OA. 31-93 047

FILED
SID J. WHITE
OCT 21 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT STATE OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA

Petitioner,

-vs-

JACK R. SNYDER, et ux.,

Respondents.
_____/

CASE NO. 79,720

FIFTH DISTRICT COURT OF APPEAL CASE NO. 90-1214

INITIAL BRIEF OF AMICUS CURIAE SPACE COAST LEAGUE OF CITIES, INC., CITY OF MELBOURNE, AND TOWN OF INDIALANTIC

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APPELLANT'S INITIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

In this case, the Brevard County Board of County Commissioners will be referred to alternatively as the Petitioner and the County. Jack R. Snyder will be referred to alternatively as the Respondent or the "Property Owner." The Space Coast League of Cities, Inc., a Florida Not-for-Profit Corporation, the City of Melbourne, Florida, a Florida municipal corporation, and the Town of Indialantic, Florida, a Florida municipal corporation, are amicus curiae and jointly file this brief. All three amici will be referred to collectively as the "Space Coast League." Individually, the Space Coast League of Cities, Inc., will be referred to as the "Space Coast League of Cities, Inc." Individually, the City of Melbourne, Florida, will be referred to as the "City." The Town of Indialantic, Florida,, will be referred to as the "Town."

STATEMENT OF THE CASE AND FACTS

The Space Coast League adopts the Statement of the Case and Facts of the Petitioner.

SUMMARY OF THE ARGUMENT

The Space Coast League notes that without a demonstrated need, the fifth district court of appeal's Snyder opinion turns the law of zoning and perhaps comprehensive planning on its head. The Snyder opinion is loosely worded in such a way that it will clearly be applied to other types of growth management permits. In the case of comprehensive planning, there is already a circuit court opinion pending in the fifth district court of appeal

applying Snyder to comprehensive plan amendments. If Snyder is applied to variances and special exceptions, which is what Snyder seems to require, the application of Snyder will run counter to established Florida Supreme Court precedent.

The Snyder opinion is contrary to established Supreme Court precedent with regard to the burden of proof of an applicant for a rezoning. Further, Snyder is founded on an Oregon case, Fasano v. Board of County Commissioners,[1] and its progeny, which an Oregon court recently described as being "of diminishing importance."[2] Oregon courts now urge adhering to statutory law; and in Florida, certainly with regard to municipalities, statutory law indicates that the act of rezoning property is legislative in nature.[3] The statutory process for amending a comprehensive plan provides a process that is also legislative in nature.[4]

If Snyder is upheld, it will require that the ex parte communication rule must be applied to rezonings and comprehensive plan amendments, thereby stifling public participation. The Snyder/Fasano approach to rezonings will set up an often awkward process, in which many will not know, dependent on the type of

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[1] 507 P.2d 23 (Ore. 1973).

[2] Dan Gile and Associates v. McIver, 831 P.2d 1024 (Or. Ct. App. 1992).

[3] §166.041, Fla. Stat. (1991)

[4] §§163.3184, 163.3187, and 166.041, Fla. Stat. (1991)

proposal pending, whether the proposal is subject to review by a quasi-judicial or legislative type of review.

The average citizen will be required to spend money that he or she does not have to hire lawyers and expert witnesses to defend a position in opposition to a proposal at the city council or county commission level. No longer will rezoning proposals be subject to the public referendum right, which the public currently enjoys in many municipalities and charter counties. Finally, if Snyder is upheld, seeking court review of rezoning actions will be turned into a grotesque combination of certiorari and injunctive relief actions, because the method of seeking review of quasi-judicial action is through certiorari, while the method of attaking a lack of consistency with a comprehensive plan or the underlying constitutional invalidity of a zoning ordinance is by way of declaratory and injunctive relief.

A better approach would be simply to overturn Snyder. Because in regard to growth and growth management aspects California is far more similar to Florida than Oregon, this Honorable Court should reject Oregon's Fasano approach to rezonings and follow the lead of the California Supreme Court taken twelve years ago in Arnel Development Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980), in which the California Supreme Court decided to protect the public's referendum rights and declared that, in the face of California's comprehensive planning laws, the act of site specific rezoning continued to be legislative in character.

ARGUMENT

I. SNYDER IS SO BROAD THAT IT IS CONTRARY TO SUPREME COURT PRECEDENT AND WILL BE APPLIED TO VIRTUALLY EVERY ASPECT OF GROWTH MANAGEMENT

"If it ain't broke, don't fix it!" The saying sums up why this Court should reverse Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), pet. for rev. granted, Case No. 79,720 (Fla. oral argument March 1, 1993).

The Snyder court painted a bleak picture of local government gone mad, depriving everyone of their consitutional property rights, bending over backwards to accommodate screaming masses of residents who don't ever want anyone to develop anything in their backyards. The Snyder panel attempted to correct this problem by assuring that site-specific rezoning is a quasi-judicial function. There is no assurance, however, that the Snyder approach will solve this problem.

Respectfully, amici Space Coast League neither believe the problem is as black as has been painted, nor believe that Snyder will correct the perceived problem. In fact the Space Coast League knows from experience that Snyder is so broadly worded that it is turning the law of zoning AND land use planning on its head. Snyder is but the first in a string of dominoes.

A. The Second Domino: LAND USE PLAN AMENDMENTS

An example of the broad application of Snyder has appeared recently in Puma v. City of Melbourne, Case No. 90-10022-CA-X/S (Fla. 18th Cir.Ct. amended order filed May 13, 1992), appeal pending, 5th DCA Case no. 92-01038 (Fla. 5th DCA appellant's

reply brief filed Oct. 6, 1992). In Puma, a circuit court judge in Brevard County made a determination that Snyder applies to site specific amendments of a comprehensive plan. The trial court in Puma determined that, because of Snyder, site-specific future land use map amendments must be considered as quasi-judicial in nature[5] and subject to the litany of Snyder requirements, e.g. - burden of proof, requirement of findings, presumption of appropriateness of property owner's application, etc.

A statement by the Puma trial judge excerpted from the trial record gives a flavor of how widely one can expect Snyder to be applied. The trial judge stated:

> [w]ell, they [the Snyder appellate panel] sure say in here that it doesn't make any difference what you ask for. It just applies to one land owner or one piece of land, and that it's not a legislative function anymore.

Puma, (5th DCA R. 338).

Comprehensive plan future land use amendments are questions of planning, not zoning, as in Snyder. The trial court's view in Puma, inheres in Snyder, wherein it states that

> (1) While enactments of general comprehensive zoning and planning ordinances and maps, and amendments thereto of broad general application, constitute legislative action establishing rules of law of general application; subsequent governmental action which in substance involves the proper application of the previously enacted general rule of law to a particular instance

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[5] The opinion is fundamentally at odds with Rinker Materials Corp. v. Dade County, 528 So.2d 904 (Fla. 3d DCA 1987), but then again, so is the fifth district court of appeal's open-ended opinion in Snyder.

> (i.e., a specific parcel of privately owned land under then existing conditions), regardless of the form in which presented (i.e., whether involving a petition for rezoning, for a special exception, for conditional use permit, for a variance, for a site plan approval, or whatever) does not constitute legislative action requiring judicial deferential review as to reasonableness under the powers clause of the state constitution (Art. II, §3, Fla. Const.) and the separation of powers doctrine of the United States Constitution.

Snyder, 595 So.2d at 80 (emphasis added). What the term "or whatever" means in the foregoing quote is open to question.

Admittedly, there are statements in Snyder which could be argued to give support to the fact that the opinion was crafted in such a manner so that it could be extended to apply to comprehensive plan land use changes. An additional example of wording is

> The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive plan.

Snyder, at 81 (footnote omitted) (emphasis added). What the "etc." means is open to question.

In both of the foregoing passages, the "etc." and the "or whatever" language is so broad that one might argue that it appears to refer to all "zoning-related" permits known under the Local Government Comprehensive Planning and Land Development

Regulation Act as "development permits." See §163.3164(7), Fla. Stat. (1991).

The broadness of the language has caused Snyder to be applied to comprehensive plan land use changes in Puma.[6] Comprehensive plan amendments are not even considered to be "development permits" within the statutory definition. Snyder by its very terms apparently applies to development permits other than site specific rezonings.

B. The Third Domino: SPECIAL EXCEPTIONS

In one of the sweeping statements in Snyder, the district court articulated a degree of proof for special exceptions that conflicts with this Court's prior ruling. In Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986), this Court resolved a conflict that had existed as to the burden of proof for special exceptions. This Court ruled that, once the petitioner meets the initial burden of showing that the application meets the local government's zoning code criteria for granting special exceptions, the burden is on the governmental agency to demonstrate,

> by competent substantial evidence presented at the hearing and made a part of the record, that the [special] exception requested by the petitioner did not meet

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[6] The same issue has been raised in the following cases related to comprehensive plan land use amendments: Florida Institute of Technology v. Martin County, No. 92-494-CA (Fla. 19th Cir. Ct. filed May 28, 1992); Section 28 Partnership, Ltd. v. Martin County, No. 92-569-CA (Fla. 19th Cir. Ct. filed June 24, 1992); Younger v. City of Palm Bay, No. 92-2330-AP (Fla. 18th Cir. Ct. oral argument Nov. 18, 1992).

> such standards and was, in fact, adverse to the public interest.

See id. at 167 (quoting Irvine v. Duval County Planning Commission, 466 So.2d 357, 364 (Fla. 1st DCA 1985) (Zehmer, J., dissenting)) (emphasis added).[7]

In the opinion at bar, the Florida Fifth District Court of Appeal established an entirely new requirement for the degree of proof that governmental bodies must establish in order to deny a special exception. The instant opinion states that

> [t]he initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive plan. Upon such a showing 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.

Snyder, 595 So.2d at 81 (footnotes omitted) (emphasis added).

Recently, the fifth district court reaffirmed its Snyder requirement that a zoning authority must produce clear and convincing evidence of some public necessity in order to defeat a landowner's prima facie showing of entitlement to a particular

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[7] In confirming this standard, this Court agreed with the dissent written by Judge Zehmer in the lower court opinion. Judge Zehmer had relied on the reasoning in Rural New Town, Inc. v. Palm Beach County, 315 So.2d 478 (Fla. 4th DCA 1975), in which the court had explained the distinction between rezonings and special exceptions, and then described the respective burdens of proof. See id. at 480.

use of his land. See ABG Real Estate Development Co. v. St. Johns County, 17 F.L.W. D2226, D2227 (Fla. 5th DCA Sept. 25, 1992) (citing Snyder).

The requirement that evidence be "clear and convincing" is a much higher standard than this Court's previously adopted "competent substantial" evidentiary standard. The Irvine "competent substantial" standard is itself a high standard for zoning authorities to meet. Such a high standard safeguards that landowners who have met the initial burden will be granted requests for special exceptions unless the zoning authority has presented solid evidence that the requested exception does not meet the standards and is adverse to the public interest.

The Snyder requirement that zoning authorities must present "clear and convincing" evidence, however, goes beyond this safeguard. The "clear and convincing" standard requires such a high degree of proof that zoning authorities will almost never be able to meet that requirement. The result will be that requests for special exceptions will have to be granted almost as a matter of routine rather than as a matter of sound quasi-judicial consideration. This Court should reject the burden of proof adopted in Snyder and reaffirm the burden of proof set forth in Irvine.

Finally, the Space Coast League notes that the "clear and convincing" evidence requirement is completely counter to the burden of proof previously established by this Court in rezoning matters. Historically, complaining landowners have been required

to "carry the burden of both alleging and proving the invalidity if the ordinance and this burden is an extraordnary one." Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. 1964); Accord 1 Jurgensmeyer & Wadley, Florida Zoning - Attacks and Defenses §4-4 (1980).

As noted by Professor Jurgensmeyer:

> This rule was clearly the law in Florida relative to the burden of proof until 1965 when the Florida Supreme Court's opinion in Burritt v. Harris [172 So.2d 820 (Fla. 1965)] appeared to require the defending county to prove its action on the rezoning question was debatable. Three years later the court clarified its position in St. Petersburg v. Aiken [217 So.2d 315 (Fla. 1968)]. After the lower court (relying on a common interpretation of Burritt) placed the burden on the city "to prove the reasonableness and necessity of the zoning classification" the high court accepted the case as a vehicle for clearly and correctly stating the applicable law quoting Metropolitan Dade County v. Karter [200 So.2d 624 (Fla. 3d DCA 1967)], the court held that "the burden is upon the petitioner [property owner] to show that the application for rezoning raised a matter which was not a fairly debatable issue before the legislative authority."

1 Jurgensmeyer & Wadley, Florida Zoning - Attacks and Defenses §4-4 (1980) (footnote omitted).

C. The Fourth Domino: VARIANCES

Like the Snyder court's statement of the degree of proof for special exceptions, the court's statement as to the proof for zoning variances conflicts with this Court's prior ruling. In Nance v. Town of Indialantic, 419 So.2d 1041 (Fla. 1982), this Court held that the proper standard of review in a zoning variance case is

> whether the lower tribunal had before it competent substantial evidence to support its finding.

Id. at 1041.

In Nance, this Court adopted the district court opinion, coincidentally the same court that penned Snyder. See id. The district court had explained that the standard of review establishes the quantum and quality of evidence that will make a zoning variance determination irreversible by the reviewing court. See Town of Indialantic v. Nance, 400 So.2d 37, 39 (Fla. 5th DCA 1981).

The district court opinion went on to explain that the "competent substantial evidence" standard of review of quasi-judicial action effectively provides the same standard the "fairly debatable" test provides for review of legislative municipal zoning action. See id. at 40 (citing DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957)). In other words, the action will be sustained if it is reasonably based on the evidence presented. See id.

Contrary to this Court's express ruling in Nance, however, the Snyder court included variances in the group of land use categories that the court said should be granted only if the zoning authority meets its burden by "clear and convincing" evidence. See Snyder, 595 So.2d at 81. The Snyder statement of the law is clearly at odds with this Court's holding in Nance. This Court, therefore, should reaffirm its Nance holding as to the quantum of proof necessary in variance cases.

D. Is There A Fifth Domino: ???

The Space Coast League is uncertain what the fifth domino will be. We know that there could be one. Comprehensive plan land use amendments were nowhere in the fifth district court's Snyder opinion, but already they have been included within the Snyder umbrella. We don't know what's next, but the trial judge's remarks in Puma are haunting:

> [w]ell, they [the Snyder appellate panel] sure say in here that it doesn't make any difference what you ask for. It just applies to one land owner or one piece of land, and that it's not a legislative function anymore.

Puma, (5th DCA R. 338).

II
FLORIDA LAW DOES NOT CONTEMPLATE THAT A CHANGE OF ZONING IS OTHER THAN LEGISLATIVE ACTION AND SUBJECT TO THE FAIRLY DEBATABLE RULE

A. Snyder is Based on Oregon Caselaw

Snyder and its command that the process of rezoning must be regarded as a quasi-judicial function is founded on Oregon law and that state Supreme Court's landmark decision in Fasano v. Board of County Commissioners, 507 P.2d 23(1973).[8] The Court in Snyder undertook a compelling review of the Fasano case. See Snyder, 595 So.2d at 76-78.

The Snyder opinion dutifully repeats a concept extracted from Fasano, wherein it states

> The application of a fairly debatable, or for that matter, any other deferential or

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[8] The Court in Snyder after a review of Fasano and the quasi-judicial approach to rezoning stated, "We agree with the Fasano approach and conclude that rezonings are not legislative in nature...." Snyder, 595 So.2d at 78.

> discretionary standard, is not the correct standard of judicial review where the issue and decision involves the proper application of a legislative rule of law to a particular piece of property.

Snyder, 595 So.2d at 79-80 (footnote omitted).

As noted by one commentator, there is an inherent problem with Snyder.

> [T]he logic of the decision errs in several important respects. For example, in finding that rezonings are quasi-judicial in nature, the court relied on doctrines and precedents which were developed outside Florida and outside the context of examining the exercise of local authority.

Lincoln, R., Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine, 7 J. Land Use & Envtl L. 333, 336 (1992).

For comparative purposes with our zoning and growth management law in Florida, an analysis of Oregon law and Fasano is appropriate. After all, Florida's comprehensive planning program drew heavily on comprehensive planning and land use regulation concepts inherent in the law of states such as Oregon and California.

However, because Snyder is so heavily based on Fasano and the concepts it initiated in Oregon land use law, it is worthwhile to examine how Oregon land use law has developed since the 1973 Fasano opinion and to contrast and compare the development of that law with Florida law.

The Fasano distinction between what is legislative and what should be regarded as quasi-judicial, which was followed in Snyder, is simply that

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an all together different test.

Fasano, 507 P.2d at 26.[9]

While the directives of Fasano seemed clear, by 1976, problems began to arise in Oregon with the implementation and use of quasi-judicial proceedings. Two cases in 1975 determined that challenged local ordinances were legislative enactments in nature and therefore exempt from the procedural requirements proposed by Fasano.

In Culver v. Dagg, 532 P.2d 1127 (Or.App. 1975), rezoning of over half of Washington County (including the petitioner's 35 acre parcel) was found to be legislative in nature. In Parelius v. Lake Oswego, 539 P.2d 1123 (Or.App. 1975), rezoning of a 72.9 acre tract in multiple uses and ownerships was also found to be legislative.

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[9] In Marggi v. Ruecker, 533 P.2d 1372 (Or.App. 1975), an Oregon court applied Fasano concepts to a comprehensive plan amendment. The Oregon Court of Appeals determined that a site specific plan amendment changing the land use on a 5.29 acre parcel should be viewed as being quasi-judicial in nature.

However, in Green v. Hayward, 552 P.2d 815 (Or. 1976) a zoning change on 140 acres of land[10] was reviewed functionally as a quasi-judicial case. In Petersen v. City of Klamath Falls, 566 P.2d 1193 (Or. 1977), a 141-acre tract owned by four individuals who planned to coordinate a development was to be annexed into the City of Klamath Falls. Fasano was applied, and the annexation was determined to be a quasi-judicial act.

Chaos was resulting. A rezoning on a 73-acre tract in Parelius was found to be legislative, while an annexation of a 141-acre tract in Petersen and a 140-acre rezoning in Green were found to be quasi-judicial. This seems directly contrary to Fasano's supposedly clear directive: rezoning of larger tracts with multiple uses and owners is more policy oriented and thus a legislative function; rezoning of small tracts with single uses and a single owner is more the application of policy and thus quasi-judicial.

In light of Parelius, Green, and Petersen, there was no bright line of demarcation or the distinction between rezonings which were legislative and those that were quasi-judicial. It was not clear how many acres, owners, or multiple uses must be subject to an application for rezoning before the application would be classified as one that is legislative in character.

The Oregon Supreme Court, in South of Sunnyside Neighborhood League v. Clackamas County, 569 P.2d 1063, 1071 n.5 (Or. 1978),

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[10] The parcel consisted of one 50 acre tract owned by the proponent of the change and an adjacent 90 acre tract upon which the proponent held an option to purchase.

perceived the problem but seemed uninclined to resolve the problem, noting

> ...our references in this opinion to 'single tract' or 'single parcel' amendments are convenient ways of describing the type and scale of land-use decisions which we treated have treated as quasi-judicial...we do not intend by the use of the terms 'single tract' and 'single parcel' to adopt a test for determining when a given land-use is quasi-judicial rather than legislative. The number of factors such as the size of the area affected in relation to the area and planning unit, the number of landowners affected, and the kinds of standards governing the decision makers may be relevant. The decision with which we are now concerned is clearly quasi-judicial, and we find it unnecessary to formulate, in the present case, a test for making that determination.

Id.

In 1979 Justice Linde in Strawberry Hill 4-Wheelers v. Board of County Commissioners, 601 P.2d 769 (Or. 1979), attempted to find a solution, setting forth a modification of the South of Sunnyside test for distinguishing a quasi-judicial activity. He noted that the process must result in a decision,[11] it must apply pre-existing criteria, and it must be directed at a closely circumscribed factual situation or relatively small number of persons.

Obviously, the South of Sunnyside and Strawberry Hill 4-Wheelers pronouncements did little to set a "bright line" of

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[11] In Estate of Gould v. City of Portland, 740 P.2d 812 (Or.App. 1987), the "bound to result in a decision" factor was found not to be dispositive, but rather it was a part of a balancing test bearing in mind the reasons for using safeguards modeled on adjudication. These reasons included assurance of correct factual decisions and the assurance of fair attention to individuals particularly affected.

distinction that could be easily implemented by local governmental zoning and land use combatants in the trenches of the public hearing battlefield. Undoubtedly, the reason is that appellate courts are most often inclined to pen flexible rules that can be applied on a case-by-case basis to individual situations.

However, if the quasi-judicial approach to zoning is to be successful, local governments, development permit applicants, and development permit opponents alike need a bright line of demarcation that can be easily and clearly applied at the beginning of the permitting process. Otherwise, how will local government, development permit applicants, and development permit opponents know "up-front" what test a reviewing court will use: quasi-judicial or legislative? How will local government, development permit applicants, and development permit opponents know "up-front" whether a record must be made before the local permitting body?

Confronted with this type of situation, the Oregon courts tried, one more time to devise a solution, creating still more uncertainty in Neuberger v. City of Portland, 586 P.2d 351 (Or. App. 1978), rev'd in part, 603 P.2d 771 (Or. 1979). In Neuberger, the Oregon Court of Appeals examined the rezoning of a 601-acre parcel of undeveloped land in northwest Portland. There were three (3) separate landowners of portions of the parcel. All of those interests were subject to purchase contracts or options by a joint venture, which was seeking

planned unit development zoning. In this case, the appellate court found that the rezoning was quasi-judicial, even though it involved a 601-acre parcel of land.

Thus, these cases suggest that size of the property is sometimes, but not always, a factor. Other times the number of property owners[12] or different types of uses proposed in a rezoning or change of land use becomes critical. This is clearly not a rule that has much rhyme or reason to it. Finally, the number of property owners seems to matter more than the size of the parcel. No one can say, short of litigation, how many owners are required, how many uses there must be, or how big a parcel must be before the rezoning must be viewed functionally as legislative in nature.

This is the Fasano test that the Snyder court seeks to employ in Florida. How will it be implemented in Florida? Will one have to go to court and litigate over whether a rezoning is quasi-judicial or legislative in nature before local government can determine what type of hearing to afford? The Snyder/Fasano approach will result in a waste of judicial resources.

B. The Fifth Domino Found!

Apparently, all of the foregoing is exactly what the fifth district court of appeal plans. Snyder, without saying it, has

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[12] It seems peculiar that the functionality of a land use decision, such as a rezoning, would be predicated on the number of property owners holding title to the subject property, since zoning and planning regulations are intended to regulate use and not to consider ownership. See Arlen King Cole Condominium v. Miami Beach, 302 So.2d 777 (Fla. 3d DCA 1974).

set the stage by the manner in which it has interpreted Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959). Schauer involved a rezoning of a section of the City. In Schauer, this Honorable Court declared that the rezoning was legislative in character.

The fifth district court's reading of Schauer is that, because the Schauer rezoning was one involving a section of the City, something less than rezoning of a section of the City would be quasi-judicial.

> It has frequently been broadly stated that a rezoning action is a legislative action, not a quasi-judicial action. In Schauer v. City of Miami Beach, 112 So.2d 838, 839 (Fla. 1959), the supreme court stated:
>
> > It is obvious to us that the enactment of the original zoning was a legislative function and we cannot reason that the amendment of it was of different character. (Empahsis added).
>
> The answer is that there are two distinctly different types of amendments to zoning ordinances, one of which is legislative and the other of which is not. Schauer involved the enactment of a change in general policy of widespread applicability affecting a large area of the community rather than a "rezoning" that relates only to the application of an existing general legislated policy (i.e., a general rule of law) to a particular parcel of land and to owners whose property interests were easily indentifiable.

Snyder, 595 So.2d at 74 (footnotes omitted).

Aside from the fact that this Honorable Court never declared any type of rezoning to be quasi-judicial in Schauer, a problem with the fifth district court's analysis in and of itself, the major problem with the fifth district court's analysis is that nowhere did the Schauer opinion specify the size of the area

being rezoned. We do not know whether it involved 24 acres or 601 acres.

In thus analyzing Schauer, the Snyder court has cast the die for any number of cases litigating the issue of whether a rezoning is legislative or quasi-judicial in nature, in much the same way that Oregon litigated this issue over the years. Thus, if the Snyder quasi-judicial approach for rezonings and perhaps comprehensive plan land use amendments is upheld, Florida courts can look forward to having cases such as the Oregon cases of Petersen v. City of Klamath Falls, Strawberry Hill 4-Wheelers v. Board of County Commissioners, South of Sunnyside Neighborhood League v. Clackamas County, Green v. Hayward, Culver v. Dagg, Parelius v. Lake Oswego, and others, all of its own.

C. Fasano Has Been Discredited in Favor of Statutory Law

In Oregon, Fasano has been somewhat discredited. In Dan Gile and Associates, Inc. v. McIver, 831 P.2d 1024 (Or. App. 1992), the court stated:

> However, as the Court pointed out in 1979 in Neuberger v City of Portland, supra,[13] substantive and procedural zoning law has been supplemented by statutes, the statewide goals and local legislation in the years since Fasano, with the effect that the case's authority has been of diminishing importance as a source of law governing zoning and other land use decisions. See 288 Or. 168-70. The procedures that are relevant to the decision of this case are now comprehensively governed by statute.

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[13] 603 P.2d at 771.

831 P.2d at 1025.[14]

In Dan Gile and Associates, the court confronted a case in Wallowa County, Oregon, in which the owners of a 24 acre parcel received from the County governing body a zoning change from "farm use" to "residential." Id. at 1024. A referendum petition was subsequently filed to place the governing body's decision before the voters of the County at the primary election. Id.

Plaintiff then sought an order from the court that the referendum not be held. Plaintiff contended that the governing body's action was quasi-judicial rather than legislative and, therefore, not subject to the referendum process. Id. The court determined that quasi-judicial concepts imbedded in Oregon statutes would govern. See id. at 1025 n.2.

Thus, Dan Gile and Associates stands for a recognition by Oregon courts that quasi-judicial notions in Oregon no longer inhere in Fasano but arise from Oregon state statutes. Fasano has been to a great extent discredited, and statutory provisions will now supersede the law spawned by Fasano and its progeny.[15] The Space Coast League offers that the

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[14] The particular statues are ORS Chapter 197 and ORS Section 215.402 et seq.

[15] Support for the view taken in Dan Gile and Associates can be found in Neuberger v. City of Portland, 603 P.2d at 779. The Neuberger Court noted that once the State determines that a comprehensive plan is adopted "in compliance" with state law,

> zoning amendments and other land use decisions will be governed by the criteria in the plan and related ordinances or, in cases in which those criteria do not

easiest way to avoid confusion is by leaving all types of zonings and rezonings as just what they have been for years: legislative in nature. This approach is in accord with Florida statutory law applicable to municipalities.[16] Florida statutory law indicates why quasi-judicial concepts should not be applied to rezonings, as in Snyder, and certainly not to comprehensive plan land use amendments, as in Puma.

Chapter 166, Florida Statutes, guides the general operation of municipalities in Florida. §166.041(3)(c), Florida Statutes, states in pertinent part that

> (c) Ordinances initiated by the governing body or its designee which rezone specific parcels of private real property or which substantially change permitted use categories in zoning districts shall be anacted pursuant to the following procedures ....

Id. (emphasis added). §166.041(1)(a), Fla. Stat., defines what an ordinance is. It states:

> (a) "Ordinance" means an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law.

Id. (emphasis added). Consequently, Florida law requires that municipalities that decide to initiate a site specific rezoning

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> apply, by the [State comprehensive planning] goals themselves... Statutes may contain additional criteria governing land use decisions... The applicable considerations and criteria and such rules and enactments are the legislative and administration expression of what constitutes 'public need.'

Id.

[16] Although Snyder involved a County, clearly, its principles are applicable to municipalities as well.

must do so by ordinance, and adoption of an ordinance is functionally a legislative action. See, e.g., 1976 Op. Atty. Gen. Fla. 076-224 (1976).

Likewise, because of the broadness of Snyder, and consistent with commands of Fasano (as applied by Marggi v. Reuker), if Snyder is allowed to stand, it will apparently also be applied to site specific comprehensive plan amendments, as is the case in Puma. Florida law clearly indicates that the act of amending a comprehensive plan, even involving a site specific plan amendment is not only a legislative act, but it is subject to the fairly debatable test.

Section 163.3187(1)(c) and (2), Fla. Stat., sets forth the methodology for amending a comprehensive plan, by referencing section 163.3184. The statutory sub-section even sets forth the method for accomplishing a small scale site specific land use amendment for parcels of land of fewer than ten (10) acres in size. See Chap. 92-129, §8, Laws of Fla.[17]

Nevertheless, all plan amendments, including even the "small scale" site specific amendments, must be adopted pursuant to the adoption and public hearing provisions of section 163.3184(15), Florida Statutes. Section 163.3184(15)(a), Fla. Stat. (1991), states in relevant part that "...the adoption of a comprehensive plan or plan amendment

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[17] Surely, if the Snyder/Fasano quasi-judicial doctrine were to be applied to land use amendments, "small scale" amendments would seemingly fall within the ambit of the quasi-judicial doctrine.

shall be by ordinance..." (emphasis added). Thus, reading Sections 166.041(1)(a), 163.3184(15)(a), and 163.3187(1)(c), and (2), Florida Statutes, in pari materia, it is clear that adoption of even a small scale plan amendment must be accomplished by a legislative act, to-wit: adoption of an ordinance, which has been defined by law as being a legislative action.

Should there be any doubt about this, one need only review excerpts from the adoption process set forth in Section 163.3184(9) and (10), as amended by Section 7, Chapter 92-129, Laws of Florida. These two subsections come into effect once a comprehensive plan amendment has been adopted by the local government. Pursuant to these sub-sections, review of all plan amendments, including site specific amendments, is to be subjected to the fairly debatable test. The statutory process sets forth the requirement that the fairly debatable test is to be used. Furthermore, the statutory burden of proof and standard of proof requirements, e.g. - preponderance of the evidence, both seem to be at odds with Snyder at 81.[18]

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[18] Snyder states, 595 So.2d at 81,

> The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands,...complies with the regional procedural requirements of the ordinance.... Upon a showing landowner is presumptorily 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...

Consequently, Fasano has been discredited in Oregon in favor of statutory commands. Likewise, Snyder is inapposite to Florida comprehensive planning law and should not be applied to land use plan amendments.

III. SNYDER WILL STIFLE PUBLIC PARTICIPATION IN THE ZONING PROCESS

If Snyder is allowed to stand, zoning, and dependent upon the outcome of Puma, perhaps site specific comprehensive plan amendments, will be viewed as quasi-judicial in nature. This will definitely thwart public participation in the growth management process, all based on the recent decision in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. denied, 589 So.2d 75 (Fla. 1992). In this case, so called ex parte communications with quasi-judicial decision makers outside the public hearing arena is forbidden.

In Jennings, a variance denial was appealed to the Metropolitan Dade County Board of County Commissioners. The variance applicant lobbied individual members of the Commission were lobbied at separate meetings in their respective offices. Since a variance proceeding is viewed as quasi-judicial in nature, the Jennings court found that these contacts were ex parte, and that the Commission's decision was presumptively prejudicial.

While the decision is legally well reasoned, the practical, real world results have been disheartening. Almost all contact with elected officials on quasi-judicial zoning and land use matters has been cut off. In the fifth appellate

district, because of Snyder, local government attorneys have advised their officials not to discuss rezonings with citizens' groups, environmentalists, property owners and others.

Similarly, in Brevard County, home of the Puma opinion, local government attorneys have advised their officials not to discuss site specific land use plan amendments with citizens' groups, environmentalists, property owners and other based on Snyder.

Prior to Snyder, throughout the years, property owners have attempted to call or meet with individual elected city council or county commission members to determine whether or not their rezoning or comprehensive plan land use proposal would even stand a chance of being successfully acted upon. In the business world, time is money, and no property owner/developer wants to waste time with a lengthy permitting process and public hearings only to find out that there never was a chance of receiving the approval.

Now, because owner/developers can not informally meet with individual city council or county commission members, owner/developers are virtually forced into the public hearing process. In some cases, everyone's time is wasted, since applications are being filed which really have no business being presented and would not have been had the owner/developer been able to meet with a decision-maker.

Likewise, affected citizens, homeowners' groups, environmental groups and others are all "cut off" from meeting

with their elected officials on an individual basis, and explaining their case "eye to eye." What the public, as well as the owner/developer of property, is left with is an opportunity to appear at a public hearing, more likely as part of a long zoning agenda. Members of the public are forced to take off time from work in many cases. The public is forced to wait hours to speak because of long zoning agendas and other speakers.

In the interest of time and expediency, many times debate ends up being limited by elected or appointed officials. The Space Coast League would note that the public is not reacting well to this new rule against ex parte communication in rezoning and site specific land use hearings. Admittedly, the rule may be legally correct, but when members of the public feel that they can't converse with their elected officials other than by coming to lengthy public hearings and taking time off from work to do so, the result is increased alienation and frustration with government. Perhaps as part of a variance or special exception process, society may be able to live with the Jennings rule, but as part of the zoning and comprehensive planning process, it is nothing more than bad policy.[19]

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[19] In the case of site specific comprehensive plan amendments, cutting the public off from one to one contact with elected officials may be more than just bad policy. It may actually cause a result contrary to §163.3181(1), Fla. Stat. (1991), which sets forth the Legislature's intent that public participation in the comprehensive planning process is to occur "to the fullest extent possible."

The Space Coast League of Cities, Inc., would note that a number of its members, including amicus curiae the Town of Indialantic, are small municipalities with 3,000 or fewer residents. In these small communities where government truly is closest to the people, the average citizen is used to and even expects to be able to stop an elected official at the corner market or at the drug store and to discuss zoning and planning issues. Not to be able to talk with a governmental official on an informal and one to one basis is directly counter to what our forefathers envisioned in this country, namely, "Government of the people, by the people, and for the people."

IV. APPLICATION OF Snyder TO THE ZONING AND PLANNING PROCESS WILL CREATE CONFUSION OVER WHETHER CERTAIN REZONINGS AND SITE SPECIFIC LAND USE AMENDMENTS ARE QUASI-JUDICIAL OR LEGISLATIVE

As noted above in Point II.A., application of the Snyder/Fasano quasi-judicial function concept to certain rezoning proposals and site specific comprehensive plan amendments is not in the public interest as demonstrated by the confusion caused in Oregon over whether a proceeding is legislative or quasi-judicial. As Oregon caselaw amply demonstrates, whether a hearing is legislative or quasi-judicial is determined based on the number of owners of the parcel subject to a hearing, the size of property at issue, and other factors.

On the surface, this is one of those rules of law that a court might like to set forth. It appears clear, yet flexible.

However, it causes confusion. For example, under the rule, it is clear that if a single property owner with a parcel of property that is perhaps only an acre or two in size applies for a change of land use, that the amendment will be considered to be subject to quasi-judicial concepts.

However, by way of example, look at a small community. A proposal to rezone 50, 100, or even 600 acres might be viewed as being a large area of a small town and thus legislative in nature. On the other hand, if the rezoning of 50, 100, or even 600 acres were proposed in one of Florida's larger counties, such as Polk or Palm Beach, no doubt, under Snyder and Fasano, the rezoning would be considered to be quasi-judicial. Without first litigating the issue, how is one to know whether the rezoning proposal is legislative or quasi-judicial?

The Space Coast League submits that it might make a difference. This points our the fallacy of the Snyder/Fasano approach to rezonings and land use amendments. If the general public, let alone a property owner/developer or city or county commission, does not know with certainty in advance of a hearing whether the proceeding will be classified as quasi-judicial or legislative, the result will almost certainly be chaotic.

Property owner/developers, the general public, environmental groups, and others, many of whom have limited funds, will not know in advance whether to hire numerous expert witnesses and make a trial-type record. Would the affected

members of the public be better advised to spend money, which they probably don't have, to hire a lawyer to prepare a record? What should the city council or county commission do if they cannot be certain whether the proceeding is legislative or quasi-judicial? Should they delay hearing the rezoning or land use amendment, which is certainly unfair to the applicant, and seek some type of declaratory judgment for a determination, thereby costing all involved additional attorney's fees?

Another problem is inherent in the nature of zoning code amendments and comprehensive plan amendments. Some amendments are quantifiable. For example, a proposal to rezone a five (5) acre parcel of land owned by one person from a single-family to a multi-family zoning category is quantifiable. The same can be said with regard to a change in land use designation on a Comprehensive Plan Future Land Use Map of a five (5) acre parcel of land.

Under Snyder/Fasano quasi-judicial notions, it would undoubtedly be classified as a proposal requiring a quasi-judicial hearing. However, zoning codes, and especially comprehensive plans, also include numerous objectives and policies which are textual in nature. In some cases these objectives and policies have city- or county-wide effect. However, in other cases, the written policies may not state they are applicable to specific sites, but practical application of the policies would lend themselves only to just a few sites in the governmental jurisdiction.

For example, amicus the City of Melbourne has approximately 5,500 acres of vacant land, according to its Comprehensive Plan. Less than ten (10) acres of that property is located along the Atlantic Ocean. If a textual amendment to the City's comprehensive plan were proposed which stated "[N]o undeveloped property shall be developed in such a manner as to harm nesting areas of sea turtles," the amendment on its face could apply city-wide to all 5,500 acres, but since sea turtles only nest on the ten (10) beachfront acres in the City, application of the textual amendment would be to only ten (10) acres.

Similarly, what would happen if the City were to create a low density beachfront zoning category in its zoning code? Obviously, under Snyder/Fasano concepts of quasi-judicialism, either the comprehensive plan sea turtle text amendment or the new creation of the new beahcfront zoning district in the zoning code would seemingly be classified as proposals to be adopted by a legislative process. However, this proposal on an "as applied" basis certainly appears to be the type of proposal pointed only affecting small amounts of land with few owners, and it should therefore be adopted through a quasi-judicial process.

The application of quasi-judicialism in zoning leaves the Space Coast League in the posture that many local governments, applicants, and opponents of land use and zoning proposals will be, namely with many questions. Will these hypothetical

proposals be viewed as ones demanding legislative or quasi-judicial review? Will these proposals be tested by a court of law on a facially, or an as applied, basis?

V. THE IMPOSSIBLE TASK: MAKING A COMPLETE RECORD BEFORE A LOCAL GOVERNMENT BOARD OR COMMISSION

Another problem is demonstrated by the factual scenario in the case of Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988), dismissed sub nom., Cooper v. Battaglia Fruit Co., 537 So.2d 568 (Fla. 1988). In Battaglia, the City of Maitland, a homeowners group, and an interested citizen filed suit contesting a rezoning that had been approved by the Orange County Commission.

At the public hearing before the Orange County Commission, the homeowners association and interested individuals appeared and presented their case. For reasons not disclosed in the litigation, Maitland did not appear at the County Commission hearing. After approval of the owner/developer's proposed rezoning, the homeowners and the interested citizen filed a petition for writ of certiorari contesting the rezoning.[20] Maitland filed a separate petition for writ of certiorari. The circuit court overturned the decision of the Board of County

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[20] By special act of the Legislature, to contest the propriety of a rezoning one must file a petition for writ of certiorari. See Sec. 16, Chap. 63-1716, Laws of Fla.; Sec. 37-16, Orange County Code. The process sounds suspiciously like a quasi-judicial type of proceeding, given the fact that quasi-judicial decisions are reviewed in circuit court by a petition for writ of certiorari.

Commissioners, and the owner/developer of the property appealed to the fifth district court of appeal.

On appeal, the Court determined that the homeowners association and interested citizen had not timely filed their petition for writ of certiorari, and their petition was ordered dismissed. In the case of Maitland, the owner/developer argued that Maitland lacked standing to file the petition for writ of certiorari, because Maitland did not appear and make a record before the Orange County Commission.

Although the evidence submitted at the County Commission hearing adequately demonstrated Maitland's interest[21], because Maitland did not appear at the County Commission hearing, there was no basis upon the record that the Court could use to determine that Maitland had standing to contest the decision of the Board of County Commissioners. Further, whatever Maitland's objections may have been, they were never first submitted to the County Commission. Based on this situation, the fifth district court of appeal determined that Maitland's petition should have been dismissed by the circuit court.

Since certiorari is the method by which quasi-judicial actions are appealed, if the Snyder/Fasano quasi-judicial concept is applied to rezonings and comprehensive plan land use

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[21] The homeowners submitted evidence noting that Orange County, as required by its zoning code, had sent a notice of public hearing on the rezoning to Maitland, that the only way to access the property by road was by driving through Maitland, that the property was part of a larger unincorporated enclave, and that the City abutted the property on three of its four boundaries.

amendments process, effective public participation will further be hindered, because interested citizens, homeowners associations, and environmental groups will need to expend funds to hire attorneys to help prepare a record, making certain that all legal issues are preserved for appeal, not the least of which would include standing. "The problems faced by [Maitland] in obtaining effective review of zoning actions under certiorari standards are ample proof that the practice should be abolished on policy grounds, if not legal grounds." Inconsistent Treatment, supra, at 372 n.270.

From a more realistic standpoint, the Space Coast League would submit that it is almost impossible to afford all interested parties an oppotunity to build their record, except in the most contentious of cases. The reason is that in some local governments, including the larger cities and counties in this State, it is not unusual for zoning agendas to include 20 or 30 agenda items in bad economic times, when the real estate and development market is in a slump, and 40 or 50 agenda items in good economic times.

In some cases it is not unusual for 100 or more people to jam commission chambers to present their views. Local governments are sometimes required to limit debate to 3, 5, or 10 minutes in order just to get through the agenda. In a quasi-judicial setting in which a full and complete record must be prepared for the purposes of possible appellate review, local governmental decision-makers and others in the audience often

become hostile if lawyers or others attempt to take 1/2 hour to prepare a record.

Yet in the face of the Jennings no ex parte communication rule, since decision-makers can no long meet with applicants or community opposition prior to a meeting, the need for an adequate opportunity to build a record is greater than ever.

VI. SNYDER WILL DENY THE PUBLIC A RIGHT TO REFERENDUM

Finally, the right of citizens to achieve the full measure of public participation in the rezoning and comprehensive planning process may be determined by whether this Honorable Court declares rezonings and in effect also comprehensive plan amendments to be legislative or subject to the Fasano/Snyder quasi-judicial approach. If they are quasi-judicial or administrative matters, it would seem that they may not be the proper subject of a referendum. However, if they are viewed as being what they are, e.g. - legislative matters, then the referendum rights of the people inherent in Florida's Constitution are protected.

Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983), sets forth the guiding principles. In Florida Land Co., an owner/developer of property was successful in seeking a rezoning from R-U (rural urban development) to R-1A and R-1AA (single-family dwelling). A committee of citizens demanded that Winter Springs repeal the rezoning ordinance. Upon the Winter Springs Commission's failure so to do, provisions in the Winter Springs City Charter permitted the citizens to seek a referendum.

The Florida Land Company brought suit to enjoin the referendum, arguing that their due process rights would be emasculated by the referendum and that the zoning change was really an administrative matter, not subject to referendum.

On both points, the Florida Supreme Court disagreed. Whether a referendum in a zoning matter deprives a property owner of due process in law-making was answered by the U. S. Supreme Court in the City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L.Ed.2d 132 (1976). The U.S. Supreme Court indicated that a referendum on a zoning ordinance did not deprive an owner of real property of due process, and this Honorable Court agreed. Florida Land Co., 427 So.2d at 173-174.

In regard to the owner/developer's contention that the rezoning was administrative in nature and not subject to a referendum, this Court disagreed, pointing out that the rezoning issue was a legislative act.

> As such, this type of ordinance may be subject to a referendum as provided in the charter. Petitioner may feel that this leaves it without a remedy. We remind petitioner that the referendum has not yet been held, and the result may be favorable to its cause. But should that go contrary to its desires it still has its remedy in court to challenge the ordinance if it feels it is arbitrary, capricious and unreasonable, bearing no substantial relationship to the police power....

Id. at 174 (cite omitted).[22] Although the Space Coast League has been unable to find an appellate case in Florida wherein a comprehensive plan amendment has been the subject of a referendum, it undoubtedly will happen at some point in the future given the interest that growth management has attracted as an issue.

The Space Coast League would note that many municipal and county charters provide a right to initiative and referendum.[23] Applying the Snyder/Fasano quasi-judicial concepts to rezonings and comprehensive planning could curtail the rights that citizens may have. As noted in Florida Land Co. by the Supreme Court,

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[22] The Space Coast League acknowledges that notions in the Local Government Comprehensive Planning and Land Development Act, Chapter 163, Fla. Stat. (1991), would also probably continue to be applicable to comprehensive plan amendments accomplished at the ballot box. For example, any plan amendment would, more likely than not, still be required to be internally consistent with the rest of the plan. See generally Sierra Club v. Board of Supervisors, 179 Cal.Rptr. 261 (Cal.App. 1981). So too, Section 163.3194, Fla. Stat. (1991), issues of "consistency" of a rezoning proposal with a comprehensive plan would also be subject to judicial review. See §163.3215, Fla. Stat. (1991).

There may well be problems in implementing a plan amendment referendum. For example, would the referendum amendment have to be reviewed by the state land planning agency and other state agencies pursuant to Section 163.3184, Fla. Stat. (1991)? This same question was left open for another day in Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990).

[23] The right to initiate the adoption of an ordinance through the referendum process may be observed in, for example, the charters of: amicus, the Town in Section 8.01, Indialantic Town Charter; amicus, the City in Section 5.07, Melbourne City Charter; Broward County Charter in Section 5.01; Charlotte County Charter in Section 2.2G (aparently, comprehensive planning only); Hillsborough County Charter in Section 8.03; Palm Beach County in Section 5.1.

> [t]he concept of referendum is thought by many to be a keystone of self-government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them."

Id. at 172.

Of course, as was also noted in Florida Land Co., if the referendum or initiative power ended in an abuse of individual constitutional rights, the same remedies that currently exist after city or county commission legislative decision-making would be available.

If there is any doubt that requiring rezonings, and perhaps comprehensive plan amendments to be handled as a quasi-judicial function will abolish the right of referendum, one only need look at the recent Oregon case of Dan Gile and Associates. As pointed out above, the case involved a 24-acre parcel that was being rezoned from "farm use" to "residential." Although the citizens of Wallowa County circulated a referendum petition, the Oregon Court of Appeals struck the referendum, because the rezoning action was a quasi-judicial rather than legislative act.

VII. WHAT DOES AMICI SPACE COAST LEAGUE THINK THE SUPREME COURT SHOULD DO?

A. THE PROPER METHOD TO ATTACK A REZONING NEEDS TO BE CAREFULLY DELINEATED BY THE SUPREME COURT

The Space Coast League requests that the Florida Supreme Court carefully set forth the method by which a rezoning can be attacked. There is frankly too much confusion. Three questions should be addressed:

1) If the rezoning ordinance is being attacked on constitutional grounds, what approach should be used - declaratory and injunctive relief or certiorari?

2) If the rezoning is being attacked because it is inconsistent with a local government's comprehensive plan, what approach should be used - declaratory and injunctive relief or certiorari?

3) If the general propriety of a rezoning is being attacked, what approach should be used - declaratory and injunctive relief or certiorari?

The answer to questions 1) and 2) is declaratory and injunctive relief. When attacking the underlying constitutionality of an ordinance, declaratory and injunctive relief has always been viewed as proper. When attacking the lack of consistency of a rezoning with a comprehensive plan, section 163.3215, Fla. Stat. (1991), clearly requires injunctive and most probably declaratory relief.

The answer to the third question depends on whether the Court considers zoning to be a legislative or quasi-judicial function. This is because common-law certiorari is the appropriate method to review quasi-judicial action. Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); accord Keay v. City of Coral Gables, 236 So.2d 133 (Fla. 3rd DCA 1970); Harris v. Goff, 151 So.2d 642 (Fla. 1st DCA 1963). Conversely, if the issue is legislative, a suit for injunctive relief would be appropriate. Town of Belleair v. Moran, 244 So.2d 532 (Fla. 2d DCA 1971).

The Space Coast League believes that there is much to be said for uniformity. Multi-count complaints attacking the consitutionality of a rezoning ordinance, the consistency of the

rezoning to the local government's comprehensive plan, and the validity or fair debatability of the rezoning itself could all be handled as one complaint seeking one type of relief.

The alternative results in a gross distortion of legal procedure. If the act of rezoning is perceived to be quasi-judicial, the complaint as to the validity of the rezoning will have to be filed as a certiorari action within thirty days of the order being appealed from, as required by Rule 9.100(c), Florida Rules of Appellate Procedure.

If the same party filing the certiorari action also wishes to contest the consistency of the rezoning with the local comprehensive plan, that party must file a verified complaint with the affected local government and thereafter, the local government has thirty days to take further action to resolve the issue. If the local government does not resolve the issue, then the complainant may file an action for injunctive relief. §163.3215, Fla. Stat. (1991).

Meanwhile, if the complainant wishes to challenge the constituionality of the rezoning ordinance, that party can file simultaneously with the certiorari action, or presumably the Section 163.3215 consistency action, a count sounding in declaratory and injunctive relief for seeking a determination that the ordinance is unconsitutional.

At some point, no doubt, an attempt will be made to consolidate all the actions, which makes sense, because all of the legal actions arise from one rezoning of one property.

However, consolidation might end in further confusion, since some circuits in Florida consider certiorari actions before a three (3) judge panel.

Again, the Space Coast League submits that declaring a rezoning to be a legislative action would seem to solve all of this and make the procedure for most of the state a uniform one. A carefully written opinion explaining the legal method for handling the aforesaid types of action would be helpful to both bench and bar for another reason.

For years there have been many Third District Court of Appeal rezoning cases reported in which the method of appeal is certiorari. To many people around the state, including some judges, this caselaw has been cited for authority that all rezoning cases should be considered only as a petition for writ for certiorari.[24] Some courts have indicated that zoning

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[24] The fact is that a rezoning in Dade County is considered to be quasi-judicial. As noted in Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 652-653 (Fla. 3d DCA 1982), Judge Daniel Pearson noted that

> it is the character of the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action, ... The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning is identical to that afforded in a hearing on variances or special exceptions. See Section 33-36, Code of Metropolitan Dade County. Each contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine witnesses; and it is the existence of these safeguards which makes the hearing quasi-judicial in character and distinguishes it from one which is purely legislative. See Harris v. Goff, 151 So.2d 642 (Fla. 1st DCA 1963). The procedure utilized by Dade County in zoning matters

decisions as legislative actions should not be handled by certiorari review. An outstanding article on this subject is LaCroix, The Applicability of Certiorari Review to Decisions on Rezoning, 65 Fla.Bar J. 105 (June, 1991). There is, to say the least, tremendous confusion on this point.

B. THE CALIFORNIA APPROACH OFFERS THE MOST SENSIBLE SOLUTION

In Arnel Development Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980), the California Supreme Court faced an issue identical to the issue at bar, except the Arnel case had one additional twist, namely that of a pending initiative. In Arnel, the California Supreme Court examined an approximately 68 acre parcel of land consisting of three separate tracts owned by three different property owners. The Arnel tract consisted of 50 acres, and the South Coast Plaza tract consisted of 13 acres. The Roberts tract consisted of 4.5 acres.

The City of Costa Mesa's comprehensive plan designated all but 8.5 acres of the Arnel tract as being suitable for a maximum of multi-family development. The 8.5 Arnel acreage was to be low density residential under the comprehensive plan. In 1976, the City approved a rezoning that transformed the Arnel tract into a

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> ... has quite clearly been recognized as quasi-judicial. [cases cites omitted].

Accord Rinker Materials Corp. v. Dade County, 528 So.2d 904, 906 n.2 (Fla. 3d DCA 1987). In a footnote in Coral Reef Nurseries, the court noted that when zoning hearings are not conducted with these due process guarantees, the hearing is legislative in character. Coral Reef Nurseries, 410 So.2d at 653 n.10.

project allowing 127 single-family homes on 23 acres and 539 apartment units on similar acreage.

A homeowners' group circulated a petition and put an issue on the ballot to have the Arnel, Roberts, and South Coast Plaza tracts rezoned to entirely R-1 single-family zoning. The proposals received a narrow majority of the votes cast by electors.

The property owners sought relief. The trial court ruled in favor of the initiative, and the court of appeals reversed, declaring in much the same way that the Oregon Court of Appeals did in Dan Gile and Associates, that the act of rezoning was a quasi-judicial act and, therefore, could not be subject to initiative and referendum.

The California Supreme Court reversed, declaring that the act of rezoning was legislative in character, no matter how many property owners or what the size of the property involved was. In much the same way that this Honorable Court confronted the issue in the Florida Land Co. case, the California Supreme Court rejected the property owners' argument that declaring rezoning to be legislative in character denies them of due process of law.

The California Supreme Court, exactly as did this Honorable Court, cited the United States Supreme Court case of City of Eastlake v. Forest City Enterprises, Inc. as authority. The court noted that, in Eastlake, a rezoning of eight acres was at issue, but the U.S. Supreme Court cited the previous decision in

Eastlake by the Ohio Supreme Court holding that rezoning of a single eight-acre parcel was a legislative act.

> Nowhere does the opinion suggest that the Ohio courts erred in treating the rezoning of a single lot as leigslative, or even that the classification raised a significant consitutional question.

Arnel Development Co., 620 P.2d at 570.

The approach taken by California makes sense and should be affirmed here in Florida. The Space Coast League would point out that this decision was made in light of the fact that California had a comprehensive planning program similar in many respects to Florida's current program. Further, California is far more similar to Florida than Oregon.

California is a major state in this country in both land area and population. So is Florida. Oregon is not. California is experiencing a major population growth both in raw numbers, as well as percentage growth. So is Florida. In fact, Florida gained as many congressional districts in 1990 as there are in Oregon all totalled.

California is actually viewed by many as being two states. So too, Florida suffers from this same view, although many people view north, south, and central Florida as three different "states." California is a state with many urban areas. So is Florida. Oregon has only one urban area of any size -- Portland. In essence, an approach to zoning taken in Oregon, even if successful there, can not expect to succeed in a different environment. The California Supreme Court recognized this.

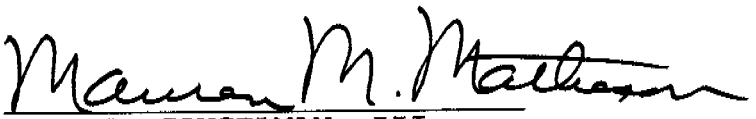
Thus, even if Oregon's Fasano approach were still viable in Oregon, Florida should not adopt the Fasano approach because Florida is too unlike Oregon. Instead, Florida is similar to California and should, therefore, follow that state's approach to the nature of rezoning, especially in view of this Court's decision in Florida Land Co. If only to preserve the people's right to referendum, granted through countless municipal and county charters, the act of rezoning must continue to be viewed as legislative in character.

CONCLUSION

The Space Coast League respectfully asks that this Honorable Court overturn the decision of the fifth district court of appeal in Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991). The Space Coast League also requests that the Court present an opinion that discusses the proper method to initiate an action in the circuit court to overturn a rezoning action as not being fairly debatable. There is simply too much confusion over this point in Florida.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to all parties on the attached Service List on this 19th day of October, 1992.



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