IN THE SUPREME COURT OF FLORIDA

VICKI MINNAUGH and
ROBERT MINNAUGH,

Petitioners,

vs.

Case No. SC00-875
4th DCA Case No. 4D99-0751

COUNTY COMMISSION OF
BROWARD COUNTY,

Respondents.
_____/

AMICUS CURIAE BRIEF OF 1000 FRIENDS OF FLORIDA, INC. and THE FLORIDA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT, COUNTY COMMISSION OF BROWARD COUNTY.

Discretionary Proceeding to Review a Decision of the Fourth District Court of Appeal
Lower Case No. 4D99-0751.

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Counsel for Amicus Curiae certify that the Time New Roman 14 point type size and style is being used in this brief.

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INTRODUCTION

Amicus curiae, 1000 Friends of Florida, Inc. and the Florida Chapter of the American Planning Association are growth management advocacy groups whose charge is to monitor the implementation of the state's growth management laws. 1000 Friends of Florida (1000 Friends) and the Florida Chapter of the American Planning Association (APA) file this brief in support of the Respondent, County Commission of Broward County.

The Fourth District Court of Appeal has certified the following question to this Court.[1]

> 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?

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[1] Several courts have certified this same question. Minnaugh v. Broward County, 752 So.2d 1263, (4th DCA 1999), Palm Springs Gen. Hosp., Inc. v. City of Hialeah Gardens, 740 So. 2d 596 (Fla. 3d DCA 1999), City of Jacksonville Beach v. Coastal Dev. of N. Florida, Inc., 730 So. 2d 792 (Fla. 1st DCA 1999), rev. granted, 744 So. 2d 453 (Fla. 1999), Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178 (Fla. 5th DCA 1998), and Poland v. City of Jacksonville, et al., 743 So.2d 1176 (Fla. 1st DCA 1999). Apparently, this Court has only accepted jurisdiction in Minnaugh and Jacksonville Beach.

In answering the certified question, 1000 Friends and APA will take no position on whether the County should have approved the particular plan amendment at issue. The primary concern to amicus curia is the process to review a local government's decision not to approve a small scale comprehensive plan amendment. Consequently, 1000 Friends and APA will not address the substance of the particular development being proposed, nor do they intend to focus on the particular evidentiary standard of proof that should be applied by the circuit courts.

STATEMENT OF THE CASE AND OF THE FACTS

1000 Friends of Florida, Inc. (1000 Friends) and the Florida Chapter of the American Planning Association (APA) adopt the statement of the case and of the facts set forth in Broward County's Answer Brief.

SUMMARY OF ARGUMENT

The 4th District Court of Appeal properly construed this Court's opinions in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993), and Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), to conclude that small scale plan amendments processed under Section 163.3187(1)(c), Fla. Stat. (1998), are legislative and not quasi-judicial in nature.

There are significant logical, practical and policy reasons to conclude that all small scale plan amendments are legislative acts. To hold otherwise and conclude that small scale plan amendments are quasi-judicial in nature would impose unreasonable restrictions on the ability of the public to affect the planning process, which is contrary to the spirit and intent of the Growth Management Act, Chapter 163, Part II, Fla. Stat. (1998).

This Court should adopt a "bright-line" rule that decisions of local governments on all types of comprehensive plan amendments are legislative in nature. Therefore, a decision to deny a request for a plan amendment is subject to de novo review in circuit court upon the filing of a compliant for declaratory and injunctive relief.

ARGUMENT.
ALL LOCAL GOVERNMENT DECISIONS TO DENY SMALL SCALE PLAN AMENDMENTS ARE LEGISLATIVE IN NATURE.

Petitioners argue that a decision by a local government to deny a request for a small scale plan amendment, processed under Section 163.3187(1)(c), Fla. Stat. (1998), is a quasi-judicial act. Petitioners apply the functional analysis test adopted by this Court in Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993), to conclude that local government decisions to deny small scale plan amendments are quasi-judicial acts, subject to review upon the issuance of a writ of certiorari. Petitioners claim that small scale plan amendments are an application of policy and not policy formulation. They also submit that small scale plan amendments are not legislative, because they are considered at quasi-judicial-like hearings before the local government. Finally, Petitioners argue that small scale amendments are quasi-judicial in nature, because they are not subject to the same type of integrated review process and state oversight applied to other types of plan amendments.

To begin, 1000 Friends and APA read this Court's decision in Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), to properly reject the use of Snyder's "functional analysis test" for plan amendments, as opposed to just decisions on requests for development orders like rezonings. Moreover, there are logical, practical and policy reasons to reject the Petitioners' arguments and conclude that all local government decisions to deny requests for small scale comprehensive plan amendments are legislative acts. Thus, decisions on a request for a plan amendment are subject judicial review, if at all, in an original action for declaratory and injunctive relief filed by the developer.[2]

A. The logical reasons. The Petitioners ask this Court to draw a "bright line" at Section 163.3187(1)(c) Fla. Stat. (1998), and there forever distinguish quasi-judicial plan amendments from plan amendments that are legislative in nature.[3] This argument is illogical for several reasons. First, not all small scale plan amendments are similarly treated under the Growth Management Act. Section 163.3187(1)(c), Fla. Stat. (1998), only authorizes the filing of an application for a small scale amendment in certain, limited instances.

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[2] It is important to realize that the issue on appeal is only relevant to decisions of a local government that deny an application for a small scale amendment. If the local government were to grant the amendment, it would be reviewed pursuant to the administrative procedures set forth in Section 163.3187(3), Fla. Stat. (1998), in a de novo administrative proceeding.

[3] It should be remembered that it was a proposed amendment to the Future Land Use Map that was at issue in Martin County v. Yusem.

The definition of a small scale plan amendment, and more importantly perhaps its size, is subject to the whim of the Legislature. For the present time anyway, a small scale amendment must be less than 10 acres.[4] However, there are several caveats to this definition. The amendment must not add to a total, cumulative amount of 120 acres in certain areas like urban infill areas and charter counties, nor exceed 80 acres other local governments not meeting these criteria. A small scale amendment may not be processed for a parcel of land that was granted a plan change within the previous 12 months, nor on land located within 200 feet of land owned by the same person who received a plan amendment in the previous year. A small scale amendment cannot be located within an area of critical state concern and a small scale amendment cannot be processed under this section if it involves a request for more than 10 residential units per acre, unless it is within a

[4] The 10 acre size is a creature of legislative whim. Originally, small scale amendments were 5 acres or less. They were later increased to 10 acres for residential and 5 acres for commercial uses. This past legislative session there were at least 14 versions of bills filed to modify the small scale amendment process. Early versions of HB 139 would have increased the small scale amendment to 99 acres. At one time versions of HB 2335 and SB 238 proposed that small scale amendments be less than 40 acres. Later this was reduced to 20 acres in CS/HB 2335. HB 1797 allowed small scale amendments to be adopted more than twice a year if they involved affordable housing in the Florida Keys Area of Critical State Concern, where they were previously not available. See also HB 2095 SB 324 and SB 2682. HB 1951 would have created "rural activity centers" and allowed up to 120 acres of small scale amendments to be adopted in those places each year. Currently only 80 acres of small scale amendments may be allowed in rural areas. See also CS/SB 1934, SB 1078, and SB 1438. There were bills to create a study commission that would have reviewed the effectiveness of small scale amendment program. See CS/SB 758 and HB 693. Finally, the small scale amendment issue may be addressed in the coming year by a study commission created by the Governor in Executive Order 2000-196.

specified area like an urban infill area.[5] Given these unrelated statutory preconditions to the use of Section 163.3187(1)(c), Fla. Stat. (1998), it does not seem logical to focus on this statutory provision as the place to draw the line between legislative and quasi-judicial plan amendments.

Moreover, the same small scale amendments that could be processed under Section 163.3187(1)(c), Fla. Stat. (1998), can also be processed with a package of large scale plan amendments pursuant to Section 163.3184, Fla. Stat. (1998), in which case it will be reviewed by the Department of Community Affairs. There it will be subject to the "integrated state review" outlined in Snyder. Therefore, some small scale plan amendments can be reviewed by the Department and some not. What is more important, the decision of which procedure to use is solely within the discretion of the developer or the local government.[6] Once again, to focus on the subsection of Chapter 163 used to process a small scale plan amendment does not seem to be a logical way to distinguish legislative from quasi-judicial acts.

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[5] Section 163.3187(1)(c), Fla. Stat. (1998).

[6] To save money on the publication of notice in the newspaper, many local governments include small scale amendments in the normal amendment cycle, which can occur only two times a year.

Snyder developed a "functional analysis" test to help courts differentiate between legislative and quasi-judicial rezonings. In Yusem, this Court correctly refused to apply this test to plan amendments, even for plan amendments that involved a specific parcel of land on the Future Land Use Map. This Court correctly justified this position reasoning that plan amendments necessarily involve planning considerations that impact areas well beyond the borders of the particular parcel at issue. 1000 Friends and APA believe that the same reasoning applied by this Court in Yusem, which notably also involved an amendment to the Future Land Use Map, controls the small scale amendment issue in this case.

The functional analysis test is very subjective. In the end, it may tends to generate more confusion and litigation than it perhaps avoids. What one person may feel affects "a large portion of the public", might be totally different from what someone else might conclude. Moreover, decisions that are considered "contingent on a fact or facts arrived at from distinct alternatives presented at a hearing," or which "can be functionally viewed as policy application, rather than policy setting" are likewise subjective in nature.

The functional analysis test depends in large part on the particular predilections of the person making the analysis. For example, consider the definition of "policy," which is perhaps the most important aspect of the functional test. Clearly the Future Land Use Map (FLUM) itself is policy. No one would argue that the initial adoption of the FLUM did not involve the development of policy.[7] Therefore, it is simply not reasonable for the Petitioners to conclude that policy is limited to the specific goals, objectives and policies contained in the plan. What can be more imbued with legislative policy than the decision of a local government to limit the types of land uses a property owner is entitled to develop under the comprehensive plan and identify this on the FLUM?[8]

Thus, if one were to ignore the recommendation to jettison the functional analysis test for the moment and apply it in this case, one would have to conclude that any amendment to the future land use map, no matter how small, must be viewed as legislative in nature precisely because it necessarily involves a change in policy reflected in the map itself.

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[7] The "policy of development", might be more a appropriate moniker.

[8] It must be remembered that the Petitioners wanted to use their land for a use that was not authorized by the Broward County plan. This is why they had to amend to Future Land Use Map from agriculture to employment uses. Snyder assumed that rezonings would be "consistent" with the plan. Given that this was not the case below, Petitioners should not prevail under any interpretation of Snyder.

Justice Pariente recognized the importance of the Future Land Use Map in her landmark dissent in Martin County v. Yusem, 664 So. 2d 976, (Fla. 4th DCA 1995). She clearly saw that the Future Land Use Map was policy when she wrote:

> In contrast to the rezonings at issue in Snyder, the review of the proposed amendment here required the County to engage in policy reformulation of its comprehensive plan and to determine whether it now desired to retreat from the policies embodied in its future land use map for the orderly development of the County's future growth. The county was required to evaluate the likely impact such amendment would have on the county's provision of local services, capital expenditures, and its overall plan for the managed growth and future development of the surrounding area. The decision whether to allow the proposed amendment to the land use plan to proceed to the DCA for its review and then whether to adopt the amendment involved considerations well beyond landowner's 54 acres. Id at 981. (Emphasis added).

After adopting Justice Pariente's reasoning in Yusem, this Court also reflected on the importance of the Future Land Use Map. It recognized that the Future Land Use Element "must contain both a future land use map and goals, policies and measurable objectives to guide future land use decisions." Id at 1292.

The court in City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 730 So.2d 792 (Fla. 5th DCA 1999), rev. granted, 744 So.2d 2d 453 (Fla. 1999), also understood the integrated nature of the comprehensive plan. In that case, the court explained how an amendment to the future land use map could reverberate throughout the rest of the plan as follows:

> It seems to us that all comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application. 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. Id. (Emphasis added).

Likewise, the court in Fleeman v. City of St. Augustine, 728 So.2d 792 (Fla. 1st DCA 1999), appreciated the link between the Future Land Use Map and the overall planning process. This is seen in how it characterized the issue on appeal, stating the "question being asked is whether to change the plan – a matter of policy consigned to the discretion of the governing body." Fleeman at page 1180. It is telling that the court did not mention the fact that Fleeman had asked for a map amendment.

Finally, logic compels the conclusion that any amendment to a legislatively adopted statement of general policy should itself be legislative in nature. In adopting this syllogism, Justice Pariente quoted from a law review article written by the undersigned, which in all modesty is still compelling reasoning.

> Amendments to a legislatively adopted statement of general policy are legislative acts because comprehensive plans are policy-setting documents of general applicability. Even if the comprehensive plan amendment consists of an amendment to the comprehensive plan's future land use map which is applicable only to a single tract of land, the amendment should be deemed legislative. The future land use map alone does not determine or control the uses which can be made of a particular piece of land. Rather, the comprehensive plan as a whole, consists of legislative policies that must be applied to determine what uses can be made of a specific tract of land.[9]

Section 163.3177(6), Fla. Stat. (1998), requires the adoption of a future land use map designating proposed future land uses. Moreover, the Future Land Use Map is supposed to be "internally consistent" with and further the rest of the plan, and therefore reflect the goals, objectives and policies of the rest of the elements of the plan, such as the conservation element, the transportation element, or the capital improvements element.[10] Notably the future land use map is supposed to designate land for various future land uses that will be needed to serve future population

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[9] Thomas G. Pelham, "Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement", 9 J. Land Use & Envtl. L. 243, 299-300 (1994). The logical principle that if the adoption of the map is legislative then its amendment must be legislative was first announced by Judge Stone's concurring opinion in Section 28 Partnership v. Martin County, 642 So.2d 609, 613 (4th DCA 1993)(there is no reason to treat a county's decision rejecting a proposed modification of a previously adopted land use plan as any less legislative in nature than the decision initially adopting the plan). This provision was quoted by this Court in Yusem at 1294.

[10] Section 163.3177(2), Fla. Stat. (1998), Section 163.3187(2), Fla. Stat. (1998)..

growth. This planning concept is called the "allocation" of land uses.[11] Theoretically at least, the land uses shown on the future land use map should provide for the various types of land uses, i.e. residential, commercial, and industrial land uses, "needed" to serve future population growth. Moreover, as recognized by the Department of Community Affairs, the total amount of the various types of land uses shown on the Future Land Use Map should not be "overallocated" to any great extreme.[12] For example, a local government should not have more residentially-designated land than it needs. Thus, the map's connection to the rest of the plan compels its legislative nature.

Petitioners make much of the fact that a small scale plan amendment processed under Section 163.3187(1)(c), is reviewed locally and is not subject to "state oversight." This is simply not true. Admittedly the small scale amendment process set forth in Section 163.3187, is somewhat different from the administrative process set forth in Section 163.3184, which governs other types of plan amendments. However, it is not logical to conclude that this means that small scale amendments are quasi-judicial and not legislative in nature.

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[11] See, Department of Community Affairs, et al. v. Lee County, et al, DOAH Case No. 95-0098(Final Agency Order 1996).

[12] "Expanding the Overallocation of Land Use Catagories", Community Planning, Department of Community Affairs (June 1995).

Small scale plan amendments are still measured by the same rules and statutes applied to large scale amendments to determine whether they are "in compliance."[13] Moreover, just like all other types of plan amendments, a small scale amendment must be adopted at a public hearing, where "affected persons," including "persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review" may appear, and thus establish "standing" to challenge the amendment.

The statutory standing to challenge plan amendments is broader than the standing required by citizens to challenge rezoning decisions.[14] Thus, to hold that small scale plan amendment hearings are quasi-juridical will inevitably confuse these rules of standing and create more litigation. For example, consider whether a person having statutory standing to challenge the approval of small scale plan amendments, also has standing to intervene in a certiorari proceeding brought by a developer whose application was denied?

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[13] In compliance is defined at Section 163.3184(1)(b), Fla. Stat. (1998), to mean "consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code.. ."

[14] Section 163.3184(1)(a), Fla. Stat. (1998). See, Putnam County Environmental Council v. Putnam County, 757 So.2d 590 (Fla. 5th DCA 2000), Educational Development Center, Inc. v. Palm Beach County, 751 So.2d 621 (Fla. 4th DCA 1999). Contra, Renard v. Dade County, 261 So.2d 832 (Fla. 1972).

In addition, if a small scale amendment is adopted under Section 163.3187(1)(a), Fla. Stat. (1998), and is challenged under Chapter 120, Fla. Stat. (1998), it is subjected to the same type of formal administrative review as large scale amendments.[15] Notably, the Department may intervene in these proceedings. Finally, just like in proceedings involving large scale plan amendments, if an Administrative Law Judge finds that the small scale amendment is not in compliance, the matter still goes before the Department for its own, separate review. There the Department applies its rule and the statute it administers and may reverse the ALJ and find that a small scale amendment is in fact not in compliance.

Finally, a local government adopting a small scale plan amendment that is found not to be in compliance is subject to the same process for the imposition of sanctions by the Governor and Cabinet that is leveled against local governments adopting large scale plan amendments that tail state muster.[16] Therefore, for these reasons it is simply illogical for the Petitioners to focus on the statute used to review plan amendments as a way to differentiate quasi-judicial from legislative acts.

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[15] See, Sunshine Ranches Homeowners Association, et al. v. Cooper City, et al., 96-5558 (Final Order 1996), Biss v. City of Hallendale, et al., DOAH Case No. 99-02598 (Final Order issued 1999).

[16] Section 163.3187(b)(2), Fla. Stat. (1998).

B. The practical reasons.

> *"In my opinion, we should be extremely cautious before labeling a decision by a county not to amend its properly adopted comprehensive land use plan as a quasi judicial action subject to review by the courts under the standard of strict scrutiny rather than the deferential "fairly debatable" standard applicable to legislative actions." Pariente, J. dissenting Martin County v. Yusem, 664 So.2d 976, 978 (Fla. 4th DCA 1995).* (Emphasis added).

Justice Pariente's wise counsel for caution is commended to this Court. The very same issues that underlay the determination in Yusem of whether the denial of a 56-acre amendment to the Future Land Use Map was quasi-judicial apply to the 4.3 acre plan amendment below.

To characterize a small scale amendment comprehensive plan amendment as quasi-judicial in nature is "duplicative of the Growth Management Act, which already provides for quasi-judicial hearings in plan amendment proceedings." Id at 980. Under Chapter 163, a small scale amendment can be challenged under Chapter 120 in a formal administrative hearing.[17] To require local governments to also conduct a quasi-judicial hearing will mean there may be two quasi-judicial hearings, one at the local level and one at DOAH. This "will not serve the interest of local government, landowners, or affected citizens. On the contrary, it will unnecessarily burden an already complicated, time-consuming and expensive process." Id.

[17] Section 163.3187(3)(a), Fla. Stat. (1998).

There is a another practical problem that flows from concluding that certain small scale amendments are quasi-judicial and others are not. Knowing that small scale amendments may be combined with large scale amendments for consideration at the same hearing, a prudent local government lawyer will conclude that it is wise to assume that **all** plan amendment hearings should be conducted with the same procedural due process requirements of a quasi-judicial hearing. If some small scale plan amendments were quasi-judicial and others were not, there would be a tendency for local government attorneys to make all plan amendment hearings quasi-judicial. To do otherwise would subject the local government to an easy reversal on jurisdictional grounds. If the plan amendment at issue was ultimately deemed legislative in nature by a reviewing court, the local government would have lost nothing by providing a record producing hearing.

Then there is the "substantive benefit to the litigants and our system of justice" noted by Justice Pariente in adopting the general principle that all plan amendments are legislative acts. She realized this would avoid the obligation on litigants to file two pleadings, a petition for writ of certiorari and an alternative petition for declaratory relief.[18]

[18] It is interesting to note that every developer in the cases before this Court on this very issue filed two pleadings, which is necessary to avoid a jurisdictional defect.

In Snyder this Court created uniformity as it applies to rezonings. Few practitioners today file alternative pleadings when seeking review of the denial of a rezoning request. They know the remedy is a petition for writ of certiorari, and that they have to build a record at a local quasi-judicial hearing.

1000 Friends and APA submit that this Court should establish the same rule of certainty with regards to the review of local denials of plan amendments, be they small scale or large scale for the same reasons it clarified things for rezonings. A practical solution is needed. This Court should reflect Justice Pariente's wise counsel and create a "bright line" rule holding that all comprehensive plan amendments are legislative, even those that are adopted pursuant to the small scale amendment process in Section 163.3187(1)(c), Fla. Stat. (1998). Therefore, the denial of a request for a plan amendment in all cases is reviewed de novo as an original action upon the filing of a complaint for declaratory and injunctive relief.

C. The policy reasons. There are significant policy issues supporting the argument that all plan amendments should be legislative in nature. This flows from the fundamental difference in the degree of public participation provided by a legislative hearing and a quasi-judicial hearing. When it involves plan amendments, this difference impacts the degree of public participation provided, which lies at the heart of the comprehensive planning process.

A quasi-judicial action requires a judicial type hearing at the local level in order to build a proper record for review by the circuit court. At a quasi-judicial hearing, the elected officials become judges and the citizens become witnesses. There evidence is introduced and people testify under oath and are subject to cross examination. More fundamentally, as noted above, at a quasi-judicial hearing, standing is limited, and therefore, the public's ability to speak is limited.

A legislative decision, on the other hand, is made at a regular public hearing. Because they are subject to review by de novo review as a petition for declaratory and injunctive relief, there is no need to build a record. [19] Thus, to characterize small scale plan amendment hearings as quasi-judicial proceedings would impinge on the free exercise of public participation, which violates the spirit and intent of the State's growth management laws and effectively disenfranchise the public from the planning process.

When this Court changed the law as it relates to the review of certain rezonings in Snyder, it fundamentally altered the relationship between the local government and the property owner, and the relationship between the local government and the judiciary. The demise of the fairly debatable standard as it

[19] The procedural requirements inuring to a quasi-judicial proceeding are distinct from those inuring to a legislative proceeding. See generally City Envtl. Servs. Landfill, Inc. v. Holmes County, 677 So. 2d 1327 (Fla. 1st DCA 1996). Yusem at 1295

relates to rezonings has made it easier for property owners to challenge a local government's unjustified denial of a zoning request. Historically where the courts have classified a land use decision as quasi-judicial, they have simultaneously provided more protection to the private property owner from arbitrary decisions caused by unsubstantiated neighborhood opposition and the public from "rank political influence" than was afforded under the traditional, legislative fairly debatable analysis.[20]

This Court's concern in Snyder to protect land owners from "neighborhoodism" in small scale rezonings, otherwise consistent with the plan, was totally appropriate.[21] That being said, it would not be appropriate for the same reasons to quiet the neighborhood's voice in small scale plan amendment proceedings initiated to allow development, which was not otherwise consistent with adopted Future Land Use Map of the comprehensive plan.

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[20] Cf. Pollard v. Palm Beach County, 560 So. 2d 1358 (Fla. 4th DCA 1990); Flowers Baking Co. v. City of Melbourne, 537 So. 2d 1040 (Fla. 5th DCA 1989); BML Investments v. City of Casselberry, 476 So. 2d 713 (Fla. 5th DCA 1985), rev. denied, 486 So.2d 595 (Fla. 1986); City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th DCA 1974); Conetta v. Sarasota, 400 So.2d 1051 (Fla. 2nd DCA 1981), contra Board of County Commissioners of Pinellas County v. Clearwater, 440 So.2d 497 (Fla. 2nd DCA 1983).

[21] Snyder at 472.

Thus, to subject small scale plan amendments to the quasi-judicial review process, would kill the plan by a thousand cuts. It will tend to encourage local governments to approve a plan amendment for a project that might otherwise violate the plan without the amendment, because the local officials know that judicial review would be limited to the record and that their shield in the traditional presumption of correctness and fairly debatable standard has been taken away. This will inevitably limit public participation in a process, for which the citizens, as a matter of law, have a right to be involved "to the fullest extent possible."[22]

Aside from the evidentiary limitations imposed on their opinion, the citizen who wishes to oppose a plan amendment that is deemed quasi-judicial in nature will have to hire a lawyer and an expert witness, go under oath and be cross-examined on their qualifications to even testify before their elected officials at the plan amendment hearing. This expense and effort is only necessary to build the record for review if the amendment is turned down, since they get an administrative formal hearing if the amendment is granted.

This complicated, litigation-oriented model is costly and fraught with pitfalls for the citizen who wants to oppose a development deemed inconsistent with the plan. Often than not, these citizens will come to the hearing unprepared. Thus,

[22] Section 163.3181, Fla. Stat. (1998).

their "testimony" may be rejected as irrelevant or without weight. The voice of the public's interests protected by the adherence to the existing plan would thus be effectively silenced.

Then there is the effect on the lexicon of local land use law. Legislative matters are reviewed de novo in the circuit court and the losing party may take a direct appeal to the applicable district court of appeal. Pure appellate review is much broader than certiorari review, and the district courts often publish a written opinion, which assists in the development of land use law in Florida. However, to conclude that a local land use decision is quasi-judicial in nature, seriously limits the involvement of the district courts of appeal. Review of quasi-judicial decisions is appellate in nature to the circuit court and is based on the record prepared at the local level, the local government in effect playing the role as the finder of fact.

Review by the district court of decisions on a writ of certiorari is narrower still and there is no longer an appeal of right to the district courts.[23] Circuit court rulings are seldom published, and they are binding only in that circuit.

[23] Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995), Florida Power and Light Co. v. Dania, 2000 Lexis 1220 (Fla. 2000).

Therefore, to hold that small scale plan amendments are quasi-judicial acts will tend to prevent the development of a statewide, uniform lexicon of land use law, and make the local circuit judges the final arbiters of land use law in Florida. In the long run this will create more uncertainly. Land use law will start to depend on the particular parochial predications of our 20 separate circuit courts, which in the end will not serve the citizen, the local government, nor the developer.

Finally, perhaps the most difficult limitation on the public in a quasi-judicial proceeding is the prohibition on ex parte communications discussed in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991), *rev. den*., 598 So.2d 75 (Fla. 1992). If a plan amendment is deemed quasi-judicial, **no** citizen, including the landowner who needs the plan amendment to do a development project, may talk to their elected officials about the proposal to amend the very plan they were involved in creating. This is undemocratic. It certainly violates the spirit and intent of the Growth Management Act, which was intended to include all of the public as an essential player in the plan adoption and amendment process. [24]

[24] Section 163.3181, Fla. Stat. (1998), states that "It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible."

In short, to characterize small scale plan amendments as quasi-judicial weakens the local comprehensive plan and lessens its effectiveness as a long-range growth management tool. It deprives the local government of much of its home rule discretion to control land use through long-range planning, and it relegates the public to a position of observer, rather than an active participant in the planning process. 1000 Friends of Florida and the Florida Chapter of the American Planning Association submit that this is too high a price to be paid for improving the ability of developers to overturn a local government's denial of their projects.

CONCLUSION.

To conclude, if this Court were to pronounce that all plan amendments, large or small, are legislative in nature, a property owner who was denied a request for a plan amendment may still have a cause of action for declaratory and injunctive relief if the denial is arbitrary and capricious or otherwise violates the landowner's constitutional rights. There the proceeding would be de novo and all parties would have the same chance to build a proper record. By characterizing all small scale plan amendments as a legislative acts, this Court will reaffirm the comprehensive plan's status as a "Constitution" guiding the local government in making land use decisions.[25] Most important of all, it will support the public's right to effectively influence the planning process.

The 4th District was imminently correct in Minnaugh. This Court should affirm that decision for the same reasons employed in Yusem and conclude that all comprehensive plan amendments are legislative acts.

[25] Charles M. Harr, "In Accordance With A Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955).

Respectfully submitted this _____day of July 2000.

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that a true and correct copy of the forgoing has been served by U.S. Mail to the individuals or entities listed below this 18th day of July 2000.

_____
Terrell K. Arline, Esquire

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