IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, Petitioner, vs. JACK R. SNYDER, Respondents.	)	Case No. 79,720 DISTRICT COURT OF APPEAL FIFTH DISTRICT No. 90-1214

AMICUS CURIAE FLORIDA LEAGUE OF CITIES, INC. BRIEF IN SUPPORT OF PETITIONER BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA

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STATEMENT OF THE CASE

Amicus, FLORIDA LEAGUE OF CITIES, INC., (Amicus League) adopts the Statement of Case as it appears in the Initial Brief of Petitioner, BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY.

STATEMENT OF THE FACTS

Amicus League adopts the Statement of the Facts as it appears in the Initial Brief of Petitioner, BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY.

SUMMARY OF ARGUMENT

The primary issue presented to this Court in Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991) is whether a rezoning is a legislative or quasi-judicial act. At risk, is the fundamental relationship between local government and its people. Id. at 68.

Amicus League believes that the role and responsibilities of local governments in rezoning actions is now and has always been legislative in nature based on this Court's decision in Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959). Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983); Gulf & Eastern Development Co. v. City of Ft. Lauderdale, 354 So.2d 57 (Fla. 1978). As this Court stated in Schauer, "[i]t is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment [rezoning] of it was of different character." Schauer at 839.

Should this Court now decide to re-characterize the nature of all rezonings as quasi-judicial rather than legislative acts, it will with the stroke of a pen drastically abrogate common law zoning principles, which are fundamental and date back to Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Amicus League asserts that the legislative nature of a rezoning action was not changed by passage of the Local Government Comprehensive Planning Act and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes (1991), as amended by Chapter 92-129, Laws of Florida (the "Growth Management

Act"). The Growth Management Act is not zoning legislation and is instead intended to provide the principles to guide future growth.

While the Growth Management Act mandated local governments to comply with its provisions, it allowed local governments to continue to exercise their discretion in rezoning actions. If the legislature had intended to abolish traditional rezoning challenges, it would have so stated by changing land use law principles as the legislature chose to do on the issue of standing. The Growth Management Act is silent concerning the appropriate standard of review in consistency challenges.

In response to the mandates of the Growth Management Act, some local governments modified existing zoning codes and land use decision-making proceedings to comply with the Growth Management Act. Thus the diversity that existed among local governments' in rezoning actions remained. Therefore, Amicus League submits to this Court that the Fifth District Court of Appeal erred when it rendered a broad uniform holding and failed to recognize variations among local government land use decision-making in Florida.

The correctness of citizen input is not judged in a legislative forum, such as a rezoning proceeding. In legislative decisions, local governing bodies must exercise their discretion and choose between "right v. right" policy questions. When a local government addresses "right v. wrong" decisions to implement a previously determined, nondiscretionary land use policy, it is performing a quasi-judicial function.

In contrast to its role in legislative proceedings, the role

of the public has been curtailed in quasi-judicial actions. Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. denied, 598 So.2d 175 (Fla. 1992). This court should not allow Snyder to now curtail public input and participation in rezoning actions, which have been historically viewed as legislative in nature.

ARGUMENT

ISSUE I. THE FIFTH DISTRICT COURT OF APPEAL IN SNYDER v. BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, 595 So.2d 65 (Fla. 5th DCA 1991), ERRED WHEN IT HELD THAT ALL GOVERNMENTAL ACTION, INCLUDING A REZONING, SUBSEQUENT TO ADOPTION OF A LOCAL GOVERNMENT COMPREHENSIVE PLAN DOES NOT CONSTITUTE LEGISLATIVE ACTION.

What is Snyder? Amicus League strongly asserts that Snyder is a rezoning case. Snyder is not a consistency challenge to a local government comprehensive plan adopted pursuant to Chapter 163, Florida Statutes (1991). Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65, 68, 79 (Fla. 5th DCA 1991). Although Petitioners in Snyder argued that the reason their rezoning request should be granted was because it was consistent with the Brevard County comprehensive plan, petitioners, however, failed to raise section 163.3215, Florida Statutes (1991) as the basis for their challenge. Paragraph (3)(b) of section 163.3215 provides that:

> 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.

Amicus League submits that the Snyder court reviewed the issue before it differently and identified the issue in this case as follows:

> [T]he essential issue in this case is whether the decision by the County Commissioners to deny the landowner's rezoning request in this instance was a legislative act to which under the constitutional separation of powers doctrine, the judiciary must give a deferential standard of review and uphold if fairly debatable. [footnote omitted.] Snyder

at 68-69.

The Snyder court held that all governmental action, including the rezoning before it, was quasi-judicial in nature and does not constitute legislative action requiring deferential judicial review. Snyder at 80. Although the issue before the Snyder court appears narrow, its holding was broad.Amicus League strongly asserts that the Snyder court departed from the essential requirements of law. Palm Beach County v. Tinnerman, 517 So.2d 699, 700 (Fla. 4th DCA 1987), rev. denied 528 So.2d 1183 (Fla. 1988). A rezoning is nothing more than an amendment to the zoning code of a local government that changes the land use designation of a parcel of land. Schauer v. City of Miami Beach, 112 So.2d 838 (1959); Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983); 8 McQuillian, MUNICIPAL CORPORATIONS, Zoning §25.93 (1991). Amicus League submits that the rezoning action before the Snyder court should be examined no differently than a rezoning prior to enactment of Local Government Comprehensive Planning Act and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes (1991), as amended by Chapter 92-129, Laws of Florida, (the Growth Management Act). Zoning law and planning law are separate and distinct. Neither must be mixed not diluted when deciding a cause of action arising under either body of law. Recent attempts to merge both bodies of law have created confusion in the courts. Judge Sharp noted this chaos in Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992):

> In view of the obvious mass confusion at the appellate level (at least in the Fifth

> District) as to what standard of review the reviewing court should apply to a zoning case, I hope our Florida Supreme Court will take jurisdiction in an appropriate case and instruct us on these matters. We obviously need some help!

Amicus League suggests that the Fifth District Court of Appeal erred in part due to three factors: 1) a misunderstanding of land use common law following adoption of the Growth Management Act; 2) a misunderstanding of the nature of a rezoning; and 3) the diversity of land use administration among Florida cities. Each factor will be addressed below.

A. SNYDER ABROGATES COMMON LAW PRINCIPLES OF LAND USE LAW AND AUTHORITY VESTED IN LOCAL GOVERNMENTS WITHOUT CLEAR LEGISLATIVE DIRECTION.

Snyder implies that adoption of a local government comprehensive plan, pursuant to the Growth Management Act, somehow changed the fundamental legislative nature of rezonings or other legislative land use actions when a single parcel of land is involved. See Puma v. City of Melbourne, Case No. 90-10022-CAX/S (Fla. 18th Cir. Ct. April 23, 1992) (Snyder applies to local government comprehensive plan land use map amendments). Amicus League submits that the legislature enacted the Growth Management Act with a full understanding of existing zoning law principles. Ellis v. Brown, 77 So.2d 845, 847 (Fla. 1955). If the legislature had intended to change the existing zoning law it would have so stated. By no longer viewing rezonings as legislative action, Snyder abrogates the long standing common law.

To best understand how the confusion between existing rezoning actions and actions under consistency arose, it is instructive to review how each action evolved. A brief discussion of the abrogation principles and zoning law both before and after the Growth Management Act will follow.

1. Abrogation Principle

Common law prevails unless the legislature abrogates the common law in a clear and concise manner. Ellis at 847; City of St. Petersburg v. Earle, 109 So.2d 388, 393 (Fla. 2d DCA 1959), cert. denied, 113 So.2d 230 (Fla. 1959).

This Court in Ellis stated:

> "'Further, as a rule of exposition, statutes are to be construed in reference to the underlying principles of the common law; for it is not to be presumed that the legislature intended to make any innovation on the common law further than the case absolutely required. The law rather infers that the Act did not intend to make any alteration other than what is specified, besides what has been plainly pronounced; if the parliament that design, it is naturally said they would have expressed it.' Potters's Dwar.St. 185."

The Growth Management Act does not clearly and concisely abrogate the common law relating to rezonings.

2. Land Use Regulation prior to the Growth Management Act

Land use regulation in Florida was historically based on zoning law which has been recognized as a legitimate exercise of police power to protect the public from noxious uses of land.

Euclid; City of Miami Beach v. Texas Co., 194 So. 368 (Fla. 1940); Yocum v. Feld, 176 So. 753 (Fla. 1937). Florida accords these local regulations presumptive validity through the application of the fairly debateable standard. Davis v. Sails, 318 So.2d 214 (Fla. 1st DCA 1975). When developing their original zoning codes, some local governments, such as Brevard County, Snyder at 67, designated districts as general use zones since the appropriate public purpose to be achieved was not readily visible at the time of adoption of the zoning ordinance. As growth or change occurs the means to change the general use is through a legislative rezoning action.[1] Schauer; Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966).

In 1968, zoning became a matter of home rule for the municipalities of Florida through the adoption of Article VII, section 2(b) of the Florida Constitution of 1968. Prior to

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[1] As early as Euclid, the U.S. Supreme Court acknowledged the fact that designated zoning uses in a developing municipality were subject to change.

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities ... Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable ... In a changing world, it is impossible that it should be otherwise... With the growth and development of the state, the police power necessarily develops, within reasonable bounds, to meet the changing conditions ... Euclid at 310-12.

municipal home rule, local governments enacted zoning ordinances pursuant to statutory enabling legislation adopted in 1939 and codified as section 176.02, Florida Statutes (1971). The 1939 enabling legislation was repealed when municipal home rule was implemented by statute in Chapter 73-129, Laws of Florida.

The common law of zoning, since Euclid, allowed a citizen to challenge rezoning action by a local government on, at least, three different grounds. First, a citizen with a specific injury different in kind for that suffered by the community as a whole could file suit to enforce of a valid zoning ordinance. Secondly, a citizen with a legally recognizable interest that was adversely affect could challenge the arbitrary and unreasonableness of the zoning enactment. Lastly, a citizen who was affected by the zoning ordinance could seek relief on the ground that the ordinance was void. Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So.2d 204, 206 (Fla. 1984), citing Renard v. Dade County, 261 So.2d 832 (Fla. 1972).

In addition to the evolving zoning law, modern comprehensive planning legislation first appeared in Florida around 1970.[2] Early comprehensive planning legislation encouraged comprehensive planning and provided a general scheme for local governments to adopt a plan. Unlike earlier legislation, the Local Government Comprehensive Planning Act of 1975, sections 163.3161-.3211,

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[2] In 1969, the Legislature enacted the Florida Interlocal Cooperation Act of 1969. Section 163.160-.315, Florida Statutes (1969). In 1973, the Legislature enacted the County and Municipal Planning for Future Development Act, Part III, Chapter 163, Florida Statutes (1973).

Florida Statutes (1975) mandated that local governments plan comprehensively and that the local land development regulations be consistent with the plan. As early as 1978, in City of Gainesville v. Cone, 365 So.2d 737, 739 (Fla. 1st DCA 1978), the court in a rezoning case held:

> The adoption of the comprehensive development plan did not change the zoning or land use regulations of a single parcel of property in the city. The existing zoning categories remained in full force and effect and still remain in full force and effect. It was not the intention of the comprehensive development plan nor that of the city commission which adopted it to place any of its suggestions in force. They were to serve merely as a guide for future decisions relating to rezoning petitions and growth and development of the city.

It is evident that the First District Court of Appeal identified the separateness of zoning from comprehensive planning efforts. See also City of Gainesville v. Hope, 377 So.2d 736 (Fla. 1st DCA 1979). Further in City of Jacksonville v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984), rev. denied, 469 So.2d 749 (Fla. 1985), the court, when reviewing the denial of a rezoning, held that although the Local Government Comprehensive Planning Act of 1975 mandates that a city's decision on rezoning be consistent with its local land use plan, the plan is not a proper ground for reversing a zoning authority. The plan is intended as a general guideline and rough timetable for community growth and does not simultaneously establish immediate minimum limits on zoning. Id. at 162-63. In that same year, this Court, in Citizens Growth Management Coalition of West Palm Beach, Inc., stated, in dicta, that the consistency

provision did not "create a right of judicial redress in the citizens and residents of the community." Id. at 208.

Thus, it is apparent that even with the consistency requirement of the local government comprehensive planning acts, causes of action involving rezoning remain separate and distinct from actions challenging the consistency of a rezoning with the local government comprehensive plan.

Snyder is not a challenge to the consistency of the local government comprehensive plan.

3. Land Use Regulation After the Growth Management Act

In 1985, the legislature passed the Growth Management Act. The Growth Management Act substantially revised the Local Government Planning Act of 1975 and for the first time provided a statutory cause of action for consistency challenges of development orders of local governments with the local government comprehensive plans. Section 163.3215, Florida Statutes (1991). A rezoning is a development order for the purposes of section 163.3215 (Through the reading of a series of definitions, one finds that development orders include governmental actions including "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of a local government having the effect of permitting the development of land." [emphasis added] Section 163.3164(6), Florida Statutes (1991) incorporates Section 163.3164(7), Florida Statutes (1991).[3]

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[3] It is interesting to note also that the legislature when drafting the Growth Management Act, defined "rezonings" as three separate terms for three separate purposes within the Growth

In addition to establishing the sole cause of action for consistency challenges, Section 163.3215, Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990), cert. pending cert. question, 601 So.2d 577 (Fla. 1st DCA 1992), identifies the requisite standing to bring such challenges and broadened the basis for standing from requiring a special damage different in kind from that suffered by the community as a whole, Citizens Growth Management Coalition of West Palm Beach, Inc. at 206, to allowing the alleged injury to be shared by the community as a whole, Section 163.3215(2). Amicus League asserts that section 163.3215 was adopted in response to Citizens Growth Management Coalition of West Palm Beach, Inc., in which this Court had previously ruled that no cause of action for consistency existed and that the standing to raise such a cause, if it existed, was not broadened by the Local Government Planning Act of 1975. Id. at 206.

Except for the establishment of the consistency cause of action and broadening the standing provision, section 163.3215 did not abrogate or change the common law of land use regulation. In drafting section 163.3215 the legislature chose to abrogate the common law on standing and provide a new statutory cause of action for those persons who meet the standing requirement. However, the

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Management Act. § 163.3164(7), Fla. Stat. (1991) defines rezoning as a "development permit" for the purposes of a consistency challenge for development orders under § 163.3215. § 163.3164(22), Fla. Stat. (1991) includes "rezonings" as "land development regulations" for the general purposes of the Growth Management Act. § 163.3213, Fla. Stat. (1991) excludes "rezonings" from the definition of "land development regulation" for the purposes of consistency challenge to land development regulations pursuant to § 163.3213, Fla. Stat. (1991).

legislature did not elect to provide the standard of review for the new cause of action.

Although the legislature had every opportunity to identify the standard of review, as it did in other sections of the Growth Management Act, it chose to remain silent. Specifically, in section 163.3184(9) and (10), Florida Statutes (1991), the legislature embraced the traditional fairly debatable standard for consistency challenges to the local government comprehensive plans. Again, in section 163.3213(5)(a), Florida Statutes (1991), the common law fairly debatable standard for consistency challenges to the land development regulations was codified.

Since the legislature chose not to provide a clear and concise declaration to the contrary, the common law standard of review remains for the section 163.3215 consistency challenge. City of Pensacola v. Capital Realty Holding Co., Inc., 417 So.2d 687 (Fla. 1st DCA 1982). The standard of review remains for a consistency challenge of a rezoning as the fairly debatable gauge, because the a rezoning is a legislative act.[4] Hirt v. Polk County Board of County Commissioners, 578 So.2d 415 (Fla. 2d DCA 1991).

Yet, Snyder is not a consistency challenge. Instead, the case merely raises the common law challenge of whether the rezoning at issue in Snyder was a valid rezoning ordinance. Snyder at 79. Amicus League strongly asserts that Snyder should be reviewed under the common law of rezoning. Nonetheless, Florida courts have

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[4] Amicus League will discuss the nature of the proceeding under subissue B.

evaluated consistency issues between local government development orders and local government comprehensive plans, including some rezonings, in a limited number of cases.[5] There is wide disagreement and confusion among Florida appellate courts regarding the proper standard to apply in a consistency review as well as other issues. As a result, Florida courts have erroneously relied on the Growth Management Act as a substitute for rezoning actions. Amicus League asserts that it is proper to rely on the Growth Management Act and, in particular, only on section 163.3215 when challenges are raised to development orders concerning consistency with the local government comprehensive plan. However, any other challenge to a rezoning remains at common law. It is the misplaced reliance on the "consistency cases" which has caused the recent confusion concerning the challenges to rezonings subsequent to the Growth Management Act.

Thus, land use planning and zoning are different exercises of sovereign power and a proper analysis for review requires that they be considered separately. Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3d DCA 1987), rev. denied, 529 So.2d 693 and 529 So.2d 694 (Fla. 1988). The Snyder court abrogated the common law and failed

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[5] Examples of these cases include: Alachua County v. Eagle's Nest Farms, Inc., 473 So.2d 257 (Fla. 1st DCA 1985), rev. denied, 466 So.2d 496 (Fla. 1986); Hillsborough County v. Putney, 495 So.2d 224 (Fla. 2d DCA 1985); Sengra Corp. v. Metropolitan Dade County, 476 So.2d 298 (Fla. 3d DCA 1985); City of Cape Canaveral v. Mosher, 467 So.2d 468 (Fla. 5th DCA 1985); Machado; Southwest Ranches Homeowners Association v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987), rev. denied, 511 So.2d 999 (Fla. 1987); B.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So.2d 252 (Fla. 1st DCA 1990).

to follow the essential requirements of law when it based its decision on cases arising under the Growth Management Act rather than on the existing law of rezoning.

B. APPELLATE REVIEW OF LOCAL GOVERNMENT LAND USE DECISIONS MUST BEGIN WITH ANALYSIS OF THE NATURE OF THE PROCEEDING BEFORE THE COURT RATHER THAN WITH A GENERALIZED STATEMENT IDENTIFYING ALL GOVERNMENTAL ACTION SUBSEQUENT TO ADOPTION OF A LOCAL GOVERNMENT COMPREHENSIVE PLAN AS QUASI-JUDICIAL ACTION.

As noted by the Second District Court of Appeal in Hirt, "when appellate courts have been called upon to classify governmental bodies' application of zoning ordinances, their decisions have sometimes tended to blur the distinction between legislative and quasi-judicial actions." Hirt at 417. In Hirt at 417, the Second District Court of Appeal identified two factors "(1) the nature of the petitioner's challenge and (2) the manner in which the Board went about making its decision" to distinguish whether a local government's land use decision was legislative or quasi-judicial.

Rather than focusing on the inherent nature of the proceeding, some Florida courts have attempted to characterize the nature of a land use action under review by the presence or absence of certain factors. These factors include, but are not limited to a review of 1) the type of challenge presented; Hirt; Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648 (Fla. 3d DCA 1982); 2) the type of evidence presented to the decision-maker; De Groot v. L.S. Sheffield, 95 So.2d 912 (Fla. 1957); Ferris v. Turlington, 510 So.2d 292 (Fla. 1987); Town of Indialantic v. Nance, 400 So.2d 37,

40 (Fla. 5th DCA 1981), op. approved, 419 So.2d 1041 (Fla. 1982); 3) the type of notice provided; Gulf & Eastern Development v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978); Section 166.041, Florida Statutes (1991); 4) scope of delegated power; Henry v Board of County Commissioner of Putnam County, 509 So.2d 1221 (Fla. 5th DCA 1987); and 5) access to a partial or impartial tribunal; Jennings.

In Hirt the Second District Court of Appeal held that certiorari review is the proper method to review a quasi-judicial action of a Board of County Commissioners, whereas injunctive and declaratory suits are the proper way to attack a Board's legislative actions);

1. A Legislative Action Requires a "Right v. Right" Decision.

Amicus League believes that the nature of a rezoning action is a legislative act. In rezoning actions, a local government is asked to decide between two competing land use policies, the existing zoning designation or a designation that is more appropriate to changing conditions in the municipality. Thus, the nature of a local government's land use decision may be evaluated on the basis of whether the decision distinguishes between two "right from right" alternative land use decisions.

A useful analogy for the Court to evaluate Amicus League's "right v. right" analysis is consideration of a local government's legislative decision to 1) increase its ad valorem millage to fund necessary municipal services; or 2) not to increase the rate and

maintain, at a minimum, the existing services. Both conclusions be susceptible to a "right v. right" decision. Review of the correctness of a legislative decision remains with the electorate. Similarly, the state legislature is faced with a "right v. right" decision when it considers increasing state revenue to fund needed programs or recognizing that the increase in revenue is not feasible. Both funding decisions may be "right." Both decisions require the exercise of discretion. The choices made to fund specific programs will be evaluated by the electorate.

Amicus League submits that a local government's adoption of a rezoning ordinance is a legislative act as it involves a "right v. right" decision. In a rezoning, a local government is faced with the decision of whether to rezone a parcel and thereby increase the density for further development on the parcel or not to increase the density and thereby maintain the character of the neighborhood, regardless of the size of the parcel. Both actions may be a "right" decision. Both decisions have the effect of reexamining or reestablishing land use policy. Lastly, either choice subjects the local public officials to public scrutiny by the electorate.

In the instant case, Amicus League believes that the nature of the challenge in Snyder is an attack on a local government land use policy decision to reclassify a particular parcel to a more intense use that is suitable for the area and promotes adopted land use policies. Simply stated, in Snyder, Brevard County was merely reviewing the viability of the possibility of modifying its prior land use policy in its legislative capacity as the local governing

body.

2. A Quasi-Judicial Action Requires a "Right v. Wrong" Decision.

Development of public policy, or a "right v. right" legislative decision is inherently different from an action by local government to enforce or implement the adopted public policy, or a "right v. wrong" decision.

For example, a local government's decision to enforce a tax increase on a specific parcel may be a quasi-judicial rather than a legislative act. The "right v. right" decision to tax has been made. The "right v. wrong" decision determines whether the "right v. right" decision is applicable in the instant case and is made without discretion. The Florida Legislature established specific guidelines to accommodate local review of an increased levy or other adjustment to ad valorem taxes on a particular parcel. Similarly, local governing bodies develop guidelines to assist administrators that implement alternative land use techniques in accordance with land use policies. While a zoning administrator may be the recipient of delegated authority to interpret a zoning code, his interpretations must be precisely based on the code.

An alternative land use technique such as a site plan review, like an action to implement a tax on a specific parcel of land - to enforce a the adopted public policy - is subject to judicial review. A reviewing court, not the public at the polls, may find the administrative decision technically wrong. Discretionary decisions by a zoning administrator are not permitted as

legislative authority can not be delegated absent standards and meaningful criteria which appear in the code. Henry.

By using this analogy, it is easy to understand why Florida courts have correctly viewed the rezoning of a parcel of land as a legislative decision. A rezoning requires that the local governing body re-examine general comprehensive zoning and planning ordinances and decide between two arguably conflicting land use policies that have an effect of general application, regardless of the size of the parcel.

The Snyder court held that the number of the parcels of land subject to a rezoning changes the nature of the decision made by the local governing body. Amicus League strongly asserts that the number of parcels cannot reasonably dictate the nature of the act. Certainly, this Court will agree that establishing the size or number of parcels involved in a rezoning action as determinative of the nature of the proceeding requires reviewing courts to travel down a slippery slope.

For instance, a property owner might seek rezoning to accommodate the siting of a hazardous waste facility on a single parcel of land. Without question, the siting of a hazardous waste facility carries with it policy decision of broad general application. Under Snyder, policy decisions of broad general application constitute legislative action. However, under the holding of the Snyder court, the siting of the hazardous waste facility on a single parcel would rise merely to a quasi-judicial decision, robbing the public at large from participation in the

decision making process. Shouldn't the Snyder court have viewed this as a "right v. right" decision?

Likewise, a local governing body might be faced with making a choice between whether to rezone a specific parcel as single family or as multi-family. Some of the members of the governing body might support the single family classification because they choose to protect the residential character of the area. Other members of the governing body might favor a multi-family classification because the multi-family designation would serve as a buffer between an existing residential area and a nearby commercial district. Both decision are "right." However, both decision have broad general application for the jurisdiction by affecting infrastructure, cultural and aesthetic ramifications. The decision reached would be a policy decision and demand a weighing of two competing "right" conclusion. The decision can be nothing but legislative in nature. Discretion is demanded by the nature of the decision.

Similarly, a local government may choose to enact a zoning regulation, which establishes an industrial use classification at a time when only a single parcel of land is afforded such use. The rezoning of only one parcel at this time is again "right v. right" decision of broad general application. It is of no importance that only one parcel is affected by the ordinance. The rezoning of a single parcel of land may be viewed as the initial step towards a redevelopment or reestablishment of a general land use policy and nothing more. A zoning classification, "may be merely the right

thing in the wrong place, -- like a pig in the parlor instead of the barnyard." Euclid.

C. DIVERSITY AMONG LAND USE ADMINISTRATION PROCEDURES COMPLICATE A REVIEW OF THE NATURE OF A REZONING BY A LOCAL GOVERNMENT.

Prior to the 1975 and 1985 planning legislation, local government comprehensive planning was not mandatory in Florida. As discussed above, many municipalities had already developed comprehensive zoning codes. Thus, some cities were able to include existing comprehensive zoning codes to satisfy the requirement for land development regulations under the Growth Management Act. However, other municipalities used the opportunity to rewrite existing zoning codes.

Florida is composed of over 390 municipalities, ranging in population from 635,230 to 10.[6] Approximately 9 or 2.3% of Florida cities have a population over 100,000 (Class 1).[7] Approximately 19 or 4.8% of Florida cities have a population over 50,000 (Class 2),[8] Approximately 90 or 23.2% of Florida cities

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[6] Florida League of Cities information - Florida Municipalities: Population and Ad Valorem Tax Information. The population data was obtained from 1990 census material and ad valorem data was compiled by the Advisory Committee on Intergovernmental Relations from DR - 403 BMs submitted by county property appraisers to the Florida Department of Revenue.

[7] Examples of other Class 1 cities include Miami, Jacksonville, Tampa, Orlando, Hollywood, and Fort Lauderdale.

[8] Examples of other Class 2 cities include West Palm Beach, Sarasota, Daytona Beach, Cape Coral and Boca Raton.

have a population over 10,000 (Class 3).[9] Approximately 174 or 44.6% of Florida cities have a population over 1,000 (Class 4).[10] Approximately 98 or 25.1% have a population less than 1,000 (Class 5).[11]

Local governments as a whole had taxable values for ad valorem tax purposes totaling approximately $243,808,533,186 in 1991. The total ad valorem tax base in Florida cities ranged from $17,361,950,152 in 1991 to 0. Miami had an ad valorem tax value of $11,178,568,606 in 1991 while Daytona Beach had an ad valorem tax value of $2,133,219,144 in 1991. Niceville had an ad valorem tax value of $203,192,895 in 1991. Starke had an ad valorem tax value of $86,540,806 in 1991 and Weeki Watchee had an ad valorem tax value of $13,548,140 in 1991.

Florida cities also vary in geographic size.[12] Jacksonville is the largest city and is approximately 759.7 square miles. Tampa is approximately 104.2 square miles. Tallahassee is approximately 58.5 square miles. Melbourne is approximately 27.9 square miles. Miami Beach is approximately 7.1 square miles.

Not only do Florida's local governments differ by population, ad valorem tax base and geographic size, Florida cities also differ

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[9] Examples of other Class 3 cities include Boynton Beach, Panama City, Sanford, Ocala, Fort Myers, and Niceville.

[10] Examples of other Class 4 cities include Fernandina Beach, Quincy, Bradenton, Avon Park, Oldsmar, Starke.

[11] Examples of other Class 5 cities include Malamar, Mayo, Weeki Watchee, Sopchoppy, Manalapan, Golden Beach.

[12] UNITED STATES DEPARTMENT OF COMMERCE, Bureau of the Census, COUNTY AND CITY DATA BOOK 1988, 634 (1988).

in governmental structure.[13] Some Florida cities may be classified as council-manager, others as strong mayor-council and the remainder as council-weak mayor or commission. As a result, land use decision-making processes vary among Florida cities although each city complies with statutory requirements contained in Chapters 163 and 166, Florida Statutes (1991). For this reason, Amicus League believes that confusion may have resulted in the Florida courts. The result is conflicting opinions since the reviewing court may have been unaware of requirements or procedures that are unique to a particular local government. For example, review of a rezoning petition is by writ of certiorari in Orange and Lee Counties pursuant to special acts enacted by the Legislature in the 1960s. See Sec. 16, Chapter 63-1716, Laws of Florida; Sec. 10, Chapter 61-2405, Laws of Florida.

Nevertheless, a local governing body is designated in each local government and is responsible for making legislative decisions. Amicus League submits these legislative responsibilities include approval or denial of rezoning petitions of specific parcels of land as well as of a local government comprehensive plan or a plan amendment, adoption of land development regulations, and developments of regional impact. A local government's legislative responsibilities cannot be delegated, although some fact finding responsibilities may be delegated with adequate guidelines to other administrative bodies

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[13]Florida League of Cities - "Getting to Know Your City and County Governments" (1990).

described below. Henry.

A municipality's local planning agency (LPA) generally functions as advisory body to the local governing body. The LPA is often responsible for preparation and recommendations regarding the adoption of the local government comprehensive plan, oversight of the effectiveness of the implementation of the local government comprhensive plan, and review of local zoning regulations and ordinances. Section 163.3174, Florida Statutes. In some communities, the local governing body may itself perform the above acts. Id.

Some local governments have a planning and zoning board (P&Z Board). The P&Z Board is also generally advisory in nature to the local governing body concerning current land use decisions. Gulf & Eastern Development Corporation at 59-60. Other municipalities may have a planning and zoning department that performs similar functions to a P&Z Board. Amicus League submits that the role of a LPA, P&Z Board or a planning and zoning department may be compared to the role performed by state legislative committee staff. Clearly, it had never been determined that action by state legislative committee staff nothing but advisory in nature. These individuals do not participate in "right v. right" policy decisions.

Many communities have a Board of Zoning Appeals. The board of zoning appeals is a quasi-judicial board that hears and decides appeals of decisions of the zoning administrator, grants special exceptions to the code, and authorizes variances from the code when

a literal interpretation would cause unnecessary hardship. Henry. In some municipalities throughout the state, the local governing body may perform this function. Policy questions are not determined by a board of zoning appeals.

Similarly, a code enforcement board is a quasi-judicial body and is responsible for the enforcement of code violations. A code inspector initiates proceedings by notifying the owner of the violation. If the violation remains, a hearing is held. Testimony is taken under oath. The board makes findings of fact, conclusions of law and issues an order which may be recorded as a lien in the public records. Any aggrieved party may file an appeal in circuit court. These procedures are uniformly applied throughout municipalities since they are codified in Chapter 162, Florida Statutes (1991). However, Amicus League submits that smaller municipalities may rely on its governing body to also perform this function. The Snyder court ignores the distinction between quasi-judicial and legislative reviews resulting from the discretion provided to local governments to tailor the minimum statutory requirements in the Growth Management Act to accommodate local diversity and needs.

There is no debate that ordinances can only be enacted by a local legislative body. Section 166.041, Florida Statutes (1991). The local government comprehensive plan is adopted by ordinance and must therefore be amended by ordinance. Even when other boards or bodies review local government comprehensive plans, amendments, rezonings, which in some instances take a quasi-judicial nature,

ultimate approval rests with the local governing body acting in its legislative capacity. Thus, it is difficult to accept the Snyder court's reasoning that all local government action subsequent to adoption of a comprehensive plan is not legislative in nature. Amicus League submits that in some smaller communities, the local governing body may perform both roles and technically in some instances render an advisory opinion to itself. When a local governing body performs such dual roles, there is confusion concerning whether it is performing a legislative or quasi-judicial act.

ISSUE II. THE FIFTH DISTRICT COURT OF APPEAL, IN SNYDER, ERRED WHEN IT FAILED TO ABIDE BY THE ESSENTIAL REQUIREMENTS OF LAW EMBRACED IN THE SEPARATION OF POWERS DOCTRINE, THE FAIRLY DEBATEABLE STANDARD AND THE RIGHT OF THE PUBLIC TO REZONE LAND BY REFERENDUM AND TO PARTICIPATE IN ITS REPRESENTATIVE FORM OF GOVERNMENT.

Because the Snyder court failed to understand the legislative nature of a rezoning action, it departed from the essential requirements of law in at least three ways: abridging the separation of powers doctrine; negating the fairly debatable standard of review; and interfering with the right of the public to rezone by referendum and participate in its representative form of government. Amicus League recognizes and emphasizes to this Court that some of the confusion in land use circles is due to the interrelationship between these three matters. "The primary purpose of the fairly debateable test is to allocate decisionmaking authority over zoning matters between the legislative municipal

body and the judiciary." Nance at 39. The degree of participation by the electorate in its governmental processes substantially differs depending on whether the proceeding is legislative or judicial.

A. SEPARATION OF POWERS DOCTRINE

Government in this country consists of three branches - legislative, judicial and executive/administrative. The separation of powers doctrine applies to local government and prohibits one branch of government from encroaching upon the powers of another. Tinnerman; Lee County v. Morales, 557 So.2d 652, 656 (Fla. 2d DCA 1990), rev. denied, 564 So.2d 1086 (Fla. 1990). The Tinnerman court explained that when "a court order which directs the zoning authority to zone a property in a particular manner[, it] violates the separation of powers doctrine." Tinnerman at 700. Each branch of government performs a separate function. Rezoning is a function of a local legislative branch of local governments and not the courts. For this reason, courts are not empowered to substitute their judgment for that of local legislative and order these entities to rezone or not rezone parcels. City of South Miami v. Meenan, 581 So.2d 228 (Fla. 3d DCA 1991). Otherwise, reviewing courts would become nothing more than super zoning boards rather than reviewing bodies. Norwood-Norland Homeowners' Association, Inc. v. Dade County, 511 So.2d 1009, 1012 (Fla. 3d DCA 1987), rev. denied 520 So.2d 585 (Fla. 1988). Rezoning is a function of the police power granted to the local government

legislative body and not to the courts. Id. at 1012.

Thus, a circuit court's standard of review of zoning decisions is not to determine proper zoning, but rather whether zoning authorities decision is fairly debateable; court is not empowered to act a super zoning board and enters area only where action of zoning body is so unreasonable and unjustified as to amount to confiscation of property. Lee County at 654; Nance at 39.

B. FAIRLY DEBATEABLE STANDARD OF REVIEW

Since Euclid, zoning actions have been regarded as legislative acts by local governments and have been subject to a deferential standard of review by the judiciary. "If the validity of the legislative classification for zoning purposes be fairly debateable, the legislative judgment must be allowed to control." Euclid at 388. "The 'fairly debateable' rule is a rule of reasonableness; it answers the question of whether upon the evidence presented to the municipal body, the municipalities action is reasonably based [i.e. not arbitrary or capricious]." Nance at 39. Schauer.

In stark contrast to the fairly debateable standard of review in rezoning actions, is the standard of review in quasi-judicial actions. The traditional standard of review for quasi-judicial action is a preponderance of the evidence or clear and convincing evidence. Ferris. If the issue to be decided involves the abrogation of a right, such as a property right, the appropriate standard is clear and convincing evidence. Ferris at 292.

Otherwise, the preponderance of the evidence standard is applicable. However, these standards of review are available only if the issue is quasi-judicial in nature. Amicus League strongly asserts that the nature of the issue presented to the Snyder court is legislative. Therefore, as stated above, the fairly debateable standard applies.

C. PUBLIC PARTICIPATION

Should the Court uphold Snyder and rule that a rezoning of a specific parcel of land is a quasi-judicial, rather than a legislative act, then the right of citizens to participate in local rezoning actions is destroyed. The Third District Court of Appeal has held that the right to access a local public official before a vote in a quasi-judicial action, such as a variance request, is presumed prejudicial. Jennings. The Snyder court would extend this presumption of prejudice to matters, which are clearly legislative, such as a rezoning or comprehensive plan amendment. The effect of such a holding presumes that informed citizens and activist groups, such as the Sierra Club, League of Women Voters, or Common Cause, who attempt to communicate concerns to elected local public official have ulterior motives beyond the good of the community. Snyder would limit participation by these individuals and groups because of the presumed prejudicial effect of such communication upon a pending rezoning action.

In addition, Snyder clearly conflicts with this Court's holding in Florida Land Co.. There, this Court affirmed a citizens

right to initiate a rezoning ordinance by referendum, which is also prescribed by statute in section 166.041. By holding that a rezoning is no longer a legislative act, the Snyder court has arguably stole a citizen's right to redress its government in land use matters.

CONCLUSION

Amicus League submits that the Fifth District Court of Appeal erred in its broad statement that all governmental action, including a rezoning, subsequent to the adoption of a local government comprehensive plan does not constitute legislative action. To reason alternatively makes the comprehensive plan a zoning ordinance and thereby robs the local legislative body of its ability to establish local policy.

Amicus League believes that in rezoning actions a local government is asked to decide between existing land use designations or a designation that is more suitable to changing conditions. The judiciary should not question the wisdom or good policy behind municipal ordinances as such action would violate the separation of powers doctrine.

In conclusion, Amicus League offers the following analogy to this Court for consideration of the evolution and zoning and zoning law in Florida: Prior to the enactment of the Growth Management Act, planning law and zoning law were two trains travelling in the same direction toward each other. In 1985, the two train tracks intersected with the introduction of the section 163.3215 consistency cause of action. There was confusion. There was Snyder. Regardless of the confusion, it remains clear that the trains are proceeding on parallel tracks with the same conductor, the local governing legislative body. Rezoning and consistency actions do not merge.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing was hand delivered to the Clerk of the Florida Supreme Court, and that a true copy was furnished by U.S. Mail this 19th day of October, 1992 to:

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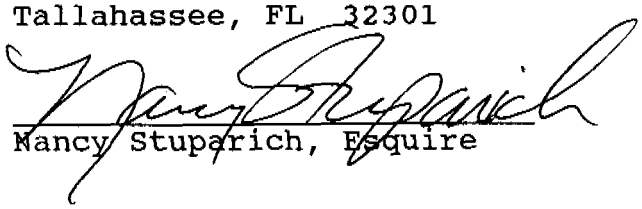

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