IN THE SUPREME COURT
OF FLORIDA

Coastal Development of North
Florida, Inc. and Meadows
Incorporated,

Petitioners,

v. Case No. 95,686

The City of Jacksonville
Beach, Florida,

Respondent
_____/

# AMENDED ANSWER BRIEF OF THE RESPONDENT, THE CITY OF JACKSONVILLE BEACH, FLORIDA

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## PRELIMINARY STATEMENT

The Petitioners, Coastal Development of North Florida, Inc. and Meadows, Inc., will be referred to herein as Petitioners or as the “Developers.”

The Respondent, the City of Jacksonville Beach, Florida will be referred to herein as the City.

References to the record certified by the clerk of the First District Court of Appeal to this Court will be (R. followed by the appropriate page number).

References to the materials contained in the Appendix to the Petitioners’ Initial Brief will be referenced as (App. at Tab _____), followed by the appropriate page number, if applicable.

## STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts contained in the Developer's Initial Brief is primarily a recitation of the testimony of the Developers' hired experts, presented to the City's Planning Commission (App. at Tab P) and later the City Council (Id. at Tab Q), in the Developers' attempt to have the City amend its 2010 Comprehensive Plan ("the Plan"), enacted pursuant to the provisions of Chapter 163, Florida Statutes. Because the Developers' Statement of the Case and Facts is fundamentally obfuscatory, the City submits the following.

The City, like all local governments in Florida, was required by the provisions of Chapter 163, Florida Statutes, to develop a comprehensive land use and development plan to govern the future development of property within the City. It is recognized that the impetus for the enactment of Chapter 163 was the Legislature's attempt to uniformly address the inconsistencies in the various local zoning systems, and to provide a comprehensive system to manage the explosive development and population growth in Florida. See Board of County Commissioners v. Snyder, 627 So. 2d 469, 473-474 (Fla. 1993).

These Developers, the Petitioners herein, own property which has been historically, is under current zoning and provided to remain in the future pursuant to the City's Plan, residential-low density (i.e. single family residential). The Developers' property is located on the

east side of Third Street (also known as A1A) in south Jacksonville Beach. On the west side of Third Street there is commercial development and on the east side of Third Street to the north is a mixture of multi-family housing and some commercial development. The adjacent property to the south and the east is a residential neighborhood.

However, and significantly, beginning with the Developers' property and continuing south all the way into St. Johns County, the east side of Third Street is now, as it has been historically, a single family residential area. Based upon the testimony presented at the hearings held before the City's Planning Commission and the City Council on the Developers' request to amend the City's Plan, the Plan's designation and retention of the east side of Third Street in south Jacksonville Beach as residential was one of the many issues analyzed, studied and publicly debated when the City first enacted its Plan.

These Developers began the process culminating in this appeal by filing an application for a "Small Scale Amendment" to the City's Comprehensive Plan, pursuant to the provisions of Section 163.3187(1)(c), seeking to have the City amend its Plan to allow commercial construction in this residential neighborhood.

The City's Planning Commission staff studied the application and recommended denial (App. Tab K), as the Developers' application ran afoul of the Plan's policies which, *inter alia,* encourages future commercial development

by “in filling,” i.e., utilizing the surplus of vacant commercial property which is zoned for and designated for that use in the City’s Plan. After a full-scale public hearing, in which the corporate Developers presented the testimony of its paid experts, the Planning Commission voted to deny the Developers’ requested Plan Amendment.

The Developers then appealed that decision to the full City Council, and again presented the same hired expert testimony. The City Council also received the Planning Commission’s staff report and the Planning Commission’s denial of the Developer’s request and heard from the City’s Planning Director, Steven Lindorff (App. Tab Q at 26-28)and members of the public. The City Council voted unanimously to deny the Petitioner’s requested Plan amendment.

The Developers then filed an action in Duval County circuit court seeking issuance of a writ of certiorari to quash the City’s decision or alternatively, for declaratory relief. After many months the circuit court entered an order granting the Developers’ Petition for Writ of Certiorari on the grounds that ostensibly the City’s decision whether to amend its Plan was “quasi-judicial,” and the City’s denial was not supported by competent substantial evidence.

The City filed a Petition for Writ of Certiorari with the First District Court of Appeal (R. 1), on the grounds that this Court’s decision in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), mandated that amendments to a local

government's comprehensive plan are legislative in nature and are subject to judicial review under the fairly debatable standard in an action for declaratory relief and that certiorari is not an available remedy. The City further argued that even if the "competent substantial evidence" standard was used, the City's decision should be affirmed. Following oral argument, the district court issued its Opinion, reversing the circuit court's order, (R. 77), holding that this Court's decision in Yusem, although not explicitly addressing the small scale amendment procedures contained in Chapter 163, controlled the issue and that regardless of the size of the property involved, amending the City's Plan still constituted a legislative decision, thereby removing certiorari as an available remedy. The district court certified the following question to this Court:

> ARE DECISIONS REGARDING SMALL-SCALE DEVELOPMENT AMENDMENTS PURSUANT TO SECTION 163.3187(1)(c), FLORIDA STATUTES, LEGISLATIVE IN NATURE AND, THEREFORE, SUBJECT TO THE FAIRLY DEBATABLE STANDARD OF REVIEW; OR QUASI-JUDICIAL, AND SUBJECT TO STRICT SCRUTINY?

City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 790 So.2d 792, 795 (Fla. 1st DCA 1999).

Following the denial by the district court of the motions for rehearing (R. 102), the Developers filed a Notice of Intent to Invoke Discretionary Jurisdiction, and on June 2, 1999, this Court issued its Order Postponing

## SUMMARY OF THE ARGUMENT

This Court's decision in Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), unequivocally holds that a local government's decision whether to amend its Comprehensive Plan is a legislative decision to be judicially reviewed under a test of reasonableness and that certiorari is not an available remedy. Although this Court did not address the amendments to Chapter 163 governing small-scale plan amendments as those amendments were not at issue in that case, this Court's rationale demonstrates that the certified question should be answered in the affirmative, and the district court's decision approved.

The Developers' theory here that small-scale Plan Amendments should be treated "like rezoning" cases, is simply the "functional analysis" which was unequivocally rejected by this Court in Yusem.

The Petitioners' claim that there was no evidence to support the City's denial is belied by this record. The Planning Commission staff's analysis of these Developers' request and the data relied upon coupled with the Plan's goals and policies conclusively demonstrates that the City's action had a solid factual basis, was clearly reasonable and should have been approved by the circuit court below.

The Petitioners' further claim that the district court exceeded its certiorari jurisdiction is without merit; the district court property recognized that the trial court failed to apply the correct law.

Accordingly, this Court should answer the certified question in the affirmative and approve the district court's decision.

## ARGUMENT

### I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE

The issue presented on this appeal by the question certified by the first district is extremely narrow:

> Are decisions regarding small-scale development amendments pursuant to section 163.3187(1)(c), Florida Statutes, legislative in nature and, therefore, subject to the fairly debatable standard of review; or quasi-judicial, and subject to strict scrutiny?

City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 790 So.2d 792, 795 (Fla. 1st DCA 1999).

The answer to this question turns on whether this Court's holding in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), applies in the context of a "small scale" amendment to the City's Comprehensive Plan, an option available to local governments pursuant to the provisions of §163.3187(1)(C), Florida Statutes.

The focus and intent of Chapter 163, the judicial treatment of current land use issues, particularly this Court's decisions in both Snyder and Yusem and the proceedings below must be addressed to clarify the context for the question certified by the first district.

The provisions of Chapter 163 establishing a local government's obligation to adopt and develop a comprehensive land use plan was animated by Florida's rapid growth and development and the perceived inability of local governments to consistently and uniformly adopt and apply standards to manage and control that growth, as recognized by this Court

in Snyder, 627 So. 2d at 473.

In City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984), review denied, 469 So. 2d 749 (Fla. 1985), the first district held that a comprehensive plan adopted pursuant to the dictates of Chapter 163 is intended "as a general guideline for community growth for a 20- or 25-year period," and establishes a long-range maximum limit on possible intensities of land use. Id. at 162-163.

As this Court held in Board of County Commissioners v. Snyder, 627 So. 2d 469 (Fla. 1993), in which the first district's decision in Grubbs was approved,[1] a comprehensive plan "is intended to provide for the future use of land, which contemplates a gradual and ordered growth," and represents a ceiling governing intensities of development above which development will not be allowed to proceed. Id. at 475. See also, Lee County v. Sunbelt Equities II, Limited Partnership, 619 So. 2d 996 (Fla. 2nd DCA 1993); B.P. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990); Palm Beach County v. Allen Morris Company, 547 So. 2d 690 (Fla. 4th DCA), review denied, 553 So. 2d 1164 (Fla. 1989); Southwest Ranches Homeowner's Association, Inc. v. Broward County, 502 So. 2d 931 (Fla. 4th DCA), 511 So. 2d 999 (Fla. 1987).

Contrary to the continued mischaracterization by the Developers of this Court's decision in Snyder, this Court's establishment of the standards of judicial review applicable in the rezoning context in connection with a comprehensive plan, was not based upon this Court's concern that "neighborhoodism" and "rank political influence" were at the root of the problems in local zoning which Chapter 163 addressed. Rather, this Court's reference was to the reason certain commentators were advocating zoning reform, 627 So. 2d at 473, and this Court's concern was with the proper standards of judicial review of challenges to local government's zoning decisions in light of the provisions of Chapter

163.

The corporate Developers' assertion herein that "the basis of the decision in Snyder was the character of the hearing (local hearing similar to a judicial proceeding)" is correct to the extent that it accurately states the context for this Court's decision on the procedural issue presented in Snyder. However, the ultimate point of and actual holding in Snyder is critical for placing this Court's decision in Yusem in its proper legal framework and for answering the question certified herein.

In Snyder, the Court recognized that under a local government's comprehensive plan, the future maximum developmental intensity of particular areas was established, and that within each of those general categories (e.g. residential, commercial, industrial, etc.), there could be numerous zoning classifications. This Court's focus in Snyder was to determine in the rezoning context the applicable standard of judicial review when a party seeking rezoning has that request denied by the local government, and to define the local government's discretion over zoning questions.

Significantly, and totally contrary to Petitioners' misuse of the term, this Court took great pains to recognize that the "strict scrutiny" which should be given by the judiciary when reviewing zoning cases in connection with a comprehensive plan is to insure that comprehensive plans are adhered to by local governments in order to effectuate the patent purpose of Chapter 163, 627 So.2d at 475. This court explicitly recognized that "strict scrutiny" arises from the necessity of strict compliance with the comprehensive plan and is to be distinguished from the type of judicial strict scrutiny review afforded in some constitutional cases. See also Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992), review denied, 613 So.2d 61 (Fla. 1993);Palm Beach County v. Alan Morris Company 547 So.2d 690 (Fla. 4th DCA), review dismissed ,553 So.2d 1164 (Fla. 1989);McGaw v. Metropolitan Dade County, 529 So.2d 1190 (Fla. 3rd DCA 1988); Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1987).

To that end, this Court recognized that while the adoption of a comprehensive plan

is a legislative policy decision, a landowner's rezoning request consistent with that plan involves a policy application to a specific set of facts and a limited parcel of property. This Court held that when a zoning classification is legally challenged, a comprehensive plan is relevant only when the requested new zoning is consistent with the comprehensive plan. When any of the several zoning classifications are consistent with the plan, the applicant seeking a change from one zoning category to the other is not entitled to judicial relief "absent proof the status quo is no longer reasonable." Id. at 475. See also Lee County v. Sunbelt Equities II, Limited Partnership, 619 So.2d 996 (Fla. 2d DCA 1993). As a further indication of the fact that local governments still have broad discretion in the zoning arena, this Court held in Snyder that even if a landowner shows that his attempted requested rezoning is consistent with the Comprehensive Plan, a local government's denial of the rezoning application is to be affirmed if competent substantial evidence is presented showing that maintaining the existing zoning accomplishes a legitimate public purpose. Critically, this Court held that even if a landowner demonstrates that the proposed rezoning is consistent with the Comprehensive Plan and the local government's denial of the rezoning is inconsistent with the Comprehensive Plan, the local government can still deny the rezoning provided that it allows some development consistent with the plan and its decision is supported by substantial competent evidence. Snyder, 627 So.2d at 475. This Court reaffirmed this specific holding in Yusem, 690 So. 2d at 1296, n. 5.

Accordingly, under both Snyder and Yusem, a local government's decision not to grant a rezoning request, even if that decision is not consistent with the plan, or its refusal to amend its comprehensive plan, is entitled to great deference. As this Court held in Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), a circuit court sitting in its appellate capacity in a certiorari proceeding is not to make a *de novo* determination as to zoning policy, which is a matter for local authorities.

Following Snyder, some courts began to review a local government's refusal to amend its comprehensive plan utilizing a "functional analysis": if the court perceived that

the proposed comprehensive plan amendment was of limited impact, it would be treated as a "quasi-judicial" decision and analyzed judicially pursuant to the standards and analysis established in Snyder, with certiorari review in the circuit court the authorized judicial remedy.

It is within this context that this Court decided Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), and answered the following certified question:

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

This Court answered the certified question in the negative, holding that "amendments to a comprehensive land use plan which was adopted pursuant to Chapter 163, Florida Statutes, are legislative decisions subject to the 'fairly debatable' standard of review." Id. The local government's legislative decision not to amend its comprehensive plan must be judicially approved if reasonable persons could differ as to its propriety. Id. at 1295.

The sole reason the district court below certified its question to this Court is because of Yusem's "footnote 6," Id. at 1296, n. 6. The holding of this Court, "that all comprehensive plan amendments are legislative decisions subject to the fairly debatable standard of review" id. at 1295, appears absolute. However, in Footnote 6 this Court stated:

> We do note that in 1995, the legislature amended Section 163.3187(1)(c), Florida Statutes, which provides special treatment for comprehensive plan amendments directly related to proposed small-scale development activities. Ch. 95 396, Section 5, Laws of Fla. We do not make any findings concerning the appropriate standard of review for these small-scale development activities.

Tellingly, *sub judice,* the Developers argued to the circuit court and to the first district below that Yusem's Footnote 6 evidenced this Court's conscious and intended decision that small-scale comprehensive plan amendments are not governed by Yusem, but should be judicially reviewed and analyzed like rezoning requests pursuant to Snyder.

This argument is disposed of by mere reference to the fact that the amendment to Chapter 163 by 95-396, Section 5, Laws of Florida, authorizing the "small-scale amendment process" was not even enacted until years after Mr. Yusem first sought to have Martin County's comprehensive plan amended, and, therefore, was not at issue in any of the proceedings leading up to review by this Court.[1]

The narrow issue presented on this appeal is the application of Yusem's holding to the provisions of Section 163.3187(1)(c), which in pertinent part provides:

> Amendments to comprehensive plans adopted pursuant to this part may be made not more than two times in any calendar year, except:
>
> **********
>
> (c) any local government comprehensive plan amendments directly related to proposed small-scale development activities may be approved without regard to statutory limits on the frequency of consideration of amendments to the local comprehensive plan. A small-scale development amendment may be adopted only under the following conditions:
>
> 1. The proposed amendment involves a use of ten acres or fewer and:
>
> **********
>
> (d) the proposed amendment does not involve a text change to the goals, policies, and objectives of the local government's comprehensive plan, but only proposes a land use change to the future land use map for site-specific small-scale development activity.

A review of the proceedings below conclusively demonstrates that the decision the City was required to make as to amending its Plan was clearly a legislative

[1] Further, by its plain terms, the small-scale amendment provisions of Section 163.3187(1)(c)1, apply only if the property involved is ten acres or less; the property at issue in Yusem was 54 acres. 690 So. 2d at 1289.

policy decision, and Yusem's holding should now be held to apply to any comprehensive plan amendment, as the district court below correctly held.

This case began with an attempt by these Developers to have the City's Planning Commission approve an amendment to the City's Plan to commercially develop property which has historically been residential, is currently zoned residential, and its future use is residential under the City's Plan. Because the Planning Commission's staff viewed this plan amendment as violating several important goals of the City's plan, it recommended that the proposed amendment be denied. The staff report (App. Tab K) noted that there was a surplus of vacant and available commercial property and that allowing commercial development in this residential neighborhood would not only erode this residential area in south Jacksonville Beach, but would also violate the Plan's goal of encouraging the "in fill" of commercial development, i.e., development in those areas already zoned for commercial use by current zoning and designated as such in the City's Plan.

At a hearing before the City's Planning Commission, the Developers presented the testimony of their hired experts and members of the public also spoke. The Planning Commission's staff recommendation to deny the proposed Plan amendment was approved by the Planning Commission. Thereafter, the virtually identical presentation of paid experts was made to the City Council for the City of

Jacksonville Beach, members of the public spoke, mostly in opposition to having the City's Plan changed in this residential area and their neighborhood encroached on by yet another commercial development, and most of whom pointed out what all members of the City Council were clearly aware of: there exists a significant surplus of commercial property which was properly zoned and intended to be commercial in the future under the City's Plan.

Significantly, Steven Lendorf, the City's Planning Director, testified explicitly that the policies underlying the City's Plan concerning in-fill development meant, as common sense would clearly indicate, exactly what it says: future commercial development should take place in those areas in which there is available vacant commercial property which is properly zoned for commercial development and which under the City's Plan is contemplated to be commercial in the future. As Mr. Lindorff explained, as did the Planning commission staff, the Plan would be violated by the commercial development of this residential property, designated to remain residential in the future under the City's Plan; simply because property across the street and to the north have some form of commercial development, does not transform the proposed commercial development of this residential area into "in fill" development.

The City Council unanimously rejected the Developers' proposed plan amendment, and in doing so clearly was engaged in a policy decision as the factors supporting Yusem's

holding demonstrate.

First, Yusem recognized that the enactment of a comprehensive plan is the quintessential legislative function, as it is a local government's "overall plan for managed growth, local services and capital expenditures as embodied in the future land use mapÿ" Id. at 1291. This Court recognized that even though the local government's decision was based upon the appropriate governmental body holding a hearing to address proposed changes in the land use designation for only a particular piece of property, it expressly concluded that:

> Amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to one piece of property.

Id. at 1293

This Court further recognized that the decision in Snyder is simply not applicable in the plan amendment context, id. at 1292, as under Snyder, the primary focus is the local government's determination, when one of several different zoning options are consistent with the plan, that the current zoning is still preferable. Yusem specifically recognized that Synder was irrelevant to the issue of the appropriate standard of judicial review when a local government is being asked to amend its comprehensive plan.

Another basis for this Court's holding in Yusem was jurisprudential. Because of the "functional analysis" being

utilized by numerous courts to reach irreconcilable results , whereby a reviewing court would determine if the amendment to the comprehensive plan being sought by the land owner appeared to by “like a rezoning” because it involved only a relatively small parcel of property and, therefore, presumably had limited impact, the law in this area had becoming “confused.”

Because a decision whether to amend a comprehensive plan still involves the exact same type of legislative deliberation as when adopting a plan in the first instance, this Court explicitly rejected the functional analysis and instead adopted a bright line approach so that there was clarity in the law and uniformity in the standards of appellate review of a local government’s actions. Id. at 1293.

This exact same functional analysis rejected in Yusem is at the core of the corporate Developers’ position herein, and is the basis for its claim that the certified question should be answered in the negative. The district court below rejected this contention, finding that the rationale of Yusem did apply, as the change to a comprehensive plan, whether pursuant to the “small-scale” amendment provisions of 163.3187(1)(c) or through the more detailed procedures elsewhere in Chapter 163, “involve the formulation of policy, rather than its mere application.” Significantly, the district court reasoned:

> Regardless of the scale of the proposed

> development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. This will, in turn, require that it consider the likely impact that the proposed amendment would have on traffic, utilities, other services, and future capital expenditures, among other things. That is, in fact, precisely what occurred here. Such considerations are different in kind from those which come into play in considering a rezoning request.

City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 790 So.2d 792, 794 (Fla. 1st DCA 1999).

The district court's decision, and its answer to the question it has certified, is in total accord with this Court's holdings, finding that the decision whether to amend a comprehensive plan is legislative, rejecting the "functional analysis" and seeking to add clarity to this confusing area of the law.

Yusem involved the fourth district's holding that the plan amendment sought in that case, involving as it did only a relatively small parcel of property, was therfore "essentially a quasi-judicial rezoning decision."

Then Judge Pariente dissented, which this Court found greatly aided its decision, reasoning that the county's decision as to whether it should "alter its overall plan for managed growth, local services, and capital expenditures as embodied in the future land use map, was a legislative act," and that determining whether to amend such a plan is no

different than the decisions involved in adopting a comprehensive plan in the first instance. Judge Pariente distinguished Snyder because the rezoning request at issue in Snyder "was consistent with the policies of the plan" and should be treated as a quasi-judicial decision, whereas in Yusem, the requested rezoning "was inconsistent with the plan and required a plan amendment." Judge Pariente advocated "a bright-line rule finding that all plan amendments were legislative acts [which] would provide clarity to the procedures involved in this otherwise confusing area of the law."

This Court agreed, finding that a local government's decision rejecting a proposed modification of a previously adopted land use plan is no less legislative in nature than the decision initially adopting the plan. This Court's holding effectively answers the question certified herein:

> [We] expressly conclude that amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to only one piece of property.

Id. at 1293-1294.

This court approved Judge Pariente's analysis that a decision whether to amend a plan requires a local government to "evaluate the likely impact that such amendment would have on the county's provision of local services, capital expenditures, and its overall plan for growth and future development of the surrounding area," which has an impact

far beyond simply the specific piece of property. These are the identical factors utilized by the district court *sub judice*, and represents a correct understanding of Yusem and its rationale.

In order to distance themselves from Yusem, the Developers' argue herein that it is the "nature of the proceeding" which should determine the answer to the certified question, and that since it presented "evidence" as to why the City's Plan should be amended, the proceedings below were quasi-judicial and subject to certiorari review in the circuit court. The City agrees that it is the "nature of the proceeding" which is central to the issue presented herein, and submits that the nature of the proceeding below before the City's Planning Commission and City Council were legislative deliberations. Again, stripped of its nomenclature, the Developers' theory is simply a restatement of the functional analysis which this Court specifically rejected:

> While we continue to adhere to our analysis in *Snyder* and with respect to the type of rezonings at issue in that case, we do not extend that analysis or endorse a functional, fact-intensive approach in determining whether amendments to local comprehensive land use plans are legislative decisions.

Yusem, 670 So.2d. at 1293.

As set forth above, this Court's footnote 6 in Yusem did not expressly address whether the same rationale should apply in the small-scale amendment context for the sole reason that this amendment was not an issue. As the district

court below stated in addressing this Court's footnote 6:

> We think that, by the language used in the footnote, the court intended to say only that, because it had not focused on the recent statutory amendment providing for small-scale development amendments, it was leaving to a future day the question of the appropriate standard of review for decisions regarding such amendment requests.

730 So. 2d at 794.

The district court also recognized that Yusem expressed "a clear intent to bring predictability to an area of the law in which confusion has been prevalent, by mandating a uniform approach to all comprehensive plan amendment requests. The result we reach here is consistent with that goal; whereas, that urged by the developers would only add to the confusion." Id.

The only other district court to address this issue was the fifth district in Fleeman v. City of St. Augustine Beach, 728 So.2d 1178 (Fla. 5th DCA 1998), which reached the identical result.

The Developers herein argue that because the small-scale amendment does not involve the multiple levels governmental review required to otherwise amend a comprehensive plan, that somehow this Court's Footnote 6 in Yusem supports the Developers' position that a small-scale amendment is to be treated "like a rezoning."

Yusem's recognition of the various levels of governmental review of comprehensive plan amendments was used as further support for its decision that proceedings to consider such amendments are legislative. The fact that the

review process for small scale amendments is different does not transform this quintessential legislative act into one that is "quasi-judicial."

There is no question that the provisions of 163.3187 governing small-scale amendments does not require the same type of state government review as with other proposed plan amendments. However, the City submits that not only are the Developers overstating this Court's reliance on this factor in Yusem (which this Court held only "further supported" its holding, 690 So.2d at 1294), but have omitted a critical discussion as to the remainder of the small scale amendment provisions.

The City submits that the apparent purpose of §163.3187(1)(c)1, concerning the different level of review than with other plan amendments, is to provide the local government with a more flexible procedure for a relatively minor plan amendment and not, as the Developers impliedly argue, to give private land owners the ability to force a local government to amend its "constitution" governing future development. The City's position is buttressed by an analysis of the provisions of Section 163.3187(3)(a), which provide:

> (3)(a) The state land planning agency shall not review or issue a notice of intent for small scale development amendments which satisfy the requirements of paragraph (1)(c). **Any affected person may file a petition with the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57 to request a hearing to challenge the compliance of a small scale development amendment with this act** within 30 days following the local

> government's adoption of the amendment, shall serve a copy of the petition on the local government, and shall furnish a copy to the state land planning agency. An administrative law judge shall hold a hearing in the affected jurisdiction not less than 30 days nor more than 60 days following the filing of a petition and the assignment of an administrative law judge. The parties to a hearing held pursuant to this subsection shall be the petitioner, the local government, and any intervenor. In the proceeding, the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act. **In any proceeding initiated pursuant to this subsection, the state land planning agency may intervene.**

(Emphasis supplied). Further, subsection (b)1 provides procedures for the administrative law judge to transmit his recommended order to the appropriate entity for final agency action, including if this recommendation is that the local government's approval of a small scale amendment be found not in compliance with other sections of Chapter 163. Significantly, subsection (b)2 establishes a procedure for the "state land planning agency" to finalize the finding that the proposed small scale amendment is not in compliance with other sections of Chapter 163. Subsection (c) provides that a local government's approval of a small scale amendment shall not become effective until after an administrative challenge authorized by this section results in a final order.

It is manifest that while 163.3187(1)(c)1, gives a

local government more flexibility for a small-scale amendment, subsection (3)(a) exists to ensure that if such an amendment is approved, any person who believes this approval violates other provisions of Chapter 163 may administratively challenge this finding and the state can intervene to ensure that the amendment is either in compliance or that this approval is reversed and the amendment denied. In short, the small-scale amendment process trades the multilevel review process required for other plan amendments for a different review process as a safeguard to ensure compliance with Chapter 163, the exact reason for the multilevel review of plan amendments generally.

Finally, a review of the transcripts of the proceedings before the City's Planning Commission and the City Council (App. Tabs P and Q, respectively) demonstrate conclusively that what was being addressed by the City involved a pure policy decision as to whether the City's fundamental document governing its future development should be altered. Simply because the property at issue in this case is less than ten acres and, therefore, subject to the small-scale plan amendment procedures, involves no different principles or any different considerations for potential impact on the remainder of the City's Plan than was the 54 acres in Yusem; as Judge Pariente noted in the district court's decision, 664 So.2d at 981, and as was cited approvingly by this Court, 690 So.2d at 1294, "the decision whether to allow a

plan amendment involves considerations well beyond the land owner’s 54 acres.”

The reality of what the City was asked to do by these corporate Developers cannot be overemphasized in terms of the City’s obligation to balance this part of its Plan with all others and the City’s decision that the Plan not be amended. The City had to balance this request with its Plan’s provisions requiring that commercial development

occur in those vacant commercial areas which were designated for such development by the City's Plan.

The fact that the City considered whatever the Developers wished to present does not alter in any way the legislative nature of the decision, or transform it into a "quasi-judicial" proceeding.[2]

Finally, the Petitioners' claim here that if the principles of Snyder are applied and a small-scale amendment is treated like a rezoning request for purposes of judicial review, then it is entitled to some relief. While the City's rational basis and factual support for its denial of these Developers' proposed plan amendment will be addressed, supra, it is significant that the availability of certiorari review in the circuit court accepted by Snyder, simply cannot logically be applied when the change sought is to the fundamental document governing local land use. As this Court recognized in Snyder, 627 So.2d at 476-477:

> [W]e cannot accept the proposition that once the landowner demonstrates that the proposed use is consistent with the comprehensive plan, he is presumptively entitled to this use unless the opposing governmental agency proves by clear and convincing evidence that specifically stated public necessity requires a more restricted use. We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan. As noted in Lee County v. Sunbelt Equities II, Limited Partnership [619 So.2d at 1005-06]:
>
> > [A]bsent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that the change is desirable. The right of judicial review does not ipso facto ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existedÿmoreover, when it is the zoning classification

[2] The City's attorney recognized that in order to afford procedural due process, all sides would be able to present whatever information, testimony or statements they wished and then the City Council would make its final decision (App. Tab Q at page 30).

> that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. 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 judicial relief absent proof the status quo is no longer reasonable. It is not enough simply to be "consistent"; the proposed change cannot be inconsistent, and will be subject to the "strict scrutiny" of Machado to ensure that this does not happen.

Two important points are established by these holdings in Snyder. First, and of fundamental importance to answering the certified question, is that by definition, the availability of certiorari review and its requirement that a local government must show a factual basis for its decision and that it is not unreasonable, arbitrary or capricious arises in the context of a landowner's rezoning proposal which is consistent with the plan. By definition, an effort to change the plan itself is not only inconsistent with the plan, it is antithetical to it.

Further, it is extremely clear that in the proceedings below, the City was being asked by these Developers not to apply already formulated policy to an existing set of facts, but rather to revisit the underlying factual findings by the myriad of experts and disciplines, and review all of the data collected in creating the City's Plan initially.

Accordingly, the district court below correctly held that regardless of the superficial uncertainty concerning Yusem's Footnote 6, any determination by a local government

whether to amended its comprehensive plan involves an inherently legislative decision making process. It is different in kind than the type of decision required when the issue before the local government is whether to rezone a particular piece of property in conformity with a comprehensive plan.

The principles and procedures announced by this Court in Snyder in the rezoning context, and which these Petitioners claim should apply to small scale plan amendments, are logically inapplicable to a determination of whether to amend the local government's fundamental document governing future land use and development.

The certified question should be answered in the affirmative and the decision of the district court approved.

## II. THERE WAS AMPLE EVIDENCE SUPPORTING THE CITY'S REFUSAL TO AMEND ITS COMPREHENSIVE PLAN.

The Developers' continued claim herein that the only evidence presented by the City justifying its refusal to amend its Plan was the testimony of neighbors concerned about traffic in this residential area is simply inaccurate, given both the factual basis underpinning the Plan itself, the Planning Commission's staff report and analysis and the presentation to the City Council made by Steven Lindorff, the City's Planning Commission Director.

Even though this Court need not reach the question of whether the City's denial was based upon competent substantial evidence (an issue which arises only if the

principles and procedures established by this Court in Snyder are held applicable in this context) as the answer to the certified question disposes of this issue, if this issue must be addressed, this record conclusively demonstrates the factual basis for the City's decision.

That members of the public spoke in opposition to the proposed Plan amendment is undisputed, and a review of most of the remarks demonstrate clearly that these citizens were keenly aware that what was being requested was a change in the City's policy. The remarks made by one resident explicitly addresses the nature of the decision making process at issue as well as the fact that the Plan itself represents significant evidence:

> I am not legally educated and I don't know that I understand exactly all that goes into the 2010 Comprehensive Plan, but what I think I know is that many, many hours were spent, a lot of dollars were spent to develop that plan. I understand, I think, that it is a state mandate that all the communities in Florida develop this plan for - so that for future growth it would be planned future growth. And yet, every time someone comes along now after the fact, after the 2010 Plan was developed, they want to chip away at it and chip away. That's defeating the purpose.

(App. Tab P at pages 56-57).

Further, numerous citizens pointed out that as a matter of fact, a significant amount of commercial property was vacant and currently available throughout the City, which was zoned for commercial use and which was designated for future commercial development under the City's Plan.

As Mr. Lindorff explained (App. Tab Q at pages 26-29), in-fill development under the City's Plan means "the absorption of land that is already zoned for a given use, not the change in use of pieces simply because they are adjacent."

The Planning Commission staff also analyzed the proposed plan amendment and its report (App. Tab K)is also based on the current factual situation existing within the City as to the need for commercial and residential property and related these needs to the policies and goals of the City's Plan:

> The applicants for this proposed small scale amendment desire to change the Future Land Use designation of 1.7 acre parcel of a + 2.8 acres of residential property that they own on the east side of South 3rd Street, immediately south of St. Augustine Boulevard. The 1.7 acre subject parcel currently exists as 11 undeveloped platted lots in the Atlantic Shores, Unit-1 Replat subdivision. The property is now designated as *Residential – Low Density* on the City's 2010 Future Land Use Map, and is zoned *Residential, single family: RS-1* on the City's zoning map. The applicants wish to have the 1.7 acre parcel redesignated as *Commercial Professional Office* on the Future Land Use Map, to allow them to then file a PUD rezoning application, ultimately allowing them to develop the parcel as office uses, instead of residential uses.
>
> The major issue that staff considered in review of this request is its consistency with the approved Comprehensive Plan. In the analysis section of the Future Land Use element, as well as in Policy LU.1.2.2, it is stated that the Downtown and South Beach Community Redevelopment area plans contain provisions for office development projects which will absorb most of the anticipated demand for future office and commercial service uses. Space needs not met in these two redevelopment areas can be and will be met through a combination of currently approved office projects and infill

projects along 3rd Street and Beach Boulevard. The plan states that no additional land will be needed to support office and service uses.

The applicants state that this proposal constitutes infill development, when actually it is not. If this property was currently located in a CPO district, and if its surrounding uses were predominantly office and service uses, then it might be considered as such, but its current designation is residential, its contiguous uses are residential. In fact, to find another piece of commercial property on the east side of South 3rd Street, south of St. Augustine Boulevard, you actually have to drive a good distance into St. Johns County, to Solano Rd. An examination of the west side of 3rd Street in this general area, however, yields that there are several vacant or underdeveloped properties, such as the property between 32nd and 34th Avenues, that are currently designated CPO.

At staff's request, the applicants conducted an informal meeting with residents of the area to discuss their proposal. Some of the concerns expressed at that meeting by residents included property value impacts, traffic, and the precedent that this change might set for the balance of the undeveloped residential properties which front along the east side of South 3rd Street.

It is staff's opinion that there is sufficient land available within the City properly designated to accommodate future office demand. Further, the applicant has not demonstrated that the property is actually inappropriate for residential use. This and other vacant residential properties along this side of S. 3rd Street are quickly becoming the only undeveloped single family residential properties east of 3rd Street. Their attractiveness as home sites will only increase as the supply further dwindles. One example of this is a new home recently constructed on the east side of 3rd Street at 34th Avenue S. The applicant also owns contiguous property which fronts on Madrid Street. This property could possibly provide access to the 3rd Street properties, whereby they could be developed as reverse frontage, walled rear yard lots along 3rd Street,avoiding multiple curb cuts.

The Plan itself constitutes sufficient, competent

substantial evidence supporting the City's decision not to amend its Plan. The fact that a Comprehensive Plan constitutes the written culmination of an extremely detailed process involving numerous considerations and significant factual findings was explicitly recognized in Snyder, wherein this Court noted that a comprehensive plan,

> [M]ust be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land as well as including principles, guidelines and standards for the orderly and balanced future economic, social, physical, and environmental and fiscal developmentÿ

627 So. 2d at 473.

There is no legal or logical basis for the Developers' theory herein that the City was required to present its own set of paid experts in order to legally justify its position, when it had already done so in developing its Plan initially. As demonstrated, the Plan itself, the Planning Commission staff's report and the uncontradicted evidence that a surplus of available commercial property existed to accommodate the current and future need for commercial development without destroying a residential neighborhood is clearly established in this record.

Accordingly, even if this Court determines that the Snyder standard of judicial review should apply, the district court's holding that the circuit court order was improper should be approved.

## III. THE CITY'S DENIAL OF THE COMPREHENSIVE PLAN

AMENDMENT WAS CLEARLY REASONABLE

The Developers argue that even if Yusem applies and the City's action is subject to the fairly debatable standard of review, the City's denial of the requested Plan amendment was not reasonable. This argument is again erroneously based upon the Developers' claim that there was no factual basis for the City's decision and that the circuit court properly quashed the City's denial of the Developers' proposed Plan amendment.

As demonstrated above, there was a solid factual basis for the City's refusal to amend its Plan. As this Court in Yusem held, 690 So. 2d at 1295, a local government's planning action must be judicially approved "if reasonable persons could differ as to its propriety."

The City submits that it is self-evident that reasonable persons could differ as to the propriety of the City's action. By definition, therefore, the circuit court not only should have denied the Developer's Petition for Writ of Certiorari, as this is not an available remedy under Yusem, but should also have entered an order on the Developer's count for declaratory relief finding that the City's denial of the Developer's proposed Plan amendment was reasonable.

The Developers' reliance on the third district's case of Debes v. City of Key West, 690 So. 2d 700 (Fla. 3rd DCA 1997), as somehow demonstrating that the City's actions

herein are not even fairly debatable, is inaccurate as a matter of both law and fact. At issue in Debes was an undeveloped parcel of land in Key West which was "specifically designated in the City's Comprehensive Plan as a primary commercial areaÿ," but was designated on the future land use map (part of the Plan) as residential property. Despite the Plan's designation and the fact that this property was surrounded in all directions and on both sides of the street by property zoned for and being used for commercial purposes, the Key West City Commission refused the amend the designation on the future land use map for this property from residential to commercial. 690 So. 2d at 701. There is no indication in this opinion whatsoever that the judicial proceedings brought by the land owner to overturn the City of Key West's decision was brought pursuant to the small-scale plan amendment provisions of §163.3187(1)(c).

In stark contrast to the facts *sub judice*, the attempted change of the property designation from residential to commercial was initiated by the Key West City Planner and its Planning Board, id., which "stemmed from the professionals' desire to correct what they characterized as their own mistake in their designating the parcel as [residential]." Id. at 703, n. 2.

The district court quashed the City of Key West's refusal to allow the commercial development of this property, finding that the City's claimed fear of increased

traffic for the commercial development was completely arbitrary, as any commercial development would obviously bring increased traffic. The City's other claimed justification, to promote affordable housing, was legally insufficient as such a goal cannot "be promoted on the back of a private land owner by depriving him of the constitutionally protected use of his property." Id. at 702.

The third district condemned the City's action as an attempted "spot rezoning" in reverse, and found the real basis for the City's refusal to allow the commercial development was the fear of economic competition by the surrounding commercial business owners. Id.

In this case, the proceedings before the City's Planning Commission as well as the City Council clearly demonstrate that the City's conscious decision to continue to preserve the current residential character of this area and provide for its future as a residential neighborhood on the east side of Third Street in south Jacksonville Beach, was the result of a thoroughly studied, documented and publicly debated part of the City's Plan. There is not one scintilla of evidence to suggest that there was anything arbitrary, unreasonable, or capricious about the City's determination in the first instance to designate this area as residential under its Plan and nor is there any factual basis whatsoever for the Developers' continued claim that the sole reason for the City's decision was the local

resident's opposition based upon concerns of increased traffic.

In fact, what is clear is that these Developers are seeking the same type of "spot rezoning" condemned by Debes via an amendment to the City's Plan in order to place a commercial development in this residential neighborhood.

The district court below refused to reach the issue of whether the City's refusal to amend its Plan should have been affirmed under the fairly debatable standard, instead remanding the case to the circuit court for a *de novo* hearing on the Developer's count for declaratory or injunctive relief. 730 So. 2d at 795. The City moved for rehearing on that aspect of the first district's decision (R. 90), on the basis that the record presented to the circuit court clearly showed that the City's refusal to amend its Plan was reasonable and, therefore, should have been affirmed under the fairly debatable standard.

## IV. THE DISTRICT COURT PROPERLY UTILIZED ITS CERTIORARI REVIEW

As an argument of last resort, the Developers claim that the first district exceeded its certiorari jurisdiction in reviewing and quashing the circuit court's order which set aside the City's refusal to amend its Plan. This argument deserves only short treatment as it is without any legal basis.

In Haines City Community Dev. v. Heggs, 658 So. 2d 523

(Fla. 1995), this Court held that the standard of review by the circuit court sitting in its appellate capacity in a certiorari proceeding, is not a *de novo* determination as to zoning policy: that is a matter for the local authorities.

The case law is legion that when a circuit court misapplies the law and in effect arrogates unto itself the power to sit as a "super legislature" and override a local government's legal discretion over either its zoning policies or amending its comprehensive plan, the circuit court's action is reviewable by the district court either on a petition for certiorari in the rezoning context, as recognized by Snyder, or in an original action for declaratory relief as recognized by Yusem.

This is the third occasion in recent years where this City, a relatively small municipality, has faced a circuit court order which in effect had the court making zoning and comprehensive land use policy for the City when legal challenges were brought by private land owners. City of Jacksonville Beach v. Marisol Land Development, Inc., 706 So. 2d 354 (Fla. 1st DCA 1998); City of Jacksonville Beach v. Prom, 656 So. 2d 581 (Fla. 1st DCA 1995). Other local governments have also had to seek relief from the district courts because of this same problem. See, e.g., Franklin County v. SGI Limited, 728 So. 2d 1210 (Fla. 1st DCA 1999); Orange County v. Lust, supra, 602 So. 2d 568 (Fla. 5th DCA 1992), review denied, 613 So.2d 61 (Fla. 1993); Lee County v. Sunbelt Equities, II, Limited Partnership, supra, 619 So.

2d 996 (Fla. 2nd DCA 1993).

Not only is the availability of certiorari review in the district court clearly contemplated by this Court in both Snyder[3] and Yusem, the district court below correctly utilized its certiorari review power in its appropriate limited capacity, considering only (1) whether the trial court afforded the parties procedural due process of law, and (2) whether the trial court applied the correct law. 730 So.2d at 793.

Because the circuit court clearly applied the wrong law which resulted in a miscarriage, as the City's determination as to its own land use policies were effectively negated by the trial court's legal error in misapplying the correct law and misperceiving its role in the land use arena, the district court correctly and properly issued the writ.

The entire premise for the Developers' argument on this point is patently erroneous, resting as it does on the demonstrably false premise that Yusem, Snyder and Debes supported the circuit court's decision. As demonstrated, this Court's Yusem decision mandated that the trial court deny the Developer's petition for writ of certiorari, as that is not an available judicial remedy when a local government's decision whether to amend its comprehensive plan is at issue. This was the exact issue presented to the circuit court, who refused to follow Yusem. The first district properly recognized that this was a misapplication of law, thereby justifying the issuance of a Writ of Certiorari.

Accordingly, the district court below properly corrected what was a miscarriage by the circuit court, who utterly failed to follow the proper law and for which certiorari review in the district court of appeal was the only available remedy for the City.

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[3] The Snyder case was also before the district court of appeal on a petition for certiorari, 627 so. 2d at 471.

## CONCLUSION

This Court's decision in Yusem is that a local government's determination whether to amend its comprehensive plan is legislative; Footnote 6 simply recognized that the small-scale amendments to Chapter 163 were not an issue and, therefore, would not be addressed.

Yusem's rationale mandates that the certified question be answered in the affirmative. A proposed Plan amendment involving only a small parcel of property requires the City to make a policy decision whether to amend its basic plan for future growth and development, a quintessential legislative act.

This Court need not reach the other issues raised herein. If it does, the record is unequivocal that the City's decision was based upon substantial and compelling facts which also refutes the claim that the City's action was improper even under the fairly debatable standard.

Finally, the district court properly utilized its certiorari powers to quash the circuit court order which was based upon a fundamental misunderstanding and misapplication of the controlling law.

Accordingly, the question certified by the district court should be answered in the affirmative and the district court's decision affirmed.

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## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of Respondent's Answer Brief was typed using Courier New, 12 point font, and was not fully justified. A three and a half inch floppy disk with a copy of Respondent's Amended Answer Brief has been furnished to the Supreme Court of Florida.

_____

Attorney

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. Mail to T. Geoffrey Heekin, Esquire, and S. Hunter Malin, Esquire, Post Office Box 477, Jacksonville, Florida 32201, on this 27th day of August, 1999.

_____

Attorney

[1] This Court disapproved Grubbs solely on whether a rezoning decision is quasi-judicial. 627 So. 2d at 476.