IN THE SUPREME COURT OF FLORIDA

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

Appellants,

vs. CASE NO. 80,230

LEON COUNTY,

Appellee.
_____/

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE[1]

This case arises upon the following question certified by the First District Court of Appeal:

> 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)?

This case began as an administrative (quasi-judicial) proceeding in which Appellants applied for a subdivision plat approval from Leon County. Following Planning Department staff review, the Planning Commission denied the plat by a written order. (AC App. 19). Appellants filed an administrative appeal to the Board of County Commissioners. Before the County heard the case, Appellants' counsel submitted a lengthy letter setting forth their position to the County. (AC App. 21-26). The Board of County Commissioners by voice vote upheld the Planning Commission's denial order. (AC App. 35-50).

Appellants then filed a petition for writ of certiorari in the Leon County Circuit Court, seeking review of the administrative record and denial order. (R. 1-35). The County interposed a defense that Appellants had failed to submit a verified administrative complaint and await a response under § 163.3215(4), Florida Statutes, prior to filing their petition for writ of

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[1] The Amended Complaint and its appendix are in the record (R. 237-315) and in the Appendix to this Brief (Brief App. 12-90). For convenience, references to paragraphs in the Amended Complaint are made by the symbol (AC ¶); references to the Amended Complaint Appendix are made by the symbol (AC App.).

certiorari. The Circuit Court (Honorable Charles D. McClure, Judge) rejected this defense upon a determination that § 163.3215 governed only challenges by third party intervenors, not the owner-applicants' rights to review by writ of certiorari. The Circuit Court granted the writ upon findings that the County's denial action was illegal. (R. 166-72).

The County sought appellate review by writ of certiorari. See Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st DCA 1990) ("Parker I"). (Brief App. 8-11). The District Court of Appeal never reached the merits of the Circuit Court's ruling. The unsigned panel majority opinion (Judges Allen and Wentworth concurring) granted certiorari, holding that Appellants were required to submit a verified complaint and await a response from the County before seeking judicial review, pursuant to § 163.3215(4), Florida Statutes. Judge Nimmons dissented, reasoning that the Circuit Court had correctly ruled that this statutory verified complaint procedure was intended to apply only to third parties seeking to intervene in a local land use dispute, and not to owner-applicants whose position had already been considered and rejected by the local land use authority. Id. at 1318.

However, on rehearing the Court of Appeal remanded the case to allow Appellants to amend their pleading. Id. at 1318. On remand, Appellants filed an Amended Complaint seeking a writ of certiorari (Count One) and declaratory and injunctive relief (Count Two) under state law. (R. 237-315).

The Amended Complaint alleged facts showing substantial compliance with the verified complaint requirement and the futility, waiver and inadequacy of further compliance. The Circuit Court nevertheless dismissed the action for failure to strictly comply with the verified complaint procedure. (R. 399-400). Appellants appealed this final order.

The District Court of Appeal affirmed without opinion, 17 FLW 1387 ("Parker II"), citing to the companion case of Emerald Acres, Inc. v. Leon County, 17 FLW 1322 (Fla. 1st DCA 1992). In Emerald Acres, the Court majority (Judges Allen and Barfield) held that Section 163.3215 replaced common law certiorari as the owner-applicant's remedy for review of local land use development orders that involve determination of consistency with comprehensive plans. The Court held that Emerald Acres had not complied with the statute's verified complaint requirement and that dismissal was proper. Judge Kahn, in a separate opinion, expressed his doubts that Section 163.3215 applied to the owner-applicant (as Judge Nimmons expressed in Parker I), but he felt bound by the prior decision to join the majority holding. (Brief App. 145-148). On rehearing, the Court certified this question. 17 FLW 1736.

To summarize, three judges have agreed with Appellants' position that § 163.3215, Florida Statutes, does not apply to the owner-applicant (the Circuit Court and Judges Nimmons and Kahn of the First District Court of Appeal), while three judges have agreed with the County's position (Judges Allen, Barfield and Wentworth of the District Court of Appeal). As shown in the argument below, no

other court has ruled that the statute displaces the owner-applicant's common law certiorari remedy. The issue is of public importance because the review of literally thousands of local land use decisions will be substantially affected by the procedure which this Court holds applicable.

STATEMENT OF THE FACTS[2]

Appellants are sellers and purchasers of a 37 acre tract of land located near the intersection of Benjamin Chaires Road and Buck Lake Road in Leon County, Florida. This property was zoned A-2 (agricultural) under the Leon County zoning ordinance at all times pertinent to this case. The zoning ordinance specifies that property zoned A-2 can be developed with single family dwelling units on a minimum lot size of 20,000 square feet (.46 acre). (AC ¶ 4-7; AC App. 4-6, 21-27).

In the fall of 1989, Appellants submitted an application for a preliminary subdivision plat for the subject property, to be called Ashford Glen. In the course of planning staff review, the application was amended to eliminate several planned lots and to conform to all technical requirements for subdivision plat approval. The amended application proposed development of 54 single family dwelling units on lots averaging .68 acre, well above the minimum authorized by the County's zoning ordinance. (AC ¶ 8-10; AC App. 21-22, 53).

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[2] For purposes of review, the fact allegations of Appellants' Amended Complaint and Appendix are presumed correct.

The County planning staff and the Planning Commission reviewed the Appellants' amended application. On January 10, 1990, the Planning Commission issued a written order denying the amended application because the lot density was deemed "too dense when compared with other subdivisions in the area which average one (1) unit per 3.1 acres." The Planning Commission ruled the application was inconsistent with general policy statements in the comprehensive land use plan relating to compatibility with neighboring properties and compaction of urban growth. (AC ¶ 11; AC App. 19).

On January 12, 1990, Appellants appealed this decision to the Leon County Commission as authorized by the Leon County Code. (AC ¶ 12; AC App. 20). The planning staff prepared a thorough agenda report describing the issue and the Planning Commission's action. (AC App. 21-26).

On January 25, 1990, Appellants' counsel submitted a seven page letter setting forth in detail the reasons why the Planning Commission's action was improper and why Appellants were entitled to plat approval. The letter included the factual background of the application supplementing the facts in the staff agenda report; an extensive discussion of the applicable legal authorities; and a request that the plat application be approved, as well as the signature of counsel. The letter addressed the legality of the Planning Commission's order because the facts were not disputed, and the only issue was one of law. (AC ¶ 13) (AC App. 27-33).

On January 30, 1990, the County Commission met to review the Planning Commission's order. The meeting began with the following statement by the County Attorney:

> MR. WILKINSON: I think it would be appropriate if Mr. Turner [Appellants' attorney] went ahead with this appeal. We did discuss the legal issues. I don't think the lawyers were able to do anything more than what lawyers normally do, which was agree to disagree.
>
> A COMMISSIONER: As I recall, he wanted a week to attempt to demonstrate to you that the Commission's recommendation was contrary to law, basically, or be a strong compelling case that we should overturn.
>
> MR. WILKINSON: Let me say, in his own inimitable way Mr. Turner did present a strong case. By the same token, we felt that the County Commission's position in construction of the ordinances is defensible. It's currently in litigation.[3] There are no clearcut cases the points of issue which you will hear tonight, and obviously the results are going to be because we are advocates. Litigation perhaps may ultimately be resolved in the circuit court and appellate court.
>
> The issues of this type, for whatever merit it has for the commissioners in considering this and several prior subdivisions that have come up, should, of course very soon be a thing of the past now that you will be operating under a new set of rules and a new comprehensive plan in terms of the requirements and so forth and so on, and so very shortly we have, this kind of decision that you well have to make will be a thing of the past ..... (AC ¶ 14; AC App. 35-36).

The Commissioners asked no questions concerning the legality of the Planning Commission's decision, and made no discussion of this dispositive issue at all. (AC App. 44-46). The County had

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[3] This reference to pending litigation was understood by all to refer to the certiorari proceeding filed by Emerald Acres, Inc. (see R. 312-315; Brief App. 87-90). That proceeding is a companion to this case and is presently before the Supreme Court as Case No. 80,288. Since the County had already determined to litigate its position on the issue, no purpose would have been served by further administrative proceedings. (AC ¶ 18a).

decided its position on this issue in the prior proceedings. Instead, immediately following Appellants' presentation, the Commission started to summarily uphold the Planning Commission's decision:

> COMMISSIONER TURNBULL: Mr. Chairman, would you entertain a motion? I move option one to uphold the Planning Commission's decision to deny the plat.
>
> CHAIRMAN YORDON: I have a motion.
>
> A VOICE: Second.
>
> CHAIRMAN YORDON: We have a second, is there discussion, all in -- yes.
>
> MR. LA CROIX: Mr. Chairman, I would recommend that you not uphold that decision unless you find that denial of the plat is consistent with the comprehensive plan, and if you do uphold the decision of the Planning Commission, I would recommend that you remand this application back to the Planning Commission with the request that the Planning Commission advise the applicant how the plat has to be amended to be approved in order to provide due process to the applicant.
>
> CHAIRMAN YORDON: Do you make any further motions?
>
> COMMISSIONER TURNBULL: I believe that was my motion.
>
> COMMISSIONER VAUSE: Actually it was.
>
> MR. WILKINSON: This is a technicality and what I would like to suggest is that David get with Marty and make --
>
> * * *
>
> COMMISSIONER TURNBULL: All right, I withdraw my original motion and my second motion is to uphold the Planning Commission decision to deny approval of the preliminary plat of Ashford Glen and remand it back to the Planning Commission for instructions to the applicant.
>
> MR. LA CROIX: I believe Mr. Turner is going to save you the trouble and waive any argument as to the lack of any denial of due process, he does not want to go back to

> the Planning Commission so if you will put that on the record, then we don't have a problem with it.

(AC App. 46-47, 48) (e.s.). Thus the expressed purpose for remand to the Planning Commission was for a technicality to "instruct" Appellants on their development rights, and not to consider the application further. Everyone present knew the case was headed for court, and there was no mention of any need for any verified complaint procedure.[4]

The County Commission unanimously adopted this restated motion by voice vote. (AC App. 50). It did not issue any written order on the matter.

Appellants had already negotiated with the County staff to reduce the proposed number of lots in Ashford Glen to 54, which was the minimum that was economically feasible for them to develop. In other subdivisions selected by the Planning Commission to determine compatibility, the range of lot sizes was 2.4 to 3.8 acres. There was no possibility that Appellants' entitlement to the applied-for .68 acre lot size would be recognized by further administrative action. To return to the Planning Commission would result in further expense and delay, for an advisory ruling that nobody wanted, without any prospect for approval of an economically feasible subdivision. (AC ¶ 10, 15, 18; AC App. 23, 53).

Moreover, as the County Attorney observed at the hearing, the County was preparing to adopt a new comprehensive plan that, once

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[4] The County's subdivision review ordinance, Section 18-35, Leon County Code (R. 389-391, Brief App. 119-121), likewise makes no reference to any verified complaint procedure.

adopted, would provide the County with legal authority that could be used to justify denial of the Appellants' plat application. Further delay in completing administrative proceedings might irreparably prejudice the Appellants. (AC ¶ 19-21 and 33-35).

On February 6, 1990, Appellants filed their petition for common law certiorari review to review the Planning Commission's order, the only written order ever provided. The gist of the petition was that the County had no lawful basis to deny the application which met the specific density standard of the zoning code, and that the general comprehensive plan policies did not purport to govern the Appellants' density rights or supercede the specific numerical standard in the zoning code. (R. 1-35). This petition was filed within 30 days of both the Planning Commission's written order and the County Commission's voice vote.

The Circuit Court determined that the County had acted illegally to deny Appellants' plat application, and granted the writ of certiorari. (R. 166-172; Brief App. 1-7), ruling in pertinent part:

> 2. The County raises a threshold question of subject matter jurisdiction. Section 163.3215, Florida Statutes (1989), does not provide the exclusive remedy for Plaintiffs to challenge the County's denial of the preliminary plat. That statute allows aggrieved citizens to challenge a decision approving development. The remedies available to an applicant to challenge the denial of use by certiorari review remain. See Gregory v. City of Alachua, 553 So.2d 206 (Fla. 1st DCA 1989), reh'g denied. This action is properly before the Court on a Complaint for Writ of Certiorari....

The Court held that the specific zoning code standard, and not the comprehensive plan, governed Appellants' density rights:

11. The Plan consists of statements of local goals, objectives and policies and supporting future land use maps. The County's ordinance adopting the plan and the plan itself provide that it is a guide to future development. (Ordinance 80-69, section 17.1-25(a); Plan, p. 3).

* * *

13. Sections 17.1-25(b) and (d), Leon County Code of Laws, implementing the Plan, and the implementation section of the Plan (pp. 124-125) provide that zoning districts existing on the date of plan adoption will continue to determine allowable land uses. This is so regardless of any conflict with the Plan (with an exception not applicable here), until the zoning is changed. Section 17.1-25(d) of Leon County's plan regulations explicitly provides that property may be developed pursuant to the density of the zoning classification in effect at the time the Plan was adopted.

14. The existing A-2 zoning classification density and use provisions would control development of Plaintiffs' property, even if the Comprehensive Plan had projected a different conflicting use or density, unless and until the zoning is changed.

* * *

17. The County Comprehensive Plan's general guideline policies cannot be used to change the specific density allowed by zoning regulations that remain unchanged. [citations omitted].

18. Under the guise of its Comprehensive Plan, the County impermissibly used its power of approval of subdivision plats to create a different density for Plaintiffs' property than allowed under the zoning code and other regulations implementing the plan. The County may not circumvent the law in this fashion to effectively amend the zoning for Plaintiffs' property without due process.

The Circuit Court concluded:

20. There was no lawful basis to deny Plaintiffs' preliminary plat for the Ashford Glen property. Leon County failed to apply applicable law and departed from

the essential requirements of law in refusing to approve the plat.[5]

Following the District Court of Appeal's remand with permission to amend their pleading, Appellants filed their Amended Complaint, again alleging they were entitled to subdivide and develop under the specific zoning code density standard, and that the comprehensive plan did not determine density at all, but deferred to the zoning code, as the Circuit Court had previously ruled. (AC ¶ 19-20). Appellants did not allege that they were entitled to relief under the comprehensive plan because the plan did not control density.

The Amended Complaint contained the following specific allegations pertinent to the verified complaint procedure:

> 13. On January 25, 1990, within 30 days of the Planning Commission's decision, Plaintiffs submitted a lengthy complaint to the Defendant, signed by their counsel, in substantial compliance with Florida Statute Section 163.3215(4) & (6), setting forth the basis for their objection to the decision and requesting approval of the proposed subdivision plat.
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> * * *
>
> 16. To avoid undue delay, Plaintiffs filed an action in this Court on February 6, 1990, within 30 days from the Planning Commission denial of the preliminary plat application and within 30 days of the Defendant's response to Plaintiffs' Complaint about action of the Planning Commission. Therefore, to the extent applicable, Plaintiff complied with conditions of Section 163.3215, Florida Statutes, to seek relief from the Planning Commission's denial of the proposed Ashford Glen plat.

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[5] An appellate court has subsequently rendered a decision that squarely adopts the same reasoning. Colonial Apartments L.P. v. City of DeLand, 577 So.2d 593 (Fla. 5th DCA 1991) (certiorari granted), review denied, 584 So.2d 997 (Fla. 1991).

* * *

18. In any event, compliance with the statutory conditions of filing an administrative complaint with, and receiving a response from Defendant prior to seeking judicial relief, is excused in this case because:

a. It would have been futile to seek any further administrative relief since Defendant's position on the issue was applied as prevailing policy, was unequivocally stated as justified and defensible by the Board of County Commissioners and its attorney at public meeting, and was currently in litigation after exhaustive presentation by Plaintiff Emerald Acres Investments, Inc. in an earlier application.

b. It would have been useless to seek any further administrative relief since Defendant, through its Planning Commission and Board of Commissioners, had refused to approve the requested plat to which Plaintiffs were absolutely entitled by law and which was already at the minimum lot density they could economically develop.

c. It was unnecessary to seek any further administrative relief because the Planning Commission acted in excess of and grossly abused its administrative authority by construing general guideline statements in the comprehensive plan as if they were specific land use requirements, and applying such general statements in an ad hoc manner to negate specific land use entitlements authorized by law in flagrant violation of the due process and separation of powers guarantees of the Florida Constitution. (R 239-241; Brief App. 14-16).

Appellants also amended their January 25, 1990 letter to include a verification by Appellants' counsel, and furnished this verified letter to the County and the Court. (Supp. R. 1-10; Brief App. 84-92).

The County again moved to dismiss the case for failure to file a verified administrative complaint under Section 163.3215(4). (R. 352-360; Brief App. 100-108). On April 10, 1991, the Circuit Court entered an order granting the motion to dismiss (R. 361-362; Brief App. 109-110). The Court held in pertinent part:

> 1. Section 163.3215, Florida Statutes, provides the sole action available to challenge the consistency of a development order with a local comprehensive plan.
>
> * * *
>
> 4. Plaintiffs are required to comply with the provisions of Section 163.3215, Florida Statutes in order to challenge the action of the local government in this case.
>
> 5. . . . this court finds that the letter, dated January 25, 1990, does not constitute a verified complaint timely filed with the local government whose actions are complained of, as required by Section 163.3215(4), Florida Statutes.

On May 2, 1991, the Court entered a final order dismissing the complaint with prejudice on grounds that Appellants could not allege any set of facts to comply with the condition precedent in Section 163.3215(4). (R. 399-400; Brief App. 129-130).[6]

SUMMARY OF ARGUMENT

A property owner whose land has been subjected to an illegal administrative land use decision enjoys an efficient and effective remedy by appellate judicial review under the writ of common law certiorari. Section 163.3215, Florida Statutes, did not abolish this remedy. Rather the statute is intended only to confer liberalized standing upon third parties who want to intervene in land use proceedings to protest certain development orders that violate the plan.

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[6] The initial order dated April 10, 1991, granting the County's motion to dismiss was not final or appealable. See Johnson v. First City Bank, 491 So. 2d 1217 (Fla. 1st DCA 1986). The order dated May 2, 1991, is the appealed final order.

The statute in subsection (1) authorizes actions to "prevent ... government from taking action on a development order ... which materially alters the use or density or intensity of use ... that is not consistent with the comprehensive plan ..." Subsection (3)(b) of the statute states that suit "under this section" shall be the sole action available to challenge the consistency of an order with the comprehensive plan. Owner-applicants such as Appellants do not seek to prevent action on a development order, and the denial order is not one that alters the use or density or intensity of use. The cause of action created in subsection (1) relates only to third party challenges to orders. An owner-applicant's suit cannot possibly arise under this statute.

The verified complaint procedure in subsection (4) simply creates the vehicle for an intervening third party to challenge certain development orders that violate the comprehensive plan. The verification and time deadline provisions in subsection (4) are imposed to protect the owner against baseless and dilatory challenges, as further shown by the provisions of subsection (6) which subject improper challenges to sanctions.

The application of Section 163.3215(4) to a property owner-applicant who has already completed a full administrative procedure is not only illogical and contrary to the clear intent of the statute, but also unduly burdens the property owner's right to speedy review of local land use decisions based upon administrative findings and a supporting record. These decisions must be subject to appellate type review under the established remedy of certiorari

as to whether the correct procedural and legal standards were followed and whether adequate supporting evidence exists. All other Florida cases recognize the certiorari remedy; none has followed the First District majority's rationale in the seven years since the statute was enacted.

It would serve no useful purpose for the owner-applicant to complete a second round of administrative review by verified complaint to notify the local government of its position which has already been considered, and give the government a second chance to perfect the record which should have been made in the initial plenary proceeding, all as a prerequisite to de novo review where the administrative record is not binding on anyone.

The only purpose served by the District Court of Appeal's decision is to shelter illegal land use decisions from judicial review by making the review procedure so prolonged and confusing that it is impractical to pursue. This may please radical "no-growth" interests but was never intended by the Legislature. There is nothing in the statute's text, the history, the applicable rules of construction, or the other case law enforcing property owners' rights that would justify the District Court's incongruous construction of the statute.

Even if the District Court properly construed the statute to apply to Appellants, however, the decision to dismiss the complaint was erroneous because Appellants alleged facts showing that they had substantially complied with the statutory procedure and that further compliance was futile, waived or inadequate to provide

lawful relief. These allegations suffice to withstand the County's motion to dismiss, and entitle Appellants to proceed to a decision on the merits.

ARGUMENT

I. SECTION 163.3215, FLORIDA STATUTES, DOES NOT REPLACE THE OWNER-APPLICANT'S RIGHT TO REVIEW OF DEVELOPMENT ORDERS BY COMMON LAW CERTIORARI.

Introduction

The District Court of Appeal's construction of Section 163.3215, Florida Statutes, eliminates the property owner's right of direct appeal by common law writ of certiorari to correct illegal land use decisions, and replaces that remedy with a heretofore unknown procedure which is an inefficient and impractical substitute, and was never intended by the Legislature. In order to appreciate the magnitude of the changes wrought by this decision, the Court must first consider the legal and practical differences between common law certiorari review on one hand, and proceedings under the statute as applied by the lower court.

Circuit courts are authorized to conduct appellate review of local quasi-judicial land use decisions by writ of certiorari under common law, even in the absence of a statute authorizing such proceedings. G-W Dev. Corp. v. Village of North Palm Beach, 317 So.2d 828 (Fla. 4th DCA 1975); Splash & Ski, Inc. v. Orange County, 596 So.2d 491 (Fla 5th DCA 1992); Rule 9.030(c)(3), Fla. R. App. P., Rule 1.630, Fla. R. Civ. P. Common law certiorari review is a

speedy and efficient remedy for relief from administrative action. Review is based only upon the administrative record. The local government must articulate its findings and reasons in a written order sufficient for judicial review as a matter of due process, and it is not free to invent new reasons or evidence to justify its action after the case is appealed to the court. See Irvine v. Duval County Planning Comm'n, 495 So.2d 167 (Fla. 1985) (approving dissent by Judge Zehmer reported at 466 So.2d at 362-69), on remand, 504 So.2d 1265 (Fla. 1st DCA 1986) (adopting Judge Zehmer's opinion as the opinion of the court); Planning Comm'n v. Brooks, 579 So.2d 270 (Fla. 1st DCA 1991); Snyder v. Board of County Commissioners, 595 So.2d 65, 80-81 (Fla. 5th DCA 1991).

The Circuit Court, sitting in its appellate capacity, can conduct only a limited review of these local land use decisions upon the following issues: (1) whether the administrative decision was supported by competent substantial evidence; (2) whether the decision departed from the essential requirements of law; and (3) whether procedural due process requirements are met. Further appellate court review is even more limited, that is, only the second and third issues can be considered. See Educational Development Center v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989); City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). This process provides an efficient remedy to determine legal rights with respect to land use.

From the landowner's perspective, this procedure is a practical necessity. Most land development involves the coordination and sequential timing of land assembly, permitting, financing, construction and marketing functions. If there is a substantial delay in the permitting stage, the whole project may be thrown off its budget or critical time path, and may be lost altogether if purchase options expire, interest rates change, lenders become skittish, construction becomes more expensive, or the market for the proposed development changes. Real estate development is a risky business at best. It becomes even more risky if a dispute over development rights cannot be resolved quickly. The typical owner must work within a limited budget, and cannot devote unlimited time or resources to determining its development rights. For this reason, an expeditious judicial review procedure is essential for a property owner to effectively protect its rights from politically-inspired illegal decisions.

The District Court of Appeal's decision overthrows this simple and efficient remedy in favor of a complex and confusing scheme, the practical details of which must be ascertained by trial and error, since they are not discussed in the statute or the opinion.

First, the Court majority construed the statute to reconstitute the administrative proceeding as a preliminary "free form" proceeding that is nonfinal and unreviewable. This is absolutely contrary to the constitutional requirements imposed by this Court on local land use decisions in Educational Development Center, above, 541 So.2d 106, and Irvine, above, 495 So.2d 167,

requiring that administrative orders be based on a full record and detailed findings and reasons to support the decision.[7]

Second, the Court held that the landowner applicant must complete a second round of administrative review by filing a verified complaint before the same body (or bodies) that had already denied the application, and allow this body (bodies) thirty days to respond, under Section 163.3215(4), Florida Statutes. It is unclear whether the verified complaint is to be filed with the Planning Commission or the Board of County Commissioners, or both.[8]

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[7] Neither the statute nor the ordinance makes this proceeding "free form." Judge Kahn, writing separately in Emerald Acres, questioned whether the extensive multitiered review given to the applications by the Planning Department staff, the Planning Commission, and finally the Board of County Commissioners, could possibly be considered "free form." 17 F.L.W at 1324-25, n. 1. Indeed, under this Court's Irvine decision, above, 495 So.2d 167, approving dissenting opinion at 466 So.2d at 362, the County could not possibly have considered this to be a "free form" proceeding.

There is nothing in the record that would indicate that anyone thought the County's action was a preliminary "free form" proceeding. On administrative appeal required by the County ordinance, the Board of County Commissioners acted summarily because it considered the existing record and order adequate, and it had already decided the issue and did not need further advocacy. The District Court of Appeal majority simply invented the "free form" concept as a rationalization for the verified complaint procedure.

[8] Neither the County's argument nor the Court's opinion specified whether the verified complaint should have been directed to the Planning Commission's written order, or to the County's voice vote, or to some unspecified later action after the technical remand to the Planning Commission. The absence of any clear procedure further justifies Appellants' position that such procedure was never contemplated. Appellants should not have to gamble their right to relief from illegal action upon a novel procedure that obscures the point of entry to court, and allows the County to posture itself to oppose court review at any stage as either premature or belated. Under this uncertain procedure, the landowner must file a verified complaint and a de novo lawsuit

This procedure has no practical purpose whatsoever. The local government is supposed to have already made its record thorough evidentiary presentations before the planning staff and the Planning Commission as delegated decision maker. Moreover, the Planning Commission had already, in compliance with the requirements of due process and its own ordinance, issued an order that specifies the reasons for its action based on this record. The Board of County Commissioners reviewed the record and order by administrative appeal and found them to be sufficient to uphold the order. The subsequent verified complaint and optional response under Section 163.3215(4) are simply a waste of time and effort.

The District Court of Appeal majority ascribed the following purpose for Section 163.3215(4), Florida Statutes, in Parker I, 566 So.2d at 1317, and again in Emerald Acres, 17 FLW at 1323:

> The requirement of Section 163.3215(4) that a verified complaint be filed with the local government prior to instituting suit has the salutary effect of putting such governmental body on notice that it should be prepared to defend its action and will need to create a record to support that action.

Under the District Court's decision, once the landowner has strictly complied with these procedures, it is permitted to seek review of the decision in court, but only de novo action for injunctive or other relief is permitted.

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after every stage of the multitiered administrative process to assure preservation of its court remedy.

The ascribed rationale for the verified complaint procedure, to allow the County to perfect its administrative record, immediately vanishes, since the court in a de novo proceeding does not even review the record, and the County could seek to invent new reasons to justify its action. There is no reason to perfect a record between the parties unless review is based on the record alone.[9]

The owner-applicant must face a year or more delay in getting the de novo case to trial, while facing the additional legal expense of pretrial motion and discovery practice, re-engaging expert witnesses, and facing the prospect that the local authority will create new grounds for denying the application while the litigation is pending. This procedure contrasts sharply with the efficient appellate remedy of common law certiorari.

Assuming the owner prevails in the trial court, it then faces the prospect that the government will seek further judicial review by plenary appeal. Plenary appeal is much more comprehensive and time consuming than the limited review by appellate court writ of certiorari, and the government gets the benefit of the automatic stay which would not be available in a certiorari proceeding. Thus the owner may face substantial additional delay if the government pursues an appeal.

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[9] The true purpose of the verified complaint procedure is obviously to allow potential new (third) parties to present their arguments to the decision maker for consideration before being allowed to proceed in court. The decision maker and owner can modify the order to amicably resolve the third party challenge.

Thus the scheme created by the District Court of Appeal's ruling provides the opportunity for governments to make illegal land use decisions, insulated from judicial review because the remedy in the courts is impractical. The threat of delay alone will force the owner to compromise away legal rights that could have been efficiently enforced by the common law remedy. This scheme serves no legitimate purpose.

The statutory procedure applies only to issues involving the consistency of a development order with the comprehensive plan. Consistency will be the primary issue in most land use cases, since all development orders (including orders granting or denying applications for plats, permits, variances, exceptions, rezonings, and all other land development approvals) must be consistent with the plan. See Section 163.3194, Florida Statutes.

However, consistency is only one of the issues in land use cases, and the owner may also need to challenge the development order for lack of supporting evidence, or for denial of procedural due process, or for denial of other legal or constitutional rights that are independent of the comprehensive plan.

For example, if the County failed to specify which plan provisions it relied on for its decision, the case would present both a consistency issue and a procedural due process issue. If the County cited only to plan policies that were too vague and subjective to guide the exercise of administrative discretion, then substantive due process or equal protection claims would arise. If the plan policies were improperly applied because no competent

substantial evidence supported their application, then this issue would have to be raised. For all these issues, the development order is final and subject to appellate review by writ of certiorari, which must be filed within thirty days after the order is rendered.[10]

In cases involving mixed or unclear issues, would a single order will be final and reviewable for some issues, but not final and reviewable for other issues? Would landowners be forced to file multiple challenges to a single order, seeking immediate appellate review by certiorari on some issues, while pursuing a second round of administrative review as a prerequisite to de novo court proceedings on other issues?

If the First District majority's view in this case were the law, there would be widespread confusion as to the finality, reviewability, standard of review and the proper remedy for virtually all future land use decisions. This confusion will extend to the appellate courts, where a single development order will be reviewed by the certiorari standard for some issues and by plenary appeal for other issues.

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[10] See, e.g., Gregory v. City of Alachua, 553 So.2d 206, n. 4 at 208 (Fla. 1st DCA 1989) (Section 163.3215 does not supplant owner's common law certiorari remedy for procedural due process violations); City Comm'n v. Woodlawn Park Cemetery Co., 553 So.2d 1227 (Fla. 3d DCA 1989) (common law certiorari is proper remedy for arbitrary denial of constitutional right to use property); Educational Development Center v. Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989) (certiorari is proper remedy for review of decision unsupported by competent substantial evidence); Splash & Ski, Inc. v. Orange County, 596 So.2d 491 (Fla. 5th DCA 1992) (owner's common law certiorari remedy upheld without regard to nature of issue).

Land use authorities' use of procedural tactics to insulate illegal decisions from judicial review has been described as follows:

> The "final decision" concept is something of a cruel joke to anyone familiar with the practice of land use regulatory agencies. Those agencies generally make it a habit *never* to given anyone a "final decision" on what *will* be permitted.
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> Planning agencies rarely believe that they have *ever* given a "final," definitive statement that no use will ever be permitted. It is a rare land use regulator who doesn't say that, if the owner would only come back with a different plan or at a different time, the new plan would be evaluated on its merits and the result might be different. Agencies can thus be expected to argue that no case is ever "ripe," because no denial is ever truly "final."
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> ***
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> Nor should one expect any chorus of concern to be expressed by the regulators. They like this system just fine, thank you, and have been playing it like Heifetz on a Stradivarius. Delay -- particularly litigational delay -- plays into the regulators' hands. If what they want is no use, then delay is a means to that end, at least for a period of years. If they seek increased leverage so that they can obtain greater influence over the project than the law grants them, or if they think they can bargain from a stronger position to obtain additional concessions because of economic pressure on the property owner, delay is also a means to that end. It is the private citizens who suffer because of the operation of the judicial appetite for "ripeness." It is they who go bankrupt or into foreclosure when the passage of time creates an economic nightmare.

Berger, "'Ripeness' Test for Land Use Cases Needs Reform", Zoning and Planning Report, 57, 58-59 (Sept. 1988).

The Legislature never intended to create this legal quagmire in which property owners' meritorious claims are bogged down in

procedural issues and judicial relief is practically unavailable. The sole purpose for Section 163.3215 was to provide a procedure for third parties to intervene in land use proceedings to assure that requirements of the comprehensive plan are enforced for certain types of orders that materially alter the use or density or intensity of use. The statute was never intended to replace the owner's common law certiorari remedy.

TEXT OF SECTION 163.3215, FLORIDA STATUTES

The legislative purpose is unmistakable when the whole statute is analyzed. The caption to the statute indicates its limited purpose to confer "Standing to enforce local comprehensive plans through development orders." The owner already has unquestionable standing to challenge a denial order, and would have no need for a statute to confer or specify its standing rights. See Judge Kahn's separate opinion in Emerald Acres, 17 FLW at 1325.

Subsection (1) allows an aggrieved or adversely affected party to bring an action for injunctive or other relief:

(a) "to prevent such local government from taking action on a development order

(b) which materially alters the use or density or intensity of use ..."

(c) "[which action] is not consistent with the comprehensive plan...." (e.s.).

An owner's challenge to a denial order does not meet any of these three criteria. That is, the owner does not seek to "prevent action on a development order," since the denial order preserves the status quo and no further action is possible. Likewise, a

denial order does not "materially alter" anything with respect to the property. Owner-applicants' challenges to denial orders cannot possibly arise under this subsection.

Subsection (1) of the statute creates the only cause of action authorized by the statute, so all of the following subsections must be read with reference to subsection (1).

Subsection (2) defines "aggrieved or adversely affected party" to mean any person or local government which will suffer an adverse effect "to an interest protected or furthered by the local government comprehensive plan...." This statute obviously applies to a third party (such as another local government) which seeks to enforce an interest protected or furthered by the comprehensive plan. The owner who is already a party with a right of review by certiorari does not need or fall within this definition.

Paragraph (3)(a) is a bar provision that assures that development orders granted or applied for prior to specified dates are immune from suits under this section. This paragraph bars suits challenging the "approval or denial" of a development order, but this reference to denials does not change the limited purpose of the statute established in subsection (1). At most, this provision contemplates that an aggrieved or adversely affected third party may challenge a denial as inconsistent with the comprehensive plan. See, e.g., Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973) (citizens group challenge to denial of an application for rezoning that would have prohibited commercial development).

Paragraph (3)(b) provides that suit "under this section" is the sole action available to challenge the consistency of a development order with a comprehensive plan. Paragraph (3)(b) relates to actions under subsection (1) to prevent local government from taking action allowing development that materially alters the use or density or intensity of use. Paragraph (3)(b) simply means that persons who are granted standing under subsections (1) and (2) have no other remedy. Since subsection (1) does not apply to an owner, paragraph (3)(b) cannot apply.[11]

Subsections (4) and (6) of Section 163.3215 confirm that this remedy is only intended for collateral challenges by nonparties. Subsection (4) requires the proposed intervenor to file a verified complaint with the local government within thirty days after the action alleged to be inconsistent has been taken. The statute creates an exhaustion requirement for a nonparty who seeks to intervene after the order has been issued, and who must establish its standing to enforce the comprehensive plan and its grounds for relief. By contrast, the applicant is already a party whose position has been established by its application and participation in the administrative proceedings leading to the development order.

Subsection (6) deems the complaining party's or its attorney's signature to be a certification that the action "is not interposed for any improper purpose, such as to harass or cause unnecessary

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[11]Appellants in particular could not possibly be covered by paragraph (3)(b) since they did not even contend the order was inconsistent with the plan but rather that the plan was silent on density.

delay or for economic advantage .... (e.s.)" The word "interpose" means to interfere or intervene, or to step between parties at variance. VII Oxford English Dictionary at 1130 (2d ed. 1989). The applicant/landowner cannot "interpose" a complaint since it is an original party to the proceeding.

Moreover, the description of prohibited purposes in subsection (6) obviously cannot apply to the applicant/owner. For example, the applicant would not have any reason to delay the order that it is seeking, and it could never certify truthfully that its action did not seek an "economic advantage". As misconstrued by the lower court, subsection (6) would require the applicant or its attorney, as a prerequisite to challenging an illegal development order, to make a false certification that the action was not interposed for "economic advantage". A false certification exposes the signer to sanctions, including attorney's fees. If the applicant or its attorney must sign a false certificate and be subjected to sanctions in order to correct an illegal decision, this is an absurd and unconstitutional result.

The statute as a whole trades liberalized standing for nonparties to make specified consistency challenges in exchange for certainty to landowners and local governments that such challenges must be well founded and administratively lodged within 30 days and judicially brought within 90 days. The statute has nothing to do with direct appellate review by an applicant who has already presented his case to local government, and received staff review, a hearing, an order, and an administrative appeal. Since the

denial of the application in this case means that no action will occur, there is no occasion for any challenge to prevent local government from taking action on an order that would materially alter use or density of property based on inconsistency with the plan, which is the only cause of action under the statute.

HISTORY OF SECTION 163.3215, FLORIDA STATUTES

Section 163.3215 was enacted in response to this Court's decision in Citizens Growth Management Coalition v. City of West Palm Beach, 450 So.2d 204 (Fla. 1984), which held that third parties' standing to intervene to challenge zoning development orders as inconsistent with the comprehensive plan was not enlarged by the Local Comprehensive Planning Act of 1975, but continued to be governed by the common law rule of standing, requiring a showing that a legally recognizable right is adversely affected. Id. at 206-08.

The following year the Legislature enacted this statute as Section 16 of Ch. 85-55, Laws of Florida, to create a cause of action and define "aggrieved or adversely affected party" to include a person who "will suffer an adverse effect to an interest protected by the comprehensive plan, including ... [examples omitted]."

The purpose for the new statute was discussed in Southwest Ranches Homeowners Ass'n, Inc. v. County of Broward, 502 So.2d 931, 935 (Fla. 4th DCA 1987), review denied, 511 So.2d 999 (Fla. 1987):

> The supreme court has recently clarified the standing requirements for citizen's groups in cases like the one

> at bar. In Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, 450 So.2d 204 (Fla. 1984), the court held that "only those persons who already have a legally recognizable right which is adversely affected have standing to challenge a land use decision on the ground that it fails to conform with the comprehensive plan." Id. at 208. The court in Citizens Growth Management upheld the trial court's finding that the Coalition had failed to prove that it or any of its members met the test. Id.
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> * * *
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> In our view, the Southwest Ranches Homeowners Association has a more direct stake in this matter than would a group of concerned citizens and taxpayers with a general interest in preserving the environmental character of the area.
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> . . . a finding of standing here is in accord with the intent of the legislature as manifested by the recent addition of Section 163.3215, Florida Statutes (1985) to the statutory scheme. This section liberalizes standing requirements and demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action.

See also Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940, 944-45 (Fla. 5th DCA 1988) (dissent by Judge Sharp, in case where majority did not rule on statute), review dismissed, 537 So.2d 568 (Fla. 1988).

Other authorities confirm the limited purpose of Section 163.3215. See commentary in DeGrove and Stroud, New Developments and Future Trends in Local Government Comprehensive Planning, 17 Stetson L. Rev. 573, 595-97 (1988) (describing Section 163.3215 as one of the vehicles for challenges by "environmental groups" (p. 595), "citizen activism" (p. 597), and citizen "watchdogs" (pp. 597-98 and n. 131); and Arline et al, Local Government Plan

Consistency and Citizen Standing, 1 J. Land Use & Env. Law 127, 144-46 (1985) (anticipating enactment of statute based on ELMS II Committee Report recommendation for liberalized standing of nonparties to enforce comprehensive plan).

There was no public dissatisfaction with the owner/applicant's common law remedy, and the statute was never intended to displace this remedy. See the general statement of legislative intent in § 163.3161, Florida Statutes, which makes no reference to owners' remedies, because the Legislature understood that owners would continue to assert their traditional common law remedy.

APPLICABLE RULE OF CONSTRUCTION

If there is any uncertainty concerning the purpose of the statute, then it should be construed to preserve common law direct appellate review. Absent unequivocal language, the courts will not construe a statute to eliminate a common law remedy. See Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co., 498 So.2d 984 (Fla. 1st DCA 1986). This rule is particularly appropriate where the statutory remedy would be a very poor substitute for the common law remedy, as in this case.

CASE LAW APPLYING STATUTE

No other courts have held that Section 163.3215 applies to an owner-applicant. On the contrary, the continued availability of appellate review by common law certiorari to the denied landowner/applicant is confirmed by numerous decisions recognizing

the finality and reviewability of local land use administrative decisions by writ of certiorari long after enactment of § 163.3215.

A different panel of the First District, in Planning Commission v. Brooks, 579 So.2d 270 (Fla. 1st DCA 1991), specifically recognized certiorari as the owner's remedy even though a consistency issue was presented (as a defense by the government, as in this case). The court's recitation of the record shows that one of the reasons given for denying the owner's application for an exception to build a parking lot was that this proposed use would be inconsistent with the plan, which projected the property for residential use. Id. at 271. The Court held that the Planning Commission had failed to create an adequate record to justify its action for purposes of judicial review, and refused to set aside the trial court's writ of certiorari. The Brooks decision panel did not consider the Planning Commission's action to be "free form", and made no mention of § 163.3215 or the prior Parker I decision as creating any procedure for the Planning Commission to perfect its record. Thus Judges Nimmons and Kahn, and the judges in Brooks, do not recognize the statute as applicable to the owner. The majority below made no attempt to distinguish Brooks.

The Second District, in Manatee County v. Keuhnel, 542 So.2d 1356 (Fla. 2d DCA 1989), review denied, 548 So.2d 663 (Fla. 1989), held that the trial court had properly acted as an appellate court and granted the owner's petition for writ of certiorari. Id. at 1357-58. The opinion recites that although the planning staff

found the rezoning application to be consistent with the plan, the County denied the application, thus implying that a consistency issue was presented.

The Third District, in Treister v. City of Miami, 557 So.2d 1141 (Fla. 3d DCA 1989), upheld the Circuit Court's denial of certiorari for a rezoning applicant despite the presence of consistency issues.

The Fourth District, in Park of Commerce Assocs. v. City of Delray Beach, 17 F.L.W. D 2047 (Fla. 4th DCA Sept. 2, 1992) (en banc), ruled that common law certiorari is still the proper method for review of quasi-judicial action, without any differentiation of consistency versus other issues.

The Fifth District repeatedly, in Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988), review dismissed, 537 So.2d 568 (Fla. 1988); in St. John's County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989), review denied, 564 So.2d 488 (Fla. 1990); and in Snyder v. Board of County Commissioners, 595 So.2d 65 (Fla. 5th DCA 1991) (extensive scholarly opinion), held that the owner/applicant has the right to review by petition for writ of common law certiorari, even though issues of consistency with the plan were presented. In Splash & Ski, Inc. v. Orange County, 595 So.2d 491 (Fla 5th DCA 1992), the Court upheld the owner's right to common law certiorari without any differentiation as to the issues.

None of these decisions even mention the statute as being relevant, or considers the Parker I-Emerald Acres rationale to be worth discussing. See also cases cited at n. 10 on page 23 above.

CONCLUSION

The District Court of Appeal's construction of § 163.3215 is unsupported by the language of the statute itself, by its context and history, by the applicable rule of statutory construction, or by any other authority. The ruling creates delay, confusion and injustice in the enforcement of property rights, and allows illegal land use decisions to be protected from judicial review by an uncharted thicket of technical procedural pitfalls and dilatory bogs. There is no indication that the Legislature ever intended this statute to impair the landowner's right to efficient judicial review of illegal decisions by common law writ of certiorari.

II. IF SECTION 163.3215(4), FLORIDA STATUTES, APPLIED TO APPELLANTS AS OWNER-APPLICANTS, THEN THEY SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF THE STATUTE AND FURTHER COMPLIANCE WAS EXCUSED BY FUTILITY, WAIVER AND INADEQUACY OF THE PROCEDURE TO REMEDY THE COUNTY'S ILLEGAL ACTION. THEIR AMENDED COMPLAINT IS SUFFICIENT TO WITHSTAND THE COUNTY'S MOTION TO DISMISS.[12]

The purpose of this statute ascribed by the panel majority, to notify the County to prepare a defensible record, was satisfied when the Appellants' counsel fully informed the County Commission of Appellants' contentions before the it considered their application on administrative appeal. The Commission's statements

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[12] This question was argued in the lower courts and the Supreme Court has jurisdiction to determine it. Rule 9.040(a), Fla. R. App. P.

and actions showed it was fully aware of the Appellants' position and knew the issue would have to be resolved in the courts.

The County has never contended that it lacked the information it needed to produce a record and final decision on Appellants' application, or that the record and final order already prepared were not adequate. The County was not prejudiced in any way by the absence of a verified complaint.[13]

Furthermore, any arguable deficiency in the Appellants' counsel's original letter was corrected by a subsequent resubmission containing a verification. The County never indicated any intention of reconsidering its position. The verification relates back to the original, as is universally permitted where no prejudice is shown.[14]

Appellants' Amended Complaint in the Circuit Court alleged their substantial compliance and the futility of further compliance

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[13] Verification would not be needed to satisfy the notification purpose ascribed by the District Court of Appeal anyway. The only possible purpose for a verification is to deter intervening objectors from pursuing baseless challenges, as explained in subsection (6) of the statute. Verification is not needed in this case, because Appellants have no purpose to harass or delay their own project.

Moreover, under subsection (6), the signature of an attorney constitutes a certification that he or she has determined after reasonable inquiry that the complaint is not made for an improper purpose such as delay. Thus Appellants' counsel's signature served any purpose that verification might have served.

[14] In any circumstance where a verified pleading is required, the absence of a verification is a curable defect, and an amendment supplying the verification relates back to the original pleading. 61A Am. Jur. 2d Pleading § 319 n.8 and § 348; 40 Fla. Jur. 2d Pleadings §§ 21, 211 and 218; Zbar v. Clarke, 278 So.2d 292 (Fla. 2d DCA 1973).

with the statute, the County's conduct effectively waiving further compliance, and the inadequacy of the verified complaint procedure to remedy the County's deliberate illegal action. These allegations are presumed correct for purposes of the County's motion to dismiss, and are amply supported by the administrative record in the appendix to Appellants' Amended Complaint. The only question is whether these allegations suffice to withstand the County's motion to dismiss.

A. Appellants' substantial compliance with the requirements of § 163.3215(4) satisfies the statute's requirements.

Appellants' submission of their counsel's letter setting forth their position met the ascribed purpose of the statute. In similar circumstances, this Court has ruled that substantial compliance is sufficient. Rabinowitz v. Town of Bay Harbor Islands, 178 So.2d 9, 12 (Fla. 1965) (substantial compliance with notice of claim law is sufficient in circumstances where recipient had actual knowledge of the claim, and the claimant reasonably believed further compliance would not have made any difference). See also Josephson v. Autrey, 96 So.2d 784 (Fla. 1957), where the plaintiff-objector filed a "complaint" in the court instead of a verified petition as required by the applicable statute, former § 176.16, Florida Statutes. The Court held that the pleading substantially complied with the statute, and proceeded to decide the merits. Id. at 787. The Court reasoned that the proceeding was de novo in substance so that the trial court could always look beyond the record if needed. Id. at 787.

Since the District Court of Appeal determined in Emerald Acres, 17 FLW at 1323, that proceedings under § 163.3215 are likewise de novo, the same reasoning would compel the Court to allow substantial compliance in this case.

B. Compliance with administrative preconditions to judicial enforcement of rights is excused where it is apparent that compliance would be futile.

Compliance with administrative procedures as a condition precedent to judicial review is always excused if compliance would be futile. This principle is well established in the judicial review of local administrative land use decisions. See, e.g., City of Holly Hill v. State ex rel. Gem Enterprises, Inc., 132 So. 2d 29, 31 (Fla. 1st DCA 1961):

> The law does not require one to pursue administrative remedies before resorting to the courts where such remedy would be of no avail.

Accord, see Metropolitan Dade County v. Fountainbleau Gas & Wash, Inc., 570 So.2d 1006, 1007 (Fla. 3d DCA 1990):

> At the outset we observe that the county commission has entertained this matter and determined it would devote all its resources to stopping the gas station's construction. Therefore, the futility of requiring any further administrative action is apparent.

See also Bruce v. City of Deerfield Beach, 423 So.2d 404, n.2 at 406 (Fla. 4th DCA 1983):

> The doctrine of exhaustion of administrative remedies is subject to the broad limitation that no person is required to take a step which is futile.

and City of Miami Beach v. Sunset Islands, 216 So.2d 509, 511 (Fla. 3d DCA 1968):

> 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.

Here the County's statements and actions demonstrated that a second round of administrative review would be useless. The proceedings before the County Commission made it clear that any further proceedings were limited to instructions from the Planning Commission as to how much of their legal rights Plaintiffs would be required to surrender. Where zoning officials engage in dilatory conduct offering the owner a protracted series of meetings, appearances or filings before administrative authorities without any reasonable prospect for relief, the owner is fully justified in proceeding to court to avoid the further expense and delay that such proceedings entail.

Remand proceedings before the Planning Commission were likewise futile. Once the County decided the issue, Appellants were not required to pursue unproductive proceedings before the Planning Commission, an inferior administrative body that could not overrule the County Commission and grant the application even if it were inclined to do so, which it obviously was not. See Halifax Area County v. City of Daytona Beach, 385 So.2d 184, 186 (Fla. 5th DCA 1980).

The County argued below that § 163.3215(4), Florida Statutes, creates a "mandatory precondition to litigation", rather than an

"administrative remedy" to be exhausted. This argument fails because exhaustion of administrative remedies is a mandatory precondition to litigation, except where exhaustion is futile, waived or inadequate. Moreover, the ascribed purpose of § 163.3215(4) is the same as for exhaustion: to allow the County a final chance to consider its decision in light of the probability of judicial review. There is no logical reason why a notice requirement should be strictly enforced in situations where a full blown administrative remedy would clearly be excused.

C. The County's knowledge of the Appellants' claim and its conduct indicating that further proceedings would be futile constitute waiver or estoppel to demand further compliance.

Statutory notice of claim requirements are satisfied when the recipient has actual knowledge of the basis for the claim, and its statements and conduct lead the claimant to believe that further notice will be futile. In such cases technical requirements for a written or verified notice are deemed waived. See, e.g., Rabinowitz v. Town of Bay Harbor Islands, 178 So.2d 9, 12-13 (Fla. 1965):

> We have, however, decided that the claim statutes should not be burdened with strained constructions that would hamper the presentation of just claims in the presence of substantial compliance with the statute. Magee v. City of Jacksonville, Fla., 87 So.2d 589, 62 A.L.R.2d 334.
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> When responsible agents or officials of a city have actual knowledge of the occurrence which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then

> the filing of such a notice may be said to be waived. If the claimant, as a result of such municipal conduct, in good faith fails to act, or acts thereon to his disadvantage, then an estoppel against the requirement of the notice may be said to arise. (e.s.)

Accord, Finnerman v. City of Lake Worth, 152 So.2d 501 (Fla. 2d DCA 1963), dealing specifically with a statutory requirement that a complaint must be verified. There the court held that city officials are estopped to assert even this express precondition if the officials have actual knowledge of the claim and fail to object to lack of verification until after suit is filed. Both Rabinowitz and Finnerman cite numerous prior cases.

Along the same lines, see City of Jacksonville v. Hinson, 202 So.2d 806 (Fla. 1st DCA 1967), cert. denied, 207 So.2d 688 (Fla. 1967) (the city's knowledge and investigation of the claim revealed the same information that would have been revealed by the required notice, and its conduct led the claimant to believe no formal notice was necessary, creating a waiver).

Section 163.3215(4), Florida Statutes, as construed by the District Court of Appeal, is likewise a notice of claim statute. The Rabinowitz rule concerning waiver or estoppel should apply here. The County's full knowledge of the Appellants' position, and its response showing that it was already committed to litigating the matter in the Emerald Acres case, were sufficient to waive or estop any demand for further administrative submissions.

D. Substantial compliance with a notice of claim law is sufficient in cases where the action challenged is manifestly illegal.

Where a challenge to government action is based upon a complete lack of any colorable legal authority, the courts have excused the party bringing the challenge from pursuing administrative proceedings that would not provide any effective relief from the illegal action. See State v. Falls Chase Special Taxing Dist., 424 So.2d 787, 794-97 (Fla. 1st DCA 1983), review denied, 436 So.2d 98 (Fla. 1983). The Third District adopted a similar rule in City of Miami Beach v. Sunset Islands, above, 216 So.2d at 511, in saying that exhaustion was excused where there was no administrative discretion to be exercised.

In this case the County's denial of the subdivision plat was manifestly illegal under existing law, as Appellants alleged and as the Circuit Court initially ruled. Appellants were entitled to immediate judicial review of the illegal decision.

The County's strategic purpose in invoking the notice of claim law was to force a remand or renewed administrative proceedings, so that final administrative action could be delayed until after a new comprehensive plan was adopted. This new plan would give the County an arguable ground to defend its action, even though the action was illegal under existing law.[15] Where administrative

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[15] The County could not apply the new plan retroactively to deny Plaintiffs' application. See, e.g., §§ 163.3194(1)(b) and 163.3197, Florida Statutes (1989); Gardens Country Club v. Palm Beach County, 590 So.2d 488 (Fla. 4th DCA 1992); City of Margate v. Amoco Oil Co., 546 So.2d 1091 (Fla. 4th DCA 1989); Dade County v. Jason, 278 So.2d 311 (Fla. 3d DCA 1973) (collecting cases

reconsideration would be inadequate to cure illegal action, pursuit of administrative remedies is not required.

E. The novelty and uncertainty of the statutory procedure are additional factors justifying the application of a substantial compliance standard in this case.

A court should be especially disposed to excuse noncompliance with preconditions in a situation where the statute creating those preconditions is ambiguous and is applied for the first time. See Agner v. Smith, 167 So.2d 86, 91 (Fla. 1st DCA 1961) (argument on futility of pursuing an administrative precondition to litigation was especially compelling because case was one of first impression construing ambiguous statute).

F. The County's citations of authority are inapposite and distinguishable.

The authorities cited by the County in the lower courts relate to other statutes, where notice is required to give the recipient a chance to respond to investigate a claim that it is not previously aware of. These cases do not purport to address the present situation where substantial compliance with a notice requirement has been made, and further compliance is futile, waived or inadequate (or all three, as in this case).

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expressing same principle before statute enacted); Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983) (expressing same principle as a due process requirement). These authorities were recognized in the Circuit Court's initial decision on the merits. The County's strategy was therefore to prolong the administrative process until the new plan could be adopted.

In Ferry-Morse Seed Co. v. Hitchcock, 426 So.2d 958 (Fla. 1983), the court construed a notice requirement in the Florida Seed Law. The Court pointed out that (a) the defendant did not act in any way to induce noncompliance, and (b) the defendant did not have knowledge of the claim that was "substantially equivalent" to the information required by the notice law. Id. at 962. Thus the Court carefully distinguished the case from the circumstances present here, where substantial compliance is sufficient.

The Court was particularly concerned that the purpose for the notice under the Seed Law was to give defendant a chance to promptly investigate a claim for defective seeds, based on perishable physical evidence. However, the court did not disturb the Rabinowitz rule in cases such as this one where the County was fully aware of the claim when it acted. Id. at 962-63.

In the libel statute cases cited by the County, Gannett-Florida v. Montesano, 308 So.2d 599 (Fla. 1st DCA 1975), and Orlando Sports Stadium v. Sentinel Star Co., 316 So.2d 607 (Fla. 1975), the claimant did not give the defendant effective notice because it failed to identify the specific statement deemed libelous. The purpose for the notice requirement was to enable the defendant to investigate the specific statement deemed libelous, rather than the entire news article in which the statement appeared, and to modify or retract only that statement if appropriate. A notice containing the entire article was not substantial compliance. More important, no futility, waiver or inadequacy claim was presented.

The cases applying the mechanics' lien statute, such as Moore v. Crum, 68 So.2d 379 (Fla. 1953), and Stresscon v. Madiedo, 581 So.2d 158 (Fla. 1991), require strict compliance with the verified notice of claim procedure in order to protect the property and its owner from unjustified lien claims. However, these cases likewise did not consider any futility, waiver or inadequacy argument as Appellants present here. Even under the mechanics' lien law, verification is excused if the owner's conduct waives it. See discussion of mechanics' lien cases in Ingersoll v. Hoffman, 589 So.2d 223, 224-25 (Fla. 1991).

Section 163.3215(4) may serve a similar purpose in those cases where a third party intervenor collaterally challenges an owner's rights under a development order so as to tie up the development. In such cases the owner needs both notice and the protection of a verified pleading to reduce the opportunity for harassment or extortion, as specified in Section 163.3215(6). However, there is no need for such protection in a case where the property owner is seeking to enforce its own rights against an illegal decision. Since the only ascribed purpose for this procedure is notice to the County, and any conceivable purpose served by verification is completely inapplicable, the County's analogy to the mechanics' lien law is inappropriate in this case.

The District Court of Appeal did not analogize to any of these decisions applying other statutes to support its decision. However, the Court did cite Williams v. Campagnulo, 588 So.2d 982 (Fla. 1991), which discussed the notice of claim procedure in the

medical malpractice statute. It is clear, however, that this notice of claim requirement is also excused upon a showing of estoppel or waiver. Ingersoll, above, 589 So.2d at 224. Neither Williams nor any other cases cited holds that substantial compliance coupled with futility, waiver or inadequacy of further compliance fails to satisfy a statutory notice requirement.[16]

Even the Parker I decision does not support the County's position. In Parker I, the Court on rehearing granted Appellants leave to amend their pleading. The Court did not foreclose any theory of avoidance that might be plead. The Court must have intended that if Appellants could plead justifiable avoidance of the statutory condition, such pleading would be sufficient and the case would be decided on the merits. Thus Parker I supports Appellants' contentions that their amended pleading is adequate.

Conclusion

It is universally held in Florida and elsewhere that statutory notice of claim requirements are excused upon a showing of substantial compliance coupled with futility, waiver or estoppel, or inadequacy of proceedings. The authorities are summarized in 1 Am. Jur. 2d Actions §§ 81 and 85 as follows:

> ... statutes requiring the giving of notice within a specified time after accrual of the cause of action as a

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[16] The Supreme Court's opinion in Ingersoll approvingly cited Solimando v. Int'l Med. Centers, 544 So.2d 1031 (Fla. 2d DCA 1989), review denied, 549 So.2d 1013 (Fla. 1989), in which the Second District cited numerous authorities for the proposition that statutory notice of claim procedures can be excused by conduct demonstrating futility, waiver or estoppel, including Rabinowitz v. Town of Bay Harbor Islands, above, 178 So.2d at 12.

> condition precedent to the right to maintain an action to enforce the right, generally are construed liberally in favor of plaintiff or claimant, and a substantial, rather than a technical, compliance with the requirements of notice ordinarily will be considered sufficient; ...
>
> ***
>
> ... the necessity of making an actual demand before commencing suit is obviated where it is shown that a demand would be useless or unavailing, as where the conduct of the defendant plainly demonstrates an intention to appropriate the property or money demanded or where by word or conduct the defendant has denied the plaintiff's right, or where the person on whom such demand should be made has no power to redress the wrong or is unable to perform. Demand is not necessary when it is clear that it would be refused. (e.s.)

The decision below is contrary to all of these authorities and has no foundation in the statute. If the statute applies to this case at all, Appellants should still be allowed to prove that they substantially complied and that further compliance was excused by futility, waiver or inadequacy, and proceed to final judgment on the merits.

CONCLUSION

This Court should answer the certified question in the affirmative, reverse the decision below ("Parker II"); disapprove the "Parker I" decision, 566 So.2d 1315; clarify that Appellants are entitled to review of the County's order by common law writ of certiorari without regard to Section 163.3215, Florida Statutes; and remand the case for a decision on the merits under state law.

RESPECTFULLY SUBMITTED this 15 day of September 1992.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the counsel listed below, by United States Mail/hand delivery/facsimile transmission, this 15 day of September 1992.

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