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Appellate Review in Land Use Regulation: Applying a Formal Versus a Functional Analysis (Park of Commerce Associates v. City of Delray Beach, 606 So. 2d 633 (Fla. 4th DCA 1992))

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APPELLATE REVIEW IN LAND USE REGULATION: APPLYING A FORMAL VERSUS A FUNCTIONAL ANALYSIS (*PARK OF COMMERCE ASSOCIATES V. CITY OF DELRAY BEACH*, 606 SO. 2D 633 (FLA. 4TH DCA 1992))

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Florida courts are questioning the traditional characterization of local land use proceedings as legislative actions which deemed a presumption of validity.[1] In the past, a landowner challenging the zoning decision had to overcome the obstacle of proving a constitutional violation.[2] Today, commentators and courts are realizing that the heavy burden of proof made effective review of land use decisions unavailable.[3]

The recent characterization in Florida of zoning decisions as quasi-judicial actions, however, has been unsystematic and confusing.[4] The Fourth District Court of Appeal's clarification of conflicting language in two preceding opinions concerning the review of a proposed site plan illustrates the confusion.[5] Previously, in *City of Lauderdale Lakes v. Corn*,[6] the Fourth District held that the city commission's review of a proposed site plan under the city's zoning laws was administrative rather than legislative in nature. Subsequent language by the court in *City of Boynton Beach v. V.S.H. Realty, Inc.*,[7] however, appeared to retract from this finding by stating that site plan review involved "informed legislative discretion."

The distinction between land use decisions which are quasi-judicial or administrative rather than legislative actions is important for determining the standard to apply for judicial review.[8]

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1. Carl J. Peckinpaugh, Jr., Comment, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499, 499 (1980).

2. *Id.*; Michael S. Holman, Comment, *Zoning Amendments--The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J 130, 130-31 (1972).

3. Peckinpaugh, *supra* note 1, at 499 (citing R. FISHMAN, HOUSING FOR ALL UNDER LAW 263-80 (1978)).

4. Peckinpaugh, *supra* note 1, at 499 (citing *see, e.g.* R. ANDERSON, AMERICAN LAW OF ZONING §§ 3.17, 3.18. (2d ed. 1976)).

5. Park of Commerce Assos. v. City of Delray Beach, 606 So. 2d 633 (Fla. 4th DCA 1992), *reh'g denied*, Nov. 18, 1992.

6. 427 So. 2d 239, 244 (Fla. 4th DCA 1983).

7. 443 So. 2d 452, 455 (Fla. 4th DCA 1984).

8. Peckinpaugh, *supra* note 1, at 515. Michael Holman proposed the following test to determine legislative from judicial activity:

Generally, local government proceedings which are quasi-judicial actions are reviewable by common law writ of certiorari to the circuit court.[9] Whereas, a landowner must challege a legisltive land use decision in the form of an original proceeding under de novo review.[10] While Florida courts realize that the characterization of rezoning proceeding as legislative or quasi-judicial action is imperative for the trial court's proper standard of review, tension still exists between the application of a formal versas a functional analysis in the determination.

This Note will intitially review the developments of land use law, discuss competing district court opinions of the correct standard for appellate review, and consider the implications of these decisions. Secondly, this note will review the fourth district's analysis and will emphasize the importance of the *Park* concurrence proposing that review of a land use decision should not focus on mere labels in a formal analysis but instead on the substance of the action under a functional analysis.[11] Finally, this Note will propose guidelines for deterining the characterization of land use decisions and the ramifications of applying either form or substance in the analysis.

I. FACTUAL BACKGROUND

Florida Power and Light (FPL) purchased land in the City of Delray Beach from Park of Commerce Associates, conditioned upon the city's approval of the construction of a service center.[12] Since the proposed sevice center complied with existing zoning regulations, Park of Commerce Associates had no reason to believe the proposed site plan would be denied,[13] and therefore, discounted the risk of allowing the purchase to be conditioned on the

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> Does the action formulate a general rule or policy which is applicable to an open class of persons, interests or situations, or does the action apply a general rule or policy to specific persons, interests, or situations? If the answer is yes to the latter half of the question, then legislative action is present. If the answer is yes to the first half of the question, then there is judicial action.

Holman, *supra* note 2, at 136 n.59.

9. Peckinpaugh, *supra* note 1, at 515 (footnote omitted); "[C]ertiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi-judicial proceeding." De Groot v. Sheffield, 95 So. 2d 912, 915-16 (Fla. 1957).

10. Peckinpaugh, *supra* note 1, at 515 (footnote omitted).

11. Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992) (Farmer, J., concurring).

12. *Id.* at 634.

13. *See id.* In addition, once the government acts in issuing authorization, good faith reliance by the developer may invoke the estoppel doctrine. Robert M. Rhodes, *Vested Rights Update*, FLA. B.J., Dec. 1980, at 787, 790.

local government's approval. The Planning and Zoning Board, however, rejected the submitted site plan, and FPL was forced to incorporate the requested changes and submit the plan to the city council.[14] Apparently due to neighborhood opposition, the city council denied the site plan.[15] This reasoning appears in direct conflict with the fifth district's proposition that "the opinion of neighbors by themselves are insufficient to support a denial of a proposed development."[16]

In *Park*, the landowner's attack on the land use decision took the form of an origial proceeding in equity when the circuit court conducted a de novo trial.[17] At first, the court based denial of the site plan on the fact that there was not access from a certain road.[18] As a matter of law, however, the court found that this basis was erroneous since a legal right of access existed for that particular road.[19] Nonetheless, the court upheld the city council's denial of the site plan on additional grounds raised for the first time by the city at the de novo trial.[20]

On consolidated appeal from the Circuit Court for Palm Beach County, appellants argued that the trial court should have applied certiorari review rather than de novo review, and thus, that the circuit court should have limited review to the record of the administrative proceeding.[21] Previously, the Florida Supreme ruled that a reviewing court, under writ of certiorari will not evaluate the evidence of the land use proceeding.[22] The appellate court, therefore, merely examines the record to determine whether the decision is supported by competant substantial evidence.[23]

II. THE *PARK* OPINION: QUASI-JUDICIAL OR LEGISLATIVE

Originally, the fourth district's panel decision per curium affirmed the circuit court which upheld the city council's denial of the site plan.[24] On rehearing, however, the fourth district, en banc, found that the the local land use decision was not a legislative

14. *Park of Commerce Assocs.*, 606 So. 2d at 634.

15. *Id.*

16. Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593, 596 (5th DCA), *rev. denied*, 584 So. 2d 997 (Fla. 1991).

17. *Park of Commerce Assocs.*, 606 So. 2d at 634.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 634, 636.

22. *See* Peckinpaugh, *supra* note 1, at 517; *see also* De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

23. *Id.*

24. Park of Commerce Assocs. v. City of Delray Beach, 16 FLW D2953; Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 634 (Fla. 4th DCA 1992).

function and that the circuit court had erroneously conducted a de novo trial.[25] Once the landowner staisfied the zoning requirements, the city did not have discretion to withhold approval, and thus, the decision was a quasi-judicial action.[26] In addition, the concurrence astutely noted that the standard of review by the trial court and then by the district court should not depend on a formal analysis revolving on labels, but rather on a functional analysis focusing on substance of the action.[27]

A. The Panel Opinion

Initially, the Fourth District Court of Appeal, in reliance on *City of Boynton Beach,* issued a per curiam affirmance of the circuit court's decision.[28] Judge Stone's concurrence added that, except for the *City of Boynton Beach* decision, he would agree with the dissent that it was error for the trial court to conduct a de novo trial of the site plan decision.[29] Stone also noted that if the proceeding was reviewed under certiorari, the landowner would prevail since the record shows that the trial court based its decision solely on evidence presented for the first time in the de novo trial.[30] Under certiorari review, which is based solely on the city council's record, the circuit court would have quashed the land use decision.[31]

B. The En Banc Opinion

In an en banc opinion on motion for rehearing, the Fourth District Court of Appeal held that site plan review is not legislative in nature because, once the legal requirements of zoning laws are satisfied, approval by the city cannot be withheld.[32] In addition, the court found that the standard of review in the trial court is contingent upon the nature of the city council's proceeding as quasi-legislative or quasi-judicial.[33] Accordingly, the opinion stated that de novo review is appropriate for quasi-legislative functions, whereas certiorari review is proper for quasi-judicial functions.[34] Thus, the fourth district's en banc opinion held that

25. Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992).
26. *Id.* at 634.
27. *See id.* at 635 (Farmer, J., concurring).
28. Park of Commerce Assocs. v. City of Delray Beach, 16 FLW D2953.
29. *Id.* (Stone, J., concurring).
30. *Id.*
31. *Id.*
32. *Park of Commerce Assocs.*, 606 So. 2d at 634.
33. *Id.* at 635.
34. *Id.*

the circuit court had erroneously conducted de novo review.[35] As a result, the court reversed and remanded the trial court's decision.[36]

Subsequently, on a motion for rehearing and clarification, the district court per curiam denied any further motions for rehearing.[37] The fourth district also clarified that the en banc opinion overruled the panel's decision affirming the de novo trial of the city council's site plan denial.[38] The en banc opinion held that site plan review is a quasi-judicial function rather than a legislative function since the city's approval is not discretionary once the legislatively adopted zoning laws are satisfied.[39]

C. The Concurring Opinion

Judge Farmer's concurrence aptly noted that the consideration given in the review of a land use decision by a trial court and then by the district cout "should not depend on mere labels used by the parties but instead by an analysis of what they did."[40] Thus, the trial and the appeallate courts should apply a functional analysis through a practical examination of the local government's actions in the proceeding, in addition to its findings.[41] For instance, although the landowner in *Corn* applied for site plan approval, the city's denial, once the landowner met site plan regulations, involved legislative action.[42] Although the landowner may have obtained certiorari review of the city's site plan disapproval, the appellant in *Corn* sought relief by mandamus, a judicial determination that the City's legislative action was unconstitutional, and an injunction against the enforcement of the administrative action.[43] Relying on a functional examination of the city's actions, Judge Farmer opined that a combination of the two forms of

35. *Id.*

36. *Id.*

37. Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 636 (on motion for rehearing and clarification, Fla. 4th DCA Nov. 18, 1992).

38. *Id.*

39. *Id.* at 634. The en banc opinion agreed with Judge Anstead's original panel dissent that stated "having appropriate zoning for the use of the property sought by [the landowner], the municipality cannot rescind that decision by unreasonably refusing to approve a site plan for the specific building contemplated to be constructed." Park of Commerce Assocs. v. City of Delray Beach, 16 FLW D2953.

40. Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992).

41. *Id.* at 635 (Farmer, J., concurring).

42. *Id.*

43. *Id.*

review may be appropriate.[44] Additionally, Judge Farmer noted that in respect to a zoning variance, the local government's determination involves a hearing which applies the facts to rooted legal principles.[45] Zoning involves the combination of legislative action with demonstrated rules of law.[46] Site plan approval or plat review, however, merely examines the uncontested facts under the existing rules.[47] Farmer reasoned that judicial review varies depending on the governmental function involved.[48] Appropriately, the en banc opinion accounted for the means by which the site plan determination was made, as well as the result.[49]

In sum, the concurrence set forth that the circuit court's review, as well as that of the district court, should not arbitrarily rely on the parties' labels of the city's actions.[50] Thus, the concurrence points out the current problem facing the Florida courts in their fluctuation between a formal and a functional analysis to determine whether a land use decision is a quasi-judicial or a legislative function.

III. APPELLATE REVIEW OF LAND USE DETERMINATIONS

A brief history of the review of land use decisions provides insight into the *Park* controversy regarding whether a formal or a functional element should determine the correct standard of review. In 1957, the Florida Supreme Court established that when notice and a hearing are required, then the proceeding is a quasi-judicial function subject to judicial review rather than a purely legislative function.[51] The confusion over whether the reviewing court should apply form or substance to determine whether a zoning decision was a quasi-judicial rather than a legislative action has, therefore, developed as a historic accident. Examination of the consistency doctrines may provide another clue in determining whether the land use challenge is a quasi-judicial or a legislative action. Varying applications of the consistency requirement by the

44. *Id.* at 636. Since legislative actions are challenged by original, *de novo* proceedings, *Corn* appropriately was not limited to certiorari review. *Id.* On the other hand, limiting review to that of a circuit court reviewing a local governmental decision would have been unjust to the city. *See, e.g.*, Education Dev. Ctr. v. Zoning Bd., 541 So. 2d 106 (Fla. 1989).

45. *Park of Commerce Assocs.*, 606 So. 2d at 635-636 (Farmer, J., concurring).

46. *Id.* at 636.

47. *Id.*

48. *Id.*

49. *Id.* at 635-36.

50. *Id.*

51. De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957); *see* Robert Lincoln, *Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine*, 7 J. LAND USE & ENVTL. L. 333, 346 (1992).

district courts have resulted in alternating focuses from form to substance in the determination of the standard of review.[52]

A. The History of Zoning

Due to the complexities of municipal growth in the United States during the turn of the century, land use controls developed from the government's constitutional police power.[53] Beginning in 1909, the U.S. Supreme Court upheld land use restrictions on building heights.[54] Through the practice of zoning in the early 20th Century, land use controls developed.[55] New York established the first comprehensive zoning ordinance in 1916, called the New York Building Zone Resolution which divided the city into districts for use, area, and height.[56] Consequently, the New York Court of Appeals upheld the zoning ordinance.[57]

Under the appointment of Herbert Hoover, an advisory commission of the U.S. Department of Commerce drafted and distributed "A Standard Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulation" which required zoning and land development regulations be executed consistently with a comprehensive plan.[58] With the adoption of the standard zoning enabling act by a large number of states, land use controls through zoning spread.[59] In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court upheld the Standard Zoning Enabling Act as constitutional use of police power.[60] Additionally, during the 1920's, limitations on land use controls arose under the judicial theory that severe land use regulations without compensation violated the Fifth Amendment as a taking of property.[61]

The early presumption that zoning should be consistent with a comprehensive plan was virtually nullified by judicial findings of comprehensive plans, even where they did not exist, in the end

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52. David LaCroix, *The Applicability of Certiorari Review to Decisions on Rezoning*, 65 FLA. BAR. J. 105, 105 (June 1991).

53. DAVID L. CALLIES & ROBERT H. REILICH, CASES AND MATERIALS ON LAND USE 2-9 (1986); *see* RICHARD BABCOCK, THE ZONING GAME Ch. 1 (1967); *see also* Alfred Bettman, *The Constitutionality of Zoning*, 37 HARV. L. REV. 834, 841 (1923).

54. Welch v. Swasey, 214 U.S. 91 (1909); *see* DANIEL MANDELKER, LAND USE LAW 128 (1982).

55. *See* CALLIES, *supra* note 33, at 4.

56. *Id.* (citing Bettman, *supra* note 33, at 834).

57. Lincoln Trust Co. v. Williams Building Corp., 128 N.E. 209 (N.Y. 1920).

58. JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT, § 1.02(1) (1992); U.S. DEP'T OF COMMERCE, STANDARD CITY PLANNING ENABLING ACT (1928).

59. Bettman, *supra* note 33, at 834-35.

60. 272 U.S. 365 (1926).

61. CALLIES, *supra* note 53, at 9, *citing* BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE: AN ANALYSIS OF CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

result of the zoning process.[62] In the 1960's and 1970's, however, the growth of land use controls, other than zoning, marked the return of the comprehensive plan.[63] Although governmental bodies passed some planning laws, the zoning laws proved merely optional or advisory.

B. Florida's Comprehensive Plan Requiring Consistency

In 1975, Florida adopted the Local Government Comprehensive Planning Act[64] which set forth that development orders should be consistent with required comprehensive plans.[65] The loose language[66] of the text and the difficulty in establishing standing to challenge consistency prevented the Act from having great effect on Florida's land use controls.[67] In 1985, the legislature enacted the Local Government Comprehensive Planning and Land Development Regulation Act (Planning Act) to rectify the problems of the 1975 Act.[68] The Planning Act mandated that local governments adopt comprehensive plans and that all action taken in regard to development orders be consistent with the plan.[69] As a result, Florida courts generally hold that planning which enacts zoning regulation is a legislative function, and thus, not reviewable by writ of certiorari.[70]

Rezoning decisions or development orders, which grant, deny, or grant with conditions an application for a development permit, are quasi-judicial or executive in nature since they execute the legislatively enacted zoning plan.[71] Accordingly, site plan approval as in *Park*, falls under the statutory definition of a

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62. CALLIES, *supra* note 53, at 271 (quoting Kozesnik v. Township of Montgomery, 131 A.2d 1 (N.J. 1957), in which Justice Weintruab stated that "[a] plan may be readily revealed in an end-product--here a zoning ordinance--and no more is required by statute"). Courts are not reluctant to "read into" zoning laws and preambles.

63. CALLIES, *supra* note 53, at 271; *see* Daniel Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976).

64. Lincoln, *supra* note 51, at 334; Ch 75-257, 1975 Fla. Laws 794 (current version at FLA. STAT. § 163.2301 (1991).

65. Lincoln, *supra* note 51, at 354 (citing Thomas Pelham et al., *Managing Florida's Growth: Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515, 541-53 (1985)).

66. *Id.*; *see* Allapatah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d DCA 1980).

67. Lincoln, *supra* note 51, at 354; *see* Citizen's Growth Management Coalition v. City of W. Palm Beach, 450 So. 2d 204 (Fla. 1984).

68. Lincoln, *supra* note 51, at 345; *see* Ch. 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. § 163.3161-.3215 (1991).

69. FLA. STAT. § 163.3194(3)(b) (1991) (stating that "a development approved or undertaken by local government shall be consistent with the comprehensive plan").

70. LaCroix, *supra* note 52, at 105; *see e.g.*, Thompson v. City of Miami, 167 So. 2d 841, 843 (Fla. 1964).

71. *See* FLA. STAT. § 163.3164(6) (1991).

development order, and thus, must satisfy the consistency requirement.[72]

C. *Varying Application of the Consistency Requirement*

Prior to the 1985 enactment of the Planning Act, Florida courts classified zoning and rezoning as legislative acts which involved a strong presumption of validity under a "fairly debatable" standard of review for due process challenges.[73] Subsequent attempts by Florida courts to implement the consistency requirement have resulted in dissimilar review of rezoning cases.[74]

When a zoning ordinance or a special act delegates to the county commission the authority to rezone, the determination of compliance with the delegated standards results in a quasi-judicial decision reviewable by certiorari.[75] In the absence of specific standards set forth in a zoning ordinance or statute, however, the Florida district courts have varied in the application of the consistency requirement by classifying rezoning as legislative or quasi-judicial, thereby alternating the standard of review from de novo to certiorari.[76] Review of a land use decision, however, should not depend on a formal analysis looking at labels, but rather on a functional analysis of the substance of the action.[77]

The disorderly application of form versas substance has resulted in the Florida district courts' confusion in determining the characterization of land use decisions for judicial review.[78] For example, the first district, in *Leon County v. Parker*, dismissed a consistency challenge filed in a certiorari action for failure to file under statutory guidelines.[79] The court's strict compliance with the statute exemplified its belief that rezoning determinations are

72. *See* Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 635 (1992), *reh'g denied*, Nov. 18, 1992.

73. Lincoln, *supra* note 51, at 364 (citing Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959) (denial of map amendment found to be a legislative act); Allapattah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d DCA 1979)).

74. *See* Palm Beach County v. Allen Morris Co., 547 So. 2d 690 (4th DCA), *rev. dismissed*, 553 So. 2d 1164 (Fla. 1989); Machado v. Musgrove, 519 So. 2d 629 (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988).

75. LaCroix, *supra* note 52, at 105; *see e.g.*, Walgreen Co. v. Polk County, 524 So. 2d 1119 (Fla. 2d DCA 1988).

76. LaCroix, *supra* note 52, at 106.

77. *See* Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992) (Farmer, J., concurring).

78. This controversy is shown in the third district's finidng in *Jennings v. Dade County*, 589 So. 2d 1337 (3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992), that rezoning decisions are legislative acts. Previously, the court had found that, while rezoings are legislative in nature, courts rely on a verbatim record in reviewing validity. Machado v. Musgrove, 519 So. 2d 629, (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1989).

79. 566 So. 2d 1315 (Fla. 1st DCA 1990).

not quasi-judicial actions.[80] On the other hand, the second district found that under Florida Rule of Appellate Procedure 9.030(b)(2)(B), when a district court reviews a circuit court in a rezoning appeal, the standard for review is whether the trial court followed procedural due process and applied the essential requirements of law.[81] The district court, therefore cannot substitute its judgment for that of the circuit court in reviewing the record evaluating the evidence.[82]

Additionally, in *Hirt v. Polk County Board of County Commissioners*,[83] the Second District focused on the form rather than the substance of local government actions and determined that quasi-judicial acts generally require a hearing.[84] The court's reasoning reinforced the problem of looking to form rather than substance by merely altering the necessary label to whether there was a hearing.[85] Instead of the confusion over what is the correct label, this formal analysis ingites the controversy of determining what constitutes a hearing.

Conversely, the Fifth District Court of Appeal set forth that the circuit courts have certiorari review of rezoning determinations.[86] Recently, in *Snyder v. Board of County Commissioners of Brevard County*,[87] the fifth district found that while the adoption of a zoning ordinance is legislative in nature, the rezoning of individual land is a quasi-judicial determination reviewable by writ of certiorari. The Florida Supreme Court granted certiorari in *Snyder*, and its opinion is likely to clarify much of the inconsistent treatment of development order proceedings in the Florida courts.

Both the *Snyder*[88] opinion and the *Park*[89] decision incorporated the functional analysis of the nature of the action to determine whether the land use decision was a quasi-judicial or a legislative function. In *Snyder*, the fifth district stated that a reviewing court

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80. Lincoln, *supra* note 51, at 370; *see Parker*, 566 So. 2d at 1317.

81. Manatee County v. Kuehnel, 538 So. 2d 52, *opinion replaced on rehearing*, 542 So. 2d 1356, 1358 (2d DCA), *rev. denied*, 548 So. 2d 663 (Fla. 1989) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982)).

82. *Id.* at 1358.

83. 578 So. 2d 415 (Fla. 2d DCA 1991).

84. Lincoln, *supra* note 51, at 369.

85. Lincoln, *supra* note 51, at 369.

86. *See, e.g.*, St. Johns County v. Owings, 554 So. 2d 535, 537 (Fla. 5th DCA 1989); Bailey, 538 So. 2d 50 (5th DCA), *rev. denied*, 545 So. 2d 1366 (Fla. 1989).

87. 595 So. 2d 65, 80-82 (Fla. 5th DCA 1991), *reh'g denied*, March 20, 1992 (unpublished).

88. *See generally* Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (5th DCA 1991), *reh'g denied*, March 20, 1992 (unpublished), *jurisdiction accepted*, 605 So. 2d 1262 (Fla. 1992).

89. *See generally* Park of Commerce Assocs v. City of Delray Beach, 606 So. 2d 633 (Fla. 4th DCA 1992).

should apply "close judicial scrutiny" in the review of a governmental decision denying a property right.[90] The court reasoned that land use decisions limiting or regulating the use of privately owned lands directly effected "basic substantive property rights" under the Florida Constitution.[91] Thus, *Snyder* applied a functional analysis to the zoning action which involved a fundamental right in concluding that the proceeding was a quasi-judicial action.[92]

Comparatively, *Park* focused on a fundamental quasi-due process right rather than a basic property right of the landowner. The fourth district held that site plan review was not a legislative function because, once the landowner satisfies the legislatively adopted zoning requirements, the governmental body cannot unreasonably withhold approval.[93] The court reiterated the fifth district's reasoning that neighbor's opinions are insufficient as a sole basis to deny a proposed land development.[94] Landowners have a due process right in that "[o]wner's are entitled to fair play; the lands which may present their life fortunes should not be subject to ad hoc legislation."[95] Thus, *Park* focused on a functional analysis of the action based on quasi-due process and on fairness.[96]

IV. THE FOURTH DISTRICT'S INTERPRETATION

Several examples of prior fourth district opinions prove illustrative of the court's focus on a functional analysis of the substance of a due process right in determining the quasi-judicial function of land use decision. To be equitable to landowners, notice of required conditions for improvement of property should be clearly

90. *Snyder*, 595 So. 2d at 81. "The government has the burden of proof by clear and convincing evidence before it may impinge constitutionaly protected property rights." *Id.* at 81 n.70.

91. *Id.* at 80; FLA. CONST. art. I, § 2.

92. *Snyder*, 595 So. 2d at 78.

93. *Park of Commerce Assocs.*, 606 So. 2d at 634.

94. *Id.* at 634 n. 1; Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593, 596 (5th DCA), *rev. denied*, 584 So. 2d 997 (Fla. 1991).

95. *Id.*

96. In addition to a due process basis, traditional equitable estoppel grounds provide a basis for a landowner's assertion of vested rights. Rhodes, *supra* note 13, at 791 n.3. Rights vest to prevent arbitrary government action if the doctrine of equitable estoppel applies to the facts. *Id.* at 787. When a property owner in good faith relies on an act or ommission of the government and makes a substantial change in position or incurs extensive expenses and duties then it would be unjust to take the aquired right away. *Id.* at 787-88. Although vested rights may not attach to mere ordinances, equitable estoppel concerns are relevnat when the local government issued a permit or authorization for development. *Id.* at 789; *see* FLA. STAT. § 380.06(18), *as amended by* FLA. LAWS 1980, ch. 80-313 (noting a statutory variation on the equitable estoppel doctrine).

set forth in zoning regulations.[97] For example, the Fourth District Court of Appeal previously held that plat review determinations were quasi-judicial in nature since a landowner should be able to obtain plat approval once uniform standards are met.[98] In the same respect, the *Corn* opinion held that, once legal requirements are met in site plan proceedings, the determination is not discretionary.[99] Thus, the court reiterated the holding in *Narco Realty, Inc.* that after the legal requirements for platting land are satisfied there is no discretion to refuse plat approval and there is a right to mandamus.[100]

Consequently, the Fourth District found that site plan approval, which factually determines whether a proposed site plan meets specific administrative regulations, is quasi-judicial in nature.[101] The city's determination cannot arbitrarily impose conditions which are not specifically contained in the ordinance. Administrative proceedings should also objectively determine satisfaction of zoning regulations.[102] Although the property owner has the burden to demonstrate compliance with zoning regulations, the determination in an administrative proceeding does not involve legislative discretion.[103] Thus, through a functional rather than a formal analysis, the fourth district determined that land use decisions are quasi-judicial actions effecting the landowner's fundamental right to due process.

V. WHY THE QUASI-JUDICIAL DETERMINATION IS IMPORTANT

The confusion of whether Florida courts should apply a formal versas a substantive analysis to zoning decisions must be clarified because a quasi-judicial determination has significant impact on the challenging landowner. A circuit court's certiorari review of a city commission acting in a quasi-judicial manner is limited to the record of the administrative proceeding.[104] The trial court should not review matters which were omitted in the original

97. *Park of Commerce Assocs.*, 606 So. 2d at 634.

98. City Nat'l Bank of Miami v. City of Coral Springs, 475 So. 2d 984, 985 (Fla. 4th DCA 1985). This is necessary to inhibit the whim of the public from impacting upon the official plat approval. *See id.*; Broward County v. Narco Realty, Inc., 359 So. 2d 509, 510 (Fla. 4th DCA 1978).

99. City of Lauderdale Lakes v. Corn, 427 So. 2d 239, 242 (Fla. 4th DCA 1983).

100. 359 So. 2d 509, 510 (Fla. 4th DCA 1978).

101. *See* Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633 (Fla. 4th DCA 1992), *reh'g denied*, Nov. 18, 1992.

102. *Id.* at 635.

103. *Id.*

104. *Id.*

administrative determination.[105] Further, certiorari review requires procedural safeguards and a written record.[106] Where as, de novo review of a legislative function is not limited to the record of the original proceeding.

In addition, the appeal procedure differs depending upon whether the city commission's function in denying the development order is classified as legislative or quasi-judicial. Legislative actions entail a strong presumption of constitutionality in a due process challenge.[107] Prior to the adoption of the 1985 Planning Act, rezoning determinations were classified as legislative in nature and could be challenged solely by an action for injunctive or declaratory relief.[108] The appeal procedure of a quasi-judicial determination, on the other hand, involves a petition for writ of certiorari.[109]

Finally, the standard of review in the trial court is determined by the nature of the city council's development order proceeding as either quasi-legislative or quasi-judicial.[110] While de novo review is correct in quasi-legislative determinations, quasi-judicial proceedings require certiorari review.[111] As shown in *Park*, the circuit court erred in conducting de novo review since the site plan determination was quasi-judicial in nature.[112] The trial court review should not have involved determinations on matters not presented during the original proceedings.[113]

VI. PROPOSED GUIDELINES APPLYING A FUNCTIONAL VERSUS A FORMAL ANALYSIS

In determining form versus function, the trend is towards a functional analysis which looks at the "nature" of the government action. This note advocates that the review given by a trial court and subsequently by a district court is dependent on a functional analysis of what the local governmental body did, as well as by what it stated. As Judge Farmer's concurrence stated "[the reviewing court] cannot achieve justice by merely applying a label and

105. *Id.*

106. Lincoln, *supra* note 51, at 375; Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 80-82 (5th DCA 1991), *reh'g denied*, March 20, 1992 (unpublished), *jurisdiction accepted*, 605 So. 2d 1262 (Fla. 1992).

107. Lincoln, *supra* note 51, at 364.

108. Peckinpaugh, *supra* note 1.

109. LaCroix, *supra* note 52, at 105.

110. Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 635 (Fla. 4th DCA 1992), *reh'g denied*, Nov. 18, 1992.

111. *Id.*

112. *Id.*

113. *Id.* at 634.

then mashing a judicial lever. [The court] must study what the parties were asked or set out to do, what they actually did, and how they went about doing it."[114] The court's decision in *Hirt* may not have been a step in the right direction because, although the opinion applied the question of whether there was a hearing, this is still just formal analysis involving a label.

This Note proposes several guidelines for determining a functional versas a formal analysis of land use decisions. First, the *Park* rationale used a functional analysis which focused on the nature of the land use decision involving the landowner's fundamental due process right.[115] Landowners are entitled to fairness and notice of the conditions which they must satisfy for site plan approval under existing zoning regulations.[116] Although the landowner has the burden to show compliance with the zoning, the local governmental body does not have discretion in issuing or denying the authorization.[117] Through a functional analysis of the action and substance of the act, the reviewing court can determine whether the land use decision was a legislative or a quasi-judicial function.

Second, the *Snyder*[118] distinction which relied upon whether a fundamental, basic property right had been abridged may provide a helpful rationale for making a functional determination. If a basic right has been abridged, then the courts should be more sympathetic with the affected parties by giving them an easier standard of appeal. Parties would benefit by certiorari review, which limits the scope of review to whether the decision was supported by competent substantial evidence in the record.[119] Whereas, de novo review requires a challenging landowner to prove the zoning was arbitrary and unreasonable under the "fairly debatable" test of constitutionality.[120]

A third approach to distinguish between legislative functions and judicial functions in zoning proceedings involves whether there was a delegation of power. Although a legislative body may not delegate the authority to determine what the law should be, it may delegate the power to apply the law to a board or local

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114. *Id.* at 636. (Farmer, J., concurring).

115. *Park of Commerce Assocs.*, 606 So. 2d at 634 n.1; *see* Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593 (5th DCA), *rev. denied*, 584 So. 2d 992 (Fla. 1991).

116. *Park of Commerce Assocs.*, 606 So. 2d at 635.

117. *Id.*

118. Snyder v. Board of County Comm'rs, 595 So. 2d 65 (5th DCA 1991), *rhn'g denied*, March 20, 1992 (unpublished), *jurisdiction accepted*, 605 So. 2d 1262 (Fla. 1992).

119. Peckinpaugh, *supra* note 1, at 517; *see* Skaggs-Albertson's v. ABC Liquours, Inc., 363 So. 2d 1082 (Fla. 1978); *see also* De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

120. Peckinpaugh, *supra* note 1, at 499-501; *see* Euclid v. Amber Realty Co., 272 U.S. 365, 388, 395 (1926).

governmental body with appropriate standards and procedural safeguards.[121] The Florida Environmental Land and Water Management Act of 1972[122] and the Local Government Comprehensive Planning Act of 1975 (LGCPA)[123] provide legislative guidelines for the delegated power of local governments over land use.[124] When land use decisions are made pursuant to delegated power with standards, local land use decisions are quasi-judicial actions reviewable by certiorari.[125] This approach which merely looks at whether there was a delegation of power, however, is problematic because it still involves formal analysis and does not look at the action in the decision.

Finally, the second district's opinion in *Hirt* attempted to solve the problem by looking at whether there was a hearing to determine that the land use decision was a quasi-judicial function.[126] This analysis, therefore, looked to form, rather than the substance, of the local government action in determining whether the decision was a legislative or quasi-judicial action.[127] The court applied a formal element by simply focusing on a new label which required a hearing. If Florida adopts the formal rationale in *Hirt* and distinguishes quasi-judicial actions after a required hearing, this Note proposes several ramifications of the problem in determining what constitutes a hearing.

First, an opposing party may propose that written comments or letters challenging a governmental body's decision constitutes a hearing. Letters written to Congress, although a possible form of a hearing, do not make an action quasi-judicial. For a hearing, a record and findings must have been made which are sufficient for "[a] court to determine whether the applicable rules of law and procedure were observed."[128] Because a court can only exercise

121. *See* La Croix, *supra* note 52, at 105; FLA. CONST. art. III § 1.

122. FLA. STAT. ch. 380 (1991).

123. FLA. STAT. §§ 163.3161-163.3211 (1991 & Supp. 1992).

124. The LGCPA requires that all land development regulations enacted must be consistent with the local comprehensive plan. *Id.* at §§ 163.3194(1), 163.3201.

125. La Croix, *supra* note 52, at 105. For example, most zoning ordinances delegate authority, with specific standards for quasi-judicial determinations of variances, conditional use approval, as well as rezonings. *Id.* at 108 n.8.

126. In essence, the second district found that the Board of County Commissioners made its decision after a public hearing challenging the application of the ordinance, and thus, held the zoning decision quasi-judicial and subject to certiorari reviw. Lincoln, *supra* note 51, at 369 (citing Hirt v. Polk County Bd. of County Comm'rs, 578 So. 2d 415, 416-417 (Fla. 2d DCA 1991)). As a result, reviewing courts can generally distinguish a quasi-judicial action from a legislative action after a required hearing. Lincoln, *supra* note 51, at 369; *see* Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992).

127. Lincoln, *supra* note 51, at 369.

128. Holman, supra note 2, 141 (footnote omitted).

judicial review over a local governmental body if the proceeding contained a sufficient record and findings,[129] written comments or letters are not persuasive as a form of a hearing.

In addition the question may exist whether the opportunity for rebuttal of evidence through cross-examination of witnesses determines a hearing.[130] A proceeding which allows witness's cross examination may look like a court room proceeding, and thus, may appear as a quasi-judicial function. Legislative hearings which sometimes cross examine witnesses, however, are not quasi-judial. Thus, although witnesses may be cross examined in an administrative proceeding, this is not a persuasive factor. Another notable factor, which is also not very persuasive is whether the testimony at the proceeding was taken under oath.

Accordingly, restrictions on the amount of participation in which an interested party is merely a name on the agenda may provide a key to whether there was a hearing. In this case, the individual may present a statement, but there are no witnesses. Thus, because of the similarity to a city commission meeting this may be a factor in determining whether there was a hearing or merely a legislative action.

Next, the question of whether rules of evidence were used in the proceeding or whether all of the testimony is admissible may impact on the determination of a hearing. Legislatures can look at anything, whereas judicial bodies screen evidence due to the impact of bias or prejudice on reliability. Although the inclusion of rules of evidence may suggest a hearing, the requirement that a rezoning hearing "be consistent with the essentials of a fair trial does not require the proceedings follow the formal rules of evidence."[131] The absence or the inclusion of rules of evidence, therefore, is not dispositive of whether the proceeding consititued a hearing.

Finally, the determination may consider whether there are ex parte restrictions limiting emergency or immediate action because of the "inherent capacity for abuse."[132] Although this seems judicial in nature, the code of ethics[133] and the Sunshine Act[134] in Florida account for ex parte restrictions in legislative actions. Accordingly, this factor may be misleading.

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129. *See id.*

130. For example, proceedings before zoning boards may involve the rebuttal of evidence through witness's cross examination. *See* Holman, *supra* note 2, at 141.

131. *See* Holman, *supra* note 2, at 141.

132. Ex parte decision making does not belong in a rezoning hearing because the issue does not require emergency attention. *See* Holman, *supra* note 2, at 141.

133. FLORIDA RULES OF PROFESSIONAL CONDUCT

134. FLA. STAT. § 286.011 (1991).

An additional concern involves the requirments mandating a hearing for quasi-judicial review and whether local governments should be required to produce a written record of the proceeding.[135] If the local government is restricted to making findings only on the record presented, it seems quasi-judicial. By comparison, de novo review of legislative actions generally takes notice of all facts in the form of an original proceeding in equity.[136] A reviewing court may overturn a local land use decision when it is not supported by competent substantial evidence in the record,[137] therefore, the appeal is by certiorari and not de novo review. Thus, quasi-judicial review of local governmental proceeding may mandate notice as well as a hearing.

VII. CONCLUSION

The Florida Supreme Court's coming decision in *Snyder v. Board of County Commissioners*[138] is expected to clarify the uncertainty of whether a formal or a functional analysis should determine if the land use decision was a legislative or a quasi-judicial action.[139] Considering the trend of the Florida courts, as well as the legislative intent of the 1985 Planning Act,[140] the Florida Supreme Court is likely to rule that rezoning determinations are quasi-judicial actions. This ruling would also reiterate the *Park* opinion that a site plan proceeding is not a legislative function since the city cannot unreasonably deny authorization once the landowner satisfies the zoing regulations.[141]

Until the Supreme Court rules, Florida land use practitioners will remain in a state of uncertainty regarding appellate review of zoning determinations. As a practical consideration, attorneys need to know how to file rezoning cases on appeal. In addition,

135. *See* Lincoln, *supra* note 51, at 335 n.18.; Machado v. Musgrove, 519 So. 2d 629 (3d DCA 1987) (stating that although rezonings are legislative, courts rely on a verbatim record in reviewing the validity of the decisions), *rev. denied*, 529 So. 2d 694 (Fla. 1989); *cf.* Hirt v. Polk County Bd. of County Comm'rs, 573 So. 2d 415 (Fla. 2d DCA 1991) (implying that the County has authority to determine whether a verbatim record must be made).

136. Peckinpaugh, *supra* note 1, at 515.

137. Peckinpaugh, *supra* note 1, at 517; *see* De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

138. 595 So. 2d 65 (5th DCA 1991), *reh'g denied*, March 20, 1992 (unpublished), *jurisdiction accepted*, 605 So. 2d 1262 (Fla. 1992).

139. As previously stated, the *Snyder* opinion found that, although zoning is a legislative act, rezoing is quasi-judicial. *Id.* at 80. Further, because quasi-judicial proceedings are reviewable by writ of certiorari, it required a written record and procedural safeguards. *Id.* at 80-82.

140. Ch. 85-55, 1985 Fla. Laws (current version at FLA. STAT. § 163.3161-.3215 (1991)).

141. *See* Park of Commerce Assocs. v. City of Delray Beach, 606 So. 2d 633, 634 (Fla. 4th DCA 1992).

the Florida district courts must rectify the varying treatment of comprehensive plans to resolve the uncertainty in the law and disparity of treatment by judges. The Florida Supreme Court must intercede to provide guidelines of whether a formal or a functional analysis is necessary to determine if the land use decision was a legislative or a quasi-judicial action for judicial review.