

# THE BEST LAID PLANS: THE RISE AND FALL OF GROWTH MANAGEMENT IN FLORIDA

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## I. INTRODUCTION

Florida's Growth Management Act of 1985<sup>1</sup> (Growth Management Act) was implemented by the adoption of local government comprehensive plans which were based on the expectation that land use amendments would receive deferential review by the courts. The Florida Supreme Court has ruled that, on a case-by-case basis, land use amendments may be quasi-judicial acts rather than quasi-legislative acts, and therefore subject to strict scrutiny.<sup>2</sup> This makes the process of challenging or defending a land use amendment decision so complex, expensive and potentially unfair that it could bring Florida's growth management program to a halt.

Part II of this article gives a short history of growth management nationwide, beginning in 1926 with *Village of Euclid v. Ambler Realty Co.*, in which the United States Supreme Court ruled that local governments may regulate private property through zoning.<sup>3</sup> This part touches on why growth management programs were instituted by the states and why early efforts proved only partially successful. This part also offers a history and short description of Florida's leadership role in the development of growth management theory and describes how local governments developed local comprehensive plans as required by Florida's growth management laws.

Part III then analyzes the impact of the Florida Supreme Court's decision in *Board of County Commissioners of Brevard County v. Snyder*<sup>4</sup> on Florida's growth management program. In *Snyder*, the court ruled that certain land use decisions are quasi-judicial in nature and subject to strict scrutiny by writ of certiorari.<sup>5</sup> That ruling cast the Florida growth management program into turmoil by imposing procedural requirements in land use decisions that inhibit the public's ability to participate. The ruling also undercuts the administrative review procedure established in the Growth Management Act and makes the courts the final arbiters of local government planning decisions.

Next, Part IV analyzes some of the legal issues courts must wrestle with in applying *Snyder* to local government comprehensive plan amendment decisions. This part concludes that *Snyder's* application of strict scrutiny is finding its way into land use cases not traditionally

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1. Ch. 85-55, 1985 Fla. Laws (codified as amended at FLA. STAT. §§ 163.3161-163.3215 (1995)) (officially titled the "Omnibus Growth Management Act of 1985").

2. See *infra* note 148 for a discussion of the distinction between strict scrutiny in land use cases and strict scrutiny as used in constitutional cases.

3. 272 U.S. 365 (1926).

4. 627 So. 2d 469 (Fla. 1993).

5. *Id.* at 474-75.

subject to such review.<sup>6</sup> Rather, those decisions were traditionally given great deference by the courts.

Part V connects *Snyder's* application of strict scrutiny in reviewing comprehensive plan amendment decisions to the recent line of United States Supreme Court decisions raising the level of scrutiny given to cases involving regulatory takings. This part concludes that although the *Snyder* Court sought to remove politics from land use decision making,<sup>7</sup> the effect of applying strict scrutiny to comprehensive plan amendment decisions shifts the focus of political pressure from elected local officials to elected circuit court judges. This not only fails to achieve the court's purpose, it violates the doctrine of separation of powers.<sup>8</sup>

Part VI consists of two interviews. The first is with Noreen Dreyer, the former County Attorney for Martin County. Two years after Martin County adopted its comprehensive plan, three plan amendment decisions made by the Martin County Commission were challenged in circuit court. Ms. Dreyer points out that by giving property owners a second chance at every land use decision through strict scrutiny, *Snyder* shifts the resources of a local government away from planning and into litigation. The second interview is with Richard Grosso, Legal Director of 1000 Friends of Florida. He advocates changes in the growth management program not only to accommodate *Snyder*, but also to refine the process to address the requirements of the Florida Private Property Rights Protection Act.<sup>9</sup>

Part VII concludes that although Florida has been a leader in growth management since 1972,<sup>10</sup> its growth management program is in danger of collapsing under the weight of strict judicial scrutiny. For Florida's planning effort to function effectively in the future, the Florida Supreme Court, the Florida Legislature, and the Department of Community Affairs must all take immediate action.

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6. See *id.* at 471 ("The district court of appeal acknowledged that zoning decisions have traditionally been considered legislative in nature. Therefore, courts were required to uphold them if they could be justified as being 'fairly debatable.'").

7. *Id.* at 472-73.

8. FLA. CONST. art. II, § 3. "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

9. Ch. 95-181, 1995 Fla. Laws (codified at FLA. STAT. § 70.001). For a discussion of Florida's Private Property Rights Protection Act see Ellen Avery, *The Terminology of Florida's New Property Rights Law: Will It Allow Equity to Prevail or Government to be "Taken" to the Cleaners?*, 11 J. LAND USE & ENVTL. L. 181 (1995).

10. See, e.g., James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 490 (1994).

## II. A SHORT HISTORY OF GROWTH MANAGEMENT

To effectively evaluate the current state of growth management in Florida and the impact of the recent judicial trend toward closer scrutiny of the land use decisions of local governments, a review of the history of growth management is necessary. This part offers a glimpse at how land use regulation developed.

### A. *In the Beginning: Village of Euclid v. Ambler Realty Co.*

In 1926, the United States Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,<sup>11</sup> held that zoning is a constitutional exercise of the state's police power, even though it limits property owners' use of their land.<sup>12</sup> The legislative power to control the use of land in order to promote the health, safety and welfare of residents could be delegated by the state to local governments.<sup>13</sup> As a result, zoning decisions made by local governments were reviewed deferentially by the courts and were generally held constitutional, so long as it was fairly debatable whether the regulation served a legitimate government purpose.<sup>14</sup> The concept was that local elected officials, with the discretion to weigh the legal technicalities of zoning proposals against the myriad of social and political issues that make up local politics, will make the best land use choices for their own communities.<sup>15</sup> It was a simple, straight forward system based on the fundamental American political concept of separation of powers.<sup>16</sup> This legislative power was

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11. 272 U.S. 365 (1926).

12. *Id.* at 397. See also Wickersham, *supra* note 10, at 492-93 (by 1926, when the Supreme Court ruled in *Euclid*, over 400 municipalities had zoning ordinances in place. "Today, almost every state and major city, with the exception of Houston, Texas, employs zoning as its tool of land use regulation.").

13. Jeffrey M. Taylor, *Untangling the Law of Site-Specific Rezoning in Florida: A Critical Evaluation of the Functional Approach*, 45 U. FLA. L. REV. 873, 878-79 (1993). "States and municipalities were given the authority to zone under the Department of Commerce's Standard State Zoning Enabling Acts of 1924 and 1926 and the Standard City Planning Enabling Act of 1928." *Id.* at 879 n.38. The Florida version of those acts "existed as Chapter 176, Fla. Stat. (1991) [sic], until repealed as part of the implementation of municipal home rule powers in 1973." Brief of Amicus Curiae at 17, Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993) (No. 79,720).

14. John W. Howell & David J. Russ, *Planning vs. Zoning: Snyder Decision Changes Rezoning Standards*, 68 FLA. B.J., May 1994, at 16; Thomas G. Pelham, *Quasi-Judicial Rezoning: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243, 246 (1994). There is broad consensus that the current trend towards viewing land use decisions by local governments as quasi-judicial actions, and therefore subject to heightened scrutiny, is a stark contrast to the deferential review local governments have previously enjoyed in land use decision making for the past seventy years. See Pelham, *supra*, at 246-47.

15. See Daniel L. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1, 4 (1992).

16. See *supra* note 8 and accompanying text.

balanced on the one hand by the power of residents to vote offending officials out of office and on the other hand by a property owner's access to constitutional remedies through the courts.<sup>17</sup>

Like many fundamental American political concepts, local control of land use decisions came under pressure with the population boom following the end of World War II.<sup>18</sup> By the 1970s, states like Florida, which had experienced massive population growth, recognized land development as both a major economic force and a major challenge.<sup>19</sup> Traditional reliance on the Euclidean approach developed into a highly irrational and politicized process with both citizens and landowners demanding preferential treatment.<sup>20</sup> Zoning proved inadequate to regulate major projects and to protect critical resources in the face of such growth.<sup>21</sup>

Growth states became concerned that the local governments to which they had delegated their land use authority and, therefore, the responsibility for dealing with growth issues, were having difficulty predicting and shaping long term development trends without the coordination and guidance offered by the principles of comprehensive land use planning.<sup>22</sup> It appeared that local governments, which

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17. Such a constitutional remedy is a claim for a taking under the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V. There is a long line of decisions developing this area of law. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 105 U.S. 1003 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that the zoning ordinance in question was constitutional, but nonetheless considering the constitutionality of the ordinance as applied to the specific property).

18. See Wickersham, *supra* note 10, at 494-95 (zoning regulation operates prospectively, affecting new development in the southern and far western sunbelt cities greater than the older northern and midwestern cities).

19. See David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 226 (1993). "Properly defined and understood, growth management, far from being a code word for no-growth or slow-growth efforts, has as central to its meaning a commitment to plan carefully for the growth that comes to an area so as to achieve a responsible balance between the protection of natural systems [and growth] . . . [Growth management] is deeply committed to a responsible 'fit' between development and the infrastructure needed to support the impacts of development." *Id.* at 227 (quoting John M. DeGrove & Deborah A. Mines, LINCOLN INSTITUTE OF LAND POLICY, *THE NEW FRONTIER IN LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES* 9 (1992)). See also Cristina Binkley, *Florida Land Use Laws: A Solution to the Land Use Law? It Depends What the Problem Is*, WALL ST. J., Mar. 29, 1995, at F1. In 1995, Florida was growing by 900 people per day. *Id.*

20. Pelham, *supra* note 14, at 246-47.

21. Wickersham, *supra* note 10, at 496-98.

22. Taylor, *supra* note 13, at 879. Another concern was the impropriety, discrimination, and misuse of the Euclidean deferential system of decision-making which allowed local governments to both violate the precepts of comprehensive planning and adopt plans to such an extent that a plan may realistically cease to exist. *Id.*

commonly made piece-meal zoning changes in response to specific developer requests,<sup>23</sup> were failing to adequately consider the cumulative effects of their decisions on issues of regional and state-wide importance.<sup>24</sup> Thus, the states began to reassert some of their regulatory power.<sup>25</sup> However, the states did not simply take back the regulatory power they had delegated to the local governments; rather, they created hybrid systems in which local governments retained the authority to make local decisions so long as those decisions met criteria established by the states.<sup>26</sup>

The hybrid systems attempted to blend the best of both worlds: local decision making and state-wide policy making.<sup>27</sup> By offering guidance rather than issuing commands, the state plans of the 1970s encouraged local governments to adopt land use plans that were aspirational.<sup>28</sup> The planning process was intended to provide a forum where elected officials and citizens, aided by experts, would debate and establish a consensus on the desired future character of the community.<sup>29</sup> Land use decisions under the new plans were still treated deferentially by the courts.<sup>30</sup> This left the ballot box as the strongest restraint on land use decisions, giving local voters almost total control over their community's future.<sup>31</sup>

### *B. Florida's Plans: To Dream the Impossible Dream*

Largely in response to a substantially high rate of growth, which increased Florida's population from 2.7 million people in 1950 to 6.8

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23. *Id.* at 884. "When developers or individual landowners submit rezoning applications for small parcels of land to a local zoning board, the probability of abuse, discrimination, or improper planning increases. Local commissioners often substitute rational scrutiny of rezoning applications with personal interest or favoritism. As a result, zoning districts may develop haphazardly and in conflict with the comprehensive plan." *Id.*

24. Wickersham, *supra* note 10, at 503-05.

25. *Id.*

26. *Id.* at 511. "In the early 1970s, three states, Vermont, Florida, and Oregon, passed growth management statutes that shifted considerable regulatory power back to the state or regional level." *Id.* at 512.

27. See John M. DeGrove, *State and Regional Planning and Regulatory Activity: The Florida Experience and Lessons for Other Jurisdictions*, C930 A.L.L.-A.B.A. 397, 426 (1994).

28. See Wickersham, *supra* note 10, at 499 ("[B]ecause the purpose of a plan is to offer guidance for shaping land development trends in an uncertain and rapidly changing future, it needs to be aspirational rather than commanding, general rather than specific.").

29. *Id.*

30. *Id.* at 518. Pre-*Snyder* land use decisions were considered quasi-legislative actions which were sustained by the courts so long as they were fairly debatable. Pelham, *supra* note 12, at 246; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ([I]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

31. Wickersham, *supra* note 10, at 522-24.

million in 1970,<sup>32</sup> Florida leapt to the forefront of state-wide planning in 1972 when the Florida Legislature passed the Florida Environmental Land and Water Management Act.<sup>33</sup> This was the first in a series of interacting statutes designed to bring the impacts of growth under control by addressing some of the persistent problems raised by Euclidean zoning and local control of land use.<sup>34</sup> The cornerstone of the series was the Local Government Comprehensive Planning and Land Development Regulation Act of 1975.<sup>35</sup> These acts combined to protect areas of critical state environmental concern, to regulate developments large enough to have regional impacts,<sup>36</sup> and to motivate local governments to adopt land use plans.<sup>37</sup> Under these acts, Regional Planning Councils develop plans in conformance with the State Comprehensive Plan.<sup>38</sup> The local government plans, though often grudgingly adopted,<sup>39</sup> are reviewed for compliance with both the State Comprehensive Plan and regional plan.<sup>40</sup> Under this system, local governments still enjoyed almost absolute discretion in making land use decisions. If the local decisions concern developments of

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32. DeGrove, *supra* note 27, at 426; BUREAU OF ECONOMIC AND BUSINESS RESEARCH COLLEGE OF BUSINESS ADMINISTRATION, FLORIDA STATISTICAL ABSTRACT 3 (Anne H. Shermeyen ed., 1991) [hereinafter ABSTRACT].

33. Ch. 72-317, 1972 Fla. Laws (codified as amended at FLA. STAT. ch. 380 (1995)); Wickersham, *supra* note 10, at 514.

34. Wickersham, *supra* note 10, at 512. The series of acts included the Water Resources Act, the State Comprehensive Planning Act, and the Land Conservation Act. See DeGrove, *supra* note 27, at 427. For a discussion of the Water Resources Act, see Ronald A. Christaldi, *Sharing the Cup: A Proposal for the Allocation of Florida's Water Resources*, 23 FLA. ST. U. L. REV. (forthcoming 1996); Phyllis Park Saarinen & Gary D. Lynne, *Getting the Most Valuable Water Supply Pie: Efficiency in Florida's Reasonable-Beneficial Use Standard*, 8 J. LAND USE & ENVTL. L. 491 (1993). For a discussion of the State Comprehensive Planning Act see Richard G. Rubino, *Can the Legacy of the Lack of Follow-Through in Florida State Planning Be Changed?*, 2 J. LAND USE & ENVTL. L. 27 (1986); Jerry Mitchell, *In Accordance with a Comprehensive Plan: The Rise of Strict Scrutiny in Florida*, 6 J. LAND USE & ENVTL. L. 79 (1990).

35. Ch. 75-257, 1975 Fla. Laws (codified as amended at FLA. STAT. §§ 163.3161-163.3215 (1995)).

36. David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 203 (1994).

37. DeGrove, *supra* note 27, at 427.

38. FLA. STAT. § 186.507 (1995). See generally Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 482 (1993) (discussing state growth management plans in general); *Compact Urban Developments in Florida: A Roundtable Discussion*, 5 J. LAND USE & ENVTL. L. 225 (1989).

39. See Porter, *supra* note 38, at 482.

[L]ocal governments usually were among the most vociferous opponents of the statutes. They viewed state acts as setting up regional 'supergovernments' and state bureaucracies that would direct decision making on development and that would quickly lead to the ruination of their communities. They also resisted yet another state mandate that would require increased local expenditures and yield no discernible benefits for their communities.

*Id.*

40. FLA. STAT. §§ 163.3184(5)-163.3184(6) (1995).

regional impact (DRI),<sup>41</sup> or development in areas of critical state concern,<sup>42</sup> those decisions could be challenged by means of appeal to the Florida Land and Water Adjudicatory Commission (Adjudicatory Commission).<sup>43</sup> Standing to appeal to the Adjudicatory Commission is limited to the state planning agency, the property owner, and the developer.<sup>44</sup> Affected citizens, abutters, other local property groups, and citizen intervenors, such as environmental groups, do not have standing to challenge local land use decisions to the Adjudicatory Commission, even though land use decisions often affect both property values and the quality of life in a community.<sup>45</sup>

Even these limited infringements on local power sparked legal and political debates between localities and the state.<sup>46</sup> The additional time required for review of projects and plan amendments delayed projects and increased development costs.<sup>47</sup> Affected property owners and citizens groups became frustrated because they did not have standing to legally challenge projects in court.<sup>48</sup> Even if the

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41. FLA. STAT. § 380.06 (1995) (“[D]evelopment of regional impact,’ as used in this section, means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county.”). Florida courts have read the threshold requirements flexibly, allowing jurisdiction under the statute for projects that do not meet numerical tests. *General Dev. Corp. v. Division of State Planning*, 353 So. 2d 1199 (Fla. 1st DCA 1977).

42. FLA. STAT. § 380.05 (1995); Porter, *supra* note 38, at 482. “State officials . . . understood that they had to retain a significant role for local governments in growth management, . . . [o]ften expressing the principle of continuing local control over day-to-day decisions.” *Id.*

43. FLA. STAT. § 380.07 (1995). Wickersham, *supra* note 10, at 517-18.

44. FLA. STAT. § 380.07 (1995); Friends of Everglades, Inc. v. Board of County Comm’rs, 456 So. 2d 904, 909 (Fla. 1st DCA 1984) (holding that while Chapter 380, *Florida Statutes*, does not abrogate the rights of citizens to challenge local zoning decisions in circuit court, citizens may not exercise their limited standing to challenge local zoning decisions before the Adjudicatory Commission); Caloosa Property Owners Ass’n, Inc. v. Palm Beach County Bd. of County Comm’rs, 429 So. 2d 1260, 1263-64 (Fla. 1st DCA 1983) (holding that: (1) only the State land planning agency, the appropriate regional planning councils, the developer, and the landowner may appeal a land development order; and (2) implicit in the Act’s statement of legislative purpose, section 380.021, *Florida Statutes*, is the view that “the DRI review process is primarily a comprehensive land use review technique for large scale development involving primarily two groups—developers on the one hand, and on the other, governmental planners and permitting authorities”); Wickersham, *supra* note 10, at 518.

45. Wickersham, *supra* note 10, at 518. *Cf. White v. Metropolitan Dade County*, 563 So. 2d 117, 127 (Fla. 3d DCA 1990) (denying standing in court action to individuals who are neither directly nor adversely affected by the County’s action and who failed to show that they had a legally recognizable interest in the property).

46. Wickersham, *supra* note 10, at 517.

47. *Id.* at 497 (“Municipalities seek to maintain the overall use and density mix for the project area . . . . [To achieve this they] may exact compromises from developers in exchange for approval of major projects: the dedication of land for public purposes such as roads, parks, and schools, or . . . payments into a public fund for offsite improvements.”).

48. See *Citizens Growth Management Coalition, Inc. v. City of West Palm Beach*, 450 So. 2d 204 (Fla. 1984) (holding that “only those persons who already have a legally recognizable right

politicians who approved controversial projects were voted out of office, the projects they had approved could still be developed.<sup>49</sup> Frustration grew at the state level as well. Lacking the actual power to approve or disapprove local planning decisions,<sup>50</sup> state and regional planners could not effectively coordinate and oversee local planning and regulation.<sup>51</sup> Local governments changed their plans "willy-nilly virtually every time a city council or county commission met,"<sup>52</sup> and the system was not effectively coping with the infrastructure needs or environmental impacts of new growth.<sup>53</sup>

During the 1980s, Florida's population growth rate had increased to over 300,000 new residents per year.<sup>54</sup> State regulators, local governments, developers, and citizens were all frustrated by their differently perceived failures of the planning process,<sup>55</sup> and the time was ripe for a comprehensive reassessment of Florida's growth management program.<sup>56</sup>

The legislature went back to the drawing board, and in 1985 engineered one of the nation's most comprehensive and ambitious planning programs.<sup>57</sup> Incorporating many of the recommendations of the governor-appointed Environmental Land Management Study Committee II,<sup>58</sup> the legislature amended the Florida State Comprehensive Planning Act of 1972,<sup>59</sup> adopted the Comprehensive State Plan,<sup>60</sup> and passed the Growth Management Act.<sup>61</sup> These acts

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which is adversely affected have standing to challenge a land use decision on the ground that it fails to conform with the comprehensive plan").

49. In Martin County, a DRI was the focal point of elections in 1982, and two of the three commissioners who voted for it were voted out of office. Interview with Noreen Dreyer, former County Attorney for Martin County, Florida (June 19, 1995) [hereinafter Dreyer Interview]. A second DRI, the subject of *Jensen Beach Land Co. v. Citizens for Responsible Growth of the Treasure Coast, Inc.*, 608 So. 2d 509 (Fla. 4th DCA 1992), was the focal point of the 1990 commission election, and the only commissioner who voted for that DRI and was up for reelection was voted out of office. Dreyer Interview, *supra*. Citizens who attempted to challenge the first DRI did not have standing. *Id.* Citizens who challenged the second one did. *Id.* In both cases, the DRIs survived the tenure of the politicians who voted for them. *Id.*

50. DeGrove, *supra* note 27, at 428.

51. Wickersham, *supra* note 10, at 502 ("[T]o conclude that municipal regulation of land use is at the mercy of the state is to confuse form with substance.").

52. DeGrove, *supra* note 27, at 428.

53. *Id.* at 427.

54. ABSTRACT, *supra* note 32, at 38 (3,190,965/10 years = >300,000/year).

55. See Wickersham, *supra* note 10, at 501-05.

56. DeGrove, *supra* note 27, at 428.

57. Pelham, *supra* note 14, at 248.

58. DeGrove, *supra* note 27, at 429.

59. Ch. 72-295, 1972 Fla. Laws (codified as amended at FLA. STAT. ch. 186 (1995)).

60. Ch. 85-57, 1985 Fla. Laws (codified as amended at FLA. STAT. ch. 187 (1995)).

61. Ch. 85-55, 1985 Fla. Laws (codified as amended at FLA. STAT. §§ 163.3161-163.3215 (1995)). The Growth Management Act "amended the previous Local Government Comprehensive Planning and Land Development Regulation Act of 1975 . . . and established the local

mandated that the Regional Planning Councils employ regional plans consistent with the newly adopted state plan.<sup>62</sup> Local governments were required to adopt detailed comprehensive plans by 1992.<sup>63</sup> Also, the Growth Management Act required that local plans be consistent with the goals and policies of both the regional and state plans,<sup>64</sup> and that local governments implement their plans through consistent local land development regulations and land use decisions.<sup>65</sup> The Act mandated that local governments choose a specific level of service for water, sewer, solid waste, drainage, conservation, recreation and open space.<sup>66</sup> The Act additionally ordered "concurrency,"<sup>67</sup> requiring that facilities and services needed by new development be in place in time to serve that development.<sup>68</sup> Concurrency is designed to accomplish two major goals: (1) to make sure that the impact of new development is realistically assessed before it is approved; and (2) to eliminate the lag time between the development and the provision of services.<sup>69</sup> Therefore, local governments must commit to providing these services when a new development creates a need for them.<sup>70</sup>

The Growth Management Act's enforcement provisions were revolutionary. Local governments which make land use decisions inconsistent with local, regional and state plans can be held accountable in four new ways: (1) the state can withhold grants and other state funds from governments that adopt inconsistent plans or amendments;<sup>71</sup> (2) the state can seek an injunction requiring the local government to act consistently;<sup>72</sup> (3) affected citizens, who were granted broad standing by the Growth Management Act, can challenge land use plan amendments that are inconsistent with local plans

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comprehensive plan as the primary source for local land use determinations." Mitchell, *supra* note 34, at 79.

62. FLA. STAT. § 186.507(1) (1995); Callies, *supra* note 36, at 204.

63. FLA. STAT. § 163.3167 (1995); DeGrove, *supra* note 27, at 433 ("As of May 1992, 302 local plans had been found in compliance, 43 plans were near compliance.").

64. FLA. STAT. §§ 163.3184(5)-163.3184(6) (1995); DeGrove, *supra* note 27, at 430.

65. FLA. STAT. § 163.3201 (1995); Callies, *supra* note 36, at 204.

66. FLA. STAT. § 163.3180(1) (1995).

67. FLA. STAT. § 163.3180 (1995). See David L. Powell, *Recent Changes in Concurrency*, 68 FLA. B.J., Nov. 1994, at 67.

68. FLA. STAT. § 163.3180 (1995).

69. FLA. STAT. §§ 163.3161, 163.3180 (1995); Powell, *supra* note 65.

70. Powell, *supra* note 65. See Powell, *supra* note 17, at 291-97.

71. FLA. STAT. § 163.3184(11)(a) (1995). See also Porter, *supra* note 36, at 494 ("Florida . . . may suspend recreation and state revenue-sharing grants, as well as federally-funded community development grants.").

72. FLA. STAT. § 163.3184(11) (1995); Porter, *supra* note 38, at 494. The Growth Management Act provides for state preparation of a local plan if the local government fails to prepare it. FLA. STAT. § 163.3167(3) (1995).

through an administrative appeal process;<sup>73</sup> and (4) affected citizens, under a more limited standing allowance, may challenge inconsistent development orders, including zoning decisions, through an action in court for injunctive relief or other relief.<sup>74</sup>

The Growth Management Act is a monumental balancing act.<sup>75</sup> It attempts to establish a consensus by giving something of value to every interested group. In addition to the new powers given to the citizens and the state, the Act promised to benefit the development community by speeding up the development review process and making it more reliable.<sup>76</sup> To do this, the Act removes much of the intense political pressure that frequently accompanies development review decisions.<sup>77</sup> The local government did not receive the benefit of additional power and control like that given to other parties affected by the Act, including the property owners, state government and development communities. Functionally, the Growth Management Act creates a substantial shift in power from local government back to the state.<sup>78</sup>

Although the Growth Management Act reclaimed some of the state's land use decision-making power, both the legislature and local officials understood that it was not intended to drastically affect local government decision making because of its firm foundation in the familiar Euclidean zoning model. So long as broad state or regional plans were not violated, local governments could choose the intensity and rate of growth which their community wanted.<sup>79</sup> All that local

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73. FLA. STAT. §§ 163.3184(9), 163.3184(10) (1995).

74. FLA. STAT. § 163.3215(1) (1995).

75. Powell, *supra* note 19, at 339. On the whole, the benefits relating to natural resource protection, provision of adequate public facilities, and community development must be weighed against potential economic dislocations, unfair burdens on individuals, and excessive state involvement in local affairs. *Id.*

In the next generation of growth management in Florida, this commitment to making the growth management system the servant of everyone—and not a captive of any single constituency at the expense of others—may present the most daunting challenge of all . . . . [W]e have learned through the years that growth management, to work effectively, must balance the affected but often competing interests of *all* our people.

*Id.* at 339-40. (quoting Letter from Lawton Chiles, Gov., Fla., to Rep. Bolley L. Johnson, Speaker, Florida House of Representatives (Feb. 19, 1993) (copy on file, Florida State University Law Review)).

76. FLA. STAT. § 163.3161 (1995).

77. Howell, *supra* note 14, at 16.

78. Wickersham, *supra* note 10, at 512.

79. FLA. STAT. §§ 163.3177(2), 163.31775 (1995). “[T]he Minimum Criteria for Review of Local Government Comprehensive Plans and Determination of Compliance of the Department of Community Affairs determine compliance with the Growth Management Act.” FLA. STAT. § 163.3177(10) (1995). The minimum criteria are commonly referred to as Rule 9J-5, which sets

governments had to do was provide the services which they had promised in their plans.<sup>80</sup> The legislature expressly stated in the Growth Management Act that it should “not be interpreted to limit or restrict the powers of municipal or county officials, but [the Act] shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land.”<sup>81</sup> The intent of the legislature was to build public support for Growth Management by utilizing the political nature of local government’s legislative land use decision-making process, and mandated public participation in the process to “the fullest extent possible.”<sup>82</sup> The legislature attempted to keep growth management decisions in the political/legislative arena by requiring that challenges to a plan, element or amendment’s consistency with the Growth Management Act<sup>83</sup> be processed through the Department of Administrative Hearings,<sup>84</sup> culminating in a hearing before the governor and cabinet sitting as the Adjudicatory Commission.<sup>85</sup> Only after passing through a series of hearings or negotiations with administrative and political bodies is an appeal of a local government decision intended to slip from the legislative arena and enter the court system.<sup>86</sup> However, in 1985, even the Florida court system treated local government land use decisions as legislative acts under the Euclidean scheme.<sup>87</sup> Therefore,

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out general guidelines for achieving compliance. *Id.* The specifics were left up to the local governments. FLA. ADMIN. CODE ANN. r. 9-J (1995).

80. See Powell, *supra* note 67, at 67. The Growth Management Act creates a broad mandate to achieve concurrency, but does not give a detailed methodology by which to achieve it or standards by which to judge it. See FLA. STAT. § 163.3177(10)(h) (1995).

81. FLA. STAT. § 163.3161(8) (1995); 85-197 Op. Fla. Att’y Gen. (1985). The Attorney General additionally reassured local officials that “the Legislature has recognized the broad home rule powers of municipalities and counties for planning and regulating the use of land within their respective jurisdictions.” *Id.*

82. FLA. STAT. § 163.3181(1) (1995).

83. See FLA. STAT. § 163.3184(13) (1995) (proceedings under this section are the sole proceeding or action for a determination of whether a local government’s plan, element, or amendment is in compliance).

84. FLA. STAT. § 163.3184(10)(a) (1995).

85. FLA. STAT. §§ 163.3164(1), 163.3184(11) (1995).

86. FLA. STAT. § 120.68(1) (1995) (“A party who is adversely affected by final agency action is entitled to judicial review.”); FLA. STAT. § 120.68(2) (1995) (“[A]ll proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides.”).

87. See, e.g., *Southwest Ranches Homeowners Ass’n v. Broward County*, 502 So. 2d 931 (Fla. 4th DCA 1987) (holding that rezonings are legislative acts, but require stricter scrutiny). After adoption of the Growth Management Act, Florida District Courts of Appeal developed a variety of approaches to decide whether zoning was a legislative or quasi-judicial act. See *Snyder v. Board of County Comm’rs of Brevard County*, 595 So. 2d 65 (Fla. 5th DCA 1991) (holding that zoning is a quasi-judicial action requiring strict scrutiny and placing a heavy burden on the government), *rev’d*, 627 So. 2d 469 (Fla. 1993); *Machado v. Musgrove*, 519 So. 2d 629 (Fla. 3d DCA 1987) (holding that strict scrutiny is used to determine whether zoning

local officials were justified in approaching their new comprehensive planning chores with confidence, because they were traversing familiar legal and political territory and the courts would treat their land use decisions deferentially.

Nevertheless, the plan adoption process placed an extraordinary strain on local governments. Local officials struggled to comply with the confusing new rules,<sup>88</sup> while under intense pressure to meet the plan adoption deadlines.<sup>89</sup> They negotiated compliance agreements to settle their differences with the Department of Community Affairs (DCA),<sup>90</sup> they faced sanctions before the governor and cabinet,<sup>91</sup> and they defended their plans from appeals by citizen groups.<sup>92</sup> Comprehensive planning turned out to be an expensive,<sup>93</sup> time-consuming effort,<sup>94</sup> for which few locally elected officials were adequately trained or experienced.<sup>95</sup>

Nor, for the most part, did local officials have the political will, time or expertise to formulate true long-range consensus plans and make sweeping land use changes throughout their jurisdictions to implement those plans.<sup>96</sup> Instead, many utilized the broad, generalized land use categories found in their old plans, because of their confidence in continuing to make land use decisions in response to

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deviates from the comprehensive plan); *City of Cape Canaveral v. Mosher*, 467 So. 2d 468 (Fla. 5th DCA 1985) (holding that consistency requires stricter scrutiny).

88. DeGrove, *supra* note 27, at 433.

89. FLA. STAT. § 163.3167(2) (1995). Submission could not be later than July 1, 1991. FLA. STAT. § 163.3167(2)(b) (1995).

90. DeGrove, *supra* note 27, at 434. One half of all local plans submitted initially were found not to be in compliance. *Id.* The threat of sanctions put heavy pressure on local governments to settle their differences and make plans consistent before an administrative hearing took place. *Id.*

91. Pelham, *supra* note 14, at 252.

92. Porter, *supra* note 38, at 495. "Florida's appeals process has been the forum for many objections to state decisions on plan reviews . . . . The appeals processes are credited with providing a pressure release valve for complaints, as well as for helping to establish more specific interpretations of state goals." *Id.*

93. DeGrove, *supra* note 27, at 442. Through 1991, the state had given \$44 million in planning support to local government. *Id.* This is in addition to local funds spent on the planning process. *Id.*

94. Richard Grosso, *Florida's Growth Management Act and Relevant Administrative and Judicial Opinions Interpretations*, C930 A.L.I.-A.B.A. 497, 499 (1994). The last plan was adopted in mid-1992. *Id.* By 1992, only 302 of Florida's 458 local governments had completed plans that had been found in compliance. DeGrove, *supra* note 27, at 433.

95. Taylor, *supra* note 13, at 915.

96. See Powell, *supra* note 19, at 269. "Many local plans have been criticized for being written to satisfy the DCA 'checklist' and not to a specific future condition—a 'destination'—that represents the shared values of the community." *Id.* See also Porter, *supra*, note 38, at 490 (explaining that "[t]he shortage of funding and time frames have 'led to the use of 'cookbook' approaches and other short cuts that are antithetical to rational, comprehensive planning'") (citing Charles L. Siemon, *Growth Management in Florida: An Overview and Brief Critique*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT 35, 40 (1992)).

specific landowner requests.<sup>97</sup> Each broad land use category allowed a variety of zoning designations to control the details of eventual development on a particular property.<sup>98</sup> Textual provisions in the plans set standards to control the timing, location and intensity of development.<sup>99</sup> Most plans included amendment procedures and standards that must be met for a property to qualify for a plan amendment.<sup>100</sup> Local officials intended to make plan amendments in the future in response to market and political forces just as they had under the old system. The planning program was revolutionary, but the plans relied on the traditional exercise of Euclidean discretion for their implementation.<sup>101</sup>

By the 1992 plan-adoption deadline, almost all of Florida's 458 local governments had adopted comprehensive plans or were far along in the process.<sup>102</sup> Those landowners and citizens who participated in the planning process<sup>103</sup> understood that the new plans would not eliminate requests for land use map amendments and zoning changes, although they expected that the process would still be political every step of the way. The comprehensive plans would serve as an additional check and balance against local government decisions.<sup>104</sup> Land use changes must be tailored to meet the policies of the plans.<sup>105</sup> If the changes are not consistent with the plan, they could be challenged through the administrative process established in the Growth Management Act.<sup>106</sup> It was never the intention or expectation of any of the involved parties that the courts, rather than

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97. DeGrove, *supra* note 27, at 428.

98. Howell, *supra* note 14, at 18.

99. *Id.* at 18-19.

100. *See, e.g.*, FLA. STAT. § 163.3187 (1995). "The procedure for amendment of an adopted comprehensive plan or element shall be as for the original adoption of the comprehensive plan or element set forth in s. 163.3184." MARTIN COUNTY COMPREHENSIVE GROWTH MANAGEMENT PLAN §§ I-II(C)(2) (1990). The staff would recommend denial of any proposed amendment that does not meet any of the following standards: (1) change in the area made the proposed change logical; (2) development of vacant land in the area has altered its character; (3) the proposed change would correct an inappropriate use; or (4) the proposed change would "meet a necessary public need which enhances the health, safety or general welfare of County residents." *Id.* The standards are couched in legislative terms, presupposing that the decision as to whether a public need is met would be legislative. *Id.*

101. Howell, *supra* note 14, at 16.

102. Grosso, *supra* note 94, at 497.

103. *See* FLA. STAT. § 163.3181 (1995) ("It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible.")

104. *See* FLA. STAT. § 163.3202 (1995) (each municipality must adopt land development regulations which are consistent with the comprehensive plan).

105. *See id.*

106. FLA. STAT. § 163.3184(10) (1995). *See* Wickersham, *supra* note 10, at 517-18. The administrative process is set out in sections 163.3184(8)-(13), *Florida Statutes* (1995).

the political body, would become the final arbiters of comprehensive plan land use decisions.

### III. THE FLORIDA SUPREME COURT SHIFTS THE CONTROL OF COMPREHENSIVE PLANNING FROM LOCAL GOVERNMENT TO THE COURTS

In a series of decisions, the Florida Supreme Court has raised the level of review that the courts give local government actions when a court determines that a government action is quasi-judicial. This has led to a shift in the control of comprehensive planning from the local decision makers to the courts.

#### A. *Along Came Snyder: Board of County Commissioners of Brevard County v. Snyder; City of Melbourne v. Puma*

On October 7, 1993, the Supreme Court of Florida, in *Board of County Commissioners of Brevard County v. Snyder*,<sup>107</sup> held that local comprehensive plans are legally binding and that such plans provide courts with a meaningful standard of review for amendment requests.<sup>108</sup> Before *Snyder*, most, if not all, of Florida's local comprehensive plans were found to be in compliance with the Growth Management Act. The holding should have been good news for state planners, but the supreme court applied a newly created legal standard in a way that caught state planners and local governments by surprise. The court, in essence, reversed the very basis of Euclidean decision making.<sup>109</sup> Quoting *Euclid*, the court acknowledged that historically local governments have enjoyed broad discretion over zoning decisions because they were considered legislative actions subject to highly deferential review.<sup>110</sup> The advent of comprehensive plans, the court opined, changed that.<sup>111</sup>

The Florida Supreme Court ruled that comprehensive plans transformed some zoning decisions from quasi-legislative to quasi-judicial actions.<sup>112</sup> The concept that zoning should be a quasi-judicial

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107. 627 So. 2d 469 (Fla. 1993). Brevard County denied Snyder a zoning change on a one-half acre parcel of property. *Id.* at 472. The Florida Supreme Court quashed the district court's ruling, but in so doing, established new judicial rules for reviewing land use decisions. *Id.* at 476.

108. *Snyder*, 627 So. 2d at 472.

109. *Id.*

110. *Id.*

111. *See id.* The court explained that the Growth Management Act required zoning to be consistent with the comprehensive plans. *Id.* Therefore, those zoning decisions which are the application of adopted policy to specific property are quasi-judicial actions deserving strict scrutiny. *Id.*

112. *Id.* at 473-74.

action was not new.<sup>113</sup> Two decades earlier, the Oregon Supreme Court ruled that zoning should be a quasi-judicial action.<sup>114</sup> A conflict between Florida's District Courts of Appeal<sup>115</sup> on this issue prompted the Florida Supreme Court to hear *Snyder* to settle the issue.<sup>116</sup> Planning experts presumably looked forward to the removal of zoning decisions from the political arena as a positive benefit of the comprehensive planning process.<sup>117</sup> What was surprising, however, was that the ruling also transformed decisions on certain comprehensive plan amendments into quasi-judicial actions subject to strict judicial scrutiny. This violates both the intent and the purpose of the Growth Management Act,<sup>118</sup> and promises to have a significant effect on Florida's ability to manage growth in the future.

To clarify this issue, the Florida Supreme Court explained the rationale for its holding. A legislative action "results in the *formulation* of a general rule of policy, whereas [a] judicial action results in the *application* of a general rule of policy."<sup>119</sup> The court could have simply ruled that the adoption of and amendment to the comprehensive plan is the formulation of policy, and therefore is a legislative act. It would logically follow that as a general policy, the issuance of development orders and zoning decisions consistent with the plan would be quasi-judicial acts.<sup>120</sup> A decision based on this distinction between planning and zoning would have built on and reinforced the planning structure created by the legislature;<sup>121</sup> it would have clearly defined the

113. Pelham, *supra* note 14, at 243; 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). In an effort to make development permitting more efficient and less political, there was substantial support for making zoning quasi-judicial. *Id.*

114. *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 29 (Or. 1973).

115. *Compare Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996 (Fla. 2d DCA 1993) (holding that the mere fact that an application for a rezoning is consistent with the comprehensive plan does not give a landowner a right to the rezoning it desires) *with Board of County Comm'rs of Brevard County v. Snyder*, 595 So. 2d 65 (Fla. 5th DCA 1991) (holding that owner-initiated, site-specific rezoning proceedings are quasi-judicial in nature), *rev'd* 627 So. 2d 469 (Fla. 1993).

116. *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 470-71 (Fla. 1993).

117. *See id.* at 469.

118. FLA. STAT. § 163.3161 (1995).

119. *Snyder*, 627 So. 2d at 474 (emphasis in original).

120. Pelham, *supra* note 14, at 273. *See also* Brief of Amicus Curiae, *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993) (No. 79,720).

121. *See* FLA. STAT. § 163.3167 (1995) (requiring municipalities to adopt a comprehensive plan); FLA. STAT. § 163.3203 (1995) (requiring municipalities to adopt land development regulations consistent with the policies of the comprehensive plan). *See* Wickersham, *supra* note 10, at 521. Florida adopted a state plan, chapter 187, *Florida Statutes* (1995), and created regional planning councils, section 186.504, *Florida Statutes* (1995), which adopted regional plans that conform with the state plan, section 186.507, *Florida Statutes* (1995). Local governments are

separation of powers between local governments and the courts in land use decision making,<sup>122</sup> and it would have largely removed decisions on development orders from the political arena resulting in inconsistent, "ad hoc, sloppy and self-serving decisions."<sup>123</sup> Such a holding would have created clarity where there had been confusion and would have given Florida's growth management efforts firm legal ground on which to build. But the court instead utilized a functional analysis of the "legislative versus quasi-judicial" issue which had been gathering support in the District Courts of Appeal since the late 1980s.<sup>124</sup>

Under this functional analysis, it is the "character of the hearing that determines whether or not board action is legislative or quasi-judicial,"<sup>125</sup> rather than whether the decision was a planning or zoning decision. The court explained that:

[I]t is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature. However, . . . 'rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action.'<sup>126</sup>

Had this reasoning applied only to zoning decisions and other development orders, it would have had little impact on Florida's efforts to manage growth. However, the court suggested that, under this analysis, a court should not make a distinction between requests for zoning changes and requests for land use changes which require amendment to a comprehensive plan.<sup>127</sup>

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required to adopt local plans which conform with the regional and state plans. FLA. STAT. §§ 163.3184(9)-163.3184(10) (1995). Until 1993, Land developments of regional impact required approval by both regional and state agencies. *Id.*; Wickersham, *supra* note 10, at 521.

122. *See supra* note 8.

123. *Snyder*, 627 So. 2d at 473 (quoting Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2 (1992)).

124. *Board of County Comm'rs of Brevard County v. Snyder*, 595 So. 2d at 78 (Fla. 5th DCA 1991), *rev'd* 627 So. 2d 469 (Fla. 1993); Pelham, *supra* note 14, at 275.

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

126. *Id.* (quoting the lower court, 595 So. 2d 65, 78).

127. *Id.*

[Q]uasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

*Id.* (quoting *West Flagler Amusement Co. v. State Racing Comm'n*, 165 So. 64, 65 (1935)). Comprehensive plan amendments require notice, hearing and consideration of evidence. FLA.

Four months later, in *City of Melbourne v. Puma*,<sup>128</sup> a case which dealt with a comprehensive plan amendment on a small parcel of land, the Florida Supreme Court made its position clear by applying *Snyder* to the facts in *Puma*.<sup>129</sup> Since the functional analysis applies to plan amendments as well as to zoning changes, a court can eventually rule that any decision on a land use amendment to a comprehensive plan is legislative or quasi-judicial, depending on the facts of each case. The court's redefinition of local government decisions on comprehensive plan amendments as quasi-judicial acts will have several serious impacts on Florida's ability to manage growth.

*B. What a Tangled Web We Weave: Parker v. Leon County; Jennings v. Dade County*

The same day that the Florida Supreme Court decided *Snyder*, the court held, in *Parker v. Leon County*,<sup>130</sup> that the administrative hearing process established in the Growth Management Act applies only to third-party intervenors who are challenging the consistency of land use decisions.<sup>131</sup> In *Parker* the court interpreted *Snyder* to hold that land owners must challenge quasi-judicial land use decisions by common-law certiorari in circuit court.<sup>132</sup> Although *Parker* dealt with development orders and not with land use amendments, the holding dovetails with the court's logic in *Snyder*, which also dealt initially with a development order—a rezoning.<sup>133</sup> Moreover, *Snyder* did not distinguish between rezonings and land use amendments; rather, it distinguished between quasi-judicial and legislative land use decisions.<sup>134</sup> Read together, these rulings make clear that a landowner who wants to challenge a land use decision must seek common law

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STAT. § 163.3184(15) (1995). See also FLA. STAT. § 163.3187(1)(c)2. ("A local government is not required to comply with the requirements of s. 163.3184(15)(c), for plan amendments . . . if the local government complies with . . . s. 125.66(4)(a) for a county, or in s. 166.041(3)(c) for a municipality.").

128. 630 So. 2d 1097 (Fla. 1994).

129. *Id.* The Florida Supreme Court remanded *Puma*, a case in which the Fifth District Court of Appeal denied a request for a land use amendment for "further consideration consistent with [the] opinion in *Snyder*." *Id.* Neither *Puma* nor *Snyder* expressly stated that amendments are quasi-judicial acts. However, by remanding *Puma* for resolution in accordance with *Snyder*, which dealt exclusively with zoning, the court implied that the *Snyder* analysis applies to land use amendments as well. See *id.*

130. 627 So. 2d 476 (Fla. 1993).

131. *Id.* at 479.

132. *Id.*

133. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d at 474. A "development order" is any order granting a development permit, which includes a rezoning. FLA. STAT. §§ 163.3164(6)-163.3163(8) (1995).

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

remedies, while a third party who wants to challenge the same decision must do so through the procedures outlined in the Growth Management Act. This makes challenging and defending local land use decisions complex, time consuming and costly for property owners and local governments.

For the benefit of all interested parties, the Florida Legislature sought to standardize and expedite challenges to land use decisions by requiring that the administrative appeals process defined in the Growth Management Act "be the sole proceeding or action for a determination of whether a local government's plan, element, or amendment is in compliance with this act."<sup>135</sup> Thus, pre-*Snyder* appeals were limited to two possible procedures, the administrative hearing process defined in the statute<sup>136</sup> and an appeal on constitutional grounds, much like the one which was the basis of the first Euclidean zoning decision.<sup>137</sup> Both of these procedures place a heavy burden on the challenging party to overcome the presumption of the local government's consistency and constitutionality.<sup>138</sup>

The Florida Supreme Court's decisions in *Snyder*, *Puma*, and *Parker* complicated the growth management process by adding an unanticipated third procedure for reviewing comprehensive plan amendments, namely writ of certiorari in the local circuit court.<sup>139</sup> Common law certiorari review, like an appeal, entails review of the hearing record,<sup>140</sup> rather than a trial de novo. The circuit court determines: (1) whether procedural due process has been afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the land use decision is supported by competent, substantial evidence.<sup>141</sup> With this added method of challenge, every

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135. FLA. STAT. § 163.3184(13) (1995). This is consistent with the Oregon model in which all land use cases are heard by a seven member Land Conservation and Development Commission. OR. REV. STAT. §§ 197.030-197.065, 197.225 (1995); Wickersham, *supra* note 10, at 523-24.

136. FLA. STAT. § 163.3213 (1995).

137. See J. Freitag, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743 (1994). Since the 1930s, the United States Supreme Court has set the tone for review of legislative decisions by refusing to replace the social policies of elected officials with those of the courts. *Id.* This has resulted in deferential review using the fairly debatable standard for due process and equal protection claims. *Id.* In takings cases, until recently, legislative acts have also enjoyed the same review. *Id.*

138. FLA. STAT. §§ 163.3184(8)-163.3184(13) (1995).

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

140. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982).

141. *Id.* However, courts have not clarified what constitutes substantial, competent evidence and what weight a local government may give the opinions voiced by its citizens in the context of a quasi-judicial public hearing. This requirement alone may severely reduce the effectiveness of public participation. See Metropolitan Dade County v. Blumenthall, Nos. 94-52, 94-137, 1995 WL 366684 (Fla. 3d DCA June 21, 1995).

local government decision on a land use amendment could result in a de novo administrative hearing, a circuit court trial, an action for injunctive relief, a strictly scrutinized review of the record by writ of certiorari, or possibly all four at the same time.

For example, if a government made a compromise decision to allow more intense development on a property which attracted public attention because of environmental concerns, the property owner, third-party intervenors, and the involved state agencies could challenge the decision. Until a court rules on whether the decision is legislative or quasi-judicial, the property owner must seek constitutional relief, injunctive relief and review by writ of certiorari. Regardless, the state agencies and intervenors would challenge consistency through the administrative process. The property owner or the third party could also seek actual damages in circuit court, but only the third party could seek injunctive relief in the circuit court, if a development order is involved.<sup>142</sup> Additionally, in order to protect their legal interests, dissatisfied property owners must file and maintain both a constitutional challenge and a petition for writ of certiorari, because the land use decision will be characterized after the fact by the courts as quasi-judicial or quasi-legislative, and only filing one action may result in no remedy at all.<sup>143</sup> The need for a person to simultaneously pursue and defend multiple claims will burden the courts and raise the cost of comprehensive planning for all involved. Furthermore, the existence of different procedures with different standards of review for different parties to a land use dispute creates the potential for inconsistent or conflicting results.

The potential for inconsistent results also raises serious equal protection issues. After the *Parker* and *Snyder* decisions, a third-party intervenor, who may be an individual whose property rights are seriously affected by a land use decision or a group of citizens trying to preserve their community's property values and quality of life,<sup>144</sup> is treated differently than the property owner who seeks to change the land use. Third-party intervenors must follow the administrative procedure established in the Growth Management Act, which consists

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142. Interview with Richard Grosso, Legal Director for 1000 Friends of Florida, in Ft. Lauderdale, Florida. (June 27, 1995) [hereinafter Grosso Interview]. See also *Turner v. Sumter County Bd. of County Comm'rs*, 649 So. 2d 276 (Fla. 5th DCA 1995) (holding that a third party may have a certiorari action in addition to a claim under the Growth Management Act).

143. See *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995) (holding that the land owner had no avenue of relief other than a reapplication when he failed to file a petition for writ of certiorari to challenge a land use decision that was eventually ruled to be quasi-judicial five years after the decision was made).

144. For a discussion of quality of life as a consideration in zoning decisions see Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994).

of a series of settlement conferences and hearings, and which ultimately results in a final order issued by the Adjudicatory Commission that may be appealed to the district court.<sup>145</sup> While a property owner who seeks to force a local government into making a land use change needs only to file a petition for writ of certiorari directly in the circuit court,<sup>146</sup> a third-party intervenor must first overcome a very deferential review of the local government decision in order to prevail.<sup>147</sup> Not only are these de novo hearings expensive and time consuming, they also provide the landowner a second opportunity to strengthen the record for court review by introducing new evidence into the record. Obviously, the procedure applicable to the landowner is preferential because it is shorter, less expensive and provides no opportunity for the parties to supplement the record. The landowner also has the advantage since the court will apply a high level of scrutiny to the government's decision to deny the land use request.<sup>148</sup> This system clearly tips the scales of justice in favor of the property owner seeking the change, even though a third party challenging the decision may have equal or more significant property rights at stake.

Additionally, by shifting land use amendments into the realm of quasi-judicial acts, the *Snyder* decision has thrown a procedural roadblock in front of the Growth Management Act's two primary goals—intergovernmental coordination and public participation.<sup>149</sup> Since elected officials have traditionally met personally with their constituents to discuss issues that concern them, the shift from legislative to quasi-judicial procedural requirements immediately created a

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145. FLA. STAT. §§ 163.3184(9)-163.3184(11), 120.57 (1995) (establishing that hearings result in final orders); FLA. STAT. § 120.68(2) (1995) (establishing that final actions of agencies may be appealed to district courts of appeal).

146. FLA. CONST. art. V, § 5(b).

147. FLA. STAT. §§ 163.3184(9)-163.3184(10) (1995).

148. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993). "This term as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases." *Id.* "[T]he proposed change cannot be *inconsistent* [with the comprehensive plan], and will be subject to the 'strict scrutiny' of *Machado* to insure this does not happen." *Id.* at 475-76 (emphasis in original) (citation omitted). The *Machado* Court explained strict scrutiny as follows:

"Strict implies rigid exactness . . . [and that the] 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 order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review."

*Machado v. Musgrave*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987) (citations omitted).

149. See FLA. STAT. §§ 163.3184(2), 163.3184(4)-163.3184(6) (1995) (requiring coordination and intergovernmental review); FLA. STAT. § 163.3181 (1995) (stating that it is the "intent of the Legislature that the public participate in the comprehensive planning process"). This process requires public hearings. FLA. STAT. § 163.3181 (1995).

conflict with the prohibition against *ex parte* communications. In *Jennings v. Dade County*,<sup>150</sup> the Third District Court of Appeal ruled that *ex parte* communications with elected officials can invalidate a quasi-judicial land use decision.<sup>151</sup> When combined with *Jennings*, *Snyder* drove a wedge of misunderstanding and distrust between the people and their local governments by making it a violation for citizens to talk about hotly-contested land use issues with their elected representatives. Political frustration grew so quickly that the Florida Legislature responded with legislation that mitigated the effect of *Jennings*, by giving the voters access to their elected representatives.<sup>152</sup>

*Jennings*, however, exposed only the tip of the procedural iceberg when it deemed land use decisions quasi-judicial. Although land use decisions are made at public hearings, which are different from trials, circuit courts will review many land use decisions as quasi-judicial acts. Other than *Snyder's* holding that local governments need not make formal findings of fact when rendering their decisions,<sup>153</sup> the Florida Supreme Court has offered no guidance to the lower courts as to the procedural requirements to be applied at quasi-judicial public hearings.<sup>154</sup> Whether concerned members of the public must have standing to speak, must be sworn in or must be subjected to cross examination, and whether conventional rules of evidence apply remain unanswered questions.<sup>155</sup> If the full procedural requirements of quasi-judicial hearings are imposed, public participation in land use hearings could become so onerous as to eviscerate specific legislative goals for public participation and intergovernmental coordination.<sup>156</sup> The not-for-profit organization, 1000 Friends of Florida,<sup>157</sup> which was created to promote effective comprehensive planning, has formulated a Model Ordinance for local governments to adopt in order to balance fair procedural requirements with the need to ensure public access to the process.<sup>158</sup> Richard Grosso, Legal Director for 1000 Friends of

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150. 589 So. 2d 1337 (Fla. 3d DCA 1991), *cert. denied*, 598 So. 2d 75 (Fla. 1992).

151. *Id.* at 1341.

152. Ch. 95-352 Fla Laws, 1995 (codified at FLA. STAT. § 286.0115 (1995)).

153. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

154. *See id.*

155. Grosso Interview, *supra* note 142.

156. *Id.* *See* Metropolitan Dade County v. Blumenthal, Nos. 94-137, 94-52, 1995 WL 366684 (Fla. 3d DCA June 21, 1995) (*per curiam*) (holding that certain kinds of public comment by lay persons do not constitute substantial, competent evidence for purposes of review).

157. This organization is modeled after 1000 Friends of Oregon, "a public advocacy group instrumental in shaping the implementation of [Oregon's growth management law] and in forging a coalition of support from environmental, development, and housing advocates." Wickersham, *supra* note 10, at 523.

158. Grosso Interview, *supra* note 142.

Florida, notes that even less onerous procedures intimidate citizens, take longer and cost more, effectively causing the land use decision-making process to come to a halt.<sup>159</sup>

*C. It Is All in How You Look at It: Applying Strict Scrutiny*

Despite the burden of dealing with new procedural problems, Florida's growth management process would still be able to function much as it was designed to function. However, the *Snyder* holding goes further by requiring strict scrutiny for quasi-judicial decisions and reallocating the burden of proof used by lower courts when evaluating individual cases.<sup>160</sup> These changes play a significant role in determining who ultimately gets to make land use decisions because local governments must show a legitimate public purpose which justifies maintaining the existing use.<sup>161</sup> At the heart of the *Snyder* ruling is the concept that "a property owner's right to own and use his property is constitutionally protected."<sup>162</sup> Another concept on which the court based its holding is "the necessity of strict compliance with the comprehensive plan."<sup>163</sup> These two concepts combine to make the review of land use decisions subject to strict scrutiny.<sup>164</sup> The strict scrutiny standard is much harder to meet than the previously employed, fairly debatable standard of review.

Previously, a local government decision also enjoyed a presumption of correctness.<sup>165</sup> In *Rural New Town, Inc. v. Palm Beach County*,<sup>166</sup> the property owner brought a cause of action seeking to estop enforcement of a zoning decision. The court held that "the burden is *not* upon the governing authority to [prove] or establish by competent substantial evidence that the zoning regulation or classification is reasonable or is in furtherance of its police powers."<sup>167</sup> The party challenging the decision has the burden of overcoming that presumption by establishing a "prima facie case that the ordinance is arbitrary, unreasonable and confiscatory and, thus, unconstitutional."<sup>168</sup> Since *Euclid*, this has been a very heavy, almost

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159. *Id.*

160. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 471 (Fla. 1993).

161. *Id.* at 476.

162. *Id.*

163. *Id.* at 475.

164. *Id.*

165. Lambros, Inc. v. Town of Ocean Ridge, 392 So. 2d 993, 994 (Fla. 4th DCA 1981).

166. 315 So. 2d 478 (Fla. 4th DCA 1975).

167. *Id.* at 480 (emphasis in original).

168. Lambros, 392 So. 2d. at 994.

insurmountable burden.<sup>169</sup> The *Snyder* court substituted a much easier burden by requiring proof that the proposed land use is “consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance.”<sup>170</sup>

On its face, it might appear that the burden to prove that a request for a plan amendment is consistent with the comprehensive plan is difficult to establish; however, in practice it is not. The comprehensive plans adopted by local governments anticipated and welcomed requests for future land use amendments. Most plans include a process, with specific criteria, for making and evaluating land use amendments.<sup>171</sup> An amendment that complies with that process complies with the plan<sup>172</sup> and will be consistent with the plan so long as it does not directly conflict with any of the plan’s elements such as traffic, drainage, or recreation.<sup>173</sup> Amendments affecting small parcels of land, such as those in *Snyder* and *Puma*, may have negligible individual impacts on other plan elements. The impacts caused by changing the land use on larger parcels can be addressed by submitting textual plan amendments to the other plan elements.<sup>174</sup> If a property owner proposes a combination of facility improvements and simultaneous text amendments that adjust the various elements of the plan to address the impacts of his proposed land use change, the

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169. See, e.g., Freitag, *supra* note 137, at 748.

170. Board of County Comm’rs of Brevard County v. Snyder, 627 So. 2d 469, 476 (Fla. 1993).

171. See, e.g., MARTIN COUNTY COMPREHENSIVE GROWTH MANAGEMENT PLAN §§ I-9 (1990). Staff can recommend approval of a plan amendment if one of the following criteria are met: (1) changes in land use designations in the general area make the change logical and consistent, and there is availability of public services; (2) growth in the area has made the request reasonable and consistent with area land use characteristics; (3) the change would correct an inappropriate designation; or (4) the change would meet a public service need which enhances the health, safety or general welfare. *Id.*

172. Grosso Interview, *supra* note 142; Dreyer Interview, *supra* note 49. Both Grosso and Dreyer emphasize that these criteria were included in the plans to ward off inappropriate requests. *Id.* Under strict scrutiny, however, the criteria are being used as the key for arguing that a change must be approved if it is consistent with this language. Grosso and Dreyer argue that the criteria are only a threshold question to see if an amendment should even be considered. *Id.*

173. Hiss v. Sarasota County, 602 So. 2d 535 (Fla. 1st DCA 1992).

174. This is easier than it sounds. If a plan sets a certain level of service for a road, that level of service can be met even if the proposed amendment doubles the traffic by doubling the number of lanes on the road. Similarly, previously unexpected water users can be supplied by new treatment plants, maintaining the approved level of service. This is especially easy for large projects with the cash flow to front the money for improvements. For example, the *Martin County Comprehensive Growth Management Plan* § 7(4) (1990), establishes the level of service for community parks at “2 developed acres per 1,000 population.” See also *Environmental Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1215 (Fla. 1st DCA 1991) (holding that data supporting a plan amendment need not even be accurate, if it is the best available data).

plan will remain internally consistent and in compliance with the Growth Management Act.<sup>175</sup> Thus, a well framed amendment is consistent with the plan if the amendment does not require adoption of a new policy or change to an existing policy,<sup>176</sup> and if it is not so extreme that it violates a basic concept of the plan. Most amendments, therefore, will be consistent, and the burden of proof will then shift to the local government.

The government's burden under *Snyder* is "to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose . . . [and that] the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable."<sup>177</sup> The court slightly mitigated the harshness of the burden by explaining that a local government still has the discretion to deny a requested zoning change so long as it approves "some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence."<sup>178</sup> However, this only grants a local government limited discretion in evaluating requests for zoning changes. The *Snyder* decision does not address the thornier problem of what degree of discretion a local government has in making decisions on proposed amendments to the plan itself. Nor does it address what standard the courts should use when reviewing those decisions on proposed plan amendments.

On certiorari review, the key question the circuit court will ask is whether there was substantial, competent evidence presented at the hearing to establish that the decision to deny a land use amendment in a comprehensive plan accomplished a legitimate public purpose and was not arbitrary, discriminatory or unreasonable. Since a multitude of land use scenarios for a particular piece of property may be consistent with its plan,<sup>179</sup> a local government will be hard pressed to prove that the denial of one consistent use was not arbitrary, discriminatory or unreasonable, while a different consistent use which

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175. FLA. STAT. § 163.3177(10)(a) (1995) (stating that a local plan is consistent if it "is compatible with" and "furthers" state and regional plans). See *Hiss*, 602 So. 2d at 535 (finding plan consistent, even though statutory requirements not met, where as a whole it is calculated to meet requirements).

176. *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609, 612 (Fla. 4th DCA 1994), cert. denied, 654 So. 2d 920 (Fla. 1995).

177. *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993).

178. *Id.* at 475.

179. *Respondent's Showing of Cause at 9, Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677), cert. denied, 651 So. 2d 1195 (Fla. 1995). Ten land use scenarios for the subject property were considered by the County Commission. *Id.* All were consistent with the plan. *Id.*

serves a legitimate public purpose is approved. The fact that the concerns of the neighbors and the political will of the community do not constitute substantial, competent evidence<sup>180</sup> makes the government's legal position even harder to defend. Without the deference afforded to legislative actions, the circuit courts are unlikely to find that the government's decision was supported by substantial, competent evidence, and therefore is not arbitrary, discriminatory or unreasonable.<sup>181</sup>

Whether there was substantial, competent evidence to support the government's decision will be decided on a case-by-case basis by the circuit courts, and a circuit court's decision on this point is not subject to review on appeal.<sup>182</sup> Therefore, the combined effect of the *Snyder*, *Parker*, and *Puma* rulings is to undermine the Growth Management Act by stripping local government of most of its legislative land use decision making power and placing that power directly in the hands of the circuit courts.

#### IV. THE LOWER COURTS WRESTLE WITH THE *SNYDER* DOCTRINE

Due to the ambiguities left by the *Snyder* decision and the ad hoc nature with which the courts now apply the quasi-legislative/quasi-judicial standard, courts have been able to restrict even further the authority of local governments to make land use decisions. Several cases involving Martin County's planning and zoning decisions illustrate this point.

##### A. *FIT to be Tied*: Florida Institute of Technology v. Martin County<sup>183</sup>

The impact of the supreme court's decisions in *Snyder*, *Parker*, and *Puma* on local government's ability to implement the Growth

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180. See *Metropolitan Dade County v. Blumenthal*, Nos. 94-137, 94-52, 1995 WL 366684 (Fla. 3d DCA June 21, 1995) (per curiam) The opinions, hopes, dreams and promises of local residents, although socially and politically perhaps the most important evidence, are not relevant or competent evidence to the courts. *Id.* at \*2. The courts require experts and facts. *Id.*

181. See Freitag, *supra* note 137, at 743-47 (discussing the *Lochner* era and the relevance of deferential review). Deference given to the decisions of an elected body is an acknowledgment that the courts should not substitute their policy judgments for that of legislative officials. *Id.*

182. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). "[A] final judgment of a circuit court acting in its review capacity is not appealable as a matter of right to a district court if it has already been directly 'appealed' to a circuit court . . . [T]he district court . . . [only] determine[s] that the procedural due process was afforded and essential requirements of law were observed." *Id.* (citing FLA. R. APP. P. 9.030(b)(2)(B)). *Snyder* requires that district courts review circuit court decisions according to *Vaillant*. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993). See also *Education Dev. Ctr. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989) (holding certiorari review of zoning cases to the two discrete components of review in *Vaillant*).

183. 641 So. 2d 898 (Fla. 4th DCA 1994), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

Management Act was felt immediately by the local governments. Martin County, a small county on the edge of south Florida's urban expansion,<sup>184</sup> embraced comprehensive planning with the adoption of comprehensive plans in 1982 and 1990.<sup>185</sup> Florida Institute of Technology (FIT), through foreclosure, regained title to an eighty-one-acre parcel of land which had the appropriate land use and zoning designations for an ambitious Planned Unit Development (PUD). When FIT approached the county staff to clarify the project's status, FIT and the staff agreed that both FIT and the county might benefit if they joined forces to reassess the land use and zoning of the parcel.<sup>186</sup> Without making any promises as to what the result would be, Martin County initiated a land use amendment for the property, and FIT paid some of the costs of seeking the amendment.<sup>187</sup> The existing land use for the property allowed forty-eight acres of low density residential, seven acres of commercial office residential, and twenty-six acres of waterfront commercial.<sup>188</sup> At the first public hearing, FIT and the county staff supported two different plans for the property, both of which were consistent with the comprehensive plan and were less intense than the existing land use designation.<sup>189</sup> Because the existing land use had been approved to accommodate a PUD that guaranteed continued public access to the Indian River, public comment at the hearing was intense.<sup>190</sup> The County Commission proposed to adopt an even less intense use, which did not include any waterfront commercial property at all.<sup>191</sup> FIT did not agree to the change, and the county did not adopt a plan amendment.<sup>192</sup> FIT filed a verified complaint to challenge the county's decision pursuant to the administrative procedure in the Growth Management Act, but did not pursue that action when the county agreed to consider additional plans for the property.<sup>193</sup> At a second public hearing, county staff

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184. ABSTRACT, *supra* note 32, at 39. Martin County, located north of Palm Beach County on Florida's east coast, had 64,000 residents in 1980. *Id.* By 1990, it had grown to 100,900 residents. *Id.*

185. Marc Freeman, *Martin County Defends 'Absurd' Growth Plan*, PALM BEACH POST, June 1, 1994, at 1B.

186. Initial Brief of Appellant at 11-12, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

187. *Id.* at 12.

188. *Id.* at 7.

189. *Id.*

190. See Martin County Commission Minutes, (September 15, 1992) (available at Commission Records, Martin County Administration Building, Stuart, Florida).

191. *Id.*

192. *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898, 899 (Fla. 4th DCA 1994), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

193. *Id.* at 898.

presented nine potential land use scenarios for the property.<sup>194</sup> All were consistent with the comprehensive plan.<sup>195</sup> Once again there was extensive public input. During this hearing, the County Commission proposed a tenth land use scenario which the staff stated would also be consistent with the comprehensive plan.<sup>196</sup> The commission and FIT could not reach an agreement, and once again, the county did not adopt any land use amendment.<sup>197</sup> At the end of the hearing, the property was still approved for a valid PUD and still enjoyed a land use designation more intense than any of the scenarios proposed by the county staff, the county commission, or FIT.<sup>198</sup>

The FIT attorneys were aware that the supreme court had accepted *Parker* for review, so they filed a petition for writ of certiorari in the circuit court in addition to a verified complaint per the Growth Management Act.<sup>199</sup> The circuit court dismissed the writ after ruling that the commission's action was legislative, and therefore certiorari review was not the proper vehicle for an appeal.<sup>200</sup> FIT appealed the decision to the Fourth District Court of Appeal, arguing that the county's action was quasi-judicial, because the proposal included a zoning change which would have been made if the land use amendment had been adopted.<sup>201</sup> Martin County argued that the only decision made at the hearing was a decision not to adopt a comprehensive plan amendment and that comprehensive plan amendments, because they are legislative acts, are not subject to certiorari review.<sup>202</sup>

While the case was under consideration at the Fourth District, the supreme court issued its *Snyder* and *Parker* rulings. Subsequently, the district court rejected Martin County's arguments.<sup>203</sup> Quoting *Snyder's* holding that "[i]t is the character of the hearing that determines whether or not board action is legislative or quasi-judicial,"<sup>204</sup> the district court ruled that:

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194. *Id.*

195. Respondent's Showing of Cause at 9, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

196. *Florida Inst. of Technology*, 641 So. 2d at 898-99.

197. *Id.* at 899.

198. Initial Brief of Appellant at 7, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

199. *Florida Inst. of Technology*, 641 So. 2d at 899.

200. *Id.*

201. Initial Brief of Appellant at 21, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677), *rev. denied*, 651 So. 2d 1195 (Fla. 1995).

202. *Id.* at 16.

203. *Florida Inst. of Technology*, 641 So. 2d at 899-900.

204. *Id.* at 899.

[the Martin County] board hearings essentially addressed the change in land use designation for a particular piece of property. There was discussion as to whether the suggested change was consistent with the policies of the growth management plan . . . [which] leads to the conclusion that this board's action, in this instance, was quasi-judicial in nature.<sup>205</sup>

The district court directed the circuit court to reinstate the certiorari proceedings and apply the standard of review in *Snyder*.<sup>206</sup> Martin County's request for review by the supreme court was denied,<sup>207</sup> and rather than subject itself to *Snyder's* standard of review, the commission agreed to a settlement with FIT under which the land use would be changed through a land use amendment.<sup>208</sup> The agreement allowed FIT to present preferences and support any one of three scenarios considered at the second hearing in 1992.

The Fourth District understood that the only decision made by Martin County at the hearings was to not grant a comprehensive plan amendment.<sup>209</sup> Therefore, this ruling established that *Snyder* is not limited only to zoning cases. Under *Snyder's* functional analysis, some local government decisions on land use amendments will also be ruled quasi-judicial actions. The court did not address the question of whether any decision on a land use amendment could be deemed a legislative act after *Snyder*.

#### *B. Field of Nightmares: Section 28 Partnership, Ltd. v. Martin County*<sup>210</sup>

The answer came quickly from the Fourth District Court of Appeal as to whether any decision on a land use amendment could be deemed a legislative act after *Snyder*. Section 28 Partnership, Ltd. (the Partnership) sought to amend Martin County's comprehensive plan so that 628 acres of land used for agricultural purposes could be developed as a commercial and residential PUD.<sup>211</sup> The property is located in southern Martin County, bordering Palm Beach County,<sup>212</sup> and is situated at the headwaters of the Loxahatchee River, which has been designated as a Wild and Scenic River by the National Park

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205. *Id.* at 900.

206. *Id.*

207. *Martin County v. Florida Inst. of Technology, Inc.*, 651 So. 2d 1195 (Fla. 1995).

208. *See* Joint Motion to Stay Proceedings, *Florida Inst. of Technology, Inc. v. Martin Co.* 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677); *Florida Inst. of Technology, Inc. v. Martin County*, Case No. 92-494-CA (Fla. 19th Cir. Ct., Apr. 21, 1995).

209. *Florida Inst. of Technology*, 641 So. 2d at 898-99.

210. 642 So. 2d 609 (Fla. 4th DCA 1994), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

211. *Id.* at 612.

212. *Id.*

Service. Jonathan Dickenson State Park borders the property on two sides.<sup>213</sup> The requested land use amendment would have increased the intensity of development on the property from a maximum of 200 homes to 810 housing units, “a golf course, a clubhouse, and 50,000 square feet of retail and office use.”<sup>214</sup> As was the case in *FIT*, this was a controversial request. Again, local residents were quite vocal about the impact of the project’s traffic on the roads in the area and in their neighborhoods.<sup>215</sup> Residents of both counties were concerned about protecting the park and the river.<sup>216</sup>

Martin County previously denied an earlier amendment request for a less intensive development on this property;<sup>217</sup> but the Partnership redesigned the project and applied again.<sup>218</sup> The new request addressed the technical issues brought up at the earlier hearing<sup>219</sup> and asked that the county adopt a new plan policy creating an “Adjacent County Urban Service Area” so that the project could be serviced by utilities from Palm Beach County.<sup>220</sup> At the hearing, the Partnership presented extensive testimony by development experts that the amendment would result in greater compliance with the policies of the comprehensive plan than the current land use designation.<sup>221</sup> On the other hand, nearby local governments and local residents asked the county not to approve the amendment, and the county staff recommended denial.<sup>222</sup> After listening to all of the arguments, the commission denied the amendment.<sup>223</sup> The Partnership filed a verified complaint with the county;<sup>224</sup> a constitutional claim in the circuit court,<sup>225</sup> and a petition for certiorari review in circuit court.<sup>226</sup> The Honorable John E. Fennelly, the circuit court

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213. *Id.* at 610.

214. *Id.* at 612.

215. See Martin County Commission Minutes, (May 5, 1992) (available at Commission Records, Martin County Administration Building, Stuart, Florida).

216. *Id.*

217. Freeman, *supra* note 185, at 1B.

218. *Id.*

219. Dreyer Interview, *supra* note 49. At the second public hearing, the Partnership attempted to thoroughly address the technical issues raised by the proposed project. *Id.*

220. Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609, 612 (Fla. 4th DCA 1994), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

221. Martin County Commission Minutes, (May 5, 1992) (available at Commission Records, Martin County Administration Building, Stuart, Florida). One of the major thrusts of the Partnership’s presentation was that the proposed project would improve rather than harm the environment. *Id.*

222. *Id.*

223. Section 28, 642 So. 2d at 609.

224. Initial Brief of Appellee at 33, Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

225. *Id.*

226. *Id.*

judge,<sup>227</sup> who had previously ruled that the county's land use decision in the *FIT* case had been a legislative act, similarly ruled in *Section 28* that the county had acted legislatively; both decisions also denied review by writ of certiorari.<sup>228</sup> The Partnership appealed to the Fourth District Court of Appeal just as *FIT* had previously done.<sup>229</sup> *Section 28* was assigned to a different panel of judges than *FIT*,<sup>230</sup> but both panels were in the district court at the time *Snyder*, *Parker* and *Puma* were decided. The significance of this case to Florida's growth-management program was stressed to the court in an amicus brief filed by the DCA,<sup>231</sup> the state agency charged with implementing the Growth Management Act.<sup>232</sup> Both the DCA and Martin County argued that decisions on comprehensive plan amendments are legislative acts.<sup>233</sup> The Partnership initially argued, as had *FIT*, that the request included both a zoning and a comprehensive plan amendment, and that the zoning aspect of the request made the decision a quasi-judicial act.<sup>234</sup> Martin County responded that the plan amendments were threshold issues without which the zoning was a moot point, and the action was, therefore, purely a planning decision.<sup>235</sup> To this, the Partnership, using the logic of *Snyder*, replied that because the plan set standards for land use amendments, such amendments should be considered an application of general policy to specific property.<sup>236</sup> Therefore, the district court had all of the relevant arguments before it when it ruled in *Section 28*.

The district court could have distinguished *Section 28* from *FIT* based on the fact that the property involved in *Section 28* was much

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227. *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994); *Section 28*, 642 So. 2d at 609. As one of the first circuit court judges to apply the *Snyder* ruling, Judge Fennelly analyzed the impact of the decisions in: Hon. John E. Fennelly, *Examining the Current State of Post-Comprehensive Plan Land-Use Decision Making in Florida: A Property Owner's Guide to the Local Government Comprehensive Planning and Land Development Regulation Act*, 7 ST. THOMAS L. REV. 1 (1994) (analyzing the impact of post-*Snyder* decisions).

228. *Section 28*, 642 So. 2d at 609; *Florida Inst. of Technology*, 641 So. 2d at 898.

229. *Section 28*, 642 So. 2d at 609.

230. *Florida Inst. of Technology*, 641 So. 2d at 900; *Section 28*, 642 So. 2d at 613.

231. Brief of Amicus Curiae, Department of Community Affairs, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied* 654 So. 2d 920 (Fla. 1995).

232. FLA. STAT. § 163.3204 (1995).

233. Brief of Amicus Curiae, Department of Community Affairs, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied*, 654 So. 2d 920 (Fla. 1995); Reply Brief of Appellee at 25-26, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

234. Initial Brief of Appellant at 2, 4, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

235. Reply Brief for Appellee at 2, *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609 (Fla. 4th DCA 1994) (No. 93-0747), *cert. denied*, 654 So. 2d 920 (Fla. 1995).

236. *Id.* at 8.

larger or that the requested increase in land use intensity was much greater. The district court could have supported drawing a distinction on these lines by analogizing the distinction drawn in *Snyder* between “comprehensive rezonings affecting a large portion of the public,” which the *Snyder* court found to be legislative in nature,<sup>237</sup> and those which “have an impact on a limited number of persons or property owners,” which the *Snyder* Court found to be quasi-judicial.<sup>238</sup> Instead, the Fourth District made it clear that the size of the property and the increase in intensity of use are not necessarily determinative.<sup>239</sup> Nor did the court find determinative the fact that the request was owner initiated and site specific.<sup>240</sup> Rather, two of the three district court judges focused on *Snyder*’s first and most broad holding<sup>241</sup> 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.”<sup>242</sup> Therefore, the court held that the county’s decision not to create a new policy for urban service areas was a legislative or policy making decision.<sup>243</sup> The third judge, while concurring with the result, argued that land use amendments are legislative in nature.<sup>244</sup> Additionally, the *Section 28* court held that “the pristine nature of the land in the park and around the river, the size of the park, and the use of it by the public” also made decisions on the changes sought for the *Section 28* property a matter of policy.<sup>245</sup> The Fourth District denied certiorari review.<sup>246</sup> The Florida Supreme Court refused to review this decision, as it had refused to review *FIT*.<sup>247</sup>

*FIT* and *Section 28* define the post-*Snyder* landscape as one in which local government decisions concerning comprehensive plan amendments will be considered quasi-judicial acts unless they neces-

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

238. *Id.* (quoting lower court opinion in *Snyder*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991)).

239. Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609, 612 (Fla. 4th DCA 1994).

240. *Id.*

241. *Id.*

242. *Snyder*, 627 So. 2d at 474 (emphasis in original).

243. *Section 28*, 642 So. 2d at 612.

244. *Id.* at 613 (Stone, J., concurring specially). This split among the judges was reminiscent of the opinion in *Battaglia Properties, Ltd. v. Florida Land and Water Adjudicatory Commission*, in which only the judge who wrote the opinion considered general comprehensive zoning and planning ordinances, maps and amendments to be legislative in nature, while both the concurring judge and the dissenting judge agreed that in the particular case, involving one parcel of land under one ownership, the decision was quasi-judicial.

245. *Section 28*, 642 So. 2d at 612.

246. *Id.*

247. Section 28 Partnership, Ltd. v. Martin County, 654 So. 2d 920 (Fla. 1995); Martin County v. Florida Inst. of Technology, Inc., 651 So. 2d 1195, 1195 (Fla. 1995).

sitate the adoption or alteration of a plan policy or affect environmentally sensitive lands of great public interest. Whether there is a property size or relative increase in land use intensity that will cross the threshold into legislative policy formation is not settled.

*C. Through a Looking Glass: Section 28 II*

The curious tale of *Section 28*, however, did not end with the district court's ruling. In *Section 28 Partnership, Ltd. v. Martin County (Section 28 II)*,<sup>248</sup> the Partnership originally sought \$38.9 million in damages<sup>249</sup> for substantive due process violations, equal protection violations and takings clause violations.<sup>250</sup> The Partnership also sought declaratory and injunctive relief.<sup>251</sup> In a de novo trial, the circuit court "heard over 13 days of testimony from more than 30 witnesses, [and] received over 200 items of evidence."<sup>252</sup> The circuit court issued its final judgment before the Fourth District made its ruling on appeal of the denial of the writ of certiorari.<sup>253</sup>

Referring to the Florida Supreme Court's holding in *Snyder*,<sup>254</sup> the circuit court's first conclusion of law directly contradicted the previous ruling of the Nineteenth Judicial Circuit and the eventual Fourth District ruling. The circuit court concluded, as a matter of law, that Martin County's decision "involved the application of adopted policy to the Partnership's individual interests and basic property rights."<sup>255</sup> The county's action was quasi-judicial and thus it was not the proper action to seek injunctive relief<sup>256</sup> because injunctive relief is only available to challenge legislative actions.<sup>257</sup>

The circuit court then applied a very non-deferential level of review to the Partnership's constitutional claims. Despite the voluminous testimony to the contrary, the circuit court also concluded that the county's refusal to grant the site-specific applications was "arbitrary and capricious and [did] not bear a substantial relationship

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248. No. 92-569-CA (Fla. Cir. Ct. 1994).

249. Freeman, *supra* note 185, at 1B.

250. Final Judgment at 4-5, *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994).

251. *Id.*

252. *Id.* at 1.

253. *Id.* at 7 (indicating that the Final Judgment on the constitutional issues was issued on July 14, 1994). The Fourth District issued its opinion on September 9, 1994. *Section 28*, 642 So. 2d at 609.

254. 627 So. 2d 469 (Fla. 1993).

255. Final Judgment at 5, *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994).

256. *Snyder*, 627 So. 2d at 469.

257. See *Naples Airport Auth. v. Collier Dev. Corp.*, 513 So. 2d 247 (Fla. 2d DCA 1987); *Zukowski v. Casselberry*, 244 So. 2d 179 (Fla. 4th DCA 1971); *Sunset Islands 3 & 4 Assoc. v. City of Miami*, 214 So. 2d 45 (Fla. 3d DCA 1968).

to the public health, safety and welfare."<sup>258</sup> Finally, the court concluded that a buffer requirement, which had been discussed as part of the PUD, constituted a taking,<sup>259</sup> even though the county never approved the PUD.<sup>260</sup>

The circuit court awarded the Partnership \$100,000 for the substantive due process claim and \$100,000 for the takings claim.<sup>261</sup> The court also enjoined Martin County from enforcing any restriction on the Partnership's property which was more restrictive than one unit per acre.<sup>262</sup> The court further ordered Martin County to approve the Partnership's application for the PUD as submitted to the commission on May 5, 1992, as if the commission had amended the comprehensive plan.<sup>263</sup> Then the court ordered the commission to amend its comprehensive plan to accommodate these changes.<sup>264</sup> Martin County appealed the circuit court decision to the Fourth District Court of Appeal.

In February, 1996, the Fourth District issued its decision reversing the takings damages granted by the lower court, quashing the injunction, and remanding the case to be heard as a legislative land use decision.<sup>265</sup> If the Fourth District had not ruled that the circuit court applied the wrong standard of review, it was possible that portions of the *Section 28 II* ruling would have stood because rulings on due process and equal protection claims are upheld if no mistake of law is found. District courts will not reweigh the evidence or overturn the circuit court's conclusions of fact unless they are clearly erroneous.<sup>266</sup> However, the Fourth District ruled that the county's decision was a legislative action and thus subject to the fairly debatable standard.<sup>267</sup> The circuit court's references to *Snyder* notwithstanding, the original cause of action followed the appropriate

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258. Final Judgment at 5, *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994).

259. *Id.*

260. *Section 28 II*, 642 So. 2d at 609. Because the land use amendment was not approved, the PUD could not be approved; PUD is a zoning category, and zoning must be consistent with the land use designation. *Snyder*, 627 So. 2d at 473 (citing FLA. STAT. §§ 163.3194(1)(a), 163.3202, 163.3194(3) (1991)).

261. Final Judgment at 7, *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994).

262. *Id.*

263. *Id.*

264. *Id.* at 6-7.

265. *Martin County v. Section 28 Partnership, Ltd.*, 1996 WL 81781 (Fla. 4th DCA 1996).

266. *Oceanic Int'l Corp. v. Lantana Boatyard*, 402 So. 2d 507, 511 (Fla. 4th DCA 1981); *Department of Trans. v. Morehouse*, 350 So. 2d 529 (Fla. 3d DCA 1977); *Courshan v. Fontainebleau Hotel Corp.*, 307 So. 2d 901 (Fla. 3d DCA 1975).

267. *Section 28 II*, 1996 WL 81781 at \*1.

procedure to press claims challenging legislative actions.<sup>268</sup> The circuit court has previously exercised its authority to enjoin local government from imposing any land use restriction less than a certain intensity on a specific parcel of property, however, the Fourth District quashed the injunction. The court concluded by noting that not all requests to amend comprehensive plans will necessarily be considered legislative.<sup>269</sup>

*D. Between a Rock and a Hard Place: Martin County v. Yusem*<sup>270</sup>

Within two years after Martin County adopted a comprehensive plan, three judges from the Nineteenth Judicial Circuit individually presided over four cases challenging Martin County's plan amendment decisions. In *FIT* and *Section 28*, the court ruled that plan amendments were legislative acts and denied writs of certiorari.<sup>271</sup> In *Section 28 II*, the court ruled that the county's land use decision was quasi-judicial, and consequently, applied strict scrutiny.<sup>272</sup> In *Martin County v. Yusem*, the court raised the question, but did not answer it.<sup>273</sup>

Yusem took an unusual and convoluted path through the growth management system. In 1989, while Martin County was in the process of adopting its comprehensive plan, Melvyn Yusem applied for a land use amendment to increase the residential density on his fifty-four-acre property to two units per acre.<sup>274</sup> Martin County adopted its comprehensive plan in February, 1990,<sup>275</sup> and approved Yusem's amendment in May, 1990.<sup>276</sup> The county sent the amendment to the DCA for review according to the requirements of the Growth Management Act, and the agency did not approve the land use change.<sup>277</sup> Because of the deferential standard of review traditionally applied by the courts to land use decisions,<sup>278</sup> few landowners had

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268. See *Naples Airport Auth. v. Collier Dev. Corp.*, 513 So. 2d 247 (Fla. 2d DCA 1987); *Zukowski v. Casselberry*, 244 So. 2d 179 (Fla. 4th DCA 1971); *Sunset Islands 3 & 4 Assoc. v. City of Miami*, 214 So. 2d 45 (Fla. 3d DCA 1968).

269. *Section 28 II*, 1996 WL 81781 at \*5. See also *City of Sanibel v. Goode*, 372 So. 2d 181 (Fla. 2d DCA 1979); *Dade County v. Beauchamp*, 348 So. 2d 53 (Fla. 3d DCA 1977).

270. *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995).

271. *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898, 900 (Fla. 4th DCA 1994) (holding that the action was legislative); *Section 28*, 642 So. 2d at 609 (holding that the action was legislative).

272. Final Judgement at 5, *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994).

273. 664 So. 2d 976 (Fla. 4th DCA 1995).

274. *Id.* at 976.

275. MARTIN COUNTY GROWTH MANAGEMENT PLAN, *supra* note 100.

276. *Yusem*, 664 So. 2d at 976.

277. *Id.*

278. *Board of County Comm'rs v. Snyder*, 627 So. 2d 469, 471 (Fla. 1993).

ever challenged Martin County's decision to deny a land use amendment. However, the DCA was a guaranteed adversary and gave Martin County two options: deny the amendment or revise the data and analysis for the plan to justify the designation.<sup>279</sup> The county staff had not recommended approval of the amendment,<sup>280</sup> therefore, the county commission chose to withdraw their approval of the amendment,<sup>281</sup> rather than challenge the DCA and risk the eventual imposition of financial sanctions.<sup>282</sup> At the time, Martin County must have thought that this decision was the most risk efficient.

However, the landowner immediately filed suit against the county for declaratory relief, based on a violation of due process rights, denial of equal protection and inconsistency with the comprehensive plan.<sup>283</sup> The case was assigned to a Nineteenth Circuit Court judge who had not participated in any of the other Martin County land use cases.<sup>284</sup> Again, Martin County argued that a decision not to amend the comprehensive plan is a legislative decision subject to deferential review.<sup>285</sup> The property owner argued for strict scrutiny supported by substantial, competent evidence, as defined in *Snyder*.<sup>286</sup> After a trial de novo, the circuit court applied strict scrutiny based on the lower court's decision in *Snyder*,<sup>287</sup> which just weeks later was partially overruled by the supreme court.<sup>288</sup> The *Yusem* court acknowledged that *Snyder* was a rezoning case, which did not deal with a comprehensive plan amendment, but concluded that the same rationale applied in both cases.<sup>289</sup> The court then found that there was "no substantial competent evidence to support the County's denial of the requested land use amendment"<sup>290</sup> and ruled that Martin County's decision not to adopt the *Yusem* amendment was arbitrary, unreasonable and inconsistent with the comprehensive plan.<sup>291</sup> As did the court in *Section 28 II*, the circuit court enjoined the county from "enforcing any land use restrictions or zoning designations on

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279. *Id.*

280. Final Judgment at 4, *Martin County v. Yusem*, No. 91-04-CA.

281. *Id.*

282. FLA. STAT. § 163.3184(11)(a) (1995).

283. Final Judgment at 1, *Martin County v. Yusem*, No. 91-04-CA.

284. *Id.* at 7 (the Honorable Robert Makemson was assigned).

285. *Id.* at 1.

286. *Id.*

287. *Id.* (applying the standard in *Snyder*, 595 So. 2d at 65).

288. The *Yusem* opinion was rendered on Sept. 23, 1993 and the *Snyder* opinion was rendered Oct. 9, 1993.

289. Final Judgment at 2, *Martin County v. Yusem*, No. 91-04-CA.

290. *Id.* at 6.

291. *Id.* at 7.

Plaintiff's land more restrictive than two units per acre.<sup>292</sup> Martin County appealed the ruling to the Fourth District Court of Appeal.<sup>293</sup>

On appeal, Martin County argued that the trial court erred in subjecting the county's land use decision to strict scrutiny rather than the fairly debatable standard applicable to legislative actions.<sup>294</sup> However, over a vigorous dissent,<sup>295</sup> the Fourth District found the action in *Yusem* to be quasi-judicial, distinguishing *Yusem* from *Section 28* and noting the consistency of its decision with *Puma*.<sup>296</sup> The *Yusem* court justified its holding by pointing out that the county's land use decision had a limited impact on the public, and the decision addressed a change in the land use designation of a particular piece of property.<sup>297</sup> As a result, the circuit court did not have jurisdiction over the case, due to the property owner's failure to pursue a writ of certiorari concurrently with his other claims.<sup>298</sup> The Fourth District's ruling did not address whether strict scrutiny was the appropriate standard of review by the circuit court.

Both parties were unhappy with the result. The property owner immediately filed a Motion for Rehearing and Request for a Certified Question.<sup>299</sup> He argued that because his original action directly challenged the constitutionality of the comprehensive plan as applied to his property, the action should not be excluded from review by the circuit court, even if the land use decision was quasi-judicial. The property owner requested that the following question be certified to the Florida Supreme Court:

Does a determination that a governmental action is quasi-judicial preclude a direct action challenging the constitutionality of an existing ordinance or regulation, as applied to one's property, as being arbitrary and unreasonable?<sup>300</sup>

Martin County has not asked for a rehearing. Instead, pointing out that *Puma* actually provides little guidance and that *FIT* and *Section 28* produced conflicting results, the county has asked the Fourth District to certify the following question to the Florida Supreme Court:

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292. *Id.*

293. *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995).

294. *Id.* at 976.

295. *Id.* at 978-82 (Pariente, J., dissenting).

296. *Id.* at 975.

297. *Id.*

298. *Id.* at 978.

299. Motion for Rehearing and Request for a Certified Question, *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995) (filed Sept. 14, 1995).

300. *Id.* at 5.

Whether the adoption of comprehensive plan amendments in accordance with the Growth Management Act is a legislative or quasi-judicial act.<sup>301</sup>

*Yusem*, the County argued, presents the issue in its purest form.<sup>302</sup> On November 22, 1995, the Fourth District reissued its August 30, 1995 opinion in *Yusem*, ordered a rehearing on the land owner's constitutional issue and certified the following question to the Florida Supreme Court:

Can a rezoning decision which has limited impact under *Snyder*, but which does require an amendment of the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?<sup>303</sup>

The Supreme Court of Florida has accepted jurisdiction and a large number of amicus briefs have been filed. The Supreme Court's ruling promises to have more meaning for the future of growth management in Florida than it will for the parties.

#### V. THE TREND IN THE UNITED STATES SUPREME COURT TOWARDS STRICTER SCRUTINY IN LAND USE CASES

The trend of the United States Supreme Court appears to be toward increasing the level of review that courts give land use decisions. The Florida Supreme Court, in *Snyder*, seems to have followed this trend. The decisions of lower courts also are in line with this march toward courts micro-managing local government land use decisions.

##### A. *The Apple Does Not Fall Very Far From the Tree*

*Section 28 II* and *Yusem* are bellwether cases for growth management in Florida. They demonstrate a not-so-subtle shift to stricter judicial scrutiny in all forms of property rights cases decided by the

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301. Motion for Certification at 1, *Martin County v. Yusem*, 664 So. 2d 976 (Fla. 4th DCA 1995) (filed Sept. 14, 1995).

302. *Id.* at 3. After the Fourth District's ruling that the land use decision in *FIT* was quasi-judicial, Martin County wanted to ask the court to certify this question. However, because the court's holding that the land use decision in *Section 28* was legislative was before the Florida Supreme Court for review at the same time as *FIT*, the county was caught on the horns of a dilemma. Dreyer Interview, *supra* note 49. Therefore, the county unsuccessfully requested the Fourth District to certify the question of whether *Snyder* applies to comprehensive plan land use amendments which are initiated by local governments. Motion for Rehearing and Certification at 8, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 93-0677).

303. *Martin County v. Yusem*, 664 So. 2d 976, 982 (Fla. 4th DCA 1995).

Supreme Courts of the United States and Florida.<sup>304</sup> The shift to stricter scrutiny is trickling down into rulings made by the lower courts in various combinations and permutations, but this shift is having a significant impact on land use.

Since the 1930s, the judicial scrutiny given to substantive due process claims, such as those in *Yusem* and *Section 28 II*, has been highly deferential review, requiring the court to find only that the regulation serves the identified public interest in some rational way.<sup>305</sup> Thus, if reasonable people could fairly debate an issue, then the regulation will be found a valid exercise of the police power.<sup>306</sup> Similarly, in equal protection cases, the courts have applied deferential review except in cases concerning suspect classifications or deprivation of a group's fundamental rights.<sup>307</sup> In recent years, however, higher judicial scrutiny has been more frequently applied in regulatory takings claims,<sup>308</sup> such as the one brought in *Section 28 II*.

A trend toward higher scrutiny surfaced in *Nollan v. California Coastal Commission*,<sup>309</sup> and has developed in *Lucas v. South Carolina Coastal Council*<sup>310</sup> and *Dolan v. City of Tigard*,<sup>311</sup> indicating that the current Supreme Court "will scrutinize more closely than previous Courts the legislative motives behind police power legislation that adversely affects private property interests."<sup>312</sup> To avoid being a taking, a "cause-and-effect relationship must exist between the property restricted by the regulation and the social evil that the regulation seeks to remedy."<sup>313</sup> The regulation must "substantially

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304. See Freitag, *supra* note 122. This shift has a political counterpart. In 1995, the Florida Legislature passed the Bert J. Harris, Jr., Private Property Rights Protection Act, which "provides remedies for real property owners whose property has been inordinately burdened by governmental action." Ch. 95-181 Fla. Laws, 1995 (codified at FLA. STAT. § 70.001 (1995)). See Ellen Avery, *The Terminology of Florida's New Property Rights Law: Will It Allow Equity to Prevail or Government to be "Taken" to the Cleaners?*, 11 J. LAND USE & ENVTL. L. 181 (1995), for a discussion on Florida's new Private Property Rights Act.

305. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 465 (1981) (cited by Freitag, *supra* note 137, at 744 n.6). This deferential approach was defined in *Nebbia v. New York*, 291 U.S. 502 (1934) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

306. Pelham, *supra* note 14, at 246.

307. See, e.g., *Beauchamp v. Murphy*, 37 F.3d 700, 707 (1st Cir. 1994) ("Since there is no suspect classification here involved, nor any deprivation of fundamental rights, the ordinary equal protection test is extremely deferential."), *cert. denied*, 115 S. Ct. 1365 (1995); see Freitag, *supra* note 137, at 763.

308. See Freitag, *supra* note 137, at 746.

309. 483 U.S. 825 (1987).

310. 105 U.S. 1003 (1992). See Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. LAND USE & ENVTL. L. 285 (1993).

311. 114 S. Ct. 2309 (1994).

312. Freitag, *supra* note 137, at 746.

313. *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988).

advance” a legitimate state interest.<sup>314</sup> In addition to raising the level of judicial review, this shifts the focus of the debate from whether the government can identify a protectable legitimate interest to (1) whether the regulation, as applied in each specific case, substantially advances that interest,<sup>315</sup> and (2) whether the impact on the specific property is in proportion to the property’s impact on the interest.<sup>316</sup> This is a question of fact, which must be answered on a case-by-case basis at the lowest court level.<sup>317</sup> The factual findings of the lower court receive a very deferential review on appeal and will not be overturned unless clearly erroneous.<sup>318</sup>

The Florida Supreme Court’s ruling in *Snyder*, as applied in *FIT*, *Section 28*, and *Yusem* will result in most land use amendment decisions being declared quasi-judicial, subject to a strict-scrutiny review.<sup>319</sup> The Florida Supreme Court’s ruling is consistent with the trend established by the United States Supreme Court. Although the *Snyder* Court gave authority to the local government to use discretion when making land use decisions,<sup>320</sup> its judicial foundation stands on the concept that “a property owner’s right to own and use his property is constitutionally protected, [and] review of any governmental action abridging that right is subject to close judicial scrutiny.”<sup>321</sup> In *Section 28*, the Fourth District Court interpreted *Snyder* as “recognizing that a landowner has a constitutional right to use property in a manner consistent with preexisting government plans, absent clear evidence of a conflicting public necessity justifying a more restrictive use.”<sup>322</sup> The Fourth District’s emphasis on requiring “clear evidence” and “public necessity justifying a more restrictive use” places a heavy burden of proof on the government. This standard is a far cry from the deferential review requirement of establishing a rational relationship between the land use decision and a legitimate public interest. Local governments will be hard pressed to meet this new standard.<sup>323</sup>

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314. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987).

315. Freitag, *supra* note 137, at 760.

316. *Id.*

317. *Id.* at 760-61 (explaining that *Pennell* rested on an inadequate factual basis in finding a taking as an example of the factual reliance of higher scrutiny).

318. *Oceanic Int’l Corp. v. Lantana Boatyard*, 402 So. 2d 507, 511 (Fla. 4th DCA 1981) (citing *In re Estate of Donner*, 364 So. 2d 742, 748 (Fla. 3d DCA 1978)).

319. *Board of County Comm’rs of Brevard County v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993).

320. *See id.*

321. *Id.* at 471.

322. *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609, 612 (Fla. 4th DCA 1994).

323. *Id.*

*B. All Roads Lead to the Circuit Court*

By relabeling decisions on land use amendments as quasi-judicial actions, the Florida Supreme Court has effectively transferred one of the most traditional, relevant and politically volatile legislative powers from elected officials to circuit court judges. Although the change in labels avoids a semantic violation of the Florida Constitution's separation of powers doctrine,<sup>324</sup> the change functionally places the legislative responsibility for making land use policy on the circuit courts. This usurps the authority of both the legislature and the local governments, and violates the spirit, if not the letter, of the separation of powers doctrine.<sup>325</sup> The Growth Management Act clearly intended land use amendments to be an exercise of legislative power<sup>326</sup> and to be reviewed by the legislative and executive branches.<sup>327</sup> For the courts to control zoning is a violation of the intent and spirit of the Growth Management Act.<sup>328</sup> The courts should "safeguard the powers vested in the Legislature from encroachment by the Judicial branch of the Government . . . [S]uch encroachments ultimately result in tyranny, in despotism, and in destruction of constitutional processes."<sup>329</sup>

Whether a case follows the administrative hearing path, the original action path or the writ of certiorari path, a court will likely make the ultimate land use decision. On certiorari review, the circuit court will decide whether substantial, competent evidence exists to sustain the decision.<sup>330</sup> If the court finds there was not such evidence, then the decision will be quashed.<sup>331</sup> A local government's choices at that time will be to settle the case, as Martin County did in *FIT*,<sup>332</sup> to grant the originally requested use or to go through the process and deny the land use change again, with the intention of laying an acceptable evidentiary record at the second public hearing. In an

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324. FLA. CONST. art. II, § 3.

325. *Id.* "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

326. *See* FLA. STAT. § 163.3187 (1995) (listing procedures for local governments to follow in amending a comprehensive plan).

327. *See* FLA. STAT. § 163.3184 (1995) (listing methods for review by local government and the Adjudicatory Commission).

328. *See* *Pepper v. Pepper*, 66 So. 2d 280 (Fla. 1953) (holding that orders issued by the lower courts effectively amended a statute, and an attempt by the judicial branch to exercise powers appertaining to the legislative branch would be a violation of the separation of powers doctrine in the Florida Constitution).

329. *Id.* at 284.

330. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

331. *Id.*

332. Joint Motion to Stay Proceedings at 1, *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994) (No. 92-010).

original action, the circuit court will weigh the evidence, and if it finds the government decision to be arbitrary or capricious, the court may issue an injunction setting a minimum land use intensity for the parcel.<sup>333</sup> In review of a writ of certiorari, the district court is not allowed to review the circuit court's evaluation of the evidence.<sup>334</sup> In an original action, the district court gives very deferential review to the circuit court's factual findings and may overrule them only if they are clearly erroneous.<sup>335</sup> Only where a case traverses the full length of the administrative hearing path and is subject to the Adjudicatory Commission's order, will a district court, rather than a circuit court, hear the initial challenge.<sup>336</sup>

As *FIT*, *Section 28*, *Section 28 II*, and *Yusem* illustrate, even within the same jurisdiction, different circuit court judges have varied interpretations of the highly specialized and technical body of law governing comprehensive planning.<sup>337</sup> This variance could result in inconsistent decisions, with no effective mechanism to review and correct these decisions. *Education Development Center, Inc. v. City of West Palm Beach Zoning Adjustment Board of Appeals*,<sup>338</sup> exemplifies this potential for conflict. In that case, the Fourth District Court of Appeal quashed the circuit court which had overturned a decision of a zoning board.<sup>339</sup> The zoning board had denied the Center's land use application, and the circuit court granted the Center's writ of certiorari, "concluding that there was 'substantially competent evidence' to support the Center's application as required by the zoning code."<sup>340</sup> The district court ruled that "the circuit court had applied the incorrect standard of review"<sup>341</sup> and quashed the circuit court order.<sup>342</sup> On remand, the circuit court again reversed the zoning board's decision, "this time finding that there was no substantial,

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333. FLA. STAT. § 163.3215(1) (1995). A third party may also bring action for injunctive relief after a zoning approval is given. *Id.* Here, the circuit court would rule on the zoning issues rather than the land use issues for the property.

334. *Education Dev. Ctr. v. City of W. Palm Beach Bd. of Appeals*, 541 So. 2d 106, 108-09 (Fla. 1989); *Bell v. City of Sarasota*, 371 So. 2d 525 (Fla. 2d DCA 1979).

335. *Oceanic Int'l Corp. v. Lantana Boatyard*, 402 So. 2d 507, 511 (Fla. 4th DCA 1981); *Department of Transportation v. Morehouse*, 350 So. 2d 529 (Fla. 3d DCA 1977); *Courshon v. Fontainebleau Hotel Corp.*, 307 So. 2d 901 (Fla. 3d DCA 1977).

336. FLA. STAT. § 120.68 (1995).

337. See *Florida Inst. of Technology, Inc. v. Martin County*, 641 So. 2d 898 (Fla. 4th DCA 1994); *Section 28 Partnership, Ltd. v. Martin County*, 642 So. 2d 609, 612 (Fla. 4th DCA 1994); *Section 28 II*, No. 92-569-CA (Fla. Cir. Ct. 1994); *Martin County v. Yusem* 664 So. 2d 976 (Fla. 4th DCA 1995).

338. 541 So. 2d 106 (Fla. 1989).

339. *Id.* at 107.

340. *Id.*

341. *Id.*

342. *Id.*

competent evidence to support the city's denial of the petition.<sup>343</sup> The district court reversed the circuit court a second time because it disagreed with the circuit court's conclusion as to the existence of substantial, competent evidence.<sup>344</sup> The district court found that the circuit court had "either reinterpreted the inferences which the evidence supported or reweighed the evidence; in either event substituting its judgment for that of the zoning board, which it may not properly do."<sup>345</sup>

The Florida Supreme Court settled this dispute by ruling that the district court did not have the authority to review the circuit court's conclusion about sufficiency of evidence.<sup>346</sup> Rather, a district court review of a writ of certiorari is limited to determining whether "the 'circuit court afforded procedural due process and . . . applied the correct law.'"<sup>347</sup> Thus, unless the circuit court commits some other reversible error, its conclusion as to whether there was sufficient evidence to support a local government's land use decision will be the final one.<sup>348</sup> As Justice McDonald proffered, in his dissent in *Educational Development Center*, circuit court judges will be clothed "with powers of absolute czars" in land use matters.<sup>349</sup>

Placing the ultimate authority for land use decisions on the circuit court may also have unexpected ramifications for the court system. Land use is perhaps the most important and is certainly one of the most volatile political arenas of local government. *Snyder* listed the

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343. *Id.*

344. *Id.*

345. *Id.* (quoting *City of West Palm Beach Zoning Bd. v. Education Dev. Ctr., Inc.*, 526 So. 2d 775, 777 (Fla. 4th DCA), *rev'd*, 541 So. 2d 108 (Fla. 1988)).

346. *Id.* at 108-09.

347. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (reaffirming that *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982), controls this issue). In *Snyder*, the Florida Supreme Court stated that *Vaillant* applies in land use cases. 627 So. 2d at 476.

348. *Heggs*, 658 So. 2d at 530-31.

349. *Education Dev. Ctr. v. City of W. Palm Beach Bd. of Appeals*, 541 So. 2d 106, 109 (Fla. 1989) (McDonald, J., dissenting). This is just one of many cases where the propensity of the circuit courts to substitute their judgment for that of elected officials has been acknowledged. Judge McDonald argued that the district court should have the ability to review the circuit court's ruling on the sufficiency of the evidence to determine if the circuit court's ruling followed the appropriate law in assessing factual matters. *Id.* This concern was restated emphatically by the dissent in *Metropolitan Dade County v. Blumenthal*, Nos. 94-137, 94-52, 1995 WL 366684, at \*11 (Fla. 3d DCA June 21, 1995) (Cope, J., dissenting). Judge Cope argued that a circuit court's reweighing of the evidence is a misapplication of the law, which should be reviewed by the district court. Judge Cope cites *Multidyne*, where the district court granted certiorari after ruling that the circuit court applied an incorrect legal standard in deciding that a city commission decision was not supported by substantial, competent evidence. See *id.* at \*10-11 (citing *City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.*, 567 So. 2d 955 (Fla. 4th DCA 1990)).

fact that land use decisions are subject to “neighborhoodism and rank political influence” as one of the primary reasons courts should take control of land use decisions.<sup>350</sup> Circuit court judges are elected officials.<sup>351</sup> They must run for election every six years in a process that is designed to be as apolitical as possible.<sup>352</sup> However, to win when opposed, judges must accept campaign contributions and make political speeches just like any other political candidate. With so much focus on the circuit court’s role in land use decisions, a judicial candidate’s position on growth management and land use policy could become a litmus test for political support in communities facing serious growth management choices. By shifting land use authority from the local government to the circuit court, *Snyder* has not removed land use from the political arena. Instead, it has thrust the circuit courts into the garishly lit arena of politics.

#### VI. SAVING THE FUTURE OF BOTH GROWTH MANAGEMENT AND LOCAL GOVERNMENT IN FLORIDA: THE EFFECTS OF *SNYDER* MUST BE REVERSED

Under the current state of the law, land use planning decisions have been effectively taken away from local governments. This not only defies the intent of the Growth Management Act, it has the effect of destroying productive planning. This next section is comprised of two interviews regarding the future of growth management in Florida.

##### A. *A Voice in the Wilderness: Interview with the Martin County Attorney*

Noreen Dreyer was the Martin County Attorney during the period in which the county adopted its comprehensive plan and while *FIT*, *Section 28*, *Section 28 II*, and *Yusem* worked their way through the courts. During 1994, her office simultaneously had two land use amendment cases pending review by the Florida Supreme Court, one case pending review in district court, and one case in circuit court.<sup>353</sup> Ms. Dreyer believes that the Growth Management Act and the case law following *Snyder* and *Parker* have created a maze from which local officials cannot escape.<sup>354</sup> She believes that local officials unfairly bear

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350. Board of County Comm’rs of Brevard County v. Snyder, 627 So. 2d 469, 472-73 (Fla. 1993).

351. FLA. CONST. art. V, § 10(b).

352. FLA. STAT. § 105.071 (1995).

353. Martin County v. Florida Inst. of Technology, Inc., 641 So. 2d 898 (Fla. 4th DCA 1994), cert. denied, 651 So. 2d 1195 (Fla. 1995); Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609, 612 (Fla. 4th DCA 1994), cert. denied, 654 So. 2d 920 (Fla. 1995); Section 28 II (No. 94-02243); Martin County v. Yusem, 664 So. 2d 976 (Fla. 4th DCA 1995).

354. Dreyer Interview, supra note 47.

the brunt of the land use debate.<sup>355</sup> The state forced local governments to adopt complex plans based on policies, such as concurrency,<sup>356</sup> that had never been tried before. Court decisions have placed barriers between elected officials and their constituents and no longer give deference to home rule decision making.<sup>357</sup> The process is so confusing that no one knows exactly what will happen next, and everyone is frustrated or angry.<sup>358</sup> As a result, local officials have turned out to be expendable foot soldiers on the front line of the growth management "Land Use War[s]."<sup>359</sup>

Ms. Dreyer believes that local government land use amendment decisions are inherently legislative in nature because local officials bring much more to the planning table than just the law.<sup>360</sup> They have intimate knowledge of their constituents' fears, hopes and needs, and they are the keepers of the community vision.<sup>361</sup> The people in a community become involved in land use decisions because the decisions have a significant effect on everyday life.<sup>362</sup> These decisions determine how many children are in the schools, how many cars are on the roads and what kinds of projects will be built next door.<sup>363</sup> In the past, citizens have controlled local land use by voting for officials who share their community vision. If local officials no longer have legislative discretion in land use decision making, the community no longer has a voice in its own future.<sup>364</sup>

Ms. Dreyer is also concerned that the cost<sup>365</sup> of untangling the gordian knot of procedural requirements and litigation will generate a taxpayer revolt against both local government and comprehensive planning.<sup>366</sup> She cites Martin County's experience as an example of the high cost at every level of the comprehensive planning process as

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355. *Id.*

356. FLA. STAT. § 163.3180 (1995). See Powell, *supra* note 67.

357. Dreyer Interview, *supra* note 49.

358. *Id.*

359. Freeman, *supra* note 185, at 1B.

360. Dreyer Interview, *supra* note 49.

361. See FLA. STAT. § 163.3181(1) (1995) (the intent of the legislature is that the public participate in the comprehensive planning process). The community's vision is crucial to the entire concept of planning. The Growth Management Act requires public participation to develop that consensus for that vision. *Id.* Without consensus, there is no support for the plan. See Powell, *supra* note 19, at 270.

362. See generally Karkkenian, *supra* note 144.

363. *Id.*

364. Dreyer Interview, *supra* note 49.

365. Freeman, *supra* note 185, at 1B. Martin County had spent \$200,000 defending its decision on *Section 28*, before *Section 28 II* went to trial. *Id.* The developer had spent over \$500,000. *Id.*

366. Dreyer Interview, *supra* note 49.

it is currently being applied.<sup>367</sup> If the legislature does not act quickly to free local governments from the land use maze, she says, the refusal of either the taxpayers or the politicians, or both, to pay the cost will halt Florida's growth management efforts.<sup>368</sup>

*B. Florida Needs a Little Help from Its Friends: Interview with the Legal Director for 1000 Friends of Florida*

Richard Grosso, Legal Director for 1000 Friends of Florida,<sup>369</sup> is also concerned about the effect of shifting land use decision making from the legislative to the judicial arena. He argues that all comprehensive plan amendments should be deemed legislative actions, and that, within the plan framework, all zoning decisions should be quasi-judicial.<sup>370</sup> He explains that two entirely different kinds of land use decisions must always be made. Planning is the decision of "whether" a land use should be allowed; it is the legislative creation of policy.<sup>371</sup> Zoning is the decision of "how" property should be developed within that land use; it is the quasi-judicial application of that policy.<sup>372</sup> This is a clear functional distinction that could easily be applied by all interested parties.<sup>373</sup> Because *Snyder* did not expressly recognize that distinction, Grosso is concerned that the courts which have interpreted it will create a comprehensive planning process in Florida very different from that which the legislature intended.<sup>374</sup> While he supports the logic of *Snyder*, he believes that the lower courts have applied it too broadly and that they have intentionally advanced the private property rights of landowners over the rights of the public.<sup>375</sup> He calls these rulings examples of "judicial activism," made with neither concern for, nor a deep appreciation of, the public's rights in the land planning process.<sup>376</sup>

Nonetheless, Grosso remains optimistic that *Snyder* has not shifted the burden of proof in land use cases so drastically that the courts will routinely nullify local government land use decisions.<sup>377</sup> However, that prospect, combined with the Florida Legislature's adoption of the

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367. *Id.*

368. *Id.*

369. 1000 Friends of Florida is a not for profit organization dedicated to effective comprehensive planning. Their address is: P.O. Box 5948, Tallahassee, Florida 32314.

370. Grosso Interview, *supra* note 142.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

Private Property Rights Protection Act,<sup>378</sup> has convinced him that comprehensive planning in Florida must evolve to survive.<sup>379</sup>

If the courts do exercise expanded jurisdiction over land use decisions, however, Grosso feels that the legislature should address *Snyder*, *Parker*, and *Puma* by amending the Growth Management Act to clarify that decisions to approve or reject comprehensive plan amendments are legislative actions deserving deferential review by the courts.<sup>380</sup> That would establish a clear separation of power between legislative and judicial bodies, giving control of land use amendments back to local government. To make the process of challenging decisions consistent and more efficient, Grosso would also support the creation of a land use board of appeals, similar to that in Oregon, which hears all land use challenges.<sup>381</sup> He points to the legislature's success in adopting legislation in response to *Jennings*,<sup>382</sup> as evidence that the legislature can sensitively balance the competing interests involved.

Grosso points out, however, that while the legislature and the courts are struggling with broad policy issues, the DCA, through its rulemaking authority, can mitigate the impact of both the Private Property Rights Protection Act and the *Snyder*-driven case law by adjusting its method of reviewing plan amendments.<sup>383</sup> This would also better achieve the Growth Management Act's goals in the post plan adoption era.<sup>384</sup>

Grosso is enthusiastic about a proposal under which the DCA could make it easier for state agencies, members of the public, local governments and property owners to reach agreement on land use amendments and, thereby, avoid litigation all together.<sup>385</sup> The solution is a simple one: merely change the requirements for drawing

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378. Ch. 95-181, Fla. Laws 1995 (codified at FLA. STAT. § 70.001 (1995)). This act provides "remedies for real property owners whose property has been inordinately burdened by governmental action." *Id.*

379. Grosso Interview, *supra* note 142.

380. *Id.*

381. *Id.* This is consistent with the opinion expressed by James F. Murley, Secretary of the Florida Department of Community Affairs and former Executive Director of 1000 Friends of Florida, who believes that a "land court" would be a more efficient way to resolve disputes. Oregon is one state that uses a land court which could be used as a model for the legislature to consider. Binkley, *supra* note 19. Oregon established an administrative land court to decide land use challenges. The Oregon Supreme Court ruled that zoning decisions are quasi-judicial and are subject to review by the courts. See *Board of County Comm'rs v. Fasano*, 507 P.2d 23, 30 (Or. 1973).

382. See *supra* note 152 and accompanying text.

383. Grosso Interview, *supra* note 142.

384. *Id.*

385. *Id.*

land use maps.<sup>386</sup> Under the current system, uniform land use categories are designated on parcels of property based on their location and ownership boundaries, with little regard for the varying environmental systems within the specific parcels.<sup>387</sup> Therefore, the suitability and capacity of a property for development is determined, not at the planning phase of decision making, but at the zoning stage of the development, which is when all of the environmental issues are addressed under the current system.<sup>388</sup> Grosso points out that under the new Private Property Rights Protection Act,<sup>389</sup> continued use of this approach could increase the frequency of litigation by inviting takings claims, because a landowner may be prohibited at the zoning stage from developing his property in accordance with its approved land use.<sup>390</sup> The proposed approach would require a detailed review of each property for which a land use amendment is proposed to identify its environmental sensitivity, suitability and capacity for development before the land use plan amendment is considered. Land use map amendments should designate the specific areas scheduled for conservation and the appropriate intensity of development on the remaining areas based on that analysis.<sup>391</sup>

This proposal for review of land use map amendments would address several growth management problems. By making such a detailed review of each property, local governments will build a strong factual basis for their land use decisions. A strong factual record will constitute substantial, competent evidence to withstand strict scrutiny of land use decisions by the courts. This will make it easier for local governments to win in actions either for injunctive relief or by writ of certiorari, and the more cases local governments win, the less time they will spend in court. A second benefit is that identifying a property's development limitations before granting a more intense land use will avoid giving a property owner a false sense of the land's potential. Since the decision to limit a property's development will be made at the time the increase in land use is granted, it will help avoid takings actions.<sup>392</sup> The proposal will also bring credibility back to the planning effort. By making land use map amendments based on the physical and environmental characteristics of the land rather than on abstract planning principles and ownership

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386. *Id.*

387. *Id.*

388. *Id.*

389. FLA. STAT. § 70.001 (1995).

390. Grosso Interview, *supra* note 142.

391. *Id.*

392. *Id.*

boundaries, the maps will begin to reflect the concrete goals and benefits of planning. This concrete representation of the results of planning, combined with the reduction in cost and the reduction in negative publicity resulting from litigation, should help rebuild public support for the planning effort. A change of this nature is within the rule-making authority of the DCA and would not need legislative approval.<sup>393</sup>

## VII. CONCLUSION

The *Wall Street Journal* is right: "Just about everybody agrees that Florida's 10-year-old land use law is broken."<sup>394</sup> The organization that Grosso heads, 1000 Friends of Florida, is concerned that the public will be squeezed out of the process.<sup>395</sup> Local officials, who must raise tax revenues to pay for the process, feel that adopting the plans and then defending them in court will turn out to be so expensive that the public will rebel against paying the additional taxes.<sup>396</sup> Developers say that the process puts them through "hell."<sup>397</sup> Everyone involved fears that resolution of land use amendment disputes can become an endless process.<sup>398</sup>

These fears are justified as evidenced by the last three years in Martin County. Martin County is only one of 458<sup>399</sup> local governments in Florida attempting to implement new comprehensive plans. If the Martin County experience proves typical, comprehensive planning in Florida is doomed to suffocate under a mountain of appellate briefs, final judgments and motions, unless a change is made.

A large part of the problem was created by the Florida Supreme Court. In *Snyder*, *Parker* and *Puma*, the supreme court created a procedure and standard of review for land use amendment decisions that is at odds with the intent and the structure of the Growth Management Act. If the court has reached the conclusion that the Growth Management Act is an inappropriate infringement on the private property rights of landowners, it should have ruled the Act unconstitutional. Instead, the court gutted the Growth Management Act by taking away the local governments' discretion to plan for their communities. The result has been an increased case load of costly

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393. *Id.*

394. Binkley, *supra* note 19, at F1.

395. Grosso Interview, *supra* note 142.

396. Dreyer Interview, *supra* note 49.

397. Freeman, *supra* note 185, at 1B.

398. Binkley, *supra* note 19, at F1.

399. Powell, *supra* note 67, at 268.

litigation that has alienated the public, weakened local government and driven up the cost of building homes and businesses.

The district courts can take the first step toward saving Florida's Growth Management program by certifying to the Florida Supreme Court the question of whether *Snyder* applies to land use amendments. Since *Snyder* did not directly address land use amendments, *Puma's* terse ruling could be considered ambiguous. The supreme court should explain or reconsider *Puma* and rule that its holding in *Snyder* does not apply to comprehensive plan amendments. The supreme court should further clarify that, although zoning is a quasi-judicial action, plan amendments are legislative actions subject to the traditional deferential review given policy-making decisions.

Even if the courts agree to address the issue, the legislature should still act immediately. It may either establish a land court or amend the Growth Management Act to define land use amendments as legislative acts subject to deferential review similar to that established in the Growth Management Act. The functional result of either action must be to create a single, consistent procedure for challenging land use amendment decisions that is available to all parties. The procedure selected must be both fair and efficient.

Regardless of the decisions made by the legislature and the courts, the DCA should revise the way it reviews land use map amendments. By requiring that amendments to land use maps allocate uses based on the suitability of property rather than the property boundaries, the DCA can maximize its effectiveness in achieving the functional goals of the Growth Management Act under any standard of review. If these actions are not taken, Florida's growth management program will collapse under its own weight and the twenty-year effort will be riddled with uncertainty, signifying nothing but broken dreams and litigation.