SUPREME COURT
STATE OF FLORIDA

MARTIN COUNTY, FLORIDA,

Petitioner,

vs.

CASE NO. 87,078
DISTRICT COURT
CASE NO. 93-3025

MELVIN R. YUSEM,

Respondent.
_____/

JOINT BRIEF OF AMICUS CURIAE DEPARTMENT OF COMMUNITY AFFAIRS AND 1000 FRIENDS OF FLORIDA, INC. IN SUPPORT OF PETITIONER MARTIN COUNTY

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STATEMENT OF THE CASE AND OF THE FACTS

The Department of Community Affairs (Department) and 1000 Friends of Florida, Inc. (1000 Friends), adopt the statement of the case and of the facts set forth in Martin County's brief. The Department and 1000 Friends take no position as to whether or not the County should have approved the particular plan amendment below. The issue of concern to these *amicus curiae* is the **process** employed to review the decision not to amend the plan, not with the **substance** of the decision.

SUMMARY OF ARGUMENT

The 4th District failed to recognize the clear distinctions in the facts and misapplied this Court's holding in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993). Snyder did not involve a plan amendment, and this Court did not hold that plan amendments were quasi-judicial in nature. Moreover, the project that the Snyders wanted to develop was consistent with the plan. The project Yusem wanted to develop was not consistent with the plan, that is why he needed a plan amendment. Consistency is at the heart of the legislative-quasi-judicial analysis.

To determine that a plan amendment is a quasi-judicial act is contrary to the spirit and intent of the Growth Management Act and imposes unreasonable restrictions on the ability of the public to effect the planning process. The 4th DCA has set upon a path that makes it easier for the property owner to reverse a denial of a plan amendment in court than it is for someone opposing the granting of an amendment to seek reversal in the administrative forum. This dichotomy is inconsistent with the growth management system in Florida and does not serve the public interest.

A COMPREHENSIVE LAND USE PLAN IS THE LOCAL GOVERNMENT'S EXPRESSION OF POLICY GOVERNING LAND USE AND DEVELOPMENT. A DECISION WHETHER TO AMEND THAT POLICY IS A LEGISLATIVE NOT A QUASI-JUDICIAL ACT.

A. The facts and the holding in Board of County Commissioner of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993) are distinguishable and do not control the resolution of the certified question.

At issue in this case is whether the amendment of a local government's comprehensive plan -- its land use policy document -- is legislative or quasi-judicial, and the standard by which that decision will be reviewed.

Prior to adoption of this State's growth management law[1], zoning regulations were the mechanism by which local governments regulated the use of land. Zoning decisions were considered to be legislative in nature, and the courts developed the deferential "fairly debatable" standard of review. Today in Florida, statutorily-mandated comprehensive land use plans, not zoning ordinances, are the preeminent mechanism which governs the use and development of land. Without question, the adoption of a comprehensive plan is a legislative function.[2]

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[1] Section 163.3161, et al., Florida Statutes.

[2] Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1987), *en banc, cert. denied*, 529 So.2d 693 (Fla. 1988).

Within this regulatory framework, this Court held in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993), that the denial of a request to rezone a parcel of land to a zoning designation, which was **consistent** with the policies in the County's comprehensive plan, was a quasi-judicial act. That is, the zoning decision involved the implementation of the local government's land use policies expressed in its comprehensive plan. As such, the decision must be made in a judicial-type, fact-finding hearing and is subject to a strict scrutiny standard of review in a writ of certiorari proceeding.

Snyder clearly did **not** hold that comprehensive plan amendments are quasi-judicial acts. That issue was not addressed. Snyder involved an application for a rezoning, not a plan amendment. At issue in Snyder was a denial of a request to rezone a one-half acre parcel of land from GU (single family residential) to RU-15 (multifamily residential at 15 units per acre). The future land use map in the Brevard County comprehensive plan designated the site residential, and was apparently so general as to authorize the full range of residential densities. Therefore, unlike Mr. Yusem, the Snyders did not need to amend the local government's comprehensive plan in order to develop their project. They needed a change to the County's zoning, which is merely a means by which the comprehensive plan is implemented.

The rezoning sought by the Snyders **was consistent** with the local government's comprehensive plan. On the contrary, the project Yusem wants to develop **is not consistent** with the Martin County Comprehensive Plan, which explains why Yusem needed to amend the plan itself before he could seek a change to the zoning designation. The Future Land Use Map (FLUM) in the Martin County Comprehensive Plan designates Yusem's site for Rural Residential Use, which limited density to .5 dwelling units per acre. Because he wants to develop at a density of 1.8 dwelling units per acre, he had to seek an amendment to the FLUM to Residential Estate Use, which tripled the allowable densities to 2 units per acre.

To read Snyder as applying to plan amendments is to ignore these essential facts. The issue in this instant appeal involves a refusal to amend the future land use map (FLUM) designation for a 54 acre parcel in the Martin County Comprehensive Plan (the Plan), not just the denial of a rezoning request. Thus, the facts in Snyder are distinguishable, moreover, the holding is also not controlling.

Chapter 163, Part II, Florida Statutes, popularly known as the Growth Management Act, requires that local governments engage in comprehensive land use planning, through which the Legislature intended:

> that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare, prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.[3]

Such plans have been recognized to be legislative in nature.[4]

Once a comprehensive plan consistent with the requirements of the Growth Management Act is in place, it is implemented through the adoption of land development regulations and issuance of development orders, each of which must be consistent with the adopted comprehensive plan.[5]

In Snyder this Court recognized that the consistency mandate requires that all land development decisions must be consistent with the plan.[6] It is this requirement of consistency that assures that the comprehensive plan actually means something; that it will be followed and enforced. The consistency of a proposed development

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[3] Section 163.3161(3), Fla. Stat. (1995).

[4] Section 28 Partnership, Ltd. v. Martin County, 642 So.2d 609 (Fla. 4th DCA 1994), *review denied*, 654 So.2d 920 (Fla. 1995) ("there is no reason to treat a commission decision rejecting a proposed modification of a previously adopted land use plan as any less legislative in nature than the decision initially adopting the plan.")(Stone, J. concurring)

[5] Sections 163.3167(1)(c), 163.3194, 163.3201, Florida Statutes.

[6] Snyder at 473, citing Section 163.3194, Florida Statutes.

with the local government's comprehensive plan was critical to this Court's reasoning in Snyder, where it tied this important legal condition precedent to development to its holding stating:

> Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. Id at 476. (Emphasis added).

Obviously, if the rezoning in Snyder had been inconsistent with the plan, the case would have never reached this Court in the first place. This begs the question as to why the courts below allowed Yusem to accomplish with two acts (a plan amendment and a rezoning) what he could not legally do with one (just an inconsistent rezoning).

Zoning and planning are fundamentally different. Unfortunately, this important distinction was apparently lost on the lower courts. Years ago Professor Charles Harr, who was cited with authority by this Court in Snyder, likened a comprehensive plan to a constitution.[7] Zoning and other land development regulations (LDRs) merely implement the plan. LDRs are legally subservient to the plan and their adoption or amendment must be consistent with the plan. Land

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[7] Haar, "In accordance with a comprehensive plan", 68 Harv. L. Rev. 1154 (1955), see also Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1988) (en banc), review denied, 529 So.2d 693 (Fla. 1988).

development regulations, in turn, are implemented through the issuance of development orders, which must be consistent with the regulation and with the plan.[8] A rezoning is by definition a development order.[9] A plan amendment is nothing of the kind.

Additionally, it must be realized that the procedural limitations imposed by the Growth Management Act on the adoption of a plan amendment are exactly like those employed to adopt the original plan. The process of adoption, monitoring, and from time to time amending a comprehensive plan is governed exclusively by the Growth Management Act which treats this entire process as a legislative function. These procedures severely limit local government's ability to amend the plan, they guarantee the public's right to be heard and provide a broad grant of standing to challenge the amendment. This is as it should be. It should be difficult to amend a constitution. The opinion below fails to respect and support the dignity of the comprehensive planning process set forth in the Growth Management Act.

Recognizing the fundamental difference between development orders (rezonings) and plan amendments enabled this Court to place the "policy application vs. policy making" examination at the center of the legislative vs. quasi-judicial

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[8] Section 163.3194, Fla. Stat. (1993).

[9] Section 163.3164, Fla. Stat. (1993).

analysis. It is through the comprehensive planning process (which process is imbued with public participation to a considerable extent) that a local government **makes** growth management policies. It is through the plan's adoption and occasional amendment, that the local government promulgates and codifies these policies. On the other hand, policies are **applied** through rezonings, permitting and other development orders and regulations. While consideration of existing plan policies are sometimes necessarily involved in a decision to amend the plan, the plan amendment process is nonetheless, first and foremost a policy making process. It is not a policy application process.

While this Court in Snyder correctly noted that the plan does not automatically set the outside limits of density and recognized that local governments still retained some discretion to time the increase in zoning densities within the range of densities allowed in the FLUM, it was proper to require that the local government at least explain how a denial of a rezoning request still provided the landowner with a use that was consistent with the plan. While this change in the law was appropriate with regards to small rezonings, it is quite another thing entirely to impose this shift in paradigm onto plan amendments.

When the 4th District ignored these important distinctions between rezonings and plan amendments, between policy making through the plan and policy

application through zoning decisions, it effectively relegated a plan amendment to the level of a development order. This result is not consistent with this Court's opinion in Snyder and belies the basic hierarchy of planning and zoning under Florida's growth management system.

B. To characterize plan amendment hearings as quasi-judicial proceedings violates the spirit and intent of the State's growth management laws and effectively disenfranchise the public from the planning process.

When this Court changed the law as it relates to the review of certain rezonings in Snyder, it fundamentally altered the relationship between the local government and the property owner, and between the local government and the judiciary. In Snyder, this Court recognized that through the adoption of the 1985 amendments to the Local Government Comprehensive Planning Act (the Act) the state imposed a rigorous growth management system on local governments.[10] The Act required the adoption of a comprehensive plan meeting minimum state standards, and required that the plan be implemented with land development regulations (LDRs). Most important of all, the Act mandated that all land development decisions had to be consistent with the plan.[11] It was precisely

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[10] Snyder at 473.

[11] Section 163.3194, Fla. Stat. (1985).

because of these "reforms" in the law that this Court jettisoned the presumption of validity and the fairly debatable standard as it relates to small scale rezonings.[12]

The demise of these traditional common law zoning principles has made it easier for property owners to challenge a local government's unjustified denial of a zoning request. Historically where the courts have classified a land use decision as quasi-judicial, they have simultaneously provided more protection to the private property owner from arbitrary decisions caused by unsubstantiated neighborhood opposition than was afforded under the traditional, legislative fairly debatable analysis.[13] This Court's concern to protect land owners from "neighborhoodism" in small scale rezonings, which were otherwise consistent with the plan, was totally appropriate.[14] This being said, it would not be appropriate for the same reasons to quiet the neighbor's voice in plan amendment proceedings initiated to allow development which was not consistent with the existing plan.

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[12] Snyder, at 473.

[13] Cf. Pollard v. Palm Beach County, 560 So. 2d 1358 (Fla. 4th DCA 1990); Flowers Baking Co. v. City of Melbourne, 537 So. 2d 1040 (Fla. 5th DCA 1989); BML Investments v. City of Casselberry, 476 So. 2d 713 (Fla. 5th DCA 1985), rev. denied, 486 So.2d 595 (Fla. 1986); City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th DCA 1974); Conetta v. Sarasota, 400 So.2d 1051 (Fla. 2nd DCA 1981), contra Board of County Commissioners of Pinellas County v. Clearwater, 440 So.2d 497 (Fla. 2nd DCA 1983).

[14] Snyder at 472.

The 4th District created a situation where the **denial** of a plan amendment would be reviewed in a substantially different way than the process employed to review the **approval** of a plan amendment. Under the logic employed by the lower court, if an application for a "quasi-judicial" plan amendment is denied by the local government, it would be reviewed by an appellate panel of the circuit court, based on the limited record created below, upon the filing of a common law petition for writ of certiorari. In that forum, the local government's planning decision to refuse to amend its plan would **not** be afforded any presumption of correctness, and the reviewing courts would **not** apply the fairly debatable standard, but would use the less deferential competent substantial evidence standard.[15] On the other hand, under the Growth Management Act, if that same amendment was **adopted** and found to be in compliance by the Department, it would be reviewed **de novo** at a formal administrative hearing. There the action of the local government would be presumed correct and the burden would be on the attacker, i.e. the neighbor, of the amendment to prove the amendment was not fairly debatable.[16]

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[15] Snyder at 476.

[16] Section 163.3184(10), Fla. Stat. (1995).

It simply does not make any since to subject the local government's **denial** of a request to amend the plan to an **easier** process of review than would be used if the plan was amended. The result of the lower court's decision to apply Snyder's quasi-judicial rule to plan amendments necessarily makes it more likely that local governments will grant amendments to allow development, which is inconsistent with the plan. To subject plan amendments to the quasi-judicial review process, encourages local government to approve a plan amendment for a project which would violate the plan without the amendment, because the local officials know that judicial review would be limited to the record and that their shield in the traditional presumption of correctness and fairly debatable standard has been taken away.

Thus, the 4th District has substantially eased the procedural limitations on a property owner who was denied a request to change the plan in the face of a contrary statutory system that places stricter limitations on the citizen who would oppose the adoption of that same plan amendment. Hopefully this double standard was unintended by the courts below. Nonetheless, the resulting paradox is that it is easier, and subject to less stringent review for a local government to amend its plan, than to maintain it in its current form, which result clearly violates the intent of the Growth Management Act.

Another problem with the 4th District's opinion is that because one really never knows what size of an amendment is small enough to be called quasi-judicial,[17] prudent local government lawyers often advise that **all** plan amendment hearings comply with the procedural due process requirements of a quasi-judicial hearing. Otherwise they would set their local government client up for an easy reversal. If the plan amendment was ultimately deemed legislative in nature by a reviewing court, they would have lost nothing by providing a record producing hearing.

This leads to a process that effectively disenfranchises the public from the plan amendment process, to which they, as a matter of law, have a right to be involved "to the fullest extent possible".[18] The citizen who wishes to oppose a plan amendment that might be deemed quasi-judicial in nature is now compelled to hire a lawyer and an expert witness, go under oath and be cross-examined on their qualifications to even testify before their elected officials, all in an effort to build the record essential for review if the amendment is turned down. This complicated,

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[17] Florida Institute of Tech. v. Martin County, 641 So.2d 898 (Fla. 4th DCA 1994), held an 84 acre amendment to the FLUM was quasi-judicial. Section 28 Partnership, Ltd v. Martin County, held that a 638 acre amendment was legislative. Martin County v. Yusem, 20 FLW D1967 (4th DCA opinion issued August 30, 1995), held that a 54 acre amendment was quasi-judicial.

[18] Section 163.3181, Fla. Stat. (1995).

litigation-oriented model is costly and fraught with pitfalls for the citizen who wants to oppose a development deemed inconsistent with the plan. Often than not, these citizens will come to the hearing unprepared. Their testimony may be rejected as irrelevant or without weight. Thus, the voice of the public's interests protected by the adherence to the existing plan has been effectively silenced by the court's opinion below.

The limitation of the standing doctrine is another burden imposed on the citizen in a quasi-judicial hearing. Arguably, only those persons who can show a special injury different in degree from that suffered by the public at large may become parties to certiorari proceedings and appear before the quasi-judicial local board. Renard v. Dade County, 261 So. 2d 832 (Fla. 1972). This significant limitation on public input into the planning process is inconsistent with the Act, which grants standing to any person who owns land or operates a business in the local jurisdiction and who appears before the local government.[19]

Finally, the most difficult limitation on the public in a quasi-judicial proceeding is the prohibition on ex parte communications, discussed in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991), *rev. den.*, 598 So.2d 75 (Fla.

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[19] Section 163.3184(1)(a), Fla. Stat. (1995). This broad grant of inclusiveness is another indicator that the plan amendment process is legislative in nature, not quasi-judicial.

1992). If a plan amendment is deemed quasi-judicial, **no** citizen, including the landowner who needs the plan amendment to do a development project, may even talk to their elected officials about the proposal to amend the very plan they were involved in creating. This is undemocratic and violates the spirit and intent of the Growth Management Act, which was intended to include all of the public as an essential player in the plan adoption and amendment process. [20]

In short, characterizing plan amendments as quasi-judicial weakens the plan and lessens its effectiveness as a long range growth management tool. It deprives the local government of much of its home rule discretion to control land use through long-range planning, and relegates the public to a position of observer, rather than an active participant in the planning process.

C. Conclusion.

To conclude, if this Court were to pronounce that plan amendments are always legislative in nature, a property owner who was denied a request for a plan amendment would still have a cause of action for declaratory and injunctive relief. There the playing field would be level with the rest of the public. There the property owner would be faced with the same presumption of correctness and the

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[20] Section 163.3181, Fla. Stat. (1995), states that "It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible."

fairly debatable standard. There the proceeding would be de novo and all parties would have the same chance to build a proper record. Most importantly of all, by characterizing a plan amendment as a legislative act, this Court will reaffirm the comprehensive plan's status as a constitution guiding the local government in making land use decisions, and it will support the public's right to effectively influence the planning process.

The majority of the 4th District was simply wrong in Yusem. The dissent by Judge Pariente on the contrary was imminently correct and well reasoned in recognizing that plan amendments are legislative not quasi-judicial acts. This Court should adopt the dissent and remand with instructions for the 4th District to review the denial of the amendment as a legislative act.

Respectfully submitted this 22nd day of February, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing has been furnished to the following parties by U.S. Mail or fax, or both, this 22nd day of February, 1996.

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