IN THE SUPREME COURT OF FLORIDA

CITY OF MELBOURNE, a Florida municipal corporation, Petitioner, v. JOSEPH ALBERT PUMA, Respondent.	)	Case No. 81-652

AMICUS CURIAE
FLORIDA LEAGUE OF CITIES, INC.
CORRECTED BRIEF IN SUPPORT OF PETITIONER
CITY OF MELBOURNE, A FLORIDA
MUNICIPAL CORPORATION

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STATEMENT OF THE CASE

Amicus, FLORIDA LEAGUE OF CITIES, INC. adopts the Statement of Case as it appears in the Initial Brief of Petitioner, CITY OF MELBOURNE. Hereinafter, Amicus, FLORIDA LEAGUE OF CITIES, INC., shall be referred to as "Amicus League" and the CITY OF MELBOURNE shall hereinafter be referred to as "City."

STATEMENT OF THE FACTS

Amicus League adopts the Statement of the Facts as it appears in the Initial Brief of City.

SUMMARY OF ARGUMENT

The issue now presented to this Court in City of Melbourne v. Puma, 616 So. 2d 190, (Fla. 5th DCA 1993), is whether the adoption of a local government comprehensive plan amendment pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes (1991), as amended by chapter 92-129 and chapter 93-206, Laws of Florida (hereinafter the Growth Management Act) is a quasi-judicial action based on the Fifth District Court of Appeal's decision in Snyder v. Board of County Commissioners of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991) juris. accepted, 605 So. 2d 1262 (Fla. 1992). At risk, in Puma as in Snyder, is the fundamental relationship between local government and its people after enactment of the Growth Management Act.

Amicus League believes that the Florida Legislature intended the local government comprehensive plan amendment process as well as its related challenges, to be separate and distinct causes of action from challenges to denial of rezoning requests. Common characteristics such as the legislative nature of both proceedings and application of the fairly debatable standard upon review do not merge these actions.

It is without question that the integration of principles of planning law and traditional zoning law has caused confusion in the courts and among practitioners. Amicus League believes this Court can clarify the confusion in Puma. This Court should identify the fundamental nature of an amendment to a local government

comprehensive plan as a legislative act by local government and thereby preserve the deferential review to which it is entitled. Amicus League believes that such a holding is consistent with legislative intent surrounding the Growth Management Act.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN CITY OF MELBOURNE v. JOSEPH ALBERT PUMA, 616 So. 2d 190 (Fla. 5th DCA 1993), WHEN IT AFFIRMED THE TRIAL COURT'S FINAL JUDGEMENT, AS AMENDED, ON THE AUTHORITY OF SNYDER V. BOARD OF COUNTY COMMISSIONERS, 595 So. 2d 65 (Fla. 5th DCA 1991), juris. accepted, 605 So. 2d 1262 (Fla. 1992).

What is Puma? Puma is another example of the judiciary's continuing struggle to integrate local government compliance with the Local Government Comprehensive Planning and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes (1991), as amended by Chapter 92-129 and Chapter 93-206 (hereinafter referred to as the Growth Management Act) with traditional zoning law. Amicus League asserts the Fifth District Court of Appeal erred in Puma when it affirmed the trial court's Final Judgment, as amended, on the authority of Snyder.[1]

In Snyder, the Fifth District Court of Appeal held all governmental action, regardless of form, taken subsequent to adoption of a local government comprehensive plan, are no longer local "legislative action requiring judicial deferential review as to reasonableness under the powers clause of the state constitution (Art. II, § 3, Fla. Const.) and the separation of powers doctrine of the United States Constitution." Synder, 605 So. 2d at 80. From this premise, the Fifth District Court of Appeal drew several

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[1]The Fifth District Court of Appeal also cited ABG Real Estate Development Company of Florida, Inc. v. St. Johns County, 608 So. 2d 59 (Fla. 5th DCA 1992) cause dism., 613 So. 2d 8 (Fla. 1993) as supplemental authority. Amicus League also believes that ABG Real Estate Development is unpersuasive authority since the challenge raised in that case is separate and distinct from the challenge raised in Puma.

additional conclusions in Snyder, which Amicus League and others argued were erroneous to this Court.[2]

For example, the Fifth District Court of Appeal also held in Snyder that the "fairly debatable" standard of review was not the correct standard of judicial review when the decision involves application of a legislative rule of law to a particular parcel of property. Id. at 79-80. The Court indicated a local government's decision to deny a rezoning application must be accompanied by specific reasons to support the denial. Id. at 81. These reasons must be made on the basis of findings of fact and a record sufficient for judicial review. Id. Moreover, the Fifth District Court of Appeal held in Snyder that a landowner is presumptively entitled to use his property in the manner requested unless the opposing government can assert and prove by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive use. Id.

Amicus League believes Snyder to be contrary to existing land use law concerning local legislative land use policy decisions. By affirming Puma on the authority of Snyder, the Fifth District Court of Appeal has ruled that the same holdings are equally applicable in a challenge to a local government comprehensive plan amendment. Amicus League strongly disagreed with the Fifth District Court of

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[2]Other Amici appearing before this Court in Snyder in support of the position of Petitioner, the Brevard County Board of County Commissioners included Broward County, Hillsborough County, Florida Association of County Attorneys, Space Coast League of Cities, City of Melbourne, Town of Indialantic, Florida Department of Community Affairs, Osceola County, Florida Attorney General, and Florida Association of Counties.

Appeal's decision in Snyder and now equally strongly disagrees with the appellate court's decision in Puma for the reasons discussed below.

A. Puma Erroneously Abrogates Common Law Principles of Local Government Home Rule and Zoning.

In order to reach its holdings in Snyder, the Fifth District Court of Appeal concluded in Snyder and later in Puma that adoption of a local government comprehensive plan pursuant to the Growth Management Act, somehow changed the fundamental responsibility of local government to legislate local land use policy when a single parcel of land is involved. Amicus League submits that this underlying premise is erroneous since there is evidence that the Florida Legislature enacted the Growth Management Act with a full understanding of existing zoning law and home rule principles. There is no evidence that the Legislature intended to change these principles or the nature of a proceeding associated with either body of law. The Legislature indicated in section 163.3161(8), Florida Statutes (1991), that enactment of the Growth Management Act was not intended to limit or restrict local government home rule powers. That section provides:

> It is the intent of the Legislature that the repeal of ss. 163.160 through 163.315 by s. 19 of chapter 85-55, Laws of Florida, shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land. It is, further, the intent of the Legislature to reconfirm that ss. 163.3161 through 163.3215 have provided and do provide the necessary

> statutory direction and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers, duties, and responsibilities.

Thus, it appears that the Florida Legislature acknowledged the distinct nature of local government home rule, existing zoning law, and planning principles when it enacted the Growth Management Act. Amicus League reminds this Court that in Ellis v. Brown, 77 So. 2d 845, 847 (Fla. 1955), this Court stated:

> "Further, as a rule of exposition, statutes are to be construed in reference to the underlying principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the parliament that design, it is naturally said they would have expressed it." Potters's Dwar.St. 185.

Applying the abrogation doctrine to the instant case, it appears that by relying on Snyder as authority to review all local government action subsequent to enactment of a local government comprehensive plan, the Fifth District Court of Appeal in Puma, as in Snyder erroneously abrogated common law principles of home rule and zoning law.

B. Local Government Comprehensive Plan Amendments are Not Rezoning Requests.

Amicus League submits the Fifth District Court of Appeal erred in Puma since it erroneously believed judicial review of a local

government comprehensive plan amendment was identical to review of a rezoning action. Because the Puma court viewed these governmental actions as analogous, it affirmed Puma based on Synder. In essence, the Fifth District Court of Appeal merged each distinct governmental action and applicable law.

Amicus League submits that actions to amend a local government comprehensive plan and requests to rezone land are not identical governmental actions although both actions occur subsequent to a local government's original enactment of a local government comprehensive plan. Because Snyder was a challenge to denial of a rezoning request and Puma is not a rezoning challenge, Snyder should not be followed in Puma.

A challenge to a local government comprehensive plan amendment is a separate and distinct cause of action from a challenge to denial of a rezoning request despite several common characteristics. Amicus League believes the circuit court and the Fifth District Court of Appeal erred when they viewed local government comprehensive plan amendments and rezoning requests as identical actions due to these similarities, but failed to recognize the separateness of each challenge and governmental function served.

1. Local Government Comprehensive Plan Amendments and Rezoning Actions Remain Separate and Distinct Legislative Actions by a Local Government Regarding Local Land Use Policy.

a. Zoning Law. Zoning has historically been recognized as a legitimate exercise of police power to protect the public from noxious uses of land. City of Miami Beach v. Texas

Co., 194 So. 368 (Fla. 1940); Yocum v. Feld, 176 So. 753 (Fla. 1937); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed 303 (1926). A government may regulate the use of land by zoning as long as the regulation is a proper use of the police power and does not deny a landowner all reasonable use of the property. A proper police power regulation must further a public purpose and may not be arbitrary or unreasonable. City of Miami Beach v. Lachman, 71 So. 2d 148 (Fla. 1953), appeal dism., 348 U.S. 906 (1955).

When developing their original zoning codes, some local governments designated districts as general use zones since the appropriate public purpose to be achieved was not readily visible at the time of adoption of the zoning ordinance. As growth and change occurred, the local government changed the general permitted use of a parcel by ordinance in a rezoning action.[3] Schauer v. City of Miami Beach, 112 So. 2d 838 (1959); Stainger v. Jacksonville Expressway Authority, 182 So. 2d 483 (Fla. 1st DCA 1966). Amicus League argued to this Court in Snyder that a rezoning is simply a newly enacted ordinance to amend an existing zoning code in order to change the legislated use of a parcel of land. Therefore, a rezoning is a valid exercise of the police powers if it furthers the public health, safety and welfare according to the "fairly debateable" standard of review. Schauer; Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla.

[3]As early as Euclid, the U.S. Supreme Court acknowledged the fact that designated zoning uses in developing municipalities were subject to change. Euclid, 71 L.Ed. at 310-12.

1983); 8 McQuillian, MUNICIPAL CORPORATIONS, Zoning §25.93 (1991).

b. Planning Law. In addition to the evolving zoning law, modern local government comprehensive planning legislation first appeared in Florida around 1970.[4] Early efforts to legislate local government comprehensive planning simply encouraged local governments to plan. However, as early as 1978, in City of Gainesville v. Cone, 365 So. 2d 737, 739 (Fla. 1st DCA 1978), the First District Court of Appeal acknowledged the difference between planning and zoning. The First District Court of Appeal stated:

> The adoption of the Comprehensive Development Plan did not change the zoning or land use regulations of a single parcel of property in the City. The existing zoning categories remained in full force and effect and still remain in full force and effect. It was not the intention of the Comprehensive Development Plan nor that of the City Commission which adopted it to place any of its suggestions in force. They were to serve merely as a guide for future decisions relating to rezoning petitions and growth and development of the City.

Other Florida courts also recognized the fact that enactment of planning legislation did not change existing zoning law in the absence of evidence of a contrary legislative intent. For instance, in City of Jacksonville v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984), rev. denied, 469 So. 2d 749 (Fla. 1985), the court,

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[4]In 1969, the Legislature enacted the Florida Interlocal Cooperation Act of 1969. Section 163.01, Florida Statutes (1991). In 1975, the Legislature enacted the Local Government Comprehensive Planning Act of 1975, Sections 163.3161-.3211, Florida Statutes (1975).

when reviewing the denial of a rezoning, held that although the Local Government Comprehensive Planning Act of 1975 mandates that a city's decision to rezone a parcel of land must be consistent with its local land use plan, the plan is not a proper basis to reverse the decision of a zoning authority. The court explained that the City of Jacksonville comprehensive plan was intended to be a general guideline and rough timetable for community growth and does not simultaneously establish immediate minimum limits on zoning. Grubbs at 162-3. City of Gainesville v. Hope, 377 So. 2d 736 (Fla. 1st DCA 1979).

In 1985, the Florida Legislature enacted the Growth Management Act as planning legislation to guide future growth. The primary difference between the 1985 Growth Management Act and the 1975 planning legislation is that the 1985 Growth Management Act contained provisions to sanction local governments for failure to comply with its mandates. The 1975 legislation simply encouraged local government planning efforts.

The Third District Court of Appeal in Machado v. Musgrove, 519 So. 2d 629, 631-632 (Fla. 3rd DCA 1987), rev. denied, 629 So. 2d 693 and 629 So. 2d 694 (Fla. 1988), stated "[a] local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. [citations omitted.] The plan is likened to a constitution for all future development within the governmental boundary."

Moreover, the Growth Management Act now authorized a cause of

action based on planning principles referred to as a "consistency challenge" in section 163.3215, Florida Statutes. In addition, the Growth Management Act incorporated broad citizen standing provisions in order to insure public participation in the process in section 163.3181, Florida Statutes (1991). The Legislature also included provisions concerning future amendments to the original local government comprehensive plans in the 1985 Growth Management Act. Sections 163.3184, .3187, .3189, and .3181, Florida Statutes, (1991), as amended. It appears the Legislature recognized that in the future changes to the original local government comprehensive plan would be needed to incorporate needed changes to local land use policy as a community grew. Amicus League asserts that an amendment to a local government comprehensive plan is nothing more than a newly enacted ordinance to amend the existing local government comprehensive plan.

Following enactment of the Growth Management Act, several Florida courts continued to acknowledge the distinct nature of zoning and planning law. In Machado at 631, the Third District Court of Appeal stated "[l]and use planning and zoning are different exercises of sovereign power, [citations omitted] therefore, a proper analysis, for review purposes, requires that they be considered separately.[5]" Other appellate courts since

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[5]Amicus League strongly disagrees with the Machado court when it held that the deferential fairly debatable standard should not be applied to consistency challenges between development orders and the local government comprehensive plan due to the distinct nature of planning and zoning. Instead, Amicus League believes that since the Legislature failed to identify a standard of review in these challenges, the fairly debatable standard should be applied based

Machado have likewise acknowledged the distinct function of planning and zoning. Lee County v. Sunbelt Equities II Ltd. Part., 18 Fla. L. Weekly D1260, 1263 (Fla. 2d DCA 1993).

The fact that two cause of actions are separate and distinct does not prohibit the actions from sharing similar characteristics. In summary, although the end result of a local government comprehensive plan amendment and subsequent rezoning has the ultimate effect of legislatively changing the allowable use of a parcel of land after enactment of the original plan, each action retains its separateness and fulfills a different governmental objective.

2. Legislative Acts Are Enacted by Ordinance.

Moreover, actions to rezone land and to adopt local government comprehensive plan amendments are accomplished by enactment of an ordinance. Section 166.041(3)(c), Florida Statutes (1991), prescribes minimum statutory notice and public hearing requirements for local governments to follow when approving rezoning requests by ordinances.[6] Sections 163.3184, .3187, .3189, and .3181 prescribe minimum statutory notice and public hearing requirements for local governments to follow when adopting an amendment to their local

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on common law home rule principles. This Court did not review Machado or subsequent related cases.

[6]In Attorney General Opinion 90-18, the Attorney General opined that any amendment to the substantive provisions or general text of a zoning ordinance, which has the effect of changing or altering existing uses or restrictions or existing regulations of land or permissible activities thereon, is a type of rezoning which requires the notice requirements set forth in section 166.041(3)(c).

government comprehensive plan by ordinance.

Amicus League submits the statutory requirements illustrate the legislative nature of rezoning actions and proposed local government comprehensive plan amendments in view of the notice provisions and requisite public hearings. Some of the recent confusion concerning the nature of rezonings and local government comprehensive plan amendments may be due to the fact that cities can supplement the minimum procedures for adoption of ordinances identified in section 166.041, Florida Statutes (1991), with more stringent procedures.[7] There is little debate that ordinances can only be enacted by a local legislative body. A local government cannot delegate its legislative responsibilities since these obligations are inherent in its sovereign nature.[8]

Section 166.041(1)(a), Florida Statutes (1991) defines an ordinance as "an official legislative action of a governing body which action is a regulation of a general and permanent nature and enforceable as a local law." In the instant case, Amicus League submits an adopted local government comprehensive plan amendment

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[7] In Attorney General Opinion 81-32, the Attorney General opined that section 166.041, Florida Statutes (1979) establishes minimum reading requirements for the adoption of an ordinance. The opinion states "[a] municipality may specify, by an ordinance or charter amendment adopted subsequent to the enactment of Section 166.041, additional or more stringent requirements for the adoption or enactment of ordinances or prescribe procedures in greater detail than are contained in section 166.041(3)(a)." See also, Bubb v. Barber, 295 So. 2d 701 (Fla. 2d DCA 1974).

[8] Amicus League acknowledges that some fact finding responsibilities may be delegated with adequate guidelines to other administrative bodies such as a Board of Zoning Appeals or a Code Enforcement Board.

will impact the entire community and is intended to be of a permanent nature. To reason otherwise, would necessitate comparison of a local government comprehensive plan to a detailed zoning map rather than a planning guide for future growth. Machado.

In summary, even in instances where local governments create other boards or bodies to review local government comprehensive plans, amendments, or rezonings, ultimate approval by ordinance rests with the local governing body acting in its legislative capacity. Thus, it is difficult to accept the Snyder and Puma courts rationale that all local government action subsequent to adoption of a local government comprehensive plan are not legislative in nature since these actions are ultimately codified by ordinance even when some fact finding responsibilities may be delegated to advisory boards.

3. Local Government Comprehensive Plan Amendments and Rezonings are Both Legislative Not Quasi-Judicial in Nature.

Amicus League acknowledges that there are other land use actions that local governments have adopted to implement local land use policy such as variances and special exceptions which are quasi-judicial in nature. Each of these actions fulfills a separate governmental function.

For example, approval of a variance request allows a property owner to use the property in a manner prohibited by the ordinance. Town of Indialantic v. Nance, 485 So. 2d 1318 (Fla. 5th DCA 1986), rev. denied 494 So. 2d 1152 (Fla. 1986). A special exception allows a property owner to use his property according to a use

expressly permitted by a zoning ordinance. Irvine v. Duval County Planning Commission, 504 So. 2d 1265 (Fla. 4th DCA 1991). Although these actions, like rezonings and local government comprehensive plan amendments, have the ultimate effect of changing the allowable use on a parcel of land, as stated above each action fulfills a separate and distinct objective.

Variances and special exceptions have both been viewed by reviewing courts as quasi-judicial in nature. Amicus League notes that although each action is quasi-judicial in nature, Florida courts have not allowed this similarity to cause these actions to merge since each action accomplishes a different purpose in the development of local land use policy. Likewise, Amicus League believes this Court should not view rezonings and local government comprehensive plan amendments, as identical acts, simply because both have the ultimate effect of changing the permitted use of land and both are legislative in nature.

Assuming arguendo, that this Court believes that actions to rezone local government comprehensive plan amendments are not separate and distinct actions and that local government comprehensive plan amendments should be viewed as rezonings, Amicus League still maintains the trial court and the Fifth District Court of Appeal both erred when they relied on Snyder. Rezonings, the definition of which for the sake of argument may include local government comprehensive plan amendments, are legislative rather than quasi-judicial acts. Amicus League believes that the role and responsibilities of local governments in rezoning actions is now

and has always been legislative in nature based on this Court's decision in Schauer; Florida Land Co.; Gulf & Eastern Development Co. v. City of Ft. Lauderdale, 354 So. 2d 57 (Fla. 1978), See also Grubbs; Board of County Commissioners of Leon County v. Monticello Drug Co., 18 Fla. L. Weekly D1307 (Fla. 1st DCA 1993).

In Hirt v. Polk County Board of County Commissioners, 578 So. 2d 415 (Fla. 2d DCA 1991), the Second District Court of Appeal developed an analysis to be used to determine the distinction between legislative and quasi-judicial actions land use action. The Second District Court of Appeal identified two factors to distinguish whether an action by a local government is legislative or quasi-judicial in nature: (1) the nature of the land owner's challenge and (2) the manner in which the local government made its decision. Id. at 417. Amicus League believes the inherent nature of a decision to amend a local government comprehensive plan is a local legislative policy decision. Moreover, when the Florida Legislature enacted the Growth Management Act, it provided local governments with a process to amend their local government comprehensive plan, which encouraged public participation in a legislative manner.

a. Nature of the Proceeding.

1. A Legislative Action Requires a "Right v. Right" Decision.

Amicus League believes that the nature of a rezoning and an amendment to a local government comprehensive plan are legislative acts. In both actions, a local government is asked to decide

between two competing land use policies. Thus, the nature of a local government's land use decision may be evaluated on the basis of whether the decision distinguishes between two "right from right" land use decisions.

A useful analogy for the Court to evaluate Amicus League's "right v. right" analysis is consideration of a local government's legislative decision to 1) increase its ad valorem millage to fund necessary municipal services; or 2) not to increase the rate and maintain, at a minimum, the existing services. Both conclusions are susceptible to a "right v. right" decision. Review of the correctness of a legislative decision remains with the electorate.

Similarly, the Florida Legislature is faced with a "right v. right" decision when it considers increasing state revenue to fund needed programs or recognizing that the increase in revenue is not feasible. Both funding decisions may be "right." Both decisions require the exercise of discretion. The choices made to fund specific programs will be evaluated by the electorate.

Amicus League submits that a local government's adoption of a rezoning ordinance or a local government comprehensive plan amendment are legislative acts since both involve "right v. right" decisions. In a rezoning, a local government is faced with the decision of whether to rezone a parcel and thereby increase the density for further development on the parcel or not to increase the density and thereby maintain the character of the neighborhood, regardless of the size of the parcel. Both actions may be a "right" decision. Both decisions have the effect of re-examining

or re-establishing land use policy. Lastly, either choice subjects the local public officials to public scrutiny by the electorate.

Similarly, upon review of a proposed local government comprehensive plan amendment, a local government is faced with the decision of whether to redefine future land use policy concerning a particular parcel or to maintain the character of the neighborhood, regardless of the size of the parcel. Both choices may be a "right" decision. Both decisions have the effect of re-examining or re-establishing future land use policy. Lastly, either choice subjects the local public official to public scrutiny by the electorate.

In the instant case, Amicus League believes that the nature of the challenge in Puma is an attack on a local government land use policy decision to plan for future use of a particular parcel to a more intense use that is suitable for the area. Simply stated, in Puma, the City was merely reviewing the possibility of modifying its future land use policy in its legislative capacity as the local governing body.

2. A Quasi-Judicial Action Requires a "Right v. Wrong" Decision.

Development of public policy, or a "right v. right" legislative decision is inherently different from an action by local government to enforce or implement an adopted public policy, or a "right v. wrong" decision. For example, a local government's decision to enforce a tax increase on a specific parcel may be a quasi-judicial rather than a legislative act. The "right v. right"

decision to tax has been made. The "right v. wrong" decision determines whether the "right v. right" decision is applicable in the instant case and is made without discretion.

The Florida Legislature established specific guidelines to accommodate local review of an increased levy or other adjustment to ad valorem taxes on a particular parcel. Similarly, local governing bodies develop guidelines to assist administrators that implement alternative land use actions in accordance with land use policies. While a zoning administrator may be the recipient of delegated authority to interpret a zoning code, his interpretations must be precisely based on the code.

A quasi-judicial land use action such as a variance request like an action to implement a tax on a specific parcel of land, is subject to judicial review. A reviewing court, not the public at the polls, may find the administrative decision technically wrong. Discretionary decisions by a zoning administrator are not permitted since as stated above legislative authority can not be delegated absent standards and meaningful evaluation criteria. Henry v. Board of County Commissioner of Putnam County, 509 So. 2d 1221 (Fla. 5th DCA 1987).

By using this analogy, it is easy to understand why Florida courts have correctly viewed the rezoning of a parcel of land as a legislative decision and why this Court should conclude an amendment to a local government comprehensive plan is also a legislative decision. Both actions require the local governing body to re-examine existing local government comprehensive plans

and zoning ordinances and decide between two arguably conflicting land use policies that have an effect of general application, regardless of whether a single parcel of land is affected by the decision.

The Snyder court, and by implication the Puma court, held that the number of the parcels of land subject to a rezoning or local government comprehensive plan amendment changes the nature of the decision made by the local governing body. Amicus League strongly asserts that the number of parcels cannot reasonably dictate the nature of a land use act. Certainly, this Court will agree that establishing the size or number of parcels involved in a rezoning or a local government comprehensive plan amendment as determinative of the nature of the proceeding requires reviewing courts to travel down a slippery slope.

For instance, a property owner might seek rezoning or a plan amendment to accommodate the present or future siting of a hazardous waste facility on a single parcel of land. Without question, the siting of a hazardous waste facility carries with it a policy decision of broad general application. Under Snyder and now Puma, the siting of the hazardous waste facility on a single parcel would rise merely to a quasi-judicial decision, robbing the public at large from participation in the decision making process. How could Florida courts view such decisions as anything but legislative actions?

Likewise, a local governing body might be faced with making a choice between whether to rezone or amend the local government

comprehensive plan to accommodate or plan a change in use of a specific parcel from single to multi-family use. Some of the members of the governing body might support the single family classification because they choose to retain and protect the future residential character of the area. Other members of the governing body might favor a multi-family classification because the multi-family designation would serve as a buffer between an existing or future residential area and a nearby commercial district.

Both decisions may be "right." Both decisions have broad general application for the jurisdiction by affecting infrastructure, cultural and aesthetic ramifications. The ultimate decision reached would be a policy decision and demand a weighing of two competing "right" conclusions. The decision can be nothing but legislative in nature. Discretion is demanded by the nature of the decision.

Similarly, a local government may choose to enact a zoning regulation or amendment to a local government plan, which ultimately allows an industrial use at a time when only a single parcel of land is afforded such use. The rezoning of or amendment to accommodate only one parcel at this time is again a "right v. right" decision of broad general application. It is of no importance that only one parcel is affected by the proposed action. The rezoning or related amendment of a single parcel of land may be viewed as the initial step towards a redevelopment or re-establishment of a general land use policy and nothing more.

b. <u>Manner in Which the Board Made Decision</u>.

The procedure to rezone a parcel of land differs from the procedure to amend a local government comprehensive plan to allow a particular use although both processes are legislative in nature. The processes are different since each achieves a separate and distinct local governmental objective.

1. Local Government Comprehensive Plan Amendment Process.

Upon receipt of an application to amend a local government comprehensive plan, a local government must consider whether the land use necessary to grant the development request would be consistent with the range of land use designations established for the parcel by the local government's comprehensive plan. Section 163.3194, Florida Statutes (1991) and section 163.3215.[9]

Once a local government decides to amend its comprehensive plan, the proposed plan amendment must be submitted to the Department of Community Affairs and several other governmental entities for a compliance review by the Department of Community Affairs. The procedure for the compliance review is lengthy, complex and subject to differing notice and hearing requirements depending on the content and status of the amendment and the underlying plan. Sections 163.3184, .3187, .3189, and .3181.

In Puma, however, the plan amendment requested by Mr. Puma never became a proposed plan amendment nor reached the compliance

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[9] Section 163.3215 establishes a cause of action for an aggrieved or affected party to challenge the consistency of a local government's rezoning with its local government's comprehensive plan.

review process since it was defeated by the City of Melbourne at the initial hearing on the request. There is not a statutory procedure to follow in the event the local government fails to approve a requested amendment to a local government comprehensive plan. Amicus League submits that in the absence of such statutory direction, common law home rule principles and standards of review apply.

Nevertheless, a review of the statutory plan amendment procedure illustrates the legislative nature of the proceeding. The notice and hearing requirements extend to the public at large due to the Growth Management Act's underlying intent to promote public participation. A local government's decision to adopt the proposed amendment prior to the statutory review necessitates a "right v. right" decision by the governing body. As stated above, because the Florida Legislature failed to provide a statutory procedure to follow, common law home rule principles apply, and the procedure is legislative in nature.

2. Rezoning Process and Procedures.

A rezoning action is generally initiated by a developer, who approaches a local government for permission to develop his land. Having satisfied the requirements of the Growth Management Act, the local government's second concern is whether the proposed development meets the permitted uses identified in the local government's zoning code. If the proposed development is permitted by the existing code, the developer next applies for a development order. If the proposed development is not permitted by existing

zoning regulations, the governing body or its designee must amend the zoning code by enacting a rezoning ordinance and thereafter seek a development order.

The Legislature established minimum notice and public hearing requirements to govern procedures for cities to adopt rezoning ordinances in section 166.041, Florida Statutes. If the proposed rezoning involves less than 5 percent of the total land area of the municipality, the local government notifies each real property whose land will be affected by the change. If the proposed ordinance affects more than 5 percent of the total land area of the municipality, the local government shall provide for two advertised public hearings on the rezoning ordinance. Section 166.041(3)(c) contains details regarding the requisite advertisement of meetings.

In summary, the detail of the statutory procedure identified for rezonings closely parallels the notice and hearing procedure in the amendment process, although the Florida Legislature chose to specifically supercede the notice provisions in section 166.041. The similarity between both notice and hearing requirements of the two statutes further demonstrates the legislative nature of both proceedings.

c. Other Factors Considered.

Rather than focusing on the inherent nature of the proceeding and the manner in which the decisions are made, some Florida courts have attempted to characterize the nature of a land use action under review by the presence or absence of certain factors. These factors include, but are not limited to a review of 1) the type of

challenge presented; Hirt; Manatee County v. Keuhnel, 542 So. 2d 1356 (Fla. 2d DCA) rev. denied, 548 So. 2d 663 (Fla. 1989); Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648 (Fla. 3d DCA 1982); 2) the type of evidence presented to the decision-maker; De Groot v. L.S. Sheffield, 95 So. 2d 912 (Fla. 1957); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Town of Indialantic v. Nance, 400 So. 2d 37, 40 (Fla. 5th DCA 1981), op. approved, 419 So. 2d 1041 (Fla. 1982); 3) the type of notice provided; Gulf & Eastern Development; Section 166.041, Florida Statutes (1991); 4) scope of delegated power; Henry; and 5) access to a partial or impartial tribunal; Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), cert. denied., 598 So. 2d 175 (Fla. 1992).

Florida courts have not rendered consistent decisions when analyzing the presence or absence of these factors in a rezoning procedure. The inconsistency was presented to this Court in Snyder. Amicus League believes those cases upholding the legislative nature of rezonings are reflective of current Florida law. This belief is shared by other Amici in support of Petitioner Brevard County in Snyder.

Moreover, should this Court decide that actions to rezone land and related amendments to a local government comprehensive plan are not separate and distinct actions, Snyder and now Puma would clearly conflict with this Court's holding in Florida Land Co. There, this Court affirmed a citizens right to initiate a rezoning ordinance by referendum, which is also prescribed by statute in section 166.041. By holding that a rezoning is no longer a

legislative act, the Snyder and now the Puma court has arguably stolen a citizen's right to redress its government in land use matters. Based on the arguments presented above and the authorities cited, Amicus League believes that the nature of a local government comprehensive plan amendment can only be legislative.

4. The Fairly Debatable Standard of Review Applies to Challenges to Local Government Comprehensive Plan Amendments and Rezoning Actions.

Since Euclid, zoning actions have been regarded as legislative acts by local governments and have been subject to a deferential standard of review by the judiciary. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Euclid, 71 L.Ed. at 388. In other words, the legislative decision must be upheld "when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction." Lachman at 152. The "fairly debatable" standard is basically a rule of reasonableness. It prohibits decision-making by local government officials which is arbitrary and capricious. Nance, 400 So. 2d at 39. Schauer; Monticello Drug Co.

In stark contrast to the fairly debatable standard of review in rezoning actions, is the standard of review in quasi-judicial actions. The traditional standard of review for quasi-judicial action is a preponderance of the evidence or clear and convincing evidence. Ferris. If the issue to be decided involves the abrogation of a right, such as a property right, the appropriate

standard is clear and convincing evidence. Ferris at 292. Otherwise, the preponderance of the evidence standard is applicable. However, these standards of review are available only if the issue is quasi-judicial in nature. Amicus League strongly asserts that the nature of the issue presented to the Snyder court is legislative. Therefore, as stated above, the fairly debatable standard applies. Amicus League notes that since Snyder, the Fifth District Court of Appeal again applied the "fairly debatable" standard to review of denial of a rezoning requests in Orange County v. Lust, 602 So. 2d 568 (Fla. 5th DCA 1992). The Fifth District Court of Appeal appears to ignore Snyder.[10]

5. As Legislative Acts, Comprehensive Plan Amendments and Rezoning Actions Require Public Participation and Access to Local Officials Concerning Local Land Use Policy.

Should this Court uphold Puma and rule that an amendment to a local government comprehensive plan is a quasi-judicial, rather than a legislative act, then the right of citizens to participate in local government comprehensive planning is destroyed. The ability of the public to access its local public officials has been curtailed in land use matters involving quasi-judicial proceedings. The Third District Court of Appeal held in Jennings that ex-parte communications with a local public official before a vote in a quasi-judicial action, such as a variance request, is presumed

[10] Judge Sharp in a concurring opinion notes the mass confusion among the appellate courts concerning the standard of review the reviewing court should apply to a rezoning. Judge Sharpe stated "I hope our Florida Supreme Court will take jurisdiction in an appropriate case and instruct us on these matters. We obviously need some help!"

prejudicial.

The League believes the Fifth District Court of Appeal erroneously extended this presumption in Snyder to matters, which are clearly legislative, such as a rezoning or local government comprehensive plan amendments. The effect of such a holding presumes that informed citizens and activist groups, such as the Sierra Club, League of Women Voters, or Common Cause, who attempt to communicate concerns to elected local public official, have ulterior motives beyond the good of the community. Snyder would limit participation by these individuals and groups because of the presumed prejudicial effect of such communication upon a pending rezoning action.

There is further evidence of a specific legislative intent to encourage public participation in the process to adopt comprehensive plan amendments. Section 163.3181, Florida Statutes, provides:

> (1) It is the intent of the Legislature that the public participate in the local government comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the local government comprehensive planning process and to provide real property owners with notice of all official actions which will regulate the use of their property. The provisions and procedures required in this act are set out as the minimum requirements towards this end.
>
> (2) During consideration of the proposed plan or amendments thereto by the local planning agency or by the local governing body, the procedures shall provide for broad dissemination of the proposals and

> alternatives, opportunity for written comments, public hearings as provided herein, provisions for open discussion, communications programs, information services, and consideration of and response to public comments.

Moreover, section 163.3215, Florida Statutes, broadened the basis for standing from requiring a special damage different in kind from that suffered by the community as a whole, Citizens Growth Mgmt. Coalition of West Palm Bch., v. City of West Palm Beach, 450 So. 2d 204 (Fla. 1984), to allow the alleged injury to be shared by the community as a whole.[11] Amicus League asserts the Florida Legislature made these changes in order to insure preservation of the legislative nature of the proceedings.

In summary, Amicus League submits that local government comprehensive plan amendments are not rezoning requests. Both actions are separate and distinct acts performed by a local government acting in its legislative capacity. Both require the local government to make "right v. right" decisions, are subject to the fairly debatable standard of review and invite public participation into the decision-making process. Yet, local government comprehensive plan amendments and rezoning actions fulfill different objectives in developing local land use policy and employ different procedures to achieve those goals. For these reasons, Amicus League submits that despite the similarities

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[11]Amicus League asserts that section 163.3215 was adopted in response to Citizens Growth Management Coalition of West Palm Beach, Inc., in which this Court had previously ruled that no cause of action for consistency existed and that the standing to raise such a cause, if it existed, was not broadened by the Local Government Planning Act of 1975. Id. at 206.

between rezoning and local government comprehensive plan amendments, each is a separate and distinct action within local land use policy development.

c. An Internal Consistency Challenge to a Local Government Comprehensive Plan Amendment is Separate and Distinct From a Challenge to Consistency Between a Rezoning and the Local Government's Existing Comprehensive Plan.

Amicus League believes that some confusion has occurred due to the failure of some Florida courts to recognize novel issues created by the integration of planning and zoning law. Local government zoning must be accomplished or "consistent with" an underlying comprehensive land use plan. Section 163.3194(b).

There appear to be several types of consistency requirements in the Growth Management Act.[12] Amicus League believes the Florida Legislature intended a local government comprehensive plan to be "internally consistent" with the Growth Management Act if it is "in compliance." The Growth Management Act states to be "in compliance," a plan must be "consistent with the requirements of ss. 163.3177, 163.3178, and 163.3191, the state comprehensive plan, the appropriate regional policy plan, and Rule 9J-5, F.A.C., where such rule is not inconsistent with Chapter 163, part II." Section 163.3184(1)(b).

Sections 163.3177 and .3178 contain the minimum criteria for compliance. If the plan as a whole is not in conflict with and

[12] For example, the Florida Legislature defined "consistency" for the purposes of evaluating the relationship between the local government comprehensive plan and the state and regional comprehensive plans in section 163.3177(10)(a), Florida Statutes (1991).

takes action in the direction of realizing the criteria unsatisfied by the plan, Amicus League believes consistency exist. The standard of review for these internal consistency determinations appears to be the "fairly debateable" standard. Section 163.3184(9)(a) and 163.3184(10)(a). Therefore, local government comprehensive plans must be amended in a manner to preserve the existing internal consistency of the local government comprehensive plan as well as the consistency with the new provisions contained in the proposed amendment. Section 163.3187(2). However, the Florida Legislature failed to clearly define requirements or criteria to evaluate whether a comprehensive plan, as amended, is internally consistency.

On the other hand, the Florida Legislature created a separate and distinct cause of action for consistency challenges between development orders and local comprehensive land use plans in Section 163.3215, Florida Statutes, of the Growth Management Act. Section 163.3215(3)(b) states that "[s]uit 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." Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990), cert. pending cert. question, 601 So.2d 577 (Fla. 1st DCA 1992); Emerald Acres Investment, Inc. v. Leon County, 601 So. 2d 577 (Fla. 1st DCA 1992).

Several reviewing courts have applied a strict scrutiny standard of review of consistency between development orders and the comprehensive plan. Machado; McCormick v. City of

Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990); White v. Metropolitan Dade County, 563 So. 2d 117 (Fla. 3d DCA 1990). Other courts have applied a more flexible standard, causing confusion within the courts. Southwest Ranches Homeowners Association, Inc. v. Broward County, 502 So. 2d 931 (Fla. 4th DCA 1987), rev. denied, 511 So. 2d 999 (Fla. 1987).

Amicus League believes the Fifth District Court in Puma failed to recognize the difference between the requirement for internal consistency within a local government comprehensive land use plan and the requirement for consistency between land development regulations or development orders and an existing comprehensive land use plan. Amicus League believes these consistency determinations are separate and distinct.

It is clear from the facts and ruling in Puma that the initial factual issue before the court was the whether the proposed plan amendment would disrupt the internal consistency of the existing plan. Amicus League believes the trial court correctly proceeded to apply the fairly debatable standard of review to review Mr. Puma's proposed amendment. The standard of review in challenges to internal consistency of a proposed comprehensive plan amendment is the fairly debatable standard as identified in sections 163.3184(9) and (10), Florida Statutes (1991).

However, when the circuit court amended its Final Judgment it applied a strict scrutiny standard to review of the internal consistency challenge. Amicus League believes the circuit court erred when it so amended its earlier decision and the Fifth

District Court of Appeal erred when it affirmed the Final Judgment, as amended, on the authority of Snyder.

In summary, the consistency challenge raised in Puma concerns the internal consistency between a proposed plan amendment and the existing comprehensive plan.[13] The consistency challenge raised in Snyder concerns the consistency between a land development regulation and the existing comprehensive plan.[14] Therefore, Snyder should not be viewed as authority to decide the issues raised in Puma.

While it may be successfully argued that the Legislature specifically abrogated the adoption and challenge procedures for a proposed plan amendment which was adopted by a local government, the Legislature was silent as to the procedure to be followed if a plan amendment failed to be adopted. Therefore, it is only logical under the law that the traditional common law procedure for a substantially aggrieved person to challenge the denial by a local government of a proposed comprehensive amendment must be followed. Amicus League submits that when adopting the Growth Management Act, the Legislature never intended to abrogate existing home rule and

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[13] Although the circuit court indicated it was evaluating whether the plan amendment was "contrary" to the plan, Amicus League believes it was actually considering whether the proposed plan amendment was consistent with the plan. In fact, in its conclusions of law in its Final Judgment, the circuit court held that the proposed amendment would be "internally consistent" with the existing plan. Final Judgment at 3.

[14] Amicus League in Snyder argued that challenges to rezoning actions were separate and distinct from a challenge to the consistency of a proposed amendment to the zoning code and the existing comprehensive plan.

zoning law principles. If the legislature had intended to do so, it would have so stated. Ellis.

CONCLUSION:

As argued to this Court in Snyder, zoning and planning law are separate and distinct bodies of law. A rezoning is merely an amendment to an existing zoning ordinance. A local government comprehensive plan amendment is merely an amendment to an existing local government comprehensive plan. Planning and zoning law must not be mixed nor diluted when deciding a cause of action under either body of law. Both are separate and distinct legislative acts by local government.

Puma offers this court an opportunity to distinguish between principles of planning and zoning law and to guide Florida courts. Puma is also an opportunity to eliminate the confusion existing in current land use law. Amicus League submits that the confusion began when the Fifth District Court of Appeal erred in its broad statement in Snyder that all governmental action subsequent to the adoption of a local government comprehensive plan no longer constitutes legislative action. The broad statement could embrace challenges to amendments to local government comprehensive plans as well as rezoning actions. Should this Court adopt Snyder as the law in Florida, it will in effect rob the local legislative body of its ability to plan for future local land use policy.

WHEREFORE, Amicus League respectfully submits that this Court quash the opinion of the Fifth District Court of Appeal in Puma and remand the proceeding to the City.

Respectfully submitted this 4th day of August, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing was hand delivered to the Clerk of the Florida Supreme Court, and that a true copy was furnished by U.S. Mail this 4th day of August, 1993 to:

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