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# Can Florida's Legislative Standard of Review for Small-Scale Land Use Amendments Be Justified?

*Bernard R. Appleman\**

## ABSTRACT

This article examines the legal justification and practical application of recent Florida Supreme Court decisions classifying all comprehensive plan amendments as legislative decisions and all other zoning changes as quasi-judicial. The author outlines historical trends and concerns relating to the appropriate standard of judicial review for zoning actions, followed by a review of the evolution of the statutes and case law in Florida. The article challenges the standard of deference for legislative review of zoning actions based on separation of powers and due process. It also identifies inconsistencies in Florida case law and inequities in local government processes for reviewing small-scale amendments and rezonings. The article concludes that classifying all amendments as legislative is not adequately reasoned or justified and leads to inconsistent and inequitable results. In addition, it provides recommendations for legislative reform.

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## I.

## INTRODUCTION

To rezone a 1.3 acre plot from residential low-density to commercial community-general, the City of Jacksonville exercised a state-mandated two stage process that entailed reviewing policy implications and submitting a copy of the proposed change to a state agency.<sup>1</sup> On the other hand, a zoning ordinance to add up to 600 multi-family residential units in an 885-acre tract did not require any policy analysis or submission to the state, but rather was subject to a review only of the impact of the change on the local comprehensive plan.<sup>2</sup> These apparently inconsistent processes result from the application of recent Florida Supreme Court decisions that apply a “bright-line” rule classifying all comprehensive plan amendments as legislative decisions subject to a highly deferential judicial review and all other zoning changes as quasi-judicial decisions subject to a more stringent judicial review.<sup>3</sup>

This article examines whether this “bright line” rule is appropriate based on its legal justification and practical application. Part II outlines historical trends and concerns relating to the classification and the standard of judicial review for zoning actions. Part III reviews the evolution of the statutes and case law in Florida, including examples of the impact of the court’s decisions. Part IV challenges the high deference of review afforded legislative zoning actions and identifies inconsistencies and inequities in the Florida process for reviewing amendments and rezonings. Finally, Part V summarizes the author’s rationale for concluding that designating all amendments as legislative is not justified and has resulted in the lack of a uniform, rational means for classifying land use decisions. In addition, it provides recommendations for legislative reform.

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1. See JACKSONVILLE, FLA., ORDINANCE 2004-5 (2004), available at <http://citycirc.coj.net/coj/COJBillList.asp?Bill=2004-0005> [hereinafter JACKSONVILLE, FLA., ORDINANCE 2004-5].

2. See Report of the Planning and Development Department for Application for Rezoning R-2005-117 to Planned Unit Development, February 24, 2005, available at <http://citycirc.coj.net/coj/COJbillDetail.asp?F=2005-0117\Reports> [hereinafter Application for Rezoning R-2005-117].

3. The Florida Supreme Court’s bright-line rule is that a land use decision is classed as legislative if the action is a plan amendment and as quasi-judicial if it is not an amendment. See discussion *infra*.

## II. BACKGROUND

### A. *Zoning and Comprehensive Planning*

In the landmark 1926 case of *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court (the “Court”) validated local government zoning and planning as means to exercise state police power.<sup>4</sup> The Standard State Zoning Enabling Act (SZEa) provided guidelines to the states in adopting, amending and enforcing zoning statutes.<sup>5</sup> The SZEa stipulates that zoning regulations are to be established in accordance with a comprehensive plan.<sup>6</sup> A comprehensive plan is a document prepared by a local government to serve as the basis for future decisions on zoning. It is future oriented, intended to anticipate and account for growth and change.<sup>7</sup>

Because of the extreme difficulty in accurately predicting future growth needs and because of a plan’s inherent transitory nature, there is an ongoing need to amend the provisions of a comprehensive plan. Florida statutes, for example, mandate a revised plan every five years and provide procedures for regular and special amendments.<sup>8</sup> The classification of amendments and the ultimate procedure for adopting and challenging them is a major theme of this article.<sup>9</sup>

An amendment to the comprehensive plan may be initiated by persons seeking a use not allowed by the plan or to eliminate a use that is permitted under the plan. The amended plan by itself typically does not permit a landowner a different use of his land. Rather, it changes the map that designates future land use (fu-

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4. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-96 (1926).

5. See JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3.6, at 48 (2003) (citing Standard State Zoning Enabling Act (U.S. Dept. of Commerce rev. ed. 1926)); PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW*, at 5-6, 17 (2d ed. 2003).

6. See Mark S. Dennison, *Zoning Action Not in Accordance with a Comprehensive Plan*, 37 AM. JUR. 3D *Proof of Facts* 383 § 1 (2004) (citing Standard State Zoning Enabling Act § 3 (U.S. Dept. of Commerce rev. ed 1926)).

7. See SALSICH & TRYNIECKI, *supra* note 5 at 25-26; JUERGENSMEYER & ROBERTS, *supra* note 5, § 2.9.

8. See FLA. STAT. §§ 163.3184; .3187(2005).

9. See discussion *infra*, Sections II, III, IV and V.

ture land use map or FLUM).<sup>10</sup> The landowner must then file for a zoning ordinance that achieves the desired zoning change.<sup>11</sup>

## B. Standards for Judicial Review of Zoning Decisions

### 1. Classifying Zoning Decisions Based on Effect on Policy

One can categorize local government decisions affecting land use based on how they relate to policy. Some decisions, such as adoption of a comprehensive land use plan or a major revision of the plan, are clearly policy-making acts. Decisions that formulate policy are classified as legislative actions based on the general function of that branch of government to establish broad goals and directions for the general welfare of the community.<sup>12</sup> Other decisions, such as granting a special use permit to a landowner who meets the specified requirements, are characterized as the application of a previously determined policy to a new parcel of land.<sup>13</sup> Decisions that apply or interpret policies set by legislators are classified as judicial or quasi-judicial actions.<sup>14</sup> In between these two examples of land use changes, which are clearly either policy making or policy application, lies a middle ground where it is not always evident whether the decision-making body is formulating or applying policy.<sup>15</sup> Examples are major rezonings within a designated land use and small-scale amendments to a comprehensive plan.<sup>16</sup> How a zoning decision is classified or la-

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10. In Florida, land uses are classified based on broad categories such as residential, commercial, industrial, and agricultural. Each of these broad categories includes a number of zoning codes. For example, residential may include low or high density single-family residential, multi-family residential, or mobile homes. Changing land use within a broad category (e.g., from low density to high density residential) requires a different procedure than changing from one category to another (e.g., from residential to commercial).

11. In some Florida jurisdictions, it is common for the two actions to be filed in tandem; see Section IIIA *infra* discussing the specific procedures for selected municipalities.

12. See Michael S Holman, *Zoning Amendment—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 135 (1972).

13. See *id.*

14. See Robert C. Downier, II, *Quasi-Judicial Proceedings and Constitutional Rights: What is Happening to Separation of Powers?* FLA. B.J., Apr, 1997, at 44, 46 (clarifying that a quasi-judicial decision is one in which the body acts judicially but it is not a court as defined in the constitution).

15. See SALSICH & TRYNICEKI, *supra* note 5 at 253-54.

16. See *City of New Smyrna Beach v. Andover Dev. Corp.*, 672 So. 2d 618, 620 (Fla. 5th Dist. Ct. App. 1996) (questioning whether a planned use development should be legislative or quasi-judicial).

beled can profoundly influence the process for the decision and the outcome of a challenge to that decision.<sup>17</sup>

## 2. Decisions and Commentaries on Classifying Zoning Decisions

### a) *Euclid* “Fairly Debatable” Standard to Classify Zoning Decisions

In the early stages of zoning, the Court established that zoning actions were legislative and that the decisions of a local government would not be overturned unless they were “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>18</sup> This standard is highly deferential to the legislature and became known as the “fairly debatable” standard.<sup>19</sup> Through the 1960’s, almost all courts followed this rule for classifying zoning decisions.<sup>20</sup>

### b) *Fasano v. Board of County Comm’rs of Washington County*<sup>21</sup>

The Oregon Supreme Court was among the first courts to question the *Euclid* rationale. In *Fasano*, several homeowners opposed a developer’s requested change of zoning from single family residential to planned residential, which allowed for a mobile home park.<sup>22</sup> The county board of commissioners approved the developer’s request, overriding the vote of the planning commission, based on a finding that the increased density and different type of housing would help to meet the needs of urbanization.<sup>23</sup> In denying the homeowners’ challenge, the county had argued that the board’s decision was legislative and that the homeowners would need to show that the county had

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17. See Dennison, *supra* note 6, § 4.

18. *Euclid*, 272 U.S. at 395.

19. See Graham C. Penn, Note: *Trying to Fit an Elephant in a Volkswagen: Six Years of the Snyder Decision in Florida Land Use Law*, 52 FLA. L. REV. 217, 219 (2000) for the following description of the Florida version of the fairly debatable standard. “An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that it makes sense or points to a logical deduction that in no way involves its constitutional validity;” *City of Miami Beach v. Lachman*, 71 So. 2d 148, 152 (Fla. 1953).

20. See Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decision-making*, 65 N.D. L. REV. 161, 161 (1989).

21. *Fasano v. Board of County Comm’rs of Washington County*, 507 P.2d 23 (Or. 1973).

22. See *id.* at 25.

23. See *id.*

acted arbitrarily (i.e., it sought to apply the fairly debatable standard).<sup>24</sup>

In affirming the lower courts' decision in favor of the homeowners, the Oregon Supreme Court noted that "a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority. . . ."<sup>25</sup> The court firmly rejected the notion that the judicial review of the zoning action was limited to whether the change was arbitrary and capricious.<sup>26</sup>

### c) Other State Court Opinions

In explaining its holding, the *Fasano* court identified examples of other state supreme courts that had disputed the notion that all zoning decisions were legislative.<sup>27</sup> The Washington Supreme Court explained that, in its role as a fact finding tribunal, the local planning commission more closely resembles a quasi-judicial proceeding than a legislative one.<sup>28</sup> Supporting this trend, the Colorado Supreme Court in *Snyder v. Lakewood* distinguished between a judicial process that enacts a rezoning ordinance and a legislative process that enacts the general ordinance.<sup>29</sup> In a subsequent decision, however, the Colorado Supreme Court partially overruled *Lakewood*, declaring that an amendment to a zoning ordinance is a legislative act.<sup>30</sup>

Some states rejected the trend initiated by *Fasano* and retained the *Euclid* fairly debatable standard.<sup>31</sup> The California Supreme Court declared unequivocally that "zoning ordinances, whatever the size of parcel affected, are legislative acts."<sup>32</sup> The court in

24. *See id.*

25. *Id.* at 26.

26. *See id.* at 27.

27. *See id.*, 507 P.2d, at 26. There is, however, some evidence that *Fasano* was partially overruled; Dennison, *supra* note 6, § 4; "the time has come for Oregon courts to defer more to other branches of government in the area of land use law" (quoting *Norvell v. Portland Metro. Area Local Gov't Boundary Comm'n*, 604 P.2d 896, 899 (Or. Ct. App. 1979)).

28. *See Chrobuck v. Snohomish County*, 480 P.2d 489, 495-96 (Wash. 1971); *see also Fleming v. Tacoma*, 502 P.2d 327, 331 (Wash. 1972).

29. *See Snyder v. Lakewood*, 542 P.2d 371, 372 (Colo. 1975).

30. *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297, 302 (Colo. 1981).

31. *See JUERGENSMEYER & ROBERTS, supra* note 5, § 5.9, at 173-74 (citing *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833 (Alaska 2001)); Dennison, *supra* note 6, § 4 (identifying two states that had retreated from application of the *Fasano* doctrine).

32. *See Arnel Dev. Co. v. Costa Mesa*, 620 P.2d 565, 566-67 (Cal. 1980).

*Arnel Dev. Co. v. Costa Mesa* further explained that classifying smaller zoning ordinance as quasi-judicial would unsettle well established rules, would create confusion resulting in time-consuming litigation, and would not be necessary.<sup>33</sup>

#### d) Florida Decisions

As of 1989, according to one commentator, about ten states had adopted the *Fasano* quasi-judicial standard.<sup>34</sup> In 1993, Florida joined this select group with the holding in *Board of County Comm'rs v. Snyder* that certain rezoning actions were quasi-judicial.<sup>35</sup> Florida had adopted the *Euclid* standard in *City of Miami Beach v. Ocean & Inland Co.*,<sup>36</sup> but Florida courts had experienced a great deal of controversy regarding the appropriate standard of review.<sup>37</sup>

### 3. Procedures for Challenging Zoning Decisions

#### a) Challenging Legislative Decisions

The SZEA provides procedures for reviewing quasi-judicial actions (i.e., decisions by boards of adjustors), but does not provide comparable procedures for reviewing legislative actions.<sup>38</sup> Because most state statutes also do not prescribe procedures for reviewing legislative decisions on zoning, the courts will only permit a *de novo* appeal.<sup>39</sup> Under a *de novo* appeal, an appellant can seek declaratory judgment and injunctive relief.<sup>40</sup> In reviewing the decision, the court applies the highly deferential "fairly debatable" standard.<sup>41</sup>

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33. See *Arnel*, 620 P.2d, at 566; but see *Youngblood v. Board of Supervisors*, 586 P.2d 556, 560 (Cal., 1978) (earlier case holding that approval of a subdivision map is a quasi-judicial decision under California code).

34. See *Cordes*, *supra* note 20 at 190-91, note 162; A 2004 update identified eight states (not including Florida) that were using the *Fasano* doctrine; *Dennison*, *supra* note 6, § 4; but see JUERGENSMEYER & ROBERTS, *supra* note 5, § 5.9 at 173 (noting the adoption of the *Fasano* doctrine by the American Law Institute's Model Land Development Code; A.L.I. MODEL LAND DEV. CODE, § 2-312(2) and notes (1975)).

35. See *Board of County Comm'rs v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) (establishing a functional analysis test for rezonings in Florida); see discussion *infra* Section IIIB.

36. See *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 367 (Fla. 1941).

37. See discussion *infra* Section III-B.

38. See JUERGENSMEYER & ROBERTS, *supra* note 5, § 5.32 at 225 (citing Standard Zoning Enabling Act § 7, U.S. Dep't of Commerce (rev. ed. 1926)).

39. See JUERGENSMEYER & ROBERTS, *supra* note 5, § 5.32, at 225.

40. See *City of Jacksonville Beach v. Coastal Dev. of N. Florida, Inc.*, 730 So. 2d 792, 794 (Fla. 1st Dist. Ct. App. 1999).

41. See SALSICH & TRYNICEKI *supra* note 5, at 249; *Euclid*, 272 U.S. 365 at 388.

For a *de novo* review of a zoning decision, there is a rebuttable presumption that the ordinance is valid; the challenger must prove by clear and convincing evidence that the ordinance is "arbitrary and capricious."<sup>42</sup> The procedure entails first reviewing the property owner's evidence to determine if he has been able to overcome the presumption of validity.<sup>43</sup> The court then reviews the local government evidence to determine if it presents a "fairly debatable" response to the landowner claims.<sup>44</sup>

### b) *Challenging Quasi-Judicial Decisions*

For a quasi-judicial or administrative decision, the court is less deferential in its scope of review. The standards and procedures for this review are often prescribed by state administrative procedure acts,<sup>45</sup> as well as by the SZEA.<sup>46</sup> The party challenging the decision files a writ of certiorari.<sup>47</sup> Under state administrative acts, quasi-judicial zoning decisions are presumed valid and afforded some deference based on the expertise of the board of adjusters, but not as much deference as for legislative decisions.<sup>48</sup>

Most state statutes require substantial evidence to support a quasi-judicial or administrative action.<sup>49</sup> The Fifth Circuit of the United States Court of Appeals (Fifth Circuit) noted that quasi-judicial decisions are reviewed to determine whether they are substantiated by the record.<sup>50</sup> The same court further noted that legislative zoning decisions are reviewed to determine if the government could reasonably conceive the determinative facts as true.<sup>51</sup> The Seventh Circuit observed that "[L]egislatures can

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42. See *Michalek v. Village of Midlothian*, 452 N.E. 2d 655, 663 (Ill. Ct. App. 1983); see SALSICH & TRYNICEKI, *supra* note 5 at 249.

43. See SALSICH & TRYNICEKI, *supra* note 5 at 249 (citing *Michalak v. Village of Midlothian*, 452 N.E.2d, 655, 663 (Ill. Ct. App. 1983)).

44. See *id.*, *supra* note 5 at 252 (citing *White v. City of Brentwood*, 799 S.W.2d 890, 892 (Mo. Ct. App. 1990) (quoting *Elam v. City of St. Ann*, 784 S.W.2d 330, 335 (Mo. Ct. App. 1990))).

45. See *id.*

46. JUERGENSMEYER & ROBERTS, *supra* note 5, § 5.32 at 225 (citing Standard Zoning Enabling Act § 7, U.S. Dep't of Commerce (rev. ed. 1926)).

47. *Id.*

48. JUERGENSMEYER & ROBERTS, *supra* note 5, § 5.33B at 227 (noting that the presumption of expertise loses validity when the local government does not establish any criteria for expertise).

49. See *id.* (citing *Sunderland Family Treatment Services v. City of Paso*, 903 P.2d 986 (Wash. 1995)); SALSICH & TRYNICEKI, *supra* note 5 at 252 (citing Mo. Rev. Stat. § 536.100 et seq. (1996)).

50. *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986).

51. *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that an equal protection challenge to a legislative decision must convince the court that the facts

base their action on considerations—such as the desire of a special interest group. . . that would be thought improper in judicial decision-making.”<sup>52</sup> In Florida, the appropriate standard of review for quasi-judicial decisions is competent substantial evidence.<sup>53</sup> The requirement of competent substantial evidence is more stringent (i.e., more difficult for a local government to conform to) than the fairly debatable criterion and is often referred to as “strict scrutiny.” One should not, however, confuse this level of scrutiny with the strict scrutiny applied to equal protection and other constitutional tests.<sup>54</sup>

### C. Zoning Practices and Abuses

#### 1. Examples of Abuses and Deficiencies

Major factors in the need for legislation and alternative judicial treatment of land use decision have been actual and potential abuses in the decision-making process.<sup>55</sup> Richard Babcock’s 1966 book on zoning provided the first comprehensive review of zoning practice in the United States.<sup>56</sup> The book outlined general deficiencies of zoning due to the lack of administrative procedures; the lack of ethics of politicians and developers; the bias in local decision-making; and the dearth of overall planning.<sup>57</sup>

In an update of the 1966 book, Babcock and co-author, Charles Siemon observed many of the same problems documented in the original.<sup>58</sup> In spite of new zoning and increased use of planning, certain factors such as localism, greed and xenophobia were still present.<sup>59</sup> The authors documented cases in San Antonio, Chicago, and Lafayette, Louisiana, in which decisions by local legislative bodies were decided largely on political

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on which classification is based could not “reasonably be conceived to be true by the governmental decision-making.”).

52. *Conistony Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988).

53. *Snyder*, 627 So. 2d at 474 (citing *DeGroot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957)).

54. *See id.* at 475 (describing the difference between strict scrutiny for land use and other uses of strict scrutiny) (citing *In re Estate of Greenberg*, 390 So. 2d 40, 42-43 (Fla. 1980) (providing requirements for strict scrutiny under equal protection)).

55. *See* RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966).

56. *See id.*

57. *See id.* at 153-54.

58. *See* RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME RE-VISITED* 1 (1985).

59. *See id.*

considerations.<sup>60</sup> In Chicago, for example, the mayor and the city evaded for fifteen years a judge's order to build public housing in white areas after a finding that the city had segregated blacks into one all-black area.<sup>61</sup> The authors maintain that "the process of land use control remains unfair," as it has been for fifty years.<sup>62</sup> Parochial interests, e.g., the "not in my backyard" attitude, have resulted in manipulation of the system by those with the power to do so.<sup>63</sup> The authors contend that the main question is "whether the judiciary is qualified to deal effectively with these issues."<sup>64</sup>

In an overview of zoning, law professor Robert Wright observed that the widespread abuse of the process of rezoning has encouraged courts to rethink the traditional approach for classifying zoning decision.<sup>65</sup> He noted that zoning is an ad hoc process which is more administrative or quasi judicial than legislative and that a rezoning ordinance is often not the result of a comprehensive plan.<sup>66</sup> He further observed that developers and other real estate interests, who frequently predominate on planning commissions, have a very strong influence on the decisions.<sup>67</sup> As a result, a commission may approve a project over the opposition of the professional staff.<sup>68</sup> He suggested that courts have recognized that the process is essentially an administrative, often politically tainted, process and questioned whether it is legislative.<sup>69</sup>

## 2. Comment from Courts on Abuse

Judge Grimes in *Snyder* claimed that local zoning rules are very inconsistent; implying that the fairly debatable rule was a factor.<sup>70</sup> He also cited criticism by Babcock (deploring the effect of "neighborhoodism and rank political influence on zoning")<sup>71</sup> and by Mandelker and Tarlock (that zoning decision are too

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60. *See id.* at 5-9, 85-90, 276.

61. *See id.* at 3.

62. *See id.* at 260.

63. *See* BABCOCK & SIMON, *supra* note 58 at 260.

64. *See id.*

65. *See* ROBERT R. WRIGHT, *LAND USE IN A NUTSHELL* 197 (1994).

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* at 197-98.

70. *See Snyder*, 627 So. 2d at 472.

71. *Id.* at 472-73.

often ad hoc and self serving. . .).<sup>72</sup> The *Fasano* court asserted that quasi-judicial review for rezoning is justified because of the almost irresistible pressures that can be asserted by private economic interests on local governments.<sup>73</sup> Both *Fasano* and *Snyder* changed the standard of review of certain zoning actions from legislative to quasi-judicial in efforts to reduce the abuses and conflicts of interest.<sup>74</sup>

### 3. Commentaries on Alternative Standards of Review

This divergence of opinion on how to classify land use decisions led to a plethora of legal analysis and commentary. An editor of *The Urban Lawyer* applauded the *Fasano* court for providing a logical basis for judicial review of rezoning decision.<sup>75</sup> He enthusiastically agreed that the benefit of judicial review in controlling development and in preserving use for its desired purposes greatly outweighed any disadvantages.<sup>76</sup> A city attorney from Austin, Texas recommended that his state follow the Oregon approach.<sup>77</sup> He warned that the inadequacy of standards of review for rezoning cases increased the likelihood that zoning decisions would be based on the extent of lobbying instead of the merits of the case.<sup>78</sup>

An Illinois law professor agreed that courts should use a functional analysis (similar to that described in *Fasano*) for small rezonings because they more closely resemble judicial acts than legislative acts.<sup>79</sup> Their primary impact falls on only a few landowners.<sup>80</sup> He asserted that many courts fail to provide due process protection to legislative decisions.<sup>81</sup> As a result, he maintained, several states adopted the *Fasano* approach primarily because it provides due process safeguards.<sup>82</sup>

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72. See *id.* (citing Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2 (1992)).

73. See *Fasano*, 507 P.2d at So. 2d.

74. See *id.*; see also *Snyder*, 628 So. 2d at 472.

75. See Robert H. Freilich, *Fasano v. Board of County Commissioners of Washington County: Is Rezoning an Administrative or Legislative Function?* 6 URB. LAW. i, vii (1975).

76. See *id.* at xii.

77. See Jerry L. Harris, *Rezoning—Should it be a Legislative or Judicial Function?* 31 BAYLOR L. REV. 409, 424 (1979).

78. See *id.* at 424.

79. See Cordes, *supra* note 20 at 190.

80. See *id.* at 192.

81. See *id.* at 189 (citing *Fiser v. City of Knoxville*, 584 S.W. 2d 659 (Tenn. App. 1979) (rezoning a legislative act not requiring impartial decision-maker)).

82. See *id.* at 190, n176.

A California commentator argued that her state's insistence on the fairly debatable rule for all zoning actions was unfair to small landowners.<sup>83</sup> She advocated increased statutory protection by requiring legislative decisions to be supported by findings, by increasing the number of hearings and dissemination, and by allowing victims of arbitrary or discriminatory land use decision to recover attorney fees for successful challenges.<sup>84</sup> In his comprehensive review of *Snyder*, Thomas Pelham, a prominent Florida land use attorney strongly opposed the quasi-judicial standard for amendments to a comprehensive plan.<sup>85</sup> Overall, however, the commentators strongly supported the principle of classifying at least some rezoning actions as quasi-judicial rather than legislative.

### III.

#### FLORIDA LAW FOR PLAN AMENDMENTS AND REZONINGS

##### A. *Administrative Procedures for Amendments and Rezonings*

###### 1. Amending a Comprehensive Plan

###### a) *Requirements for Comprehensive Plans*

Consistent with the Standard State Zoning Enabling Act, the Florida legislature enacted Growth Management Acts in 1975 and 1985<sup>86</sup> requiring local governments to adopt local comprehensive plans consistent with the Act.<sup>87</sup> The local plans must establish "principles, guidelines and standards for the orderly and balanced future economic, social, physical, environmental and fiscal development of the area."<sup>88</sup> The plans must include specified elements, including a future land use element (FLUE).<sup>89</sup> The FLUE must contain a future land use map (FLUM), which designates the permissible land use classifications (e.g., commer-

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83. See Sara Reusch Levitan, *The Legislative-Adjudicative Distinction in California Land Use Regulation: A Suggested Response to Arnel Development Co. v. City of Costa Mesa*, 34 HASTINGS L. J. 425, 459 (1982).

84. See *id.*

85. Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L., 243, 300-01(1994).

86. Ch. 85-55, 1985 Fla. Laws (codified as amended at FLA. STAT. §§ 163.3161-163.3215).

87. FLA. STAT. § 163.3181(2005).

88. FLA. STAT. § 163.3177(2005).

89. FLA. STAT. § 163.3177(6) (2005).

cial, residential, conservation, industrial, and agricultural) for all the various plots and parcels.

*b) Proposal- First Stage Review*

The process to develop or amend a comprehensive plan involves two stages, a proposal stage and an adoption stage.<sup>90</sup> Based on its own initiative or from a constituent, the designated local planning agency (LPA) of the local government prepares a draft amendment to the comprehensive plan.<sup>91</sup> Following a public hearing by the local government,<sup>92</sup> the LPA submits the draft for review to the Florida Department of Community Affairs (DCA), the state-wide agency that oversees land planning.<sup>93</sup> The draft is also sent to the appropriate regional planning council, as well as to the regional water management district, state Departments of Transportation and Environmental Protection, and other public agencies.<sup>94</sup> The DCA has discretion on whether to review, but must conduct the review if requested to do so by a regional planning council, an affected person, or the local government that submitted the amendment.<sup>95</sup>

*c) Adoption- Second Stage Review*

The procedure for adoption depends on whether the DCA reviews the proposed amendment. If the DCA reviews the amendment, it issues an ORC (Objections, Recommendations and Comments) report.<sup>96</sup> Following a second public hearing, the local government has sixty days to adopt the amendment as originally drafted, to adopt the amendment with change, or to decide not to adopt the amendment.<sup>97</sup> If the DCA has not reviewed the amendment, and there are no proposed changes or objections from any affected party, the amendment can be adopted directly.<sup>98</sup> After the local government adopts the amendment, it

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90. FLA. STAT. § 163.3184 (2005); *see also* Florida DCA Plan Amendment Process Flow Chart (reflecting revised process pursuant to SB 1906, May 31, 2002), *available at* <http://www.dca.state.fl.us/fdcp/dcp/Procedures/PlanAdmb&w85x14.PDF>.

91. The procedure for developing a new comprehensive plan is the same as for an amendment; FLA. STAT. § 163.3814 (2004) (titled "Process for adoption of comprehensive plan or plan amendment").

92. FLA. STAT. § 163.3184(15)(b)(1) (2005).

93. FLA. STAT. § 163.3167 (2)(b) (2005).

94. FLA. STAT. § 163.3184(3)(a) (2005).

95. FLA. STAT. § 163.3184(5) (2005).

96. FLA. STAT. § 163.3184(6)(c) (2005).

97. FLA. STAT. §§ 163.3184(15)(b)2; (7) (2005).

98. FLA. STAT. § 163.3184(7)(b) (2005).

resubmits the amendment to DCA and the Regional Planning Commission for review.<sup>99</sup> The Florida statute does not give DCA or the governor authority to adopt, repeal or revise the amendment.<sup>100</sup> The essence of the statute is the authority given to the state to levy sanctions, mostly economic (e.g., withhold funds for roads or water systems) if the plan or amendment is out of compliance.<sup>101</sup>

## 2. Special Requirements for Small-Scale Amendments

In 1995 the Florida legislature exempted small scale amendments from several of the requirements described above.<sup>102</sup> The act defined a small-scale amendment as follows:<sup>103</sup>

- It involves land use of ten acres or less; and
- It does not involve a text change to the goals, policies or objectives of the comprehensive plan. A land use change to the FLUM is considered a small-scale amendment.

In the proposal phase,<sup>104</sup> the small-scale amendment requires only one hearing compared to two hearings for a general amendment.<sup>105</sup> Similar to the procedure for a standard plan amendment, the local government submits the proposed amendment to the DCA and other government or public agencies.<sup>106</sup> The DCA, however, has indicated that it does not review small scale proposals.<sup>107</sup> Furthermore, in the adoption stage, the local government is not required to submit the amendment to the DCA as is required for a standard amendment.<sup>108</sup> Municipalities and counties are permitted to adopt small-scale amendments immediately

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99. FLA. STAT. § 163.3184(7)(a) (2004) (2005).

100. See Richard Grosso, *Florida's Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go*, 20 NOVA L. REV. 589, 601 (1966).

101. See *id.*; FLA. STAT. § 163.3184(11)(a) (2005).

102. See Grosso, *supra* note 100 at 600.

103. FLA. STAT. § 163.3187(1)(c)(1) (2005). The definition of small-scale amendment excludes certain property based on proximity to previous amended tracts, areas of critical state concern and limits the cumulative effect of the amendments.

104. FLA. STAT. § 163.3187(1)(c)(1) (2005).

105. FLA. STAT. § 163.3187(1)(c)(3) (2005).

106. FLA. STAT. § 163.3187(1)(c)(2)(b) (2005)

107. See Florida DCA Division of Community Planning 2003 Summary Report, at 10, available at <http://www.dca.state.fl.us/fdcp/dcp/publications/programsum/programsummary2003.pdf> [hereinafter FLDCA 2003 Report].

108. Florida DCA Plan Amendment Process Flow Chart (reflecting revised process pursuant to SB 1906, May 31, 2002), available at <http://www.dca.state.fl.us/fdcp/dcp/Procedures/PlanAdmb&w85x14.PDF>.

upon conclusion of the adoption hearing.<sup>109</sup> Table 1 summarizes the differences between processes for standard and small-scale amendments.

Table 1: Differences Between Standard and Small-Scale Amendments

Action	Standard Amendment	Small-Scale Amendment
<b>General Provisions; § 163.3187(1)(c)1</b>		
Area involved	More than ten acres	Ten acres or less
Plan Content	Any content change	No change in FLUM or text
Frequency of amendment	Twice a year maximum	Any time*
<b>First Stage- Proposal</b>		
	§ 163.3184(15)	§ 163.3187(1)(c)
Public Hearings	Two required	One required
Submission for review	Sent to DCA & other agencies	Sent to DCA & other agencies
DCA review	Discretionary; Review if request by local government or affected party ;	DCA does not review
<b>Second Stage- Adoption</b>		
Statute	§ 163.3184(7)(a)	§ 163.3184(7)(a)
Public Hearings	One public hearing	One public hearing
Adoption options by local government	<ul style="list-style-type: none"> <li>• Adopt with changes;</li> <li>• Adopt without changes; or</li> <li>• Not adopt</li> </ul>	<ul style="list-style-type: none"> <li>• Adopt with changes;</li> <li>• Adopt without changes; or</li> <li>• Not adopt</li> </ul>
Submittal to DCA	Sent to DCA & other agencies	Not required unless challenged

\* Small-scale amendments are limited on cumulative acreage per year.

### 3. Comparing Small-Scale Amendments and Rezonings

Not only are small-scale amendments treated differently than standard (large scale) amendments, but in many localities, the processing of small-scale amendments is similar to that of rezonings not involving an amendment. The example below compares

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109. FLA. STAT. § 166.041(3)(c)(1)(2005) (municipalities) ; FLA. STAT. § 125.66(4)(a) (2005) (counties). One minor difference is that for counties, a FLUM amendment initiated by a private party does not qualify for the expedited adoption process; FLA. STAT. § 125.66(2); (4) (2005).

a municipality's process for a rezoning with that for a small-scale amendment.

The City of Jacksonville processed a request to allow commercial development on a 1.3 acre plot for a property that had been residential.<sup>110</sup> The new use required a change in the land use designation of the FLUM from LDR (low density residential) to CGC (community general commercial)<sup>111</sup> and a change in the zoning district within the new land use designation from RDR (residential low density) to CCG (commercial community general).<sup>112</sup>

The city processed the two changes in tandem. A tandem process requires that the board of commissioners deliberate first on the amendment to the comprehensive plan to determine if the general type of development sought should be permitted.<sup>113</sup> Once the amendment has been approved, the board considers the suitability of the proposed rezoning.<sup>114</sup> The new land use sought by the City of Jacksonville thus required two separate ordinances to be reviewed in tandem. The first ordinance, which changed the land use designation map (the FLUM), was considered a small-scale amendment to the city's comprehensive plan.<sup>115</sup> The second ordinance, proposing a change from one permitted zoning class to another within a land use designation, was a rezoning, entailing no change to the comprehensive plan.<sup>116</sup> The specific procedures that the city followed are summarized below.

*a) Procedural Steps for Small-Scale Amendment  
Ordinance 2004-5<sup>117</sup>*

1. Ordinance is proposed by property owner, developer or member of city council.<sup>118</sup>

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110. The proposed rezoning actually included some additional land to comprise a total of 3.5 acres with alternate zoning districts; these other uses have been excluded from the analysis to avoid confusion.

111. See JACKSONVILLE, FLA., ORDINANCE 2004-5, *supra* note 1.

112. See JACKSONVILLE, FLA., ORDINANCE 2004-6 (2004), available at <http://city.circ.coj.net/coj/COJBillList.asp?Bill=2004-0006> [hereinafter JACKSONVILLE, FLA., ORDINANCE 2004-6].

113. See Dennison, *supra* note 6, § 2.5.

114. *Id.* (citing Prince v. Payette County Bd. of County Comm'rs, 958 P.2d 583, 587 (Idaho 1998)).

115. JACKSONVILLE, FLA., ORDINANCE 2004-5, *supra* note 1.

116. JACKSONVILLE, FLA., ORDINANCE 2004-6, *supra* note 112.

117. JACKSONVILLE, FLA., ORDINANCE 2004-5, *supra* note 1.

118. JACKSONVILLE, FLA., CODE § 650.402(b) (2004).

2. Following notice, the planning and development department held a public information workshop; considered comments; prepared a report; and rendered a favorable advisory opinion to city council.<sup>119</sup>
3. The planning commission (the local planning agency) held a public meeting after notice; considered comments at the meeting; and recommended approval to city council.<sup>120</sup>
4. The land use and zoning committee held a public meeting after notice; considered comments; and recommended approval to city council.<sup>121</sup>
5. The city council held a public meeting after notice, considering public comments and recommendations of other committees.<sup>122</sup>
6. The city council determined the bill was necessary to achieve specified general goals of the comprehensive plan and adopted the ordinance based on its statutory authority.<sup>123</sup>

*b) Procedural Steps for Rezoning Ordinance 2004-6*<sup>124</sup>

1. Ordinance is initiated by a property owner, developer or member of city council.<sup>125</sup>
2. The planning and development department considered the ordinance and rendered an advisory opinion that it was consistent with the city's 2010 comprehensive plan.<sup>126</sup>
3. The planning commission considered the ordinance and rendered a favorable advisory opinion.<sup>127</sup>
4. The Land Use and Zoning Committee, after notice, held a public hearing and made a favorable recommendation to city council.<sup>128</sup>
5. The city council held a public meeting after notice and considered public comments along with recommendations of other committees.<sup>129</sup>

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119. *Id.*, §§ 650.404(a)-(c) (2004).

120. *Id.*, § 650.405.

121. *Id.*; § 650.408.

122. *Id.*; § 650.406; *see also id.*; § 650.206(a) (stipulating requirement to send copies of the proposed plan to DCA and other agencies per FLA. STAT. § 163.3184(3)).

123. *Id.*; § 650.406(c); FLA. STAT. §§ 163.3161 -.3164(2004).

124. *See* JACKSONVILLE, FLA., ORDINANCE 2004-6, *supra* note 112.

125. JACKSONVILLE, FLA., CODE § 656.129(2004).

126. *Id.*

127. *Id.*

128. *Id.*, § 656.123.

129. *Id.*, § 656.124.

6. The city council determined that the ordinance met the general requirements (similar to the purpose of a plan) and the objectives of the Planned Use Development (PUD) section of the zoning code and adopted the zoning change.<sup>130</sup>

These procedures, though based on different statutory requirements, are nearly identical and do not support a claim of qualitatively different evaluation processes. Because the city defined the small-scale amendment as a legislative process and the rezoning as a quasi-judicial process, it utilized slightly different formalities in the review procedures. These are, however, distinctions without any differences. The first five steps, consisting of initiation, internal review, public meetings, and hearings, were identical. Step 6, the justifications for the need for the changes, differed slightly as they were keyed to the specific requirements for the two types of action. What is most significant is that the two actions, nominally so similar, will be treated substantially differently if challenged by an affected party.<sup>131</sup>

#### B. *Florida Supreme Court Decisions Affecting Standards of Review for Rezoning and for Plan Amendments*

The recent history of the development of the standard of review is dominated by three Florida Supreme Court decisions, which form the basis of the current law in Florida.

1. *Snyder* Functional Analysis Test for Classifying Zoning Decisions<sup>132</sup>

In 1993, the Florida Supreme Court established a functional analysis test that classified a zoning decision as legislative if it formulated land use policy and as quasi-judicial if it merely applied policy.<sup>133</sup> The Snyders sought to rezone their property to a classification allowing up to fifteen units per acre.<sup>134</sup> The county staff recommended denial of the rezoning application because the property was located in the one-hundred year flood plain in which only two units per acre were permitted.<sup>135</sup> Based on the Snyders' plan to raise the land elevation to eliminate the flood

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130. *Id.*, § 656.125.

131. See discussion *infra* Sections IIIB and IV.

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

133. *Id.*

134. *Id.* at 471.

135. *Id.*

plain concern, the planning and zoning board voted to approve the requested zoning change.<sup>136</sup> However, as a result of citizen opposition based on increased traffic, the commission ultimately denied the rezoning request without providing a reason.<sup>137</sup>

In affirming the lower court reversal, the Fifth District Court of Appeal explained that “ a rezoning action which entails the application of a general rule or policy to specific individuals, interests or activities is quasi judicial in nature,” requiring a standard of review stricter than the “fairly debatable” standard applied to legislative matters.<sup>138</sup> Applying these principles to the Snyders’ circumstances, the state supreme court found that the petition for rezoning was consistent with the comprehensive plan and that the government had not sufficiently asserted the public need for a more restrictive zoning classification.<sup>139</sup> Thus, there was no basis for the board’s denial of the rezoning.<sup>140</sup>

The court concluded that “[i]t is the character of the hearing that determines whether or not board action is legislative or quasi-judicial.”<sup>141</sup> The court adopted its explanation of the general distinction from a 1935 case.<sup>142</sup>

A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful.<sup>143</sup>

It then applied that principle to land use decisions. “Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts. . . are quasi-judicial actions. . .”<sup>144</sup> Based on this analysis, the court concluded that the Snyders’ rezoning application was “ in the nature of a quasi-judicial proceeding. . .”<sup>145</sup>

136. *Id.*

137. *Id.*

138. *Id.* at 471-72.

139. *Id.* at 472.

140. *Id.*

141. *Id.* at 474 (quoting *Coral Reef Industries, Inc. v. Babcock Co.* 410 So. 2d 648, 652 (Fla. 3d Dist. Ct. App. 1982)).

142. *Id.*

143. *West Flagler Amusement Co. v. State Racing Commission*, 165 So. 2d 64, 65 (Fla. 1935).

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

145. *Id.*

The court established the following process for reviewing a rezoning application:

- 1) A property owner has the initial burden of proof that rezoning is consistent with the comprehensive plan and rezoning procedures.<sup>146</sup>
  - 2) The burden then shifts to the local government's review board to establish that maintaining the existing classification accomplishes a legitimate government purpose and that the denial is not "arbitrary, discriminatory, or unreasonable." The board is not required to make findings of fact, but it must show that the ruling was supported by "competent substantial evidence."<sup>147</sup>
2. *Yusem* Holds that Comprehensive Plan Amendments are Legislative Decisions<sup>148</sup>

In 1997, the Court established the rule that an amendment to a local government's comprehensive plan is by definition formulation of policy and hence legislative in nature.<sup>149</sup> *Yusem*, a landowner, sought to change the use of a fifty-four acre plot to estate density (two units per acre).<sup>150</sup> According to the FLUM of Martin County's revised comprehensive plan, *Yusem's* plot was part of a 900-acre tract that was designated rural density (one residence per two acres).<sup>151</sup> *Yusem* applied to the board of commissioners for an amendment to the future land use map.<sup>152</sup> The board submitted the proposed amendment to the Florida DCA, which recommended that the county deny the amendment or revise the analysis to justify a showing of consistency with the more intensive nearby land use.<sup>153</sup> When the board decided to deny the proposal rather than revise it, *Yusem* filed for declaratory and injunctive relief.<sup>154</sup> In a divided opinion with a strong dissent from Judge (now Justice) Pariente,<sup>155</sup> the Fourth District

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146. *Id.* at 476.

147. *Id.*

148. *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997).

149. *Id.* at 1295.

150. *Id.* at 1289.

151. *Id.*

152. *Id.* at 1289-90.

153. *Id.*

154. *Id.*

155. *Id.* at 1291. The Florida Supreme Court found her reasoning persuasive in *Coastal*; see discussion *infra* Section IIIB.

Court of Appeal, relying on *Snyder*, affirmed the circuit court decision to grant the motions.<sup>156</sup>

After reviewing the detailed protocols for a plan amendment, the Florida Supreme Court concluded that amendments to a comprehensive plan are legislative decisions, even “in respect to only one piece of property.”<sup>157</sup> The court’s decision limited the use of the functional analysis test strictly to rezonings.<sup>158</sup> It distinguished plan amendments such as that of *Yusem* from rezonings, such as the one in *Snyder*.<sup>159</sup> In a well-noted footnote, the court, recognizing that the 1995 amendment to the statute provided special treatment for proposed small-scale amendments to the comprehensive plan, chose not to include those amendments in its holding, noting that “[w]e do not make any findings concerning the appropriate standard of review for these small scale developments.”<sup>160</sup>

The court explained that because a land use plan is “like a constitution for all future development. . .,” functional analysis is not appropriate for comprehensive plan amendments.<sup>161</sup> Reviewing a proposed amendment requires a county to “engage in policy reformulation. . .” and to decide if changes were warranted to promote “orderly development of the County’s future growth.”<sup>162</sup> The county would also be required to evaluate the impact of the amendment on other county activities relating to future growth.<sup>163</sup> The court noted that this decision involved considerations “well beyond the landowner’s fifty four acres.”<sup>164</sup>

The court further justified its conclusion that amendments are legislative decisions by outlining the multi-stage review process required under Florida law.<sup>165</sup> Thus the court concluded, an

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156. *Id.* at 1289-91. See *City of Melbourne v. Puma*, 630 So. 2d 1097, 1097 (Fla. 1994) (remanding for further consideration consistent with *Snyder*); *Battaglia Properties, Ltd. v. Florida Land & Water Adjudicatory Comm’n*, 629 So. 2d 161, 165 (Fla. 5th DCA 1993) (holding that a proposed rezoning to a usage including multi-family, office, and commercial development that affected a large part of the public is legislative); *Pelham*, *supra* note 86 at 243. The Florida Supreme Court found this reasoning persuasive in *Coastal*; see discussion *infra* Section IIIB.

157. *Id.* at 1293, emphasis added.

158. See *id.*

159. *Id.*

160. *Id.* at 1293n6.

161. *Id.* at 1293-94.

162. *Id.* at 1293.

163. *Id.* at 1294.

164. *Id.*

165. *Id.* (citing FLA. STAT. § 163.3184(8) (1989)); see also discussion *supra* Section IIIA; Powell, 21 Fla. St. L. Rev. 223 (1993) (noting that the legislature subsequently

amendment requires "strict oversight on the several levels of government," in contrast to a rezoning request, which is evaluated on the local level only.<sup>166</sup>

### 3. Courts' Applications of *Snyder* and *Yusem*

*Snyder*, as a major departure from previous practice elicited significant criticism.<sup>167</sup> Following *Yusem*, courts were divided on whether small-scale amendments were legislative or quasi-judicial.<sup>168</sup> In *Fleeman*, the Fifth District Court of Appeal held that the request to change the land use of a 0.26-acre plot was a small-scale amendment to the comprehensive plan and constituted a legislative act.<sup>169</sup> The court added that this case was a good example of the need to define a small-scale amendment as a legislative policy decision.<sup>170</sup> Even though it was a small parcel, its proximity to the ocean and to a major thoroughfare suggested important policy concerns.<sup>171</sup> These concerns are "better left to the legislative body, with limited judicial review."<sup>172</sup>

In *Grondin*, the Florida Tenth Circuit Court held that a small-scale amendment was a quasi-judicial action.<sup>173</sup> The court first established that the zoning change of a three-acre parcel from

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amended FLA. STAT. § 163.3184 to require the DCA to review the plan amendment if it determines that this review is necessary or is requested to do so by the regional government transmitting the plan).

166. *Yusem*, 690 So. 2d at 1294.

167. For example, Pelham noted that *Snyder* failed to provide any useful guidance for distinguishing between comprehensive rezoning (legislative) and small scale (quasi-judicial). Pelham, *supra* note 85 at 285; He opined that *Snyder* had consigned local government to years of litigation such as had been experienced in Oregon after Fasano; *id.* A former Martin County commissioner observed that applying strict scrutiny to a comprehensive plan amendment shifts responsibility for local land use decisions from elected local officials to elected circuit judges; see Mary Dawson, *The Best Laid Plans: The Rise And Fall Of Growth Management In Florida*, 11 J. LAND USE & ENVTL. L. 325, 327 (1996). She criticized *Snyder* for removing the discretion of local governments to control land use decisions and to plan for their communities; *id.* at 373. She also claimed that the application of the quasi-judicial process significantly increased case loads and the cost of litigation, which in turn alienated the public and increased the cost of development; *Id.* at 373-74.

168. But, see *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204, 208 n.24 (Fla. 2001) (noting that following *Yusem*, four of the five district courts of appeal had held small-scale amendments to be legislative).

169. *Fleeman v. City of St. Augustine Beach*, 728 So. 2d 1178, 1179-80 (Fla. 5th Dist. Ct. App. 1998).

170. *See id.*

171. *See id.*

172. *See id.*

173. *Grondin v. City of Lake Wells*, 5 Fla. L. Weekly Supp. 727, 727 (June 25, 1998).

single family to commercial qualified as a small-scale amendment under the statutes, as the proposed change was consistent with the stated policies of comprehensive plan and would not result in a change in the text of the comprehensive plan.<sup>174</sup> According to the court, the proposed land use change was not the broad formulation of policy associated with a legislative decision; rather the city's decision more closely resembled an application of the comprehensive plan.<sup>175</sup> Finding that the city decision was not supported by competent substantial evidence, the court quashed the city's denial of the amendment.<sup>176</sup>

#### 4. *Coastal* Extends Bright-Line Rule to Small-Scale Amendments<sup>177</sup>

In 2001, the Florida Supreme Court confirmed that the *Yusem* bright-line rule for classifying comprehensive plan amendments as legislative also applied to small-scale amendments.<sup>178</sup> Coastal Development of North Florida, Inc. (Coastal Development), seeking to change the FLUM designation of 1.7 acres of property from residential to commercial, submitted an application showing it met five of the six criteria for an amendment.<sup>179</sup> At a hearing before the planning commission, where Coastal Development's experts were opposed by citizens objecting to the traffic, the commission and the city council turned down the request as not consistent with the plan's goals of first infilling existing commercial space.<sup>180</sup>

The dispute ultimately reached the Florida Supreme Court, which held that small-scale comprehensive plan amendments are legislative decisions subject to the fairly-debatable standard of review.<sup>181</sup> While recognizing that the procedure for a small-scale

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174. *See id.* The court applied FLA. STAT. § 166.041(3)(c) (1997), which applies specifically to municipalities and is comparable to FLA. STAT. § 163.3187(1)(c)2.a. (1997).

175. *See id.*

176. *See Grondin*, 5 Fla. L. Weekly Supp. at 728; A Florida land use attorney agreed with the rationale of Grondin that small-scale amendment are more similar to traditional rezoning decisions because the scope is limited to changes in the FLUM; *see Kent Wetherell, Environmental and Land Use Law. Small Scale Plan Amendments: Legislative or Quasi-judicial in Nature?* FLA. BAR J., Apr. 1999, at 80, 81.

177. *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001).

178. *Id.* at 210.

179. *Id.* at 205.

180. *Id.*

181. *Coastal*, 788 So. 2d at 210.

amendment is somewhat different from that of a standard amendment, the court maintained that this proceeding still allows the DCA to intervene and an affected person to challenge whether an adopted amendment complies with the statute.<sup>182</sup>

The court endorsed the statement by Pelham<sup>183</sup> that even for a single tract of land, one must consider the entire comprehensive plan and not just the FLUM.<sup>184</sup> The court explained that the FLUM, as part of the comprehensive plan, is itself a policy decision.<sup>185</sup> Any change in the FLUM requires the local government to re-examine policy, even if the amendment to the FLUM is consistent with the textual goals and objectives of the comprehensive plan.<sup>186</sup> The court distinguished a change in the FLUM (which formulates policy) with a change that is consistent with the FLUM (which applies policy).<sup>187</sup> In addition, no matter what the size of the amendment, the local government must determine whether the reformulation of policies is socially desirable.<sup>188</sup> This determination will force the local government to consider the expected impact on other government services such as traffic and utilities.<sup>189</sup> These considerations differ from the considerations involved in a rezoning.<sup>190</sup> Judge Wells concluded 1) that although small-scale amendments lack mandatory DCA oversight, alternate remedies are available to any aggrieved parties that are not available in standard rezoning actions; and 2) the decision reinforces the policy of uniformity and certainty in land use decisions.<sup>191</sup>

#### IV.

##### ANALYSIS OF THE LEGISLATIVE STANDARD OF REVIEW FOR SMALL-SCALE AMENDMENTS

The author's challenges to the general validity of legislative review of small-scale amendments are based on the lack of separation of powers for local decisions, the limited due process for

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182. *Id.* at 207.

183. *See Pelham, supra* note 85 at 300-01.

184. *Coastal*, 788 So. 2d at 208-09. It is noteworthy that Thomas Pelham was one of the attorneys for the county in the Florida Supreme Court *Yusem* case.

185. *Id.* at 209.

186. *Id.*; Pelham, *supra* note 85 at 284.

187. *Coastal*, 788 So. 2d at 209.

188. *See id.*

189. *See id.*

190. *See id.*

191. *Id.*

legislative actions, and the enhanced potential for abuse within legislative processes. Florida specific challenges include the lack of consistency among the key Florida Supreme Court cases; and inequities in processes for small-scale amendments, large scale amendments and rezonings.

### A. *Challenging the Legislative Standard of Review for Zoning Actions*

#### 1. Local Governments Do Not Provide True Separation of Powers

The special nature of the lawmaking process as justification for great deference to legislative decisions may not be valid at the local level of government. The separation of powers into legislative, judicial and executive branches was a critical factor in the framing and acceptance of the Constitution.<sup>192</sup> According to Madison, the chief obstacle to fairness in the legislature is conflict among factions where one interest group attempts to force its will on others.<sup>193</sup> But in a large and diverse group, no single faction would have enough influence to dominate the others.<sup>194</sup> Rather, advocates achieve their ends by organizing coalitions and persuading their colleagues.<sup>195</sup>

Because this balancing prevents abuse, legislative actions are given greater deference than judicial or executive actions.<sup>196</sup> However, this analysis is based on the separation of powers as exhibited in the federal or state governments.<sup>197</sup> For this model to operate according to the framers' intent, the legislative bodies must be of a sufficient size to contain a "variety of interests that no one faction could tyrannize the others."<sup>198</sup> This is often not the case in city or county governments where domination by a single interest or faction is more likely to occur.<sup>199</sup>

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192. See THE FEDERALIST NO. 51, at 347-53 (James Madison) (J. Cooke ed. 1961).

193. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 854 (1983) (citing THE FEDERALIST NO. 10, at 56-57 (James Madison) (J. Cooke ed. 1961)).

194. See *id.* (citing THE FEDERALIST NO. 10, at 63-65 (James Madison) (J. Cooke ed. 1961)).

195. See Rose, *supra* note 193 at 855.

196. See *id.*

197. See *id.* at 855-56.

198. See Todd W. Prall, *Dysfunctional Distinctions in Land Use: The Failure of Legitimate/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*, 2004 B.Y.U. L. REV. 1049, 1089 (citing Rose, *supra* note 194 at 856 (citing THE FEDERALIST NO. 10, at 63-65 (James Madison) (J. Cooke ed. 1961))).

199. See *id.*; Rose, *supra* note 193 at 856.

As a result, local legislative bodies provide fewer safeguards than a larger representative body.<sup>200</sup> One can argue that decisions by local lawmaking bodies are never fully legislative for the purposes of judicial review.<sup>201</sup> In decisions regarding land use, local governments will not be restrained by the factors identified by Madison.<sup>202</sup> Accordingly, the courts should defer less to local land use decisions compared to those of state or federal lawmakers.<sup>203</sup>

Local governments often do not strictly follow the notions of separate and distinct roles for legislative, executive, and judicial officials.<sup>204</sup> Typically, especially in smaller localities, elected bodies perform duties that are administrative or quasi-judicial in nature as well as legislative.<sup>205</sup>

What gives legislature its legitimacy is the process of legislation.<sup>206</sup> When this process loses its broad-based character and its distinction from an adjudicative body, as typically occurs for local governments, the rationale for deference is also lost. The multiplicity of roles for local governments is particularly relevant to zoning decisions.<sup>207</sup> By rezoning, city councils or county commissions, (the legislative bodies for cities and counties), make decisions that are quasi-judicial (i.e., applying a law to a particular case).<sup>208</sup> Commentators have asserted that the legislative/adjudicative split in zoning decisions demonstrates the lack of validity in applying federal and state concepts to local government.<sup>209</sup>

The difference in applying separation of powers at the state and local levels is illustrated in a Georgia Supreme Court case.<sup>210</sup> A landowner challenged the constitutionality of an ordinance for issuing bonds because the chief commissioner also served in the executive branch of the county.<sup>211</sup> The state supreme court held that the separation of powers under the state constitution "has

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200. See Rose, *supra* note 193 at 856.

201. See *id.*

202. See *id.*

203. See *id.*

204. See Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City Of Tigard*, 75 N.Y.U.L. REV. 242, 260 (2000).

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.* at 260-61. Note that several of the commentators do not distinguish between comprehensive plan amendments and other types of zoning changes.

209. See *id.* at 261; see also Rose, *supra* note 193 at 846.

210. *Building Authority of Fulton County v. State*, 321 S.E.2d 97, 102 (Ga. 1984).

211. See *id.*

no relation to municipal offices, created by the legislature, in the discharge of strictly municipal functions.”<sup>212</sup> The court explicitly held that the constitutional phrase, “[T]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided,” applied only to the state government and not to counties or municipalities.<sup>213</sup> The court added that as the county commission serves as both the executive and legislative branches, the separation of powers could not apply to counties or to municipalities.<sup>214</sup> Thus, legal actions enacted by such a commission would merit less deference than similar action by a state legislative body.

## 2. Legislative Decisions Lack Due Process

Another criticism of the application of the legislative fairly debatable standard of review is that it denies procedural due process to those challenging the local government’s decision.<sup>215</sup> The Court has observed that the role of procedural due process is to avoid erroneous results and deprivations.<sup>216</sup> Procedural due process applies to administrative or adjudicative actions but not to legislative actions.<sup>217</sup> Judge Richard A. Posner of the U.S. Court of Appeals, Seventh Circuit, asserted that “[l]egislative due process’ seems almost an oxymoron.”<sup>218</sup> In principle, due process is not required for legislative acts because the large number of constituents causes legislators to act reasonably.<sup>219</sup>

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212. *Id.*

213. *Id.* at 102-03.

214. *See id.*; *see also* Smith v. Board of Comm’rs, 259 S.E.2d 74, 76 (Ga. 1979) (noting that county commissioners serving as both legislative and executive branches of government exercised bad judgment beyond their authority).

215. *See* Pelham, *supra* note 85 (noting that citizens seek local decision-making that afford due process rather than on undue political influence of a particular constituent).

216. *See Developments in the Law: Zoning*, 91 HARV. L. REV. 1427, 1506 (1978) [hereinafter *Developments in the Law*] (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950)).

217. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d at 652-53 (“it is the existence of the safeguards [of due process] that makes hearing quasi-judicial and distinguishes it from legislative.”); *see also* SALSICH & TRYNICEKI, *supra* note 5 at 94 (citing Chongris v. Bd. Of Appeals of Town of Andover, 811 F.2d 36, 41 (7th Cir. 1987) (holding that a full-scale judicial hearing is not required because a zoning decision is legislative. . .)).

218. JUERGENSMEYER & ROBERTS, *supra* note 5, § 10.13 at 452 n.4 (quoting L. C. & S, Inc. v. Warren County Area Plan Comm’n, 244 F.3d 601, 602 (7th Cir. 2001)).

219. *See Developments in the Law*, *supra* note 216 at 1509.

a) *Elements of Due Process*

It is instructive to examine the specific elements of due process with respect to land use decisions. The fundamental meaning of the due process clause is that at a minimum it requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."<sup>220</sup> Due process does not entail a fixed procedure; rather it varies with the circumstances.<sup>221</sup> Justice Brandeis observed that due process assures: "[T]hat the trier of the facts shall be an impartial tribunal; that no findings shall be made except upon due notice and opportunity to be heard; [and] that the procedure at the hearing shall be consistent with the essentials of a fair trial. . . ."<sup>222</sup> The Oregon Supreme Court summarized what the parties at a land use hearing are entitled to as follows: an opportunity to be heard, an opportunity to present and rebut evidence, a tribunal which is impartial in the matter (i.e., having had no pre-hearing or ex parte contacts concerning the question at issue), a record to be made, and adequate findings executed.<sup>223</sup> A Florida judge explained that "the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to the full judicial hearing is required" and that "[q]uasi-judicial proceedings are not controlled by strict rules of evidence and procedure."<sup>224</sup>

b) *Impartial Tribunal*

A person with an interest in land that is affected by the zoning actions should be precluded from voting on the matter as a conflict of interest.<sup>225</sup> This practice of preventing interested parties from voting is most likely to be observed in a meeting of a zoning board where it is acting in the capacity of a quasi-judicial body.<sup>226</sup> However, when such a body acts in a legislative capacity, lawmakers with a bias frequently do not refrain from voting on

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220. *Mullane*, 339 U.S. at 313.

221. See *Holman*, *supra* note 12 at 140.

222. See *id.* (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (concurring opinion)).

223. *Fasano*, 507 P.2d at 30.

224. *Jennings v. Dade County*, 589 So. 2d 1337, 1341 (Fla. 3d DCA 1991).

225. See *Holman*, *supra* note 12 at 140.

226. See JACKSONVILLE, FLA. CODE § 656.124 (13) (requiring notice that council committee hearing on rezoning is quasi-judicial).

such matters.<sup>227</sup> The courts, though, are precluded from examining a legislator's motives.<sup>228</sup>

The perception of fairness is a principal reason for requiring an impartial tribunal, as lack of such protection may lessen the trust in the adjudicative process.<sup>229</sup> The Court has strongly endorsed this concept by virtue of its stringent rules for disqualification of judges.<sup>230</sup> The Court concedes that the rule may sometimes exclude judges who have no actual bias but whose participation may create a perception of bias.<sup>231</sup> One can distinguish between the standards of proving actual bias and the standards of the appearance of impartiality.<sup>232</sup>

There have been numerous documentations of abuse from this principle of impartiality.<sup>233</sup> For example, a councilman voted to approve a rezoning which resulted in his own property value being increased by \$600,000.<sup>234</sup> Because it was a legislative matter, however, this action was held not to be reviewable by a court.<sup>235</sup> In a less egregious case, Maine's highest court determined that procedural due process required vacating a decision made by commission board members who had not heard the evidence or assessed the credibility of witnesses.<sup>236</sup>

### c) *Notice and the Opportunity to be Heard*

These two fundamental precepts of due process are applied in various manners, depending on the circumstances of the adjudicative bodies of local governments. Typically the board or com-

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227. See Rose, *supra* note 193 at 869-70.

228. See Cordes, *supra* note 20 at 190 (citing County Council for Montgomery County v. District Land Corp., 337 A.2d 712, 720 (Md. 1975) (noting that the "motives, wisdom or propriety of a municipal governing body in passing an ordinance are not subject to judicial inquiry. . .In addition, individual council members and other city officials may not testify as to the motives actuating council action. . .")).

229. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 484 (1986).

230. See *id.*

231. See *id.* (noting that "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" (citing *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)))).

232. See Mark S Dennison, *Zoning: Proof of Bias or Conflict of Interest in Zoning Decisions*, 32 AMJUR POF 3d 531, § 9 (providing examples of both in court decisions).

233. See discussion *supra* Section II-C.

234. See *Schauer v. Miami Beach*, 112 So. 2d 838, 839 (Fla. 1959).

235. See *id.* at 841.

236. See SALSICH & TRYNICEKI, *supra* note 5 at 94 (citing *Pelke v. City of Presque Isle*, 577 A.2d 341, 343 (Me. 1990)).

mission will hold a public hearing following public notification.<sup>237</sup> In some cases individuals with property or an interest directly affected by the proposed action receive direct personal notice of the meeting.<sup>238</sup> Depending on the magnitude and impact of the zoning change, additional hearings or workshops may be held.<sup>239</sup>

Judge Posner observed that due to the general nature of legislation, notice is impracticable, as many of the persons affected by the legislation will be unknown and unknowable.<sup>240</sup> Many local governments are statutorily required to afford some level of notice and opportunity to be heard for decisions by legislative bodies, as exemplified by Florida's "sunshine" law.<sup>241</sup> In the area of zoning, some local governments require nearly the same notice and opportunity for legislative as for quasi-judicial decisions.<sup>242</sup> Some courts are, however, lenient in enforcing notice and the opportunity to be heard and in allowing post-deprivation remedies when dealing with decisions by a legislative body.<sup>243</sup>

#### d) *Ex Parte Communications*

Precluding *ex parte* communications would entail major changes from current practice in most local governments.<sup>244</sup> Elected officials consider contact with constituents, including developers, attorneys and landowners, as part of their jobs.<sup>245</sup> Non-elected officials also frequently have meetings and discussions

237. JACKSONVILLE, FLA. CODE § 650.205 (Public hearing; public participation).

238. JACKSONVILLE, FLA. CODE § 650.205(b) (requiring a hearing before the planning commission for a comprehensive plan amendment).

239. FLA. STAT. § 163.3184 (15)(b) (requiring that "[T]he local government body hold at least two advertised public hearings on proposed comprehensive plan or plan amendment.").

240. L. C. & S, Inc., 244 F.3d at 603.

241. See JUERGENSMAYER & ROBERTS, *supra* note 5, § 10.31 at 452-53. (citing FLA. STAT. § 286.011).

242. Compare JACKSONVILLE, FLA. CODE § 656.123 (Public hearing and CODE); § 656.124 (Notice of public hearing by council committee (for rezoning and amendment to zoning code) with CODE § 650.205 (Public hearing; public participation [for amendment of comprehensive plan]); see also discussion *supra* Section IIIA on comparing procedures for rezoning and small-scale amendment.

243. See SALSICH & TRYNICKEKI, *supra* note 5 at 93-94, 135 (citing *Minton v. Fiscal Court of Jefferson County* 850 S.W. 2d 52, 53 (holding that delivery of notice to some but not all "applicable property owners" was sufficient)).

244. See Holman, *supra* note 12 at 141.

245. See Robert Lincoln and Sidney Ansbacher, *What's a Local Government got to do to get Reviewed Around Here?* FLA. B.J., May 2003, at 50, 51 (noting that *ex parte* restrictions would limit the ability of citizens to gain access to their representatives).

with potential parties to a zoning request.<sup>246</sup> At the very least, due process would require that the officials (elected or appointed) divulge the content of the ex parte contacts at the hearing to enable interested parties to take account of them. The Idaho Supreme Court held that ex parte telephone calls to city council members prior to a hearing were outside the council's record and violated due process.<sup>247</sup> A Florida appellate court held that a quasi-judicial land use decision was invalid due to an ex parte communications with elected officials<sup>248</sup> In response to citizen frustration with the prohibition of meeting with elected officials, however, the legislature enacted a statute that specifically allowed voters access to their representatives.<sup>249</sup>

e) *Record of Findings*

A record is needed to allow the court to determine whether the local government followed the applicable rules of law and the procedures for fact-finding.<sup>250</sup> Records not only help the court exercise control over the decision-making body, but they also make the deciding body more aware of its responsibilities and more likely to follow the procedures.<sup>251</sup> Records of fact-finding can also improve the quality of judicial review. Commentators have been critical of the quality of the records kept.<sup>252</sup>

Florida Supreme Court Justice Pariente has criticized *Snyder* for not requiring a local government board to enter written findings of fact in meeting its burden of showing that the zoning achieves a legitimate purpose.<sup>253</sup> She claimed that this omission may have unintentionally "lessened rather than heightened the review of the zoning decision."<sup>254</sup> In his concurrence, however, Chief Justice Wells countered that the requirement for written findings in all quasi-judicial decision would be too cumbersome and could result in boilerplate writings and litigation over

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246. *See id.*

247. *See SALSICH & TRYNICKEI, supra* note 5 at 94 (citing Idaho Historic Pres. Council, Inc. v. City Council, 8 P.3d 646, 649-50 (Idaho 2000)).

248. *See Dawson, supra* note 167 at 346 (citing Jennings v. Dade County, 589 So. 2d 1337, 1341 (Fla. 3d Dist. Ct. App. 1991)).

249. *See id.* (citing FLA. STAT. § 286.0115 (1995)).

250. *See Holman, supra* note 12 at 141.

251. *See id.*

252. *See id.* at 141-42.

253. *See Snyder*, 627 So. 2d at 476; G.B.V., 787 So. 2d at 849 (Pariente, J. dissenting).

254. G.B.V., *Int'l. So. 2d* at 849-50.

whether the writings are adequate.<sup>255</sup> Other commentators have insisted that written findings are essential for effective review of quasi-judicial decisions.<sup>256</sup>

### 3. Balancing the Efficiency of the Legislative Review Standard Against the Potential for Abuse

An important question is the effect of the standard of review (quasi-judicial or legislative) on the potential for abuse. Abuses occur when decisions are made on the basis of political influence or favoritism, on the basis of inadequate procedure, or by uninformed government officials. Correcting abuses was one of the articulated factors driving the *Snyder* decision to establish quasi-judicial review in place of legislative review for certain land use transactions.<sup>257</sup>

There is a strong sense that quasi-judicial review will help prevent abuses because of the due process afforded and the less deferential standard of review.<sup>258</sup> Designating a process as quasi-judicial would in theory enhance the challenger's opportunity to present the case before a tribunal, for example by exclusion of ex parte communications and by clarifying evidence rules. In a local government, however, often it is the same individuals making both legislative and quasi-judicial decision, but with different hats. For example, for the City of Jacksonville, the city council enacts changes to the comprehensive plan (a legislative function) and also approves zoning changes (a quasi-judicial function).<sup>259</sup>

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255. See *id.* at 848-49 (Wells, J., concurring).

256. See Pelham, *supra* note 85 at 287-88; T.R. Hainline, Jr., and Steven Diebenow, *Environmental and Land Use Law: Snyder House Rules? The New Deference in the Review of Quasi-Judicial Decisions*, FLA. BAR J., Nov. 2000, at 53, 53. ("[W]ithout [detailed findings], the reviewing court would be compelled to grope in the dark and resort to guesswork as to what facts the Board had found to be true and what facts alleged were not true;" Irving v. Duval County Planning Comm'n, 466 So. 2d 357,366 (Zehmer, J. dissenting (quoting Laney v. Holbrook, 8 So. 2d 465, 468 (Fla. 1942))).

257. See *Snyder*, 627 So. 2d at 472-73 (noting zoning abuses cited by Babcock and others).

258. See *supra* Section I-C; but see *G.B.V.*, 787 So. 2d at 850 (noting that absent written findings of fact, quasi-judicial review by certiorari may force the circuit court to rely on evidence that may not have been relied upon by the zoning board, resulting in a more deferential and less fair process (Pariente, dissenting, citing Hainline & Diebenow, *supra* note 256 at 53)).

259. See discussion *supra* Section III A.2; JACKSONVILLE, FLA. CODE § 650 Comprehensive Planning for Future Development: Part 2. Comprehensive Plan) and JACKSONVILLE, FLA. CODE § 656 (Zoning CODE: Part I, Subpart C: Procedures for Rezoning and Amendments to the Zoning Code).

A second significant difference between the quasi-judicial and legislative review processes is the degree of deference granted by the courts to the decision-making body. To overturn legislative decisions, the court must determine that the basis for the decision was capricious or arbitrary and not even debatable.<sup>260</sup> For quasi-judicial decisions, the court still defers to the judgment of the tribunal, but competent substantial evidence is required to preclude reversal.<sup>261</sup> Local boards making zoning decisions include elected officials and appointees who may be unduly swayed by a subsection of the electorate. Therefore, requiring that these decisions be based on competent substantial evidence may be the most effective control for small-scale amendments.<sup>262</sup>

These two features of legislative decisions as compared to quasi-judicial decisions (i.e., reduced due process and greater degree of deference) reinforce each other in limiting a citizen's ability to challenge the decision.<sup>263</sup> Accordingly, the courts and legislature should assure that there is a strong legal basis and a defensible rationale before providing that a decision be deemed legislative.

Although some authorities have claimed that due process rules are too cumbersome,<sup>264</sup> preventing abuse may justify erring on the side of less deference and greater due process.<sup>265</sup> There is little evidence that local governments that provide comparable due process for both legislative and quasi-judicial zoning decisions

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260. See discussion *supra* in Section II. Florida adopted the fairly debatable standard in 1941; *Snyder*, 627 So. 2d at 472 (citing *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 367 (Fla. 1941)).

261. *Id.*

262. See Petitioner's Brief at 31-32, *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001)(No. Fla. 95,686) (claiming that the amended state statute does not prevent such abuse). For a general amendment there are additional controls via the review by DCA and other public agencies. See discussion *supra* Section IIIA.

263. Pelham pointed out the irony in the situation in which a comprehensive rezoning having much greater potential to undermine a comprehensive plan is subject to the more deferential fairly debatable standard, whereas a small rezoning with much less potential impact is subject to strict scrutiny. See Pelham, *supra* note 85 at 291.

264. See Dawson, *supra* note 167 at 346 ("if the full procedural requirements of quasi-judicial hearings are imposed, public participation in land use hearings could become so onerous as to eviscerate specific legislative goals for public participation and inter-governmental coordination").

265. But see LINCOLN & ANSBACHER, *supra* note 245 at 50 (claiming that a district court certiorari review, required for a quasi-judicial decision, is much more expedient than a de novo review, required for legislative decision, and will save money for litigants and the courts).

are overly burdened with the extra safeguards.<sup>266</sup> On the other hand, there is greater potential for abuse when lawmaking bodies make land-use decisions without competent substantial evidence.<sup>267</sup> Therefore, there is a strong public policy argument for establishing competent substantial evidence as the standard of review for zoning decisions.

B. *Inequity and Lack of Consistency in Classifying Small-Scale Amendments as Legislative Decisions*

1. Small-Scale Amendments, Unlike Standard Amendments, Are Not Policy Requiring the Fairly Debatable Standard

The *Coastal* and *Yusem* decisions did not address the *Snyder* functional analysis test, which provided a logical basis for determining whether a decision is legislative or quasi-judicial (i.e., whether it formulates or applies policy).<sup>268</sup> Rather, in those decisions, the courts applied a purely mechanical rule for the standard of review for a comprehensive plan amendment with a rationale that can be summarized as follows: 1) because it is an amendment, it is policy; 2) because it is policy, it is legislative; and 3) because it is legislative, it deserves deference (i.e., the fairly debatable standard of review).<sup>269</sup>

This rationale takes no account of the basic underlying principle for deferring to the legislative body based on historical practices or public policy.<sup>270</sup> The policy/principle argument is as follows: 1) the legislature is broad-based, responding to a diverse constituency; 2) this diverse base gives it authority to make policy and makes it more difficult to provide due process or to address individual concerns; 3) the ultimate recourse of represented citizens is via the ballot box; and 4) thus, legislative decisions deserve deference.<sup>271</sup>

These latter factors are not present for a small-scale amendment. The legislation is not broad-based, but rather is narrowly focused on a single parcel of land.<sup>272</sup> Because it affects only a

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266. See discussion *supra* Section III-A regarding City of Jacksonville zoning codes and practices.

267. See discussion *supra* Section II-C.

268. See discussion *supra* Section IIIB.

269. See *Coastal*, 788 So. 2d at 208.

270. See discussion *supra* Section IV-A.

271. *Id.*

272. See FLA. STAT. § 163.3187(1)(c)(1) (2005) (limiting a small-scale amendment to an area of ten or fewer acres).

single parcel, relatively few other landowners are affected and only a small segment of the population will participate in the decision. Because of the limited interest, the legislators are unlikely to be voted out of office based on a small-scale amendment decision. Thus the decision does not merit the deferential fairly debatable standard.<sup>273</sup>

The nature of the specific review processes for small-scale and standard amendments supports the claim that the former is not policy.<sup>274</sup> For example, processing a small-scale amendment in tandem (consecutively) with a rezoning indicates that the level of community interest and the extent of debate anticipated for a small-scale amendment are similar to those of a small scale rezoning, which is clearly not policy.<sup>275</sup> This process can be contrasted with that of standard (i.e., large-scale) amendments, which are permitted only twice a year in Florida.<sup>276</sup> For these amendments, municipalities such as Jacksonville both anticipate and receive a much wider range of input and comment.<sup>277</sup>

In *Coastal*, the City of Jacksonville Beach argued that any small-scale amendment would require that the city council consider the policy impact of the amendment, including traffic, utilities, and other services.<sup>278</sup> Yet the City's brief before the Florida Supreme Court mentioned only that alternate vacant commercial space was available nearby and that the proposed amendment would "violate the plan's goal of encouraging the 'infill' of commercial development. . . ."<sup>279</sup> It is hard to see how granting this change for an area less than two acres could significantly affect the City's overall growth plans. Moreover, the determination that the change in land use is not consistent with a policy of promoting infill of existing areas is arguably an application of policy, not a formulation of policy. Given the significance of this holding, the court furnished no justification other than repeating that

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273. See discussion *supra* Section IV-A.

274. See discussion *supra* Section III-A.

275. The only differences between small-scale amendments and small-scale rezonings for the City of Jacksonville are the final review and the submission to DCA, which are required for the former by statute; see discussion *supra* Section III-A.

276. See FLA. STAT. § 163.3187(1) (2005).

277. Interview with Shannon Scheffer, Office of the General Counsel of City of Jacksonville (March 29, 2005)[hereinafter interview with Shannon Scheffer].

278. See *City of Jacksonville Beach v. Coastal Dev. of North Florida*, 730 So. 2d 792, 794 (Fla. 1st Dist. Ct. App. 1999).

279. See Amended Answer Brief of the Respondent at 14, *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001) (No. FL 95,686).

any change in the FLUM is a policy decision.<sup>280</sup> There are undoubtedly numerous examples of changes to FLUMs for small parcels that likewise would have essentially no effect on policy. What is most troubling about the *Coastal* bright-line rule is its absolute nature that allows no specific determination whether policy is being formulated or applied.<sup>281</sup>

## 2. The Adoption Processes for Small-Scale Amendments and Rezonings are Similar, but their Classifications Differ

The practices of several municipalities confirm that the procedures for adopting small-scale amendments are very similar to those for small-scale rezoning.<sup>282</sup> Yet, small-scale amendments are deemed legislative decisions while rezonings are quasi-judicial, resulting in an inherently inequitable judicial review process. One procedural difference is that the adopted small-scale amendment is submitted to the DCA for discretionary review, while a rezoning is not.<sup>283</sup> Unless there is a specific challenge, however, the DCA will not review a small-scale amendment.<sup>284</sup>

The great similarity in review procedures is evidenced by the practice of processing a small-scale amendment and a rezoning in tandem.<sup>285</sup> In a tandem process, a local government seeking to change the use of a small parcel of land to a use not consistent with the FLUM pairs the small-scale amendment ordinance with a rezoning ordinance for the identical parcel.<sup>286</sup>

For example, in the City of Jacksonville the process is as follows.<sup>287</sup> Following a review and recommendation by staff, the paired ordinances are reviewed successively by the planning commission (the designated land planning agency), the Land Use and Zoning Committee (a subcommittee of the City Council)

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280. See *Coastal*, 788 So. 2d at 209.

281. See *id.* at 208.

282. See JACKSONVILLE, FLA. CODE § 656 (Zoning Code: Part I, Subpart C: Procedures for Rezoning and Amendments to the Zoning Code); see also JACKSONVILLE BEACH, FLA. CODE § 34 (2004) (Development Review Procedures) and NEPTUNE BEACH, FLA. CODE § 27-17 (2004) (Amending This Code); § 27-18 (2004) (Amending the Comprehensive Plan).

283. FLA. STAT. § 163.3187(1)(c)(2)(b) (2005).

284. See FLDCA 2003 Report, *supra* note 107 at 10.

285. See discussion *supra* Section III-A regarding City of Jacksonville procedures.

286. See *id.* The small-scale amendment changes the FLUM to the desired land use category while the “in tandem” rezoning changes the zoning code.

287. See discussion *supra* Section III-A concerning City of Jacksonville procedures.

and the City Council.<sup>288</sup> Although the ordinances are voted on separately, the testimony for and against them are presented at the same hearings.

The most significant substantive difference between these two actions is the type of review afforded a challenger.<sup>289</sup> A property owner disagreeing with the rezoning files a writ of certiorari to a circuit court and forces the municipality to bolster its denial with competent substantial evidence.<sup>290</sup> An owner disputing the amendment files a *de novo* action for declaratory or injunctive relief; at the trial the local government must show only that the decision was not arbitrary or capricious.<sup>291</sup>

A party opposing the *approval* of paired ordinances would be able to challenge the rezoning portion of the decision under a quasi-judicial process.<sup>292</sup> But if the amendment were not paired to a rezoning, the chances of getting the decision reversed would be greatly diminished because of the fairly debatable standard applied to the amendment.<sup>293</sup> On the other hand, consider a person challenging a *denial* of a paired amendment and zoning change. If the amendment were denied, the zoning board would not even vote on the proposed zoning as it would be incompatible with the land use map.<sup>294</sup> The challenger would thus be limited to a *de novo* court action with the burden to prove that the decision was not even fairly debatable.

### 3. Classifying all Rezoning as Quasi-Judicial is Inconsistent with *Snyder's* Functional Analysis

The Court's bright-line rule in *Yusem* and *Coastal* that all amendments are legislative implied that all land use changes not involving a change to the FLUM are quasi-judicial.<sup>295</sup> Because the courts did not indicate otherwise, this rule also applies to

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288. *See id.*

289. *See* discussion *supra* Section II-B.

290. *See id.*

291. *See id.*

292. *See* discussion *supra* Section III-A regarding City of Jacksonville procedures.

293. *See id.* One could argue that a person would not need to challenge an amendment because it only affects the land usage classification and not the actual zoning; that person could always wait until the adverse zoning change was proposed before challenging it and still have the quasi-judicial process available. There would, however, be no basis to challenge the zoning change if, based on the amendment, the new zoning were now consistent with the land use map.

294. *See* discussion *supra* Section III-A regarding City of Jacksonville procedures.

295. *Coastal*, 708 So. 2d at 209; *Yusem*, 690 So. 2d at 1294.

large scale rezonings that are consistent with the land use map.<sup>296</sup> For example, allowing a rezoning of a large tract of land from low-density residential to commercial could, however, have a major impact on the need for new roads and utilities. Yet, under the strict rule it would be deemed quasi-judicial. Such a policy seems to be imprudent and inconsistent with *Snyder's* functional analysis test.<sup>297</sup>

After articulating its major rule that “[g]enerally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy,”<sup>298</sup> Judge Grimes added in an often overlooked comment: “[a]pplying this criterion, it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature.”<sup>299</sup> Under *Yusem-Coastal*, however, a large-scale rezoning that is not part of a plan amendment would not be subject to policy review or submitted to the DCA.<sup>300</sup> This procedure frustrates the legislators’ intent by depriving the DCA and other affected local governments and public agencies from potentially meaningful input.<sup>301</sup>

*Yusem* chose to distinguish rather than to overrule *Snyder*: “In *Snyder II*, we plainly did not deal with the issue of the appropriate standard of review for amendments to a comprehensive land use plan.<sup>302</sup> Judge Wells further explained the court’s position:

While we continue to adhere to our analysis in *Snyder* with respect to the type of rezonings at issue in that case, we do not extend that analysis or endorse a functional, fact-intensive approach to determining whether amendments to local comprehensive land use plans are legislative decisions. Rather, we expressly conclude that

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296. For example, see Application for Rezoning R-2005-117, *supra* note 2 (application to rezone 885 acres to add 400 to 600 multi-family residential units within a PUD, while maintaining existing and projected commercial, office and industrial uses).

297. See *Snyder*, 627 So. 2d at 474 (explaining the elements of the functional analysis test).

298. *Id.*

299. *Id.* In practice, a rezoning expected to have a major impact may well undergo considerable internal review by the designated administrative agency, because the staff or commissioners realize the potential impact and want to minimize criticism and perhaps maximize their own position.

300. See FLA. STAT. § 166.041 (omitting any requirement for a municipality to submit a new ordinance for review to any state agency).

301. See *id.*

302. *Yusem*, 690 So. 2d at 1293.

amendments to comprehensive land use plans are legislative decisions.<sup>303</sup>

Under an interpretation that *Snyder* classifies all rezonings that are policy as amendments, there would be no need to retain *Snyder* as it would be identical to the bright line rule. Yet *Yusem* implicitly affirms *Snyder*.<sup>304</sup> In addition, *Coastal* implicitly affirmed this distinction by noting that: “[h]owever, a proposed zoning change under *Snyder* must be consistent with the FLUM, thus requiring policy application instead of policy reformulation,”<sup>305</sup>

If *Yusem* and *Coastal* did not overrule *Snyder*, as indicated, the *Snyder* functional analysis test is still valid for determining the standard of review for a rezoning not involving an amendment, i.e., “comprehensive rezonings affecting a large portion of the public are legislative in nature.”<sup>306</sup> As a result, under *Snyder*, a small scale rezoning is typically quasi-judicial as it affects only a small number of landowners and a small area, while a large-scale rezoning, affecting a large area and number of individuals, is a legislative decision.<sup>307</sup> This analysis is inconsistent with *Coastal* and *Yusem*, which imply that all rezoning are quasi-judicial.<sup>308</sup>

For amendments, on the other hand, the *Snyder* functional test is not valid according to these same decisions.<sup>309</sup> Instead the *Coastal* and *Yusem* Courts have established a bright-line rule that all amendment are legislative.<sup>310</sup> The different approaches for classifying rezonings (*Snyder* functional test) and amendments (*Yusem*–*Coastal* bright-line rule) result in a significant inconsistency, which at the very least can cause confusion. Table 2 summarizes the apparent positions of the three Florida Supreme Court decisions on the four types of zoning actions.

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303. *Id.*

304. See Amicus Curiae Brief of Florida Legal Foundation at 4, *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997) (No. Fla. 87,078), available at <http://www.law.fsu.edu/library/flsupct/87078/87078ans2.pdf> (observing that accepting the position that any change in the FLUM constitutes an amendment would effectively eviscerate *Snyder*).

305. *Coastal*, 788 So. 2d at 209.

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

307. *Id.*

308. *Coastal*, 788 So. 2d at 209; *Yusem*, 690 So. 2d at 1294.

309. See *id.*; *Yusem*, 690 So. 2d at 1293.

310. *Id.*; *Yusem*, 690 So. 2d at 1293.

Table 2. Classification of Zoning Decisions from Florida Supreme Court Opinions<sup>311</sup>

Type of Land Use Action	<i>Snyder</i>	<i>Yusem</i>	<i>Coastal</i>
Large Scale Amendment	Legislative	Legislative	Legislative
Small Scale Amendment	Quasi-judicial	Not addressed	Legislative
Large Scale Rezoning	Legislative	Quasi-judicial	Quasi-judicial
Small Scale Rezoning	Quasi-judicial	Quasi-judicial	Quasi-judicial

The procedures adopted by several municipalities confirm the confusion and inconsistency. Many, if not most of the municipalities in Florida treat all rezonings not involving an amendment as quasi-judicial.<sup>312</sup> In Jacksonville, a recent rezoning ordinance, which was not accompanied by an amendment, involved a tract with an area greater-than 800 acres.<sup>313</sup> This rezoning and similar rezonings were decided upon without providing copies to the Florida DCA, DOT or DEP to review.<sup>314</sup> In addition, although affected parties aware of the zoning action may seek appropriate judicial review, many parties, including the public and public agencies, could be seriously affected by this government action, yet not have an opportunity for meaningful review.

#### 4. The *Yusem-Coastal* Bright-Line Rule Is Not Consistent with the Statutory Differences Between Small-Scale and Standard Amendments

The *Yusem-Coastal* bright line rule defines all amendments as legislative, subject to the fairly debatable standard of review.<sup>315</sup> The basic rationale is that these are all formulations of policy subject to the extensive multi-agency state-wide review process.<sup>316</sup> However, because a small-scale amendment differs substantially from a standard amendment in its nature and in the approval process, requiring the same classification for all amendments is not appropriate.

311. See discussion *supra* Sections III-B & IV-B.

312. See Application for Rezoning R-2005-117, *supra* note 2. See also discussion *supra* Section IV-B.2

313. Report of the Planning and Development Department for Application for Rezoning R-2005-117 to Planned Unit Development (February 24, 2005), available at <http://citycirc.coj.net/coj/COJbillDetail.asp?F=2005-0117\Reports>.

314. See JACKSONVILLE, FLA. CODE § 656 (Zoning CODE: Part I, Subpart C: Procedures for Rezoning and Amendments to the Zoning CODE).

315. *Coastal*, 788 So. 2d at 205.

316. See *id.* at 209.

A zoning change of ten acres or less that amends only the FLUM, but does not alter the text of the comprehensive plan, qualifies as a small-scale amendment.<sup>317</sup> The legislature does not require DCA to review such an amendment because it typically involves only a single parcel, it affects only a small number of interests, and it does not involve a new policy. Similarly, because it has not undergone substantive, if any, policy review at the local government level, the standard of review should be quasi-judicial.<sup>318</sup> It is instructive to compare the type of review at the local government for a small scale amendment with the semi-annual comprehensive plan amendments. For the latter, there is substantially more discussion and debate addressing real policy issues such as the amendment's impact on traffic, schools, and utilities.<sup>319</sup>

It is noteworthy that the 1995 amendments to the Florida statutes that streamlined the state review for a small-scale amendment were enacted following *Snyder* (1993) but prior to *Yusem* (1997).<sup>320</sup> Thus, the legislators were aware of the *Snyder* functional analysis test under which a small-scale amendment would be subject to quasi-judicial review if it were an application of policy rather than a formulation of policy.<sup>321</sup> The legislature's elimination of a major portion of the review process of a small-scale amendment is consistent with a recognition that such an amendment does not involve formulation of policy based on the *Snyder* functional analysis test.<sup>322</sup> *Yusem* and *Coastal* established a protocol that is intrinsically different from the one in *Snyder* for determining the standard of review for zoning changes.<sup>323</sup> The difference hinges on whether it involves an amendment. Under *Yusem* and *Coastal*, if the change involves an amendment, the decision is always legislative.<sup>324</sup> Under *Snyder*, if the change involves another zoning action, the decision is based on the functional analysis test.<sup>325</sup> Thus, under *Snyder*, a rezoning not

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317. See FLA. STAT. § 163.3187(1)(c)(1) (2005).

318. See discussion *supra* Section IIB.

319. Interview with Shannon Scheffer, *supra* note 277.

320. See 1995 Amendments to Florida Chapter 9J-5 (FLA. STAT. §§ 163.3125-163.3189)(1995).

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

322. *Yusem*, 690 So. 2d at 1295; *Coastal*, 788 So. 2d at 209.

323. *Id.*; *Coastal*, 788 So. 2d at 209.

324. *Id.*; *Coastal*, 788 So. 2d at 209.

325. See *Snyder*, 627 So. 2d at 474.

involving an amendment may be legislative or quasi-judicial depending on the number of individuals affected.<sup>326</sup>

In response to an amicus curiae brief, the City of Jacksonville Beach noted that although the review processes for small-scale and standard amendments differ, this difference “does not transform what is a quintessential legislative act into one which is quasi-judicial.”<sup>327</sup> The City also noted that the procedure still allows the state to intervene during the adoption phase to ensure that the amendment complies with the statute.<sup>328</sup> This response did not, however, suggest how the DCA would be alerted to the need to intervene without having previously reviewed the amendment. It also does not address the reduced capability of challenging the amendment.

## V.

### CONCLUSIONS

This article re-examines the holding in *Coastal* that a small-scale amendment is a legislative decision subject to the fairly debatable judicial standard of review. The author maintains that the *Yusem-Coastal* bright-line rule fails to properly account for inequities and inconsistencies in the law. As a result, the Court has not eliminated confusion or established a consistent, rational means for classifying land use decisions.

#### A. *Small-Scale Amendments Are Not Policy*

Small-scale amendment should not be classed as legislative decisions because the traditional separation of powers argument breaks down at the local level and because the decisions do not formulate policy. On a federal or state level, the legislature's broad base and diversity of input justify giving great deference to legislative decisions. This diversity of input, which allows coalitions to offset one another to prevent dominance is simply not present for a local government. As a result, there is greater opportunity for undue influence by powerful developers and others, with a far greater likelihood of abuse in land use decisions.

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326. See *id.*; see also Brief of Amicus Curiae, Florida Home Builders Association at 10-12, *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001) (No. Fla. 95,686).

327. See Response to Brief of Amicus Curiae, Florida Home Builders Association at 10, *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001) (FL 95,686).

328. See *id.* at 11 (citing FLA. STAT. § 163.3187(3)(a) (1995)).

Not only does the legislature not operate under the federal model envisioned by the framers, but there is often no true separation of powers at the local level. In many instances, council or commission members serve on both legislative and quasi-judicial bodies. This arrangement does not justify separate judicial review processes depending on which hat the individuals were wearing at the time of the decision.

Defining a small-scale amendment as policy does not make it legislative and deserving of deference. What gives legislature its legitimacy is the process of legislation. When this process loses its broad-based character and its distinction from an adjudicative body, as typically occurs for local councils or commissions, the rationale for deference is also lost. The *Snyder* court and numerous commentators have furnished ample documentation of abuses by biased decision-makers.<sup>329</sup>

The evidence also clearly indicates that a small-scale amendment, as defined by the Florida law, is not necessarily a true policy decision. A change in the FLUM for a small parcel of land will often significantly impact only those landowners in the immediate vicinity. It seems unlikely that the local board or council will thoroughly examine the impact on a broad range of policy issues of each amendment as suggested in the *Yusem* and *Coastal* opinions, particularly with strong commercial interests at stake.<sup>330</sup>

The state and local procedures support this interpretation. The Florida statutory procedure does not require routine review of small-scale amendments by DCA or other public agencies.<sup>331</sup> At the local level, several municipalities provide essentially the same review procedures for a small-scale amendment and for a rezoning.<sup>332</sup> The inference is that the type of review conducted at the local level depends on the extent of impact, thereby resembling the *Snyder* functional analysis test. Accordingly, there is no basis for a different classification and standard of review for small-scale amendment and small scale rezonings.

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329. See *Snyder*, 627 So. 2d at 472-73. See also discussion *supra* Section IIC.

330. See *Yusem*, 690 So. 2d at 1294.

331. See FLA. STAT. § 163.3187(1)(c) & discussion *supra* Section IIIA.2.

332. See *id.* & discussion *supra* Section IIIA.2

B. *Land Use Action Classifications are Inconsistent and Conflicting*

The statutes and case law provide an inconsistent framework for classifying land use decisions by local governments. Because *Yusem* and *Coastal* explicitly stated that they were not overruling *Snyder* regarding land use decisions not involving a plan amendment, the latter court's functional analysis test is still valid for rezonings. This test would conceivably classify the rezoning of a large and strategically placed parcel of land as a formulation of policy, requiring a legislative review process. However, according to the *Yusem-Coastal* bright-line test, only amendments are legislative, with all other rezonings classified as quasi-judicial.<sup>333</sup> Thus, for a large scale rezoning, the *Snyder* functional analysis test results in a different classification than the *Yusem-Coastal* bright line rule. In essence, the court is deferring to the local government to implement *Snyder*. Local zoning codes, however, typically do not distinguish between small-scale and standard rezonings. A standard rezoning, affecting a larger number of constituents, though generating substantial discussion of policy, will not be designated as a legislative decision.<sup>334</sup>

The *Coastal -Yusem* rule that provides the same standard of review for all comprehensive plan amendments is not consistent with the state statutes. The 1995 amendment to the Growth Management Act established significant changes in the procedures for reviewing a small-scale amendment, suggesting that the legislature considered these actions substantively different from standard plan amendments.<sup>335</sup> The principal difference is that there is no external independent body (i.e., DCA or other agency) reviewing the small-scale amendment for consistency with state statutes, regional plans or state-wide plans or verifying the internal consistency of the amended plan.<sup>336</sup> This situation differs significantly from the multi-stage review described by *Coastal* in justifying the classification of the small-scale amendment.<sup>337</sup> The fact that the legislative amendments were enacted following *Snyder*, but prior to *Yusem* or *Coastal*, support the claim that they are more consistent with *Snyder*.

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333. *Coastal*, 788 So. 2d at 209.

334. Large scale rezonings are often processed in tandem with plan amendments. See discussion *supra* Section IIIA.

335. See FLA. STAT. §§ 163.3161-.3215 (1995).

336. See discussion *supra* Section IIIA.2

337. *Coastal*, 788 So. 2d at 208.

C. *Lack of Procedural Due Process Is a Concern for Local Land Use Decisions*

Deference to local boards is based on a misplaced faith that the legislative process protects public and private interests against unfair or biased decisions. The inherent reduction of due process for a legislative decision compared to a quasi-judicial one may significantly affect challengers' rights at the local level. Although notice and an opportunity to be heard, the most important facets of procedural due process, are widely available in local decisions, local bodies do not adequately address *ex parte* communication or the need for unbiased decision making. Where elected officials also serve in a quasi-judicial capacity, the nature of local governments may make enforcing *ex parte* rules impractical. Establishing independent commissions for the quasi-judicial decision may be especially burdensome on very small counties or cities and is likely to generate resistance.<sup>338</sup>

Although local governments are not likely to require formal due process even for quasi-judicial hearings, they must at least assure a process that prevents blatant abuse of *ex parte* communication and bias by lawmakers. Examples of mitigating factors are requiring records of certain *ex parte* communications, strict ethics codes for decision-makers, and vigilant press coverage.

Commentators and judges have weighed in both for and against requiring record-keeping of fact finding. In an era where the need for transparency and accountability in government are universally agreed upon, the arguments for requiring records seem persuasive. The ease and convenience of acquiring and retaining electronic records support this conclusion.

Local governments should be aware that although due process is not formally required for a legislative decision, the procedures afforded the aggrieved landowner may be the only realistic opportunity to win the case, given the limited opportunity for judicial review. Thus, independent of the implications for judicial review, due process is essential to assure that the decision is a fair one arrived at in a recognizably fair and reasonable manner. The effort to resolve these problems will be offset by the potential reduction or elimination of "the confusion, corruption and abuse of individual rights which is inherent. . ." in the legislative process.<sup>339</sup>

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338. See discussion *supra* Section IVB.

339. See Holman, *supra* note 12 at 143.

D. *The Court's Reasons for the Fairly Debatable Standard Are Not Convincing*

The reasons offered by the *Coastal-Yusem* court do not support imposing the fairly debatable standard on an aggrieved landowner seeking to challenge a local government's decision. *Coastal* maintained that in spite of the lack of mandatory review by the DCA, the existence of other remedies available to affected parties constituted sufficient safeguards.<sup>340</sup> Unfortunately, these remedies do not provide the affected person with the right to challenge based on the competent substantial evidence standard.

*Coastal's* other claimed benefit of the holding was that the bright-line rule offered uniformity and certainty in land use decisions.<sup>341</sup> One counter is that because of the inconsistencies of *Coastal* with the statutes and with *Snyder* in classifying a large scale rezoning, the courts may be faced with additional challenges on the validity of these laws. Moreover, certainty in the judicial outcome is not always a virtue if the decision results in inequities or in inadequate legal remedies for grievances.

E. *Recommendations for Legislative Reform*

Although the intent of this article is not to develop a detailed proposal for modifying the procedures for reviewing small-scale amendments, guidelines are presented below for legislative reform of the process.

1. Eliminate the Distinction Between Legislative and Quasi-Judicial Review for Zoning Actions.

The review of all zoning actions should be based on a standard of competent substantial evidence or equivalent. There is no reason the government should not be required to provide this level of specificity to establish its case. One proposed mechanism is the "rational justification rule" suggested by Siemon and Kendig.<sup>342</sup>

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340. *Coastal*, 788 So. 2d at 209

341. *Id.*

342. See Charles L. Siemon & Julie P. Kendig, *Symposium Article: Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 740 (1996). This rule would entail holding a de novo court proceeding to determine whether a rezoning action "bears a substantial relationship to the public health, safety and welfare." If the plaintiff could not prove that the action is unrelated to public welfare, the court would defer to local government. If the

## 2. Eliminate the Two Levels of Review for Small-Scale and Standard Plan Amendments

State statutory review should be limited to zoning changes that have a significant impact on policy or that affect a large number of interested parties.<sup>343</sup> To achieve this, it is recommended that the legislature establish criteria for types of zoning change requiring review by DCA and other public and government agencies such as the following:

- Comprehensive plan amendments greater than ten acres, along with other criteria under the current statutes;
- Zoning changes of greater than some minimum tract size (e.g., fifty acres); and
- Other tracts based on special circumstances such as: requests by the local government based on guidelines; or requests by interested parties based on recognized criteria and possibly requiring authorization from a magistrate.

## 3. Establish Minimal Due Process Requirements.

State statutes are needed to ensure minimal criteria for impartial tribunal (based on strict conflict of interest limitations and disclosure of communication), record of findings for all adjudicatory or advisory local government bodies, and modified restriction on ex parte communication. Although it is not practical to limit ex parte entirely, strict guidelines are needed requiring advance notification where possible and strict reporting of contacts. In addition, although most local governments provide adequate notice and opportunity to be heard and to present evidence, the legislature should codify these by statute.

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plaintiff can establish this initial proof, the burden would shift to the government. If the government is able to demonstrate by preponderance of the evidence that the action is substantially related to public welfare, the court would sustain the government action.

343. As Pelham has pointed out in his critique of *Snyder*, there are still unanswered questions regarding the criteria for distinguishing between decisions of limited impact and those affecting policy; Pelham, *supra* note 85 at 284-85.

