Administrative Law Section Newsletter

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Local Administrative Law: All Plan Amendments are now Legislative Decisions

by Ralf G. Brookes, Morgan & Hendrick, Key West

In March 1997, the Florida Supreme Court held in *Martin County v. Yusem*, 22 FLW S156 (Fla. March 27, 1997) that all plan amendments are legislative, not quasi-judicial, decisions. In April 1997, the Third District Court of Appeals in *Debes v. City of Key West*, 22 FLW D827 (Fla. 3rd DCA April 2, 1997) reminded local governments that there must still be a rational basis for legislative plan amendments . . . regardless of whether the quasi-judicial or legislative test is applied.

In the arena of local government, decisions in the field of administrative law are generally not subject to Florida's Administrative Procedures Act, *Florida Statutes* Chapter 120. In recent years, rezonings and comprehensive plan amendments have become increasingly difficult for both local governments and administrative lawyers. Complex hearings are held before City and County Commissions that are historically and politically more adept at making legislative, rather than quasi-judicial, decisions. Judicial review of these local decisions under Florida's Growth Management Act led to differing District Court opinions and recent changes in the 50 year history

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From the Chair ... Your Section Wants You!!

by Robert M. Rhodes, Chair

This year offers our Section many continuing and new opportunities and challenges. I'll outline a few of our priorities.

First, membership. We need to grow the section, increase member participation in section activities, and recruit the next generation of section leaders. Several new Executive Council members joined us this year and they reflect the diversity of our membership — a strength that has enabled us to mold consensus positions which are generally viewed as balanced and objective. Nonetheless, all of our activities can benefit from increased member participation, particularly those of you who have not served in the past. I encourage each of you to contact any section officer or Executive Council member if you wish to participate in section activity. Elizabeth McArthur will chair the membership committee.

Second, we will continue our productive CLE programs. Donna Blanton, CLE committee chair, and Mike Maida will spearhead a fall CLE program devoted to mediation in the administrative forum. Additionally, we will consider programs addressing local government administrative practice and a review and assessment of recent revisions to the Administrative Procedure Act. Later in the year we will start planning the next Administrative Law Conference

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which will provide a useful forum for discussing and exchanging ideas to improve administrative law, practice, and procedure. The next Conference tentatively is scheduled for fall, 1998.

Third, we will amplify our efforts to establish a student administrative law writing contest. We hope this competition will be up and running this coming year. Also, with the leadership of Jim Rossi and Johnny Burris, we will establish a stronger working relationship with each state law school to promote and support teaching state administrative law. We'll also consider joining with one of the law schools to produce a national forum on significant emerging administrative law issues.

Fourth, our Public Utilities Committee chaired by Doc Horton will work on a forum that will address from various perspectives deregulation of electric utilities. This should be a timely and provocative session that will bring together public, private, and citizen views on this important public policy issue.

Fifth, we will publish our regular newsletter and Bar *Journal* column. Dave Watkins and Seann Frazier will chair these efforts.

Finally, we will maintain the Section's active involvement in the development of administrative law policy and practice. We will continue to work with legislative staff and committees on possible further revisions to the APA. We will assess the effects of recent APA revisions and the recently adopted Uniform Rules of Procedure. We will offer our assistance to the Constitutional Revision Commission. Past chairs Linda Rigot and Bill Williams will lead these endeavors.

In all, we have another challenge-filled year, and I encourage those of you who have not actively participated in your Section, to become involved.

Join us. Let us hear from you.

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of zoning law. But the Supreme Court in *Yusem,* and the Third District Court of Appeals in *Debes*, recently shed some new light into the murky waters of this increasingly-complex area of administrative law, and remembered lessons of the past.

With the advent of Florida's Growth Management Act in 1985, the zoning of property, previously treated as a purely "legislative" decision, must now survive an increasingly technical array of standards, criteria and different avenues of judicial review. Legislative actions are reviewable under the fairly debatable standard in an original action. *Martin County v. Section 28 Partnership, Ltd.*, 676 So.2d 532 (Fla. 4th DCA 1996). The denial of a quasi-judicial application is reviewable by petition for writ of certiorari, if you are the applicant. *Section 28 Partnership, Ltd. v. Martin County*, 642 So.2d 609 (Fla. 4th DCA 1994). If you are an affected citizen alleging that an action is inconsistent with the comprehensive plan, judicial review is available solely in an original action under *Florida Statutes* §163.3215.

Although ultimately subject to judicial review, it is the local governments that must initially decide whether an action is legislative or quasi-judicial because each type of action has its own procedures, standards and methods of review. *See, Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993); *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3rd DCA 1991), *review denied*, 598 So.2d 75 (Fla. 1992). To make this determination, the Florida Supreme Court required local governments to conduct a functional analysis of each application. Actions which result in the "formulation" of a general rule of policy are legislative. But actions which result in the "application" of a general rule of policy are quasi-judicial. *Snyder*. From *Snyder* (in 1993) until now, this functional analyses was applied to both rezonings and plan amendments on a case-by-case basis. Plan amendments or rezonings could be either quasi-judicial or legislative. And every case required analyses.

But in *Yusem*, the Supreme Court restored a bit of common sense to the process and held that amending a plan was just like adopting an original plan. A plan amendment was legislative because it involved the formulation of a general rule of policy, regardless of the size of the parcel or number of people affected. All plan amendments are legislative. *Martin County v. Yusem*, 22 FLW S156 (Fla. March 27, 1997). The Supreme Court also confirmed that judicial review of a plan amendment, a legislative act, is available in an original action filed in circuit court. *Yusem*, *citing Hirt v. Polk County Board of County Commissioners*, 578 So.2d 415, 416 (Fla. 2d DCA 1991).

Although all plan amendments

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are conclusively legislative, the functional analyses must still be applied to rezonings. Comprehensive rezonings that affect a large area or portion of the public are legislative determinations subject to the fairly debatable standard of review. But rezonings that affect a limited area or number of persons are quasi-judicial decisions, subject to a higher degree of scrutiny under the two prong test set forth in *Snyder*. In a quasi-judicial rezoning, the applicant has the burden of proving that the application is consistent with the comprehensive plan and complies with procedural requirements. Once this burden is met, the burden shifts to local government to demonstrate a valid, legitimate public purpose for maintaining the existing designation. *Snyder* at 474-476.

This sounds simple enough. Plan amendments are legislative. Rezonings require functional analyses. But what if applications for a plan amendment and rezoning are filed at the same time? The District Court cases that arose in *Snyder*'s wake often considered applications that combined rezonings with plan amendments, and the reviewing Courts failed to make a distinction between the two applications, further leading to the confusion.

These dual applications were processed at the same time in order to reduce the extraordinary amount of time needed to proceed on a plan amendment and then a subsequent rezoning under Florida's Growth Management Act, *Florida Statutes* §§ 163.3184 and 163.3187. Proposed plan amendments must first be transmitted to various state agencies including the Department of Community Affairs. Only after review can an amendment be adopted and must be submitted to DCA once again for a second compliance review under the Growth Management Act. *Florida Statutes* §163.3184. Generally, larger-scale plan amendments can only be adopted twice per year, but smaller scale amendments affecting less than 10 acres can be submitted more frequently. Florida Statute §163.3187. Rezonings can be accomplished more quickly and frequently. But rezonings must still be in compliance with each and every element of the comprehensive plan, i.e., frequently necessitating the simultaneous plan amendment.

Because different standards apply to legislative plan amendments and rezonings, it would be easier to defend decisions in which plan amendments are heard first, in a separate hearing prior to the rezoning. All to frequently, a plan amendment and a rezoning application are heard together in one hearing, usually at the request of an eager applicant whose project awaits approval. The best strategy, in light of *Yusem*, is to decide the legislative plan amendment first. Even if both hearings occur at the same meeting. The first decision, a legislative plan amendment, is easier to uphold. In most cases, the legislative decision on the plan amendment will form the basis for a quasi-judicial decision on the underlying rezoning application. Only then should the hearing on the quasi-judicial rezoning application be heard. A separate hearing meeting the substantive and procedural requirements of *Snyder* can then be convened.

Remember, even a quasi-judicial rezoning application that is consistent with the plan or adopted plan amendment can be denied if a legitimate public purpose exists to keep the existing zoning in place under the second prong of the test set forth in *Snyder*. *Snyder* at 476. Does this "legitimate public purpose" standard closely parallel the "fairly debatable"or "rational basis" test applied to purely legislative decisions? And in the end, is there any real, practical difference? The Supreme Court reminded us in *Snyder* (1993), and again in *Yusem* (1997), that a "land use plan must be based on adequate data and analysis in providing for gradual and ordered growth in the future use of land." Even legislative plan amendments must still have a rational basis that is supported by competent, substantial evidence. That is the underlying constitutional basis for all modern zoning and growth management systems.

We must not forget the historical, constitutional basis for zoning established in *Euclid v. Ambler*, 272 U.S. 365 (1926). It is worth remembering that only on a motion for rehearing in *Euclid* was the United States Supreme Court persuaded to change its collective mind and hold zoning constitutional. *Land Use*, Callies and Freilich, West Publishing (1986), p. 47, note 9. Since the *Euclid* decision in 1926, zoning has become a part of almost all local government codes. It is also in *Euclid* that the "fairly debatable" standard was first enunciated in the context of zoning; "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." The *Euclid* court also discussed in detail many public purposes that formed the rational basis for zoning districts limiting the allowable uses of land.

Two years after *Euclid*, United States Supreme Court again examined a residentially-zoned parcel adjoining established industrial uses. The Court held that the line of separation between the residential and industrial district, which transected an existing commercial building, was unconstitutional because it lacked a rational basis. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The zoning district was not supported by a fairly debatable rational basis. Usually, the rational basis, or lack of a rational basis, can be found by looking at a map of the surrounding uses and asking a simple question: "Does it make sense?" (see, *Nectow*, zoning map, included in the opinion).

After nearly 50 years of zoning decisions and growth management legislation, the Third District recently brought us back to earth. In *Debes*, the Third District reversed the denial of even a "legislative" plan amendment (from Residential to Commercial) because it resulted in "discriminatory spot zoning — or, in this context, spot planning — in reverse." Under the Court's analysis even a legislative decision must have some rational basis supported by competent, substantial evidence, especially in cases that raise the old specter of "spot zoning," or the creation of small zoning islands or pockets unsupported by any rational basis.

The City's stated reasons for maintaining the residential zoning in *Debes* lacked both a rational basis and could not be supported by competent, substantial evidence. The Court found that the City's general-

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ized concerns about additional traffic that would be generated by commercial uses was insufficient to retain residential spot zoning. Traffic concurrency and levels of service were properly considered during site plan review once a specific project was proposed. In addition, the City's desire to build affordable housing on the privately-held parcel was also an insufficient basis to deny the application. The plan amendment or rezoning application should be considered "without regard to the one particular use which the owner might then intend to make of the various uses permitted under a proper zoning category" *Debes, citing Porpoise Point Partnership v. St. John's County*, 470 So.2d 850 (Fla. 5th DCA 1985). Affordable housing, although desirable, could have supported condemnation for that use, but "emphatically may not be promoted on the back of a private property owner . . ."

Even the "fairly debatable" test applied to legislative acts, could not rescue the City from what the District Court called a decision that "so fundamentally and seriously departs from the controlling law that a miscarriage of justice has resulted . . ." The Court noted that regardless of whether the decision was characterized as legislative or quasi-judicial, the decision to deny the request could not be upheld under any test. "As we suspect is *very often the case*, the application of any possible formulation of the showing necessary either to support or to overturn a local government's decision of the present kind, including the "fairly debatable" standard deemed appropriate in *Martin County v. Yusem* . . . would yield the same result." *Debes*, 22 FLW at D828, n.4. (emphasis added).

Local governments must not only determine whether a rezoning application is consistent with each and every element, policy and objective in the Comprehensive Plan under *Snyder* and *Machado v. Musgrove*, 519 So.2d 629, 635 (Fla. 3rd DCA 1987), there must be a rational basis to support the designation and the district's boundaries. *Euclid Nectow*. Without a fairly-debatable, rational relationship to the health, safety or morals of the community and competent, substantial evidence to support the rational basis and district boundary, the Third District held that the zoning designation "is based on no more than the fact that those who support it have the power to work their will." *Debes*. The United States Supreme Court stated in 1926 that such an ordinance "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Euclid v. Ambler*, 272 U.S. 365 (1926).

Although the early Supreme Court cases of *Euclid* and *Nectow* were not cited in *Yusem* or *Debes* they should not be forgotten by local governments or local administrative law practitioners. Although many state and regional land use schemes have been adopted[1] in the 50 years since these early cases, a rational basis supported by competent, substantial evidence is still required for all modern comprehensive plans and zoning designations.

[1] *E.g.*, Hawaii's state land use act, Oregon's and Florida's Growth Management Act and the Tahoe Regional Planning Act, which was the subject of a recent United States Supreme Court opinion in *Suitim v. Tahoe Regional Planning Council*, Slip Op. 96-243 (May 27, 1997).

Case Notes, Cases Noted and Notable Cases

by Elizabeth McArthur

In a key land use law case, the Florida Supreme Court in *Martin County v. Yusem*, 22 Fla. L. Weekly S156 (Fla. Sup. Ct., March 27, 1997), took out its bright line marker and answered in the negative the following question certified by the Fourth DCA as being of great public importance: Can a rezoning decision which has limited impact under *Snyder* but does require an amendment of the comprehensive land use plan still be a quasi-judicial decision subject to strict scrutiny review?

The *Snyder* case referenced in the certified question is *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), in which the Florida Supreme Court had held that rezoning actions that have a limited impact on the public and that can be seen as policy applications rather than policy setting, are quasi-judicial decisions. The *Snyder* decision suggested that a functional test was to be applied to determine whether the impact of the action is limited, looking at such factors as whether the parcel of land at issue was owned by only one person. That was the situation presented in the *Yusem* case, involving one 54-acre parcel owned by one person for which a density rezoning and comprehensive plan amendment were sought.

However, in *Yusem*, the Court receded from any notion that a functional test could be applied to determine that a rezoning decision had limited impact and was therefore quasi-judicial, where the rezoning request also requires a comprehensive plan amendment. As the Court held, "While we continue to adhere to our analysis in *Snyder* with respect to the types 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 amendments to comprehensive land use plans are legislative decisions." 22 Fla. L. Weekly at S158. As legislative decisions, comprehensive land use plan amendment decisions are subject to the fairly debatable standard of review, which, as the Court reminded, is a