Stat. The compatibility and furtherance standards obviously require rational, particular findings by a local government, and not merely some unexplained reason for decision making.

Nor will the "preponderance of the evidence" standard applicable in administrative proceedings adequately protect rezonings' precise, policy implementing function. Under this standard, the landowner would have the initial burden of demonstrating by competent substantial evidence that the proposed rezoning is consistent with the local comprehensive plan. The burden would then shift to the local government to adduce competent substantial evidence rebutting the landowner's consistency showing. Department of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). This standard is appropriate in de novo administrative proceedings in which the challenged agency action is the first application of government policy; however, it is not appropriate in development order proceedings that specifically implement and refine local planning and growth management policies established in the local land use plan and a locality's land development regulations. Rezoning, in effect, constitutes a "third level" consistency determination which should be overcome only upon local government showing of inconsistency by greater than a preponderance of the evidence.

C. Case law protecting private property rights recognizes the appropriateness of applying the clear and convincing standard to government actions that impinge on private property rights.

The U.S. Constitution, Articles V and XIV, and the Florida Constitution, article 1, section 1 recognize the right to acquire, possess, and protect property. Moreover, the most valuable aspect of property ownership is the right to use it. Lucas v. South Carolina Coastal Council, ____ U.S. ____; 112 S.Ct. 2886 (1992); Connecticut v. Doehr, 111 S.Ct. 2105, 2113 (1991). Nash-Tessler v. City of North Bay Village, 17 Fla. L. Weekly D2337 (Fla. 3d DCA 1992). In recognition of the constitutionally protected nature of private property rights and the reality that governmental action limiting or restricting the use of that property impinges on these rights, the court in Snyder required the local government -- only after a prima facie showing of plan consistency by the rezoning applicant -- to demonstrate by clear and convincing evidence that restriction or limitation of the proposed land use is necessary in light of a specific public necessity.

Despite DCA's hyperbolic characterization of the court's opinion in Snyder as an "insult" to local government and as "launch[ing] a revolutionary attack on local government police powers" (Brief of Amicus Curiae DCA, at 29), in fact, the opinion does not depart from established case law in Florida recognizing and protecting private property rights. For example, in Stokes v. City of Jacksonville, 276 So. 2d 200 (Fla. 1st DCA 1973), the court invalidated local government action denying rezoning of a parcel of

property from residential to commercial use, and stated

> [t]he constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power. The owner will not be required to sacrifice his rights absent local government demonstration of a substantial need for restrictions in the interest of public health, safety, morals, safety, or welfare.

Id. at 204 (emphasis added).

In Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), this Court recently held government to a clear and convincing evidence standard to justify substantial interference with private property rights in forfeiture proceedings. Id. at 967. And in In re Bryan, 550 So. 2d 447, 448 (Fla. 1989), this Court adopted the clear and convincing standard for deprivation of basic property rights in incompetency proceedings. Per these cases, the clear and convincing evidence standard is an appropriate burden for government to meet when it proposes to restrict one's right to use his private property. Thus, the court in Snyder correctly required the local government to demonstrate by clear and convincing evidence that the rezoning denial was necessary in light of a specific public necessity, and its holding should be upheld by this Court.

CONCLUSION

For the reasons set forth herein, Amicus Curiae Florida Homebuilders Association respectfully requests this Court to affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae has been furnished by Federal Express to Robert D. Guthrie, Jr., Esquire, and Eden Bentley, Esquire, Office of the County Attorney for Brevard County, 2725 St. Johns St., Melbourne, FL 32940; and Frank J. Griffith, Jr., Esquire, P.O. Drawer 6310-G, Titusville, FL 32782-6515; and by U.S. Mail to the following: Paul Gougleman, Esquire, and Maureen Matheson, Esquire, 1825 South Riverview Drive, Melbourne, FL 32901; Jane C. Hayman, Esquire, and Nancy Stuparich, Esquire, P.O. Box 1757, Tallahassee, FL 32302-1757; Jonathon Glogau, Esquire, and Denis Dean, Esquire, Office of the Attorney General, The Capitol Room 1502, Tallahassee, FL 32399-1050; John J. Copelan, Jr., Esquire, and Tracy Lautenschlager, Esquire, County Attorney's Office, 115 South Andrews Ave., Suite 423, Ft. Lauderdale, FL 33301; William J. Roberts, Esquire, 217 South Adams St., Tallahassee, FL 32302; Neal D. Bowen, Esquire, Office of the County Attorney for Osceola County, 17 South Vernon Avenue, Kissimmee, FL 34741; Karen Brodeen, Esquire, and David Russ, Esquire, Florida Department of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100; Richard J. Grosso, Esquire, 1000 Friends of Florida, P.O. Box 5948, Tallahassee, FL 32314; Thomas Pelham, Esquire, Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302; M. Stephen Turner, Esquire, Broad & Cassel, P.O. Box 11300, Tallahassee, FL 32302, this 10th day of November, 1992.

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