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I. INTRODUCTION

Leon County v. Parker[1] (*"Emerald Acres I"*) and *Emerald Acres Investments, Inc. v. Board of County Commissioners of Leon County*[2] (*"Emerald Acres II"*) are the stories of two parties' unsuccessful attempts to obtain meaningful judicial review of adverse administrative actions by the Leon County government. They are not, to say the least, pretty stories. Neither are they, in the author's view, the finest hours of Florida's intermediate appellate courts. The First District Court of Appeal and Leon County effectively denied both parties access to meaningful judicial review of adverse administrative action. Although still pending, these rulings affected both parties' rights to use property.[3] On the merits, the circuit court found this action to be a departure from the essential requirements of law and in violation of Leon County's own ordinances.[4] In a remarkable display of legal legerdemain, the First District transformed the broad access and remedy provisions of the Local Government Comprehensive Planning Act[5] ("LGCPA") into a legal spring gun that blew the unsuspecting parties into a legal "twilight zone." These decisions, aside from due process considerations, raise serious constitutional issues and create further confusion in the post comprehensive plan legal environment.[6]

The constitutional issues involve both the appellate rulemaking authority of the Florida Supreme Court and the constitutional certiorari jurisdiction of the circuit courts. This paper will initially demonstrate that the First District was incorrect, and that the remedy provisions are simply cumulative to common law certiorari review. This argument allows harmonization of the act's remedy provisions with existing precedent and avoids the constitutional issues raised by the decisions. The second part of

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1. 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990).

2. 601 So. 2d 577 (Fla. 1st Dist. Ct. App. 1992).

3. The First District in *Emerald Acres II* denied rehearing, but certified the following question to the Florida Supreme Court: "Whether the right to petition for common law certiorari in the circuit courts of the state is still available to a landowner/petitioner who seeks appellate review of a local government development order finding comprehensive plan inconsistency, notwithstanding section 163.3215, Florida Statutes (1989)?." *Id.* at 584.

4. Thus, the circuit court arguably found Leon County's action to be arbitrary and capricious. *See id.* One commentator describes this highly deferential standard of review as a kind of judicially imposed lunacy test! MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 56 (1988).

5. FLA. STAT. §§ 163.3213, 163.3215 (1991).

6. *See* John E. Fennelly, *Just to Cage the Tiger: Proposed Judicial Resolutions to Consistency Challenges Under the Local Government Comprehensive Planning and Land Development Act*, 22 STETSON L. REV. 435 (1993).

the discussion will be directed to the constitutional implications of the decisions. The initial, or statutory construction, discussion will also require a detour into the administrative law of access as contrasted with the traditional notions of standing. In addition, it will be necessary to review the supreme court's previous treatment of common law certiorari. With the foregoing framework in mind, *Emerald Acres I* and *II* await.

II. THE OPENING STAGE

A. *Round One: Administrative Shell Games*

Emerald Acres and Parker submitted subdivision applications in accordance with Leon County's Comprehensive Plan. The County's Planning Commission, after review, denied the applications. The Commission's stated basis for denial was that the proposed subdivisions were "too dense when compared with other subdivisions in the area, thus violating" the comprehensive plan.[7] The petitioners then sought review of this decision by the County Commission. The Commission, while upholding the initial decision, remanded the applications to the Planning Commission. The stated purpose of the remand was "to advise the respondents as to how the plats could be corrected to make the proposed subdivisions consistent with the county's comprehensive plan."[8] After unsuccessful negotiations, Emerald Acres sought common law certiorari review in the circuit court. Leon County, at the outset, moved to dismiss the petition on the basis that Emerald Acres and Parker had not complied with the notice provisions of the LGCPA.[9] The circuit court denied the County's motion and proceeded to a hearing on the merits. The circuit court determined that the County's denial of the application "was a departure from the essential requirements of law."[10] The court based this determination on relevant portions of the County's own comprehensive plan. The circuit court found "the fact that sections 17.1-25(b) and (d) of the ordinance adopting the county's comprehensive plan provided that zoning classifications existing on the date of plan adoption would continue to determine allowable land uses until the zoning was changed."[11]

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7. *Emerald Acres I*, 566 So. 2d at 1316.
8. *Id.*
9. *See id.*
10. *Id.*
11. *Id.*

Based on the foregoing plan provisions, the court determined that "[i]nasmuch as the A-2 zoning classification for the subject properties had never been changed, and since the proposed subdivision plats were consistent with such zoning classification[s], . . . the subdivisions were consistent with the comprehensive plan. . . . [T]herefore, . . . the denials of the proposed plats, based upon inconsistency with the comprehensive plan, were erroneous."[12]

The circuit court, therefore, granted the requested relief. Leon County appealed, using what would prove to be the spring gun in the LGCPA. Ironically, the circuit court's factual determination that the County arbitrarily violated its own plan, has never been challenged or overturned.

B. *Round Two: The Spring Gun is Loaded*

As indicated, Leon County argued on appeal that the trial court's denial of its motion to dismiss was error. The County, based on its reading of the LGCPA remedy provisions, argued that the failure to comply with the time provisions of the remedy provisions was a complete defense to any judicial review. The First District agreed with the County's position and reversed. The First District, in fact, found it unnecessary to "reach the merits of this determination [comprehensive plan compliance and arbitrary refusal by Leon County] because we find that the trial court should have granted the petitioner's [Leon County] motion to dismiss filed in each case for failure of the respondents [Parker and Emerald Acres] to comply with Section 163.3125. . . ."[13] The First District, in reaching this conclusion, rejected the trial court's conclusion that the statutory remedy provisions of the LGCPA applied only when local government approved an application and someone other than the applicant sought to challenge that decision.[14]

The mandatory construction of the time provisions, the First District argued, were both "reasonable and logical."[15] The court reasoned "[a] local government, such as a county commission, often proceeds in an informal, free-form manner."[16] Leon County, the court observed, "[r]ather than simply deny[ing] the respondent's requests in the cases below . . . suggested that the respondents meet further with the Planning Commission

12. *Emerald Acres I*, 566 So. 2d at 1316.
13. *Id.*
14. *Id.* at 1317.
15. *Id.*
16. *Id.*

in an effort to work out the differences."[17] Mandatory reading of the notice provisions would, therefore, have "the salutary effect of putting such government body on notice that it should be prepared to defend its action and will need to create a record to support that action."[18] Judge Nimmons, in dissent, approved the court's interpretation of the statute's remedy provisions. He would have found the notice provisions applicable only when "an aggrieved or adversely affected party" institutes an action "where the local governmental agency has *granted* the applicant's proposal."[19]

Emerald Acres and Parker moved for a rehearing, alleging that they had complied with the notice provisions, but had inadvertently omitted that fact in their certiorari petition.[20] The First District, in response, denied rehearing, but indicated that "on remand, the trial court may dismiss the complaints with leave to amend. If the trial court does grant leave to amend, Emerald Acres Inc., may . . . have that issue properly before the trial court for resolution."[21] This set the stage for a judicial coup de grace to Emerald Acres attempt to obtain meaningful judicial review of Leon County's denial of their application.

C. *Round Three: The Spring Gun is Fired*

Emerald Acres dutifully returned to the trial court and filed an amended petition for certiorari and mandamus. The trial court this time around dismissed the complaint, finding "that the verified complaint was filed 58 days after the decision of the board, in violation of section 163.3215."[22] The First District affirmed, and rejected Emerald Acres argument that the statutory notice period did not begin to run until the County's action was

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17. *Emerald Acres I*, 566 So. 2d at 1317. It is difficult to follow the logic of the First District on this issue. If the parties were still trying to resolve the issues, then how could the ambivalent denial constitute final agency action and trigger the Act's time clock?

18. *Id.*

19. *Id.* at 1318 (Nimmons, J., dissenting). Judge Nimmons, in essence, adopted the board access to non-applicants reading of the LGCPA remedy provisions. This concept will be the subject of extended discussion. *See infra* part II.

20. *Id.*

21. *Id.*

22. *Emerald Acres II*, 601 So. 2d at 579. As indicated in note 17, and its accompanying text, the Commission did not simply *deny* the application, but suggested further meetings between planners and the applicants. It is difficult to fathom how either applicant could have a clue that the clock was running. As noted, if the decision was final, what exactly remained to be worked out? Thus, Leon County's invitation could be viewed fairly as administrative sandbagging. This makes the result reached by the First District a kind of judicial sanction for administrative cheap shots.

reduced to writing and sent to the applicant. "Section 163.3215," the court noted, "contains no requirement that the 'alleged inconsistent action' be reduced to writing."[23] The court then characterized the statutory notice provisions as a substantive "condition precedent to instituting a judicial action . . . ."[24] This characterization of the notice provisions enabled the court to also reject Emerald Acres' contention that those provisions were an unconstitutional infringement of the Florida Supreme Court's appellate rulemaking authority. This last conclusion was an *apriori* result reached without discussion or analysis that proved the truth of the old philosophy adage that when you define the terms, you have already won the argument.[25]

Judge Kahn, who reluctantly concurred on stare decisis principles, was plainly uncomfortable with the result.[26] In Judge Kahn's opinion, "sufficient cause exists to question the propriety of applying the statute to bar the present action."[27] The remedy provisions, in his view, should be read expansively so that "the new statutory remedy may well be seen as cumulative to common law certiorari . . . ."[28] Judge Kahn reached this conclusion because common law certiorari was essentially an appellate remedy in the circuit court, and "it does not follow that the availability of a more expansive remedy under the statute necessarily abrogates any right to certiorari review of the local government action."[29] Judge Kahn, in contrast to the majority, viewed the LGCPA remedy provisions as "legislatively establishing the means by which an interested person, *not a party to the proceedings before the local government body*, may seek to vindicate rights that are arguably protected under a previously adopted comprehensive

23. *Id.* at 580.

24. *Id.*

25. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 42 (1960). "[C]ourts do not yet regularly and as of course face up to their job of integrating the particular statute into the doctrinal whole;" and thus not "implementing the clear purposes of a statute with the full resources of a court or the matter of recognizing a clear and broad statutory policy in an apt area even though that area is not embraced by the literal language." *Id.* As will be discussed in part IV.B., the First District Court's conclusion on the appellate rulemaking issue is in direct contradiction to supreme court precedent and fails to integrate the Act's remedy provisions into the doctrinal whole of judicial review of administrative action.

26. *Emerald Acres II*, 601 So. 2d at 581 (Kahn, J., concurring).

27. *Id.*

28. *Id.* at 583.

29. *Id.*

plan."[30]

Judge Kahn also expressed concern that the majority's treatment of the remedy provisions of the LGCPA raised serious constitutional questions concerning the legislature's power to limit circuit court common law certiorari jurisdiction and the supreme court's exclusive appellate rulemaking authority.[31] Judge Kahn, to avoid these separation of powers issues, expressed a preference for the approach used by the Fifth District Court of Appeal[32] in a similar case, *Splash & Ski, Inc. v. Orange County*.[33]

The Fifth District, as will be demonstrated, employed an approach that avoided constitutional problems and afforded the aggrieved parties relief against another legislatively created spring gun.

D. *Splash & Ski: The Spring Gun is Unloaded and Cased*

Splash & Ski, Inc., sought a special exception from Orange County to operate watercraft at "Shooters Waterfront Cafe."[34] The application was denied, and Splash & Ski petitioned for common law certiorari in accordance with Florida Rule of Appellate Procedure 9.030(c)(3). Splash & Ski did not, however, comply with the notice provision of the special statute that permitted certiorari review of County Commission zoning decisions.[35] Although the record is not clear, the circuit court viewed the statutory remedy as exclusive and dismissed the petition. The circuit court's view is similar to that of the First District in *Emerald Acres I* and *II*.[36]

On appeal, Splash & Ski argued that Orange County's notice provisions violated article V, sections 2(a) and 5(b) of the Florida Constitution.[37] Splash & Ski also argued that, even if the provisions were constitutional, the remedy provided was cumulative to common law certiorari.[38]

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30. *Id.* at 582. Thus, Judge Kahn embraced Judge Nimmons' and the circuit court's view of the intent of the access provisions in the Act enunciated in *Emerald Acres I*.

31. *Emerald Acres II*, 601 So. 2d at 582; *see also supra* note 3.

32. *Id.* at 583.

33. 596 So. 2d 491 (Fla. 5th Dist. Ct. App. 1992).

34. *Id.* at 493.

35. *Id.* An early law review article characterized Florida appellate law on certiorari as "confusing" and that major portions of opinions consist of misleading dicta that "mislead the Bar and afford the bench 'authority' for later decisions of questionable soundness." William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U. FLA. L. REV. 477, 477 (1951) (containing an excellent discussion of common law and statutory certiorari).

36. *Splash & Ski*, 596 So. 2d at 495.

37. *Id.* at 493.

38. *Id.*

Judge Griffin, writing for the court, deftly avoided the constitutional issues raised by the appeal. She did, however, express serious reservations concerning the validity of the statutory provision if read so as to eliminate common law certiorari. Judge Griffin noted pointedly: "If the existence of Orange County's statutory certiorari procedure were to preclude review by common law certiorari, the petitioner's argument that the unique requirements of Orange County's special act violate the Florida Constitution would have to be seriously considered."[39]

Judge Griffin also took pains to note that, "[w]e are unaware whether any other county presently has a similar notice requirement."[40] This unique requirement, she noted, "is an effective procedural trap for those who have not figured out that the requirements for certiorari review by a Florida court can be found in a county ordinance instead of the Florida appellate rules."[41] The result of those hidden provisions was: "In the rest of the state, the certiorari jurisdiction of the circuit court is invoked simply by filing a petition in the circuit court in accordance with the appellate rules within thirty days. In Orange County, thirty days has shrunk to ten days . . . ."[42]

The court, however, resolved the apparent conflict by a straightforward analysis of the proper relationship between statutory and common law certiorari. That relationship, simply put, is that "[t]he remedy of statutory certiorari is independent and cumulative to common law certiorari. Common law certiorari is available if a statutory remedy fails."[43]

In *Splash & Ski*, Judge Griffin also supplied an analytical framework that can correct the deficiencies in and potential constitutional problems raised by the First District in *Emerald Acres I* and *II*. Judge Griffen reasoned "certain statutory notice requirements are substantive, not procedural, and create a valid condition precedent rather than an impermissible intrusion into the court's exclusive rule making power."[44] These requirements, however, "are not jurisdictional . . . [if] a condition precedent is not met, the court does have jurisdiction of the cause; the case is simply subject to dismissal if the condition precedent is not satisfied . . . ."[45]

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39. *Id.* at 494.
40. *Id.* at 494 n.9.
41. *Splash & Ski*, 596 So. 2d at 495 n.12.
42. *Id.* at 494-95.
43. *Id.* at 494 (citing Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 942 (Fla. 5th Dist. Ct. App.), *appeal dismissed*, 537 So. 2d 568 (Fla. 1988)).
44. *Id.* at 495.
45. *Id.* (citing Hospital Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990)).

In appellate review, on the other hand, a notice requirement, "is not a condition precedent to accrual of a cause of action."[46] Rather, "petitioner's rights have been determined . . . [and] [w]hat petitioner now seeks is appellate review of the Board's decision."[47] The Judge noted: "There are no substantive 'conditions precedent' to appellate review—the courts are open to all who follow the appellate rules and pay the filing fee. The state constitution specifically identifies the time for seeking appellate review to be a matter of 'practice and procedure.'"[48]

The First District's analysis of the remedy provisions of the LGCPA has, in light of *Splash & Ski*, created additional uncertainty in Florida land use law.[49] The district courts are now in conflict over the viability of common law certiorari in post LGCPA litigation. The initial issue is primarily legislative intent, while the secondary issues involve significant constitutional questions arising under the separation of powers doctrine. They include the constitutional subject matter jurisdiction of the circuit court and the exclusive appellate rulemaking jurisdiction of the supreme court. Adequate discussion of the Legislature's intent concerning the remedy provisions requires a detour into nuances of the administrative law of access or standing. It will also be necessary to compare, contrast, and distinguish certiorari from trial proceedings in the circuit court.

III. STANDING, ACCESS, PARTIES, AND REMEDIES: A WALK ON THE WILD SIDE OF ADMINISTRATIVE LAW

The LGCPA remedy provisions for review of local government land use decisions, in essence, are a curious blend of the administrative law of standing or access and traditional notions of judicial review and remedies. The Act's provisions in this regard might be likened to a legislatively created witch's brew of procedural complexity. That cauldron, like

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46. *Splash & Ski*, 596 So. 2d at 495.

47. *Id.*

48. *Id.* (citing FLA. CONST. art. V, § 2(a)).

49. The Second and Fifth Districts view common law certiorari as a cumulative remedy. *See* Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996, 999 (Fla. 2d Dist. Ct. App. 1993); Splash & Ski, Inc. v. Orange County, 596 So. 2d 491, 493 (Fla. 5th Dist. Ct. App. 1992); Snyder v. County Comm'rs, 595 So. 2d 65, 76 (Fla. 5th Dist. Ct. App. 1991) *overruled by* Board of County Comm'rs v. Snyder, 19 Fla. L. Weekly S17 (Oct. 7, 1993). However, the Fourth District has aligned itself with the First District's approach in *Emerald Acres I* and *II*. See Jensen Beach Land Co. v. Citizens for Responsible Growth of the Treasure Coast, 608 So. 2d 509 (Fla. 4th Dist. Ct. App. 1992).

MacBeth's,[50] is now boiling in Florida's appellate courts. A powerful ingredient in the brew is the question of proper parties in any proceeding under the Act.

A. *Standing or Access Under the LGCPA: Hail, Hail, the Gang's All Here*

The LGCPA judicial review provisions permit an "aggrieved or adversely affected party"[51] to seek injunctive or other relief against *any local government* to prevent such *local government* from taking any action on a development order.[52] An aggrieved or adversely affected party is defined as "any person or local government which will suffer an adverse effect to an *interest* protected or furthered by the local government comprehensive plan . . . ."[53] Protected interests include "health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, . . . equipment or services, or environmental or natural resources."[54] These interests, under LGCPA remedy provisions, "may be *shared* in *common* with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons."[55] The Act's administrative review provisions,[56] in turn, allow "substantially affected persons" to challenge land development decisions in a purely administrative forum.[57]

These administrative standing or access concepts were developed to ensure "[e]xpansion of public access to the activities of governmental agencies."[58] Under Florida's Administrative Procedure Act, these agency activities are, for the most part, quasi-legislative rulemaking. Substantially affected persons include trade associations,[59] interest groups,[60] and even

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50. WILLIAM SHAKESPEARE, MACBETH act 4, sc.1.

51. FLA. STAT. § 163.3215(l) (1991).

52. *Id.*

53. *Id.* § 163.3215(2) (emphasis added).

54. *Id.*

55. *Id.* (emphasis added).

56. FLA. STAT. § 163.3213 (1991).

57. *Id.* § 163.3213(2)(a). This term is not defined in the section and has been the source of considerable confusion under chapter 120 of the Florida Statutes Administrative Procedure Act. *See* Cortese v. School Bd. of Palm Beach County, 425 So. 2d 554, 556 n.4 (Fla. 4th Dist. Ct. App. 1982) (citing Judith S. Kavanaugh, *Administrative Standing Under Chapter 403: What Does the Jerry Case Mean*, 53 FLA. B.J. 729, 730-31 (1979)).

58. Florida Home Builders Ass'n v. Department of Labor, 412 So. 2d 351, 352 (Fla. 1982).

59. *See id.*

parents of school age children.[61] The Act's access or standing definitions are clearly borrowed and are much broader than classical judicial notions of standing.[62] Indeed, the late Professor Patricia Dore, a leading authority on the Act and its access provisions, argued that traditional judicial notions of standing are not applicable in the administrative law context.[63] Reviewing courts, in her view, should disregard those concepts and apply an "access test" to administrative proceedings.[64] The appropriate test employed in a functional manner looks to the specific statute to determine who should be granted access to agency rule making.[65]

The LGCPA remedy provision, viewed through the Administrative Procedure Act's access filter, becomes much more comprehensible. It emerges as a broad access mechanism that permits interested groups, as defined by the Act, to mount a challenge to land use decisions of local governments. Challenges may be mounted in either an administrative or judicial forum, but the Act's provisions are the exclusive remedy to interested groups or individuals. The notice provisions, as conditions precedent to filing, serve the salutary effect of putting a local government on notice of a possible challenge to a land use decision.[66] To allow a non-applicant to challenge a land use decision of a local government seems more consistent with the Act's own terminology. Further, the Act apparently would allow a legislatively defined adversely affected or aggrieved party to bring an action or administrative proceeding against *a local government* without naming the applicant as a party.[67] The applicant could conceivably intervene in the proceeding but appears not to be an indispensable party. Judge Kahn's analysis is also supported, once again, by the remedy terminology of the Act. The Act provides for "injunctive or other relief,"

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60. *See* Farmworkers Rights Org. Inc. v. Department of Health & Rehabilitative Servs., 417 So. 2d 753 (Fla. 1st Dist. Ct. App. 1982).

61. *See Cortese*, 425 So. 2d at 555.

62. Standing in classical terms is the right of a party to bring or defend a particular action. As Trawick notes, "[t]o have standing a person must have a cause of action that he can assert and *personal stake* in the outcome . . . ." HENRY P. TRAWICK, FLORIDA PRACTICE AND PROCEDURE § 4-15 (1992) (emphasis added).

63. *See* Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 967, 993 (1986) (suggesting a functional analysis that will ensure broad access to agency activity principal rulemaking).

64. *Id.*

65. *Id.* at 984-85; *see also* Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767, 779-83 (1991).

66. *See supra* text accompanying notes 31-36.

67. *See* FLA. STAT. § 163.3215(1) (1991).

that suit under its provision "shall be the sole action available," and that a "condition precedent" to institution of an action shall be a "verified complaint."[68] This legislative language, together with the broad definition of adversely affected parties, clearly envisions a trial court remedy for a non-applicant. Extension of the exclusivity provisions to exclude constitutionally based appellate jurisdiction of the circuit court in common law certiorari is unwarranted. Indeed, as Judge Griffin persuasively argued in *Splash & Ski*,[69] common law certiorari is and has been viewed historically as an appellate remedy.[70] The Act's language and apparent intent makes the First District's reading of the remedy provisions problematic at best.

IV. SNYDER AND VAILLANT REVISITED: AN EMERGING TREND SUPPORTED BY EXISTING PRECEDENT

A. *The Emerging Trend*

The LGCPA, as has been noted elsewhere, has transformed the post comprehensive plan land use decisions of local governments.[71] The initial adoption of the plan, which was a policy or quasi-legislative decision, zoning or otherwise, is now a quasi-judicial function.[72] The post-plan land use decision will be measured for compliance with the criteria established in the plan. This is the much praised and cursed concept of consistency. Consistency necessarily requires measuring a given post-plan land use decision against a known policy standard, the plan. This fact finding process is essentially quasi-judicial.

The Fifth District Court of Appeal recognized this fundamental transformation of the post-plan land use decision in a trail blazing decision, *Snyder v. Board of County Commissioners*.[73] Snyder was denied rezoning

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68. *Id.* Trawick notes that actions are classified as ex contractu, ex delicto, or statutory. TRAWICK, *supra* note 62, § 1-1. Common law certiorari, he notes, "is a form appellate review but, the proceeding is an original action." *Id.* § 36-2. Trawick further notes that "certiorari is a writ issued by a superior court to an inferior court public officer or body to review a judicial or quasi judicial order or judgment . . . ." *Id.*; *see also id.* §§ 1-5, 6-20. (supporting Judge Griffin's analysis in Splash & Ski, Inc. v. Orange County, 596 So. 2d 491 (Fla. 5th Dist. Ct. App. 1992).

69. *Splash & Ski*, 596 So. 2d at 491.

70. *Id.*

71. Fennelly, *supra* note 6, at 487.

72. *Id.* at 454.

73. 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991).

by the commission even though his requested land use complied with the county's comprehensive plan. Snyder unsuccessfully sought review by common law certiorari in the circuit court. The Fifth District reversed in what can be fairly characterized as a sophisticated, comprehensive, and systematic analysis of the impact of the LGCPA on zoning and land use decisions in the post-plan context.

The *Snyder* court, employing what it and other courts have characterized as a "functional analysis,"[74] first noted that "broad judicial statements that all rezoning decisions are legislative in nature are out of step with the realities of zoning practice and the evolvement of zoning law."[75] This process, the court held, was now a "quasi-judicial review."[76] This conceptual result flowed from the nature of the task performed in the post-plan environment. The task, necessarily imposed by the Act, involves application of a general rule or policy (the plan) to specific individuals, interests or situations. The application of general policy criteria to a discrete person, interest, or situation was inherently quasi-judicial.[77] Determination of that general policy, in contrast, is a legislative function. This preliminary function, under the LGCPA, is performed when the plan is formulated and then enacted.[78]

The Second District, in a recent decision, *Lee County v. Sunbelt Equities II, Ltd. Partnership*,[79] has followed the analytical framework advanced by the Fifth District in *Snyder*. The Second District's opinion in the case candidly recognized that "Florida's appellate courts are neither unanimous nor consistent on the question whether rezonings are legislative

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74. *Id.* at 78. Lest Professor Dore and the Fifth District be accused of making a doctrine out of whole cloth, no less a luminary than Benjamin Cardozo found this type of analysis an improvement in jurisprudence. In 1921, Cardozo argued, "perhaps the most significant advance in the modern science of the law is the change from the analytical to the functional attitude. The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and the efficiency of the remedy to attain the ends for which the precept was devised." Benjamin N. Cardozo, *The Nature of the Judicial Process. Lecture II. The Methods of History, Tradition, and Sociology, in,* CARDOZO ON THE LAW 73 (Legal Classics Library 1982) (quoting Roscoe Pound "*The Administrative Application of Legal Standards,*" 44 A.B.A. REP. 441, 449 (1919)).

75. *Id.* at 75.

76. *Id.* at 80.

77. *Id.* at 77.

78. *See* Carl J. Peckingpaugh, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499, 504 (1980); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 33-45 (1977).

79. 619 So. 2d 996 (Fla. 2d Dist. Ct. App. 1993).

or quasi-judicial."[80] Nor have they, in the Second District's view, been "consistent about the method or scope of review."[81] The court then, after a discussion of *Snyder's* analytical framework, agreed that a "functional analysis"[82] was appropriate and that post-plan land use decisions were "quasi-judicial."[83] This result and approach, to the Second District, led to "a fair and workable solution"[84] to issues raised by the evolving law of property rights . . . that "does not augur well for local governments who are reluctant to justify their decisions with explicit reference to evidence and public policy."[85] Land use decisions, the court noted, "if reached under a veil of silence . . . are vulnerable to charges of arbitrariness or improper motive."[86] Based on the foregoing, the Second District concluded "any *party adversely affected* by a rezoning decision is entitled to *some form of direct appellate review*."[87]

Applying a functional analysis to common law certiorari in the LGCPA context leads inexorably to the conclusion that it is essentially an appellate procedure that reviews administrative action. The scope of that review is, as Judge Kahn noted, much more limited in nature but is nonetheless a review.[88] The circuit court is reviewing, in the consistency context, a factual determination by a local government that a proposed land use is or is not in compliance with the plan. This analysis of the proceeding is also consistent with existing supreme court precedent as set forth in the seminal case of *City of Deerfield Beach v. Vaillant*.[89]

B. *The Established Precedent*

Vaillant was terminated by the City of Deerfield Beach and unsuccessfully appealed to the Civil Service Board. The board, after a full hearing, upheld his termination. He then sought and obtained a writ of common law

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80. *Id.* at 1000.

81. *Id.*

82. *Id.* at 1001 (quoting David La Croix, *The Applicability of Certiorari Review to Decisions on Rezoning*, 65 FLA. B.J. 105 (June 1991).

83. *Id.*

84. *Lee County*, 619 So. 2d at 1001. The Second District also stated that it agreed "site-specific, owner-initiated rezoning requests are sufficiently judicial in character that final administrative orders are thereafter appropriate for appellate review." *Id.*

85. *Id.* at 1002.

86. *Id.*

87. *Id.*

88. *See* Emerald Acres II, 601 So. 2d 577, 583 (Fla. 1st Dist. Ct. App. 1992); *see also supra* notes 69, 79, 84 and accompanying text.

89. 419 So. 2d 624 (Fla. 1982).

certiorari in the circuit court. The City then attempted a plenary appeal in the Fourth District. Judge Letts, writing for the Court, treated the City's attempted appeal as a petition for certiorari and denied relief.[90] To Judge Letts, regardless of the nomenclature, the relief sought in the Court was effectually an appeal.[91] The supreme court, on appeal, followed Judge Letts' analysis noting "where full review of administrative action is given in the circuit court as a matter of right, one appealing the circuit court's judgment is not entitled to a second full review in the district court."[92] The supreme court, in *Vaillant*, also cited with approval a Third District decision, *Save Brickell Ave., Inc. v. City of Miami*.[93] *Brickell* held squarely that a zoning review in the circuit court was appellate review.[94]

The supreme court, in a more recent case, *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*,[95] reaffirmed *Vaillant's* continuing viability and expressly extended its rationale to zoning decisions.

Factually, Education Development Center, Inc. obtained certiorari relief in circuit court from an adverse zoning decision. On appeal, the Fourth District reversed and remanded the case to the circuit court. The circuit court, on remand, was to only "review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion."[96] On remand, the circuit court found that there was no substantial competent evidence to support the agency's conclusion and again granted certiorari relief.

On review, the Fourth District, undauntedly granted certiorari and quashed the circuit court's order. The court held:

> There was substantial evidence to support denial of the application to permit the operation of a preschool in this residential area. To find to the contrary, we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed the evidence; in either event substituting its judgment for that of the zoning board, which

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90. City of Deerfield Beach v. Vaillant, 399 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1981).

91. *See Vaillant*, 419 So. 2d at 626. Arguably, Judge Letts was also employing a "functional analysis" to the common law certiorari proceeding in the circuit court.

92. *Id.*

93. 393 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1981).

94. *Id.* at 1198 n.1.

95. 541 So. 2d 106, 108 (Fla. 1989).

96. City of W. Palm Beach Zoning Bd. of Appeals v. Education Dev. Ctr., Inc., 504 So. 2d 1385, 1386 (Fla. 4th Dist. Ct. App. 1987).

it may not properly do.[97]

The supreme court, on review, in effect struck the Fourth District with its own *Vaillant* petard. The supreme court, citing the Fourth District's own language in *Vaillant*, reiterated the view that "common sense dictates that no one enjoys three full appellate reviews . . . ."[98] The court then clearly held that "[w]hen the circuit court reviews the decision of an administrative agency under *Florida Rule of Appellate Procedure 9.030(c)(3)*, there are *three* discrete components of its *certiorari review*."[99] The components are "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence."[100] The district court, in its review, is limited to *two* discrete components; "whether the circuit court afforded procedural due process and applied the correct law."[101]

V. TOWARD SYNTHESIS

As indicated previously, the LGCPA has injected profound uncertainty into Florida law.[102] Indeed the entire area of land use law has been described as a legal fault line.[103] Given the novel and dynamic issues that are confronting the district courts and the evolving law of property rights it is not surprising that there is uncertainty. On the issues presented by *Emerald Acres I* and *II*, however, the uncertainty is a direct result of legislative draftsmanship. The Legislature, by blending administrative law standing law concepts with traditional common law remedies in the LGCPA, has thrown the bench and bar a legislative knuckleball. That the First District went down swinging is thus not the least bit surprising.

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97. City of W. Palm Beach Zoning Bd. of Appeals v. Education Dev. Ctr., Inc., 526 So. 2d 775, 777 (Fla. 4th Dist. Ct. App. 1988).

98. *Education Dev. Ctr., Inc.*, 541 So. 2d at 108 (citing City of Deerfield Beach v. Vaillant, 399 So. 2d 1045, 1047 (Fla. 4th Dist. Ct. App. 1981)).

99. *Id.* at 108 (emphasis added).

100. *Id.* (citing *Vaillant*, 419 So. 2d at 626).

101. *Id.*

102. *See supra* text accompanying notes 6, 50.

103. John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 16 (1992). "We as a society have not resolved the tension between property law and environmental rights. Controversies abound . . . the dispute . . . is a tremor running along a deep fault line in American Society." *Id.*

Emerald Acres I and *II* are not any less troublesome to say the least. First, the First District has badly misconstrued legislative intent with regard to the remedy provisions. There is, as indicated earlier, no basis for the court's conclusion that the Legislature intended to attempt a curtailment of common law certiorari. It is simply not there and the court was clearly guilty of apriori reasoning. It assumed the premise and reasoned formally to a conclusion. Professor Karl N. Llewellyn characterized this type of decision as a *formal*[104] decision making that ignored what he described as the situation sense[105] of a case. Holmes even more bluntly called decision making of this nature "unconscious"[106] because it ignored existing supreme court precedent as expressed in *Vaillant* and its progeny. Precedent clearly viewed common law certiorari as an appellate proceeding. This in turn, has resulted in decisions that fail to adequately distinguish between the trial and appellate functions and jurisdiction of the circuit court. Finally, the decisions have needlessly created separation of powers issues that potentially threaten the constitutionality of the LGCPA's remedy provisions.

The supreme court can, in the Llewellyn sense, tidy up this area by looking to the policy implications of the act and its own existing precedent. Llewellyn described this as appellate judging in the grand tradition—a Cardozo-like "drive to give clear and reasoned guidance for a whole type-situation . . . wisdom in judging where sound guidance lay. . . sensitivity to equities . . . subtlety of craftsmanship . . . ."[107] This type of approach should recognize that the remedy provisions of the LGCPA were intended to permit broad access to defined groups. Access that would allow them, in compliance with the act conditions precedent, to challenge local governmental land use decisions. This reading of the Act's remedy provisions is consistent with, as Llewellyn describes it, the situation sense of the Act. This interpretation would also leave intact the applicant's right to challenge

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104. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38 (1960). In the formal style "[o]pinions run in deductive form with an air or expression of single-line inevitability." *Id.*

105. *Id.* at 143. "[S]tress in first instance on the problem-situation as a type, with quest for a sound and guidesome form of rule to govern. . . ." In other words, examine LGCPA in light of the purpose of the statute as a whole and in view of existing precedent defining and explaining certiorari. *Id.*

106. Perhaps of the reasons judges do not like to discuss policy or to put a decision in terms of their views as lawmakers, is that the moment you leave the path of merely logical deduction, you loose the illusion of certainty which makes legal reasoning seem like mathematics. But that certainty is only an illusion nevertheless. OLIVER W. HOLMES, JR., THE PATH OF THE LAW, IN THE COMMON LAW AND OTHER WRITINGS 126 (1982).

107. LLEWELLYN, *supra* note 104, at 443.

a land use decision by common law certiorari, and avoid the constitutional issues raised necessarily in *Emerald Acres I* and *II*.

If, however, the supreme court accepts the First District's interpretation of the Act's remedy provisions, then it would appear inevitable that the constitutional issues alluded to by Judges Griffin and Kahn will have to be addressed. The balance of this article will, therefore, address these issues.

VI. THE CONSTITUTIONAL QUAGMIRE

The separation of powers doctrine is a basic principle that underlies both the Constitutions of the United States and the State of Florida. The doctrine envisions a division of sovereign power between three distinct branches of government: Executive, Legislative and Judicial. The placement of powers in one branch, because of constitutional supremacy, precludes alteration of the division except by constitutional alteration. Thus, neither Congress nor the State Legislature may alter or exercise powers proper to a coordinate branch of government.[108] Simply put, the Legislature can not decide a negligence case and the Supreme Court can not pass a state budget. Nor can one branch alter the constitutional functions of another branch.

The doctrine outlined by Madison in *The Federalist Papers* received constitutional recognition in the seminal case of *Marbury v. Madison*.[109] Congress had attempted in the Judiciary Act of 1789 to expand the court's jurisdiction to allow the court to issue writs of mandamus. Chief Justice Marshall and the Supreme Court, quite simply, would have none of it. The Constitution, he argued, assigns and limits governmental power. Thus, since the Constitution is the "paramount law,"[110] a "law repugnant to the [C]onstitution is void."[111] Although the Constitution is paramount, the instrument itself can still be "looked into" in cases arising under the Constitution.

Florida's constitutional framers were even more explicit. Article II, section 3 (branches of government) provides that "[t]he power of the state

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108. Separation of powers in Madison's view was a basic bulwark against tyranny. Thus he observed in *The Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny." MICHAEL KAMMEN, THE ORIGINS OF THE AMERICAN CONSTITUTION 187 (1986).

109. 5 U.S. (1 Cranch) 137 (1803).

110. *Id.* at 177.

111. *Id.* at 180.

government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[112]

Despite this explicit prohibition, however, the supreme court has had to periodically grapple with legislative attempts to directly or indirectly limit or expand the jurisdiction of the courts.[113] In each instance, the Florida Supreme Court has resisted any legislative attempt to alter the jurisdiction conferred by the constitution on the courts of this state.

City of Dunedin v. Bense[114] is illustrative and bears a striking resemblance to *Marbury v. Madison*. In *Bense*, the Legislature had attempted to give the supreme court "'original jurisdiction . . . by injunction or other appropriate remedy' to prohibit the filing of any action attacking the validity of a validation decree except in the manner provided in this section."[115] The supreme court in *Bense* recognized as a benchmark principle of constitutional jurisdiction that "[n]either this court nor the Legislature has the power to extend the jurisdiction of this court beyond the confines of the constitutional prescription."[116] The court also recognized that "the Legislature must function within the orbit prescribed by the Constitution."[117]

The supreme court, in tones similar to Marshall's, flatly rejected the attempt, holding: "jurisdiction of the Supreme Court is conferred by the Constitution itself. It is not endowed with any common-law prerogative outside of the boundaries established by organic law. Certainly the appellate jurisdiction is clearly defined. Its original jurisdiction is stated with equal clarity."[118] The Legislature, the court held, "has no power to extend jurisdiction of the Supreme Court beyond that defined in the Constitution."[119] Any contrary conclusion, the court noted, "would necessarily ignore the historical doctrine of separation of powers that is so fundamental to our democratic system."[120] Failure to resist would "be authority to the legislative branch of the government to regulate and control the constitu-

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112. FLA. CONST. art. II, § 3.

113. Perhaps it would be appropriate to expand the famous adage that no one's life, liberty, or property are safe while the Florida Legislature is in session to include "nor Constitutional form of government."

114. 90 So. 2d 300 (Fla. 1956).

115. *Id.* at 301. The statute in question concerned causeway and island improvement revenue bonds. The court recognized the public interest in prompt validation. *Id.* at 301-02.

116. *Id.* at 302.

117. *Id.*

118. *Bense*, 90 So. 2d at 302.

119. *Id.*

120. *Id.* at 302-03.

tional jurisdiction of the judicial branch."[121]

The converse of the foregoing principle would appear equally valid. If the Legislature could by simple legislative fiat disregard constitutional limitations and expand a court's subject matter jurisdiction, it could with equal impunity limit jurisdiction or constitutionally based remedies, such as, injunction.

The supreme court has also resisted this latter notion as well as the former, at least with regard to its own jurisdiction.[122] In *Sun Insurance Office, Ltd. v. Clay*,[123] Chief Justice Roberts stated "it has been many times held by this court that . . . the Legislature cannot restrict or take away jurisdiction conferred by the constitution. . . ."[124]

Article V, section 5 of the Florida Constitution vests circuit courts with both jurisdiction to issue writs of certiorari and the power of direct *review* of administrative action prescribed by general law.[125] The analogy provided by *Bense* and *Clay* therefore, would seem clear. The Legislature must also move within its proper orbit concerning the constitutional jurisdiction of the circuit court. The constitution, the paramount document, precludes any legislative attempts to curtail jurisdiction, to issue writs of certiorari. Jurisdiction, it should be added, that the supreme court has clearly characterized as appellate in nature.

The Legislature, from a functional standpoint, can create a substantive right and remedy. Thus, the remedy provisions of the LGCPA should be viewed as a legislatively created cause of action. As such, as Judge Griffin noted, it exists apart and totally separate from the circuit court's appellate jurisdiction, i.e., the power to issue writs of certiorari and review administrative action.[126] The circuit court's jurisdiction, from a functional standpoint, can be viewed as two dimensional. The remedy provisions of the LGCPA, it is argued, properly belong in this first dimension. The second, equally constitutionally based dimension of jurisdiction, implicates circuit court appellate jurisdiction. Both dimensions, it is argued, exist

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121. *Id.* at 303.

122. Cardozo described this tendency to extend itself along the lines of logical development as "an intellectual passion for elegantia juris, for symmetry of form and substance." Benjamin N. Cardozo, *The Nature of the Judicial Process. Lecture I. Introduction. The Method of Philosophy, in*, CARDOZO ON THE LAW, *supra* note 74, at 34 n.28 (quoting W.G. Miller in THE DATA OF JURISPRUDENCE).

123. 133 So. 2d 735 (Fla. 1961).

124. *Id.* at 742. The holding in *Clay* seems to conflict with the holding in *Bense*. In the view of the *Clay* court, however, *Bense* was not controlling. *Id.* at 741.

125. FLA. CONST. art. V, § 5.

126. *See supra* text accompanying notes 40-47.

independently of each other and are functionally distinct. In essence the First District, in *Emerald Acres I* and *II*, has ignored the distinction and collapsed the circuit court's appellate jurisdiction into its trial jurisdiction. This is a scrambled and impermissible result at variance with the constitution and supreme court precedent as expressed in *Vaillant* and its progeny.

A. *Legislatively Established Appellate Filing Times*

As discussed previously,[127] if the time requirements governing the remedy provisions are viewed from the circuit court's trial court dimension, then the result reached in *Emerald Acres* appears sound. Quite another issue is presented if the remedy provisions' time requirements are viewed as also controlling common law certiorari in circuit court. To reiterate, the supreme court has consistently treated certiorari as an appellate remedy governed by the Rules of Appellate Procedure.[128] The constitution in article V, section 2(a) vests the supreme court with jurisdiction to "adopt rules for [the] *practice and procedure in all courts including the time for seeking appellate review.*"[129] The filing periods, therefore, when viewed from the second or appellate dimension, intrude on the supreme court's rulemaking authority and raise a clear separation of powers issue. The supreme court has historically treated appellate filing requirements as a procedural matter exclusively within its constitutional sphere of authority.[130]

This historical treatment of legislatively imposed appellate filing requirements continues to be followed.[131] The Fourth District Court of Appeal in no uncertain terms noted "the Florida Constitution, Article V, Section 2(a), provides that the Supreme Court shall adopt rules of procedure in all courts, 'including the time for seeking appellate review.' Matters of practice and procedure within the authority of the Supreme Court may not be exercised by the Legislature."[132] The court found any explicit or implicit attempt of the Legislature to extend the time for direct appeal would be untimely.[133]

Given the historical treatment of circuit court certiorari as an appellate remedy and the supreme court's previous reaction to legislatively imposed

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127. *See supra* notes 44-47 and accompanying text.

128. *See supra* text accompanying note 101.

129. FLA. CONST. art. V, § 2(a) (emphasis added).

130. *See* Markert v. Johnston, 367 So. 2d 1003, 1005 n.8 (Fla. 1978).

131. *See In re* Adoption of a Minor Child, 570 So. 2d 340, 342 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 593 So. 2d 185 (Fla. 1991).

132. *Id.* (quoting FLA. CONST. art. V, § 2(a)).

133. *Id.*

appellate filing requirements, the result in *Emerald Acres I* and *II* appears even more tenuous. Affirmance would require that the supreme court ignore its own precedent concerning the nature of certiorari, and accept legislative intrusion into its rulemaking authority. This, on separation of powers grounds, the court has consistently refused to allow the Legislature to do.

VII. POST SCRIPT: THE FEDERAL SPECTER

Parker, one of the parties in *Emerald Acres I*, fared much better in the federal court. The Estate and Parker, frustrated in their attempts for meaningful judicial review in state court, brought an action in district court. Parker alleged Leon County's actions were "arbitrary and capricious," and deprived them of both due process and equal protection under the Fourteenth Amendment.[134] The district court agreed and granted summary judgment against the County.[135] The district court, in a comprehensive and systematic opinion, noted that while a federal court's role in reviewing zoning cases is limited, "'deprivation [of a property interest] is of constitutional stature if it is undertaken for an improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis.'"[136]

It would appear, therefore, that Florida appellate courts are unwilling or unable to provide relief to litigants who are subjected, in the LGCPA context, to arbitrary and irrational administrative action by state and local agencies, the federal courts are an alternative forum. This conclusion is warranted by the district court decisions and the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*.[137]

VIII. CONCLUSION

The recent decisions of the First District in *Emerald Acres I* and *II* are at variance with the legislative intent of the LGCPA and of established Florida constitutional jurisprudence. Hopefully, the supreme court will

134. Parker v. Leon County, No. TCA 91-40133-WS, 1992 WL 209626, at *2 (N.D. Fla. March 18, 1992).

135. *Id.* at *5.

136. *Id.* at *7 (quoting Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir.), *cert. denied*, 112 S.Ct. 55 (1991)).

137. 112 S.Ct. 2886 (1992).

quickly correct the error.[138] Failure to do so could result in wholesale federal intervention in cases of this nature. A minor correction could, however, correct the problem and insure that Florida's courts are available to protect all Floridians from the arbitrary and unreasonable exercise of state power.

138. Since this article was written, the Florida Supreme Court determined that common law certiorari was available to a property owner seeking to challenge adverse administrative action under the LGCPA. Parker v. Leon County, Nos. 80230, 80288, 1993 WL 530281, at *4 (Fla. Oct. 7, 1993). The court further restricted access to the Act's remedy provisions to third party non-applicants. *Id.* at *3. The court did not, however, reach the constitutional issues raised in this article.