

SUPREME COURT OF FLORIDA
Tallahassee, Florida

Appeal No: 95,686

COASTAL DEVELOPMENT OF NORTH FLORIDA, INC., AND
MEADOWS INCORPORATED,

Petitioners,
v.

CITY OF JACKSONVILLE BEACH, FLORIDA,

Respondent.

On Appeal from the First District Court of Appeal

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INITIAL BRIEF ON THE MERITS

Petitioners, Coastal Development of North Florida, Inc., and Meadows Incorporated, timely petition this Court to reverse the decision by the First District Court of Appeal for the State of Florida, rendered on March 30, 1999, rehearing denied on May 6, 1999.

Introductory Statement

Petitioners, Coastal Development of North Florida, Inc., and Meadows Incorporated, will be referred to as "Coastal" or "Petitioners". Respondent, The City of Jacksonville Beach, Florida, will be referred to as "Respondent" or "the City". The documents cited in the appendices to Petitioners' Initial Brief on the Merits will be referred to as P., tab letter, and, if applicable, by page number. For example, page 3 of the document at Tab A, Volume I of the Appendix would be cited as (P. Vol. I, Tab A, p.3).

Jurisdiction

On March 30, 1999, the First District Court of Appeal (the "First District"), in reversing the Circuit Court's decision in favor of Petitioners, certified the following issue to this Court as being one of great public importance:

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?

As such, this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure.¹

Questions Presented

- B. IS A LOCAL GOVERNMENT DECISION CONCERNING A SMALL-SCALE AMENDMENT A QUASI-JUDICIAL ACTION WHICH IS SUBJECT TO JUDICIAL "STRICT SCRUTINY", PURSUANT TO FLORIDA CASE LAW AND SECTION 163.3187(1)(c), FLORIDA STATUTES?

- C. WAS RESPONDENT'S DENIAL OF PETITIONERS' APPLICATION AND FAILURE TO APPROVE THE ORDINANCE ENACTING THE APPLICATION FOR A SMALL-SCALE AMENDMENT BASED ON COMPETENT SUBSTANTIAL EVIDENCE?

¹ Petitioners believe the standard of review of a small-scale amendment to the Comprehensive Plan to be an issue of great public importance. There are three major types of land use decisions which can be made. This Court has already made a decision on two of these types of decisions; to wit: rezonings (Snyder) and large-scale amendments (Yusem). The third type of decision, a small-scale amendment, is the subject of this appeal. Notably, the Fifth District, in Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998), also certified this issue to be one of great public importance. Fleeman, despite requesting certification, did not file a Notice Of Appeal with this Court.

Petitioners additionally seek discretionary review under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, as the First District's Order directly conflicts with the Third District's Order in Debes v. City of Key West, 690 So. 2d 700 (Fla. 3d DCA 1997) In Debes, the Third District held that the proper standard of review for the denial of a small-scale amendment is the competent, substantial evidence standard set forth in Snyder. Id. at 701.

Further, when this Court accepts a case for consideration pursuant to Article V, Section 3(b)(4), Florida Constitution, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, review is not limited to the question certified by the District Court of Appeal. See Trushin v. State, 425 So. 2d 1126 (Fla. 1983); Bell v. State, 394 So. 2d 979 (Fla. 1981). As such, Petitioners are requesting that this Court review the other critical issues which are presented herein, and which were at issue in the appeal to the First District.

- C. WAS RESPONDENT'S DENIAL OF PETITIONERS' APPLICATION AND FAILURE TO APPROVE THE ORDINANCE ENACTING THE APPLICATION FOR THE SMALL-SCALE AMENDMENT "FAIRLY DEBATABLE"?
- D. DID THE FIRST DISTRICT ERR IN REVERSING THE CIRCUIT COURT BECAUSE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.030(b)(2)(B), ITS REVIEW WAS LIMITED TO DETERMINING WHETHER THE CIRCUIT COURT AFFORDED PROCEDURAL DUE PROCESS AND WHETHER THE CIRCUIT COURT FAILED TO FOLLOW A CLEARLY ESTABLISHED PRINCIPLE OF LAW WHICH RESULTS IN A MISCARRIAGE OF JUSTICE?

Statement of the Case and Facts

Petitioners filed an application (the "Application") for a small-scale amendment to the 2010 Comprehensive Plan for the City of Jacksonville Beach (the "Comprehensive Plan") with the Respondent for Petitioners' property located on the southeast corner of the intersection of South Third Street (also known as A1A) and St. Augustine Boulevard. (P. Vol. I, Tab A). The subject site is currently designated Residential, single family: RS-1, and Petitioners were seeking a change to Commercial Professional Office Zoning for ± 1.7 acres of Petitioners' ± 2.8 acre parcel. The Petitioners would like to build professional offices on the subject site. Critically, the site is currently undeveloped and not in use. Moreover, there is significant dense, commercial zoning which in effect surrounds the subject site including: land that is zoned and used as a Commercial Professional Office which is located across Third Street from Petitioner's Property on the west side of South Third Street directly across the street from the subject site and extending south towards Butler Boulevard; and land to the

immediate north and northwest of the site on the same side of Third Street as the subject site that is used for higher intensity commercial uses than Petitioners propose, including two gas stations and a shopping center. The land to the northeast of the subject site is multi-family residential. The only land that is residential which is located adjacent to the subject site is that land to the east of the subject site on Madrid Street, a significant portion of which is owned by Petitioners, and that land to the south that is located on the east side of Third Street.

The City of Jacksonville Beach, Land Development Code (the "Code") provides that an applicant must prove that at least one of the six enumerated factors exists before an application for an amendment to the Comprehensive Plan is granted. See Code Sec. 34-177; (P. Vol. I, Tab I). In the Application and at the hearing conducted below, the Petitioners established five of the six factors enumerated in the Code including that: (1) there were changed projections in the Comprehensive Plan; (2) there were changed assumptions in the Comprehensive Plan; (3) there were new issues that had arisen since adoption of the Comprehensive Plan; (4) there was a need for additional detail or comprehensiveness in the Comprehensive Plan; and (5) there were updates that needed to be made to the data used for the Comprehensive Plan.² Although the Petitioners' Application established five of the six factors set

² The only element not established, data errors, was not applicable to the Application.

forth in the Code (and was thus more than sufficient to support a small-scale amendment to the Comprehensive Plan) the Planning and Development Department's Staff Report (the "Staff Report") recommended denial of the Application. (P. Vol. I, Tab K).

Petitioners' Application was heard by the Planning Commission for the City of Jacksonville Beach. (P. Vol. II, Tab P). At this hearing, Petitioners presented expert testimony and exhibits to establish five of the six factors set forth in the Code sufficient for granting the Application. The only opposition to the Application, other than the Staff Report recommendation, was that presented by non-expert members of the public who (comprised mostly of adjoining residential land owners) voiced their general opposition to any development in the area and their specific opposition to the Application. (P. Vol. II, Tab P). Despite this lack of expert testimony opposing the Application and despite the lack of any credible opposition, the Planning Commission voted to deny the Application in a three to two vote. (P. Vol. II, Tab P, pp.66-67).

Petitioners properly and timely objected to this denial by the Planning Commission, prompting a hearing before the Respondent's City Council. (P. Vol. II, Tab Q). At the hearing, Petitioners again presented expert testimony along with certain exhibits in support of their Application. (P. Vol. II, Tab Q).

David Van Horn, a Certified Planner who had participated in the preparation of the Respondent's Comprehensive Plan, testified

on behalf of the Petitioners. (P. Vol. II, Tab Q, pp.15-16). Mr. Van Horn testified without rebuttal or contradiction that the Code only requires that one of the six factors be established in order to obtain approval of a request for a small-scale amendment to the Comprehensive Plan; and that Petitioners established five of the six factors. (P. Vol. II, Tab Q, pp.15-29). Specifically, Mr. Van Horn³ testified that: (1) there were changed projections in the Comprehensive Plan as a result of the fact that there had been changes in the original projections, including population increases, since the date that the original Comprehensive Plan was prepared in 1985; (2) since the current growth in the area was not anticipated at the time the Comprehensive Plan was adopted, there were changed assumptions in the original Comprehensive Plan; (3) there were new issues that had arisen after the adoption of the Comprehensive Plan, including the elimination of 180,000 square feet of available and planned commercial professional office space in a development of regional impact ("DRI") located in the City; (4) there was a need for additional detail or comprehensiveness in the Comprehensive Plan due to changes in the population estimates and the elimination of the office space in the DRI; and (5) there were updates that needed to be made to the data used for the

³ Mr. Van Horn is a member of the American Institute of Certified Planners and holds a master's degree in planning. (P. Vol. II, Tab Q, p.15).

original Comprehensive Plan as to population increases and the increased need for office space. (P. Vol. II, Tab Q, pp.15-29).

Further, Mr. Van Horn testified that Petitioners' proposed development should be considered "infill", since it would serve as a transition between the higher and equally intensive commercial uses to the north and west, on the one hand, and the residential uses to the east and south, on the other hand. (P. Vol. II, Tab Q, p.19). Mr. Van Horn demonstrated that Petitioners' Application should be granted because Petitioners more than established five of the six factors set forth in the Code.

Petitioners also presented expert testimony from a traffic engineer, Jim Robinson.⁴ Mr. Robinson testified that there would be no negative impact on traffic congestion in the area when compared to the existing use; that the level of service standards embodied in the Comprehensive Plan will not be violated for South Third Street for the proposed development; and that the proposed amendment will actually result in improved traffic safety when compared to the existing permitted use (due to the fewer number of curb cuts that will be needed for Petitioners' proposed development versus the number that would be needed to develop this property as

⁴ Mr. Robinson is a registered professional engineer in four states, including Florida. Additionally, Mr. Robinson is a member of the Expert Witness Council of the Institute of Transportation Engineers, the national organization that focuses on traffic and transportation matters, and is a recent past president of the Florida Section of the American Society of Civil Engineers. (P. Vol. II, Tab Q, p.31).

residential). (P. Vol. II, Tab Q, pp.30-39). Therefore, Petitioners established that there would be no negative impact caused by the traffic generated by the proposed development.

Petitioners also presented the expert testimony of Duncan Ennis,⁵ a licensed real estate appraiser, who testified that there would be no depreciation in the value of the surrounding residences if Petitioners' Application was approved. (P. Vol. II, Tab Q, pp.39-44). In fact, Mr. Ennis testified that, based upon his study of areas where similar professional offices had been built, there would be an appreciation in the value of the surrounding residences if Petitioners' Application was approved. (P. Vol. II, Tab Q, pp.42-44). Thus, the proposed development would not negatively impact the value of the surrounding property. Mr. Ennis further testified that single family development along South Third Street had long since become undesirable, as evidenced by the fact that no residential homes facing the heavily trafficked Third Street have been constructed in the City of Jacksonville Beach in over thirty-seven (37) years. (P. Vol. II, Tab Q, p.42). Therefore, the only competent expert testimony established that commercial professional office use would be a proper use for this site and would have no negative impact on the value of the surrounding properties.

⁵ Mr. Ennis is a Member of the Appraisal Institute (MAI) and a Residential member of the Appraisal Institute (RM). Mr. Ennis has actively appraised residential, commercial, industrial and special purpose properties in Jacksonville and Jacksonville Beach for 23 years. (P. Vol. II, Tab Q, pp.39-40).

Finally, Petitioners produced Garry Abbey, a licensed civil engineer, who testified concerning his study of the feasibility of developing residential lots that backed onto Third Street and had access onto Madrid Street. (P. Vol. II, Tab Q, pp.42-47). This study was commissioned by Petitioners as a result of suggestions by Respondent that homes could be constructed with their back yards abutting Third Street and that Petitioners' property could thus be developed as residential. Apparently, the Respondent has all but conceded that the development of these lots as residential homes facing Third Street is not practical. In order to implement this suggestion, Petitioners would have had to use one of their lots for an access road from Madrid and would have had to have another access road running parallel to Madrid Street due to the odd shape of the parcel. Mr. Abbey testified that, after subtracting that portion of land required for the new road that these proposed residential lots would front onto, such a proposed development would leave the remaining portions of the lots too small and undesirable for use as residential lots. (P. Vol. II, Tab Q, pp.42-47). He also testified that the Fire Marshall raised a concern that it would be difficult to obtain emergency access or access with any large trucks (for garbage, utilities, etc.) to these proposed new lots from the proposed access road. (P. Vol. II, Tab Q, p.45). Therefore, the only competent testimony, expert or otherwise, established that such a residential development, as was suggested by Respondent, was not feasible.

A number of the many members of the lay public present also spoke. The various speakers raised issues such as the availability of other commercial space, their speculation that increased traffic congestion may be caused by Petitioners' development, their speculated and unsubstantiated fear of the reduction of their personal property values, their opinions that the Comprehensive Plan should not be modified, and their fear of the precedent that the development would set for the remaining undeveloped residential land along Third Street. (P. Vol. II, Tab Q, pp.42-98). All of the speakers recommended disapproval of the Application. (P. Vol. II, Tab Q, pp.42-98). However, none of these speakers qualified as experts, and none presented any factual basis for their statements. (P. Vol. II, Tab Q, pp.42-98). Absolutely no studies or expert testimony was introduced in opposition to Petitioners' evidence. Therefore, the only testimony that was presented in opposition to Petitioners' application was merely opinion testimony of the many members of the public who were present at the hearing and who were testifying based on speculation and emotion without any factual support or basis. In sum, no expert testimony or evidence was presented by the Respondent.

Despite the lack of expert testimony or other competent substantial evidence upon which to deny the Application, Respondent voted to deny Petitioners' Application. (P. Vol. II, Tab Q, pp.101-02). Petitioners properly and timely objected to this decision. (P. Vol. II, Tab Q, pp.101-102). Petitioners then

appealed this decision to the Fourth Judicial Circuit Court, in and for Duval County, Florida (the "Circuit Court"). (P. Vol. I, Tab E). The Circuit Court, through a Petition for Writ of Certiorari, Pursuant To Rule 9.100(f), Florida Rules Of Appellate Procedure Or, In The Alternative, Action For Declaratory And Injunctive Relief, held on June 30, 1998, that: (1) the decision by a local government concerning small-scale amendments is quasi-judicial in nature, and thus, the correct standard of judicial review is whether there is competent substantial evidence to support the local government's decision; (2) since the standard of review is competent substantial evidence, review by certiorari is proper; (3) there was no evidence, much less competent substantial evidence, to support the City's decision to deny Petitioners' Application for the small-scale amendment; and (4) even if decisions by a local government concerning small-scale amendments are legislative and thus entitled to a fairly debatable standard of review by declaratory and/or injunctive relief, the City failed to show that its decision was fairly debatable. (P. Vol. I, Tab J). As such, the Circuit Court granted Petitioners' Petition for Writ of Certiorari, quashed Respondent's decision to deny Petitioners' Application for a small-scale amendment to the Comprehensive Plan, and ordered Respondent to grant Petitioners' Application for a small-scale amendment to the Comprehensive Plan. (P. Vol. I, Tab J).

Respondent, on July 27, 1998, filed a Petition for a Writ of Certiorari with the First District. Jurisdiction was based on

Article V, Section 4(b)(3), Florida Constitution, and Rule 9.030(b)(2)(B), Florida Rules of Appellate Procedure. On March 30, 1999, the First District reversed the Order of the Circuit Court, in part, by holding: (1) a decision by a local government concerning small-scale amendments is legislative in nature, and thus, the correct standard of judicial review is whether the local government's decision is fairly debatable; and (2) since the correct standard of judicial review is whether the local government's decision is fairly debatable, review by certiorari is improper and the correct method of review is by declaratory action and/or injunctive review. (P. Vol. I, Tab L). As a result of this holding, the First District remanded the case back to the Circuit Court to determine whether Respondent's denial of the Application was fairly debatable. (P. Vol. I, Tab L). Finally, the First District certified the following issue as one of great public importance 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?

(P. Vol. I, Tab L, p.8).

Since the Circuit Court had already determined that Respondent's denial of the Application was not fairly debatable, given the lack of any competent, substantial evidence to support Respondent's decision, Respondent filed a Motion for Rehearing on

April 9, 1999, and Petitioners filed a Motion for Rehearing on April 13, 1999. (P. Vol. I, Tab M). These motions were denied by the First District on May 6, 1999. (P. Vol. I, Tab N).

On May 26, 1999, Petitioners timely invoked the discretionary jurisdiction of this Court by serving Respondent with Petitioners' Notice to Invoke Discretionary Jurisdiction and filing the same with the First District on May 27, 1999. (P. Vol. I, Tab O). Petitioners respectfully request that this Court reverse the decision of the First District and reinstate the Circuit Court's Order.

Summary of Argument

The issue in this case, the proper standard for judicial review of a local government's decision of an application for a small-scale amendment to a comprehensive plan, was not resolved by this Court in Martin County v. Yusem, 690 So. 2d 1288, 1293 n.6 (Fla. 1997). This Court, in Yusem, held that large-scale amendments to a comprehensive plan, because of the integrated review process mandated by the Legislature, are legislative in nature and thus are subject to a fairly debatable standard of review. Prior to Yusem, this Court held in Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993), that rezoning decisions, which are considered only at the local level and are at

risk of being based on neighborhoodism and a popularity poll, are quasi-judicial and thus subject to judicial review to determine if competent, substantial evidence supported the local government's decision. Because decisions on small-scale amendments (in addition to decisions on rezonings and large-scale amendments) are a major part of land use planning, it is submitted that this Court should accept jurisdiction and resolve this issue.

Because the Legislature created a process for the consideration of a small-scale amendment which is akin to the process for consideration of an application for rezoning (i.e., review only by the local government), the appropriate standard for judicial review of a small-scale amendment is competent, substantial evidence. Likewise, because the process created by the Legislature for small-scale amendments does not require the integrated review by various levels of government mandated by the Legislature for large-scale amendments, the proper standard of review for small-scale amendments is the competent, substantial evidence standard described by this Court in Snyder. This conclusion is supported by the rationale forming the basis of this Court's opinions in Snyder and Yusem, and is further supported by the process set up by the Legislature in Section 163.3187, Florida Statutes, for the review of an application for a small-scale amendment to a comprehensive plan.

In particular, this Court in Snyder found that the Florida Legislature enacted the Growth Management Act (the "Act") in

response to concerns that land use decisions were based on the "rank political influence" of the local electorate who were in attendance at the local hearing. See 627 So. 2d at 472-73. Because rezoning decisions, unlike decisions on large-scale amendments, are considered only at the local level before the local electorate, this Court held that the local government would have to present competent, substantial evidence supporting its decision to deny an application for rezoning where the landowner showed the application to be consistent with the comprehensive plan. Id. at 476. Thus, the basis of the decision in Snyder was the character of the hearing (local hearing similar to a judicial proceeding) and the possibility of political influence on the decision.

Similarly, in Yusem, this Court explained its holding based on the character of the hearing. Specifically, this Court found that the integrated review process mandated by the Legislature for large-scale amendments ensures that the policies and goals of the Act are followed. 690 So. 2d at 1294. Moreover, this Court found that the process for consideration of a large-scale amendment was "in contrast to a rezoning proceeding, which is only evaluated on the local level." Id.

Similar to rezonings, and contrary to large-scale amendments, applications for small-scale amendments are only evaluated on the local level, and thus, such decisions are exposed to the dangers of neighborhoodism and popularity polls. As found by this Court in Snyder, the Act was enacted to address these dangers.

Additionally, in accordance with the rationale of Snyder and Yusem, because the Act only mandates a local hearing for decisions on small-scale amendments, judicial review of such decisions should be based on the existence of competent, substantial evidence. Crucially, if the local government wants to create a legislative process for review of a small-scale amendment, then the local government can opt into the integrated review process mandated for large-scale amendments. See § 163.3187(1)(c)3., Fla. Stat.

The First District's decision in the instant case and the Fifth District's decision in Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998), are simply erroneous and are inconsistent with the rationale of Yusem and Snyder and with the framework created by the legislature for the consideration of small-scale amendments. Initially, the Legislature had answered the questions which the Fifth District in Fleeman believed remained open. Specifically, the Legislature answered the questions, "how small must the parcel be" and "how many other people must be affected" by defining a small-scale amendment as concerning less than ten acres of land. If the Legislature finds that ten acres impacts too many people, then the Legislature will amend the statute.

Moreover, as defined by the Legislature, a small-scale amendment is an application of policy. Specifically, a small-scale amendment may be adopted only if it does not involve a text change to the goals, policies, and objectives of the local government's

comprehensive plan. See § 163.3187(1)(c)1.d., Fla. Stat. Instead, an applicant for a small-scale amendment must show that, because of a change in circumstances from those considered when the comprehensive plan was adopted, an additional zoning classification is consistent with the goals and policies of the comprehensive plan. This constitutes an application of fixed policy to existing circumstances which were not foreseen at the time the comprehensive plan was adopted, but which are consistent with the policies already adopted.

Because an application for a small-scale amendment is considered only at the local level and because a small-scale amendment, by definition, is only an application of policy, decisions concerning a small-scale amendment should be subject to a competent, substantial evidence standard of review. As such, the First District's Order should be reversed.

Legal Argument and Supporting Authority

- I. A LOCAL GOVERNMENT DECISION CONCERNING A SMALL-SCALE AMENDMENT IS A QUASI-JUDICIAL ACTION WHICH IS SUBJECT TO JUDICIAL "STRICT SCRUTINY" PURSUANT TO FLORIDA CASE LAW AND SECTION 163.3187(1)(c), FLORIDA STATUTES.

This Court, in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), noted that the applicable standard of review announced for large-scale amendments was not necessarily the applicable standard of review for small-scale development. Specifically, 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, §5, Laws of Fla. We do not make any findings concerning the appropriate standard of review for these small-scale development activities.

Yusem, 690 So. 2d at 1293 n.6 (Fla. 1997) (emphasis added).

Until the "Local Government Comprehensive Planning Act" was adopted in 1975, local zoning ordinances controlled land use decisions. See Board of County Comm'rs v. Snyder, 627 So. 2d 469, 472 (Fla. 1993). In the early years of land use zoning, both state and federal courts adopted a highly deferential standard of judicial review because these courts considered zoning decisions to be legislative in nature. Id. (citing Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); and City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941)). However, over time, Florida appellate courts increasingly became divided on whether

rezonings were "legislative" or "quasi-judicial" proceedings. Ultimately, in 1993 this Court in Snyder held that rezoning decisions are quasi-judicial in nature and, thus, subject to a strict scrutiny standard of review by certiorari. Id.

In particular, this Court in Snyder found that the Florida Legislature enacted the Growth Management Act (the "Act") in response to concerns that land use decisions were based on the "rank political influence" of the local electorate who were in attendance at the local hearing. See 627 So. 2d at 472-73. Because rezoning decisions, unlike decisions on large-scale amendments, are considered only at the local level before the local electorate, this Court held that the local government would have to present competent, substantial evidence supporting its decision to deny an application for rezoning where the landowner showed the application to be consistent with the comprehensive plan. Id. at 476. Thus, the basis of the decision in Snyder was the character of the hearing (local hearing similar to a judicial proceeding) and the possibility of political influence on the decision.

In 1986, the Florida Legislature adopted Laws 1986, Ch. 86-191, Section 10, to allow a future land use map reclassification for small-scale, residential developments of five (5) acres or less and small-scale, non-residential developments of three (3) acres or less. See Ch. 86-191, § 10, Laws of Fla. Before these small-scale development amendments could be approved, they had to be submitted

to the Department of Community Affairs for review.⁶ Id. However, in 1992, the Florida legislature streamlined the Department of Community Affairs' mandatory review and increased the allowable "small-scale" parcel to ten (10) acres for both residential and non-residential uses. Ch. 92-129, § 8, Laws of Fla. Critically, the primary motive for streamlining the Department of Community Affairs review and increasing the acreage size in 1992 was for the express purpose of eliminating the unnecessary delay and costs in approving projects subject to the Department of Community Affairs

⁶ The Department of Community Affairs is the lead state governmental agency in the comprehensive planning process. The Department's responsibilities include:

1. Pre-adoption review of local comprehensive plans for consistency with the state comprehensive plan and strategic regional policy plans;
2. Post-adoption "compliance determinations" for local comprehensive plans and plan amendments;
3. Adoption and implementation of rules governing contents of comprehensive plans and land development regulations, including concurrency management systems; and
4. Assurance that local governments implement their comprehensive plans through the adoption of land development regulations.

See generally Ch. 163, Fla. Stat (1997). Critically, as will be discussed infra, in the context of this Court's holding in Yusem, the Department of Community Affairs does not make post-adoption compliance determinations for small-scale amendments to a local government's comprehensive plan "unless the local government elects to have them subject to those requirements." See § 163.3187(1)(c)3., Fla. Stat. (1997) (emphasis added). The legislature clearly envisioned that local governments could opt in and have even small-scale amendments treated the same as large-scale amendments. A distinction between the handling of the two was clearly envisioned by the legislature.

review. See 1992 Florida Senate Staff Analysis and Economic Impact Statement for Bill No. CS/SB 1882; (P. Vol. I, Tab H, pp.5-8).

Finally, in 1995, less than two years after this Court decided Snyder, the Florida legislature eliminated the mandatory Department of Community Affairs review for small-scale amendments⁷ and implicitly stated that small-scale amendments concern policy application and not policy making by amending the statute to read, in pertinent part:

(c) [a] small-scale development amendment may be adopted only under the following conditions:

1. The proposed amendment involves a use of 10 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 a site-specific small scale development activity.

§ 163.3187(1)(c), Fla. Stat.(emphasis added). Therefore, presently under Section 163.3187(1)(c), Florida Statutes, a small-scale amendment cannot be adopted unless it is both fewer than 10 acres and does not change the goals, policies and objectives of the local

⁷ Section 163.3187(1)(c)3., Florida Statutes, reads, in pertinent part: "Small scale development amendments . . . require only one public hearing before the governing board, which shall be an adoption hearing . . . and are not subject to the requirements of s. 163.3184(3)-(6) unless the local government elects to have them subject to those requirements." (Emphasis added). Critically, Sections 163.3184(3)-(6) contain the integrated review process mandated for large-scale amendments to the Comprehensive Plan.

comprehensive plan. See id. Rather, the proposed small-scale amendment may only be adopted if it involves fewer than 10 acres and the request involves only a change to the future land use map (i.e., policy application). See id. Given these critical requirements and distinctions, Petitioners respectfully submit that decisions regarding small-scale development amendments are quasi-judicial under the reasoning of both Snyder and Yusem.

In Snyder, this Court, agreeing with the lower court, announced a three-factor test for determining whether local government review is legislative or quasi-judicial in nature:

[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 distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action. . . .

627 So. 2d at 474 (quoting Snyder, 595 So. 2d at 78). As such, under Snyder, a local government decision is quasi-judicial if: (1) it involves a site specific decision which will have a limited impact on the surrounding community; (2) the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing; and (3) the decision can be functionally viewed as policy application rather than policy making.

In the case of a small-scale amendment to the Comprehensive Plan, as stated above, the Florida legislature, less than two years after Snyder was decided, amended Section 163.3187(1)(c), Florida

Statutes, to track the above three Snyder requirements for classifying a decision of a local government as quasi-judicial. First, before a small-scale amendment can be adopted, the requested change has to involve site specific land of fewer than 10 acres (i.e., site specific with limited impact).⁸ See § 163.3187(1)(c)1., Fla. Stat. Second, as the Statement of the Case and Facts show, the decision in this case was contingent on a fact or facts arrived at from distinct alternatives presented at a hearing. Finally, not only can the small-scale amendment decision be functionally viewed as policy application rather than policy making, the Florida legislature has mandated that result. Specifically, as stated above, a small-scale amendment cannot be adopted unless it is shown that the amendment is consistent with the goals, policies and objectives of the comprehensive plan. See § 163.3187(1)(c)1.d., Fla. Stat. (1995). Once consistency is shown, as in the instant case,⁹ then the decision is one of pure policy application, not policy making, because the change requested

⁸ If the Florida Legislature finds, in the future, that a 10-acre site is not sufficiently limited or is overly limited, then the Florida Legislature can amend the statute.

⁹ Specifically, as is discussed in the Statement of the Case and Facts, supra, Petitioners, through the use of several experts and other evidence, were able to show that the requested land use map change was consistent with the goals and policies of the City's land use plan.

is only to the future land use map and not to the actual text of the comprehensive plan.¹⁰ Id.

Further, this Court's decision in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), supports the conclusion that decisions concerning the approval of a small-scale amendment are quasi-judicial, rather than legislative in nature. In Yusem, the landowner owned 54 acres that were part of a 900-acre tract with a land use allowing up to two units per acre. Id. at 1289-90. However, the future land use map restricted the 900-acre tract to one residential unit per two acres. Id. at 1290. As such, Yusem requested an amendment to the future land use map from "Rural Density" to "Estate Density" in order to obtain a density of two

¹⁰ One Circuit Court explained this critical distinction as follows:

The requested change presented by Petitioner in his case meets the requirements of a small-scale development activity. . . . It would appear that the requested change in the comprehensive plan made by the Petitioner was consistent with the stated policies of the comprehensive plan, would not have resulted in a change of the text of the comprehensive plan, and would be limited to change in the future land use designation on the future land use maps. . . . In as much as this change was implementation of stated policy of the plan and was specific in its intent, it appears to this court that this small-scale amendment was not the broad formulation of policy associated with the legislative decision. Rather, this small-scale amendment was the application of policy associated with quasi-judicial decisions.

Grondin v. City of Lake Wales, 5 Fla. L. Weekly Supp. 727, 728 (Fla. 10th Cir. Ct. 1998) (emphasis added).

units per acre. Id. Yusem also requested a re-zoning of his property from Agricultural to Residential. Id.

Initially, the Martin County Commission voted to begin the Chapter 163 amendment-adoption process by transmitting a copy of the proposed amendment to the Department of Community Affairs. Id. The Department of Community Affairs reviewed the data and recommended that Martin County either abandon the amendment or revise the data and analysis. Id. Upon reconsideration by the Martin County Commission, the proposed amendment was denied. Id. A petition for certiorari was filed in the Circuit Court, which quashed the denial, relying upon the Snyder District Court opinion and this Court's decision in City of Melbourne v. Puma, 630 So. 2d 1097 (Fla. 1994).¹¹ Id. at 1290-91. The Fourth District Court of Appeal concluded that Martin County's decision was subject to the "strict scrutiny" standard of review, but dismissed the petition on other grounds. Id. at 1290.

Upon review, this Court held that local government decisions regarding whether to approve an application for a large-scale amendment are legislative in nature and, thus, subject to a fairly debatable standard of review. Id. at 1293-94. However, in reaching this holding, not only did this Court expressly limit the

¹¹ In Puma, this Court accepted jurisdiction over a decision involving a rezoning from a low-density residential to a commercial classification. 630 So. 2d 1097. Ultimately, this Court remanded Puma to the Fifth District for further consideration in light of this Court's then recent opinion in Snyder. Id.

decision to large-scale amendments,¹² but the underlying rationale of Yusem reveals that a different standard of review is applicable to small-scale amendments.

Specifically, this Court in Yusem found that the county was required to evaluate the likely impact such amendments would have on the county's provision of local services, capital expenditures, and its overall plan for growth and further development of the surrounding area. Id. at 1294 (quoting Martin County v. Yusem, 664 So. 2d 976, 981 (Fla. 4th DCA 1995) (Pariente, J., dissenting)). In Yusem, the decision whether to allow the proposed amendment to the land use plan and then whether to adopt the amendment, involved considerations well beyond the landowner's 54 acres. Id. (quoting same). In contrast, there were no similar considerations in the instant case. The Respondent did not have to make this extensive evaluation in order to decide this issue. The decision was limited to the ± 1.7 acres and would be no more involved than a typical rezoning decision.¹³

Additionally, a small-scale amendment is distinguishable from a large-scale amendment because, as this Court recognized in Yusem, when a large-scale amendment is being considered, Sections 163.3184(3)-(6), Florida Statutes, require that after holding a public hearing that the local government transmit the proposed

¹² See Yusem, 690 So. 2d at 1293 n.6 (Fla. 1997).

¹³ See note 20, infra.

amendment to the state land planning agency, the appropriate regional planning council, the water management district, and the Department of Transportation. See § 163.3184(3), Fla. Stat. In contrast, Section 163.3187(1)(c)3., Florida Statutes, addressing small-scale amendments to the Comprehensive Plan, specifically states that the procedural requirements for small-scale amendments "are not subject to the requirements of Sections 163.3184(3)-(6) unless the local government elects to have them subject to those requirements." § 163.3187(1)(c)3., Fla. Stat. (emphasis added). Sections 163.3184(3)-(6), Florida Statutes, provide various and integrated levels of review; to wit: intergovernmental review, regional and county review and state land planning agency review. Because the Florida Legislature defined a small-scale amendment as excluding policy changes, the Florida Legislature decided that this integrated review process should not apply to small-scale amendments. See § 163.3187(1)(c)3., Fla. Stat.

This Court in Yusem relied on Chapter 163, part II, Florida Statutes, the Local Government Comprehensive Planning and Land Development Regulation Act (the "Act"), for its holding that large-scale amendments are legislative in nature. 690 So. 2d at 1294. Specifically, this Court stated that the Act provides a two-stage process for large-scale amendments to a Comprehensive Plan: transmittal and adoption. Id. If the local government transmits the proposed amendment to the Department of Community Affairs (the "Department"), the Department, after reviewing the amendment,

provides the local government with its objections, recommendations for modifications, and the comments of any other regional agencies. Id. (citing § 163.3184(4), Fla. Stat.). Then, the local government may: “(1) adopt the amendment; (2) adopt the amendment with changes; or (3) not adopt the amendment.” Id. (citing § 163.3184(7), Fla. Stat.).

If the local government adopts the amendment, the Department again reviews the amendment. Id. (citing § 163.3184(8), Fla. Stat.). If an amendment is found not to be in compliance with the Act, the State Comprehensive Plan, and the Department’s minimum criteria rule, then the matter is referred to the Administration Commission. Id. (citing §§ 163.3184(1)(b), (9)(b), (10)(b), Fla. Stat.). This Commission, which is composed of the Governor and the Cabinet, is then empowered to levy sanctions against a local government, including directing state agencies not to provide the local government with funding for future projects. Id. (citing § 163.3184(11)(a), Fla. Stat.). In Yusem, this Court concluded:

This integrated review process ensures that the policies and goals of the Act are followed. The strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its comprehensive plan, it is engaging in a policy decision. This is in contrast to a rezoning proceeding, which is only evaluated on the local level.

Id. (emphasis added). This is the precise rationale for this Court’s holding in Yusem, which mandates that a different standard of review be applied to small-scale amendments.

In contrast to the integrated review process required for large-scale amendments, small-scale amendments are not required to be reviewed by these various "levels of government." Rather, the Application proceeds immediately to the local hearing. See § 163.3187(1)(c)3., Fla. Stat. Therefore, local governments reviewing applications for small-scale amendments are not subject to the same strict oversight by various levels of government as they are with large-scale plan amendments.¹⁴ The judicial system

¹⁴ In the instant case, the Circuit Court recognized the critical distinction between the comprehensive, intergovernmental review of large-scale amendments and the absence of intergovernmental review for small-scale amendments, by stating:

Large scale amendments involve policy making by the local government and require several reviews at both the state and local government levels. § 163.3184(3) - (10), Fla. Stat. (1995). In contrast, small scale amendments are only reviewed at the local government level. As such, the proceedings involved in small scale amendments are almost identical to those for a rezoning, and they likewise involve policy application. See § 163.3187 (1)(c), Fla. Stat. (1995). The Florida Supreme Court, in Yusem, recognized that:

This integrated review process [for large scale comprehensive plan amendments] ensures that the policies and goals of the Act are followed. The strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its comprehensive plan, it is engaging in a policy decision. This is in contrast to a rezoning proceeding which is only evaluated on the local level.

Yusem, 690 So. 2d at 1294. In contrast to large scale comprehensive plan amendments, small scale comprehensive plan amendments, like requests for a rezoning, are only evaluated on the local level. Small

does not need to scrutinize a decision which has been thoroughly reviewed and scrutinized already, such as decisions made regarding large-scale amendments. Such thorough review of large-scale amendments is necessary because such amendments affect policy decisions ranging beyond the amendment itself. Because these decisions affect policy beyond the amendment itself, strict review is conducted by various levels of quasi-legislative agencies who are accountable to each other.

However, it is necessary to scrutinize a decision which is not protected by so many procedural safeguards and levels of legislative review. Especially where, as in the instant case, the local elected government can deny an application solely based upon the demands of the voting public without presenting its own expert testimony or evidence.¹⁵ It is submitted that the Legislature

scale comprehensive plan amendments, due to the fact that they are limited review proceedings, involve policy application rather than policy making. As a result, small scale comprehensive plan amendments, like rezonings, are quasi-judicial proceedings subject to strict scrutiny and the competent, substantial evidence standard of review. See Board of County Commissioners v. Snyder, 627 So. 2d 469, 474-475 (Fla. 1993). Therefore, this Court finds that the Respondent's decision is properly reviewable by certiorari and is subject to strict scrutiny.

(P. Vol. I, Tab J, pp.11-12).

¹⁵ Since the local government can elect to have its small-scale amendments subject to the extensive and integrated intergovernmental review pursuant to Section 163.3187(1)(c)3., Florida Statutes, it has the option of having its decisions subject to a legislative process. However, a local government should not be able to both elect not to have intergovernmental review and then

understood, in drafting Section 163.3187(1)(c)3., Florida Statutes, that review of small-scale amendments was a quasi-judicial process. The Respondent made clear, with or without evidence, it will make whatever arbitrary decision it wants. This type of decision-making, affecting the rights of only a few people, should be properly scrutinized by the judicial system.

Finally, there are additional strong policy reasons to require a strict scrutiny standard of review for small-scale amendments. Specifically, local boards that make planning and zoning decisions are composed of political electees and/or appointees. Therefore, they may be swayed by the opinions of their electorate. As such, decisions may be based solely on elected officials responding to their electorate. The legal requirement that these decisions be based on competent, substantial evidence is the only control by which these boards are prevented from being swayed by their electorate. In contrast, when a large-scale amendment is at issue, the various levels of government help control the process and

make arbitrary and baseless decisions behind the transparent veil of a "legislative judgment". Stated differently, a local government should not be able "to have its cake and eat it too." If the local government believes the small-scale amendment process should be legislative, then the local government can opt in to the legislative review process. In the instant case the Respondent clearly understood it was acting in its quasi judicial capacity, and in fact announced at the beginning of the hearing that it was conducting a "quasi-judicial" proceeding. (P. Vol. II, Tab Q, P.3) Furthermore, the hearings were held using a trial format involving each side's presentation of evidence, the right to cross examine and the right to argument.

prevent it from being arbitrary and based solely on a "popularity poll" or "neighborhoodism".¹⁶

Turning to the Fifth District's holding in Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998),¹⁷ and the decision by the First District in the instant case, these courts have fundamentally misconstrued the substantive and procedural differences between large and small-scale amendments. For example, the Court in Fleeman reasoned that the public adoption hearing, held pursuant to Section 163.3184(7), with all of the appendant limitations, restrictions, and review processes applicable to all comprehensive plans is indicative of legislative action. Id. at 1180. It is respectfully submitted that the Court in Fleeman is simply incorrect. Quasi-judicial decisions are also made in public hearings. Site-specific rezonings typically involve multiple public hearings and, at a minimum, include a first reading and second reading before adoption of the ordinance or resolution. As such, the Fleeman Court's reasoning that plan amendments require a public hearing, therefore making the decision "legislative", is

¹⁶ In fact, this Court in Snyder implied that neighborhoodism and popularity are not valid reasons to deny an application for rezoning. 627 So. 2d 469, 472-73.

¹⁷ As in the instant case, in Fleeman, the landowner petitioned for certiorari review of a decision by the City of St. Augustine, which such decision denied the adoption of a proposed small-scale amendment by the landowner. 728 So. 2d at 1179. The Fifth District held that the decision whether to adopt a proposed small-scale amendment is "legislative", and thus, these decisions are only reviewable by seeking a declaratory judgment, and not by certiorari review. Id. at 1180.

non-sequitur; and flies in the face of the mandated treatment of zoning issues by certiorari review.

Further, in apparent reliance on Yusem, both the First District and the Fleeman Court heavily justified their holdings that small-scale amendment requests are legislative decisions with rationales of convenience and certainty. For instance, the Court in Fleeman stated:

We cannot discern any good reason for the courts to treat small-parcel amendments differently than any other amendments or adoption of comprehensive land use plans. To do so would invite more uncertainty in this still unsettled area of law. How small must the parcel be? How many other people must be affected?

Id. Likewise the First District stated:

In addition, we discern from the language used by the court in the body of the Yusem opinion a clear intent to bring predictability to an area of the law in which confusion had 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.

(P. Vol. I, Tab L, p.7). While Petitioners agree that courts should promote certainty and clarity,¹⁸ these decisions create what the courts expressed concern about; to wit: the promotion of more

¹⁸ However, Petitioners respectfully assert that convenience and clarity should only be secondary concerns to a landowner's right to make productive use of its land. Furthermore, a policy of convenience and clarity should not trump a legislative judgment that decisions concerning small-scale amendments are an application of policy and thus subject to strict scrutiny.

uncertainty over the proper means to obtain approval of a small-scale amendment.

Critically, contrary to the Fifth District's interpretation of Section 163.3187, the Florida Legislature has answered how small a parcel must be in order to resort to a small-scale development amendment: ten acres or less. See § 163.3187(1)(c)1., Fla. Stat. Stated differently, the legislature has already determined what acreage size it considers to be a limited impact on surrounding communities and public policy.¹⁹ Further, given the clarity of Section 163.3187(1)(c), Florida Statutes, it is unclear why the Courts ruled that to hold that decisions concerning small-scale amendments are quasi-judicial would add to any uncertainty. Specifically, it is submitted that such a holding could not be any more clear for the courts to follow given the Yusem decision, and given the definitive requirements laid out by the legislature in defining what is necessary to adopt a small-scale amendment pursuant to Section 163.3187(1)(c), Florida Statutes. If the landowner applies for a large-scale amendment, the decision is subject to a fairly debatable standard of review; whereas, if the

¹⁹ Of course the legislature can change the acreage size if it believes that a smaller or larger parcel of land would be a sufficient limited impact on surrounding communities and public policy. However, currently the legislature has decided that ten (10) acres or fewer is sufficiently site specific, and, as such, constitutes a limited impact to surrounding landowners and public policy. Since it is within the legislature's authority to regulate this subject matter, it is respectfully submitted that general principles of separation of powers demand that the legislature not be "second guessed" by the City or the judiciary.

decision concerns a small-scale amendment, the decision is subject to judicial strict scrutiny. Where is the potential confusion? Why is this any more confusing than the identical standard used in rezoning cases? Petitioners respectfully submit there would be no confusion and that this argument is not a valid basis for ignoring the plain language of Section 163.3187(1)(c)1.d., Florida Statutes, which clearly states that the decision to adopt a small-scale amendment is policy application, not policy making.

Finally, and most importantly, it is respectfully submitted that both the Court in Fleeman and the First District in the instant case incorrectly relied on the rationale that because governmental policies may be involved, the decision making process is necessarily legislative. See 728 So. 2d at 1180; (P. Vol. I, Tab L, p.7) Simply because governmental policies may be involved does not automatically trigger a "legislative" or "quasi-legislative" label for the decision-making process local governments must undergo to arrive at a decision. If all that is required for a decision to be considered legislative is that the decision might concern or affect policy, then it is submitted that most, if not all, land use decisions made by a local government would be considered legislative decisions, including rezoning matters.²⁰ Rather, the critical factors for determining whether a

²⁰ Critically, even in a rezoning a local government's policies will be affected. This is necessarily true because rezonings do not occur in a "vacuum". Rather, identical to small-scale amendments, a rezoning must first be shown to be consistent

decision is legislative or quasi-judicial are the degree of impact to the policies of the local government, and whether the decision is being made by using already existing policy and comparing that policy to an existing set of facts. As stated in Snyder:

It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648 (Fla. 3d DCA 1982).^[21] Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy. [citation omitted]. In West Flagler Amusement Co. v.

with the local government's comprehensive plan. See Snyder, 627 So. 2d at 474. However, the critical distinctions made by Snyder in determining whether a decision is quasi-judicial or legislative in nature are the degree of impact on those policies and whether they are made by applying existing policy to an existing set of facts or whether the local government is recreating or making new policy. Id. Critically, small-scale amendments, like rezonings, have a very limited impact on the local government's policies, and the decision is made by applying existing policy to an existing set of facts. See § 163.3187(1)(c), Fla. Stat. Compare this to large-scale amendments where either the size of the property or the inconsistency of the proposed amendment with the comprehensive plan is going to cause a substantial impact to the policies of the local government.

²¹ Further, in Coral Reef Nurseries, the court stated:

The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning . . . contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses; and it is the existence of these safeguards which makes the hearing quasi-judicial in character and distinguishes it from one that is purely legislative.

410 So. 2d at 652-63 (comparing rezoning hearings to variance hearings).

State Racing Commission, 122 Fla. 222, 225, 165 So. 64, 65 (1935), we explained:

A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

627 So. 2d at 474 (emphasis added).

In the instant case, as part of its Comprehensive Plan, the City not only adopted goals, policies and objectives to guide decisions on "future" land use questions, but concurrently implemented the very same goals, objectives and policies as part of the City's land use plan.²² In other words, the City's policy formulation was already completed when Petitioners applied for the use change. The implementation section of the City's land use plan, in combination with the promulgated goals, objectives and policies, form the standards that must be applied to the question of reclassifying a specific parcel's use under Section 163.3187(1)(c), Florida Statutes. As stated previously, a small-scale amendment is not a text change. Rather, Section

²² See generally City of Jacksonville's Land Use Code (P. Vol. I, Tab I).

163.3187(1)(c)1.d. prohibits any text change in small-scale development amendments. Without any text change, what action is the local government taking in deciding whether to approve a small-scale amendment? The answer is self-evident: local government is comparing the proposed use change to the fixed goals, objectives, and policies in its comprehensive plan in deciding whether to grant or deny the small-scale amendment. In other words, it is clear that the local government is applying policy as Section 163.3187(1)(c)1.d. requires rather than making policy which Section 163.3187(1)(c)1.d. prohibits.²³ Therefore, it is submitted that the appropriate judicial standard of review for local government decisions concerning small-scale amendments is whether there is competent, substantial evidence to the support the decision. As such, Petitioners respectfully urge that the First District Court of Appeal's decision is erroneous and should be reversed.

II RESPONDENT'S DENIAL OF PETITIONERS' APPLICATION AND FAILURE TO APPROVE THE ORDINANCE ENACTING THE APPLICATION FOR A SMALL-SCALE AMENDMENT WAS NOT BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

²³ In sum, at the time the comprehensive plan was adopted, the City believed that the adopted goals and policies justified certain current and future land use designations. Over time, a change in circumstances or data (which was not anticipated by the City when adopting the comprehensive plan) may justify additional land use designations which are consistent with the goals and policies originally adopted by the City. These types of decisions do not alter or change policy; rather, these decisions are based on the application of existing policy to a set of facts and circumstances which did not exist and was not foreseeable at the time the policies were adopted.

The Respondent has failed to establish that its decision was based on competent, substantial evidence.²⁴ Critically, neither the Respondent nor the individuals opposing Petitioners' Application called a single expert, testifying witness, or proffered any evidence which could provide anything that would even remotely be considered as competent, substantial evidence.²⁵ (P. Vol. II, Tab Q). Respondent did not issue any findings of fact or make any statements as to the basis for its decision. (P. Vol. II, Tab Q). Although findings of fact are not, per se, required; competent,

²⁴ Substantial evidence has been described in De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957), as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred."

"Competent" is defined as:

Duly qualified; answering all requirements; having sufficient capacity, ability or authority; possessing the requisite physical, mental, natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit.

See BLACK'S LAW DICTIONARY 284 (6th ed. 1990).

As discussed below, and as the Circuit Court found, the evidence relied upon by the Respondent was neither substantial nor competent. As such, the First District's decision should be reversed.

²⁵ Thus, as will be discussed in Section III. Below, Respondent cannot even meet the "fairly debatable" standard which it fervently argues should apply. See Debes, 690 So. 2d at 701 n.4 (stating that when no relevant evidence is presented, the standard of review is irrelevant because the City's position is not even "fairly debatable"); see also note 26, infra (citing cases holding that public opinion testimony alone does not constitute competent, substantial evidence).

substantial evidence must be present to support Respondent's decision. Snyder, 627 So. 2d at 476.

Respondent, instead, relied strictly on the emotional remarks made by some of the public who attended the hearing in making its decision. (P. Vol. II, Tab Q). This type of consideration is merely a popularity contest leading to an arbitrary decision wherein significant policy concerns are not at issue. Florida law clearly mandates that the mere personal opinions of nearby homeowners and residents do not constitute the competent, substantial evidence upon which Respondent may base its decision to deny Petitioners' Application.²⁶ See Pollard v. Palm Beach County, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990) (holding that the opinions of residents are not competent, substantial evidence); Conetta v. City of Sarasota, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981) (holding that the commission, which based its decision primarily on the sentiments of other residents of the area, should be reversed as such decision amounted to nothing more than a popularity poll of the neighborhood); and City of Apopka v. Orange County, 299 So. 2d

²⁶ While some courts have considered the opinion of lay testimony, it is only under limited circumstances and more importantly, only in conjunction with competent, substantial evidence. See, e.g., Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593, 596 (Fla. 5th DCA 1991) (holding that opinions of neighbors by themselves are insufficient to support a denial of a proposed development); BML Investments v. City of Casselberry, 476 So. 2d 713, 715 (Fla. 5th DCA 1985) (stating that layperson opinions in and of themselves are insufficient to support the denial).

657, 660 (Fla. 4th DCA 1974) (holding that opinions of residents are not competent substantial evidence).

In Apopka, the commissioners relied on the testimony of an abutting landowner, the testimony of other owners within a two to five mile radius, a petition signed by two-hundred members of the relevant association, and approximately thirty-five people in attendance at the hearing who objected but did not testify. 299 So. 2d at 659. Since there was no testimony and only public opinion the Court stated that the quasi-judicial functions of zoning should not be controlled or unduly influenced by the opinions and desires expressed by interested persons at public hearings. Id. (citation omitted). The court went on to find that the objections of the large number of residents is not a sound basis for denial of a permit. Id. (citing Anderson, American Law of Zoning Vol. 3, s. 15.27, pp. 155-156). The Apopka Court stated that the evidence in opposition to the request for an exception consisted mainly of laypersons' opinions which were unsubstantiated by any competent facts. Id. at 660. The Apopka Court therefore found that there was no competent, substantial evidence to support the board's ruling and thus reversed and remanded the case. Id.

Likewise, in Pollard v. Palm Beach County, 560 So. 2d 1358, 1359 (Fla. 4th DCA 1990), a special exception to the zoning in a residential area was sought in order to establish an adult congregate living facility. Both the County Zoning Department and the County Planning Commission approved the exception based upon

documentary evidence and expert opinion. Id. However, in the public hearing before the county commission, various neighbors expressed their opinion that the proposed use would cause traffic problems, light and noise pollution, and would generally have an unfavorable impact on the area. Id. As a result, the county commission denied the application. The Circuit Court denied certiorari review. Id. The Fourth District Court of Appeals reversed the denial, finding that there was no competent, substantial evidence to support the commission's denial. Id. at 1360. The District Court found that the Circuit Court: overlooked the law which states that a special exception is permitted absent a determination that the requested use would adversely affect the public interest; and also overlooked the law that the opinions of residents are not factual evidence and not a sound basis for the denial of a zoning application. Id.

In the instant case, Petitioners presented evidence and the testimony of four prestigious experts in order to fully meet their burden to establish that they were entitled to the small-scale amendment to the Comprehensive Plan.²⁷ See Snyder, 627 So. 2d at 476

²⁷ Specifically, as stated in the Statement of the Case and Facts, Petitioners admitted into evidence a Technical Report prepared by David Van Horn, (P. Vol. I, Tab D), an Office Market Analysis prepared by David Van Horn, (P. Vol. II, Tab S), an aerial photograph of the subject site, (P. Vol. II, Tab T), a traffic report prepared by James Robinson, (P. Vol. II, Tab U), and an appraisal report prepared by Duncan Ennis (P. Vol. II, Tab V). The testimony of three additional expert witnesses was presented, to wit: Mr. Van Horn; Mr. Robinson; and Mr. Ennis. Respondent presented no expert testimony.

(holding that once the landowner carries his/her burden of showing that the proposal is consistent with the Comprehensive Plan and complies with all procedural requirements of the zoning ordinance, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose). In contrast, the only testimony that was presented opposing the subject change was the testimony of the residents in the area. (P. Vol. II, Tab Q). Despite Respondent's apparent predetermined intent to deny Petitioners' application, Respondent had absolutely no evidence of its own to present during the hearing. Although there was one resident who claimed to be an appraiser, he did not state that he made any sort of market analysis concerning the subject property. (P. Vol. II, Tab Q, p.85-86). Rather, Respondent claims, without any kind of credible support in the record, that the City, through its Planning Commission staff and City Council, all recognized that the current plan was sufficient and thus should not be amended. This statement is nothing more than a post-hoc rationalization of the City's decision which does not constitute competent, substantial evidence.²⁸ See Burlington Truck Lines, Inc. v. U.S.,

²⁸ Further, it is worth noting that the Chairman of the City Council recognized that more than lay testimony was needed to substantiate the City's position when he stated:

if the city council tonight votes no on this ordinance, we're probably facing a lawsuit by these individuals against the City, and in order to defend that lawsuit it would be to the City's advantage if there is some

371 U.S. 156, 246 (1962) (holding that post-hoc rationalizations are not substantial evidence).

Therefore, since the City fully relied upon nothing more than the opinions of residents and can only justify its decision through post-hoc rationalizations, it is submitted that this Court should reverse the First District's decision and reinstate the Circuit Court's Order because Respondent's denial of Petitioners' Application and the failure to approve the ordinance enacting the Application for a small-scale amendment was not based on competent, substantial evidence.

III. RESPONDENT'S DENIAL OF PETITIONERS' APPLICATION AND FAILURE TO APPROVE THE ORDINANCE ENACTING THE APPLICATION FOR THE SMALL-SCALE AMENDMENT IS NOT "FAIRLY DEBATABLE."

Moreover, even if this Court finds that the correct judicial standard of review for decisions concerning small-scale amendments is whether the local government's decision is fairly debatable, it is clear that Respondent's decision to deny Petitioners' Application is not even fairly debatable. In addition to the

expert testimony from the opponents to this, and I'm speaking about something other than private opinion and emotion and that sort of thing, someone who can come forward and tell us, for instance, a real estate appraiser of some sort, for the opponents, who says that the property values in the south end will be decreased and so forth. . . .

But without that, without some sort of expert testimony which a judge can view as evidence, we're going to lose the lawsuit, and I'll tell you that right now. . . .

(P. Vol. II, Tab Q, pp.6-7).

holding of the Circuit Court that Respondent's denial of Petitioners' Application and failure to approve the ordinance enacting the Application for the small-scale amendment is not supported by competent, substantial evidence, the Circuit Court's Order also stated:

Further, even if this Court applied the fairly debatable standard that is applicable when large scale amendments are denied, the Respondent's denial of the Petitioners' Application would still be improper. Since there is no basis, other than the unsubstantial opinion testimony of the members of the public who were present at the hearing, for the Respondent's denial of the Application, the Respondent's denial was unreasonable. There was no evidentiary basis for the Respondent's decision. Therefore, based on this Court's review of the record and the applicable case law, even under the less stringent fairly debatable standard, this Court would find Respondent's denial of the Application was improper.

(P. Vol. I, Tab J, pp.17-18).

In Debes v. City of Key West, 690 So. 2d 700 (Fla. 3d DCA 1997), the issue before the Monroe County Circuit Court was whether the city commission's denial of an application to amend the City of Key West's future land use map from medium density residential to commercial general was improper. The city argued that the denial was supported by competent, substantial evidence. Id. at 701. Further, the city argued that to the extent the denial was not supported by competent, substantial evidence, the denial was "fairly debatable" in accordance with Yusem. Id. The Third District in Debes, held that denying the application solely on fears of increased traffic and a desire to promote affordable

housing was not competent, substantial evidence. Id. at 701-02.

Moreover, the Third District stated:

While we agree that Snyder provides the appropriate standard of review, [citations omitted], the issue is not determinative or even important in our consideration of the case. As we suspect is very often the case, the application of any possible formulation of the showing necessary either to support or to overturn a local government's decision of the present kind, including the "fairly debatable" standard deemed appropriate in Martin County v. Yusem [citations omitted], would yield the same result.

Id. at 701 n.4.

In the instant case, as discussed in Section II., supra, the City relied upon nothing more than the opinions of residents and can only justify its decision through post-hoc rationalizations and not any expert, testifying witness, or offer any evidence. (P. Vol. II, Tab Q). Therefore, respectfully, this Court should reverse the First District's decision in accordance with Debes because the City's denial of Petitioners' Application and failure to approve the ordinance enacting the application for a small-scale amendment is not even "fairly debatable".

IV. THE DISTRICT COURT ERRED BY REVERSING THE CIRCUIT COURT BECAUSE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.030(b)(2)(B), ITS REVIEW WAS LIMITED TO DETERMINING WHETHER THE CIRCUIT COURT AFFORDED PROCEDURAL DUE PROCESS AND WHETHER THE CIRCUIT COURT FAILED TO FOLLOW A CLEARLY ESTABLISHED PRINCIPLE OF LAW WHICH RESULTS IN A MISCARRIAGE OF JUSTICE.

In Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995), this Court discussed and analyzed the certiorari standard of review of a Circuit Court's Order under Rule 9.030(b)(2)(B), Florida Rules of Appellate Procedure. The underlying facts in Heggs concerned a final judgment of eviction entered by a county court which was appealed to the Circuit Court. Id. at 525. On appeal, the Polk County Circuit Court reversed the county court's judgment. Id. The Plaintiff, Haines City Community Development, then sought common-law certiorari review of the Circuit Court's order in the Second District Court of Appeal. Id. The Second District denied the petition upon the authority of Combs v. State, 436 So. 2d 93 (Fla. 1983). Id. On further appeal, this Court held that a District Court should review a circuit court's decision to see if due process was afforded²⁹ or whether the circuit court's order departed from an essential and clearly established principle of law so seriously that upholding the departure would result in a miscarriage of justice.³⁰ Id.

²⁹ Neither Petitioners nor Respondent argued that due process was denied by the Circuit Court. In fact, even a cursory review of the records will demonstrate the Respondent was afforded full due process.

³⁰ This Court in Heggs further held that the standard of review is the same for reviewing appeals to the Circuit Court of county court decisions and for reviewing appeals to the Circuit Court of administrative proceedings. Id. at 530. Specifically, this Court stated: "we can see no justifiable reason for adopting different standards for district court review in such cases." Id.

In so holding, this Court in Heggs cited several cases which explain the nature of the limited review. For instance, this Court agreed with the following statement:

The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice.

Id. at 527 (quoting Jones v. State, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring)) (emphasis added). Likewise, this Court in Heggs quoted the following from the First District:

Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void.

Id. at 527 (quoting State v. Smith, 118 So. 2d 792 (Fla. 1st DCA 1960)) (emphasis added). This Court in Heggs also quoted the following excerpt from one of its earlier opinions:

In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of [a] clearly established principle of law resulting in a miscarriage of justice.

Id. at 528 (quoting Combs v. State, 436 So. 2d 93 (Fla. 1983)) (emphasis added). Finally, this Court in Heggs stated that the District Court's opinion was an "excellent example" of the correct

application of the limited standard of review. Id. at 531. The District Court's opinion stated, in part:

Thus, we are unable to conclude that this is one of "those few extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected."

Haines City Community Dev. v. Heggs, 647 So. 2d 855, 856 (Fla. 2d DCA 1994) (quoting Combs, 436 So. 2d at 95) (emphasis added).

In the instant case, even if this Court were to hold that the Circuit Court should not have applied a strict scrutiny standard through certiorari review, the error, if any, would not rise to the level of "a violation of [a] clearly established principle of law which results in a miscarriage of justice." See Combs v. State, 436 So. 2d 93 (Fla. 1983).

At the time the Circuit Court made its decision, the only applicable legal authority was Yusem, Snyder, Debes and Sections 163.3184-3187, Florida Statutes. As explained more fully above, all existing legal authority supported the Circuit Court's decision. In fact, the Fleeman decision (which was rendered after the Circuit Court's decision in the instant case) expressly found that its decision conflicted with Debes and certified the conflict. As a result of the fact that all then existing legal authority supported the Circuit Court's decision, the Circuit Court did not violate a clearly established principle of law.

In particular, it was proper for the Circuit Court to rely on Snyder because the type of hearing for small-scale amendments is

similar to the type of hearing described in Snyder for rezonings. Specifically, the small-scale amendment hearing (which is similar to a rezoning hearing) contains safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence and the right to cross-examine adverse witnesses. As such, according to Snyder and as acknowledged by the Respondent at the local hearing in this case, the hearing on whether to grant an application for a small-scale amendment is quasi-judicial in nature subject to strict scrutiny upon judicial review. (P. Vol. II, Tab Q, p.3).

Moreover, consideration of a small-scale amendment is policy application and not policy making. A comprehensive plan is a set of written policies based on then-existing data. Based on the written policies and the existing data, a future land use map is prepared which identifies those land use designations which are consistent with the policies set forth in the text of the plan. As recognized by Respondent's Land Development Code and Section 163.3187(1)(d), Florida Statutes, a change in previously existing data or a change in circumstances which was not foreseen at the time that the Plan was adopted may justify an additional land use designation which is consistent with the already adopted and existing policies. By definition, a small-scale amendment is not an amendment of the text or policies of the Plan. As such, as recognized by the Florida Legislature in Section 163.3187(1)(d), a small-scale amendment is only an application of existing policy

which can and should be considered in a quasi-judicial proceeding. Thus, Petitioners believe that the Circuit Court, in rendering its decision, properly considered and applied relevant legislation.

Further, the Circuit Court's decision is consistent with this Court's rationale in Yusem. As stated in Section I. above, this Court in Yusem recognized that a decision which is only evaluated on the local level is different from a decision subject to the strict oversight on various levels of government.³¹ 690 So. 2d at 1294. The Circuit Court correctly found that a small-scale amendment decision is only evaluated on the local level and is not subject to strict oversight on several levels of government.³²

³¹ Specifically, this Court stated as its basis for its holding in Yusem:

This integrated review process ensures that the policies and goals of the Act are followed. The strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its Comprehensive Plan, it is engaging in a policy decision. This is in contrast to a rezoning proceeding, which is only evaluated at the local level.

Yusem, 690 So. 2d at 1294 (emphasis added).

³² Of course, a local government may opt in to the more integrated review process if it desires to make the small-scale amendment process legislative in nature. See § 163.3187(1)(c)3., Fla. Stat. However, the Respondent did not opt into the more integrated review process, and in fact at all times throughout hearings and presentation of witnesses, proceeded as a quasi-judicial proceeding. Unless a local government opts in to the more integrated review process, land use decisions will be made by a popularity poll and neighborhoodism without strict scrutiny upon judicial review. Thus, unless the local government opts in to the integrated review process, the concerns addressed in Snyder in finding pure local government decisions subject to strict scrutiny

Thus, Petitioners believe that the Circuit Court properly applied the rationale of this Court set forth in Yusem.

Since the Circuit Court's decision was in accord with the only circuit court decision which existed at that time, it should be affirmed in strict compliance with the long established jurisprudence regarding appeals from these types of actions. Although the Debes opinion is not a model of clarity, it is clear after a strict review of the facts that the facts in Debes concerned a small-scale amendment and that the Third District found strict scrutiny to be the proper standard of review. Thus, the Circuit Court's decision is consistent with the holding of Debes.

It is respectfully submitted that under the appropriate standard of review issue alone, the Circuit Court's decision must be affirmed. Anything other than a reversal of the First District's opinion and a reinstatement of the Circuit Court's decision would essentially destroy years of appellate jurisprudence and create great uncertainty and confusion in this area of appellate law.

In sum, because the Circuit Court's decision was consistent with all applicable legal authority existing at the time of its decision, it was improper for the First District to reverse the Circuit Court's Order. As a result, the First District's Order should be reversed.

upon judicial review will control land use decisions.

Conclusion

For all of the reasons set forth above, the proper standard for judicial review of a small-scale amendment to the Comprehensive Plan is competent, substantial evidence upon petition for certiorari. Because the Circuit Court did not misconstrue existing law and because the First District erroneously found that small-scale amendment decisions are subject to a fairly debatable standard of review, the First District's Order should be reversed.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of Petitioners' Initial Brief On The Merits was typed using Courier, 12 point, font, and was fully justified. A three and a half inch floppy disk with a copy of Petitioners' Initial Brief On The Merits has been furnished to the Supreme Court of Florida.

Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Stephen Stratford, Esquire, 1301 Riverplace

Boulevard, Suite 1638, Jacksonville, Florida 32207, and to William S. Graessle, Esquire, 219 Newnan Street, 4th Floor, Jacksonville, Florida 32202, via regular United States Mail on June 28, 1999.

Attorney