IN THE SUPREME COURT
OF FLORIDA

CASE NO. 80,230

J. GWYNN PARKER and CLARICE P. CALE, as Personal Representatives of the ESTATE OF EUNICE P. ANDERSON, deceased, and CENTURY DEVELOPMENT OF TALLAHASSEE, INC.,

Petitioners,

v.

LEON COUNTY,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case is accepted. Petitioners' Statement of the Facts takes considerable liberty in arguing excerpted portions of the record presented to the trial court, in the form of the parties' filed Appendices, and such Statement of the Facts is hereby corrected and supplemented as follows:

1. The complete basis of the Respondent's Planning Commission's decision to deny the Petitioners' plat application, as it appears in the record, was that the proposed density of the subdivision (1 dwelling unit per .6 acre) was too dense when compared with the few other subdivisions in the area averaging 1 dwelling unit per 3.1 acres, violating Comprehensive Plan policies relating to compatibility, and that the subdivision in a rural area, as proposed, was inconsistent with various Comprehensive Plan policies promoting compact urban growth and discouraging urban sprawl. (Petitioners' Appendix [hereinafter, "P.A."]: 47, 52, 83; Respondent's Appendix [hereinafter, "R.A."]: 1-6) (The references are to a staff review and recommendation and to a staff summary of the Planning Commission action. No transcript of the Planning Commission hearing was ever supplied by the Petitioners as part of their Appendix in support of their Petition for Writ of Certiorari, and the Petition originally filed was addressed to and challenged the January 30, 1990 appeal decision of the Board of County Commissioners.) (R.A.: 11)

2. The January 25, 1990 letter from Petitioners' counsel to the County Attorney, which the Petitioners claim to be "substantial

compliance" with the verified complaint requirement of Florida Statutes, Section 163.3215(4), did not address any of the Comprehensive Plan policies with which the plat was found by the Planning Commission to be inconsistent; instead, as stated in the first paragraph of the letter, it outlined counsel's "preliminary analysis of our legal position"--which was simply that the County Ordinance adopting the Comprehensive Plan, as interpreted by Petitioners, provided that zoning ordinance provisions took precedence over inconsistent policies in the Comprehensive Plan. (P.A.: 55-7) In addition to not addressing the specific Comprehensive Plan policies involved, the letter also failed to meet the requirements of Section 163.3215(4), in that it was untimely (P.A.: 55) and was not verified. (P.A.: 61) Furthermore, as pointed out in the Respondent's Answer to the original petition for writ of certiorari filed in the trial court, the legal position taken is contrary to the provisions of Chapter 163, Florida Statutes, that a Comprehensive Plan takes precedence over inconsistent zoning regulations. (R.A.: 51) No verification was added to this letter until December 4, 1990, approximately ten and one-half months after the decision of the Board of County Commissioners. (P.A.: 92) In fact, the verification was not added until eight days <u>after</u> the Petitioners' Amended Complaint was filed following remand from the District Court of Appeals. (P.A.: 26)

3. The Petitioners have suggested that a quoted statement of the County Attorney at the appeal hearing of their plat denial

referenced the pending adoption of a new Comprehensive Plan "which would provide the County with legal authority which could justify denial of the Appellants' [sic] plat application." What was actually being addressed by the County Attorney's statement was the Petitioners' argument--also made by a prior plat applicant then in litigation with the Respondent--that inconsistent zoning ordinance provisions take precedence over a Comprehensive Plan, and that the issue would be soon be moot, either because of a judicial determination or because of adoption of a new Plan and new implementing regulations. (P.A.: 63-5) The statement had nothing whatsoever to do with the specifics of the Petitioners' plat or the specific Plan policies with which it was found to be inconsistent.

4. Though the Petitioners have stated that the decision of the Respondent's Board of County Commissioners on the appeal was never reduced to writing, the official, adopted, written minutes of the Board's January 30, 1990 meeting provide:

> Commissioner Turnbull withdrew her motion and then moved to uphold the Planning Commission's decision to deny the preliminary plat of Ashford Glen, find that denial of the preliminary plat is consistent with the Comprehensive Plan, and remand it back to the Planning Commission for them to advise the applicant what would be necessary for the preliminary plat to be approved. Commissioner Henderson seconded the motion which carried unanimously. (R.A.: 8)

The development order <u>was</u>, however, also reduced to writing, with a copy provided to the Petitioners, on February 2, 1990, three days after the appeal hearing and four days before the original petition for writ of certiorari was filed. (R.A.: 43) Regardless, Section 163.3215, by its terms, does not apply only to written development

orders; but, if it did, and if the Respondent's development order had never been reduced to writing, the Petitioners filed suit on February 6, 1990 (R.A.: 19), alleging that "Administrative proceedings have concluded, and this matter is now ripe for judicial review." (R.A.: 12) The litigation itself would then have rendered moot any requirement for a written order, if there had been such a requirement and if the written notice had not already been provided.

6. The Petitioners have stated that their original petition for writ of certiorari filed herein was to review the Respondent's Planning Commission order denying their subdivision plat, attempting to portray their counsel's letter as having been filed within thirty days after that decision. The original Petition for Writ of Certiorari, however, was clearly addressed to the denial of the appeal by the Respondent's Board of County Commissioners, which the Petitioners claimed to be their final administrative remedy. (R.A.: 11-2)

7. The Petitioners have stated that, at the appeal hearing, the Respondent's Board of County Commissioners "made no discussion" of the "dispositive issue at all." Several questions were asked by Commissioners, however, concerning the proposed subdivision, its location, and the identification and locations of existing nearby subdivisions addressed in the staff report prepared for the appeal hearing. (P.A.: 68-73) All of these questions related to the dispositive issue--the Comprehensive Plan policies with which the Planning Commission had found the proposed plat to be inconsistent.

What Petitioners refer to as the "dispositive issue" is their legal argument that the specific minimum requirements of the Zoning Ordinance controlled over the applicable Comprehensive Plan policies. Neither at the appeal hearing or at the Planning Commission hearing did the Petitioners ever address the merits of the applicable Comprehensive Plan policies, object to the supportive data provided to the Planning Commission by the Respondent's professional planning staff, or submit any data or evidence of their own.

8. The Petitioners have stated that the remand to the Planning Commission was a mere "technicality" and would have served no purpose. As stated at the appeal hearing before Respondent's Board of County Commissioners, the remand was only for the purpose of providing the Petitioners with due process, in accordance with judicial opinions that a simple denial of a plat without advising the applicants what changes had to be made to obtain approval is a denial of due process. (P.A.: 75) Such a remand, however, would also have served the same purpose as the District Court of Appeals found to be the reason for a verified complaint under Section 163.3215(4)--to crystalize the issues as to Comprehensive Plan policies and to more specifically establish what <u>would be</u> approvable under the Plan as well as what is not. Nevertheless, the Petitioners waived such remand, leaving no question that the decision of the Board of County Commissioners on January 30, 1990, was final. (P.A.: 81)

9. It should be noted, to avoid any confusion, that several

documents included by the Petitioners in their Appendix filed in the Circuit Court or attached to motions filed in the Circuit Court, two of which are also included in the Appendix filed by the Petitioners with their Initial Brief, do not relate to the Petitioners' subdivision application, but to an entirely different subdivision application not before the Court in this case. (P.A.: 87-90) Also, one of the documents included in the Petitioners' Appendix is incomplete, omitting the list of Comprehensive Plan policies which formed the basis of the development order denial. (P.A.: 83-6; R.A.: 1-6)

The only decision before the District Court of Appeals for review was the trial court's determination that the Petitioners did not--and could not--plead compliance with the statutory condition precedent to an action under Florida Statutes, Section 163.3215. In their Statement of Facts, the Petitioners have admitted that they did not plead such compliance, but only what they contended was "substantial compliance" and that what the statute required as a condition precedent was nothing more than an available administrative remedy which would have been futile or a notice of claim requirement which need only be substantially complied with. Since Florida law is to the contrary, any facts concerning the plat inconsistency determination itself, or concerning what the Petitioners claim was "substantial compliance," are irrelevant.

SUMMARY OF ARGUMENT

Section 163.3215, Florida Statutes, creates a statutory action to enforce a purely statutory right. Chapter 163, Florida Statutes, requires cities and counties to adopt comprehensive plans, sets out the requirements for such plans, and prohibits local governments from issuing development orders inconsistent with the applicable comprehensive plan. Section 163.3215 sets forth who may enforce this right to comprehensive plan consistency and creates an exclusive cause of action for such enforcement.

As with many statutory causes of action, such as enforcement of a mechanic's lien, Section 163.3215 sets out a condition precedent to bringing an action under that section. For a statutory cause of action, compliance with the condition precedent is a substantive element of the cause of action.

The Petitioners' proposed subdivision plat was denied specifically and solely for inconsistency with the Respondent's Comprehensive Plan. In fact, the Respondent's Board of County Commissioners specifically found, in upholding the denial on an appeal of that decision, that denial of the plat application was consistent with the Comprehensive Plan. The Petitioners filed an action in circuit court to challenge such denial, alleging that the inconsistency determination was erroneous and that denial of the plat was inconsistent with the Comprehensive Plan. The Petitioners did not, however, comply with the mandatory condition precedent set out in Section 163.3215 and did not allege jurisdiction under Section 163.3215; on remand from the District Court of Appeals, the

action was pleaded as a petition for writ of certiorari and a complaint for declaratory judgment.

The District Court of Appeals has reviewed the statute and determined that the Legislature meant specifically what it clearly said: that an action under the statute is the only method available to review approvals or denials of development orders when the issue is comprehensive plan consistency or inconsistency.

While the denial of a plat application is a quasi-judicial act and has been traditionally reviewable by petition for writ of certiorari, traditionally such a review did not involve a Comprehensive Plan consistency requirement. Such a requirement has only recently been created by statute, and, again, that right was created by the same statute which created the exclusive statutory action to review consistency determinations.

The answer to the certified question is obvious, and requires no time and energy of this Court. Certiorari is clearly available to review a plat denial if such denial is on some basis other than Comprehensive Plan inconsistency. That obvious answer provides no comfort to the Petitioners, however, since the Petitioners' plat application <u>was</u> denied solely on the basis of Comprehensive Plan inconsistency and the Petitioners failed to comply with the statute which provided an action for review of the denial.

ARGUMENT

I. SECTION 163.3215, FLORIDA STATUTES, IS AN EXCLUSIVE STATUTORY ACTION PROVIDED BY THE LEGISLATURE TO ENFORCE AN EXCLUSIVELY STATUTORY RIGHT.

The certified question is:

> Whether the right to petition for common law certiorari in the circuit courts of the state is still available to a landowner/petitioner who seeks appellate review of a local government development order finding comprehensive plan inconsistency, notwithstanding section 163.3215, Florida Statutes (1989)?

As discussed hereinafter, the Local Government Comprehensive Planning Act of 1975 (amended and renamed in 1985 as the Local Government Comprehensive Planning and Land Development Regulation Act) included, for the first time in Florida Law, a requirement that all local government development orders be consistent with that local government's adopted Comprehensive Plan. The Legislature thus created a right, in all affected persons, to have local governments adhere to the requirements and limitations of their Comprehensive Plans. The Local Government Comprehensive Planning Act of 1975, however, did not include a definition of what Comprehensive Plan consistency meant; did not include any provisions regarding who had standing to enforce the right to Comprehensive Plan consistency; and did not include any particular cause of action for the enforcement of such right.

In 1985, the Legislature cured all three of these deficiencies. Section 163.3194, Florida Statutes, was amended to include subsection (3)(a), defining what Comprehensive Plan consistency meant in regard to development orders, and Section

163.3215 was adopted to provide an exclusive cause of action for enforcement of the development order consistency right and to define who had standing to bring such an action.

As discussed below, Section 163.3215 is in no way ambiguous. It clearly provides that if the approval or denial of a development permit application is alleged to be inconsistent with a local government's adopted Comprehensive Plan, "the sole action available" to challenge that development order is pursuant to the statute.

Section 163.3215 did not, however, address any other basis for challenging a development order. Thus, any other cause of action available, before the 1985 adoption of Section 163.3215, to challenge a local government development order is still available. The only actions Section 163.3215 encompasses are actions by adversely-affected parties alleging that the approval of a development order is inconsistent with an applicable Comprehensive Plan and actions by permit applicants alleging that denial of a development permit, based on Comprehensive Plan inconsistency, was erroneous. If an adversely-affacted party alleges that a permit was approved in violation of the requirements and limitations of a subdivision or zoning ordinance, or without required notice to that adversely-affected party, or in violation of any other statutory or constitutional requirement--other than Comprehensive Plan consistency--the traditional remedies of certiorari, injunction, and declaratory judgment are naturally still available.

Likewise, if a development permit application is denied as

being contrary to a zoning ordinance requirement or subdivision ordinance requirement, or without a required public hearing and notice to the applicant, or because the applicant has red hair, or for any reason--other than Comprehensive Plan inconsistency--the traditional remedies of certiorari, mandamus, injunction, and declaratory judgment are naturally still available.

Since the Local Government Comprehensive Planning and Land Development Regulation Act clearly creates both a statutory right and an exclusive statutory remedy, the certified question answers itself. The Legislature certainly has the right to do both of these things. There is, therefore, no need for any interpretation or clarification by this Court.

The District Court of Appeals, in this case, held nothing more than that the statute means exactly what it says. No case cited by the Petitioners considered or decided this same issue. Certainly the Petitioners can--and did--cite case after case holding that a quasi-judicial determination by a local government agency is reviewable by petition for common law certiorari. In no such case, however, other than this one, has a Florida court considered a case in which the sole reason for denial of a permit application was Comprehensive Plan inconsistency and in which non-compliance with the statutory condition precedent of Section 163.3215 was raised as a defense.

The statute at issue in this case is Fla. Stat., §163.3215, which provides a statutory cause of action for reviewing development orders issued by local governments in regard to issues of

Comprehensive Plan consistency. If the action of the local government is determined by the court to be inconsistent with the local government's Comprehensive Plan, a variety of remedies is available under the statute.

Throughout their brief, the Petitioners have attempted to obfuscate the issues involved by confusing what is a cause of action with possible remedies. They have also attempted to confuse the Court as to the distinctions between a required condition precedent to a statutory cause of action, an available administrative remedy, and a statutory notice of claim requirement.

Section 163.3215 is in no way ambiguous. Its pertinent provisions are:

> **163.3215 Standing to enforce local comprehensive plans through development orders.**
>
> (1) Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order, as defined in §163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.
>
> (2) "Aggrieved or adversely affected party" means any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons.
>
> (3) (a) No suit may be maintained under this section challenging the approval or denial of a zoning, rezoning, planned unit development,

variance, special exception, conditional use, or other development order granted prior to October 1, 1985, or applied for prior to July 1, 1985.

(b) Suit under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part.

(4) As a condition precedent to the institution of an action pursuant to this section, the complaining party shall first file a verified complaint with the local government whose actions are complained of setting forth the facts upon which the complaint is based and the relief sought by the complaining party. The verified complaint shall be filed no later than 30 days after the alleged inconsistent action has been taken. The local government receiving the complaint shall respond within 30 days after receipt of the complaint. Thereafter, the complaining party may institute the action authorized in this section. However, the action shall be instituted no later than 30 days after the expiration of the 30-day period which the local government has to take appropriate action. Failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the actions complained of.

. . . (Emphasis added.)

Applicable definitions contained in Fla. Stat., Ch. 163, are the following:

163.3164 Definitions.--As used in this act:

. . .

(6) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.

(7) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

. . . (Emphasis added.)

Also pertinent is the requirement of Fla. Stat.,

§163.3194(1)(a):

> **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.
>
> . . . (Emphasis added.)

The Legislature quite clearly provided in Section 163.3215 that the sole action available to review development orders of a local government--in regard to issues of Comprehensive Plan consistency--shall be a statutory cause of action under that section.

Certiorari is a common law action, normally available to review quasi-judicial determinations of local government agencies when no other means of review is available. E.g., G-W Development Corp. v. North Palm Beach Zoning Board of Adjustment, 317 So.2d 828 (Fla. 4th DCA 1975). If any quasi-judicial decision of a local government agency is challenged on any basis other than Comprehensive Plan consistency--because the agency had no jurisdiction, because of a denial of due process, because an application was improperly denied on some basis other than Comprehensive Plan inconsistency--a petition for common law certiorari is still available as the action to review the agency's determination. See Gregory v. City of Alachua, 553 So.2d 206, 208n4 (Fla. 1st DCA 1989).

Should a local government decide--as to an application for a development order--that the application must be denied because of Comprehensive Plan inconsistency and other reasons as well, the applicant may have to file a two-count complaint, including a

statutory cause of action to review the Comprehensive Plan consistency determination and a common law petition for writ of certiorari to raise other, non-Plan related issues. If the conditions precedent required by Section 163.3215 are not satisfied by the time a petition for writ of certiorari must be filed, it is a simple matter to file the petition for writ of certiorari raising other, non-Plan related issues and, when the Section 163.3215 condition precedent is satisfied, file either a supplemental or amended complaint adding a second count or file the statutory action as a separate proceeding, with or without a motion to consolidate.

When the District Court of Appeals issued its first opinion in this case, reiterating and giving judicial sanction to the specific terms of Section 163.3215 that an action under that section shall be "the sole action available" to challenge any development order on the issue of Comprehensive Plan consistency, any competent attorney could easily have determined what would be required to file an amended complaint herein: (1) allege jurisdiction of the court under Section 163.3215; (2) allege compliance with the statutory condition precedent; and (3) allege that it was denial of the Petitioners' subdivision plat application, not its approval, that was inconsistent with Respondent's Comprehensive Plan.

Petitioners' counsel undoubtedly then determined that those three allegations were necessary to allege a cause of action under Section 163.3215. The problem was, however, that the required statutory condition precedent had never been complied with, and such compliance could not be pleaded truthfully.

The Petitioners' Amended Complaint therefore alleged everything possible other than what was required. The basis for the Court's jurisdiction was not alleged to be Section 163.3215; rather, the Amended Complaint included one count as a common law certiorari petition and one count as a statutory action for declaratory judgment. (P.A.: 12, 18) The verified complaint required as a condition precedent was called a "notice of claim" or an available "administrative remedy"--anything but a statutory condition precedent. This was because the law is clear that a condition precedent to a statutory cause of action is an element of the cause of action and must be complied with, whereas a notice of claim and exhaustion of administrative remedies may be excused under certain circumstances.

In its first opinion in this case, the District Court of Appeals merely gave effect to the clear and unambiguous terms of a legislative enactment. The Legislature apparently determined that comprehensive planning for future development and growth in the State of Florida was so significant and vital an issue that it deserved special consideration, not only by local governments but by the courts as well.

The Local Government Comprehensive Planning and Land Development Regulation Act, a part of Florida Statutes, Chapter 163, now requires local governments to plan responsibly for future growth by the adoption of a Comprehensive Plan in accordance with the Act [§163.3167(2)]; to address specific vital planning issues in their Plans (§163.3177); to obtain State approval of those Plans

[§163.3184(6)-(10)]; to obtain State approval of any Plan amendments [§163.3187(2)]; to ensure that the Plans are fiscally responsible and that no development is permitted unless the necessary public facilities to serve such development are provided [§§163.3177(3) and 163.3177(10)(h)]; and to issue no development orders unless they are consistent with every element of the Comprehensive Plan [§163.3194(1)(a)]. The Legislature also set out its intent and purpose (§163.3161) and factors to be considered by the court in reviewing any local government action in relation to its Comprehensive Plan [§163.3194(4)(a)]. Finally, the Legislature established a separate procedure for judicial review of local government consistency determinations on applications for development orders and provided that any person "aggrieved or adversely affected" by such determinations had a quick and effective action for judicial review--but only that action (§163.3215).

By adopting this comprehensive scheme for local planning and development regulations, the Legislature has not only provided for much more responsibility and soundness in local government land use decisions; it has also removed much of the arbitrariness and "political" influence from the local land use planning process. It has also provided more stability to local government land use decisions by eliminating such things as years-after-the-fact actions for injunction or declaratory judgment as to approvals and denials of rezoning applications. Under this new scheme, at least as to Comprehensive Plan consistency issues, a development permit approval or denial is final if no challenge by an adversely affected party is

initiated, under Section 163.3215, within thirty days after the approval or denial.

Now, simply because the Petitioners and their counsel failed to comply with the required statutory procedure, they would have this Court begin to erode the Legislative scheme and unreasonably decide that the Legislature did not mean what it clearly and specifically said in Section 163.3215. It is a sure bet, however, that if the Respondent had determined that approval of the Petitioners' application was consistent with the Respondent's Comprehensive Plan, rather than its denial, and if adversely-affected neighboring property owners judicially challenged the consistency determination, the Petitioners would all of a sudden know the difference between a condition precedent to a statutory cause of action and an available administrative remedy or notice of claim requirement, and they would properly be insisting that any person who failed to comply with the statutory condition precedent would have no cause of action for review of their approval.

However, considering only the decision sought to be reviewed herein--the District Court of Appeals' initial determination that Section 163.3215 does provide the sole action available to review whether their plat denial was consistent with Respondent's Comprehensive Plan, and the Amended Complaint the Petitioners thereafter chose to file--it is clear that the Circuit Court properly dismissed this action.

Many of the cases cited by the Petitioners, such as G-W Development Corp. v. North Palm Beach Zoning Board of Adjustment,

supra, hold that certiorari is available to review a quasi-judicial determination only when no other means of review is available. See, also, 3 Fla.Jur.2d Appellate Review §467, and numerous cases cited therein. Certiorari may also be available when another method of review has been lost, but only when the loss is not due to the party's own neglect. 3 Fla.Jur.2d Appellate Review §470, and cases cited therein. In this case, failure to comply with a statutory condition precedent is due solely to the fault of the Petitioners.

The Petitioners chose to allege jurisdiction and style their complaint as a two-count action for common law certiorari and declaratory judgment. Even though they elected not to file a statutory action under Section 163.3215, they attempted to address the statutory condition precedent as nothing more than a required notice of claim or an available administrative remedy, because they had not complied with it and needed to have compliance somehow waived.

The issue of compliance with the condition precedent will be addressed more fully hereinafter. However, since the Petitioners elected to not allege jurisdiction under Section 163.3215 and to style their complaint as a petition for writ of certiorari and a complaint for declaratory judgment, the Circuit Court's dismissal with prejudice was clearly proper.

The Petitioners' Brief carries on at length about what the District Court of Appeals determined was the appropriate method of reviewing development order consistency determinations, and the Petitioners' Brief argues several policy matters concerning whether

or not common law certiorari should be available even when a development order is denied solely on the basis of Comprehensive Plan inconsistency. It must be kept in mind, however, that it was the Legislature, not the District Court of Appeals which decided that a Section 163.3215 review was the Petitioners' sole action available to challenge the Respondent's inconsistency determination. Petitioners' policy arguments should best be made to the Legislature. Neither this Court nor the District Court of Appeals can amend a statute which clearly provides an exclusive statutory remedy for enforcing a purely statutory right.

The Petitioners have also attempted to characterize this case as sanctioning "Land use authorities' use of procedural tactics to insulate illegal decisions from judicial review . . . ." (Petitioners' Brief, Page 24.) This is a gross misrepresentation of this case. The Respondent has done nothing except attempt to comply with a state statute which requires that its development orders be consistent with its Comprehensive Plan. The Respondent informed the Petitioners of its staff consistency review and conclusion, pointing out the specific Comprehensive Plan policies with which the proposed plat was inconsistent; and the Planning Commission denial and Board of County Commissioners affirmance of that denial were both specifically based on inconsistency with those Plan policies. Rather than address those policies, however, the Petitioners have concocted a legal argument that, because of wording in the ordinance adopting Respondent's Comprehensive Plan, the state statute requiring consistency does not apply. When the Petitioners, through

their counsel's negligence, failed to properly comply with the state statute providing an exclusive method of review for Comprehensive Plan inconsistency determinations, the Respondent did nothing more than raise the statutory requirement as a defense, as it was entitled to do.

The Circuit Court initially agreed with the Petitioners' argument concerning the interpretation of the ordinance adopting Respondent's Comprehensive Plan. Respondent contends that this decision of the circuit court was clearly erroneous, and it raised this arguiment in its petition for writ of certiorari to the First District Court of Appeals. The District Court of Appeals, however, did not have to reach this issue because of the Petitioners' non-compliance with the statutory condition precedent. The fact that the Petitioners and the Respondent disagree as to the interpretation of Respondent's Plan-adoption ordinance and the requirements of state statute does not make the Respondent's denial of the proposed plat "illegal" or unlawful. And it was no procedural "tactic" of the Respondent which deprived the Petitioners of judicial review; it was the negligence of Petitioners' counsel. Furthermore, it has been the Petitioners who have used every possible tactic to gain approval of their proposed subdivision, without ever dealing with the substantive issue of the specific Comprehensive Plan policies involved.

Just as the Petitioners have misrepresented this case, they have also attempted to mischaracterize the opinions in numerous other cases as having determined that certiorari review is still

available, regardless of Section 163.3215, when a development permit application is denied solely on the basis of Comprehensive Plan inconsistency. No case cited by the Petitioners involved a permit denial based solely and specifically on Comprehensive Plan inconsistency, a failure of the permit applicant to comply with the Section 163.3215 condition precedent, and a pleaded defense based on such non-compliance.

As to the statute itself, the Petitioners have argued that, since subsection (1) uses the term "to prevent [a] local government from taking action on a development order," the statute should apply only to development orders approving permits. If that was what was intended by the Legislature, however, it would have been a simple matter for the Legislature to define "development order" as only including approvals or to say "to prevent a local government from approving a development permit . . . ." The Petitioners argue that a local government denying a development permit application takes no "action," but it is the denial itself which is the official action of the local government, and clearly--as in this case--a permit applicant would like to prevent such a denial.

Petitioners also argue that the statute does not apply because subsection (1) refers to a development order "which materially alters the use or density or intensity of use . . . ." Petitioners argue that a denial does none of these things. It is clear, however, that a denial which--at least until another type of permit is requested--stops the development of 58 small lots in a rural area, does alter the intensity of use of the land, from 54 dwelling

units to something considerably less than that.

Petitioners also suggest that the wording "not consistent with the comprehensive plan" also somehow does not apply to a denial. In this case, however, the Board of County Commissioners specifically found that denial of the plat application was consistent with the Respondent's Comprehensive Plan. The Petitioners must, therefore, properly raise and argue the contrary position--that the development order, the denial, was inconsistent with the Comprehensive Plan--and that is the Section 163.3215 cause of action.

Petitioners also argue that the subsection (2) definition of "aggrieved or adversely affected party" can only mean a third party affected by an approval, since an owner whose permit application is denied already has "a right of review by certiorari." This argument completely ignores the fact that third parties who are adversely affected by approvals of rezonings, subdivision plats, and other local government development orders also have a right of review by an action for mandamus, certiorari, declaratory judgment, or injunction. In both cases, however, the Legislature has now provided that, when the sole issue is the statutory right to Comprehensive Plan consistency, the sole action available is under Section 163.3215.

The Petitioners have attempted to render meaningless the subsection (3)(a) time limitation on certain actions under the statute challenging the "approval or denial" of development orders, but their attempt completely ignores the fact that, if the Legislature had intended to exclude property owners from the

statute, it could have easily said so in subsection (1), (2), or (3), rather than depend upon a strained interpretation of the statute to do so. It also ignores the fact that subsection (3)(b) specifically states that the statute provides for the sole action available to "challenge the consistency of a development order with a comprehensive plan . . . ." Again, if the Legislature had intended only development permit denials, it would have been unnecessary to carefully use the term "development order" throughout the statute or to define "development order" as including both approvals or denials of applications.

Finally, the Petitioners argue that the subsection (4) requirement of a verified complaint is meaningless if the statute encompasses challenges by permit applicants to application denials, because "the applicant is already a party whose position has been established by its application and participation . . . ." This argument is refuted by the facts of this particular case, in which the Petitioners never informed the Respondent of any disagreement with regard to the applicable Comprehensive Plan policies forming the basis of the denial or the staff analysis of the Plan policies and surrounding development pattern. Also, in some cases, Comprehensive Plan consistency issues may arise too late in the permit review process to allow the applicant to fully address them and develope a factual record as to the policies involved.

The statute is not at all ambiguous, as suggested by the Petitioners. If it were ambiguous, however, case law cited by the Petitioners--to the effect that an ambiguous statute should not be

interpreted as eliminating a common law remedy--would still be inapplicable. The statute does not eliminate a common law remedy, because no person ever had a common law right to Comprehensive Plan consistency; that right--and the remedy--are both statutory.

II. STATUTORY CAUSES OF ACTION REQUIRE STRICT COMPLIANCE WITH STATUTORY CONDITIONS PRECEDENT.

As noted above, the Petitioners' exclusive action available was a statutory cause of action under Section 163.3215, not a common law certiorari petition or an action under the Declaratory Judgment Act. In Florida, while satisfaction of conditions precedent may usually be alleged generally, a pleader relying on a cause of action created by statute must specifically allege compliance with statutory prerequisites. Moore v. Crum, 68 So.2d 379 (Fla. 1953), and San Marco Contracting Co. v. State, Department of Transportation, 386 So.2d 615, 617 (Fla. 1st DCA 1980). Florida courts require strict compliance with such statutory conditions precedent. E.g., Ferry-Morse Seed Co. v. Hitchcock, 426 So.2d 958 (Fla. 1983); Moore v. Crum, supra; and Gannett Florida Corp. v. Montesano, 308 So.2d 599 (Fla. 1st DCA 1975), cert. den. 317 So.2d 78 (Fla. 1975).

Furthermore, compliance with a condition precedent to a statutory cause of action is an essential element of the cause of action, and an action cannot be properly commenced until all of such elements are present. Ferry-Morse Seed Co. v. Hitchcock, supra at 961, and Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607, 610 (Fla. 4th DCA 1975).

The Petitioners did not even allege generally that they had complied with all conditions precedent. What they did allege was that they had "substantially" complied with the requirements of Section 163.3215(4) and that compliance with the statutory condition precedent should be dismissed or excused in their case. () Their Amended Complaint, however, as well as their Brief filed herein, continuously speaks in terms of exhausting an administrative remedy and confuses that doctrine with a statutory condition precedent. All of the case authorities cited by the Petitioners in support of their futility argument relate to situations dealing with the futility of an administrative remedy; not a single one is a case involving a statutory cause of action and a statutory condition precedent to that action.

Required exhaustion of administrative remedies is a judicial doctrine based on policies which include deference to agencies which are part of the executive or legislative branches of government and a policy of not stifling administrative action before it has run its course. 1 Fla.Jur.2d, *Administrative Law* §147, and cases cited therein. There are several bases for excusing exhaustion of remedies in certain instances. On the other hand, as stated above, a statutory condition precedent is an element of a statutory cause of action, compliance with which must be pleaded in order to state a cause of action. 40 Fla.Jur.2d, *Pleadings* §79 (entitled "Statutory Conditions"), and cases cited therein. If all elements of the action as required by statute are not present, the court has no jurisdiction of the subject matter. Even one of the authorities

cited by the Petitioners in their Amended Complaint, the concurring opinion of Judge Ferguson in Warner v. City of Miami, 490 So.2d 1045 (Fla. 3d DCA 1986), clearly states that "the failure-to-exhaust defense does not go to subject matter jurisdiction but to court policy . . . ." Id. at 1045. As noted above, satisfaction of a condition precedent to a statutory cause of action is an element of the cause of action, the absence of which leaves the court with no subject matter jurisdiction.

Even assuming, however, that what is involved here is simply the failure to exhaust an administrative remedy, rather than non-compliance with a statutory condition precedent, the facts and cases relied upon by the Petitioners would not justify even a failure to exhaust an administrative remedy. The Warner v. City of Miami, supra, opinion merely finds a failure to exhaust an administrative remedy excusable in that case, without identifying any of the facts which led to that conclusion. Bruce v. City of Deerfield Beach, 423 So.2d 404 (Fla. 4th DCA 1983), merely held that a pleaded failure to exhaust an administrative remedy for futility raised a factual issue precluding a summary judgment.

Other case opinions were cited in the Petitioners' Brief to support their argument and assertion that, in this case, "The futility of requiring any further administrative action is apparent." One of these cases, Metropolitan Dade County v. Fountainbleau Gas & Wash, Inc., 570 So.2d 1006 (Fla. 3d DCA 1991), merely mentions administrative remedies in passing and gives no facts as to what possible administrative remedies were available, if

any, and why they might have been excusable. City of Holly Hill v. State ex rel. Gem Enterprises, Inc., 132 So.2d 29 (Fla. 1st DCA 1961), merely held that the administrative remedies claimed to be available were futile because they could not have accorded any relief or were unnecessary to the decision made by the City of Holly Hill City Council.

City of Miami Beach v. Sunset Islands 3 & 4 Property Owners Association, Inc., 216 So.2d 509 (Fla. 3d DCA 1969), was a mandamus proceeding to compel a building inspector to perform a clear legal duty and enforce a zoning ordinance and require termination of a land use prohibited in the applicable zoning district. The court did not detail in its opinion what the possible claimed available administrative remedy was, or what facts led it to conclude that "it became apparent that the building inspector was not going to discharge his duty and . . . halt the unauthorized use . . . ." Id. at 510-1. As to alleged failure to exhaust an administrative remedy, the court held:

> Mandamus is a recognized remedy to require a public official, who is clothed with the authority, to discharge his duty. . . . There is no requirement that a relator exhaust his administrative remedies prior to seeking the issuance of an alternative writ of mandamus, when it is apparent that either such a gesture would be a futile one or that there is no discretion to be exercised by the official involved under the clear wording of either a statute or an ordinance designating him as the authoritative person to respond thereunder. . . . (Citations omitted.)
>
> 216 So.2d 511.

Obviously, this case does not involve a petition for writ of mandamus, and it does not involve an official who refuses to act or the performance of a non-discretionary clear legal duty. This case

involves merely a dispute and difference of opinion with public officials who have acted with regard to a discretionary function in balancing and applying Comprehensive Plan policies and goals in regard to a particular proposed development. Petitioners did not even identify in their Amended Complaint any facts related to their subdivision application to support the conclusion that exhaustion would be futile. Instead, they based their argument on the Respondent's position taken with regard to a completely different subdivision. It is beyond question that, particularly in regard to land use and zoning determinations, both administrative and judicial determinations are entirely dependant upon the facts of the specific land and application involved.

The only facts pleaded by the Petitioners to support their "futility" argument were that the Respondent denied their subdivision plat application and had denied another subdivision application the Petitioners claimed to be similar. (P.A.: 16) (The implication was that the Respondent had obviously taken a position; therefore, any "rehearing" or reconsideration would necessarily be fruitless.) The Petitioners could say as much, however, about any denial by a local government of any permit application. Accepting that argument would make the verified complaint requirement of Section 163.3215 totally meaningless. By the Petitioners' reasoning, no person who was denied a development permit on the basis of Comprehensive Plan inconsistency would ever have to satisfy the statutory condition precedent, because the authority which denied the permit had already taken a position.

As to the 'other' subdivision application alleged to have been denied, the facts of that application are not before the Court; each land use decision is unique based on the particular facts as to each piece of land; and the fact that the Respondent's position that its Comprehensive Plan policies applied over conflicting zoning ordinance minimum requirements had already been submitted to the courts does not change the fact that what is also involved in this case is the particular application of various Comprehensive Plan policies and goals to the facts of this proposed subdivision. The statutory verified complaint and response requirement would have crystallized the parties' positions with regard to the facts of this particular application, the specific proposed subdivision involved, and the area surrounding that specific proposed development; the requirement would have had nothing to do with any other case.

It is impossible to tell if the statutory verified complaint would have been futile, because the Petitioners have never, either before the Respondent's Planning Commission and Board of County Commissioners or before the courts, made any argument addressed to the specific Comprehensive Plan policies upon which the inconsistency determination was based or the factual matters and staff analysis which led to that determination. Perhaps if the Petitioners had ever addressed the Comprehensive Plan issues in a proper verified complaint, prior to filing suit, this matter could have been resolved.

The Petitioners have also attempted to characterize the statutory condition precedent set out in Section 163.3215(4) as a

notice of claim requirement similar to numerous statutory and charter requirements that reasonable notice of a claim be provided a public agency prior to institution of any action for damages. Such notice of claim requirements (typically called "non-claim" statutes or ordinances) are not themselves part of a statute which creates a cause of action; they are procedural requirements which must be followed prior to the institution of certain tort or other actions for damages, and courts regularly hold that substantial compliance is necessary. All of the cases cited by the Petitioners held that only substantial compliance with a non-claim statute or charter provision was necessary. However, without going through each of those cases, suffice it to say that not one of them dealt with a statutory cause of action and a required condition precedent to that action.

Petitioners have attempted to "toss off" the cases cited above regarding statutory causes of action by attempting to characterize all of them as cases in which the issue of substantial compliance simply wasn't addressed, because no "substantial compliance" had been performed. Actually, a quick perusal of the cases will reveal that the particular statutory conditions precedent involved in those cases were "nearly" complied with or complied with in a technically deficient manner; "substantial compliance" was certainly not discussed in these case opinions because they held that strict compliance was necessary. The most familiar statutory cause of action, as to which Florida courts have repeatedly held that strict compliance with statutory conditions precedent is necessary, is that

provided in the mechanic's lien law. In Stresscon v. Reynaldo Madiedo, 581 So.2d 158 (Fla. 1991), the Florida Supreme Court once again held--citing several prior cases--that foreclosure of a mechanic's lien is a statutory cause of action and requires strict compliance with the statutory conditions precedent. (Stresscon, by the way, involved an after-the-fact verification of a required notice, which is exactly what the Petitioners herein are claiming was part of their "substantial compliance.")

Even though strict compliance with a condition precedent to a statutory cause of action is necessary under Florida case law, the Petitioners merely alleged in their Amended Complaint that they had substantially complied with the verified complaint requirement of Section 163.3215(4) by means of a letter from their attorney, arguing his legal position as to how the Respondent's Comprehensive Plan should be interpreted, which was sent to the Respondent's County Attorney. (P.A.: 55) The letter was not verified, merely signed by the attorney (The statute requires verification.); the letter was delivered to the County Attorney several days before action was taken by the Respondent's Board of County Commissioners (the approving authority) on Petitioners' plat application (The statute requires that a verified complaint be filed with the Respondent within the thirty-day period after action is taken on a development permit application.); the letter simply argued the attorney's position that general Comprehensive Plan policies should not be used to deny an application which meets the minimum requirements of a zoning ordinance (The statute requires that the

verified complaint set out the facts and issues as to the application of the Comprehensive Plan policies to a particular Plan consistency determination--which had not yet been finally made in this case. Furthermore, Chapter 163 provides that a Comprehensive Plan takes precedence over any conflicting development regulations.); the letter did not even identify itself as intending to be a Section 163.3215 verified complaint, so that a response, as provided in the statute, could be made; and Petitioners' initial complaint herein (a petition for writ of certiorari) was filed in this case on February 6, 1990 (R.A.: 19), only seven days after the development order was issued denying the plat application (P.A.: 62-79), four days after written notice of the final action (R.A.: 43), and twelve days after the attorney's letter was delivered. (P.A.: 55) (The statute provides that a party must institute the statutory review action no sooner than thirty days after the verified complaint is filed or no sooner than receipt of a response to the verified complaint, whichever is earlier.)

The attorney's letter, which the Petitioners claim was substantial compliance with the statutory condition precedent, was again sent to the Respondent (and filed with the Court) on December 4, 1990, with the attorney's verification attached to it in such a way as to appear that this was a timely "verified complaint" under the statute. (P.A.: 91-9) Aside from the fact that this second copy of the letter--even if it could be considered as meeting the requirements for a verified complaint--was provided more than ten and one-half months after issuance of the development order to which

it was addressed, this suit had already been filed some ten months earlier. As noted above, compliance with a condition precedent to a statutory cause of action is an essential element of the cause of action, and an action cannot be properly commenced until all of such elements are present. Ferry-Morse Seed Co. v. Hitchcock, supra at 961, and Orlando Sports Stadium, Inc. v. Sentinel Star Co., supra at 610. Generally, failure to comply with a statutory condition precedent cannot be cured by compliance after suit is filed. Orlando Sports Stadium, Inc. v. Sentinel Star Co., supra at 610, and authorities cited therein.

Therefore, even if the law permitted only substantial compliance with a condition precedent to a statutory cause of action, under no stretch of the imagination could this letter be considered as "substantial compliance."

CONCLUSION

Based upon the authorities cited and the argument made herein, it is respectfully requested that this Court decline to accept jurisdiction of the certified question or, if jurisdiction is accepted, that the Court affirm the District Court of Appeals' conclusion that Section 163.3215, Florida Statutes, means exactly what the Legislature clearly and specifically said.

DATED this 6th day of October, 1992.

Pennington, Wilkinson & Dunlap, P.A.

By: 

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. first class mail, postage prepaid, to M. Stephen Turner and David K. Miller, Esq., Broad & Cassel, P.O. Box 11300, Tallahassee, Florida 32302, this 6th day of October, 1992.

David La Croix