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QUASI-JUDICIAL REZONINGS: A COMMENTARY ON THE *SNYDER* DECISION AND THE CONSISTENCY REQUIREMENT

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I. INTRODUCTION

The slowly evolving national trend toward judicialization of the local zoning process has reached Florida. In *Board of County Commissioners of Brevard County v. Snyder*,[1] the Florida Supreme Court made some fundamental changes in the law of zoning. Traditionally, Florida and most other states viewed zoning as a legislative act subject to very deferential judicial review under the fairly debatable rule.[2] The opinion in *Snyder* altered these rules for some local zoning actions, holding that rezonings which affect a limited number of persons or landowners are quasi-judicial actions subject to strict judicial scrutiny.[3] Characterizing local rezonings as quasi-judicial rather than legislative actions promises to significantly affect the way in which rezoning decisions are made by local governments and reviewed by the judiciary. However, the full impact of *Snyder* cannot be presently ascertained, because the decision fails to resolve many relevant issues. Moreover, several related court decisions have compounded the uncertainty.[4]

Judicial recharacterization of local rezoning actions in *Snyder* has provoked harsh criticism from some local government advocates.[5]

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1. 627 So. 2d 469 (Fla. 1993), *rev'g*, 595 So. 2d 65 (5th DCA 1991). In this article, "*Snyder*," the "*Snyder* case," or the "*Snyder* decision" refers to the Florida Supreme Court's decision. When the context does not otherwise make it clear, discussion of the Fifth District Court of Appeal's decision will be indicated by reference to "the Fifth District's" decision.

2. *See generally* HAGMAN & JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, 793-803 (1986); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP In the Nollan Invitation (Part I)*, 23 URB. LAWYER 301, 302-09 (1991).

3. *Snyder*, 627 So. 2d at 474-75. The court also ruled that "comprehensive rezonings affecting a large portion of the public are legislative in nature." *Id.* at 474.

4. These decisions, Jennings v. Dade County, 589 So. 2d 1337 (3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992); Parker v. Leon County, 627 So. 2d 476 (Fla. 1993); and City of Melbourne v. Puma, 616 So. 2d 190 (5th DCA 1993), *remanded*, 630 So. 2d 1097 (Fla. 1994), *on remand*, 635 So. 2d 159 (5th DCA 1994); are discussed *infra* notes 178-93, 241-57 and accompanying text.

5. *See, e.g.*, Paul R. Gougleman, III, *The Death of Zoning As We Know It*, 67 FLA. B. J. 25 (Mar. 1993).

However, *Snyder*'s principal holding inevitably and predictably comes from the rise of mandatory local comprehensive planning and consistency requirements. Historically, the local zoning code has been the primary instrument for controlling the use of land. However, as a result of the passage of state planning legislation in recent decades, the local comprehensive plan has replaced the local zoning code as the preeminent document for regulating land use and development in a growing number of jurisdictions.[6] Florida has been in the vanguard of this national reform movement.[7] Through the imposition of statutory plan consistency requirements, Florida and other jurisdictions have subjugated zoning and other land development regulations to the substantive standards and policies contained in a legislatively adopted local comprehensive plan. In these consistency regimes, the zoning and rezoning of specific tracts of land are a means of applying the standards and policies of the local plan. Consequently, because the function of zoning has changed, courts have begun to reexamine the traditional rules and procedures by which local zoning decisions are made and judicially reviewed.[8] This historical perspective is essential to an understanding and appreciation of the *Snyder* decision.

Consistent with the national trend and reflecting the state's new mandatory planning legislation, the Florida judiciary has reevaluated its traditional view of the local zoning process and the role of the courts in reviewing local zoning decisions. In a series of groundbreaking decisions, the state's lower appellate courts proposed a variety of models for making and reviewing local zoning decisions.[9] These decisions placed varying degrees of emphasis on Florida's new state planning legislation and its mandatory consistency requirement and the need for increased procedural safeguards in local rezoning proceedings. They also brought to the forefront of public debate the conflicting interests of state and local governments, landowners, affected citizen groups, and the general public in the local land use regulatory process. Eventually, using the *Snyder* case as a vehicle, the competing interests petitioned the supreme court to reconcile the

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6. *See generally* ABA SEC. URB., ST. & LOC. GOV'T L., STATE AND REGIONAL COMPREHENSIVE PLANNING (Peter A. Buchsbaum & Larry J. Smith eds., 1993) [hereinafter Buchsbaum & Smith].

7. *See infra* notes 31-34 and 39-67 and accompanying text.

8. *See infra* notes 36-38 and accompanying text.

9. *E.g.*, Board of County Comm'rs of Leon County v. Monticello Drug Co., 619 So. 2d 361 (1st DCA 1993), *rev'd sub nom.* O'Connor Dev. Corp. v. Leon County, 630 So. 2d 578 (Fla. 1994); Lee County v. Sunbelt Equities, 619 So. 2d 996 (Fla. 2d DCA 1993); Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993); Machado v. Musgrove, 519 So. 2d 629 (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988); Southwest Ranches Homeowners Ass'n, Inc. v. Broward County, 502 So. 2d 931 (4th DCA 1987), *rev. denied*, 511 So. 2d 999 (Fla. 1987).

conflicts.[10] The resulting middle-ground decision tried to reconcile the conflicting lower court decisions and balance the various competing interests; however, the opinion ultimately compromised the consistency requirement and failed to fully resolve all of the pertinent issues.

This Article comments on *Snyder* and the role of the consistency requirement in changing the nature and function of local zoning decisions. Part I examines the historical context in which the *Snyder* decision must be understood and evaluated, especially the evolution of mandatory plan consistency requirements. Particular attention is given to Florida's Growth Management Act and its consistency requirement. Part II describes and evaluates the competing models developed by Florida's lower courts for reviewing and resolving consistency challenges to local zoning decisions. The lower courts' treatment of the consistency requirement is given special mention. Part III analyzes the major rulings of the supreme court's *Snyder* decision and its response to the competing interests and conflicting decision-making models which emerged in the lower courts' decisions. This part also discusses the implications of *Snyder* and several related decisions for the local zoning process. It is hoped this commentary will prove useful not only in understanding the *Snyder* decision but also in coping with its requirements and its unanswered questions. It should also be of interest in other jurisdictions where the judiciary has not yet confronted these issues.

II. *SNYDER* IN HISTORICAL CONTEXT: REFORMING THE LOCAL ZONING PROCESS THROUGH PLAN CONSISTENCY REQUIREMENTS[11]

Historically, local governments exercised the zoning power pursuant to broad delegations of state legislative power subject only to constitutional limitations. The 1926 Standard State Zoning Enabling Act,[12] from which most state zoning enabling legislation evolved, did not require prior adoption of a local comprehensive plan and did not set forth significant substantive standards controlling the exercise of the zoning power.[13] Consequently, in the exercise of the zoning power, local governments have traditionally enjoyed very

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10. The *Snyder* case attracted a large number of *amici curiae* briefs from organizations representing the state government, local governments, the development industry, and citizens. 627 So. 2d 469 (Fla. 1993).

11. Part II is largely based on arguments presented by the author on pages 7-20 of the Brief Pro Se of Amicus Curiae Thomas G. Pelham filed in the supreme court in the *Snyder* case, Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993) (No. 79720).

12. STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926), *reprinted in* MODEL LAND DEV. CODE app. A at 210 (Tent. Draft No. 1, 1968).

13. *See* THOMAS G. PELHAM, STATE LAND USE PLANNING AND REGULATION, 46-47 (1979).

broad discretion, circumscribed only by such constitutional limitations as the Due Process, Equal Protection, and Taking Clauses. Unconstrained by any meaningful substantive state statutory standards, these local legislative zoning actions usually received only very loose judicial scrutiny.[14]

Consequently, both federal and state courts adopted a highly deferential standard of judicial review very early in the history of local zoning. In 1926, the United States Supreme Court held in *Village of Euclid v. Ambler Realty*,[15] that local zoning regulations would not violate the Due Process and Equal Protection Clauses unless they were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[16] The Court reasoned that "if the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control."[17] In the ensuing decades, federal and most state courts applied *Euclid*'s substantial relationship test and highly deferential fairly debatable standard.[18] For example, the Florida Supreme Court adopted *Euclid*'s substantial relationship test in *State ex rel. Helseth v. DuBose*,[19] and expressly applied the fairly debatable rule as early as 1941 in *City of Miami Beach v. Ocean & Inland Co.*[20]

Unfettered by meaningful state statutory standards and inhibited only by the very loose scrutiny afforded by the fairly debatable rule, the local zoning system developed into a highly irrational and politicized process. Critics of the local zoning system have found it deficient in terms of both process and policy. In an early critique of the local zoning system, Richard Babcock, one of the nation's foremost land use practitioners, wrote that "[t]he running, ugly sore of zoning is the total failure of this system of law to develop a code of administrative ethics."[21] Subsequently, in his classic indictment of the local regulatory system, *The Zoning Game*, Babcock further exposed and deplored the procedural irrationality of, the lack of state standards for, and the influence of neighborhoodism and rank political influence on, the local decision-making process.[22] Other national land use scholars and commentators have continued to echo Babcock's

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14. Kayden, *supra* note 2, at 302-09.
15. 272 U.S. 365 (1926).
16. *Id.* at 395.
17. *Id.* at 388 (emphasis added).
18. Kayden, *supra* note 2, at 302-09.
19. 128 So. 4, 6 (Fla. 1930).
20. 3 So. 2d 364, 366 (Fla. 1941).
21. Richard Babcock, *The Chaos of Zoning Administration*, 12 Zoning Digest (Am. Plan. Ass'n) 1 (1960).
22. RICHARD BABCOCK, THE ZONING GAME (1966).

criticism of the local zoning process. For example, Professors Mandelker and Tarlock recently wrote that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits."[23]

These critiques prompted increasing calls for reform of the local land use decision-making process. Some commentators urged that substantive standards for land use regulation should be established in the form of a legally binding comprehensive plan. Foremost among the proponents of this approach was Harvard Law Professor Charles Haar, whose influential and widely cited article, *In Accordance with a Comprehensive Plan*,[24] strongly advocated such a requirement. According to Haar, requiring that local land use regulations be consistent with a legally binding comprehensive plan would serve several salutary purposes. First, it would serve as a constant reminder to local legislatures of long-term goals. Second, it would counteract pressures from citizens and landowners for preferential treatment. Third, it would provide courts with a meaningful standard of review.[25] In a subsequent article, Haar contended that a mandatory local plan would also provide landowners and developers with certainty and predictability as to the uses they could make of their land.[26] To achieve these purposes, Haar recommended revision of state enabling acts to require that zoning be in accordance with a separately prepared and adopted comprehensive plan.[27]

Richard Babcock, based on his critique of the local zoning process, also lead the call for reform. In *The Zoning Game*, Babcock urged increased state control of the local zoning system and advocated three major reforms: (1) statutorily mandated administrative procedures to be followed at the local level; (2) statutory prescription of the major substantive criteria by which local land use decisions are made; and (3) establishment of a statewide administrative agency to review the decisions of local governments in land use matters, with final appeal to an appellate court.[28]

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23. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAWYER 1 (1992). Noting the increasing trend toward closer judicial scrutiny of local land use decisions, Mandelker and Tarlock suggest that state courts in particular now "are less willing to wink at what they perceive as a flawed political process." *Id.* at 3.

24. Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

25. *Id.* at 1174.

26. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 362-63 (1955). Haar stated that the master plan would be "an intelligent prophesy as to the probable reaction of the local governmental authorities to a given proposal for development." *Id.* at 363.

27. Haar, *supra* note 23, at 1157, 1174.

28. Babcock, *supra* note 21, at 153-54.

Reflecting the increasing calls for state legislative reform, the American Law Institute undertook a critical reexamination of the Standard State Zoning Enabling Act, the Standard City Planning Enabling Act,[29] and the state enabling legislation these model laws had inspired. This reform project culminated in the adoption of the *Model Land Development Code* (*Model Code*) in 1975.[30] In addition to providing for procedural and planning reforms at the local level, the *Model Code*, in Article 7, called for increased state participation in land use decision making for developments of regional impact and areas of critical state concern.[31]

These various reform proposals resulted in a spate of state land use legislation. Commencing in the 1960s and continuing to the present time, numerous states adopted legislation to reform the local land use decision making process.[32] Florida has been a leader among the states in this national reform movement. In 1972 it became the first state to adopt Article 7 of the *Model Code*,[33] and its 1985 growth management legislation probably stands as the nation's most ambitious and comprehensive planning act.[34] A common feature of much of this state legislation is the requirement that local governments adopt comprehensive plans containing substantive standards and policies for local land use decisions.[35]

In some other states, where state legislatures did not respond expeditiously to the need for reform, the judiciary played a leadership role. The Oregon Supreme Court's opinion in *Fasano v. Board of County Commissioners*[36] represents the leading example of judicially-mandated reform. The *Fasano* court relied upon a provision in that state's traditional zoning and planning enabling act that zoning be in

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29. Standard City Planning Enabling Act (U.S. Dept. of Commerce 1928).

30. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (1976).

31. *Id.* at Art. 7.

32. *See generally* FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971); THOMAS G. PELHAM, STATE LAND-USE PLANNING & REGULATION (1979); JOHN DEGROVE, LAND GROWTH & POLITICS (1984); JOHN DEGROVE & D. MINESS, THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES (1992); Buchsbaum & Smith, *supra* note 6.

33. Pelham, *supra* note 12, at 5. *See* FLA. STAT. ch. 380 (1993), which provides for the regulation of developments of regional impact and areas of critical state concern.

34. Thomas G. Pelham, *The Florida Experience: Creating a State, Regional, and Local Comprehensive Planning Process, in* Buchsbaum & Smith, *supra* note 6, at 95.

35. For a discussion of some of the leading examples of the new state legislation, including the Florida, Hawaii, Oregon, Vermont, and Washington acts, see Buchsbaum & Smith, *supra* note 6; DeGrove & Miness, *supra* note 31.

36. 507 P.2d 23 (Or. 1973) (en banc). The lower court in the *Snyder* case relied heavily upon the *Fasano* decision. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 77-78 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993); *see infra* notes 121-126 and accompanying text.

accordance with a comprehensive plan. Citing this requirement, the *Fasano* court held that the comprehensive plan was the principal legislative policy statement, that the zoning of property involved the application of that legislative policy to a specific rezoning request, and that therefore zoning decisions should be viewed as quasi-judicial rather than legislative acts.[37] Accordingly, in *Fasano* the Oregon Supreme Court imposed new procedural requirements on local governments and held that such local zoning decisions would be subjected to much stricter scrutiny than was afforded by the traditional fairly debatable rule.[38] Subsequently, a number of other state supreme courts adopted some version of the *Fasano* approach.[39]

In Florida, the state legislature took the lead in reforming local government land use decision making. Following its adoption of legislation based on Article 7 of the *Model Land Development Code* in 1972, the Florida Legislature adopted the Local Government Comprehensive Planning Act of 1975.[40] This legislation was amended and greatly strengthened by the Florida Legislature in 1985.[41] Popularly known as Florida's Growth Management Act, this legislation dramatically changes the traditional local land use regulatory process.[42]

Under Florida's Growth Management Act, the local comprehensive plan stands as the preeminent local legislative statement of policy governing local land use decisions. One Florida court has characterized the local comprehensive plan as the "constitution" for land use regulation and development.[43] The adopted local plan must include "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal

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37. 507 P.2d at 26-28.

38. *See id.* at 29-30.

39. According to the Fifth District Court of Appeal in *Snyder*, nine other states have adopted *Fasano* or some variation of its standard: Colorado, Hawaii, Idaho, Illinois, Kansas, Montana, Nevada, Virginia, and Washington. 595 So. 2d at 77-78.

40. Ch. 75-257, 1975 Fla. Laws 794 (codified at FLA. STAT. §§ 163.3161-.3211 (1975)).

41. Ch. 85-55, 1985 Fla. Laws 207 (codified at FLA. STAT. §§ 163.3161-.3215 (Supp. 1986)).

42. In this article, Florida's local planning legislation will be referred to as the Growth Management Act. For discussion and analysis of this legislation, see Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992); Thomas G. Pelham, William L. Hyde, & Robert P. Banks, *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515 (1985). In 1993, the Florida Legislature again extensively amended the Growth Management Act. Ch. 93-206, 1993 Fla. Laws 1887 (codified at FLA. STAT. §§ 163.3161-.3202 (1993)). The 1993 amendments were based on the recommendations of the Third Environmental Land Management Study Committee which are analyzed in David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993).

43. Machado v. Musgrove, 519 So. 2d 629, 632 (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988).

development" of the local government's jurisdictional area.[44] At a minimum, the local plan must include elements covering future land use and capital improvements generally, and sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer protection specifically, conservation, recreation and open space, housing and traffic circulation, intergovernmental coordination, coastal management (for local governments in the coastal zone), and mass transit (for local jurisdictions with 50,000 or more people).[45]

Of special relevance to local rezoning actions, the future land use plan element of the local plan must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate the "proposed future general distribution, location, and extent of the uses of land" for various purposes.[46] It must also include standards to be utilized in the control and distribution of densities and intensities of development. The future land use plan must be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land.[47]

After its adoption, the local comprehensive plan replaces the old comprehensive zoning ordinance as the paramount instrument for regulating land use. Local governments are required to implement their adopted local plans and to make land use decisions based on the standards and policies contained in those plans. The local plan must be implemented through the adoption of land development regulations consistent with the plan.[48] All development, both public and private, and all development orders approved by local governments must demonstrate consistency with the adopted local plan.[49] The Growth Management Act broadly defines "development order" to include all local zoning and rezoning decisions.[50] Accordingly, in making a zoning decision, a local government must apply and

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44. FLA. STAT. § 163.3177(1) (1993).
45. *Id.* § 163.3177(6).
46. *Id.* § 163.3177(6)(a).
47. *Id.*
48. *Id.* § 163.3202.
49. *Id.* § 163.3194(1)(a).
50. FLA. STAT. § 163.3164(7) defines "development order" to mean "any other granting, denying, or granting with conditions an application for a *development permit*." (emphasis added). FLA. STAT. § 163.3164(8) defines "development permit" to mean "any building permit, *zoning permit*, subdivision approval, *rezoning*, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." (emphasis added).

adhere to the goals, objectives and policies of the local comprehensive plan.

The consistency requirement for land development regulations and orders ensures that the goals, policies, and objectives of the local plan are implemented and observed by local governments. The Growth Management Act defines consistency as follows:

> A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.
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> A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.[51]

Through the consistency requirement, the Growth Management Act establishes the goals, objectives, and policies of the local comprehensive plan as the controlling legislative standards for local zoning and other land use and development decisions. The essence of the consistency requirement is that local governments must apply the legislative standards contained in the local comprehensive plan to specific applications for rezonings and other development approvals.

However, the local plan is much more than the local government's primary legislative statement of land use policy; it is also the document through which *state* standards and policies are translated into action at the local level. The Florida Legislature has established state standards and policies regarding land use and development in at least three different ways. First, the legislatively adopted State Comprehensive Plan[52] establishes long-range policy guidance[53] through its goals and policies for such important issues as housing, water resources, coastal and marine resources, natural systems and recreational lands, air quality, land use, transportation, and public

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51. *Id.* § 163.3194(3)(a), (b).

52. FLA. STAT. ch. 187 (1993).

53. FLA. STAT. § 187.101(1) provides in part: "The State Comprehensive Plan shall provide long-range policy guidance for the orderly social, economic, and physical growth of the state."

facilities.[54] Second, the Growth Management Act contains specific planning requirements, including the general standards for the various elements of the local comprehensive plan applicable to every local government in the state.[55] Third, the Legislature has approved the Florida Department of Community Affairs' minimum criteria rule,[56] except to the extent that it may conflict with Chapter 163.[57] This rule sets forth detailed minimum criteria for the preparation and review of local comprehensive plans and plan amendments.[58] Each local comprehensive plan must be consistent with the State Comprehensive Plan, the Growth Management Act, and the Department's minimum criteria rule.[59]

To ensure that these state standards and policies are adopted at the local level, the Growth Management Act requires that each local comprehensive plan and plan amendment be reviewed and approved by the Department of Community Affairs.[60] The Department's review of an adopted plan or plan amendment determines whether it complies with the State Comprehensive Plan, the Growth Management Act, and the Department's minimum criteria rule.[61] Ultimately, if the Department determines that a local plan or plan amendment is not in compliance with these state requirements, the Florida Administration Commission,[62] if it concurs in this finding, may impose sanctions on the local government.[63]

The Growth Management Act also contains enforcement mechanisms to ensure that local governments adopt land development regulations and development orders consistent with the state and local policies contained in the adopted local plan. Accordingly, if a local government fails to adopt land development regulations that are consistent with its adopted local plan, the Department is empowered to seek a court injunction to compel their adoption.[64] If a local government adopts land development regulations that are

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54. FLA. STAT. §§ 187.201(1)-(26) contains the goals and policies of the State Comprehensive Plan.

55. *See generally,* FLA. STAT. ch. 163, part II, (1993), and specifically FLA. STAT. § 163.3177.

56. FLA. ADMIN. CODE ANN. ch. 9J-5.001(1) (1994).

57. FLA. STAT. § 163.3177(10)(c) (1993).

58. FLA. ADMIN. CODE ANN. r. 9J-5.001(1) (1994) states in part: "This chapter establishes minimum criteria for the preparation, review, and determination of compliance of comprehensive plans pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Florida Statutes."

59. FLA. STAT. § 163.3184(1)(b) (1993).

60. *See* §§ 163.3184-.3189.

61. *Id.* § 163.3184(1)(b), (2).

62. The Administration Commission consists of the Governor and six members of the Florida Cabinet. FLA. STAT. §§ 20.03(1) (1993); § 163.3164(1) (1993).

63. *Id.* §§ 163.3184(11); 163.3189(2)(b).

64. *Id.* § 163.3202(4).

inconsistent with the local plan, a substantially affected citizen may challenge the regulations for inconsistency with the local plan in a state administrative hearing following a preliminary consistency determination by the Department.[65] With regard to local development orders—defined to include a rezoning[66]—the Growth Management Act does not provide for administrative review by the Department, an administrative hearing officer, or the Administration Commission. Instead, a citizen with standing may seek judicial review of local development orders alleged to be inconsistent with local plans.[67] To encourage and facilitate consistency challenges to development orders, the Growth Management Act confers broad citizen standing to bring such enforcement actions.[68]

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65. *Id.* § 163.3213.

66. *See supra* note 49 and accompanying text.

67. *Id.* § 163.3215(1) provides:

> Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a *development order*, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part.

(emphasis added). Sections 163.3164(7) and 163.3164(8) define "development order" to include a "zoning permit" and a "rezoning." *See supra* note 49.

68. The traditional standing rules applicable to actions challenging or enforcing local zoning ordinances were summarized by the supreme court in Renard v. Dade County, 261 So. 2d 832 (Fla. 1972) as follows: (1) to enforce a valid zoning ordinance, a plaintiff must prove special damages different in kind from that suffered by the community as a whole; (2) to attack a validly enacted zoning ordinance as arbitrary and unreasonable, a plaintiff must have a legally recognizable interest that is adversely affected; and (3) to attack a zoning ordinance which is void because it was enacted in a procedurally incorrect manner, a plaintiff must be an affected resident, citizen or property owner. 261 So. 2d at 837-38; *see also* Skaggs-Albertsons v. ABC Liquors, Inc., 363 So. 2d 1082, 1087 (Fla. 1978).

Prior to the enactment of section 163.3215, *Florida Statutes*, in 1985, the supreme court considered the application of the *Renard* standing rules to consistency challenges brought under the Growth Management Act. In Citizens Growth Management Coalition v. West Palm Beach, 450 So. 2d 204 (Fla. 1984), the supreme court held that the Growth Management Act, as adopted in 1975, did not alter the standing requirements established in *Renard*. As the basis for this conclusion, the supreme court cited the fact that the Growth Management Act did not expressly establish any new cause of action, did not create any new standing requirements or even address the question of who has standing to enforce the act, and did not indicate that it intended to create new legal rights in citizens. *Id.* at 206-07.

In response to the decision in *Citizens Growth Management Coalition*, the Florida Legislature in 1985 amended the Growth Management Act by adopting section 163.3215. This section does create a new cause of action and expressly confers standing on "any aggrieved or adversely affected party" to bring the newly authorized actions to challenge the consistency of development order. FLA. STAT. § 163.3215 (1993). Section 163.3215(2) defines "aggrieved or adversely affected party" to mean:

> Any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community

Inevitably, in view of the Growth Management Act's strong consistency requirement and its creation of liberal citizen standing to enforce the requirement, Florida's judiciary reexamined the nature of zoning and the role of the courts in reviewing and deciding consistency challenges to local zoning actions. Prior to *Snyder*, the state's lower appellate courts had addressed these fundamental issues in a variety of cases. From these decisions emerged several conflicting models for making and reviewing local zoning decisions. These cases also brought to the surface and underscored the strong competing interests of the state and local governments, local officials, landowners, affected citizens, and the general public in these issues. To fully understand the *Snyder* decision, it will be helpful to examine how Florida's lower appellate courts viewed the relationship between local rezonings and the new consistency requirement.

III. *SNYDER*'S FLORIDA ANCESTORS: COMPETING MODELS FOR MAKING AND REVIEWING REZONING DECISIONS

A threshold question in the initial consistency cases concerned the standard of judicial review. Should the statutory consistency requirement alter the traditional rule that local zoning decisions are subject to review under the fairly debatable rule? If so, what should be the appropriate standard of judicial review? The early case of *City of Cape Canaveral v. Mosher*[69] suggested that the consistency requirement implies a much higher degree of judicial scrutiny than is customary under the fairly debatable rule. In an influential and frequently quoted passage in his concurring opinion, Judge Cowart explained the consistency requirement as follows:

> The word "consistency" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified,

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> at large, but shall exceed in degree the general interest in community good shared by all persons.

Thus, as the Fourth District Court of Appeal stated in Southwest Ranches Homeowners Ass'n, Inc. v. Broward County, 502 So. 2d 931, 935 (4th DCA 1987), *rev. denied*, 511 So. 2d 999 (Fla. 1987), section 163.3215 "liberalizes standing requirements and demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action." See Parker v. Leon County, 627 So. 2d 476, 479 (Fla. 1993), in which the Florida Supreme Court cited and quoted with approval this passage from *Southwest Ranches; see also* FLA. STAT. § 163.3194(4)(b) (stating "this act shall be construed broadly to accomplish its stated purposes and objectives").

69. 467 So. 2d 468 (Fla. 5th DCA 1985).

> by the norm, it is "consistent" with it but if the compared item *deviates or departs in any direction or degree from the parameters of the norm,* the compared item or action is not "consistent" with the norm.[70]

This explanation implies that determining whether a local zoning action is consistent necessitates a close examination of both the zoning action and the provisions of the local comprehensive plan.

The contention that the consistency requirement compels a stricter standard of judicial review ignited a vigorous debate that reverberated through subsequent court decisions.[71] Local governments urged continued application of the highly deferential fairly debatable rule. Landowners and citizen challengers argued for a closer look by the courts to ensure that local governments act consistently with their adopted plans. Consequently, the role of the fairly debatable rule became a major focal point of the lower appellate courts' efforts to establish the ground rules for resolving consistency challenges to local zoning decisions.

With one exception, Florida's lower appellate courts concluded that the fairly debatable standard was not appropriate in consistency challenges. However, in rejecting the fairly debatable rule, courts gave varying degrees of emphasis to the consistency requirement and differed significantly on the standard of review. These differences included the nature or characterization of the local zoning decision, the procedures to be followed by local governments in making those decisions, and the allocation of the burden of proof among the parties. As a result, the lower appellate courts presented a wide range of models for making and reviewing local zoning decisions.

A. Fairly Debatable Review of Legislative Actions

Board of County Commissioners of Leon County v. Monticello Drug Co.[72] represents the traditional approach to review of local rezoning decisions. Accordingly, this case is discussed first, even though it was decided by the First District Court of Appeal after the other four district courts had rendered decisions rejecting the fairly debatable

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70. *Id.* at 471 (Cowart, J. concurring). In an action challenging a rezoning ordinance, the majority opinion in *Mosher* invalidated the ordinance on the constitutional ground that it bore no "substantial relation to the health, morals, welfare, or safety of the public." *Id.* at 469. In his concurring opinion, Judge Cowart argued that the rezoning ordinance should have been voided on the ground that it was inconsistent with the city's comprehensive plan. *Id.* at 471 (Cowart, J. concurring).

71. *See infra* part III. A–D.

72. 619 So. 2d 361 (1st DCA 1993), *rev'd sub nom.* O'Connor Dev. Corp. v. Leon County, 630 So. 2d 578 (Fla. 1994).

rule.[73] The *Monticello Drug* case originated after Leon County denied the landowner's rezoning application. Alleging that the requested rezoning was consistent with the county's comprehensive plan, the landowner then filed a petition for writ of certiorari and other relief in the circuit court.[74] Following a series of procedural gymnastics,[75] the circuit court entered an order quashing the county's denial of the rezoning application. In reaching this decision, the circuit court determined that the county's denial of the rezoning application was a quasi-judicial action subject to strict judicial scrutiny.[76]

On appeal the First District Court reversed. Citing previous decisions rejecting the circuit court's characterization of local rezoning decisions as quasi-judicial, the First District held that a local rezoning decision constitutes a legislative action.[77] After applying the "legislative" label to the county's rezoning decision, the court then ruled that the decision required the fairly debatable rather than the strict scrutiny standard of review.[78] Finally, the First District rejected the trial court's ruling that a rezoning application shown to be consistent with the local comprehensive plan must be granted unless the local government presents clear and convincing evidence that public

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73. These prior decisions by the other four lower appellate courts are discussed *infra* notes 86-173 and accompanying text.

74. 619 So. 2d at 361-63.

75. In an initial order, the circuit court found that the county had erred in denying the rezoning application without specifying its reasons for determining that the rezoning application was inconsistent with the county's comprehensive plan. Finding further that Monticello Drug had failed to comply with the statutory preconditions to bringing a court action pursuant to section 163.3215, *Florida Statutes*, the circuit court ruled that the time period for complying with this condition precedent should not begin to run until the county specified the reasons on which its inconsistency determination was based. Accordingly, the circuit court remanded the case to the county "to set forth with specificity the reasons for its determination that the rezoning application was determined to be inconsistent with the comprehensive plan." *Id.* at 363. After the county issued a letter declining to reconsider its rezoning decision and stating that the reasons for its inconsistency determination were adequately set forth in staff reports and the official minutes and transcripts of Planning Commission and Board meetings, the circuit court treated the letter as compliance with its initial order and permitted Monticello Drug to file any pleading which it deemed appropriate. Subsequently, Monticello Drug filed a verified complaint with the county which rejected it on the ground that it was not filed within the statutory time period. Next, Monticello Drug filed a "Complaint after Remand" which eventually resulted in entry of a final order by the circuit court. *Id.* at 364.

76. *Id.* at 365. The circuit court cited and relied upon the Fifth District's decision in Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993). *Monticello Drug*, 619 So. 2d at 365.

77. *Monticello Drug*, 619 So. 2d at 365. In support of this ruling, the First District cited Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983); Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959); City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (1st DCA 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985). *Monticello Drug*, 619 So. 2d at 365. It is noteworthy that all of these cases were decided before the substantial revisions to the Growth Management Act in 1985.

78. *Monticello Drug*, 619 So. 2d at 365.

necessity required a more restrictive use.[79] Citing its own prior decision in *City of Jacksonville Beach v. Grubbs*,[80] the court distinguished between comprehensive planning and zoning. According to the court, zoning may allow less intensive uses than those contemplated and provided for in a comprehensive plan, and a local government's determination of when it is appropriate to conform the more restrictive zoning with the comprehensive plan is a legislative judgment subject to limited judicial review.[81]

Several aspects of the First District's decision in *Monticello Drug* are noteworthy. First, the decision makes only a passing reference to consistency and does not expressly refer to the statutory consistency provision or otherwise discuss the significance of the requirement. Essentially, the court simply ignored the Growth Management Act and its statutory consistency requirement. Second, the court ignored its own prior suggestions or rulings that strict scrutiny, rather than the deferential fairly debatable standard, should apply to some cases.[82] Third, the court rigidly adhered to the traditional approach without even discussing the appropriateness of applying the fairly debatable rule to consistency challenges—an especially glaring

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79. *Id.*

80. 461 So. 2d 160 (1st DCA 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985).

81. *Monticello Drug*, 619 So. 2d at 365-66. Quoting from its prior decision in *Grubbs*, which in turn quoted from the Oregon case of Marracci v. City of Scappoose, 552 P.2d 552, 553 (Or. Ct. App.), *rev. denied*, 276 Or. 133 (Or. 1976), the Fifth District set forth the full rationale for its position as follows:

> [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan. . . .
>
> The applicable comprehensive plan contains no timetable or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan. In such a situation, we hold the determination of when to conform more restrictive zoning ordinances with the plan is a legislative judgment to be made by a local governing body, and only subject to limited judicial review for patent arbitrariness. In adopting a comprehensive plan, a governing body necessarily makes a great number of legislative and policy judgments about what the future use of land might and should be. It is just as much a legislative judgment when the local governing body is called upon to decide whether "the future has arrived" and it is therefore appropriate to conform zoning with planning.

Monticello Drug, 619 So. 2d at 365-66 (citations omitted).

82. In City of Jacksonville Beach v. Grubbs, the First District had stated that rezoning decisions authorizing more intensive uses than those authorized by the local comprehensive plan should be subject to strict scrutiny. 461 So. 2d at 163 n.3. Subsequently, in B.B. McCormick & Sons v. Jacksonville, 559 So. 2d 252, 255 (Fla. 1st DCA 1990), the court held that strict scrutiny, rather than the fairly debatable standard, applied in determining whether the city's decision to locate a landfill at a particular site was consistent with the local comprehensive plan.

omission in view of the extensive opinions that already had been rendered by each of the other four district courts of appeal.[83]

To evaluate the appropriateness of the fairly debatable rule, one must understand its function and operation. The rule refers to the degree of proof required to establish that a legislative zoning decision fails to satisfy the substantial relationship rule applicable to challenges against an ordinance on grounds that the ordinance violates the Due Process or Equal Protection Clauses of the United States and Florida Constitutions. One court stated the substantial relationship rule as follows: "[i]n order for a zoning ordinance or regulation to be valid, it must have some substantial relationship to the promotion of the public health, safety, morals or general welfare."[84] The evidence adduced to demonstrate whether the application of a zoning ordinance to specific property satisfies the substantial relationship test is measured by the fairly debatable rule.[85] A local zoning decision is fairly debatable "when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity."[86]

The fairly debatable standard is obviously very deferential to the local government. In order to sustain its zoning decision, the local government need only present enough substantial competent evidence to place the validity of its decision in reasonable dispute or controversy. On the other hand, the rule places a heavy burden on the challenger of a local zoning decision. In order to show that the zoning decision is not fairly debatable, the challenger must "conclusively" show or present clear and convincing evidence that the zoning decision is not valid.[87] Otherwise, the local zoning decision remains fairly debatable and, therefore, valid. Application of this highly deferential rule to constitutional challenges to local zoning

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83. *See supra* note 71 and accompanying text.

84. Davis v. Sails, 318 So. 2d 214, 217 (Fla. 1st DCA 1975); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926), holding that local zoning regulations do not violate the due process and equal protection clauses unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (citations omitted).

85. The fairly debatable rule has been stated as follows: "If the application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application is fairly debatable, then the application of the ordinance by the zoning authority should not be disturbed by the courts." Davis v. Sails, 318 So. 2d 214, 217 (Fla. 1st DCA 1975).

86. City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955).

87. *See, e.g.*, Watson v. Mayflower Property, Inc., 177 So. 2d 355, 362 (2d DCA), *cert. denied*, 183 So. 2d 215 (Fla. 1965). "A party asserting that a zoning decision is invalid because not fairly debatable bears an extraordinary burden." B. B. McCormick & Sons v. Jacksonville, 559 So. 2d 252, 255 n.4 (Fla. 1st DCA 1990) (citation omitted).

decisions is appropriate. The rule reflects a healthy judicial respect for the legislature's judgment as to how best to exercise the police power to protect the public health, safety, morals, and general welfare.

But should the fairly debatable rule apply when local zoning decisions are challenged on grounds of inconsistency with the local comprehensive plan? In considering this question, several important points need to be made about the fairly debatable rule. First, it was formulated and adopted by the judiciary, and therefore, can be altered or modified by the courts if necessary to achieve an important public policy. Second, the rule was originally developed and applied by the courts in determining the *constitutionality* of local zoning actions and not in determining the compliance of local zoning decisions with legislatively established standards. Third, the rule was adopted at a time when the nature of local land use regulation was dramatically different than it is today. At the time of the rule's formulation, state legislatures had not imposed any mandatory planning requirements or substantive zoning criteria on local governments. As discussed earlier, the Growth Management Act establishes substantive statutory standards for local land use decisions and makes the state-mandated local comprehensive plan the supreme statement of legislative policy for local zoning decisions. Fourth, application of this rule to consistency challenges would make it very difficult to enforce the consistency requirement and would therefore defeat a major goal of the Growth Management Act. Accordingly, in reviewing cases involving consistency challenges to local rezoning decisions, Florida's other lower appellate courts had compelling reasons to reject application of the fairly debatable rule.

B. Moderately Strict Scrutiny Of Legislative Actions

The Fourth District Court of Appeal was the first Florida appellate court to hold that enforcement of the consistency requirement necessitates a stricter standard of judicial review than the traditional fairly debatable rule, at least in certain circumstances. In *Southwest Ranches Homeowners Ass'n, Inc. v. Broward County*,[88] a homeowners association challenged the consistency of two county zoning ordinances with the local comprehensive plan. The two ordinances changed the agricultural zoning of a 588-acre parcel of land to permit the location and construction of a sanitary landfill and a resource recovery plant. According to the Association, the rezonings were

88. 502 So. 2d 931 (4th DCA), *rev. denied*, 511 So. 2d 999 (Fla. 1987).

inconsistent with the conservation, potable water, and solid waste elements of the local plan.[89]

In deciding the consistency challenge, the court first determined the appropriate standard of judicial review. The county relied on the traditional Florida rule that zoning decisions are legislative actions subject to the fairly debatable rule and contended that the two zoning ordinances should be upheld if found "fairly debatable."[90] Although it did not recharacterize local rezoning as quasi-judicial rather than legislative actions, the court rejected the county's argument. The court held that a stricter standard of review is required in cases where the rezoning action approves a more intensive use than that allowed by the local comprehensive plan.[91] As the rationale for its decision, the court cited the Growth Management Act:

> [W]e believe the enactment of the comprehensive statutory scheme manifests a clear legislative intent to mandate intelligent, uniform growth management throughout the state in accord with the statutory scheme. This purpose cannot be achieved without meaningful judicial review in lawsuits brought under [the Growth Management Act].[92]

Having concluded that a stricter standard of review than the fairly debatable rule applied to at least some zoning decisions, the court then had to define the stricter standard. The court first rejected as too strict the definition of consistency advanced by Judge Cowart in the *Mosher* case.[93] Instead, the court opted for a more moderate approach to the determination of consistency, holding that a court should consider and weigh a broad range of factors where a rezoning action allows for more intensive uses than those contemplated

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89. *Id.*

90. *See id.* at 935.

91. *Id.* at 936. The court stated:

> Where the zoning authority approves a use *more intensive* than that proposed by the plan, the long term expectations for growth under the plan have been exceeded, and the decision must be subject to stricter scrutiny than the fairly debatable standard contemplates.

Id. (citation omitted).

92. *Id.* (citations omitted). The Fourth District agreed with the First District Court's earlier application of the fairly debatable rule to less intensive uses in City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (1st DCA 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985). Concurring with *Grubbs*' application of the fairly debatable rule to zoning changes in these circumstances, the Fourth District noted that "the purpose of a comprehensive plan is to set general guidelines for future development, and not necessarily to accomplish immediate land use changes." *Southwest Ranches*, 502 So. 2d at 936.

93. *Southwest Ranches*, 502 So. 2d at 936. For a discussion of Judge Cowart's view, see *supra* text accompanying notes 68-69.

under the comprehensive plan's future land use element.[94] After considering these factors, the court concluded that Broward County's rezoning to permit the sanitary landfill and solid resource recovery facility in an area designated as "agricultural" by the future land use element was not inconsistent with the overall goals and purposes of the Broward County plan.[95]

The Fourth District's decision-making model can be described as follows: Rezoning actions are legislative in nature. However, in reviewing the consistency of a rezoning with the local comprehensive plan, the traditional fairly debatable rule is not appropriate in all cases. For rezonings which permit more intensive uses than those provided for in the local comprehensive plan, a stricter standard of review is necessary. Strict scrutiny does not mean rigid exactness with each and every provision of the local comprehensive plan. Instead, the court must consider and balance various factors in determining consistency.

C. *Extremely Strict Scrutiny Of Legislative Action*

The Third District Court of Appeal was the first lower appellate court to require strict judicial scrutiny in consistency challenges to *all* local zoning actions, regardless of whether they permit more or less intensive uses than those contemplated in the local comprehensive plan. In *Machado v. Musgrove*,[96] the Third District reviewed a circuit court decision reversing the Dade County Commission's approval of a rezoning application. The county had granted an application to rezone 8.5 acres of property from GU (interim zoning) to RU-5A (professional offices) in an area designated by the county's

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94. 502 So. 2d at 937. The court stated that "Sections 163.3194(4)(a)-(b). . . permit the court to consider a broad range of factors in determining consistency with a comprehensive plan." These statutory sections provide:

> A court, in reviewing local government action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.
>
> It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives.

FLA. STAT. §§ 163.3194(a) - (b) (1993).

95. *Southwest Ranches*, 502 So. 2d at 937-39.

96. 519 So. 2d 629 (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988).

comprehensive plan for estate residential uses (up to two units per gross acre).[97] Although it applied the traditional fairly debatable rule, the circuit court invalidated the rezoning as inconsistent with the local plan. The applicant then sought certiorari review of the circuit court's decision.[98]

Although the Third District affirmed the circuit court's invalidation of the rezoning actions, it applied a different standard of review. The court recognized that rezonings are legislative actions ordinarily subject to the deferential fairly debatable standard.[99] However, the court ruled that a different standard must be applied in consistency challenges.[100] According to the court, the Growth Management Act and its consistency requirement provide "a limitation on a local government's otherwise broad zoning powers."[101] These statutory limitations imply "that application of a fairly debatable, or for that matter any other deferential or discretionary standard,"[102] is not appropriate in reviewing the consistency of a rezoning decision.[103] Therefore, the court concluded that, in reviewing consistency challenges to local zoning actions, a "non-deferential standard of strict judicial scrutiny applies."[104] Moreover, according to the court, an applicant for a zoning change has the burden of proving "by competent and substantial evidence that the proposed development conforms *strictly* to the comprehensive plan and its elements."[105]

The court then enunciated a definition of "strict scrutiny" in the context of consistency challenges:

> Strict implies rigid exactness. . . . A thing scrutinized has been subjected to minute investigation. . . . Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or

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97. *Id.* at 630-31.

98. *Id.*

99. *Id.* at 632. According to the Third District, "it is well-settled that a zoning action is an exercise of legislative power to which a reviewing court applies the deferential fairly debatable test. *See, e.g., Southwest Ranches*, 502 So. 2d at 935." *Id.*

100. *Id.*

101. Machado v. Musgrove, 519 So. 2d 629 (3d DCA 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988).

102. *Id.* at 633. According to the court, the Growth Management Act, and particularly its consistency requirement, "implies . . . that application of a fairly debatable, or for that matter any other deferential or discretionary standard, is not the correct standard of review of an administrative determination that a development order is consistent with the local comprehensive plan." *Id.*

103. *Id.*

104. *Id.* at 632.

105. *Id.* at 632 (emphasis added) (citing Fasano v. Board of County Comm'rs, 507 P.2d 23 (1973)).

> order of a tribunal for *exact compliance* with, or adherence to, a standard or norm. It is the antithesis of a deferential review.[106]

The court derived this definition from the conception of consistency formulated by Judge Cowart in his concurring opinion in *City of Cape Canaveral v. Mosher.* The Third District court expressly approved Judge Cowart's concept as "a working definition which squares with" the statutory definition of consistency.[107] Unlike *Southwest Ranches,* the *Machado* approach applies strict scrutiny to every consistency challenge to a local zoning action. The *Machado* court cited rezonings that constitute "a greater intensity of use," "a lesser intensity of use," "a different and incompatible character of use," and "a failure to comply with the plan's mandatory procedures"[108] as actions inconsistent with local plans requiring strict scrutiny. Thus, it made no difference whether rezonings permitted uses that were more or less intensive than those permitted by the comprehensive plan. *Machado* expressly rejected "the unique view" of *Southwest Ranches* that a reviewing court may "weigh competing public and private interests" for determining consistency in cases "where a proposed development fails to conform to one or more critical elements of the land use plan."[109] Under *Machado,* if a rezoning proposal deviates to any degree from any element of the local plan, it fails as inconsistent. Although the Fourth District in *Southwest Ranches* interpreted section 163.3194(4)(a), *Florida Statutes,* as sanctioning a more flexible approach, the Third District rejected this interpretation.[110] In the view of the Third District, if a rezoning decision is inconsistent with the local plan in any respect, the Growth Management Act does not permit "a reviewing court to further consider the extent and degree of a clear inconsistency."[111] In *Machado,* the Third District adopted a model for extremely strict judicial scrutiny of the consistency of local

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106. Machado v. Musgrove, 519 So. 2d 629, 632 (3d DCA 1987), *rev. denied,* 529 So. 2d 694 (Fla. 1988) (citations omitted and emphasis added).

107. *Id.* at 633-34 (quoting Judge Cowart's definition of consistency from City of Cape Canaveral v. Mosher, 467 So. 2d 468, 471 (Fla. 5th DCA 1985), and the statutory definition of consistency from FLA. STAT. § 163.3194(3)(d) (1985)). For Judge Cowart's definition of consistency, see *supra* text accompanying note 69.

108. *Id.* at 633.

109. *Id.* at n.3.

110. *Id.* at 635. The Third District interpreted section 163.3194(4)(a) as follows:

> We read the provision, in context, as a recognition of the court's inherent power to take into account fundamental fairness questions as may arise from a strict application of the plan—not as a license to second-guess the legislative body where there is simply the to-be-expected collision of the plan with private interests.

Id.

111. Machado v. Musgrove, 519 So. 2d 629, 633 (3d DCA 1987), *rev. denied,* 529 So. 2d 694 (Fla. 1988) (citing for support prior decision in Sengra Corp. v. Metropolitan Dade County, 476 So. 2d 298 (Fla. 3d DCA 1985)).

zoning decisions. The *Machado* model resembles in some important respects the approach in *Southwest Ranches*. Both treat rezoning decisions as legislative acts which must be subject to strict judicial scrutiny because of the consistency requirement. *Machado* differs significantly from *Southwest Ranches* by applying the strict scrutiny standard to all rezonings. Additionally, the *Machado* model applies a *much* stricter level of scrutiny than the more flexible approach followed by the Fourth District in *Southwest Ranches*. The *Machado* model requires strict adherence to every element of the local plan. Thus, the *Machado* model can be appropriately described as one of pure consistency.

D. Strict Scrutiny Of Quasi-Judicial Acts With Extra Protection For Property Owners

If one categorizes local rezoning decisions as legislative acts, then local governments can accomplish these in the same manner as other legislation without the procedural trappings of a judicialized process. Because both the Third and Fourth District Courts of Appeal adopted a judicial review standard of strict scrutiny without recharacterizing the legislative nature of local rezoning actions, these courts had no need to reconsider the procedures governing local zoning decisions. However, when the issue reached the Fifth District Court of Appeal, this court adopted a dramatically different model for making and reviewing rezoning decisions. It recharacterized some local rezoning decisions as quasi-judicial acts and mandated new procedural requirements for local zoning proceedings.

Snyder v. Board of County Commissioners of Brevard County[112] started with the Brevard County Commission's decision to deny Jack and Gail Snyder's rezoning application. They had sought a rezoning of their one-half acre parcel of land from GU (General Use), a holding zone which permitted construction of a single-family residence, to a medium density, multi-family residential zoning classification allowing construction of fifteen units per acre. Without giving any reason, the county commission denied the rezoning application despite the county planning board's favorable recommendation and finding that the rezoning was consistent with the county's adopted

112. 595 So. 2d 65 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

comprehensive plan.[113] The Snyders then sought certiorari review of the county's decision in circuit court. Their complaint was denied.[114]

Subsequently, the landowners petitioned the Fifth District Court of Appeal for certiorari review of the circuit court's decision. They argued that the county commission deviated from the essential requirements of law by denying their rezoning application—one allegedly consistent with the county's comprehensive plan—and by failing to make written findings of fact and to give written reasons for its denial.[115] In response, the county contended that its denial of the rezoning request was legislative action and that therefore the county commission was not required to make findings of fact or give reason for its actions. Additionally, the county contended that as a legislative action, its rezoning request should be upheld under the fairly debatable rule.[116] With the issues so framed, and against the backdrop of the *Machado* and *Southwest Ranches* decisions, the Fifth District was positioned to reconsider the manner in which rezoning decisions are made and judicially reviewed.

The Fifth District held that the county's rezoning decision was subject to strict judicial scrutiny.[117] However, the court's *Snyder* decision reflects a perspective that is strikingly different from that of its sister courts. Both *Southwest Ranches* and *Machado* focused directly on the role of the local comprehensive plan and the enforcement of its standards and policies through the consistency requirement. In sharp contrast, the Fifth District's *Snyder* decision was clearly driven by two different concerns: the importance of private property rights and the highly political nature of the traditional local zoning system. In a lengthy section marred by excessive rhetoric,[118]

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113. *Id.* at 66-68. At the public hearing before the County Commission, a number of adjacent neighborhood residents opposed the rezoning request. *Id.* at 67. Some of the pertinent facts are taken from the supreme court's decision in Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 471 (Fla. 1993).

114. *Snyder*, 595 So. 2d at 68. Neither party questioned the jurisdiction of the circuit court to review the county's rezoning decision by certiorari. *Id.* at 68 n.8.

115. *Id.* at 68.

116. *Id.*

117. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 81 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

118. For example, the court states: "Anglo-American law recognizes and protects private property rights and recognizes that the only proper limitation on the right of a citizen to use private property is the common law of nuisance as now embodied in the constitutional concept of police power." *Id.* at 69-70. In another case, the court states that private property ownership includes the right to freely use the property as the owner desires subject only to "the common law remedies for the abatement of public and private nuisances." *Id.* at 69. However, the United States Supreme Court has recognized that the power to regulate pursuant to the police power to protect and promote the public welfare is much broader than the power to abate nuisances. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954), in which the Supreme Court stated:

the court forcefully emphasized the importance of private ownership of property and the right of property owners to use land as they desire.[119] Echoing the criticisms of Babcock and other land use commentators, the court also expressed disdain for the political nature of the local zoning process[120] and the lack of adequate procedures and protections for the property owner.[121] Implicit in the court's discussion of these issues is the perceived need to provide greater protection for private property owners by reforming the local land use decisionmaking process.

Given the Fifth District's perspective, it is not surprising that the court pursued a much more ambitious agenda than the Third and Fourth Districts. While *Southwest Ranches* and *Machado* focused on strict judicial scrutiny of local legislative zoning decisions as a means of enforcing the consistency requirement, the Fifth District's *Snyder* decision sought to reform the local zoning process in order to protect property owners. In pursuit of this goal, the court undertook a functional analysis of local rezoning decisions, recharacterized the

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> The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

119. The court summed up its discourse on private property rights as follows:

> [T]he right of a citizen to own property is one of the most fundamental and cherished rights and is the cornerstone that anchors the capitalistic form of government guaranteed by the federal and state constitutions. The most valuable aspect of the ownership of property is the right to use it. Any infringement on the owner's full and free use of privately owned property, whether the result of physical limitations or governmentally enacted restrictions, is a direct limitation on, and diminution of, the value of the property and the value of its ownership and accordingly triggers constitutional protections.

Id. at 70 (footnotes omitted).

120. According to the court:

> Rezoning is granted not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, *and perhaps foremost, on local political considerations* including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.

Id. at 73 (emphasis added).

121. The court described the local zoning process as follows:

> The legislative and executive are the political branches of government and the governmental zoning bodies exercising those functions have *politicized the "rezoning"* process by forming the issues and considering and determining them at public meeting to which nearby landowners are encouraged to appear and oppose requests for rezoning and the issue-forming, fact-finding, and *decision-making is conducted in a politicized forum and atmosphere* rather than in a neutral forum by an independent deliberative body determining facts in a detached manner and applying general legislative rules of law impartially to individual cases or specific instances.

Id. at 74 (emphasis added).

fundamental nature of these actions, and established new procedural requirements for the local zoning process.[122]

Unlike the *Southwest Ranches* and *Machado* courts, the Fifth District in *Snyder* characterized certain rezoning decisions as quasi-judicial acts rather than legislative acts.[123] Expressly adopting the rationale of the *Fasano* decision, the court reached this conclusion by applying a functional analysis: an action which formulates a general rule of policy applicable to a large portion of the public (policy-setting) is legislative in character, while an action that involves application of a general rule of policy to a specific individual or parcel of property (policy application) is quasi-judicial in nature.[124] The local comprehensive plan is a policy-setting document; it "represents general legislative policy."[125] A rezoning of property is policy application; it involves the application of general policy—the comprehensive plan—to a specific individual and parcel of land.[126] Based on this analysis, the court held that "enactments of original general comprehensive zoning and planning ordinances and maps, and amendments thereto of broad general application" are legislative acts "establishing rules of law of general application."[127] By contrast, a rezoning of a specific tract of land involves the "application of the previously enacted general rule of law to a particular instance" and is a quasi-judicial act.[128]

Next, the Fifth District ruled that quasi-judicial rezonings are subject to strict judicial scrutiny and not the deferential fairly debatable rule.[129] But whereas *Southwest Ranches* and *Machado* embraced strict scrutiny as a means of enforcing the consistency requirement, the Fifth District adopted this standard in order to protect private property rights. According to the court, the regulation of land use through the application of general policy to specific tracts of land

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122. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 78-81 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

123. *Id.* at 78.

124. *See id.* at 78. As support for this proposition, the court cited *Fasano*, two Florida lower appellate court decisions, City of Melbourne v. Hess Realty Corp., 575 So. 2d 774 (Fla. 5th DCA 1991) and Hirt v. Board of County Comm'rs of Polk County, 578 So. 2d 415 (Fla. 2d DCA 1991), and a law review article, Carl J. Peckingpaugh, Jr., *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499 (1980). *Id.* at 78-79.

125. *Id.* at 75-76.

126. *See id.* at 79-80.

127. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 80 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

128. *Id.* at 78-80.

129. *Id.* 79-81. The court stated: "The application of a fairly debatable, or for that matter, any other deferential or discretionary standard, is not the correct standard of judicial review where the issue and decision involves the proper application of a legislated rule of law to a particular piece of property." *Id.* at 79-80 (footnote omitted).

affects constitutionally protected property rights and the landowner's constitutional right of access to the courts to protect those property rights.[130] Therefore, because of the constitutional origins of private property rights, the courts must strictly scrutinize any governmental action denying or abridging those rights.[131] Further evincing its desire to give maximum protection to the private property owner, however, the court suggested that local decisions granting a landowner's rezoning request, if challenged by citizen objectors, should be presumed valid and subjected only to fairly debatable judicial review.[132]

Finally, to ensure that a quasi-judicial zoning decision can be effectively and strictly scrutinized, the court established new rules which must be followed by local governments in rendering those decisions. First, the local government must compile and preserve a record of its decision-making proceedings, make written findings of fact, and state the reasons for any decision that denies an owner the use of its land.[133] Second, the record, the findings of fact, and the stated reasons must be sufficient for a court to review the legal sufficiency of the findings of fact, the evidence on which they are based, and the reasons given for the local government's decision.[134] Third, to further protect private property rights, the court established burden of proof rules that are unusually onerous for local governments. If a landowner carries the initial burden of demonstrating that his application for rezoning is consistent with the local comprehensive plan and complies with applicable procedural requirements, "the landowner is presumptively entitled to use his property in the manner he seeks."[135] The burden then shifts to the local government to assert and prove "by clear and convincing evidence that a specifically

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130. *Id.* at 80-81. The court stated: "Landowners adversely affected by the action of a governmental zoning authority are entitled to access to the trial and appellate courts of this state for full judicial review of such governmental action." *Id.* at 81.

131. The court stated: "Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. *Id.* at 81.

132. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 81 n.68 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

133. *Id.* at 81. Regarding the record, this court placed the burden on the local government "to assure that an adequate record of the evidence is prepared, including the relevant evidence establishing the rezoning applicant's prima facie case such as the rezoning application, the planning and zoning staff report, and the minutes of any hearing before the Planning and Zoning Board. This evidence should be provided to a reviewing court." *Id.* at 80. Also, the local zoning authority must make "specific, written, detailed" findings of fact to support any decision denying a landowner's requested rezoning, and enter these findings into the record. *Id.*

134. *Id.* at 81.

135. *Id.*

stated public necessity requires a specified, more restrictive, use."[136] In the event a local government meets this burden, the landowner's recourse is to prove that the specified, more restrictive use constitutes a taking of private property.[137]

In asserting the landowner's presumptive right to approval of a rezoning application found consistent with the local comprehensive plan, the Fifth District rejected Brevard County's plea for recognition of a distinction between planning and zoning and for greater local governmental discretion in designating the zoning of specific parcels of land. The county contended that it properly denied the rezoning application because the existing zoning was also consistent with the comprehensive plan. Under the county's theory, a local government has the legislative discretion, subject only to fairly debatable review, to determine the zoning of any parcel of land so long as it falls within the parameters of the comprehensive plan.[138] The court rejected the county's argument with a *non-sequitur*: in enacting original zoning ordinances, local governments, preferring to take a "wait and see" attitude toward future development, customarily "underzone" undeveloped areas. Hence, the original zoning does not evince a legislative intent "which prefers the existing classification over a subsequent proposed classification."[139] Therefore, the court seemed to say, there is no reason to give any deference or presumption of validity to existing zoning classifications even if they are consistent with the comprehensive plan. On the contrary, there exists a presumption that the landowner is immediately entitled to the maximum uses permitted by the future land use projections of the

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136. *Id.* To support the clear and convincing evidence standard, the court cited a string of Florida court decisions which apply such a standard in cases involving the abridgment of constitutionally protected rights. *Id.* at 81 n.70.

137. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 81 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

138. *Id.* at 79.

139. *Id.* The court described the practice of "underzoning" as follows:

> Most communities in actual practice have zoned their undeveloped land under a highly restrictive classification such as "general use" and agriculture. Typically, in such "zones" the most development allowed was one single family residence on very large parcels. The original intent was not to permanently preclude more intensive development but to adopt a "wait and see" attitude toward the direction of future development.
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> In reality, therefore, at the inception of zoning most land was zoned according to its then use, exceptions were grandfathered in and most vacant land was underzoned or "short zoned."

Id. at 72-73. Actually, assuming the existence of this practice, it seems to support the county's argument that it should have the discretion to determine when a specific tract of land should be upzoned so long as the existing decision is consistent with the local comprehensive plan.

comprehensive plan. The court's reasoning is not only a very narrow and restrictive interpretation of the consistency requirement but it also fails to recognize the crucial distinction between future planning and current zoning. Nevertheless, the court's refusal to allow greater local flexibility and discretion in making rezoning decisions within the parameters of the comprehensive plan is perfectly consonant with its strong private property rights perspective and its distrust of the local zoning process.[140]

One other facet of the Fifth District's *Snyder* decision merits special mention. Its imprecise, ambiguous, and inconsistent terminology casts a cloud of confusion over the extent of the court's recharacterization of rezoning decisions as quasi-judicial. Are all rezonings of property quasi-judicial actions, or are some rezonings still treated as legislative actions? The Fifth District's precise holding on this point remains open to some debate. The court framed the issue in terms of the application of "a previous legislated general zoning ordinance (a comprehensive zoning plan) to a *particular parcel of land*."[141] The court's holding on this issue is that application of a previously enacted general rule of law (a general comprehensive zoning and planning ordinance and map)[142] "*to a particular instance* (i.e., *a specific parcel of privately owned land* under then existing conditions)" is quasi-judicial.[143] But this merely leads to the question: Does a "specific parcel" refer only to a tract of land under single or common ownership or does it also include a specifically described parcel that includes numerous tracts or lots separately owned by many different individuals?

Strict scrutiny of the court's functional analysis for clues to the meaning of its holding only adds to the confusion. In one passage the court states that "comprehensive rezonings or rezonings affecting a large portion of the public are legislative in character."[144] The meaning of this terminology is not clear because the court had previously distinguished between two types of "rezonings." One type of

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140. *See supra* notes 116-119 and accompanying text.

141. *Id.* at 75 (emphasis added).

142. At times the court creates confusion by failing to distinguish clearly between the comprehensive plan and its future land use map and the general comprehensive zoning ordinance and zoning map, sometimes using the terms interchangeably or in combinations that make little sense. For example, at one point the court states that the landowners in *Snyder* "demonstrated conclusively that such use was consistent with the county comprehensive plan of the county general zoning ordinance." Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 81 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

143. *Id.* at 80. At an earlier point in its opinion, the court referred to "the application of zoning ordinances in specific cases involving *particular circumstances and parcels of land*" as an "exercise of the judicial function." *Id.* at 71-72 (emphasis added).

144. *Id.* at 78.

"rezoning" makes "a change in general policy of widespread applicability effecting a large area of the community" by amending the comprehensive plan or comprehensive zoning ordinance and is therefore a legislative act; the other type relates to the application of the comprehensive plan or comprehensive zoning ordinance to particular tracts of land and landowners.[145] Regardless of the intended meaning of "comprehensive rezonings," the court distinguishes such rezonings from

> rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interest, 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 executive or judicial or quasi-judicial action but are definitely not legislative in character.[146]

But how many persons or property owners constitute a "limited number?" One, a dozen, or any number less than either the entire population or the total number of property owners in the local jurisdiction? The Fifth District's opinion provides no further guidelines for distinguishing between legislative, comprehensive rezonings and quasi-judicial, small-scale rezonings.

Arguably, the court's opinion is susceptible to two interpretations. Based on a cursory reading of the opinion, the most obvious interpretation is that the Fifth District intended to limit its recharacterization of rezoning decisions as quasi-judicial acts to actual rezonings of small-scale, site-specific, owner-initiated rezonings involving a single or relatively few landowners.[147] A more careful and thoughtful reading of the opinion may lead one to the interpretation that all rezoning decisions which actually change the land use

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145. *Id.* at 74-75. Also, the court distinguished between two types of "zoning maps:" the future land use map of the local comprehensive plan, and the zoning map which reflects the actual zoning of particular parcels of land. The court noted that changes in the comprehensive plan map constitute legislative actions and that changes in the zoning map represent quasi-judicial actions. *Id.* at 75.

146. *Id.* at 78 (footnotes omitted). In a footnote to this passage, the court observed:

> The functional difference between amendments to zoning ordinances and comprehensive planning maps, which constitutes legislative action, and decisions made in individual zoning application cases and the recording of those decisions in minutes of meeting (rather than an ordinance change) and on actual zoning maps, which is non-legislative action, is reminiscent of the difference between planning-level, policy-making, decisions for which government has sovereign immunity[,] . . .[and] executions or applications [of those] decisions[,] for which it does not have sovereign immunity.

Id. at 78 n.60.

147. This interpretation is buttressed by the fact that *Snyder* involves an owner-initiated rezoning request for a one-half acre parcel of land.

designation of a tract of property (policy application), regardless of its size and the number of landowners, is quasi-judicial. Only so-called "rezoning" decisions which amend the comprehensive plan or the general comprehensive zoning ordinance (policy setting) are legislative acts.[148]

Only the second interpretation is consistent with the court's functional analysis. Under the statutory consistency requirement, all rezonings, large and small, must be consistent with the comprehensive plan.[149] In other words, the local zoning authority must apply the legislatively established policies of the comprehensive plan to any and all rezonings of specific parcels of land, regardless of the size of the parcel or the number of people affected by it. Logically, therefore, under the court's functional analysis, *all* actual rezonings of property, not just those affecting "a limited number of persons," should be characterized as quasi-judicial actions.

If the Fifth District did intend to limit its quasi-judicial holding to small-scale, site specific rezonings involving the limited number of persons or landowners, why did it overlook the resulting logical flaw in its analysis? The answer may lie in the court's failure to consider fully, or to link its functional analysis directly to, the consistency requirement. Apparently, this omission was intentional. In discussing judicial rejection of the fairly debatable rule by other courts, the Fifth District distinguished between those courts (such as the Third and Fourth Districts) which have undertaken "a more searching review of the consistency with the underlying planning" from those which have followed the lead of *Fasano* in applying "stricter scrutiny by reasoning that local rezonings are quasi-judicial in character."[150] The Fifth District decided to follow the latter approach and did not undertake a detailed analysis of the consistency requirement. Indeed, in its lengthy opinion, the court only mentioned the Growth Management Act or its consistency requirement in two brief textual passages and one footnote.[151]

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148. The court's functional analysis and its distinction between two types of rezonings and two types of zoning maps, *see supra* notes 143-44 and accompanying text, support this interpretation.

149. *See supra* notes 47-49 and accompanying text.

150. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 76 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993). Actually, this distinction is somewhat misleading because *Fasano* linked its decision that rezonings are quasi-judicial to Oregon's statutory requirement that zoning decisions be in accordance with a comprehensive plan. Fasano v. Board of County Comm'rs, 507 P.2d 23, 27 (Or. 1973).

151. In one passage, the court stated:

> In 1985, the Florida legislature enacted the Local Government Comprehensive Planning and Land Development Regulation Act. Rezonings under the new act are required to be consistent with the local comprehensive plan. Under the prior

Consequently, it would be understandable if the court overlooked the fact that under Florida's statutory consistency requirement all rezonings of land involve policy application and, therefore, are arguably quasi-judicial actions.

Whatever its logical deficiencies, the Fifth District's model provides for strict scrutiny of quasi-judicial actions with extra protection for private property rights. Recharacterizing at least those rezonings affecting a limited number of persons or landowners as quasi-judicial, this model imposes new procedural requirements on the local zoning process so that these quasi-judicial decisions may be effectively subjected to strict judicial scrutiny. In making these quasi-judicial rezoning decisions, the local zoning authority must preserve a record of its proceedings, make findings of fact, and state reasons for denial of a rezoning request sufficient to permit judicial review of the legal sufficiency of the evidence, the findings of fact, and the reasons given for the denial. Finally, to further limit the discretion of the local government and to provide greater protection for private property rights, this model poses new rules concerning the burden of proof in quasi-judicial rezoning proceedings. If the landowner carries his or her burden to demonstrate that the rezoning application is consistent with the comprehensive plan, the local government must grant the application unless it presents clear and convincing evidence that a specifically identified public necessity compels a more restrictive, specific use.

E. Strict Scrutiny of Quasi-Judicial Acts With Planning Flexibility For Local Government

After the supreme court accepted review of the *Snyder* case, *Lee County v. Sunbelt Equities*[152] presented the Second District Court of Appeal with an opportunity to reconsider the nature of local rezoning decisions. *Sunbelt Equities* originated with an application to rezone property from its existing agricultural land use classification to commercial/office uses. Although the rezoning proposal appeared to be consistent with future land use projections of the county's

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> statutes, this was permissive, not mandatory. As a result, Florida courts have adopted a standard of strict scrutiny in reviewing the consistency between local development orders (which include rezoning decisions) and the local comprehensive plan (which represents general legislative policy).

595 So. 2d at 75-76 (footnotes omitted). Subsequently, the court also mentioned that the Growth Management Act authorizes challenges to rezoning actions on the basis of inconsistency with the local comprehensive plan. *Id.* at 76. Finally, in a footnote, the court observed that a comprehensive plan adopted in accordance with section 163.3177, *Florida Statutes* is a "legislated rule of law." *Id.* at 80 n.62.

152. 619 So. 2d 996 (Fla. 2d DCA 1993).

comprehensive plan, the county commission determined the proposal was inconsistent with the plan.[153] Rejecting recommendations of approval by both the county's planning staff and hearing examiner, the county commission denied the rezoning application. The landowner then filed a petition for review in the circuit court, which relied on *Snyder* in reversing the county's decision. Lee County then sought review by the Second District.[154]

Acting with the benefit of the prior appellate court decisions in *Southwest Ranches, Machado,* and *Snyder,* the Second District was in a position to write a definitive opinion on the various issues raised by application of the consistency requirement to local rezoning decisions. Curiously, however, while the court discussed or at least mentioned the principal issues, it did not resolve a number of them. First, while it acknowledged the statutory consistency requirement of section 163.3161, *Florida Statutes,* the Second District failed to explain how that requirement transforms rezoning from legislative to quasi-judicial action.[155] Second, the court noted that the consistency requirement had given rise to the concept of strict scrutiny, but pointed out that the *Machado* and *Southwest Ranches* courts disagreed on whether strict scrutiny should be applied to all consistency cases or only to those involving local rezonings approving uses more intensive than those proposed by the local plan.[156] However, the Second District in *Sunbelt Equities* did not clearly indicate whether it agrees with *Machado* or *Southwest Ranches* as to when strict scrutiny should be applied. Third, the Second District did not define consistency or indicate whether it approved of the *Machado* court's definition of the term.[157]

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153. *Id.* at 998-99. The county commission adopted a written resolution which found that the rezoning proposal was inconsistent with the Lee County Comprehensive Plan because it did not comply with the site location standards for Neighborhood Commercial Development, would create "unreasonable development expectations" that were contrary to the commercial acreage limitations in the comprehensive plan, and would lead to the opening of "new areas to premature, scattered, or strip development." *Id.* at 999.

154. *Id.* Although the landowner filed both a petition for certiorari and an original action pursuant to section 163.3215, *Florida Statutes,* the circuit court addressed only the certiorari petition. Consequently, the Second District reviewed only the circuit court's certiorari decision and declined to consider the county's contention that the landowner's action should be dismissed for failure to comply with the statutory preconditions of section 163.3215. *Id.* n.3.

155. *Id.* at 1003. Interestingly, the court discusses the consistency requirement in part III of its opinion, which is entitled "The Scope of Review at the Circuit and DCA Levels," and not under part II, entitled "Rezoning: Legislative or Judicial Proceeding?" *Id.* at 999, 1002.

156. *Id.* at 1003 & 1003 n.9.

157. Note the court's brief discussion of consistency at page 1003 of the opinion. Although it did not define consistency or inconsistency, the Second District did state that a rezoning proposal cannot be inconsistent with the comprehensive plan, and it "will be subject to the 'strict scrutiny' of *Machado* to insure this does not happen." Lee County v. Sunbelt Equities, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993).

Instead of an opinion comprehensively explicating the meaning and role of the consistency requirement, the Second District limited itself to a review and critique of the Fifth District's *Snyder* decision. The court began its critique by concurring in most of the major tenets of *Snyder*. It agreed that some local rezoning decisions should be characterized as quasi-judicial acts, but adopted an exceedingly narrow interpretation of the principal *Snyder* holding. According to *Sunbelt Equities*, the Fifth District in *Snyder* held that only "site-specific, owner-initiated rezoning requests" are quasi-judicial acts.[158] As the rationale for its decision, the court also expressly adopted "the functional analysis of *Snyder*."[159] Echoing the concern expressed in *Snyder* about the highly political nature of the traditional local zoning process, the Second District also agreed that recharacterizing local rezoning decisions as quasi-judicial would help to de-politicize the local zoning process.[160] Finally, the court adopted, at least implicitly, the procedural requirements established in *Snyder* for the conduct of local quasi-judicial rezoning proceedings.[161]

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158. *Id.* at 999, 1001. The court explained that its prior decision in Lee County v. Morales, 557 So. 2d 652 (2d DCA) *rev. denied*, 564 So. 2d 1086 (Fla. 1990), which described a rezoning decision as legislative action, did not conflict with the Fifth District's *Snyder* decision because it involved a comprehensive downzoning initiated by the county and not an owner-initiated zoning change. *Id.* at 999.

It should be noted that nowhere in its *Snyder* opinion does the Fifth District expressly state that only "site specific, owner-initiated rezoning" requests are quasi-judicial, although the case did involve such an application. *See supra* notes 121-26, 139-47 and accompanying text.

159. *Id.* at 1000-1001. The Second District stated: "We believe a fair and workable solution is to adopt the functional analysis of *Snyder*, which is consistent procedurally with our prior decision in *Manatee County v. Kuehnel*." *Id.* at 1001. Manatee County v. Kuehnel is reported at 542 So. 2d 1356 (2d DCA), *rev. denied*, 548 So. 2d 663 (Fla. 1989).

160. The court stated: "The effect of labeling rezoning decisions as quasi-judicial is to refer them to an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches." *Id.* at 1001. Yet, the court also recognized both the impossibility and the undesirability of completely de-politicizing the local zoning process:

> [A]ccepting the notion that rezonings are quasi-judicial does not operate to exclude the public from those proceedings where such applications are considered on their merits. The need to allow such public access, which includes the right to voice objections (at least on the part of those claiming to be substantially affected by the pending action), points out the difficulty in completely de-politicizing such proceedings.

Id. at 998 n.1.

161. Although the Second District never expressly spelled out the procedural requirements which must be followed in local quasi-judicial rezoning decisions, its adoption of the *Snyder* procedural requirements is implicit in several passages of its *Sunbelt Equities* decision. For example, the court stated: "This is the occasion for the *Snyder*-type individualized rezoning application, which we now declare to be quasi-judicial and *therefore subject to procedural safeguards*." *Id.* at 1006. At another point in its opinion, the court stated: "Moreover, it is debatable whether the new procedural requirements implicit in our adoption of *Snyder* should be viewed either as onerous or as infringing upon powers traditionally reserved for local elected officials." *Id.* at 1002. This statement was followed with a quotation from Jennings v. Dade

Regarding the burden of proof rules established in *Snyder*, however, the Second District declined to follow the lead of the Fifth District. Recall that in its *Snyder* opinion the Fifth District ruled that if a landowner demonstrates that its rezoning application is consistent with the comprehensive plan, then the landowner is presumptively entitled to approval of the request unless the local government presents clear and convincing evidence that a specifically stated public necessity requires a more restrictive use.[162] The Second District rejected this rule for several reasons. First, it overstates the nature and extent of property rights; a landowner is not always entitled to the "highest and best" or the most intensive use of its land.[163] Moreover, demonstrating the consistency of a proposed rezoning request with the comprehensive plan does not alone create an enforceable property right that triggers application of the clear and convincing evidence standard.[164]

Next, according to *Sunbelt Equities*, the Fifth District in *Snyder* failed to adequately distinguish between zoning and comprehensive planning. Based on its theory of "short zoning," the Fifth District accorded little value to zoning classifications and placed great credence in the comprehensive planning process.[165] However, the Second District dismissed the "short zoning" theory as an "unacceptably overbroad" generalization that cannot be applied on a statewide basis and asserted that both the comprehensive plan and a zoning classification are presumptively valid.[166] More importantly, the Second District noted that "the purpose of a comprehensive plan is to

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County, 589 So. 2d 1337, 1340 (3d DCA 1991) *rev. denied*, 598 So. 2d 75 (Fla. 1992), which described the procedures that must be followed in quasi-judicial proceedings. 619 So. 2d at 1002.

162. *See supra* note 134 and accompanying text.

163. Lee County v. Sunbelt Equities, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993).

164. *Id.* at 1006-07. According to the Second District:

> [t]he courts, reviewing a rezoning application, should not presume the landowner does or can assert an enforceable property right, one which triggers application of the "clear and convincing evidence" standard, every time a more intensive use of the property is sought. Instead, the landowner must prove the existence of such a right, not just consistency with a comprehensive plan, before so rigorous a burden will be imposed upon the local government.

Id. at 1007.

165. *Id.* at 1004-05; *see supra* notes 137-138 and accompanying text.

166. *Id.* The court stated:

> However, implicit in *Snyder* is a suggestion that the future oriented comprehensive planning process always will result in a more accurate and appropriate use designation than will the more immediate act of zoning a specific parcel. We believe that *both* a comprehensive plan and a zoning classification are presumptively valid, and that one seeking a change in either has the burden of showing its invalidity.

Id. at 1005 (footnote omitted).

set general guidelines for future development, and not necessarily to accomplish immediate land use changes."[167] Because a range of permissible zoning classifications for any particular tract of property may be consistent with the comprehensive plan, the landowner is not presumptively entitled to any particular zoning category within the range.[168]

Finally, the Second District believed that the "clear and convincing evidence" standard unduly and unacceptably limits local governmental discretion. According to the court, in the absence of an enforceable property right, a rezoning application "appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable."[169] If a range of zoning classifications is consistent with the comprehensive plan, then the local government has the discretion "to impose a zoning category at the low end of that range."[170] Consequently, the Second District concluded that the "clear and convincing evidence" standard would "fundamentally undercut the power of local governments to superintend the use of real property."[171]

Having rejected the "clear and convincing evidence" standard, the Second District then decided what burden of proof, if any, would allow a local government to deny a consistent rezoning request. If the landowner demonstrates that its application is consistent with the comprehensive plan, the court concluded that there should be some shifting of burdens to ensure that the local government acts "carefully when restricting property rights."[172] Thus, the Second District decreed that the local government must demonstrate "*by substantial competent evidence* that the existing (obviously more restrictive) zoning classification was enacted in furtherance of some legitimate public purpose and that the public interest is legitimately served by continuing that classification."[173] Obviously, this standard allows local governments far more discretion than the Fifth District's *Snyder* decision. Accordingly, the Second District quashed the circuit court's order, which granted the landowner's rezoning application

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167. *Id.* at 1004 (quoting from Southwest Ranches Homeowners Ass'n, Inc. v. Broward County, 502 So. 2d 931, 936 (4th DCA), *rev. denied*, 511 So. 2d 999 (Fla. 1987)).

168. 619 So. 2d 996, 1004 (Fla. 2d DCA 1993).

169. *Id.* at 1005.

170. *Id.* at 1004.

171. *Id.* at 1006.

172. *Id.* at 1007.

173. *Id.* According to the court, the local government will have to "justify this conclusion with evidence in the record." *Id.*

based on *Snyder*, and remanded for proceedings consistent with the rule announced in *Sunbelt Equities*.[174]

As further guidance for the circuit court on remand, the Second District emphasized that establishing consistency with the Lee County comprehensive plan would not be sufficient to mandate approval of Sunbelt's rezoning request. According to the court:

> The comprehensive plan represents, in effect, a future ceiling above which development should not proceed. It does not give developers *carte blanche* to approach that ceiling immediately, or on their private timetable, any more than a city or county is entitled to view its planning and zoning responsibilities as mere make-work.[175]

Therefore, the county's decision to deny the application must be upheld if the record contains "substantial competent evidence favoring continuation of the *status quo*."[176]

Following the lead of *Snyder*, the Second District adopted a model of strict scrutiny of quasi-judicial actions. Characterizing site-specific, owner initiated rezonings as quasi-judicial actions, the court held that such decisions must be made in accordance with the procedural requirements of *Snyder* and are subject to strict judicial scrutiny. However, *Sunbelt Equities* rejected *Snyder*'s attempt to provide extra protection for property rights by imposing an onerous burden of proof requirement on local government. Instead, *Sunbelt Equities* opted for a burden of proof rule distinguishing between comprehensive planning and zoning and allowing local governments more flexibility and discretion in determining the present zoning of land.

IV. THE SUPREME COURT'S *SNYDER* DECISION: JUDICIALIZING REZONINGS AND COMPROMISING CONSISTENCY

The issues addressed by the five lower appellate courts affect a number of competing and often conflicting interests. First, state and local governments and the general public have an interest in achieving the goals and objectives of the Growth Management Act. Protection and promotion of this interest requires a system for making and reviewing local rezoning and other development decisions that provides for effective enforcement of the consistency requirement. Second, local governments and their officials have an interest in maintaining a manageable local zoning process which is not so cumbersome and time-consuming that it overtaxes the resources and capabilities of local decision-making bodies. This interest is of

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174. 619 So. 2d 996, 999, 1007-08 (Fla. 2d DCA 1993).
175. *Id.* at 1008.
176. *Id.* (footnote omitted).

special concern to small local governments with limited staffs and financial resources. Third, property owners and other affected citizens have a strong interest in a rational local decision-making process that affords fair treatment and due process and produces decisions based on previously established policies and standards rather than the undue political influence of a particular applicant, industry or constituency. On the other hand, these same groups have an interest in ensuring that the zoning process does not become so judicialized that effective participation requires the employment of lawyers and other professionals for even the most routine rezoning application.[177]

Application of the quasi-judicial model to rezoning adversely affects several of these interests. Requiring local governments to conduct a formal, judicial-type proceeding on *every* quasi-judicial rezoning application, no matter how small or insignificant and regardless of whether anyone desires to challenge the decision, greatly complicates the local decision-making process and places a heavy strain on the time and resources of local governments. Although property owners and affected citizens are ensured of a more rational local decision-making process, one may legitimately question whether this requires more process than necessary. Indeed, some property owners and other affected citizens may be unduly burdened by the necessity of employing attorneys and other experts to present their cases to the local zoning authority. Thus, although the quasi-judicial model ensures enforcement of the consistency requirement by subjecting local rezoning decisions to strict judicial scrutiny, it has a negative impact on other important interests.

Potentially, the interplay between the quasi-judicial rezoning approach of the Fifth District in *Snyder*, the Second District in *Sunbelt Equities* and the Third District's decision in *Jennings v. Dade County*[178] will adversely impact another set of interests. *Jennings* held that ex

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177. In response to the various lower appellate court decisions, particularly the Fifth District's *Snyder* opinion, the Executive Council of the Florida Bar Environmental and Land Use Law Section in 1993 adopted the report and recommendations of its Ad Hoc Committee on Non-Lawyer Representation in Zoning Matters. Concluding that the issue is "how to insure competent representation in a rapidly changing procedural and substantive milieu," the Committee reported that

> [U]ninformed or inappropriate representation in land use and zoning matters impedes the general public interest in fair, efficient and accessible local government decisionmaking and may tend to lessen citizen participation because lay groups become intimidated by the formality or are unable to bear the cost. The Committee has not concluded that a lawyer is needed in all quasi-judicial proceedings.

Mary D. Hansen, *Non-Lawyer Representation Committee Recommendations Approved*, 15 FLA. BAR ENVTL. & LAND USE L. SEC. REP. 3 (Sept. 1993).

178. 589 So. 2d 1337 (3d DCA 1991), *rev. denied*, 598 So. 2d 75 (Fla. 1992).

parte communications with local decision makers in quasi-judicial proceedings are presumed prejudicial[179] and urged local quasi-judicial officials to avoid all ex parte contacts. Failure to observe this admonition may result in the invalidation of local quasi-judicial decisions.[180] Therefore, if local rezoning decisions are deemed quasi-judicial, the interests of local officials in communicating with their constituents and of citizens in petitioning and lobbying their local officials may be drastically curtailed. The *Jennings* factor has been frequently cited by local governments in criticizing the quasi-judicial approach to local rezoning decisions.[181]

To avoid the undesirable effects of the quasi-judicial model, some *amici curiae* urged the supreme court to at least consider adoption of the *Machado* approach and treat local rezoning decisions as legislative actions which are subject to strict scrutiny when judicially challenged on consistency grounds.[182] As previously discussed, characterization of a rezoning decision does not necessarily preclude strict judicial scrutiny of the decision; it is within the judicial prerogative to apply a higher level of scrutiny to legislative rezoning decisions challenged on plan consistency grounds. This approach would protect all of the competing interests. Because the decision is legislative in nature, local governments could continue to make rezoning decisions in informal, legislative-type hearings without the trappings of a courtroom proceeding. Ex parte communications would not present a legal problem, and citizens could continue to communicate freely with their local legislative decision makers. Although property owners and affected citizens may not receive full "due process" in the local proceeding, the protection of judicial-type procedures would be

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179. *Id.* at 1341. The presumption is rebutted if the local government proves by competent evidence that the communication was not prejudicial.

180. *See id.* Grounding the rebuttable presumption rule in constitutional due process considerations *id.* at 1340-41, the Third District stated: "Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable." *Id.* at 1341. Recognizing that unsolicited ex parte communications are not always avoidable, the court ruled that such communications do not require automatic reversal of the quasi-judicial decision but instead are subject to the rebuttable presumption. *Id.*

181. For example, Brevard County, in its arguments to the supreme court in the *Snyder* case, contended that if rezoning decisions are deemed quasi-judicial actions, the county commissioners would be "prohibited from obtaining community input by way of ex parte communications from its citizens." Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 472 (Fla. 1993); *see also* Gougleman, *supra* note 5, at 28.

182. *See e.g.*, Brief of Amicus Curiae 1000 Friends of Florida, Brief Pro Se of Amicus Curiae Thomas G. Pelham, and Brief of Amicus Curiae Florida Home Builders Ass'n, Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993) (No. 79720); *see generally* Richard J. Grosso, *Looking for the Middle Ground on* Snyder, 15 FLA. BAR ENVTL. & LAND USE L. SEC. REP. 1, 22 (Sept. 1993).

available to them if they challenged the local decision in court. Arguably, the Growth Management Act would allow parties with standing to challenge allegedly inconsistent rezonings in a trial de novo in circuit court.[183] By subjecting the local decision to strict scrutiny based on a record compiled in a de novo proceeding, the court could ensure that the consistency requirement is observed by local governments. Thus, while the quasi-judicial model requires a judicialized hearing at the local level on every rezoning application, the legislative model avoids disruption and complication of the local decision-making process by providing only for a judicial proceeding on those rezoning applications which are actually challenged for inconsistency in court.

This legislative model took on added significance because of the supreme court's simultaneous review of *Snyder* and *Parker v. Leon County*.[184] *Parker* involved two situations in which developers had applied to Leon County for development approval. After the county denied the applications, the developers alleged that the denials were inconsistent with the county's comprehensive plan and sought

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183. This interpretation of section 163.3215, *Florida Statutes*, was advanced in dissenting opinions in at least two different cases. In Gilmore v. Hernando County, 584 So. 2d 27, 28 (5th DCA 1991), *rev. denied*, 598 So. 2d 76 (Fla. 1992), Judge Sharp argued in her dissent:

> [w]hen such a "consistency" challenge is made in the circuit court, it should conduct a full hearing on the issues, hear expert witnesses, and consider the various interpretations of the Comprehensive Plan, where, as here, the Plan is not clear and unambiguous. This procedure contrasts with the older method of review, essentially by writ of certiorari, where the trial court only reviews the record created by the zoning bodies. When faced with an inconsistency challenge, the circuit court should create and establish a new record. . . . [Consistency issues] should only [be] resolved by the trial court after a full hearing.

Similarly, in Gregory v. City of Alachua, 553 So. 2d 206, 211 (Fla. 1st DCA 1989), Judge Wentworth stated in her dissent:

> I find the above quoted language in the statute [FLA. STAT. § 163.3215], upon which the complaint was expressly based, provides only for a suit or action clearly contemplating an evidentiary hearing before the court to determine the consistency issue on its merits *in the light of proceedings below but not confined to matters of record in such proceeding.*

(emphasis added).

184. 627 So. 2d 476 (Fla. 1993). This opinion actually involved two decisions of the First District Court of Appeal, Emerald Acres Investments, Inc. v. Board of County Comm'rs of Leon County, 601 So. 2d 577 (Fla. 1st DCA 1992), and Parker v. Leon County, 601 So. 2d 1223 (Fla. 1st DCA 1992), which were consolidated for review by the supreme court. 627 So. 2d at 477. The consolidated cases will be referred to as *Parker*. In each of the two cases, the First District Court of Appeal held that section 163.3215, *Florida Statutes*, provides the exclusive method for judicially challenging inconsistent development orders but certified the following question as one of great public importance:

> Whether the right to petition for common law certiorari in the circuit courts of the state is still available to a landowner/petitioner who seeks appellate review of a local government development order finding comprehensive plan inconsistency, notwithstanding section 163.3215, Florida Statutes (1989)?

Id.; *Emerald Acres*, 601 So. 2d at 584; *Parker*, 601 So. 2d at 1223.

common law certiorari review in circuit court. The county moved to dismiss the actions because the developers had failed to comply with the statutory precondition for judicially challenging inconsistent development orders under the Growth Management Act.[185] After the county appealed the circuit court's denial of its motions to dismiss, the First District Court of Appeal held that the developer's actions for certiorari review should have been dismissed.[186] According to the First District, the statutory proceeding is now the sole action available to challenge a development order for inconsistency with the local comprehensive plan[187] and common law certiorari is no longer an available remedy.[188] Because quasi-judicial decisions are reviewable by certiorari, the First District's decision in *Parker* provided ammunition for those who urged the court in *Snyder* to treat local rezoning decisions as legislative actions subject to strict judicial scrutiny based on a record compiled in a trial de novo in circuit court.

As the Florida Supreme Court pondered the nature of rezonings, *City of Melbourne v. Puma*[189] raised the same issue regarding local comprehensive plan amendments. In *Puma* a landowner applied to the City of Melbourne for an amendment to the city comprehensive plan's future land use map to change the designation of its property from low density residential to commercial and for a rezoning. After the city denied the application, the landowner filed suit in circuit court alleging that the plan amendment application should have been treated by the city in the same manner as a site-specific

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185. *Parker*, 627 So. 2d at 477. As previously noted, section 163.3215, *Florida Statutes* (1993) creates a cause of action for challenging local development orders that are inconsistent with a local comprehensive plan. *See supra* note 66. Section 163.3215(4), *Florida Statutes* (1993), provides as follows:

> As a condition precedent to the institution of an action pursuant to this section, the complaining party shall first file a verified complaint with the local government whose actions are complained of setting forth the facts upon which the complaint is based and the relief sought by the complaining party. The verified complaint shall be filed no later than 30 days after the alleged inconsistent action has been taken. The local government receiving the complaint shall respond within 30 days after receipt of the complaint. Thereafter, the complaining party may institute the action authorized in this section. However, the action shall be instituted no later than 30 days after the expiration of the 30-day period which the local government has to take appropriate action. Failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the actions complained of.

186. 627 So. 2d at 478.

187. *Emerald Acres*, 601 So. 2d at 580-81. Section 163.3215(3)(b), *Florida Statutes*, (1993) provides: "Suit under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part."

188. *Emerald Acres*, 601 So. 2d at 580-81; *Parker*, 627 So. 2d at 478.

189. 630 So. 2d 1097 (Fla. 1994).

rezoning application. Initially, the circuit court held that the city's denial of the plan amendment was a legislative act subject to the fairly debatable rule.[190] Shortly thereafter, the Fifth District rendered its decision in the *Snyder* case, and the landowner immediately filed a motion for rehearing in the *Puma* case. On rehearing, the circuit court reversed its earlier decision and held that the plan amendment application was subject to *Snyder*'s rules for quasi-judicial actions.[191] After the city petitioned for review, the Fifth District affirmed the circuit court's final order on rehearing, citing its *Snyder* decision as authority.[192] The Florida Supreme Court then accepted jurisdiction of the case.[193]

This unusual confluence of cases—*Snyder, Parker,* and *Puma*—placed the Florida Supreme Court in a unique position to consider and resolve simultaneously the multiplicity of issues raised by the quasi-judicial debate. In considering *Snyder,* the court had the benefit of the widely divergent views of the five lower appellate courts which had previously considered the character of local rezoning decisions following enactment of the Growth Management Act. *Puma,* which involved the distinctly different but related issue of whether comprehensive plan amendments are legislative or quasi-judicial actions, enabled the court to more fully consider the functional nature of rezoning decisions. Finally, *Parker* allowed the court to consider and determine the appropriate means of seeking judicial review of local zoning decisions, an issue which may turn on whether the decision is characterized as legislative or quasi-judicial. These three cases presented the court with an opportunity to fashion a definitive and comprehensive view as to how local rezoning decisions must be made and judicially reviewed as a result of the consistency requirement. Unfortunately, as the following analysis of the court's opinion in *Snyder* indicates, the court did not take maximum advantage of the opportunity.

A. The Quasi-Judicial Issue

On this core issue, the Florida Supreme Court concluded that "limited impact" rezoning decisions are quasi-judicial while "comprehensive" rezonings are legislative. Without discussing or even mentioning the alternative approach taken by the Third and Fourth

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190. Puma v. City of Melbourne, Case No. 90-10022-CA-x/s (Fla. 18th Cir. Ct. Final Order filed November 27, 1991).

191. *Id.* (Amended Order Motion Rehearing filed May 13, 1992).

192. City of Melbourne v. Puma, 616 So. 2d 190 (5th DCA 1993), *remanded* 630 So. 2d 1097 (Fla. 1994), *on remand,* 635 So. 2d 159 (5th DCA 1994).

193. City of Melbourne v. Puma, 624 So. 2d 264 (Fla. 1994).

Districts and urged by some *amici*, the court essentially adopted the rule advocated by the Fifth District.[194] The court's reasoning is remarkably brief, considering the magnitude of the issue. Applying the functional analysis of *Snyder* and *Sunbelt Equities* rather than the consistency analysis of *Southwest Ranches* and *Machado*, the supreme court enunciated the general rule that "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."[195] After stating this principal, the supreme court then boldly asserted, without further explanation, that "it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature" while those "'rezoning actions which have an impact on a limited number of persons or property owners'" are quasi-judicial acts.[196] Accordingly, the court held, as did the Fifth District, that Brevard County's decision on the Snyders' application for rezoning their one-half acre parcel was a quasi-judicial act.[197] This incomplete syllogism is the extent of the court's analysis of the quasi-judicial issue.

The supreme court's reasoning presents two problems—one of logic, the other of practicality. Regarding the court's logic, why is it "evident" that comprehensive rezonings are legislative actions? As the court itself seemed to recognize, all rezonings, comprehensive and small-scale, must be consistent with the local comprehensive plan.[198] Therefore, all rezonings of land involve the application of the legislatively adopted policies in the comprehensive plan and, under the court's functional analysis, should be deemed quasi-judicial acts. Clearly, then, the supreme court's functional analysis suffers from the same logical defect as the reasoning of the lower appellate courts in *Snyder* and *Sunbelt Equities*, and apparently for the same reason. Although the court's opinion contains a lengthy statement about the origins, purposes and content of the consistency requirement,[199] it fails to link the requirement to its functional analysis.[200]

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194. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993).

195. *Id.*

196. *Id.* (quoting with approval the Fifth District's statement of the rule regarding small-scale, quasi-judicial rezonings). For the full text of the Fifth District's statement of the rule, see *supra* text accompanying note 144.

197. *Snyder*, 627 So. 2d at 474.

198. *Id.*

199. *Id.* at 472-474.

200. Unlike the Fifth District's *Snyder* opinion, see *supra* notes 123 and 149, the supreme court's opinion nowhere expressly recognizes that a local comprehensive plan represents the formulation and adoption of general legislative policy.

Practically, the Florida Supreme Court's ruling presents problems because it provides no meaningful guidance for distinguishing between so-called comprehensive rezonings, which are deemed legislative acts, and small-scale or limited impact rezonings, which are treated as quasi-judicial actions. All we know from the facts of *Snyder* is that a rezoning involving a one-half acre parcel of land owned by two people is quasi-judicial action. The supreme court did not expressly adopt or even mention *Sunbelt Equities*' limitation of the quasi-judicial label to "site-specific, owner-initiated rezoning requests."[201] Thus, the court's quasi-judicial rule leaves us with many unanswered questions. How many persons or how much property has to be involved before rezoning becomes a legislative, "comprehensive" rezoning rather than a quasi-judicial, "limited impact" rezoning? Does "affecting a large portion of the public"[202] refer only to the number of landowners involved or does it also include large geographical areas regardless of the number of landowners? For example, is a rezoning of 10,000 acres containing several hundred landowners a legislative act and a rezoning of 10,000 acres with one landowner a quasi-judicial act? A rezoning of a large geographical area, regardless of the number of landowners, arguably will affect "a large portion of the public" in some fashion. On the other hand, if the large geographical area has only one or a very few property owners, its rezoning arguably affects "only a limited number of persons" or "identifiable parties and interests." Finally, to inject a further note of uncertainty, will the answer to these questions vary with the size of the local jurisdiction's geographical area and population? Clearly, under the Florida Supreme Court's approach, some rezonings are amenable to both the legislative or quasi-judicial designation.[203]

Regrettably, by failing to more clearly distinguish between the two categories of rezonings, the Florida Supreme Court has probably consigned local governments, landowners and citizens to years of litigation over the meaning of "comprehensive" and "limited impact" rezonings. The experience of Oregon following the *Fasano* decision in 1973 reflects that after numerous court decisions, the distinction

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201. *See supra* note 156 and accompanying text.

202. 627 So. 2d at 474.

203. One influential law review article concluded that "some zoning decisions are difficult to characterize as distinctly legislative or quasi-judicial." Carl J. Peckingpaugh, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499, 508 (1980). This article has been cited by the Florida Supreme Court and the Fifth District Court of Appeal in Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993), *rev'g*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991); the Third District in *Machado*, 519 So. 2d at 632-33; and the Second District in *Sunbelt Equities*, 619 So. 2d at 1000 n.5.

between legislative and quasi-judicial rezonings remained unsettled six years later when its supreme court addressed the issue again.[204] It will probably be several years, if ever, before there is a definitive ruling from the Florida Supreme Court on this issue. In the meantime, the local zoning process will be hindered by the uncertainty, confusion, and litigation over this issue. Pending further judicial clarification, local governments will have to make intelligent and cautious decisions about the nature of each rezoning application. If a local government fails to adhere to the requisite procedures in determining a rezoning application later deemed quasi-judicial, the local decision will face reversal as in *Snyder*. Consequently, prudence dictates that if there is any doubt about the nature of a particular rezoning application, the local government should treat it as a quasi-judicial action.

B. Procedural Requirements For Quasi-Judicial Rezonings

What procedures must be followed by local governments in making quasi-judicial rezoning decisions? Because in *Snyder* the Florida Supreme Court held for the first time that some local rezonings are quasi-judicial actions, it would have been helpful if the court had fully explained the procedural requirements that govern such proceedings. Unfortunately, with one exception, the supreme court chose not to provide any further guidance on this issue.

In its only definitive ruling on local procedures, the court rejected one of the key requirements imposed by the Fifth District. Noting that "[w]hile they may be useful," the court held that local zoning authorities "will not be required to make findings of fact."[205] This ruling seems to be totally inconsistent with the court's characterization of rezoning decisions as quasi-judicial. Although the court gave no explanation for this ruling, it did acknowledge, and apparently

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204. In Neuberger v. City of Portland, 603 P.2d 771 (Or. 1979), the Oregon Supreme Court was again called on to consider the distinction between quasi-judicial and legislative rezonings. In discussing the historical background of this issue, the court stated:

> The opinion in *Fasano* assumed that the exercise of "administrative, quasi-judicial, or judicial" authority is readily recognized as such, and proceeded to examine the criteria applicable to zone change decisions of that kind and, in addition, to offer some "brief remarks on questions of procedure." Since *Fasano*, both this Court and the Court of Appeals have repeatedly been called upon to distinguish quasi-judicial from legislative land use decisions.

Id. at 774 (citation and footnote omitted). In a footnote, the court cited numerous prior Oregon cases which considered the issue. *Id.* at 774 n.3; *see also* South of Sunnyside Neighborhood League v. Board of County Comm'rs, 569 P. 2d 1063, 1071 n.5 (Or. 1977) (citing and comparing cases in which the Oregon Supreme Court has characterized rezoning or related decisions as either quasi-judicial or legislative).

205. *Snyder*, 627 So. 2d at 476.

accept, Brevard County's argument "that the requirement to make findings in support of its rezoning decision will place an insurmountable burden on the zoning authorities."[206] As the Second District stated in rejecting this contention in *Sunbelt Equities*, this argument is debatable.[207] A prudent local government will always insure that its staff prepares and places in the record an analysis of a rezoning application's consistency with the local comprehensive plan. Presumably, the applicant and other serious participants will do likewise. Moreover, after all testimony on a rezoning application has been received, the public hearing may be continued to give its staff ample time to prepare a recommended order, containing findings of fact, for the zoning authority's subsequent consideration and approval. Under Florida's development of regional impact process, local governments have for many years followed this practice without apparent difficulty.[208] Strategically, from the perspective of judicial review, local governments will benefit from this practice. It is far more advantageous for the local government to adopt its own written findings of fact, which if supported by substantial competent evidence a court would accept, than to have a court determine whether the local decision is supported by such evidence based on its own independent review of the record.[209]

In any event, requiring written findings of fact serves important public policy objectives that far outweigh any inconvenience to the local government. First, written findings of fact are an integral part of quasi-judicial proceedings,[210] and as the Fifth District observed, are essential to effective strict judicial scrutiny of quasi-judicial decisions.[211] Second, as the Second District observed, written findings of fact will greatly reduce the possibility of arbitrary or politically motivated rezoning decisions, thereby providing greater protection

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206. *Id.* at 472.

207. Lee County v. Sunbelt Equities, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993).

208. *See* FLA. STAT. § 380.06 (15) (1993). This section provides that the local government must issue a written development order containing findings of fact and conclusions of law within thirty days after a public hearing on an application for development approval for a development of regional impact.

209. A local comprehensive plan adopted pursuant to the Growth Management Act is a complex document, frequently consisting of several volumes and literally hundreds of policies. A local government will be better served by framing the consistency issues through written findings of fact and specific reasons for its decision than by leaving it to a court, unfamiliar with the intricacies of the local plan, to divine from a voluminous record and after-the-fact briefs why the local government made its rezoning decision.

210. For example, the Florida Administrative Procedure Act, chapter 120, *Florida Statutes*, (1993), which establishes procedures for the quasi-judicial proceedings of state administrative agencies, requires written findings of fact. FLA. STAT. §§ 120.57(1)(b) (8), (9).

211. *See supra* notes 131-32 and accompanying text.

for property rights.[212] Finally, requiring written findings of fact forces close attention to the consistency requirement; if local governments must make written findings of fact to support their consistency determinations, local officials are likely to focus much more closely on the relationship between a proposed rezoning and the goals, objectives and policies of the local comprehensive plan. Consequently, by relieving local governments of this fact finding responsibility, the Florida Supreme Court missed an opportunity to emphasize the importance of complying with the consistency requirement, made it much easier for local officials to disguise arbitrary decisions, and made more difficult effective judicial review of local rezoning decisions.

The Second and Fifth Districts also held that in addition to making findings of fact, a local government must give specific reasons for its denial of a rezoning application.[213] Does the court's ruling that the local government need not make findings of fact encompass the requirement to give specific reasons for the applicant's denial? Although the court did not expressly address this requirement, the answer appears to be in the affirmative. After ruling that written findings of fact are not required, the court observes that in order to uphold the local rezoning decision in a certiorari proceeding in circuit court, "it must be shown that there was competent substantial evidence presented to the board to support its ruling."[214] This statement implies that the local government must preserve a record of the local proceeding which contains substantial competent evidence to support the rezoning decision. However, no mention is made of an additional responsibility to give specific reasons for the decision. If this is the import of *Snyder*, then the Florida Supreme Court's decision makes it even more difficult to effectively enforce the consistency requirement. The requirement of providing specific reasons for a consistency determination serves not only the important public purposes advanced by a fact finding requirement, but also informs the applicant and other interested citizens of the specific provisions of the local comprehensive plan promoted or

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212. The Second District stated:

> The evolving law of property rights, exemplified by *Lucas v. South Carolina Coastal Council*, does not augur well for local governments who are reluctant to justify their decisions with explicit references to evidence and public policy. If reached under a veil of silence, even honest land-use decisions are vulnerable to charges of arbitrariness or improper motive.

Sunbelt Equities, 619 So. 2d at 1002 (citation omitted).

213. *See id.* at 1008; Snyder v. Board of Comm'rs of Brevard County, 595 So. 2d 65, 81 (5th DCA 1991), *rev'd*, 627 So. 2d 469 (Fla. 1993).

214. 627 So. 2d at 476.

violated by the rezoning application. If the local government is not required to provide a specific statement of the basis for its consistency analysis, there is a much greater likelihood that local decisions will be made for improper reasons.[215]

Except for its ruling regarding written findings of fact and its reaffirmation of the substantial competent evidence rule, the court chose not to address the issue of local procedures. Consequently, local governments and other affected parties will have to look to other Florida decisional law for procedural guidance. For example, the *Jennings* decision contains a good summary of the procedural due process requirement for local quasi-judicial proceedings. In a passage quoted with approval in *Sunbelt Equities*,[216] the Third District stated:

> [W]e note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled. Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.[217]

As previously discussed, *Jennings* also held that proof of an ex parte contact with a local decision-maker in a quasi-judicial proceeding is presumed prejudicial.[218] The Florida Supreme Court did not revisit this rule, as it was not an issue in *Snyder*, but did acknowledge Brevard County's argument that if its rezoning decisions are deemed quasi-judicial, county commissioners will be prohibited from receiving public input through ex parte communications from citizens.[219]

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215. As the Second District stated, "[t]he requirement of providing specific reasons for a ruling, in accord with the characterization of such proceedings as quasi-judicial, should diminish (if not altogether eliminate) the likelihood those mandatory findings will only mask the "real reason [an] application was denied." Lee County v. Sunbelt Equities, 619 So. 2d 996, 998 n.1 (Fla. 2d DCA 1993). Sunbelt had argued that "the real reason" for denial of its application was vocal neighborhood opposition. *Id.*

216. *Id.* at 1002.

217. Jennings v. Dade County, 589 So. 2d 1337, 1340 (3d DCA 1991) (citations omitted), *rev. denied*, 598 So. 2d 75 (Fla. 1992).

218. *Id.* at 1341.

219. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 472 (Fla. 1993).

Nevertheless, the court did recharacterize some rezonings as quasi-judicial, thereby subjecting these proceedings to the ex parte rules established in *Jennings*. Consequently, until this issue is reconsidered by the judiciary or perhaps addressed by legislation,[220] local officials should observe *Jennings*' admonition against ex parte communications.[221]

C. *The Standard Of Judicial Review*

With regard to the standard of review, the Florida Supreme Court agreed unequivocally with the Fifth District that the appropriate standard of review for quasi-judicial rezonings is strict scrutiny.[222] Significantly, the court also adopted the *Machado* approach to strict scrutiny and did not distinguish between rezonings based on whether they allow more or less intensive uses than those contemplated by the local plan. Noting that "strict scrutiny" is a term arising "from the necessity of strict compliance with comprehensive plan," the court cited both *Machado* and the lower court's *Snyder* decision as examples of the type of strict scrutiny review applicable in the judicial review of land use decisions.[223] Thus, at least with regard to quasi-judicial rezonings, the court adopted a strict standard of

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220. Proposed legislation addressing the *Jennings* issue was introduced in the 1994 Session by the Florida Legislature. House Bill 2585 passed the House of Representatives but not the Senate and thus did not become law. Among other things, House Bill 2585 would have allowed citizens to communicate with any local official, except members of the judiciary, about the merits of any matter, including quasi-judicial matters, on which action may be taken by a local agency. Such communications would not be presumed prejudicial, but the local official would be required to disclose them. Telephone Interview with Donna Ehrlich, Staff Member, Fla. H.R. Comm. on Comm'y Affairs (May 2, 1994).

221. *See supra* note 177 and accompanying text.

222. 627 So. 2d at 475. "In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions." *Id.*

223. *Id.* The supreme court distinguished strict scrutiny review of land use decisions from the type of strict scrutiny used in cases involving fundamental constitutional rights. *Id.* As an example of the latter type of case, the court cited *In re* Estate of Greenberg, 390 So. 2d 40 (Fla. 1980), which described the strict scrutiny standard in constitutional cases as follows:

> The strict scrutiny analysis requires careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling and requires inquiry as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn. This test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state and applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution. Those fundamental rights to which this test applies have been carefully and narrowly defined by the Supreme Court of the United States and have included rights of a uniquely private nature such as abortions, the right to vote, the right of interstate travel, first amendment rights, and procreation.

Id. at 42-43 (citations omitted).

judicial review that facilitates the effective enforcement of the consistency requirement.

What standard of review will be used in consistency challenges to comprehensive rezonings which are characterized by the court as legislative acts? As previously discussed, all rezonings, whether comprehensive or small-scale, must be consistent with the local comprehensive plan. Admittedly, comprehensive rezonings occur much less frequently than do site-specific, owner-initiated rezonings, but the consistency of these large-scale rezonings is important because they involve sizable land areas. Even though such comprehensive rezonings are characterized as legislative, strict scrutiny review could still be applied under the *Machado* model. However, although the Florida Supreme Court does not directly address this issue, there is some indication in *Snyder* that the court believes that strict scrutiny is applicable only to the review of quasi-judicial decisions.[224] For example, the court reaffirmed that a local board's legislative actions "will be sustained as long as they are fairly debatable."[225] Ironically, therefore, comprehensive rezonings, which because of their size have far more potential to subvert a local comprehensive plan than do small-scale rezonings, may be subject to a far more deferential standard of judicial review. For the sake of the consistency requirement, this factor should be carefully considered in any future litigation which involves the issue of the standard of judicial review for comprehensive rezonings.

D. The Burden Of Proof

The Florida Supreme Court parted company with the Fifth District on the issue of the burden of proof and adopted the approach of the Second District in *Sunbelt Equities*. As *Sunbelt Equities* emphasized, the Fifth District's *Snyder* opinion failed to distinguish adequately between zoning and comprehensive planning and improperly placed more credence in the latter than the former.[226] Accordingly, the Fifth District held that a landowner was presumptively entitled to the maximum density consistent with the local comprehensive plan, a proposition rejected in *Sunbelt Equities*. Similarly, the court stated that the Fifth District's "opinion overlooks the premise that the comprehensive plan is intended to provide for

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224. For example, the court stated that "the review by strict scrutiny in zoning cases appears to be the same as that given in the review of *other quasi-judicial* decisions." Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993) (emphasis added).

225. *Id.* at 474.

226. *See supra* notes 165-68 and accompanying text.

the *future* use of land, which contemplates a gradual and ordered growth."[227] For this reason, the court agreed with the First and Second Districts that a local government should have some discretion in choosing, from among a range of uses or densities permitted by a comprehensive plan, the exact density or use to be assigned to a particular tract of property at a specific point in time.[228]

Relying heavily upon and quoting extensively from *Sunbelt Equities*, the Florida Supreme Court then rejected the Fifth District's assertion that a landowner has a presumptive right to immediately maximize the use of its land to the full extent allowed by the comprehensive plan. The court opined that filing a consistent rezoning application does not necessarily entitle a landowner to relief nor does it "confer any property-based right upon the owner where none previously existed."[229] Therefore, the court rejected the Fifth District's "clear and convincing evidence" standard that is usually applied in cases involving fundamental rights, including constitutionally protected property rights.[230] The court then adopted the burden of proof rules established in *Sunbelt Equities*. First, the applicant bears the initial burden of proving that the rezoning proposal is consistent with the local comprehensive plan and complies with all applicable procedural requirements. Assuming the local zoning authority wishes to deny the consistent application, the burden then shifts to the local board to demonstrate by substantial competent evidence that the existing zoning classification serves a legitimate public purpose (and is also consistent with the local comprehensive

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227. 627 So. 2d at 475.

228. *Id.* at 475. The court cited and quoted from the First District's opinion in City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (1st DCA 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985), which quoted with approval a statement from the Oregon case of Marracci v. City of Scappoose, 552 P.2d 552, 553 (Or. Ct. App. 1976), both of which had been cited with approval by the First District in Board of County Comm'rs of Leon County v. Monticello Drug Co., 619 So. 2d 361, 365-66 (1st DCA 1993), *quashed sub nom.* O'Connor Dev. Corp. v. Leon County, 630 So. 2d 578 (Fla. 1994). For the text of the quotation from *Marracci*, *see supra* note 79. In addition, the Florida Supreme Court cited and quoted at length from *Sunbelt Equities*' discussion of the role of the comprehensive plan and the discretion of local government in applying the local comprehensive plan. 627 So. 2d at 475-76.

229. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993) (quoting from Lee County v. Sunbelt Equities, 619 So. 2d 996, 1005 (Fla. 2d DCA 1993)).

230. *Id.* at 475. The court was not insensitive to the plight of a landowner whose consistent rezoning application is denied. For example, the court stated: "We do not believe the Growth Management Act was intended to preclude development but only to insure that it proceed in an orderly manner." *Id.* at 476. Therefore, the court expressly stated that a local government may deny a consistent zoning application "provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence." *Id.* at 475.

plan).[231] Although the scope and meaning of the "legitimate public purpose" standard will have to be determined in future litigation, presumably the term has reference to any purpose which is within the scope of the police power and has been pursued in a constitutionally valid manner, i.e., one that is not "arbitrary, discriminatory, or unreasonable."[232] If the local government carries its burden, then the rezoning application must be denied.[233]

Why should the local government's burden in a consistency challenge be cast in constitutional terms? Although a local government's zoning decision must serve a legitimate public purpose in order to pass constitutional muster, we are dealing here with comprehensive plan consistency challenges. The purpose of a local comprehensive plan is to establish additional, legislatively established policies to guide local land use decisions. Thus, should not the local government have the burden of establishing that the denial of a consistent rezoning application is justified by policies in the local comprehensive plan? Under Florida law, local plans must include policies controlling the location, density and intensity of use, and the timing of development. While the local comprehensive plan is a

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231. *Id.* The court clearly states that the landowner must be left with some use or development that is consistent with the comprehensive plan. *Id.* at 475.

232. *Id.* at 476. *Sunbelt Equities,* which originated the standard, discussed public purpose in terms of its constitutionality, 619 So. 2d at 1007, and the court expressly stated that the local government's burden includes a "showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable." *Snyder,* 627 So. 2d at 476. Also, the Florida Supreme Court stated that the "legitimate public purpose" rule subsumes the landowner's traditional remedies, which include an action "to prove the denial of an application was arbitrary, discriminatory, or unreasonable." *Id.* (citations omitted). To be constitutional, an exercise of the police power to regulate land use must be substantially related to the public health, safety, morals or general welfare (the permissible objectives of the police power). If there is no such relationship, the regulation will be deemed arbitrary, discriminatory, or unreasonable, and therefore, violative of the Due Process or Equal Protection Clauses. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

233. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 476 (Fla. 1993). In its original *Snyder* opinion, the Florida Supreme Court stated that when the local government proves that an existing zoning designation serves a legitimate public purpose, "a landowner's only remaining recourse will be to demonstrate that the existing zoning classification of the property is confiscatory and thereby constitutes a taking." Board of County Comm'rs of Brevard County v. Snyder, No. 79,720, slip. op. at 16 (Fla. Oct. 7, 1993); 18 Fla. L. Weekly 522, 525. Brevard County moved for a clarification, contending that under Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984), compensation is not available for a confiscatory zoning ordinance and that invalidation of the ordinance is the only remedy under Florida law. Subsequently, the court issued a corrected opinion which eliminated the reference to "a taking" and substituted the following sentence: "If the board carries its burden, the application should be denied." 627 So. 2d at 476. The correction is puzzling because *National Bulk Carriers* is no longer good law. In First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304, 307 (1987), the United States Supreme Court held that the takings clause of the United States Constitution requires a state to provide a compensation remedy when a land use regulation effectuates a taking.

future-oriented document, it also provides controlling standards for present-day decisions. Arguably, therefore, a local government, in denying a consistent rezoning application, should be required to cite local plan policies justifying its decision to allow only lower densities or intensities than are permitted by the local plan or justifying a decision that the timing is not right for the requested uses.[234] Otherwise, by including in their local plans broad land use classifications with minimal standards,[235] a local government can acquire virtually unlimited discretion to decide when to allow the densities and intensities of use provided for in its local plan. This practice will significantly undermine the purposes of the Growth Management Act and its consistency requirement. Consequently, in its laudatory effort to provide planning flexibility for local governments, the Florida Supreme Court may have gone too far when it linked the local government's burden to general constitutional constraints rather than to specific comprehensive plan provisions.

The court's recognition of the distinction between planning and zoning and its rejection of the Fifth District's burden of proof rules represent major victories for local governments. By recognizing the critical distinction between the local comprehensive plan and implementing zoning regulations, the court confers upon local government significant discretion in determining the timing and manner in which a local comprehensive plan is implemented. Equally important, the substitution of the "legitimate public purpose" standard for the "clear and convincing evidence" standard is much more favorable to local governments, making it considerably easier for the local zoning authority to deny a rezoning application that is consistent with the local comprehensive plan.

E. The Appropriate Method Of Judicial Review: Certiorari Or Trial De Novo?

The Snyders sought judicial review of Brevard County's rezoning decision by filing a petition for writ of certiorari. Because neither

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234. The Oregon Supreme Court's decision in Marracci v. City of Scappoose, which was relied upon by the Florida Supreme Court in *Snyder*, *see supra* note 221, recognized that a comprehensive plan might contain timetables "or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan," and implied that a local government's discretion to deny a consistent rezoning application would be more limited in such cases. 552 P.2d 552, 553 (Or. Ct. App.), *rev. denied*, 276 Or. 133 (1976); *see supra* note 79. Interestingly, when the Florida Supreme Court quoted from the *Marracci* decision, it omitted this portion of the Oregon court's statement. *Snyder*, 627 So. 2d at 475.

235. For an example of this practice, see John W. Howell and David J. Russ, *Planning vs. Zoning:* Snyder *Decision Changes Rezoning Standards*, 68 FLA. B. J. 16, 18-19, 25 n.17 (May 1994).

party questioned the appropriateness of certiorari review,[236] the Fifth District did not consider this issue. Nevertheless, several *amici curiae* suggested to the Florida Supreme Court that the Snyders should have brought an original action pursuant to section 163.3215, *Florida Statutes*.[237] This suggestion was consistent with the proposed legislative model of judicial review where rezoning decisions constitute legislative acts subject to strict judicial scrutiny based on a record compiled in an original proceeding in circuit court. Having characterized the county's rezoning decision as quasi-judicial rather than legislative in nature, however, the court held that the Snyders had properly sought judicial review by certiorari.[238] Additionally, citing *Parker v. Leon County*,[239] decided on the same day as *Snyder*, the court explained that a de novo action pursuant to section 163.3215, *Florida Statutes*, was not available to the Snyders because that statute "only provides a remedy for third parties to challenge the consistency of development orders."[240]

What is the appropriate method of judicial review of a local rezoning decision challenged on consistency grounds? *Parker v. Leon County* provides only a partial answer. It establishes that applicants for rezonings and other development orders may seek certiorari review without complying with the procedural requirements of section 163.3215.[241] According to the supreme court, section 163.3215 applies only to actions brought by third party intervenors to challenge local decisions denying applications for rezoning or other development orders. This conclusion is based on an exceedingly narrow and strained interpretation of the statutory provision. Recognizing that the statute contains some very broad language suggesting that it is applicable to any person challenging the consistency of a local development order,[242] the court nevertheless focused primarily on the portion of section 163.3215(1) authorizing an action

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236. *Snyder*, 595 So. 2d at 68 n.8.

237. *Snyder*, 627 So. 2d at 475 n.1.

238. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 474-75 (Fla. 1993).

239. 627 So. 2d 476 (Fla. 1993).

240. *Snyder*, 627 So. 2d at 475 n.1.

241. *Parker*, 627 So. 2d at 478-79. For the text of section 163.3215(4), *Florida Statutes*, which establishes the condition precedent to seeking judicial review, *see supra* note 181.

242. *Parker*, 627 So. 2d at 479-80. For example, section 163.3215(1) provides that "*[a]ny* aggrieved or adversely affected party may maintain an action." (emphasis added). Section 163.3215(2) defines "aggrieved or adversely affected party" to mean "*any* person or local government which will suffer an adverse effect to an interest protected or furthered by the local comprehensive plan . . . ." (emphasis added). Moreover, the term "development order," which is used in section 163.3215(1), is defined as "*any* order granting, *denying*, or granting with conditions an application for a development permit." FLA. STAT. § 163.3164(7) (1993) (emphasis added).

"*to prevent a local government from taking any action on a development order which materially alters the use or density or intensity of use on a particular piece of property* that is not consistent with the comprehensive plan."[243] As construed by the court, this provision was not intended to apply to actions brought by applicants because an applicant "does not seek to prevent action on a development order" and "the denial of an application does not alter the use or density of property."[244] Additionally, the court concluded that the statutory condition precedent established in section 163.3215(4) for filing a judicial consistency challenge also suggests that the statute applies only to third-party intervenors. According to the court, "such a requirement would be superfluous with respect to applicants who have already made their position known to the local government."[245]

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243. *Parker*, 627 So. 2d at 479 (paraphrasing FLA. STAT. § 3215(1)). For the full text of section 163.3215(1), *see supra* note 66.

244. Parker v. Leon County, 627 So. 2d 476, 479 (Fla. 1993). This statutory provision is susceptible to another interpretation. "[A]ction on a development order" clearly includes *denial* as well as approval of development orders, and an applicant does seek to prevent denial of his or her application. Moreover, "development order" is defined to include both the granting and *denial* of applications for a development permit. *See* FLA. STAT. §§ 163.3215(1), .3164(6). Also, a proposed development order granting an application for rezoning would "materially alter the use or density or intensity of use." Arguably, therefore, denial of an application for such a development order does constitute "action on a development order" within the meaning of section 163.3215(1).

245. *Id.* at 479. However, a third-party intervenor may also have participated in the local zoning hearing and informed the local government of his or her position. Also, the court's conclusion ignores the legitimate public policy reason for requiring the filing of a verified complaint with a local government prior to initiation of a court action. As explained by the First District, this requirement has the "salutary effect" of putting the local government on notice that its action may be challenged, and it also gives the parties an opportunity to resolve disputes "without the necessity of court proceedings." Leon County v. Parker, 566 So. 2d 1315, 1317 (1st DCA 1990), *rev'd*, 627 So. 2d 476 (Fla. 1993). This compelling public policy objective is just as relevant to disputes involving the applicant as to objections filed by third-party intervenors.

A third reason given by the supreme court for its restrictive reading of the statute is found in section 163.3215(6), which provides for attorneys' fees for the filing of any pleading or paper for an improper purpose. Under this provision, the signature of a complaining party or its attorney on any pleading constitutes a certification that "it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or for economic advantage, competitive reasons or frivolous purposes or needless increase in the cost of litigation." FLA. STAT. § 163.3215(6) (1993). Citing the *Oxford English Dictionary*, the court interpreted the word "interpose" to mean "interfere or intervene," and concluded that an "applicant cannot interpose a complaint because it is an original party to the proceeding." *Parker*, 627 So. 2d at 479. This argument is unpersuasive. To do a little "dictionary shopping," *Webster's New Twentieth Century Unabridged Dictionary* defines "interpose" as "to place or put between; to insert," or "to introduce into a conversation, debate, etc." WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 960 (2d ed. 1983). Clearly, an applicant can "insert" or "introduce" a verified complaint into its debate with the local government just as readily as can a third-party intervenor. In addition, subsection 163.3215(6) applies not only to verified complaints filed with the local government but also to any pleading, motion or paper filed in the ensuing litigation.

Consequently, the court held that applicants are not subject to the requirements of section 163.3215, need not comply with the statutory condition precedent to seeking judicial review, and may seek judicial review by petition for certiorari in circuit court.[246]

How must third-party intervenors seek judicial review of allegedly inconsistent development orders? *Parker* does not fully resolve this issue. Clearly, third-party intervenors are subject to section 163.3215 and must comply with the requirement to file a verified complaint with the local government prior to filing their lawsuit.[247] However, after complying with the statutory conditions precedent to filing suit under section 163.3215, are third-party intervenors entitled only to certiorari review or may they obtain judicial review by trial de novo? Some commentators and a few lower court appellate judges argue that third-party intervenors are entitled to a de novo trial in circuit court.[248] However, neither *Parker* nor *Snyder* provides a clear and definitive answer to this question. *Parker* does not indicate the nature of judicial review that is available under section 163.3215. Additionally, in rejecting the contention that the Snyders

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An applicant is just as likely to "interpose" a pleading, motion or paper as is a third-party intervenor.

Equally unconvincing is the court's contention that subsection six obviously does not apply to landowner applicants because a landowner who challenges the denial of its rezoning request always does so "for an economic advantage." *Parker*, 627 So. 2d at 479. The term "economic advantage" more likely refers to situations in which one party tries to obtain an "economic advantage" over any other party, such as an economic competitor of the applicant. A landowner who challenges the denial of its rezoning application does not always, or even very often, do so for an economic advantage over the local government or any other party. Using the court's interpretation of "economic advantage" would automatically subject virtually any party to the sanctions of subsection 163.3215(6). For example, a property owner who fears that a proposed, allegedly inconsistent upzoning of adjacent property would decrease the value of her property is acting for her "economic advantage" in challenging the rezoning. Yet the property owner is clearly an "aggrieved or adversely affected party" with standing to bring a consistency challenge pursuant to subsections 163.3215(1) and (2). Surely the Legislature did not intend that the "economic advantage" language of subsection 163.3215(6) be construed in a manner that effectively nullifies the broad standing conferred by subsection 163.3215(2).

246. *Id.* at 479.

247. *Id.* at 479. *Parker* clearly states that section 163.3215 "applies to actions by third-party intervenors" and that the statutory condition precedent in section 163.3215(4) "pertains only to third-party intervenors." *Id.*

248. *See, e.g.*, John W. Howell and David J. Russ, *Planning vs. Zoning:* Snyder *Decision Changes Rezoning Standards*, 68 FLA. B. J. 16, 22-23 (May 1994), which argues that after *Snyder* third-party intervenors may "file a *de novo* action for relief in circuit court." *Id.* In a concurring opinion in Emerald Acres Inv., Inc. v. Board of County Comm'rs of Leon County, 601 So. 2d 577, 583 (1st DCA 1992), *rev'd*, Parker v. Leon County, 627 So. 2d 476 (Fla. 1993), Judge Kahn argued that section 163.3215 establishes "a statutory cause of action providing *de novo* review to a party aggrieved or adversely affected by a local government development order." However, he also contended that this "more expansive remedy under the statute" does not abrogate any common law right to certiorari review. *Id. See supra* note 179 for the opinions of two other judges that the statute provides for a de novo proceeding.

should have sought de novo review pursuant to section 163.3215 because that statute provides remedies only for third-parties, the supreme court did not indicate whether that section provides de novo review for third-party intervenors. Finally, quasi-judicial actions of local governments are traditionally reviewed by certiorari, and for this reason *Snyder* held that Brevard County's quasi-judicial rezoning decision was "properly reviewable by petition for certiorari."[249] Consequently, the scope of third-party intervenors' right to judicial review will remain in some doubt pending clarification through further litigation.

Citizen advocates may argue that the judiciary should construe section 163.3215 as entitling third-party intervenors to a trial de novo in circuit court. Limiting third-party intervenors to certiorari review of the record compiled before the local authority will subject them to a tremendous burden. In order to effectively exercise their right to judicial review, third-party intervenors will be compelled to participate in every local rezoning proceeding to ensure that an adequate record is developed on every conceivable consistency issue.[250] Assuming citizens take this burden seriously, every local rezoning proceeding, including those in which the local government makes a proper decision to which no one ultimately objects, will become lengthier and more complicated. On the other hand, if third-party intervenors do not build an adequate record in the local proceeding, their chances of demonstrating the inconsistency of a local decision in a subsequent judicial proceeding will be significantly diminished. By comparison, if section 163.3215 is construed to permit de novo actions, third-party intervenors need challenge only those local decisions they believe are inconsistent with the local comprehensive plan, and would have a fair opportunity to demonstrate inconsistency through the development of a full and complete record subject

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249. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993). *See also* Park of Commerce Assoc. v. City of Delray Beach, 19 Fla. L. Weekly 148-49 (Fla. Mar. 31, 1994) (holding that a local government's denial of a site plan was a quasi-judicial decision under the *Snyder* rule and therefore subject to certiorari review by the courts, and expressly rejecting the holding of City of Boynton Beach v. V.S.H. Realty, Inc., 443 So. 2d 452 (Fla. 4th DCA 1984), that a local decision about a site plan is a legislative action properly reviewable in a de novo proceeding in circuit court).

Query: Would the holding of *Park of Commerce Associates* be different in a suit brought pursuant to section 163.3215?

250. It might be argued by some that this would be a desirable practice and should be required. However, section 163.3215 contains no requirement that a citizen participate in the local proceeding in order to obtain standing to bring a consistency challenge. Compare section 163.3215 with section 163.3184, in which the Legislature expressly requires participation in the local proceedings for adoption of a comprehensive plan in order for parties to acquire standing to challenge a comprehensive plan compliance determination by the Department of Community Affairs.

to strict scrutiny by the reviewing court. Consequently, because citizen actions pursuant to section 163.3215 are the only mechanism for enforcing the consistency requirement for local development orders, citizens will contend that this provision should be construed broadly to give third-party intervenors the maximum opportunity to demonstrate to the reviewing court that a local government has failed to act consistently with its comprehensive plan.[251]

F. A Post Script To Snyder: *The* Puma *Decision*

Shortly after rendering its *Snyder* decision, the Florida Supreme Court injected another note of confusion into the quasi-judicial debate. Despite the fundamental importance of the issue involved, the court, in an enigmatic, four-sentence per curiam opinion, remanded *City of Melbourne v. Puma* to the Fifth District Court of Appeal.[252] Stating that the conflict which had prompted it to take jurisdiction of *Puma*[253] had been resolved by its recent decision in *Snyder*, the supreme court remanded *Puma* "for further consideration consistent with our opinion in *Snyder*."[254] The Fifth District then remanded the case to the trial court with the same instruction.[255] This directive is puzzling and confusing because *Snyder* dealt with rezoning actions and *Puma* deals with comprehensive plan

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251. *See* FLA. STAT. § 163.3194(4)(b) (1993), which provides "that this act shall be construed broadly to accomplish its stated purposes and objectives." The language of section 163.3215 is susceptible to the interpretation that it creates a new cause of action to be determined in a de novo proceeding rather than providing for appellate review by certiorari. For example, section 163.3215(1) provides in part that "any aggrieved or adversely affected party may *maintain an action for injunctive or other relief*." (emphasis added). Subsection 163.3215(3)(a) provides in part that "no *suit* may be maintained under this section. . . ." (emphasis added). Subsection 163.3215(3)(b) states in part: "*Suit* under this section shall be the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part." (emphasis added). Some argue that use of the words "action," "suit," and "challenge," rather than "appeal" indicate that a new cause of action has been created, and that the Legislature would have used the terms "appeal" or "certiorari review" if that had been its intent. *See* Robert Lincoln, *Inconsistent Treatment: The Florida Courts Struggle With the Consistency Doctrine*, 7 J. LAND USE & ENVTL. L. 333, 372-78 (1992).

For an argument that section 163.3215 authorizes a de novo proceeding in circuit court, see Emerald Acres Inv., Inc. v. Board of County Comm'rs of Leon County, 601 So. 2d 577, 582-83 (1st DCA 1992) (Kahn, J. concurring) ("[T]he legislature has now seen fit to establish a statutory cause of action providing *de novo* review to a party aggrieved or adversely affected by a local government development order."), *rev'd*, Parker v. Leon County, 627 So. 2d 476 (Fla. 1993).

252. 630 So. 2d 1097 (Fla. 1994).

253. Although the supreme court had accepted jurisdiction of *Puma* under its conflict jurisdiction, it is difficult to see how any conflict existed, at least with regard to the nature of plan amendments. No appellate court decision prior to *Puma* had addressed the issue of whether plan amendments adopted pursuant to the Growth Management Act are quasi-judicial or legislative actions.

254. 630 So. 2d at 1097.

255. 635 So. 2d 159 (Fla. 5th DCA 1994).

amendments. Applying the Fifth District's functional analysis of rezonings from *Snyder*, a local comprehensive plan is clearly a legislative action because it is a policy-setting document of general applicability.[256] However, in *Snyder*, although the court stated that action resulting in the formulation of general policy is legislative in nature while application of the general policy is a quasi-judicial act, it then ruled that comprehensive rezonings affecting a large segment of the public are legislative and that rezonings impacting a limited number of persons or property owners are quasi-judicial.[257] In remanding *Puma* based on its decision in *Snyder*, is the court suggesting that local plan amendments, as modifications to a policy-making document, should be categorized as legislative acts? Or is the court indicating that plan amendments should be categorized as either quasi-judicial or legislative based upon the number of persons or property owners affected by the amendment? The brief per curiam opinion provides no clues.

Given the ambiguity of its *Puma* opinion and its failure to expressly characterize the nature of comprehensive plans and plan amendments in *Snyder*, the supreme court's opinion in *Puma* gives the lower courts little meaningful guidance on the issue. Accordingly, the trial court, or, in the event of another appeal, the Fifth District may conclude that it should affirm its initial decision in *Puma* and hold that small-scale or site-specific plan amendments are quasi-judicial actions subject to all the procedural requirements established in *Snyder*. Whatever the ultimate decision in the Fifth District, it will not be binding on the other lower appellate courts until the Florida Supreme Court itself provides a definitive answer. Consequently, by failing to directly and expressly resolve this fundamental issue in *Puma*, the court may have spawned another wave of litigation.

Comprehensive plan amendments should be treated as legislative acts for both logical and practical reasons. Logically, as noted above, amendments to a legislatively adopted statement of general policy are legislative acts. 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

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256. Logically, therefore, all amendments to the local comprehensive plan should also be deemed legislative actions. *But see* Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65, 80 (5th DCA 1991) (holding that "*enactments of original* general comprehensive zoning and *planning ordinances and maps*, and *amendments thereto of broad general application*, constitute legislative action establishing rules of law of general application.") (emphasis added), *rev'd on other grounds*, 627 So. 2d 469 (Fla. 1993).

257. *See supra* notes 191-92 and accompanying text.

amendment should be deemed legislative. The future land use plan map alone does not determine or control the uses which can be made of a particular tract of land. Rather, the comprehensive plan as a whole, including the future land use map and all of the other policies of the plan, consists of legislative policies that must be applied to determine what uses can be made of a specific tract of land.[258]

From a practical perspective, characterizing a comprehensive plan amendment as a quasi-judicial act that is subject to *Snyder*'s procedural mandates would be duplicative of the Growth Management Act, which already provides for quasi-judicial hearings in plan amendment proceedings. In adopting comprehensive plan amendments, local governments must apply the general standards established by statute and administrative rule.[259] After the Department of Community Affairs determines whether the local government has complied with these legislative requirements, the local government, the applicant, an affected citizen, or the Department itself, can request an administrative hearing pursuant to the Florida Administrative Procedure Act.[260] Requiring local governments to conduct quasi-judicial proceedings on plan amendments at the local level will not serve the interests of local government, landowners, or affected citizens. On the contrary, it will unnecessarily burden an already complicated, time-consuming and expensive process.

V. CONCLUSION

Florida's Growth Management Act is intended to alter significantly the local planning and zoning process. Under this new planning regime, the mandatory local comprehensive plan is a significant limitation on the exercise of the zoning power by local governments. It replaces the local comprehensive zoning ordinance as the preeminent local legislative statement of land use policy. It is also the

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258. *See* Southwest Ranches v. Broward County, 502 So. 2d 931, 935 (4th DCA), *rev. denied*, 511 So. 2d 999 (Fla. 1987). In *Southwest Ranches*, the court stated:

> Initially, we reject the County's assertion that the land use element of its comprehensive plan alone should be considered in determining consistency. . . . The other elements of the plan were adopted pursuant to the statutory mandate of Chapter 163. We cannot agree that the land use plan is the sole, controlling document with which subsequent plan elements had to comply. On the contrary, each subsequently adopted element was designed to fulfill the overall requirements and goals of the statute, as the text of these elements amply demonstrates. We find no conflict between the charter powers of the county and the statutorily mandated obligation to adopt a comprehensive plan and abide by *all* its elements.

259. *See supra* notes 51-58 and accompanying text.

260. *See* FLA. STAT. § 163.3184(9), (10) (1993). Section 120.57(1), *Florida Statutes* (1993), establishes procedural requirements for formal administrative hearings that are even more extensive than those mandated by *Snyder* for local rezoning proceedings.

conduit through which state standards and policies are brought to bear on local land use and development decisions. To ensure that the state and local policies embodied in the comprehensive plan govern local land use and development decisions, the Act requires all local land use regulations and decisions regarding development orders, including rezoning decisions, to be consistent with the local comprehensive plan. The gist of the consistency requirement is to ensure that local governments apply the policies and standards of their local comprehensive plans when making zoning and other land use regulatory decisions. Hence, by requiring local governments to exercise their zoning and other land use regulatory powers subject both to broad constitutional constraints *and* legislatively-established standards and policies, the consistency doctrine transforms the nature of local rezoning decisions.

Effective implementation of the Growth Management Act ultimately depends on the willingness of the judiciary to recognize the significance of the consistency requirement and to enforce consistency by applying an adequate standard of judicial review. The fairly debatable rule traditionally applied by the courts in constitutional challenges to local zoning decisions is not appropriate for judicial review of consistency challenges. To ensure that local zoning and other development decisions are consistent with the policies and standards of an adopted local comprehensive plan, courts must take a closer look at the local decision. Otherwise, if a local government is allowed to determine the consistency issue, subject only to the highly deferential fairly debatable rule, the significance of the local comprehensive plan will be greatly reduced, and the efforts of the Florida Legislature to inject state standards and policies into the local land use decision-making process will be thwarted. Consequently, the consistency requirement poses considerable challenges for the judiciary as well as local governments, planners, landowners, and citizens.

The early experience of Florida courts with the consistency requirement presents a fascinating case study of the judiciary's ability to respond to new legal concepts. Following the substantial revision of the Growth Management Act in 1985, each of Florida's five lower appellate courts was compelled to consider the impact of the consistency requirement on the traditional local zoning system. From their judicial labors emerged five models for making and reviewing local zoning decisions in a consistency regime. These models range from the traditional model of fairly debatable review of legislative action, to models with differing degrees of strict scrutiny of legislative acts, to strict scrutiny of quasi-judicial actions with varying degrees of protection for property rights and local governmental planning

flexibility. These models would affect in markedly different ways an array of public and private interests, from the interest of state and local governments and the general public in the enforcement of the Growth Management Act, to the interest of local governments in a manageable local zoning process with a sufficient measure of local decision-making discretion, to the interest of land owners and citizens in a fair, rational, and accessible local regulatory system. Inevitably, the supreme court was asked to reconcile the competing models and conflicting interests.

The resultant *Snyder* decision is a compromise solution. Although it most closely resembles the model adopted by the Second District in *Sunbelt Equities*, it contains elements from each of the lower appellate court decisions. The Florida Supreme Court rejected the legislative/strict scrutiny model of the Third and Fourth Districts that have avoided some of the quasi-judicial model's undesirable side effects, including the *Jennings* ex parte communication problem. Instead, the court, applying a functional analysis, recharacterized rezoning actions that affect a limited number of landowners or specifically-described property as quasi-judicial decisions because they involve the application of legislatively-adopted general rules of policy. Somewhat illogically, in an apparent concession to local government, the court maintained the legislative characterization of comprehensive rezonings affecting a large portion of the public even though these rezonings must be consistent with the local comprehensive plan and, therefore, also involve the application of general policy. Consistent with its characterization of limited impact rezonings as quasi-judicial acts, the court implicitly confirmed that these decisions must be made in accordance with more formalized procedural requirements. Apparently out of deference to local governments, however, the court relieved local officials of responsibility for preparing written findings of fact and specific reasons for their rezoning decisions. Perhaps most significantly, in a major victory for citizens, landowners, and consistency advocates, the court held that all quasi-judicial rezoning decisions will be subject to the strict scrutiny review standard of *Machado*. For local governments, this loss of the deferential fairly debatable review standard for most local rezoning decisions is balanced by the court's rejection of the Fifth District's onerous "clear and convincing evidence" burden of proof rule that greatly expanded the rights of property owners. Drawing a strong distinction between planning and zoning, the court ruled that local governments may deny a consistent rezoning application by demonstrating with substantial competent evidence that a legitimate public purpose justifies continuation of an existing, consistent zoning classification. Lest the scales be tipped too sharply in favor of local

government, the court stated that local governments must allow some development that is consistent with the local plan. Generally faithful to the purposes of the consistency requirement, the court's model can be aptly described as strict scrutiny of quasi-judicial rezoning decisions with considerable planning flexibility for local governments and due regard for the landowner.

The *Snyder* opinion does de-emphasize and even compromise the consistency requirement in certain respects. First, the decision is based on a functional analysis which emphasizes the procedural due process considerations involved in the adjudication of individual rights rather than a consistency analysis which emphasizes the importance of accomplishing the public policy objectives of the Growth Management Act. Second, although the bulk of local rezonings will probably be captured by the quasi-judicial/strict scrutiny rule, the exclusion of comprehensive rezonings from the *Snyder* requirements is troublesome. By failing to recognize that these "legislative," large-scale rezonings are also subject to the consistency requirement, the court has created a potentially damaging loophole in the comprehensive planning process. One means of preventing these large-scale rezonings from undermining the local comprehensive plan is to subject them to strict judicial review as provided for in the *Machado* model. Third, by ruling, either expressly or implicitly, that local governments need not make written findings of fact or give specific reasons for their consistency decisions, the court has missed an opportunity to underscore the importance of the consistency requirement. As some of the local courts recognized, this requirement would compel local governments to focus clearly and seriously on the standards and policies in their comprehensive plans rather than on improper political considerations, would enhance the public's ability to understand the reasons for local rezoning decisions, and would facilitate effective judicial review of local decisions. Fourth, in wisely rejecting the Fifth District's "clear and convincing evidence" standard, the court may have unwittingly conferred too much discretion on local governments to deny consistent rezoning applications. The consistency doctrine would hold that the reasons for a local government's rejection of an application should be based on the local comprehensive plan rather than on the constitutional concept of a "legitimate public purpose." Having been given the flexibility to deny consistent applications by proof of such purposes, local governments may have little incentive to adopt specific comprehensive plan policies and standards which define and limit their discretion to control the extent and appropriate timing of rezonings.

Snyder and its companion cases, *Parker* and *Puma*, leave a number of important questions unanswered. How are we to distinguish

between legislative, comprehensive rezonings and quasi-judicial, limited impact rezonings? Precisely what procedures should be followed by local government in making quasi-judicial rezoning decisions? *Snyder* provides no definitive answers. What is the method by which third-party intervenors may seek judicial review of allegedly inconsistent development orders? *Parker* tells us that third-party intervenors, but not rezoning applicants, must satisfy the statutory precondition of filing an administrative complaint with the local government before initiating a consistency challenge in court. However, *Parker* does not expressly decide whether the third-party intervenor will be entitled to a de novo proceeding in circuit court or will be limited to certiorari review of the record of the local proceeding. Finally, in *Puma* the court declined to expressly and conclusively decide the issue of whether a comprehensive plan amendment is a legislative or quasi-judicial act. Moreover, the manner in which the court disposed of *Puma* opens the door to a lower court ruling that large-scale comprehensive plan amendments are legislative, while site-specific or limited-impact plan amendments are quasi-judicial. Characterizing even single-site comprehensive plan amendments as quasi-judicial will greatly complicate an already difficult plan amendment review process. By failing to decide, or to provide meaningful guidance for resolving these fundamental, threshold issues, the court has ensured continuing controversy, confusion and litigation in the comprehensive planning arena.

Parker is a particularly worrisome decision. The decision results in two sets of procedural requirements for initiating consistency challenges—one for applicants and a different one for third-party intervenors. More importantly, *Parker* does not expressly decide whether section 163.3215 affords citizen challengers the right to a de novo proceeding in circuit court. When read in conjunction with *Snyder* and other cases, however, *Parker* may suggest that third-party intervenors are not entitled to a de novo proceeding and will be limited to certiorari review of the record of the local quasi-judicial proceeding. Arguably, limiting third-party intervenors to certiorari review is contrary to the meaning and intent of the Growth Management Act and will greatly weaken the ability of citizens to enforce the consistency requirement. This issue is especially critical because the citizen suit is the only mechanism for enforcement of the consistency requirement for development orders. The Legislature should revisit this issue and amend section 163.3215 to establish uniform procedures for challenging development orders, to expressly specify the method by which third-party intervenors may judicially challenge development orders, and to insure an effective citizen enforcement mechanism for the consistency requirement.

Standing alone, *Snyder* is on the whole a positive decision for growth management and the consistency requirement. It recognizes, although not as explicitly as some would like, the fundamental transformation of the local land use regulatory process which has been mandated by the Growth Management Act. It establishes a framework for improved local decision-making and more effective judicial enforcement of the consistency requirement through strict scrutiny of local decisions. Although it will not completely satisfy any of the affected interests, *Snyder* stands as a relatively balanced decision that provides a reasonable measure of protection for state and local governments, landowners, affected citizens, and the general public. Ultimately, therefore, *Snyder* is reflective of the controversies and compromises that have characterized the adoption and early implementation of the Growth Management Act.