IN THE SUPREME COURT OF FLORIDA

MARTIN COUNTY,

Petitioner,

vs.

MELVYN R. YUSEM, Etc.,

Respondent.
_____/

CASE NO. 87,078
District Court of Appeal,
4th District - No. 93-3025

JOINT BRIEF OF AMICUS CURIAE, SEMINOLE COUNTY, AND AMICUS CURIAE, THE SEMINOLE COUNTY COUNCIL OF LOCAL GOVERNMENTS

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INTRODUCTION/PRELIMINARY STATEMENT

Seminole County ("County") and the Seminole County Council of Local Governments ("Council") adopt the Introduction set forth in Martin County's Initial Brief. The following matters are presented to the Court to, hopefully, assist the Court in making its decision in this case which may have far reaching ramifications upon local governments and their comprehensive planning processes and procedures and to, hopefully, encourage the Court to clear up the confusion that is present in terms of how land use decisions are made by local governments.

The County and its seven cities have experienced a high rate of growth. The seven municipalities located within the County are: Altamonte Springs, Casselberry, Lake Mary, Longwood, Oviedo, Sanford and Winter Springs. The County and the cities are members of the Council which functions as a collaborative body designed to enhance intergovernmental coordination and encourage the efficient functioning of local government within the County.

As this Court well knows, comprehensive planning in Florida has been an evolutionary process. The first truly significant planning act in Florida was the "*Local Government Comprehensive Planning Act of 1975.*" *Ch. 75-257, Laws of Fla.* What this Court may not be very familiar with is the fact that a year before the enactment of the statewide planning act the County and it municipalities successfully persuaded the Legislature to enact the "*Seminole County Comprehensive Planning Act of 1974.*" *Ch. 74-612, Laws of Fla.* Indeed the 1975 act of statewide application was

largely modeled after the 1974 act drafted for the County and its municipalities. Thus, the County and its municipalities have been leaders in comprehensive planning because Seminole County citizens, long ago, recognized the important relationship that comprehensive planning has to the high quality of life that they desired.

The growth that the County and its municipalities have experienced since 1974 and their projected future growth is clearly indicative of the need for sound comprehensive planning and growth management practices in the past, present and future. Witness the following population statistics (the source for which is the Bureau of Economic and Business Research of the University of Florida):

	1974 Population (7/1/74)	1995 Population (4/1/95)	Projected 2010 Population
Unincorporated	67,106	162,322	*
Altamonte Springs	15,537	37,917	*
Casselberry	14,697	24,144	*
Lake Mary	2,694	7,251	*
Longwood	5,566	13,602	*
Oviedo	2,601	17,910	*
Sanford	22,145	35,311	*
Winter Springs	3,990	25,673	*
TOTAL	134,336	324,130	457,603

* Only countywide projection is available for the year 2010.

As can be plainly seen, the County and its municipalities have grown tremendously and appear to be set to continue to grow at a high rate in the future.

The County and its cities have planned for this growth by collaborating with their citizens in the comprehensive planning process. The Public Participation section of the Implementation

Element of the Seminole County Comprehensive Plan[1] states as follows:

> Seminole County has, since the early 1970's, engaged in an active comprehensive planning process which involved diverse individuals and groups. The County's early involvement in comprehensive planning has resulted in a citizenry with a great deal of knowledge and valuable input with regard to planning issues. The purpose of these provisions is to continue public participation in the comprehensive planning process....

The County's original Comprehensive Plan, enacted pursuant to its 1975 special planning act, resulted from the work of numerous committees which had been given the task to develop short term and long term frameworks for development and land use issues in the County.[2] The municipal Council members have enacted comprehensive plans like the County and have also demonstrated a commitment to sound growth management practices and public participation in the planning process. The County and the members of the Council continue to rely upon its citizens in developing the goals, policies and objectives for the future of each community as they face the pressures and challenges of growth while attempting to

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[1] The County and Council were authorized to file a brief only. Accordingly, an appendix to this brief has not been filed. The County's Comprehensive Plan and the comprehensive plans of all of the Council members are enacted by ordinance and filed with the Department of Community Affairs (which also has the numerous volumes of support data and analysis relating to those comprehensive plans) and the Department of State.

[2] The County's Comprehensive Plan will be referenced to herein throughout for brevity's sake. Indeed the County's Plan and comprehensive plans or its cities were all determined to be in compliance with the 1985 Growth Management Act.

maintain the high quality of life that the citizens of each jurisdiction have become accustomed to and demand.

STATEMENT OF THE FACTS AND CASE

The County and the Council adopt and accept Martin County's Statement of the Facts and Case.

SUMMARY OF ARGUMENT

The adoption of a comprehensive plan is a legislative Act. The amendment of a comprehensive plan is a legislative act of local government. The standard of review is set forth in growth management legislation and is, otherwise, the fairly debatable standard of review. A rezoning decision that, without an amendment to the comprehensive plan to provide consistency with the plan, would cause an inconsistency between the plan and the proposed zoning classification is not a quasi-judicial decision subject to strict judicial scrutiny review as the rezoning is not authorized under State law absent the plan amendment (the consistency requirement of *Section 163.3194(1)(a), Florida Statutes (1995)*).

If, however, the Court were to determine that certain or all comprehensive plan amendments are quasi-judicial actions, the Court ultimately will be required to answer questions such as the following:

(1) Must witnesses be sworn at local government land use public hearings in order to provide competent substantial evidence?

(2) Must witnesses be subject to cross examination at local government land use public hearings in order to comport with established concepts of procedural due process?

(3) If witnesses are subject to cross examination, who are the parties that are entitled to cross examine the witnesses?

(4) Must documentary evidence be verified or otherwise comport to generally accepted evidentiary rules at local government land use public hearings in order to provide competent substantial evidence?

(5) Are citizens allowed to "instruct their representatives" outside of the local government land use public hearing or must all testimony be heard and evidence be received at the public hearing?

ARGUMENT

A. INTRODUCTION:

In a recent study conducted between mid-1990 and May, 1991 on behalf of the Kettering Foundation by the Harwood Group. (a public issues and consulting firm from Bethesda, Maryland) reached several conclusions relative to the views of the community as to their ability to communicate with their elected officials. The study, resulting from a series of 10 two-hour focus group discussions with each focus group consisting of about 12 citizens made, as part of the overall report, the following conclusions:[3]

(1) Citizens believe that they have been denied access to the political process.

(2) Citizens have no sense of the issues.

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[3] Pamphlet entitled "The Future Of Local Government; Involving Citizens in Community Decision Making" published by International City/County Management Association (1995).

(3) The faith of citizens in the mechanisms of public expression has been shaken.

(4) Citizens often don't know how to participate.

(5) Citizens believe that the system is spiraling beyond control.

(6) The relationship between citizens and public officials has been severed.

If the processes imposed upon public participation in matters before the people's representatives cause the free expression of the public to be chilled, these conclusions would appear to be true in Florida. The citizens of Florida are losing the right to instruct their representatives. *Article I, Section 5, Florida Constitution*, provides that: "**[t]he people shall have the right** peaceably to assemble, to **instruct their representatives**, and to petitions for redress of grievances." (Emphasis added). When such processes defeat or deter public participation, by their very nature, they must be unconstitutional.

Citizens expect to be able to talk to their local representatives when they see them on the street, at civic club meetings, at the grocery store, at the little league ball game, at the church social, at the site or property involved in the land use decision, in their office or otherwise. Citizens expect to be able to talk to their local representatives about pot holes in the street, "those darn bureaucrats," taxes and land uses they support or oppose. Citizens expect to be able to speak with their local representatives about their vision for the future of their

community. Take away the right of citizens to talk to their local representatives and you have fundamentally altered local government and the constitutionally guaranteed contacts that citizens have with local government officials.

If this Court concludes that decisions relating to amendments of comprehensive plans are decisions that are quasi-judicial in nature, then this Court will be labeling the comprehensive planning amendment process with the same label that is present in land use decisions such as rezonings, special exceptions/conditional uses and variances. Concomitantly, the rights of citizens to participate in the comprehensive planning process will be chilled.

The courts have been chipping away at the significance of citizens input at land use public hearings. For example, in *Metropolitan Dade County v. Blumenthal*, 20 F.L.W. D1445 (Fla. 3rd DCA, June 21, 1995), the court concluded that the testimony of the president of a concerned federation of homeowners associations did not provide the county commission with substantial competent evidence upon which to base a decision to deny a rezoning application. The federation president provided evidence of the trends of development in the area, but the court concluded that since the president was not an "expert" on zoning, his testimony had no legal significance.

As it stands now, in face of the case of *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992), some local governments are taking the position that its land use decision makers must, essentially, isolate themselves

and refuse oral or written contacts with citizens relative to land use matters that are before them. Other local governments take intermediate steps not quite so drastic. Yet other local governments, such as the County, stand fast on the provisions of *Article I, Section 5, Florida Constitution*, and operate in a manner that openly allows citizens the right to discuss land use matters of importance with their elected or appointed representatives and to write letters in advance of land use public hearings expressing their opinions.[4] The danger in this latter position is, of course, that a disenchanted proponent or opponent can then drag the matter into circuit court alleging that improper ex-parte communications have occurred that have influenced the decision that was made. The provisions of *Chapter 95-352, Laws of Florida*, did not remove the chilling effects of the *Jennings* decision upon the local governments land use decision making process.

The County, in a resolution established various procedures relating to land use matters, provides that "[t]he comprehensive planning process in Seminole County is a legislative process." *Resolution No. 95-R-74* (March 14, 1995). The municipal members of the Council ascribe to this same position.

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[4] The County Commissioners disclose at quasi-judicial land use hearings that they have had ex-parte communication. In the context of local government officials an ex-parte communication may be, as noted above, having a conversation at the neighborhood grocery store or a youth soccer game, or receiving letters and petitions from citizens, or visiting the site or property which is involved in the land use decision.

B. GENERAL PRINCIPLES FROM THE CASE LAW: QUASI-JUDICIAL VS. LEGISLATIVE:

A local government's legislative action is subject to challenge in circuit court by an original action for declaratory judgment and will be sustained if "fairly debatable." *Nance v. Town of Indialantic*, 419 So. 2d 1041 (Fla. 1982). A local government quasi-judicial decision is subject to review in circuit court by certiorari and will be upheld if supported by substantial competent evidence. *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957). The "fairly debatable" standard is also adopted in Florida's Growth Management Act. See, *Section 163.3184(10)(a) and Section 163.3213(5)(b), Florida Statutes (1995).*

In *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993), this Court stated the applicable criteria to determine whether a zoning action is legislative or quasi-judicial. Jack and Gail Snyder owned a one-half acre parcel of property. The Snyders filed an application to rezone this property from a single-family use to a zoning category that allowed fifteen residential units per acre. A comprehensive plan amendment was not required. When the matter came before the board of county commissioners, the property owners spoke on their own behalf and a number of citizens spoke in opposition to the request. This Court concluded that the board's action on the property owner's application was quasi-judicial in nature and properly reviewable by certiorari. This Court differentiated the two types of action as follows:

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy. Id. at 474. (Citations omitted)

Quoting from its opinion in *West Flagler Amusement Co. v. State Racing Commission*, 122 Fla. 222, 225, 165 So. 64 (1935), this Court explained:

> A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. Id. at 65.

In *Snyder*, this Court recognized that "comprehensive rezonings affecting a large portion of the public are legislative in nature." *Snyder*, 627 So. 2d at 474. However, this Court agreed with the Fifth District Court Of Appeal when it said:

> Rezoning 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. *Snyder*, 627 So. 2d at 474. [quoting *Snyder v. Board of County Commissioners of Brevard County*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991)].

In summary, this Court held that a zoning decision is reviewable by certiorari, as a quasi-judicial act, if: (1) it has a "limited impact" on identifiable parties and interests; (2) the

outcome is contingent on facts presented at the hearing; and (3) it is viewed as policy application rather than policy setting. However, it is clear that this Court also recognized as a significant factor in *Snyder*, the fact that the proposed zoning was consistent with the existing comprehensive plan. *Snyder*, 627 So. 2d at 475.

In *Machado v. Musgrove,* 519 So. 2d 629, 632 (Fla. 3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988), the court explained the difference between planning and zoning functions as follows:

> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. § 163.3167(1), Fla. Stat. (1985); *Southwest Ranches Homeowners Ass'n v. Broward County*, 502 So. 2d 931 (Fla. 4th DCA 1987). The plan is likened to a constitution for all future development within the governmental boundary. *O'Loane v. O'Rourke*, 231 Ca. App. 2d 774, 789 42 Cal. Rptr. 283, 288 (1965).
>
> Zoning, on the other hand, is the means by which the comprehensive plan is implemented, *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160 (Fla. 1st DCA 1984), and involves the exercise of discretionary powers within limits imposed by the plan. *Baker v. Milwaukee*, 533 P. 2d 772 (1975), at 775. It is said that a zoning action not in accordance with a comprehensive plan is ultra vires. Charles M. Harr, "In Accordance With A Comprehensive Plan," 68 Harv. L. Rev 1154 (1995) at 1156.

As the court said in *Machado*, comprehensive planning provisions as envisioned in *Chapter 163, Florida Statutes*, are not zoning laws. Zoning laws implement comprehensive plans. Zoning codes must be consistent with comprehensive plans. Comprehensive plans are a limitation on local government's otherwise broad zoning

powers. *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160 (Fla. 1st DCA 1994) *rev. denied*. 469 So. 2d 749 (Fla. 1985). This Court correctly recognized the planning/zoning distinction in *Snyder* at 475.

This Court cited *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959), as an example of a rezoning that was held to be a legislative decision because the rezoning in that case was comprehensive in nature in that it effected a change in the zoning of a large area so as to permit property that previously was restricted to use as private residences to be used as locations for multiple family buildings and hotels. *Snyder*, 627 So. 2d at 474.

In the case of *Sarasota County v. Karp*, 662 So. 2d 718 (Fla. 2d DCA October 4, 1995), the Second District Court Of Appeal concluded that the decision making process relating to a land use amendment (a corridor plan) was legislative even though the plan only directly affected a finite number of parcels because the number of parcels affected by the corridor plan, 179 acres and 48 separate parcels, were deemed fairly substantial. The corridor plan was deemed the formulation of a general policy rather than the application of a previously determined policy. The Second District Court Of Appeal in *Karp* noted that the area within the purview of the corridor plan was a vibrant, rapidly changing area of the county in need of a more updated plan. Lastly, the court noted that the corridor plan did not downgrade the present zoning on the property, but, in fact, permitted a new office use.

In another post-*Snyder* case, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994), *rev. denied*, 645 So. 2d 920 (Fla. 1995), Martin County had refused to amend its comprehensive plan in order for a parcel to be developed as a planned unit development. The Fourth District stated that:

> We conclude that the county's decision not to amend the comprehensive plan to allow ... [certain uses] was a legislative or policy making decision under *Snyder*. Id. at 612.

Judge Stone, in a concurring opinion in *Section 28* stated that "... 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." Id. at 613.

C. COMPREHENSIVE PLANS AS "CONSTITUTIONS":

By definition, a comprehensive plan is a statutorily mandated legislative plan to control and direct the future development and growth. *Section 163.3167(1), Florida Statutes (1995)*. Professor Pelham states that "[u]nder Florida's Growth Management Act, the local comprehensive plan stands as the preeminent local legislative statement of policy governing local land use decisions." Thomas G. Pelham, "Quasi-Judicial Rezonings: A Commentary on the Snyder Discussion And the Consistency Requirement, 9 Journal of Land Use & Environmental Law 2 (1994) at 249. Comprehensive plans have been compared to a constitution for all future land development within the governmental boundary. *Machado*, 519 So. 2d at 629, 632, *rev. denied*, 529 So. 2d at 694; *Gardens Country Club v. Palm Beach County*, 590 So. 2d 488, 490 (Fla. 4th DCA 1991).

It makes no sense that the initial adoption of a comprehensive plan is the "formulation" of policy but that subsequent amendments to the same plan are the "application" of policy. Subsequent amendments to a comprehensive plan are either the "formulation" of policy or the "reformulation" of policy. "Constitutions" are not amended in quasi-judicial proceedings. "Constitutions" are amended in legislative proceedings.

Future land use elements and maps of comprehensive plans represent the long-range desired use of property by local governments. Future land use elements are the codification of the local government's goals, policies and objectives as to how and when property is to be developed in the future. When a local government changes a future land use designation it is actually re-setting or re-formulating its policies regarding how the property is to be developed. That is a policy-making, legislative decision.

When a local government places its original land development regulations/zoning classification on property, the decision is a policy-making decision and, hence, legislative action. When considering the nature of amendments to the original ordinance, this Court in *Schauer* stated that, "[i]t is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character." *Schauer*, 112 So. 2d at 839. In *Schauer*, a large area that was rezoned from private residential uses to multiple family building and hotels was held to be legislative

action. Id. at 839. The *Schauer* decision was favorably cited by this Court in *Snyder*.

D. PUBLIC PARTICIPATION:

Neither the County nor any member of the Council have a code or charter provision addressing the procedures to be utilized in a quasi-judicial hearing. The County has adopted *Resolution No. 95-R-74* and a Public Participation section of the Implementation Element of the County Comprehensive Plan, which provides a general enumeration of policies to encourage full public participation in the comprehensive planning process such as the following policy:

> The County shall continue its policy of incorporating citizens groups and organizations into the comprehensive planning process and related processes. These groups include, but are not limited to, chambers of commerce, the League of Women Voters, professional associations, homeowners associations and environmental groups.

Section 163.3181(1) and (2), Florida Statutes (1995), provides as follows in requiring that public participation occurs with regard to the comprehensive planning process:

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

> procedures shall provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings as provided herein, provisions for open discussion, communications programs, information services, and consideration of and response to public comments. (Emphasis added).

Rule 9J-5.004, Florida Administrative Code, similarly provides as follows:

> Public Participation.
>
> (1) The local governing body and the local planning agency shall adopt procedures to provide for and encourage public participation in the planning process, including consideration of amendments to the comprehensive plan and evaluation and appraisal reports.
>
> (2) The procedures shall include the following:
>
> (a) Provisions to assure that real property owners are put on notice, through advertisement in a newspaper of general circulation in the area or other method adopted by the local government, of official actions that will affect the use of their property;
>
> (b) Provisions for notice to keep the general public informed;
>
> (c) Provisions to assure that there are opportunities for the public to provide written comments;
>
> (d) Provisions to assure that the required public hearings are held; and
>
> (e) Provisions to assure the consideration of and response to public comments.[5]

[5] It would be difficult, if not impossible, to respond to public comments "off the cuff" at public hearings. The only plausible way to insure that adequate responses are given to public concerns is to allow unrestrained communications prior to public hearings with regard to land use issues of concern to the public.

> available to the general public and should, while the planning process is ongoing, release information at regular intervals to keep its citizenry apprised of planning activities. (Emphasis Added).

This Rule and *Section 163.3181, Florida Statutes (1995)*, are implemented in the Implementation Element of the Seminole County Comprehensive Plan. *Section 125.66, Florida Statutes (1995)* and *Section 166.041, Florida Statutes (1995)*, provide for a public hearing process relative to land use changes.

None of the procedures set forth above which, in conjunction with Florida's Open Meetings Law set forth in *Chapter 286, Florida Statutes (1995)*, and the Public Records Law set forth in *Chapter 119, Florida Statutes (1995)*, (collectively Florida's "Government in the Sunshine Laws") require cross examination, the swearing of witnesses or any other rigid judicial procedures that are incompatible with the public hearing process on a legislative action at the local government level.

If trial-like rigid procedures were to be required in making local government land use decisions, the general public's right to instruct its elected representatives would be chilled and the local government public hearing process would become a complex process not conducive to providing the opportunity for public participation as required by law.

E. THE STATUTORY AND ADMINISTRATIVE SCHEME:

The fact that the comprehensive planning issues relating to a small parcel are legislative and complex in nature is born out by the fact that **every** proposed plan amendment is evaluated by the

Florida Department of Community Affairs pursuant to the provisions of *Chapter 9J-5, Florida Administrative Code*. The purpose of that Chapter is spelled out in *Rule 9J-5.001(1), Florida Administrative Code*, as follows:

> This Chapter establishes minimum criteria for the preparation, review, and determination of compliance of comprehensive plans and plan amendments pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Florida Statutes. This Chapter establishes criteria implementing the legislative mandate that local comprehensive plans be consistent with the appropriate strategic regional policy plan and the State Comprehensive Plan, and recognizes the major role that local government will play, in accordance with that mandate, in accomplishing the goals and policies of the appropriate comprehensive regional policy plan and the State Comprehensive Plan. (Emphasis added).

Thus, **each** plan amendment proposed for adoption by a local government is reviewed for consistency with the provisions of:

(1) the State Comprehensive Plan as set forth at *Chapter 187, Florida Statutes (1995)*;

(2) the applicable strategic regional policy plan promulgated by administrative rule by the appropriate regional planning council pursuant to the provisions of *Chapter 186, Florida Statutes (1995)*; and

(3) the numerous complex minimum criteria for plan amendments set forth in *Chapter 9J-5* dealing with concurrency, transportation/traffic circulation, mass transit, ports and aviation facilities, housing, sanitary sewer, solid waste, stormwater management, potable water, natural groundwater recharge, conservation, recreation and open space, intergovernmental coordination,

capital improvements, future land use (including issues relating to the density and intensity of development), optional plan elements (for example, the County has adopted plan elements that are not required by State law relating to public libraries, development design, public safety and economic development), and coastal management (not applicable in Seminole County since it is not a coastal county).

Indeed, *Section 163.3177(6)(a), Florida Statutes (1995)*, requires that the future land use plan must be based on adequate data and analysis concerning the local government jurisdiction such as projected population, the amount of lands assigned various land uses to accommodate the projected population, the availability of public services and facilities, and the character of the undeveloped land.

The plan amendment process is inherently legislative in nature and purpose. A very small parcel of land can cause serious and substantial planning issues to arise that are policy based. For example, in the case of *Miller Enterprises, Inc., et al. v. Florida Land and Water Adjudicatory Commission*, 582 So. 2d 792 (Fla. 5th DCA 1991), the legislative decision of Seminole County in terms of the County's Comprehensive Plan relating to a five-acre parcel resulted in an administrative challenge by the Florida Department of Community Affairs. After a multi-day hearing before a hearing officer assigned by the Division of Administrative Hearings, a proceeding before the Governor and Cabinet sitting as the Florida Land and Water Adjudicatory Commission, and an appeal to the Fifth

District Court of Appeal; the planning issues relative to the five-acre parcel were resolved in favor of the County. Again, the planning issues relating to a small parcel with a small number of owners may involve serious and complex planning issues.

F. PROBLEMS INHERENT FROM IMPOSING QUASI-JUDICIAL PROCEEDINGS UPON LOCAL GOVERNMENTS:

Numerous procedural issues arise with regard to imposing quasi-judicial proceedings upon local governments. The below summarized issues are applicable to all quasi-judicial land use decisions, but would be particularly problematic if imposed upon comprehensive planning decisions dealing with the community's planning "constitution" and in view of the statutory and rule based requirements relating to public participation.

Cross Examination

One of the dangers in declaring a land use decision matter quasi-judicial is that the type of cross-examination given to parties in full-dress judicial hearings may be demanded by applicants or opponents. Two cases are cited to support this position: (1) *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992); and (2) *Lee County v. Goldberg*, Case No. 94-416-CA-JRT (20th Cir. Ct. June 16, 1994), *cert. denied*, Case No. 94-02455 (Fla. 2d DCA March 9, 1995).[6]

In *Jennings*, the Third District Court of Appeal stated:

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[6] The County and Council recognize that it is unusual to cite circuit court decisions (particularly without a Florida Law Weekly Supplement citation) in this Court. The issues that are discussed in this brief are prevalent in the circuit courts, however, and thus the County and Council have done the most they can do without filing an appendix by providing this Court with circuit court case citations.

> [W]e note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled. Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts. *Jennings* 589 So. 2d at 1340.

The *Jennings* court cited *Coral Reef Nurseries, Inc. v. Babcock Company*, 410 So. 2d 648 (Fla. 3d DCA, 1982), where the Third District Court Of Appeal stated in dicta that due process in a quasi-judicial zoning proceeding required that the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the Commission acts. *Coral Reef*, 410 So. 2d at 1340, 1341. (Emphasis added).

Both *Jennings* and *Coral Reef* come from Dade County and Dade County has a County Code and Charter provision which specifically establish by local law the elements that are required in a Dade County land use hearing. The *Coral Reef* decision, cited as authority in *Jennings*, attributes the specific elements of procedural due process to *Section 33-36, Metropolitan Dade County Code*, as follows:

> The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning is identical to that afforded in a hearing on variances or special exceptions. See Section 33-36 Code of Metropolitan Dade County. Each 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. *Coral Reef* at 652, 653. (Emphasis added).

The Dade County Charter also contains a Citizens' Bill of Rights. As noted in footnote 5 to the concurring opinion of Judge Ferguson in *Jennings*, the Dade County Charter has a specific charter provision setting forth the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts" in hearings before Dade County. See *Jennings*, 589 So. 2d at 1344, footnote 5. In other words, the Third District Court Of Appeal in *Jennings* and *Coral Reef* was not setting forth the law on the minimum requirements of fundamental due process in a quasi-judicial hearing but was discussing the specific legislative code and charter provisions of Dade County. In conclusion, the dicta in *Jennings* and *Coral Reef* addressing cross-examination should not be utilized by this Court as authority for imposing the requirement of cross-examination in quasi-judicial hearings.

The full impact of the *Snyder* and *Jennings* decisions upon the open and free flowing public hearing processes of local governments have not made their way, by and large, through the appellate courts. Thus, perhaps, the two leading cases that indicate the confusion that is occurring relative to what quasi-judicial means in the context of a local land use decision are circuit court cases which are discussed below.

For example, if the dicta in *Jennings* and *Coral Reef* were used as authority to require cross-examination in quasi-judicial hearings in County or Council member land use decisions, such examination should be limited to the applicant and the local government. The case law only mentions the right of "parties" to cross-examine witnesses. Only the applicant and the local government would be appropriate parties.

This exact issue was addressed by the Honorable Judge Kerry I. Evander in *Schopke v. City of Melbourne*, Case No. 92-12637-AP, Brevard County, Eighteenth Judicial Circuit.[7] In *Schopke*, a petition for certiorari was filed to review the granting of a conditional use permit for the operation of a soup kitchen. One of the issues before the Court was whether the petitioner, a neighboring property owner, was denied procedural due process because the city council refused to allow him the right to cross-examine one of the applicant's representatives at the public hearing.

In *Schopke*, Judge Evander specifically held that third-party neighboring property owners do not have the right to cross-examine witnesses at a quasi-judicial zoning hearing and that such an argument arises from an "overbroad and erroneous interpretation" of *Jennings*. Judge Evander held that the "parties" referenced in *Jennings* are limited to the applicant and the governmental agency and stated:

> The *Jennings* decision does not in any way recognize a right on behalf of all neighboring property owners to cross-examine any and all

[7] See Footnote 6.

> individuals who may speak for or against the zoning application. To recognize such a right on behalf of all "interested" persons would create a cumbersome, unwieldy procedural nightmare for local government bodies. Id. at 4. (Emphasis added).

Judge Evander noted that the neighboring property owners in the case before him had been given ample opportunity to present evidence and argument to the city council.

In *Goldberg v. Lee County*, Case No. 94-00416, Twentieth Judicial Circuit Court, *cert. denied*, Case No. 94-02455, (Fla. 2d DCA, March 9, 1995), the Lee County Circuit Court held that a third-party who appeared at a hearing to protest the granting of a special exception was denied due process by the fact that the hearing examiner in that case refused to permit some form of cross-examination. The holding in *Schopke*, supra, directly conflicts with the holding in *Goldberg*. Unfortunately, the parties below in *Goldberg*, the landowner/applicants and Lee County, did not challenge Goldberg's standing as a "party" and, hence, the *Goldberg* court does not address this issue in its decision. Most importantly, it must be noted that the *Goldberg* court only held that "some form of adequate cross-examination" be permitted in quasi-judicial hearings.

This Court should clearly state that cross examination is not required in local government public hearing involving quasi-judicial land use decisions.

Sworn Testimony.

Another issue that arises from the concept that local government land use decisions are quasi-judicial is inherent in the

fact that most jurisdictions base their land use decisions on unsworn testimony and unverified documents. Two cases that are cited to support the position that sworn testimony is required at quasi-judicial hearings are *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA 1974) and *Goldberg*.

However, although cited for that proposition, in *City of Apopka*, the Fourth District Court Of Appeal did not hold that procedural due process requires that witnesses be sworn before giving testimony in a quasi-judicial proceeding or that a decision is not supported by competent substantial evidence if the testimony presented at the hearing is not sworn. The decision in *City of Apopka* involved the appeal of an order denying an application for a special exception to build an airport. 299 So. 2d at 658. In determining whether there was substantial competent evidence to support the county commission decision, the Fourth District stated:

> The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by an competent facts. Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly, we find it impossible to conclude that on an issue as important as the one before the board, <u>there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for</u>. <u>Id</u>. at 660. (Emphasis added).

On remand to the county commission for another de novo hearing on the special exception application, the only instruction from the court, even after rehearing, to the board of county commission was for the board to apply the balance-of-interests test to the evidence adduced before the board. Id.

The Fourth District Court Of Appeal did not direct the board to swear in witnesses or to allow cross examination. In fact, the court in *City of Apopka* cited with favor the "evidence" of the appellant/applicants in support of the special exception application. This "evidence" consisted of unsworn testimony and was apparently deemed competent and substantial by the Fourth District Court Of Appeal to make, in part, the following findings:

> Their testimony showed that there was a definite public need for the airport; that serious in depth studies had been made to determine the most appropriate location for the airport; that the location in question was the best available.... Id. at 658.

The court quashed the commission's decision in *City of Apopka* because of the lack of evidence to support that decision and not because the evidence was unsworn testimony or because cross-examination was specifically prohibited.

In *City of St. Petersburg v. Cardinal Industries Development Corporation*, 493 So. 2d 535, 538 (Fla. 2d DCA 1986), the Second District Court Of Appeal explained that it was obvious that the reason why the Fourth District Court Of Appeal in *City of Apopka* had ordered the board to conduct a de novo hearing on the application for special exception was because of the lack of facts in the record to substantiate the board's conclusion that the exception

would adversely affect the public interest. The Second District Court Of Appeal expressly held as follows regarding the trial court's concern over the manner in which the evidence was received:

> We know of no requirement that witnesses appearing before the applicable boards in special exception proceedings must be sworn.... Id. at 538.

The holding in *City of St. Petersburg* directly conflicts with the holding in *Lee County v. Goldberg*. Could the difference between the two cases be because this Court's decision in *Snyder* was rendered after the decision in *City of St. Petersburg*, but before the decision in *Lee County v. Goldberg*? If so, the *Lee County v. Goldberg* decision is not in accord with this Court's recent decision in *Snyder*. In *Snyder* this Court did not require sworn testimony or cross-examination in quasi-judicial hearing.

In *Snyder* this Court established the criterion to determine when a rezoning hearing is quasi-judicial or legislative and in doing so, had the opportunity to expand the requirements of procedural due process in such quasi-judicial hearings. This Court did not do so. In fact, this Court retreated from the then existing case law that required zoning boards to make written findings of fact as stated in *Snyder v. Board of County Commissioners of Brevard County*, 595 So. 2d 81, (Fla. 5th DCA 1991). Addressing that issue in *Snyder* this Court held that zoning boards "will not be required to make findings of fact." 627 So. 2d at 476. If the court in *Goldberg v. Lee County* based its decision on *Snyder*, the *Goldberg* court erred in its interpretation of *Snyder*.

A review of land use cases reveals that unsworn testimony has been deemed to constitute competent substantial evidence. In *Hillsborough County Board of Commissioners v. Longo*, 505 So. 2d 470 (Fla. 2d DCA 1987), the unsworn opinions of professional planning staff and a lay board of planning commissioners was recognized as substantial competent evidence. In *Riverside Group, Inc. v. Smith*, 497 So. 2d 988 (Fla. 5th DCA 1986), unsworn staff opinions were recognized as substantial competent evidence. In *City of Apopka*, the unsworn testimony from the consulting engineer, a representative of the Federal Aviation Administration and the Florida Department of Transportation was deemed competent substantial evidence. In *City of St. Petersburg v. Cardinal Industries Dev. Corp.*, 493 So. 2d 535 (Fla. 2d DCA 1986), the unsworn testimony of lay people was recognized as competent substantial evidence.

A review of land use cases reveals that unverified documents have been deemed to constitute competent substantial evidence. In *ABG Real Estate Development Company of Florida, Inc. v. St. John's County*, 608 So. 2d 59, 62 (Fla. 5th DCA 1992), *cause dismissed*, 613 So. 2d 8 (Fla. 1993), the local government unsworn staff report was found to be "strong evidence". In *Riverside Group, Inc. v. Smith*, 497 So. 2d 988, 990 (Fla. 5th DCA 1986), a planning board file containing extensive unsworn information constituted competent substantial evidence. In *City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.*, 567 So. 2d 955 (Fla. 4th DCA 1990), an expert's opinion furnished by unsworn letter constituted competent substantial evidence.

The intrusion of trial-like procedures into local governmental public hearing would convert local government hearings into a courtroom like setting and would deter citizens from participating in the process and would make the already complex comprehensive planning and land use decisions by local governments all the more perplexing to the public.

The typical Florida land use proceeding conducted by a local government is commenced by the application of a property owner for some type of approval under the provisions of the local government's land development regulations. Usually a rezoning, variance or special exception is sought. If the request is consistent with the applicable comprehensive plan, the matter then proceeds through the analysis announced in *Snyder* to determine if the proposed land use change is legislative or quasi-judicial. If the applicant can show the local governing body that facts and circumstances exist which entitle him or her to approval, then approval may be given.

Typically, the local government's ordinance provides for notice to persons owning property in the vicinity of the property which is the subject of the application. This provides some assurance that persons who may oppose a change of land uses are able to appear and make a presentation at the hearing. Depending on the size, scope and nature of the application, none, some or many people may wish to speak or otherwise comment on the proposed change. In addition to the special notice, all such meetings are noticed as public hearings of which the entire population receives notice.

Citizens generally do not care whether the courts have labeled a hearing as legislative or quasi-judicial. What they do care about is that they be heard on matters which they perceive to affect their interests or their community. It is immaterial whether their motives are noble or selfish, whether their fears are real or perceived or whether their opinions are founded or unfounded. The long standing tradition of local land use law in this country and in this State is that the people must have their say. The right of the citizens to be heard is constitutionally guaranteed.

Public hearings on land use matters, whether characterized as legislative or quasi-judicial, tend to be rough and wide open in nature. The "robust debate"[8] which is often referred to as essential to the experiment of democracy is nowhere more evident than in land use proceedings held in local government meeting rooms. The debate usually far exceeds that which any court would tolerate in a formal judicial hearing. While most people would expect to be sworn as a witness, be subject to cross-examination and be interrupted every time they make a stray comment in a formal judicial hearing, citizens will not and should not countenance the same from a local commission regarding their comments and opinions on land use matters.

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[8] Various U.S. Supreme Court cases have described the nature of political debate, using such terms as "uninhibited, robust, wide-open". *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964). Attempts to limit participation by labeling the proceeding "quasi-judicial" should only be considered against the backdrop of the line of U.S. Supreme Court cases which recognize open public debate as a constitutional requirement. See, e.g., *New York Times*, supra, *Stromberg v. California*, 283 U.S. 359, 369, 75 L.Ed. 1117, 51 S.Ct. 532 (1931), and many others.

Therefore, the local government body conducting a public hearing will generally allow full opportunity to be heard to all and will sometimes limit or prohibit cross-examination.

If it becomes the rule that each interested person is able to have full opportunity for cross-examination, how does the local board give each of the say 150 people in the hearing room the opportunity to cross-examine each of the other 149? Land use hearings would take as much time as anti-trust cases.

Also, the average citizen would be chilled in their desire and right to be heard and the local government body will be deprived of what may be very valuable and highly relevant input.

The Eleventh Circuit and the Middle District of Florida, affirm the relevance of public input in land use hearings. For example, in *Corn v. Lauderdale Lakes*, 997 F. 2d 1369, 1387 (11th Cir. 1993), the Court stated as follows:

> Merely because citizen input may not be a sufficient basis for a rational government land use decision in every instance does not mean it can never be a sufficient basis for such a decision. In most cases it will be. See *Greenbriar [Greenbriar, Ltd. v. City of Alabaster]*, 881 F. 2d 1570, at 1579.
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> . . . .
>
> In the finest tradition of participatory government, the matter was investigated and resolved in a series of public meetings at which Corn and interested citizens presented information and opinions to the governmental decision makers-- the members of City Council. ... As often occurs, some misinformation was corrected, and some was contradicted and disputed; but that is the nature of democratic decision making. Id.

Another consideration is whether, and to what extent, the hearing is really adversarial. When the application is filed, the neighbors notified and the staff review conducted, it is not known whether there is any opposition. Often, if not usually, it is not even known until the hearing. What effective cross-examination can be prepared at that time? Will all hearings have to be continued so as to allow all interested persons to prepare for cross-examination?

How can the local government body determine before-hand whether the "witness" has standing and can, therefore, cross-examine? Who are the "parties" for purposes of being afforded the right to cross-examine?

Lest developers get excited about the prospect of scaring off opposing members of the public with threats of withering cross-examination, it is clear that this proposition is a two edged sword. If full cross-examination becomes the rule, it will only take a short time for organized opponents to development to figure out that the hearings can be turned into filibusters for purposes of delaying locally unpopular land uses.

The only reasonable rule for land use hearings is to allow the local government body discretion to control the hearing, including allowing or not allowing cross-examination as necessary, by conducting reasonable inquiry where necessary and by allowing the public as well as the applicant within reason to have their say. This will require the local government body to sort through more "testimony", much of which is bound to be irrelevant and then make

rulings legislative decisions based upon the relevant facts. On balance, it is better for these hearings to be informal and participatory rather than to be formal but exclusive.

Thus, there is no likely value to either local governments, the owners of private property or the general public that would result from converting "public friendly" hearings into rigidly complex judicial proceedings. The robust debate at the local government level should continue as it accords private property owners fundamental due process and the public an opportunity to instruct their elected representatives through public participation in land use matters.

Ex-parte Communications.

While stating that ex-parte communications are anathema in quasi-judicial settings, the *Jennings* court also stated:

> However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex-parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication does not mandate automatic reversal. *Jennings*, 589 So. 2d 1341. (Emphasis Added).

A good example of how far the procedural quagmire can go relative to ex-parte communication is displayed in *1994 Op. Att'y Gen. Fla. 094-71 (August 19, 1994)* in which the Attorney General said that communications by Brevard County Commissioners with County staff on a staff initiated rezoning of County-owned property "should" be documented and placed on the record in order for all parties to have an opportunity to respond. In that question, it

was the Brevard County that was the applicant for a rezoning of the county-owned property.

The Brevard County Commission asked the Attorney General the following additional question that was answered in that same opinion:

> 1. If a county commissioner engages in ex-parte communication regarding a rezoning, must he or she abstain from participating in the rezoning proceeding and/or disclose the communication on the record?

The Attorney General opined as follows:

> 1. Proof of an ex-parte communication creates a rebuttable presumption that a decision is prejudiced. However, nothing requires a county commissioner who has engaged in an ex-parte communication to abstain from voting on a request for rezoning or to disclose such communication on the record. Id. (Emphasis Added).

Local government officials must be able to speak freely with citizens. They must be able to speak with their staffs. The rigid ex-parte rules that apply to the Judicial Branch of Florida Government cannot be logically applied to local government officials making land use decisions. This Court should conclude that the entire comprehensive planning process in this State, including all amendments, is a legislative proceeding. This Court should identify the essentials of due process required in land use matters that are quasi-judicial in nature.

CONCLUSION

The County and the Council respectfully request this Court to find and determine that the comprehensive planning process in Florida is a legislative process which is reviewable as provided in

State statutory law, under the fairly debatable standard of review. Additionally, and in any event, the County and the Council request the Court to provide the local governments of Florida with the guidance that is required in order to conduct the public's business in the context of those cases which are quasi-judicial in nature. Local governments need guidance. Only this Court can provide the guidance that is needed. This is an appropriate case from which such guidance may arise.

DATED this 22nd day of February, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Gary R. Oldehoff**, Assistant County Attorney, 2401 S.E. Monterey Road, Stuart, FL 34996, Attorney for Petitioner, and **Thomas E. Warner, Esquire**, Post Office Drawer 6, Stuart, FL 34995-0006, Attorney for Respondent, **Terrell K. Arline, Esquire**, 926 East Park Avenue, Tallahassee, FL 32301, Attorney for 1000 Friends of Florida, Inc., and **Sherry A. Spiers, Esquire**, 2740 Centerview Drive, Tallahassee, FL 32399-6558, Attorney for The Florida Department of Community Affairs, Inc., this 22nd day of February, 1996.

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