ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Fourth DCA Case No.: 93-3025

CASE NO. 87,078

MARTIN COUNTY, a political subdivision of the State of Florida,

Petitioner,

v.

MELVYN R. YUSEM, Trustee,

Respondent.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DECISION BELOW

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IDENTITY AND INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such action only

where the Foundation's position has broad support within the general community. The Board of Trustees has authorized the filing of a brief amicus curiae in this matter. PLF has participated in numerous cases involving constitutional protection of property rights before the United States Supreme Court and other courts. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, Foundation attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and the Foundation participated as amicus curiae in cases from *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), to *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Pacific Legal Foundation considers this case to be of special significance in that it concerns the fundamental issue of how communities may deal with population growth in the context of urban development and the standard of review that will be applied by the courts when planning decisions run afoul of public concerns. PLF seeks to augment the argument of respondent Yusem in this case. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional needed viewpoint with respect to the issues presented by this case.

STATEMENT OF THE CASE

Pacific Legal Foundation adopts as accurately reflecting the facts of this case the findings of facts (FF) set forth in the Final Judgment (Cir. Ct. Order) dated September 23, 1993, of Judge Makemson, Nineteenth Judicial Circuit Court, Martin

County. For reasons of clarity, these findings, found at Pages 3-5 of the order, are set forth below: Mr. Melvyn Yusem owns a 54-acre parcel of undeveloped land in Martin County (County). FF 1. In 1989, he filed an application with Martin County seeking an amendment to the County's comprehensive land use designation of his land from rural density (.5 units per acre) to estate density (2 units per acre). Simultaneously, he filed a petition to rezone the property to Planned Unit Development (R). FF 2.

The application for the land use amendment was reviewed by the Martin County staff and presented to the local planning agency which, after reviewing it, recommended its approval. FF 3. The application was then sent to the County Commission (Commission) on May 1, 1990. The staff there recommended denial of the application on the grounds that the application for land use amendment was premature. However, the Commission, by a vote of three to two, moved recommendation of the amendment and directed that it be sent to the Department of Community Affairs (DCA) for its statutory review of comprehensive land use amendments. FF 4.

Martin County staff sent the recommendation to the DCA without sending any of the findings of the Commission that justified the request. FF 5. The DCA reviewed the proposed amendment and submitted its Objections, Recommendations and Comments (ORC) to the County. The ORC stated that the proposed amendment did not include an analysis that demonstrated that the more intensive development requested was a logical extension of a more intense land use designation

in the nearby area. The ORC stated that according to the data and analysis presented, the area is predominately rural and agricultural. The DCA recommended that the County either abandon the amendment or revise the data and analysis to demonstrate that the proposed amendment is a logical extension of the more intensive land use in the nearby area. FF 6.

The application came to the County Commission on October 16, 1990, for its final hearing. Again the staff recommended denial. This time the County Commission denied the requested amendment on the basis of "leap-frog development."[1] The County changed plaintiff's zoning designation from Small Farms District (A-1) to Rural Estate District (RE-2A) in Resolution No. 90-10.43. FF 7.

At the time of the application and at both of the Commission meetings, Mr. Yusem's property was located in the Primary Urban Service District (PUSD). Under Martin County's Comprehensive Plan, the PUSD is reserved for residential densities of two units per acre and up. Also at the same time period, the County's available public services in that area were operating at acceptable levels of service. FF 9.

Adjacent to Mr. Yusem's land is a development called Fern Creek with a designation of estate density, the same density sought by him. FF 10. One-half mile from his property is the campus of Indian River Community College and the site

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[1] Leap-frog developments are defined in Section 4-1.B of the Comprehensive Plan as those located beyond the fringe of urban development where the planned provision of urban services cannot be assured in a cost-effective manner and where community planning goals would be adversely affected. Cir. Ct. Order at 6.

of a new branch of Martin Memorial Hospital. FF 11. A new interchange of I-95 was opened and Mr. Yusem's property has frontage on Salerno Road, a major arterial road between U.S. 1 and State Road 76 which gives direct access to the new interchange and I-95. FF 12. Also approximately one-half mile from Mr. Yusem's property is a new elementary school and also nearby, a large residential PUD, Willoughby, was approved. FF 13. The intersection of Salerno Road and U.S. 1, approximately one and one-half miles from Mr. Yusem's property, is developed commercially. FF 14. Located on Salerno Road between State Road 76 and U.S. 1, are several residential communities with zoning or land use densities of two acres or more. FF 15.

Based on the above facts, the Circuit Court concluded that Yusem's requested zoning and land use change were consistent with the County's Plan; logical and consistent with past changes in use in the general area; and that there were adequate public services available. The trial court further found that there was no substantial competent evidence to support the County's denial of the requested amendment. Cir. Ct. Order at 6-7.

The court found for Mr. Yusem on three counts of his complaint, granting declaratory relief and finding that the County had acted in an arbitrary and unreasonable manner and, furthermore, had acted in a manner inconsistent with the comprehensive plan. Cir. Ct. Order at 7. Martin County was enjoined from enforcing any land use restriction or zoning designation on Mr. Yusem's land more

restrictive than two units per acre unless otherwise agreed between Martin County and Mr. Yusem. Cir. Ct. Order at 7.

The County appealed the trial court's judgment and the Florida Department of Community Affairs intervened to file an amicus brief on behalf of the County. On August 30, 1995, the District Court of Appeal issued its opinion,[2] reversing the judgment of the trial court for want of jurisdiction but without prejudice to Yusem's filing a new application.

Most significant was that portion of the opinion in which the court held that the decision of the County denying Yusem's request to amend the county's future land use map to allow more residential units on his property was quasi-judicial (policy application) and not a legislative (policy making) decision.

The court noted the two distinguishing characteristics between quasi-judicial and legislative decisions. The first relates to procedural due process.

> The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning ... contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses; and it is the existence of these safeguards which makes the hearing quasi-judicial in character and distinguishes it from one which is purely legislative.

Yusem, 664 So. 2d at 977 (quoting *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 652-53 (Fla. 3d DCA 1982)), *cited in Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993) (*Snyder II*).

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[2] *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995).

The second relates to the impact of the amendment on the public, either in terms of the number of people or range of other property affected by the amendment. Where the amendment to the future land use map would have a limited impact on the public, the action taken by the county in regard to the amendment would be quasi-judicial. *Yusem*, 664 So. 2d at 977 (citing *Florida Institute of Technology v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994)).

Unlike a court's review of a legislative decision in which great deference is given to the decision–making body, a court will apply strict scrutiny to a decision arising from a quasi–judicial hearing.

The Court of Appeal granted the county's motion to certify "a question of great public importance":

> Can a rezoning decision which has limited impact under *Snyder*, but does require an amendment of the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?

Yusem, 664 So. 2d at 982.

SUMMARY OF ARGUMENT

In its Brief on the Merits at 1, the County asserts that "[t]his case raises the most significant question about local governments' ability to plan for future growth since the passage of the Growth Management Act in 1985." While reasonable minds might disagree as to the historical significance of this case, there can be little doubt that the question certified by the Fourth District Court differs from that which the County of Martin now chooses to answer. While it may be the practice to reframe questions, the question raised by the County obfuscates the gradations that

exist in the broad spectrum of zoning cases. The effect of this effort is intended to nullify much of this Court's decision in *Snyder II*, 627 So. 2d 469.[3] Furthermore, many decisions relating to land use will be beyond meaningful review by the courts as independent arbiters of the constitutionality of a planning entity's decisions.

This Court is familiar both with Florida's history of land use planning and with the confusion that existed concerning judicial review of planning decisions by governmental entities. A comprehensive ordering process was begun by this Court in 1957 with its decision in *DeGroot v. Sheffield*, 95 So. 2d 912 (1957), where it clarified the definitions of and distinctions between quasi-judicial and executive

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[3] That this is the County's express design is manifest. At Page 2 of its Brief on the Merits, the County poses its own question in place of that certified by the district court.

> Is the planning decision to amend a local government comprehensive plan by changing the future land use map designation for a specific property legislative or quasi-judicial?

(Capitalization omitted.)

It then answers the reformulated issue: "The question, no matter how it should be phrased, must be answered in the negative."

This formulation leaves out the critical "limited impact" factor, an omission that is intended to elevate form over substance thus eviscerating the logic of *Snyder*.

The County's intentions are made all the more clear when, at 19-20, it states: "This court's *Snyder* decision was a judicial excursion out of the realm of time-honored judicial deference recognized under the separation of powers doctrine and into the realm of greater judicial activism and a new 'balance' of the separation of powers."

decisions. Thirty-five years later, in *Snyder II*, 627 So. 2d 469, this Court applied the same reasoning to quasi-judicial and legislative decisions.

The case now before this Court involves a quasi-judicial decision which should be reviewed by a court on appeal applying the same standard of strict judicial scrutiny. Opposing this result, the County raises the same arguments frequently and unsuccessfully brought in Florida courts. The County relies on the *mechanism* by which a change in a land use planning document is sought, rather than the *effect* of the change. The County would have every *amendment* to a plan be a legislative act, whether it affect one or a thousand property owners. This is simply not a rule promulgated by this Court in any of its decisions. Furthermore, the County suggests a new rule, that if the application is intended to change or is not consistent with existing law, it is legislative and not quasi-judicial. The County would have *every* application for a zoning change, variance, or special exception be legislative and beyond the significant review of the court. Such a rule is fundamentally unsound, contrary to this Court's decisions related to zoning and growth management, and clearly incompatible with judicial oversight permitted if not mandated by the Local Government Comprehensive Planning and Growth Management Acts.

Protection of property rights guaranteed under the Florida and United States Constitutions justify the Court's continued application of *Snyder II*'s standard of strict judicial review to quasi-judicial decisions. In the United States Supreme Court decision, *Dolan v. City of Tigard*, the Court emphasized that an individual must not be compelled by the Government to bear public burdens which should be borne by the

public as a whole.[4] Furthermore, the government cannot "leverage" a constitutionally protected incident of ownership in exchange for a discretionary benefit.

In no case after *Snyder II* has this Court taken the overly formalistic and anachronistic approach advocated by the County to zoning and quasi-judicial review. The County offers no compelling justification to modify Florida's well-reasoned and balanced approach to planned community development.

ARGUMENT

I

THIS REZONING DECISION WHICH HAS LIMITED IMPACT ON OTHER PROPERTIES OR PROPERTY OWNERS, BUT REQUIRES AN AMENDMENT TO THE COMPREHENSIVE LAND USE PLAN, IS A QUASI-JUDICIAL DECISION SUBJECT TO STRICT SCRUTINY REVIEW

As previously noted, the County asserts in its Brief on the Merits at 19-20 that "[t]his court's *Snyder* decision was a judicial excursion out of the realm of time-honored judicial deference recognized under the separation of powers doctrine and into the realm of greater judicial activism and a new 'balance' of the separation of powers." The County's assessment contains a number of inaccuracies. The Court's *Snyder* decision was no "excursion," but was a *continuation* of an established practice of judicial review of administrative decisions begun almost 40 years ago.[5] However, more importantly, the former "balance of the separation of powers" to which the County refers never existed and would be incompatible with the purpose of

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[4] *Dolan*, ___ U.S. ___, 114 S. Ct. 2309, 2316 (citing *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 1554 (1960).

[5] *De Groot v. Sheffield*, 95 So. 2d 912 (discussed *infra*).

an independent judiciary. As will be discussed below, the degree of deference that the County would have this Court give to zoning decisions is so great as to insulate the County's decision from meaningful review.

Previously, local governments exercised the zoning power subject only to "fairly deferential" review by the courts. *Snyder II*, 627 So. 2d at 472 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 2d 303 (1926).[6] As expected, the adoption of a deferential standard led over the years to a rather inconsistent system of zoning, not just in Florida but in other states as well. *Snyder II*, 627 So. 2d at 472-73. In response, Florida enacted a series of measures beginning with the Local Government Comprehensive Planning Act of 1975 (Laws of Fla. Ch. 75-257) and more recently the Growth Management Act (Laws of Fla. Ch. 85-55). *See Snyder II*, 627 So. 2d at 473. An important feature of these Acts is the requirement that each county and municipality prepare a local comprehensive plan governing future development of economic, social, physical,

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[6] In his treatise, *American Land Planning Law*, Professor Norman Williams referred to a "third stage" in the history of land use controls during which

> the courts gave great respect to decisions on zoning by various local agencies. ... The change in attitude was expressed in various ways–a genuine presumption of validity which controlled unless a strong case was made to the contrary, the rule that zoning was valid when the case was fairly debatable, etc. In some states this respect for local autonomy went so far as to make judicial review more or less *pro forma*; ... if the only proof needed was that there was something to be said in favor of a regulation, a municipality could hardly lose.

Norman Williams, Am. Land Plan § 5.04, *Land Use and the Police Power* (1988).

environmental, and fiscal aspects of the community. Section 163.3177(1). Land development regulations are adopted to implement the plan with which they must be consistent. Fla. Stat. § 163.3177(1).

In 1957, this Court adopted an orderly procedure for determining the correctness of orders of administrative agencies. In *DeGroot v. Sheffield*, 95 So. 2d 912, it was observed that, at the time, there were more than "one hundred boards, bureaus and officials engaged in administrative activities affecting the rights and property of individuals as well as the public." *Id.* at 914. One commentator had suggested that "[n]o branch of administrative law is more seriously in need of reform than the law concerning methods of judicial review." *DeGroot v. Sheffield*, 95 So. 2d at 914 (citing Kenneth Davis, 44 ILL. L. REV. at 565).

In *DeGroot*, this Court distinguished between two categories of administrative decisions, executive[7] and quasi-judicial,[8] and accorded each a different standard of review.

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[7] The "executive" decisions in *De Groot* appear more "ministerial" than "legislative." However, the case is illuminating for its consistency with respect to the definitions of "quasi-judicial" actions in terms of the due process involved.

[8] "[W]hen notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive." *Id.* at 915.

A. The Standard of Judicial Review of a Rezoning Decision Is Governed by This Court's Decision in Snyder II

In *Snyder II*, this Court distinguished between the two types of decisions applied to the zoning context, concluding that "comprehensive rezonings affecting a large portion of the public are legislative in nature." *Snyder II*, 627 So. 2d at 474. This Court agreed with the appellate panel which stated:

> "[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action."

Id. at 474 (quoting *Board of County Commissioners of Brevard County v. Snyder* (*Snyder I*), 595 So. 2d at 65, 78 (Fla. 4th DCA 1991)). Furthermore, as was stated in *Snyder II*, the nature of the procedure and protections afforded can make the hearing quasi-judicial in character and distinguishes it from one which is purely legislative.

Despite numerous opportunities, this Court has not retreated from its conclusion as to the two discrete types of administrative decisions and their entirely different standards of judicial review. Shortly after *Snyder II*, this Court ruled that denial of a site plan was a quasi-judicial decision subject to judicial review by petition for certiorari. *Park of Commerce Associates v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994). In that case, the City of Delray Beach unsuccessfully urged this Court to overrule *Snyder*. *Park of Commerce*, 636 So. 2d at 15.

Similar efforts by the County in other cases to limit *Snyder* have been unsuccessful. In *Florida Institute of Technology v. Martin County*, 641 So. 2d 898, the Fourth District Court of Appeal stated:

> We reject Martin County's contention that the decisions in *Parker* and *Snyder* do not affect the dismissal of the certiorari proceedings because FIT is not a landowner/applicant, and the proceedings concerned a local government's own review of the land use map designations on specific property, an act that is legislative in nature in the same way that the original adoption of a zoning plan or comprehensive plan is legislative.
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> ....
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> The record reflects that the board hearings essentially addressed the change in the land use designation for a particular piece of property. ... While these circumstances might be characterized as hybrid, application of the reasoning of *Snyder* and a review of the record leads to the conclusion that this board's action, in this instance, was quasi-judicial in nature.

Id. at 899-900.

B. Strict Judicial Scrutiny Should Apply to This Case Where Yusem Was Required to Undergo a Procedural Process That Resulted in a Quasi-Judicial and Not a Legislative Decision

As this Court observed in *Snyder II*, in addition to the impact, the character of the hearing determines whether or not a board action is legislative or quasi-judicial. *Snyder II* 627 So. 2d at 474. It is undeniable that Yusem's application for a land use change required not the formulation of a general rule of land use policy but, rather, the application of a general rule. In his Answer Brief in the District Court of Appeal, Yusem stated that he

> was required to set forth detailed factual information in his application to support the requested land use change. [He] had to demonstrate that there was full compliance with all applicable Code provisions; that public facilities and services were available and adequate; that concurrency requirements were met; and that his request was consistent with the Plan .... [T]he County reviewed the facts at public hearings, and applied the facts to the standards in the Plan.

Answer Brief at 14. The circuit court, determining the process to be quasi-judicial and not legislative, applied a strict judicial scrutiny standard of review, a decision upheld by the Fourth District Court of Appeal. *Yusem*, 664 So. 2d at 977.

In its Brief on the Merits at Page 23, the County argues that the action did not arise from a quasi-judicial proceeding. The County's assertion that courts have rejected the application of *DeGroot* to the adoption of zoning ordinances is without merit. Consistent with *DeGroot*, the *adoption* of zoning ordinances is a legislative and not quasi-judicial act, thereby permitting only deferential review by a court. In that regard, the County's statement that "courts ... ruled that zoning was not quasi-judicial" obfuscates the correct rule stated in the cases upon which the County relies.[9] County's Brief at Page 23. As this Court noted in its *Snyder II* decision, "[e]nactments of original zoning ordinances" have been considered legislative. *Snyder II*, 627 So. 2d at 474 (citing *Gulf & Eastern Co.* and *County of*

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[9] The County cites *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983); *Gulf and Eastern Development Company v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978); *County of Pasco v. J. Dico, Inc.*, 343 So. 2d 83 (Fla. 2d Dist. Ct. App. 1977), as standing for the proposition that courts "have continued to regard as legislative the *adoption* of zoning ordinances." County's Brief at Page 23 (emphasis added).

Pasco). But it is because of its comprehensive nature that the action is legislative, not because it relates to zoning. *Snyder II* 627 So. 2d at 474 (citing *Schauer v. City of Miami Beach*).

For example, the County cites *Harris v. Goff*, 151 So. 2d 643 (Fla. 1st DCA 1963), as standing for the proposition that adoption of a zoning ordinance is not a quasi-judicial decision. In fact, in *Harris*, the court noted that the particular "zoning ordinance under attack ... was entered pursuant to a hearing having none of the characteristics or safeguards of a quasi-judicial proceeding. *Harris v. Goff*, 151 So. 2d at 644. However, the court stated that the fact that one particular ordinance was not quasi-judicial did not mean that others might not be quasi-judicial.[10]

> This holding does not apply to zoning ordinances adopted by municipalities proceeding in accordance with the provisions of Ch. 176, F.S.A. This statute specifically provides that review of municipal zoning ordinances adopted pursuant thereto may be had by writ of certiorari issued by the courts in which complaint against the ordinance is filed, and the proceedings had thereon will be in the nature of a trial de novo.

Id.

Furthermore, the County's reference to *Rinker Materials Corporation v. Metropolitan Dade County*, 528 So. 2d 904 (Fla. 3rd DCA 1987), is irrelevant. The County states in its Brief on the Merits at Page 23 that in *Rinker* the court rejected the application of *DeGroot* to site specific amendments to comprehensive plans.

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[10] Citing as an example a zoning ordinance adopted in accordance with the provisions of Ch. 176, F.S.A. *Id.*

However, in actuality, Rinker involved a facial challenge to the validity of an ordinance under which property was zoned. The court stated that passage of the ordinance was legislative, but noted "applications for zoning changes, variances, or special exceptions and which provide interested parties with procedural due process are generally considered quasi-judicial." *Rinker*, 528 So. 2d at 906 n.2 (quoting *Coral Reef Nurseries, Inc. v. Babcock*, 410 So. 2d 648, 653 (Fla. 3d DCA 1982)). This case relates to a site-specific application rather than passage of a broad-ranging ordinance.

Furthermore, that *DeGroot* did not apply had nothing to do with the fact that *Rinker* was a zoning case. Rather, as the court observed:

> The trial court incorrectly treated the case as either an appeal from quasi-judicial action taken by the commission, or a petition for a writ of certiorari from a 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.*

Rinker, 528 So. 2d at 905 (emphasis added).

The County suggests its own rule for determining whether a decision of an administrative body is legislative or quasi-judicial. At Page 24 of the Brief on the Merits, the County states:

> [T]he matter in question does not exhibit the fundamental incidents of a quasi-judicial action or proceeding .... The contemplated action--changing the law applicable to the future development of the developer's property, is indisputably the formulation or establishment of a rule of law or planning policy applicable to future transactions rather than an application of already existing law to present facts. Yusem's application was not consistent

with the applicable laws because it was intended to change those laws.

If this theory had any merit, the inescapable conclusion would be that *every* application for a zoning change, variance, or special exception would be legislative! When taken literally, every application must be at odds with existing "law" else it would not be necessary. By implication, the County seeks to overturn every case which has found these types of applications to be quasi-judicial, beginning with *Snyder II*. Such a rule is fundamentally unsound, contrary to this Court's decisions related to zoning and land growth management, and clearly incompatible with the kind of judicial oversight contemplated by the Local Government Comprehensive Planning and Growth Management Acts.

C. Strict Judicial Scrutiny Should Apply to This Case Where the Amendment Sought Will Have an Impact on Only a Limited Number of Persons and Where the Decision Can Be Functionally Viewed as Policy Application, Rather Than Policy Setting

In its Brief on the Merits at 31-32, the County suggests that the district court's decision regarding the effect of this amendment on other property and persons was "off-hand" and the product of "lip service." In light of the findings of the trial court and district court, this criticism is most undeserved.

This Court held in its *Snyder II* decision that "'rezoning actions which have an impact on a limited number of persons or property owners ... and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action.'" *Snyder II*, 627 So. 2d at 474 (quoting *Snyder I*, 595 So. 2d at 78). The County has not demonstrated to the courts that this

rezoning action would have an *impact* on a sufficiently large number of persons or property owners so as to escape the conclusion mandated by *Snyder II* that it is quasi-judicial.

In his final judgment, the trial judge made the following findings of fact relevant to the certified question:

> 1. Plaintiff, MELVYN R. YUSEM ... owns a 54-acre parcel of undeveloped land in Martin County.
>
> ....
>
> 9. At the time of the application ..., Plaintiff's property was located in the Primary Urban Service District [which under the Comprehensive Plan [was] reserved for residential densities of two units per acre and up. ...
>
> 10. Adjacent to Plaintiff's land was a development called Fern Creek with a designation of estate density, the same density sought by Plaintiff.
>
> 11. One-half mile from Plaintiff's property is the campus of Indian River Community College and the site of a new branch of Martin Memorial Hospital.
>
> 12. A new interchange on I-95 was opened and Plaintiff's property had frontage on Salerno Road, a major arterial road between U.S. 1 and State Road 76 ....
>
> 13. Also approximately one-half mile from Plaintiff's property is a new elementary school and also nearby, a large residential PUD, Willoughby, was approved.

Final judgment at 3-5 (emphasis added).

Martin County has not directly disputed these findings of fact before this Court. Nonetheless, the County argues that Mr. Yusem's proposed increase in

unit density will have a profound effect on surrounding properties, suggesting that "this amendment would change the character of 900 acres of rural land and require the County to replan and refocus its capital improvements plan." County's Brief at 32. However, mere rhetoric does not satisfy the County's obligation to demonstrate the basis for denying Mr. Yusem's amendment application, particularly where the County's assertions are inconsistent with the trial court's findings of fact.

The County even acknowledges in its Brief on the Merits that "[t]he test created by *Snyder II* which requires a court to carefully determine whether an action has an impact on a limited number of persons or property, is a crucial element of the decision whether a matter involves policy making or policy implementation." Petitioner's Brief at 31-32. As stated at Page 14 of Yusem's Answer Brief:

> [Mr.] Yusem was required to set forth detailed factual information in his application to support the requested land use change. [He] had to demonstrate that there was full compliance with all applicable Code provisions; that public facilities and services were available and adequate; that concurrency requirements were met; and that his request was consistent with the Plan. ... [T]he County's review and decision was directed at one specific property owner and one small 54 acre parcel of property.[11]

Snyder II would take on a bizarre meaning if this "crucial element of the decision" could be satisfied solely by well-crafted but essentially unprovable

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[11] The initial burden is upon the landowner seeking to rezone property to prove "that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. *Snyder II*, 627 So. 2d at 476.

claims of a rezoning application's ruinous consequences, such as are asserted by the County. Without evidence of the ills, the County has fallen far short of meeting its burden.[12]

D. Strict Judicial Scrutiny Should Not Depend on Whether an Amendment to a Plan Is Sought, as Opposed to Local Zoning Variances, Where There Is a Limited Effect as Described in Snyder II

At Page 28 of its Brief on the Merits, petitioner criticizes the "tendency in the district courts and trial courts to blend planning and zoning, and to use the term 'zoning' or 'rezoning' to refer to and analyze cases where the matter in issue is a comprehensive plan amendment. ... In contrast, Judge Pariente's careful distinction between the two unfortunately appears to be the exception rather than the rule."

Petitioner's own words speak volumes on this issue. In fact, the overly formalistic approach advocated by Judge Pariente in her dissent is not the rule and for good reasons. If the principal discriminator between legislative and quasi-judicial decisions were whether the application sought to amend an element of a land use plan or secure a variance to a zoning ordinance, counties, and cities would have every incentive to draft extraordinarily comprehensive land use plans and dispense altogether with zoning ordinances. Courts could expect to hear challenges to denials of applications for plan amendments governing everything from set-backs, structural

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[12] This Court stated in its *Snyder II* decision, "[w]hile they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari ... it must be shown that there was competent substantial evidence presented to the board to support its ruling." *Snyder II*, 627 So. 2d at 476.

densities, to height limitations, and to aesthetics and be forced to apply only a highly deferential standard of review.

This Court must certainly have been sensitive to this concern when in its *Snyder II* decision it did not limit the distinctions between legislative and quasi-judicial decisions to matters of form over substance. In *Snyder II*, this Court observed that "comprehensive rezonings affecting a large portion of the public are legislative in nature." *Snyder II*, 627 So. 2d at 474. This rule speaks not of whether the rezoning effort is by way of an amendment to a plan or by zoning variance. Rather, the only issues which appear relevant are: (1) the process of the hearing and rights conferred as a result, and (2) the impact of the rezoning on other property and individuals.

In *Section 28 Partnership v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994), the Fourth District observed:

> We take the *Snyder* court's pronouncement ... to mean that the trial court's initial task is to examine whether the action complained of results in the formulation of a general rule of policy, or in the application of such a rule.

Id. at 612. The court concluded that the decision of the county not to amend the comprehensive plan was legislative and not quasi-judicial. However, the conclusion was not based on the fact that the Partnership sought an amendment to the plan. Rather it was because

> [t]he application would require the amendment of the plan to provide for a new category [of property] ... which is not presently in the comprehensive plan, and thus a "formulation of a general rule of policy."

Id. at 612 (quoting *Snyder II*, 627 So. 2d at 474). *Section 28* is a logical extension of the *Snyder II* decision in which this Court observed that where an amendment to a zoning ordinance was so comprehensive in nature that it changed the zoning of a large area it would be deemed to be an exercise of a legislative function. *Snyder II*, 627 So. 2d at 474 (citing *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959)).

II

PROTECTION OF PROPERTY RIGHTS GUARANTEED UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS JUSTIFY THE COURT'S CONTINUED APPLICATION OF SNYDER II'S STANDARD OF STRICT JUDICIAL REVIEW TO QUASI-JUDICIAL DECISIONS

As the Supreme Court of the United States observed in its recent opinion, *Dolan v. City of Tigard*:

> One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Dolan, 114 S. Ct. at 2316 (citing *Armstrong v. United States*, 364 U.S. 49).

However, the Supreme Court acknowledged that state and local governments have the authority to engage in land use planning so long as the regulation substantially advances legitimate state interests and does not deny an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. at 260. Furthermore, the government cannot force a property owner to give up a constitutionally protected incident of ownership in exchange for a discretionary benefit. *Dolan*, 114 S. Ct. at 2317 (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)).

Sadly, as some commentators have observed, local governments have used their authority to "leverage" concessions and conditions on property owners wishing to develop their land.[13] The Fifth District Court of Appeal observed in its *Snyder I* decision:

> [P]ersons owning or using land naturally prefer that nearby lands not be used at all and that their use be continued to be restricted by zoning regulations. The legislative and executive are the political branches of government and the governmental zoning bodies exercising those functions have politicized the "re-zoning" process by forming the issues and considering and determining them at public meetings to which nearby landowners are encouraged to appear and oppose requests for rezoning and the issue-forming, fact-finding and decision-making is conducted in a politicized forum and atmosphere rather than in a neutral forum by an independent deliberative body determining facts in a detached manner and applying general legislative rules of law impartially to individual cases or specific instances.

Snyder I, 595 So. 2d at 73-74. While this Court disapproved in part the extent to which the Fifth District sought to protect valuable property rights, a number of

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[13] Thomas Pelham in his often cited article on the subject of quasi-judicial rezonings, referred to a number of highly critical commentators *Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENV. L. 243, 246-47 (1994). Of note:

> Other national land use scholars and commentators have continued to echo ... criticism of the local zoning process. For example, Professors Mandelker and Tarlock recently wrote that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits." Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1 (1992).

Snyder II's references to the lower court's opinion and Thomas Pelham's article demonstrate the concerns this Court must have had about the *ad hoc* approach of local governments to the zoning process. *Snyder II*, 627 So. 2d at 472-73.

In response to concerns that local governments were administering zoning applications on a constitutionally infirm, ad hoc basis, courts have scrutinized the decisions of the permitting agency to determine whether the factual findings support the conditions as being related and proportional to the public impact of the development. This means applying the standard articulated in *Dolan*:

> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. ... If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.

Dolan, 114 S. Ct. at 2317.

As was observed by the California Supreme Court:

> It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

Ehrlich v. City of Culver City, ___ Cal. 4. ___, ___, 96 Daily Journal D.A.R. 2558, 2562 (March 7, 1996).

The Oregon Supreme Court reached a similar conclusion some 20 years earlier in *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23

(1973) (*en banc*). With regard to the categorization of rezoning decisions, the Court observed:

> At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life.
>
> ....
>
> It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.

Fasano, 264 Or. at 580 (citations omitted). The court explained that this level of judicial review was justified by a comparison of the dangers of making "desirable change more difficult against the danger of the almost irresistible pressures that can be asserted by private economic interests on local government." *Id.* at 587-88.

These cases are not the only ones in which a heightened level of judicial scrutiny has been applied to quasi-judicial zoning decisions of local governments. They demonstrate that Florida is certainly not alone in having expressed concerns about the possibility of improper land use decisions and in having articulated, as this Court did in *Snyder II*, a coherent policy for minimizing the potential harms by requiring strict judicial review.

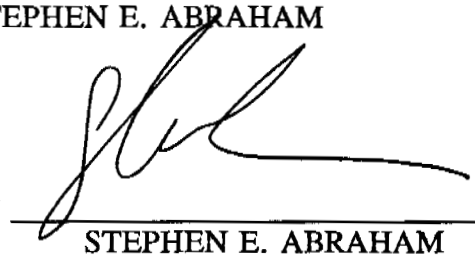
CONCLUSION

A review of cases relating to facts similar to those presented in this case has revealed no case after *Snyder II* in which this Court has taken the overly formalistic and anachronistic approach advocated by the County to zoning and quasi-judicial review. The County offers no compelling justification to modify Florida's well-reasoned and balanced approach to planned community development. For the reasons stated above, this Court should answer the certified question in the affirmative and approve the decision of the Fourth District.

DATED: May 17, 1996.

Respectfully submitted,

JAMES S. BURLING
STEPHEN E. ABRAHAM



By _____
STEPHEN E. ABRAHAM

Attorney for Amicus Curiae
Pacific Legal Foundation

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May 17, 1996

DECLARATION OF SERVICE BY MAIL

I, Stephen E. Abraham, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 2151 River Plaza Drive, Suite 305, Sacramento, California.

On May 17, 1996, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DECISION BELOW were placed in envelopes addressed to:

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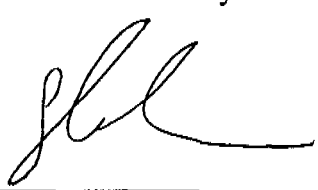
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of May, 1996, at Sacramento, California.



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