IN THE SUPREME COURT OF THE STATE OF FLORIDA

4TH DCA CASE NO.: 93-3025

MARTIN COUNTY,

Petitioner, CASE NO. 87,078

vs.

MELVYN R. YUSEM, ETC.,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This 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: whether the Act changed the fundamental balance of powers between the judiciary and local and state land use authorities in future growth management and land use planning. The simple issue raised by this case is whether an amendment to the future land use map designation of a particular property in a local government's comprehensive plan is a legislative or quasi-judicial matter. The question certified by the Fourth District Court of Appeals was drafted in light of this Court's decision in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993)(hereinafter Snyder II):

> CAN A REZONING DECISION WHICH HAS LIMITED IMPACT UNDER *SNYDER*, BUT DOES REQUIRE AN AMENDMENT TO THE COMPREHENSIVE LAND USE PLAN, STILL BE A QUASI-JUDICIAL DECISION SUBJECT TO STRICT SCRUTINY REVIEW?

Phrased another way, the question may be:

> IS A PLANNING DECISION RELATING TO AN AMENDMENT TO THE COMPREHENSIVE LAND USE PLAN WHICH HAS A LIMITED IMPACT UNDER *SNYDER* A QUASI-JUDICIAL DECISION SUBJECT TO STRICT SCRUTINY REVIEW?

The question should not hinge on the fortuitous circumstance that a rezoning or other development order was also applied for or considered. The answer should not be one way if a landowner applied for a rezoning or other development order and another way if he did not. Therefore, stated in its most basic, the question can be rephrased:

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?

The question, no matter how it should be phrased, must be answered in the negative. The adoption and amendment of local comprehensive plans are always policy-making decisions. The creation of a comprehensive plan is the formulation of future policies. An amendment to that plan is a change in that policy - a change constituting the formulation of new policy.

The instant case is a perfect illustration of this point. Yusem's property and 900 acres surrounding it were the subject of a formulation of policy in the Plan that the area would constitute a "reserve area" for possible urban development in the future. The County also formulated a policy this area would not be immediately provided capital facilities, or planned for construction of capital facilities to facilitate development at urban densities. The amendment in question necessarily would have required changes in those policies and a new reformulation of policy.

This matter was a legislative proceeding, and the County's decision not to adopt Yusem's amendment should have been upheld as fairly debatable. The passage of the Growth Management Act did not usher in an opportunity for the courts to change the fundamental balance of power between the judiciary and local and state land use authorities on matters of planning.

Had the trial court applied the appropriate analytical standard for legislative actions, the evidence amply established that the County's rejection was fairly debatable. Judgment should

have been entered for the County.

STATEMENT OF THE FACTS

This case is a landowner's challenge to the Martin County Board of County Commissioners decision not to amend the Martin County Comprehensive Growth Management Plan (hereinafter "Plan") to authorize higher densities of development on the landowner's property.

THE MARTIN COUNTY COMPREHENSIVE PLAN AND THE SUBJECT PROPERTY

In February, 1990, the County adopted the Plan in accordance with the requirements of the 1985 Local Government Comprehensive Planning and Land Development Regulation Act, Laws of Florida Chapter 85-55; Florida Statutes Chapter 163, Part II.

Yusem's property is located in an approximately triangular tract of 900 acres of rural and undeveloped land. The subject property is in the center of the bottom axis of the triangle. (Exhibit 1) The Plan's land use element designated Yusem's property and the rest of the 900-acre tract "Rural Density Residential", which allowed up to 1 residential unit per 2 acres.

The tract was included within the Plan's Urban Service District, (Transcript, p. 459). The boundary of the District is Cove Road, an east-west dirt road that is immediately south of the Respondent's property. (Exhibit 62, Figure 4-5) The Urban Service District contains far more land than is necessary to accommodate future population. (Transcript, p. 590) Some areas of the Urban

Service District are currently designated by the Plan for rural densities because they are rural in character and not appropriate for urban development at this time. The area in which Yusem's property lies is one such area. (Transcript p. 643) Other areas, which are already developed or suitable for development at urban densities pesently or in the near future are designated for urban densities.

The Plan states that this tract is not an area presently intended to be available for urban densities. It is expressly described as a "potential reserve area for future urban/suburban development". (Exhibit 62, Section 4-2A(5), p. 4-14)

The Plan also contains a concept called "Active Residential Development Planning Preference" (ARDPP), as well as provisions throughout the Plan which place limitations upon amendments and development approvals to assure compact urban development and encourage infill development. These policies are designed to counter pressures to "sprawl," or develop prematurely, at the fringes of the Primary Urban Service District. (See, generally testimony of Henry Iler, Transcript, p. 565-574)

Yusem's property is 54 acres in the middle of this 900-acre tract of rural designated land. The tract presently contains nurseries, grazing lands, and homes on large tracts. (Transcript, p. 435-437) Other than the construction of the Pinewood Elementary School with an access road, there had been no development in this area for several years preceding the adoption of the Plan in 1990, (Transcript, p. 433), and little or no change in the character of

the area. (Transcript, p. 437) Based upon continued agricultural classifications and agricultural activities, the area is viable for rural uses such as large tract homesites, nurseries, and grazing, and homes have sold in the area. (Transcript, Id.). Therefore, the rural designation and zoning are compatible with character of the 900 acres surrounding the subject property. Minimal infrastructure exists in the area, and it is of the type which is compatible with rural uses and densities and the land continuing to be rural in nature and designation.

The community character of the area is rural. Yusem's land was actively being used for cattle grazing. (Transcript, p. 323, 436), and had an agricultural classification for ad valorem tax purposes. (Transcript, p. 324). Adjacent properties to the north of the subject property include single family homes on lots ranging in size from 1.6 to 4.3 acres. The property to the south is vacant. The property to the east consists of a church and day care facility, and a single family home on 4.8 acres. To the west is a single family home on 9.04 acres and the Fern Creek subdivision, containing 24 lots of one half acre each. (Exhibit 46, p. 4)

Existing uses in this 900-acre tract are vacant lands, flower farms, farmlands, tropical fish farms, and extensive acreage utilized for grazing. (Exhibit 1; Exhibit 1-A; Transcript, 435-437). There are also dirt roads in this area, including the east and south borders of Yusem's property. (Transcript, p. 624) With the exception of the construction of the Pinewood Elementary School and a spur extension of Willoughby Boulevard to serve that school,

there have been no changes in the area or its fundamentally rural character between 1986 (Transcript, p. 433), and February 20, 1990, the date of adoption of the Plan. Nor did changes occur between February and October 16, 1990, the date of the challenged Board decision (Transcript, p. 431). The parties stipulated to the following distances from Yusem's property to the nearest development: (Transcript, p. 8)

To site of future hospital	: .63 miles
To U.S. 1 (nearest major highway to east)	: 8052 ft; 1.53 miles
To water and sewer lines	: 1545 feet
To Indian River Community College Entrance	: 4993 ft; .9 miles
To Pinewood Elementary School	: 5058 ft; .95 mi.
Distance to SR-76 (nearest major highway to west)	: 6,355 ft.
Distance to Woodlands development	: 3,697 ft.
Distance to Martin Meadows development	: 5,078 ft.

YUSEM'S APPLICATION AND THE COUNTY'S ACTIONS

In September 1989 (four months before the Plan was adopted) Yusem applied to the County to change the Plan's future land use map designation for the property from Rural Density Residential (1 unit per two acres) to Estate Density Residential (2 units per acre). (Exhibit 7) Yusem also applied for agreement to rezone the property if the amendment were made to Planned Unit Development(R)

in accordance with a 60 unit master plan agreement.[1]

Yusem contended that the County was required to make the Plan amendment because the property was located in the Urban Service District. Yusem also contended that the amendment was justified on the basis of existing development outside the 900-acre tract which was approved and constructed years before the adoption of the Plan. The Plan provides that when the County's staff reviews a future land use map amendment application, it may recommend that the Board of County Commissioners consider making an amendment if there are "past changes in land use designations in the general area", or "growth in the area, in terms of development of vacant land, and redevelopment".[2] (Ex. 62, p. 1-8) The changes and growth must occur after the adoption of the plan. (Id.)

On May 1, 1990, the Board of County Commissioners considered the applications at a comprehensive plan amendment transmittal hearing[3]. The Board considered whether it was interested in

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[1] As will be described in more detail later, according to Martin County Ordinance, Planned Unit Development zoning districts are negotiated zoning districts which are authorized in lieu of straight zoning districts.

[2] Yusem will likely argue that this provision of the Plan requires the Board of County Commissioners to limit their discretion. However, a plain reading of the Plan language proves that this language is a guideline for the staff reporting on the application and not a limitation on the County Commission. The pertinent words are "staff can".

[3] The Growth Management Act provides that the amendment of an adopted Plan proceed in two stages - transmittal and adoption. §163.3184, 163.3187 Fla. Stat. (1995). In the first stage, the local government considers only whether to submit the possible amendment to the State for further review. The State then provides a report on the amendment, concerning its compliance or non-compliance with the Growth Management Law. Thereafter, in the

transmitting the amendment to the Florida Department of Community Affairs for review and response by the State and its land planning agencies in accordance with the Growth Management Act. At the Board hearing, the County's staff offered a report concluding and recommending that the amendment should not be made, and at least two commissioners discussed opposition to the transmittal on the grounds that the proposed land use map amendment was not appropriate at the time. (Exhibit 31) By 3-2 vote the Board of County Commissioners nevertheless voted to transmit the amendment.

On August 29, 1990, the Department of Community Affairs issued its response to the proposed amendment. It issued a formal objection, pursuant to §163.3184(6) Fla. Stat. (1989) (Exhibit 56). The Department notified the County that its Plan could be held not in compliance with the Growth Management Law if Yusem's amendment was adopted. Fla. Admin. Code R. 9J-11.001(6); §163.3184(8) Fla. Stat. (1989). (Exhibit 56) The Department's report concluded:

> "The County should consider abandoning the amendment." (Exhibit 56, p. 4)

When the amendment was again considered for adoption on October 16, 1990, the staff report again concluded that the amendment should not be made and again recommended rejection. (Defendant's Exhibit 45) Residents in the 900-acre tract voiced their opposition to the amendment and the changes in the area that it would engender (Exhibit 62, p.38). They noted that a change to

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second stage, the local government can "adopt the amendment, adopt the amendment with changes, or determine that it will not adopt the amendment." §163.3184(7) Fla. Stat. (1995).

Yusem's property would preordain an immediate change of the entire 900-acre tract to urban densities and development because it would be impossible to prevent additional amendments due to Yusem's location in the center of the tract. (Exhibit 31, p.31) The Board of County Commissioners decided not to adopt the amendment.

Because the land use designation of the property was not changed, the Board of County Commissioners never considered the rezoning request since the request was patently inconsistent with the Plan without the requested amendment. (Transcript, p. 153-154). Thus, there has never been a decision by the Board of County Commissioners on the requested rezoning request[4].

THE TRIAL COURT'S ACTIONS

The trial court's Final Judgment finds that the Board of County Commissioners' decision not to adopt the amendment was based solely upon a finding that the amendment would constitute "leap-frog development". (R. 557). This specific finding, however, is not consistent either with the motion passed by the Board, which made no specific mention of the term "leap-frog development" (Exhibit 62, p. 37), the comments of the commissioners themselves, or the evidence presented at the trial. The bases were urban

[4] Martin County stipulated that Yusem's rezoning application was denied. This, however, should not be inferred to mean that the Board of County Commissioners actually adopted a motion to deny the rezoning application. The reason for this stipulation was that the rezoning was not granted. In fact, and as is confirmed by the record, the rezoning application was never acted upon because it became moot when the comprehensive plan amendment was rejected.

sprawl, character of the surrounding area, present lack of capital facilities to accommodate urban growth in the area, that the amendment was neither a logical nor timely extension of more intense land uses, conflicts with Plan goals, and inconsistencies with the Plan. (Exhibit 62; Exhibit 46; Exhibit 45). The Board of County Commissioners' motion was to adopt the "staff recommendation" (Exhibit 62, p. 37) which was contained in the report. No reference is made to the term "leap-frog development" in either the staff's report or the Board's motion.

At trial, Yusem's witnesses testified that the existing land use map designation for the subject property was inconsistent with the Plan because it was located within the Plan's urban service district. (Transcript, p. 214) They testified that the proposed amendment was consistent with the property's location by virtue of its location in that district regardless of the surrounding rural development pattern. (Transcript. p. 213).

The County's witnesses testified that there have been no changes in land use patterns in the 900-acre rural tract containing Yusem's property,[5] and that current infrastructure and future improvements are a function of rural land uses and designations in the area. (Transcript, p. 792) In addition to the lack of planned infrastructure to facilitate development of the tract at the densities requested in Yusem's amendment, the infrastructure necessary to serve water and wastewater needs for the proposed use

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[5] This was confirmed by Yusem's witnesses. (Transcript, p. 219)

of the land was not available, (Transcript p. 224-225), and had to be provided by Yusem. Water lines to serve the proposed use were proposed to be extended some 1545 feet by Yusem. Yusem even had to increase lot sizes to qualify for use of septic systems, rather than sewers because the property was too far from sewer lines. (Transcript p. 224)

Henry Iler, the County's Growth Management Director at the time the amendment was considered, testified that the amendment was in conflict with six major policy clusters of the Plan, each of which justified the County's decision not to adopt the amendment. (Transcript, p. 611-675). Robert Pennock, Comprehensive Plan Review Administrator of the Department of Community Affairs, testified that the adoption of this amendment would constitute a failure by the County to discourage urban sprawl and would, therefore, violate state law. (Transcript, p. 739-740). Pennock also testified that the Department would have objected to this amendment if it had been adopted. (Transcript p.743-744)

STATEMENT OF THE CASE

Yusem filed a Verified Complaint pursuant to §163.3215 Fla. Stat. (1990),[6] followed first by a Petition for Certiorari, Martin County Case No. 90-1200-CA Makemson, and then this action, a declaratory judgment action under F.S Chapter 86 with requests for

[6] This process is not applicable to landowners. Parker v. Leon County, 627 So.2d 476 (Fla. 1993).

injunctive relief. Yusem voluntarily dismissed his *certiorari* petition.

The declaratory judgment/injunction action had five counts. The case went to trial on all counts on Unilateral Pretrial Statements on December 21, 1992. Yusem presented four witnesses: the attorney who represented him before the County, the planner who drew his proposed Planned Unit Development for the subject property, a professor of urban planning, and Yusem, the Respondent, himself. The County presented testimony from the real estate manager of the Martin County Property Appraiser's Office, the County's director of development review, the supervisor of the Clerk of the Martin County Commission, the County's former Growth Management Department Director, its Utilities Director, Transportation Engineer, and the Comprehensive Plan Review Administrator of the Department of Community Affairs.

On September 15, 1993, the trial court issued a Final Judgment finding for Yusem on Counts I, II, and IV, and in favor of the County on Counts III and V. (R. 560). Despite the unmistakable fact that the case was a three-day trial *de novo*, the trial court's judgment was based on Snyder v. Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991) (hereinafter Snyder I), a case which was subsequently reversed in pertinent part by this Court in Snyder II. Indisputably, the case was filed and tried as a declaratory and injunctive action, not an appeal in *certiorari*.

The County appealed to the Fourth District Court of Appeals. On August 30, 1995, by 2-1 vote, the court issued a decision

reversing the Final Judgment because it found that the proceeding in question was quasi-judicial. Martin County v. Yusem, 664 So.2d 976 (4th DCA 1995). The majority only considered one of the County's points that the proceeding was legislative - that the amendment did not have a limited impact on a limited number of persons or properties. Id. at 977. Because Yusem had voluntarily dismissed his separate petition for *certiorari*, and this action was filed more than thirty days after the County's decision was rendered, the majority concluded that the trial court had no jurisdiction.

Judge Pariente issued a lengthy dissent in which she observed that the majority was simply wrong in its analysis of the law in general and Snyder II, in particular, and had "ignored" the potential implication of the amendment on the 900-acre tract and the policies already embodied in the County's Plan. Judge Pariente opined that the County's proceedings were undeniably legislative in character.

Martin County filed a motion to certify the general question:

> WHETHER THE ADOPTION OF COMPREHENSIVE PLAN AMENDMENTS IN ACCORDANCE WITH THE GROWTH MANAGEMENT ACT IS A LEGISLATIVE OR QUASI-JUDICIAL ACTION?

The court granted the motion, but certified a far less general question:

> CAN A REZONING DECISION WHICH HAS A 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?

Martin County took this appeal.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. The amendment of a comprehensive plan under the Growth Management Act is not a quasi-judicial decision subject to strict scrutiny review. It is a legislative matter reviewable under the fairly debatable rule that is applied to all challenges to legislative actions. The trial court should have considered this case the original *de novo* action that it was and applied the established rules for challenges to legislative decisions of local governments.

The District court also erred when it concluded, with neither analysis nor explanation, that the Respondent's proposed amendment has a limited impact under Snyder II. This amendment would have had a significant impact on 900 acres of surrounding lands, and would have necessitated capital facilities planning changes that would have impacted landowners and residents of other areas of the County. If properly and meaningfully analyzed, the District Court should have ruled that the amendment did not have an impact on a limited number of persons and properties, and should have, therefore, recognized that the matter implicated policy-making.

The trial court also erred when it shifted the burden of proof to the County, and considered only the question of the amendment's consistency with the Plan. It is well settled that the burden of proof rests on the one seeking the change, here Yusem. Likewise, it is quite clear that the issue of consistency is not the only issue that a local government may consider in deciding whether to embrace an amendment to its comprehensive plan.

Had the trial court applied the correct law, there was ample and conclusive evidence to establish that the County's decision not to change the policy of its plan is fairly debatable.

ARGUMENT

I. THE AMENDMENT OF A COMPREHENSIVE PLAN IS A LEGISLATIVE ACT.

The District Court ruled that the County Commission's action was a quasi-judicial proceeding. This conclusion is erroneous. It contradicts the inescapable fact that Yusem's application was to AMEND the law, not to apply it. The County Commission's consideration of whether to amend the Plan, and decision not to adopt the amendment and thus change the plan, are matters legislative in character.

A. The Act of Deciding Whether To Amend A Comprehensive Plan Is Legislative.

A "legislative act" prescribes what the law shall be in future cases arising under it. Florida Courts have consistently held that the enactment of laws regulating the use and development of land is a legislative function. E.g., Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983); Gulf & Eastern Development Corp. v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978); Josephson v. Autrey, 96 So.2d 784 (Fla. 1957); Watson v. Mayflower Property, Inc., 223 So.2d 368 (Fla. 4th DCA 1969), certiorari discharged, 233 So.2d 390 (Fla. 1970); County of Brevard v.

Woodham, 223 So.2d 344 (Fla. 4th DCA) cert. denied, 229 So.2d 872 (Fla. 1969).

Counties are required to prepare and adopt comprehensive plans in accordance with the Local Government Comprehensive Planning and Land Development Regulation Act (the Growth Management Act) Laws of Florida, Chapter 85-55, (as amended)(§163.3161, et. seq., Fla. Stat. (1995)). The Plan must be the result of detailed study, and must be supported by adequate data and analysis. §163.3177, Fla. Stat. (1995). Public participation "to the fullest extent possible" is a touchstone of the comprehensive planning process. §163.3181, Fla. Stat. (1995). The Growth Management Act provides a statutory process for adopting or amending a comprehensive plan. That process provides for review and approval at both the local and the state level, with input from state agencies, regional planning councils, and adjoining local governments. §163.3184, Fla. Stat. (1995). An adopted plan or amendment must be found "in compliance" with the Act. "In compliance" is defined to mean consistent with all of the Act's requirements for elements of plans, with the state comprehensive plan, the applicable regional plan, and with the provisions of Rule 9J-5, F.A.C. that are adopted by the state land planning agency, the Department of Community Affairs. §163.3184(b), Fla. Stat. (1995). The Act provides for an administrative process to determine challenges to whether the plan or amendment is in compliance, §163.3184(9)-(13), Fla. Stat.

(1995)[7], and penalties for counties whose plans or amendments are found not in compliance. §163.3184(11), Fla. Stat. (1995). Thus, it goes without saying that a comprehensive plan is a "statutorily mandated legislative plan". Machado v. Musgrove, 519 So.2d 629, 633 (Fla. 3d DCA 1987) review denied, 629 So.2d 693 (Fla. 1988).

The elements and provisions of this legislative plan must be internally consistent with one another. §163.3177(2), Fla. Stat. (1995). For instance, the future land use element must be internally consistent with the provisions of the capital improvements element and the capital improvement plan, and the conservation element must be internally consistent with the coastal management element and the future land use element. In short, a comprehensive plan is a carefully prepared, highly integrated piece of legislation.[8]

The adoption or amendment of a comprehensive plan's future land use map designation or future land use element is no different than the adoption or amendment of a particular section of a statute. Nor does it matter whether the subject is the entire plan or simply an amendment to the plan. The Florida Legislature, in

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[7] §163.3184(13), Fla. Stat. (1995) declares that this adinistrative process is the "exclusive" proceeding available for challenges regarding comprehensive plans and comprehensive plan amendments. It would appear that the circuit court might not have had jurisdiction to entertain Yusem's challenge. The Record contains two motions on this point that were not ruled upon. (R. 395-399, 409-413).

[8] Comprehensive plans have also been likened to "constitutions". Machado v. Musgrove, 519 So.2d 629, 632 (Fla. 3d DCA 1987). This term is apt, because like a constitution, a comprehensive plan is a living document, and especially so because it may always be amended to reflect change.

adopting the Local Government Comprehensive Planning and Land Development Regulation Act, clearly considered *all* forms of comprehensive planning (adoption or amendment) legislative matters.[9] The statute groups the adoption of original plans and amendments to those plans together, and provides for a common legislative framework for both the original plan and any future amendment. Both are subject, for instance, to the substantive evaluative requirements of §163.3177, Fla. Stat. (1995) and to the procedural requirements of §163.3184, Fla. Stat. (1995). Additionally, the legislature has expressly provided that a local government's decision on the legality of both the original plan and any amendment must be upheld if it is "fairly debatable." §163.3184(9) and (10), Fla. Stat. (1995). This, of course, is the time honored rule for reviewing legislative actions.

It is beyond dispute that the original drafting and adoption of the Martin County Comprehensive Growth Management Plan, as well as all proceedings leading up to that adoption, are the act of a legislative body, and are rightfully characterized as legislative actions and proceedings. The statutory procedure that was followed by the Board of County Commissioners with respect to the instant action is no different than the process used when the County adopted its comprehensive plan. §163.3184, Fla. Stat. (1995). In principle, the nature of the proceeding for purposes of judicial

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[9] In 1992 the Florida Legislature made this point emphatically clear by adopting Chapter 92-129, Laws of Florida to specifically and expressly make the comprehensive plan statute's substantive and procedural requirements applicable to comprehensive plan amendments.

review should be characterized no differently at this time merely because the procedure relates to an amendment. Simply put, they are one and the same. Section 28 Partnership, Ltd. v. Martin County, 642 So.2d 609 (Fla. 4th DCA 1994), review denied, 654 So.2d 920 (Fla. 1995) ("there is no reason to treat a commission decision rejecting a proposed modification of a previously adopted land use plan as any less legislative in nature than the decision initially adopting the plan.")(Stone, J. concurring).

Yusem's amendment typifies the policy-making, legislative nature of comprehensive plan amendments. Inherent in the amendment is a policy decision whether to open and urbanize the rural tract, an area expressly delineated not as a location for immediate development at urban densities but as "a reserve area for potential future urban development", only eight months into the fifteen-year plan period. Also evident in this amendment is the policy decision whether it is appropriate to refocus the capital improvements element and plan away from other areas currently planned for infrastructure improvements, and to this rural tract. Concurrently, since population and population growth are finine numbers, a policy decision is also necessary to determine whether this location will be the present locus for urban growth rather than another area that the Plan has already planned and designated for current urban development.

This court's Snyder II decision was a judicial excursion out of the realm of time-honored judicial deference recognized under the separation of powers doctrine and into a realm of greater

judicial activism and a new "balance" of the separation of powers.[10] The decision in Snyder II derived in some measure from a suspicion with the validity and legitimacy of local zoning decisions and a perception that the protections the law provided through the "fairly debatable" rule were probably inadequate. Snyder II, 627 So.2d at 472-473. Neither the Court's suspicion, nor a belief that the fairly debatable rule is inadequate, are justified when the matter pertains to a comprehensive plan change rather than a rezoning.

Unlike a zoning action, which is determined entirely at the level of the local zoning authority, the adoption or amendment of a comprehensive plan is considered at several levels of government. The law contains several levels of oversight and safeguards to assure that unprincipled decisions cannot be made by the local government. Moreover, because the local plan must be based on data and analysis that must be confirmed by the state, decisionmaking is significantly limited to what is justified by the data and analysis and consistent with the plan. The "antithesis of deference" Machado, 519 So.2d at 632 (Fla. 3d DCA 1987) strict scrutiny rule is not needed. Rather, the fairly debatable rule is sufficient in the comprehensive planning context.

This Court's Snyder II decision was also explained by the notion that the Local Government Comprehensive Planning Act of

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[10] A respected land use authority considers Snyder II the "judicialization of the local zoning process." Thomas G. Pelham, Quasi-Judicial Rezonings: A Commentary on the *Snyder* Decision and the Consistency Requirement, 9 J. Land Use & Envtl. L., 243 (1994).

1975, Ch. 75-257, Laws of Fla., and the Growth Management Act, Ch. 85-55, Laws of Fla., both called for "strict scrutiny" review of rezonings. Thus, this portion of the Snyder II decision is explained as merely an implementation of the statutes. These same statutes, however, clearly and unmistakably provide that comprehensive plan and comprehensive plan amendment challenges are to be analyzed pursuant to the fairly debatable principle. §163.3184(9)(a), (10)(a), Fla. Stat. (1995).

The County's comprehensive plan was adopted in February 1990, four months after Yusem applied to amend the plan, and eight months before the County Commission rejected the amendment. Judge Pariente accurately pointed out that "[i]f the landowner had [sought to change the future land use map designation for his property by] challeng[ing] the County's initial action in adopting the future land use map, the County's action would have been evaluated under the highly deferential standard of judicial review." Yusem, 664 So.2d at 979. However, the District Court rewards Yusem for choosing instead to seek an amendment, rather than participate in the overall adoption of the Plan or challenge the Plan at adoption, and grants him strict scrutiny review. This is entirely unjustified by law, equity, or reason. Consider the following additional anomalies which result from this decision:

1. Property owner applies to change the future land use map designation for a property he owns. The local government adopts the amendment. If a third party challenges the amendment, the challenge must be made administratively (as a compliance challenge) and the amendment will not be disturbed if the local government's decision is "fairly debatable". §163.3184(9)(a) Fla. Stat. (1995).

2. Same property owner applies to change the future land use map designation for the same property. The local government rejects the amendment. If the owner challenges the decision, the action is brought in court and the decision is subject to strict scrutiny. Yusem (instant case). If a third party challenges the decision, the action is a compliance challenge and it will be upheld if it is "fairly debatable". §163.3184(9)(a), Fla. Stat. (1995).

3. Same property owner applies to change the future land use map designation for the same property. The local government rejects the amendment, but amends the future land use map by changing the future land use map designation to a designation different from the one requested. If the land owner challenges the decision to reject the amendment, the action may be brought in court and the decision is subject to strict scrutiny. Yusem. If the land owner challenges the decision to amend the plan to a different designation, the action is a compliance challenge and it is subject to fairly debatable review. §163.3184(9)(a), Fla. Stat. (1995). If a third party challenges the decision to adopt the different amendment, the action is a compliance challenge and it is subject to fairly debatable review. Id.[11]

This approach does not make sense and does not produce fair or equitable results. The three proceedings should all be subject to the same standard of review, and that standard, according to the statute, should be the fairly debatable rule.

B. The Action Does Not Arise From A Quasi-Judicial Proceeding.

DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957) remains the seminal case on the principle of quasi-judicial actions. In DeGroot, this Court ruled that:

> when 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-

[11] These scenarios assume that the Department of Community Affairs finds the Plan in compliance. The same results would occur, and additional permutations on this theme would be evident, if the Department found the Plan not in compliance.

judicial as distinguished from being purely executive.

Fundamentally, however, judicial or quasi-judicial acts and proceedings have three fundamental features: 1) presentation of the facts and issues by adversaries, (See, e.g., Northwest Florida Home Health Agency v. Merrill, 469 So.2d 893 (Fla. 1st DCA 1985)); 2) rules of law that, when applied, will determine a result; and 3) a requirement that a decision be compelled by the application of the facts to the rules of law.

Not long after DeGroot, the courts approved the application of this analysis to zoning and ruled that zoning was not quasi-judicial. See, e.g., Harris v. Goff, 151 So.2d 643 (Fla. 1st DCA 1963). However, the courts rejected the application of DeGroot to, and have continued to regard as legislative the adoption of zoning ordinances. See, e.g., 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 DCA 1977). See, also, LaCroix, "The Applicability of Certiorari to Review Rezoning", 65 Fla. B. Jnl 105 (1991). The courts have also rejected the application of DeGroot to site specific amendments to comprehensive plans. Rinker Materials Corporation v. Metropolitan Dade County, 528 So.2d 904 (Fla. 3d DCA 1987) (comprehensive plan amendments are not subject to certiorari; rather, they are reviewable in original actions).

A "judicial act" determines what the law is and what rights of parties are with reference to transactions already had; a

"legislative act", by contrast, prescribes what the law shall be. Snyder II; Nider v. Hoffman, 89 P.2d 136, 32 Cal. App. 2d 11 (Cal. Ct. App. 1939); CRT Corp. v. Board of Equalization of Douglas County, 110 N.W. 2d 194, 172 Neb. 540 (1961). Legislation "looks to the future and changes existing conditions by making a new rule to be applied thereafter". Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, at __, 53 L.Ed. 150, 159 (1908)(emphasis supplied).

Regardless of whether one takes a "functional approach" or a doctrinal approach, the matter in question does not exhibit the fundamental incidents of a quasi-judicial action or proceeding as recognized by Judge Pariente. 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. No decision was compelled or could be derived based on the application of the existing law to the facts because indeed the request was in fact to change the existing law. The Board of County Commissioners did not lack discretion to decide not to endorse the proposed amendment.

The proceeding conducted by the Martin County Board of County Commissioners was not quasi-judicial in nature merely because it was a noticed public hearing. The fact that a hearing was held is obviously not determinative, as the original adoption of

comprehensive plans requires the same noticed public hearings under the statutes. Oliver Wendell Holmes eloquently made this point nearly one hundred years ago:

> Proceedings legislative in nature are not proceedings in a court, ... no matter what may be the general or dominant character of the body in which they may take place....That question depends not upon the character of the body, but upon the character of the proceedings....And it does not matter what inquiries may have been made as a preliminary to the legislative act. *Most legislation is preceded by hearings and investigations*. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act, to which the inquiry and decision lead up....So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. Prentis, 211 U.S. at 226-227, 29 S.Ct. at __, 53 L.Ed. at 159 (italics added).[12]

This Court eloquently observed some sixty years ago that the classifications of the functions of government

> ... are to be determined as occasion requires by a consideration of the language and intent of the Constitution as well as of the history, the nature, and the powers, limitations, and purposes of the republican form of government established and maintained by the Federal and State Constitutions. The essential nature and effect of the governmental function to be performed, rather than the name given to the function or to the officer who performs it, should be considered in determining whether ... it is legislative, executive, or judicial in its nature... Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So.2d 876, 881 (1930)

The essential nature of the function being performed, rather than the manner in which it was performed, determines what type of

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[12] A review of the arguments made by counsel in Prentis (contained in the Lawyer's Edition) demonstrates that Yusem's very argument was made by the Appellants, to wit: the fact that notice and a hearing preceded the decision transformed the action into a judicial one. The U.S. Supreme Court thus rejected this very contention nearly a century ago.

function it is. Snyder II, 627 So.2d at 474 (the character is determinative). What type of function it is, in turn, determines what type of procedures should be followed to satisfy the essential requirements of due process.

As recognized above by the United States Supreme Court, as well as by the Florida courts in Board of County Commissioners of Hillsborough County v. Casa Development Ltd. II, 332 So.2d 651 (Fla. 2d DCA 1976), statutory requirements for notice and public hearings do not transform an inherently legislative function into a quasi-judicial action. Nor has the adoption of the Local Government Comprehensive Planning and Land Development Regulation Act, Laws of Florida, Chapter 85-55, abolished time-honored legal principles governing how the law perceives the actions of the branches of government, or changed what has been traditionally regarded as a fundamentally legislative action or proceeding into a quasi-judicial one. If such were the case, the adoption of every ordinance would be a quasi-judicial act, and the decision whether to enact an ordinance would become a function of "evidence" rather than the discretion of the legislative body.

C. Assuming, *arguendo*, that this case actually related to rezoning, the District Court erred in following Snyder II because the particular rezoning requested by Yusem in this case was a legislative matter.

The District Court concluded that this action is within the Court's *certiorari* jurisdiction by focusing on the principle of zoning and, therefore, following this Court's decision in Snyder II. The court's reliance on zoning (and therefore on Snyder II) is

misplaced for three reasons. First, the instant case is not about a zoning decision. It is about a planning decision. Second, the rezoning requested by Yusem was never even addressed and decided by the County Commission. Third, the requested rezoning was a legislative matter unaffected by this Court's ruling in Snyder II.

The reason why the both Yusem and the majority below have characterized this as a rezoning of a specific parcel of land is plainly an effort to analogize this case to the Snyder II decision. Nevertheless, Yusem's request was indisputably about land use planning, and more importantly amending an adopted comprehensive growth management plan. Clearly, in Snyder II the only issue was whether a request to be rezoned to a zoning district consistent with the existing land use designation was legislative or quasi-judicial. The Fifth District's ruling in Snyder I was also limited to that issue. Snyder I and Snyder II simply involved a request pursuant to, and in accordance with ,*the existing law.* In contrast, Yusem's request was to amend the comprehensive plan to *create the law* necessary to render a particular zoning legal.

The courts and the commentators have repeatedly recognized that there is a fundamental distinction between comprehensive planning and zoning that prohibits the two from being considered one and the same. See, e.g., Machado, 519 So.2d 629 (Fla. 3d DCA 1987) review denied, 529 So.2d 693 (Fla. 1988); Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So.2d 996 (Fla. 2nd DCA 1993). Simply stated, planning formulates and establishes the policy under which the community will evolve over the entire

comprehensive plan period. Zoning follows and simply implements that planning policy under the conditions and circumstances at the particular point in time.

There appears to be a 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. The wording of the certified question illustrates this point. In contrast, Judge Pariente's careful distinction between the two unfortunately appears to be the exception rather than the rule.

This Court understands the difference, and instructed legal practitioners of its significance when it observed in Snyder II that comprehensive planning and zoning are different functions that should not be lumped together under the term "zoning." Snyder II 627 So.2d at 475. The comprehensive plan formulates the policy "intended for the future use of land, which contemplates a gradual and ordered growth." Id.

It is particularly inappropriate to let the mere fact that Yusem also made an application to rezone the subject property determine whether this matter is legislative. The local government action from which this case arises was the rejection of a proposed comprehensive plan amendment. Yusem's requested zoning of the subject property was undeniably never discussed or considered, because, once the amendment to the land use element amendment of the Plan was rejected, the rezoning of the property to a district allowing four times the density allowed by the comprehensive plan

was a moot issue.

Yet assuming, *arguendo*, that Yusem's rezoning application could be considered in the equation of whether the proceeding was legislative or quasi-judicial, its inclusion actually makes the County Commission's action even more conclusively legislative. For if we consider Yusem's planned unit development rezoning application, it is inescapably evident that the proceedings and actions at issue are discretionary and policymaking in nature.

Under Martin County law, planned unit development zoning is available only in lieu of otherwise available straight zoning district designations that would implement the land use designations and the allowable densities. The Plan defines Planned Unit Development Zoning as a negotiated zoning district agreed to between the landowner and the County:

> A PLANNED UNIT DEVELOPMENT is a unified development which is planned, approved and controlled according to provisions of a binding written document negotiated between the developer and the County as a special PUD zoning district and approved at a public hearing. The purpose of such PUD districts is to provide flexibility to the strict zoning and development regulations in a manner which is mutually beneficial to the County and the development, and to encourage enlightened and imaginative approaches to community planning.... Specific PUD district regulations are negotiated voluntarily by both the developer and the County, and neither is guaranteed maximum benefits by right. Martin County Comprehensive Growth Management Plan, §4-1(B)(6). (Exhibit 29)

In other words, planned unit development zoning is a zoning district which is created for a specific property as a result of negotiations between the County and the landowner in lieu of straight zoning. As with any negotiation, either the landowner or

the County may simply decide not to enter into the agreement.[13]

Accordingly, planned unit zoning is never a matter of right. The decision, *vel non,* to rezone to a planned unit development zoning is not a function of the proof of criteria or the satisfaction of a rule of law or the requirements of a policy. On the contrary, no proof or argument is sufficient in and of itself to raise a request for planned unit development rezoning to the status of a right. It is a negotiated contract. As a result, recent cases addressing rezoning, site plan applications, master plan applications, special exceptions, or other development orders that appear to expand the category of actions deemed quasi-judicial, are clearly not analogous to this instant case because none related to a negotiation or contained this fundamental element of discretion. See, e.g., Snyder II; Park of Commerce Associates v. City of Delray Beach, 636 So.2d 12 (Fla. 1994).

The function of a Board of County Commissioners in considering whether to negotiate and agree to a planned unit development zoning is analogous to the negotiation of a franchise agreement, as was considered in Board of County Commissioners of Hillsborough County

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[13] In this regard, planned unit development zoning per Martin County law differs from the planned unit zoning at issue in Hirt v. Polk County Board of County Commissioners, 578 So.2d 415 (Fla. 2d DCA 1991), and A.B.G. Real Estate Development, Inc. v. St. Johns County, 608 So.2d 59 (Fla. 5th DCA 1992). In those cases, applicable law established requirements which if satisfied entitled the landowner to the requested zoning. In this case, the applicable law plainly states that satisfaction of minimal requirements does not require approval by the Board of County Commissioners. The remaining element of discretion retained in the Martin County Plan distinguishes this matter from potentially having a quasi-judicial character.

v. Casa Development Ltd. II, 332 So.2d 651 (Fla. 2d DCA 1976). There, the court held that the action was "quasi-legislative" in character. Quasi-legislative actions, like pure legislative functions, are not reviewable by certiorari. Board of County Commissioners of Manatee County v. Circuit Court of the Twelfth Judicial Circuit, 433 So.2d 537 (Fla. 2d DCA 1983).

In short, the action at issue, whether it be the amendment to the comprehensive plan or the requested rezoning that became moot, is legislative in nature and not subject to review in *certiorari*. Both were by nature the formulation of policy rather than the mere application of law.

II. THE DISTRICT COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT YUSEM'S AMENDMENT DID NOT AFFECT A LARGE NUMBER OF PEOPLE OR PROPERTIES.

The majority below concluded without explanation that the future land use element amendment applied for will have a limited impact on the public. The effect of this curt statement is to establish a *stare decisis* precedent that a land use decision relating to 54 acres, designated consistently with and located in the middle of a 900-acre tract, has a limited impact on the public under Snyder II. The majority's refashioning of the certified question was apparently to avoid a reassessment of this clearly erroneous conclusion. This matter is simply too important to allow this off-hand conclusion and significant precedent to stand. The 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. There is a compelling need to give this element additional attention and explication, for if the Snyder II decision is to be meaningfully applied by the lower trial and appellate courts, they must understand the importance of this factor and how it should be considered. All of the evidence in this case showed 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. It clearly was not adequately considered in this case.

Judge Pariente observed in her dissent that her two brethren on the panel "ignored" the significance of this property's location in the center of a tract of 900 acres of rural, similarly planned lands, and thus "the potential implication of any amendment on the remaining 900 acre tract and on the policies already embodied in the County's comprehensive land use plan, including its future land use map which is the subject of this amendment". Yusem, 664 So.2d at 979. Based on the compelling evidence in the record demonstrating that the amendment would have a significant impact on this entire tract as well as on the County's capital improvement plan, it appears that the majority may have given this critical factor nothing more than lip service.

Judge Pariente was correct. The "potential implication" of this amendment was not trivial. The time was not ripe to open this rural area to urban densities. If Yusem's amendment was adopted and urban densities were introduced into the center of this area,

it would open the entire 900-acre area to urban growth before the plan intended the area to be urban. Because the property is in the center of the tract rather than on the edge of existing urban development, there would be no way to prevent like changes in land use designations for the entire tract. The likelihood that this amendment request would be followed by similar requests by developers owning undeveloped lands in the tract (including Yusem's brother-in-law) was quite real. A number of people living in this area commented that this change would have a significant effect on the rural character of the area and their way of life.

The County's capital facilities plan, an adopted element of the Plan, for this area was a function of rural densities rather than urban densities. Opening the area to urban development and densities would force the County to have to redirect its limited resources for capital improvements from other more appropriate, planned areas to this one.

As this Court and several district courts have of appeals have noted, the element of time is a crucial feature of comprehensive planning:

> [T]he opinion [Snyder I] overlooks the premise that the comprehensive plan is intended to provide for the *future* use of land, which contemplates a gradual and ordered growth....
>
> A comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.

Snyder II, 627 So.2d at 475.

The purpose of a comprehensive plan is to set general guidelines for development, and not necessarily to accomplish immediate land use changes. Southwest Ranches v. Broward County, 502 So.2d 931, 936 (Fla. 4th DCA 1987) rev. denied, 511 So.2d 999 (Fla. 1987); see,also, §§ 163.3161(2), 163.3161(3), 163.3167(1)(a) and (b), 163.3177(1), and 163.3177(6)(a) Fla. Stat. (1995)(which all describe a future orientation). The element of time was clearly overlooked in both the trial court's Final Judgment and the district court's belief that the amendment was of trivial impact.

The issue of inadequate infrastructure to facilitate development of the rural area was a major concern with adopting the requested amendment. Commissioner Hurchalla stated at the Board meeting:

> I think my biggest concern about this (and it has been every time it comes up) is that there are about a thousand acres similarly situated, and until such time as we have an analysis as to what that would mean. All our water, all our sewer, all our traffic so far has been based on this whole thousand acres in that area being one for two [one unit for two acres]. If you multiply that times four, it has a significant difference in gallons per day, and trips per day in all those places....[W]hen we do this piece we signal to everybody who is all around them that now the world is changed. But we still haven't got the public facilities even estimated as to what those impacts are going to be. (Exhibit 31, p.18; Transcript p. 723-724).

Commissioner Hurchalla continued:

> But there's another thing that I think probably is the most important issue in looking at something like this, and that's cumulative impact. We have a road plan, we've got a twenty-year road plan. It has got impact fees designed from it, it has got all sorts of things designed from it. It doesn't include these 1000 acres having their density changed. We've got a water plan...but it

> doesn't include supplying all this area. That might be possible to do to change the road plan, to change the water plan, but I think what comprehensive planning means is that you do them all at once. (Exhibit 31, p.39; Transcript p. 724-727).
>
> We are not just asked, when we look at these, to see if a service is immediately available. We've got a five year CIE now. We're asked to see whether we'll be able to make it available in the future, and that five year CIE doesn't plan for this. If we use [Plaintiff's counsel's] argument that it is in the urban service area, ergo, it's two units per acre, I've got a thousand more acres that before I can legally go forward, I've got to have in the CIE. I've got to ask you guys [her fellow commissioners] to take some other things out, and I've got to put them in, because they're not there now. Our park planning doesn't have all this in two units per acre. That changes our numbers appreciably. Our water system doesn't even plan to put lines out there.... (Exhibit 31, pp. 51-52)
>
> ...It's not consistent with the Water Element of the Plan; it's not consistent with the Road Plan, cause neither of those planned for the area to be at two units per acre. (Exhibit 31, p. 53)

She later stated:

> [W]e're at the point where we're at 88% of our water allocation and unless you all know something I don't, I don't believe we have construction plans, at this point for a new well. That's not specifically to this project, because it's obviously something that we should have had in addition, but it points out the concurrency problem of doing land use changes, which set a precedent for other land use changes, and traffic, or water, when we're still not geared up to see what the effects are going to be. (Exhibit 62, p. 24).

Quite clearly, had the amendment been adopted, it would have triggered an immediate change in the area from a rural "reserve area" for possible future urban expansion into an urban area. Providing the amount of infrastructure necessary to facilitate development of the area at urban densities of two units per acre (like that requested by the plaintiff) would have required a

redirection of the County's capital improvement plan, a fundamental shift in County policy.

III. THE TRIAL COURT ERRED IN CREATING AND APPLYING AN UNPRECEDENTED BURDEN OF PROOF WHICH CLEARLY CONTRADICTS ESTABLISHED BURDENS OF PROOF IN COMPREHENSIVE PLAN AMENDMENT CASES.

1. The trial court wrongly imposed the burden of proof upon the County rather than upon Yusem who was the one seeking the change.

The analysis applied by the trial court imposed the burden of proof upon the County to prove that the requested land use element amendment was inconsistent with the comprehensive plan, which is directly opposite to the legion of appellate cases which correctly place the burden upon the applicant. See, Machado, 519 So.2d at 632 ("the burden is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements"); White v. Metropolitan Dade County, 563 So.2d 117 (Fla. 3d DCA 1990); Sunbelt Equities, 619 So.2d 996 (Fla. 2d DCA 1993); City of St. Petersburg v. Aikin, 217 So.2d 315 (Fla. 1968). The one seeking the change was indisputably Yusem, not the County.

2. The trial court's analysis, which was based solely upon the consistency of Yusem's request was clearly erroneous, because the consistency of the request is but one consideration in determining whether the County's rejection of the amendment was proper.

The trial court's analysis was simply a black-or-white consideration of whether or not the plaintiff's request was consistent with the County's Plan. The Final Judgment shows that the lower court described the issue as whether the requested land

use amendment is consistent with the Martin County Comprehensive Plan. (R. p. 555)

The trial court's error in using this analysis is that the consistency of the request is not the only material consideration. See, e.g., Sunbelt Equities, 619 So.2d 996; Snyder II; Southwest Ranches v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987) rev. denied, 511 So.2d 999 (Fla. 1987). Even if the requested amendment was consistent, the County was still authorized to reject the amendment. Id. Justice Grimes' words for this Court are compelling:

> Even where a denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided that the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence.
>
> * * *
>
> Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to relief absent proof the status quo is no longer reasonable. It is not enough to simply be "consistent"; the proposed change cannot be "inconsistent"... Snyder II, 627 So.2d at 525 (citations omitted)

In analyzing the case as it did, the trial court plainly failed to consider the County's proof that even assuming, *arguendo,* that the request was consistent there were valid rationales for declining to make the amendment. Based upon this Court's holdings, including the holding in Snyder II, the consistency of the request does not give rise to an absolute right to a land use. The law recognizes both the possibility of other land uses or

classifications as well as rationales not based strictly upon inconsistency as justifying a rejection of a consistent zoning or land use designation. In this case, the evidence demonstrated that the existing plan for the subject property is compatible with the surrounding area, which is decidedly rural, and that maintaining that existing plan would be both reasonable and proper. The County also described several rationales for not adopting the amendment, such as that adopting the amendment would likely result in a finding by the Department of Community Affairs that the County's plan was not in compliance with state law (Transcript, p. 744), and would subject the County to litigation at the least and a loss of state funds at worst. (Transcript 182-183,); see also §163.3184(11) Fla. Stat. (1989)[14].

IV. THE TRIAL COURT SHOULD HAVE ENTERED JUDGMENT FOR THE COUNTY

Florida's common law has long recognized a fundamental tenet that where there is adequate evidence to sustain a legislative decision, and no rule of law is violated by the decision, the courts will respect it and enforce it. See, State v. Jacksonville Terminal Co., 90 Fla. 721, 106 So. 576 (1925). Therefore, the law in Florida, as it is in all states, is that a local government's legislative decisions are inviolate if they are "fairly debatable" - when it is shown that *for any reason* it is open to dispute or

[14] 1990 is the year in which the amendment would have been adopted.

controversy *on grounds that make sense* or point to a logical deduction". City of Miami Beach v. Lachman, 71 So.2d 148, 152 (Fla. 1954)(emphasis added). Moreover, legislative acts are clothed with a presumption of validity. Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Rural New Town, Inc. v. Palm Beach County, 315 So.2d 478 (Fla. 4th DCA 1975); Woodham, 223 So.2d at 348. The mere fact that a landowner's proposed use of his property is consistent with the law is not conclusive and does not permit the conclusion that a decision not to allow the proposed use is illegal and unconstitutional. Woodham, 223 So.2d at 344. The burden rests on the party challenging the decision to establish that the decision is arbitrary, unreasonable, or confiscatory and thus not "fairly debatable". City of Miami Beach v. Silver, 67 So.2d 646 (Fla. 1953); Aikin, 217 So.2d 315 (Fla. 1968); Rural New Town, Inc., 315 So.2d 478. It is axiomatic that the challenger cannot carry this burden if the local government demonstrates a fairly debatable rationale for its action.

Yusem did not prove, nor did the trial court find, that the existing plan for the subject property is unconstitutional. All of the evidence pointed to the uncontrovertible fact that the plan for the property is the same as the plan for 900 acres just like it. The legitimacy of this plan is obvious. Nor did Yusem prove, or the lower court find, that the request was strictly consistent with the comprehensive plan. The trial court only believed that the County had not established that the request was inconsistent. As

was made quite clear in White v. Metropolitan Dade County, 563 So.2d 117 (Fla. 3d DCA 1990), Yusem bears the burden of affirmatively proving strict consistency with the Plan; it is not the County's burden to show inconsistency.

The evidence also showed that the County satisfied its burden. The County's unrebutted evidence established that the existing legislative plan for the Yusem property is constitutional. The property is in the heart of a 900 acre tract of rural lands with rural residential densities, agricultural uses like flower farms and cattle grazing, and limited infrastructure. Moreover, this plan has been approved by the State of Florida as a valid exercise of the County's duties under the Growth Management Act.

The County also presented at least a number of unrebutted reasons why its decision is fairly debatable. The transcripts of the hearings, whose introduction into evidence was agreed to by both parties, (Exhibits 31 and 62) contains a clear articulation of evidence of fairly debatable reasons for the Board's decision. The amendment - to a density four times more intense than the region surrounding the property - was patently incompatible with the Plan's present rural development concept for the area surrounding Yusem's property. The cumulative effect of amending the comprehensive plan land use designation on Yusem's property as requested could not be overlooked merely because the request was to change a plan rather than a spot. If Yusem's property was granted a higher density, creating an island of urban densities in a sea of rural densities and uses, then either a spot zone would exist or

other landowners in the area would inevitably rely on Yusem's change to compel changes to their properties. If the County had to follow Yusem's argument, it would be nearly impossible to deny similar requests from adjoining property owners to have this higher density. Yet increasing the planned density of nearly nine hundred acres by four-fold would have required the County to reevaluate and recreate its entire Plan to adjust the Plan for such an enormous resultant imbalance. There was unrebutted testimony that this would have had an especially great impact on the County's Capital Improvements Element and Plan. Though the County was hampered in its efforts to fully demonstrate the effect of this need to replan, the evidence shows that the area's infrastructure was already at its maximum for roads and water and therefore not ready to accommodate a change to this higher density of development. (Transcript, p. 792, 824-825)

The County's witnesses further described several bases that justified the County's rejection of the amendment, and showed that the County was justified in rejecting this amendment. It was unequivocally established that there has been little development in the rural area surrounding the property, and that the area has a distinctly and quite viable rural character. (Exhibit 1; Transcript, p. 435-438) Presently, the existing land use pattern for this area is to permit rural type development, and this is the Comprehensive Plan's anticipated land use development pattern. The latter is particularly demonstrated by the fact that no capital facilities or supportive services or facilities to accommodate any

change from this pattern were programmed or planned. Mr. Iler demonstrated that the Board could have reasonably and legitimately decided not to adopt the amendment because it would result in a deflection and redirection of the County's focus of future development to the 900 acre area to the prejudice of other Plan mandates to direct growth and financial resources to areas currently served by full array of capital facilities, or necessary for redevelopment, revitalization, or infill. Likewise, the reprioritization associated with providing sufficient infrastructure to this rural area to accommodate the change initiated by this amendment would have prejudiced and indeed violated the Plan's requirement that the County's funds and energies be devoted to repair of existing systems for current users, to facilitating redevelopment, and to correcting existing deficiencies. Of secondary importance was providing for new development not contemplated by the Plan.

Mr. Iler also testified regarding the Plan's ARDPP rules, elements, and requirements of the Plan that Yusem clearly never addressed and apparently never even knew about. These rules are in the Plan because the Plan's urban service district is larger than necessary to accommodate the County's future population needs. They mandate that the County prohibit further unplanned or unsupported proliferation of residential capacity and time future development in a manner which demonstrates a keen awareness of the need to encourage compact urban development within the urban service district (to develop from the centers out) and not act in

a manner that will result in encouraging new nodes of development. Without refutation, Iler testified that this amendment would violate the ARDPP rules because it would increase the overallocation of residential capacity, would not be development occurring from the center out, and would promote a higher intensity of residential development in the rural area than is currently contemplated by the Plan.

Robert Pennock, of the Department of Community Affairs (the Department which oversees comprehensive planning throughout the state) articulated the most obvious fairly debatable reason for the Board's decision. He testified without contradiction and in no uncertain terms that the amendment and development would constitute urban sprawl in violation of one of the most fundamental requirements of the Growth Management Act,[15] and would violate the fundamental mandates of Chapter 163, Rule 9J-5 and the State's Comprehensive Plan. (Transcript, p. 739-740) He also testified that the Department would have objected to the amendment if it had been subsequently adopted. (Transcript, p. 743-744) Based upon the evidence that the County would bear a substantial statutory risk and penalty if it had adopted this amendment or persisted in its insistence,[16] it is quite clear that the Board had a proper and

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[15] In a Department of Community Affairs "Technical Memo", Secretary Thomas G. Pelham described discouraging urban sprawl as a "key component of Florida's growth management laws as shaped by the Legislature since the mid-1980s".

[16] See, §163.3184(10) and (11) Fla. Stat. (1989), describing that in addition to the cost and expense of going to hearing on the amendment among other things a County may lose funds to increase capacity for roads, bridges, and water and sewer systems, as well

indeed compelling reason for rejecting this amendment.

The evidence proves that the County's decision is based upon rationales that a reasonable person would find fairly debatable. The trial court should have found for the County on all counts of this *de novo* action.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court reverse the Fourth District Court of Appeals decision that the proceeding in question was quasi-judicial and rule that amendments to comprehensive plans are legislative actions, and remand the case to the lower court to proceed accordingly.

Respectfully submitted,

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as its eligibility for grants and revenue sharing. Quite clearly, the public health, safety and welfare would have been jeopardized by this amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to Tim B. Wright, Esq., Attorney for Respondent, 1100 South Federal Highway, P.O. Drawer 6, Stuart, FL 34995-0006, Lonnie Groot, Deputy County Attorney, Attorney for Amicus Curiae Seminole County, 1101 East First Street, Sanford, FL 32771, Sherry Spiers, Assistant General Counsel, Attorney for Amicus Curiae Florida Department of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100, and Donna L. McIntosh, Esq., Attorney for Amicus Curiae Seminole County Council of Local Governments, 200 W. First Street, Suite 22, P.O. Box 4848, Sanford, FL 32772-4848, this 22nd day of February, 1996.

GARY K. OLDEHOEFT
Assistant County Attorney