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IN THE SUPREME COURT
OF THE 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,

vs.

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

Respondents.

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

RESPONDENTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTION

STATUTES

RULES

REFERENCES

References to the appendix filed herein by Snyder will be by use of the letter "A" followed by the page number of the appendix. The Respondents, **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 County.

SUMMARY OF THE ISSUES

I. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE CIRCUIT COURT APPLIED INCORRECT PRINCIPALS OF LAW TO THE FACTS AND EVIDENCE IN THIS CASE.

II. THE DISTRICT COURT OF APPEAL LOGICALLY AND CORRECTLY FOUND THAT A REZONING DECISION WHERE THE FACTS ARE SIMILAR TO THE SNYDER FACTS, IS A QUASI-JUDICIAL DECISION AND NOT A LEGISLATIVE ACT OF THE LOCAL GOVERNMENT.

III. THE FIFTH DISTRICT COURT OF APPEAL HAS NOT CREATED AN IRRECONCILABLE CONFLICT BETWEEN FLORIDA RULES OF CIVIL PROCEDURE 1.630 AND SECTION 163.3215, FLORIDA STATUTES, 1991.

IV. THE FIFTH DISTRICT COURT OF APPEAL DID NOT ADDRESS ANY ISSUES CONCERNING EXPARTE DISCUSSIONS AND THEREFORE THAT ISSUE IS NOT BEFORE THIS COURT.

V. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN PLACING THE INITIAL BURDEN ON THE LANDOWNER TO DEMONSTRATE THAT HIS APPLICATION FOR REZONING COMPLIES WITH THE REQUIREMENTS OF THE ORDINANCE AND THAT THE USE THAT HE IS SEEKING IS CONSISTENT WITH THE COUNTY'S COMPREHENSIVE ZONING PLAN; THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN SHIFTING THAT BURDEN TO THE GOVERNMENT ONCE THE LANDOWNER HAS MET HIS BURDEN.

VI. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY APPLIED THE TEST OF CLOSE JUDICIAL SCRUTINY RATHER THAN THE FAIRLY DEBATABLE STANDARD.

VII. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN REQUIRING THE LOCAL GOVERNMENT AGENCY TO STATE REASONS FOR ITS ACTION THAT DENIES THE OWNER THE USE OF HIS LAND WHICH WOULD INCLUDE FINDINGS OF FACT AND A RECORD OF ITS PROCEEDINGS SUFFICIENT FOR JUDICIAL REVIEW.

STATEMENT OF THE CASE

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

In November 1988, the Board of County Commissioners for Brevard County, Florida, denied a request by Snyder for rezoning. Snyder owned one-half (1/2) acre of undeveloped property on Merritt Island, Florida. The property was zoned in a holding category (GU) which would permit one single family residence on five (5) acres of land. Snyder owned one-half acre of land. He requested a rezoning to medium density multi-family (R-2-15) so that he could build approximately six (6) townhouses on the property. After the denial by the County (A-14), Snyder filed the Verified Complaint with the County as required by Section 163.3215, Florida Statutes. Snyder simultaneously filed a Petition for Certiorari (A-1-14) in the Circuit Court of Brevard County, Florida within thirty (30) days of the decision by the County. A three judge panel of the Circuit Court heard the Petition for Certiorari and by a two to one decision, the Circuit Court denied the Petition for Writ of Certiorari (A-103-104). Snyder filed an Amended Petition for Writ of Certiorari in the Fifth District Court of Appeal (A-105-126); the Respondent filed a Response to Amended Petition for Writ of Certiorari in the Fifth District Court of Appeal (A-127-151); and Snyder filed a Reply Brief (A-152-164). The Fifth District Court

of Appeal granted the Petition for Certiorari and remanded the case to the Circuit Court. The County filed a Motion for Rehearing, Motion for Rehearing En Banc and a Motion for Certification of Issues to the Florida Supreme Court. Those Motions where denied by the Fifth District Court of Appeal on March 20, 1992. The decision is cited as Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991). Subsequently, the County timely filed a Notice to Invoke Discretionary Jurisdiction of this Court and jurisdiction was accepted.

STATEMENT OF THE FACTS

The Respondents filed an application for rezoning of their property in August 1988. The Respondents own and still do own a parcel of property located in the unincorporated area of Brevard County, Florida, which is approximately one-half (1/2) acre in size. They have owned the property since 1980. The property was zoned GU (for general use) which is essentially a holding category under the Brevard County Zoning Code. Respondents filed an application for rezoning requesting a multi-family zoning classification (RU-2-15) which would allow a maximum of eight units on the property. Respondents intended to build five or six townhouse units if the rezoning was approved (A-14).

After the application for rezoning was filed, the Brevard County Planning and Zoning staff reviewed the application and then completed the County's standard "Rezoning Review Worksheet" (A-37-43). The County staff's initial review was completed on October 15, 1988 (A-37). The Respondents' application for rezoning was scheduled for a Planning and Zoning Board meeting on November 7, 1988, followed by public hearing before the Brevard County Board of County Commissioners on November 28, 1988 (A-37).

The "Rezoning Review Worksheet" showed that the proposed multifamily use of the Respondents' property was compatible with the existing land uses and zoning adjacent to the Respondents property; and it showed that the development proposal was

consistent with the future land use and service sector maps (A-39). The review showed that there were no problems with potable water; sanitary sewer; solid waste facilities; parks and recreation and that the project met all of those requirements (A-42-43). Finally, at the conclusion of the "Rezoning Review Worksheet" (A-43), there are staff review comments which state that, "This request is consistent with the FLU Map Series" (future land use map series). The staff review comments went on to state:

> "HOWEVER, THIS REQUEST IS LOCATED IN THE 100-YEAR FLOODPLAIN, IN WHICH A MAXIMUM OF 2 UNITS PER ACRE IS PERMITTED. THEREFORE, THIS REQUEST SHOULD NOT BE CONSIDERED FOR APPROVAL".

Because the staff believed the property to be within the 100-year floodplain, the Respondents' application received a negative recommendation only because of the floodplain concern.

Following the completion of the staff review, the Respondents attended and made an oral presentation to the Planning and Zoning Board on November 7, 1988. In Brevard County, Florida, the Planning and Zoning Board is an advisory board to the Board of County Commissioners. Factually what happened at that public hearing is very important in this case. The minutes of that meeting (A-8,9,10) show that nearby landowners appeared and were heard. Those interested citizens expressed several normal concerns about traffic; that the residents did not want multifamily use in this area; that there already was existing zoning for multifamily in the area; and the neighborhood was mainly single family.

Respondents spoke at the Planning and Zoning Board Meeting and stated they would probably only build five (5) units and they would build three (3) story townhouses on the property. What is crucial is that Mr. Edwards (Planning and Zoning Director for Brevard County) was asked by Mr. Hersperger (a Planning and Zoning Board member) about the floodplain concern. The minutes show (A-10):

> "In answer to Sam Hersperger's question, Mr. Edwards replied that the applicant (Snyder) has submitted a topo showing that the property is 3.9 ft., which is within the purview of taking it out of the 100-year floodplain at the time of development. In reply to Mr. Johnson's question, (another Board member) Mr. Edwards stated that the staff is not concerned at this time about traffic at the time of buildout."

Following those comments by the Zoning Director of Brevard County, the Planning and Zoning Board voted nine to one to approve the Respondents' rezoning request (A-10).

The Planning and Zoning staff review worksheet shows that the only concern the professional staff had with the rezoning application was that the property may be in the 100-year floodplain. Between the time that review worksheet was completed in mid-October until the Planning and Zoning Meeting on November 7, 1988, the Planning and Zoning Director, and presumably his staff, determined that the property was close enough to being out of the 100-year floodplain, that at the time of development the project would not be in the floodplain.

After the Planning and Zoning Board Meeting, the rezoning application was set for public hearing before the Board of County Commissioners for November 28, 1988. The County staff's comments drafted in October 1988, identified the only problem as the 100-year floodplain. Those comments were changed between November 7 and November 28, 1988, by a handwritten note at the end of the staff comments as follows:

"(RE-FUTIATED) See P & Z Item 17,
PG. 3, Mr. Edwards". (A-11).

That was attached as Exhibit "D" to the Petition for Certiorari and was a true and correct copy of the comments before the Board of County Commissioners on November 28, 1988. The handwritten comment was a <u>significant</u> change to the earlier comments to show the Petitioner/County that the statement that the property was located in the 100-year floodplain had been refuted (re-futiated) by Mr. Edwards' oral comments at the Planning and Zoning Meeting of November 7, 1988 (A-10).

On November 28, 1988, the Petitioner, Board of County Commissioners, held its public hearing on the rezoning application. Exhibit "E" to the Petition for Certiorari is a transcript of the minutes of Respondents' rezoning request (A-12-14). Those minutes show that nine citizens spoke in opposition to the rezoning request; however not one of them spoke about a floodplain problem. The citizens' comments had to do with the narrow road; traffic problems and concerns about medium density development; that the development could be hazardous to children

going to school; and that the zoning request was in conflict with the desires of the residents of the street (A-12-13). Mr. Snyder (Respondent) then spoke and stated that if approved, the density would allow eight units and he intended to build five or six units (A-14). The motion to deny the request was made by Commissioner Dobson who gave no findings of fact or reasons for denying the rezoning request. Neither Commissioner Dobson, nor any other County Commissioner, nor any of the residents who spoke, stated that the rezoning request should be denied because it was within the 100-year floodplain.

In the County's Response to the Petition for Certiorari, filed in the Circuit Court, (A-17-29) the County did not argue that the property was in the 100-year floodplain, or even that the Board of County Commissioners could have denied it because it was in the floodplain. Rather, the Petitioner's response confirms that the citizens' comments concerned narrowness of the street; quiet nature of the neighborhood street; parking problems; sales of property were for single family use in the area; land in the area, even though multifamily, had gone undeveloped; and lack of sewer service (A-17-18). Petitioner noted in parenthesis (A-18) that the staff had initially recommended a maximum of two (2) units per acre be allowed on this parcel. That recommendation had to do with the fact that the staff initially believed Respondents' property was in the 100-year floodplain. Mr. Edwards corrected that at the first public hearing before the Planning and Zoning Board on November 7, 1988.

The request for Petition of Certiorari was argued before the three judge Circuit Court panel on February 12, 1990. Following oral argument, the Circuit Court panel took over three months to render a decision. The decision was to uphold the Board of County Commissioners by a vote of two to one. That conclusion was based in large part on the fact that one document (A-73) of Respondents' Exhibit G (the early staff comments dated in October) showed that the property was in the 100-year floodplain (A-103).

The Circuit Court panel simply failed to review the entire record before it. If Petitioner had wanted to deny the project for a substantial reason, the most substantial reason it could have picked was that the property was in the 100-year floodplain. Respondents submit that was not mentioned by the citizens, nor by the Board of County Commissioners because it had been determined by the staff that the property was in fact not in the 100-year floodplain.

The Respondents filed an Amended Petition for Writ of Certiorari with the Fifth District Court of Appeal (A-105-126). The Fifth District Court granted the Petition and remanded the case to the Circuit Court with directions. A copy of their decision and holdings is in Respondents' Appendix (A- 165-182).

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991), should be upheld by this Court on all of the major holdings found in that case.

The Snyder Court correctly cited the scope of review that it must adhere to in a review of a rezoning decision. The Court correctly stated that its scope of review was limited to a determination as to whether the Circuit Court afforded the landowners procedural due process and applied the correct law. Procedural due process was not an issue in this case. The Court then went on to find that the Brevard County Circuit Court had applied the incorrect law. Respondents submit that the Appellate Court did not reweigh the evidence but merely reviewed the record before it; including the important staff review documents known as the "rezoning review worksheet". Petitioner claims that somehow the District Court of Appeal was confused and looked at an inaccurate survey in making its determination. There is no indication in the Snyder opinion that the Court reviewed surveys at all or relied on an incorrect survey.

Obviously from the recitation of facts in the first two pages of the Snyder decision, the Appellate Court has made a thorough review of the documents that were before the Circuit Court. In the recitation of the statement of the facts by the Appellate

Court, it is clear that the Appellate Court found in the record where the initial negative comments for the rezoning request by the staff, were changed between the planning and zoning meeting and the meeting of the Board of County Commissioners. That is not a reweighing of the evidence. The Appellate Court did not make a finding that the property in question was not in the flood plain, but merely that the documents before the Board of County Commissioners when it rendered its decision showed that the flood plain was no longer a problem with the rezoning request. Initially it had been the only problem with the rezoning request.

Petitioner has argued in its brief that the decision-making process in the Snyder rezoning request was a legislative act by the County. The Appellate Court disagreed with that and made a detailed analysis on when the decision-making process is legislative and when it is quasi-judicial. The Snyder Court stated that where a decision by the legislative body is of a broad general nature affecting the general public and/or the general area of its jurisdiction, such as when it adopts a zoning code; or when it adopts elements of its comprehensive plan; or when its amends a portion of its comprehensive plan or element thereof; then such decisions are legislative in nature. The Snyder Court holds that where the decision making process has the procedural safeguards such as due notice to the parties, a fair opportunity to be heard in person and through counsel, the right to present evidence and the right to cross-exam witnesses is important in determining that the hearing is quasi-judicial. Further, where

the decision is contingent upon the evidence produced at the hearing and the action, in this case a request for rezoning, is not an action which will produce a decision or policy of general applicability to a wide portion of the public, but rather is the application of the existing legislated laws to a specific parcel owned by specific persons, then in fact that proceeding is quasi-judicial in nature.

Snyder distinguishes its holding from the cases of Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959); Florida Land Company v. City of Winter Springs, 427 So.2d 170 (Fla. 1983); and other Supreme Court and District Court of Appeal cases because many of those cases where prior to the local government comprehensive planning act; and many of the fact situations in those cases are quite different than the facts in Snyder. Many of the cases cited by the County were in fact legislative decisions by the governmental body. Schauer is an example of that, but the County continues to cite it for the proposition that a rezoning decision is a legislative decision. A rezoning decision, or a decision on a variance, or a decision for a special exception or conditional use permit where the procedural safeguards are in place, as they were in Snyder, and where the decision affects a particular piece of property owned by particular individuals, should be found to be a quasi-judicial proceeding and this Court should so hold.

The Snyder decision does not change or affect the public hearing requirements of Chapter 125, but in fact makes the public

hearing process all that more important. The functional test of Snyder announced by the Fifth District Court of Appeal should not be confusing to landowners or to local governments. It is simply a test to determine what type of decision the local government is being asked to make.

The Petitioner raises a concern about a possible conflict between the right to review a decision by petition for certiorari with the procedural provisions of Section 163.3215, Fla. Stat. That issue was never raised by either party, or either the Circuit Court, or District Court of Appeal in making the decision. On a review of the decision of the District Court of Appeal in Snyder, the Supreme Court does not have before it the issue of conflict between those two remedies.

Another issue which the Petitioner would like the Court to address is the issue concerning exparte communications and whether there is a prohibition from such communications because of the holding in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991). Once again, that "issue" was not before the Board of County Commissioners during the decision-making process; it was not raised as an issue by either party before the Circuit Court of Brevard County, Florida; and its was not raised by either party in their briefs to the District Court of Appeal; and such an issue was not addressed by the Appellate panel in the Snyder decision. This matter is before the Supreme Court on a review of the Snyder decision and holdings and the question of exparte communications is not part of the Snyder decision.

Essentially the Snyder Court states that where a landowner applies for a certain use on his property, then that landowner has the initial burden to show that what he is requesting meets the basis requirements imposed by the local government on his property. He must show that his request is consistent and compatible with the comprehensive plan of the local government. In Snyder, the County's own documents show that Mr. and Mrs. Snyder's request for rezoning on their property was consistent and compatible with the requirements of the County's land use plan. Then the Snyder Court holds that if that landowner meets that initial burden, then the burden should shift to the local government so that if the local government wants or decides to deny the request, it must prove by clear and convincing evidence that there is a specific public necessity to turn down the rezoning request and hold the property to a more restrictive use than requested by the landowner.

That shifting of the burden to the government makes sense. First of all, the government has used its legislative power to enact regulations which apply to different zoning categories. The government has adopted a comprehensive land use planning map which shows people like Mr. Snyder what zonings would be appropriate in this area. Then when the landowner, relying on the legislative acts of the government, applies for a use that is consistent with the legislated determinations of the local government, he should receive the rezoning requested or substantially receive the rezoning requested, if he can show his property in fact meets the

criteria already legislated by the government. If the government decides to deny that person's request, it should have an awful good reason to do so. That shifting of the burden of proof is correct and should be upheld by this Court.

The Snyder Court used a test for reviewing quasi-judicial decisions. The Snyder Court found that the proper test is "close judicial scrutiny". Several appellate courts in this state have found that a strict judicial scrutiny test is appropriate in reviewing decisions such as this one.

Snyder does not do away with the fairly debateable rule. That deferential standard is applicable to legislative decisions of the government. For instance, if the adoption of the government's comprehensive land use plan is fairly debatable it should be upheld. However, where the process is a quasi-judicial process as it was in Snyder, then the reviewing Court should take a harder look at that decision-making process in order to protect a landowner from being turned down for political reasons or for no other land use related reason. That test has recently been favorably looked upon by the Third District Court of Appeal in the case of Gabrielle Nash-Tessler v. City of North Bay Village, Florida, (Fla. 3d DCA 1992) Case No: 91-2615, Opinion filed 10-13-92. Simply put, where the decision is found to be legislative in nature, the fairly debatable still applies. Where the process is found to be one of quasi-judicial nature, the close/strict scrutiny rule should apply.

The Snyder Court also found and held that a proper record is important in order for judicial review. In this particular case, the County made no findings of fact when it turned down the Snyder rezoning request. The Snyder Court states that where government turns down a request that presumptively has met the legislated requirements for the property, that decision is subject to close judicial scrutiny and the government needs to make specific findings of fact and reasons for its decision. Then the Court can determine whether the denial or the abridgment of the landowner's right to use his property was proper.

In conclusion, the Fifth District Court of Appeal has made proper holdings for both the landowner and the government when reviewing decisions of a local government for a rezoning or similar request as is found in Snyder.

BRIEF ON THE MERITS

I. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE CIRCUIT COURT APPLIED INCORRECT PRINCIPALS OF LAW TO THE FACTS AND EVIDENCE IN THIS CASE.

The District Court of Appeal in Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991), clearly states the law on its limits of review. The Court specifically stated at page 68:

> "The scope of our review is limited to a determination as to whether the circuit court afforded the landowners procedural due process and applied the correct law. "

The footnote essentially lists the cases cited by the Petitioners, i.e. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982); Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989). See also Combs v. State, 436 So.2d 93 (Fla. 1983). Additionally in the case cited by Petitioner, St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989), rev. denied, 564 So.2d 488 (Fla. 1990), the Court found that the Circuit Court in that case had applied the correct law as it relates to administrative res judicata, as well as, the law that a zoning change must comply with the Florida Local Government Comprehensive Planning and Land Regulation Act. The Court specifically stated at page 537:

> "Again, the circuit court's weighing of the evidence is not subject to review by this court, as long as the correct standard of law has been applied."

The Fifth District Court of Appeal in its Snyder opinion clearly found that the correct standard of law had not been applied by the Brevard County Circuit Court.

The recent case of Education Development Center, supra, at page 108, set forth the standard for District Court review of the Circuit Court's review of a decision. The Supreme Court reaffirmed its position set forth earlier in City of Deerfield Beach, supra, and found the standard for the District Court has only two discrete components:

> "The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law".

The important distinction is that the Appellate Court in Snyder found that the Circuit Court did not apply the correct law in several facets of the case.

The Appellate Court in Snyder did not reweigh the evidence, nor did it err in its analysis of the facts in the case. The Court simply reviewed the entire record on appeal and found that the Circuit Court failed to apply the correct law. The Fifth District Court of Appeal then set forth in its opinion the correct law to be utilized in a rezoning case with facts similar to the facts in Snyder.

Petitioner claims there was an inaccurate or incorrect survey in the County Zoning File. The Fifth District Court of Appeal did not rely on a survey of land south of the Snyder property. The Snyder property was clearly and accurately described in its

application for rezoning (A-7), and the survey of the Snyder property was a part of the zoning file (A-68) as indicated by the affidavit of the Planning and Zoning Director, George Edwards, who certified to the Circuit Court what documents were in the file (A-30-31). Specifically A-68 is a survey of the Snyder property, i.e., lots 84 and 85, and the north one-half (1/2) of lot 83. There is nothing in the Snyder opinion which indicates, or even could indicate, that the Fifth District Court of Appeal "relied on a survey of land to the south which did not include any of the subject property". Petitioner submits that "based on that error" the decision of the Fifth District Court of Appeal should be reversed! There was no reliance on a wrong survey by the Fifth District Court of Appeal, and the opinion does not even mention a survey.

In the recitation of the facts of the case, the Fifth District Court of Appeal gave a summary of the facts that were in the record at the Circuit Court level and stated at page 67:

> "One member of the P&Z D Board asked about the flood plain problem. In response, the minutes of the hearing show that a Mr Edwards, representing the P&Z D staff, stated that the landowners had submitted a topographical map showing the elevation of the subject property was such that it was 'within the purview of taking it out of the 100 year Flood Plain at the time of development.' The Planning and Zoning Board recommended approval of the zoning change."

In the recitation of the facts by the Fifth District Court of Appeal (Page 66,67 and 68), the word "survey" is not in the recitation of the case. How the Petitioner could state that 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..." is a mystery. The Petitioner has made a unfounded assumption that the Appellate Court reviewed some incorrect survey. There is absolutely no basis to make such an assumption from the written opinion of the Appellate Court. There is no indication any where in the opinion that the Appellate Court reviewed any survey. It is clear from the above quote concerning Mr. Edward's statements, that the Appellate Court reviewed a certified copy of the minutes of the Planning and Zoning Board Meeting of November 7, 1988 (A-8-10).

The final point to the Petitioner's first argument is to argue that multi-family zoning in proximity to a single family residential neighborhood is incompatible. Petitioner cites the case of Gautier v. Town of Jupiter Island, 142 So.2d 321 (Fla. 2d DCA 1962), and several other cases, all of which predate the Florida Local Government Comprehensive Planning and Land Regulation Act adopted in 1985. That act clearly mandates that a rezoning change must be consistent with the local government's adopted comprehensive plan, Section 163.3194, Fla. Stat. In Snyder, the adopted Brevard County Comprehensive Plan covering the Snyder property indicated that medium density residential use was an acceptable use on the Comprehensive Plan. A major aspect of the Appellate Court decision is to hold that where a landowner, such as Snyder, applies for a rezoning that is consistent with the local government's adopted land use plan, then the presumption is for

granting the requested rezoning unless the local government can show that a more restrictive zoning classification is necessary to protect the health, safety, morals or welfare of the general public.

For the Petitioner to conclude that the Circuit Court and the County found the rezoning request was not appropriate for the area is not accurate. In fact, the Commission made no findings of fact. The Circuit Court in its April 1990 Order, made no statements concerning whether the multi-family zoning was appropriate for the area or not. The Circuit Court Order discussed one exhibit, which was later amended by the staff prior to it getting to the county commission meeting, which initially showed that the property was within the flood plain. The Circuit Court decision has nothing to do with the appropriateness or inappropriateness of multi-family zoning near single family residential zoning. The "findings" of the Commission and the trial court are nonexistent as they concern the appropriateness or inappropriateness of multi-family zoning near a single family residential neighborhood.

Petitioner argues the comprehensive plan limited density on the subject property to twelve (12) units per acre. That is not accurate because the County's own staff documents showed (A-37) that Snyder could potentially have eight (8) units on the site. In the handwriting of a County staff member, (A-39) the County recognized that there is a six hundred sixty foot (660') rule which would allow an extension of the urban service sector. All the Fifth District Court of Appeal did in its summation of the case was

simply to recite what the pertinent documents in the record showed on their face.

II. THE DISTRICT COURT OF APPEAL LOGICALLY AND CORRECTLY FOUND THAT A REZONING DECISION WHERE THE FACTS ARE SIMILAR TO THE SNYDER FACTS, IS A QUASI-JUDICIAL DECISION AND NOT A LEGISLATIVE ACT OF THE LOCAL GOVERNMENT.

The Snyder Court made a detailed and logical analysis of whether the decision of the County to deny the Snyder zoning request was a legislative act. The Court's analysis begins on Page 68 of the decision and continues through page 76. The Court outlined the importance of that issue by stating at page 68:

> "The essential issue in this case is whether the decision by the County Commissioners to deny the landowners' rezoning request in this instance was a legislative act to which, under the constitutional separation of powers doctrine, the judiciary must give a deferential standard of review and uphold if 'fairly debatable'. Proper resolution of this issue necessarily implicates constitutional considerations relating to private property rights, separation of powers and the powers and duties of the respective branches of government."

A review of the relevant Supreme Court decisions on this question starts with a review of Schauer v. City of Miami Beach, 112 So.2d. 838 (Fla. 1959). Essentially that case concerned whether or not a court, or the judiciary, could investigate or review the motive of an individual councilman or legislator when voting on legislation. In that case, the City of Miami Beach had adopted an amendatory ordinance:

> "....to effect a change in the zoning of a large area so that 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 at 839)

It is unclear from the facts in the decision exactly what was being acted upon, however, there is no indication that it was a rezoning request by a particular individual for a particular use on a particular piece of property. Granted the land use language has changed since this decision over thirty (30) years ago, however, it appears from the quoted passage above that the City was amending its Land Use Plan or amending its Zoning Map over a "large area" to change either the Land Use Plan or Zoning Map from only allowing "private residences" (single-family residences?) to allow multi-family buildings (apartments, townhouses, condominiums) and hotels. The Court stated that the passage of the original zoning ordinance which may have adopted a Land Use Plan or a Zoning Map for the City, was a legislative function and therefore the amendatory ordinance amending that original zoning ordinance was a large scale amendment to the Zoning Map or Land Use Plan, and the Court held that was an exercise of a legislative function. The Snyder decision does not conflict with Schauer based on those facts. The Snyder Court agrees that:

> "..... enactments of original general comprehensive zoning and planing ordinances and maps, and amendments thereto of broad general application, constitute legislative action establishing rules of law of general application." (Snyder at page 80)

It appears from the language in the Schauer decision that the city had enacted an amendment of broad general application and

therefore the Snyder decision does not conflict with Schauer in declaring that that type of action is legislative.

Petitioner cites the case of Florida Land Company v. City of Winter Springs, 427 So.2d 170 (Fla. 1983) for the proposition that the Supreme Court has affirmed that a rezoning decision is a legislative act. The question before the Court in the Florida Land Company case was a decision of the City Council of Winter Springs to rezone the property of Florida Land and to amend the City's official zoning map, and to amend a comprehensive land use map which is incorporated in the comprehensive plan of the City. Under the City Charter if the citizens did not like the decision of its City Council, they could ask for a referendum and in that case the citizens asked for a referendum. The facts of the Florida Land Company case are easily distinguishable from the facts of Snyder. Most importantly, the decision-making in Snyder did not involve an amendment to the comprehensive land use map and to the comprehensive plan itself. The Snyder court would agree that an amendment to the comprehensive plan or the comprehensive land use map is a legislative function. The Petitioner cites the case of Gulf and Eastern Development Corporation v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978) for the proposition that the Supreme Court has consistently held that rezoning is a legislative act. A review of that decision will show that the only issue that the Supreme Court addressed in that case was the question of whether notice to the landowner of a Planning and Zoning Meeting was a requirement under due process principles. The Court

determined that the failure to give notice to the landowner involved in that case was fatal and the Court stated at page 59:

> "It is without question that due process requires that an affected landowner be given prior notice and an opportunity to be heard before action is taken by a zoning authority to alter the use to which the owner is permitted to put his land. (cites omitted) The crux of the issue, however, is at what stage of the proceedings must the owner be notified and be given an opportunity to be heard."

At the beginning of that decision, writing for the Court, Justice Sundberg stated at page 58:

> "While petitioner raises five points for our consideration, we believe the points respecting notice are dispositive of the case and will limit our discussion and decision to that issue".

To cite this case for the proposition that all rezonings are of a legislative nature is not a fair analysis of the decision.

Petitioner cites the case of Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So.2d 204 (Fla. 1984), for the proposition that the Supreme Court has already considered the issues of the Snyder case and rejected the reasoning of the Fifth District Court of Appeal in Snyder. In fact the Supreme Court clearly stated at page 206 of that decision that the only issue that it was addressing was:

> "In its brief the Coalition raises two issues. The first is whether it had standing to raise the question of whether the ordinances were passed in conformity with the Local Government Comprehensive Planning Act. The second is whether the city was required to use administrative procedures in determining whether the proposed development was consistent with the city's comprehensive plan. Because we affirm the trial court's holding with

> respect to standing, we refrain from commenting upon the second issue."

Thus, the Supreme Court only addressed the question of standing to challenge a zoning decision. In that case a group of citizens had filed lawsuits to challenge the rezoning decisions of the City of West Palm Beach. The Court found on the facts of the case that that group did not have the legally recognizable interest that had been adversely affected to meet the test of standing which had been established by Renard v. Dade County, 261 So.2d 832 (Fla. 1972).

The actual holding of that decision is found in the last sentence of the decision at page 208:

> "Since the trial court found that the Coalition had failed to prove that it or any of its members had a legally recognizable interest which would be affected by the city's ordinances, we affirm its holding that appellant lacked standing to question the validity of the ordinances. It is so Ordered".

Petitioner next cites a line of District Court of Appeal cases and states that all of those cases hold that rezoning is a legislative action. A careful reading of the cases will find that is not true.

Many of the cases are cases where the denial of the rezoning request was upheld, but a careful review of the cases will show that the requested rezoning did not comply with the existing city, town, or county comprehensive land use plan. Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992); S.A. Healy, Company v. Town of Highland Beach, 355 So.2d 813 (Fla. 4th DCA 1978); Machado

v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), rev. den. 529 So.2d 694 (Fla. 1988); another group of cases cited by Petitioner fall into the category of cases where there was no Comprehensive Plan in existence, or where the case does not discuss whether the rezoning request was consistent, or inconsistent, with an existing Land Use Plan: Marell v. Hardy, 450 So.2d 1207 (Fla. 5th DCA 1984); County of Brevard v. Woodham, 223 So.2d 344 (Fla. 4th DCA 1969) cert. denied. 229 So.2d 872 (Fla. 1969); City of Tampa v. Speth, 517 So.2d 789 (Fla. 2d DCA 1988).

In the following cases cited by Petitioner, there is no mention by the Court that the rezoning decision was a legislative act; nor is there a holding by the Court that the decision of the governmental agency was a legislative action: St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989) rev. denied. 564 So.2d 488 (Fla. 1990); Riverside Group, Inc. v Smith, 497 So.2d 988 (Fla. 5th DCA 1986); City of New Smyrna Beach v. Barton, 414 So.2d 542 (Fla. 5th DCA 1982) rev. denied. 424 So.2d. 760 (Fla. 1982); Palm Beach County v. Allen Morris Company, 547 So.2d 690 (Fla. 4th DCA 1989) rev. dismissed, 553 So.2d 1164 (Fla. 1989); Southwest Ranches Homeowners Association v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987); rev. denied. 511 So.2d 999 (Fla. 1987); Metropolitan Dade County v. Fuller, 515 So.2d 1312 (Fla. 3d DCA 1987).

The Petitioner cites the case of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), for the proposition "that the enactment and amending of zoning ordinances is a legislative function...". The Jennings holding does not discuss whether a

rezoning request such as the request in Snyder is legislative or quasi-judicial. The quoted sentence was from the concurring opinion of Judge Ferguson and he cites Schauer. Once again it should be noted that the Schauer decision concerned the adoption by the city council of an ordinance which changed a large area of the zoning map or of the zoning code, and was not a site specific request for rezoning. Jennings does cite with approval the case of Coral Reef Nursery, Inc. v. Babcock Company, 410 So.2d 648 (Fla. 3d DCA 1982). In that case the Third District Court of Appeal addressed the issue of whether a rezoning request is legislative or quasi-judicial and that Court stated at page 652:

> "Second, and far more important, it is the character of the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action and, in turn, determines the applicability of the doctrine of administrative res judicata. The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning is identical to that afforded in a hearing on variances or special exceptions. See Section 33-36, Code of Metropolitan Dade County. Each contains the safe-guards of due notice, a fair opportunity to heard in person and through counsel, the right to present evidence, and the right to cross-exam adverse witnesses; and it is the existence of these safeguards which makes the hearing quasi-judicial in character and distinguishes it from one which is purely legislative."

The procedure utilized by Dade County in zoning matters such as that involved in the present case has quite clearly been recognized as quasi-judicial. The Brevard County Code provides for a public hearing on a rezoning request, the safeguards of due

notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-exam adverse witnesses. The actual proceeding used by the Board of County Commissioners of Brevard County, Florida, in holding its hearings on rezoning cases amounts to a quasi-judicial proceeding based on the procedural due process afforded to all interested parties on each rezoning request.

The Fifth District Court of Appeal reviewed the record in Snyder which included the minutes of both the Planning and Zoning Board Meeting and the Meeting of the Board of County Commissioners of Brevard County and stated at page 79:

> "Moreover, the manner in which the decision was made in this case was not legislative in nature. A hearing was held after notice to the parties and the decision was contingent on the evidence adduced as at executive, (administrative), or judicial proceeding. This zoning action was not an action producing a policy of general applicability to a wide portion of the public, but an application of policy to a specific individual and a single parcel of land after a proceeding in which a decision was made between two distinct alternatives."

That reasoning should be affirmed by this Court.

There is no question that the adoption of the local government's comprehensive plan and all of the elements thereto is a legislative function. There is no question that the adoption of a future land use element, or comprehensive planning map is a legislative function where the elected officials decide which areas of their city or county should permit commercial uses, industrial uses, mobile home parks, residential uses, hotel and motel use and

other and various land uses. Those are the types of decisions the elected officials where elected to make and those decisions will not be disturbed by a reviewing court unless they are found to be not fairly debatable. However, where the legislative body is making a decision on how and what rules to enforce upon a given specific parcel of property, as in Snyder, then that decision, assuming it has the procedural safeguards of due process, is no longer a legislative process but is quasi-judicial in nature and this Court should so hold. See Odham v. Petersen, 398 So.2d 875 (Fla. 5th DCA 1981); approved in part, 428 So.2d 241 (Fla. 1983).

The Petitioners herein continue to cite Schauer as the pinpoint for the declaration by the Supreme Court that rezonings are legislative. Aside from the fact that the City Council in Schauer was not deciding on a rezoning request by an individual landowner, the Fifth District Court of Appeal had this to say about Schauer at page 75:

> "Board judicial statements suggesting that all rezonings are legislative in nature are out of step with the realities of zoning practice and also with the evolvement of zoning law. Since the Florida Supreme Court first stated it could not reason the amendment of the zoning ordinance was different from the legislative function involved in its original enactment, Schauer, 112 So.2d at 839, the mechanics of zoning has come to be better known and understood and there have been significant changes in zoning law."

The Court then explained how zoning law has evolved to the point there are two types of zoning maps: one is a comprehensive future land use plan map and the other is a zoning map which

records the actual zoning on each parcel of property within that government's jurisdiction. Clearly, if the legislative body makes changes in the comprehensive future planning map, then that is a legislative function. However, when changes are made to the zoning maps themselves, the Fifth District Court of Appeal correctly states at page 75:

> "...; Changes in zoning maps showing existing zoning are ministerial clerical recordings of the result of non-legislative decision-making in cases involving the application of the legislative rule of zoning law to a specific parcel of land following a decision on a particular application by a particular owner."

That declaration by the Fifth District Court of Appeal in Snyder is a correct analysis of the way zoning changes and decisions are made and this Court should uphold the Appellate Court's decision that rezoning decisions such as Snyder's are in fact quasi-judicial proceedings.

Chapter 125, Fla. Stat., requires a public hearing for rezoning requests. Of course it does. The Snyder decision which finds the public hearing procedure used in Brevard County, Florida, for the Snyder rezoning request as a quasi-judicial proceeding does not conflict in any way with the public hearing provisions of Chapter 125, Fla. Stat. The opinion in Snyder does not mandate approval of the zoning request for the maximum density under the comprehensive plan as suggested by Petitioner. There is no indication of that anywhere in the decision. To argue that the Snyder decision renders public hearing useless is nonsense. In fact under the Snyder rationale, a public hearing becomes much more

meaningful and important than if the proceeding is considered a legislative proceeding.

Petitioner maintains that the functional analysis used by the Fifth District Court of Appeal to determine what actions are legislative and what actions are quasi-judicial will lead to confusion because "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". The Fifth District Court of Appeal adopted the rationale of the landmark decision of the Oregon Supreme Court, Fasano v. Board of County Commissioners, 264 Or. 574, 507 P.2d 23 (1973). The Fasano Court outlined a method to distinguish the difference between a quasi-judicial action and a legislative action by stating at page 27:

> "Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest or situations, or whether it entails the application of a general rule or policy to specific individuals, interests or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is quasi-judicial."

The Fifth District Court of Appeal in Snyder adopted the Fasano approach and further stated at page 78:

> "Initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public are legislative in character. However, rezoning actions which have an impact on a limited number of persons, or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as

> policy application, rather then policy setting, are in the nature of executive or judicial or quasi-judicial action but are definitely not legislative in character."

The test recited from the Fasano decision as well as the above criteria should not cause confusion for the property owners or local governments. The property owners and local governments will know the nature of the action based on whether the action is going to produce a general rule or policy which is applicable to an open class of individuals, interests or situations; or whether the type of action will entail the application of a general rule or policy to specific individual's interest or situation. If it is the latter it is a quasi-judicial action.

The facts of the Snyder rezoning request clearly make it a quasi-judicial action based on the functional analysis.

Snyder, is not the first Florida decision to apply the principles enunciated above. In Machado v, Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), that court cited Fasano with approval and applied the Fasano standard of review to a rezoning comprehensive land use plan decision. Further, the functional analysis was also used in City of Melbourne v. Hess Realty Corporation, 575 So.2d 774 (Fla. 5th DCA 1991) and in Hirt v. Polk County Board of County Commissioners, 578 So.2d 415 (Fla. 2d DCA 1991); see also, DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957).

Rezoning actions such as Snyder should be considered quasi-judicial actions. To do so will not eliminate viable public input into zoning decision or defeat the democratic process, or invite

a host of procedural problems and confusion as stated by the Petitioner. In fact to hold those types of proceedings as quasi-judicial decisions will provide a greater protection to the landowner and the general public by allowing the judiciary to take a careful and thorough review of rezoning decisions of local governmental bodies.

III. THE FIFTH DISTRICT COURT OF APPEAL HAS NOT CREATED AN IRRECONCILABLE CONFLICT BETWEEN FLORIDA RULES OF CIVIL PROCEDURE 1.630 AND SECTION 163.3215, FLORIDA STATUTES, 1991.

The Petitioner states that the Fifth District Court of Appeal's decision will defeat the rights of property owners to challenge the rezoning decisions of local government. The issue of any possible conflict between the provisions of Section 163.3215, Fla. Stat., and Rule 1.630, Florida Rules of Civil Procedure was not addressed by the Appellate Court in Snyder. That possible conflict was simply not an issue in this case. In fact, the District Court of Appeal recognized that it was not an issue in its footnote eight (8) on page 68 of the decision which states:

> "Neither party raises the issue of whether the circuit court should have reviewed the rezoning decision by certiorari review."

Factually what happened in this matter is that after the decision of the Board of County Commissioners on November 28, 1988, the Respondent filed a Verified Complaint with the Court as required by Section 163.3215, Fla. Stat. Simultaneously, the Respondent filed a Petition for Certiorari (A-1-14).

Respondent also filed a Complaint for Declaratory Judgment on February 28, 1989, under a separate civil action number in the Brevard County, Circuit Court. The County filed its Amended Motion to Dismiss which references the Declaratory action (A-15). A Hearing was held on the matter in the Circuit Court and Judge Clarence Johnson denied the County's Amended Motion to Dismiss but Ordered that Snyder choose which lawsuit to go forward with, i.e. the Petition for Writ of Certiorari or the Complaint for Declaratory Relief (A-16). Snyder continued with the Petition for Writ of Certiorari. In the County's Response to the Petition for Certiorari, filed with the Circuit Court (A-17-29), the issue of a conflict between Rule 1.630, Florida Rules of Civil Procedure and Section 163.3215, Fla. Stat., was not raised or mentioned. The decision of the Circuit Court (A-103-104) does not address the issue because it was not an issue before that Court.

The Amended Petition for Writ of Certiorari filed by Respondents in the Fifth District Court of Appeal did not raise as an issue the question of any conflict between the right to utilize a Petition for Certiorari versus the remedy provided in Section 163.3215, Fla. Stat. The County's Response to Amended Petition for Writ of Certiorari (A-127-151) filed with the Fifth District Court of Appeal did not raise the issue. Respondents maintain that a review of this rezoning decision is proper by a Petition for Writ of Certiorari. City of Deerfield Beach, supra; Irvine v. Duval County Planning Commission, 466 So.2d 357 (Fla. 1st DCA 1985); Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla.

1986).

Petitioner asks this Court to reverse the decision of Snyder in order to correct the possible conflict. Clearly this Court should not reverse Snyder in order to address a possible problem which was not raised at the Circuit Court or District Court of Appeal level by either party or addressed by either Court.

IV. THE FIFTH DISTRICT COURT OF APPEAL DID NOT ADDRESS ANY ISSUES CONCERNING EXPARTE DISCUSSIONS AND THEREFORE THAT ISSUE IS NOT BEFORE THIS COURT.

In point four of Petitioner's Brief, Petitioner seems to be asking this Court to make a ruling concerning exparte communications and perhaps affirm or overturn the Third District Court of Appeals decision in Jennings v. Dade County, 589 So.2d. 1337 (Fla. 3d DCA 1991). The issue of exparte communications or discussions concerning the Snyder rezoning process has never been an issue in this case. There is nothing in any of the record or appendix or briefs of either party to indicate that there were or were not any exparte communications. This issue is being raised by Petitioner for the first time in its Brief. This argument by Petitioner is simply not part of the Snyder decision at all and therefore, this Court should not address it.

V. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN PLACING THE INITIAL BURDEN ON THE LANDOWNER TO DEMONSTRATE THAT HIS APPLICATION FOR REZONING COMPLIES WITH THE REQUIREMENTS OF THE ORDINANCE AND THAT THE USE THAT HE IS SEEKING IS CONSISTENT WITH THE COUNTY'S COMPREHENSIVE ZONING PLAN; THE FIFTH DISTRICT OF APPEAL WAS CORRECT IN SHIFTING THAT BURDEN TO THE GOVERNMENT ONCE THE LANDOWNER HAS MET HIS BURDEN.

The Petitioner argues that the Appellate Court in Snyder misinterpreted the meaning of consistency; further, the Petitioner sets forth reasons why the denial of the Snyder rezoning request was appropriate.

The reasons listed by the Petitioner have to do with flood plain; incompatibility with the character of the surrounding area; and the extension of the urban service sector. Unfortunately for the purposes of the record on review, the Board of County Commissioners made no findings as to why it denied the rezoning request, and therefore it is difficult to uphold the reasoning of the County in its denial when it gave no reasons to agree or disagree with.

It is important to remember that the County's own documents, and specifically the "Rezoning Review Worksheet" which consists of seven (7) pages (A-37-43), was prepared by the County's professional staff as a review of the consistency and compatibility of the rezoning request of Snyder.

A review of those documents shows that the development potential if the rezoning where granted was eight units (A-37); and that the development proposal (i.e. the request for rezoning to multi-family, RU2-15), is consistent with the future land use and service sector maps (A-39). The further notation concerning the consistency with the comprehensive plan (A-39) states:

> "Density is urbanizing not to exceed twelve (12) units/acre reduced density. However, the 660' rule would allow extension of urban

service sector. Therefore, this would be consistent." (A-39)

The next review portion has to do with "land use compatibility" (A-39). The professional staff found the requested zoning is "probable compatibility". There was no finding of incompatibility with the character of the surrounding neighborhood. The next section reviewed has to do with "public facilities and services assessment" (A-41-43) and the staff review of the requested rezoning for transportation facilities; potable water; sanitary sewer; solid waste; parks and recreation; facility and service availability (A-41-43). A review of the staff's comments concerning all of those elements will show there were no negative comments. Initially the staff was concerned that the Snyder property may be in the flood plain. That staff comment was changed following the November 7, 1988, Planning & Zoning Meeting where the Planning and Zoning Director, George Edwards, stated that the floodplain would not be a problem for that parcel at the time of development. The record before the District Court of Appeal showed that the County's professional staff found the requested rezoning to be both consistent and compatible with not only the future land use element, but all other relevant elements of the County's comprehensive plan. The County uses its Planning and Zoning Board as an advisory board for rezoning requests. That Board recommended approval of the Snyder rezoning request by a vote of nine (9) to one (1).

Since there are no findings of fact or reasons given for the denial by the Board of County Commissioners at its November 28, 1988, meeting, the Appellate Court had no reasons to review from the governing body. All indications in the record show that the request was consistent and compatible with the County land use plan. That being the case, the District Court of Appeal correctly found and ordered that the requested zoning should be granted to Respondent. Furthermore, there is nothing in the record to indicate that rule which would allow the extension of the service sector since the property was within 660' feet of an urban area has to be ruled on or applied for or to the Board of County Commissioners. Even without the benefit of the 660' rule, the rezoning review worksheet shows that if the rezoning request of Snyder were granted, he would be permitted twelve (12) units per acre. Based on lot size of .54 acres, that would allow Snyder either six or seven units, which is all the Respondent requested as shown by the minutes of the November 28, 1988, County Commissioner Meeting (A-14).

The Petitioner asserts that the Fifth District Court of Appeal has somehow found that consistency means that the maximum density requested must by granted. The opinion of the Fifth District Court of Appeal certainly does not say that; nor does it say anywhere that "approval of less intensive zoning classifications is not considered consistent" by that Court. There is nothing in the Snyder opinion to conclude that the Fifth District Court of Appeal has developed a rigid interpretation of consistency. The County's

own documents demonstrate that the proposed rezoning was consistent and the Court has simply held that once the landowner meets his initial burden to demonstrate that his proposed use complies and is consistent with the comprehensive plan then:

> "Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use." Snyder at page 81.

There was no error by the Fifth District Court of Appeal in regards to its holding concerning consistency with the comprehensive plan.

VI. THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY APPLIED THE TEST OF CLOSE JUDICIAL SCRUTINY RATHER THAN THE FAIRLY DEBATABLE STANDARD.

The Respondent agrees that historically the fairly debatable rule has applied in zoning and rezoning decisions because those decisions have characterized the rezoning process as a legislative process. The Snyder opinion agrees that the fairly debatable rule or standard continues to apply to true legislative actions such as the enactment of zoning codes; the enactment of the comprehensive land use plan; and amendments of broad general application. The Fifth District Court of Appeal stated essentially that the fairly debatable standard does not apply to:

> "...subsequent governmental action which in substance involves the proper application of the previously enacted general rule of law to a particular instance (i.e., a specific parcel of privately owned land under then existing conditions), regardless of the form in which presented (i.e., whether involving a petition for rezoning, for a special exemption, for a

> conditional use permit, for a variance, for a site plan approval, or whatever) does not constitute legislative action requiring judicial deferential review as to reasonableness under the powers clause of the state constitution (Art. II, Section 3, Fla. Const.) and the separation of powers doctrine of the United States Constitution." Snyder, at page 80.

The judicial deferential review refers to the fairly debatable standard. The Appellate Court found the proper standard when reviewing a denial by a governmental agency of a property owner's right to use his property is as follows:

> "Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny." Snyder at page 81.

This "close judicial scrutiny test" is not a new standard. In the past, several appellate courts have used a strict judicial scrutiny rule. Strict judicial scrutiny was defined in Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3d DCA 1987) as follows:

> "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 norm. It is the antithesis of a deferential review."

The holding in Machado is basically that a strict judicial scrutiny test applies where the case involves the consistency of a rezoning change with the comprehensive plan. The Third District Court of Appeal would have applied the same test to the Snyder case as the Fifth District Court of Appeal did. Both the First and Fourth District Court of Appeals have recognized the strict

scrutiny rule. City of Jacksonville v. Grubbs, 461 So.2d 160 (Fla. 1st DCA 1984) rev. denied 469 So.2d 749 (Fla. 1985); Southwest Ranches Homeowners Assoc. Inc. v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987) rev. denied 511 So.2d 999 (Fla. 1987).

Petitioner cites the case of Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992) to show that the Fifth District Court of Appeal has been inconsistent with its treatment of whether and when the close/strict scrutiny rule applies, or the fair debatable rule applies. The author of that opinion, Judge Griffin, does state at page 571, that the fairly debatable standard applied in Orange County v. Lust. However, both Judge Harris and Judge Sharpe wrote concurring opinions and both stated that the standard of review should not have been the fairly debatable rule. Two of the other Judges, Peterson and Diamantis, concurred in the result only; and Judges Goshorn and Cowart dissented without opinion. Orange County v. Lust is a poor example to use to show that the Fifth District Court of Appeal has "returned to the fairly debatable standard" as Petitioner claims. The facts of the case show that the case was anything but a typical rezoning case because it was also combined with a claim for inverse condemnation.

Most recently the Third District Court of Appeal issued a decision in Gabrielle Nash-Tessler v. City of North Bay Village, Florida, Case NO: 91-2615, Opinion filed October 13, 1992. A copy of that opinion is attached in Respondent's Appendix (A-183-194). In that case Tessler applied for a variance to be able to add on

to existing buildings on substandard lots. In Tessler the landowner's site plan was approved by a review committee and that committee found that the proposed project "conformed to the Dade County Comprehensive Development Master Plan, the North Bay Village Master Plan, and the Biscayne Bay Management Plan". Tessler, A-185. The Planning and Zoning Board recommended denial of the variance by a tie vote and then the City Commission passed a form resolution which denied the variance. The Third District Court of Appeal adopted the holding in Snyder which states that the initial burden is upon the landowner to demonstrate that he has met with the reasonable requirements of the applicable ordinance and that it is consistent with the applicable comprehensive land use plan. Tessler A-188. Furthermore, the Third District Court of Appeal adopted the close judicial scrutiny rule pronounced in Snyder. Tessler A-188.

This Court should uphold the close/strict judicial scrutiny test. That test is appropriate where a Court reviews the decision of governmental bodies where those decisions deny or abridge the right of a landowner to use his property; and specifically where that landowner has shown prima facia that his proposal for rezoning complies with and is consistent with that governmental agencies' comprehensive plan.

The fairly debatable standard, which favors upholding the government action if at all possible, should not be used in fact situations such as Snyder. Where the landowner presumptively meets the criteria that has already been legislated by the

government, then if the government turns down or denies the landowner's request to be able to use his property substantially as the government said he should be able to, then, and in that event, a stronger test is clearly called for to protect the rights of the general public. If the local government's decision is allowed to be reviewed by the fairly debatable standard in such a case, the chances and potential for abuse and politically motivated decisions will have a far greater chance of being allowed to stand then if the Court adopts a stricter standard such as the close/ strict judicial scrutiny standard.

Petitioner states that under any standard of review the comprehensive plan of the County requires denial of the requested rezoning due to an inconsistency with the adopted plan. The inconsistency the Petitioner is describing is that the property was in the flood plain. The record before the Circuit Court and the District Court of Appeal and this Court shows that the initial "staff review comments" (A-43) prepared by the County staff which showed that the property was in the flood plain was corrected to say that it wasn't in the flood plain (A-11) prior to the matter being heard by the Board of County Commissioners. The Board of County Commissioners did not mention the flood plain when it denied the zoning; the citizens who spoke against the rezoning request and the County staff who attended the meeting did not mention the flood plain. The County's Brief and Response to the Petition for Certiorari to the Circuit Court did not mention as one of the possible reasons for denial that the property was in the flood

plain.

Under the standard most favorable to the government, i.e., the fairly debatable standard, presumably the Circuit Court could have upheld the decision of the County based on that standard. The stricter standard is required in cases like this so that people such as Snyder who have a piece of land that presumptively meets the criteria adopted and approved by the legislative body of the local government, can not be turned down without being given specific reasons for that denial which in turn gives the reviewing judiciary specific items to review under its strict or close judicial scrutiny test. It is difficult to give a strict or close judicial scrutiny to the review of the decision of the governmental agency where there are no reasons given for the government's decision. This stricter standard of review is called for under the facts of the Snyder case.

VII. THE FIFTH DISTRICT COURT OF APPEAL WAS CORRECT IN REQUIRING THE LOCAL GOVERNMENTAL AGENCY TO STATE REASONS FOR ITS ACTION THAT DENIES THE OWNER THE USE OF HIS LAND WHICH WOULD INCLUDE FINDINGS OF FACT AND A RECORD OF ITS PROCEEDINGS SUFFICIENT FOR JUDICIAL REVIEW.

The District Court of Appeal followed Irvine v. Duval County Planning Commission, 466 So.2d 357 (Fla. 1st DCA 1985) in requiring specific, written, detailed findings of fact to be made by the local zoning authority to supporting a decision made which denies the landowner's requested use of the land where that landowner has met his initial burden to show consistency with the local

government's adopted comprehensive land plan. The Snyder Court held at page 81:

> "Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy under applicable law (i.e., under general comprehensive zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken."

The recent decision of the Third District Court of Appeal, Gabrielle Nash-Tessler, supra, has adopted the Snyder requirement that the respective local governmental agencies set out detailed findings of fact. Tessler at page 7. The Tessler decision also agrees that one of the reasons for requiring those standards of detailed findings of fact and reasons for a denial are to protect the landowner and the general public from politically motivated decisions.

The Supreme Court of Florida should uphold the District Court of Appeals ruling on that part of the case. The requirement by the Appellate Court for specific findings of fact only applies where the government takes an action denying or abridging a landowner's right to use his property. First, the Appellate Court found that judicial review under that set of facts requires close/strict

judicial scrutiny. In order for the judiciary to properly have close/strict judicial scrutiny, there needs to be as complete of a record as possible for the court to review. In the Snyder case for instance there is a complete set of documents concerning the staff's review and recommendation of the rezoning application. There are also complete minutes of both the Planning and Zoning Board Meeting and the Board of County Commissioner Meeting, which include the comments from the actual landowner at those meetings, as well as the comments of the County staff at those meetings. The Court also has in the record the written and oral comments of other citizens who appeared at those hearings either for or against the proposal. What is missing is detailed findings of fact and reasons given for the denial by the County. One can only guess at the reasoning by the County. In fact when rendering its decision, the Circuit Court attempted to make its own findings of fact. That was not the proper function of the Circuit Court in reviewing the decision of the County. Battaglia Fruit Company v. The City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988). Furthermore, neither of the reasons given by the Circuit Court are accurate (flood plain concern) or legally sufficient (citizens comments). Bailey v. City of Augustine Beach, 438 So.2d 50 (Fla. 5th DCA 1989) and Flowers Baking Company v. City of Melbourne, 537 So.2d. 1040 (Fla. 5th DCA 1989).

Had the Circuit Court had a proper record before it which included specific findings of fact and reasons for the denial of the rezoning request, then the Circuit Court could have made a more

proper review of whether the reasons given by the County were supported by substantial competent evidence. The Circuit Court had no ability to do that without the specific findings of fact and reasons which the District Court of Appeal has now held should be included in a case where the local government denies or abridges the right of a landowner to use his property.

The Irvine decision is similar to Snyder. In that case the record reflected that the landowner had demonstrated that his request met the basic standards of the ordinance. The Irvine Court then found that the burden shifted to the Duval County Commission:

> "....the Planning Commission Order failed to make any detailed findings of fact explaining its denial of the application, the Commission failed to include in the record of its proceedings competent evidence sufficient to support its denial of the application, and the commission's attempted justification of its denial by merely reciting that petitioner had failed to carry his burden of proof is not in accord with applicable rule of law." Irvine at page 365.

Other Courts in Florida have held that administrative or quasi-judicial proceedings require findings of fact to be placed on the record. City of Miami v. Lopez, 487 So.2d 1111 (Fla. 3d DCA 1986); City of Deerfield Beach v. Vaillant, supra; Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, supra; Anderson v. Mason, 184 So.2d 177 (Fla. 1966); Ryder Truck Lines, Inc. v. King, 155 So.2d 540 (Fla. 1963).

Petitioner asserts that there are cases that hold findings of fact are not necessary. The Petitioner cites the case of Desisto College Inc. v. Town of Howey-in-the-Hills, 706 F.Supp. 1479 (Fla.

M.D. 1989). The Court in Desisto College, Inc. essentially held that findings of fact were not necessary for the adoption of the ordinance in question in that case. The ordinance which was the subject of that lawsuit was a legislative ordinance which amended the City's zoning code. Clearly a City Council has the right to change its permitted uses in its different zoning categories which is what that case is about. Petitioner also cites the case of Riverside Group, Inc. v. Smith, 497 So.2d 988 (Fla. 5th DCA 1986) for the proposition that the Fifth District Court of Appeal has held findings of fact are not unnessary. That case had to do with the findings of fact of an advisory board of the county. The Fifth District Court of Appeal held that it was harmless error for the planning and zoning Board's failure to submit written findings of fact in giving its recommendation of approval or disapproval to the commission. The simple reason for that decision was that the Board of County Commissioners did not even have to accept or even consider the recommendation of the planning and zoning board at that time, and therefore whether the planning and zoning advisory board made any written findings of fact or not was unimportant to the decision-making process.

The decision of the Fifth District Court of Appeal to require findings of fact and reasons for decision when there is a denial or an abridgement of a person's right to use his land, particularly after that landowner has made a prima facia showing that he has met all the legislative requirements, is correct and this Court should so hold.

CONCLUSION

The decision of the Fifth District Court of Appeal should be upheld in all respects. The District Court of Appeal did not reweigh the evidence in this matter but simply looked at the existing record. The Court correctly found that the Circuit Court had applied incorrect principals of law to the facts and evidence in the case. The documents before the Appellate panel showed that ultimately the County's own staff had no negative comments concerning the rezoning request of the landowner. Clearly the Fifth District Court of Appeal did not rely in any part on an erroneous survey.

The Florida Supreme Court should hold that rezoning decisions where the procedural safeguards are substantially similar to the facts in Snyder; and where the decision affects a particular parcel of property owned by identifiable parties; and where the decision is limited to that parcel of property then such a decision is quasi-judicial in nature and not legislative. The functional analysis approach used by the appellate panel is a clear test that should be used by courts in reviewing decisions of local governmental bodies. If the proceeding is quasi-judicial in nature, then the proper test for review such a decision is not the fairly debatable rule, but rather a close/strict judicial scrutiny standard. Further, in order for the proper judicial review, the local government should be required to make specific findings of

fact and reasons for its decision in order for the judiciary to be able to make a proper review of the matter.

The Florida Supreme Court should uphold those important rulings and holdings of the Fifth District Court of Appeal in Snyder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Appellants' Initial Brief has been provided by United States Mail service to Eden Bentley, Assistant County Attorney, 2235 North Courtenay Parkway, Merritt Island, Florida 32953; Paul Gougelman, Esquire, and Maureen M. Matheson, Esquire, 1825 South Riverview Drive, Melbourne, Florida 32901; Jane C. Hayman, Esquire and Nancy Stuparich, Esquire, Post Office Box 17517, Tallahassee, Florida 32302-1757; Jonathan A. Glogau, Assistant Attorney General, and Denis A. Dean, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050; John J. Copeland, Jr., County Attorney, and Sharon Cruz, Assistant County Attorney, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301; William J. Roberts, Esquire, Post Office Box 1386, Tallahassee, Florida 32302; Robert M. Rhodes, Esquire, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301; Richard E. Gentry, Esquire, 201 East Park Avenue, Tallahassee, Florida 32301; Thomas Pelham, Esquire, Post Office Drawer 810, Tallahassee, Florida 32302; and Neal D. Bowan, County Attorney, 17 South Vernon Avenue, Room 117, Kissimmee, Florida 34741 this 9th day of November, 1992.

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