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### Zoning and the Complicated Reliance on Restrictive Covenants

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# ZONING AND THE COMPLICATED RELIANCE ON RESTRICTIVE COVENANTS

Dennis A. Kerbel, Esq.\*

## INTRODUCTION

Zoning decisions remain among the most significant policy choices a local government can make, as they can directly change the very character of an area. Since the advent of Euclidean zoning,<sup>1</sup> local zoning schemes have divided a municipality into districts that segregate residential, business, industrial, agricultural, and other categories of uses from each other.<sup>2</sup> Once

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<sup>1</sup> Named, not for the mathematical system, but for *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), which gave constitutional approval to this type of regulation.

<sup>2</sup> See *Euclid*, 272 U.S. at 394–95. The U.S. Supreme Court deferred to the determinations of local legislatures that zoning ordinances were constitutional uses of the police power to protect “the public health, safety, morals, or general welfare” and that the separation of a municipality into distinct districts within which certain uses were prohibited was not “arbitrary and unreasonable.” *Id.* at 395. The Court specifically affirmed the exclusion of apartment buildings from single-family detached homes, based on criteria that have been a staple of local zoning ordinances since then:

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports . . . concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting

the zoning scheme is established, a local government is generally obligated to assign each parcel of land to one of these general zoning districts.<sup>3</sup> The strict division of a municipality into specific and distinct zones has presented its own unique challenges, because the life of a city is not always so easily divisible into boxes. Yet, the Florida Supreme Court has long interpreted the (otherwise correct) prohibition on contracting away the police power—referred to in this context as unlawful “contract zoning”<sup>4</sup>—to also restrict a local government from imposing site-specific conditions when reassigning the zoning district applicable to a property—referred to as “conditional zoning” (or, more precisely, “conditional rezoning”).<sup>5</sup>

Consequently, zoning boards considering rezonings are generally obligated to consider, not any one particular use that may be made of a property, but rather the application of the proposed Euclidean district generally. But zoning boards often want assurances as to what, exactly, they are approving to be done on a property (albeit without running afoul of the prohibition on direct control of property<sup>6</sup>). And zoning applicants, who need regulatory approval to undertake their projects, want to assure the respective zoning boards and the interested community members who support or object to those projects that the applicants will adhere to the representations they make to the public.

Over the last several decades, one common mechanism applicants have used to address these issues, while avoiding the prohibition on contract zoning and restrictions on conditional rezoning, has been to voluntarily proffer a restrictive covenant (or declaration of restrictions—the terms are

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from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

*Id.* at 394–95.

<sup>3</sup> See, e.g., *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956); *Debes v. City of Key West*, 690 So. 2d 700, 702 (Fla. 3d DCA 1997); *Porpoise Point P’ship v. St. Johns Cty.*, 470 So. 2d 850, 851 (Fla. 5th DCA 1985).

<sup>4</sup> See *Hartnett*, 93 So. 2d at 89 (“A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner.”); *Chung v. Sarasota Cty.*, 686 So. 2d 1358, 1359 (Fla. 2d DCA 1996) (“Contract zoning” refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government’s rezoning or enforceable promise to rezone.).

<sup>5</sup> Zoning and rezoning decisions are distinguished from other zoning actions, such as variances, conditional uses, and other exceptions, reviews, and interpretations of zoning ordinances. See *infra* Part III.

<sup>6</sup> See, e.g., *Debes*, 690 So. 2d at 702; *Porpoise Point P’ship*, 470 So. 2d at 851.

used interchangeably) during a rezoning hearing.<sup>7</sup> The covenant may be an inducement to approve the rezoning, but because it is presented during the zoning hearing itself and not in a separate proceeding, it does not represent the illegal contracting away of the police power.<sup>8</sup> And, because the covenant is voluntarily imposed by the property owner, it is not a condition of the rezoning. The covenant thereafter becomes part of the zoning regulations governing the property.<sup>9</sup>

But, because covenants are rooted in law governing private property transactions, they present challenges when used as regulatory zoning instruments. Covenants may be enforced as local regulations, but they are legal instruments to which the law also attaches unique theories of redress. To be binding, covenants require certain formalities that do not apply to other zoning regulations. For example, all property owners and mortgagees must execute the instrument. In addition, depending on the terms of the covenant, amending or deleting the covenant may require not only the normal zoning hearing process, but also the approval of the parties who created the covenant and any other parties who are given rights to enforce the covenant. Such requirements may present unique challenges. For example, if a covenant applies to property that is sold off into numerous condominium units without granting a condominium association the authority to approve modifications,<sup>10</sup> then the local government's approval

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<sup>7</sup> Local governments also have the option to adopt and apply new zoning ordinances—sometimes referred to as “form-based codes”—that provide for mixed-use developments and do away with the strict Euclidean districts. *See, e.g.*, Code of Miami-Dade County, Florida, Ch. 33, art. XXXIII(I)–(V); Miami 21 Code, City of Miami. But, rewriting a local zoning code is a significant undertaking that requires extensive use of professional resources and community hearings to determine the right mix of uses for the subject area. *See generally* TERRY E. LEWIS ET AL., SPOT ZONING, CONTRACT ZONING, AND CONDITIONAL ZONING, 2 FLA. ENVTL. & LAND USE L. 9-1 (1994) (“Conditional zoning is gaining acceptance in Florida as a desirable means to ameliorate the rigidity of Euclidean zoning. . . . This process employs tools such as impact and planned unit development zoning. With impact zoning, development type and density are included in the zoning ordinance. Planning flexibility and creativity are encouraged. Strict lot line, floor space, curb, gutter, and sideyard requirements are relaxed.”).

<sup>8</sup> *See, e.g., Walberg v. Metro. Dade County*, 296 So. 2d 509, 511 (Fla. 3d DCA 1974).

<sup>9</sup> *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) (“[T]he duly imposed restrictive covenant in this case is a governmental regulation, rather than an estate, interest, claim or charge affecting the marketability of the property’s title. . . .”), *reh’g denied* (June 6, 2016), *review denied*, SC16-1189, 2016 WL 7474142 (Fla. Dec. 29, 2016); *Metro. Dade Cty. v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007–08 (Fla. 3d DCA 1990) (The County Commission approved the rezoning of the property to a commercial district, but the zoning resolution “clearly expressed that the county commission granted rezoning only for a bank or savings and loan and accepted the property owner’s offer of a restrictive covenant and the county’s option to enforce this restriction.”).

<sup>10</sup> *See generally* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999) (“[I]t may be easier for zoning regulators to allow more fragmentation later than for individuals to turn the ratchet back and reassemble land.”); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) (noting the risks in use of conservation easements because of the “nontrivial” expenditures that may arise in “reassembling fragmented property rights”).

of the covenant release may not be sufficient to remove the restriction if the covenant's modification term requires the consent of all of the property owners.

Given the complexities that zoning covenants present, it is time to revisit the legal underpinnings of the system that restricted the use of conditional rezonings, so that regulatory hearings before local government boards do not become unnecessarily embroiled in ancillary issues concerning ownership of real property.<sup>11</sup>

## I. ZONING AND REZONING AS LEGISLATIVE ACTS

Local governments have the authority to enact zoning laws and regulations under their “police power, asserted for the public welfare.”<sup>12</sup> Traditional Euclidean zoning divides a municipality into general zoning districts of varying intensities—for example, single-family residential, multi-family residential (usually, apartments), neighborhood-serving business, liberal business, light industrial, heavy industrial, agriculture—and assigns each parcel of land to one of those districts. In earlier times, the decision to zone or rezone a parcel was considered to be a legislative act, and both the original enacting legislation and any subsequent rezoning actions were reviewed under the “fairly debatable” standard.<sup>13</sup>

The leading case was the Florida Supreme Court's decision in *City of Miami Beach v. Lachman*, 71 So. 2d 148 (Fla. 1953). *Lachman* concerned owners of eighty-six lots whose application to rezone their beachfront properties from a single-family residential district to a district that permitted apartment houses and hotels had been denied.<sup>14</sup> At that time, a challenge to

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<sup>11</sup> This article does not address development agreements adopted pursuant to the Florida Local Government Development Agreement Act (sections 163.3220–163.3243, Florida Statutes).

<sup>12</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926); see also *Forde v. City of Miami Beach*, 1 So. 2d 642, 645 (Fla. 1941) (“[I]t is no longer questioned that a municipality, acting under legislative authority, may be vested with the power to enact a valid zoning ordinance and that a general attack thereon will ordinarily fail; nor is it questioned that the right of an urban owner to the free use of his property may be regulated by a legitimate exercise of the police power, and when so asserted, fairly and impartially in the interest of the public health, safety, morals or general welfare, the courts will not substitute their judgment for that of the public officials duly authorized in the premises unless it clearly appears that their action has no just foundation in reason and necessity [i.e., the ‘fairly debatable’ rule].”).

<sup>13</sup> *City of Miami Beach v. Lachman*, 71 So. 2d 148, 152–53 (Fla. 1953) (“There is no showing here of confiscation. It may or may not be that some owners will suffer a reduction in price if they sell before the city in its discretion changes the zoning plan. After all, that is the matter of greatest importance, and it is a debatable question. It cannot be solved by looking at one man's property, but must be resolved by a contemplation of the whole picture. So considered, we find no abuse of discretion.”).

<sup>14</sup> *Id.* at 149–50.

a zoning decision was by original action; thus, the owners sued to enjoin the city from enforcing the single-family residential zone on their properties. A trial was held, evidence was produced, and the trial court determined that the zoning ordinance “was unreasonable and not ‘fairly debatable.’” The Florida Supreme Court looked principally to *Village of Euclid* to determine the applicable standard of review for rezoning decisions and held, “An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.”<sup>15</sup> This standard is based on separation of powers principles, as the Court further noted: “If such a deduction supports the city’s contention that to remove the present zoning restrictions would destroy the entire zoning scheme and bring about the evils contended by the city, then the Court should not substitute its judgment for that of the City Council.”<sup>16</sup>

For the ensuing decades, rezoning decisions in Florida, whether by ordinance or resolution, were considered to be legislative decisions. As such, they were to be reviewed through the filing of “[s]uits in equity seeking injunctive relief against a zoning ordinance or resolution on the ground that it is arbitrary, capricious, confiscatory or impinges on some right or guarantee of the Constitution of this State.”<sup>17</sup> But, the adoption of the rezoning ordinance was not subject to any more heightened standard or procedure than the adoption of any other ordinance.<sup>18</sup>

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<sup>15</sup> *Id.* at 152.

<sup>16</sup> *Id.*

<sup>17</sup> *Harris v. Goff*, 151 So. 2d 642, 645 (Fla. 1st DCA 1963) (“It has been uniformly held in this state that the function of a board or commission in the enactment of zoning ordinances is a purely legislative function. The decisions on this subject dispel any contention that a zoning ordinance or resolution is quasi-judicial in character.”) (footnote omitted); *see also, e.g., Schauer v. City of Miami Beach*, 112 So. 2d 838, 839 (Fla. 1959) (“It is obvious to us that the enactment of the original zoning ordinance was a legislative function and we cannot reason that the amendment of it was of different character.”); *Palm Beach Cty. v. Tinnerman*, 517 So. 2d 699, 700 (Fla. 4th DCA 1987) (“[C]lassification of lands under zoning ordinances involves the exercise of legislative power. Thus, the doctrine of separation of powers prevents the courts from interfering with such exercise. Therefore, a court order which directs the zoning authority to zone a property in a particular manner violates the separation of powers doctrine.”); *City of Jacksonville Beach v. Grubbs*, 461 So. 2d 160, 163 (Fla. 1st DCA 1984) (“[T]he zoning authority’s decision should have been reviewed under the traditional ‘fairly debatable’ standard of review and . . . neither the comprehensive plan nor the proposed zoning ordinance supported reversal below. . . . [T]he city produced evidence that its decision was related to the health, safety, welfare and morals of the community and there was no competent evidence that plaintiff was deprived of reasonable beneficial use of the property.”); *Dade Cty. v. Markoe*, 164 So. 2d 881, 882 (Fla. 3d DCA 1964) (“The entire thrust of the petition is directed to the lack of authority in the commission to rescind, by its second resolution, the first resolution which rezoned the property. The circuit court found, and we think correctly, that the action of the commission in enacting the second resolution was legislative in character. This being so, there was nothing to review, for only those decisions which have a judicial or quasi-judicial character are subject, in [certiorari] proceedings . . . , to review.”).

<sup>18</sup> The Florida Supreme Court would later recede from this principle and determine that

The underlying premise of the Euclidean system is to prevent one category of uses from encroaching on another, but the emphasis on general categories restricts a local government's ability to tailor a rezoning to the unique features that may have developed in a surrounding neighborhood over time.<sup>19</sup> As the Florida Supreme Court long ago determined in *Hartnett v. Austin*, the first priority in evaluating rezonings is whether it maintains the "uniformity" of the zoning scheme and its "well-defined classes of uses."<sup>20</sup> Indeed, under Florida law, it has even been held to be improper to consider the particular use a property owner wants to make of his property:

A property owner is entitled to have his property properly zoned based on proper zoning concepts without regard to the one particular use which the owner might then intend to make of the various uses permitted under a proper zoning classification. A zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights.<sup>21</sup>

Deviating from the uniform system was considered to be arbitrary and capricious and thus a basis to invalidate the rezoning decision.<sup>22</sup>

The downside of this rigid system is that it makes it difficult for a local government to address a situation where a proposed zoning district would permit some uses that are compatible with surrounding properties, but would include other uses that may not be compatible. For example, a modern warehouse and showroom development that is permitted in a light industrial district and is not otherwise permitted in a commercial district might be appropriately located next to a single-family neighborhood if developed with noise attenuation and buffering, but other industrial uses that are permitted within the same district might not be compatible with the

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rezonings are quasi-judicial decisions. See *infra* Part IV.

<sup>19</sup> See generally ARDEN H. RATHKOPF ET AL., THE LAW OF ZONING AND PLANNING § 44:3 (4th ed. Apr. 2017 Update) ("Unnecessary and unchecked reliance on rezoning with conditions will invariably exacerbate the problems of ad hocery and uncontrolled discretion that have long plagued the zoning process. When utilized as a substitute for planning and a well drafted zoning code, the practice of rezoning with conditions threatens to undercut even the modicum of the 'rule of law' that might be embodied in a formally structured adjudicatory permit land use regulatory system.").

<sup>20</sup> See, e.g., *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956).

<sup>21</sup> *Porpoise Point P'ship v. St. Johns Cty.*, 470 So. 2d 850, 851 (Fla. 5th DCA 1985); see also *Debes v. City of Key West*, 690 So. 2d 700, 702 (quoting *Porpoise Point P'ship* and holding that city's desire to retain property for promotion of affordable housing was an impermissible basis to reject rezoning to commercial district of a property that was otherwise completely surrounded by properties zoned and developed for commercial uses).

<sup>22</sup> *Hartnett*, 93 So. 2d at 89 ("Such is certainly not consonant with our notion of government by rule of law that affects alike all similarly conditioned.").

surrounding neighborhood.<sup>23</sup> Conversely, imbalances can arise where “land on the periphery of a highly restricted zone . . . feel[s] the impact of uses maintained in an adjacent and less restricted zone . . . more heavily . . . than . . . other land in the same district”; pressure then mounts to “reclassif[y] land lying on the borderline of a district” because of the “unequal hardship” on properties that are otherwise classified within the same zoning district.<sup>24</sup>

One method local governments have unsuccessfully used to address unique zoning considerations for a particular site is so-called “contract zoning,” which is illegal. Contract zoning entails a municipality “enter[ing] into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner.”<sup>25</sup> Most egregious is when a municipality has adopted a contract that commits it in advance to rezone the property in a later proceeding, but the contract was entered into without the strictures of either a zoning hearing or the process attendant to amending an ordinance.<sup>26</sup> Contract zoning is a violation of the “long established principle that a municipality cannot contract away the exercise of its police powers.”<sup>27</sup>

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<sup>23</sup> Cf. *Kemp v. Miami-Dade Cty.*, Case No. 13-009GM, Recommended Order (Fla. Div. Admin. Hr’gs Aug. 1, 2013), adopted in Final Order No. DEO-13-091 (Fla. Dept. of Econ. Opportunity Sept. 24, 2013). This case concerned a comprehensive plan amendment, not a rezoning, but because the issues were resolved through the acceptance of a restrictive covenant addressing noise attenuation, buffering, and other compatibility issues, it serves as a useful illustration of the complexities that can arise in land-use applications.

<sup>24</sup> PATRICIA E. SALKIN, *AMERICA LAW OF ZONING* § 9:20 (5th ed. 2014).

<sup>25</sup> *Hartnett*, 93 So. 2d at 89.

<sup>26</sup> *Chung v. Sarasota Cty.*, 686 So. 2d 1358, 1359–60 (Fla. 2d DCA 1996) (“One of the reasons contract zoning is generally rejected is because ‘[t]he legislative power to enact and amend zoning regulations requires due process, notice, and hearings,’” whereas other legislative acts do not) (quoting Terry Lewis et al., *Spot Zoning, Contract Zoning, & Conditional Zoning*, in *FLORIDA ENVIRONMENTAL & LAND USE LAW* §§ 9-1, 9-13 (James J. Brown ed., 2d ed. 1994)).

<sup>27</sup> *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956); see generally RATHKOPF ET AL., *supra* note 19, at § 44:10 (“Contract rezoning today is considered illegal largely on the ground that exercise of the zoning power pursuant to a bilateral agreement between a developer and a municipality unlawfully bargains away the municipality’s police power.”). Requiring the approval of neighbors or a homeowner’s association before a zoning resolution can be adopted presents similar issues of whether the police power has been unlawfully delegated. *Pollard v. Palm Beach Cty.*, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990) (“[O]pinions of residents are not factual evidence and not a sound basis for denial of a zoning change application.”); *City of Apopka v. Orange Cty.*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (“The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit.”); *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586, 588 (Fla. 5th DCA 1993) (“The agreement of neighbors should not be a sufficient or sound basis to allow a variance although it could be a consideration in a close case. Neighbors and their attitudes change from time to time while the variance does not.”); Op. Att’y Gen. Fla. 2012-32 (2012) (“[A]n ordinance which delegates the legislative power vested in the county commission to determine the public policy and regulate property rights based on the written consent of all or a majority of the specified landowners and homeowners



Another tailoring method is known as “conditional zoning,” which refers to a “zoning amendment [i.e., a rezoning] which permits a use of particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified.”<sup>28</sup> Conditional zoning, which has been permitted in other states,<sup>29</sup> permits rezoning decisions to better address situations in which “[u]navoidably, districts with unlike restrictions abut one another.”<sup>30</sup> Through conditional zoning, local governments can address the resulting imbalance<sup>31</sup> and can thus avoid a continuing cycle of “hardship, petition, and relief.”<sup>32</sup>

One objection to conditional zoning is that it can become “illegal spot zoning,” meaning a rezoning that creates a small island of property that allows significantly more liberal uses than that of surrounding properties—“solely for the benefit of a particular property owner.”<sup>33</sup> The concern is that conditional zoning creates “a clear incentive on the part of local officials to substitute ‘zoning by negotiation’ for a well planned and standardized zoning code.”<sup>34</sup> But this concern is an overinflated outgrowth of courts’ preference for uniformity in a Euclidean system and may even be a case of

prior to accepting an application for rezoning might well be seen by a court as an invalid delegation of the legislative power of the county.”) *But see infra* note 102.

<sup>28</sup> *Broward Cty. v. Griffey*, 366 So. 2d 869, 871 (Fla. 4th DCA 1979) (quoting R. ANDERSON, AMERICAN LAW OF ZONING § 9.20 (2d ed. 1976)) (holding that County’s land-use approval was not unlawful as conditional zoning, because the stipulated right-of-way exactions were no different than would be required of similarly-zoned properties); M. Henning, *Land Use—Goffinet v. Christian County: New Flexibility In Illinois Zoning Law*, 8 LOYOLA U.L.J. 642 (1977). This is distinct from a “conditional use permit” or “special use permit,” in which particular uses are only permitted in certain zoning districts upon a showing, at a public hearing, that applicable criteria are satisfied. *See, e.g., Palm Beach Polo, Inc. v. Vill. of Wellington*, 918 So. 2d 988, 990 (Fla. 4th DCA 2006) (approving Planned Unit Development, which is “a zoning device used to permit flexibility in design and use of property” consisting of “an agreement between the land owner and the zoning authority, and the terms of development are negotiated between the parties in accordance with the conditions set forth in the governing ordinances”); *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 780 (Fla. 2d DCA 1992) (approving request for a “conditional use permit . . . to sell beer and wine for off premises consumption”); *Alachua Cty. v. Eagle’s Nest Farms, Inc.*, 473 So. 2d 257, 260 (Fla. 1st DCA 1985) (approving special use permit for a private airstrip).

<sup>29</sup> Arizona, Idaho, Indiana, Maine, Maryland, North Carolina, Rhode Island, Tennessee, and Virginia authorize some form of conditional rezoning without requiring creation of a new zoning category. *See RATHKOPF ET AL., supra* note 19, at § 44:4.

<sup>30</sup> SALKIN, *supra* note 24, at § 9:20.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; *see also* RATHKOPF ET AL., *supra* note 19, at § 44:12 (“Generally, state courts uphold conditional rezoning so long as the rezoning: (1) promotes the general welfare and not merely private interests; (2) the rezoning does not otherwise constitute illegal spot zoning; (3) the conditions imposed are reasonable and not otherwise illegal; and (4) there is no express agreement bargaining away a municipality’s future use of the police power.”).

<sup>33</sup> *City Comm’n of Miami v. Woodlawn Park Cemetery Co.*, 553 So. 2d 1227, 1240 (Fla. 3d DCA 1989).

<sup>34</sup> RATHKOPF ET AL., *supra* note 19, at § 44:3; *see also infra* note 51.

courts improperly substituting their policy judgments as super-zoning boards.<sup>35</sup> Moving away from the suburban development model that underlies the Euclidean system means recognizing that some locations that may be appropriate for more intense or different uses than the surrounding properties; but the existing zoning categories may not provide an appropriate mix of uses; and rewriting the zoning code or creating new categories may not be an appropriate or feasible solution. Conditional zoning is actually more likely to ameliorate the “spot” effect, because it would allow the appropriate introduction of different uses while also limiting the potential incompatibility with the surrounding areas. Thus, conditional rezoning would permit a more orderly change of neighborhood character over time, rather than the abrupt change that can result after piecemeal rezonings to new districts.<sup>36</sup>

In the 1956 decision of *Hartnett v. Austin*, the Florida Supreme Court merged the objections to “contract zoning” with the objections to “conditional zoning” and put a stop to using either vehicle to vary from the “uniformity” requirement of Euclidean zoning. *Hartnett* concerned a decision to rezone a property from a single-family residential district to a commercial district, “subject to and dependent upon the full and complete observance of the limitations, restrictions and other requirements” generally described in the ordinance but to be effectuated through the subsequent execution of a contract between the city and the property owner. The rezoning ordinance prescribed that the contract would address the following conditions:

- (1) a ‘Bay Point type wall’ shall be placed around the perimeter of the property not less than 40 feet inside the property line abutting certain streets;
- (2) the 40-foot strip shall at all times be kept and maintained in a condition

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<sup>35</sup> *S. A. Healy Co. v. Town of Highland Beach*, 355 So. 2d 813, 815 (Fla. 4th DCA 1978) (“The Courts are not empowered to act as super zoning boards substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives.”).

<sup>36</sup> *See, e.g., Woodlawn Park Cemetery*, 553 So. 2d at 1233 (“Running through all of these cases is the court’s determination that it is entirely arbitrary and not at all ‘fairly debatable’ on grounds that make sense for the governing authority to allow for an entire transformation of the character of an area through extensive rezoning of all nearby properties—and then to deny the subject property owner equal treatment, although similarly situated. It is thought to be confiscatory of a person’s property in such cases to prevent a property owner from utilizing his property in a certain way, when virtually all of his adjoining neighbors are not subject to such a restriction. Often, as previously noted, the courts refer to such arbitrary refusals to rezone as ‘reverse spot zoning’ because the refusal to rezone the subject property creates, in effect, a veritable zoning island [as in *Tollius*], or a zoning peninsula [as in *Manilow* and *Olive*], in a surrounding sea of contrary zoning classification. In these cases, the courts have reasoned that a governing authority, although having large discretionary zoning power, may not, under the guise of its police power, discriminate in such a blatant fashion against a property owner—as such arbitrary governmental action violates the property owner’s constitutional right to make legitimate use of his land.”).

prescribed by the City Commission at the expense of the property owner; (3) suitable contracts shall be entered into between the city and the property owner covering the above requirements and also providing for control of lights on the premises in order to bring about ‘as little glare and disturbance’ as possible to the people in the neighborhood (this expense was to be borne by the property owner); (4) the property owner should furnish and pay for adequate police protection within the rezoned area; (5) to submit to the City Commission for approval plans and specifications of any proposed building; and (6) the property owner shall not open access to certain abutting streets.<sup>37</sup>

Notably, these types of conditions frequently accompany approvals of site-specific zoning approvals such as variances and exceptions.<sup>38</sup>

The Florida Supreme Court nevertheless rejected the rezoning, because of the conditions and the need for a subsequent agreement to address the impacts of the proposed commercial use on surrounding residential properties. The Court held, “In exercising its zoning powers the municipality must deal with well-defined classes of uses. If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse.”<sup>39</sup> The Court further described the purported evils of moving away from uniformity: “The zoning classifications of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. Both the benefits of and reasons for a well-ordered comprehensive zoning scheme would be eliminated.”<sup>40</sup> The *Hartnett* court was particularly concerned about the need for significant terms to be worked out in a separate instrument, and that the rezoning ordinance was not complete on its face.<sup>41</sup> But, beyond concern about the method by which the city had conditioned the rezoning, the *Hartnett* court appears to have been principally concerned with Euclidean zoning principles of uniformity over flexibility.

The Florida Supreme Court’s reticence about conditional rezoning and its emphasis on the “uniformity” of a zoning code were also rooted in older

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<sup>37</sup> *Hartnett v. Austin*, 93 So. 2d 86, 88 (Fla. 1956).

<sup>38</sup> See *infra* Part IV.

<sup>39</sup> *Hartnett*, 93 So. 2d at 89.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 88 (“The provisions of a municipal ordinance which conditions its effectiveness upon the necessity for the subsequent execution of a contract with private parties such as was done in the case at bar cannot be held to provide the degree of clarity and certainty that is required of municipal legislation.”).

notions that neighbors had vested rights in the zoning of other properties.<sup>42</sup> Hence, the *Hartnett* court expressed concern that “[t]he residential owner would never know when he was protected against commercial encroachment” and that “[t]he commercial establishments . . . would never know when they had protection against . . . smoke and noise producing industries.”<sup>43</sup> But the Florida Supreme Court later receded from the suggestion that one can be vested to a zoning scheme.<sup>44</sup> The court specifically receded from *Hartnett* on this point, holding that “a rule of estoppel cannot be read into such decisions as that of *Hartnett v. Austin* . . . that a neighboring owner had a ‘right to a continuation of’ existing zoning conditions sufficient to allow contest of an amendment by such party.”<sup>45</sup> Nevertheless, the emphasis on preserving the Euclidean system remained, primarily reflected in courts’ decisions invalidating zoning decisions by classifying them as “spot zoning” or “reverse spot zoning.”<sup>46</sup>

Despite the legal preference for uniformity in a zoning code, the need to address the unique features or surrounding context of a particular parcel or group of parcels has not gone away, in this or any other jurisdiction. But, following *Hartnett*, the approval of a general zoning classification should be complete on its face, and rezonings should not have unique conditions.<sup>47</sup>

<sup>42</sup> *Hartnett*, 93 So. 2d at 89.

<sup>43</sup> *Id.*

<sup>44</sup> *Oka v. Cole*, 145 So. 2d 233, 235 (Fla. 1962) (finding “no authority . . . that vested rights can accrue to neighboring owners, or that ordinances altering zoning restrictions are to be tested by any standard other than that applicable to zoning classification generally”) (footnotes omitted).

<sup>45</sup> *Id.*; see also *New Port Largo, Inc. v. Monroe Cty.*, 95 F. 3d 1084, 1090 (11th Cir. 1996) (“Because there is no general constitutional right to be free from all changes in land-use laws, . . . [plaintiff] must do more than rely on the original zoning to establish an equitable estoppel.”).

<sup>46</sup> See, e.g., *City of Miami Beach v. Robbins*, 702 So. 2d 1329, 1330 (Fla. 3d DCA 1997) (prohibiting downzoning of “three blocks” to lower density residential category where “the surrounding property was ‘a vast sea of [higher density districts] and other types of zoning’”); *City Comm’n of City of Miami v. Woodlawn Park Cemetery Co.*, 553 So. 2d 1227, 1233 (Fla. 3d DCA 1989) (requiring rezoning of residential parcel to commercial zone because surrounding properties had been granted similar rezoning over time); *Porpoise Point P’ship v. St. Johns Cty.*, 470 So. 2d 850, 851 (Fla. 5th DCA 1985); *Kugel v. City of Miami Beach*, 206 So. 2d 282, 283 (Fla. 3d DCA 1968) (rejecting, as “arbitrary and unreasonable and . . . confiscatory,” continued zoning of property under residential category—even though area north of subject property retained residential category—because of commercial zoning and commercial development on remainder of surrounding properties).

<sup>47</sup> Of course, rezonings may in fact have been approved with unique conditions; but if such actions were not reversed on appeal, then they would remain valid today despite *Hartnett* and its progeny. Any challenges to the legality of a unique condition on rezoning would be subject to the jurisdictional limits on untimely appeals. *Peltz v. Dist. Ct. of App., 3d Dist.*, 605 So. 2d 865, 866 (Fla. 1992) (“The untimely filing of a notice of appeal precludes the appellate court from exercising jurisdiction.”); *Miami-Dade Cty. v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003). The failure to timely seek review of a zoning action would bar further challenges to that action. See *State ex rel. Sarasota Cty. v. Boyer*, 360 So. 2d 388, 393 (Fla. 1978) (“As a general rule . . . matters determined in an order which has become final without appeal are not later subject to appellate review simply because a later order affected those matters or applied them to other interlocutory matters under

Therefore, the only way to make certain that representations made in support of a rezoning are enforceable is through the use of one of the oldest forms of land-use control—a declaration of restrictive covenants.<sup>48</sup> This mechanism allows a zoning applicant to impose voluntary restrictions on his or her own property through a covenant, which the zoning board can consider in approving the rezoning and can subsequently enforce.

In *Walberg v. Metro. Dade County*, 296 So. 2d 509, 511 (Fla. 3d DCA 1974), the Third District distinguished *Hartnett* and accepted that voluntary restrictions announced in a rezoning hearing—albeit not proffered as a recordable covenant—are proper zoning considerations. *Walberg* concerned a County-initiated “downzoning,” to rezone a property from a multi-family zoning district to one of lower population density. At the hearing, the property owner made representations to the zoning board regarding its planned development of the property, to encourage denial of the rezoning. The board rejected the rezoning, and two neighbors appealed. In holding that the property owner’s representations were a valid zoning consideration and did not constitute illegal contract zoning, the court distinguished *Hartnett*: “it does not appear from this record that a private contract was made by the County with a property owner for a change or perpetuation of zoning.”<sup>49</sup> Instead, “the most that can be said . . . is that the Commissioners may have been influenced by representations made by South Cutler [the developer who benefited from a denial of the proposed downzoning].” From this, the Court held, “[a] rule which would forbid owners from announcing concessions to the public interest in any proceeding before a zoning authority would not be in the best interest of the public,” and the

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consideration. . . .”); *Atl. Shores Resort, LLC v. 507 S. St. Corp.*, 937 So. 2d 1239, 1243–44 (Fla. 3d DCA 2006) (holding that collateral estoppel barred relitigation of issues before architectural review commission); *Paresky*, 893 So. 2d at 665–66 (holding that collateral estoppel applies to zoning proceedings); *Miller v. Booth*, 702 So. 2d 290, 291 (Fla. 3d DCA 1997) (affirming County’s decision to deny zoning application under “administrative res judicata” based on failure to show “substantial change in circumstances”). Similarly, an original action to challenge a zoning decision would be subject to the “catch-all” statute of limitations for challenges to local government ordinances or resolutions, which is 4 years from the date of adoption. See *Milan Inv. Group, Inc. v. City of Miami*, 50 So. 3d 662, 664 (Fla. 3d DCA 2011); *Paresky v. Miami-Dade County Bd. of County Comm’rs*, 893 So. 2d 664, 665 (Fla. 3d DCA 2005).

<sup>48</sup> See *Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990) (“The code creates various zoning categories, including the BU–1A, Limited Business District, section 33–246 Dade County Code, which is the basic set of regulations applicable to the subject property. If unrestricted, this category would permit a gas station on the subject property. Additionally, however, are the sections providing for further restrictions as to specific properties. Thus section 33–33 of the code provides that applications ‘may be granted subject to all reasonable restrictions and conditions deemed necessary.’ This power to subject property to further restriction is emphasized in section 33–315 of the code where the board of county commissioners is authorized to ‘take final action upon any and all matters and requests contained in the application. . . .”).

<sup>49</sup> *Walberg*, 296 So. 2d at 511.

record did not show “that the Commission failed to consider the public’s interest or acted upon the basis of a private contract.”<sup>50</sup>

At base, the key difference between contract zoning, conditional zoning, and voluntary zoning covenants involves the method by which the conditions are made binding. In pure contract zoning, bilateral promises are made: both the local government and the applicant are bound to perform specific actions. In conditional rezoning, the property is rezoned with conditions not applicable to all properties in the same zoning district, which would be inconsistent with *Hartnett’s* uniformity requirement (even if, in the modern era, unique conditions may better address the blighting influences that *Euclid* assumed imposing strict zoning districts would correct). By contrast, with voluntary zoning covenants, the proffering party binds itself to its own promises, but the local government is not required to accept the offer; and the property is ultimately rezoned (or not, as in *Walberg*) based on the uniform zoning scheme, while the zoning covenant provides an additional layer of regulation that the local government can enforce. But covenants come with their own unique legal requirements that can dramatically affect the zoning process later.

## II. FORMALITIES APPLICABLE TO PRIVATE COVENANTS

Restrictive covenants have been used since before the advent of zoning laws.<sup>51</sup> A private property owner who seeks to develop and subdivide his or her property imposes restrictions for the benefit of all purchasers, and those restrictions bind and run with each separate parcel of the subdivided land.<sup>52</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., *Osius v. Barton*, 147 So. 862, 867–68 (Fla. 1933) (“The natural desire of householders to secure desirable home surroundings because of the growth of cities and the more crowded conditions of modern life, has led to a demand for land limited to development purposes. This natural desire has been so exploited by realtors and land companies, that restricted residential property is now becoming the rule rather than the exception in our cities. The legal machinery to achieve this end has been found in the main not in the ancient rules of easements or covenants, but in the activities of courts of equity in preventing fraud and unfair dealing by those who take land with notice of a restriction upon its use, so that in equity and good conscience they should not be permitted to act in violation of the terms of such restrictions.”); *Korn v. Campbell*, 192 N.Y. 490, 495–96 (1908); see generally RATHKOPF ET AL., *supra* note 19, at § 1:1 (“As was the case with nuisance doctrine, the American approach to restrictive covenants emerged from English common law. . . . American courts were less hostile—perhaps boosted by a robust land records system and prescriptions as to the form such covenants could take. Courts have either abolished or considerably liberalized some of the technical early common law requirements for covenants to run with the land and to be enforceable by and against later owners.”).

<sup>52</sup> *Stephl v. Moore*, 114 So. 455, 455 (Fla. 1927) (“Covenants restraining the free use of real property, although not favored in law, will be enforced by the courts when the restriction applies to the location of buildings to be erected on the land, and such restrictions are carried in all deeds with a view to preserve the symmetry, beauty, and general good of all interested in the scheme of development. The benefit of the restrictive covenants inures to each purchaser, irrespective of the time of purchase.”);

For example, a restrictive covenant may prohibit commercial enterprises within a residential development,<sup>53</sup> it may require that residential buildings be set back a particular distance from the street,<sup>54</sup> or it may prohibit fences on waterfront lots.<sup>55</sup> The restriction can be contained in the deed of conveyance for the property,<sup>56</sup> or it can be contained in a separate instrument, such as a plat<sup>57</sup> or a declaration of restrictions.<sup>58</sup> But the instrument will be considered a “covenant running with the land,” and not merely a covenant personal to an individual owner, if, among other terms, “performance of the covenant . . . touch[es] and involve[s] the land or some right or easement annexed and appurtenant thereto, and tends necessarily to enhance the value of the property or renders it more convenient and beneficial to the owner.”<sup>59</sup>

In general, restrictive covenants fall into three classes.<sup>60</sup> The first class are “those which are entered into with the design to carry out a general scheme for the improvement or development of real property,” in which “the covenant is enforceable by any grantee as against any other, upon the theory that there is a mutuality of covenant and consideration, which binds each and gives to each the appropriate remedy.”<sup>61</sup> The second class are “those cases in which the grantor exacts the covenant from his grantee . . . for the benefit and protection of contiguous or neighboring lands which the former retains,” but in which the grantees “cannot enforce the covenant as against each other” and only “the grantor and his assigns of the property

RATHKOPF ET AL., *supra* note 19, at § 1:1 (“Generally, reciprocal covenants on residential use imposed for the benefit of all the land of a common grantor and evidencing a general scheme or plan for development and use are enforceable by any later landowner or representative owners’ association for whose benefit they were imposed, despite technical common law rules involving ‘privity of estate’ or that covenants ‘touch and concern’ the land.”).

<sup>53</sup> See, e.g., *Osius*, 147 So. at 863–64.

<sup>54</sup> *Stephl*, 114 So. 455.

<sup>55</sup> *Rea v. Brandt*, 467 So. 2d 368, 369 (Fla. 2d DCA 1985).

<sup>56</sup> *Osius*, 147 So. at 863–64.

<sup>57</sup> *Wahrendorff v. Moore*, 93 So. 2d 720, 722 (Fla. 1957) (*en banc*).

<sup>58</sup> See, e.g., *Fiore v. Hilliker*, 993 So. 2d 1050, 1051–52 (Fla. 2d DCA 2008) (“The restrictions did not appear on the face of the deed, but were referred to in the deed as ‘Schedule B’ and were recorded in the Lee County public records.”); *AC Assocs. v. First Nat. Bank of Florida*, 453 So. 2d 1121, 1123 (Fla. 2d DCA 1984) (parking agreement reciprocally affecting two adjacent parcels of real property and recorded in public records).

<sup>59</sup> *Maule Indus., Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958); see also *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 (Fla. 1980) (“A developer, in carrying out a uniform plan of development for a residential subdivision, may arrange for the provision of services to the subdivision or for the maintenance of facilities devoted to common use, and may bind the purchasers of homes there to pay for them. In this case, all of the elements of an affirmative covenant running with the land have been established.”).

<sup>60</sup> *Korn v. Campbell*, 192 N.Y. 490, 495–96 (1908); see generally 51 A.L.R. 3d 556 (1973) (recognizing *Korn* as “the leading case on the subject in this country”).

<sup>61</sup> *Korn*, 192 N.Y. at 495–96.

benefited may enforce it against either or all of the grantees.”<sup>62</sup> The third class are “mutual covenants between owners of adjoining lands, in which the restrictions placed upon each produce a corresponding benefit to the other, and . . . either party or his assigns may invoke equitable aid to restrain a violation of the covenant.”<sup>63</sup>

The elements to establish a covenant running with the land are: (1) “constructive notice, and intent, expressed in the declaration, that the covenant run”; (2) “privity, of contract and estate, between the covenanting parties, and succession to the interest of the covenantee by the party seeking to enforce”; (3) “a uniform plan of development, with benefit to correspond to burden, in that all of the lots in the subdivision were to be charged and benefitted,” or, if not uniform or reciprocal, “an agreement creating a negative easement or equitable servitude . . . which was contractual in nature”; and (4) that “the covenant enhanced the value or enjoyment of the property, so it touches and concerns the land.”<sup>64</sup>

A private restrictive covenant operates like a contract,<sup>65</sup> except that the parties seeking to enforce its terms do not necessarily have to be in direct privity with one another. When property is subdivided and sold with “restrictions on its use pursuant to a general plan of development or improvement,” any grantee can enforce the restrictions against any other.<sup>66</sup> This authority rests on “the theory that there is a mutuality of covenant and consideration” or, alternatively, on “the ground that mutual negative equitable easements are created.”<sup>67</sup> Notably, “this doctrine is not dependent

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Bessemer*, 381 So. 2d at 1348 n.3 (Fla. 1980) (citing *Frumkes v. Boyer*, 101 So. 2d 387 (Fla. 1958); *Vetzel v. Brown*, 86 So. 2d 138 (Fla. 1956); *Volunteer Security Co. v. Dowl*, 33 So. 2d 150 (Fla. 1947); *Osius*, 147 So. 862; *Burdine v. Sewell*, 109 So. 648 (Fla. 1926); *Armstrong v. Seaboard Air Line Ry.*, 95 So. 506, 510 (Fla. 1922) (Whitfield, J., dissenting); *Fiore*, 993 So. 2d at 1052–53 (“[I]t is not necessary that a restrictive covenant be reciprocal when the division of property was not made pursuant to a general scheme or plan. Rather, the restrictive covenant in this case was an agreement creating a negative easement or equitable servitude.”); *Thompson v. Squibb*, 183 So. 2d 30 (Fla. 2d DCA 1966); *Batman v. Creighton*, 101 So. 2d 587 (Fla. 2d DCA 1958); *Maule Indus., Inc. v. Sheffield Steel Prods., Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958); RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 24.04, at 579–80 (1977).

<sup>65</sup> *See Homer v. Dadeland Shopping Ctr., Inc.*, 229 So. 2d 834, 836 (Fla. 1969) (“An easement of way is essentially an inherently legal interest in land, as distinguished from a restriction resulting from a restrictive covenant, which is but a creature of equity arising out of contract.”); *Wahrendorff*, 93 So. 2d at 722 (*en banc*) (“[R]estrictive covenants [on a plat] . . . will be recognized and enforced when established by contract between the parties involved. . . . [U]pon a severance of title by the grant of one or more lots according to the plat and by reference thereto, the restriction then springs into existence and becomes binding as between the subdivider and his purchasers and as between the purchasers inter sese.”); *Fiore*, 993 So. 2d 1053 (“[T]he restrictive covenant in this case was an agreement creating a negative easement or equitable servitude . . . which was contractual in nature.”).

<sup>66</sup> *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 307 (Fla. 2d DCA 1966).

<sup>67</sup> *Id.*



on whether the covenant is to be construed as running with the land.”<sup>68</sup>

Furthermore, for private covenants, “it is not necessary that a restrictive covenant be reciprocal when the division of property was not made pursuant to a general scheme or plan,” as the restrictive covenant could instead be “an agreement creating a negative easement or equitable servitude . . . which was contractual in nature.”<sup>69</sup> Under Florida law, “covenants restraining the free use of realty are not favored.”<sup>70</sup> Florida courts will nonetheless enforce private covenants “to provide the fullest liberty of contract and the widest latitude possible in disposition of one’s property,” unless the covenants are “contrary to public policy” or “contravene any statutory or constitutional provisions,” and provided that “the intention is clear and the restraint is within reasonable bounds.”<sup>71</sup>

Private restrictive covenants are generally enforced by the private parties with rights in the covenant. Indeed, private restrictions can restrict the use or development of property even if the use or development would otherwise be permitted under applicable zoning regulations.<sup>72</sup> Restrictive covenants may be enforced in suits of equity by a party for whose benefit the restriction was established,<sup>73</sup> provided that the “subsequent grantee who

<sup>68</sup> *Id.*; see also *Nelle v. Loch Haven Homeowners’ Ass’n, Inc.*, 413 So. 2d 28, 29 (Fla. 1982) (“[A] remote grantee may enforce restrictive covenants against another remote grantee when a common grantor intended to create a uniform building plan or scheme of restrictions.”); *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Ass’n*, 245 So. 2d 609, 611 (Fla. 1971) (“Whether a restrictive agreement is technically one ‘running with the land’ is material in equity only on the question of notice, since if it runs with the land it is binding regardless of notice and, if not, the owner is bound only if he takes the land with notice.”).

<sup>69</sup> *Fiore*, 993 So. 2d 1052–53.

<sup>70</sup> *Hagan*, 186 So. 2d at 308–09.

<sup>71</sup> *Id.*; see also *Fiore*, 993 So. 2d at 1052–53 (holding that building restriction prohibiting structures over certain height near river enforceable even though property owner seeking enforcement did not have a reciprocal restriction, because building restriction was a “negative easement” imposed as a restrictive covenant as a condition of the sale of property); *Robins v. Walter*, 670 So. 2d 971, 974 (Fla. 1st DCA 1995) (holding that bed and breakfast inn in residential development violated deed restriction prohibiting ongoing business or commercial use of property and holding, “while we are aware that restrictive covenants should be narrowly construed, they should never be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction.”).

<sup>72</sup> *Wahrendorff v. Moore*, 93 So. 2d 720, 722 (Fla. 1957) (“As to the effect of the rezoning in cases such as this [to cancel contractual restrictive covenants], we are of the view that such action by an official body is admissible in evidence but it is not conclusive.”); *Staninger v. Jacksonville Expressway Auth.*, 182 So. 2d 483, 485 (Fla. 1st DCA 1966) (“It is well settled that the zoning or rezoning of real property cannot in any way abolish, abrogate or enlarge lawful contractual covenants and restrictions pertaining thereto.”); *Tolar v. Meyer*, 96 So. 2d 554, 555 (Fla. 3d DCA 1957) (“The zoning regulations of Dade County, Florida, did not abrogate the restrictions nor impair the lawful contract rights created thereby.”).

<sup>73</sup> *Osius v. Barton*, 147 So. 862, 865 (Fla. 1933) (“The rule is well established that where a covenant in a deed provides against certain uses of the property conveyed which may be noxious or offensive to the neighborhood, inhabitants, those suffering from a breach of such covenant, though not parties to the deed, may be afforded relief in equity upon a showing that the covenant was for their

seeks to enforce a restrictive covenant created by a common grantor against another subsequent grantee of a separate parcel of realty . . . show[s] that the covenant was intended to apply to both parcels.”<sup>74</sup> Thus, one resident of a subdivision subject to a restrictive covenant requiring a particular setback could obtain an injunction to prohibit a second resident from allowing the second resident’s home to encroach into the setback on the second resident’s property.<sup>75</sup>

In general, “interpretation of a contract or a covenant is a matter of law” that is governed by “the intentions of the parties,” the “best evidence” of which is the “plain language of the contract” or “covenant.”<sup>76</sup> Amendments to a private covenant are subject to a similar analysis, in that courts will look first to the express terms of the covenant as to how it may be amended.<sup>77</sup> Where there is a uniform plan of development, the enforceability of amendments is governed not only by the terms of the declaration but also by a test of “reasonableness,”<sup>78</sup> to ensure that “the reserved power be exercised in a reasonable manner so as not to destroy the general plan.”<sup>79</sup> But private covenants generally require that amendments or

benefit as owners of neighboring properties.”).

<sup>74</sup> *Rea v. Brandt*, 467 So. 2d 368, 369 (Fla. 2d DCA 1985).

<sup>75</sup> *Stephl*, 114 So. 455, 455 (Fla. 1927); *Batman v. Creighton*, 101 So. 2d 587, 590 (Fla. 2d DCA 1958) (“It was the view of the chancellor that the covenants were for the benefit of all the grantees and they could enforce them.”). *But see Finchum v. Vogel*, 194 So. 2d 49, 52 (Fla. 4th DCA 1966) (“The possibility of reverter on a condition subsequent is a personal right reserved to the grantor which may be enforced only by the grantor, its successors or assigns. It therefore necessarily follows that these so-called ‘restrictions’ may not be construed as covenants for the benefit of all grantees from the common grantor, and no grantee has any rights against any other grantee by way of enforcement which they would have in the absence of a reservation of a general power to modify and in the absence of a provision for reverter having the effect of a condition subsequent.”) (internal citations omitted).

<sup>76</sup> *Royal Oak Landing Homeowner’s Ass’n, Inc. v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993).

<sup>77</sup> *See, e.g., Holiday Pines Prop. Owners Ass’n, Inc. v. Wetherington*, 596 So. 2d 84, 87 (Fla. 4th DCA 1992) (looking to terms “within the contemplation of the grantor and the grantee” and “to the documents themselves” for authority to amend covenant); *Bay Island Towers, Inc. v. Bay Island-Siesta Ass’n*, 316 So. 2d 574, 575 (Fla. 2d DCA 1975) (affirming modification of restrictions to prohibit use of land for any use other than single-family dwelling, where modification was approved in accordance with modification clause of restriction providing that “restrictions, conditions, covenants and reservations may be modified, amended or entirely rescinded by and with the consent of the grantors, their heirs, assigns or representatives and a majority of the owners of lots in said subdivision”); *Gercas v. Davis*, 188 So. 2d 9, 11 (Fla. 2d DCA 1966) (“No release of the restrictions was obtained from the subdivider, or any of the residential lot owners in the subdivision. It would seem that under these circumstances a release or a modification of the restriction by the owners of the lots so restricted, so as to permit the sale of alcoholic beverages, would be a nullity.”).

<sup>78</sup> *Wetherington*, 596 So. 2d at 87.

<sup>79</sup> *Nelle v. Loch Haven Homeowners’ Ass’n, Inc.*, 413 So. 2d 28, 29 (Fla. 1982) (recognizing that “[t]here may be times . . . when the grantor reserves too much power or other factors support a finding that a common building plan was not intended.”); *Luani Plaza, Inc. v. Burton*, 149 So. 3d 712, 715 (Fla. 3d DCA 2014) (“The Fifth Amendment . . . comprises a reasonable exercise of the amending power of the Declaration. . . . It is true that a prohibition on ‘residential use’ is not among the 146 prohibited uses

releases be approved by all of the original parties, or their successors, unless the covenant specifies a different modification process.<sup>80</sup>

Because getting all of the property owners to agree to modify a private covenant may be impossible, either because the other owners will not agree

of the project in the Declaration. However, a cursory perusal of these prohibitions, especially when considered within the context of the entire document, leaves little doubt the scrivener had but one thing in mind—commercial use—at the time of drafting.”), *reh’g denied* (2014), *review denied*, 168 So. 3d 223 (Fla. 2015).

<sup>80</sup> *Tolar v. Meyer*, 96 So. 2d 554, 556 (Fla. 3d DCA 1957) (restriction against church use would be enforced despite acquiescence of owner-subdivider to use, because “such acquiescence could not and would not bind or waive the rights of the other parties to the agreement creating the restrictive covenants”); *see also In re Heatherwood Holdings, LLC*, 746 F. 3d 1206, 1218 (11th Cir. 2014) (“[B]ecause HGC did not represent every Heatherwood homeowner at the time the Agreement between HGC and FCB was entered, the implied restrictive covenant could not have been destroyed by the Agreement.”); *Wood v. Dozier*, 464 So. 2d 1168, 1170 (Fla. 1985) (“Where a purchaser of land intends to use it for a purpose not allowed by a restrictive covenant, he should seek to have the deed restriction removed before purchasing the property.”); *Luani Plaza, Inc. v. Burton*, 149 So. 3d 712, 715 (Fla. 3d DCA 2014) (“[T]he Fifth Amendment to the Declaration prohibiting residential use of the units . . . was properly adopted by the unit owners. Article X, Section 3 of the Declaration provides that it ‘may be amended at any time and from time to time upon execution and recordation of an instrument executed by the Owners holding not less than four-fifths of the voting interests.’”), *reh’g denied* (2014), *review denied*, 168 So. 3d 223 (Fla. 2015); *Essenson v. Polo Club Assocs.*, 688 So. 2d 981, 984 (Fla. 2d DCA 1997) (“[S]ince the agreement was not mutually modified, since any changes in conditions were as a result of the actions of Polo Club and since the covenant continues to provide benefits, the court erred in entering a summary judgment in favor of Polo Club and should have entered one in favor of Huntley Lane Associates.”); *Dolphins Plus, Inc. v. Hobdy*, 650 So. 2d 213, 214 (Fla. 3d DCA 1995) (“The fact that the heirs of the developers subsequently gave Dolphins Plus a lease for this purpose does not alter this result because, as a matter of law, the lease alone was not sufficient to release or terminate the plat restriction.”); *AC Assocs. v. First Nat’l Bank of Fla.*, 453 So. 2d 1121, 1130 (Fla. 2d DCA 1984); *Endruschat v. Am. Title Ins. Co.*, 377 So. 2d 738, 741 (Fla. 4th DCA 1979) (developer “cannot release any restrictions after the property encompassed by any such restrictions has been sold by him”); *Balzer v. Indian Lake Maint., Inc.*, 346 So. 2d 146, 147–48 (Fla. 2d DCA 1977) (affirming covenant that would “be automatically renewed for each ten year period [after January 1, 1966], unless owners of at least two-thirds of the lots in the subdivision known as Indian Lake Estates shall, at least six months prior to any such renewal date, agree in writing to a change in or an abrogation of any of the above covenants, and record such writing so amending the aforesaid covenants.”); *Field Properties, Inc. v. Fritz*, 315 So. 2d 101, 103 (Fla. 2d DCA 1975) (that subgrantee obtained control of grantor corporation and attempted to release deed restrictions was ineffective where deed did not reserve in grantor right to release restriction); *Johnson v. Three Bays Properties No. 2, Inc.*, 159 So. 2d 924, 925–26 (Fla. 3d DCA 1964) (“Appellants did not question appellee’s right to amend the declaration of protective covenants, without the consent of the appellants. . . . ‘Words and phrases used in contracts should be given the ordinary and commonly understood and accepted meaning.’ The word modify is commonly understood to mean alteration or change. Thus alteration or change is not restrictive, it may be characterized, in a quantitative sense, as either an increase or decrease.”); *Harwick v. Indian Creek Country Club*, 142 So. 2d 128, 129 (Fla. 3d DCA 1962) (“[T]he agreement of 1944 was unenforceable and void because of the failure of all the property owners in the subdivision to execute it. . . . Therefore, same did not operate to relax the restrictive single family residence restrictions within the subdivision which are still enforceable by the appellant.”) (citing *Tolar*, 96 So. 2d at 554); *Batman v. Creighton*, 101 So. 2d 587, 590 (Fla. 2d DCA 1958) (citing *Tolar* and holding that “covenants were for the benefit of all the grantees and they could enforce them”); *McCown v. Gottlieb*, 465 So. 2d 1120, 1123 (Ala. 1985) (agreement between grantors and one lot owner which purported to release the covenant prohibiting subdivision was ineffective and void).

or because they are so numerous that their signatures cannot feasibly be gathered,<sup>81</sup> the law recognizes other alternatives for these instruments. First, private covenants are governed by the “rule against unreasonable restraints on the use of property,” which “concerns restraints of such duration that they prevent the free alienation of property.”<sup>82</sup> Private restrictions are thus subject to “the test of reasonableness,” and “[t]he validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property.”<sup>83</sup> And because the law generally discourages restraints on the free use of real property, “substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant.”<sup>84</sup>

Equity also permits courts to consider changes in circumstance and to determine that it would be unfair to enforce a private covenant. A court of equity may “cancel a restrictive covenant in a deed as a cloud on title” where it finds that: restrictions “have come to an end because of circumstances that have arisen which would show that the purpose for which the restrictions were imposed have come to an end”; and “the use of the tract of land for whose benefit the restrictions were established has so utterly changed that no party . . . could be heard to enforce it in equity, or would suffer any damage by the violation of such restrictions.”<sup>85</sup> Thus, a court of equity could refuse to enforce private restrictions “where the equitable enforcement of building restrictions would be oppressive and unreasonable because of an entire change in the circumstances and in the neighborhood of the property, and the character of the improvements and the purposes to which they are applied.”<sup>86</sup>

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<sup>81</sup> See, e.g., *Wood*, 464 So. 2d at 1170; *Luani Plaza*, 149 So. 3d at 715; *Essenson*, 688 So. 2d at 984; *Dolphins Plus*, 650 So. 2d at 214; *AC Assocs.*, 453 So. 2d at 1130; *Endruschat*, 377 So. 2d at 741; *Field Properties*, 315 So. 2d at 103; *Three Bays Properties No. 2*, 159 So. 2d at 925–26; *Harwick*, 142 So. 2d at 129; *Batman*, 101 So. 2d at 590; *Tolar*, 96 So. 2d at 556; *McCown*, 465 So. 2d at 1123; *In re Heatherwood Holdings*, 746 F. 3d at 1218.

<sup>82</sup> *Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980).

<sup>83</sup> *Id.*; see also *Seagate Condo. Ass’n, Inc. v. Duffy*, 330 So. 2d 484, 485 (Fla. 4th DCA 1976) (“Our courts have traditionally undertaken to determine the validity of restraints by measuring them in terms of their duration, type of alienation precluded, or the size of the class precluded from taking.”).

<sup>84</sup> *Washingtonian Apartment Hotel Co. v. Schneider*, 75 So. 2d 907, 909 (Fla. 1954) (reversing injunction to enforce restriction that was ambiguous); *Moore v. Stevens*, 106 So. 901, 904 (Fla. 1925).

<sup>85</sup> *Osius*, 147 So. at 865.

<sup>86</sup> *Edgewater Beach Hotel Corp. v. Bishop*, 163 So. 214, 216 (Fla. 1935). In *Edgewater Beach Hotel Corp.*, the Florida Supreme Court reversed an injunction enforcing a restrictive covenant to prohibit the construction of a hotel on Ocean Drive in Miami Beach. The court noted that “the restrictions were written at a time when the city of Miami Beach was a small village of between 500 and 1,000 people” but that the population was then “something like 20,000 people.” Moreover, when Ocean Drive was widened, little attention was paid to the deed restrictions, and buildings were erected indiscriminately. Additionally, “[t]hose lots, which were evidently designed to accommodate the most modest sort of a dwelling to cost around \$1,500, are now of such value that to erect such a dwelling on

Cancellation of a private covenant is nevertheless an extraordinary remedy. The test to determine whether a private restriction remains enforceable is

whether or not the original purpose and intention of the parties to such covenant can be reasonably carried out, in the light of alleged material changes which are claimed to have effectually frustrated their object without fault or neglect on the part of the one who seeks to be relieved of their observance;

this test is rooted in “the principle of contract law known as discharge of contractual obligation by frustration of contractual object.”<sup>87</sup> Moreover, judicial modification or cancellation of privately negotiated property restrictions is generally disfavored, because “[s]ubstantial uncertainty for property owners as to rights and obligations would . . . result . . . if courts, at the instance of a suing property owner and over the objection of adjacent property owners, could modify or cancel a . . . property restriction.”<sup>88</sup>

Once imposed, private covenants can be difficult to dislodge without expending significant resources to either obtain the approval of all affected

them would be to indulge in utter foolishness.” Because “[t]he conditions have entirely changed since the plat was made and the lots sold by the developers of the subdivision,” the complainant’s remedy would not be to enforce the restriction but would at most be in an action at law to recover damages for the alleged breach of the covenant. *Edgewater Beach Hotel Corp.*, 163 So. at 216. *But see Allen v. Avondale Co.*, 185 So. 137, 138 (Fla. 1938) (“The changes shown to have taken place would ordinarily be sufficient to grant relief from enforcing the covenants but it is shown that all these changes took place before Appellant purchased his lot; he was therefore on notice of them and all but one were in another subdivision.”); *Wood v. Dozier*, 464 So. 2d 1168, 1169 (Fla. 1985) (affirming continued vitality of *Avondale* holding “that where the owner of property who seeks relief from the enforcement of restrictive covenants shall be denied the relief sought when he is on notice that all material changes in the neighborhood occurred prior to his purchase of the property”).

<sup>87</sup> *Osius*, 147 So. at 862; *Acopian v. Haley*, 387 So. 2d 999, 1001 (Fla. 5th DCA 1980) (citing *Barton v. Moline Properties, Inc.*, 164 So. 551 (Fla. 1935)). Restrictive covenants that do not appear on the face of a deed, or in a plat referenced in a deed, may also be subject to extinguishment after 30 years under Florida’s Marketable Record Titles to Real Property Act (MRTA), Ch. 712, Fla. Stat. (2017). *Martin v. Town of Palm Beach*, 643 So. 2d 112, 114–15 (Fla. 4th DCA 1994) (“[T]he 1957 deed is the root of title, as well as the only muniment of title. . . . [T]he 1957 deed does not contain the use restriction set forth in the 1948 deed, but instead only generally states that the conveyance is subject to easements, covenants, limitations, reservations, and restrictions of record. Because this language fails to comport with the requirements of section 712.03(1), the use restriction contained in the 1948 deed has not been preserved.”).

<sup>88</sup> *AC Assocs.*, 453 So. 2d at 1130 (“Substantial uncertainty for property owners as to rights and obligations would, we believe, result under circumstances like this if courts, at the instance of a suing property owner and over the objection of adjacent property owners, could modify or cancel a commercial (or residential) property restriction on the basis that it is unreasonable by reason of a different type of commercial (or residential) use planned by the suing property owner. This would especially appear to be the case when, as here, the commercial uses of the adjacent property, which is the only other property covered by the restriction, have remained the same. As a general rule, property owners accommodate to property restrictions, not vice versa.”).

property owners or to seek judicial modification or cancellation. For private covenants, this may well be a feature, not a bug. But, for covenants involving the public zoning process, it poses significant challenges.

### III. SPECIAL CONSIDERATION FOR ZONING COVENANTS

Restrictive covenants accepted through the zoning process present unique considerations.<sup>89</sup> First, as the First District determined, covenants involving government are not mere legal instruments, but are, rather, solemn promises to its citizenry:

In dealing with its citizenry, the Government is required to adhere to the same strict rule of rectitude of conduct and the turning of the same square corner as the Government requires of its citizens. . . . Just as one by deep deliberation may not add “one cubit unto his stature,” even so, the Government through the convenient process of legislative enactment may not render ineffective by “one jot or one tittle,” its solemn covenant with its citizenry.<sup>90</sup>

Second, and more significantly, restrictive covenants accepted by a zoning authority become something more than solemn promises: they become law.<sup>91</sup> Thus, zoning covenants not only observe the formalities of

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<sup>89</sup> This article focuses on restrictive covenants related to rezonings, but governments accept restrictive covenants with other zoning actions such as unusual uses, special exceptions, and variances, and in other regulatory contexts as well. For example, Miami-Dade County environmental regulations permit development of properties containing ecologically sensitive wetlands, subject to restrictions to mitigate the environmental impacts of the development. See Ch. 24, Art. IV, Div. 1, Code of Miami-Dade County, Fla. One of the mitigation mechanisms the County may employ is to require the owner to execute a mitigation covenant over a portion of the property to be developed. Such covenants “restrict development or alteration of the property to a designated portion of the property and may include conditions for the environmental protection and environmental management of designated portions of the property,” and may only be released or modified with the approval of the County. §§ 24-48.2(I)(B)(2)(b), 24-48.2(II)(B)(10)(c), Code of Miami-Dade County, Fla. Such mitigation is proffered pursuant to Florida law when an application for development does not otherwise meet the State’s criteria. See, e.g., § 373.414(1)(b), Fla. Stat. (2017) (“If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.”); § 373.414(8)(b), Fla. Stat. (2017); Fla. Admin. Code R. 62-345.100–62-345.600.

<sup>90</sup> *Okaaloosa Island Leaseholder’s Ass’n v. Hayes*, 362 So. 2d 101, 103 (Fla. 1st DCA 1978) (quoting *Matt. 5:19, 6:27* (King James) and citing *Daniell v. Sherrill*, 48 So. 2d 736, 739 (Fla. 1950)).

<sup>91</sup> *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910, 915 (Fla. 3d DCA 2016) (“The restrictive zoning covenant sealed the intent and objectives of the County’s regulation of the golf course property. This Court has determined that a ZAB resolution, containing a restrictive covenant,

private covenants, but also the law accords them a special status befitting of their creation and acceptance as local laws. Courts should thus give the same level of deference to zoning covenants as they give to other regulations.<sup>92</sup>

In *Metropolitan Dade County v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006 (Fla. 3d DCA 1990), the Third District explained the legal status of covenants accepted in conjunction with zoning approvals. In that case, the property owners had nearly completed constructing a gas station when the County discovered that it had issued the permit in error: the resolution rezoning the property to a commercial district had been approved subject to acceptance of a covenant restricting the use of the property to a bank or savings and loan.<sup>93</sup> Indeed, the covenant had never been recorded, but the rezoning resolution “clearly expressed that the county commission granted rezoning only for a bank or savings and loan.”<sup>94</sup> The Court held that property owners have constructive notice of the generic zoning regulations in the applicable zoning ordinances, the zoning resolutions adopted for the specific property and, significantly, the terms of covenants accepted in connection with zoning resolutions: “[T]he public is on notice that . . . [zoning] resolutions which are passed subsequent to public hearing can modify districts and restrict property use; and that the rights of property owners can thus be limited.”<sup>95</sup> The court further held that it was “illegal” to violate the terms of the zoning covenant, thereby recognizing that zoning resolutions and attendant conditions or covenants are, in effect, local laws.<sup>96</sup>

An earlier Third District decision explored the interplay between the law governing restrictive covenants and the law of zoning. In *Norwood-Norland Homeowners’ Ass’n, Inc. v. Dade Cty.*, 511 So. 2d 1009 (Fla. 3d DCA 1987), the court heard an appeal from a decision to rezone certain property around Dolphin Stadium, and to release that property from a previously-accepted zoning covenant. The covenant, accepted by the County in 1977, restricted the property to lower density uses like a park or a school, and contained the following modification clause:

This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple

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constitutes a governmental regulation with the force of law.”); *Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990) (“Such a restriction on the property’s use which was made in the public interest became binding upon the property,” and violation of the covenant’s use restriction “would be illegal.”).

<sup>92</sup> See *infra* Part IV.

<sup>93</sup> *Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990).

<sup>94</sup> *Id.* at 1007–08.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.<sup>97</sup>

The petitioners contended that the County had not followed the terms of the covenant in approving the rezoning, because the County had allowed the developers to reduce the rezoning area and thereby eliminate the need to seek consent from property owners beyond that reduced radius.<sup>98</sup> The petitioners also contended that the County had violated the majority vote requirement, because it allowed affected property owners to vote based on the number of parcels they owned; they contended that it should have been one vote per owner, not one vote per parcel.<sup>99</sup>

Notably, the court considered the covenant issue as part of the zoning appeal, not in an original action seeking enforcement of the covenant. But, while the issue arose in an appeal of the zoning resolution, the court nevertheless looked principally to the express terms of the modification clause in the covenant. The court held that “drawing the lines in by 351 feet to obtain a majority vote [was] in full compliance with the restrictive covenant,” as the modification clause allowed for the covenant to be released as to only a portion of the subject property.<sup>100</sup> As for the tabulation of majority votes, the court looked to Florida law on private restrictive covenants, which held that private covenants are to be “strictly construed in favor of the free and unrestricted use of property” and that ambiguous terms are to be “resolved against the party claiming the right to enforce the restriction.”<sup>101</sup> The court observed that “the provisions for release of the restrictive covenant are susceptible to different interpretations” and that there “was no evidence in the record as to the parties’ intentions in drafting the covenant.”<sup>102</sup> The court affirmed tabulation as one vote per parcel, because, under those facts, that interpretation was “consistent with the

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<sup>97</sup> *Norwood-Norland Homeowners’ Ass’n, Inc. v. Dade Cty.*, 511 So. 2d 1009, 1011 (Fla. 3d DCA 1987).

<sup>98</sup> *Id.* at 1013.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1014.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



pronounced policy against land restrictions.”<sup>103</sup> But the latter was a curious conclusion, because, had several owners of multiple parcels instead been against the change, then, under the court’s interpretation, the result would have been to defeat the change and to retain the land restrictions.

*Norwood-Norland* is significant because it showed the court recognizing the hybrid nature of zoning covenants: the covenant’s specific terms may be reviewed by analogy to the standards applicable to private restrictive covenants, but that review takes place within the process for review of zoning actions. This method of reviewing a regulatory zoning covenant is consistent with the principles that regulatory covenants are a form of local law<sup>104</sup> and, as local laws, are entitled to the deference afforded to local regulations under the police power.<sup>105</sup>

The Third District further examined the interplay between the law governing private covenants and the law of zoning in its *en banc* opinion in *Metro. Dade Cnty. v. Sunlink Corp.*, 642 So. 2d 551 (Fla. 3d DCA 1992). *Sunlink* concerned a 1974 covenant recorded by AT&T to induce the County to rezone its property from residential use to light industrial use.<sup>106</sup> Because the subject property was surrounded by residential uses, the covenant restricted the industrially-zoned properties so that the property could only be conveyed to “entities owned, controlled by, or affiliated with the Owner [AT&T].”<sup>107</sup> The covenant further provided that the restrictions would run for thirty years, with automatic ten-year extensions,

unless an instrument signed by a majority of the then owner(s) of the real property and a majority of those within 500 feet of the boundary of the property has been recorded, agreeing to change the covenants in whole or in part, providing the covenants have first been released by the Commission.<sup>108</sup>

In 1989, the nature of the telecommunications industry had changed so significantly that *Sunlink*, which had received the property from the divestiture of AT&T, no longer needed the property and sought to sell it—but the zoning covenant impeded the sale.<sup>109</sup> Rather than pursuing a zoning application in compliance with the modification clause, as was done in *Norwood-Norland*, *Sunlink* filed a declaratory judgment action seeking to

<sup>103</sup> *Norwood-Norland Homeowners’ Ass’n, Inc. v. Dade Cty.*, 511 So. 2d 1009, 1014.

<sup>104</sup> *Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990).

<sup>105</sup> See *infra* Part IV.

<sup>106</sup> *Metro. Dade Cty. v. Sunlink Corp.*, 642 So. 2d 551, 551 (Fla. 3d DCA 1992), *on reh’g* (Feb. 2, 1993).

<sup>107</sup> *Id.* at 551–52.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 552.

invalidate the covenant based on changed circumstances and unreasonable restraint of alienation<sup>110</sup>—theories that can be used to extinguish private restrictions.<sup>111</sup> The trial court had granted judgment in favor of Sunlink, but the Third District reversed.

The appellate court considered the factors for unreasonable restraint claims—namely the duration of the restraint, the type of alienation precluded, and the size of the precluded class.<sup>112</sup> The court determined the term to be reasonable, because it was subject to cancellation or modification with the written consent of the neighbors. As to the type of alienation precluded, the court—relying on *Fontainebleau Gas & Wash*—held that “unmarketability” was not the proper consideration for a covenant “created and recorded to preserve the nature of the neighborhood and to induce the county to change the zoning classification.”<sup>113</sup> The court further held that the covenant “continues to preserve the character of the neighborhood and is therefore ‘reasonable when judged in view of the justifiable expectations of the parties.’”<sup>114</sup> Finally, as to the size of the precluded class, the Court held that it was not unlimited or absolute—and therefore not unreasonable—because if AT&T or Sunlink “wish[ed] to remove or modify the restrictive covenant, they can follow the steps outlined in the Declaration of Restrictive Covenants.”<sup>115</sup> The *en banc* panel thus directed Sunlink “to seek release from the covenant by the mechanism prescribed in the covenant itself,”<sup>116</sup> namely the zoning process and the neighbors’ written consents.

Especially noteworthy about *Sunlink* is the Court’s reliance on the zoning purpose of the covenant within the traditional framework for equity review of private covenant modifications. The covenant could be subject to further attack, but that challenge would likely have to originate in an appeal of a zoning decision implicating the terms of the covenant, as was done in *Norwood-Norland*.

The interplay between private covenant law and zoning law is further illustrated in the recent decision of *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910, 916 (Fla. 3d DCA 2016), *reh’g denied* (June 6, 2016), *review denied*, SC16-1189, 2016 WL 7474142 (Fla. Dec.

<sup>110</sup> *Id.*

<sup>111</sup> *See supra* Part II.

<sup>112</sup> *Sunlink Corp.*, 642 So. 2d at 551, 553–56 (Jorgenson, J., dissenting; adopted as the opinion of the *en banc* court).

<sup>113</sup> *Id.* at 553–56 (Fla. 3d DCA 1992) (Jorgenson, J., dissenting; adopted as the opinion of the *en banc* court).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 556.

29, 2016). That case concerned, not a rezoning, but an “unusual use” zoning approval for a golf course and country club use. Consistent with *Hartnett*, that is the type of site-specific application that could be subject to site-specific conditions (without a covenant) without constituting either contract zoning or conditional zoning.<sup>117</sup> A covenant would therefore not have been necessary. But, in that context, covenants serve to further solemnize the applicant’s representations to induce approval. They also serve as a form of super-notice to anyone acquiring an interest in the property, because the covenant is recorded in the public records and should be found in a search of the property’s chain of title.<sup>118</sup> The analysis in *Save Calusa Trust* is nevertheless instructive, because the terms of the *Calusa* covenant are similar to those of covenants that have accompanied rezonings.<sup>119</sup>

In *Calusa*, one of the conditions in the zoning resolution was “[t]hat restrictive covenants running with the land in proper covenant form, meeting with the approval of the Zoning Director, be recorded to ensure that the golf course be perpetually maintained as such.”<sup>120</sup> The covenant that the developer recorded in 1968 provided:

The aforescribed property may only be used for the following purposes:

A golf course and for the operation of a country club which may include a clubhouse, pro shop, locker rooms, swimming pools, cabanas, liquor, beer and wine facilities, dining room facilities, parking, tennis courts, putting greens, golf driving ranges and all other uses incidental thereto.

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<sup>117</sup> *Hartnett v. Austin*, 93 So. 2d 86, 90 (Fla. 1956) (“[T]he applicant [ ] was not appealing to a Board of Adjustment for a variance on the basis of any hardship. . . . What we have here held might not be applicable to a proper application for a variance by an owner based on hardship.”). Zoning covenants are not just used with rezonings. They may be used with other types of applications, such as variances, special exceptions, and unusual uses. Consistent with *Hartnett*, those types of zoning actions may be subject to special conditions, so a covenant would not be necessary. But, in that context, covenants serve to further solemnize the applicant’s representations to induce approval. They also serve as a form of super-notice to anyone acquiring an interest in the property, because the covenant is recorded in the public records and should be found in a search of the property’s chain of title. See *First Am. Title Ins. Co. of St. Lucie Cty., Inc. v. Dixon*, 603 So. 2d 562, 564 (Fla. 4th DCA 1992) (“By statute, the clerk is required to record, index, and maintain documents relating to real property in the public records.”); § 28.222, Fla. Stat. (2017).

<sup>118</sup> See *First Am. Title Ins. Co. of St. Lucie Cty., Inc. v. Dixon*, 603 So. 2d 562, 564 (Fla. 4th DCA 1992) (“By statute, the clerk is required to record, index, and maintain documents relating to real property in the public records.”); § 28.222, Fla. Stat. (2017).

<sup>119</sup> See, for example *Sunlink Corp.*, 642 So. 2d at 551 and *Norwood-Norland Homeowners’ Ass’n, Inc. v. Dade Cty.*, 511 So. 2d at 1009.

<sup>120</sup> *Save Calusa Trust*, 193 So. 3d at 912.

These restrictions shall continue for a period of ninety-nine years unless released or revised by the Board of County Commissioners of the County of Dade, State of Florida, or its successors with the consent of 75% of the members of the corporation owning the aforescribed property and those owners within 150 feet of the exterior boundaries of the aforescribed property.<sup>121</sup>

In 2012, the successor owners of the golf course sought to redevelop it but were unable to obtain the required consents of the surrounding homeowners.

When County staff determined that a zoning application could not be processed until the owners obtained the homeowners' consents, the owners filed a quiet title action seeking to, among other claims, invalidate the zoning covenant under Florida's Marketable Record Title Act ("MRTA"). The owners claimed that the zoning covenant was an "estate or interest in, or a claim or charge to, title to real property," and could therefore be extinguished under MRTA without following the zoning process.<sup>122</sup> The Third District rejected this argument. Instead, the court determined that a zoning covenant is a form of zoning regulation, not an encumbrance on or defect that affects the marketability of title to real property, and it is thus not subject to MRTA.<sup>123</sup> Still at issue is whether the covenant remains enforceable under the analysis conducted in *Sunlink* and *Norwood-Norland*. Consistent with those decisions, the Third District provided a framework for further analysis in the zoning context; the court noted that "whether changed circumstances exist to warrant cancellation of the covenant and whether the covenant constitutes an unlawful restraint on alienation" could be "addressed as matters preliminary to a proposed re-zoning."<sup>124</sup> Left unspecified is: whether that determination could be made through a zoning resolution appealed through the certiorari review process for quasi-judicial decisions;<sup>125</sup> or whether that determination must be made by a trial court in

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 911.

<sup>123</sup> *Id.* at 912. In the 2017 legislative session, the Florida Legislature considered a bill to add zoning covenants to the list of interests extinguished by MRTA. See H.B. 735, 2017 Leg., Reg. Sess., (Fla. 2017); S.B. 1046, 2017 Leg., Reg. Sess. (Fla. 2017). But the bill was not adopted, so the *Save Calusa Trust* decision remains the final word on this issue.

<sup>124</sup> *Save Calusa Trust*, 193 So. 3d at 916 n.12.

<sup>125</sup> See Fla. R. App. P. 9.100(c)(2); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) ("Although termed 'certiorari' review, review at this level is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal."); *Norwood-Norland Homeowners' Ass'n*, 511 So. 2d at 1011. *But cf. Baker v. Metro. Dade Cty.*, 774 So. 2d 14, 19, 20 n.13 (Fla. 3d DCA 2000) (holding that a quasi-judicial board cannot modify the application of the comprehensive plan to a zoning application on grounds of fundamental fairness—even where the ordinance governing the comprehensive plan references the need to consider fundamental fairness when

a declaratory action.<sup>126</sup>

One thing is clear, based on the zoning covenants whose enforceability was affirmed in *Norwood-Norland*, *Fontainebleau Gas & Wash*, and *Sunlink*: covenants can lawfully be used to tailor a rezoning to the surrounding neighborhood. But that method of tailoring comes with additional complexities. In a straightforward zoning matter, an application is filed, a hearing is held, interested parties can make their views heard, the government makes a decision, and an appellate court can review it. Covenants insert novel ownership and consent issues into that process, by also subjecting the decision to the consent of interested parties whose consent might not otherwise be required for rezoning application.<sup>127</sup>

It would be better for Florida to simply allow conditional rezoning, so that zoning boards have a greater range of options to address the impacts of redevelopment and balance the property rights of zoning applicants with the property rights of neighbors. If conditional rezoning were explicitly

applying the comprehensive plan—because “[f]undamental fairness’ questions are judicial ones, within the jurisdiction of the courts”; and an administrative agency has no power “to determine the illegality or unconstitutionality of legislation,” namely the comprehensive plan provisions that apply to the property); *Dade Cty. v. Overstreet*, 59 So. 2d 862, 865 (Fla. 1952) (“The proposed location of a liquor store . . . or similar questions under the Statutes or under zoning ordinances or resolutions of a County or City, should be challenged on the ground that such Statutes, ordinances or resolutions with reference thereto are illegal or unconstitutional; the same should not and cannot be adjudicated by the Beverage Director . . . as these are clearly judicial questions for determination by the Circuit Courts under Section 11 of Article V of the Constitution of Florida, F.S.A.”).

<sup>126</sup> See *Sunlink Corp.*, 642 So. 2d at 553–56. Declaratory judgment claims seeking to invalidate the *Calusa* covenant on grounds of “unlawful restraint on alienation” and of “material change in circumstance” remain pending in the underlying litigation. Amended Complaint, *St. Andrews Holdings, Ltd. v. Morot-Gaudry*, No. 12-33641 (Fla. 11th Cir. Ct. Oct. 29, 2012).

<sup>127</sup> Covenants requiring the consent of neighbors have been repeatedly affirmed and given the status of local laws, see *supra* Part III, but no case has specifically addressed the interaction between a local law that subjects modification or release to the approval of third parties and either the general prohibition on unlawful delegations of the police power, see *supra* note 29, or the First Amendment right “to complain to public officials and to seek administrative and judicial relief from their actions,” *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F. 3d 83, 91 (2d Cir. 2002). On the other hand, Florida courts have consistently affirmed, as complying with due process, zoning regulations that require zoning approvals to be submitted to the voters in a referendum. See, e.g., *Fla. Land Co. v. City of Winter Springs*, 427 So. 2d 170, 174 (Fla. 1983) (“The wisdom of this decision may be questioned in that all zoning changes made in this fashion are subject to the whims of a referendum and to the vicissitudes of the electorate. The other side of the coin is that this is a power that the people have reserved. If the people of Winter Springs choose to give up the power and pass it over solely to a zoning body, that they may do. But that they have not done, and this Court cannot and will not do it for them.”); *Vill. of Palmetto Bay v. Alexander Sch., Inc.*, 3D16-1201, 2017 WL 1018495, at \*3 (Fla. 3d DCA Mar. 15, 2017) (“Charter provisions such as Section 10.1 that allow some decisions to be made by voter referendum do not violate due process rights.”). As such, a covenant requiring the approval of neighbors within a certain radius could be construed as the equivalent of a referendum requirement, albeit of only a segment of the electorate; cf. Miami-Dade County Home Rule Charter, § 7.02 (providing for referendum on lease or disposition of mini or neighborhood park and requiring affirmative vote by “a majority of the residents residing in voting precincts any part of which is within 1 mile of the park [to] authorize such sale or lease by majority vote in an election.”).

allowed, then, as explained below, the current law governing judicial review of rezoning decisions would provide sufficient protection against the arbitrary and capricious use of the police power that had concerned Florida courts when they limited conditional rezoning.

#### IV. ZONING DECISIONS AS QUASI-JUDICIAL ACTS

Zonings and rezonings were historically the only zoning actions to have been considered legislative acts. But zoning boards also consider applications for variances, conditional uses, special exceptions, unusual uses, and other exceptions, reviews, and interpretations of zoning ordinances. The Florida Supreme Court had distinguished rezonings from variances or exceptions as follows: “rezoning ordinarily contemplates a change in existing zoning rules and regulations within a district, subdivision or other comparatively large area in a given governmental unit, which theretofore has been uniformly zoned in its entirety.”<sup>128</sup> By contrast, “the granting of a variance or exception usually contemplates only . . . permitting a non-conforming use in order to alleviate undue burden or ‘unnecessary hardship’ upon the property owner which the zoning rules and regulations otherwise impose.”<sup>129</sup> And *Hartnett* further recognized that flexibility, and hence site-specific conditions, could be appropriate in the context of applications “appealing to a Board of Adjustment for a variance on the basis of any hardship” rather than “seeking an outright change in the zoning ordinance by amendment.”<sup>130</sup>

These other types of zoning actions—in contrast to zonings and rezonings—have always been considered “quasi-judicial.”<sup>131</sup> A quasi-judicial proceeding is an administrative or local board proceeding in which the board’s action is contingent on notice, an opportunity to be heard, the presentation of evidence, and a requirement that the board’s judgment be based on the showing made at the hearing.<sup>132</sup> Moreover, unlike legislative

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<sup>128</sup> *Troup v. Bird*, 53 So. 2d 717, 720 (Fla. 1951).

<sup>129</sup> *Id.*

<sup>130</sup> *Hartnett v. Austin*, 93 So. 2d 86, 90 (Fla. 1956); see also *J. C. Vereen & Sons, Inc. v. City of Miami*, 397 So. 2d 979, 983 (Fla. 3d DCA 1981) (“Where, however, as here, a party seeks a variance and not a change or amendment in the zoning ordinance and there is no contracting away of police power, the deed or contract will be upheld.”).

<sup>131</sup> See, e.g., *Sun Ray Homes, Inc. v. Dade Cty.*, 166 So. 2d 827, 829 (Fla. 3d DCA 1964) (“In the instant case the action of the Board of County Commissioners was clearly quasi-judicial because it was a review of an interpretation and application of an ordinance by the Zoning Appeals Board. The ordinance in question is valid as applied to the facts of this case.”); *Alachua County v. Eagle’s Nest Farms, Inc.*, 473 So. 2d 257, 260 (Fla. 1st DCA 1985) (“Since the special use permit, as defined by the zoning regulations, is more analogous to a special exception than a rezoning, the denial or issuance of a special use permit is essentially an administrative function [rather than a legislative function].”).

<sup>132</sup> *De Groot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957) (*en banc*) (holding that Civil Service

matters, lobbying of board members on quasi-judicial matters is generally prohibited for the same reasons that *ex parte* communications would be prohibited in a court of law.<sup>133</sup>

Quasi-judicial actions are distinguished both from purely executive actions—in which decisions are, with certain exceptions, not subject to a hearing or to judicial review<sup>134</sup>—and from legislative actions—which often involve the establishment of a general policy and which do not require sworn testimony or evidence or a closed record presented at a hearing.<sup>135</sup> These distinctions among executive, legislative, and quasi-judicial functions are rooted in the Constitutional separation of powers.<sup>136</sup> The Florida Supreme Court has admonished courts to refrain from interfering in the actions of a co-equal branch of government: “Promiscuous intervention by the courts in the affairs of these administrative agencies except for most urgent reasons would inevitably result in the dethronement of the commissions and the substitution of the courts in their place and stead.”<sup>137</sup> The Florida Supreme Court has further pronounced, “Judicial intervention

Board termination proceeding was quasi-judicial).

<sup>133</sup> *Jennings v. Miami-Dade Cty.*, 589 So. 2d 1337, 1341 (Fla. 3d DCA 1991) (citations omitted) (“Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. . . . However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. Nevertheless, we hold that the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action. Upon the aggrieved party’s proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence.”). In response to that decision, the Florida Legislature adopted section 286.0115, Florida Statute, which purports to “remov[e] the presumption of prejudice from ex parte communications.” No court has directly reviewed that statute, but at least one court called into doubt the constitutionality of a municipal ordinance adopted pursuant to section 286.0115 that purported to remove the presumption of prejudice for *ex parte* communications. See *Palmer Trinity Private Sch., Inc. v. Vill. of Palmetto Bay, Florida*, 802 F. Supp. 2d 1322, 1326 (S.D. Fla. 2011) (noting that a municipal ordinance that “creates a scheme that is directly contrary to the framework laid out in *Jennings*. . . has never been interpreted by Florida courts, and it is unclear if [the ordinance] stands up to Florida constitutional scrutiny in light of *Jennings*.”).

<sup>134</sup> *De Groot*, 95 So. 2d at 916 (providing an example of non-reviewable, “purely executive” judgment as removal of an employee from office “where one holds office at the pleasure of the appointing power and the power of appointment is coupled with the power of removal contingent only on the exercise of personal judgment by the appointing authority”).

<sup>135</sup> See *Harris v. Goff*, 151 So. 2d 642, 645 (Fla. 1st DCA 1963); see *Bd. of Cty. Comm’rs of Brevard Cty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993).

<sup>136</sup> At the local government level, the separation of powers doctrine relates to the relationship between the local government and the judiciary, not an internal separation of powers within the local government itself. For counties and municipalities, the constitutional doctrine of a separation of powers between the executive and legislative *branches* of government does not exist. See *Citizens for Reform v. Citizens for Open Gov’t, Inc.*, 931 So. 2d 977, 989 (Fla. 3d DCA 2006) (“[T]he concept of Constitutional separation of powers simply does not exist at the local government level.”) (citations omitted).

<sup>137</sup> *Otham v. Foremost Dairies, Inc.*, 128 So. 2d 586, 593 (Fla. 1961).

in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.”<sup>138</sup>

Appellate review of quasi-judicial decisions respects the separation of powers, albeit in a different application than the “fairly debatable” standard that governs review of legislative actions. Quasi-judicial decisions are reviewed by petition for writ of certiorari. “[T]he reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination.”<sup>139</sup> Instead, the appellate court “merely examines the record below” to determine whether the lower tribunal provided procedural due process, acted in accord with “the essential requirements of the law,” and “had before it competent substantial evidence to support its findings and judgment.”<sup>140</sup> “Competent substantial evidence” means “that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.”<sup>141</sup>

Over the years, the Florida Supreme Court clarified the scope of certiorari review of quasi-judicial local government decisions: “Although termed ‘certiorari’ review, review at this level is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal.”<sup>142</sup> The review is plenary in that the court must review the matter and not simply decline to exercise discretionary jurisdiction.<sup>143</sup> But the court does not actually decide the underlying merits of the controversy: the court may at most quash the administrative order and “leave the subject matter, that is, the controversy pending before the tribunal, commission, or administrative authority, as if no order or judgment had been entered.”<sup>144</sup>

Because rezonings were long considered legislative, the only process that was due was the process attendant to the adoption of ordinances or

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<sup>138</sup> *Key Haven Associated Enter., Inc. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982) (emphasis added); see also *Pushkin v. Lombard*, 279 So. 2d 79, 81 (Fla. 3d DCA 1973) (citing *Odham* and reversing trial court that “allowed the plaintiffs to by-pass and interfere with the orderly administrative proceedings of the ‘Board’” because plaintiffs are required “to exhaust their administrative remedies before attempting to invoke the scrutiny of the court”).

<sup>139</sup> *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000).

<sup>143</sup> *Id.*

<sup>144</sup> *Tamiami Trail Tours v. R.R. Comm’n*, 174 So. 451, 454 (Fla. 1937) (“The appellate court has no power when exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration, nor to direct the respondent to enter any particular order or judgment.”).



resolutions generally.<sup>145</sup> But in the late 1980s and early 1990s, questions arose as to the true nature of a rezoning hearing and the procedural and judicial review standards that should apply to it.<sup>146</sup> Finally, in the landmark ruling of *Board of County Commissioners of Brevard County v. Snyder*, the Florida Supreme Court resolved the issue. The court decided that rezonings that

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 considered to be “quasi-judicial action,” and such rezoning actions are “properly reviewable by petition for certiorari.”<sup>147</sup>

Furthermore, the courts’ historic concerns for the “uniformity” of a zoning scheme<sup>148</sup> are largely addressed by the statutory requirement that all local governments adopt a comprehensive plan with a future land use plan

<sup>145</sup> But, in Miami-Dade County, rezonings had long been treated as quasi-judicial applications, based on the County’s unique procedure of taking action on rezonings by resolution rather than by ordinance. See *Baker v. Metro. Dade Cty.*, 237 So. 2d 201, 202 (Fla. 3d DCA 1970) (“The commission’s procedure, i.e., utilizing the resolution as a means of denying the request for rezoning, is quasi-judicial in nature and certiorari was the proper remedy for review of such quasi-judicial proceeding.”) (citing *Harris v. Goff*, 151 So. 2d 642 (Fla. 1st DCA 1963)); *Metro. Dade Cty. v. Greenlee*, 213 So. 2d 485, 486 (Fla. 3d DCA 1968) (“Such a separate suit would not be appropriate to review the resolution of the county commission sought there on grounds other than a general challenge of invalidity of the zoning ordinance.”); *Land Corp. of Fla. v. Metro. Dade Cty.*, 204 So. 2d 222, 224 (Fla. 3d DCA 1967) (“The separate suit filed in this case did not present an attack on the validity of the zoning ordinance, and for that reason the case of *Thompson v. City of Miami*, Fla. 1964, 167 So. 2d 841 is not applicable. Here the challenge was to the county commission’s ruling for which review by certiorari is prescribed by s 33-316 of the Code of Ordinances of Metropolitan Dade County.”); *Dade Cty. v. Metro Imp. Corp.*, 190 So. 2d 202, 204 (Fla. 3d DCA 1966) (“Under the provisions of Section 33-315 of the Charter, action taken by the County Commission sitting as an appellate board for one of the lower echelon zoning authorities is final action. The Commission may, at its discretion, do three things other than taking final action as defined in Section 33-315, (1) it may defer action on a matter before it in order to inspect the site in question; (2) it may refer the matter back to the zoning appeal board for further consideration and recommendation; (3) it may refer the matter to any department for its recommendation but when Final action in the nature of rezoning, or a denial of rezoning, is taken by the Board, then the next procedural step is judicial review.”).

<sup>146</sup> See, e.g., *Snyder v. Bd. of Cty. Comm’rs of Brevard Cty.*, 595 So. 2d 65, 73 (Fla. 5th DCA 1991) (expressing the view that “rezoning is granted not solely on the basis of the land’s suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request”).

<sup>147</sup> *Bd. of Cty. Comm’rs of Brevard Cty. v. Snyder*, 627 So. 2d 469, 474–75 (Fla. 1993) (quoting Fifth District Court of Appeal decision).

<sup>148</sup> See *supra* Part I.

map to address “proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public facilities, and other categories of the public and private uses of land.”<sup>149</sup> Comprehensive plans and plan amendments are legislative decisions (subject to administrative review), but the statute requires all land development regulations and development orders to be consistent with the comprehensive plan.<sup>150</sup>

Unfortunately, the court has not gone further to revisit the precedents it had established when rezoning was considered to be a legislative act and did not receive the procedural safeguards of quasi-judicial hearings. But is now clear that rezoning decisions, like other zoning actions, are held to a higher due process standard than other local government decisions.<sup>151</sup> And it is clear that zoning decisions that affect discrete parcels or interests are quasi-judicial and not legislative in character. Accordingly, a clear vehicle exists for judicial review as to the propriety of rezonings subject to site-specific conditions.

## CONCLUSION

Permitting conditional rezonings outright would give greater options to local governments in tailoring zoning decisions to surrounding areas without having to either rewrite their zoning codes or rely on applicants to proffer restrictive covenants and then deal with the collateral ownership, modification, and enforceability issues that may arise. The quasi-judicial zoning hearing process and attendant right to judicial review provide sufficient protections against arbitrary and capricious rezoning actions. Moreover, *Fontainebleau Gas & Wash* enforced the terms of a covenant that had never actually been recorded; what mattered to the court was that the terms of the restriction had been expressed on the face of the resolution.<sup>152</sup> Thus, it was constructive notice—not of instruments in the chain of title—but of zoning regulations on file with the zoning department, that gave life to that restriction.<sup>153</sup> It is time to revisit *Hartnett v. Austin*’s

<sup>149</sup> § 163.3177(6)(a), Fla. Stat.

<sup>150</sup> § 163.3194(1), Fla. Stat.

<sup>151</sup> *See id.* at 474 (holding that a local government decision that “determines the rules of law applicable, and the rights affected by them, in relation to past transactions” is a quasi-judicial decision; “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.”); *Jennings*, 589 So. 2d at 1340.

<sup>152</sup> *Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990) (“A preamble to the zoning resolution clearly expressed that the county commission granted rezoning only for a bank or savings and loan and accepted the property owner’s offer of a restrictive covenant and the county’s option to enforce this restriction. No such restrictive covenant was ever recorded.”).

<sup>153</sup> *Id.* at 1007–08.

emphasis on a uniform Euclidean system and to fully embrace conditional rezoning.