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SUPREME COURT
STATE OF FLORIDA

BOARD OF COUNTY COMMISSIONERS)
OF BREVARD COUNTY, FLORIDA,)
)
Petitioner,)
)
vs.) CASE NO. 79,720
)
JACK R. SNYDER, et al.,)
)
Respondents.)
)
)

Brief of *Amicus Curiae* Florida Department of Community Affairs on Behalf of Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

The Department adopts by reference the statement of the case and of the facts contained in the initial brief filed by Brevard County in this case.

For purposes of this brief the petitioner will be identified as petitioner or Brevard County, and the respondent as respondent or Snyder.

SUMMARY OF ARGUMENT

The Florida Legislature in 1985 adopted a law which radically altered the conditions under which planning and zoning would take place in the future. Among the changes it wrought was the creation of a new, exclusive method for challenging rezonings for being inconsistent with the comprehensive plans which were to be adopted by each county and municipality pursuant to the Omnibus Growth Management Act of 1985.[1] That new, exclusive method appears in Section 163.3215, Fla. Stat., which requires that any person wishing to challenge the consistency of a "development order" (which is defined as a decision granting or denying a "development permit," which is further defined as any subdivision approval, site plan approval, building permit or rezoning which has the effect of permitting the development of land),[2] ultimately pursue that challenge in an action for declaratory and injunctive relief in circuit court. This law thus has the effect of eliminating whatever other remedies might have existed for comprehensive plan inconsistency under the common law prior to 1985, including a petition for writ of certiorari, review by appeal, or otherwise.

Accordingly, insofar as the decision in Snyder v. Board of County Commissioners[3] attempts to create a new obligation for local government to conduct rezoning decisions in a certain manner in

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[1]Ch. 85-55, Laws of Fla.

[2]Section 163.3164(6), (7), Fla. Stat. (1991).

[3]595 So.2d 65 (Fla. 5th DCA 1991).

order to facilitate appellate review by the courts, that decision is inconsistent with the clear and unambiguous language of this statute and therefore must be reversed.

The Snyder decision also insults local governments by putting into writing its assumption that local governments will not consider rezoning decisions in good faith; that they will, instead, "listen to the crowd," or "do what the public wants." Having thus expressed its skepticism about local governments, the decision goes on to construct an elaborate but unauthorized system of presumptions and hurdles to ensure that the interests which it feels are important to society (that is, the interests of the property owner, the developer and the land speculator) are protected. This system of presumptions and artificial barriers is created from juridical whole cloth and is without foundation in either the common law or statutory law in the State of Florida. Therefore, with respect to presumptions attaching to decisions about land use and to the other hurdles erected to make local governments stumble on the way to comprehensive planning, the decision should be reversed.

The First District Court of Appeal has demonstrated the proper way to address rezonings which are alleged to be inconsistent with the plan.[4]

It has laid the groundwork for the conclusions that this Court should reach about the application of the provisions in Chapter

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[4]See Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990); Emerald Acres Investment v. Leon County, 601 So.2d 577 (Fla. 1st DCA 1992).

163, Part II, Fla. Stat. (1991), to rezoning decisions. These are as follows:

1. The exclusive method for challenging a rezoning, or any other development order, for inconsistency with the local government's comprehensive plan is through a de novo proceeding for declaratory and injunctive relief brought in circuit court in accordance with the procedures contained in Section 163.3215, F.S. In that proceeding, the person challenging the local government's actions has the burden of proving, by a preponderance of the evidence, that the development order is inconsistent with the comprehensive plan. In evaluating that issue, the circuit judge must apply the "strict scrutiny" standard to the development order at issue, as described in Machado v. Musgrove.[5] However, the circuit court must also recognize that a local government typically has wide latitude in making decisions about the degree to which a development order is or is not consistent with this comprehensive plan, and specifically a local government is under no obligation to grant a rezoning to give a property owner the highest and best use permitted that property owner under the terms of the comprehensive plan, unless the owner is guaranteed that use by the plan.

2. There still exists a remedy for persons who feel that the granting or denial of an application for rezoning (or any other

[5]519 So.2d 629 (Fla. 3rd DCA 1987), review denied, 529 So.2d 693 (Fla. 1988).

development order) is arbitrary, capricious or confiscatory, either through a petition for writ of certiorari to the circuit court, or by initiating an action for declaratory or injunctive relief addressed to that issue. However, neither a petition for writ of certiorari nor the typical action for declaratory and injunctive relief (except as otherwise authorized by Section 163.3215) may be brought on the issue of consistency of the rezoning decision with the comprehensive plan.

For these reasons, the instant decision should be reversed and an opinion entered clarifying the responsibilities of local government and the courts under the provision of Chapter 163, Part II, Fla. Stat. (1991).

ARGUMENT

I. The Snyder decision should be reversed because it ignores the exclusive statutory remedy for challenging rezoning decisions for inconsistency with a comprehensive plan and creates without legal foundation a new procedure and new responsibilities for local government.

A. The only way to challenge a rezoning decision for inconsistency with a comprehensive plan is by filing a *de novo* action for declaratory and injunctive relief pursuant to Section 163.3215, Fla. Stat.

1. The Power to Zone in Florida and the Endurance of the Fairly Debatable Standard

Florida's codified laws used to be filled with dozens of sections prescribing in great detail the land use powers of local

government, and how those powers were to be used and reviewed.[6] This is because local governments in Florida initially obtained their power to zone from the state legislature by specific general act or special act, through a slow and careful portioning out of the state's police powers to regulate land uses and other activities to protect the public health, safety and welfare.[7] For example, in 1925, the Florida Supreme Court held that the power given by the Legislature to Jacksonville in its Charter to legislate in the "general welfare" did not convey sufficient authority to adopt and enforce zoning regulations derived from the state's police powers; such authority had to be conferred specifically by general or special act.[8] Municipalities in Florida obtained power to zone by general legislation in 1939,[9] and

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[6]See, e.g., Ch. 10847, Laws of Fla. (1925) (charter of the City of Miami); Ch. 176, Fla. Stat. (1939) (zoning powers of municipalities); Ch. 163, Part II, Fla. Stat. (1981), Sections 163.160-163.315, which covered subjects like the procedure for establishing zoning districts (Section 163.210), the procedure for amending zoning districts (Section 163.215), and judicial review of board of adjustment decisions (Section 163.250).

[7]See Pinellas County v. Laumer, 94 So.2d 837 (Fla. 1957); State ex rel. Helseth v. Du Bose, 99 Fla. 812, 128 So. 4, 6 (1930), wherein the court (citing Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)) held the City of Vero Beach had authority to engage in zoning by virtue of a special act, Ch. 11262, Sp. Acts of 1925, unless the zoning ordinances were "clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, or general welfare." (Citations omitted). Nevertheless, the city's actual decision under its zoning ordinance, to deny the county's application for a permit to construct a jail, was reversed. 128 So. at 6-7.

[8]State ex rel. Shad v. Fowler, 90 Fla. 155, 105 So. 733, 734 (1925).

[9]Section 176.04, Fla. Stat. (1941); Section 5, Chapter 19539, 1939; C.G.L. 1940 Supp. 2949(5).

counties in 1969.[10] They were granted the power to govern themselves by adopting any law not inconsistent with general or special law in the constitutional revisions of 1968.[11]

The United States Supreme Court validated the typical system of zoning used by these local governments and established an enduring scope of judicial review for land use regulations in Euclid v. Amber Realty Co.,[12] upholding zoning that divided the town into distinct land use categories, one of which kept an owner from developing his property as he desired. The Supreme Court in Euclid took care to state that zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare."[13] However, in response to the owner's argument that the designation for his land was arbitrary the Court also said:

> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.
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> * * *
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> We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot--not the courts.[14]

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[10]Sections 163.160-163.315, Fla. Stat. (1969).

[11]See Article VIII, Section 2B, Florida Constitution; Municipal Home Rule Powers Act, Section 166.021(4), Fla. Stat.; Hillsborough Association For Retarded Citizens, Inc., v. Temple Terrace, 332 So.2d 610 (Fla. 1976).

[12]272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[13]47 S.Ct. at 118.

[14]272 U.S. at 388, 393.

As local governments' zoning decisions were challenged, the fairly debatable rule quickly became the standard applied throughout Florida for the next sixty years.[15] Specifically, the rule was construed to apply to applications for rezoning, as well as to the initial adoption of jurisdiction-wide zoning.[16] Indeed, one court described the burden of proof as a party seeking relief from a zoning action as "an extraordinary one which places upon such party the duty of showing from the record before the trial court that the zoning ordinance under challenge is not fairly debatable; the debate must be upon grounds which 'make sense.'"[17]

Those who wished to challenge zoning decisions for being arbitrary and capricious could do so by filing a petition for writ of certiorari in the circuit court for a review of the local government's zoning decision[18] or by attacking the

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[15]See, e.g., State ex rel Helseth v. Du Bose 99 Fla. 812, 128 So. 4, 6 (1930); Renard v. Dade County, 261 So.2d 832 (Fla. 1972); State ex rel Office Realty Co. v. Ehinger, 46 So.2d 601 (Fla. 1950); Surfside v. Abelson, 106 So.2d 108 (Fla. 3rd DCA 1958); J.H.S. Homes, Inc., v. Broward County, 140 So.2d 621 (Fla. 2nd DCA 1962); McCormack v. Pensacola, 216 So.2d 785 (Fla. 1st DCA 1968).

[16]See John G. Lane Line, Inc. v. Jacksonville, 196 So.2d 16 (Fla. 1st DCA 1967); Metropolitan Dade County v. Fletcher, 311 So.2d 738 (Fla. 3rd DCA 1975); Pembroke Pines v. Blacker, 314 So.2d 195 (Fla. 4th DCA 1975).

[17]Dade County v. Beauchamp, 348 So.2d 53, --- (Fla. 3rd DCA 1977).

[18]See Lewis v. Howanitt, 378 So.2d 310, (Fla. 3rd DCA 1979).

constitutionality of the zoning decision by filing an action for equitable relief.[19]

As applied to rezonings, due process required that an affected landowner be given prior notice and an opportunity to be heard before action was taken by a zoning authority to alter the use to which the owner was permitted to put his land. Therefore, a city planning and zoning board was required to give notice to an affected landowner of a hearing at which the board considered rezoning the landowner's property, and the landowner was entitled to an opportunity to be heard, where the board enjoyed de facto interim zoning authority pursuant to the city charter and city ordinances and where, much, if not all, of the fact-finding discussion and consideration with respect to the merits or demerits of the zoning change were accomplished at the zoning board level.[20]

In order to assess the fairness of a local government zoning ordinance -- for purposes of determining whether the ordinance takes the owner's property without just compensation, the benefits to the property owners from the ordinance, which serves the local government's interest in assuring careful and orderly development of residential property with provisions for open space areas, and thereby benefit property owners as well as the public, must be

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[19]See Trans American Property, Inc., v. Riviera Beach, 400 So.2d 803 (Fla. 4th DCA 1981).

[20]Gulf & Eastern Development Corp. v. Ft. Lauderdale, 354 So. 2d 57 (Fla. 1978).

considered along with any diminution in market value at the property owners might suffer.[21]

2. The Relationship Between Zoning and Comprehensive Plans.

The earliest general legislation giving municipalities in Florida the power to zone contained the following language:

> **176.04 Purposes in View in Making Regulations.** -- Regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and a general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout said municipality.[22]

It is not surprising that the "in accordance with a comprehensive plan" language appears here since it was included in the federal Department of Commerce's Standard State Zoning Enabling Act.[23] However, little attention was paid to the "accordance with" language by local governments or the courts, and it was not taken to require adoption of a separate document known as a comprehensive plan. Rather, it was enforced only on those rare occasions when the local government zoned only selected areas within its

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[21]Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

[22]Section 176.04, Fla. Stats. (1941); Section 5, Chapter 19539, 1939; C.G.L. 1940 Supp. 2949 (5). (Emphasis added).

[23]U.S. Dep't of Commerce, the Standard State Zoning Enabling Act, 1922 (Rev'd Ed. 1926).

jurisdiction, where such zoning was done by means of an interim ordinance that was passed with legally questionable procedures, or where the zoning ordinance failed to control one or more of the key factors it was intended to regulate, such as uses or heights.[24]

Without a controlling comprehensive plan, zoning often took place in a policy vacuum that could be, and sometimes was, the equivalent of "trial by neighborism."[25] This was at least in part a consequence of the fairly debatable test because local government zoning decisions could be defended easily, even if they were based on "momentary taste."[26] Out of frustration, one of the most prominent spokespersons for planning in the modern age said:

> It is difficult to see why zoning should not be required, the master plan legislative and judicially, to justify itself by consonance with a master plan as well. It might even be argued that any zoning done before a formal master plan has been considered and promulgated as per say unreasonable, because of failure to consider as a whole the complex relationships between the various controls which a

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[24]DiMento, Developing the Consistency Doctrine: The Contribution of the California Courts, 20 Santa Clara L. Rev. 285, 286 (1980). A zoning ordinance was not unconstitutional for failure to represent a comprehensive plan where, although the ordinance had been amended many times since its adoption, the record did not indicate that such ordinance failed to comprehensively zone the entire municipality. Jefferson National Bank v. Miami Beach, 267 So.2d 100 (Fla. 3rd DCA 1972), Cert. Denied, 273 So.2d 763 (Fla. 1972). See also, County Commissioners of Ann Arundel County v. Ward, 186 Md. 330, --- 46 A. 2nd. 684, 688 (1946), in which the court said: "the Enabling Act calls for a comprehensive plan, but we think that such a requirement has met its due consideration as given to the common needs of a particular district."

[25]Babcock, The Zoning Game, 141 (1966).

[26]Siemon, The Paradox of "In Accordance with the Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations, 16 Stetson Law Review 603, 610 (1987).

municipality may seek to exercise over its inhabitants in furtherance of the general welfare.[27]

This chink in the planning armor led a number of states faced with extraordinary growth problems, such as Hawaii, California, Oregon, New Jersey and Florida, to amend their enabling laws for zoning to make it clear that "planning was an essential ingredient in the zoning equation."[28] In fact, in Florida, Chapter 163, Part II, Fla. Stat., was amended to create the Local Government Comprehensive Planning Act of 1975.[29] However, the plans were of such low quality that the courts, given the opportunity to construe the "consistency" requirements of the Act to require that local governments amend their land use regulations to bring them into conformance with the plans, declined to do so.[30] The local government plans mandated by the 1975 law were by and large useless; because there were no minimum criteria they had to meet,

there was no state comprehensive plan to provide policy guidance,

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[27]Haar, In Accordance with a Comprehensive Plan, 68 Harvard Law Review 1154, 1174 (1955).

[28]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 Law Review 603, 612 (1987).

[29]Fla. Stat. Sections 163.3161, 163.3162, 163.3194 (1975).

[30]See, 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; City of Gainesville v. Cone, 365 So.2d 737 (Fla. 1st DCA 1979); Metropolitan Dade County v. Brisker, 485 So.2d 1349 (Fla. 3rd DCA 1986).

and there was no meaningful review of them by the State.[31] Nevertheless, those local governments that did adopt a comprehensive plan and thereafter conform their land use regulations to that plan were rewarded with a further presumption of validity because the "essence of constitutional zoning with no due process or equal protection problems is generally recognized to be demonstrated by the existence of a plan which uniformly, without discrimination and without unreasonable restrictions, promotes the general welfare."[32]

3. The New Statutory Procedure in Section 163.3215, Fla. Stat.

The Legislature brought about huge changes in the growth management system in Florida when it adopted the Omnibus Growth Management Act of 1985.[33]

The Act gave the Department the authority to adopt by rule minimum criteria to be met by comprehensive plans, adopted a state comprehensive plan against which local plans could be measured, and gave the Department meaningful review authority to examine plans and find them not in compliance if they were inconsistent with state law.[34] The Act also adopted for the first time a new method for challenging development orders, which are defined to include

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[31]See, Pelham, Towards an Integrated Statewide Planning Process, F.S.U. Law Review.

[32]Amcon Corp v. City of Eagan, 348 N.W. 2d. 626, 74 (Minn. 1984).

[33]Ch. 85-55, Laws of Fla.

[34] See Sections 163.3167, 163.3177(9) and 163.3184, Fla. Stat. (1987).

decisions granting or refusing an application for rezoning,[35] by means of a suit for declaratory and injunctive relief filed after notice to the local government and an opportunity to respond.[36] That the Legislature intended this remedy to apply to persons seeking relief from a local government decision granting or denying an application for rezoning is made clear by the language in subsection (3), which states as follows:

> (3)(a) No suit may be maintained under this section challenging the approval or denial of a zoning, rezoning, planned unit development, variance, special exception, conditional use, or other development order granted prior to October 1, 1985, or applied for prior to July 1, 1985.
>
> (b) Suit under this section shall be the sole action available to challenge the consistency of a development order of a comprehensive plan adopted under this part.[37]

Obviously, if the Legislature had not intended for this exclusive remedy to apply to zonings or rezonings, it would not have specifically mentioned the zonings or rezonings to which the statutory remedy would not apply. According to standard rules of statutory interpretation, this provision must be given its plain meaning: a zoning or rezoning may only be challenged for consistency in an action for declaratory or injunctive relief pursuant to Section 163.3215.

a. The Substance of the Test -- Strict Scrutiny

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[35]See Section 163.3164(5), (6), Fla. Stats. (1991).

[36]Section 163.3215, Fla. Stat. (1991).

[37]Section 163.3125(3), Fla. Stat. (1991).

Although this legislative mandate is not confusing, and seems to be readily apparent upon examination of the statute, it was more than six years before an appellate court in a published decision enforced this provision by dismissing an untimely action which was filed without prior notice to the local government.[38]

In the meantime, other courts throughout the state ruled on the issue of zoning consistency with comprehensive plans without specifically mentioning or enforcing the provisions of Section 163.3215. Among the cases which addressed the issue of the propriety of a rezoning or a refusal to rezone were the following:

Pfeiffer v. City of Tampa,[39] in which the court had before it an appeal of a declaratory judgment suit involving whether the City property in question was zoned C-1 by zoning ordinance or was restricted to single-family residential use by a special act of the Florida Legislature. The court said that the general language of the statute allowing municipalities to regulate building activities, including the provisions in Chapter 163, Part II, was overridden by the specific mandates of the special act.

Sengra Corp. v. Metropolitan Dade County,[40] in which the plaintiff submitted an application to rezone 12.3 acres in Miami Lakes from IU-C (industrial use conditional) to RU-4A (hotel/apartment house district) so it could construct a 126-bed

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[38]See Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990); Emerald Acres Investment v. Board of County Commissioners, 601 So.2d 577 (Fla. 1st DCA 1992).

[39]470 So.2d 10 (Fla. 2nd DCA 1985).

[40]476 So.2d 298 (Fla. 3rd DCA 1985).

hospital. The planning department recommended denial of the rezoning because there was no demonstrated need for a new hospital and the aviation department was concerned that aircraft noises from a nearby airport would adversely affect the hospital. The Board of County Commissioners denied the request stating that it would be in conflict with "the principal intent of the plan for the development of Dade County, Florida." It was brought before the appellate division of the circuit court, which affirmed the denial without an opinion and then brought by certiorari to the 3rd District Court of Appeal.

The court said that the petitioner had not met its burden of "showing that the reasonableness of the existing zoning classification is not fairly debatable."[41] That the requested rezoning was not consistent with the comprehensive development master plan was a valid basis for denying the request.[42]

In Hillsborough County v. Putney,[43] the landowner sought to rezone its property from agricultural to commercial neighborhood. The property in question was covered by a red maple swamp, which was included in the county's conservation area designation. Also, the conservation element of the comprehensive plan had a policy which said: "Disapprove all rezoning applications within

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[41]Broward County v. Capeletti Brothers, Inc., 375 So.2d 313 (Fla. 4th DCA 1979), cert. denied 385 So.2d 755 (Fla. 1980).

[42]Id. at 316; Wald Corp. v. Metropolitan Dade County, 338 So.2d 863, 868 (Fla. 3rd DCA 1976), cert. denied, 348 So.2d 955 (Fla. 1977).

[43]495 So.2d 224 (Fla. 2nd DCA 1986).

conservation areas unless the application is for a plan development which requires detailed site plan review following specific guidelines and criteria."[44] Based on this policy the County denied the request. The circuit court subsequently granted the petition for writ of certiorari, reversed the decision and ordered the board to rezone the property to a zoning classification not more restrictive than neighborhood commercial. The circuit court decision in turn was reviewed by petition for writ of certiorari and the 2nd DCA overturned it, citing Sengra Corp. v. Metropolitan Dade County,[45] and Alachua County v. Eagle's Nest Farms, Inc.[46]

Another case was Southwest Ranches Homeowners, Inc. v. Broward County.[47] In this case the homeowners association tried to enjoin the county from locating a landfill on a site near their homes. The selection of the site was challenged as being inconsistent with several elements of the plan under Section 163.3194. The county put on contrary evidence. The court recognized that Section 163.3194(1) requires that all development undertaken be consistent with the plan. The court rejected the county's assertion "that the land use element of its comprehensive

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[44]495 So.2d at 225.

[45]476 So.2d 298 (Fla. 3rd DCA 1985).

[46]473 So.2d 257 (Fla. 1st DCA 1985), reviewed denied, 486 So.2d 495 (Fla. 1986) (inconsistency with intent and purpose of comprehensive plan was valid basis for denying special use permit.)

[47]502 So.2d 931 (Fla. 4th DCA 1987).

plan alone should be considered in determining consistency." It said:

> We cannot agree that the land use plan is the sole, controlling document with which subsequent plan elements had to comply. On the contrary, each subsequently adopted element was designed to fulfill the overall requirements and goals of the statute, as the text of these elements amply demonstrates. We find no conflict between the charter powers of the County and the statutorily mandated obligation to adopt a comprehensive plan and abide by all its elements.[48]

The court recognized the traditional fairly debatable test applied to rezoning decisions. ". . . [w]e believe the enactment of the comprehensive statutory scheme manifests a clear legislative intent to mandate intelligent, uniform growth management throughout the state in accord with the statutory scheme." The court continued, "Our reading of the analysis in Grubbs, with which we agree, is that zoning decisions should not only meet the traditional fairly debatable standard, it should also be consistent with the comprehensive plan."

> 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 and the fairly debatable standard contemplates. In our view, such stricter scrutiny should be applied to the ordinances involved here, which allow more intense use of an area than was originally contemplated by the County's land use plan.[49]

The Court also made favorable reference to Judge Cowart's concurring opinion in City of Cape Coral v. Mosher,[50] where he advocated strict adherence to the plan. "In his view, all zoning

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[48]502 So.2d at 935 (Emphasis in original).

[49]Id. at 936 Note 3.

[50]467 So.2d 468 (Fla. 5th DCA 1985).

changes which depart from the parameters of the plan with respect to density should be deemed inconsistent with the plan and invalid."[51]

The Machado v. Musgrove decision cited above is one of the most influential on the issue of the relationship between zoning and the comprehensive plan.[52] In this case landowners sought to have their property rezoned from an interim category to professional office use; the land was designated estate residential (two units per acre) in the comprehensive plan in an area limited to ranchlands, nurseries and croplands.[53] The court went on to say:

> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. § 163.3167(1), Fla. Stat. (1985); Southwest Ranches Homeowners Ass'n v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987). The plan is likened to a constitution for all future development within the governmental boundary. O'Loane v. O'Rourke, 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283, 288 (1965).
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> Zoning, on the other hand, is the means by which the comprehensive plan is implemented, City of Jacksonville Beach v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984), and involves the exercise of discretionary powers within limits imposed by the plan. Baker v. Milwaukie, 533 P.2d at 775. It is said that a zoning action not in accordance with a comprehensive plan is ultra vires. Haar, In Accordance With A Comprehensive Plan, at 1156.[54]

The "strict scrutiny" test endorsed by the Machado court is

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[51]Id.

[52]519 So.2d 629 (Fla. 3rd DCA 1988) (en banc), review denied, 529 So.2d 693 (Fla. 1988).

[53]519 So.2d at 630-631.

[54]519 So.2d at 631-632.

described as being a departure form the fairly debatable test because the requirement that all zoning action "conform to an approved land use plan is, in effect, a limitation on a local government's otherwise broad zoning power.[55] It is further described as follows:

> The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.
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> Strict scrutiny is not defined in the land use cases which use the phrase but its meaning can be ascertained from the common definition of the separate words. Strict implies rigid exactness. A thing scrutinized has been subjected to minute investigation. Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review.
>
> Analogously where a zoning action is challenged as violative of the comprehensive land use plan the burden of proof is no 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. See Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (en banc). See also comment, Burden of Proof in Land Use Regulations: A Unified Approach and Application to Florida, 8 Fla. St. U.L.Rev. 499 (1980) (the 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, City of Cape Canaveral v. Mosher, 476 So.2d 468 (Fla. 5th DCA 1985), a different and incompatible character of use, Alachua County v. Eagle's Nest Farms., Inc., 473 So.2d 257 (Fla. 1st DCA 1985), or a failure to comply with the plan's mandatory procedures, Hillsborough County v. Putney, 495 So.2d 224 (Fla. 2d DCA

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[55]519 So.2d at 632, citing, Maryland-National Capital Park & Planning Comm. v. Mayor & Council of Rockville, 272 Md. 550, 325 A.2d 748 (Ct. App. 1974).

1986), the requested rezoning will be denied as inconsistent with the comprehensive plan.[56]

The Machado court also said there is an implication that neither the fairly debatable standard nor any other deferential standard should apply created by the fact that the Legislature supplied a definition of consistency at Section 163.3194(3)(a), Fla. Stat. (1991), which says:

> 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.[57]

Another rezoning case was City of Tampa v. Madison,[58] in which an unsuccessful applicant for a rezoning from residential to commercial sought review of the decision by the city to deny rezoning through a petition for writ of certiorari in circuit court. The trial court overturned the city's decision and ordered the property rezoned and thereby appeared to have shifted to the city the burden of proving that the request for rezoning adversely affected the welfare of the public. "The burden of proving the necessity for a change in zoning, where the arbitrariness of an existing zoning classification, rest upon the parties seeking the

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[56]519 So.2d at 633 (some citations omitted). The "strict scrutiny" test has been endorsed in B.B. McCormick & Sons, Inc., v. Jacksonville, 559 So.2d 252, 255 (Fla. 1st DCA 1990).

[57]519 So.2d at 633, citing, McPherson, Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans, 61 Fla.B.J. 71 (1987).

[58]508 So.2d 754 (Fla. 2nd DCA 1987).

change."[59] The court found that the issue of zoning was fairly debatable and that the city's decision was supported by competent substantial evidence, and reversed the trial court's decision.[60]

b. The Remedy -- De Novo Action, Certiorari, or Appeal

An interesting case on remedies is Rinker Material Corp v. Dade County.[61] Rinker opposed a rezoning adjacent to is operation to low-density residential land because it feared that residents of that land would complain about and therefore compromise their mining operations. Rinker filed an original action seeking declaratory and injunctive relief challenging the rezoning as an unreasonable and arbitrary exercise of the county's authority.

> The trial court incorrectly treated the case as either an appeal from quasi-judicial action taking by the commission, or a petition for a writ of certiorari from a commission's zoning action. The case before the circuit court was neither. Instead, it was an original action properly mounting a direct attack on an ordinance. As such, Rinker was entitled to present evidence to prove its contention that the ordinance was unreasonable and arbitrary.[62]

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[59]508 So.2d at 755.

[60]Id.

[61]528 So.2d 904 (Fla. 3rd DCA 1987).

[62]528 So.2d at 905, citing, Coral Gables Federal and Savings v. City of Lighthouse Point, 444 So.2d 92 (Fla. 4th DCA 1984); Graham v. Talton, 192 So.2d 324 (Fla. 1st DCA 1966). In Graham a writ of certiorari was determine to be the improper method for challenging a rezoning ordinance on the basis that is was unreasonable; instead, the proper method was direct challenge in circuit court. On the other hand, in Albrite v. Hensly, 492 So.2d 852, 856 (Fla. 5th DCA 1986), a writ of certiorari was found to be the proper remedied to challenge a county's grand variance where the record in the circuit court was limited solely to the record of proceedings before the board. Also compare with the Eastside Properties Inc., v. Dade County, 358 So.2d 873 (Fla. 3rd DCA 1978), where it is was held that when reviewing a zoning action the County Commission on petition for writ of certiorari the circuit court may consider only

The Rinker court said, "In enacting the ordinance amending the Dade County Comprehensive Development Master Plan the County Commission was performing a legislative function."[63]

Rinker therefore could not only oppose the passage of the ordinance, it could also challenge the legality of the ordinance in an original action in circuit court, where it would not be limited to the record developed before the commission and could introduce additional evidence whether it has been considered by the commissioners or not.[64]

One Fifth DCA case that implied that injunctive relief would be the proper route after October 1, 1985, was Battaglia Fruit Grove v. City of Maitland,[65] in which the county approved Battaglia's application for a rezoning of a 33.3 acre tract after finding that the rezoning complied with the county's growth management policy. A petition for writ of certiorari was filed by the city in the circuit court. The circuit court granted the

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the record of proceedings before the commission.

[63]528 So.2d at 906, footnote 2 of which reads:

> As the County correctly pointed out on rehearing, although an ordinance amending the Comprehensive Development Master Plan is legislative in nature, proceedings on applications for zoning changes, variances, or special exceptions and which provide interested party with procedural due process are generally considered quasi-judicial. [citations omitted].

[64]See Coral Reef Nurses Inc. v. Babcock, 410 so.2d 648 (Fla. 3rd DCA 1982); New Smyrna Beach v. Barten, 414 So.2d 542 (Fla. 5th DCA 1982), (Cowart, J., concurring), review denied, 424 So.2d 760 (Fla. 1982).

[65]537 So.2d 940 (Fla. 5th DCA 1988).

petitions and quashed the county commission's decision. The legislation in question, which was Orange County's Zoning Code, established by special act of the Florida Legislature, stated that any person aggrieved by a decision of the county commission could file a petition for writ of certiorari in the circuit court. It also stated that a notice of intent to file a petition of writ of certiorari had to be filed in the circuit court within tens days after rendition of the decision. Since the petitioners had not met that ten day period, the petition was untimely.[66] The 5th DCA said common law certiorari was also not available because another party did not file its petition within the thirty-day jurisdictional period. The court also said that Section 163.3215, Florida Statutes (1985) "which authorizes an action for injunctive or other relief to enforce a local comprehensive plan" was not applicable because Battaglia filed its application before July 1, 1985."[67]

The court concluded as follows:

> Whatever objections the City of Maitland had to the proposed rezoning were never made to the agency which had the power to grant or deny the rezoning request. Its complaint that the plan development would burden its municipal services and require it to furnish additional police and fire protection was never presented to the Board of County Commissioners and there is no such evidence in the administrative record. . . . in a certiorari proceeding the circuit court has no zoning powers but can only review the administrative record of the agency that has such powers. The dissent is an error when it says that the circuit court may hear an objection de novo. Not only does the legislative act which gives Orange County its zoning powers specifically prohibit de novo court review, but the law generally limits the

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[66]530 So.2d at 942.

[67]530 So.2d at 943 (emphasis added).

authority of a reviewing court to the record made at the zoning hearing.[68]

B. The availability of this remedy renders the characterization of the local government rezoning decision as "legislative" or "quasi-judicial" irrelevant and eliminates the necessity for the entry of findings and the other new requirements imposed by the decision.

There are only two cases in which an appellate court has discussed the proper application of Section 163.3215, Fla. Stat., and the impact which that section has on the remedies for persons challenging a rezoning action for inconsistency with the comprehensive plan. The first of these is Leon County v. Parker,[69] in which two developers wanted to challenge a decision by the county that their subdivisions would not be approved because their density, when compared with other subdivisions in the area, violated the provisions in the comprehensive plan relating to compatibility.[70] Also, the planning commission determined that each of the proposed plats was inconsistent with "comprehensive plan policies promoting compact urban growth and discouraging urban sprawl."[71]

After unsuccessful appeal to the board of county commissioners, the respondents initiated action in circuit court seeking certiorari review of the actions of the commission. After

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[68]537 So.2d at 943 (footnote omitted).

[69]566 So.2d 1315 (Fla. 1st DCA 1990).

[70]566 So.2d at 1316.

[71]Id.

a final hearing the trial court determined that the denial of the applications was a departure from the essential requirements of law, based on the court's interpretation of the zoning classification within which the subdivisions were located.[72]

The First DCA did not reach the merits of the determination because it found that the trial court should have granted the county's motion to dismiss for failure to comply with Section 163.3215. In commenting on the trial court's holding that the procedure in Section 163.3215 applied only to persons other than the applicant challenging the granting of a development order permit, the court said:

> The term "development order," as used in subsection (1), is a statutorily defined term which means "any order granting, denying, or granting with conditions an application for a development permit." (e.s.) Section 163.3164(6), Fla. Stat. (1989). Also, subsection (3)(a) of Section 163.3215 refers to suits "under this section challenging the approval or denial . . . ." (e.s.)
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> The issue presented by the respondents' complaints was whether the proposed developments were consistent with the comprehensive plan. Section 163.3215(4) provides that a verified complaint must be filed with the local government as a condition precedent to the institution of a suit raising such issues. This basic condition was not satisfied. The deficiency was properly raised by the petitioners' timely motions to dismiss which, as mentioned above, were denied by the trial court.
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> The provisions for such a condition precedent seemed reasonable and logical. A local government body, such as a county commission, often proceeds in an informal, free-form manner. The action of the Leon County Commission in these cases does not appear to be an exception. Rather than simply deny the respondents' request in the cases below, the Leon County Commission suggested that the respondents meet further with the Planning Commission in an effort to work out differences. The requirement of Section 163.3215(4) that a

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[72]566 So.2d at 1316.

> verified complaint be filed with the local government prior to instituting suit has the salutary effect of putting such governmental body on notice that it should be prepared to defend its action and will need to create a record to support that action. Indeed, if such procedure had been following in the instant cases, the disputed matters might well have been resolved without the necessity of court proceedings.[73]

A similar result was reached in Emerald Acres Investment, Inc., v. Leon County,[74] which was the case which resulted from later proceedings in the Parker litigation. After the case was quashed and remanded, the trial court determined that Emerald Acres had not complied with the provisions of Section 163.3215. It turned out there that appellant had filed a petition for writ of certiorari and mandamus, and a complaint for declaratory and injunctive relief, with the circuit court, within 30 days after the decision of the board of county commissioners denying approval of the subdivision. However, the procedures in 163.3215 were not followed. The First DCA said that the 30-day period for filing a verified complaint with the local government is not to be measured from the time when the local government decision is reduced to writing; rather, it is to be measured from the date when the actual decision was made.[75] The court rejected Emerald Acres' argument that Section 163.3215 unconstitutionally intruded on the rule-making authority of the Supreme Court because the Legislature had "legitimate, substantive reasons for enacting the requirement of filing of verified complaint as a condition precedent to

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[73]566 So.2d at 1315.

[74]601 So.2d 577 (Fla. 1st DCA 1992).

[75]601 So.2d at 580.

instituting a judicial action[.]"[76] In closing, the court said:

> Appellants' argument that the remedy of common law certiorari is still available is without merit . . . . The remedy of common law certiorari is not available because the Legislature has designated the statutory remedy the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under the Local Government Comprehensive Planning and Land Development Regulation Act. Section 163.3215(3)(b), Fla. Stat. (1989).[77]

Upon motion for rehearing the court certified the following question of great public importance to the Supreme Court:

> WHETHER THE RIGHT TO PETITION FOR COMMON LAW CERTIORARI IN THE CIRCUIT COURTS OF THE STATE IS STILL AVAILABLE TO A LANDOWNER/PETITIONER WHO SEEKS APPELLATE REVIEW OF A LOCAL GOVERNMENT DEVELOPMENT ORDER FINDING COMPREHENSIVE PLAN INCONSISTENCY, NOT WITHSTANDING SECTION 163.3215, FLA. STAT. (1989)?[78]

The Snyder decision clearly makes the rezoning decision quasi-judicial, with attendant presumptions and new requirements for factual findings, etc., and reviewable by appeal or on petition for writ of certiorari.[79] This outcome is confusing, however, because less than eight months later the whole panel of the 5th DCA released Orange County v. Lust,[80] which appears to be at odds with Snyder. In Lust a property owner bought a .05 acre parcel by tax deed and asked for it to be rezoned from agricultural to heavy commercial so he could erect a billboard on it.[81] The county

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[76]Id.

[77]601 So.2d at 580-581.

[78]601 So.2d at 1223.

[79]595 So.2d at 78-79.

[80]602 So.2d 568 (Fla. 5th DCA 1992) (en banc).

[81]602 So.2d at 569.

refused and Lust filed a petition for writ of certiorari. The Lust court said the trial court overstepped its bounds by looking beyond the question of whether there was competent, substantial evidence to support the decision.[82] Since it was "fairly debatable" that the request was inconsistent with the plan, the trial court incorrectly quashed the decision.[83]

Judge Sharp pointed out that it would have been unlawful for the county to have granted the rezoning without first amending its plan. In a statement indicative of the confusion at the 5th DCA and around the state on this issue Judge Sharp expressed hope that the Florida Supreme Court would instruct the lower courts on the matter of zoning consistency. "We obviously need some help!" she wrote.[84]

II. The Snyder decision should be reversed because it wrongly insults local governments and their rezoning decisions and wrongly limits local government discretion in rezoning decisions.

A. The decision launches a revolutionary attack on the police powers and autonomy of local governments by exalting speculative interests in property over the public welfare and by creating a presumption that the local zoning process is unfair.

The Snyder decision is a case with a surprisingly harsh attitude towards local government democracy and public participation, and towards legitimate efforts by state and local governments to regulate the use of the land. Whether the

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[82]602 So.2d 568 (Fla. 5th DCA 1992).

[83]Id.

[84]602 So.2d at 576 (Sharp, J., concurring specially).

hyperbolic language in the opinion is the result of personal frustration with some land development process or the work product of an overly ambitious clerk, it merits some comment.

The Snyder decision attempts to take planning law back to early 1900's when it says "the ownership of property is meaningful only to the extent that the owner has the right to use property in such manner as the owner desires."[85] This statement is inconsistent with a long line of precedent, cases from the United States Supreme Court and the Florida Supreme Court to the effect that an owner is not entitled to highest and best use of his or her property, he or she is entitled only to a reasonable use of that property. Take for example the plaintiff in McNulty v. Town of Indialantic.[86] In that case, a property owner was denied a variance to allow him to put up some condominium units on oceanfront property. Even though he alleged that this denied him of all reasonable use of his property, the trial court rule otherwise and said that he still had many beneficial uses of the property, such as walkovers, gazebos, sand fences and a viewing deck.[87]

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[85]595 So.2d at 69.

[86]727 F.Supp. 604 (M.D. Fla. 1989).

[87]727 F.Supp. at 608. See also Andrus v. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d, where the owner of some eagle artifacts was prohibited from selling them by a law which because effective after he had legitimately acquired them, where the Supreme Court said:

> Suffice it to say that government regulation -- by definition -- involves the adjustment of rights for the public good. Often this adjustment curtails some

The court makes another inflammatory (and inaccurate) statement when it says:

> The most valuable aspect of the ownership of property is the right to use it. Any infringement on the owner's full and free use of privately-owned property, whether a result of physical limitations or governmentally-enacted restrictions, is a direct limitation on, and direct diminution of, the value of its ownership and accordingly triggers constitutional protection.[88]

This statement ignores the obvious fact that a piece of property which is surrounded by similar pieces of property can be made much more valuable for certain uses through the imposition of governmental restrictions on the use of the property.[89] For example, a regulation imposing a large lot size on a piece of property in an exclusive subdivision will tend to make that property more valuable than if the lot size were permitted to be smaller. Similarly, if a piece of property is suitable for mining, then a prohibition on using that property for housing helps eliminate that potential conflict between incompatible uses in the future and thereby makes the property more valuable. Indeed, the Snyder court itself seems to recognize that government restrictions can have a positive effect on land value in the following passage: "The value of land zoned and used for residential purposes is further enhanced because of the spaciousness occasioned by the non-

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> potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

[88]595 So.2d at 70 (footnote omitted).

[89]See Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

use of nearby land, the use of which is restricted by zoning."[90]

The notion that restrictions on land use trigger special constitutional protections, such as the Snyder decision's pronouncement that a property owner establishing prima facie consistency with a land use designation would thereupon be entitled to the highest use within that category absent "clear and convincing" evidence to the contrary[91] is inconsistent with precedent.

Such pronouncements by the court are unseemly and invade the province of policy-makers. As the court said in City of Coral Gables v. Sakolsky,[92] "Questions of zoning policy, of benefit or detriment, of what is good or bad for the city and the public, involve an exercise of police power and are essentially matters within the legislative orbit of the city."

Under our system of government, separated into three branches, courts are never permitted to invalidate a legislative act "because it fails to square with their individual social or economic theories or what they deem to be sound public policy."[93] Nor can the judiciary impose on another branch of local government rules

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[90]595 So.2d at 65.

[91]595 So.2d at 81, 81 n. 70.

[92]215 So.2d 329, 333 (Fla. 3rd DCA 1968).

[93]Barnes v. B.K. Credit Service, Inc., 461 So.2d 217, 219 (Fla. 1st DCA 1984); See also Moore v. State, 343 So.2d 601, 603 (Fla. 1977) (courts must not be swayed by "any personal opinions as to [legislation's] wisdom or efficacy.")

for the conduct of its business.[94]

In what could only be described as a blatant attempt by the majority to set policy, as opposed to enforcing the law, the court spends much time describing "some basic zoning and rezoning concepts."[95] Among the "basis concepts" which the court speculates about is:

> Most development has not occurred "as-of-right" under actual zoning practices. Most communities in actual practice have zoned their own developed land under a highly restrictive classification such as "general use" and agriculture. . . . The original intent was not to permanently [sic] preclude more intensive development but to adopt a "wait and see" attitude toward the direction of future development.
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> In reality, therefore, at the inception of zoning most land was zoned according to its then use, exceptions were grandfathered in and most vacant land was under-zoned or "short-zoned."[96]

In what is truly an inaccurate and harmful statement, the court says that an owner whose land has thus been zoned and "who wishes to exercise his constitutional right to use his vacant property or make a more intense use of his under-zoned land, has to first obtain permission from the government." This is an entirely new and unjustified attempt to expand the rights of property owners in the State of Florida. The precedent is clear in this state that a diminution in property values alone does not render a land use regulation void, even if it is "harsh and results in serious

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[94]See Second District Court of Appeal v. Lewis, 550 So.2d 522, 526 (Fla. 1st DCA 1989).

[95]595 So.2d at 72.

[96]595 So.2d at 65 (footnote omitted).

depreciation of the value of the property because financial advantage is not the test, but a greater advantage to the community as a whole."[97] Indeed the 5th DCA itself has recognized that a property owner is not entitled to the highest and best use of her property.[98]

Among the most important reasons that comprehensive planning exists are the protection of natural resources, the efficient provision of services, the discouragement of urban sprawl, and the creation of viable communities. There is no way that these land use planning ends can be achieved without restricting the use of some people's property.[99] These goals have certainly been

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[97]Waring v. Peterson, 137 So.2d 268, 271 (Fla. 2nd DCA 1962).

[98]Baily v. City of St. Augustine Beach, 538 So.2d 50 (Fla. 5th DCA 1989), Review denied, 545 So.2d 1366 (Fla. 1990); see also Town of Bay Harbor Island v. Briggs, 522 So.2d 912 (Fla. 3rd DCA 1988), review denied, 531 So.2d (Fla. 1988) (restricting parking to ground floor not confiscatory; owner not entitled to highest and best use); S.A. Healey Co. v. Town of Highland Beach, 355 So.2d 813 (Fla. 4th DCA 1978) (a regulation that reduced property value from $1.6 million to $800,000 was not invalid because it prevented the use that was economically most advantageous).

[99]See Village of Belle Terre v. Boraas, 416 U.S. 1, 8, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974), where the court said:

> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessing of quiet seclusion and clean air make the area a sanctuary for people.

Similarly, in Agins v. Tiburon, 447 U.S. 255, 261 n.8, 100 S.Ct. 2138, 2142 n.8, 65 L.Ed.2d 106 (1980), the Court accepted that it was

> in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts such as air, noise and water pollution, traffic congestion, destruction of scenic beauty,

recognized by the court's being legitimate and the basis for the above passage in the Snyder case in law or planning theory is a complete mystery.

Just as the Snyder case attempts to do damage to the cause of reasonable comprehensive planning, it also takes a number of cheap shots at local governments and the operation of local government democracies. Accordingly, the court makes statements like:

> Most government officials have little motivation to incur the "wrath of neighbors" by zoning vacant land for industrial, commercial, or intensive residential development in advance of an actual proposal for development.
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> Furthermore, rezoning is granted not solely on the basis of the land suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost on local considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made, whose ox is being fattened or gored by the granting or denial of the rezoning request.
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> In this context, local governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer. Such techniques used by local zoning officials as "floating zones" or "contract or conditional zoning" are more analogous to administrative or executive decision-making than legislative policy-making and would be immediately and justifiably condemned in any proper judicial form as being unjust and unfair if not extortion.[100]

The court then urges the approach to determining consistency

> disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.

[100]595 So.2d at 73 (emphasis added; footnotes omitted). For one branch of government to accuse another of "extortion" so blithely is reprehensible.

be that used by the Oregon Supreme Court in Fasano v. Board of County Commissioners.[101] Throughout this lengthy analysis, the court nowhere recognizes that Section 163.3215(4) makes it fairly plain that the remedy found in that section is the only one that may be used to challenge consistency.

B. Subject to the strict scrutiny test for development approval more intense than those apparently permitted by the plan, local governments have wide discretion to grant or deny rezonings somewhere within the most and least restrictive land uses permitted in each comprehensive plan category, especially within the "underzoned" or "short-zoned" areas described by the Snyder decision as most deserving of judicial protection.

Perhaps the worst mistake committed by the court is its ruling to the effect that, upon a showing by the landowner that his petition for use of privately-owned land complies with the "reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning [sic] plan. . .the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use."[102]

This holding demonstrates a truly profound misunderstanding of

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[101]264 Or. 574, 507 P.2d 23 (1973) (en banc).

[102]595 So.2d at 81 (Footnotes omitted).

the law of zoning[103] and theory of planning. A comprehensive plan is a long-range document intended to guide the growth of a community and to make that community able to provide facilities and services in a way that is beneficial to the public. A comprehensive plan also is important to make the community viable and to protect natural resources in the community. If a local government were forced to permit the most intense use allowable under every comprehensive plan category at the whim of the property owner, it would make the comprehensive plan an empty vessel. Planning considerations which enter into the composition of such a document include timing, transition, specificity and capital facility planning.[104] As one of the leading commentators on plan consistency has written, it is not at all unusual for a local government to put together a comprehensive plan with the idea that certain "designations represent a long-range plan for community use, while the present zoning maintains a holding pattern until development patterns demand a change."[105]

The approach to zoning in the Snyder decision is directly contrary to the approach taken by the Supreme Court of Oregon (which the Snyder court favorably uses in its citation to the Fasano case). This is demonstrated in Philippi v. City of

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[103]See notes and text at notes 94 - 96, supra.

[104]See Hart, Comprehensive Land Use Plans and the Consistency Requirement, 2 Florida State University Law Review 766 (1974).

[105]DiMento, Taking the Planning Offensive: Implementing the Consistency Doctrine, 7 Zoning and Planning Law Report No. 6 (June 1984).

Sublimity.[106] In that case, the city denied an owner's application for a subdivision development permit for property which was zoned single-family residential but which was also subject to a "agricultural retention policy" set out in the city's comprehensive plan.

In the Philippi case the court said:

> Analysis here must be prefaced with the recognition that a local government's comprehensive plan holds the pre-eminent position in its land use powers and responsibilities. Zoning and subdivision ordinances, local land use decisions, are intended to be the means by which the plan is effectuated and, to such an extent, they are subservient to the plan. Accordingly, a particular zoning designation does not of itself entitle the landowner to a particular corresponding use irrespective of whether applicable provisions of the plan may mandate otherwise. The question thus presented is whether the challenged "agricultural retention policy" is applicable to the subject parcel and whether it permits the city to delay the parcel's development.[107]

The court recognized that planning and timing are essential elements of every comprehensive plan and, in reversing the appellate court's decision, said:

> A plan policy to retain agriculturally productive land in that use until such time as it is needed for the zoned use is not inconsistent with the concept of zoning designations. A zoning may be but is not necessarily a mere catalog of existing uses; nor does a zoning ordinance necessarily give an automatic license to a landowner to develop his or her property to any use permitted by its particular zone class.
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> The comprehensive plan here at issue sets forth a legislative decision as to which future property uses will or will not be in the public interest, and in what order. Where the comprehensive plan permits uses more intensive than a parcels present use, the question of when and under what the conditions the parcel may be permitted to be further developed can be made to turn on policies or factors within the zoning

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[106]662 P.2d 325 (Or. 1983).

[107]662 P.2d at 328 (footnote and citation omitted).

ordinance itself or the plan, provided they are applicable, clearly set out, and consistent with the zoning designation.[108]

The Oregon court's approach to the timing of a rezoning decision within the parameters of a plan is clearly superior to the short-sighted viewpoint in the instant case. The approach taken by the Snyder court is so fatally flawed in terms of consistency with acceptable comprehensive planning norms, it should be specifically rejected by this court out of hand.

III. Brevard County's denial of Snyder's request for rezoning was consistent with the comprehensive plan, including provisions in the plan restricting building in the flood plain.

The Snyder court seemed persuaded to adopt the respondents' contention that its land was not located within the 100-year floodplain. But the critical land use concern to look at is not whether or not the project is located in the 100-year floodplain, but whether or not the land on which the project will be built is. For the elevation of a project on fill or pilings lifts the project above the flood level but does not eliminate the dangers posed to surrounding properties and uses; that is, the displacement of flood waters which are forced to seek other ground, in the case of fill, and the creation of safety hazards such as floating debris and contaminated water and wastewater systems, in the case of structures built on pilings.[109] Brevard County's zoning decision

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[108]622 P.2d at 328-329.

[109]See Burby & French, Coping with Floods: The Land Use Management Paradox, Journal of the American Planning Association, 47 (3): 289-300 (1981).

was clearly consistent with its comprehensive plan. But for the misinformed standard of proof applied by the Snyder decision, the zoning decision would have been found consistent, as it should be.

IV. This Court should reverse the Snyder decision and issue an opinion clarifying the procedure for challenging a rezoning for plan inconsistency.

With admirable conviction and clarity, Judge Sharp, in her dissent in Gilmore v. Hernando County,[110] laid out what the process should be in this case on remand:

> [A] suit for injunctive relief in the circuit court to challenge the rezoning as not being consistent with the County's Comprehensive Plan. . .is not only authorized by the new statute, section 163.3215(1) but it appears to be the sole or exclusive way to challenge a zoning decision (called a development order by the statute), "which materially alters the use or density or intensity of use of certain property" as not being consistent with a County's required Comprehensive Zoning Plan. When 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 writ of certiorari, where the trial court only reviews the record created by the zoning bodies. When faced with an inconsistency challenge, the circuit court should create and establish a new record. That process was aborted in this case.
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> An additional error committed by the trial court in this case, which likely contributed to its granting summary judgment, was its application of a "fairly debatable" standard of review, which essentially is the least restrictive and most deferential to the zoning authority's decision. While it may be properly applied in some zoning cases, a stricter review standard should be engaged in by the circuit court when a zoning decision (or "development order") is challenged under

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[110] 584 So.2d 27, 28-31 (Sharp, J., dissenting) (footnotes omitted).

section 163.3215(3)(b) as being inconsistent with the Comprehensive Plan adopted by the County. This is because chapter 163 has limited the discretion of zoning boards and commissioners to rezone in a manner inconsistent with the Plan they adopt pursuant to the statute. If the zoning is inconsistent, it is void unless the zoning body undertakes to amend the Plan, as specified by the statute.

CONCLUSION

De Tocqueville, on the subject of the freedom of the people of the United States and its relationship to land, said: "Their ancestors gave them the means of remaining equal and free by placing them on a boundless continent."[111] However, as occupants and users of the land we now know our continent is not boundless. We have seen more than three-fifths of the 215 million acres of wetlands in the 48 contiguous states destroyed, representing an irreplaceable loss vital natural resources;[112] we have observed the flight of our upper and middle classes from the inner city to outlying suburbs, leaving the poor within the urban core to feed upon themselves in crime and drug abuse;[113] and we have presided over the pollution and destruction of thousands of essential wildlife habitats and freshwater and marine environments, with the result that many species which thrived on this continent for eons are now faced with extinction.[114] Each of these problems is related to a lack of land use planning, and it was to solve problems like these that the legislature, with remarkable foresight, enacted in 1985 the Local Government Comprehensive

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[111]De Tocqueville, Democracy in America, 301 (vintage ed 1945).

[112]Johnson, Savings the Wetlands from Agriculture: An Exam of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bill, 7 Land Use & Environmental Law Journal 299 (1992).

[113]Jackson, The Crabgrass Frontier, 138-155 (1985).

[114]Gluckman, Use of the Police Power to Preserve Wildlife Habitat, Environmental and Urban Issues, Vol. XVIII, No. 4 (1991).

Planning and Land Development Regulation Act.[115]

The Snyder decision threatens many of the concepts contained in this landmark 1985 legislation. For the reasons stated in this brief that decision should be reversed by this Court.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following parties by U.S. Mail this 19th day of October, 1992.

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[115]Chapter 163, Part II, Fla. Stat. (1991).

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