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SUPREME COURT OF FLORIDA

CASE NO. 89,005

AMENDMENT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.020(a) AND ADOPTION OF FLORIDA RULE OF APPELLATE PROCEDURE 9.190

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FILED
SID J. WHITE
NOV 12 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

COMMENTS TO RULES 9.020(a) AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE

By Order dated September 27, 1996, this Court granted leave to file comments to the amendment of Rule 9.020(a) and the adoption of Rule 9.190, Florida Rules of Appellate Procedure. The law firm of Eckert Seamans Cherin & Mellott offers the following comments to Rules 9.020(a)(3) and 9.190(b)(3) and (c)(4):

1. Rule 9.030(c)(1)(C), Florida Rules of Appellate Procedure, provides that the circuit courts shall review, by appeal, administrative action when provided by law.

2. Pursuant to Rule 9.030(c)(1)(C), several local governments, including, for example, Metropolitan Dade County, enacted legislation providing for review by appeal of quasi-judicial administrative action. See Section 33-316, Code of Metropolitan Dade County, Florida (Exhibit "A").

3. Appellate review of quasi-judicial administrative decisions where permitted by local law permits review as of right as opposed to discretionary review by certiorari. See Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995); City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982).

4. Review by appeal ensures that the circuit court will receive the entire record on appeal, rather than selective excerpts contained in an appendix to a petition for writ of certiorari. The entire record will enable the circuit court to properly discharge its responsibility which is to determine, inter alia, whether the administrative decision is supported by substantial competent evidence. Haines City at 530; Deerfield Beach at 626.

5. Elimination of review by appeal and substitution of review by certiorari substantially condenses the time within which the aggrieved party must prepare a well-reasoned argument which is fully researched and documented. The aggrieved party, however, does not control the resources which are the necessary prerequisites to preparing such an argument. On appeal, for example, the record, including the transcript, must be prepared within fifty days of the filing of the notice of appeal. The appellant's initial brief is filed twenty days thereafter. In a certiorari proceeding, the petitioner would have to obtain a transcript and copies of the record on an expedited basis in order to prepare a proper petition within thirty days. The administrative agency will be the only party with a complete copy of the record. Since the administrative agency, in most cases, will be the party being sued, the administrative agency will have no incentive to expedite the copying of the record. Further, where the record of the administrative proceeding is particularly voluminous, or where the pending actions are particularly numerous, the administrative agency may not have sufficient personnel available to expedite the copying of the record.

6. It is respectfully submitted, therefore, that provision should be made in the rules to ensure that an aggrieved party will be entitled to review as of right of quasi-judicial decisions of administrative entities. Further, an aggrieved party should be afforded adequate time to

obtain a transcript, obtain copies of the record and to prepare a thoughtful and well-researched petition or brief on the basis of said transcript and record. Thirty days, it is submitted, is not an adequate time. If review is to be by certiorari, it is respectfully requested that the rules grant to the petitioner an adequate time within which to supplement the petition following receipt of the transcript and record. Such time frames could coincide to the time frames permitted on appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure. Alternatively, circuit courts should retain jurisdiction, pursuant to Rule 9.030(c)(1)(C), Florida Rules of Appellate Procedure, to review, by appeal, administrative action when provided by law, even where such law is local law rather than general law.

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT
701 Brickell Avenue, Suite 1850
Miami, Florida 33131

By: Ross A. McVoy for 115543
Eileen Ball Mehta
Fla. Bar No. 239127

By: Ross A. McVoy for 115543
Stanley B. Price
Fla. Bar No. 143648

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Sec. 33-316. Exhaustion of remedies; court review.

No person aggrieved by any zoning resolution order, requirement, decision or determination of an administrative official or by any decision of the Zoning Appeals Board may apply to the Court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article. It is the intention of the Board of County Commissioners that all steps as provided by this article shall be taken before any application is made to the Court for relief; and no application shall be made to the Court for relief except from resolution adopted by the Board of County Commissioners, pursuant to this article. Zoning resolutions of the Board of County Commissioners shall be reviewed by the filing of a notice of appeal in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules of Appellate Procedure for the review of the rulings of any commission or board; and such time shall commence to run from the date the zoning resolution sought to be reviewed is transmitted to the Clerk of the Commission. The Director, or his duly authorized representative, shall affix to each zoning resolution the date said zoning resolution is transmitted to the Clerk of the Commission. The Clerk of the Board shall comply with all requirements of the Florida Rules of Appellate Procedure. For the purposes of appeal the Director shall make available, for public inspection and copying, the record upon which each final decision of the Board of County Commissioners is based; provided, the Director may make a reasonable charge commensurate with the cost in the event the Department is able to and does furnish copies of all or any portion of the record. Prior to certifying a copy of any record or portion thereof, the Director or his designee shall make all necessary corrections in order that the copy is a true and correct copy of the record, or those portions requested, and shall make a charge of not more than ten cents ($0.10) per page, instrument maps, picture or other exhibit; provided, the charges here authorized are not intended to repeal or amend any fee or schedule of fees otherwise established. The Chairman, Vice-chairman or Acting Chairman of the Board of County Commissioners at any zoning hearing before the Commission may swear witnesses and, upon timely request in writing, compel the attendance of witnesses in the same manner prescribed in the County Court. The Director shall employ a qualified court reporter to report the proceedings before the Board of County Commissioners, who shall transcribe his notes only at the request of the County or other interested party, at the expense of the one making the request. Such transcript, as well as the transcript of the proceedings before the Zoning Appeals Board, when certified by the reporter, may be used in a court review of a matter in issue.

It is the intent of the Board of County Commissioners that no decision under this chapter shall constitute a temporary or permanent taking of private property or an abrogation of vested rights (taking or vested rights deprivation). In the event that any court shall determine that a decision of the Board of County Commissioners under this chapter constitutes a taking or vested rights abrogation, such decision of the board is declared to be non-final and the court is hereby requested to remand the matter to the Board of County Commissioners, which shall reconsider the matter after notice of the County Commission hearing is given pursuant to Section 33-310(c) through (f). In the event that a court fails to remand a matter to the Board of County Commissioners after finding that a taking or vested rights abrogation has occurred, the director is instructed to forthwith file an application to remedy such taking or vested rights abrogation, which application shall be heard directly by the Board of County Commissioners after notice is given pursuant to Section 33-310(c) through (f). The Board of County Commissioners may elect to request that any remand or director's application be deferred until a later point in the litigation, including the completion of any judicial appeals. Notwithstanding anything to the contrary contained in this chapter, the Board of County Commissioners shall have orig-

inal administrative jurisdiction over any remand or director's application pursuant to this paragraph.
(Ord. No. 60-14, 4-19-60; Ord. No. 61-30, § 1, 6-27-61; Ord. No. 62-48, § 1F, 12-4-62; Ord. No. 64-65, § 6, 12-15-64; Ord. No. 65-11, § 2, 2-16-65; Ord. No. 66-66, § 5, 12-20-66; Ord. No. 76-74, § 1, 7-20-76; Ord. No. 78-52, § 2, 7-18-78; Ord. No. 79-91, § 1, 10-16-79; Ord. No. 94-37, § 4, 3-3-94; Ord. No. 95-215, § 1, 12-5-95)

Sec. 33-317. Limitation on issuance of permits.

The Department shall not issue any type of permit or certificate based upon any action of the Zoning Appeals Board until a final decision has been rendered on the application by the appropriate board or the County Commission as provided by this ordinance; provided, however, a temporary conditional permit or certificate may be issued prior to such final decision if the Director should first determine that the withholding of the same would cause imminent peril to life or property and then only upon such conditions and limitations, including the furnishing of an appropriate bond, as may be deemed proper by the Director.

Upon application of the Director, any variance, special exception, new use, special permit or unusual use heretofore or hereafter granted that is not utilized within the three-year period following the date of its grant or approval, may be terminated by the Board of County Commissioners after the required noticed public hearing or hearings, if it is determined that there have been sufficient changes in circumstances in the neighborhood and area concerned that to permit the same to be used would be detrimental to the area and incompatible therewith; provided, a variance shall not be terminated if the guidelines for granting the same exist. The foregoing provision shall not apply if the resolution granting the variance, special exception, new use, special permit or unusual use establishes a specific time limitation for utilizing the same. In such instances, the time limitation established by such resolution shall prevail.

In the event application is made for a change of zoning on property which possesses any variance, special exception, new use, special permit or unusual use not yet utilized, no permits or certificates shall be issued for such variance, special exception, new use, special permit or unusual use until the hearing has been concluded. If the application for change of zoning is approved, the variance, special exception, new use, special permit or unusual use shall terminate, unless continued by the rezoning resolution; otherwise such variance, special exception, new use, special permit or unusual use shall remain in full force and effect, unless terminated by other provisions in this section.

A variance, special exception, new use, special permit or unusual use shall be deemed to have been utilized if the use pursuant thereto shall have been established, or if a building permit has been issued, acted upon, and the development to which such variance, special exception, new use, special permit or unusual use is an integral part is progressively and continuously carried to conclusion.
(Ord. No. 60-14, 4-19-60; Ord. No. 61-30, § 1, 6-27-61; Ord. No. 73-104, § 1, 12-18-73)

Sec. 33-318. Reserved.

Editor's note—Section 33-318, pertaining to pending applications, has been deleted as obsolete. It was derived from Ord. No. 60-14, adopted April 19, 1960 and Ord. No. 61-30, § 1, adopted June 27, 1961.

Sec. 33-319. Administrative building moratoria.

(a) Whenever it shall be made to appear to the County Manager that it is in the public interest to make a comprehensive determination as to whether existing County zoning districts applying to a portion of the area of Dade County are appropriate, and it is further made to appear to him that the said existing zoning districts may be detrimental to the said area should they continue to remain applicable and building permits be issued predicated thereon the County Manager shall immediately issue his administrative order delineating the area in question and prohibiting the issuance of building permits therein.

(b) Any administrative order issued pursuant to subsection (a) shall be complied with by all