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Trying to Fit an Elephant in a Volkswagen: Six Years of the Snyder Decision in Florida Land Use Law

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NOTE

TRYING TO FIT AN ELEPHANT IN A VOLKSWAGEN: SIX YEARS OF THE *SNYDER* DECISION IN FLORIDA LAND USE LAW*

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I. INTRODUCTION

In 1993, the Supreme Court of Florida made a bold move in an attempt to improve the manner in which zoning decisions are made in the state. Landowners had long chafed under a system in which courts reviewed local government zoning decisions with the utmost deference.[1] Many believed that the deference courts applied to such decisions had allowed arbitrary and unfair zoning practices to undercut the very purpose of zoning

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** To Lara: my friend, my love, my wife. Special thanks to my parents, Charles and Carol Penn, for teaching me what hard work and sacrifice mean.

1. *See* Board of County Comm'rs v. Snyder, 627 So. 2d 469, 472-73 (Fla. 1993).

ordinances themselves: the creation of well-planned communities.[2] The court in *Board of County Commissioners v. Snyder* sought, at least partially, to limit such unfairness by changing the standard and procedure of review of local government decisionmaking.[3] The subject of this note is what has come of the *Snyder* decision in the last part of the decade.

First, this Note will explore how the *Snyder* framework has been applied to other areas of land use planning, most importantly amendments to local comprehensive plans. Second, this Note will describe the judicial reaction to the new standard of review established by the *Snyder* decision. Some recent decisions have raised some serious doubts that *Snyder* has made any difference at all in reducing arbitrary decisionmaking, at least in one Florida District. Finally, this Note will explore how courts have adapted to the new procedural framework under *Snyder*. It seems that some district courts have had trouble adjusting to their new role in the post-*Snyder* world.

II. THE ORIGINS OF THE "FAIRLY DEBATABLE" RULE: *VILLAGE OF EUCLID V. AMBLER REALTY*

In 1926, the Supreme Court first recognized the constitutionality of zoning ordinances in the seminal case of *Village of Euclid v. Ambler Realty Co.*[4] The Euclid Village Council had adopted a comprehensive zoning ordinance which divided the village's area into use, height, and area districts.[5] The plaintiff landowner complained that the ordinance deprived it of its property in violation of the Fourteenth Amendment's due process requirement.[6]

In upholding the constitutionality of the ordinance, the Court found that modern urban life required some flexibility to allow local governments to ensure the health, safety and welfare of the citizenry.[7] The Court recognized that problems "constantly are developing, which require . . . additional restrictions in respect of the use of occupation and private lands in urban communities."[8] In recognizing this "elasticity," the Court held that the provisions of Euclid's ordinance would have to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" if they are to be declared

2. *See id.*
3. *Id.* at 472-75.
4. 272 U.S. 365, 395-96 (1926).
5. *See id.* at 379-80.
6. *See id.* at 384. The plaintiff's complaint was based on the fact that its large parcel had been placed in three use districts, two of which did not allow the industrial use it sought for the parcel, and the overall property's value had been unconstitutionally lessened. *See id.* at 382-84.
7. *See id.* at 386-87.
8. *Id.*

unconstitutional.[9] The Court found that the landowner had not shown that the Village had acted in such a way, and the standard of review which would come to be known as "fairly debatable" was born.[10]

The Supreme Court of Florida expressly adopted the fairly debatable standard in 1941's *City of Miami Beach v. Ocean & Inland Co.*[11] Florida's version of the rule is perhaps best summarized by the supreme court's opinion in *City of Miami Beach v. Lachman.*[12] In that case, the court wrote that "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."[13] It is this extreme deference to local government decisionmaking that Jack and Gail Snyder faced when they sought to challenge a local government's rejection of a zoning change to their property.[14]

III. THE *SNYDER DECISION*

In *Board of County Commissioners v. Snyder*, the Snyders owned a half-acre parcel on Merritt Island in unincorporated Brevard County.[15] The parcel was zoned "GU" (general use), a classification which allowed for single family homes to be built.[16] The Snyders filed an application with the County to rezone the property to a zoning classification which would allow

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9. *Id.* at 395 (citing Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31(1917)).

10. *See id.* at 395-97. The expansive language of the *Euclid* decision found some limitation two years later when the Court applied the new rule for a second time in *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). As in *Euclid*, the plaintiff in *Nectow* argued that the zoning ordinance applied to his property violated his Fourteenth Amendment due process rights. *See id.* at 185. The ordinance split the plaintiff's tract into two uneven parcels, a parcel zoned for strictly residential and the much larger remainder zoned for unlimited use. *See id.* at 186. A master had initially tried the case and the Court relied heavily on his findings of fact. *See id.* The master had found that plaintiff's tract was surrounded on two sides by industrial and railroad uses and that "no practical use can be made of [the smaller parcel] for residential purposes" largely because it would be impossible to make adequate return on residential development. *Id.* at 187. As a result, the master had found that neither the "health, safety, convenience and general welfare" of the immediate neighborhood or the entire city would benefit from the zoning designation. *Id.* The Court agreed, adding that it found that the inclusion of the smaller parcel in a residential district was not "indispensable" to the City's general zoning plan. *Id.* at 187-88. What *Nectow* signaled was that the Court was not going to allow local governments to escape judicial scrutiny of zoning decisions entirely. The *Nectow* Court even undertook to show the City of Cambridge how it could have redrawn the zoning lines so that the system would make more sense. *Id.* Despite the language in *Nectow* suggesting more judicial scrutiny of zoning decisions, it was not to be. The relaxed standard of *Euclid* would rule the country's, and Florida's, land use law for decades to come.

11. 3 So. 2d 364, 366-67 (Fla. 1941).

12. 71 So. 2d 148, 152 (Fla. 1953).

13. *Id.*

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

15. *See id.*

16. *See id.*

up to fifteen units per acre.[17] The County's Future Land Use Map (FLUM) designated the area for "residential use," a designation that was consistent with twenty-nine zoning classifications, including the one that the Snyders sought.[18]

The County's planning and zoning board heard the Snyders' request and approved it.[19] The Snyders then came before the County Commission to gain final approval for the zoning change.[20] The Commission heard from a number of citizens who spoke against changing the zoning of the parcel.[21] The citizens objected mainly to an increase in traffic that they believed would be caused by the development.[22] After hearing evidence on both sides, the Commission voted to deny the Snyders' application without providing a reason for the decision.[23]

After their petition for certiorari was denied by the circuit court, the Snyders petitioned and were heard by the Fifth District Court of Appeal.[24] The district court held that the fairly debatable rule was inapplicable and found for the Snyders.[25] The Supreme Court of Florida then reviewed the case because of its conflict with both district and supreme court cases and again found for the Snyders.[26]

The *Snyder* court acknowledged the long history of the fairly debatable rule in zoning jurisprudence, but noted that it had increasingly come under fire for encouraging arbitrary and poor land use decisions.[27] The court went on to discuss how the Florida Legislature had become a national leader in reform of land use decisionmaking with the passage of the Growth Management Act (GMA) in 1985.[28] Under the GMA, local governments are required to develop comprehensive plans which are subject to approval

17. *See id.*

18. *See id.* Section 163 of the Florida Statutes, otherwise known as the "Local Government Comprehensive Planning and Land Development Regulation Act," requires all local governments to develop a comprehensive plan. FLA. STAT. § 163.3167 (1997). A required element of the comprehensive plan is what is known as the "future land use element." *See* FLA. STAT. § 163.3177(6)a (1997). Central to the future land use element is the FLUM, which is required to show the "proposed future equal distribution, location, and extent" of the various categories of land use for the local government's jurisdiction. *Id.* The FLUM is different from a zoning map in that it addresses both current and future land uses for an area. *See id.*

19. *See Snyder*, 627 So. 2d at 471.

20. *See id.*

21. *See id.*

22. *See id.* Snyder told the Commission that he planned to only build five or six units, fewer than the zoning designation would allow. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* at 470-71.

27. *See id.* at 472.

28. *See id.* The GMA has now been replaced by the current Section 163.

by the state's Department of Community Affairs (DCA).[29] The comprehensive plan must contain, along with many other elements, the local government's plans for dealing with most elements of future land use for its jurisdiction.[30]

Central to the future land use element required by the GMA is the FLUM, which designates the future growth patterns of the jurisdiction.[31] The GMA also requires that all development regulations adopted by the local government must be consistent with the comprehensive plan.[32] This consistency requirement embraces both approvals and denials of development orders, which, in turn, include zoning permit applications.[33]

It is in the shadow of the GMA's new requirements that the *Snyder* court decided to retreat from the fairly debatable rule and turn to strict scrutiny as the standard for reviewing local government zoning decisions.[34] Noting that the fairly debatable rule was the appropriate standard for courts to apply when a legislative action is challenged, the court first determined that the zoning hearing before them was not legislative, but quasi-judicial.[35] To reach this result, the court applied a functional analysis, reasoning that the character of the hearing determines the nature of the action undertaken.[36]

The *Snyder* court found that the board action before them was quasi-judicial because it resulted in the application of a general rule rather than its formulation.[37] The actual creation of policy in the court's view was the enactment of an original zoning plan.[38] In a rezoning action such as the one in *Snyder*, the court found that local governments are not making policy, but applying it.[39] Thus, the court ruled that strict scrutiny should be applied to the local government's decisionmaking in similar situations.[40]

The *Snyder* rule places its initial burden on the landowner.[41] If the landowner meets the burden of showing that the rezoning proposal is consistent with the comprehensive plan, the burdens of production and persuasion shift to the local government.[42] The local government will have

29. *See id.*; FLA. STAT. § 163.3167(2) (1997).
30. *See Snyder*, 627 So. 2d at 472; FLA. STAT. § 163.3177(6)a (1997).
31. *See* FLA. STAT. § 163.3177(6)a (1997).
32. *See* FLA. STAT. § 163.3194(3) (1997).
33. *See* FLA. STAT. § 163.3164(7), (8) (1997).
34. *See Snyder*, 627 So. 2d at 474.
35. *See id.* at 474-75.
36. *See id.* at 474.
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.* at 476.
42. *See id.*

to show why denying the rezoning accomplishes a "legitimate public purpose."[43] The local government must also show that the zoning board or similar body had "competent substantial evidence" before it which supported the ruling.[44] If the local government meets this burden, the decision to deny a rezoning application will stand.[45] The court noted that findings of fact by the local board may be useful but would not be required.[46]

The court recognized several limits to the new rule. First, and most obviously, the requested zoning change must be consistent with the comprehensive plan to be given presumptive validity.[47] Second, the court recognized that comprehensive plans are designed to forecast long-range maximum uses on land and may include use categories which are currently inappropriate for a parcel.[48] For example, Brevard County's comprehensive plan included twenty-nine potential zoning classifications for the Snyder's property.[49] Given the general nature of comprehensive plan designations, the court found that local governments should retain the discretion to deny a use consistent with the plan, at least when substantial competent evidence supports it.[50]

Third, the court explicitly rejected the view of the district court as to the effect of a showing of consistency by the landowner.[51] The district court had ruled that a landowner's showing of consistency with the comprehensive plan provided a presumption of validity that the local government can only overcome with a showing that some public necessity requires a more restricted use.[52] The court rejected such a strong presumption in favor of the landowner when the local government's action is also consistent with the plan, finding that it would be unduly restrictive on local governments.[53] Finally, the court recognized that some rezonings which are "comprehensive" and affect a "large portion of the public are legislative in nature."[54] Such rezoning decisions would still be judged under the fairly debatable rule.[55]

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43. *Id.*
44. *Id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* at 475.
49. *See id.* at 471.
50. *See id.* at 475.
51. *See id.*
52. *See id.*
53. *See id.*
54. *Id.* at 474.
55. *See id.*

IV. THE LIMITS OF QUASI-JUDICIAL: COMPREHENSIVE PLAN AMENDMENTS

The *Snyder* court left many questions unanswered as to which land use decisions are quasi-judicial in nature. Perhaps most importantly, the court did not address what standard should apply to changes in the local government's comprehensive plan. Since they typically cover a significant area, most comprehensive plan amendments would likely be easily placed within the language in *Snyder* of a "comprehensive rezoning" and thus be judged to be legislative.[56] What quickly arose in the lower courts, however, was the question of what standard should apply when comprehensive plan amendments are not "comprehensive" in scope, but more akin to the rezoning of a single parcel. The next three years would bring a series of inconsistent district court opinions on the issue, followed by a not entirely satisfactory supreme court decision.

In 1994's *Florida Institute of Technology, Inc. v. Martin County*,[57] the Fourth District found that a hearing denying a single parcel comprehensive plan amendment was quasi-judicial and thus subject to the *Snyder* rule.[58] The Florida Institute of Technology owned an 81-acre parcel in Martin County.[59] The previous owner had received a Planned Unit Development (PUD) designation for the parcel in the County's comprehensive plan.[60] The County's staff was concerned about the validity of the prior amendment and suggested the County initiate another amendment.[61] At a subsequent hearing, the County Commission decided not to adopt the amendment.[62]

In finding the County's action quasi-judicial, the court relied heavily on the language from *Snyder*[63] in which the supreme court had focused on changes in the designation of a particular piece of property. The *Snyder* court had found that such changes are properly seen as quasi-judicial because they involve a limited number of property owners, identifiable parties, and "facts arrived at from distinct alternatives presented at a hearing."[64] The *Florida Institute* court, however, did not ignore the *Snyder* court's focus on the difference between creating and applying policy[65] and

56. *Id.*
57. 641 So. 2d 898 (Fla. 4th DCA 1994).
58. *Id.* at 900.
59. *See id.* at 898.
60. *See id.*
61. *See id.*
62. *See id.*
63. *Snyder*, 627 So. 2d at 474.
64. *Id.* (quoting Snyder v. Board of Comm'r, 595 So. 2d 65, 78 (Fla. 5th DCA 1991)).
65. *See id.*

found that policymaking may have been involved in the decision.[66] This finding suggests that the amendment should be deemed a legislative act. While recognizing that the decision may have involved some policy changes, the court found that the "hybrid" of a single parcel comprehensive plan amendment called for the application of the *Snyder* rule.[67] Thus, the court's application of *Snyder*'s functional analysis led the court to decide that the Commission's actions were more judicial than legislative.[68]

The Fourth District did an abrupt about-face just three months later in *Section 28 Partnership v. Martin County*, finding a comprehensive plan amendment to be legislative in nature.[69] In *Section 28 Partnership*, the appellant partnership had sought an amendment to the County's comprehensive plan to allow a 638-acre parcel to be developed as a PUD.[70] In order to develop the PUD, the partnership requested an amendment that would have created a novel category in the comprehensive plan.[71] The court found that the County's decision to reject the proposal was legislative in nature.[72]

First, the court recognized that the creation of a novel category in the plan would be the formulation of policy.[73] However, the court did not find this to be dispositive.[74] The partnership argued that the amendment would be "site-specific" and thus should be treated as quasi-judicial under *Snyder*.[75] However, the court also rejected this as being dispositive, finding that the fact that the amendment involved only one parcel, albeit a large one, would not in itself determine the issue.[76]

The court focused instead on the fact that the parcel was bordered on two sides by a state park and a preserve area.[77] It was the "pristine nature" of the park and preserve and the public recreational use of the two areas that encouraged the court to find that the *Snyder* rule should not apply.[78]

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66. *See Florida Institute*, 641 So. 2d at 900.

67. *See id.*

68. *See id.*

69. 642 So. 2d 609, 609-10 (Fla. 4th DCA 1994).

70. *See id.* at 612.

71. *See id.* The partnership requested a designation called an Adjacent County Urban Service Area. *See id.* This designation would allow the partnership to take advantage of county services in adjacent Palm Beach County. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.* The property was bordered by the Jonathan Dickinson State Park and the Loxahatchee River Preserve area. *See id.*

78. *See id.* The court distinguished the *Florida Institute* case by pointing out that, in that case, the same parcel had previously been amended for a prior owner and the petitioner was seeking to enforce that amendment. *See id.* at 612 n.2. The court, however, failed to explain exactly why that

The court relied on the language from *Snyder* in which the supreme court found that those government decisions which are comprehensive and affect a large portion of the public should be deemed legislative in nature.[79] It thus seems that the public involvement in the park and preserve was the deciding factor for the court.

Under the *Section 28 Partnership* court's application of the *Snyder* functional analysis, it seems that a comprehensive plan amendment would not be a legislative act unless a significant portion of the public would be directly affected, either because of the large area involved or the existence of a special public interest.[80] The *Section 28 Partnership* court dealt with a situation in which both a single-site comprehensive plan amendment was required and the decision would have a significant impact on the community at large. The question remained, however: what would the result be if a single parcel amendment did not present such an obvious public interest?

The supreme court addressed such an issue in *Martin County v. Yusem*, three years after the *Section 28 Partnership* decision, and found that hearings on comprehensive plan amendments were legislative, not quasi-judicial, and thus not subject to *Snyder*.[81] The Respondent, Mr. Yusem, owned a fifty-four acre parcel in Martin County that was limited to one residential unit per two acres on the county's FLUM.[82] Yusem requested an amendment to the FLUM in order to increase the allowable density on his parcel to two units per acre.[83] The county initially agreed to amend the

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changed the nature of the hearing significantly. *See id.* The *Florida Institute* case involved a PUD designation which the prior owner had never utilized. *See supra* text accompanying notes 57-60. The county itself initiated the change in the FLUM because county staff were concerned about the validity of the existing approval. *See id.* The board's action could thus be seen as application of policy. The problem with that approach can be seen by looking at the original amendment. It involved a single parcel as well. *See id.* Under the court's interpretation of *Snyder*, the initial amendment decision likely should be seen as quasi-judicial. If the initial amendment was quasi-judicial, it becomes hard to see how the second amendment could be the application of policy created through the initial amendment, given that quasi-judicial hearings are not supposed to create policy.

79. *See Section 28 Partnership*, 642 So. 2d at 612.

80. *See id.* Judge Stone concurred with the opinion but wrote separately, indicating that he would have found the county's decision to be legislative absent the novel designation category and the great public interest. *See id.* (Stone, J., concurring). Instead, Judge Stone would find any decision regarding whether to amend a comprehensive plan as legislative. *See id.* (Stone, J., concurring).

81. 690 So. 2d 1288, 1289 (Fla. 1997).

82. *See id.* at 1289-90.

83. *See id.* Yusem also sought a rezoning of the property along with the plan amendment which would change his zoning designation from an agricultural use to a residential PUD. *See id.* at 1290.

parcel's designation and began the process required by the state.[84] The DCA, however, found the proposed amendment lacked the requisite data and gave the county the choice of either abandoning the amendment or revising the supporting data.[85] The County Board of Commissioners then held another hearing on the proposed amendment and decided not to pursue it further.[86]

Yusem sued and the circuit court, relying on *Snyder*, found that the board's decision was quasi-judicial.[87] On appeal, the Fourth District again applied *Snyder*'s functional analysis and upheld the circuit court's decision because the change would have a limited effect on the public.[88] Thus, the Fourth District here had faced a situation that was lacking in *Section 28 Partnership*, a single-site comprehensive plan amendment in which the court could not find a significant public interest.[89] It found that the lack of significant public interest was enough to make the hearing a quasi-judicial undertaking.[90]

In disagreeing with the lower courts, the supreme court also rejected the functional analysis it had utilized in *Snyder*.[91] Instead, the court decided to remove any confusion as to the issue and expressly concluded that amendments to comprehensive plans are legislative.[92] The bright-line rule adopted by the court also expressly covered single parcels.[93]

The heart of the reasoning of the *Yusem* court's decision came from Judge, now Justice, Pariente's dissent to the district court's opinion.[94] In

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84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See* Martin County v. Yusem, 664 So. 2d 976, 977 (Fla. 4th DCA 1995).

89. *See id.* The District also relied on the Florida Supreme Court's decision in *City of Melbourne v. Puma*. 630 So. 2d 1097 (Fla. 1994); *see Yusem*, 664 So. 2d at 977-78. The Florida Supreme Court in *Puma* had dealt with a rezoning request and remanded it for further consideration in light of *Snyder*. *See Puma*, 630 So. 2d at 1097. As the court in *Yusem* noted, the Fourth District interpreted the remand in *Puma* to be support for its position that certain plan amendments should fall within *Snyder*. *See Yusem*, 664 So. 2d at 978. This was based on the fact that the rezoning in *Puma* would require a plan amendment, an issue that the supreme court did not mention in its opinion. *See Yusem*, 690 So. 2d at 1291. Thus, the Fourth District took the supreme court's silence on the amendment issue to be a sign of agreement with its point of view. *See id.*

90. *See Yusem*, 664 So. 2d at 976-77.

91. *See Yusem*, 690 So. 2d at 1293.

92. *See id.* The court cited at length Judge, now Justice, Pariente's dissent from the District opinion. *See id.* at 1291. Judge Pariente had argued that the initial passage of a comprehensive plan was a legislative act since it involved important policy choices. *See id.* Judge Pariente had seen no reason to treat the process of amending the comprehensive plan any differently. *See id.* The court also noted that Judge Pariente had argued that such a bright-line rule would "provide clarity to the procedures involved in this otherwise confusing area of the law." *Id.*

93. *See id.* at 1293.

94. *See id.* at 1293-94.

her dissent, Judge Pariente had argued that any comprehensive plan amendment involves a "policy reformulation."[95] Given that an amendment necessarily involved a reconsideration of a local government's "provision for local services, capital expenditures, and its overall plan for growth and future development of the surrounding area," Judge Pariente argued that considerations involved in any such decision would go far beyond an individual parcel.[96] In her view, all amendments, no matter the size of the parcel, were actions creating policy rather than applying it.[97]

The *Yusem* court also remarked that the "integrated review" process involved in the adoption of amendments to comprehensive plans gave support to its view.[98] The first step in the process of amending the plan rests at the local government level.[99] If the local government decides to amend the plan, it transmits it to the DCA for review.[100] The DCA responds with any objections or changes it finds necessary to make the amendment consistent with the local, regional, and state comprehensive plans.[101] The local government then has the opportunity to adopt the amendment as is, alter it to meet the DCA's request, or reject it completely.[102] Assuming the amendment is adopted by the local government, the DCA again reviews it.[103] If the DCA does not find it objectionable after staff review and an administrative hearing, the amendment process is complete.[104] The court found that the strict oversight involved in the amendment process clearly pointed to a policy decision.[105]

The *Yusem* court's abandonment of the functional analysis of *Snyder* and embrace of a bright-line approach brought some needed clarity to the post-*Snyder* jurisprudence. As the Fourth District opinions showed, relying on a functional analysis regarding comprehensive plan amendments often resulted in contradictory and confused opinions. However, the functional

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95. *Id.* (citing *Yusem*, 664 So. 2d at 981 (Pariente, J., dissenting)).
96. *Yusem*, 664 So. 2d at 981 (Pariente, J., dissenting).
97. *See id.*
98. *Yusem*, 690 So. 2d at 1294.
99. *See id.*; FLA. STAT. § 163.3184(3) (1997).
100. *See Yusem*, 690 So. 2d at 1294; FLA. STAT. § 163.3184(4) (1997).
101. *See Yusem*, 690 So. 2d at 1294.
102. *See id.*; FLA. STAT. § 163.3184(7) (1997).
103. *See Yusem*, 690 So. 2d at 1294; *see also* FLA. STAT. § 163.3184(8) (1997).
104. *See Yusem*, 690 So. 2d at 1294. If, however, the DCA finds that the amendment is not consistent with the Act, the State's comprehensive plan and the DCA's own minimum criteria rule, the amendment is passed on to the Administration Commission for final review. *See id.*; FLA. STAT. § 163.3184(9)b,(10)b (1997). The Administration Commission is composed of the Governor and the Cabinet and is empowered to levy sanctions against local governments which have improperly amended their comprehensive plans. *See Yusem*, 690 So. 2d at 1294; *see also* FLA. STAT. § 163.3184(11)(a) (1997).
105. *See Yusem*, 690 So. 2d at 1294. The court also noted that the Act itself requires that the DCA apply the fairly debatable rule when judging plan amendments. *See id.* at 1295.

analysis could provide some benefits, especially in some marginal cases. Judge Pariente's argument that all plan amendments involve alteration of policy far beyond the actual parcel clearly makes sense in most situations.[106] There will be situations, however, when the relevant policy considerations will be almost exclusively limited to the parcel in question. The need for stricter scrutiny may be called for in such situations, given that very few of the difficult policy decisions which led the *Yusem* court to deem the amendment procedure legislative in nature would be present. However elegant and logical the bright-line rule adopted in *Yusem* may be, there remains a chance that local governments could both act without sufficient justification and avoid strict scrutiny when the countervailing government interests are not present.

The *Yusem* court did provide one potential answer to this concern. In a footnote, the court took note of a 1995 statutory amendment that allows for special, expedited review of comprehensive plan amendments that are directly related to small-scale development plans.[107] The court refused to rule on the appropriate standard of review for such amendments, perhaps leaving an opportunity to avoid the problems inherent in the *Yusem* bright-line rule.[108] However, both the Fifth and First Districts recently reviewed the question left open by the *Yusem* court and found no reason to apply a different standard to small parcel comprehensive plan amendments.[109]

In 1998, in *Fleeman v. City of St. Augustine Beach*, a landowner sought an amendment to the City's comprehensive plan to change the designation of a portion of his parcel to allow for commercial development.[110] Since the parcel was less than 10 acres in size, the owner, Mr. Fleeman, sought the application under the small parcel amendment procedure.[111] Under that procedure, the local government is not limited in the number of amendments per year, need hold only one public hearing on any amendment, and may also avoid mandatory state review.[112] Despite the lenient rules provided for small parcel amendments, the *Fleeman* court could find no reason to distinguish such proceedings from the standard amendment procedure discussed in *Yusem*.[113] Instead, the court found that

106. *See Yusem*, 664 So. 2d at 981 (Pariente, J., dissenting).

107. *See Yusem*, 690 So. 2d at 1293 n.6; FLA. STAT. § 163.3187(1)c (1997).

108. *See id.*

109. *See* Fleeman v. City of St. Augustine Beach, 728 So. 2d 1178, 1180 (Fla. 5th DCA 1998); City of Jacksonville Beach v. Coastal Dev. of N. Fla., 730 So. 2d 792, 794-95 (Fla. 1st DCA 1999).

110. *Fleeman*, 728 So. 2d at 1179. A condemnation of a portion of the property had left only .3863 acres of the parcel designation commercial. *See id.*

111. *See id.* at 1179; FLA. STAT. § 163.3187(1)c (1997).

112. *See Fleeman*, 728 So. 2d at 1180.

113. *See id.* Fleeman had also argued that since small-scale amendments affect a limited number of persons, they should be deemed quasi-judicial under *Snyder*'s functional analysis. *See id.*

the same policy concerns are involved in either proceeding.[114]

In extending the *Yusem* bright-line, the *Fleeman* court sought to avoid inserting more uncertainty into a "still unsettled area of law."[115] While the *Yusem* rule has its benefits, the result in *Fleeman* represents some of its potential inequities. Fleeman had been left with .3863 acres designated for commercial use after a Department of Transportation condemnation, a little more than one-half of the original size of the designated portion.[116] Although the court pointed to several potential policy interests involved in the amendment of the parcel's designation, it remains that the City had previously deemed it wise to designate more than half of an acre of the property commercial.[117] Therefore, the policy concerns involved in a small addition of commercial designation do not seem altogether weighty in this case. The First District reviewed the issue in 1999's *City of Jacksonville Beach v. Coastal Development of North Florida, Inc.* and held that small-scale plan amendment decisions are legislative in nature.[118] The developer in *Coastal Development* had argued that the footnote in the *Yusem* opinion represented an implicit recognition by the supreme court that small-scale amendments should be held to a different standard.[119] Therefore, the developer argued, small-scale amendment decisions should be deemed quasi-judicial in nature.[120] The court disagreed, holding that the *Yusem* court did not deem small-scale amendment decisions different through the footnote; instead, the court was simply "leaving to a future day the question of the appropriate standard of review."[121] Addressing the issue, the *Coastal Development* court followed the *Fleeman* court's reasoning, finding that all comprehensive plan amendments "necessarily involve a formulation of policy."[122] The court also observed in the *Yusem* decision a "clear intent to bring predictability to an area of the law in which

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114. *See id.* The court relied on analysis similar to Judge Pariente's as quoted in *Yusem*, focusing on the important policy decisions involved in every plan amendment in comparison to the considerations involved in a rezoning action. *See id.*

115. *Id.* The court found that a functional approach would raise more questions than it would answer. *See id.* The court did note, however, that the parcel in question was located "on a major thoroughfare, close to the ocean, and perhaps near environmentally sensitive land." *Id.* This implies that a functional analysis would garner the same result: an amendment of this parcel would be legislative since it would involve important public interests. Given the significant public interest relied on in *Section 28 Partnership*, however, the public interest involved in *Fleeman* seems paltry. *See supra* text accompanying notes 76-77.

116. *See Fleeman*, 728 So. 2d at 1179.

117. *See id.*

118. 730 So. 2d 792, 794-95 (Fla. 1st DCA 1999).

119. *See id.* at 794.

120. *See id.*

121. *Id.*

122. *Id.*

confusion had been prevalent."[123] The court held that finding small-scale amendment decisions legislative in nature would assist in that goal through assuring a uniform approach to all comprehensive amendment requests.[124] So, like the *Fleeman* court, the *Coastal Development* court decided that a bright-line approach was preferable to the uncertainty of a case-by-case functional analysis. However, the application of the *Yusem* rule to small-scale amendment decisions has dangers of its own.

The situation in *Fleeman* represents the dangers inherent in an extension of the *Yusem* rule to small-scale amendment decisions. Fleeman lost some of his property to condemnation by the state government; the City then declined to restore his lost commercial potential in a situation in which serious City interests were likely not involved.[125] Under the fairly debatable standard, landowners like Fleeman have little recourse against such decisions, however inequitable the result. Under the *Fleeman* and *Coastal Development* courts' extension of *Yusem*, similar situations will inevitably occur. Whether the resulting damage will outweigh the acknowledged benefits of a bright-line rule remains to be seen.

Despite the supreme court's hope in *Yusem* that some needed clarity could be brought to the standard of review of land use decisionmaking by local governments, at least one case points to some continuing confusion at the District level.[126] Decided just five days after *Yusem*, the Third District's opinion in *Debes v. City of Key West* suggests that the supreme court may not have been clear enough.[127]

The petitioner in *Debes* owned undeveloped property in the City of Key West.[128] The City's FLUM designated the property Medium Density Residential, a designation which barred all commercial development.[129] The City Planner made three attempts to convince the City Commission to amend the FLUM to change the property's designation to Commercial General, a designation that would allow commercial development.[130] Each application to amend the comprehensive plan was rejected by the City

123. *Id.* In this the court was clearly correct. Just a quick glance at the Fourth District cases which preceded *Yusem* makes it clear that the lower courts were drawing some unclear and arbitrary lines when they applied a functional analysis. *See supra* text accompanying notes 56-79.

124. *See Coastal Development*, 730 So. 2d at 794. The court also certified the standard of review issue to the supreme court as a question of great public importance. *See id.* at 795. This decision provides the supreme court with the discretion to hear the case. *See* FLA. CONST. art. V, § 3(b)5.

125. *See Fleeman*, 728 So. 2d at 1179.

126. *See Yusem*, 690 So. 2d at 1293.

127. 690 So. 2d 700, 701 (Fla. 3d DCA 1997).

128. *See id.*

129. *See id.*

130. *See id.* The city's Planning Board approved each application of the City Planner to amend the plan. *See id.*

Commission.[131]

The district court quashed the circuit court's ruling that the denial was valid, holding that the City's action was impermissible reverse "spot planning" and thus illegal.[132] The result of the case was not remarkable; the potential problem with the *Debes* decision, however, lies in the standard of review applied.[133] The court found the *Snyder* rule provided the appropriate standard to judge the validity of the City's actions, despite the fact that the *Yusem* decision explicitly required the fairly debatable standard for comprehensive plan amendment decisions.[134] There is no mistaking that the court was aware of the *Yusem* decision before ruling in *Debes*, the opinion even cites to *Yusem* in a footnote.[135]

Despite the court's finding that *Snyder* should apply, the court noted that the standard of review was "not determinative or even important in [the] consideration of the case."[136] The court also noted that the facts of the case before them would "yield the same result" regardless of which standard of review was utilized.[137] This statement does not provide the answer, however, to why the court felt that *Snyder* should apply in the face of *Yusem*'s command.[138]

While the court may have been right that the facts presented in *Debes* were so compelling that they would have overcome the fairly debatable

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131. *See id.* The petitioner sued after each rejection of the amendment. *See id.* at n.1. The first two suits resulted in the circuit court quashing the denials. *See id.* The third denial was upheld by the circuit court. *See id.*

132. *Id.* In the court's opinion, the city's action was "spot-planning in reverse" because the denial essentially allowed the petitioner's property to remain singled out for unfavorable treatment in the plan. *Id.* The petitioner's property was surrounded on all sides by parcels that were designated for commercial uses. *See id.* "Spot zoning" in the classic sense means providing a benefit to a particular parcel that is denied to surrounding parcels. "Reverse" spot zoning would be just the opposite: denying a single parcel a benefit shared by the surrounding properties. This, in the court's view, was "spot-planning in reverse" because the city discriminated against the petitioner through planning rather than zoning. *Id.*

133. *See id.*

134. *See id.*

135. *See id.* at n.4.

136. *Id.*

137. *Id.*

138. *See id.* One potential answer lies in the temporal proximity of the *Yusem* and *Debes* decisions, barely a week apart. The city in *Debes* had argued that *Snyder* should be the appropriate standard of review and that the decision of the city was justified by substantial competent evidence, an indication that *Yusem* was not decided at the time. *See id.* Given *Yusem*'s utility to the city's position, it is highly unlikely that the city's attorney would not have used *Yusem* as support if it was available. It may have been that the *Debes* court had made its ruling before *Yusem* was decided and rather than revisit the issue in the light of *Yusem* the court simply added a reference to *Yusem* to a footnote of the opinion. *See id.* at n.4. Thus, the language in the opinion suggesting that any standard of review would yield the same result may have been inserted at least partially as a justification for failing to apply *Yusem*. *See id.*

rule's deference for local government decisions, compelling facts should not provide justification for applying an inapplicable standard of review.[139] Given the clarity of the *Yusem* decision, however, it is unlikely that more decisions akin to *Debes* will be forthcoming. *Debes* seems to be unique in its failure to correctly apply the rule. The harm resulting from the court's failure is thus likely to be minimal.

V. DEFINING STRICT SCRUTINY DOWN?: THE PROBLEM OF CITIZEN TESTIMONY

Along with feeling out the boundaries of what types of actions will be deemed quasi-judicial, the courts have also been wrestling with what constitutes "substantial, competent evidence" in the zoning and planning context.[140] The *Snyder* decision places the burden on the local government to show that a rejection of a zoning change request was supported by substantial competent evidence.[141] The Supreme Court of Florida has defined substantial evidence as "such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred."[142] This standard, while not strict scrutiny in the constitutional sense, is significantly more rigorous than the fairly debatable rule.[143]

Perhaps the greatest source of arbitrary decisionmaking in the zoning context is what some commentators have called "neighborhoodism," or the influence placed on local government by neighbors of the parcel in question.[144] Courts have long pondered over how to weigh the testimony of neighbors, and what kind of such testimony should be considered a valid basis for local government decisionmaking.[145] The *Snyder* decision did little to remove the question; in contrast, its requirement of substantial competent evidence makes the question of the validity of citizen testimony even more pressing.

The leading Florida case on citizen testimony in zoning decisionmaking is 1974's *City of Apopka v. Orange County*.[146] In *Apopka*, the Orange County Commission rejected a request to change the zoning of a large

139. *See id.*

140. *Id.*; *see also Snyder*, 627 So. 2d at 476.

141. *See Snyder*, 627 So. 2d at 476.

142. De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957).

143. *See Snyder*, 627 So. 2d at 471.

144. *Id.* at 472-73 (quoting from RICHARD F. BABCOCK, THE ZONING GAME (1966)).

145. *See generally* City of Apopka v. Orange County, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (noting that although interested parties should be given a chance to express their views about applications for special exceptions or zoning changes, Board of Commissions is not required to hold a plebiscite).

146. *Id.*

parcel to allow for the construction of an airport.[147] The Commission had heard the testimony of citizens who opposed the plan.[148] In a much cited opinion, the Fourth District found that the Commission had impermissibly relied on "laymen's opinions unsubstantiated by any competent facts."[149] The court found that the Commission had essentially conducted an opinion poll of the electorate rather than eliciting relevant facts from the members of the public.[150] Thus, later courts have taken the *Apopka* court's ruling to mean that "generalized statements of opposition" on the part of the public are to be ignored, but fact-based testimony is valid evidence.[151] Thus, as long as a citizen's testimony is fact-based, it will generally be deemed "competent."

If courts are in agreement that fact-based testimony from neighbors is acceptable in zoning and planning decisionmaking, there is still some confusion as to the weight to be given such testimony. In other words, how much and what kind of citizen testimony can support a local government's rejection of a rezoning request? Three cases from the Third District provide a glimpse at how certain kinds of citizen testimony have been found to constitute substantial competent evidence in such a way that possibly endangers the purpose of the *Snyder* decision.

In *Metropolitan Dade County v. Blumenthal*, the Third District court, sitting en banc, quashed the circuit court's reversal of the County's decision to reject a rezoning application.[152] The circuit court had rejected the testimony of neighbors to the project, finding it "'conclusionary and without adequate support.'"[153] The district court disagreed, finding that the circuit court had misinterpreted *Apopka* in rejecting what was fact-based testimony by the neighbors.[154]

The testimony in question was of Mr. Morgan Levy.[155] Levy had spoken against the landowner's proposal to build 18 units per acre on the property, instead requesting that the development be limited to 13 units per acre.[156] Levy had introduced, without objection, a diagram of the area surrounding the parcel.[157] He had also, without objection, drawn a line on the diagram

147. *Id.* at 660.
148. *See id.*
149. *Id.*
150. *See id.* at 659.
151. Metropolitan Dade County v. Blumenthal, 675 So. 2d 598, 607 (Fla. 3d DCA 1996) (rehearing en banc and adopting Judge Cope's dissent to the panel opinion as the opinion of the court).
152. *Id.* at 610.
153. *Id.* at 606 (quoting circuit court opinion at 3).
154. *See id.* at 606-07.
155. *See id.* at 601.
156. *See id.* at 602.
157. *See id.* at 607.

showing where previous zoning decisions had limited densities to 13 units per acre.[158] The parcel in question was located within the area on Levy's diagram where other properties were limited to 13 units per acre.[159] The district court noted that there was no dispute as to the factual validity of Levy's testimony.[160]

The County Commission's resolution denying the zoning change noted that the proposed change was "'incompatible with the neighborhood.'"[161] Levy's testimony essentially went to that question.[162] He sought to demonstrate how a development of 18 units per acre would be incompatible with surrounding developments limited to 13 units per acre.[163] The district court quite reasonably found that Levy's uncontested, fact-based testimony was competent and properly part of the substantial evidence the County relied on in rejecting the proposed change.[164] The problem which would soon appear in the wake of *Blumenthal*, however, is that neighbor testimony of incompatibility can assume a role of such importance that it alone becomes capable of derailing a rezoning application.

A step in that direction was taken in the Third District's opinion in *Metropolitan Dade County v. Sportacres Development Group, Inc.*[165] The property owner in *Sportacres* had sought zoning variances that would have allowed it to excavate a lake and develop a subdivision which did not meet the frontage and lot area requirements of the current zoning designation.[166] The County's Zoning Appeals Board approved the application with 39 conditions after a hearing at which a group of neighbors testified in opposition.[167]

The neighbors appealed the decision to the County Commission which, after two public hearings, overruled the Zoning Appeals Board decision.[168] The property owner petitioned the circuit court for relief and the court

158. *See id.* at 603.
159. *See id.*
160. *See id.* at 606.
161. *Id.* at 603.
162. *See id.*
163. *See id.*
164. *See id.* at 605.
165. 698 So. 2d 281, 282 (Fla. 3d DCA 1997). The *Snyder* framework is not directly on point in this case since the developer was not seeking a rezoning permit but unusual use and non-use variances permits. *See* Sportacres Dev. Group, Inc. v. Metropolitan Dade County, 4 Fla. L. Weekly Supp. 432, 434 (1996). The decision is still relevant, however, because of its discussion of substantial competent evidence and neighbor testimony.
166. *See Sportacres*, 698 So. 2d at 282.
167. *See id.*
168. *See id.*

reversed the Commission's decision.[169] The circuit court found that the Commission had impermissibly based its decision on unsubstantiated lay opinion rather than the other competent, substantial evidence in the record.[170]

The Third District reversed the circuit court, finding that the Commission had substantial competent evidence supporting the decision before it.[171] The court noted that the Commission had access to a record which "contained maps, reports and other information which, in conjunction with the testimony of the neighbors, if believed by the Commission, constituted competent substantial evidence."[172]

The neighbors' testimony before the board addressed three issues.[173] First, the neighbors expressed concern about the lot size variance, arguing that the smaller size of lots in the development would make it incompatible with the surrounding neighborhood.[174] The neighbors also argued that the smaller lots would negatively affect their property values.[175] The third major concern raised by the neighbors was that the large lake to be built in the development would be a "health hazard."[176]

The problems with the neighbor's testimony as to the latter two issues are clear. As the circuit court noted, the neighbors presented only one piece of factual evidence as to the potential for decreased property values.[177] That evidence consisted of testimony that one local resident had recently sold a home for $175,000 while the mid-range home price of the proposed development was to be $110,000.[178] While factually based, such testimony was properly rejected by the circuit court as insufficient.[179] Both the circuit and district court are silent as to the type of evidence presented as to the health hazard concern. Regardless, the relevance of both the health hazard

169. *See Sportacres*, 4 Fla. L. Weekly Supp. at 434.
170. *See id.*
171. *See Sportacres*, 698 So. 2d at 282.
172. *Id.*
173. *See id.*
174. *See Sportacres*, 4 Fla. L. Weekly Supp. at 433.
175. *See id.*
176. *Sportacres*, 698 So. 2d at 282. This issue is the source of much of the notoriety the *Sportacres* decision enjoys in Dade County. Telephone interview with John Shubin, Attorney for Barbara Watson (Mar. 8, 1999). The property at issue is located in a predominately African-American community. *See id.* One of the neighbors' arguments was that the large proposed lake would be a health hazard to the community because many African-Americans have poor swimming skills and would risk drowning. *See id.* The concern over the use of the so-called "blacks can't swim" argument is probably misplaced. *See id.* It was not even presented to the district court, so its competence is irrelevant. *See* Petition for Writ of Certiorari at 9-11, Metropolitan Dade County v. Sportacres Dev. Group, Inc., 698 So. 2d 281, 282 (Fla. 3d DCA 1997).
177. *See Sportacres*, 4 Fla. L. Weekly Supp. at 433.
178. *See id.*
179. *See id.*

testimony and the testimony as to lower property values is questionable because the County made its decision based on incompatibility with the surrounding area.[180]

The neighbors' testimony as to compatibility with the neighborhood largely consisted of a comparison of the home sizes in the area with the development's proposed home sizes.[181] The existing homes in the surrounding area were 7,500 square feet.[182] The proposed home size in the development would be 4,500 square feet.[183] The circuit court found that such evidence was insufficient to show incompatibility.[184] The circuit court found that the neighbors had failed to explain why the smaller lots would be incompatible with the surrounding area.[185] Under the circuit court's rubric, therefore, merely pointing out a fairly significant difference in home size is insufficient to show incompatibility.[186]

The circuit court noted that to allow such evidence to foil a variance request would contravene the County's policy of allowing such variances in the first place.[187] Since variance requests, by definition, will involve land uses which differ, often significantly, from the surrounding area, evidence of this difference should not alone be sufficient to deny a variance request.[188] The district court opinion does not explicitly reject this argument; it simply states that substantial competent evidence existed to support the board's decision.[189] Implicit assumptions can be made, however, that indeed the district court did find the evidence of incompatibility sufficient.[190]

It may be that incompatibility with the surrounding neighborhood is within a lay person's competency and the Commission correctly considered the neighbors' testimony. If, as other courts have found, lay people can testify as to "natural beauty," they are probably equally qualified to testify

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180. *See id.* at 434.

181. *See id.* at 433.

182. *See Sportacres*, 698 So. 2d at 282. The surrounding homes were required to be 7,500 square feet because of restrictive covenants entered into in the early 1960s. *See Sportacres*, 4 Fla. L. Weekly Supp. at 433.

183. *See Sportacres*, 698 So. 2d at 282.

184. *See Sportacres*, 4 Fla. L. Weekly Supp. at 433.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.* The circuit court's argument would likely have the same force in the rezoning context. A request to change a zoning designation from one dwelling per acre to two in an area of single family homes on acre plots, for example, could easily be deemed incompatible simply on visual inspection.

189. *See Sportacres*, 698 So. 2d at 282.

190. *See* Petition for Writ of Certiorari at 9-11, Metropolitan Dade County v. Sportacres Dev. Group, Inc., 698 So. 2d 281, 282 (Fla. 3d DCA 1997).

as to any aesthetic incompatibility.[191] Therefore, the testimony in *Sportacres* was likely competent in that it does not take an expert witness to testify that existing homes are significantly larger than the homes in a proposed development. The question remains, however, whether evidence of a difference in home sizes or other aesthetic concerns should suffice to support a finding of incompatibility with the surrounding neighborhood. If so, very few variances or significant rezoning actions would ever be granted in the face of well informed neighborhood opposition. The problems inherent in permitting such evidence to alone support a rejection of a proposed zoning change were soon vividly demonstrated in another Third District opinion, 1998's *Metropolitan Dade County v. Section 11 Property Corp.*[192]

The landowner in *Section 11* filed an application for a special zoning exception to allow it to develop a self-storage facility on its parcel.[193] The proposed use was allowed under the parcel's zoning designation if accepted at a public hearing.[194] Under the special exception framework, the validity of the request is presumed and denial must be supported by substantial competent evidence that the exception would be adverse to the public interest and would be incompatible with the surrounding area or the comprehensive plan.[195]

When the special exception proposal came before the County Commission, staff supported the application as compatible with the surrounding area.[196] Opposing the application was a group of neighbors.[197] The neighbors' objections to the proposed facility included the increased traffic and noise and the decrease in property values that they believed would result, as well as concerns about the aesthetic qualities of such a facility.[198] The Commission denied the special exception because of "incompatibility with the surrounding area and its development."[199]

Upon certiorari review, the circuit court found that substantial competent evidence did not exist to support the denial.[200] The court found that the neighbors' testimony on incompatibility was insufficient because

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191. Board of County Comm'rs v. City of Clearwater, 440 So. 2d 497, 499 (Fla. 2d DCA 1983).

192. 719 So. 2d 1204 (Fla. 3d DCA 1998).

193. *See* Section 11 Property Corp. v. Metropolitan Dade County, 5 Fla. L. Weekly Supp. 517, 518 (1998).

194. *See id.* The relevant standard was the equivalent of a rezoning request under *Snyder*. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. *Id.* at 517.

200. *See id.* at 519.

it had no factual support.[201] Instead of facts, the circuit court found that the neighbors' testimony constituted an "emotional outpouring."[202] Thus, the circuit court had found a classic *Apopka* situation: neighbor testimony consisting solely of opinion.[203] To the contrary, the Third District court on review found that the neighbor's testimony was competent, fact-based, and part of the substantial competent evidence supporting the denial.[204] The district court accordingly reversed the circuit's decision.[205]

The district court focused exclusively on the aesthetic concerns of the neighbors, wisely ignoring the traffic, noise and property value questions.[206] The court noted that several neighbors had described the proposed facility as "'industrial'" and thus incompatible with the neighborhood.[207] The court also quoted another neighbor who described the project as an "'eyesore'" and commented that no amount of landscaping could enhance its appearance.[208] This neighbor argued that any attempt at landscaping would be akin to "'trying to put an elephant in a Volkswagen [sic], you still know the elephant is there.'"[209] It was this testimony that the district court found to be fact-based and a worthy basis for a denial of the special exception.[210]

In *Section 11*, the dangers lying under the surface in *Blumenthal* and *Sportacres* finally came to light. There, the neighbor testimony was not an uncontested demonstration of relative zoning densities as in *Blumenthal*.[211] Neither did the testimony deal with the relative sizes of homes in the proposed development and the surrounding area as in *Sportacres*.[212] In *Section 11*, the testimony found to be competent was purely aesthetic; the neighbors simply did not want an unattractive, "'industrial'" building in their neighborhood and sought to block it.[213] There seems to be no doubt that the special exception would have passed absent the neighbor's

201. *See id.* To the contrary, the circuit court noted that the county staff had presented "more than ample evidence" of compatibility, at least for noise and traffic concerns. *Id.*

202. *Id.*

203. *See id.*

204. *See* Metropolitan Dade County v. Section 11 Property Corp., 719 So. 2d 1204, 1205 (1998).

205. *See id.*

206. *See id.* There is little doubt that the testimony presented by the neighbors on both traffic and property values was far from competent, since it consisted of nothing but opinion. *See Section 11*, 5 Fla. L. Weekly Supp. at 518.

207. *Section 11*, 719 So. 2d at 1205. In the immediate area surrounding the parcel there was a gas station and an auto supply store. *See Section 11*, 5 Fla. L. Weekly Supp. at 517.

208. *Section 11*, 719 So. 2d at 1205.

209. *Id.*

210. *See id.*

211. *See Blumenthal*, 675 So. 2d at 602.

212. *See Sportacres*, 698 So. 2d at 282.

213. 719 So. 2d at 1205.

testimony.[214] Thus, the result in *Section 11* indicates that *Snyder* may have not adequately reduced the danger of "neighborhoodism" in local government decisionmaking.

The testimony seen in *Section 11* was not by itself illicit. Neighbors should be free to testify on the aesthetic compatibility of proposed development. The question again is whether neighbor testimony on aesthetic compatibility should be the sole basis of the requisite substantial competent evidence. If so, the line between acceptable fact-based testimony and unacceptable *Apopka* opinion testimony would be blurred beyond recognition. Is testimony calling a project an "eyesore" opinion or, as the district court in *Section 11* found, "fact-based testimony regarding . . . aesthetic incompatibility?"[215] Even if legitimately competent, such aesthetic testimony should not be allowed to alone support a local government decision. Otherwise, neighbors would be given a tool of incredible and all too easily abused power. If other courts follow the *Section 11* reasoning, the *Snyder* rule may be in some danger. It becomes quixotic to demand substantial competent evidence when testimony such as presented in *Section 11* suffices.

VI. THE ROLE OF THE COURTS IN THE POST-*SNYDER* WORLD

The *Snyder* court's reconstruction of the way local land use decisions are reviewed introduced some new confusion into the proper role of courts in the process. Perhaps most importantly, the *Snyder* decision placed land use jurisprudence into an ongoing and contentious debate about the role of district courts in reviewing circuit court appellate decisions.[216] Under the *Snyder* rubric, initial review of local land use decisions is by certiorari to the circuit court.[217]

By deeming local zoning decisionmaking a quasi-judicial undertaking, the *Snyder* court signaled the circuit courts to utilize a review procedure equivalent to the one applied to administrative agency decisions.[218] The Supreme Court of Florida has held that circuit court review of an administrative decision is limited to whether procedural due process was

214. *See id.* at 1204. Given that the county staff pressed for approval, it seems very unlikely that a contrary decision would have been made absent the neighborhood resistance.

215. *Id.* at 1205.

216. *See generally* City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982) (discussing appropriateness of district courts' review of circuit court decisions in administrative matters).

217. *See Snyder*, 627 So. 2d 469, 476 (1993).

218. *See id.* at 474-76; *see also* Town of Mangonia Park v. Palm Beach Oil, Inc., 436 So. 2d 1138, 1139 (Fla. 4th DCA 1983) (discussing the limited review of administrative agency decisions by circuit courts).

accorded, the essential requirements of the law were observed, and the findings were supported by competent substantial evidence.[219] By limiting the circuit courts to determining whether the local government had competent substantial evidence before it, the *Snyder* court implicitly denied the circuit court the ability to re-evaluate the evidence.[220] Therefore, the local government's decision, as long as it is supported by competent substantial evidence, is entitled to deference and should not be second-guessed by the reviewing circuit court.

The *Snyder* court noted that further review at the district court level would be governed by the court's 1982 decision in *City of Deerfield Beach v. Vaillant*.[221] The boundaries of review laid out by the *Snyder* court, however, were soon tested, and in some cases, breached. Under *Vaillant*, a district court's certiorari review is limited to a determination of whether the circuit court afforded procedural due process and applied the correct law.[222] The second element of the review, the correct application of law, would soon become an issue in two ways. First, courts differed on how egregious such an incorrect application must be to trigger appellate reversal. Second, courts have questioned what actually constitutes an incorrect application of law.

The first question has been answered by the supreme court. The second remains open to disagreement.

A. *When Is District Court Review in Order?*

A year after the *Vaillant* decision, the Supreme Court of Florida again dealt with the issue of the scope of certiorari review by district courts.[223] In *Combs v. State*, the court reviewed the application of a "departure from the essential requirements of law" standard for reviewing the actions of a circuit court.[224] The court found that district courts should look to both the existence and seriousness of legal error and reverse a lower court only when "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice."[225] The court went on to note that such a standard is appropriate to avoid certiorari review in the district court becoming essentially a second appeal.[226]

The supreme court seemed to retreat from the language in *Combs* and return to *Vaillant*'s arguably more broad standard of review in 1989's

219. *See Vaillant*, 419 So. 2d at 626.
220. *See Snyder*, 627 So. 2d at 476; *see also Town of Mangonia Park*, 436 So. 2d at 1139.
221. *See Snyder*, 627 So. 2d at 476.
222. *See Vaillant*, 419 So. 2d at 626.
223. *See* Combs v. State, 436 So. 2d 93, 95 (Fla. 1983).
224. *Id.* Note that *Combs* was not a zoning decision, but a criminal case.
225. *Id.*
226. *See id.*

Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals.[227] The court again dealt with the extent of a district court's certiorari review and, quoting language from *Vaillant*, found that the "application of the correct law" standard was appropriate.[228] The *Education Development* court never mentioned the "miscarriage of justice" language seen in *Combs*, creating an implication that the *Combs* framework was too restrictive on district courts.[229] However, the court did not explicitly overturn, or even mention, *Combs*.[230]

The supreme court addressed the apparent contradiction between *Combs* and *Education Development* in 1995's *Haines City Community Development v. Heggs* and found that the seemingly disparate standards were synonymous.[231] After a review of each case, the *Heggs*' court found that both standards "reduced to their core" were the same.[232] What the standard approved in *Heggs* actually consists of, however, seems to be the *Combs*'s rule. The court quoted with approval the district court's opinion which included the "miscarriage of justice" language from *Combs*, noting that the district court's analysis "captures the essence" of the holdings in *Combs* and *Education Development*.[233] Thus, the *Heggs* court seemed to reiterate *Combs*'s focus on limiting district court review.

The *Heggs* decision has important bearing on the *Snyder* court's finding that district court review should be ruled by *Vaillant*'s "application of the correct law" standard.[234] Even though the "miscarriage of justice" language of *Combs* is not directly repeated by the court in *Heggs*, the court does quote it with approval.[235] District courts, without exception at this date, have also adopted the *Heggs* standard as if it required a miscarriage of justice to reverse a circuit court.[236] Therefore, the *Heggs* decision seems to have created an environment where district courts are more limited in their ability to reverse circuit court decisions. Parties successful at the circuit level would thus be wise to emphasize the "miscarriage of justice"

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227. 541 So. 2d 106, 108 (Fla. 1989). *Education Development* was a zoning case, and its result seemed to indicate both that the *Vaillant* and *Combs* standards were disparate and that zoning cases should be treated under *Vaillant* instead of *Combs*.

228. *Id.*

229. *Id.* at 107-09.

230. *See id.*

231. 658 So. 2d 523, 529-31 (Fla. 1995).

232. *Id.*

233. *Id.* at 531.

234. *See Snyder*, 627 So. 2d at 476.

235. *Heggs*, 658 So. 2d at 531.

236. *See, e.g.*, G.B.V. Int'l, Ltd. v. Broward County, 709 So. 2d 155, 155 (Fla. 4th DCA 1998); Seminole County Bd. of County Comm'rs v. Eden Park Village, Inc., 699 So. 2d 334, 335 (Fla. 5th DCA 1997); Bird-Kendall Homeowners Assoc. v. Metropolitan Dade County Bd. of County Comm'rs, 695 So. 2d 908, 909-10 (Fla. 3rd DCA 1997); Debes v. City of Key West, 690 So. 2d 700, 703 (Fla. 3d DCA 1997).

language of *Combs* at the district court in order to discourage reversal.

B. *What Is the Extent of District Court Review?*

The more central question left open by *Heggs*, however, is the breadth of review included in the "applied the correct law" standard. This is perhaps most important in the zoning context when the circuit court has found that no substantial competent evidence existed to support a local government decision. Courts have recently been wrestling with the question of whether the circuit court's determination regarding substantial competent evidence should be deferred to or scrutinized as an application of law.

The Third District reviewed the issue in *Blumenthal* and found that the district courts' scope of certiorari review in zoning matters encompassed the review of a circuit court's determination of whether substantial competent evidence existed.[237] The court found that:

> [A]ll the district courts that have addressed this scope of review issue are in accord that where the circuit court applies an incorrect legal standard and erroneously determines that a zoning decision is not supported by substantial competent evidence or where the record is clear that the court has impermissibly reweighed the evidence . . . certiorari is available to the aggrieved party.[238]

The court's latter assertion is well accepted; a circuit court would be exceeding its own certiorari jurisdiction if it reweighed the evidence before the local government, or reversed the decision simply because it disagreed with the local government's evaluation of the evidence.[239]

The former assertion, that the review of the "application of the legal standard" somehow includes the circuit court's determination of whether substantial competent evidence existed, is more problematic.[240] Such

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237. *See Blumenthal*, 675 So. 2d at 608-09. The panel opinion was released one month prior to the *Heggs* decision and thus the court relied on *Vaillant* for the breadth of certiorari review. *See id.* at 607.

238. *Id.* at 608-09.

239. *See generally* Town of Mangonia Park v. Palm Beach Oil, Inc., 436 So. 2d 1138, 1139 (1983) (holding that the circuit court erred in reversing the decision of the town code enforcement board).

240. *Blumenthal*, 675 So. 2d at 608. It is unclear from the opinion exactly which errors the court found in the circuit court's reasoning. *See id.* at 608-09. The court did quote at length the Fourth District's opinion in *City of Ft. Lauderdale v. Multidyne Waste Management, Inc.*, where that court had found that a circuit court had erroneously deemed evidence incompetent and also

review would be appropriate if the circuit court erroneously rejected the sole competent evidence supporting the decision, for example. However, the line between a proper review of a circuit court's actions and an invasion of the circuit's discretion is far from clear. When it is arguable that no substantial competent evidence existed, revisiting the issue and reversing the circuit court's determination seems to be dangerously close to the "second appeal" the supreme court warned of in *Combs*.[241] Under the *Vaillant/Heggs* framework, such a level of review would be inappropriately broad for certiorari review.[242]

The confusion inherent in the review of circuit court determinations that no substantial competent evidence existed was recently demonstrated by the Fourth District's opinion in *City of Dania v. Florida Power & Light*.[243] The court noted that it could not reweigh the evidence before the local government, but found that its scope of review did include a determination of "whether the circuit court exceeded its scope of review and substituted its own factual findings" for the local government's.[244] The court then proceeded to revisit the issue of substantial competent evidence and found that indeed there was sufficient evidence to support the local government's decision.[245] Because the court could find no reason why the circuit court did not recognize substantial competent evidence in the record, it ruled that the circuit court had reweighed the evidence.[246]

The *Florida Power & Light* decision demonstrates how unclear the line is between a district court reviewing the application of law made by a circuit court and a district court actually reweighing the evidence itself. In order to find that the circuit court impermissibly reweighed the evidence, the district court felt it necessary to revisit the record.[247] In the record, the court found sufficient evidence to support the local government's decision.[248] Therefore, the court came to the conclusion that the circuit court had substituted its judgment for the local government's.[249] The court's only justification for this finding seems to be that, given the existence of competent substantial evidence in the record, the circuit court must have impermissibly reweighed the evidence. Otherwise, it follows,

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reweighed the evidence before the local government. *See id.* at 608 (quoting 567 So. 2d 955 (Fla. 4th DCA 1990)). The *Blumenthal* court noted that the same reasoning applied in the case before them. *See id.*

241. *Combs*, 436 So. 2d at 95.
242. *See Vaillant*, 419 So. 2d at 626.
243. 718 So. 2d 813, 815 (Fla. 4th DCA 1998).
244. *Id.*
245. *See id.* at 816.
246. *See id.* at 817.
247. *See id.* at 816.
248. *See id.*
249. *See id.* at 817.

the circuit court could not have reversed the local government's decision.

The circuit court in *Florida Power & Light* had not explicitly rejected the evidence the district found was substantial.[250] It had simply found that substantial competent evidence had not existed.[251] If the circuit had explicitly deemed a class of competent evidence inappropriate and relied on such to overturn the local government decision, the district court would have been justified in finding the circuit incorrectly applied the law. But the circuit had not done so, making the district court's action appear to be a reweighing of the evidence.[252]

The district court relied on the silence of the circuit court opinion regarding certain testimony presented by the local government to signal that the circuit court had disregarded the evidence and thus substituted its judgment.[253] It is questionable whether a circuit court's silence on a specific item of evidence should allow a district court to assume that the circuit court had impermissibly found that evidence incompetent. To allow such action in all cases would open nearly every such appeal to a revisitation of the evidence presented to the local government and a new determination of competence and substantiality.

More generally, it is possible for district courts to utilize the standard of review applied in *Blumenthal* and *Florida Power & Light* to revisit, and potentially reweigh, every circuit court finding of no substantial competent evidence. In order to find a circuit court exceeded its jurisdiction by reweighing the evidence before the local government, the district court must make a determination if substantial competent evidence existed. To make this determination, the district court will essentially replicate the circuit court's investigation of the record. If the district court finds that the local government had enough evidence before it, it can then find that the circuit court necessarily reweighed the evidence. Such a result occurred in *Florida Power & Light*.[254] The district court found that the circuit reweighed the evidence because it had recognized substantial competent evidence that the circuit court did not.[255] Thus, despite the restrictions of the *Vaillant* rule, the very investigation of the circuit court's action by the district court can essentially become a "second appeal" at least for the question of substantial competent evidence.

In her concurrence to the *Florida Power & Light* opinion, Judge Warner pointed out language from *Education Development* which, in her opinion, indicated that district courts cannot review circuit court determinations of

250. *See id.* at 816.
251. *See id.*
252. *See id.*
253. *See id.*
254. *See id.* at 817.
255. *See id.*

whether substantial competent evidence existed.[256] First, the court in *Education Development* had quashed the district court's order because it had simply "disagreed with the circuit court's evaluation of the evidence."[257] Moreover, Justice McDonald, in his dissent in *Education Development*, had argued that the majority's decision had in fact precluded district courts from reviewing circuit court's determinations of whether competent substantial evidence existed.[258] Therefore, Judge Warner concluded that *Education Development* had foreclosed the review undertaken by the *Florida Power & Light* court.[259]

Whether *Education Development* did foreclose the type of review used by the *Blumenthal* and *Florida Power & Light* courts is an open question. It certainly does seem that any such review can involve a new investigation of the evidence before the local government. This type of review comes very close to being a second appeal of the substantial competent evidence question, seemingly in violation of the spirit, if not the rule of *Vaillant*, *Education Development*, and *Heggs*.[260] Of all the questions which have arisen in the wake of *Snyder*, this issue is perhaps the most ripe for review by the supreme court. The court may find, as Justice McDonald argued in his *Education Development* dissent, that preventing district reviews of this issue would turn circuit court judges into the "absolute czars in zoning matters."[261] Given the centrality of the determination of whether substantial competent evidence existed to the *Snyder* framework, circuit courts would likely very rarely be reversed. The court could then rule that district courts may review such questions to prevent abuse at the circuit level. As it stands currently, however, it seems that such review may be outside the jurisdiction of the district courts and the *Blumenthal* and *Section 11* courts exceeded that jurisdiction.

VII. CONCLUSION

The legacy of the *Snyder* decision after six years seems to be a mixed one. Some issues have since been clarified while others have become hopelessly muddled. On the positive side, the *Yusem* court provided needed clarity to the comprehensive plan issue after the confusion created by the district courts' use of *Snyder*'s functional analysis.[262] However, the *Yusem*

256. *See id.* at 818 (Warner, J., concurring specially). Judge Warner agreed that the circuit court should be reversed because it imposed an "especially heavy burden" on the city because the proposed use was an essential service. *Id.* at 817.

257. *Id.* at 818 (quoting *Education Development*, 541 So. 2d at 108-09).

258. *Id.* (quoting *Education Development*, 541 So. 2d at 109 (McDonald, J., dissenting)).

259. *See id.*

260. *See supra* text accompanying notes 218-32.

261. *Education Development*, 541 So. 2d at 109 (McDonald, J., dissenting).

262. *See supra* text accompanying notes 90-105.

bright-line approach, as extended by *Fleeman* and *Coastal Development*, has left an opportunity for local governments to act arbitrarily when reviewing small parcel comprehensive plan amendments.[263] The supreme court has yet to clarify whether its footnote in *Yusem* truly meant that small-scale amendments are to be held to a different standard. Hopefully, the court will take up the issue in the near future.

The Third District's wholesale acceptance of aesthetic testimony by neighbors, as evidenced most notably in *Section 11*, demonstrates that the substantial competent evidence standard may not be as effective as once thought in limiting arbitrary decisions.[264] While such testimony should be considered competent, real questions persist whether it should be considered alone sufficient to support a local government's decision. If the *Section 11* view of substantial competent evidence is widely adopted, *Snyder*'s ultimate impact will be unduly lessened.[265]

The supreme court's *Heggs* decision also bears heavily on the way land use decisions are reviewed.[266] By emphasizing the language from *Combs* cited with approval by the *Heggs* court, parties victorious at the circuit court level may be able to avoid reversal if the district court fails to find that errors created a "miscarriage of justice."[267] Finally, the broad approach to certiorari review embraced by the *Blumenthal* and *Florida Power & Light* courts has demonstrated how evidence can be reweighed when a district court is investigating the circuit court's application of the law.[268] This approach is arguably directly contrary to the framework the *Snyder* court sought to establish for review of zoning decisions.[269] More concretely, it seems to provide a "second appeal" at least for the determination of whether the local government had substantial competent evidence before it.[270]

The issues raised by *Section 11* and *Florida Power & Light* are perhaps the most pressing for supreme court review. The *Section 11* rule presents a real danger of dilution of the substantial competent evidence standard. The *Florida Power & Light* decision may be equally dangerous to the proper functioning of certiorari review at the district court level. A resolution of these outstanding issues would go far towards assuring the

263. *See supra* text accompanying notes 105-24.

264. *See supra* text accompanying notes 191-214.

265. *See supra* text accompanying notes 191-214.

266. *See supra* text accompanying notes 230-35.

267. *See supra* text accompanying notes 230-35. This, of course, assumes that courts will imbue "miscarriage of justice" with some substance in the land use context. While courts have adopted the language from *Combs*, it is still an open question whether the standard has actually changed.

268. *See supra* text accompanying notes 236-60.

269. *See supra* text and accompanying notes 236-60.

270. *See supra* text accompanying notes 236-60.

Snyder rule's future efficacy. As it stands now, the rules adopted in these two cases threaten to render *Snyder* a noble, but ultimately ineffective attempt at reforming zoning jurisprudence.