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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CITY OF MELBOURNE, a municipal corporation in the State of Florida,

Petitioner,

Case No. 81,652

-vs-

JOSEPH ALBERT PUMA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

In this case, Petitioner (defendant below), the City of Melbourne, will be referred to as the "City." Respondent (plaintiff below), Joseph Albert Puma, will be referred to alternatively as "Mr. Puma." Each page in the record will be referenced to as ("R:____"), and the property subject to this action will be referred to as the "Property."

STATEMENT OF THE CASE

In light of 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), jurisdiction accepted, 605 So.2d 1262 (Fla. 1992), this is a case of first impression in Florida. Snyder determined that the act of site specific rezoning is a quasi-judicial function. The effect of the trial court's decision and the Fifth District Court's affirmance in this case is to apply Snyder to site specific amendments to a comprehensive plan, thereby making the act of amending a comprehensive plan a quasi-judicial function.

This case arises from Mr. Puma's request to allow the development of a professional office on the Property. At trial semantical differences as to the issues surfaced. Mr. Puma claimed that he sought an order to make the zoning consistent with what he believed the City's Comprehensive Plan permitted.

The City's position was that Mr. Puma sought a site specific amendment to the land use designation in the Comprehensive Plan

Future Land Use Element. The trial court's amended order on rehearing indicates that the trial court accepted the City's position (R: 491-492).

The City Council denied the request for a change of the Comprehensive Plan land use designation, and a complaint was filed. The following occurred:

1) November 27, 1991: Circuit Court Judge Jere E. Lober found that the City Council's decision denying the change of land use was fairly debatable and substantially related to the promotion of the public health, safety, and welfare (R: 463-467).

2) Rehearing was requested by Mr. Puma (R: 473-477).

3) December 12, 1991: The Fifth District Court of Appeal filed its opinion in Snyder.

4) March 23, 1992: On rehearing Judge Lober reversed his earlier ruling based on Snyder (R: 483-484). The court ruled that the "rezoning" matter should be remanded to the City Council for fact finding and an evidentiary hearing pursuant to Snyder.

5) April 22, 1992: The City appealed (R: 485-486).

6) May 13, 1992: After the Fifth District Court of Appeal temporarily relinquished jurisdiction (R: 490), the trial court entered an amended order on rehearing (R: 491-492) to reflect that the case related to a change of land use designation on the Future Land Use ("FLU") Map of the City's Comprehensive Plan and not rezoning.

7) April 9, 1993: The Fifth District Court of Appeal affirmed per curiam, citing only to its opinion in Snyder and to

one of Snyder's progeny.

8) July 9, 1993: This case was accepted for review by the Supreme Court without oral argument. As of the date of this brief, the Supreme Court's opinion in Snyder has not been filed, the Court having heard oral argument on March 1, 1993.

FACTS

The Property is located in the northern part of the City adjacent to U.S. 1 and Horse Creek. It has close to 1000 feet of frontage on Horse Creek which constitutes the north and west boundaries of the Property (R: 27). The Property has a boundary of about 600 feet running along the South side of the property, and a boundary of about 330 feet on U.S. 1 (R: 27).

A. Comprehensive Plan Land Use Designation: The Comprehensive Plan FLU Map, which is part of the record,[1] shows that the Property is designated as Low Density Residential.[2] Property to the North and West of the Property and across Horse Creek is also designated as Low Density Residential. The property across U.S. 1 and to the East/Northeast of the Property is designated as Commercial and to the East/Southeast is designated Low Density Residential. To the South of the Property the land use designation is Mixed Use which allows Medium Density

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[1] See Defendant's Exhibit #1.

[2] Low Density Residential permits up to 6 units per acre (R: 161).

Residential[3] and Commercial usage (R: 30-34).

B. Zoning Designation: The Property is zoned "R-1A," permitting single-family residential use (R: 188). The land immediately to the South of the Property is zoned "C-P" or "Parkway Commercial" and has a strip shopping center on it (R: 33). Land to the Southwest of the Property is zoned "R-2," which permits multi-family residential use (R: 33). That land is currently vacant (R: 33).

The land to the North and Northwest across Horse Creek consists of Grandview Shores, an old single-family subdivision (R: 33-34). Land across Horse Creek on the westside of U.S. 1, North of the Property, is zoned for professional office purposes with an office building on it (R: 32).

Directly East/Northeast of the Property and across U.S.1 from the Property, the land has been zoned for Commercial use. That land has a small boat sales facility on it (R: 32). Also across U.S. 1 to the east/southeast of the Property (south of the boat sales facility), there is a road leading into a single-family subdivision, and on the corner of that property is a service station (R: 32-33).

C. Facts Leading to the Controversy at Bar: Mr. Puma purchased the Property in 1980 for $74,000.00 (R: 170; 172). The useable size of the Property is 3.9 acres (R: 52-53), according

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[3] Medium Density Residential includes Low Density Residential and permits 1 to 15 units per acre of residential development. (R: 30-34); See also Future Land Use Element, Melbourne Comprehensive Plan.

to Mr. Puma's planner (R: 27-28). There has been no development on the Property (R: 28; 171). He has made no attempt to sell the Property (R: 171).

According to Peggy Braz, Melbourne's Planning and Zoning Administrator,[4] the Property was platted in 1956 as a single family residential project (R: 28; 188). In the 1972 zoning plan, the 1972 single family residential zoning classification was placed on the Property, and the zoning has not changed since that time (R: 188).

In 1988, the City adopted its new Comprehensive Plan consistent with Chapter 163, Florida Statutes, and designated the Property in the Comprehensive Plan as Low Density Residential (R: 64). The Comprehensive Plan was subsequently approved by the State of Florida.

In December, 1989, Mr. Puma submitted an application to change the Comprehensive Plan FLU Map designation of the Property from Low Density Residential to Commercial (R: 357-358), subject to volunteered restrictions on the use of the Property (ie.- property to be used only for a one-story office building) (R: 129-130).

This proposal was recommended by the City staff, and the Planning and Zoning Board/Local Planning Agency accepted the

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[4] Ms. Braz's extensive credentials are set forth (R: 186-187).

planning staff's recommendations (R: 49; 148).[5] When the proposal to amend the Future Land Use Element of the Comprehensive Plan was presented to the City Council, the City Council on May 22, 1990 voted to deny approval (R: 362-364).

Thereafter, Mr. Puma initiated this case (R: 353-364). The trial court framed the issues to be studied at trial as follows:

> 1) Whether the . . . Comprehensive Plan Low Density Residential designation . . . [of] the subject Property is contrary to the goals and policies of the Comprehensive Plan; and
>
> 2) If the answer . . . is [no] . . ., the Court would consider whether the City's action in retaining the designation . . . as Low Density Residential in its Land Use element was discriminatory and thus not fairly debatable, . . . (R:156).

D. Planning Considerations Related to the Comprehensive Plan: At trial, Mr. Puma stated it wouldn't make sense to develop the Property with one-family homes. However, he also stated that from a physical standpoint, the Property could be developed as a single-family residential project (R: 171).

Ed Washburn, Mr. Puma's planner, testified that he felt the plat was "destroyed" for two reasons. First, jurisdictional wetlands determinations would make some of the lots undevelopable. Second, the City Fire Department would probably want a bigger cul-de-sac at the end of the road so that fire engines could turn around. This would cause some of the lots to be made smaller in size (R: 52). Nevertheless, he affirmed that

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[5] A copy of the recommendations of the Planning and Zoning Board/Local Planning Agency at their May 10, 1990 meeting is set forth in the record (R: 360-361).

the Property could be developed for single-family residential purposes, that it was physically possible to do so, and that it would not be prohibitively expensive to do so (R: 54).

To do this Mr. Washburn noted that a developer could use a combination of vegetation and berms for buffering from nearby Commercial uses (R: 61). Further, the Property has natural attributes that would help, because it "rises a good way above U.S. 1 and is heavily treed" (R: 61-62).

E. Internal Consistency of the Comprehensive Plan's Land Use Designation with the Comprehensive Plan's Policies: Mr. Washburn testified that the Low Density Residential Comprehensive Plan classification for the Property was not consistent with the rest of the Comprehensive Plan (R: 41-42), because there are no other parcels "on there that are vacant that are shown for low density residential or commercial use" (R: 69).

Mrs. Braz was asked whether, in reviewing the policies of the Comprehensive Plan, the Plan it would be "more" internally consistent for the Property to be designated professional or Commercial, as opposed to Low Density Residential. Mrs. Braz responded "I wouldn't say more consistent. I believe that it is consistent as Low Density Residential, and I believe that it is consistent if its limited to professional. I do not believe that it is in conflict with the current plan to keep that parcel Low Density Residential" (R:160).

Mrs. Braz cited, inter alia, paragraph D on page 2-15 of the Plan's Future Land Use Element which states that the land use

shown on the FLU Map represents the intended use of those areas based on promoting the concept of protecting established and new residential neighborhoods from non-residential intrusion. Further, the Future Land Use Element indicates that establishment of commercial areas is to occur near the Florida East Coast Railway, the Airport or major intersections on U.S. 1. Mrs. Braz noted that the Property was not located adjacent to a major interchange on U.S. 1 (R: 213-215).

Mr. Washburn noted that there is a Comprehensive Plan policy which allows commercial development "along sections of U.S. 1" (R: 71-72). His comments suggested that because the Property is on U.S. 1, it should be designated Commercial and that Low Density Residential was inappropriate.

Mrs. Braz noted that this Comprehensive Plan does not indicate that all of U.S. #1 should automatically be Commercial property (R: 215). She noted that objective 7 of the Future Land Use Element requires the establishment of a "number of roads including U.S. #1 as a scenic parkway. In doing so, it says that you can allow high intensity uses. You can allow commercial office and hotels along these parkways. It doesn't say anything about you've got to do this." (R: 216) (e.s.). She further opined that she completely disagreed with Mr. Washburn's testimony that designation of the property as Low Density Residential was inconsistent with the foregoing policy.

She also believed that it was reasonable for the Property to be designated as single-family residential (R: 195). She based

this opinion on the fact that there was single family residences located to the north of the property, that much of the area is single-family residential in character, and that the trees and vegetation on the Property can probably be maintained if it is single-family or low density in character (R: 195). Designating the Property as Low Density Residential would preserve and protect the integrity of the residential development across Horse Creek (R: 195).

Mrs. Braz noted that low density residential projects <u>are not</u> unsuited for development on major arterials like U.S. 1 (R: 198). She affirmed that during the comprehensive planning process, the City worked long and hard on that issue. She noted that

> [i]f you are going to make that statement that single-family residential or low density residential or multi-family residential is not compatible with an arterial highway, then you are going to create strips [of commercial usage] over every single arterial highway in the City, and you would not want to do that. We looked at some big cities, some Savannahs, Columbias, Atlantas, and they have major highways, huge highways, six lane highways with single-family residential adjacent to them, some big, beautiful estate type uses. So we made a conscious effort not to designate commercial just because you had a four-lane or arterial highway.

(R: 198-199).

Mr. Washburn stated that the Low Density Residential land use designation on the Property became discriminatory upon the change in the land use designation to Commercial of the parcel to the South of the Property (R: 76). Mrs. Braz stated that it was consistent with the Comprehensive Plan to go from Commercial use

to Low Density Residential without any transitional zoning in between. In fact, that issue is specifically addressed in the Comprehensive Plan. "It indicates when you have such a situation you should have an adequate buffer." (R: 164-165).

Mrs. Braz detailed certain subdivisions within the City that had been recently developed or were presently being developed within the past few years that involved placing low density residential uses immediately adjacent to either a commercial parcel or an arterial highway (R: 203-205). Mrs. Braz cited the Long Point subdivision with ten (10) lots backing up to Wickham Road (R: 203), and East Bay Plantation with lots that back up to Wickham Road (R: 203).

Mr. Washburn agreed that there are a number of subdivisions along collector and arterial roads (R: 59; 66). One of these subdivisions, Sylvan Shores, which is a single-family project is directly across U.S. 1 from the Property (R: 60). Another new project is Madison Riverfront Estates (a/k/a Pineapple Place) which consists of five (5) lots and is located on U.S. 1 and 1800 feet south of the Property (R: 38). Mrs. Braz noted that, in her view, that parcel was quite similar to the Property (R: 227).

In response to a question by the Court, Mrs. Braz noted that up to 24 residential units could be placed on Mr. Puma's Property, according to the Comprehensive Plan land use designation (R: 161-163). Mrs. Braz also stated that there was no prohibition in the Comprehensive Plan against an apartment complex being located next to a commercial property along an

arterial highway (R: 164).

E. Economic Considerations: At trial Mr. Puma stated that he thought the Property was worth somewhat less than what he paid for it (R: 173). However, at a pre-trial deposition Mr. Puma stated that his property had increased in value since the time of the purchase (R: 174).

Mr. Puma also admitted that he had not had the Property appraised in consideration of the Comprehensive Plan land use designation (R: 175). Further, he conceded that at the time he purchased the Property, he was completely unaware of the fact that it was zoned for single-family residential use or that it had been so platted (R: 179).

Robert Houha, Mr. Puma's witness, is an appraiser. The essence of his testimony was that he did not think it was feasible to develop the Property as low density residential (R: 89). Unfortunately for the Respondent, on cross-examination, Mr. Houha admitted that he had not conducted an appraisal of the Property as a single-family project (R: 100). He didn't even know if Mr. Puma had listed the Property for sale as a single-family parcel (R: 100). With regard to rezoning, Mr. Houha conceded that he didn't even know the specifics of the Property (R: 102), and that he had no idea whether the Property had been devalued from the price Mr. Puma paid (R: 102).

Dennis Basile, an MAI Appraiser (member of the appraiser institute) who has been in the business since 1972 and was appointed by the Governor to the Florida Real Estate Appraisal

Board,[6] testified on behalf of the City. The Court recognized him as an expert in the area of real estate appraisal (R: 241). In his expert opinion, the Property could be developed for single family residential use (R: 241-242), and that this was based upon the highest and best use analysis for the Property (R: 242).[7]

Based on the appraisal analysis that he conducted on the Property (R: 243), he stated that the greatest return on the Property would be realized by developing a three lot subdivision (R: 244). The lots would be worth a total of $107,500.00 (R: 247). He also noted that the project could be adequately buffered from U.S. 1 and adjacent commercial uses (R: 255).

He opined that keeping the Property designated as Low Density Residential would act to preserve and protect the residential integrity of the neighborhood to the north (R: 256). One reason to preserve the residential use of the Property is based on the failure of the Commercial use of the land immediately to the North and South along U.S. 1. The Commercial property to the South has been used for approximately three years as a strip shopping center and never achieved an established occupancy (R: 257). The shopping center has gone into foreclosure and is currently owned by a bank (R: 258-259).

With regard to the land to the North on U.S. 1 across Horse

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[6] (R: 237-239).

[7] For an excellent description of what is included in the highest and best use analysis, see (R: 242-243).

Creek, it is used as an office building. Seven years old, it has never achieved a full established occupancy (R: 260). Two years ago, it was completely vacant, and the owner unsuccessfully attempted to lease or sell it (R: 260). An auction was held prior to trial, and only one very low offer was received (R: 260-261). More recently, the building was finally sold for $250,000.00, $100,000 below its listed price (R: 261).

Based on the foregoing, the Court entered its November, 1991 order in favor of the City finding the City's decision to deny the change of land use on the Comprehensive Plan FLU Map to be fairly debatable and bearing a substantial relationship to the public health, safety, and welfare (R: 467-472).

Mr. Puma sought rehearing (R: 473-477). It was Mr. Puma's position that "the future land use map did not reflect the zoning as outlined in the comprehensive plan" (R: 317). The trial court noted that that contention had been rejected (R: 317). The trial court further noted that a finding had been made that the FLU Map, was part of the Comprehensive Plan, and that it was consistent with the written mandates of the Plan (R: 318).

The Fifth District Court of Appeal's recent opinion in Snyder v. Brevard County was argued at the rehearing. The City maintained that the case was not applicable to Comprehensive Plan FLU Map applications, and that such changes are essentially legislative in nature (R: 325). In part this is because Comprehensive Plan land use mapping represents a City policy decision (R: 326-327).

Counsel for the City objected to the fact that at this late date raising the issue that this case should be tried as a quasi-judicial case based on Snyder is improper, because the particular action that Mr. Puma filed was an action for an injunction (R: 329). Mr. Puma selected the matter of trying the case de novo, which clearly is a legislative type of action (R: 329).

The court attempted to clarify what the trial had involved, an application to amend the FLU Map in the Comprehensive Plan (R: 333). It was Mr. Puma's contention that the Planning Board had been asked to state that the Property should have been zoned professional or commercial in accordance with the Comprehensive Plan. Mr. Puma maintained that he had not asked that the Comprehensive Plan be amended. He asked that the zoning of the Property be amended to conform to the Comprehensive Plan, which was Commercial (R: 333).

Mr. Puma's position was that he did not consider the proceeding as being an amendment to the Comprehensive Plan (R: 335). Mr. Puma's counsel noted that

> [t]he Comprehensive Plan says that everything on arterial highways should be commercial -- that's the Comprehensive Plan. Then they adopted a Future Land Use Map, which merely continued what had been there before. But that Future Land Use Map was at variance with the Comprehensive Plan.

(R:336). Judge Lober noted that he had earlier determined just the opposite (R: 336).

The City noted that if the court ruled that Snyder was applicable and that land use map amendments were quasi-judicial, then the City had been prejudiced by the way the case had

proceeded. The court agreed (R: 345), noting that several days had been spent going through the entire case, hearing testimony, not including pre-trial hearings and motions. The trial court therefore ruled that the case should be remanded to the City Council for an evidentiary hearing together with findings of fact, all in light of Snyder (R: 347-349). The trial court also noted that "the actions of the City are not in violation of the Comprehensive Plan" (R: 350).

The case was then appealed to the Fifth District Court of Appeal which affirmed. City of Melbourne v. Puma, 616 So.2d 190 (Fla. 5th DCA 1993).

SUMMARY OF THE ARGUMENT

The City's position is that based on the wording of Snyder, it was not intended to be applicable to land use amendment proceedings. Further, it makes no sense to do so, because all land use amendments are nothing more than a change of policy, and policy is legislative in nature.

If the Court believes that Snyder is applicable to land use proceedings, since Snyder is based on Oregon caselaw, Oregon case law must be further explored. Oregon case law now recognizes that whether a proceeding is quasi-judicial is not based on judicial opinion but statute. Applying that notion to Florida law, Chapters 163 and 166, Florida Statutes, unequivocally recognize that all comprehensive plan amendment proceedings are legislative and subject to the fairly debatable rule.

From the standpoint of good judicial policy, the City points

to a number of reasons why it doesn't make sense to apply Snyder to any comprehensive plan land use amendments. The City cites the chaos caused in Oregon by using the quasi-judicial approach, application of Florida's Jennings rule which cuts off public participation, problems that the public will have in preserving its legal rights, and the fact that the potential right to pass comprehensive plan amendments by referendum would be cut off.

Finally, if Snyder is applicable to land use map amendments, review should have been in the circuit court by certiorari. However, the Respondent through its complaint for injunctive relief and based on argument in the lower court invited the error, and the case should have been considered de novo and tried by consent.

ARGUMENT

I
HOW THE TRIAL AND APPELLATE COURTS CONCLUDED THAT SNYDER IS APPLICABLE TO COMPREHENSIVE PLAN AMENDMENTS

The appellate court's per curiam affirmance citing only to Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991) and ABG Real Estate Development Co. of Florida, Inc. v. St. Johns County, 608 So.2d 59 (Fla. 5th DCA 1992), leaves some question as to the basis upon which the lower court concluded that comprehensive plan amendments are quasi-judicial. City of Melbourne v. Puma, 616 So.2d 190 (Fla. 5th DCA 1993).

How did the Snyder rezoning case ever become authority for the proposition that site specific comprehensive plan amendments are quasi-judicial in nature? The answer is based on two

passages from the Snyder opinion. The first quote states:

> (1) While enactments of general comprehensive zoning and planning ordinances and maps, and amendments thereto of broad general application, constitute legislative action establishing rules of law of general application; subsequent governmental action which in substance involves the proper application of the previously enacted general rule of law to a particular instance (i.e., a specific parcel of privately owned land under then existing conditions), regardless of the form in which presented (i.e., whether involving a petition for rezoning, for a special exception, for conditional use permit, for a variance, for a site plan approval, or whatever) does not constitute legislative action requiring judicial deferential review as to reasonableness under the powers clause of the state constitution (Art. II, §3, Fla. Const.) and the separation of powers doctrine of the United States Constitution.

Snyder, at 80 (e.s.).

The second quote states:

> The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive plan.

Snyder, at 81 (e.s.; footnote omitted).

Both the trial and appellate courts in the case at bar have seized on the laundry list of development permits (rezoning, special exception, conditional use, variance, site plan approval, etc.) as authority for the proposition that site specific comprehensive plan amendments are to be accomplished through quasi-judicial proceedings. The laundry list of development permits is nothing more than obiter dictum, since Snyder was a rezoning case.

Respectfully, the City maintains that defining words such as

"etc." and "or whatever" to refer to comprehensive plan amendments, without more, is a perilous over-expansion of the concepts in Snyder. Yet, that is exactly what the appellate and trial courts did. After considering the foregoing quote with the "whatever" language in it, the trial court stated:

> [w]ell, they sure say in here that it doesn't make any difference what you ask for. It just applies to one land owner or one piece of land, and that it's not a legislative function anymore. (R: 338).

There are numerous reasons discussed below why expansion of the "etc." and "or whatever" language to include comprehensive plan amendments does not make sense. See also Gougelman, The Death of Zoning as We Know It, 67 Fla.B.J. 25 at 26-29 (March 1993).

II
AMENDMENTS TO A COMPREHENSIVE PLAN ARE QUESTIONS OF POLICY, NOT DEVELOPMENT PERMITS

There is a "pecking order" of decisions in the growth management process. In most Florida local governmental jurisdictions, building permits are at the bottom of the "pecking order." They implement site plan or platting decisions. In turn, site plan or platting decisions implement special exceptions, conditional uses, or site specific zoning decisions. Special exceptions, conditional uses, or site specific zoning decisions implement a local government's zoning code. Zoning codes implement comprehensive plans.

Thus, comprehensive plans are at the top of the pecking order of decisions in the growth management process. Decision-making in the comprehensive planning process is policy-making in

nature. Decision-making in the zoning process is policy-making in nature. Decision-making in the conditional use/[8]special exception,[9] site planning/[10]platting,[11] and building permit process is quasi-judicial or administrative. If the Fifth District Court of Appeal's Snyder opinion is upheld by the Supreme Court, then decision-making in the rezoning process is quasi-judicial in nature.

The difference between the policy-making comprehensive plan and the subordinate and implementing zoning, conditional use/special exception, site plan/plat, and building permit is recognized by the Local Government Comprehensive Planning and Land Development Regulation Act, Part II, Chapter 163, Florida Statutes (hereinafter: the "Growth Management Law").

The Growth Management Law defines the subordinate and implementing acts of zoning or approval of a conditional use/special exception, site plan/plat, or building permit as "development permits." See § 163.3164(8), Fla. Stat. (1993). Specifically absent from the laundry list of "development permits" in the Growth Management Law is comprehensive plan adoption or amendment.

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[8] City of Melbourne v. Hess Realty Corp., 575 So.2d 774 (Fla. 5th DCA 1991).

[9] Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986).

[10] Park of Commerce v. City of Delray Beach, 606 So.2d 633 (Fla. 4th DCA 1992).

[11] cf. Broward County v. Narco Realty, Inc., 359 So.2d 509 (Fla. 4th DCA 1978).

This is because one of the cornerstones of Florida's Growth Management Law is that all development orders,[12] which are decisions of a local government denying or approving "development permits," must be consistent with the local government's comprehensive plan. § 163.3194(1)(a), Fla. Stat. (1993). The "consistency doctrine" demonstrates a legislative determination that no development permit can be issued, unless it is consistent with the local government's policy on growth management, ie. - the Comprehensive Plan.

The effect of the lower courts' opinion in Puma is to turn a comprehensive plan amendment into something less than policy and implicitly, a development permit.

III
FLORIDA STATUTORY LAW PROVIDES THAT SITE SPECIFIC COMPREHENSIVE PLAN AMENDMENTS ARE LEGISLATIVE ACTS, WHILE OREGON LAW (WHICH IS THE BASIS OF THE SNYDER OPINION) PROVIDES THAT SUCH AMENDMENTS ARE QUASI-JUDICIAL

A

Florida law clearly indicates that the act of amending a comprehensive plan, including a site specific plan amendment is a legislative act subject to the fairly debatable test. Section 163.3189, Florida Statutes (1993),[13] sets forth a procedure for amendment. It provides that the procedure for amendment of an adopted plan is, with certain additional requirements, the same as the process provided in Section 163.3184.

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[12] § 163.3164(7), Fla. Stat. (1993).

[13] This section was significantly amended in 1993. See Ch. 93-206, § 12, Laws of Fla.

Section 163.3187(1)(c), Florida Statutes (1993),[14] also sets forth the methodology by which "small scale" comprehensive plan FLU Map amendments of parcels of fewer than ten (10) acres may receive expedited comprehensive plan review. Surely, if the Snyder/Fasano quasi-judicial doctrine were to be applied to land use amendments, "small scale" amendments would fall within the ambit of the quasi-judicial doctrine. With regard to the "small scale" amendments, Section 163.3187(2), Florida Statutes, states that "[t]he procedure for an amendment of an adopted comprehensive plan or element shall be as for the original adoption of the comprehensive plan element set forth s. 163.3184."

Thus, whether the amendment is accomplished pursuant to either Sections 163.3187 or 163.3189, the process ultimately relates back to Section 163.3184. That section, with some variation, sets forth the process for adopting a comprehensive plan or amendment of a comprehensive plan.

Section 163.3184(15)(a), Florida Statutes (1993), states in relevant part that "... the adoption of a comprehensive plan or plan amendment shall be by ordinance ... "(e.s.). Section 166.041(1)(a), which sets forth the powers of municipalities, defines the term "ordinance" to mean an official legislative action of a governing body...." In other words amendment of a comprehensive plan is accomplished by adoption of an ordinance,

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[14] This section was significantly amended in 1992. See Ch. 92-129, § 8, Laws of Fla.

which is a legislative act. Thus, reading Sections 166.041(1)(a), 163.3184(15)(a), 163.3187(1)(c), and (2), and 163.3189, Florida Statutes, in pari materia, it is clear that adoption of even a small scale plan amendment must be accomplished by a legislative act, to-wit: an ordinance.

Should there be any doubt about this, one need only review excerpts from the adoption process set forth in Section 163.3184(9) and (10). These two subsections come into effect once a comprehensive plan amendment has been adopted by the local government. Pursuant to Section 163.3184, the local government is to forward the amendment to the Department of Community Affairs ("DCA") which reviews the adopted amendment to determine whether or not it is "in compliance" with the requirements of law.[15]

If the DCA determines that the plan amendment is "in compliance," the DCA will publish a notice so stating in a local newspaper of general circulation. The notice advises affected individuals that within twenty-one (21) days of the publication of the notice, they may file a petition with the DCA seeking review pursuant to Section 120.57, Florida Statutes (the Florida Administrative Procedure Act). The statute notes that "[i]n this proceeding the local plan or plan amendment shall be determined

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[15] The requirements of law are set forth within the definition of "in compliance" and include Sections 163.3177, 163.3178, and 163.3191 of the Growth Management Law, Chapter 9J-5 of the Florida Administrative Code, the State Comprehensive Plan set forth in Chapter 187, Florida Statutes, and the applicable Regional Comprehensive Plan. See § 163.3184 (1)(b), Fla. Stat.

to be in compliance if the local government's determination of compliance is fairly debatable." § 163.3184(9)(a), Fla. Stat. (1993) (e.s.).

Similarly, if after the local government adopted comprehensive plan land use amendment has been reviewed by the DCA and found to be "not in compliance," an administrative hearing is held. The statute in pertinent part states that

> [i]n the proceeding, the local government's determination that the comprehensive plan amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the comprehensive plan or plan amendment is not in compliance. The local government's determination that elements of its plan are related to and consistent with each other shall be sustained if the determination is fairly debatable.

§ 163.3184(10)(a), Fla. Stat. (1993).

Both statutes set forth the requirement that the fairly debatable test is to be used. The fairly debatable test is, of course, a test applied to legislative actions. Town of Indialantic v. Nance, 400 So.2d 37, 39 (Fla. 5th DCA 1981), approved, 419 So.2d 1041 (Fla. 1982). Furthermore, the statute sets forth the burden of proof, requiring use of the preponderance of the evidence standard. See § 163.3184 (10)(a), Fla. Stat. (1993). The statute also sets forth who has the burden of going forward to demonstrate whether the local government's action was correct and what must be proven. § 163.3184 (9), (10), Fla. Stat. (1993).

Snyder is completely at odds with the legislative command.

> The initial burden is upon the landowner to

> demonstrate that his petition or application for use of privately owned lands, ... complies with the reasonable procedural requirements of the ordinance.... Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use....

Snyder, at 81 (e.s.).

In essence under the statute the local government's determination that the amendment is "in compliance" is presumed correct. "In compliance" means, at least in part, that the amendment and the plan as amended is "internally consistent." §§163.3177(2) and 163.3184(1)(b), Fla. Stat. (1993).[16] Snyder on the other hand requires that once an applicant shows consistency, the local government's determination is without presumption, and that the local government's burden of proof is one of clear and convincing evidence. Who has the burden of proof, what they must prove, and what evidentiary standard is to be applied, as set forth in Snyder, is completely contradictory to the statutory scheme.

Even recent amendments adopted by the Legislature during its 1992 Session reaffirmed its intention that Section 163.3187 "small scale" amendments are legislative and subject to the foregoing process. See § 163.3187(1)(d), Fla. Stat. (Supp.

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[16] Section 163.3177(2) states that the several elements of the plan shall be consistent with one another. The planning/legal jargon for this requirement is that the plan is "internally consistent." This form of consistency is to be distinguished from consistency of a development permit with a plan as set forth in Section 163.3194.

1992).

B

The key case in this Country declaring a site specific rezoning to be quasi-judicial in nature is Fasano v. Board of County Commissioners, 507 P.2d 23 (Or. 1973). Certainly, no state has had more experience with quasi-judicial land development permitting than Oregon. The Fifth District Court of Appeal, after a thorough review of Fasano[17], stated that "[w]e agree with the Fasano approach and conclude that rezonings are not legislative in nature...." Snyder, at 78. Thus, Snyder and its command that the rezonings must be regarded as a quasi-judicial function is founded on Oregon law. Since the view that site specific comprehensive plan amendments are quasi-judicial in nature is based on Snyder, it logically follows that this view must also be based on Oregon law.

This is one of the problems with Snyder and its extension to comprehensive plan amendments. As explained by one commentator "the logic of the decision errs in several important respects. For example, in finding that rezonings are quasi-judicial in nature, the court relied on doctrines and precedents which were developed outside Florida and outside the context of examining the exercise of local authority." Lincoln, R., Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine, 7 J. Land Use & Envtl L. 333, 336 (1992) (hereinafter: "Inconsistent Treatment").

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[17] Snyder, at 76-78.

However, because Snyder is so heavily based on Fasano and the concepts it initiated in Oregon land use law, perhaps it is worthwhile to examine how Oregon land use law has developed since the 1973 Fasano opinion and to contrast and compare the development of that law with Florida land use law. Certainly, if we are to be guided by Fasano, we must also be guided by the legal concepts spawned by Fasano.

The Fasano distinction between what is legislative and what should be regarded as quasi-judicial, which was followed in Snyder, is simply that

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority, and its propriety is subject to an all together different test.

Fasano, 507 P.2d at 26.

Not unexpectedly, shortly after Fasano was decided, the Oregon Court of Appeals was asked to determine whether "an amendment of a comprehensive land use plan as it affects a single small parcel of property [is] "judicial" as distinguished from "legislative" as those words are used in Fasano...?" The Court in Marggi v. Ruecker, 533 P.2d 1372 (Or.App. 1975), stated in answer to the foregoing question that " [a]s we interpret Fasano such an amendment is judicial." Id.

Marggi v. Ruecker involved a 5.29 acre tract of land which was land use designated in the City of Hillsboro's Comprehensive

Plan as "park" property. The property was zoned residential. After a legislative-type hearing, Hillsboro changed the land use designation in its Comprehensive Plan from "park" to "commercial." Based on these facts, the Court, citing Fasano, stated that

> [h]e who seeks a change of the existing permitted use of a specific tract of land to a use different from the use contemplated by the comprehensive plan has a far greater burden of proof than does he who seeks permission to use such a tract in the manner contemplated by the Comprehensive Plan.... It follows that when the issue before governmental bodies proposes a change of the permitted use of a specific small parcel of land, that issue can be resolved only by the application of the standards of proof and public interest enunciated in Fasano and this must be done in the manner prescribed by Fasano - that is, a judicial-type hearing.

Ruecker, at 1373.

Fasano and Marggi both referred to site specific rezonings and comprehensive plan amendments being quasi-judicial. Rezonings and comprehensive plan amendments related to larger areas of land are, apparently, perceived as being more policy oriented and therefor legislative in character.

About two years after Fasano, confusion began to arise in Oregon with the implementation and use of quasi-judicial proceedings. In short, how big an area must be covered by a comprehensive plan amendment or rezoning before it is a legislative proceeding became an issue.

Two cases in 1975 determined that challenged local ordinances were legislative enactments in nature and therefore exempt from the Fasano mandated procedural requirements. In

Culver v. Dagg, 532 P.2d 1127 (Or.App. 1975), proposals replanning and rezoning of over half of Washington County (including the petitioner's 35 acre parcel) were found to be legislative in nature. In Parelius v. Lake Oswego, 539 P.2d 1123 (Or.App. 1975), rezoning of a 72.9 acre tract in multiple uses and ownerships was also found to be legislative.

However, in Green v. Hayward, 552 P.2d 815 (Or. 1976), a zoning change on one 50 acre tract owned by the proponent of the change and an adjacent 90 acre tract upon which the proponent held an option to purchase was conducted. The Court found this to be a quasi-judicial matter. In Petersen v. City of Klamath Falls, 566 P.2d 1193 (Or. 1977), a 141 acre tract owned by four individuals who planned to coordinate a development was to be annexed into the City of Klamath Falls. The annexation was determined to be a quasi-judicial act.

Chaos was resulting. A rezoning on a 73 acre tract in Parelius was found to be legislative, while an annexation of a 141 acre tract in Petersen and a 140 acre rezoning in Green were found to be quasi-judicial. No one could tell how small a parcel had to be before it could be reliably determined to be a quasi-judicial proceeding. Further, the courts in struggling with the issue were engrafting two new considerations -- ownership and multiple use. Changes of land use or rezonings of tracts in multiple uses or involving multiple ownerships would also be viewed as legislative.

However, what was the line of demarcation, the distinction

between land use changes and rezonings which were legislative and those that were quasi-judicial? How many acres, owners, or types uses must be subject to an application for change of land use or rezoning before the application would be classified as one that is legislative in character? Could a large scale developer/ property owner manipulate the system by breaking a huge tract of land with many different land uses, like a Development of Regional Impact, into several small tracts, thereby turning a legislative proceeding into a quasi-judicial proceeding?

Unfortunately, there was no bright line of distinction. The Oregon Supreme Court in South of Sunnyside Neighborhood League v. Clackamas County, 569 P.2d 1063, 1071 n.5 (Or. 1978), noted the problem and refused to clarify the issue by setting a line of demarcation between legislative and quasi-judicial actions, stating the following:

> ...our references in this opinion to 'single tract' or 'single parcel' amendments are convenient ways of describing the type and scale of land-use decisions which we have treated as quasi-judicial...we do not intend by the use of the terms 'single tract' and 'single parcel' to adopt a test for determining when a given land-use is quasi-judicial rather than legislative. The number of factors such as the size of the area affected in relation to the area and planning unit, the number of landowners affected, and the kinds of standards governing the decision makers may be relevant. The decision with which we are now concerned is clearly quasi-judicial, and we find it unnecessary to formulate, in the present case, a test for making that determination.

Justice Linde in Strawberry Hill 4 Wheelers v. Board of County Commissioners, 601 P.2d 769 (Or. 1979), attempted to bring some clarity to the problem. He noted that the process must

result in a decision, it must apply pre-existing criteria, and it must be directed at a closely circumscribed factual or relatively small number of persons.

Finally, more uncertainty was added to the process in Neuberger v. City of Portland, 586 P.2d 351 (Or.App. 1978), rev'd in part, 603 P.2d 771 (Or. 1979). In Neuberger, the Oregon Court of Appeals examined the rezoning of a 601 acre parcel of undeveloped land in Northwest Portland. The parcel actually consisted of three (3) tracts of land, each of which was owned by a different individual. All of those interests were subject to purchase contracts or options by a joint venture, which was seeking planned unit development zoning. In this case, the appellate court found that the rezoning was quasi-judicial, despite the fact that it involved a 601 acre parcel owned by at least three different people.

In summary then, Oregon courts refused to set a "bright line" standard that could be easily applied by local governments, property owners, environmental groups, and other interested members of the public. This is not surprising since most courts have found that appellate pronouncements are usually more workable and readily implemented, if they are not bright light in character but are flexible, leaving application to a case-by-case application. The problem with not having a "bright line" standard in this type of case as will be noted below in point VI, is that local governments and participants in land use hearings need to know before a hearing whether it is to be handled as a

quasi-judicial or legislative proceeding.

The Oregon cases suggest that size of the property is sometimes a factor but not always. Other times the number of property owners[18] or different types of uses proposed in a rezoning or change of land use proceeding becomes critical. This is clearly not a rule that has much rhyme or reason to it.

The Snyder case in employing the same rule cited in Fasano stated

> [t]he answer is that there are two distinctly different types of amendments to zoning ordinances, one of which is legislative and the other of which is not. Schauer [v. City of Miami Beach, 112 So.2d 838 (Fla. 1959)] involved the enactment of a change in general policy of widespread applicability affecting a large area of the community rather than a "rezoning" that relates only to the application of an existing general policy (i.e., a general rule of law) to a particular parcel of land and to owners whose property interests were easily identifiable.

Snyder, at 74 (footnote omitted). In light of the chaos spawned in Oregon, how will the rule be implemented in Florida? Will one have to go to court and litigate over whether a land use change or a rezoning is quasi-judicial or legislative in nature before going to a zoning or land use hearing? Doesn't this seem to be a blueprint for a waste of judicial resources, further clogging court dockets with cases that don't need to be filed, except merely to pay homage to notions of quasi-judicialism?

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[18] It seems peculiar that the functionality of a land use decision would be predicated on the number of property owners holding title to land, since zoning and planning regulations are intended to regulate use and not to consider ownership. See City of Miami Beach v. Arlen King Cole Condominium Ass'n., Inc., 302 So.2d 777 (Fla. 3rd DCA 1974).

Since the time of the above referenced decisions however, even Fasano has been somewhat discredited. As noted in Dan Gile and Associates, Inc. v. McIver, 831 P.2d 1024 (Or.App. 1992),

> ... as the Court pointed out in 1979 in Neuberger v City of Portland, supra, [19] substantive and procedural zoning law has been supplemented by statutes, the statewide goals and local legislation in the years since Fasano, with the affect that the case's authority has been of diminishing importance as a source of law governing zoning and other land use decisions. See 288 Or. 168-70. The procedures that are relevant to the decision of this case are now comprehensively governed by statute.

Id. at 1025 (e.s.).[20]

In Dan Gile and Associates, the Court confronted a case in Wallowa County, Oregon, in which the owners of a 24 acre parcel received from the County governing body a zoning change from "farm use" to "residential." A referendum petition was subsequently filed to place the governing body's decision before the voters of the County at the May 19, 1992 primary election. The Plaintiff then sought an order from the Court that the referendum not be held, because it contended that the governing body's action was quasi-judicial rather than legislative, and therefore, not subject to the referendum process. The Court determined that quasi-judicial concepts imbedded in Oregon statutes would govern. See Dan Gile and Associates, 831 P.2d at 1025 n.2.

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[19] 603 P.2d 771.

[20] The particular statues are ORS Chapter 197 and ORS Section 215.402 et seq.

The message from Oregon is clear that Fasano has been to some extent discredited, because statutory provisions have superseded Fasano. This is also the case in Florida. Florida statutory law indicates why Snyder should not be applied in the setting of comprehensive plan land use amendments.

IV
COMPREHENSIVE PLAN AMENDMENTS ARE POLICY MATTERS DESERVING MAXIMUM PUBLIC PARTICIPATION WHICH QUASI-JUDICIAL PROCEEDINGS INHIBIT

Section 163.3181, Florida Statutes (1993), sets forth the Legislature's intent that public participation in the comprehensive planning process is to occur "to the fullest extent possible." Procedures for notifying the public and receiving input are to be designed pursuant to this sub-section, and these procedures are viewed as being "the minimum requirements."[21]

Clearly, input into the planning process is one of the cornerstones of the successful adoption or disapproval of any proposed comprehensive plan amendment, regardless of the area affected by the amendment. It is the City's contention that if the Snyder/Fasano quasi-judicial approach is applied to comprehensive plan amendments affecting areas of limited size and having small numbers of property owners, public participation in the comprehensive planning process will be hindered for a number of reasons.

Public participation will be significantly thwarted because of the recent decision in Jennings v. Dade County, 589 So.2d 1337

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[21] See also Fla. Admin. Code. R. 9J-5.004,

(Fla. 3rd DCA 1991), rev. denied, 598 So.2d 75 (Fla. 1992). In this case, ex parte communications with quasi-judicial decision-makers outside the public hearing arena are forbidden.

Jennings involved a case in which a variance denial was appealed to the Metropolitan Dade County Board of County Commissioners. Individual members of the Commission were lobbied by the variance applicant at separate meetings in their respective offices. Since a variance proceeding is viewed as being quasi-judicial in nature, the Jennings decision found these contacts to be ex parte. The Commission's decision was presumptively prejudicial.

While the decision is legally well reasoned, the practical results have been disheartening. Since the Puma ruling making comprehensive plan amendments quasi-judicial, almost all contact with elected officials has been cut off except at public hearings. For years property owners have attempted to call or meet with individual elected city council or county commission members to determine whether or not their application for change of land use would even stand a chance of being successfully acted upon.

In the business world, time is money, and no property owner wants to waste time with a lengthy process involving public hearings and expert witnesses only to find out that there never was a chance of receiving the approval. Now, because property owners can not informally meet with individual city council or county commission members, they are virtually forced into the

public hearing process. In some cases, everyone's time is wasted, since applications are being filed which really have no business being presented and would not have been had the property owner been able to meet with a decision-maker.

Likewise, affected citizens, homeowners' groups, environmental groups and others are all "cut off" from meeting with their elected officials on an individual basis, and explaining their case "eye to eye." What the public, as well as the owner of property, is left with is an opportunity to appear at a public hearing, more likely as part of a long land use permit agenda. The public is forced to take off time from work in many cases. The public is forced to wait hours to speak because of long agendas and other speakers. In the interest of time and expediency, many times debate ends up being limited to three or five minutes per person by elected or appointed officials.

Finally, the City would note that the public is not reacting well to this new rule. Admittedly, the rule may be legally correct, but when members of the public feel that they can't converse with their elected officials other than by coming to lengthy public hearings and taking time off from work to do so, the result is increased alienation and frustration with government. Perhaps as part of a variance or special exception process, society may be able to live with the Jennings rule, but as part of the comprehensive planning process, it is nothing more than bad policy, if not contrary to the spirit of Section

163.3181.

Application of the Snyder/Fasano quasi-judicial function to certain types of comprehensive plan amendments is not in the public interest as demonstrated by the confusion caused in Oregon over whether a proceeding is legislative or quasi-judicial. As Oregon law amply demonstrates, whether a hearing is legislative or quasi-judicial is determined based on the number of owners of the parcel subject to a hearing, the size of property at issue, and other factors.

If the general public, let alone a property owner/developer or city or county commission, does not know with certainty in advance of a hearing whether the proceeding will be classified as quasi-judicial or legislative, the result could be chaotic. Property owner/developers, the general public, environmental groups, and others, many of whom have limited funds, will not know in advance whether to hire expert witnesses and make a trial-type record, as required in a quasi-judicial hearing. Would the affected members of the public be better advised to spend money, which they probably don't have, to hire a lawyer to prepare a record? What should the city council or county commission do, if they cannot be certain whether the proceeding is legislative or quasi-judicial?

V
USE OF A QUASI-JUDICIAL STANDARD FOR PLAN AMENDMENTS IS COUNTER TO FLORIDA CASELAW

It remains a mystery how the Fifth District Court of Appeal could have concluded that site specific comprehensive plan

amendments are quasi-judicial. A comprehensive plan is comprised of interdependent, symbiotic provisions. By law, the provisions of the plan must all be "internally consistent." § 163.3177, Fla. Stat. (1993). Consequently, even a minor change in one provision or element of the plan may have a ripple effect on the other elements of the plan that sometimes will cause a local government to consider associated amendments to put the plan back into balance.

A request to amend a land use designation, which relates to but one element of a plan, is thus no different from a request to amend a whole element of the plan. It is axiomatic that a decision not to legislate is only reviewable through an original action alleging constitutional or other fundamental violations, and is not reviewable through an action in certiorari. See Rinker Materials Corp. v. Dade County, 528 So.2d 904 (Fla. 3rd DCA 1987). Analogizing a plan amendment to a simple rezoning request, as the lower courts have done, is fundamentally wrong.

Rinker Materials, a case from the Third District Court of Appeal, is directly on point. In this case the plaintiff filed an original action seeking declaratory relief challenging several actions of Dade County, including a plan amendment. The circuit court refused to permit the plaintiff to introduce evidence outside the record, considering the action to be one in certiorari only.

The Third District Court of Appeal noted that the lower court improperly treated

> the case as either an appeal from quasi-judicial action taken by the [Dade County] Commission, or a petition for writ of certiorari from the commission's zoning action. The case before the circuit court was neither. Instead, it was an original action properly mounting a direct attack on an ordinance. As such, Rinker was entitled to prove its contention that the ordinance was unreasonable.

Rinker, at 905.

The court further stated:

> In enacting the ordinance amending the Dade County Comprehensive Development Master Plan the county commission was performing a legislative function.

Id. at 906. In a footnote, the court even distinguished the act of amending a comprehensive plan, which is a legislative act, from that of a rezoning, which is a quasi-judicial act in Dade County. Rinker, at 906 n.2.

Rinker Materials is significant for two reasons. First, this case involved a change to the comprehensive plan affecting a specific site. Second, the Third District has long regarded rezonings in Dade County as being quasi-judicial in nature, which is the view taken in Snyder and by the lower courts in Puma. See Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 653 (Fla. 3d DCA 1982).

The Fifth District's reliance on Snyder in the case at bar is startling in the face of Rinker Materials, but it is incredible given an isolated reference in a Snyder footnote.

> The functional difference between amendments to zoning ordinances and comprehensive planning maps, which constitutes legislative action, and decisions made in individual

> zoning application cases ... which is non-legislative action, is reminiscent of the difference between planning-level ... tort liability [cases] ....

Snyder, at 78 n.60 (e.s.).

Since the time that the Fifth District Court of Appeal issued its opinion in Snyder, it also bears noting that two appellate courts have rendered opinions regarding Snyder. In Lee County v. Sunbelt Equities, II, 18 Fla. L. Weekly D1260 (Fla. 2d DCA May 14, 1993), the Second District Court of Appeal concurred in Snyder's pronouncement that site specific rezonings were quasi-judicial, but the Court refused to adopt the remainder of the opinion. Id. at D1263. In particular the Court noted that it was unable to find the authority for use of the clear and convincing evidence standard of proof. Sunbelt Equities, II, at D1264. The opinion also did not suggest how the Court would react to a case involving site specific comprehensive plan amendments.

The First District Court of Appeal has completely rejected Snyder finding it completely inconsistent with previous Florida Supreme Court and First District Court of Appeal decisions. See Board of County Commissioners of Leon County v. Monticello Drug Co., 18 Fla. L. Weekly D1307 (Fla. 1st DCA May 21, 1993).

VI
QUASI-JUDICIAL "MINI-TRIAL" PROCEDURES ARE CUMBERSOME AND UNWORKABLE BEFORE COUNTY COMMISSIONS AND CITY COUNCILS WITH LONG AGENDAS

Another problem which makes the quasi-judicial process unworkable for comprehensive plan amendments is demonstrated by

Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988), dismissed, 537 So.2d 568 (Fla. 1988). In Battaglia, a 33 acre rezoning was at issue. At the public hearing before the County Commission, a homeowners association appeared and presented its case. The City of Maitland did not appear at the hearing.

After approval of the proposed rezoning, Maitland and the homeowners filed separate Petitions for Writ of Certiorari contesting the rezoning.[22] The Circuit Court overturned the decision of the County Commission, and the property owner appealed to the Fifth District Court of Appeal.

The Fifth District Court dismissed the homeowners association's petition, because they had not timely filed their appeal. The landowner argued that Maitland lacked standing to file the Petition for Writ of Certiorari, because Maitland did not appear and make a record before the Orange County Commission.

Since Maitland did not appear at the County Commission hearing, there was no basis upon the record that the Court could use to determine that Maitland had standing to contest the decision of the County Commission. Consequently, Maitland's petition should have been dismissed by the circuit court.

Since certiorari is the method by which quasi-judicial actions are appealed, if the Snyder/Fasano quasi-judicial concept is applied to comprehensive plan land use amendments process,

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[22] Orange County has a special act which requires suit to be brought by certiorari. Splash & Ski, Inc. v. Orange County, 596 So.2d 491, 493 n.4 (Fla. 5th DCA 1992).

public participation will further be hindered, because interested citizens, homeowners associations, and environmental groups will need to expend funds to hire attorneys to help prepare a record, making certain that all legal issues are preserved for appeal, not the least of which would include standing.

"The problems faced by [Maitland] in obtaining effective review of zoning actions under certiorari standards are ample proof that the practice should be abolished on policy grounds, if not legal grounds." Inconsistent Treatment, supra, at 372 n.270. However, the problem is amplified by the fact that most city councils and county commissioners, because of long agendas, limit the amount of time that one can have to address an issue. The 3 minute or 5 minute time limit is not unusual. It appears that by just about the time that the interested citizen finishes explaining what the basis of his standing is, he will be gavelled out of order for going over his allotted time. So much for public participation as encouraged by Section 163.3181, Florida Statutes!

VII
USE OF A QUASI-JUDICIAL STANDARD FOR COMPREHENSIVE PLAN AMENDMENTS WILL EMASCULATE THE PUBLIC'S RIGHT TO INITIATIVE

The right of citizens to achieve the full measure of public participation in the comprehensive planning process may be determined by whether this Court declares comprehensive plan amendments to be legislative or quasi-judicial in nature. If they are quasi-judicial or administrative matters, it is doubtful whether they may be the proper subject of an initiative or

referendum. Dan Gile and Associates, a recent opinion of the Oregon Court of Appeals, supra, is illustrative. If the plan amendments are viewed as being what they are, e.g. - legislative matters, then the initiative and referendum rights of the people inherent in Florida's Constitution are protected.

Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983), a site specific rezoning case, sets forth the guiding principles. In Florida Land Co., an owner/developer of property was successful in seeking a rezoning from R-U (rural urban development) to R-1A and R-1AA (single-family dwelling). A committee of citizens demanded that Winter Springs repeal the rezoning ordinance.

Upon the Winter Springs Commission's failure to do so, provisions in the Winter Springs City Charter permitted the citizens to seek a referendum. The Florida Land Company brought suit to enjoin the referendum, arguing that their due process rights would be emasculated by the referendum and that the zoning change was really an administrative matter, not subject to referendum.

On both points, this Court disagreed. Whether a referendum in a zoning matter deprives a property owner of due process in law-making was answered by the U. S. Supreme Court in the City of Eastlake v. Forest City Enterprises, Inc., 49 L.Ed.2d 132 (1976). The U.S. Supreme Court indicated that a referendum on a zoning ordinance did not deprive an owner of real property of due process, and the Florida Supreme Court agreed. Florida Land Co.,

at 173-174.

In regard to the owner/developer's contention that the rezoning was administrative in nature and not subject to a referendum, the Florida Supreme Court disagreed, pointing out that the rezoning issue was a legislative act.

> As such, this type of ordinance may be subject to a referendum as provided in the charter. Petitioner may feel that this leaves it without a remedy. We remind petitioner that the referendum has not yet been held, and the result may be favorable to its cause. But should that go contrary to its desires it still has its remedy in court to challenge the ordinance if it feels it is arbitrary, capricious and unreasonable, bearing no substantial relationship to the police power....

Florida Land Co., at 174 (cite omitted).

Although the City has been unable to find an appellate case in Florida wherein a comprehensive plan amendment has been the subject of an initiative or a referendum, it certainly could happen. The City notes that Section 5.07, Melbourne City Charter, as is the case with many Florida charter governments, provides that the city electors have the power to adopt by initiative and referendum any ordinance.

Applying the Snyder/Fasano quasi-judicial concepts to comprehensive planning will curtail the rights that citizens may have. As noted by the Supreme Court in Florida Land Co., "[t]he concept of a referendum is thought by many to be a keystone of self government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them." Id. at 172 (footnote omitted). Of course, as was also noted in Florida Land Co., if

the referendum or initiative power ended in an abuse of individual constitutional rights, the same remedies that currently exist after city or county commission legislative decision-making would be available.[23]

VIII
WHETHER THE PETITIONER IS BARRED BY THE INVITED ERROR DOCTRINE OR THE CONCEPT OF TRIAL BY CONSENT

After obtaining an adverse judgment, Mr. Puma filed a motion for rehearing arguing Snyder, which asserts that the act of a site specific rezoning is quasi-judicial in nature. The trial court ordered the case remanded for an evidentiary hearing and findings of fact. If the holding of Snyder is extended to site specific future land use element amendments, this decision seems proper. Since the process is quasi-judicial, any new action in the lower court would be by petition for writ of certiorari.

This is because common-law certiorari is the appropriate method to review quasi-judicial action. Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); Keay v. City of Coral Gables, 236 So.2d 133 (Fla. 3rd DCA 1970); and Harris v. Goff, 151 So.2d

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[23] The City acknowledges that notions in the Local Government Comprehensive Planning and Land Development Act, Chapter 163, Florida Statutes, would also probably continue to be applicable to plan amendments accomplished at the ballot box. For example, any plan amendment would, more likely than not, still be required to be internally consistent with the rest of the plan. See generally Sierra Club v. Board of Supervisors, 179 Cal.Rptr. 261 (Cal.App. 1981). The City also acknowledges that there may well be problems in implementing a plan amendment initiative or referendum. For example, would the referendum amendment have to be reviewed by the state land planning agency and other state agencies pursuant to Section 163.3184, Florida Statutes? This same question was left open for another day in Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990).

642 (Fla. 1st DCA 1963). Conversely, if the issue is legislative, a suit for injunctive relief would be appropriate. Town of Belleair v. Moran, 244 So.2d 532 (Fla. 2d DCA 1971).

Mr. Puma filed an action which appears to be in the nature of a prayer for injunctive relief. The complaint clearly is not a petition for writ of certiorari. The case was tried de novo, not as an appeal. In fact the issue of whether the case should be tried de novo was discussed by the trial court and the parties at great length (R: 133-142). Mr. Puma's position was that the action was de novo (R: 140; 142).

Having failed in his efforts to obtain a favorable judgment in November, 1991, Mr. Puma sought rehearing, arguing Snyder, which will require further review under a different standard. The City believes that whatever error may have occurred, if the concepts in Snyder are the law, the manner in which the case was tried is "invited error."

> As a general principle, a party who has invited an error in the lower tribunal cannot be heard to complain of the error in the appellate court. This principle, sometimes referred to as the "invited error" rule, is based on the premise that a party who has requested certain action in the lower tribunal, waives the right to challenge the correctness of the action.

Padovano, P.J., Florida Appellate Practice Sec. 5.8A (West's 1992).

The applicable principle is somewhat analogous to the election of remedies doctrine in that a party electing one course of action should not later be allowed to avail himself of an incompatible course. Barbe v. Villeneuve, 505 So.2d 1331 at

1331-32 (Fla. 1987). However, the invited error rule or the corollary "trial by consent"[24] rule seems more applicable.

A land use case that is remarkably similar to the case at bar is Gregory v. Alachua County, 553 So.2d 206 (Fla. 1st DCA 1989). In this case a three-count complaint seeking injunctive and/or declaratory relief, pursuant to Section 163.3215, Florida Statutes, was filed arguing that a rezoning was not consistent with the local comprehensive plan. Two of the three counts were later abandoned, and the remaining count which sought injunctive and declaratory relief left the issues of whether evidence before the City Commission at the time of the public zoning hearing demonstrated consistency of the zoning proposal with the comprehensive plan. Pursuant to Section 163.3215, this case was one seeking injunctive and declaratory relief and should have been tried de novo. However, what was examined was the state of the record and what occurred at the City Council meeting. The court noted

> .... while the complaint states that it is brought under section 163.3215, the pleadings were impliedly amended to seek relief in the form of appellate review, and such issue was in effect tried by consent. ... In the instant case, the issues framed in the order of pretrial compliance clearly indicate that the matter was to be tried via appellate review. ... It is equally clear from the record of the trial that the judge intended not to conduct a de novo proceeding, but to conduct an appellate review of the commission proceedings.

Gregory, at 208-209 (cites omitted). Thus, the First District

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[24] DiTeodoro v. Lazy Dolphin Development Co., 418 So.2d 428, 429 (Fla. 3rd DCA 1982), rev. denied, 427 So.2d 737 (Fla. 1983).

Court of Appeal reversed and remanded on other grounds but in essence affirmed the type of review (appellate), despite the fact that the statute called for de novo review. This was based on the concept of trial by consent.

We have the same situation at bar here, except that the parties sought de novo review rather than appellate-certiorari review, which if Snyder is to be applied to land uses changes, would seem to be the correct method of consideration of this case in the lower court.

CONCLUSION

The Petitioner prays that this Honorable Court will: 1) Order that the amended order on rehearing of the trial court, as well as the appellate court's affirmance, be reversed; 2) That Snyder v. Brevard County Board of County Commissioners, be determined not to be applicable to any type of comprehensive plan proceeding; and 3) Order that the trial court's original November, 1991 order be reinstated.

In the event that the Court determines that Snyder is applicable, the Court should reinstate the trial court's original November, 1991 judgment in favor of the City based on the doctrine of trial by consent and invited error.

It is hoped that this Honorable Court will address the issue of the relationship of Snyder to comprehensive plan proceedings. This same issue is being litigated in Younger v. City of Palm Bay, Case No. 92-2330-AP (Fla. 18th Cir.Ct. oral argument Nov. 18, 1992), which is undecided but pending in circuit court now.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served on and has been furnished by U.S. Mail to RALPH GEILICH, Attorney for Respondent, Post Office Box 820, Melbourne, Florida 32902-0820; Eden Bentley, Esq., Asst. County Attorney, Office of the County Attorney - Building "C," 2725 St. Johns Street, Melbourne, Florida 32940; Sherry Spiers, Esq., Asst. General Counsel, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 32399-2100; John Copelan, Esq., General Counsel, and Barbara Monahan, Esq., Asst. General Counsel, Broward County General Counsel's Office, 115 S. Andrews Avenue - Suite 423, Ft. Lauderdale, Florida 33301; Nancy Stuparich, Asst. General Counsel, and Jane Hayman, Asst. General Counsel, Florida League of Cities, P.O. Box 1757, Tallahassee, Florida 32302; Jonathan A. Glogau, Esq., Asst. Attorney General, Attorney General's Office, Alexander Building - Room 307, 2020 Capital Circle, S.E., Tallahassee, Florida 32399, on this 3rd day of August, 1993.

Respectfully submitted,
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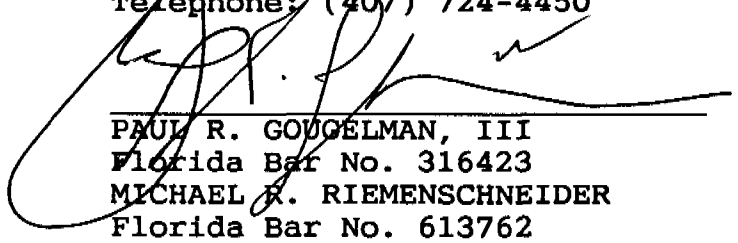

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