

IN THE SUPREME COURT OF FLORIDA

BROWARD COUNTY,

CASE NO: 93,115

Petitioner,

v.

G.B.V. INTERNATIONAL, LTD., etc., et al.

Respondents.

BRIEF OF PETITIONER ON THE MERITS

SHARON L. CRUZ

Interim County Attorney for Broward County

ANTHONY C. MUSTO

Chief Appellate Counsel

Florida Bar No: 207535

Governmental Center, Suite 423

115 South Andrews Avenue

Fort Lauderdale, Florida 33301

Telephone: (954) 357-7600

Telecopier: (954) 357-7641

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
CERTIFICATE OF TYPE SIZE AND STYLE	vii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	18
ARGUMENT	22

I

THE DISTRICT COURT ERRED IN GRANTING CERTIORARI	22
--	----

A

THE DISTRICT COURT’S CONCLUSION THAT THE COMMISSION BASED ITS DECISION ON INCOMPATIBILITY IS NOT SUPPORTED BY THE RECORD AND DOES NOT, EVEN IF DEEMED SUPPORTED BY THE RECORD, CONSTITUTE A BASIS TO QUASH THE ORDER OF THE CIRCUIT COURT	24
--	----

B

THE DISTRICT COURT IMPROPERLY APPLIED THE STANDARDS APPLICABLE TO ZONING ISSUES OF LIMITED IMPACT TO A LARGE SCALE DEVELOPMENT THAT, IF ALLOWED, WILL HAVE A SIGNIFICANT EFFECT ON THE COMMUNITY AS A WHOLE 28

C

THE FACT THAT PLAT APPROVAL REQUIRED THE AMENDMENT OF THE CITY OF COCONUT CREEK'S LAND USE PLAN SHOWS THAT THE DETERMINATION HERE WAS LEGISLATIVE 33

D

EVEN IF IT IS SAID THAT *SNYDER APPLIES HERE, G.B.V. INTERNATIONAL'S* FAILURE TO PROVE THAT ITS REQUEST FOR PLAT APPROVAL WAS COMPATIBLE WITH SURROUNDING LAND USES, A FACTOR WHICH RENDERED THE APPLICATION INCONSISTENT WITH THE COUNTY'S COMPREHENSIVE PLAN, REQUIRED THE CIRCUIT COURT TO REJECT THE REQUEST FOR CERTIORARI 34

II

THE DISTRICT COURT ERRED WHEN, IN GRANTING CERTIORARI, IT WENT BEYOND QUASHING THE ORDER UNDER REVIEW AND ISSUED DIRECTIONS TO THE CIRCUIT COURT 36

CONCLUSION 40

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

CASES	PAGE
<i>ABG Real Estate Dev. v. St. Johns County</i> , 608 So. 2d 59 (Fla. 5th DCA 1992)	37
<i>Applegate v. Barnett Bank</i> , 377 So. 2d 1150 (Fla. 1979)	27
<i>Barnett & Klein v. President of Palm Beach</i> , 426 So. 2d 1074 (Fla. 4th DCA 1983)	27
<i>Board of County Commissioners v. Snyder</i> , 627 So. 2d 469 (Fla. 1993)	10, 12, 19, 28, 29, 30, 31, 32, 34
<i>Brown v. Walton County</i> , 667 So. 2d 376 (Fla. 1st DCA 1995)	26
<i>Cardelle v. Cardelle</i> , 645 So. 2d 22 (Fla. 3d DCA 1994)	27
<i>City of Deerfield Beach v. Valliant</i> , 419 So. 2d 624 (Fla. 1982)	22
<i>City of Miramar v. Amoco Oil Co.</i> , 524 So. 2d 506 (Fla. 4th DCA 1988)	38
<i>Firestone v. Firestone</i> , 263 So. 2d 223 (Fla. 1972)	27
<i>G.B.V. International, Ltd. v. Broward County</i> , 709 So. 2d 155 (Fla. 4th DCA 1998)	16, 17
<i>Gulf Oil Realty Co. v. Windhover Assn.</i> , 403 So. 2d 476 (Fla. 5th DCA 1981)	37

<i>Haines City Community Development v. Heggs,</i> 658 So. 2d 523 (Fla. 1995)	23
<i>Hirt v. Polk County Board of County Commissioners,</i> 578 So. 2d 415 (Fla. 2d DCA 1991)	33
<i>Jones v. State,</i> 477 So. 2d 566 (Fla. 1985)	23
<i>Klein v. Hendry County Hospital Authority,</i> 596 So. 2d 1253 (Fla. 4th DCA 1992)	27
<i>Lawrence v. Florida East Coast Ry.,</i> 346 So. 2d 1012 (Fla. 1977)	22
<i>Leisure Resorts v. Frank J. Rooney, Inc.,</i> 654 So. 2d 911 (Fla. 1995)	22
<i>Martin County v. Yusem,</i> 690 So. 2d 1288 (Fla. 1997)	11, 12, 20, 32
<i>Nance v. Town of Indialantic,</i> 419 So. 2d 1041 (Fla. 1982)	32
<i>National Advertising Co. v. Broward County,</i> 491 So. 2d 1262 (Fla. 4th DCA 1986)	38
<i>Snyder v. Board of County Commissioners,</i> 595 So. 2d 65 (Fla. 4th DCA 1991)	29
<i>Snyder v. Douglas,</i> 674 So. 2d 275 (Fla. 2d DCA 1994)	36, 37
<i>Stilson v. Allstate Ins. Co.,</i> 692 So. 2d 979 (Fla. 2d DCA 1997)	22

Tamiami Trail Tours v. Railroad Comm.,
128 Fla. 25, 174 So. 451 (1937) 37

Vandergriff v. Vandergriff,
456 So. 2d 464 (Fla. 1984) 27

OTHER AUTHORITIES

Susan L. Trevarthen, *Due Process and Ethical Concerns in Local Quasi-Judicial Hearings and Development Approvals*, THE AGENDA, April, 1998, p.10 25

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Chief Justice Major B. Harding's Administrative Order dated July 13, 1998 relating to font requirements for briefs filed in this Court, undersigned counsel certifies that the type size and style of used in this brief is 14 points Times New Roman, proportionately spaced.

INTRODUCTION

Petitioner Broward County was the respondent in both the circuit and district courts. Respondents GBV International, Ltd., and Ashtok Patel were the petitioners in each court. Petitioner will be referred to in this brief as “the County” or “Broward County.” Respondents will be referred to collectively as “G.B.V. International.” The symbol “A,” followed by a number, will constitute a reference to a numbered item from the appendix filed by G.B.V. International in the district court. The symbol “T” will constitute a reference to the transcript of proceedings held on November 12, 1996, before the Broward County Commission.

STATEMENT OF THE CASE AND FACTS

G.B.V. International filed in the circuit court for the Seventeenth Judicial Circuit a complaint for writ of certiorari and writ of mandamus (A2), seeking review of the Broward County Commission's determination to grant G.B.V. International's application for plat approval at a density of six units per acre, rather than at the requested 10 units per acre.

The facts leading up to the Commission's action were set forth in the circuit court's order as follows:

This matter came before the Broward County Commission on December 12, 1995, for consideration of the adoption of Resolution 95-1179 for the purpose of transmitting to the Florida Department of Community Affairs an amendment to the Broward County Land Use Plan. The amendment, in pertinent part, called for the increase in density from five units per acre to ten units per acre of the affected property. The minutes of the Commission meeting (page 235) reflect that "[a]fter discussion, Mr. Laystrom [counsel for Petitioners] showed by gesturing in the affirmative to Commissioner Gunzburger's request that the applicant would voluntarily not utilize the City of Coconut Creek's flexibility provision."

Subsequently, on May 1, 1996, after the Department of Community Affairs approved the transmission, the matter came before the

Commission again, on Petitioner's request to amend the County's land use plan to increase the density from five to ten units. At that meeting, Mr. Laystrom affirmed the fact that he had previously agreed that Petitioners would not seek to utilize the City of Coconut Creek's flexibility provision.

At that transmittal meeting, Commissioner Gunzburger asked me to waive the flexibility for this property. Because I've had such an extensive discussion and I did, by the way, I don't want you to think that I hadn't. . . .

Transcript, 23.

So the only issue here became one of the units versus the five units per acre and the school board commitment which we've made. And we have agreed to take away our ability to flex this property. And we agreed to it . . .

Transcript, 24.

At no time at either the December 12 or the May 1 meeting did Petitioner's counsel indicate that the waiver was tied to any specific action of the Commission or to anything else.

Subsequent to counsel's unconditional affirmation of the waiver, the Commission at the May 1 meeting refused to pass the proposed amendment to the land use plan.¹ One of the commissioners who opposed the amendment then moved that the density be increased from five to six. Transcript, 66-67. That commissioner indicated that her motion was made "in a spirit of compromise," Transcript, 75, and that in her opinion, it constituted "a lot of compromise on my part." Transcript, 75-76. During consideration of the motion, Petitioner's counsel addressed the Commission and urged them to adopt the compromise. He indicated:

I can still file another amendment to go from 6 to 8 and come back in six months that way if—so I'd rather have you vote for the 5 and 6 rather than kill me entirely. At least then I'd have my basic application path and then I'll file another one to go from 6 to—I don't even know when I could file an application.

Transcript, 71.

Petitioner's counsel did not in his remarks to the Commission make any effort to withdraw or modify his previous unconditional waiver of the ability to seek flex. Rather, as quoted above, he merely indicated that he did want the increase to six and that he would subsequently return to the Commission to seek to increase that number.

The motion passed and the compromise increase in density from five to six therefore took effect.

On November 12, 1996, Petitioners returned to the Commission, but not simply to ask for reconsideration of the matter and for an increase in density as projected by their counsel. Rather, in the interim between the May 1 and November 12 meetings, Petitioners did exactly what they pledged they wouldn't do. They went to the City of Coconut Creek and successfully convinced the city to utilize the flex provision to increase the density to ten. Petitioners contended that under these circumstances they were entitled to plat approval that would have increased the density from six to ten. . . .

¹With two members absent, the Commission actually voted 3-2 in favor of the amendment. Since four votes (a majority of the full Commission) was required for passage, however, the amendment failed.

(A1 1-4)

The Commission granted plat approval at six, rather than 10, units per acre. The substitute motion to this effect that was eventually approved by the Commission did not state a reason for the action. Rather, the commissioner who made the motion simply stated:

Mr. Chair, I think I still have the floor.
I'd like to offer a substitute motion to approve

the plat with the deletion of the 120 residential flex units.

(T 7)

The motion was seconded without the statement of a reason (T 7).

Discussion followed which included references to G.B.V. International's waiver of its right to seek flex and the Commission's previous reliance on that waiver. For instance, the following exchange occurred between one commissioner and counsel for Petitioners:

COMMISSIONER POITER [sic]:
When we said it was transmitted and then it came back, we still went back to six units. This property was presented -- you agreed to six units.

MR. LAYSTROM: I did not agree to six units per acre.

COMMISSIONER POITER [sic]: Well, you did something to get Commissioner Parrish. Because I remember almost wrapping my legs around her.

(T 53-54)

Subsequently, a second commissioner also raised the matter.

COMMISSIONER GUNZBURGER: Wait, wait. Let me ask a question because you keep confusing me. And, you know, I'm not easily confused, Mr. Laystrom. Didn't you voluntarily agree at transmittal time not to flex?

MR. LAYSTROM: At ten, yes. And I'm willing to do that --

COMMISSIONER GUNZBURGER: No. At six.

MR. LAYSTROM: No. At ten. That's what you transmitted at, Commissioner Gunzburger. And I would do that again today at ten. I'm happy to do that. I mean that's what your code provides for and that is really what the doctor is asking you to do.

(T 54-55)

When the Commission voted on the question, none of the commissioners stated a reason for their vote (T 61).

G.B.V. International then sought review in the circuit court, which denied relief on two independent grounds, finding that G.B.V. International was estopped from asserting error in the refusal to grant plat approval at a 10-unit density due to its waiver and that, alternatively, G.B.V. International's claims were without merit. As to estoppel, the circuit court stated:

Petitioners' method of proceeding was an effort to obtain two bites at the apple. They allowed the Commission to proceed with the impression that flex would not be applied in the hopes that the waiver would help induce the result they wanted—an increase to ten units. When it turned out that Petitioners' approach was only partially successful in light of the compromise increase to six, they renounced the waiver that got them the partial increase, successfully exercised the presumably waived flex provision and came back in an effort to force the Commission to give them precisely what the Commission wouldn't give them despite their strategic decision to waive flex.

Simple fairness dictates that Petitioners cannot have it both ways. They represented that they were waiving flex and used that representation obtained the benefit of having the Commission consider their request under the assumption that there was such a waiver (an intangible benefit that led to the tangible benefit of a 20 percent increase in density). It would be clearly inappropriate to allow them to renounce the representation that the Commission relied upon in granting them a benefit and to utilize the waived process to obtain the very result they hoped to reach by agreeing to the waiver in the first place.

The theory of estoppel is the application of the rules of fair play. *Branca v. City of Miramar*, 634 So. 2d 604 (Fla. 1994). The doctrine is based on public policy and is designed to promote justice. *Yorke v. Noble*,

466 So. 2d 349 (Fla. 4th DCA 1985), approved, 490 So. 2d 29 (Fla. 1986).

The essential elements of estoppel are the representation by a party as to some material fact which is contrary to conditions or affairs later asserted, reliance upon the representation by the party claiming estoppel, and a change in position by the party claiming estoppel to its detriment as the result of the representation and reliance. *Jewett v. Leisinger*, 655 So. 2d 1210 (Fla. 4th DCA 1995); *Florida Dept. of Transportation v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992), review denied, 617 So. 2d 318 (Fla. 1993).

Clearly, in the present case, Petitioners' counsel's representations were contrary to the subsequent conditions and affairs asserted as the result of the use of flex. Just as clearly, the Commission relied upon those representations. Further, the Commission's decision to back down from its determination that it would not increase density and to instead increase the density from five to six in light of the spirit of compromise shows that the Commission changed its position to its detriment as the result of the representation and reliance.

Thus, the facts demonstrate that the necessary predicates have been met for the application of estoppel and that the rules of fair play support that application. This court therefore finds that Petitioners are estopped from raising their present claim.

(A1 4-6 [footnote omitted])

With regard to the merits, the circuit court initially focused its attention on this court's decision in *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), and stated:

In *Snyder*, the court dealt with a situation in which property in question was zoned in a manner that allowed for the construction of a single-family residence. The owners indicated that they intended to build "five or six units on the property," and sought the rezoning necessary to do so. *Id.* at 471. The supreme court found that the action constituted an exception to the long standing rule and would be deemed to be quasi-judicial in nature. In doing so, the court quoted from and specifically noted its agreement with the following portion of the Fifth District's opinion that was being reviewed:

[R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from district alternatives presented 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. . . .

627 So. 2d at 474, quoting from *Snyder v. Board of County Commissions*, 595 So. 2d 65 (Fla. 4th DCA 1991) (emphasis added).

Until recently, the supreme court has provided no guidance in interpreting *Snyder*. Trial courts and local governments have therefore had to try to determine its limitations. To be on the safe side, local governments have allowed property owners to call witnesses, to cross-examine witnesses, and to exercise other rights associated with quasi-judicial proceedings, in most land use matters. In the present case, for example, Broward County allowed Petitioners to proceed in such a manner.

(A1 7-8)

The circuit court then discussed this court's decision in *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1977), saying:

The [Yusem] court then noted that it was adhering in *Snyder* "with respect to the type of rezonings at issue in that case." *Yusem*, 22 Fla. L. Weekly at S158 [690 So. 2d at 1293]. The court went on to refuse to extend *Snyder* any further, however, rejecting an effort to have its reasoning apply to rezoning decisions which require an

amendment to a comprehensive land use plan. The court in *Yusem* has therefore made it clear that *Snyder* should not, and will not, be extended beyond the relatively limited circumstances specifically dealt with by that case. *Yusem* is essence puts to rest the previously discussed fear of local governments that *Snyder* could constitute a wholesale departure from the traditional analysis and that it could be deemed applicable to all land use matters.⁴

⁴*Yusem* also puts to rest Petitioners' contention that because Broward County allowed him to exercise the rights that attach to quasi-judicial hearings, the matter here must be deemed quasi-judicial. The property owner in *Yusem* was given a hearing similar to the one here and the supreme court rejected his argument that this fact made his hearing quasi-judicial in nature. 22 Fla. L. Weekly at S158 [690 So. 2d at 1292]. The court's conclusion is consistent with the sentiments expressed by Judge Ferguson in his concurring opinion in *Jennings v. Dade County*, 589 So. 2d 1337, 1343 (Fla. 3d DCA 1991). Judge Ferguson stated that "it is the nature of the act performed that determines its character as legislative or otherwise."

(A1 8)

The circuit court went on to analyze the facts here against the *Snyder-Yusem* backdrop.

The present case involves an effort to increase the density of the property by 120 units.⁵ This is a far cry from the increase in *Snyder* from one unit to five or six. In *Snyder*, the only people affected might be a few neighbors that might have a bit more traffic to deal with. An increase of 120 units, on the other hand, brings hundreds of additional residents to the property, significantly increases traffic and the demands for government services. The provision of some of those services will mean that other areas will not receive those same services to the same extent, or in the same time frame, as they otherwise would have.

Moreover, the request here was predicated on the use of flex by the City of Coconut Creek. Any time flex is used, a large portion of the public is affected because the use of flex in one location means that it cannot be used elsewhere. The determination as to whether to use flex therefore requires a balancing of factors such as the allocation of resources, the locations of facilities to provide those resources, the need to retain flexibility in other areas, and the impact on adjoining property owners. The use of flex can be likened to throwing a rock into a pond. The ripple effects spread far and wide.

This court therefore concludes that the large number of units that would be added to the property and the fact that the application here was predicated on the use of flex provide two, independent, equally valid, reasons why the *Snyder* reasoning does not apply here.

Taken together, they provide an even stronger rationale.

⁵Had Petitioners not given the county commission the impression that they were going to waive flex, as discussed previously in this order, the increase would have certainly been 150 units, since there can be little doubt that under such circumstances, the Commission would not have allowed the increase from five to six, an increase that gave Petitioners an additional 30 units.

(A1 9-10)

The circuit court also found there to exist two additional reasons for rejecting the merits of G.B.V. International's claims.

Another reason why Petitioners' contentions must be rejected is the dictates of *Yusem* itself. As discussed above, *Yusem* holds that rezoning decisions which require an amendment to a comprehensive land use plan are legislative in nature. Here, the request for plat approval was predicated upon the City of Coconut Creek's use of flex, which was based on the city's amendment to its land use plan (May 1 Transcript, 45). Moreover, the use of the flex units required the recertification of the plan by the Broward County Planning Council (November 12 Transcript, 34; August 27, 1996 Memorandum from Susan M. Tramer to Elliot Auerhahn). Thus, the plat approval here could not have even reached the Commission without the amendment of the city's land use plan. Under the bright line test of *Yusem*, which

states that all rezoning decisions that require land use plan amendments are legislative, the decision here must be deemed to be legislative.

A third reason why Petitioners' arguments must be rejected is the fact that the proposed change is not compatible with surrounding land uses. As noted by Associate Planner Elizabeth Mumby at the May 1 hearing, the density requested by Petitioners "would set an undesirable precedent in the vicinity in the five going acre pattern, currently established by the Broward County Land Use Plan (Transcript, 2-3)."

Section 5-198 of the Broward County Land Development Regulations mandates that an application for final plat approval for lands within a municipality must be in conformity with the Broward County Land Use Plan. That plan requires compatibility with surrounding land uses. See Broward County Land Use Plan, Objective 14.02.00 and Policies 14.02.01, 14.02.03 and 14.02.04. Thus, incompatibility means lack of conformity with the comprehensive plan.

Even under *Snyder's* quasi-judicial approach, applicants bear the burden of proving that their proposals are "consistent with the comprehensive plan." *Id.* at 476. Petitioners here failed to do so.⁶

⁶ Petitioners cannot take solace in the fact that after the application of flex, the Planning Council found the plat here to be "considered in compliance with the permitted

uses and densities of the effective land use plan.” September 27, 1996, Memorandum from Susan M. Tramer to Elliot Auerhahn. This finding merely states the obvious. Once the Coconut Creek plan encompassed the flex units, the application was consistent with the fact that the density for the property in question, as far as Coconut Creek was concerned, was 10 units. This finding in no way addressed the issue of consistency with the Broward County Land Use Plan, nor did it even discuss compatibility with surrounding land uses.

(A1 10-11)

G.B.V. International filed a petition for certiorari in the Fourth District Court of Appeal. That court granted the petition and quashed the order of the circuit court. *G.B.V. International, Ltd. v. Broward County*, 709 So. 2d 155 (Fla. 4th DCA 1998).

The district court rejected the circuit court’s conclusion as to estoppel by stating, 709 So. 2d at 155:

The Commission did not base its denial of the plat *as submitted* on estoppel but on incompatibility. Yet the circuit court reached beyond the Commission’s stated reasons and decided the application on a basis not raised before the County Commissioners. In order to do so, the circuit court relied on evidence not presented to the Commissioners and thus not considered by them in denying approval. In effect, the circuit court decided an issue that was neither presented to nor decided by the

Commission. We regard the circuit court's decision in this regard as a departure from the essential requirements of law while sitting in certiorari review of local government and a denial of procedural due process.

As to the merits, the Fourth District did not address the circuit court's conclusions regarding the number of units, the application of flex and the impact of those factors together. Rather, the district court merely set forth the holdings in *Snyder* and other precedent and concluded, *id.* at 156:

Broward County's land use development regulations contain specific requirements for plat approval. The record before the Commission established that the developer had complied with all of their requirements, so that approval was a ministerial function.

In granting certiorari, the Fourth District not only quashed the order of the circuit court, *Id.*, but it also "remand[ed] for entry of an order directing Broward County to approve the plat as requested." *Id.*

The present proceeding follows.

SUMMARY OF ARGUMENT

The Fourth District's conclusion that the circuit court departed from the essential requirements of law by applying the doctrine of estoppel cannot withstand scrutiny either factually or legally. The district court's decision was predicated on its finding that the Commission's refusal to approve the plat at the higher density level requested by G.B.V. International was based on incompatibility, not estoppel. This conclusion is not supported factually by the record. None of the commissioners voting in the majority explained the reason for their votes. Neither the motion to approve the plat at the lower density, nor the second to the motion, was based on any specific rationale. During discussion of the item, at least two commissioners expressed concerns about the waiver by G.B.V. International that formed the basis for the application of estoppel. It is thus clear that there is simply no way of determining the basis for the Commission's decision or if there even was one basis. Thus, the district court's determination that the decision was based on incompatibility cannot stand.

From a legal perspective, the district court's conclusion must also be deemed faulty. Even if it is assumed that the Commission's decision was based on incompatibility, it was not a departure from the essential requirements of law for the circuit court to rely on estoppel. Appellate courts will affirm judgments if they can be sustained under any theory, not just the theory relied upon by the lower court. Surely,

this principle must apply even more strongly when as here, the more stringent standard of review applicable to certiorari proceedings is in effect and when review is being sought from a quasi-judicial proceeding in which the decision makers are not even lawyers and in which no lawyer presents arguments in opposition to those advanced by the party that later seeks review.

The district court's determination to grant certiorari cannot be sustained on the merits either. It is based on an inappropriate expansion of the scope of this court's decision in *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), which found to be quasi-judicial in nature rezoning actions that only affect a limited number of persons or property owners. The district court's decision extends that ruling to large scale development that, if approved, will significantly impact on the community as a whole. This court has previously declined to expand the reach of *Snyder* and should continue to do so. Applying *Snyder* to situations such as that presented here would leave counties and cities without an important mechanism to control and regulate the unharnessed growth that will otherwise result from the efforts of major developers like G.B.V. International.

Also demonstrating that the circuit court correctly denied G.B.V. International's requested relief are two additional factors: (1) the requested plat approval required the amendment of the land use plan of the city of Coconut Creek and therefore, pursuant

to the dictates of this court's decision in *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997), the determination was legislative in nature; and (2) G.B.V. International's proposal was not compatible with surrounding land uses and was therefore not consistent with the County's comprehensive plan. Thus, even assuming the applicability of *Snyder*, G.B.V. International's failure to meet its burden of showing consistency with the plan called for the denial of its application.

If it is found that the Fourth District's grant of certiorari was not erroneous, it should be found that the remedy the district court granted was improper. In granting certiorari, the district court quashed the order under review, but also remanded with directions to the circuit court that it enter an order requiring the County to approve the plat as requested. The district court's decision is contrary to a long line of authority from this court, other district courts and from the Fourth District itself, that makes it clear that in granting certiorari, a court can only quash the order under review and that it cannot direct that any particular action be taken. Moreover, this well settled principle is particularly applicable to the present case for two reasons. First, since the Fourth District's directions require the circuit court to also issue directions, the district court not only exceeded its own authority, but it is requiring the circuit court to exceed its authority as well. Second, accepting the district court's finding that the Commission's decision was based on incompatibility means that the Commission's disposition of the

matter created a situation in which there was no need for the Commission to reach the estoppel issue. If the incompatibility finding is deemed to be improper, the Commission should have the opportunity to consider the estoppel issue that the district court found never to have been addressed, an issue that could provide an alternative route to the same result.

ARGUMENT

I

THE DISTRICT COURT ERRED IN GRANTING CERTIORARI¹

A “limited standard of review” applies when a petitioner seeks certiorari review of an order of a circuit court sitting in its appellate capacity. *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982 (Fla. 2d DCA 1997). Such review may not be used as a “vehicle for a second appeal.” *Id.* Rather, a petitioner must demonstrate a departure from the essential requirements of law, *City of Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982), that “is something more than a simple legal error.” *Stilson*, 692 So. 2d at 982. The mere misapplication of the correct law does not constitute such a departure. *Id.* Even when a district court concludes that a circuit court’s decision is erroneous, it “should examine the seriousness of the error and use its discretion to correct an error ‘only when there has been a violation of [a] clearly established principle of law resulting in a miscarriage of justice.’” *Id.* (citation and footnoted omitted). In its decision in *Haines City Community Development v. Heggs*, 658 So.

¹ Although this court accepted jurisdiction based on conflict relating to the issue discussed in Point II of this brief, there can be no question that once jurisdiction is accepted, this court may review the district court’s decision for any error. *Leisure Resorts v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 912 (Fla. 1995); *Lawrence v. Florida East Coast Ry.*, 346 So. 2d 1012, 1014, n.2 (Fla. 1977).

2d 523, 527 (Fla. 1995), this court cited with favor an explanation of the term “departure from the essential requirements of law” that was set forth by Chief Justice Boyd in his specially concurring opinion in *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985). This court noted that with the following words, Chief Justice Boyd “captured the essence of the standard.”

The required “departure from the essential requirement of law” means something far beyond legal error. It means an inherent illegibility or irregularly, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Thus, the district court’s granting of certiorari can be upheld only if it is concluded that the circuit court’s decision constituted such an essential illegality. Moreover, since the circuit court relied on several separate and independent bases for its ruling, the district court’s decision can only be deemed proper if such a finding can be made as to each of these bases. The County submits that it can be made as to none of them.

A

THE DISTRICT COURT'S CONCLUSION
THAT THE COMMISSION BASED ITS
DECISION ON INCOMPATIBILITY IS
NOT SUPPORTED BY THE RECORD AND
DOES NOT, EVEN IF DEEMED
SUPPORTED BY THE RECORD,
CONSTITUTE A BASIS TO QUASH THE
ORDER OF THE CIRCUIT COURT

The district court's conclusion that the circuit court departed from the essential requirements of law by applying the doctrine of estoppel cannot withstand scrutiny either factually or legally.

From a factual perspective, the problem with the district court's decision is the fact that it was predicated on the finding that the Commission's denial of the plat at 10 units per acre was not based on estoppel, but on incompatibility. The record simply does not support this finding.

It is clear that not even one commissioner voting in the majority specifically stated the reason for his or her vote. Moreover, the motion to approve the plat at six units per acre was not based on any specific rationale. Neither was the second to the motion. During discussion of the matter, at least two commissioners expressed concerns about the waiver by G.B.V. International that formed the basis for the circuit court's conclusion regarding estoppel. Under these circumstances, there is just no way

of knowing what extent those two commissioner's votes may have been based on the estoppel concept or to what extent their comments regarding G.B.V. International's waiver may have influenced other commissioners who voted in the majority. It is also quite possible that there was no one single basis for the Commission's decision. Different commissioners could well have voted based on different factors.

It is true that no commissioner used the word "estoppel." It must be remembered, however, that the commissioners are not judges. In fact, no member of the Broward County Commission at the time this matter was considered was even a lawyer. Moreover, it is important to realize that quasi-judicial hearings before the Commission are not adversarial in nature. County staff, none of whom are lawyers, present the Commission with a recommendation based solely on their factual assessment of whether an application meets the County's requirements and not on legal concepts such as estoppel.² Although the County Attorney is present to respond to any requests the commissioners might have for legal advice, he or she cannot, consistent with due process, also serve as an advocate. *Brown v. Walton County*, 667 So. 2d 376

² As noted by Susan L. Trevarthen in *Due Process and Ethical Concerns in Local Quasi-Judicial Hearings in Land Use and Development Approvals*, THE AGENDA, April, 1998, p. 10 (copy attached as an appendix to this brief), "[a]pplicants are frequently represented by an attorney who is experienced in such hearings, and trained to prepare witnesses, object to evidence, cross-examine witnesses, argue, and ensure the record is complete in case of challenge." *Id.* at 11. Because "[t]hese advocacy skills are not taught in planning school, and few planners have much first-hand experience with litigation and creation of a record for appellate review, . . . [t]his is simply not a fair fight." *Id.*

(Fla. 1st DCA 1995). Thus, there is no one present whose role is to present or advocate any equitable legal arguments that are within the Commission's discretion.

Given these factors, the lack of specific reference to the legal concept of estoppel should not compel the conclusion that the Commission's decision was not based on this concept.

Rather, there is simply no way to determine from the record the basis (if, as noted, there was one basis) for the Commission's decision. Moreover, to the extent that there was a basis, it appears just as likely from the record the facts underlying the estoppel argument formed that basis as it does that incompatibility was the reason. Thus, the County submits that the Fourth District's conclusion the circuit court "decided an issue that was neither presented to nor decided by the Commission" is unsupported by the record and that the district court therefore erred in finding the circuit court's action to be a departure from the essential requirements of law.

From a legal perspective, the County submits that even if it is said that the Commission's decision was based on incompatibility, the district court's granting of certiorari was nonetheless inappropriate.

Even in reviewing direct appeals from judicial proceedings, appellate courts will affirm judgments if they can be sustained under any theory, not just the theory relied upon by the lower court. *See Vandergriff v. Vandergriff*, 456 So. 2d 464 (Fla. 1984);

Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979); *Cardelle v. Cardelle*, 645 So. 2d 22 (Fla. 3d DCA 1994); *Klein v. Hendry County Hospital Authority*, 596 So. 2d 1253 (Fla. 4th DCA 1992). Indeed, “a trial court’s judgment, even if insufficient in its findings, should be affirmed if the record as a whole discloses any reasonable basis, reason or ground on which the judgment can be supported.” *Barnett & Klein v. President of Palm Beach*, 426 So. 2d 1074, 1075 (Fla. 4th DCA 1983), quoting *Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972).

Surely, this principle must apply even more strongly to certiorari proceedings because of the more stringent standard of review. Moreover, it must apply even more strongly to review of quasi-judicial action, given the fact that such proceedings need not comply with all the procedures that pertain to court proceedings. Further, it must apply even more strongly when the decision makers are not even lawyers. Finally, it must apply even more strongly when the nature of the proceeding in the lower tribunal is such that no attorney presents arguments in opposition to those advanced by the party that later seeks review. The County thus submits that it plainly applies under the facts of the present case and that it demonstrates that the circuit court properly reached the estoppel issue without regard to the basis for the Commission’s decision. The district court therefore erred in quashing that decision.

B

THE DISTRICT COURT IMPROPERLY APPLIED THE STANDARDS APPLICABLE TO ZONING ISSUES OF LIMITED IMPACT TO A LARGE SCALE DEVELOPMENT THAT, IF ALLOWED, WILL HAVE A SIGNIFICANT EFFECT ON THE COMMUNITY AS A WHOLE

Assuming arguendo that the district court properly found that the circuit court departed from the essential requirements of law in considering the issue of estoppel, it should nonetheless be concluded that the district court erred in granting certiorari. This conclusion is compelled because the district court improperly expanded the scope of this court's decision in *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993). The district court did so by applying *Snyder*, which deals solely with rezoning actions that only affect a limited number of persons or property owners, to a proposed large scale development that, if allowed, will have a significant impact on the community.

In *Snyder*, this court dealt with a situation in which a husband and wife sought the rezoning needed to build "five or six units" on their property, which was zoned in a manner that allowed for the construction of a single-family residence. 627 So. 2d at 471. This court found that the rezoning request was not governed by the long standing rule that rezoning actions are legislative in nature. In finding the request to be a quasi-judicial matter, this court quoted from and specifically noted its agreement with the

portion of the Fifth District opinion, *Snyder v. Board of County Commissioners*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991), that stated:

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

627 So. 2d at 474

(emphasis added)

It is thus clear that *Snyder* only applies to actions which have an impact on just “a limited number of persons or property owners.” Clearly, that is not the case here. The present case, depending on how it is analyzed, involves an increase in the density of the property by either 120 or 150 units.³ Even if the figure of 120 units is accepted, the development here is, as the circuit court noted, “a far cry from the increase in *Snyder* from one unit to five or six (A1 9).” The circuit court discussed the differences in the impact of the rezoning request in *Snyder* and the request for plat approval here.

³ The request before the Commission sought an increase of 120 units. Had G.B.V. International not previously given the Commission the assurance that it would waive flex, as discussed above, the requested increase would have certainly been 150 units, since there can be little doubt that under such circumstances, the Commission would not have allowed the increase from five to six units per acre, an action that gave G.B.V. International an additional 30 units.

In *Snyder*, the only people affected might be a few neighbors that might have a bit more traffic to deal with. An increase of 120 units, on the other hand, brings hundreds of additional residents to the property, significantly increases traffic and the demands for government services. The provision of some of those services will mean that other areas will not receive those same services to the same extent, or in the same time frame, as they otherwise would have.

(A1 9)

The circuit court went on to state:

Moreover, the request here was predicated on the use of flex by the City of Coconut Creek. Anytime flex is used, a large portion of the public is affected because the use of flex in one location means that it cannot be used elsewhere. The determination as to whether to use flex therefore requires a balancing of factors such as the allocation of resources, the locations of facilities to provide those resources, the need to retain flexibility in other areas, and the impact on adjoining property owners. The use of flex can be likened to throwing a rock into a pond. The ripple effects spread far and wide.

This court therefore concludes that the large number of units that would be added to the property and the fact that the application here was predicated on the use of flex provide two, independent, equally valid, reasons why the *Snyder* reasoning does not apply here.

Taken together, they provide an even stronger rationale.

(A1 9-10)

The factors noted by the circuit court demonstrate that the proposed development here is not one which would impact only “a limited number of persons or property owners.” Rather, it plainly is one that would affect the community as a whole. The rationale of *Snyder* is thus not applicable to the present case and G.B.V. International’s request is governed by the long standing rule that land use determinations are legislative in nature.

Moreover, the public interest would be best served by, the conclusion that a commission’s determination on proposals for large-scale projects, such as that proposed here, is legislative in nature. Commissions need to have some manner of regulating growth. Applying the *Snyder* rationale to projects of the sort dealt with by this case would make it extremely difficult for commissions to exercise any control over development. Landowners who have the resources to hire counsel and to take the steps recommended by counsel will be able to force commissions to grant their land use requests. Major developers like G.B.V. International will have those necessary resources and, as a result, more and more large-scale development will have to be allowed without regard to the effect on the quality of life or the problems created for

the community. In *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997), this court, recognizing the importance of orderly growth, declined to expand the scope of *Snyder* to encompass rezoning decisions which require amendments to comprehensive land use plans. The County submits that this court should follow the *Yusem* approach and continue to confine the logic of *Snyder* to actions of limited impact. To do otherwise would tie the hands of local governments and open the door to unrestrained development.

Given the legislative nature of the determination, it is clear that the Fourth District erred in concluding that G.B.V. International's compliance with the requirements of the County's land development regulations entitled it to plat approval. Approval on that basis is mandated only when the proceeding is quasi-judicial in nature. When a determination is legislative, it need only be justified as "fairly debatable" in order to be upheld. *Nance v. Town of Indialantic*, 419 So. 2d 1041 (Fla. 1982). G.B.V. International has never asserted that this standard has not been met and indeed could not reasonably do so. Moreover, an attack on a legislative action is not properly raised in a review proceeding, but should be made in an action for declaratory and injunctive relief. *Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415 (Fla. 2d DCA 1991). Thus, it is beyond dispute that a determination that the proceeding here was legislative in nature would require the reversal of the district

court's decision.

C

THE FACT THAT PLAT APPROVAL
REQUIRED THE AMENDMENT OF THE
CITY OF COCONUT CREEK'S LAND USE
PLAN SHOWS THAT THE
DETERMINATION HERE WAS
LEGISLATIVE

The circuit court also found an independent reason for concluding that the determination in this case was legislative, the fact that plat approval here required the amendment of the land use plan of the City of Coconut Creek (A1 10). As noted by the circuit court, "Under the bright line test of *Yusem*, which states that all rezoning decisions that require land use plan amendments are legislative, the decision here must be deemed to be legislative (A1 10)." This factor also demonstrates that the circuit court properly denied certiorari.

D

EVEN IF IT IS SAID THAT *SNYDER* APPLIES HERE, G.B.V. INTERNATIONAL'S FAILURE TO PROVE THAT ITS REQUEST FOR PLAT APPROVAL WAS COMPATIBLE WITH SURROUNDING LAND USES, A FACTOR WHICH RENDERED THE APPLICATION INCONSISTENT WITH THE COUNTY'S COMPREHENSIVE PLAN, REQUIRED THE CIRCUIT COURT TO REJECT THE REQUEST FOR CERTIORARI.

The record before the circuit court demonstrated that G.B.V. International did not meet its burden under *Snyder* of proving that its proposal was “consistent with the comprehensive plan.” 627 So. 2d at 476. Thus, even assuming the applicability of *Snyder*, the circuit court properly denied certiorari. In this regard, the County incorporates and relies upon the following discussion of this issue in the circuit court's order.

A third reason why Petitioners' arguments must be rejected is the fact that the proposed change is not compatible with surrounding land uses. As noted by Associate Planner Elizabeth Mumby at the May 1 hearing, the density requested by Petitioners “would set an undesirable precedent in the vicinity in the five going acre pattern, currently established by the Broward County Land Use Plan (Transcript, 2-3).”

Section 5-198 of the Broward County Land Development Regulations mandates that an application for final plat approval for lands within a municipality must be in conformity with the Broward County Land Use Plan. That plan requires compatibility with surrounding land uses. See Broward County Land Use Plan, Objective 14.02.00 and Policies 14.02.01, 14.02.03 and 14.02.04. Thus, incompatibility means lack of conformity with the comprehensive plan.

Even under *Snyder's* quasi-judicial approach, applicants bear the burden of proving that their proposals are “consistent with the comprehensive plan.” *Id.* at 476. Petitioners here failed to do so.⁶

⁶ Petitioners cannot take solace in the fact that after the application of flex, the Planning Council found the plat here to be “considered in compliance with the permitted uses and densities of the effective land use plan.” September 27, 1996, Memorandum from Susan M. Tramer to Elliot Auerhahn. This finding merely states the obvious. Once the Coconut Creek plan encompassed the flex units, the application was consistent with the fact that the density for the property in question, as far as Coconut Creek was concerned, was 10 units. This finding in no way addressed the issue of consistency with the Broward County Land Use Plan, nor did it even discuss compatibility with surrounding land uses.

(A1 10-11)

II

THE DISTRICT COURT ERRED WHEN, IN GRANTING CERTIORARI, IT WENT BEYOND QUASHING THE ORDER UNDER REVIEW AND ISSUED DIRECTIONS TO THE CIRCUIT COURT

If it is held that the Fourth District did not err in granting certiorari, it should nonetheless be held that error occurred with regard to the remedy ordered by that court.

The district court, as would be anticipated when certiorari is granted, quashed the order under review. The court did not stop there, however. It went on to expressly direct the circuit court to take a particular action. Specifically, the court stated:

We therefore grant review by certiorari, quash the order of the circuit court *and remand for entry of an order directing Broward County to approve the plat as requested.*

(emphasis added)

The district court's decision in this respect is contrary to decisions of this court, other district courts and even prior decisions of the Fourth District. The decision under review is plainly erroneous.

In *Snyder v. Douglas*, 674 So. 2d 275, 279 (Fla. 2d DCA 1994), the Second District pointed out the limited nature of relief that can be provided by a court in granting certiorari.

. . . [O]n certiorari an appellate court can only deny the writ or quash the order under review. It has no authority to take any action resulting in the entry of a judgment or orders on the merits or to direct that any particular judgment or order be entered.

(citation omitted)

The court in *Snyder v. Douglas* relied on this court's decision in *Tamiami Trail Tours v. Railroad Comm.*, 128 Fla. 25, 174 So. 451, 454 (1937), which stated:

The appellate court has no power when exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration, nor to direct the respondent to enter any particular order on judgment.

The Fifth District has repeatedly reached the same conclusion. In *Gulf Oil Realty Co. v. Windhover Assn.*, 403 So. 2d 476, 478 (Fla. 5th DCA 1981), that court stated:

. . . [A]fter review by certiorari, an appellate court can only quash the lower court order; it has no authority to direct the lower court to enter contrary orders.

(footnote omitted)

Likewise, in *ABG Real Estate Dev. v. St. Johns County*, 608 So. 2d 59, 64 (Fla. 5th DCA 1992), the Fifth District said:

A court's certiorari review power does not extend to directing that any particular action be taken, but is limited to quashing the order reviewed.

Prior to its decision in the present case, the Fourth District consistently applied the principle expressed in the above cited line of cases. In *National Advertising Co. v. Broward County*, 491 So. 2d 1262, 1263 (Fla. 4th DCA 1986), that court stated:

A court's certiorari review power does not extend to directing that any particular action be taken, but is limited to denying the writ of certiorari or quashing the order reviewed.

The above portion of the opinion in *National Advertising* was quoted and relied upon by the Fourth District in *City of Miramar v. Amoco Oil Co.*, 524 So. 2d 506, 507 (Fla. 4th DCA 1988), which quashed that portion of a circuit court order granting certiorari that directed a city to grant a special exception.

In the present case, the district court's directions to the circuit court clearly constitute error. Moreover, the error is particularly egregious here for each of two reasons. First, the directions require the circuit court to also issue directions. They therefore not only exceed the district court's authority but they also require the circuit court to exceed its authority. Second, the district court's decision on the merits found that the Commission acted based on incompatibility and that it did not consider the estoppel issue. Accepting this finding means that the Commission's disposition of the

matter created a situation in which there was no need for it to reach the estoppel issue. If the incompatibility finding is deemed to be improper, the Commission should be given the opportunity to address the issue that the district court found never to have been addressed. Reversal is therefore mandated.

CONCLUSION

Based on the foregoing argument and authorities, Broward County respectfully submits that this court should reverse the decision of the Fourth District and remand with directions to deny G.B.V. International's petition for certiorari. Alternatively, Broward County respectfully submits that this court should reverse the decision of the Fourth District and remand with directions to grant certiorari and quash the circuit court's order without directing the circuit court to take any specific action.

Respectfully submitted,

SHARON L. CRUZ
Interim County Attorney for Broward County
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Telecopier: (954) 357-7641

ANTHONY C. MUSTO
Chief Appellate Counsel
Florida Bar No: 207535

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to JAMES C. BRADY, Counsel for Petitioners, BRADY & COKER, 1318 S.E. Second Avenue, Fort Lauderdale, Florida 33316 on this _____ day of October, 1998.

ANTHONY C. MUSTO