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IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT NO. 79,720

FIFTH DISTRICT COURT OF APPEAL
CASE NUMBER: 90-1214

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA §

Petitioner, §

v. §

JACK R. SNYDER and GAIL K. SNYDER, his wife §

Respondents. §

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

OFFICE OF THE COUNTY ATTORNEY
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REFERENCES

References to the record will be by use of the letter "R" followed by the page number of the record or the appendix filed by Snyder where the reference is located. Jack R. Snyder and Gail K. Snyder, shall be referred to as Respondents or Snyder. The Board of County Commissioners of Brevard County, Florida, shall be referred to as Petitioner or Commission. The relevant portions of Chapter 163, Part II, Florida Statutes, have not been altered since 1985; the 1991 version of the statute will be cited unless noted otherwise.

SUMMARY OF THE ISSUES

I. THE FIFTH DISTRICT COURT OF APPEAL IMPROPERLY REWEIGHED THE EVIDENCE AND ERRED IN ITS ANALYSIS OF THE FACTS IN THIS CASE.

II. THE DISTRICT COURT OF APPEAL ERRED BY DETERMINING THAT RE-ZONING DECISIONS ARE NOT LEGISLATIVE ACTS OF LOCAL GOVERNMENTS.

III. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY CREATING AN IRRECONCILABLE CONFLICT BETWEEN THE PROCEDURAL REQUIREMENTS OF FLORIDA RULE OF CIVIL PROCEDURE 1.630 AND SECTION 163.3215, FLORIDA STATUTES (1991).

IV. THE FIFTH DISTRICT COURT OF APPEAL ERRED AND FAILED TO RECOGNIZE THAT EX PARTE DISCUSSIONS OF RE-ZONING APPLICATIONS ARE PERMITTED IN RE-ZONING ACTIONS.

V. THE FIFTH DISTRICT COURT OF APPEAL ERRED AND FAILED TO RECOGNIZE THAT CONSISTENCY, AS DEFINED BY CHAPTER 163, PART II, FLORIDA STATUTES (1991), ALLOWS LOCAL GOVERNMENTS TO TAKE ACTION APPROVING LESS INTENSIVE USES WHERE THE COMPREHENSIVE PLAN SETS A MAXIMUM LIMIT ON DENSITY.

VI. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY FAILING TO APPLY THE FAIRLY DEBATABLE STANDARD OF REVIEW.

VII. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY RULING THAT SPECIFIC FINDINGS OF FACT ARE REQUIRED IN RE-ZONING ACTIONS.

VIII. THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL UNCONSTITUTIONALLY ENCROACHES ON THE LOCAL GOVERNMENT'S AUTHORITY TO ZONE PROPERTY UNDER CHAPTER 125, FLORIDA STATUTES, AND ARTICLE VIII OF THE FLORIDA CONSTITUTION.

STATEMENT OF THE CASE

This case is before the Supreme Court following the County's Notice to Invoke Discretionary Jurisdiction. The Supreme Court accepted jurisdiction September 23, 1992. The proceedings below were as follows.

In November, 1988, the Board of County Commissioners of Brevard County, Florida, denied a request by Snyder for re-zoning (R-14). Snyder filed two separate actions, but ultimately chose to pursue the appeal of the re-zoning decision by Petition for Writ of Certiorari to the Eighteenth Judicial Circuit Court (R-15, 16, 17). A three-judge panel of the circuit court heard the Petition for Writ of Certiorari. The circuit court denied the Petition for Writ of Certiorari (R-16, 17). Thereafter, Snyder filed a Petition for Writ of Certiorari in the Fifth District Court of Appeal. Exhibit "A" of the Petition was stricken (R-107, 108). The Fifth District Court of Appeal granted the Petition for Writ of Certiorari and remanded the case to the circuit court. The County filed a Motion for Rehearing, Motion for Rehearing En Banc and Motion for Certification of Issues to the Florida Supreme Court. These motions were denied by the Fifth District Court of Appeal on March 20, 1992. Subsequently, the County timely filed the Notice to Invoke Discretionary Jurisdiction of this court and jurisdiction was accepted.

STATEMENT OF THE FACTS

This case arose from the denial of a re-zoning request on Merritt Island in Brevard County, Florida. The one-half (1/2) acre tract in question is zoned GU (general use) and is located on a substandard, twenty-foot wide, dead end road. The area is designated under the 1988 Brevard County Comprehensive Plan (comprehensive plan) Future Land Use Map for residential use (R-45, Exhibit F of Notice of Filing Record, page 2 of re-zoning review worksheet). Twenty-nine zoning classifications are considered to have the potential to be consistent with this land use designation (R-32), including GU which allows construction of a single family residence. Respondents filed a re-zoning request for multi-family zoning, under the RU-2-15 zoning classification. RU-2-15 zoning allows fifteen units per acre pursuant to Section 12(F)(3)(b), Appendix C-Zoning, Code of Brevard County, Florida (R-44).

In this case, pursuant to the comprehensive plan, density on Appellee's property was capped at twelve units per acre under the urbanizing density guidelines (also called service sector designation) (R-45). The Brevard County Comprehensive Plan, Future Land Use Element Policy 1.7, provides that density guideline boundaries may be extended a distance of six hundred sixty feet (R-106). In this case, since the property was within six hundred sixty feet of an urban district which provides a density of thirty units per acre, the Board of County Commissioners had a choice whether or not to extend the urban district and encompass Respondents' lots so as to increase the allowable density. This issue is discussed in the re-zoning review worksheet (R-45).

The comprehensive plan also sets policies on development in floodplains. In reviewing the environmental aspects of Respondents' property, the staff found the request was not consistent with the development regulations for property within the 25-100-year Floodplain (R-76). One hundred per cent of the parcel is located within

the 25-100-year Floodplain (R-76) where maximum residential density is limited to two density units per acre by the comprehensive plan (R-48, 76). This restriction is in Policy 4.2 of the Conservation Element of the Brevard County Comprehensive Plan in effect in November, 1988 (R-97-99). Pursuant to Policy 1.6 of the Future Land Use Element, the more restrictive provisions of Policy 4.2 of the Conservation Element control over the density provisions of the Future Land Use Element (R-105, 106). In addition to the staff comments, the record reflects a map was provided to the County Commissioners which indicated the location of floodplains based on the water's edge and wetlands areas. Respondents' property was shaded and circled on the map (R-52) which revealed the property was in the 100-year Floodplain. Further, the record reflects that the staff also used a copy of the Federal Flood Insurance Rate Map (FIRM) to determine the location of the 100-year Floodplain in relation to Respondents' property (R-96 [three pages are marked 96], 97-99). The subject property was highlighted at R-96 in the heavily shaded area which designates 100-year floodplains (R-96). The map indicates the base elevation for the zone where Respondents' property is located is four feet. (Base elevation is defined by the Brevard County Code, Chapter 14, as the crest elevation in relation to the mean sea level expected to be reached during a base flood (R-93).) No evidence was provided by the Respondents indicating the elevation on the subject property was above four feet.

The zoning director indicated that a topographical survey had been submitted by the Respondents showing the property elevation was at 3.9 feet and the director made a statement disregarding the floodplain issue (R-10). The only topographical survey in the record was presented by Respondent (R-70). However, that survey is not of the parcel of land in question in this lawsuit. Reflected in that survey are parcels 81, 82 and the southern portion of lot 83, of the Plat of North Banana River

Park (R-70). The Petition for Writ of Certiorari and the re-zoning action addressed the northern portion of lot 83, 84 and 85, of the Plat of North Banana River Park, as recorded in Plat Book 4, Page 35 of the Public Records of Brevard County, Florida (R-44, 72). The topographical survey presented by Respondent depicted the wrong property. Further, even if that survey covered the lots in question, the survey indicates that the lots described were located within the flood zone A-4, with a base flood elevation on the map of four feet (R-95). The survey reflects an average elevation of 3.9 feet which does not take the property outside, or above, the floodplain.

The technical evidence in the record relied upon by the Commission and circuit court reflects the subject property was in the 25-100-year Floodplain. The portion of the record filed by Respondents and noted as being the documents submitted to each County Commissioner, shows the property in the 25-100-year Floodplain (R-76, Exhibit G). Contrary to Respondents' contentions before the circuit court (R-74-76), the staff comments have not been altered. The allegedly "amended" staff comments are attached to Respondents' petition and that entire document has been altered by Respondents for exhibit purposes (R-11).

At the public hearing before the Planning and Zoning Board on November 7, 1988, and before the Board of County Commissioners on November 28, 1988, adjacent property owners spoke against the requested re-zoning. The citizens expressed concerns about traffic and stated that they did not wish to have multi-family zoning in the area. The residents described the character of the neighborhood as single family residential (R-8-14) and indicated multi-family zoning would be incompatible. Multiple petitions protesting the re-zoning were presented (R-43, 62, 63, 64 and 65). The Board of County Commissioners reviewed all of the evidence before it, including staff report maps, petitions, comments, minutes, land development

regulations and comprehensive plan policies, amounting to approximately sixty-five pages of information. Based on all the evidence, the Commission denied the requested re-zoning.

Respondents filed a Petition for Writ of Certiorari in the circuit court. The court denied the petition (R-116, 117) and found:

> Included on the record of appeal are Exhibits "F" and "G" attached to Petitioners "Notice of Filing of Record" dated September 19, 1989. Petitioner asserts these exhibits compose the entire record Respondent had before it in making its decision. Exhibit G clearly states that the entire parcel is in the 25 to 100 year floodplain and that maximum residential density in that floodplain is two (2) dwelling units per acre.
>
> In addition to the above, there was competent, substantial evidence before the Board, from those who would be affected, to support the Board's decision.

Thereafter, Respondents filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal. The Fifth District granted the petition and ruled that re-zoning decisions by local governments do not constitute legislative actions. Following that initial determination, the court ruled that the fairly debatable standard does not apply in reviewing re-zoning actions and that the burden of proof is on the local government to prove by clear and convincing evidence that a specifically stated public necessity requires denial of the re-zoning request.

SUMMARY OF ARGUMENT

Background

In 1926, the United States Supreme Court upheld zoning as a proper legislative exercise of the police power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The court also held zoning decisions should be reviewed by the fairly debatable standard. In 1975, the Local Government Comprehensive Planning Act (LGCPA) was adopted in the State of Florida. § 163.3161, Fla. Stat. (1975). Under the LGCPA, after adoption of a comprehensive plan, all subsequent actions approving development were required to be consistent with the comprehensive plan. § 163.3194, Fla. Stat. (1975). In 1985, Chapter 163, Florida Statutes, was amended. § 163.3167, Fla. Stat. (1991). The consistency requirement remained in place. § 163.3194, Fla. Stat. (1985).

Under the statutory framework, comprehensive planning and zoning are separate functions. *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. den.* 529 So.2d 694 (Fla. 1988). The comprehensive plan provides guidelines regarding land use and addresses infrastructure concerns such as roads, sewers, water, parks and drainage. Land development regulations including zoning ordinances refine, restrict or control land use in a particular area and must be consistent with the guidelines set out in the comprehensive plan. § 163.3194, Fla. Stat.; § 163.3164(6) and (7), Fla. Stat.

The following example explains how the process operates. A comprehensive plan designates a particular area for residential use. Additionally, the plan might designate a specific density for the area or indicate a permissible density range such as zero to twelve units per acre. *See*, Section 163.3177(6)(a), Florida Statutes (1991). In some comprehensive plans, the local government reserves the right to consider the appropriate number of units per acre within that range at the

time the re-zoning request is considered. Under this scenario, several distinct zoning classifications may initially appear consistent with the comprehensive plan because they fall within the applicable range of densities. At the time of the public hearing on the re-zoning request, the legislators or Commissioners are able to review detailed information and commentary regarding compatibility issues; thereafter, the Commissioners make a decision as to which zoning classification should be approved for the benefit of the property owner and surrounding properties.

Thus, the planning and zoning process historically functioned with two levels of legislation. The first level is the comprehensive plan and second level is the zoning ordinance. This two-step procedure has been essentially the same since adoption of the 1975 LGCPA. Under the 1975 Act, which contained a consistency requirement, the legislative status of re-zoning actions remained intact. Nothing in the 1985 Act changed the legislative status of re-zonings.

Nonetheless, in the opinion below, the Fifth District Court of Appeal, in conflict with earlier rulings of this court, enunciated a drastic change in the law and held that re-zoning decisions by local governments are not legislative actions, but are quasi-judicial, administrative or executive actions. In addition, the court ruled that the fairly debatable standard does not apply when courts review re-zoning actions. Further, the burden of proof on review was shifted to the local government to prove by "clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use".

The Fifth District Court of Appeal stated that the reason for the change was the adoption in 1985 of Chapter 163, Part II, Florida Statutes, and that chapter's requirement that local governments adopt a comprehensive plan. According to the Fifth District Court of Appeal since all zoning actions must be consistent with the comprehensive plan, re-zonings merely apply existing policy (as contained in the

comprehensive plan) to a specific individual or parcel. The court also reasoned that re-zonings apply policies to small parcels of land and, therefore, re-zoning decisions are quasi-judicial, rather than legislative actions.

Argument

The County argues the legislative nature of re-zonings has been established since the 1926 United States Supreme Court decision in *Euclid*. The legislative status of re-zoning has repeatedly been upheld by the Florida Supreme Court and every District Court of Appeal before and after the adoption of Chapter 163, Part II. Chapter 163, Part II, Florida Statutes, merely provides an additional or broader level of long-range planning or review; it does not eliminate the legislative zoning process. The comprehensive plan provides a framework and guide, but many policy decisions remain to be made within the parameters of the comprehensive plan. Zoning remains a legislative act for the following reasons: (1) Zoning may be subject to referendum. Only legislative actions may be subject to referendum. (2) The nature of a request for re-zoning is a request for a change in the law applicable to a parcel of land. Changing rules or regulations for development is a legislative act, not a quasi-judicial act. (3) Contrary to the court's ruling, the size of the parcel should not determine whether the action is legislative or quasi-judicial. (4) Compatibility issues considered in zoning and re-zoning actions are traditionally viewed as legislative decisions.

Aside from the nature of the act described above, the Florida Statutes indicate that re-zoning is a legislative act. First, Chapter 125 requires a public hearing on re-zoning actions. In order to have viable public input to the land use, zoning, and planning processes, the Commission must be allowed to respond to the concerns raised at the public hearing. The Fifth District Court of Appeal's decision eliminates the government's ability to operate in a legislative context and

impairs the ability to respond to public comment by mandating results in re-zoning hearings. Second, the determination that re-zoning decisions are not legislative indicates that a petition for certiorari may be the only proper method of review of such a decision. This result conflicts with the requirements of Section 163.3215, Florida Statutes (1991), which include filing a complaint with the local government. The procedural requirements of Section 163.3215, Florida Statutes, cannot be met in the context of filing a petition for certiorari. Therefore, the Fifth District Court of Appeal's opinion deprives property owners of a right to appeal. The Legislature, in drafting and creating the statutory framework of Chapter 163, clearly considered re-zoning legislative in nature; otherwise, the statutory framework for appeal does not function.

Another area requiring review is the consistency requirement of Chapter 163, Part II. Chapter 163 requires that zoning be "consistent" with the comprehensive plan. The Fifth District Court of Appeal erroneously applied a definition of consistency which requires the zoning action to be identical to the maximum densities allowed by the comprehensive plan. This ruling ignores the definition of "consistency" and the provisions of other sections of the 1988 Brevard County Comprehensive Plan and impairs the flexibility intended for comprehensive plans under Chapter 163. If a comprehensive plan merely sets a cap on density, all zoning classifications with densities below the cap should be considered consistent. Otherwise, the density anticipated for the future will be approved today, prior to construction of necessary infrastructure and in disregard of compatibility issues and more restrictive policies elsewhere in the comprehensive plan. This result is contrary to the goals of comprehensive planning.

The Fifth District Court of Appeal also created a new standard of review for reviewing re-zoning decisions. This new standard, close judicial review, is not

required by statute and is in conflict with numerous decisions of the Florida Supreme Court and other District Courts of Appeal. The Fifth District Court of Appeal's rigid consistency definition, combined with the standard of close judicial review, has a practical result of mandating results in re-zoning hearings. This result was not contemplated by Chapter 163 or the comprehensive plan and is a de facto removal of zoning authority from local governments. This approach appears to be in conflict with the Florida Constitution because it encroaches on the County's home rule power.

Finally, the Fifth District Court of Appeal reweighed or ignored the evidence and made findings of fact. The circuit court specifically found there was evidence in the record indicating the property was in the 25-100-year Floodplain and, therefore, under the comprehensive plan, density was limited to two units per acre. The District Court ignored this evidence and the circuit court's findings; the District Court of Appeal made its own findings of fact which is improper in the context of a petition for writ of certiorari.

In conclusion, the Fifth District Court of Appeal overlooked the facts in this case and the provisions of the 1988 Brevard County Comprehensive Plan. The Fifth District Court of Appeal has misconstrued the intent of Chapter 163, Part II, and removed the inherent right of local governments to zone property under Chapter 125, Florida Statutes, and the Florida Constitution.

BRIEF ON THE MERITS

I. THE FIFTH DISTRICT COURT OF APPEAL IMPROPERLY REWEIGHED THE EVIDENCE AND ERRED IN ITS ANALYSIS OF THE FACTS IN THIS CASE.

Courts are not permitted to reweigh evidence on review of a petition for certiorari. In *St. Johns County v. Owings*, 554 So.2d 535 (Fla. 5th DCA 1989), *rev. den.* 564 So.2d 488 (Fla. 1990), the court summarized the law as follows:

> As recently emphasized by the Florida Supreme Court in *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So.2d 106 (Fla. 1989), a district court of appeal plays a very limited role in reviewing a circuit court's action in a zoning dispute such as this. Only the circuit court can review whether the judgment of the zoning authority is supported by competent substantial evidence. . .a district court of appeal may not quash a circuit court's decision because it disagrees with the circuit court's evaluation of the evidence.

Owings, 554 So.2d at 537.

Here, the district court disagreed with the circuit court's evaluation of the evidence and finding that "Exhibit G clearly states the entire parcel is in the 25-100-year floodplain and that the maximum residential density is two (2) dwelling units per acre" (R-107). The district court improperly reweighed the evidence to find the subject property was outside the 25-100-year Floodplain.

According to the Future Land Use Element of the Comprehensive Plan, density in this floodplain is limited to two units per acre. The topographical survey submitted by the property owners (Respondents), which allegedly demonstrated the subject property was not in the floodplain, was <u>not</u> of the subject property, but showed property to the south. (*cf* R-70, 72). All maps and technical analysis presented to the Board of County Commissioners by staff indicated that the subject property was in the 25-100-year Floodplain. Even though there was confusion on this issue, the trial court specifically found that there was evidence in the record reflecting that the subject property was in the 25-100-year Floodplain (R-116-177).

The Fifth District Court of Appeal relied on a survey of land to the south which did not include any part of the subject property, and found the subject property was outside the 25-100-year Floodplain. Based on this error alone, the decision of the Fifth District Court of Appeal should be reversed.

Second, the comprehensive plan limited density on the subject property to twelve units per acre due to the urbanizing service sector designation. The Commission did not extend the urban service sector which would have allowed thirty units per acre; therefore, density was capped at twelve units per acre. The request for fifteen units, RU-2-15, was properly denied by the Commission.

Third, both the circuit court and the Commission found that multi-family zoning in a single family residential neighborhood is incompatible. This finding is well supported by case law addressing compatibility. In *Gautier v. Town of Jupiter Island*, 142 So.2d 321 (Fla. 2d DCA 1962), apartments were not permitted in single family neighborhoods due to the negative impact on the neighborhood. Placement of multi-family housing in a single family neighborhood operates against the goal of preserving neighborhoods and creates traffic congestion and other negative impacts. *Gautier*. In *Town of Orange Park v. Pope*, 459 So.2d 418 (Fla. 1st DCA 1984), multi-family zoning was requested and denied. Multiple experts testified regarding negative impacts to surrounding single family neighborhoods if multi-family zoning were allowed. *See also*, *City of Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953)(denying multi-family zoning in an area developed as single family); *Miles v. Dade County Board of County Commissioners*, 260 So.2d 553 (Fla. 3d DCA 1972).

In the case at bar, the circuit court and the Commission found the re-zoning request was not appropriate for the area. Nonetheless, the Fifth District Court of

Appeal ignored these findings of the Commission and the trial court. Accordingly, the decision of the Fifth District Court of Appeal should be reversed.

II. THE DISTRICT COURT OF APPEAL ERRED BY DETERMINING THAT RE-ZONING DECISIONS ARE NOT LEGISLATIVE ACTS OF LOCAL GOVERNMENTS.

The Supreme Court of Florida has historically considered enactment of zoning regulations to be legislative acts. The reason for this view is best described in *City of Miami Beach v. Wiesen*, 86 So.2d 442 (Fla. 1956), in which the court stated:

> It is trite to observe that in zoning a city into various use districts there must be a dividing line somewhere. The selection of such a line involves the exercise of the legislative power and is a problem peculiarly within the power of the legislative body of a municipality. It involves a high degree of legislative discretion and an acute knowledge of existing conditions and circumstances. . .Recognizing the fundamental premise that there must be a line somewhere, the courts should be highly respectful of the decision of the legislative body which, under the law, is vested with the power and charged with the duty of zoning. The courts should tread lightly in this field and then only where the actions of the City Council are so unreasonable and unjustified as to amount to confiscation of property.

Wiesen, 86 So.2d at 445.

Re-zoning applications are requests to amend zoning ordinances to alter the zoning classification on a particular piece of land. The question presented is whether these amendments or re-zonings retain their legislative nature.

As a general rule, legislative acts create new rules or change existing conditions. Judicial or quasi-judicial acts, in contrast, review the existing laws and facts and seek to enforce the law accordingly. *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991); *see also*, *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957); *City of St. Petersburg v. Cardinal Industries Development Corporation*, 493 So.2d 535 (Fla. 2d DCA 1986).

A re-zoning request seeks to change the existing zoning classification affecting a parcel of land. Each zoning classification contains different

regulation for the development of parcels of land within that classification. By its nature, re-zoning is a legislative act because it changes the applicable rules and regulations for developing a parcel of land.

A. Supreme Court decisions

The Florida Supreme Court has repeatedly held that decisions re-zoning land are legislative acts. For example, in *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959), the court stated, "[i]t is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character". *Schauer*, 112 So.2d at 839.

The Fifth District Court of Appeal attempts to distinguish *Schauer* on the basis that it involved a change in general policy of a large area. The court also implies provisions or permitted uses within a zoning classification were changed. In fact, the case appears to show it was "the purpose of the amendatory ordinance to effect a change in the zoning of a large area so it would not be restricted to use as sites for private residences but could be used as locations for multiple family buildings and hotels". *Schauer*, 112 So.2d at 839. Thus, it appears the action taken may have been a re-zoning action, and, therefore, the case is on point.

In 1978 and 1983, the court affirmed its position that re-zoning is a legislative act. *Florida Land Company v. City of Winter Springs*, 427 So.2d 170, 174 (Fla. 1983); *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So.2d 57 (Fla. 1978). In *Florida Land Company*, re-zoning of a parcel of land owned by a single party was approved by a city council. Subsequently, the re-zoning proposal was submitted to the citizens for a referendum vote. The Florida Supreme Court held that:

> This action [the re-zoning] by the city council was a legislative function. We have previously addressed this issue in *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959), wherein we held that "[i]t is obvious to us that the enactment of the original zoning ordinance

> was a legislative function and we cannot reason that the amendment of it was of different character." 112 So.2d at 839. As we examine the entire procedural route taken by this zoning ordinance we cannot conclude that this was anything other than 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 relation to the police power. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Florida Land Company, 427 So.2d at 174.

The Florida Supreme Court further noted that the application of the referendum process to re-zoning requests had been upheld by the United States Supreme Court in *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976).

The Fifth District Court of Appeal attempts to distinguish *Florida Land Company* by stating it addressed a comprehensive plan amendment. This distinction is misleading. In *Florida Land Company*, the city council did amend the plan, but only pursuant to the re-zoning request. The comprehensive plan was not challenged. On appeal, the plaintiff simply focused on whether re-zoning decisions are legislative actions.

Also supporting the legislative status of re-zoning actions is *Gulf & Eastern*. In *Gulf & Eastern Development Corporation*, the neighboring property owners challenged a re-zoning action and primarily addressed notice issues. However, the Supreme Court stated, "[z]oning is a legislative function which reposes ultimately in the governing authority of a municipality". *Gulf & Eastern Development Corporation*, 354 So.2d at 59.

The Supreme Court addressed the question of whether re-zonings are legislative or quasi-judicial actions in *Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc.*, 450 So.2d 204 (Fla. 1984). In

Citizens Growth Management, a comprehensive plan had been adopted under the Local Government Comprehensive Planning Act of 1975 (LGCPA), which required government actions to be consistent with the comprehensive plan. § 163.3194, Fla. Stat. (1975). A re-zoning decision was challenged by the Citizens Growth Management Coalition. The status of the re-zoning decision as a legislative act was challenged due to the existence of the comprehensive plan and the requirement that re-zoning actions be consistent with that plan. Although the Supreme Court opinion does not specifically address the issue, the Supreme Court stated, "[w]e find the circuit court's judgment was correct in all respects and we therefore affirm". 450 So.2d at 206. In that case, the circuit court held:

> 3. REZONING A LEGISLATIVE ACT.
>
> The Plaintiff concedes that the City Commission utilized legislative procedures in granting the Phillips Point rezoning. Plaintiff contends, however, that Section 163.167(1)(d) Florida Statutes, mandates that the City Commission's action be administrative or quasi-judicial in nature, including fact finding on the issue of consistency with the City's Comprehensive Plan. Zoning (and rezoning) ordinances are legislative in nature, *Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale*, 354 So.2d 57 (Fla. 1978); *Josephson v. Autry*, 96 So.2d 784 (Fla. 1957), and the court is not persuaded that the statute cited by Plaintiff is clear legislative intent to change the long established law in Florida in this respect. Completely aside from the absence of a clear legislative attempt to depart from long established law, logic and common sense dictates that all zoning action by the City Commission as representatives of and responsive to the electorate, is legislative in nature, and the City Commission collectively, and the Commissioners individually, are not (in fact), cannot be (in practice), and should not be (as a matter of law), expected to decide rezoning matters in a quasi-judicial capacity. Because the court expressly holds that the action taken by the City Commission was a purely legislative act, the court also holds as follows:
>
> A. The City Commission, in making a determination that the rezoning was consistent with its comprehensive plan, was not required to make factual findings to support such determination.
>
> B. Common law certiorari will not lie to review a purely legislative act. *G-W Development Corp. v. Village of North Palm Beach Zoning Board of Adjustment*, 317 So.2d 828 (Fla. 4th DCA 1975).

C. The standard for judicial review on the merits of whether a legislative action is an unreasonable exercise of legislative power (a review not necessary in this case because of Plaintiff's lack of standing to raise the issue) is whether the action was "fairly debatable". [Circuit court opinion attached at Appendix 1-11.]

Thus, the Supreme Court, in affirming the trial court's opinion, has already considered the issue presented by the Fifth District's decision below and rejected the Fifth District's reasoning. Therefore, the case before the court should be reversed.

B. District Court decisions

All the District Courts in Florida, including the Fifth District, have held at one time or another that re-zoning is a legislative action.

Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992). (Denial of re-zoning was legislative decision subject to review by the fairly debatable standard.)

St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989), *rev. den.* 564 So.2d 488 (Fla. 1990). (The fairly debatable standard applies to legislative rezoning decisions. Regardless of whether appellate court would have viewed the facts differently, *de novo* review is not authorized.)

Riverside Group, Inc. v. Smith, 497 So.2d 988 (Fla. 5th DCA 1986). (No specific findings of fact required in granting application for re-zoning.)

City of New Smyrna Beach v. Barton, 414 So.2d 542 (Fla. 5th DCA 1982), *rev. denied*, 424 So.2d 760 (Fla. 1982). (Legislative re-zoning decisions are reviewed under the fairly debatable standard.)

Palm Beach County v. Allen Morris Company, 547 So.2d 690 (Fla. 4th DCA 1989), *rev. dismissed*, 553 So.2d 1164 (Fla. 1989). (Rezoning decisions are reviewed by the court under the fairly debatable standard.)

Palm Beach County v. Tinnerman, 517 So.2d 699 (Fla. 4th DCA 1987), *rev. denied*, 528 So.2d 1183 (Fla. 1988). (Zoning actions are legislative. Court order directing re-zoning violates separation of powers doctrine.)

Southwest Ranches Homeowners Association v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987), *rev. denied* 511 So.2d 999 (Fla. 1987). (Rezoning should meet fairly debatable standard and be consistent with the comprehensive plan.)

Marell v. Hardy, 450 So.2d 1207 (Fla. 4th DCA 1984). (Zoning is the exclusive function of the legislative authorities and courts are not entitled to substitute their judgment for that of the legislative body. Zoning resolutions are reviewed by the fairly debatable standard.)

S.A. Healy Company v. Town of Highland Beach, 355 So.2d 813 (Fla. 4th DCA 1978). (Zoning is the exclusive function of the zoning authorities and courts are not entitled to substitute their judgment for that of the legislative body.)

County of Brevard v. Woodham, 223 So.2d 344 (Fla. 4th DCA 1969), *cert. den.*, 229 So.2d 872 (Fla. 1969). (Zoning ordinance will be upheld if it is fairly debatable.)

Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991). (Rezoning actions are legislative in nature.)

Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. den.* 529 So.2d 694 (Fla. 1988). (Zoning actions are legislative and must be consistent with comprehensive plan. Burden is on party seeking change to prove strict compliance with Comprehensive Plan.)

Metropolitan Dade County v. Fuller, 515 So.2d 1312 (Fla. 3d DCA 1987). (Fairly debatable standard applies to re-zoning.)

Dade County v. Inversiones Rafamar, S.A., 360 So.2d 1130 (Fla. 3d DCA 1978). (Re-zoning is the exclusive function of the zoning authorities and courts are not entitled to substitute their judgment for that of the legislative body.)

Smith v. City of Miami Beach, 213 So.2d 281 (Fla. 3d DCA 1968), *cert. discharged* 220 So.2d 624 (1969). (Re-zonings are legislative; burden is on landowner to show that government's action was arbitrary.)

Lee County v. Morales, 557 So.2d 652 (Fla. 2d DCA 1990); *rev. den.*, 564 So.2d 1086 (Fla. 1990). (Re-zoning is legislative act; standard of review is whether the action was fairly debatable. Zoning ordinance is not confiscatory absent deprivation of <u>all</u> beneficial use of the land.)

City of Tampa v. Speth, 517 So.2d 786 (Fla. 2d DCA 1988). (Re-zoning from single family to medium density multiple family zoning is a legislative act subject to fairly debatable standard. City appropriately denied rezoning based on aesthetic and historic character of neighborhood.)

City of Naples Airport Authority v. Collier Development Corporation, 513 So.2d 247 (Fla. 2d DCA 1987). (Re-zoning is a legislative action reviewed under the fairly debatable standard. If there is substantial competent evidence supporting the decision, it should be upheld.)

Starkey v. Okaloosa County, 512 So.2d 1040 (Fla. 1st DCA 1987). (It was the county's legislative prerogative to re-zone property.)

City of Jacksonville Beach v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984); *rev. den.*, 469 So.2d 749 (Fla. 1985). (Fairly debatable standard applies to legislative rezoning.).

Most recently, in *Jennings* (above), a 1991 case, the status of zoning as a legislative action was affirmed. The Third District Court of Appeal stated, "[i]t

is settled that the enactment and amending of zoning ordinances is a legislative function. . .". *Jennings*, 589 So.2d at 1343.

Several of the cases specifically addressed re-zoning in the context of comprehensive plans adopted under both the 1975 and 1985 Acts. Those cases also treated re-zoning as a legislative act. *Palm Beach County v. Tinnerman*, 517 So.2d 699 (Fla. 4th DCA 1987), *rev. denied* 528 So.2d 1183 (Fla. 1988); *Southwest Ranches Homeowners Association, Inc. v. County of Broward*, 502 So.2d 931 (Fla. 4th DCA 1987), *rev. den.* 511 So.2d 999 (Fla. 1987); *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. den.* 529 So.2d 694 (Fla. 1988); and *City of Jacksonville Beach v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984); *rev. den.*, 469 So.2d 749 (Fla. 1985).

It should also be noted that in *Manatee County v. Kuehnel*, 538 So.2d 52 (Fla. 2d DCA 1989), the Second District Court of Appeal entered an opinion, which it subsequently withdrew, finding that re-zoning actions were quasi-judicial. Following a motion for rehearing, that court withdrew its opinion and substituted an opinion discussing due process and the existence of substantial competent evidence. *Manatee County v. Kuehnel*, 542 So.2d 1356 (Fla. 2d DCA 1989). Thus, the issue presented by *Snyder* has been considered and rejected by the Second District Court of Appeal.

The rulings of the Florida Supreme Court and the District Courts of Appeal follow the ruling of the United States Supreme Court in 1926 which upheld zoning as a proper exercise of legislative power. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Further, the compatibility issues and concerns for protection of the neighborhood considered in re-zoning decisions under the comprehensive plan have consistently been held to be concerns of a legislative nature in the re-zoning context. *See, Village of Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *City of Miami Beach v. Ocean & Inland Co.*,

147 Fla. 480, 3 So.2d 364 (Fla. 1941); *Trachsel v. City of Tamarac*, 311 So.2d 137 (Fla. 4th DCA 1975).

Zoning regulations are legislative exercises of the police power and properly protect the public welfare and community interest in preventing nuisances, promoting aesthetics and preserving neighborhood integrity. Achieving the goal of preserving neighborhood integrity has repeatedly been upheld as a proper exercise of the police power. In *Gautier v. Town of Jupiter Island*, 142 So.2d 321, 324 (Fla. 2d DCA 1962), multi-family zoning in a single family neighborhood was denied and the court quoted, "[a]partment houses are not inherently benign. On the contrary, they present problems of congestion and may have a deleterious impact upon other uses".

Zoning and re-zoning decisions have typically addressed these public welfare issues by considering compatibility of a request with surrounding land uses, character of the area, traffic patterns and other community concerns. Compatibility issues traditionally have been considered legislative decisions.

In the context of a comprehensive plan adopted pursuant to Chapter 163, Part II, Florida Statutes (1991), re-zoning decisions continue to be made on the basis of compatibility, character of the neighborhood, traffic concerns and other relevant issues. *See e.g.*, 1988 Brevard County Comprehensive Plan Policy 1.6 (R-105). Thus, the same considerations previously held to be legislative concerns continue to be applied to re-zoning decisions after adoption of the comprehensive plan, although the discretion of the legislative body may be limited by the requirements of the comprehensive plan.

Reversal of the Fifth District Court of Appeal's decision is required to allow government to properly exercise its police powers and to consider traditional legislative issues raised in the zoning context as previously approved by both the United States Supreme Court and the Florida Supreme Court.

C. Zoning as a legislative act and Chapter 125

The Florida Supreme Court's finding that a re-zoning action is a legislative act is consistent with the statutory requirement that amendments to ordinances, including re-zoning decisions, be made in a public hearing. Section 125.66, Florida Statutes (1991), recognizes re-zoning requests may impact the public and requires a public hearing for the governing body to hear all concerns expressed by the public. Although "public hearing" is not defined by Chapter 125, advertising requirements of a public hearing are provided in Sections 125.66 and 163.3164(17), Florida Statutes (1991). At a public hearing, the public is not necessarily sworn in and they are not qualified as expert witnesses. *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F.Supp. 1479 (Fla.M.D. 1989). They simply appear to discuss their views and perceptions of the needs of the community and the character of the area.

Rather than encouraging consideration of public input, as required by Chapter 125 and encouraged by Section 163.3181, Florida Statutes, the Fifth District Court of Appeal's opinion essentially mandates approval of a zoning request for the maximum density under the comprehensive plan. This approach renders the public hearing useless. Public comments protesting the maximum density must be ignored because approval of the requested zoning is required despite other comprehensive plan provisions and compatibility concerns.

If, as proposed by the Fifth District Court of Appeal, the rules are already in place and the decision requires only administrative application of the rules, there would be no reason to require public input. Under the rationale adopted by the Fifth District Court of Appeal, re-zoning procedures could proceed like hearings in the circuit court with no notice to anyone but the parties involved. That was

neither the intent nor the spirit of the Legislature in adopting Chapter 125 and Chapter 163.

Nothing in Chapter 163, Part II, Florida Statutes (1991), or its 1987 version, states that the legislative status of zoning actions or the nature of zoning has been changed. Further, without a specific clause overriding Chapter 125, the two statutes should be read together to allow both to operate if possible. *City of Boca Raton v. Gidman*, 440 So.2d 1277 (Fla. 1983). Therefore, the provisions of Chapter 125 should still apply; the legislative public hearing process should be allowed to continue within the bounds established by the comprehensive plan. Otherwise, based on the *Snyder* and *Jennings* decisions, Chapter 125 will be ignored and viable public input to the land use, zoning and planning process will be eliminated.

D. Post facto determination of quasi-judicial or legislative status based on size of the re-zoning request

If re-zoning decisions are not legislative actions, numerous procedural questions are created. The District Court of Appeal urged re-zoning is <u>not</u> a legislative action due to the mandatory adoption of comprehensive plans and the consistency requirements of Chapter 163, Part II. The Fifth District Court of Appeal cited *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (Or. 1972), as support for its decision. A close reading of *Fasano* reveals <u>no</u> finding that the statutory requirement of consistency of zoning decisions with the comprehensive plan somehow converted the decisions from legislative to quasi-judicial actions. The *Fasano* court simply found the small size of the subject parcel (thirty-two acres) rendered the local government's action quasi-judicial. *Fasano* at 26. The Fifth District Court of Appeal also adopted this reasoning of the *Fasano* court.

Under the *Fasano*-Fifth District Court of Appeal "functional analysis" approach, a determination of the nature of the act as quasi-judicial or legislative

will probably occur in the courts after the local government has rendered its decision. The reason for this situation is that neither *Fasano* nor the Fifth District Court of Appeal provided any answers to the following questions. How large does a parcel need to be for the re-zoning action to be legislative in nature? How small does a parcel need to be for re-zoning to constitute quasi-judicial action? Does the size of the parcel as a percentage of the land encompassed in the community have a bearing on whether the re-zoning action is quasi-judicial or legislative? Does the number of persons or entities holding an ownership interest have an affect on the outcome? What is the result if comprehensive plan amendments are site specific? Will the answers differ for cities and counties since counties usually have more large tracts of undeveloped land? These questions are largely identical to those which arose in Oregon after *Fasano*.

The California Supreme court, in *Arnel Development Corp. v. City of Costa Mesa*, 28 Cal.3d 511, 620 P.2d 565 (Cal. 1980), considered *Fasano* and flatly rejected it. The court reasoned the power to legislate includes by necessary implication the power to amend existing legislation. *Arnel Development Corp.*, 620 P.2d at 569. Further, the court noted that under the *Fasano* reasoning "whenever a legislative body enacted legislation which affected relatively few persons that legislation would be invalid unless the persons affected received notice and hearing before the enacting body". *Arnel Development Corp.*, 620 P.2d at 572.

The Fifth District Court of Appeal has placed property owners, citizens and local governments in a quandary. Property owners and local governments will not know the type of action in which they are participating until the courts tell them the nature of the process. Because they will not know the nature of the action, parties will not know what standards of review they will face on appeal. Neither party will be able to determine in advance how to establish the record and what

findings of fact are necessary. Cautious landowners and local governments will be required to hire expert witnesses and establish an extensive record as if the action is quasi-judicial. These precautions, which may be unnecessary, will cost individual taxpayers, land owners and developers thousand of dollars.

In Oregon, conflicting court opinions and a general lack of direction in procedures rapidly appeared and, as a result, *Fasano* has largely been discredited. *See* the amicus brief filed by Space Coast League of Cities, Inc. and the City of Melbourne, which is hereby referenced and incorporated herein for further discussion of the problems encountered out of state. The State of Florida should not re-create the same problems experienced in Oregon. The Florida Supreme Court should adopt the reasoning of *Arnel* and reject *Fasano*.

In summary, based on the United States Supreme Court decision upholding zoning as an exercise of the police power, the Florida Supreme Court's prior rulings, the intent of Chapter 125, Chapter 163, Part II, and the referendum power of the people, re-zoning actions must be considered legislative actions. To hold otherwise will eliminate viable public input into zoning decisions, defeat the democratic process, and invite a host of procedural problems and confusion.

III. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY CREATING AN IRRECONCILABLE CONFLICT BETWEEN THE PROCEDURAL REQUIREMENTS OF FLORIDA RULE OF CIVIL PROCEDURE 1.630 AND SECTION 163.3215, FLORIDA STATUTES (1991).

The Fifth District Court of Appeal's decision that re-zoning actions are not legislative creates a procedural question which has been certified twice to the Florida Supreme Court. *Emerald Acres Investments, Inc. v. Board of County Commissioners of Leon County*, 601 So.2d 577 (Fla. 1st DCA 1992); and *Parker v. Leon County*, 601 So.2d 1223 (Fla. 1st DCA 1992).

If re-zoning is not legislative, by implication, it may be quasi-judicial. The question is, how does an aggrieved or adversely affected party appeal? A petition for certiorari is the proper method to review quasi-judicial actions, yet Section 163.3215, Florida Statutes, which provides the "sole" remedy for review of allegedly inconsistent zoning actions, does not allow review by certiorari. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957); *Irvine v. Duval County Planning Commission*, 495 So.2d 167 (Fla. 1986), citing *Irvine v. Duval County Planning Commission*, 466 So.2d 357 (Fla. 1st DCA 1985). As a result of this issue, in Brevard County, re-zoning decisions are being appealed by filing two lawsuits. First, a petition for writ of certiorari is filed; second, an action for declaratory or injunctive relief under Section 163.3215, Florida Statutes, is filed. The details of the problem are described below.

Petitions for certiorari are the typical route for reviewing quasi-judicial decisions; petitions for certiorari must be filed in the circuit court within thirty days of the contested action. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957); *Irvine v. Duval County Planning Commission*, 495 So.2d 167 (Fla. 1986), citing 466 So.2d 357 (Fla. 1st DCA 1985); Fla. R. Civ. P. 1.630.

Meanwhile, Section 163.3215, Florida Statutes (1991), is the only method to challenge consistency of a development order with the comprehensive plan. Pursuant to Section 163.3215, Florida Statutes, certain procedures must be followed prior to filing a complaint challenging the consistency of an action with the comprehensive plan. Specifically, as a condition precedent to the institution of such an action, the complaining party must first file a verified complaint with the local government. This verified complaint must be filed within thirty days after the allegedly inconsistent action has been taken. The local government, in turn, has thirty days to respond after receipt of the complaint. At this point, approximately

sixty days have passed since the decision of the local government was rendered. Thereafter, the complaining party may file suit.

In summary, a petition for certiorari attacking a non-legislative decision must be filed within thirty days of the rendition of the decision of the local government. It will, however, be too late to file the required petition for certiorari when the conditions precedent (sixty days) under Section 163.3215, Florida Statutes, have been met. Therefore, the practical result of the lower court's decision is to deny the property owner the right to sue under Section 163.3215. The petition for certiorari cannot be filed after thirty days, but Chapter 163 prohibits filing before sixty days have run. Arguably, the property owner also loses the ability to file a petition for writ of certiorari due to Section 163.3215, Florida Statutes, and the statement that the procedures therein are the "sole" remedy.

Thus, the Fifth District Court of Appeal's decision defeats the rights of property owners to challenge local governmental decisions based on inconsistency with the comprehensive plan. Simultaneously, a waste of judicial time occurs due to the need to file multiple lawsuits to protect a complaining party's uncertain rights.

The logical approach is to reverse the Fifth District Court of Appeal decision and determine once again that re-zoning is a legislative action, thereby eliminating the issue of certiorari review.

IV. THE FIFTH DISTRICT COURT OF APPEAL ERRED AND FAILED TO RECOGNIZE THAT EX PARTE DISCUSSIONS OF RE-ZONING APPLICATIONS ARE PERMITTED IN RE-ZONING ACTIONS.

Due to the interaction of the decision below with another recent case, *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991), the public appears to be barred from contacting their legislators regarding re-zoning matters.

To determine whether contact with legislators is warranted, the general nature of zoning action must be considered. Legislators are required to make policy decisions in the zoning field affecting community interests and the public. Citizens should have an opportunity to discuss the community with the legislators who are elected to represent their interests. In addition, enacting zoning regulations, as stated in *Wiesen*, requires detailed knowledge of the area. This scope of knowledge cannot be expected to be obtained in the course of one limited public hearing, but must be obtained from living in the community and discussing the nature of an area with its residents.

Previously, the information required to make zoning decisions could come from many sources, including meetings between the Commissioners and the property owners requesting re-zonings and objectors to the request. This approach is beneficial to all parties. Property owners contact their commissioners to determine the possibility of obtaining a re-zoning. This approach avoids many hours in public hearings waiting to make a presentation if a favorable outcome is unlikely based on the legislator's views of the community. It also saves thousands of dollars in application fees and consultant fees. In addition, after hearing both sides of the issue from the property owners and the objectors, local government officials are frequently able to act as mediators between groups with conflicting interests.

In *Jennings*, ex parte communications in quasi-judicial proceedings were deemed a violation of due process. Since, under *Snyder* below, zoning is no longer considered legislative, it may be considered quasi-judicial and fall within the parameters of *Jennings*. Thus, adjoining property owners and other members of the public will be prohibited from contacting their legislator or commissioner prior to the public hearing. Once these individuals reach the public hearing, their comments will be ignored per the Fifth District Court of Appeal's ruling that the zoning is

pre-ordained by the comprehensive plan. To deny the public an opportunity to be heard per the Fifth District Court of Appeal opinion below, defeats the purpose of Section 163.3181, Florida Statutes, which encourages public participation, and Chapter 125 which requires a public hearing for re-zonings and flies in the face of the democratic process.

V. THE FIFTH DISTRICT COURT OF APPEAL ERRED AND FAILED TO RECOGNIZE THAT CONSISTENCY, AS DEFINED BY CHAPTER 163, PART II, FLORIDA STATUTES (1991), ALLOWS LOCAL GOVERNMENTS TO TAKE ACTION APPROVING LESS INTENSIVE USES WHERE THE COMPREHENSIVE PLAN SETS A MAXIMUM LIMIT ON DENSITY.

A. Statutory provisions

Under the 1985 Act, all development orders are required to be consistent with the comprehensive plan. § 163.3194, Fla. Stat. (1991). The consistency requirement was initially presented in the 1975 LGCPA, Section 163.3194, Florida Statutes (1975). Section 163.3194, Florida Statutes (1991), provides:

> 163.3194 Legal status of comprehensive plan.--
> (1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted.

Re-zoning decisions are considered development orders pursuant to Section 163.3164(6) and (7), Florida Statutes (1991) (These provisions have not been amended since 1985). Thus, it is clear the consistency requirement applies to re-zoning actions. Consistency is defined in Section 163.3194(3):

> (3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are <u>compatible with and further</u> the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.
>
> (b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing and other aspects of the

> development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. [Emphasis added]

Thus, "consistency" is defined as action which is compatible with and furthers the overall intent of the comprehensive plan. "Compatible" means the items are capable of performing in harmonious or agreeable combination with each other. *The American Heritage Dictionary*, 2d college ed. Boston: Houghton Mifflin Company, 1976, p. 300. Compatibility does not require two compared items to be identical or require that they mirror each other exactly. "Further" means to help the progress of something or to advance an item or goal. The use of "compatible" and "further" requires a flexible application of consistency requirements. For example, one development order may "further" the objectives of the plan to a greater degree than another development order, yet both may be "consistent" with the plan and further one or more of the objectives of the plan.

Support for these statements is found in Section 163.3177(10)(a), Florida Statutes (1991), which also defines "consistency", "compatible" and "further" when reviewing consistency between state and local comprehensive plans. The statute provides:

> The term "compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term "furthers" means to take action in the direction of realizing goals or policies of the state or regional plan. For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plans.

Thus, a flexible approach is clearly mandated for consistency reviews between state and local plans. There is no reason to believe the same standards do not apply to analyzing the consistency of re-zoning actions with the comprehensive plan.

Finally, guidance to the reviewing court is provided at Section 163.3194(4)(a) and (b).

> (4)(a) A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.
>
> (b) It is the intent of this action that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives.

Thus, under the existing statutes, consistency review requires a consideration of all comprehensive plan policies and objectives. Re-zoning actions which further the goals of the comprehensive plan or which operate within the parameters of the comprehensive plan shall be considered consistent.

B. 1988 Brevard County Comprehensive Plan

In this case, the applicable comprehensive plan provisions relate to density, protection of the environment and prevention of flooding. *See* Future Land Use Element Policy 1.6 (R-105) and Conservation Element Policy 4.2 (R-97), the Brevard County Code, Section 14-74 (R-93). The Future Land Use Element discussed the density guidelines:

> Policy 1.6
>
> The residential density guidelines for each density area of this Comprehensive Plan represent a <u>maximum threshold</u> and the allowable density shall be based upon the following minimum criteria:
>
> Criteria:
>
> A. Environmental constraints and more stringent density guidelines established in the Conservation element policies 4.2, 4.3, 4.4, and 5.2;

B. Land use compatibility;

C. Availability of public facilities and services at acceptable levels of service;

D. Character of an area;

E. Hurricane evacuation capabilities;

F. Policies established in the Strategic Area Plans as required in Policy 10.3 of this element, upon their adoption, for specific areas in the County; and

G. Other directives, policies and criteria of this Comprehensive Plan which establish more stringent density requirements. (R-105) [Emphasis added]

Simultaneously, Policy 4.2 of the Conservation Element limited density to two units per acre in the 25-100-year Floodplain.

Thus, the intent of the comprehensive plan was to limit density to a range of densities and allow the Commission, at the time of re-zoning, to consider the compatibility of the proposed request with the surrounding area and to consider the other criteria (such as environmental concerns) listed in Policy 1.6.

In this case, denial was appropriate on three grounds. First, to protect the floodplain, density was limited to two units per acre. Second, the request was incompatible with the character of the surrounding area. Third, approval of RU-2-15 would require an extension of the urban service sector, which would then have allowed thirty units per acre. The pre-existing designation of the property as an urbanizing service sector on the Future Land Use Maps allowed only twelve units per acre while RU-2-15 allows fifteen units. Without the extension of the urban service sector, the required re-zoning was clearly in conflict and inconsistent with the comprehensive plan. The Board of County Commissioners had not approved extension of the urban service sector; therefore, RU-2-15 could not be approved.

Under the description of "consistency" presented by the statutes, the action of the Board of County Commissioners was appropriate.

C. Definitions of consistency by the courts

According to the Fifth District Court of Appeal, "consistency" appears to mean that the maximum density on the Future Land Use Map must be granted upon request. Approval of less intensive zoning classifications is not considered consistent by the Fifth District Court of Appeal. The Fifth District Court of Appeal apparently ignored all other comprehensive plan provisions noted above and the definitions of Chapter 163, Part II. In the *Snyder* case below, the court may have applied a definition for consistency previously discussed in a concurring opinion in *City of Cape Canaveral v. Mosher*, 467 So.2d 468 (Fla. 5th DCA 1985). Judge Cowart stated:

> The city appeals and argues that any zoning that is more restrictive or less intensive than that provided by a comprehensive plan is "consistent" with that plan.
>
> Section 163.3194(1), Florida Statutes, defines the legal status of a comprehensive plan to be such that after its adoption all land development regulations enacted or amended must be consistent with the adopted comprehensive plan. This requirement is itself consistent with the theory, purpose and validity of zoning. The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified, by the norm, it is "consistent" with it but if the compared item deviates or departs in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.

Mosher, 467 So.2d at 470, 471.

Based on this reasoning, the Fifth District Court of Appeal found the maximum density on the Future Land Use Maps had to be granted and the approval of a less intensive use was viewed as inconsistent. Judge Cowart's definition of "consistency" was developed under the 1975 Act prior to creation of the definition of consistency in Section 163.3194(3), Florida Statutes (1991). Judge Cowart's view is vastly different from the definitions developed by other District Courts of Appeal.

The First District Court of Appeal, in *City of Jacksonville Beach v. Grubbs*, denied a request for multi-family zoning and left the existing single family zoning in place. The court held that even though the Future Land Use Map allowed multiple family zoning, the Commission's action denying the re-zoning was consistent with the comprehensive plan. The court stated:

> [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan. . . .
>
> The applicable comprehensive plan contains no timetable or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan. In such a situation, we hold the determination of when to conform more restrictive zoning ordinances with the plan is a legislative judgment to be made by a local governing body, and only subject to limited judicial review for patent arbitariness [sic]. In adopting a comprehensive plan, a governing body necessarily makes a great number of legislative and policy judgments about what the *future* use of land might and should be. It is just as much a legislative judgment when the local governing body is called upon to decide whether "the future has arrived" and it is therefore appropriate to conform zoning with planning. [Emphasis theirs]

City of Jacksonville Beach v. Grubbs, 461 So.2d at 163.

In *Southwest Ranches*, ordinances allowing the placement of a sanitary landfill in a particular zoning district was found consistent with the comprehensive plan. The Fourth District Court of Appeal specifically addressed Judge Cowart's opinion in *Mosher*, and described it as a "fairly rigid approach". The Fourth District Court of Appeal held, "we believe the legislative scheme calls for a more flexible approach to the determination of consistency". The court specifically referenced Section 163.3194(b), Florida Statutes, which states the comprehensive plan sets general guidelines and shall be broadly construed to accomplish its goals. The court noted the comprehensive plan did not specifically address the location of sanitary landfills so there was no violation of the comprehensive plan as to its

location. At the same time, pollution protection measures were in place so that environmental protection policies of the comprehensive plan were met.

In *Machado*, professional offices were requested in an area designated for estate residential use. The area was also the subject of a neighborhood study. That study, the West Dade Ranch Study Area, limited non-residential development in the area to ranches, nurseries and croplands. The re-zoning to professional offices was overturned based on inconsistency with the comprehensive plan. The Third District Court of Appeal discussed consistency extensively and, in dicta, appeared to adopt the *Mosher* definition of consistency. However, the Third District Court of Appeal specifically stated that all elements of the comprehensive plan must be considered, not just the Future Land Use Map, and, therefore, the decision is arguably distinguished from *Mosher*. Further, the ruling related solely to the placement of offices in a residential neighborhood, a clearly inconsistent action. The Third District Court of Appeal has not yet addressed a fact scenario like the case at bar.

Thus, the case law has provided confusing rulings relating to consistency. The First and Fourth District Courts of Appeal indicate actions allowing lesser densities or more restrictive uses than those listed in the comprehensive plan may be considered consistent. The Fifth District Court of Appeal, however, appears to have developed a rigid interpretation of consistency which has been rejected by the other districts. *See, Southwest Ranches; City of Jacksonville Beach v. Grubbs.*

In effect, the Fifth District Court's approach allows the densities expected for an area at an indefinite future date (perhaps twenty years from now) to be placed on a parcel today. The infrastructure necessary to serve that density, however, is unlikely to be in place. Since the purpose of Chapter 163 is to allow for planned development with necessary infrastructure, the Fifth District Court of

Appeal's approach conflicts with the intent of Chapter 163, Part II. The Fifth District Court of Appeal's decision should be reversed because (1) it ignores other provisions and policies of the comprehensive plan which may apply to re-zoning requests and (2) it ignores the statutory definition or description of consistency in Chapter 163, Part II, Florida Statutes, and (3) it defeats the purpose of the comprehensive plan as described in Chapter 163, Florida Statutes.

The definition or meaning of consistency is inextricably intertwined with the discussion of standards of review in the case law. The controversy surrounding the appropriate standard of review is described below.

VI. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY FAILING TO APPLY THE FAIRLY DEBATABLE STANDARD.

A. Standards of review

Historically, the fairly debatable standard of review has been applied to zoning and re-zoning decisions. The fairly debatable standard is generally deferential to local governments' legislative decisions. The fairly debatable standard provides that if reasonable minds could differ, the local government's decision should be upheld. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed 303 (1926). *See e.g., City of South Miami v. Meenan*, 581 So.2d 228 (Fla. 3d DCA 1991); *City of New Smyrna Beach v. Barton*, 414 So.2d 542 (Fla. 5th DCA 1982), *rev. denied* 424 So.2d 760 (Fla. 1982). In addition, courts were to avoid acting as "super zoning boards", otherwise, they would be encroaching on the legislative function of the local government.

Since the 1985 adoption of the Local Government Comprehensive Planning and Land Development Regulation Act (LGCPLDRA), Part II of Chapter 163, Florida Statutes, a new standard of review (strict scrutiny) has been discussed by some district courts. This standard arose by case law; the statute did not dictate a new

standard of review. Section 163.3194, Florida Statutes (1991), simply requires that all development decisions including zoning must be consistent with the Comprehensive Plan. At the time the statute was adopted, the fairly debatable standard was the standard of review.

Strict scrutiny was described in *Machado*:

> 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, *People v. Gardiner*, 33 A.D. 204, 53 N.Y.S. 451 (1893), or precision, Black's Law Dictionary 1275 (5th ed. 1979). A thing scrutinized has been subjected to minute investigation. *Commonwealth v. White*, 271 Pa. 584, 115 A. 870 (1922). 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.

Machado, 519 So.2d at 632.

The First and Fourth District Courts of Appeal have held strict scrutiny applies when the proposed re-zoning allows a use which appears to be more intense than the uses allowed under the comprehensive plan. However, when the use appears to be more restrictive or less intensive than the uses allowed by the comprehensive plan, the fairly debatable standard applies. *City of Jacksonville Beach v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984), *rev. den.* 469 So.2d 749 (Fla. 1985); *Southwest Ranches Homeowners Association, Inc. v. County of Broward*, 502 So.2d 931 (Fla. 4th DCA 1987), *rev. den.* 511 So.2d 999 (Fla. 1987). The Third District Court of Appeal in *Machado*, found that strict scrutiny applies to any decision addressing consistency of a development order or re-zoning with the comprehensive plan. At the same time, the court recognized the fairly debatable standard applies to re-zoning legislative decisions. *Machado*, 519 So.2d at 631.

The Fifth District Court of Appeal, in a concurring opinion in *Mosher*, found that strict scrutiny applied to re-zoning decisions. The court simultaneously applied a new, rigid definition of consistency allowing no variation from the

maximum density stated in the Future Land Use Map. Notwithstanding the foregoing, in 1989, the Fifth District Court of Appeal applied the fairly debatable standard of review to re-zoning decisions. *St. Johns County v. Owings*, 554 So.2d 535 (Fla. 5th DCA 1989), *rev. den.* 564 So.2d 488 (Fla. 1990).

In 1991, in *Gilmore v. Hernando County*, 584 So.2d 27 (Fla. 5th DCA 1991), the Fifth District Court of Appeal affirmed the application of the fairly debatable standard. The court stated, "[w]e affirm, even though perhaps the trial court should have applied a stricter review standard. . .". *Gilmore*, 584 So.2d at 27, 28.

In 1992, the Fifth District Court, in the instant case, created yet another standard of review, "close judicial review". The court appeared to apply the *Mosher* definition of consistency. Further, the court required clear and convincing evidence that "a specifically stated public necessity requires a specified, more restrictive, use". *Snyder*, 595 So.2d at 79. The Fifth District Court of Appeal compared the level of proof necessary to deny the re-zoning request to the standard of proof required to terminate life support. *See* fn. 70 at *Snyder*, 595 So.2d at 81. Certainly, property rights are staunchly protected in American law. However, the right to a particular zoning classification out of forty-seven Brevard County zoning classifications has never risen to the level of protection described by the Fifth District Court of Appeal.

After the decision in the instant case, the Fifth District Court of Appeal ruled in *Orange County v. Lust*, 602 So.2d 568 (Fla. 5th DCA 1992). In an *en banc* decision, a re-zoning action was reviewed and the court returned to the fairly debatable standard. No mention was made of the newly created standard of "close judicial review", nor of the opinion in the *Snyder* case below. Arguably, the Fifth District Court of Appeal has effectively overruled its decision in this case by

subsequently issuing its *en banc* opinion in *Lust*. Pursuant to the Fifth District Court of Appeal's action, the fairly debatable standard should continue to apply.

The Fifth District Court of Appeal's contradictory positions illustrate the confusion on this issue. The standard of review for re-zoning decisions should be addressed by the Supreme Court to resolve the outstanding problems within and between the District Courts of Appeal. As Judge Sharp stated in *Lust*:

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

Lust, 602 So.2d at 576.

B. Application of standards of review to the case at bar

Notwithstanding the facts noted by the circuit court, the Fifth District declined to acknowledge the evidence that the subject property is in the 25-100-year Floodplain. Even taking this erroneous view of the facts, the Commission decision should still be approved if the court applies the statutory definition of consistency or the definition proposed by the First and Fourth District Courts of Appeal allowing approval of less intensive uses. The requested re-zoning was one of twenty-nine classifications which could have been considered, including GU. The Commission was required under the Future Land Use Element Policy 1.6 to consider compatibility issues and the character of the surrounding area. The Commission properly considered those issues and determined the multiple family zoning requested was not appropriate for this neighborhood. Under all definitions of consistency, except the Fifth District Court of Appeal's, the action taken meets the strict scrutiny test and the fairly debatable standards even under the erroneous fact scenario set out by the Fifth District Court of Appeal.

Moving to the facts noted by the circuit court, the zoning application was clearly inconsistent with the requirements of the comprehensive plan, under any definition of consistency and all standards of review. The circuit court stated there was evidence the subject property was in the 25-100-year Floodplain. Thus, in this case, the granting of RU-2-15 zoning would violate and be inconsistent with the provisions of the comprehensive plan because a density of fifteen units per acre violates the two units per acre density limitation in floodplains. The extension of the urban service sector was not granted so the density was capped at twelve units per acre. The RU-2-15 zoning classification, fifteen units per acre, would be inconsistent under the twelve-unit density limitation of the comprehensive plan.

Under any of the standards of review mentioned, the Brevard County Comprehensive Plan requires denial of the requested re-zoning due to clear inconsistency with the comprehensive plan.

VII. THE FIFTH DISTRICT COURT OF APPEAL ERRED BY RULING THAT SPECIFIC FINDINGS OF FACT ARE REQUIRED IN RE-ZONING ACTIONS.

In the instant case, the Fifth District Court of Appeal created an intra-district and inter-district conflict by determining that specific findings of fact are required. In *Odham v. Petersen*, 398 So.2d 875 (Fla. 5th DCA 1981), *approved in part* 428 So.2d 241 (Fla. 1983), a case involving a special exception, a quasi-judicial action, the court held the board's conclusion included as an implied finding ". . .all factors necessary to that conclusion" if there is evidence in the record supporting the decision. "It is not an essential requirement of law that every fact finder make a formal written finding as to each factual determination." The same ruling was made in *Riverside Group, Inc. v. Smith*, 497 So.2d 988 (Fla. 5th DCA 1986). *Riverside* involved re-zoning to Planned Unit Development and the failure to make specific findings of fact. Again, the Fifth District Court of Appeal held

findings of fact were not required if the record contained evidence supporting the decision.

Similarly, in *City of St. Petersburg v. Cardinal Industries Development Corporation*, 493 So.2d 535 (Fla. 2d DCA 1986), the Second District Court of Appeal held the property owner failed to demonstrate the necessity for findings of fact in a special exception case. In *DeSisto*, a 1989 case, the United States District Court for the Middle District of Florida held that local governments are not required to make findings of fact or state reasons for their actions. *DeSisto*, 706 F.Supp. at 1488, fn. 19.

County commissioners and city council members are lay people. They are not trained jurists or hearing officers. In this case, there were sixty-five pages of documents, not including the Code of Brevard County. The items presented to the Commission consisted of staff reports, maps, comprehensive plan information, zoning information, minutes of prior meetings, public comments and written and oral testimony. It is overly burdensome to require findings regarding all the facts addressed in the information presented. If there is evidence supporting their decisions, local government's actions should be upheld regardless of whether the formalities and niceties of summarized findings of fact have been made.

VIII. THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL UNCONSTITUTIONALLY ENCROACHES ON THE LOCAL GOVERNMENT'S AUTHORITY TO ZONE PROPERTY UNDER CHAPTER 125, FLORIDA STATUTES, AND ARTICLE VIII OF THE FLORIDA CONSTITUTION.

The decision below, by mandating the issuance of zoning approvals, encroaches upon the right to zone property granted to local governments pursuant to Article VIII of the Florida Constitution and Chapter 125, Florida Statutes.

This issue raises two questions. First, do local governments have an independent power to zone? Second, if local governments have an independent power

to zone, did Chapter 163, Part II, preempt that power? The answer to the first question is "yes". In *Speer v. Olson*, 367 So.2d 207 (Fla. 1979), the Florida Supreme Court held that:

> The first sentence of Section 125.01(1), Florida Statutes (1975), [Section 125.01(1), Florida Statutes (1991), as amended] grants to the governing body of a county the full power to carry on county government. Unless the Legislature has preempted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

Speer, 367 So.2d at 211.

When the Legislature repealed Sections 163.160 through 163.315, of Chapter 163, Part II, Florida Statutes, in 1985 (Ch. 85-55, Laws of Fla., effective October 1, 1985), the intent of the Legislature was to further recognize and strengthen the local government home rule power. § 163.3161(8), Fla. Stat. (1991); 1985 Op. Att'y Gen. Fla. 085-71 (August 28, 1985). Accordingly, after October 1, 1985, municipalities and counties could still rely on Chapters 166 and 125, respectively for zoning authority.

Under the above analysis, local governments appear to retain an independent source of zoning power. Because Chapter 163, Part II, does not expressly preempt Chapters 125, local government's zoning power appears to remain intact. However, it is noted Chapter 163, Part II, controls in the event of conflict with other statutes and this provision could become important due to the impact of the Fifth District Court of Appeal's ruling below. § 163.3211, Fla. Stat. (1987).

Comprehensive plans are adopted pursuant to the state-mandated requirements of Chapter 163, Part II. Once adopted, comprehensive plans are reviewed by the State of Florida's Department of Community Affairs for compliance. Thus, the planning process is controlled by the state to a certain degree. The Fifth District Court of Appeal adopted the approach that any zoning decision deviating from the

maximum density of the Future Land Use Maps is inconsistent with the comprehensive plan. The Fifth District Court of Appeal also imposed a requirement of close judicial review and a standard of clear and convincing evidence of a public necessity basis to deny a re-zoning request. Under these standards, Chapter 163, Part II, arguably operates as a de facto preemption of the local government zoning power contained in the Florida Constitution and Chapters 125 and 166. Re-zoning decisions under Chapters 125 become entirely pro forma given the consistency definition imposed by the Fifth District Court of Appeal and the new standard of review. This situation presents a conflict between the home rule powers of Article VIII of the Florida Constitution and Chapter 125, Florida Statutes, and the consistency requirements of Chapter 163, Part II. This result does not appear to be the intent of the Legislature and can be avoided. If it cannot be avoided, Chapter 163, Part II, arguably is invalid as a violation of the Home Rule Power.

Neither the courts nor the Legislature can preempt the home rule power of local governments unless the intent to preempt is clear. *State v. Dunmann*, 427 So.2d 166 (Fla. 1983). Analytically, if this court upholds the Fifth District Court of Appeal, then, in order to overcome this constitutional obstacle, it would have to characterize Chapter 163, Part II, as an intentional, express preemption rather than a de facto preemption. This approach is not available due to the language of Section 163.3161(8), Florida Statutes, which specifically recognizes the broad powers of local government to regulate the use of land.

The Florida Supreme Court should reject the Fifth District Court of Appeal's decision entirely and re-affirm the legislative nature of re-zonings. Under this approach, possible conflict with the home rule powers would be eliminated.

CONCLUSION

The Fifth District Court of Appeal decision should be reversed because the court improperly reweighed the evidence in this case and ignored all provisions and policies of the comprehensive plan except the maximum density on the Future Land Use Map. The circuit court found there was competent substantial evidence the re-zoning was inappropriate for the area and that the property was in the 25-100-year Floodplain and, therefore, density was limited to two units per acre per Policy 4.2 of the Conservation Element of the Comprehensive Plan. The Fifth District Court of Appeal ignored these findings, and, based on an erroneous survey, found that the property was outside the 100-year Floodplain.

In addition, the Florida Supreme Court should rule that re-zoning decisions are legislative acts subject to the fairly debatable standard of review in accord with decisions of the United States Supreme Court, the Florida Supreme Court and every District Court of Appeal. Ruling that re-zoning is a legislative act allows Chapter 163, Part II, to operate properly and in conjunction with Chapter 125 and Article VIII of the Florida Constitution. Legislative re-zoning actions would not require findings of fact and contact between legislators and their constituents would not be prohibited. Re-affirming re-zoning as a legislative act and defining consistency to allow approval of less intensive uses or more restrictive uses will restore the legislative zoning authority and eliminate the multitude of procedural and legal issues created by the decision of the Fifth District Court of Appeal.

APPENDIX

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. 82-6341-CA(L) 01 O

CITIZENS GROWTH MANAGEMENT COALITION OF WEST PALM BEACH,

Plaintiff,

-vs-

THE CITY OF WEST PALM BEACH,

Defendant,

and

THE GOODMAN COMPANY,

Intervenor.
_____/

FINAL JUDGMENT

Plaintiff seeks a judgment of this court holding invalid two ordinances of the City of West Palm Beach, i.e., Ordinance Number 1666-82 which rezoned certain property known as Phillips Point (the "Rezoning Ordinance"), and Ordinance Number 1661-82, which amended the prior land coverage ordinance (the "Land Coverage Ordinance"). The attack on these two ordinances, made on both procedural and substantive grounds, centers primarily around alleged violations of the Local Government Comprehensive Planning Act of 1975 ("LGCPA"), Section 163.3161 et seq., Florida Statutes 1981. The court has determined that the Plaintiff is entitled to no relief beyond a declaration of its rights.

HISTORY OF THE CASE

In January 1981, the City of West Palm Beach ("City") by ordinance adopted the "City Center Plan" as a separate element of the City's Comprehensive Plan which theretofore had been adopted by the City in compliance with the LGCPA. The City Center Plan contained standards, policies and objectives in textual form as the official statement of the City's goals, objectives and policies for the continuing development and redevelopment of the City Center.

(82)

In approximately April 1982, the Goodman Company, Inc. (the "Intervenor") submitted to the City a petition to have Phillips Point, which lies within the geographical area of the City Center Plan, rezoned to a downtown planned unit development (DPUD). The proposed project (the "project") includes the construction of two towers to replace what were then two and three story structures on the site. As required by the LGCPA and the City's Zoning Code, the City Planning Department reviewed the project for consistency with the City Center Plan and found it to be "not consistent". Goodman Company, Inc. filed a timely appeal to the City Planning Board from both the Planning Department inconsistency finding and its recommendation against the rezoning. The City Planning Board, after holding extensive public hearings on the application, found the proposed project to be consistent with the City Center Plan, stating the factual basis for its decision. The application for the DPUD was then automatically forwarded to the City Commission for further review.

The City, after notice, held a public hearing on October 4, 1982, at which it considered the application for the DPUD and the issue of its consistency with the City Center Plan. At the conclusion of that hearing, the City adopted on first reading an ordinance rezoning the property encompassed within the project to DPUD upon an express determination that the project was consistent with the City Center Plan. At the same meeting, the City Commission approved on first reading the Land Coverage Ordinance. The latter ordinance was enacted on second reading on October 7, 1982, and the Rezoning Ordinance was enacted by the City on its second and final reading on October 18, 1982.

On November 17, 1982, Plaintiff, Citizens Growth Management Coalition of West Palm Beach ("Citizens Coalition"), a not-for-profit corporation organized under the laws of the

State of Florida, filed its Complaint for Injunctive and Declaratory Relief and Petition for Statutory Writ of Certiorari. On December 7, 1982, it filed an Amended Complaint and Petition. The City was named as Defendant. Because of the special interest of Goodman Company, Inc., the latter was permitted (by stipulation of the parties) to intervene.

By virtue of the commendable cooperation between counsel, and their respective diligence and skill, the case was handled on a stipulated and expedited schedule including (1) a pre-trial stipulation outlining the legal issues to be decided, (2) the preparation and filing of an evidentiary record (subject to reserved objections of relevancy and materiality), and (3) final hearing limited to oral argument of counsel on the legal issues with references to the evidentiary record.

The court entertained oral argument of counsel for the parties on January 21, 1983, and again on February 9, 1983, affording to counsel for Plaintiff in excess of four hours of oral argument, and to counsel for Defendants City and ~~for~~ Intervenor, a period of approximately 2½ hours. Counsel for all parties were exceptionally well prepared and the responses to inquiries from the court during oral argument greatly assisted the court in reaching its decision.

By separate order the court has ruled on the reserved objections to evidentiary matters, and the court has excluded from its consideration all exhibits or other matters as to which objections were sustained.

FACTUAL FINDINGS

Citizens Coalition is a not-for-profit corporation organized under the laws of the State of Florida with over 300 members, primarily residents, citizens and taxpayers of the City of West Palm Beach. Its members have been and continue to be actively involved in the planning processes of the City of West

Palm Beach. Plaintiff's principal purpose is to organize and advance concerted efforts to insure that long range, comprehensive land use planning takes place in a manner which preserves and protects present and future resources of the City. There is no suggestion that Plaintiff has other than good motives in bringing this action.

Plaintiff has not alleged nor has it proven that either it or any of its members has sustained or will sustain a special injury or damage differing in kind from that suffered or to be suffered by the community as a whole, nor has Plaintiff proven that it or any of its members has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. Likewise, Plaintiff has not alleged nor has it proven any basis of a constitutional challenge to the validity of either the rezoning ordinance or the land coverage ordinance.

The City Planning Board, in considering the application for the project and the proposed rezoning, made factual findings upon which it based its determination that the proposed rezoning was consistent with the City Center Plan element of the City's Comprehensive Plan.

The notice for the public hearing on October 4, 1982, met all statutory requirements and Plaintiff makes no attack on the sufficiency of that notice.

The public hearing held on October 4, 1982 (at which the City considered the application for rezoning), was held in the regular meeting room of the Commission which has a capacity for 90 people. The meeting was attended by a number of individuals materially in excess of the room capacity, the excess being required to remain outside, in either an antechamber, or in a hallway or in a side room, from which positions those persons could neither see nor fully hear all of the proceedings in the Commission chambers during the four hours that the proceedings lasted. At least half

of the hearing time was used in a presentation by the Intervenor favorable to the proposed rezoning. Public participation in the hearing was conducted in an orderly and proper manner and all or substantially all of those making known to the mayor their desire to be heard were afforded the opportunity to speak although, generally, public participation and presentation was limited to three minutes per person. Such time limitation is in accord with the City's Code of Ordinances. The matter was given a full and fair hearing before the City Commission.

Ordinance Number 1661-82 (Land Coverage Ordinance), was not an ordinance rezoning property but was purely and simply a clarification of an existing zoning ordinance, and the published notice met all statutory requirements for non-zoning ordinances.

CONCLUSIONS OF LAW

Based upon the foregoing factual findings, the court reaches the following conclusions of law as to the following issues presented in this case:

1. CITIZENS COALITION'S STANDING.

The first and foremost issue, and the one which is essentially dispositive of this case, relates to the standing of Citizens Coalition to challenge the validity of these ordinances.

Any affected citizen has standing to challenge a zoning ordinance because not properly enacted, as where required notice was not given. Renard v. Dade County, 261 So.2d 832 (Fla. 1972). Plaintiff, as a corporation devoted to preserving the City's quality of life by promoting sensible and reasoned management of growth, is an "affected citizen" with standing to attack the enactment of the ordinance on the ground that is is void or invalid because the required notice was not given, Save Brickell Avenue, Inc. v. City of Miami, 393 So.2d 1197 (Fla. 3rd DCA 1981), or on the ground

that it is void or invalid by reason of departure from any essential procedure preceding its enactment, Save Brickell Avenue, Inc. v. City of Miami, 395 So.2d 246 (Fla. 3rd DCA 1981). Plaintiff's standing, however, is limited to an attack on how the ordinance is enacted.

Because Plaintiff has, by its concession, neither alleged nor shown any special damage differing in kind or degree from that suffered by the community at large, it has no standing to enforce a valid zoning ordinance. Renard v. Dade County, supra. Furthermore, because the court has found that Plaintiff has no legally recognizable interest which is adversely affected by the proposed zoning action, Plaintiff has no standing to make any claim to the effect that the rezoning is an "unreasonable exercise in legislative power". Renard v. Dade County, supra, 261 So.2d at 838; Save Brickell Avenue, Inc. v. City of Miami, 393 So.2d 1197, 1198 (Fla. 3rd DCA 1981). Finally, because Plaintiff does not seek to mount a constitutional attack upon the rezoning ordinance, Plaintiff's status as a citizen and taxpayer will not avail it of standing under the cases of Askew v. Firestone, 421 So.2d 151 (Fla. 1982); Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Brown v. Firestone, 382 So.2d 654 (Fla. 1980); and Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972).

Consequently, the court holds that the Plaintiff has no standing to raise in this case any issue other than one which seeks to attack the ordinances by reason of departure from any essential procedure preceding the ordinance's enactment.

2. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The procedure for rezoning, by which the decision of the City Planning Board automatically comes to the City Commission for review and public hearing, rendered unneccessary Citizens Coalition appealing to the City Commission the decision of the City

Planning Board determining that the project was consistent with the comprehensive plan, as a prerequisite to maintaining this action.

3. REZONING A LEGISLATIVE ACT.

The Plaintiff concedes that the City Commission utilized legislative procedures in granting the Phillips Point rezoning. Plaintiff contends, however, that Section 163.3167(1)(d) Florida Statutes, mandates that the City Commission's action be administrative or quasi-judicial in nature, including fact finding on the issue of consistency with the City's Comprehensive Plan. Zoning (and rezoning) ordinances are legislative in nature, Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978); Josephson v. Autry, 96 So.2d 784 (Fla. 1951), and the court is not persuaded that the statute cited by Plaintiff is clear legislative intent to change the long established law in Florida in this respect.[1] Completely aside from the absence of a clear legislative attempt to depart from long established law, logic and common sense dictates that all zoning action by the City Commission as representatives of and responsive to the electorate, is legislative in nature, and the City Commission collectively, and the Commissioners individually, are not (in fact), cannot be (in practice), and should not be (as a matter of law), expected to decide rezoning matters in a quasi-judicial capacity. Because the court expressly holds that the action taken by the City Commission was a purely legislative act, the court also holds as follows:

A. The City Commission, in making a determination that

1. While not directly on point, the recent decision in Florida Land Company v. City of Winter Springs, ____ So.2d ____ (Fla. 1983, Sup.Ct. Case No. 62,093, Opinion filed January 27, 1983 8 Flw 42) reiterates the law of Florida that zoning and rezoning by the City Council is a legislative function.

the rezoning was consistent with its comprehensive plan, was not required to make factual findings to support such determination.

B. Common law certiorari will not lie to review a purely legislative act. G-W Development Corp. v. Village of North Palm Beach Zoning Board of Adjustment, 317 So.2d 828 (Fla. 4th DCA 1975).

C. The standard for judicial review on the merits of whether a legislative action is an unreasonable exercise of legislative power (a review not necessary in this case because of Plaintiff's lack of standing to raise the issue) is whether the action was "fairly debatable".

4. STATUTORY CERTIORARI NOT AVAILABLE.

Plaintiff contends that the provisions of Section 163.3194(3)(a)[2], is effectively a grant to any person aggrieved by local governmental action of the right of statutory certiorari for purposes of seeking judicial review of that action. The court holds that the cited statute does not grant to Plaintiff, either expressly or by reasonable implication, the right to seek judicial review by statutory certiorari.

5. ADEQUACY OF OCTOBER 4, 1982, PUBLIC HEARING.

Plaintiff contends initially that Section 163.3181 Florida Statutes[3] applies to any action taken by the City Commission

2. A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan or element or elements thereof relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan or element or elements thereof in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan or element or elements thereof to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.

3. Relevant to Plaintiff's argument, the statute provides that in the comprehensive planning process, the public participate "to the fullest extent possible".

on zoning or rezoning. The court expressly rejects that position, holding that the provisions of Section 163.3181 apply to the comprehensive planning process (including the initial proposed plan or any amendments thereto), but that any zoning or rezoning which is consistent with the Comprehensive Plan (and thus not an amendment or the equivalent of an amendment thereto) requires public participation only in accordance with the City's zoning ordinances.

Plaintiff also contends that it was denied effective public participation because (a) many of its members were unable to attend the meeting and present their views due to the limited capacity of the Commission hearing room, and (b) those members which were able to get into the hearing room and which were permitted to submit a presentation were under such severe time limitation (3 minutes) that they were forced to summarize their views. The court holds that neither the size of the hearing room nor the time limitations imposed on the individual speakers was contrary to law, and the court further holds that the hearings were fairly conducted and that a representative group of Plaintiff's members were afforded a reasonable opportunity to make their views and positions known to the Commission.

The purpose of a public hearing on a proposed ordinance is to make certain that the legislative body has the benefit of reasonably complete data for and against the proposed legislative action, Miner v. City of Yonkers, 189 N.Y.S. 2d 762 (1959), affirmed, 9 A.D. 2d 907, 195 N.Y.S. 2d 242 (1959). Once the respective positions have been stated and the supporting data submitted (as it was in this case-both orally and in writing), additional speakers, whether pro or con, who simply hope by force of numbers alone to give cumulative effect to the position advocated, add nothing to assist the legislative body in reaching its determination.

See City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974). Any contention that the Commission was required to hear all persons without limitation as to number and time is untenable. Freeland v. Board of Orange County Commissioners, 273 N.C. 452, 160 S.E. 2d 181 (1968).

6. LAND COVERAGE ORDINANCE.

The challenge to the validity of the Land Coverage Ordinance based upon grounds of improper procedure in its enactment is without merit and is denied. While Plaintiff would have no standing to challenge the validity of the ordinance as applied to the Intervenor's project, that issue was, in any event, withdrawn pursuant to the parties' pre-trial stipulation.

7. THE PROJECT'S CONSISTENCY WITH THE CITY'S COMPREHENSIVE PLAN.

The issue of whether the Intervenor's project is, in fact, consistent with the City's Comprehensive Plan, as determined by the City Commission in adopting Ordinance Number 1666-82, is a substantive issue as to which Plaintiff has no standing. For that reason the court need not and does not pass upon that issue.

The court, having fully considered the issues properly before it, and the oral and written presentation of counsel for the respective parties, it is hereby,

ORDERED AND ADJUDGED as follows:

1. The Petition for Writ of Certiorari is denied.

2. The request for injunctive relief is denied.

3. Insofar as the above findings of fact and conclusions of law constitute a declaration of the rights of the Plaintiff organization as requested in the Amended Complaint, the Petition for Declaratory Relief is granted; however, based upon the findings of fact and conclusions of law set forth above, the Plaintiff organization is found to be entitled to no other relief, injunctive,

declaratory, or otherwise, and Defendants and the Intervenor shall go hence without day.

4. The court reserves jurisdiction to tax costs upon motion.

DONE AND ORDERED in Chambers at the Palm Beach County Courthouse, West Palm Beach, Florida, this 24th day of February, 1983.

WILLIAM C. OWEN, JR.
Circuit Court Judge

Copies furnished to:
L. Louis Mrachek, Esquire.
Albert J. Hadeed, Esquire.
Carl Coffin, Esquire.

PALM BEACH COUNTY - STATE OF FLORIDA
I hereby certify that the foregoing is a true copy of the record in my office
This 7th Day of August 19 92
Clerk Circuit Court
By Valerie McJackson D C

RECORD VERIFIED
PALM BEACH COUNTY, FLA
JOHN B. DUNKLE
CLERK CIRCUIT COURT

B3888 P1493