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IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, Petitioner, vs. JACK R. SNYDER and GAIL V. SNYDER, Respondents.	Supreme Court Case No. 79,720 Fifth District Court Of Appeal Case No. 90-1214

BRIEF PRO SE OF AMICUS CURIAE
THOMAS G. PELHAM IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE CASE

Amicus Thomas G. Pelham adopts the Respondent's Statement of the Case.

STATEMENT OF THE FACTS

The facts are adequately covered in the opinion of the Fifth District Court of Appeal.

PREFACE

The lower court is referred to either as the Fifth District Court of Appeal, the Fifth District, or the lower court.

Chapter 163, Florida Statutes, is sometimes referred to as the Florida Growth Management Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents issues which are critical to the future implementation and effective operation of Florida's growth management legislation. Florida has invested an enormous amount of time, resources, and political capital in the adoption of local government comprehensive plans to control and manage the state's future growth and development. These local plans have been adopted pursuant to state legislative mandate and in compliance with state standards and policies. Following adoption of a local comprehensive plan, local governments are required to make decisions affecting land use and development which are consistent

with their adopted local plans. The consistency requirement is the most important component of Florida's growth management process. Consequently, it is essential that the fundamental importance of the consistency requirement be understood by the Florida judiciary, and that appropriate standards of judicial review be applied to actions challenging the consistency of local actions with an adopted local comprehensive plan. The local comprehensive plan will have little meaning or effect if the courts fail to enforce effectively the consistency requirement.

Snyder v. Board of County Com'rs., 595 So.2d 65 (Fla. 5th DCA 1991) represents an attempt by one Florida appellate court to enforce the consistency requirement. The approach taken by the Fifth District Court of Appeal in Snyder has raised a number of interesting and controversial subsidiary issues: Is zoning a legislative or quasi-judicial act? Who has the burden of proving consistency with a local comprehensive plan? What is the appropriate mode of judicial review of consistency challenges--a petition for writ of certiorari or an original action in circuit court? As important as these questions are, they should not be allowed to overshadow the fundamental importance of the consistency requirement and the need for effective judicial enforcement.

This brief seeks to provide guidance to the court in the resolution of the issues presented by Snyder in a manner that is faithful to the statutory consistency requirement. Point I presents an historical overview of the local zoning process and discusses the origins and purpose of the consistency requirement.

Point II discusses two models of judicial review and enforcement of the consistency requirement. One model is that imposed upon local government by the Snyder court; the other is provided for in Fla. Stat. § 163.3215. Point III discusses the standard of review and procedural rules which should be applied in consistency challenges to zoning and other local development orders.

Historically, local governments' exercise of the zoning power has been unfettered by the constraints of statutory standards. Generally, beginning in the 1920's, state legislatures have conferred on local governments broad grants of power to protect the public health, safety, morals and general welfare through the exercise of the zoning power. Under these grants of zoning power, which were usually unattended by any meaningful statutory standards, local governments exercised broad discretion. Constrained only by constitutional limitations, the exercise of the zoning power was traditionally viewed by the courts as a legislative act to which great judicial deference should be accorded. Given virtually unlimited discretion in exercising the zoning power, local governments have, not surprisingly, abused the power.

Land use practitioners and scholars have long decried the excesses and abuses of the local zoning process. Consequently, in the 1950's reform advocates began to suggest the adoption of state standards and criteria to govern local exercise of the zoning power. One major reform proposal called for the adoption of a local comprehensive plan with which local zoning and other land use

decisions must be consistent. Thus, through the enactment of local comprehensive plans and the consistency requirement, reform advocates have sought to limit the discretion of local governments in exercising the police power to regulate land use and development.

Florida is in the forefront of this ongoing reform movement. Its growth management legislation is intended to alter dramatically the local planning and zoning process. Under this new regime, the local comprehensive plan is a significant limitation on the exercise of the zoning power by local governments. It replaces the local comprehensive zoning ordinance as the preeminent local legislative statement of land use policy. It is the conduit through which state standards and policies are brought to bear on local land use and development decisions. It is the paramount document for regulating land use and development, and local zoning and other land use actions must be consistent with the provisions of the local plan.

The fairly debatable rule traditionally applied by the courts in constitutional challenges to local land use decisions is not appropriate for judicial review of consistency challenges. To ensure that local zoning and other development decisions are consistent with the standards of an adopted local comprehensive plan, courts must closely scrutinize the local decision. Otherwise, if a local government is allowed to determine the consistency issue, subject only to the fairly debatable rule, local comprehensive plans will become virtually meaningless, and the

state legislature's effort to inject state standards and policies into the local land use decision making process will be thwarted.

Recognizing the greatly altered nature of the local "zoning game," and in an effort to give meaning to mandatory comprehensive planning and the consistency requirement, the Fifth District in Snyder imposed a new model of judicial review of local zoning actions. Essentially, the lower court characterized local zoning decisions as quasi-judicial actions which are subject to various procedural requirements, including compilation of a record and written findings of fact and an explanation of the decision. The court then logically concluded that such quasi-judicial decisions are subject to certiorari review in circuit court and will be given stricter scrutiny than that afforded by the traditional fairly debatable rule.

Although the model imposed by the Snyder court gives force and effect to the consistency requirement, it is inconsistent with the statutory cause of action afforded by Chapter 163, Florida Statutes and creates some serious administrative problems for local governments. Chapter 163 provides for an original de novo proceeding in circuit court to litigate the consistency issue. If in such proceedings, the local zoning decision is subjected to strict scrutiny based on substantial competent evidence adduced at the trial, then this proceeding also affords an effective means of enforcing the consistency requirement. Moreover, it avoids the burdensome administrative and procedural requirements placed on local governments by the Snyder decision. The Supreme Court should

hold that a Chapter 163 de novo proceeding in circuit court is the exclusive proceeding for determining the consistency of local zoning decisions with local comprehensive plans, that the local decision will be subject to strict scrutiny in such proceedings, and that an applicant has the burden of proving consistency by a preponderance of the evidence.

This Court should also clearly define the remedies which are available in a consistency challenge to local zoning or other land use and development decisions. If a court determines that a local decision approving a rezoning or other development order is inconsistent with the adopted local comprehensive plan, then the court should declare the action invalid. On the other hand, if the local action denies a rezoning or other development application which is consistent with the local comprehensive plan, then the court should remand with instructions that the local government grant the application or some lesser version of it which is consistent with the plan. The local government should not be allowed to totally reject an application which is found to be consistent with the local comprehensive plan unless it can be shown by clear and convincing evidence that denial is required by some overriding public necessity. On the other hand, contrary to the Snyder decision, a landowner should not necessarily be entitled to the maximum amount of development potentially permittable under a local comprehensive plan.

ARGUMENT

I. FLORIDA'S GROWTH MANAGEMENT ACT AND ITS CONSISTENCY REQUIREMENT LIMIT THE DISCRETION PREVIOUSLY ENJOYED BY LOCAL GOVERNMENTS IN THE EXERCISE OF THE ZONING POWER.

A. The Traditional Fairly Debatable Rule Was Devised By The Courts To Review The Constitutionality Of Local Zoning Actions Prior To The Advent Of Mandatory State Planning Requirements.

Historically, local governments exercised the zoning power pursuant to broad delegations of state legislative power subject only to constitutional limitations. The Standard State Zoning Enabling Act, on which most state zoning enabling legislation has been based, did not require prior adoption of a local comprehensive plan and did not set forth significant substantive standards controlling the exercise of the zoning power.[1] Consequently, in the exercise of the zoning power local governments have traditionally enjoyed very broad discretion, circumscribed only by such constitutional limitations as the due process, equal protection, and taking clauses. Unconstrained by any meaningful substantive state statutory standards, these local legislative zoning actions usually have been subjected only to very loose scrutiny by the courts.

Both federal and state courts adopted a highly deferential standard of judicial review very early in the history of local zoning. In 1926, in Village of Euclid v. Ambler Realty, 272 U.S. 365, the United States Supreme Court held that local zoning

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1 See T. Pelham, *STATE LAND USE PLANNING AND REGULATION* 146-47 (D.C. Heath 1979).

regulations would not be deemed violative of the due process and equal protection clauses unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Id. at 395. As stated by the Court, "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388. (Emphasis added.) Euclid's substantial relationship test and highly deferential fairly debatable rule became the standards applied by the federal and most state courts to local zoning decisions in the ensuing decades.[2] For example, the Florida Supreme Court adopted Euclid's substantial relationship test in State ex rel. Helseth v. DuBose, 99 Fla. 812, 128 So. 4, 6 (1930), and expressly applied the fairly debatable rule as early as 1941 in City of Miami Beach v. Ocean and Inland Co., 3 So.2d 364 (Fla. 1941).

Four important points need to be made about the fairly debatable rule. First, it was formulated and adopted by the judiciary. Second, it was originally developed and applied by the courts in determining the constitutionality of local zoning actions and not in determining compliance of local zoning with legislative standards. Third, it was adopted at a time when the nature of local land use regulation was dramatically different than it is today. State legislatures had not then imposed any mandatory planning requirements or substantive zoning criteria on local

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[2] Kayden, Land-Use Regulations, Rationality, and Judicial Review: The RSVP In The Nollan Invitation (Part I), 23 Urb. Law. 301, 302-309 (1991).

government. Fourth, the fairly debatable rule was adopted by the courts at a time when the local zoning code was the preeminent legislative policy statement concerning land use and development. As discussed below, under Florida's 1985 Growth Management Act, the local zoning code has been supplanted by the local comprehensive plan as the supreme statement of local legislative policy for land use and development.

B. The Fairly Debatable Rule And The Absence Of State Standards Resulted In A Highly Politicized Local Zoning Process.

Unfettered by meaningful state standards and inhibited only by the very loose scrutiny afforded by the fairly debatable rule, the local zoning system developed into a highly irrational and politicized process. Critics of the local zoning system have found it deficient in terms of both process and policy. In an early critique of the local zoning system, Richard Babcock, one of the nation's foremost land use practitioners, wrote that "[t]he running, ugly sore of zoning is the total failure of this system of law to develop a code of administrative ethics."[3] Subsequently, in his classic indictment of the local regulatory system, The Zoning Game, Babcock further exposed and deplored the procedural irrationality of, the lack of state standards for, and the influence of neighborhoodism and rank political influence on, the local decision-making process.[4] Other national land use scholars

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[3] Babcock, The Chaos of Zoning Administration, 12 Zoning Digest 1 (1960).

[4] R. Babcock, The Zoning Game (1966).

and commentators have continued to echo Babcock's criticism of the local zoning process. For example, Mandelker and Tarlock recently wrote that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without offsetting benefits."[5] Noting the increasing trend toward closer judicial scrutiny of local land use decisions, they suggest that state courts in particular now "are less willing to wink at what they perceive as a flawed political process."[6]

Similarly, the lower court in Snyder characterized the local zoning process as follows:

> . . . [R]ezoning is granted not solely on the basis of the land suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.
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> The legislative and executive are the political branches of government and the governmental zoning bodies exercising those functions have politicized the "rezoning" process by forming the issues and considering and determining them at public meetings to which nearby landowners are encouraged to appear and oppose requests for rezoning and the issue-forming, fact-finding and decision-making is conducted in a politicized forum and atmosphere rather than in a neutral forum by an independent deliberative body determining

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[5] See, e.g., Mandelker and Tarlock, Shifting The Presumption Of Constitutionality In Land Use Law, 24 Urban Lawyer 1 (1992).

[6] Id. at 3.

> facts in a detached manner and applying general legislative rules of law impartially to individual cases or specific instances.

595 So.2d at 73-74. (Citations omitted.)

Far from insulting local governments as some amici have suggested, the Snyder court has accurately portrayed the reality of the local zoning game as it has been frequently experienced and observed by many land use practitioners and scholars. Indeed, the Fifth District's description of the local zoning process is supported by the facts of this case. The petitioners applied for a rezoning of their property. Both the County planning staff and the County Planning and Zoning Board found that the application was consistent with the Brevard County Comprehensive Plan and the Planning Board recommended approval. Nevertheless, in the face of the opposition of neighboring landowners who attended the public hearing, the Board of County Commissioners denied the application without giving any reasons. Such conduct renders the local comprehensive plan meaningless.

C. The Abuses Of The Local Zoning Process Resulted In Various Reform Movements.

To reform the local land use decision-making process, some commentators have long urged that substantive standards for land use regulation should be established in the form of a legally binding comprehensive plan. Foremost among the proponents of this approach was Harvard Law Professor Charles Haar whose influential

and widely cited article In Accordance With The Comprehensive Plan,[7] strongly advocated such a requirement. According to Haar, requiring local land use regulations to be consistent with a legally binding comprehensive plan would serve several salutary purposes. First, it would serve as a constant reminder to local legislatures of long-term goals. Second, it would counteract pressures from citizens and landowners for preferential treatment. Third, it would provide courts with a meaningful standard of review.[8] In a subsequent article, Haar contended that a mandatory local plan would also provide landowners and developers with certainty and predictability as to the uses which they could make of their land.[9] To achieve these purposes, Haar recommended revision of state enabling acts to require that zoning be in accordance with a separately prepared and adopted comprehensive plan.[10]

Richard Babcock, a nationally prominent land use lawyer, was another leading proponent of reform. In The Zoning Game Babcock called for increased state control of the local zoning system and advocated three major reforms: (1) statutorily mandated administrative procedures to be followed at the local level; (2)

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7 Haar, In Accordance With The Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955).

8 Id. at 1174.

9 Haar, The Master Plan: An Impermanent Constitution, 20 Law and Cont. Prob. 353, 362-63 (1955). Haar stated that the master plan would be "an intelligent prophesy as to the probable reaction of the local authorities to a given proposal for development." Id. at 363.

10 Haar, supra note 1, at 1157, 1174.

statutory prescription of the major substantive criteria by which local land use decisions are made; and (3) establishment of a statewide administrative agency to review the decisions of local governments in land use matters, with final appeal to an appellate court.[11]

Reflecting the increasing calls for state legislative reform, the American Law Institute undertook a critical reexamination of the Standard State Zoning Enabling Act, the Standard City Planning Enabling Act, and the state enabling legislation that they had inspired. This reform project culminated in the adoption of the Model Land Development Code (Model Code) in 1975.[12] In addition to providing for procedural and planning reforms at the local level, the Model Code, in Article 7, called for increased state participation in land use decision making for developments of regional impact and areas of critical state concern.[13]

These various reform proposals resulting in a spate of state land use legislation. Commencing in the 1960's and continuing to the present time, numerous states have adopted legislation to reform the local land use decision making process.[14] Florida has been a leader among the states in this national reform movement. It was the first state to adopt Article 7 of the Model Code (See

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11 R. Babcock, The Zoning Game, 153-54 (1966).

12 American Law Institute, A Model Land Development Code, (1975).

13 Id.

14 See F. Bosselman and D. Callies, The Quiet Revolution In Land Use Control (1971); T. Pelham, State Land Use Planning And Regulation (1979); and J. DeGrove, Land Growth And Politics (1984).

Chapter 380, Florida Statutes),[15] and its 1985 Growth Management Act is the nation's most ambitious and comprehensive planning legislation.

In some states, where state legislatures had not responded to the need for reform, the judiciary played a leadership role. The leading example of judicially-mandated reform is the Oregon Supreme Court's decision in Fasano v. Board of County Commissioners, 507 P.2d 23 (Ore. 1973) (en banc), which was heavily relied upon by the lower court in this case. In Fasano the Oregon Supreme Court relied upon a provision in that state's traditional zoning and planning enabling act that zoning be in accordance with a comprehensive plan. Citing this requirement, the Fasano court held that the comprehensive plan was the principal legislative policy statement, that the zoning of property involved the application of that legislative policy to a specific application, and that therefore zoning decisions should be viewed as quasi-judicial rather than legislative acts. Accordingly, in Fasano the Oregon Supreme Court imposed new procedural requirements on local governments and held that such local zoning decisions would be subjected to much stricter scrutiny than was afforded by the fairly debatable rule. As the Fifth District Court of Appeals pointed out in its decision in this case, a number of other state supreme courts have adopted the Fasano approach. 595 So.2d at 77-78.

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15 T. Pelham, State Land Use Planning And Regulation 5 (1979).

D. Florida's Growth Management Act Is Intended To Reform The Local Land Use Regulatory Process.

In Florida the state legislature has taken the lead in reforming local government land use decision-making. The 1985 Growth Management Act dramatically changes the traditional local regulatory process.[16] It makes the local comprehensive plan the preeminent legislative statement of policy which governs land use decisions. The adopted local plan must include "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the local government's jurisdictional area. Fla. Stat. § 163.3167(1). At a minimum, the local plan must include elements covering future land use, capital improvements generally, and sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer protection specifically; conservation; recreation and open space; housing, traffic circulation; intergovernmental coordination; coastal management (for local governments in the coastal zone); and mass transit (for local jurisdictions with 50,000 or more people). Id. § 163.3177(6).

Of special relevance to local rezoning actions, the future land use plan element of the local plan must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate

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16 For discussion and analysis of this legislation, see Pelham, Adequate Public Facilities Requirements: Reflections On Florida's Concurrency System For Managing Growth, 19 Fla. S. Univ. L. Rev. 973 (1992); Pelham et al., Managing Florida's Growth: Toward An Integrated State, Regional, And Local Comprehensive Planning Process, 13 Fla. S. Univ. L. Rev. 515 (1985).

the "proposed future general distribution, location, and extent of the uses of land" for various purposes. Id. § 163.3177(6)(a). It must also include standards to be utilized in the control and distribution of densities and intensities of development. The future land use plan must be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land. Id. § 163.3177(6)(a).

Following its adoption, the local plan replaces the old comprehensive zoning ordinance as the preeminent instrument for regulating land use in Florida. The local plan must be implemented through the adoption of land development regulations that are consistent with the plan. Id. § 163.3202. In addition, all development, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. Id. § 163.3194(1)(a).

The consistency requirement for land development regulations and orders is designed to ensure that the goals, policies and objectives of the local plan are implemented. Fla. Stat. § 163.3194(3) defines consistency as follows:

> (a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities, or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

> (b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

Through the consistency requirement, the Florida Growth Management Act establishes the goals, objectives and policies of the local comprehensive plan as the controlling standards for local zoning and other land use and development decisions.

However, the local plan is much more than the local government's primary legislative statement of land use policy; it is also the document through which state standards and policies are translated into action at the local level. The Florida Legislature has established state standards and policies regarding land use and development in at least three different ways. First, the State Comprehensive Plan, which is found in Chapter 187, Florida Statutes, establishes long-range policy guidance through its goals and policies for such important issues as housing, water resources, coastal and marine resources, natural systems and recreational lands, air quality, land use, transportation, and public facilities. Second, Chapter 163, Florida Statutes, contains the specific planning requirements which must be met by every local government in the state. Among other things, this statute establishes the general standards for the various elements of the local comprehensive plan. Third, the Legislature has approved Chapter 9J-5, Florida Administrative Code (F.A.C.), except to the

extent that it may conflict with Chapter 163. See Fla. Stat. § 163.3177(10)(d)(c). Chapter 9J-5, F.A.C., sets forth detailed minimum criteria for the preparation of local comprehensive plans. Each local comprehensive plan must be consistent with the State Comprehensive Plan, Chapter 187, Florida Statutes, Chapter 163, Florida Statutes, and Chapter 9J-5, F.A.C. Id. § 163.3184(1)(b).

To ensure that these state standards and policies are adopted at the local level, the Florida Growth Management Act requires that each proposed local comprehensive plan and plan amendment be reviewed and approved by the Florida Department of Community Affairs. The Department reviews each proposed local plan and plan amendment and submits objections, recommendations, and comments to the local government concerning the compliance of the proposed plan or plan amendment with state requirements. Following the adoption of each local plan or plan amendment, the Department again reviews the adopted plan or plan amendment to determine whether it complies with the State Comprehensive Plan, Chapter 163, and Chapter 9J-5. Id. § 163.3184. Ultimately, if a local plan or plan amendment is found by the Department to be not in compliance with those state requirements, the Administration Commission, if it concurs in this finding, may impose sanctions on the local government for its noncompliance. Id. § 163.3184(11).

The Legislature also sought to ensure that local governments would adopt land development regulations and development orders consistent with the state and local policies contained in the adopted local plan. Fla. Stat. § 163.3202 requires each local

government to adopt implementing land development regulations that are consistent with its local plan. If a local government fails to adopt such regulations, the Department is empowered to seek a court injunction to compel their adoption. Id. § 163.3202(4). If a local government adopts land development regulations that are inconsistent with the local plan, a substantially affected citizen may challenge the regulations for inconsistency with the local plan in a state administrative hearing following a preliminary consistency determination by the Department. Id. § 163.3213.

With regard to local development orders, which are defined to include a rezoning, Id. §§ 163.3164(6) and (7); 163.3215(1), the Growth Management Act does not provide for administrative review by the Department, an administrative hearing officer, or the Administration Commission. Instead a citizen with standing may seek judicial review of local development orders alleged to be inconsistent with local plans. Id. § 163.3215(1).

The Florida judiciary must be diligent in enforcing the reforms mandated by the Florida Legislature in the 1985 Growth Management Act. In deciding consistency challenges brought pursuant to Fla. Stat. § 163.3215(1), the courts must recognize that these local development orders, including rezonings, are no longer mere local legislative acts which reflect only local policy determinations. Instead they are supposed to reflect the state standards and policies contained in state-approved local comprehensive plans. Accordingly, the judicial deference shown by

the fairly debatable rule is not appropriate when these local development orders are reviewed for consistency with local plans.

II. AN ORIGINAL DE NOVO ACTION IN CIRCUIT COURT IS THE APPROPRIATE AND EXCLUSIVE MEANS OF CHALLENGING LOCAL CONSISTENCY DETERMINATIONS UNDER FLORIDA'S GROWTH MANAGEMENT ACT.

A consistency determination differs significantly from the traditional zoning decisions made by local governments. The issue is whether a proposed rezoning or other development order is consistent with the standards and policies contained within the adopted local comprehensive plan. It involves a comparison of the proposal with the future land use map and the many goals, objectives, and policies contained in the various elements of the adopted local plan. In other words, the decision-making process is somewhat similar to that by which state environmental agencies make permitting decisions pursuant to criteria contained in statutes or agency rules. The ultimate issue is whether a given rezoning or other application for development approval conforms with the various standards and policies in the adopted local plan. If local plans are to achieve their purposes, local development orders challenged on consistency grounds must be subject to closer scrutiny than is afforded by the deferential fairly debatable rule.

Unfortunately, local legislative proceedings usually do not produce the kind of record which is susceptible to more stringent standards of judicial review.[17] The differences in judicial

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[17] As the First District Court of Appeal accurately observed in Leon County v. Parker, 566 So.2d 1315, 1317 (Fla. 1st DCA 1990), "A local government body, such as a county commission, often proceeds in an informal, free-form

review of records compiled in legislative proceedings and those compiled in quasi-judicial hearings have been pointed out by the courts in the context of administrative rulemaking proceedings conducted pursuant to Chapter 120, Florida Statutes. For example, in Adam Smith Enterprises, Inc. v. Dept. of Environmental Regulation, 553 So.2d 1260 (Fla. 1st DCA 1989), the First District Court of Appeal held that a different and less stringent standard of judicial review applies to a direct appeal from an adopted agency rule arising out of informal, quasi-legislative rulemaking hearings under Fla. Stat. § 120.54(3) than in an appeal from a hearing officer's final order following a formal, quasi-judicial hearing in a § 120.54(4) or § 120.56 rule challenge proceeding. 553 So.2d at 1269. The reason for the different standard, according to the court, is that legislative-type proceedings do not produce records that lend themselves to a judicial weighing of evidence:

> The record in informal rulemaking often contains generalized rather than specific information, evidence that is untested by cross-examination, and conclusory information based upon data submitted by interested parties. . . . Naturally an informal record of this sort cannot be reviewed in quite the same way as a formal adjudicatory record in which the issues are refined and the positions of the parties clearly delineated.

553 So.2d 1271. (Citations omitted.)

If there is to be meaningful judicial review of local consistency determinations, some means of compiling an acceptable

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manner."

record must be devised. Such determinations are typically made in local, legislative-type hearings which do not produce a formal adjudicatory record. The approach taken by the Fifth District Court of Appeal provides one model for compiling an adequate record; requiring the local government to conduct a quasi-judicial type hearing ensures a record which can be judicially reviewed. But this approach also has certain undesirable consequences for local government. A second model is provided for in Chapter 163, Florida Statutes: an original de novo trial in circuit court. This proceeding provides adequate procedural protections for affected landowners and produces a formal evidentiary record which the circuit court and ultimately appellate courts can scrutinize to determine the consistency issue. It also has the advantage of avoiding some of the onerous consequences of Snyder about which local governments are complaining so loudly in this case.

A. The Lower Court's Characterization Of Local Zoning Decisions As Quasi-Judicial Does Assure More Effective Judicial Review But Also Creates Unnecessary Hardships For Both Local Governments And Land Owners.

Recognizing the dramatic change in the nature of local land use regulation under Florida's Growth Management Act and the limitations of traditional judicial review under the fairly debatable rule, 595 So.2d at 74-76, the Fifth District reasoned that local rezonings should no longer be viewed as legislative acts. Rather, they are quasi-judicial in character and therefore no longer entitled to the judicial deference afforded by the fairly debatable rule. This approach has merit because under Florida's

Growth Management Act local governments now determine the rights of the applicant by applying the legislatively adopted standards and criteria in the local comprehensive plan to a specific zoning or development proposal.

The Snyder court imposed procedural requirements on the local government which are similar to those which ordinarily prevail in quasi-judicial type proceedings. First, the court held that an applicant for a rezoning or other development order has the initial burden of presenting a prima facie case establishing that the application is consistent with the comprehensive plan. Second, the court held that the burden is on the local zoning agency to assure that an adequate record of the evidence is prepared, including the applicant's prima facie case and other relevant evidence such as the report of the local planning staff and the minutes of any hearing before the local planning board. Third, the local zoning agency is required to give written reasons for its action and make written, detailed findings of fact so that a reviewing court can determine the legal sufficiency of the evidence supporting the findings of fact and the reasons given for the decision. In other words, the court imposed requirements similar to those that usually govern quasi-judicial proceedings.

This approach is consistent with the line of cases from other jurisdictions in which courts have characterized rezonings as quasi-judicial and therefore subject to stricter scrutiny. Indeed, the lower court relied heavily on Fasano v. Board of County Commissioners, 507 P.2d 23 (Ore. 1973) (en banc), the most famous

and frequently cited case standing for this proposition. Although the Fifth District's adoption of the Fasano approach would have been eminently sensible at an earlier stage in the development of Florida's regulatory process, it needs to be carefully re-evaluated in view of Florida's Growth Management Act and related legislation.

Adoption of the Fasano approach has two significant problems, one practical and one legal. Practically, imposition of the Fasano requirements on local governments will cause great hardship for local governments and citizens. Under this approach, every local decision concerning a rezoning or other development order will have to be made in accordance with the procedures prescribed for a quasi-judicial proceeding. No matter how small, insignificant or noncontroversial a particular application may be, the local government must nevertheless compile a record and formulate written findings of fact and explanations for its decision in the event the decision is subject to judicial challenge. This will be a very difficult undertaking for many of Florida's smaller local governments.

The impact on local government would be similar to the effect which imposition of a substantial competent evidence standard on quasi-legislative rulemaking proceedings would have on state administrative agencies. As described in Adam Smith Enterprises, Inc. v. Dept. of Environmental Regulation, 553 So.2d at 1272 n. 16:

> To impose a competent substantial evidence standard of review on agency rulemaking would force rulemakers to adopt more formal, rigid trial-like procedures in an attempt to make an adequate record capable of judicial review. A general paralysis of administration would

> result, and rulemaking would lose most of its peculiar advantages as a tool of administrative policy making. Trial-like adjudication would be extremely costly in time, staff and money.

In addition, applicants and other citizens may find it necessary to employ attorneys or other consultants in order to participate effectively in a quasi-judicial as opposed to a legislative-type proceeding.

Legally, the difficulty with the Fifth District's decision is that it is inconsistent with the judicial review provisions of the Growth Management Act itself. Section 163.3215(1), Florida Statutes (1991) provides an alternative method for judicially challenging local actions for inconsistency with the local comprehensive plan. Although the Fifth District cited this provision, 595 So.2d at 76, it failed to fully consider the statutory provision in reaching its decision.

B. The Florida Growth Management Act's Provision For A De Novo Proceeding In Circuit Court Provides An Alternative Mode Of Judicial Review Which Avoids The Practical Problems Of The Fasano Model For Local Governments.

The Florida Legislature has enacted a comprehensive scheme for challenging the consistency of development orders with local comprehensive plans. Fla. Stat. § 163.3215(1) provides as follows:

> Any aggrieved or adversely affected party may maintain an action for injunction or other relief against any local government to prevent such local government from taking any action on a development order, as defined in Section

> 163.3164,[18] which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part. (Footnote added.)

This provision clearly contemplates an original de novo proceeding, rather than certiorari review of the local government's record, in the circuit courts.

There is an important condition precedent to the institution of an original action in circuit court to challenge the consistency of development orders. Fla. Stat. § 163.3215(4) requires a complaining party to first file a verified complaint with the local government within thirty days after the local government takes the alleged inconsistent action. This complaint must explain why the local government's action is inconsistent with its comprehensive plan. The local government then has thirty days within which to respond to the complaint. The complaining party must then institute its suit in circuit court no later than thirty days after the expiration of the thirty-day period in which the local government is required to respond.

As one Florida court has recognized, this prerequisite to legal action serves the salutary purpose of allowing the local

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[18] § 163.3164 defines "development order" as follows:

> (6) "Development order" means any order granting, denying, or granting with conditions a development permit.
>
> (7) "Development permit" includes 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. (Emphasis added.)

government to consider the complaint and possibly correct its action so that litigation will be unnecessary. Leon County v. Parker, 566 So.2d 1315, 1317 (Fla. 1st DCA 1990). Failure to comply with this condition precedent will result in the dismissal of an action challenging the consistency of local development orders. Emerald Acres Investment v. Board of County Commissioners, 601 So.2d 577 (Fla. 1st DCA 1992); Jensen Beach Land Company, Inc. v. Citizens for Responsible Growth of the Treasure Coast, Inc., 17 FLW 2410 (Fla. 4th DCA, October 21, 1992).

Section 163.3215(b) provides that the circuit court proceeding is the exclusive method for challenging the consistency of local development orders:

> Suit under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part.

The Fifth District's decision, which provides for certiorari review of a record compiled at the local level in accordance with the court's directions, is inconsistent with this statutory provision. As the First District Court of Appeals has held, a petition for writ of certiorari is not the appropriate means of challenging local zoning decisions on consistency grounds. Rather § 163.3215(b) provides the exclusive method for bringing a consistency challenge. Emerald Isles Investment, Inc. v. Board of County Commissioners, 601 So.2d 577 (Fla. 1st DCA 1992). This Court should affirm the First District's decision in Emerald Isles and hold that Fla. Stat. § 163.3213 does provide the exclusive method for challenging the consistency of local development orders

with local comprehensive plans as intended by the Florida Legislature.[19]

The statutory provision for an original circuit court proceeding has several advantages over the model of judicial review established by the Fifth District in this case. First, it avoids the "labels game" engaged in by the Fifth District. (Because it labeled the rezoning action as quasi-judicial rather than legislative, the Fifth District required local governments to follow quasi-judicial type procedures in making zoning decisions.)

Second, the statutory proceeding avoids the imposition on local governments of the onerous requirements of conducting quasi-judicial type proceedings in every zoning or other action involving development orders at the local level. A legislative action at the local level could still be subject to strict scrutiny in an original de novo circuit court suit. As Judge Sharp stated in her dissent in Gilmore v. Hernando County, 584 So.2d 27, 34 (Fla. 5th DCA 1991):

> [w]hen such a consistency challenge is made in the circuit court, it should conduct a full hearing on the issues, hear expert witnesses, and consider the various interpretations of

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[19] In both Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990) cert. pending on certified question, 601 So.2d 577 (Fla. 1st DCA 1992) and Emerald Acres Investments, Inc. v. Board of County Commissioners, 601 So.2d 577, (Fla. 1st DCA 1992), cert. pending on certified question, 17 F.L.W. 1688, (Fla. 1st DCA, July 17, 1992), the First District Court of Appeal has certified the following question as one of great public importance to the Florida Supreme Court:

> Whether the right to petition for common law certiorari in the circuit courts of the state is still available to a landowner/petitioner who seeks appellate review of a local government development order finding comprehensive plan inconsistency, notwithstanding Sec. 163.3215, Fla. Stat. (1989).

> the comprehensive plan, where, as here, the Plan is not clear and unambiguous. This procedure contrasts with the older method of review, essentially by a writ of certiorari, where the trial court only reviews the record created by the zoning bodies. When faced with a consistency challenge, the circuit court should create and establish a new record. The trial court should hold a full hearing.

Third, it avoids the implications of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991) which imposed new rules regarding ex parte communications in quasi-judicial proceedings at the local level. Local government officials and local citizens are concerned that citizens will no longer be able to communicate freely with local legislators about the merits of rezoning applications. However, if rezoning decisions are legislative acts, then arguably the Jennings restrictions do not apply.

By providing for an original de novo action in circuit court, Fla. Stat. § 163.3215 avoids a dramatic alteration of local zoning hearings and all of the consequences that flow from that change while at the same time providing a judicial forum for determining whether a local action is consistent with the local comprehensive plan. Accordingly, for these pragmatic considerations as well as because the legislature has prescribed the exclusive form of judicial review, this Court should reject the Fifth District's approach in favor of the de novo circuit court proceeding established in Fla. Stat. § 163.3215.

If this court concurs with the lower court's quasi-judicial characterization of local rezoning decisions and with the resulting requirements to compile a record and render a written explanation

of its decision, this approach can be reconciled with the statutory provision for an original de novo trial in circuit court. The record of the local proceedings could be introduced into evidence as a part of the record in the trial court proceeding, but the parties would have the right to supplement the record with additional evidence. The trial court would then render a final order on the consistency issue based on a consideration and weighing of all the evidence, including the record of the local proceedings. This approach is suggested by the dissenting opinion in Gregory v. City of Alachua, 553 So.2d 206, 211 (Fla. 1st DCA 1989):

> I find the above quoted language in the statute [Fla. Stat. § 163.3215], upon which the complaint was expressly based, provides only for a suit or action clearly contemplating an evidentiary hearing before the court to determine the consistency issue on its merits in light of the proceedings below but not confined to matters of record in such proceedings. (Emphasis added.)

III. THE COURTS MUST SUBJECT LOCAL CONSISTENCY DETERMINATIONS TO MUCH STRICTER SCRUTINY THAN IS AFFORDED BY THE FAIRLY DEBATABLE RULE IF LOCAL COMPREHENSIVE PLANS ARE TO ACHIEVE THEIR PURPOSES.

Application of the fairly debatable rule will not provide effective enforcement of the consistency requirement. In City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1953), the Florida Supreme Court defined the fairly debatable rule in the following manner:

> A zoning ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on the grounds that it

> makes sense or points to a logical deduction that in no way involves its constitutional validity, and if it is fairly debatable then the court should not substitute its judgment for that of the city council or other zoning board.

Under this standard, all but the most egregious local actions would be found consistent with the local comprehensive plan because most actions would be at least arguable or debatable. If the goals, objectives and policies of a local comprehensive plan, which are based on state planning criteria, are to be enforced, a stricter standard of review must be applied by the courts. A stricter standard should be applied in a consistency challenge brought pursuant to Fla. Stat. § 163.3215 even if the local rezoning or other action is deemed to be legislative in nature.

Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1987) recognized that Florida's Growth Management Act, and particularly the definition of consistency found in Fla. Stat. § 163.3194, dictates a much stricter standard of review when local zoning actions are challenged on consistency grounds. According to the Machado court, this legislation implies

> that application of a fairly debatable, or for that matter any other deferential or discretionary standard, is not the correct standard of review of an administrative determination that a development order is consistent with the local comprehensive plan.

519 So.2d at 629. Accordingly, the Machado court adopted the following standard of strict scrutiny which had been enunciated in Judge Cowert's concurring opinion in City of Cape Canaveral v. Mosher, 467 So.2d 468, 471 (Fla. 5th DCA 1985):

> The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified, by the norm, it is "consistent" with it but if the compared item deviates or departs in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.

It should be noted that Machado applied the strict scrutiny standard even though it did not characterize local rezoning decisions as quasi-judicial in nature.

The strict scrutiny standard was explained in somewhat different terms in B. B. McCormick and Sons v. Jacksonville, 559 So.2d 252 (Fla. 1st DCA 1990) as follows:

> It is well-established that the construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight and should be upheld unless clearly unauthorized or erroneous. In the instant case, however, the explanation of the local body should not simply be excepted at face value. It should instead be carefully examined in light of the language of the plan with regard to whether the local government's rationale can be reconciled with the provisions of the plan. (Emphasis added.)

The Fifth District Court in Snyder correctly adopted and applied the strict scrutiny standard set forth in Machado and followed by several other lower appellate courts in Florida. This Court should also adopt and mandate that the strict scrutiny standard be applied to consistency challenges brought pursuant to Fla. Stat. § 163.3215.

Abandonment of the fairly debatable rule in the judicial review of consistency challenges does not mean that this deferential rule should not be applied to other kinds of challenges. Constitutional challenges to local zoning actions can still be measured under the deferential fairly debatable rule. In addition constitutional and other type challenges could be joined with a consistency challenge pursuant to Fla. Stat. § 163.3215 as separate counts or they could be maintained in separate actions. This "two-tier" standard of review will protect the strong public and governmental interest in achieving the purposes of mandatory local comprehensive plans while preserving a large measure of discretion to local governments in the constitutional realm.

The lower court has appropriately placed the burden of proof on the party seeking a rezoning change or other development order. 595 So.2d at 81. After the applicant has made a prima facie showing that its proposal is consistent with the local plan, the burden of going forward with evidence to establish inconsistency then should shift to the local government or the citizen challenger. In accordance with well-established rules, the ultimate burden of persuasion rests upon the party asserting the affirmative, i.e., the application is consistent, but the burden of going forward with evidence may shift back and forth throughout the proceeding. All questions of fact must be determined by substantial competent evidence and the appropriate measure of proof should be the preponderance of the evidence rule. See Florida Department of Transportation v. J. W. C. Company, Inc., 396 So.2d

778 (Fla. 1st DCA 1981). In this regard the lower court erred in holding that after the applicant establishes a prima facie case of consistency, the local government must then prove "by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use." 595 So.2d at 65. Instead, after a prima facie case has been made, the burden of coming forward with evidence to show that an application is inconsistent shifts to the local government or the citizen challenger.

Another aspect of the Snyder decision is also erroneous and should be rejected. The lower court holds in effect that a local government must approve an application for the maximum amount of development potentially permittable under the local comprehensive plan so long as the application meets the consistency requirement. However, local comprehensive plans frequently provide only for a maximum limit on development or for a range of development densities and intensities within each land use classification as well as many other textual goals and policies. An application for a development order which falls below the maximum or anywhere within the designated range, whether at the lower or higher end, may be consistent with the plan.

A local decision which grants the applicant some development within the range provided in the plan should not be deemed inconsistent simply because it does not approve the maximum amount of development allowed by the plan. As long as the local government has approved a development order which allows some

development, consistent with the local plan, the local government should have some discretion in deciding that the maximum allowable development intensity should not be allowed. As City of Jacksonville Beach v. Grubbs, 461 So.2d 160, 162-163 (Fla. 1st DCA 1984) recognized, in quoting with approval the opinion of the Oregon Court of Appeals in Marracci v. City of Scappoose, 552 P.2d 552, 553 (1976),

> [A] comprehensive plan only establishes a long range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan. . . .

In such cases, so long as the local decision, as measured by the strict scrutiny standard, is consistent with the plan, local government should be allowed to grant approval for less than the maximum limit set by the plan. Further, in such circumstances, the local decision to approve a more limited application than that filed by the applicant could be subject only to the fairly debatable rule without doing serious harm to the consistency requirement.

CONCLUSION

Florida's Growth Management Act and its consistency requirement were intended to alter the local land use regulatory process. If the purposes of this legislation is to be achieved, the Florida judiciary must effectively enforce the consistency requirement. Fla. Stat. § 163.3215 provides an original de novo

circuit court action as the exclusive means of judicially challenging local consistency determinations. Accordingly, this Court should hold that such local consistency determinations are not reviewable by a petition for writ of certiorari and can only be reviewed by the courts in actions filed pursuant to § 163.3215.

The traditional fairly debatable rule is not appropriate for the judicial review of local consistency determinations. This Court should hold that in consistency challenges pursuant to § 163.3215 reviewing courts should strictly scrutinize the local decision for consistency with the local comprehensive plan. Further, this Court should hold that the burden is on an applicant for a rezoning or other local development order to establish by a preponderance of the substantial competent evidence that its application is consistent with the local comprehensive plan. If a local government wishes to grant a lesser or more limited application than that sought by the applicant, the local government should have the discretion to take such action so long as it is otherwise consistent with the local comprehensive plan as determined under the strict scrutiny standard. The decision to grant a lesser application which is nevertheless consistent with the local comprehensive plan could be subject only to the fairly debatable rule without doing great harm to the consistency requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by overnight delivery to Robert D. Guthrie, Jr., Esq., and Eden Bentley, Esq., Office of the County Attorney, Brevard County, 2725 St. Johns Street, Melbourne, Florida 32940 and by United States Mail to the persons listed below this 12th day of November, 1992.

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