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IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA,

Appellant,

-vs-

JACK R. SNYDER and GAIL K. SNYDER,

Appellees.

SUPREME COURT CASE NO. 79,720

FIFTH DISTRICT COURT OF APPEAL CASE NO. 90-1214

INITIAL BRIEF OF AMICUS CURIAE, 1000 FRIENDS OF FLORIDA

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STATEMENT OF JURISDICTION

The Court has accepted this case for discretionary review under Article V, §3(b)(3) of the Constitution of Florida.

STATEMENT OF THE CASE

The Snyders applied for a development order (rezoning) from the Board of County Commissioners of Brevard County. The planning staff and the Planning and Zoning Board found the request to be consistent with the County's comprehensive plan. The Board of County Commissioners nevertheless denied the request without stated reasons.

The Snyders petitioned the circuit court for a writ of common law certiorari. A three-judge panel of that court denied the petition. A further petition for certiorari was filed with the District Court of Appeal, and ultimately granted in an opinion that found the action of the Board of County Commissioners to have been quasi-judicial in its essence and lacking in compliance with the essential requirements of law. From that decision, the Board of County Commissioners has pursued an appeal to this Court.

1000 Friends of Florida has petitioned for leave to file this brief *amicus curiae* under the authority of Rule 9.370, Fla. R. App. P.

STATEMENT OF THE FACTS

The facts adequately appear in the opinion of the District Court of Appeal.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal correctly characterizes the review of development orders as a subject of stricter judicial scrutiny rather than judicial deference under a "fairly debatable" test. However, the decision improperly creates a presumption in favor of the property owner in all cases, and is incomplete in its guidance to lower courts and local governments.

The adoption of the Local Government Comprehensive Planning Act imposes a discipline upon local governments which have heretofore been subject to great deference and little scrutiny in their zoning decisions. The statute requires the adoption of binding plans which are internally consistent, and which are approved by the State as being consistent with state and regional plans. Where plans are asserted to be inconsistent with the state or regional plans, an administrative hearing is required at which competent substantial evidence is to be adduced.

The statute requires all development orders to be consistent with the comprehensive plan. Interested parties, including this *amicus*, have standing to challenge such orders on those grounds. If such challenges are to be meaningful, it is incumbent upon local governments to adduce evidence, make findings, and be subject to review by a standard more stringent than fair debatability.

The statute also uniformly classifies rezonings, subdivision plats, special exceptions, variances and other permits as "development orders", all subject to a prerequisite of consistency with the underlying plan. Pre-existing caselaw offers a hodgepodge of standards of judicial review of the several types of development orders, and a coherent restatement is necessary.

That restatement should acknowledge those subjects in which the judiciary is competent to review the actions of local governments. In matters of law, courts should see that fundamental due process and the additional requirements of statute have been observed. In matters of fact or proof, courts should insure that the local governments adduce competent substantial evidence to support their conclusions. In matters of policy, courts should accord deference to local governments but should intervene to secure the statutory promise of broad interest-group participation and to protect against any capricious underweighting of economically or politically weak interests.

Applying such a restatement to the decision of the District Court, this Court should affirm the finding that the zoning action under review was "quasi-judicial" in nature and thus subject to meaningful judicial review to insure compliance with the essential requirements of law and the existence of competent substantial evidence. However, the decision goes too far in creating an unfailing presumption in favor of the property owner; a presumption in favor of the *status quo* is sufficient, and the burden of proof should be on the proponent of the development order. Judicial review under §163.3215, Fla. Stat. (1991) is *de novo*, and the court may determine whether the administrative proceeding was prejudiced by any ex parte contact or other evidence *dehors* the record.

ARGUMENT

POINT I. CHAPTER 163, PART II, FLA. STAT. (THE GROWTH MANAGEMENT ACT) COMPELS A REDEFINITION OF THE JUDICIAL ROLE IN THE ENFORCEMENT OF THE CONSISTENCY REQUIREMENT

A. THE STATUTORY PROCEDURE FOR ADOPTION AND REVIEW OF LOCAL GOVERNMENT COMPREHENSIVE PLANS

1. CONTENTS OF COMPREHENSIVE PLANS:

The Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Fla. Stat. (1991) (the "Act"), was adopted "to utilize and strengthen the existing role, processes and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development." §163.3161(2), Fla. Stat. (1991). Each local government in Florida is required to adopt a local comprehensive plan that is "in compliance" with the Act. §163.3167(1)(b), Fla. Stat. (1991). "In compliance" means consistent with §§163.3177 and 163.3178, Fla. Stat. (1991); the State Comprehensive Plan as codified in Chapter 187, Fla. Stat. (1991); the applicable regional policy plan adopted by the relevant regional planning council pursuant to §186.508, Fla. Stat. (1991); and the Minimum Criteria Rule, Rule 9J-5, Florida Administrative Code. §163.3184(1)(b), Fla.Stat. (1991).[1]

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[1] The Act is remedial in nature, intended to:
... preserve and enhance present advantages; encourage the most appropriate use of land, water and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within [local government] jurisdictions.

It is further intended that local government:

preserve, promote protect and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and good welfare;

Local governments are required to implement plans through the adoption of land development regulations and the maintenance of administrative instruments and procedures. §163.3167(1), Fla. Stat. (1991). No development may be permitted unless in conformity with a plan adopted under the Act. §163.3161(5), Fla. Stat. (1991),

The requirements for the content of local plans are established in §§163.3177 and 163.3178, Fla. Stat. (1991). §163.3177, Fla. Stat. (1991) provides for required and optional elements of local comprehensive plans. Comprehensive plans must include materials in descriptive form which establish "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area." §163.3177(1), Fla. Stat. (1991). All required and optional elements must be based on appropriate data. §163.3177(8), Fla. Stat. (1991).[2]

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prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreation facilities, housing and other requirements and services; and conserve, develop, utilize and protect natural resources within their jurisdictions. §163.3161(3), Fla. Stat. (1991).

The Act's provisions are "declared to be the minimum requirements necessary to accomplish the stated intent, purposes and objectives of this act; to protect human, environmental, economic and social resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state." §163.3161(7), Fla. Stat. (1991).

Further, "It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives. §163.3194(4)(b), Fla. Stat. (1991).

Comprehensive plans must have a capital improvements element, a future land use plan element; a traffic circulation element, consisting of proposed and existing thorough fares and transportation routes; a sanitary sewer, solid waste, drainage, potable water and natural groundwater aquifer recharge element; a natural resource conservation element; a recreation and open space element; a housing element; a coastal management element; and an intergovernmental coordination element.

The Act places great emphasis on the future land use and (where applicable) coastal management elements. The future land use element must include:

> standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use must be shown on the land use map or map series which shall be supplemented by goals, policies, and measurable objectives. Each land use category shall be defined in terms of the types of uses included and specific standards for the density or intensity of use. The element must be based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment, including the renewal of blighted areas and the elimination of nonconforming uses which are inconsistent with the character of the community. §163.3177, Fla. Stat. (1991).

Section 163.3178 specifically addresses coastal management elements for applicable jurisdictions, and includes specific requirements for data gathering and regulatory and management techniques which must be designed to "restrict development activities where such activities would damage or destroy coastal resources..." §163.3178(1), Fla. Stat (1991)

To implement the "principles, guidelines, and standards" requirement, Fla. Admin. Code Rule 9J-5.005 requires that each element contain goals, objectives, policies, standards, findings and conclusions designed to achieve specified purposes

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§163.3177(1)-(6), Fla. Stat. (1991).

Optional elements include: mass transit elements; plans for port, aviation, and related facilities coordinated with the general circulation and transportation element; recommended community design elements; and general area redevelopment elements. §163.3177(7), Fla. Stat. (1991). The mass transit element and the coordination of port, aviation, and similar facilities are required rather than optional in comprehensive plans covering a population greater than 50,000. §163.3174(6)(i), Fla. Stat. (1991).

(e.g. the protection of wetlands; the provision of affordable housing), and which must be based upon the best available, professionally acceptable data." Each element of a plan must be consistent with the underlying data and analysis. Rule 9J-5.005(2). Rule 9J-5.005(5) also requires the various elements of a plan to be consistent with one another, and that the Future Land Use Map, and all other "future conditions" maps, "reflect" the plan's goals, objectives and policies.

2. PREPARATION AND REVIEW OF THE DRAFT PLAN.

Section 163.3174, Fla. Stat. (1991), provides that a local planning agency is required to prepare the comprehensive plan following public hearings and make recommendations to the governing body as to the adoption of said plan or element.

Before adoption, each local government submits a draft plan prepared by the local planning agency for review by the Department of Community Affairs ("DCA").[3] DCA reviews the draft plan and, within 90 days, issues its Objections, Recommendations, and Comments Report ("ORC Report"), which identifies deficiencies in the draft plan and provides guidance on how they may be corrected. §163.3184(4)-(6), Fla. Stat. (1991).

3. ADOPTION AND REVIEW OF THE COMPREHENSIVE PLAN.

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[3]The "proposed" plan may be transmitted to DCA only after a public hearing held and advertised according to §163.3184(15), Fla. Stat. (1991). Working with other state and regional agencies, with expertise in the various areas addressed by plans, DCA reviews the draft plan and, within 90 days, issues its Objections, Recommendations, and Comments Report ("ORC Report"), which identifies deficiencies in the draft plan and provides guidance on how they may be corrected. §163.3184(4)-(6), Fla. Stat. (1991). The local government has 60 days to review the ORC Report and adopt its plan. Id. at §163.3184(7), Fla. Stat. (1991). Legislation passed in the 1992 legislative session extended this period to 120 days. Fla. SB 1882, §7(7)(1992).

The procedures for adopting plans are contained in §§163.3181 and 163.3184, Fla. Stat. (1991), and Chapter 9J-11, Florida Administrative Code.[4] Subsequent to plan adoption, local governments may amend their plans twice during a calendar year. §163.3187(1), Fla. Stat. (1991). The procedural and substantive requirements governing plan amendments are virtually the same as those for the plan's original adoption. §163.3187(2), Fla. Stat. (1991). Plans may be amended as long as the amendments maintain their internal consistency. *Id.*

A comprehensive plan is adopted by ordinance and becomes effective and legally binding upon adoption regardless of the fact that DCA has yet to make a compliance determination and regardless of that determination.[5] By statute, the adopted plan governs all development order decisions unless, and until, it is amended by another ordinance. §163.3184(7), Fla. Stat. (1991).

4. STANDARDS FOR LEGAL CHALLENGES TO COMPREHENSIVE PLANS

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[4]The adoption of a comprehensive plan or plan amendment is by ordinance in accordance with §163.3184(15), Fla. Stat. (1991). The local governing body is required to hold at least two advertised public hearings prior to adopting a comprehensive plan or plan amendment. §163.3184(15), Fla. Stat. (1991). The first hearing must be held at the transmittal stage and the second hearing must be held at the plan adoption stage. §163.3184(15), Fla. Stat. (1991). For plans and plan amendments which will change land use categories or the permitted uses of land, the required advertisement must be no less than one-quarter page (and of a specified type size) in a standard or tabloid size newspaper of general paid circulation in the county and of general interest and readership in the community, and not of limited subject matter, pursuant to chapter 50, and must not be placed where legal notices and advertisements appear. The newspaper should be published at least five times per week. Finally, the statute presribes the required form of the advertisement. §163.3184(15)(c), Fla. Stat. (1991).

[5]After a local government adopts its plan, the plan is again transmitted to DCA for review. DCA has 45 days to review the plan, and publish a Notice of Intent to find the plan "in compliance" or "not in compliance" with the Act. §163.3184(6), Fla. Stat. (1991).

If the plan is determined by DCA to be "in compliance", under §163.3184(9), Fla. Stat. (1991), "affected persons"[6] may challenge the plan in a formal administrative hearing pursuant to §120.57(1), Fla.Stat. (1985), conducted by the Division of Administrative Hearings. In such a proceeding, the plan is presumed to be in compliance and the challenging party bears the burden of *proving that the compliance determination is not "fairly debatable."* §163.3184(9), Fla. Stat. (1991).

If the plan is determined by DCA to be not "in compliance", DCA must file a petition with the Division of Administrative hearings for the assignment of a hearing officer and scheduling of a formal administrative hearing. "Affected persons" may intervene in support of the plan, in support of DCA's challenge to the plan, or may raise new issues challenging the plan. In such proceedings, the challengers must overcome the presumption that the plan is "in compliance" *by a preponderance of the evidence*. However, the local government's determination that the various portions of the plan are internally consistent with one another will be upheld *unless it is shown not to be "fairly debatable"*. §163.3184(10)(a), Fla. Stat. (1991).[7]

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[6]Affected persons include the affected local government; persons owning property, residing in, or operating a business within the boundaries of the local government; as long as such persons submitted oral or written objections during the plan review and adoption proceedings; and, in some cases, adjoining local governments." §163.3184(1)(a), Fla. Stat. (1991).

[7] After the hearing, the hearing officer issues a recommended order setting forth findings of fact and conclusions of law. §163.3184(9) and (10), Fla. Stat. (1991). In a §163.3184(10), Fla. Stat. (1991) "not in compliance" proceeding, the recommended order is forwarded to the Governor and Cabinet, sitting as the Administration Commission (Commission), for entry of a final order. In a §163.3184(9), Fla. Stat. (1991) "in compliance" proceeding, the recommended order is forwarded to DCA. If, after reviewing the recommended order, DCA determines that the plan is "in compliance", DCA will enter the final order. If DCA determines the plan is not in compliance, DCA will send the recommended order to the Commission for entry of the final order. Under Chapter 120, the hearing officer's findings of fact are binding upon the agency issuing the final order unless a review of the entire record reveals no competent substantial evidence to support the findings. §120.57(1)(b)10, Fla. Stat. (1985).

B. ADMINISTRATIVE AND JUDICIAL DECISIONS INTERPRETING THE GROWTH MANAGEMENT ACT

The Growth Management Act has given rise to few appellate decisions. However, the final administrative orders under the Act reveal that local government decisions in adopting and amending plans are given a level of deference and legal scope and status similar to that which historically applied to zoning ordinances:

1. DUE PROCESS RIGHTS

All parties that are substantially affected by the adoption or amendment of a plan or a determination of noncompliance are afforded due process rights. In *Florida League of Cities, Inc. v. Admin. Comm'n*, 586 So.2d 397 (Fla. 1st DCA 1991), the First District allowed the Commission, through the Chapter 120.57(1) hearing process, to apply "incipient" policy concerning sanctions for three local governments which had failed to submit their plans on time, but remanded the case back to the Commission to provide the municipalities an opportunity to challenge the underlying factual basis for the finding of non-submittal in a formal administrative hearing.

The Commission does not have the authority to amend or void a comprehensive plan or plan amendment. The only action the Commission may take against a local government whose plan has received a final determination of non-compliance is to impose sanctions against that local government. These sanctions are listed in §163.3184(11)(a), Fla.Stat. (1991) and include ordering state agencies not to provide funds to improve roads, bridges, or water systems within the boundaries of the local government. §163.3184(11)(a), Fla. Stat. (1991). The Commission may also order that the local government not be eligible for grants administered under certain programs, including: the Florida Small Cities Community Development Block Grant Program; the Florida Recreation Development Assistance Program; and revenue sharing. §163.3184(11)(a), Fla. Stat. (1991). In addition, the Commission may direct the Department of Natural Resources and the Trustees of the Internal Improvement Trust Fund to consider the non-compliance of the plan when determining whether to issue permits under §161.053, Fla. Stat. (1991) and whether to convey, sell or lease soveriegnty submerged lands. The Commission must recommend remedial actions that would bring the plan into compliance and avoid further, or continuing, sanctions. Final Orders are appealable to the District Courts of Appeal pursuant to §120.68, Fla.Stat. (1991).

In *Home Builders and Contractors Ass'n of Brevard, Inc. v. Dep't of Community Affairs*, 585 So.2d 965 (Fla. 1st DCA 1991) it was held that DCA must justify its position that a plan is not in compliance by expert testimony and other evidence.

2. STRICT COMPLIANCE WITH NOTICE REQUIREMENTS

The courts require strict adherence to the notice and procedural requirements of the Act, insuring that persons affected by plans or plan amendments may appear, be heard, and preserve their rights of administrative review. In *Benson v. City of Miami Beach*, 591 So.2d 942 (Fla. 3d DCA 1991), *rev. denied* 601 So.2d 551 (Fla. 1992) the City's notices of public hearings on the plan had been published in the "Neighbors" section of the *Miami Herald*, which was published twice a week as an insert in the main daily Herald. The various communities which make up Dade County receive their own particular "Neighbors". The Court ruled that such publication violated the Act's notice requirements because the "Neighbors" section was not circulated county-wide.

Similarly, in *Wakulla County Landowner's Ass'n v. Wakulla County,* (No. 91-224; 2d Cir. Nov. 6, 1991) a Circuit Court judge ruled that Wakulla County's plan was null and void for the County's failure to strictly comply with the statute's public hearing notice provisions.

3. DISCRETION IN ACHIEVING THE PURPOSES OF THE ACT

A plan will be deemed to be "in compliance" if it is "consistent" with the applicable statutes and rules. §163.3184(1)(b), Fla. Stat. (1991). Plan review at the state level does not entail a "minimum criteria" approach. In other words, a plan can be "in compliance" even if certain statutory or rule requirements have not been met,

as long as the plan as a whole is calculated to meet the missing requirement. *Hiss v. Sarasota County*, 602 So.2d 535 (Fla. 1st DCA 1992)[8]

Among other requirements, plans must be internally consistent. §163.3177(2), Fla. Stat. (1991). The statute defines "consistent" for purpose of determining whether plans are consistent with the state and regional plans. The local plan must not conflict with and must "further" those plans. §163.3177(10)(a), Fla. Stat. (1991). However, this definition does not apply to internal consistency. A plan is internally consistent as long as its various elements do not conflict with each other. The administrative review does not insist that all objectives and policies of a plan take action in the direction of realizing the other objectives and policies of the same plan. *Hiss et.al. v. Sarasota County*.

In *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212 (Fla. 1st DCA 1991) the omission of many known wetlands from the plan's wetlands map was found to be justified because a complete, accurate and professionally acceptable identification of all wetlands did not exist and the plan committed the County to conduct a complete wetlands inventory by a date certain. Further, until the completion of the inventory and its inclusion in the plan, all development was required to undergo a review for the identification and protection of wetlands.

The Court found that the County had rightfully declined to include two proffered wetlands maps as part of the plan because of demonstrated inaccuracies. The Court agreed that the lack of any complete, accurate and up-to-date wetlands map and the

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[8] The "consistency" language of §163.3184(1)(b), Fla. Stat. (1991) takes precedence over the Legislative intent language of §163.3177(9), Fla. Stat. (1991).

commitment to completing a local mapping effort within one year justified the finding of compliance. The County was not required to employ any information that was available, even if of questionable accuracy, in order to meet the requirement that plans be based on the "best available data."

4. ESTABLISHMENT OF FUNDAMENTAL POLICY

By law, comprehensive plans must establish the general standards and policy decisions which will govern development decisions. In *Friends of Lloyd v. Jefferson County*, 13 F.A.L.R. 3643 (Fla. Admin. Comm'n 1991) a Final Order reversed a Hearing Officer's ruling that a plan policy which deferred the establishment of implementation measures to the adoption of land development regulations was adequate and ruled that the promise of LDR's can not substitute for measures which data and analysis indicate are needed in the plan.

The Future Land Use Map (FLUM) adopted within a plan establishes the fundamental range of land uses and intensities which may occur on a parcel of land.

> "The FLUM is a critical component of the plan. "[It] provides an essential visible representation of the commitment to uphold local comprehensive plan goals, objectives, and policies, as supported by appropriate data and analysis..." *Austin v. City of Cocoa* (A.C. Sept. 29, 1989).

In *Pope v. City of Cocoa Beach*, 13 FALR 2871 (DOAH March 4, 1992) *affm'd*, 13 FALR 2867 (Admin. Comm. July 11, 1991) the Commission found an amendment which redesignated a parcel of land in the Coastal High Hazard Area, that the city was attempting to annex, to allow a higher density use than what the County had allowed, to be inconsistent with a plan policy to direct population concentrations away from

CHHA's. It was also found that, because the city had not yet successfully annexed the parcel, it had no jurisdiction to establish its land use and density.

Wilson v. City of Cocoa, 13 F.A.L.R. 3848 (Fla. Admin. Comm'n 1991) is an example of a local government's ability to "legislate" changes in the types of uses allowed for properties within its jurisdiction through the plan amendment process. In this case, a Final Order upheld the City's adoption of plan amendments which down-designated parcels of land from commercial to residential categories based on reasons related to discouraging strip commercial development.

In *DCA et. al. v. Metro-Dade County, et.al.*, Case No. 90-3599 (DOAH 1991) a recommended order has ruled that a County may amend its FLUM without having to demonstrate that individual map amendments are consistent with the relevant state, regional and local policies.

C. THE STATUTORY REGIME FAIRLY IMPLIES A REQUIREMENT OF PARALLEL JUDICIAL STANDARDS OF REVIEW OF DEVELOPMENT ORDERS UNDER §163.3215 TO INSURE THE REALITY OF CONSISTENCY

Ubi jus, ibi remedium. Article I, §21 of the Constitution of Florida provides that the courts shall be open for redress of any injury, and it is settled that under that section and its predecessors in earlier constitutions, the courts will not permit any wrong to go without a remedy whether or not the legislature has clearly provided such a remedy. *Farrington v. Flood*, 40 So.2d 462 (Fla. 1949); *Slay v. Dept. of Revenue*, 317 So.2d 744 (Fla. 1975).

1. THE STATUTORY "CONSISTENCY" CAUSE OF ACTION

The legislature has required that after a local government's adoption of a comprehensive plan, all development orders and land development regulations shall be "consistent" with the plan. §163.3161, Fla. Stat. (1991). A court which is reviewing a local government action or development regulation may consider, among other things:

> "the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation." §163.3194(4)(a), Fla. Stat. (1991).

The statute also defines consistency:

> "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 Further, 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. §163.3194(3), Fla. Stat. (1985).

Section 163.3215(1), Fla. Stat. (1991) creates a statutory cause of action, conferring standing upon "aggrieved or adversely affected parties"[9] to bring action for "injunctive or other relief in order to prevent such local government from taking action on a development order . . . which materially alters the use or density or intensity on a particular piece of property that is not consistent with the comprehensive plan . . . after first filing a verified complaint with the local government specifying the "facts upon which the complaint is based".[10] A development order is an order which grants, denies, or grants with conditions a development permit application. §163.3164(6), Fla. Stat. (1991). Development permits "include[] any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." §163.3164(7), Fla. Stat. (1991).

The statute nevertheless leaves unanswered some crucial questions, such as the nature of the review (whether in the nature of certiorari or a *de novo* proceeding), the burden of proof and the standard of review. Florida's district courts have issued conflicting opinions (both pre- and post 1985 Growth Management Act) concerning

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[9]The Act describes an "aggrieved or adversely affected party" as "any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources." §163.3215(2), Fla. Stat. (1991). The party's interest may be commonly shared with other members of the community, but must exceed the general interest in community good shared by all persons.

[10]The complaint must be filed within 30 days after the alleged inconsistent action has been taken. The local government then has 30 days to respond to the complaint. Within 30 days of the end of the local government's responce period, the complaining party may bring the authorized action. The verified complaint procedure is not a prerequisite for an action for a temporary restraining order to prevent immediate and irreparable harm. §163.3215(4), Fla. Stat. (1991).

the method of judicial enforcement of the consistency requirement, the definition of consistency, the burden of proof, the standard of judicial review, and the applicable procedural requirements. These issues, which are raised in the case *sub judice*, are resolved in the following sections.

1000 Friends urges that the statutory action, indeed the statute itself, would be meaningless without meaningful judicial review. The statute already requires the adduction of competent substantial evidence on those occasions where the Department of Community Affairs has found the local plan to be out of compliance with state and regional plans. It would eviscerate the statute to permit development orders to escape review as "legislative" acts .

Heretofore, zoning ordinances have been adopted by local governments as purely local matters. The Standard Zoning Enabling Act, originally promulgated by the U. S. Department of Commerce in 1922, formed the initial basis for the zoning laws of virtually all states, and the Florida version of that Act existed as Chapter 176, Fla. Stat. (1991), until repealed as part of the implementation of municipal home rule powers in 1973. Nevertheless, the ghost of the former statute has lingered in the caselaw like the smile of the Cheshire cat. Zoning actions of local governments have been traditionally viewed as "legislative" actions, reviewable by the courts for procedural flaws or to test whether any particular action was so egregious as to be not "fairly debatable."[11] The cause of action has been one for declaratory or

[11]Not all judicial review of rezonings has been subject to such deferential review. In Dade County, for example, it appears that under the powers of the home rule government there, review has been had by certiorari for a number of years.

injunctive relief, the traditional method of testing the outer limits of the essential powers of the legislative branch.[12]

The Local Government Comprehensive Planning Act is a new enterprise by the Legislature, intended to impose substantive discipline and accountability upon the local planning process. Nevertheless the lower courts are still hopelessly ensnarled in the seventy years of precedents that attend the Standard Zoning Enabling Act, as will appear more fully under the next point.

POINT II. CHAPTER 163, PART II, BY ESTABLISHING A DEFINITION OF CONSISTENT, APPLYING THE CONSISTENCY REQUIREMENT TO ALL DEVELOPMENT ORDERS, AND PROVIDING A STATUTORY "CONSISTENCY" CAUSE OF ACTION, SUPPLANTS MUCH OF THE EXISTING PRECEDENT CONCERNING JUDICIAL REVIEW OF REZONINGS.

A. ALL DEVELOPMENT ORDERS ARE CLASSIFIED TOGETHER IN A SINGLE DEFINITION UNDER §163.3164, FLA. STAT.

Under the Standard Zoning Enabling Act adopted or adapted by 47 states after its promulgation in 1922, most local governments made changes to their zoning ordinances and official maps by ordinance of the legislative body. A subordinate body, commonly known as the Board of Adjustments, had the jurisdiction to grant variances where an undue hardship arose by application of general ordinances to a particular parcel. That same Board also often had the power to grant special exceptions, where the uses allowed under those "exceptions" were not generally permitted throughout a zoning district but might be authorized by the underlying ordinance to be entertained

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[12]Although the decisions declare that the "fairly debatable" test is based on the existence of legislative facts, they also require that there be "competent substantial evidence" of the existence of those facts. *See, e.g., Town of Indialantic v. Nance*, 400 So.2d 37 (Fla. 5th D.C.A. 1981), *affirmed* 419 So.2d 1041 (Fla. 1982).

on an individual-parcel basis where there was no proof of any public harm. Actions of the Boards of Adjustment were widely viewed as quasi-judicial and reviewable by certiorari, and the courts were careful not to permit the appointed Board to exercise the "legislative" powers of substantive rezoning. *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957).

The Growth Management Act, in §163.3164(6) and (7), Fla. Stat. (1991), has now combined building permits, zoning permits, subdivision approvals, special exceptions, variances, and all other official actions which permit the development of land into a single definition of "development order." All such orders are now governed by the mandate of consistency with the comprehensive plan, and all such orders are reviewable under the single cause of action created in §163.3215, Fla. Stat. (1991). The statute makes no distinction in its language which would recognize the varying judicial standards that have historically been applied to the several subspecies of development orders under prior legal regimes:

B. PRIOR DECISIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEAL APPLY DIFFERING JUDICIAL STANDARDS TO THE REVIEW OF DEVELOPMENT ORDERS

1. SPECIAL EXCEPTIONS/CONDITIONAL USES

A "special exception" is usually defined as a use that would not be appropriate generally or without restriction throughout a particular zoning district but which, if controlled as to number, area, location or relation to the neighborhood, would not adversely affect the public health or safety.[13] Once the applicant meets the initial

[13] *See* former §163.170(6) Fla. Stat., part of the general zoning enabling act which was repealed by the Growth Management Act in Chapter 85-55, Laws of Florida.

burden of showing that the application meets the statutory criteria, the burden shifts to the planning authority to demonstrate *by competent substantial evidence presented at the hearing and made a part of the record* that the special exception is adverse to the public interest. *Irvine v. Duval County Planning Commission*, 495 So.2d 167 (Fla. 1986); *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th D.C.A. 1975); *Florida Mining & Materials v. City of Port Orange*, 518 So.2d 311 (Fla. 5th D.C.A. 1987).

Traditional judicial review of special exceptions has been by writ of common-law certiorari, in which the record before the administrative tribunal is reviewed and no new evidence is taken. *Rinker Materials Corp. v. Citizens and Property Owners*, 313 So.2d 80 (Fla. 4th D.C.A. 1975).[14]

2. REZONINGS

The traditional view of rezonings, whether by sweeping amendment of the underlying ordinance or by the single-parcel amendment at the behest of a particular applicant, has been that such action is quasi-legislative, and that therefore judicial review by certiorari is improper. *See, e.g., Graham v. Talton,* 192 So.2d 324 (Fla. 1st D.C.A. 1966). The traditional judicial remedy has been declaratory or injunctive relief. *Zukowski v. Casselberry*, 244 So.2d 179 (Fla. 4th D.C.A. 1971). Consistent with that remedy, the courts have not usually required the case to be limited to the record made before the local governing body. *Sunset Islands 3 and 4 Assoc. v. City of Miami Beach*, 214 So.2d 45 (Fla. 3d D.C.A. 1968). Evidence initially presented to the local

[14]*But cf.* former §163.250, Fla. Stat. which gave an option to the challenger to proceed either by certiorari or by *de novo* proceedings. *See also Odham v. Peterson*, 398 So.2d 875 (Fla. 5th D.C.A. 1981).

body may be "amplified" by additional testimony in the trial court. *Naples Airport Authority v. Collier Development Co.*, 513 So.2d 247 (Fla. 2d D.C.A. 1987).[15]

An irreconcilable line of cases from Dade County defines the consideration of rezonings as quasi-legislative in nature, and applies a "fairly debatable" standard of judicial deference, but requires that judicial review be had by certiorari and restricts that review to the record made before the governing body. *See, e.g., Eastside Properties Inc. v. Dade County*, 358 So.2d 873 (Fla. 3d D.C.A. 1978); *Dade County v. Marca, S.A.*, 326 So.2d 183 (Fla. 1976)[16]

Another curious erosion in the usual standard of deference to pure legislative action is the common observation by the courts that the local body's decision must be supported by "substantial competent evidence". *See, e.g., Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla. 1982). *Nance* in turn relies on *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957), the seminal case in which the Court undertook "to reconcile many of our previous apparently divergent opinions in an effort to establish for the future some orderly procedure..." There, the Court noted that because the decision under attack was arrived at after a full hearing pursuant to notice and based on evidence submitted, the decision was reviewable by certiorari and the record could be examined for the existence of "competent substantial evidence". The Court concluded [at 916]:

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[15]*Quare* whether a court always substitutes its judgment for that of the local government, when it receives evidence not considered by the local body.

[16]It cannot be that the Dade County ordinance specifies review only by certiorari, because a local ordinance cannot confer or limit the jurisdiction of a circuit court under Article V, §5(b) of the Constitution. *See G-W Development Corp. v. Village of North Palm Beach Zoning Board of Adjustment*, 317 So.2d 828 (Fla. 4th D.C.A. 1975).

> "[W]e disclaim any allegiance to the formalities and technicalities of the past. Procedural formalities are not necessarily sacrosanct merely because they are time-honored."

The *Nance* criterion of substantial competent evidence cannot be severed from its ancestry in *DeGroot v. Sheffield*, in which the Court held that such a standard partakes more of review of an administrative or quasi-judicial action. That holding contrasts with the frequent judicial profession that if any state of legislative facts can be *reasonably conceived* by the court, the existence of that state of facts will be assumed. *State ex rel.* Bennett v. Lee, *166 So. 565 (Fla. 1936).*

3. SUBDIVISION/SITE PLAN APPROVAL/BUILDING PERMITS

Site plan review leading to a development order is now commonly treated as "administrative action" reviewable by certiorari, and review is limited to the record presented during the administrative proceeding. *See Park of Commerce Associates v. City of Delray Beach,* ___ So.2d ___, 17 FLW D2047 (Fla. 4th D.C.A. *en banc*, September 2, 1992); *Colonial Apartments Ltd. v. City of DeLand*, 577 So.2d 593 (Fla. 5th D.C.A. 1991), *rev. den.* 584 So.2d 997 (Fla. 1991).

Subdivision plat approval is likewise considered to be limited to the factors specified in the underlying ordinance rather than any sweeping and standardless discretion under the police power. Review is by certiorari. *See City Nat. Bank v. City of Coral Springs,* 475 So.2d 984 (Fla. 4th D.C.A. 1985); *cf. Broward County v. Narco Realty, Inc.*, 359 So.2d 509 (Fla. 4th D.C.A. 1978) (mandamus is the appropriate remedy).

4. VARIANCES

Under the Standard Zoning Enabling Act, variances and special exceptions were both commended to the jurisdiction of the Board of Adjustments, and traditionally the results were reviewed by certiorari. Variances differed from special exceptions, in that special exceptions were expressly authorized by the underlying ordinance if the appropriate special circumstances were present (applicant's burden) and there was otherwise no harm to the public interest (government's burden). Variances, in contrast, were an authorized violation of the letter of the ordinance to prevent it from being confiscatory in application to a particular parcel. A unique hardship is required. Review is by certiorari.[17] Some decisions speak of applying the "fairly debatable" test normally used for quasi-legislative action; *see Bell v. City of Sarasota*, 371 So.2d 525 (Fla. 2d D.C.A. 1979), and others observe that the "competent substantial evidence" test for administrative action in *DeGroot v. Sheffield, supra,* is the same standard as the "fairly debatable" test. *Town of Indialantic v. Nance*, 400 So.2d 37 (Fla. 5th D.C.A. 1981).

C. STRICTER SCRUTINY OR "HARDER LOOKS" BY THE JUDICIARY ARE NECESSARY TO INSURE THE CONSISTENCY OF DEVELOPMENT ORDERS WITH APPROVED COMPREHENSIVE PLANS

It should be apparent from the survey of existing precedent, and the uniform definition of "development order" now contained in the statute, that much judicial labor is necessary if the conflicts are to be harmonized and aberrations discarded. It is appropriate in the context of such labor to examine the appropriate role of the judiciary.

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[17]Some decisions under particular statutes have allowed trial *de novo*. *See Albright v. Hensley*, 492 So.2d 822 (Fla. 5th D.C.A. 1986), granting such review under former Fla. Stat. §163.250; *Josephson v. Autrey, supra,*, granting *de novo* review under former §176.19, Fla. Stat.

Professor Christopher Edley has produced an extensive analysis of the problem in his work, "Administrative Law: Rethinking Judicial Control of Bureaucracy" (Yale University Press, 1990). In it, he decries the decisions which strive to maintain separation of powers formalism long after the interment of that concept at the rise of the New Deal. After examining the paradigmatic shortcomings of the judiciary's historical struggle with "law-fact-policy" distinctions and a correspondingly subjective and standardless scaling of judicial deference[18], he posits the strengths and weaknesses of each branch of government and makes some modest reformist suggestions.[19]

1. COURTS NEED NOT PRETEND THAT POLICYMAKING IS DIVORCED FROM POLITICS

Legislative and policymaking bodies are democratic, participatory and politically accountable. Yet in their worst forms they can be subjective, willful, nonscientific and subject to overweighting of majority interests. The proper sphere for policymakers can be preserved intact if the courts require disclosure of the policymakers' essentially political judgments about balancing economic risks, factual uncertainty, and assigning burdens of persuasion. With such disclosure, the courts can more accurately perceive

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[18][At p. 209]:

> Discretion of ever-increasing moment will be exercised beyond a bank of fog created by cautious judicial deference to the methodological and procedural autonomy of adminstrators. . . Everything important in an administrative decision can be subsumed into presumptively immune choices of scientific method or public participation. So the alternative to reforming this deference is, in significant respects, judicial abdication of even the most conventional of administrative law tasks.

[19]Professor Edley also goes beyond his reformist suggestions into a speculative reconstitution of roles of the branches, all in the pursuit of "sound governance". That aspect of his work is not treated or commended here.

when there is a true need to abstain from interference with the political functioning of a coordinate branch, or to require a "hard-look" by the local body at reasoned evaluation of substantive policy alternatives. It would also be easier for the courts to determine when political corruption (in the sense of unreliability, not sin) has invaded the factfinding or adjudicatory functions.

2. COURTS ARE UNIQUELY EQUIPPED TO ASSURE THE ADDUCTION OF COMPETENT SUBSTANTIAL EVIDENCE AND METHODOLOGICAL FAIRNESS TO SUPPORT FINDINGS OF CONSISTENCY AND CONCURRENCY.

As will appear at greater length in the final Point of this brief, 1000 Friends does not suggest that every zoning decision should be made in a procedurally rigid, formalized and adversarial context. Nevertheless some discipline and accountability is to be required in the *way* zoning decisions are made, if the statutory promises of consistent development orders are to be fulfilled. The process of requiring reasoned elaboration of the methodology of factfinding will expose the process to greater public scrutiny and enhance public confidence. Where a comprehensive plan has been adopted, it is no great burden on the local government to require that in granting or denying a development order, the government reveal precisely which criteria of its plan were found relevant, and by what reasoning the necessary balances were struck and the unavoidable conflicts resolved. *Odham v. Peterson*, 398 So.2d 875 (Fla. 5th D.C.A. 1981).

3. COURTS ARE TRADITIONALLY AND UNIQUELY COMPETENT TO ASSURE THAT DUE PROCESS HAS BEEN AFFORDED AND THAT THE REQUISITE FORMALITY HAS BEEN OBSERVED

It is this last role which is most familiar to the Court. It is, of course, emphatically the province of the judiciary to say what the law is. By nature, courts give reasoned elaborations for their decisions. They insist on the neutrality of decision-makers, the right of notice and the privilege of meaningful hearing and confrontation. All of these rights are commonly protected by existing decisions, no matter whether the actions under review were identified as quasi-legislative or judicial. This is not to say that every proceeding should become quasi-adversarial; there are legitimate reasons for balancing the nature and weight of public and private interests, the incremental changes in risk of an erroneous decision, and the incremental costs of added formality versus the benefit of enhanced public credibility. Nevertheless the process of requiring disclosure and identification by the local government of its true policymaking methodology, its true factfinding methodology, and a candid appraisal of its adjudicatory methodology will enable the judiciary to keep to a role which emphasizes its natural strengths and avoids interference with the real strengths of the coordinate branches.

POINT III. THE DECISION OF THE COURT OF APPEALS CORRECTLY DEFINES THE ROLE OF THE JUDICIARY IN REVIEW OF DEVELOPMENT ORDERS, BUT IS ERRONEOUS IN ITS PLACEMENT OF THE BURDEN OF PROOF AND INCOMPLETE IN ITS GUIDANCE TO LOCAL GOVERNMENTS AND TRIAL COURTS

A. THE DECISION DOES NOT CLEARLY DEMARK THE BOUNDARY BETWEEN THE ENACTMENT OF LOCAL GOVERNMENT POLICY AND ITS EXECUTION PURSUANT TO THE GROWTH MANAGEMENT ACT

The Fifth District's opinion in *Snyder* correctly views rezonings as no longer purely legislative in nature but goes too far in viewing them as completely non-discretionary "ministerial clerical recordings." 595 So.2d at 75. Because the purely

legislative function of setting fundamental and general policy is served by the adoption and amendment of a comprehensive plan and a decision to grant or deny a development order is required to be consistent with the plan, such decisions apply general policy to specific facts and are thus not purely legislative in nature.

§163.3164(7), Fla. Stat. (1991) includes rezonings within the definition of "development permit". Although rezonings are also defined as "land development regulations" in §163.3164(22), Fla. Stat. (1991), the statutory process for challenging the consistency of land development regulations is specifically inapplicable to rezonings. *Id.* See also §163.3213(2)(b), Fla. Stat. (1991). Further, the use of the term "order" to describe development permits puts rezonings in the class of administrative or executive actions.[20] Thus it is clear that, for purposes of judicial "consistency" review, the statute intended rezonings to be treated as variances, special exceptions and the like. This determination governs the issue before this court. Nevertheless, it is helpful to understand, by a review of the caselaw and other authorities, why the nature of rezonings under the act compels such a conclusion.

Commentators have, since the mid-1950's, called for comprehensive planning and consistency requirements. Haar viewed zoning without planning as "per se unreasonable because of the failure to consider as a whole the complex relationships between the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare." Haar, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1174 (1955). Haar developed the concept that zoning ordinances should be reviewed against a comprehensive plan.

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[20] See Lincoln, *supra*, 7 J.Land Use & Env. L. at 359, n. 170.

See Comment, Inconsistent Treatment: the Florida Courts Struggle with the Consistency Doctrine. 7 J. Land Use and Envtl. L. 333,339 (Spring 1992). Later, Babcock noted that the lax standard of review of zoning decisions allowed biased, prejudiced, and exclusionary decisions to be upheld on "the flimsiest of reasons." Babcock, the Zoning Game 141,159 (166). Babcock called for procedural reforms, including published rules and testimony under oath and subject to cross examination, a written record and findings of fact. Haar, at 157-158.

This court's 1959 opinion in *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959), that rezonings are purely legislative acts, is no longer relevant to the issues now before the court. As a result of the 1985 Growth Management Act, zoning decisions must be consistent with a previously adopted comprehensive plan, and thus are no longer purely legislative. Rezonings implement a plan and plans may be considered legislative in nature because of their overall effect throughout the jurisdiction. Specific actions to implement the plan and the ordinance based on it are quasi-judicial in nature. Snyder, *595 So.2d at 75* et seq.

Machado vs. Musgrove, 519 So. 2d 629 (Fla 3rd DCA 1987), recognized that after the Growth Management Act, land use planning and zoning are different exercises of sovereign power. *Id.* at 631. The Court distinguished the Growth Management Act, and the local comprehensive plans it mandates, from zoning laws. The statute's requirement that all zoning actions conform to an approved land use plan is, in effect, a limitation on a local government's otherwise broad zoning powers. *Machado* likened a comprehensive plan to a constitution for all future development within the governmental boundary and stated that zoning is the means by which the

plan is implemented and involves the exercise of discretionary powers within limits imposed in the plan. *Id.* at 632. *Machado* did not characterize rezonings as quasi-judicial but recognized that "the application of the fairly debatable standard to both the land use and zoning questions... tends to obscure the difference between their distinct functions." 519 So. 2d at 631. This analysis, and a discussion of the statutory definition of "consistent", led the court to apply "strict judicial scrutiny" to the review of a decision to grant a rezoning. 519 So.2d at 632.

The principles of strict scrutiny were first adopted by the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Ore. 1973). In *Fasano* a County Commission approved a zoning change from single family residential to planned residential, which allowed for construction of a mobile home park (25), despite a finding that the change allowed for "increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning." Upon challenge by a homeowners group, the trial court ruled that the county failed to show that the change was consistent with its comprehensive plan. The Oregon Supreme Court affirmed, stating that a zoning ordinance is a legislative act that is entitled to a presumption of validity. However the court added:

> "We would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity ... In its role as a hearing and fact-finding tribunal, the planning commission's function more nearly than not partakes of the nature of an administrative, quasi-judicial proceeding. . . .Basically, this test involves the determination whether the action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former

determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial." *Fasano* at 26.

The Oregon court thereupon rejected the proposition that judicial review of the County's zoning decision was limited to a determination of whether the change was arbitrary and capricious. The court articulated the following principles concerning the relationship of zoning and planning decisions.

(1) By enacting a comprehensive plan the state legislature has conditioned the county's power to zone upon the prerequisite that the zoning change is in conformance with the comprehensive plan (27).

(2) Because the action of the County is in this instance an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change (28).

(3) In proving that the change is in conformance with the comprehensive plan, the proof, at a minimum, should show (a) there is a public need for a change of the kind in question, and (b) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property (27).

Applying these standards the Oregon court found that the record was conclusory and superficial, and therefore insufficient to sustain this burden. There was no statement of facts on which the decision was based (30)

Snyder correctly embraces *Fasano*'s characterization of zoning actions after adoption of a comprehensive plan, and concludes that rezonings are not legislative in nature. "Initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public are legislative in character. However, rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts

arrived from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of executive or judicial or quasi-judicial action but are definitely not legislative in character." *Snyder*, 595 So.2d at 78.[21]

The exact characterization of rezoning decisions as legislative, judicial, quasi-judicial, administrative or ministerial is not critical for the determination of the appropriate standard of judicial review. See *Lincoln,* Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine, *7 J.Land Use & Env.L. 333 (1992),* at 345, 380-382. The point is that they are not due the deference given to pure policy decisions.

B. JUDICIAL REVIEW OF CONSISTENCY CHALLENGES IS BY TRIAL DE NOVO, NOT BY WRIT OF CERTIORARI

Florida's district courts have confused the consistency cause of action with certiorari review. However, Judge Sharp in her dissent in *Gilmore v. Hernando County*, 584 So.2d 27 (Fla. 5th D.C.A. 1991) accurately observed:

> "[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 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. *Gilmore* at 34.

This approach is the only one consistent with the Growth Management Act. "Consistency" actions under §163.3215, Fla. Stat. are original causes of action to be

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[21] Notice and hearing requirements for rezonings are imposed on counties by §125.66(5), Fla. Stat. (1991) and on cities by §166.041(3)(c), Fla. Stat. (1991).

brought in circuit court[22]. Certiorari actions, under which litigants may raise constitutional issues and "arbitrary and capricious" claims, but may not raise the consistency issue *per se*, survive the Act and may be brought as separate actions. See *Gregory v. Alachua County*, 553 So. 2d 206, (Fla. 1st DCA 1989)(development orders are subject to both certiorari review and §163.3215, Fla. Stat. (1991) challenge but "consistency" challenge may only be brought under §163.3215, Fla. Stat. (1991)) *Id.* at 208-9. Moreover, §163.3215 actions are *de novo* in nature. See *Gregory*, 553 So. 2d at 210 (Wentworth dissenting)

Machado, like the decision below, mistakenly viewed "consistency" as the second part of a two part inquiry involved in certiorari review. The *Machado* court re-affirmed the "well-settled" rule that the "fairly debatable" test will be used to determine whether zoning action is reasonable, or whether it is arbitrary, capricious, or an abuse of discretion.[23] The court treated the two issues as being properly raised by certiorari, but correctly held that Chapter 163, Part II had done nothing to abrogate existing remedies which were available to challenge a zoning decision. Indeed, is apparent that the Legislature meant to create an additional, independent, statutory cause of action through which parties could challenge development order decisions. The availability of this remedy is dependant upon the plaintiff's filing of a

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[22] See Lincoln, 7 J. Land Use and Environmental Law at 372-278. Lincoln accurately notes that the Legislature's use of the word "challenge" rather than "appeal" in §163.3161, Fla. Stat. (1991) means that a new cause of action was created. Lincoln provides the example of §333.11, Fla. Stat. (1991) to show that the legislature will expressly provide for certiorari review of an action when that is the intent.

[23] The Third District has continued to review due process challenges to zoning decisions under the "fairly debatable" rule. *See e.g. City of Miami v. Woodlawn Park Cemetery Co.*, 553 So.2d 1227, 1230 (Fla. 3rd DCA 1989).

verified complaint with the local government, which gives the local government the opportunity to cure the inconsistency. *See Leon County v. Parker*, 566 So.2d 1315 (Fla. 1st DCA 1990) (consistency challenge dismissed for failure to file verified complaint). *Accord, Emerald Acres Investments, Inc v. Leon County*,__So. 2d __, 17 FLW D1322(Fla. 1st DCA 1992). Cases such as *Machado* and *Southwest Ranches*, which allowed consistency to be raised by certiorari review and without any evidence that a certified complaint had been filed, are wrong.

It deserves mention that there is a question as to whether rezoning decisions are even reviewable by certiorari in Florida if they are considered to be legislative actions. Certiorari review of legislative actions is not permitted. *Modlin v. City of Miami Beach,* 201 So.2d 70 (Fla. 1967). *See* La Croix, *The Applicability of Certiorari Rview to Decisions on Rezonings.* Fla. Bar J. (June 1991) at 105. This Court's determination that rezonings are, in fact, quasi-judicial would resolve this issue and clarify that certiorari is indeed available as an independent, remedy in addition to the statutory "consistency" cause of action. See Peckinpaugh, *supra*, 8 Fla. Stat. V. L. Rev. at 515 and is more consistent with the statutory definition.

The existence of legislative guidelines for local zoning actions distinguishes Chapter 163 consistency actions from the traditional approach to judicial review of development decisions. Statutory guidelines limit the discretion of the zoning authority. Zoning actions not only must bear a substantial relationship to the public health, safety, morals, or general welfare, but also must meet specific statutory standards.

> "One primary concern over the continued validity of the traditional characterization of zoning is the relative informality of most land use control decisions, especially in the area of rezoning, which creates opportunities for abuse of authority by decision makers. Another concern is that the burden of proof on the party disputing a zoning action is so harsh that effective review is unavailable." Peckinpaugh at 499.

Actions characterized as quasi-judicial are subject to additional due process requirements, including the requirement that the decision be supported by findings which detail not only the unstated land use policies but also the evidence which supports either a finding of these policies' applicability or non-applicability. Peckinpaugh at 504. According to *Snyder*, a local government must state reasons for development order actions and make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given, and the legal adequacy of the reasons given for the result of the action taken. 595 So.2d at 81.

Concerning the mechanical implications of "strict scrutiny", the *Fasano* court said the following:

> What we have said above is necessarily general, as the approach we adopt contains no absolute standards for mechanical tests. We believe however that it is adequate to provide meaningful guidance for local governments making zoning decisions and for trial courts called upon to review them. With future cases in mind it is appropriate to add a few brief remarks on questions of procedure. Parties to the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity present and rebut evidence, to a tribunal which is impartial in matters - i.e. having had no pre hearing or *ex*

parte contact[24] concerning the question at issue - and to a record made and adequate findings executed.

Commentators have speculated that characterizing rezonings as quasi-judicial means that a record must be built at the hearing and that testimony and reports must be presented in a more formal manner than has traditionally been done at zoning hearings. It has also been speculated that lawyers may be required at these hearings to adequately ensure that all interests are being adequately represented. Hansen, *Are Lawyers Required for a Zoning Hearing?* Env. & Land Use Law Section Reporter, Vol. X, No. 1 (Dec 1987) Page 12.

However, neither the consistency requirement not the characterization of rezonings as quasi-judicial require the imposition of onerous or burdensome procedural changes to the local hearing process. The most important reason is that the "consistency" cause of action under §163.3215, Fla. Stat. (1991) for declaratory and injunctive relief is an original *de novo* action at which evidence on the consistency issue can be presented. *See Gregory v. Alachua County*, 553 So. 2d 206, (Fla. 1st DCA 1989)(development orders are subject to both certiorari review and §163.3215 challenge but "consistency" challenge may only be brought under §163.3215, Fla. Stat. (1991)) *Id.* at 208-9. A party defending, or challenging a "consistency" challenge to a rezoning need not have provided all of the technical, scientific and other evidence (under oath and subject to cross examination) needed to support its position at the local government hearing. This would be an unnecessary requirement as most

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[24] In *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3rd DCA 1991) the First District created a presumption that *ex parte* contact prior to a local quasi-judicial proceeding rendered the subsequent decision invalid.

local decisions are not challenged. Moreover, at least one commentator has opined that "public hearings,..., are insufficient forums for the protection of the rights of ... parties which may be affected by the decisions reached." Lincoln, *supra*. It is only when a challenge is taken that this type of presentation should be required. Such a rule preserves the efficiency and accessibility of the local hearing process.

However, in order to promote and allow the more reasoned decision-making and "strict" scrutiny sought by the Growth Management Act and cases like *Snyder* and *Machado*, the Court should require that development orders denying or granting (or granting with conditions) rezoning applications (or any other development permit) include minimal findings of fact and a planning rationale which would allow a court reviewing the order by certiorari to glean the reason and rationale underlying the decision from the record.

In *Pacifica Corp. v. City of Camarillo*, 149 Cal. App. 168; 196 Cal Rptr. 670 (1983) the California court discussed the requirement that a "quasi-judicial" local government decision be supported by "findings". In this court's thorough analysis, such findings:

> "must be sufficient both to enable the parties to determine whether, and on what basis, they should seek review and, in the event of review, to apprise a reviewing court of the basis for the ... action. Stated differently, the finding must bridge the analytical gap between the raw evidence and ultimate decision or order. [These findings] need not be stated with the same formality required in judicial proceedings"

and a summary of factual data, the language of a motion, on a staff report would constitute sufficient findings. 149 Cal. App. 3d at 179. For example, an order

denying a rezoning might state: "Rezoning denied for the reasons stated in the staff analysis ..." or "rezoning denied because environmental considerations and the lack of surrounding development make the existing, lower density zoning appropriate." An order granting a rezoning might state that "the plan allows a density range of between 10 and 20 units per acre in this area and the absence of significant natural resources and the existence of high density surrounding development and adequate infrastructure make the higher density end of the scale appropriate." *Machado*, in requiring a verbatim written record, goes too far.

A reciprocal obligation exists on the part of potential challengers to appear at the local hearing[25] and present the grounds upon which their position is based.[26] Such a requirement, in addition to the "verified compliant" requirement in §163.3215, Fla. Stat. (1991) effectively prevents local governments from being "sand-bagged" by potential litigants. This written record would also be available as evidence in any *de novo* hearing under §163.3215, Fla. Stat. (1991).

C. COURTS SHOULD REVIEW LOCAL GOVERNMENT REZONING DECISIONS UNDER THE STRICT SCRUTINY STANDARD AND APPLY THE STATUTORY DEFINITION OF CONSISTENCY

A court, in reviewing local government action on development regulations under this act, may consider, among other things, the "reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justifiably raised or the

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[25]In *Battaglia Fruit Company v. City of Maitland,* 530 So. 2d 940 (Fla. 5th DCA 1988) the Court dismissed a consistency challenge (erroneously brought under certiorari review) because the plaintiff city had not participate din the public hearing. *Id.* at 942.

[26] But not necessarily the underlying expert, technical, scientific or other data or testimony. The required presentation, in order to preserve the issues for suit under §163.3215, Fla. Stat. (1991), is only that which puts the local government on notice generally as to the substance of the party's position.

appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration." §163.3194(a)-(b), Fla. Stat. (1991).

This section reviews the three standards of judicial review of local zoning actions - "fairly debatable"; "stricter scrutiny"; and "strict scrutiny" - and concludes that the latter standard is required by the statute.

1. THE FAIRLY DEBATABLE STANDARD .

In *City of Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953), the Florida Supreme Court stated that "[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 a challenged regulation is presumed valid and is generally tested, not against the planning program on which it was based, but on the basis of "post hoc" rationalizations. This "minimum scrutiny" approach provides little or no incentive for responsible planning if post hoc justifications for land use decisions will suffice. Larsen, *Land Regulations: Under the Courts' Microscopes*, April 1991 Land Use Law & Zoning Digest 3. Siemon decried the lack of coherence in zoning and the "anything goes" standard of review. Siemon, the Paradox of "In Accordance With A Comprehensive Plan" and Post-Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations, 16 Stetson L. Rev. 603 (1987).

In *Gilmore v. Hernando County*, 584 So.2d 27 (Fla. 5th D.C.A. 1991) a rezoning was challenged by neighboring landowners. The Trial Court specifically rejected the strict scrutiny standard of review and applied the fairly debatable standard. It granted summary judgment to the county, concluding that the landowners had presented no material issue of fact.

The Fifth District affirmed, even though it commented that "perhaps the trial court should have approved a stricter standard of review". The court stated that the plaintiffs had failed to demonstrate by affidavit or otherwise that the rezoning was inconsistent.

Judge Sharp dissented, and noted that if the trial court had applied a stricter standard of review, a material issue of fact would have been found to exist. She urged that where a consistency challenge is made in the circuit court, the court should conduct a full hearing on the issues, hear expert witnesses, and consider various interpretations of the plan if it is not clear and unambiguous.

In *City of New Smyrna Beach*, 414 So.2d 542 (5th DCA 1982) the court reversed a trial court's invalidation of a rezoning ordinance after applying the "fairly debatable" standard. Judge Cowart, concurring, criticized the Court's use of that standard, arguing that governmental actions in rezonings, variances and special exceptions are applications of a legislative rule of law to a particular instance and are, as such, executive in character. Executive governmental action in zoning cases should not be sustained on judicial review merely because such action is fairly debatable, since almost any proposition can be "fairly debatable". This concurrence properly characterizes the nature of zoning decisions after the adoption of the consistency

doctrine, and also properly sounds the eulogy for the fairly debatable rule in Florida. Most Florida appellate courts have begun to apply a stricter standard of review.

2. DUAL STANDARD APPROACH.

In *Norwood-Norland Homeowners v. Dade County*, 511 So.2d 1009 (Fla. 3d DCA 1987) the plaintiffs challenged a rezoning that would allow for the construction of Joe Robbie Stadium. The circuit court applied the "fairly debatable" test and the zoning was upheld (1011).

On appeal the Third District stated that the standard of review for circuit courts directly reviewing zoning cases is the "fairly debatable" test, which asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a local government's decision (1102). The scope of appellate court review is limited to whether due process was followed and whether the correct standard of law was applied by the trial court (1012).

The "dual standard" essentially states that where the zoning authority approves a use more intensive than that proposed by the plan, the long term expectations for growth under the plan have been exceeded, and the decision must be subject to stricter scrutiny than the fairly debatable standard contemplates. *Southwest Ranches v. Brevard County,* 502 So.2d 931, 936 (Fla. 4th DCA 1987) A decision involving a less intensive use, on the other hand, would be subject only to fairly debatable scrutiny by a reviewing court.

There is no basis to assume there is less need or judicial review when a decision allows a use less intense on its face that seemingly allowed by a comprehensive place. There may be important reasons (promoting affordable housing,

mass transit or maximization of existing infrastructure) why a plan might require a minimum intensity of use. An exclusive focus on one aspect of consistency review is not consistent with the legislative intent that all aspects of local planning be comprehensively reviewed and coordinated.

> "The courts should assume that there are valid and important reasons for designating an area as high-density residential, commercial or industrial. These reasons may relate to the availability of urban services, the special suitability of the area for the particular high-density use, the control of urban sprawl or any number of other reasons reflecting a thoughtful and resource-efficient planning process. Allowing low density where a plan calls for high density can be as harmfully inconsistent with the goals of the plan as allowing high density when low density is called for. Allowing low density development when the plan calls for high density may run directly counter to the goals of a plan calling for compact urban development." McPherson, *Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans*, 61 Fla.B.J. 71 (1987), at 73, 74.

Ironically, the dual standard approach often requires a preliminary finding on whether the proposal is more or less intense than permitted by the plan. Only after this inquiry can the applicable judicial standard be determined. In most cases, the preliminary determination will not be obvious and will require review, not of consistency, but of overall "intensity" given several types of impacts and plan elements. The more appropriate approach, on the other hand, would avoid this problem completely through an application of one standard to all cases of inconsistency, regardless of the type of inconsistency involved. Mitchell at 89-90.

3. STRICT SCRUTINY.

The *Fasano* court started the trend toward strict review of consistency determinations by local governments, stating that "[i]n proving that the change is in

conformance with the comprehensive plan, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property. *Fasano* at 28. The court rejected the "proposition that judicial review of the county commissioners' determination to change the zoning of the particular piece of property in question is limited to a determination whether the change was arbitrary and capricious."

The statutory definition of "consistent" and criteria to be considered by reviewing courts are similar to the "strict scrutiny" test which has been applied by the First, Third and Fifth Districts.[27] The nature of rezonings under the Act and the statutory definition of "consistent" caused the Third District, in *Machado* to hold that, in reviewing such decisions, "the traditional and non-deferential standard of strict judicial scrutiny applies." 519 So.2d at 632,633.

Machado established the "fairly rigid" approach to consistency first established by Judge Cowart in his dissent in *Cape Canaveral v. Mosher*, 467 So.2d 468 (Fla. 5th D.C.A. 85). In Cowart's view:

> "Section 163.3194(1), Fla. Stat. (1991), defines the legal status of a comprehensive zoning plan to be such that after its adoption all land development regulations enacted or amended must be consistent with the adopted comprehensive plan. This requirement is itself consistent with the theory, purpose and validity of zoning. 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

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[27] See Lincoln 7 J. Envtl. & Land Use at 380.

> 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."

Mosher, 467 So. 2d at 471. See also, *Machado*, 519 So. 2d at 633-634.

Machado also adopted the following reasoning of Judge Cowart:

> A comprehensive land use plan legislatively sets a zoning norm for each zone. Under §163.3194(1) Fla. Stat. (1991), after adoption of such a plan, zoning changes should be made only when existing zoning is inconsistent with the plan and then only in the direction of making the zoning more consistent with the plan; otherwise the plan should be legislatively amended as to the area of the entire zone or as to the uses permitted within the entire zone. [T]his is the only way to (1) regulate and maintain land use by zones; (2) make individual zoning changes, which are essentially executive action, conform to a legislated plan and (3) avoid arbitrary "spot zoning" change that permits the use of individual parcels to depart from a plan. *Machado*, 519 So. 2d at 634. (quoting *Mosher*, 467 at 471)

Machado described an inconsistent use as one which was of greater or lesser intensity, of a different and incompatible character, or which is the result of a failure to comply with mandatory procedures. 519 So.2d at 633.

The *Machado* court placed the burden of proof on the party seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements. 519 So. 2d at 632.

> "[t]he proof of conformity of the zoning action to the land use plan must be discernible to a reviewing court on a verbatim record. Where the record is silent, or the evidence shows nonconformity with the plan, e.g., that a proposed project constitutes a greater intensity of use, a lesser intensity of use, a different and incompatible character of use, or a failure to comply with the plan's mandatory procedures, the requested rezoning will be denied as inconsistent with the comprehensive plan. 519 So. 2d. at 633.

B. B. McCormick & Sons v. Jacksonville, 559 So.2d 252 (Fla. 1st D.C.A. 1990) explained that the purposes of the Growth Management Act "cannot be achieved without meaningful judicial review ... and ... a standard of review stricter than fairly debatable is appropriate". 559 So. 2d at 255. The court was quick to note that it was not reviewing a zoning decision but rather a decision to site a landfill on a particular parcel of land in the City of Jacksonville.

In *Southwest Ranches, supra*, the court stated that :

> We believe that the enactment of the comprehensive statutory scheme manifests a clear legislative intent to mandate an intelligent uniform growth management throughout the state in accord the statutory scene. This purpose cannot be achieved without meaningful judicial review and lawsuits brought under the planning act. 502 So. 2d at 936.

Judge Cowart's concurring opinion in *City of Cape Canaveral v. Mosher*, 467 So. 2d 468 (Fla 5th DCA 1985), reasons that all zoning changes which depart from the parameters of the plan with respect to density should be deemed inconsistent with the plan and invalid. According to Judge Cowart, this fairly rigid approach is necessary to make an individual zoning changes, which are essentially an executive action, conform to a legislative plan. The changing needs of an area should be accommodated by amending a plan itself and not by enacting inconsistent provisions whenever a need arises. 1000 FRIENDS OF COURT suggests that this is exactly the approach contemplated by the Growth Management Act.

B.B. McCormick aptly describes the strict scrutiny approach:

> "[i]t 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 accepted 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.

In the case *sub judice*, the Fifth District concluded that, while initially the zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public are legislative in character, rezoning actions which have an impact on a limited number of persons or property owners (on identifiable parties and interests) where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, are quasi-judicial. 595 So.2d at 80. Where the issue and decision involves the proper application of a legislated rule of law to a particular piece of property, the application of the fairly debatable standard, or any other deferential or discretionary standard, is erroneous.

The lower court has placed the initial burden on the landowner to present a *prima facie* case that the requested rezoning was consistent with the comprehensive plan. *Id.* at 80-82. After the initial burden is met, the burden shifts to the County to show that the rezoning request is inconsistent with the comprehensive plan. *Id.* The Court placed the burden on the governmental zoning authority to assure that an adequate record of the evidence is prepared and available to a reviewing Court, including the relevant evidence establishing the zoning applicant's *prima facie* case. *Id.* at 80-82. In addition, specific, written, detailed findings of fact must be entered by the local government to support any decision denying the landowners' requested use of their land.

Snyder's characterization of close judicial scrutiny as the process whereby the governmental agency must state reasons for its decision, make findings of fact, and create a record sufficient for a reviewing court to examine is consistent with the principle that all land use decisions be supported by an underlying factual and technical basis and the overall policies established in a general plan. However, *Snyder* goes too far in requiring that the government satisfy a burden of clear and convincing evidence that its denial of rezoning was consistent with the plan once the landowner has satisfied his initial burden of establishing that his rezoning proposal was consistent with the plan. Indeed, although one implication of *Snyder* is that courts should not strictly scrutinize decisions to grant rezonings, another recent Fifth District opinion, *Gilmore v. Hernando County,* 584 S.2d 27,28 (5th DCA 1991) conceded that a review standard "stricter" than "fairly debatable" should have been applied by a trial court hearing a challenge to an approval of a requested rezoning.

In *White v. Metropolitan Dade County,* 563 So.2d 117 (Fla. 3d DCA 1990) the Court recognized that "developments challenged as contrary to master plans must be strictly construed and the burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan, its elements, and objectives. *White* at 128. The *Machado* opinion rejected an argument that the textual parts comprehensive plans are simply general policies that local governments were not bound to follow, stating:

> "If this is the case then there are no standards or parameters to guide when, where, what kind, and how much commercial use will be permitted in a planned residential zone, leaving the zoning authority free to approve, ad hoc, commercial zoning and residential zone subject only to a deferential court review. We

> have previously rejected that philosophy... A comprehensive land use plan is not a "vest pocket tool", ... for making individual zoning changes based on political vagary ... Instead, it is a broad statement of a legislative objective to protect human, environmental, social and economical resources and to maintain through orderly growth and development the character and stability of present and future land use and development in this state. *Id.* at 635.

Given the extensive review process an approved plan receives, the central importance placed on an approved plan, and the expressed legislative intent, strict scrutiny is an entirely appropriate standard of review.

D. THE PROPONENT OF A REZONING HAS THE BURDEN OF PROOF IN CONSISTENCY CHALLENGES

There are two schools of thought with regard to the burden of proof. The better approach is embodied by *Fasano* and *Machado*, and can be stated as follows:

> When a local government's decision is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase. If other areas have previously been designated for the particular type of development, it must be shown why it is necessary to introduce it into an area not previously contemplated and why the property owners there should bear the burden of the departure. *Fasano* at 29.

Machado likewise held:

> Where a zoning action is challenged as violative of the comprehensive land use plan, the burden of proof is upon the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements. Where the record is silent,

> or the evidence shows nonconformity with the plan . . . the requested rezoning will be denied as inconsistent with the comprehensive plan. *Machado* 519 So.2d at 633.

The *Snyder* opinion improperly employs a shifting burden of proof. This approach is inconsistent with the statutory definition of consistency. Under the statute, a local government has the ability to choose between two "consistent" alternatives. The proponent of a rezoning which has been denied must be required to demonstrate that what was granted (or required to remain) instead is inconsistent with the plan. Such a claim should be viewed with strict scrutiny.

There is no real difference between saying that a decision to deny a rezoning will be upheld if it is "fairly debatable" and ruling that the landowner, in such a case, must show, under strict scrutiny, that the rezoning denial was inconsistent with the comprehensive plan and, further, that the requested rezoning was consistent. This is essentially the holding of *City of Tampa v. Madison*, 508 So.2d 754 (Fla. 2d DCA 1987) which held that a city's denial of a rezoning should be upheld if fairly debatable, placing the burden of proving the necessity for the change, or the arbitrariness of the existing classification, on the party seeking the change.

As stated by the Fifth District in *Snyder*, "favoritism, abuses, and inconsistencies have resulted from the fact that piecemeal rezonings have been treated as legislative actions." 595 So.2d at 76.

The decision of a local government should be reviewable to the extent that the government does or does not satisfy the procedural requirements that the quasi-judicial nature of their land use decisions warrants. If a comprehensive plan requires that certain conditions exist in order to grant a particular rezoning or other

development order, the courts must insist on a showing that the conditions do in fact exist. A requirement that the proponent of a rezoning bear the burden of proving the relevant facts is simply common sence and is not onerous. For instance, on a rezoning, the most fundamental issue will be whether the type and intensity of the proposed use is consistent with the use and intensity standards established in the plan. As noted by the First District in *McCormick*, such matters are "relatively easily subject to examination for strict compliance with the plan." 559 So. 2d at 255.

However, as Judge Sharp stated in her dissent in *St. Johns County v. Owings*, 554 So.2d 535 (Fla. 5th D.C.A. 1989), courts must not forget "the rule of law which gives deference to a zoning authority's interpretation of its own ordinances or zoning plans. If the zoning authority's interpretation is not unreasonable and not palpably erroneous or arbitrary, it should be accepted by the reviewing court. A court should not arrive at its own interpretation on the basis of reason and logic as it perceives it to be." *Owings* at 543.

Strict scrutiny does not overly limit the ability of the local government to enact necessary and appropriate land use changes:

> A comprehensive land use plan legislatively sets a zoning norm for each zone. Under §163.3194(1) Fla. Stat. (1991), after adoption of such a plan, zoning changes should be made only when existing zoning is inconsistent with the plan; otherwise the plan should be legislatively amended as to the area of the entire zone or as to the uses permitted within the entire zone. This is the only way to (1) regulate and maintain land use by zones (2) make individual zoning changes, which are essentially executive action, conformed to a legislative plan and (3) avoid arbitrary spot zoning change that permits the use of individual parcels to depart from a plan. *Machado*, 519 So.2d at 634.

The greatest benefit of a finding of fact requirement is that it forces local governments to engage in reasoned decision making based on articulated standards. This would have the positive effect making local bodies more aware of their responsibility by requiring greater self-discipline and would also result in more confidence in and less distrust of zoning decisions. The Growth Management Act facilitates this approach because "the compilation of data and the analysis inherent in competent planning will inevitably impart accuracy and consistency to individual land use decisions". See Siemon, 16 Stetson L. Rev. at 627.

In *Fasano* the Oregon Supreme Court, perhaps anticipating the debate now occurring in Florida, stated that it may be criticized by those who think it desirable that the planning authority be vested with the ability to adjust more freely to changing conditions. However, said the court, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressure that can be asserted by private/economic interests of the local government, it believed that the latter dangers are more to be feared. *Id.* at 30.

CONCLUSION

The opinion below should be approved insofar as it requires strict judicial scrutiny of the consistency of development orders with an adopted local comprehensive plan. Insofar as it authorizes dual standards, prohibits *de novo* review, or places a burden of proof on the local government, the opinion should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail on the following persons this 30 day of October, 1992.

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