GRAY | ROBINSON
ATTORNEYS AT LAW

LAS OLAS CITY CENTRE
401 EAST LAS OLAS BOULEVARD
SUITE 1000
P.O. BOX 2328 (33303-9998)
FORT LAUDERDALE, FL 33301
TEL 954-761-8111
FAX 954-761-8112
gray-robinson.com

BOCA RATON
FORT LAUDERDALE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

May 27, 2015

VIA EMAIL

David Kyner, Chair
Members of the Historic Preservation Board
City of Fort Lauderdale
700 NW 19th Avenue
Fort Lauderdale, FL 33311

Re: 3017 Alhambra Street, Fort Lauderdale, Florida 33304 (the "Property")
Case No. H15010

Dear Mr. Kyner and Members of the Board:

Our firm represents Mr. James Ostryniec, the owner of the above referenced Property, in regards to a third-party's application for an historic landmark designation of the Property (the "Application"). Mr. Ostryniec has been the owner and a resident of the Property for the past twelve years, yet he first received notice of the Application approximately two weeks ago. Unfortunately, Mr. Ostryniec is quite ill and recovering from surgery out of town, and we have been engaged to represent his interests, in opposition to the Application, at the Historic Board Hearing on June 1, 2015.

Based upon our review of the Application, it is clear that neither the applicant, nor the Application, meet the criteria for an historic designation as set forth in Sect. 47-24.11.B.6. of the ULDR. In particular, the applicant and the Application, are deficient for the following reason:

1. The applicant is not the property owner, and the applicant has provided no documentation of residency in the City of Fort Lauderdale, as required pursuant to Sect. 47-24.B.1. of the ULDR. In addition, the applicant has not inspected the Property and the applicant has no particular professional experience or educational background to evaluate the architectural or historical significance of the Property.
2. The Application provides no substantive documentation of a particular architectural style at the Property, and in fact the Application includes conflicting evidence regarding whether the Property exhibits either an Art Moderne or a Deco style of architecture.
3. The Property has undergone several changes of use and extensive renovations of the interior and exterior architecture over the years, which impair any remaining architectural value of the Property; and

4. The Application includes no facts, explanation, nor analysis of the value or significance of the building architecture at the Property.

The applicant asserts that the Property meets criteria e) for historic designation, which is based upon the "quality of the architecture" and "architectural significance". However, the Application includes no evidence that the Property exhibits architectural quality nor significant architecture. The applicant suggests that by merely representing a certain architectural style (Art Moderne or Deco, whatever the style may be), the Property is therefore worthy of designation. But the ULDR does not support this assertion, and instead Sect. 47-24.11.B.6.e. requires architectural significance which is not exhibited at the Property.

For the reasons set forth above, the Historic Preservation Board should deny the Application. We will appear at the hearing, and we hereby assert our client's right to intervene in the proceeding as a Party and to introduce additional evidence and testimony at the hearing. In addition, we plan to exercise or client's due process rights as a Party, and in particular the right to review all evidence, to provide rebuttal testimony and to cross-examine all witnesses, including the applicant, City staff and consultants.

Thank you for your attention and consideration in this regard, and once again, we urge the Board to deny the Application.

Sincerely,

Stephen K. Tilbrook

Copies (via email) to:
Mayor Jack Seiler
Commissioner Bruce G. Roberts
Commissioner Dean J. Trantalis
Commissioner Robert L. McKinzie
Commissioner Romney Rogers
Linda Mia Franco, AICP, Principal Planner , Fort Lauderdale Liaison to HPB
Marilyn Rathbun, Fort Lauderdale Historical Society

JAMES OSTRYNIEC
3017 Alhambra Street, Apt. No. 5
Fort Lauderdale, FL 33304

May 26, 2015

David Kyner, Chair
Members of the Fort Lauderdale Historic Preservation Board
City of Fort Lauderdale
700 NW 19th Avenue
Fort Lauderdale, FL 33311

RE: 3017 Alhambra Street
Case No. H15010

Dear Mr. Kyner and Members of the Board:

I am the longtime owner and resident of 3017 Alhambra Street, Fort Lauderdale, Florida 33304 (the "Property"), and I'm writing to strongly oppose the application to designate this Property and my home as an historical landmark, against my will. Please accept this letter as notice that Stephen Tilbrook, Esq. with GrayRobinson, P.A. will represent me at this hearing and also note that this is a request to intervene as a Party in the proceeding. The Property is not listed on the Florida Division of Historical Resources, Master Site File. The Property is not of any historically important style, and there have been several changes to the building over the years. Specifically, the Property was originally a two-story duplex that underwent numerous changes over many years to develop it first into a nine-room motel and ultimately into a five-unit apartment building, as it currently is. Throughout the history of the Property, doors have been added, generic hurricane windows were added and a second-story deck was enlarged. The Property is no longer economically viable as a two unit apartment building, nor as a nine unit hotel, and change at this Property is inevitable.

The attempt to designate this Property historic is a ploy to oppose a recently proposed new hotel. Those who are inappropriately seeking a historic designation are using the Historic Preservation Code of the City of Fort Lauderdale as a means to delay development. This is an outrageous and deplorable use of the process. Such delay is meant to hurt me personally and cause my family and I financial harm while providing no benefit to the City of Fort Lauderdale and the local community at large.

I urge you and the entire Historic Preservation Board to carefully and diligently review this application so that it is properly denied.

Sincerely,

James Ostryniec

Copies to (via e-mail):
Mayor Jack Seiler
Commissioner Bruce G. Roberts
Commissioner Dean J. Trantalis
Commissioner Robert L. McKinzie
Commissioner Romney Rogers
Linda Mia Franco, AICP, Principal Planner , Fort Lauderdale Liaison to HPB
Marilyn Rathbun, Fort Lauderdale Historical Society

GRAY | ROBINSON
ATTORNEYS AT LAW

LAS OLAS CITY CENTRE
401 EAST LAS OLAS BOULEVARD
SUITE 1000
P.O. BOX 2328 (33303-9998)
FORT LAUDERDALE, FL 33301
TEL 954-761-8111
FAX 954-761-8112
gray-robinson.com

BOCA RATON
FORT LAUDERDALE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

June 1, 2015

VIA ELECTRONIC MAIL

D'Wayne Spence, Assistant City Attorney
City of Fort Lauderdale
100 North Andrews Avenue
Fort Lauderdale, FL 33301-1016

Re: HPB Case No. H15010; Objection to the Submission of Evidence and Testimony by Consultant Merrilyn C. Rathbun and Applicant Charlie Esposito

Dear D'Wayne,

This letter is in response to the application for historic designation (the "Application") submitted by Charlie Esposito (the "Applicant") on April 3, 2015 regarding the building located at 3017 Alhambra Street (the "Property"). Our client, Mr. James Ostryniec, owns and lives in the Property and opposes the Application for historic designation. Specifically, the Application narrative submitted by the Applicant and the memorandum prepared by Ms. Merrilyn C. Rathbun (the "Consultant"), fail to meet the minimum legal standard for competent substantial evidence required for submission as evidence in the upcoming quasi-judicial hearing scheduled for June 1, 2015, and the HPB should disregard and not rely upon the lay testimony of the Consultant and the Applicant.

Merrilyn C. Rathbun, Fort Lauderdale Historical Society

Please accept this letter as our formal objection to the submission of evidence, including the Consultant's memorandum circulated on May 29, 2015, pertaining to the Property, as well as any Consultant testimony at the HPB hearing on June 1, 2015. The basis for the objection is that the Consultant does not have the educational nor professional qualifications to offer expert testimony on architecture or historic preservation as related to the Property. In support hereof, I have attached the Consultant's resume as Exhibit A.

The Secretary of the Interior's Standards and Guidelines define Professional Qualification Standards – minimum education and experience required to perform

identification, evaluation, registration, and treatment activities for those individuals analyzing historic structures. "The minimum professional qualifications in historic architecture are a professional degree in architecture or a State license to practice architecture, plus...at least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field...or at least one year of full-time professional experience on historic preservation projects." *Archaeology and Historic Preservation: Sec. of Interior Standards and Guidelines; Qualification Standards – Historic Architecture.* "Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects." *Id.* A copy of the Secretary of Interior Standards and Guidelines is attached as Exhibit B.

It is clear that the Consultant's resume and memorandum demonstrate no basis under the Secretary of Interior Standards and Guidelines of Qualification Standards for historic architecture. With due respect to the Consultant's history of good citizenship and employment by the Fort Lauderdale Historical Society, the Consultant has presented no resume of qualifications that would suggest she possesses the education and experience required to perform identification, evaluation, registration, and treatment activities for those individuals analyzing historic structures, as defined by the Secretary of Interior.

A review of the Consultant's resume reflects that she may be qualified in a number of areas, including art education, design and teaching, but it is absent of any explanation concerning special knowledge of architecture or historic designation. Specifically, the Consultant's resume does not show she has a professional degree in architecture or a State license to practice architecture, plus at least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field, or at least one year of full-time professional experience on historic preservation projects. Without such qualifications and the application of those qualifications to the task at hand, the Consultant's testimony is no more than lay person's opinion and the expression of likes and dislikes. The Consultant's memorandum, in the latter regard, is totally lacking an explanation as to the quality of architecture and sufficient elements showing the Property's architectural significance.

Since it is anticipated that the Consultant's memorandum and/or testimony may be introduced at the HPB hearing on June 1, 2015, please accept this letter as a timely objection to the submission or consideration of such evidence. Where technical expertise is required, lay opinion testimony is not valid evidence upon which a *quasi-judicial* determination can be based in whole or in part. *See Pollard v. Palm Beach County,* 560 So.2d 1358 (Fla. 4th DCA 1990); *City of Apopka v. Orange County,* 299 So.2d 657 (Fla. 4th DCA 1974). Accordingly, we advise the HPB to disregard the unqualified recommendations in the Consultant's memorandum and to not rely upon the lay person testimony of the Consultant.

Charlie Esposito, Applicant

Please accept this letter as our formal objection to the submission of evidence by the Applicant, including the Application narrative, pertaining to the Property, as well as any Applicant testimony at the HPB hearing on June 1, 2015. The basis for the

objection is that the Applicant lacks the educational and professional qualifications to offer expert testimony on architecture or historic preservation as related to the Property.

Competent substantial evidence is the equivalent of legally sufficient evidence. *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). It is defined to be "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Whether the record also contains competent substantial evidence that would support some result other than that of the local government is irrelevant. *See e.g., Dusseau v. Metropolitan Dade County Bd. of County Com'rs,* 794 So. 2d 1270 (Fla. 2001). Competent substantial evidence must be "relevant."); *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 375 (Fla. 3d DCA 2003).

Only relevant fact-based statements constitute substantial competent evidence. On the other hand, **generalized statements** from neighboring residents or from other objecting parties cannot be relied upon as a basis to deny an application for development approval if the application complies with the applicable land development regulations. Casual statements from opponents without basis in law or fact cannot be relied upon as grounds for denial. *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA 1974) (unsubstantiated lay testimony held not to encompass substantial competent evidence); *P&R Investments, Inc. v. Indian River County*, 7 Fla. L. Weekly Supp. 667a (19th Judicial Circuit Court in and for Indian River County, June 30, 2002) (unsubstantiated testimony from neighborhood objectors regarding site design and use of a member's only gun club did not constitute substantial competent evidence). Rather, citizen testimony must be relevant and fact-based before it may be deemed substantial and competent. *See Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598 (Fla. 3d DCA 1996) (ruling that mere generalized statements of opposition are to be disregarded, but fact-based testimony is competent substantial evidence on a conditional use).

Here, the Application provides no information or support that the narrative was prepared by an expert who meets the minimum qualifications set by the Secretary of Interior regarding historic architecture. Moreover, the narratives fail to provide fact-based statements and instead rely on generalized statements without basis in law or fact.

Since it is anticipated that the Applicant's narrative and/or testimony may be introduced at the HPB hearing on June 1, 2015, please accept this letter as a timely objection to the submission or consideration of such evidence. As such, we advise the HPB to disregard the unqualified recommendations in the Applicant's narrative and to not rely upon the lay person testimony of the Applicant.

Thank you for your attention and consideration in this regard.

Very truly yours,

Brian A. Seidenberg

Attachments

EXHIBIT A

Merrilyn C. Rathbun
247 SW 3rd Avenue #5
Fort Lauderdale, FL 33312
954-761-8419

BORN 1938 Jamestown, New York

HOMETOWN & EARLY EDUCATION
1938—1968 Salamanca, New York (upstate New York, southern tier county)

EDUCATION
1980—1996 ca. Independent study Fort Lauderdale history.
1973—1979 Florida Atlantic University Boca Raton FL
- Non degree, printmaking, etching and silkscreen (intermittent]

1963—1964 SUNY, State University of New York Buffalo, Buffalo, New York
- Graduate Program for Certification by New York State Education Department, Certification in Elementary and Secondary Art Education

EDUCATION
1955—1960 Cornell University Ithaca, New York
- BFA, Department of Art, College of Architecture, Art and Planning.

EXPERIENCE
2000—present Fort Lauderdale Historical Society
Director of Research Services
Consultant to City of Fort Lauderdale Historic Preservation Board
Monthly memorandum for current cases before the Historic Preservation Board 2000—present
Architectural Resource Survey Reports—Team Member responsibilities, windshield surveys, individual property reports, page layout, copy editing:
- Central Beach Survey—2008
- Sailboat Bend Historic District—2009-2010
- Colee Hammock & Beverly Heights—2010
- Preliminary report Rio Vista Neighborhood 2011-2012

National Register Nomination for South Side School 2006
Designation Reports for the City (limited list includes successful nominations)
- Escape Hotel
- Lauderdale Beach Hotel
- Goulding Dallas House
- Needham Estate
- Mary Cutler House
- Coca Cola Bottling Plant
- Russo/Smith House
- Haele House
- Progresso Plaza
- Croissant Park Administration Building
- Woman's Club
- Grosshart House
- William Taylor Home Reed /Manuel House

Merrilyn C. Rathbun
247 SW 3rd Avenue #5
Fort Lauderdale, FL 33312
954-761-8419

- South Side Fire Station
- Bonnet House

1997—2000 Fort Lauderdale Historical Society
Research Assistant
1980—1997 *Independent Study*
National Register Nomination—Saint Anthony School/Convent/Gymnasium--1997
1978—1979 Fort Lauderdale Historical Society
Weekend Museum Attendant

1968—1969 Little Valley Central School, *Art teacher*
1960-1961 New York State College of Home Economics At Cornell University (now College of Human Ecology)
Graphic artist, Editorial Department, Extension Services

I am a native of upstate New York. I was born in Jamestown, Chautauqua County, New York in 1938. I grew up and attended schools in Salamanca, New York, a town of about 7000 people located (illegally built in the 19th century) on a Seneca Indian Reservation in Western New York. I attended Cornell University and received a B.F.A. in Studio Art from that institution in 1960. I did graduate work for New York State certification in elementary and high school art at SUNY at Buffalo. I taught art at Little Valley Central School (Western New York) for one year.

I first visited Florida and had my third birthday in Fort Lauderdale in 1940-41. I joined my parents and grandmother, who had moved to Lauderdale in 1944, in 1968. I studied printmaking independently at FAU in Boca Raton 1973-77. I volunteered with the Fort Lauderdale Historical Society and a little later worked as a museum attendant for the society 1979-80. I went to work for the society as a research assistant in 1997. In 2000 I became Director of Research Services for the Fort Lauderdale Historical Society and took over management of the society's contract with the City of Fort Lauderdale Historic Preservation Board; I hold these positions to this day.

EXHIBIT B

ARCHEOLOGY AND HISTORIC PRESERVATION:

Secretary of the Interior's Standards and Guidelines [As Amended and Annotated]

Agency: National Park Service, Department of the Interior. Action: Notice.

Summary: This notice sets forth the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. These standards and guidelines are not regulatory and do not set or interpret agency policy. They are intended to provide technical advice about archeological and historic preservation activities and methods.

Dates: These Standards and Guidelines are effective on September 29, 1983.*

***[The National Park Service has not republished "The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" since 1983 (48 FR 44716). NPS has updated portions of the Standards and Guidelines. Where NPS has officially revised portions and published the revisions in the Federal Register, such as the Historic Preservation Project standards and the treatment definitions, we strike through the 1983 language and provide a link to the new material. Where the 1983 language is not current but NPS has not officially replaced it, such as the technical information, we strike through the out-of-date materials. We then provide current technical information and links to NPS and partner websites where this information is available.**

Language within brackets has *not* been published for effect in the Federal Register as a part of the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.]

For Further Information Contact: ~~Lawrence E. Aten, Chief, Interagency Resources Division, National Park Service, United States Department of the Interior, Washington, DC 20240 (202-343-9500). A Directory of Technical Information listing other sources of supporting information is available from the National Park Service.~~
NPS Cultural Resources Email Contacts

Supplementary Information: The Standards and Guidelines are prepared under the authority of sections 101(f) (g), and (h), and section 110 of the National Historic Preservation Act of 1966, as amended. State Historic Preservation Officers: Federal Preservation Officers including those of the Department of Agriculture, Department of Defense, Smithsonian Institution and General Services Administration; the Advisory Council on Historic Preservation; the National Trust for Historic Preservation; and other interested parties

were consulted during the development of the Standards and Guidelines; additional consultation with these agencies will occur as the Standards and Guidelines are tested during their first year of use.

Purpose
The proposed Standards and the philosophy on which they are based result from nearly twenty years of intensive preservation activities at the Federal, State, and local levels.

The purposes of the Standards are:

- To organize the information gathered about preservation activities.
- To describe results to be achieved by Federal agencies, States, and others when planning for the identification, evaluation, registration and treatment of historic properties.
- To integrate the diverse efforts of many entities performing historic preservation into a systematic effort to preserve our nation's culture heritage.

Uses of the Standards
The following groups or individuals are encouraged to use these Standards:

- Federal agency personnel responsible for cultural resource management pursuant to section 110 of the National Historic Preservation Act, as amended, in areas under Federal jurisdiction. A separate series of guidelines advising Federal agencies on their specific historic preservation activities under section 110 is in preparation.
- State Historic Preservation Offices responsible under the National Historic Preservation Act, as amended, by making decisions about the preservation of historic properties in their States in accordance with appropriate regulations and the Historic Preservation Fund Grants Management Manual. The State Historic Preservation Offices serve as the focal point for preservation planning and act as a central state-wide repository of collected information.
- Local governments wishing to establish a comprehensive approach to the identification, evaluation, registration and treatment of historic properties within their jurisdictions.
- Other individuals and organizations needing basic technical standards and guidelines for historic preservation activities.

Organization
This material is organized in three sections: Standards; Guidelines; and recommended technical sources, cited at the end of each set of guidelines. Users of this document are expected to consult the recommended technical sources to obtain guidance in specific cases.

Review of the Standards and Guidelines
The Secretary of the Interior's Standards for Rehabilitation have recently undergone extensive review and their guidelines made

current after 5 years of field use. Users and other interested parties are encouraged to submit written comments on the utility of these Standards and Guidelines except for the Rehabilitation Standards mentioned above. This edition will be thoroughly reviewed by the National Park Service (including consultation with Federal and State agencies), after the end of its first full year of use and any necessary modifications will be made. Subsequent reviews are anticipated as needed. [~~Comments should be sent to Chief, Interagency Resources Division, National Park Service, United States Department of the Interior, Washington, DC 20240.~~]

Planning >>

NPS Laws | Search | E-mail | Links to the Past

Privacy & Disclaimer

MJB

RELEVANT CASE LAW

627 So.2d 469, 18 Fla. L. Weekly S522
(Cite as: 627 So.2d 469)

Supreme Court of Florida.
BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, Florida, Petitioner,
v.
Jack R. SNYDER, et ux., Respondents.

No. 79720.
Oct. 7, 1993.
Rehearing Denied Dec. 23, 1993.

Property owners brought original action seeking writ of certiorari after county board denied their application for rezoning of property from general use to medium density multiple-family dwelling use. The District Court of Appeal, 595 So.2d 65, granted petition. On review for direct conflict of decisions, the Supreme Court, Grimes, J., held that: (1) rezoning action which entails application of general rule or policy to specific individuals, interests or activities is quasi-judicial in nature, subject to strict scrutiny on certiorari review; (2) landowner who demonstrates that proposed use of property is consistent with comprehensive plan is not presumptively entitled to such use; (3) landowner seeking to rezone property has burden of proving that proposal is consistent with comprehensive plan, and burden thereupon shifts to zoning board to demonstrate that maintaining existing zoning classification accomplishes legitimate public purpose; and (4) although board is not required to make findings of fact in denying application of rezoning, upon review by certiorari in the circuit court it must be shown there was competent substantial evidence presented to board to support its ruling.

Decision of District Court of Appeal quashed.

Shaw, J., dissented.

West Headnotes

[1] Counties 104 ⚿58

104 Counties
104II Government
104II(C) County Board
104k58 k. Appeals from decisions. Most Cited Cases

Legislative action of county board of commissioners is subject to attack in circuit court; however, in deference to policymaking function of board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable.

[2] Counties 104 ⚿58

104 Counties
104II Government
104II(C) County Board
104k58 k. Appeals from decisions. Most Cited Cases

Rulings of county board of commissioners acting in its quasi-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence.

[3] Counties 104 ⚿58

104 Counties
104II Government
104II(C) County Board
104k58 k. Appeals from decisions. Most Cited Cases

It is character of hearing that determines whether or not county board action is legislative or quasi-judicial, for purposes of judicial review; generally speaking, legislative action results in formulation of a general rule of policy, whereas judicial action results in application of a general rule of policy.

[4] Zoning and Planning 414 ⚿1575

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1572 Nature and Form of Remedy

414k1575 k. Certiorari. Most Cited Cases
(Formerly 414k565)

Zoning and Planning 414 ⚿1623

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k1623 k. Modification or amendment; rezoning. Most Cited Cases
(Formerly 414k604)

Zoning and Planning 414 ⚿1702

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k1702 k. Modification or amendment; rezoning. Most Cited Cases
(Formerly 414k703)

Comprehensive rezonings affecting a large portion of the public are legislative in nature, and are subject to "fairly debatable" standard of review; however, rezoning actions which can be viewed as policy application, rather than policy setting, and which have an impact on a limited number of persons or property owners are quasi-judicial in nature and are properly reviewable by petition for certiorari; on such review they are subject to strict scrutiny and to substantial evidence standard.

[5] Zoning and Planning 414 ⚿1575

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1572 Nature and Form of Remedy
414k1575 k. Certiorari. Most Cited Cases
(Formerly 414k565)

County board's denial of landowner's application to rezone property to zoning classification which would allow construction of 15 residential units per acre was in the nature of a quasi-judicial proceeding, and was properly reviewable by petition for certiorari.

[6] Zoning and Planning 414 ⚿1351

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1350 Right to Permission, and Discretion
414k1351 k. In general. Most Cited Cases
(Formerly 414k375.1)

Zoning and Planning 414 ⚿1698

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k1698 k. Substantial evidence in general. Most Cited Cases
(Formerly 414k703)

Even where denial of a zoning application would be inconsistent with comprehensive plan, local government should have discretion to decide that maximum development density should not be allowed provided governmental body approves some development that is consistent with the plan and government's decision is supported by substantial, competent evidence.

[7] Zoning and Planning 414 ⚿1151

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(A) In General
414k1149 Comprehensive or General Plan
414k1151 k. Conformity of change to plan. Most Cited Cases
(Formerly 414k194.1)

Landowner who demonstrates that proposed use is consistent with comprehensive zoning plan is not presumptively entitled to such use if opposing governmental agency fails to prove by clear and

convincing evidence that specifically stated public necessity requires a more restricted use; property owner is not necessarily entitled to relief by proving such consistency when agency action is also consistent with plan.

[8] Zoning and Planning 414 ⚿1262

414 Zoning and Planning
414V Construction, Operation, and Effect
414V(C) Uses and Use Districts
414V(C)1 In General
414k1262 k. Maps, plats, and plans; subdivision regulations. Most Cited Cases
(Formerly 414k245)

Growth Management Act was not intended to preclude development but only to ensure that it proceed in an orderly manner. West's F.S.A. § 163.3161 et seq.

[9] Zoning and Planning 414 ⚿1146

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(A) In General
414k1146 k. Public interest and need; general welfare. Most Cited Cases
(Formerly 414k157)

Zoning and Planning 414 ⚿1151

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(A) In General
414k1149 Comprehensive or General Plan
414k1151 k. Conformity of change to plan. Most Cited Cases
(Formerly 414k159)

Zoning and Planning 414 ⚿1182

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1179 Notice and Hearing
414k1182 k. Hearing or meeting in general. Most Cited Cases
(Formerly 414k194.1)

Landowner seeking to rezone property has burden of proving that proposal is consistent with comprehensive plan and complies with all procedural requirements of zoning ordinance; burden thereupon shifts to governmental board to demonstrate that maintaining existing zoning classification with respect to the property accomplishes a legitimate public purpose; board will have burden of showing refusal to rezone property is not arbitrary, discriminatory, or unreasonable; if board carries burden, application should be denied.

[10] Zoning and Planning 414 ⚿1189

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1189 k. Filing, publication, and posting; minutes and findings. Most Cited Cases
(Formerly 414k199)

Zoning and Planning 414 ⚿1702

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k1702 k. Modification or amendment; rezoning. Most Cited Cases
(Formerly 414k703)

Although zoning board is not required to make findings of fact in making decision on landowner's application to rezone property, it must be shown there was competent substantial evidence presented to the board to support its ruling in order to sustain its action, upon review by certiorari in circuit court.

***470** Robert D. Guthrie, County Atty., and Eden Bentley, Asst. County Atty., Melbourne, for petitioner.

Frank J. Griffith, Jr., Cianfrogna, Telfer, Reda & Faherty, P.A., Titusville, for respondents.

Denis Dean and Jonathan A. Glogau, Asst. Attys. Gen., Tallahassee, amicus curiae, for Atty. Gen.,

State of FL.

Nancy Stuparich, Asst. Gen. Counsel, and Jane C. Hayman, Deputy Gen. Counsel, Tallahassee, amicus curiae, for FL League of Cities, Inc.

Paul R. Gougelman, III, and Maureen M. Matheson , Reinman, Harrell, Graham, Mitchell & Wattwood, P.A., Melbourne, amicus curiae, for Space Coast League of Cities, Inc., City of Melbourne, and Town of Indialantic.

Richard E. Gentry, FL Home Builders Ass'n, and Robert M. Rhodes and Cathy M. Sellers, Steel, Hector and Davis, Tallahassee, amicus curiae, for FL Home Builders Ass'n.

David La Croix, Pennington, Wilkinson & Dunlap, P.A., and William J. Roberts, Roberts and Eagan, P.A., Tallahassee, amicus curiae, for FL Ass'n of Counties.

David J. Russ and Karen Brodeen, Asst. Gen. Counsels, Tallahassee, amicus curiae, for FL Dept. of Community Affairs.

Richard Grosso, Legal Director, Tallahassee, and C. Allen Watts, Cobb, Cole and Bell, Daytona Beach, amicus curiae, for 1000 Friends of FL.

Neal D. Bowen, County Atty., Kissimmee, amicus curiae, for Osceola County.

M. Stephen Turner and David K. Miller, Broad and Cassel, Tallahassee, amicus curiae, for Monticello Drug Co.

John J. Copelan, Jr., County Atty., and Barbara S. Monahan, Asst. County Atty. for Broward County, Fort Lauderdale, and Emeline Acton, County Atty. for Hillsborough County, Tampa, amici curiae, for Broward County, Hillsborough County and FL Ass'n of County Attys., Inc.

Thomas G. Pelham, Holland & Knight, Tallahassee, amicus curiae, pro se.

GRIMES, Justice.

We review *Snyder v. Board of County Commissioners,* 595 So.2d 65 (Fla. 5th DCA1991), because of its conflict with *Schauer v. City of Miami Beach,* 112 So.2d 838 (Fla.1959); *City of Jacksonville Beach v. Grubbs,* 461 So.2d 160 (Fla. 1st DCA1984), *review denied,* 469 So.2d 749 (Fla.1985); and *Palm Beach County v. Tinnerman,* 517 So.2d 699 (Fla. 4th DCA1987), *review denied,* ***471** 528 So.2d 1183 (Fla.1988). We have jurisdiction under article V, section 3(b)(3) of the Florida Constitution. Jack and Gail Snyder owned a one-half acre parcel of property on Merritt Island in the unincorporated area of Brevard County. The property is zoned GU (general use) which allows construction of a single-family residence. The Snyders filed an application to rezone their property to the RU-2-15 zoning classification which allows the construction of fifteen units per acre. The area is designated for residential use under the 1988 Brevard County Comprehensive Plan Future Land Use Map. Twenty-nine zoning classifications are considered potentially consistent with this land use designation, including both the GU and the RU-2-15 classifications.

After the application for rezoning was filed, the Brevard County Planning and Zoning staff reviewed the application and completed the county's standard "rezoning review worksheet." The worksheet indicated that the proposed multifamily use of the Snyders' property was consistent with all aspects of the comprehensive plan except for the fact that it was located in the one-hundred-year flood plain in which a maximum of only two units per acre was permitted. For this reason, the staff recommended that the request be denied.

At the planning and zoning board meeting, the county planning and zoning director indicated that when the property was developed the land elevation would be raised to the point where the one-hundred-year-flood plain restriction would no longer be applicable. Thus, the director stated that the staff no longer opposed the application. The

planning and zoning board voted to approve the Snyders' rezoning request.

When the matter came before the board of county commissioners, Snyder stated that he intended to build only five or six units on the property. However, a number of citizens spoke in opposition to the rezoning request. Their primary concern was the increase in traffic which would be caused by the development. Ultimately, the commission voted to deny the rezoning request without stating a reason for the denial.

The Snyders filed a petition for certiorari in the circuit court. Three circuit judges, sitting en banc, reviewed the petition and denied it by a two-to-one decision. The Snyders then filed a petition for certiorari in the Fifth District Court of Appeal.

The district court of appeal acknowledged that zoning decisions have traditionally been considered legislative in nature. Therefore, courts were required to uphold them if they could be justified as being "fairly debatable." Drawing heavily on *Fasano v. Board of County Commissioners,* 264 Or. 574, 507 P.2d 23 (1973), however, the court concluded that, unlike initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial in nature. Under the latter circumstances, the court reasoned that a stricter standard of judicial review of the rezoning decision was required. The court went on to hold:

> (4) Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law (*i.e.,* under general comprehensive zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken.
>
> (5) The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned ***472** lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning plan. Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use. After such a showing the burden shifts to the landowner to assert and prove that such specified more restrictive land use constitutes a taking of his property for public use for which he is entitled to compensation under the taking provisions of the state or federal constitutions.

Snyder v. Board of County Commissioners, 595 So.2d at 81 (footnotes omitted).

Applying these principles to the facts of the case, the court found (1) that the Snyders' petition for rezoning was consistent with the comprehensive plan; (2) that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the health, safety, morals, or welfare of the general public; and (3) that the denial of the requested zoning classification without reasons supported by facts was, as a matter of law, arbitrary and unreasonable. The court granted the petition for

certiorari.

Before this Court, the county contends that the standard of review for the county's denial of the Snyders' rezoning application is whether or not the decision was fairly debatable. The county further argues that the opinion below eliminates a local government's ability to operate in a legislative context and impairs its ability to respond to public comment. The county refers to *Jennings v. Dade County,* 589 So.2d 1337 (Fla. 3d DCA1991), *review denied,* 598 So.2d 75 (Fla.1992), for the proposition that if its rezoning decision is quasi-judicial, the commissioners will be prohibited from obtaining community input by way of ex parte communications from its citizens. In addition, the county suggests that the requirement to make findings in support of its rezoning decision will place an insurmountable burden on the zoning authorities. The county also asserts that the salutary purpose of the comprehensive plan to provide controlled growth will be thwarted by the court's ruling that the maximum use permitted by the plan must be approved once the rezoning application is determined to be consistent with it.

The Snyders respond that the decision below should be upheld in all of its major premises. They argue that the rationale for the early decisions that rezonings are legislative in nature has been changed by the enactment of the Growth Management Act. Thus, in order to ensure that local governments follow the principles enunciated in their comprehensive plans, it is necessary for the courts to exercise stricter scrutiny than would be provided under the fairly debatable rule. The Snyders contend that their rezoning application was consistent with the comprehensive plan. Because there are no findings of fact or reasons given for the denial by the board of county commissioners, there is no basis upon which the denial could be upheld. Various amici curiae have also submitted briefs in support of their several positions.

Historically, local governments have exercised the zoning power pursuant to a broad delegation of state legislative power subject only to constitutional limitations. Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388, 47 S.Ct. at 118. This Court expressly adopted the fairly debatable principle in *City of Miami Beach v. Ocean & Inland Co.,* 147 Fla. 480, 3 So.2d 364 (1941).

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners have been critical of the local zoning system. Richard Babcock deplored the effect of "neighborhoodism" and ***473** rank political influence on the local decision-making process. Richard F. Babcock, *The Zoning Game* (1966). Mandelker and Tarlock recently stated that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits." Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law,* 24 Urb.Law. 1, 2 (1992).

Professor Charles Harr, a leading proponent of zoning reform, was an early advocate of requiring that local land use regulation be consistent with a legally binding comprehensive plan which would serve long range goals, counteract local pressures for preferential treatment, and provide courts with a meaningful standard of review. Charles M. Harr, " *In Accordance With A Comprehensive Plan,* " 68 Harv.L.Rev. 1154 (1955). In 1975, the American Law Institute adopted the Model Land Development Code, which provided for procedural and planning reforms at the local level and increased state participation in land use decision-making for developments of regional impact and areas of critical state concern.

Reacting to the increasing calls for reform, numerous states have adopted legislation to change the local land use decision-making process. As one of the leaders of this national reform, Florida adopted the Local Government Comprehensive Planning Act of 1975. Ch. 75-257, Laws of Fla. This law was substantially strengthened in 1985 by the Growth Management Act. Ch. 85-55, Laws of Fla.

Pursuant to the Growth Management Act, each county and municipality is required to prepare a comprehensive plan for approval by the Department of Community Affairs. The adopted local plan must include "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the local government's jurisdictional area. Section 163.3177(1), Fla.Stat. (1991). At the minimum, the local plan must include elements covering future land use; capital improvements generally; sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer protection specifically; conservation; recreation and open space; housing; traffic circulation; intergovernmental coordination; coastal management (for local government in the coastal zone); and mass transit (for local jurisdictions with 50,000 or more people). *Id.,* § 163.3177(6).

Of special relevance to local rezoning actions, the future land use plan element of the local plan must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate the "proposed future general distribution, location, and extent of the uses of land" for various purposes. *Id.,* § 163.3177(6)(a). It must include standards to be utilized in the control and distribution of densities and intensities of development. In addition, the future land use plan must be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land. *Id.,* § 163.3177(6)(a).

The local plan must be implemented through the adoption of land development regulations that are consistent with the plan. *Id.* § 163.3202. In addition, all development, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. *Id.,* § 163.3194(1)(a). Section 163.3194(3), Florida Statutes (1991), explains consistency as follows:

> (a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

Section 163.3164, Florida Statutes (1991), reads in pertinent part:

> (6) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.
>
> ***474** (7) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

Because an order granting or denying rezoning constitutes a development order and development orders must be consistent with the comprehensive plan, it is clear that orders on rezoning applications must be consistent with the comprehensive plan.

[1][2] The first issue we must decide is whether the Board's action on Snyder's rezoning application was legislative or quasi-judicial. A board's legislative action is subject to attack in circuit court. *Hirt v. Polk County Bd. of County Comm'rs,* 578 So.2d

415 (Fla. 2d DCA1991). However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. *Nance v. Town of Indialantic,* 419 So.2d 1041 (Fla.1982). On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence. *De Groot v. Sheffield,* 95 So.2d 912 (Fla.1957).

Enactments of original zoning ordinances have always been considered legislative. *Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale,* 354 So.2d 57 (Fla.1978); *County of Pasco v. J. Dico, Inc.,* 343 So.2d 83 (Fla. 2d DCA1977). In *Schauer v. City of Miami Beach,* this Court held that the passage of an amending zoning ordinance was the exercise of a legislative function. 112 So.2d at 839. However, the amendment in that case was comprehensive in nature in that it effected a change in the zoning of a large area so as to permit it to be used as locations for multiple family buildings and hotels. *Id.* In *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman,* the district courts of appeal went further and held that board action on specific rezoning applications of individual property owners was also legislative. *Grubbs,* 461 So.2d at 163; *Tinnerman,* 517 So.2d at 700.

[3] It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So.2d 648 (Fla. 3d DCA1982). Generally 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. Carl J. Peckingpaugh, Jr., Comment, *Burden of Proof in Land Use Regulations: A Unified Approach and Application to Florida,* 8 Fla.St.U.L.Rev. 499, 504 (1980). In *West Flagler Amusement Co. v. State Racing Commission,* 122 Fla. 222, 225, 165 So. 64, 65 (1935), we explained:

> 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. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

[4][5] Applying this criterion, it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature. However, we agree with the court below when it said:

> [R]ezoning 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 arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of ... quasi-judicial action....

Snyder, 595 So.2d at 78. Therefore, the board's action on Snyder's application was in the nature of a quasi-judicial proceeding and ***475** properly reviewable by petition for certiorari.[FN1]

> FN1. One or more of the amicus briefs suggests that Snyder's remedy was to bring a de novo action in circuit court pursuant to section 163.3215, Florida Statutes (1991). However, in *Parker v. Leon County,* 627 So.2d 476 (Fla.1993), we explained that this statute only provides a remedy for third parties to challenge the consistency of development orders.

We also agree with the court below that the re-

view is subject to strict scrutiny. In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions. *See Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So.2d 996 (Fla. 2d DCA1993) (The term "strict scrutiny" arises from the necessity of strict compliance with comprehensive plan.). This term as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases. *Compare Snyder v. Board of County Comm'rs,* 595 So.2d 65, 75-76 (Fla. 5th DCA1991) (land use), *and Machado v. Musgrove,* 519 So.2d 629, 632 (Fla. 3d DCA1987), *review denied,* 529 So.2d 693 (Fla.1988), and *review denied,* 529 So.2d 694 (Fla.1988) (land use), *with In re Estate of Greenberg,* 390 So.2d 40, 42-43 (Fla.1980) (general discussion of strict scrutiny review in context of fundamental rights), *appeal dismissed,* 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981), *Florida High Sch. Activities Ass'n v. Thomas,* 434 So.2d 306 (Fla.1983) (equal protection), *and Department of Revenue v. Magazine Publishers of America, Inc.,* 604 So.2d 459 (Fla.1992) (First Amendment).

[6] At this point, we depart from the rationale of the court below. In the first place, the opinion overlooks the premise that the comprehensive plan is intended to provide for the *future* use of land, which contemplates a gradual and ordered growth. *See City of Jacksonville Beach,* 461 So.2d at 163, in which the following statement from *Marracci v. City of Scappoose,* 552 P.2d 552, 553 (Or.Ct.App.1976), was approved:

> [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.
>
> Even where a denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence.

[7] Further, we cannot accept the proposition that once the landowner demonstrates that the proposed use is consistent with the comprehensive plan, he is presumptively entitled to this use unless the opposing governmental agency proves by clear and convincing evidence that specifically stated public necessity requires a more restricted use. We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan. As noted in *Lee County v. Sunbelt Equities II, Limited Partnership:*

> [A]bsent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The *right* of judicial review does not *ipso facto* ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed.
>
> ....
>
> Moreover, when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the *status quo* is no longer reasonable. It is not enough simply to be "consistent"; the proposed change cannot be *inconsistent,* and will be subject to the "strict ***476** scrutiny" of *Machado* to insure this does not happen.

619 So.2d at 1005-06.

[8] This raises a question of whether the Growth Management Act provides any comfort to the landowner when the denial of the rezoning request is consistent with the comprehensive plan. It could be argued that the only recourse is to pursue the traditional remedy of attempting to prove that the denial of the application was arbitrary, discriminatory, or unreasonable. *Burritt v. Harris,* 172 So.2d 820 (Fla.1965); *City of Naples v. Central Plaza of Naples, Inc.,* 303 So.2d 423 (Fla. 2d DCA1974). Yet, the fact that a proposed use is consistent with the plan means that the planners contemplated that that use would be acceptable at some point in the future. We do not believe the Growth Management Act was intended to preclude development but only to insure that it proceed in an orderly manner.

[9] Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied.

[10] While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling. Further review in the district court of appeal will continue to be governed by the principles of *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla.1982).

Based on the foregoing, we quash the decision below and disapprove *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman,* to the extent they are inconsistent with this opinion. However, in the posture of this case, we are reluctant to preclude the Snyders from any avenue of relief. Because of the possibility that conditions have changed during the extended lapse of time since their original application was filed, we believe that justice would be best served by permitting them to file a new application for rezoning of the property. The application will be without prejudice of the result reached by this decision and will allow the process to begin anew according to the procedure outlined in our opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, KOGAN and HARDING, JJ., concur.
SHAW, J., dissents.

Fla.,1993.
Board of County Com'rs of Brevard County v. Snyder
627 So.2d 469, 18 Fla. L. Weekly S522

END OF DOCUMENT

Westlaw

299 So.2d 657
(Cite as: 299 So.2d 657)

C

District Court of Appeal of Florida, Fourth District.
The CITY OF APOPKA, Florida, et al., Appellants,
v.
ORANGE COUNTY, a political subdivision of the State of Florida, and Clarcona Improvement Association, Appellees.

No. 73-273.
Feb. 22, 1974.
On Rehearing April 11, 1974.

Application submitted by three communities for special exception to allow construction of airport on extraterritorial land owned by them was denied by the zoning board of adjustment and the board of county commissioners affirmed. Municipalities' petition for certiorari was denied by the Circuit Court, Orange County, Parker Lee McDonald, J., and municipalities appealed. The District Court of Appeal, Downey, J., held that it was not the function of the board of county commissioners to hold a plebiscite on the application for special exception and that board's duty was to make finding as to how construction and operation of proposed airport would affect public interest and base its granting or denial of the special exception on those findings; and that evidence which consisted mainly of laymen's opinions which were unsubstantiated by competent facts and which were submitted at hearing where witnesses were not sworn and where cross-examination was specifically prohibited did not support conclusion that public interest would be adversely affected by the granting of the special exception.

Reversed and remanded with directions.

West Headnotes

[1] Zoning and Planning 414 ⚿1541

414 Zoning and Planning
414IX Variances and Exceptions
414IX(B) Proceedings for Variances and Exceptions
414k1539 Notice and Hearing
414k1541 k. Notice. Most Cited Cases
(Formerly 414k534)

Zoning and Planning 414 ⚿1542

414 Zoning and Planning
414IX Variances and Exceptions
414IX(B) Proceedings for Variances and Exceptions
414k1539 Notice and Hearing
414k1542 k. Hearings in general. Most Cited Cases
(Formerly 414k541)

Although notice to, and hearing of, the proponents and opponents of application for special exception for construction of airport was essential and all interested parties should have been given full and fair opportunity to express their views, it was not the function of the board of county commissioners to hold a plebiscite on the application for the special exception.

[2] Zoning and Planning 414 ⚿1552

414 Zoning and Planning
414IX Variances and Exceptions
414IX(B) Proceedings for Variances and Exceptions
414k1547 Determination
414k1552 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases
(Formerly 414k544)

Purpose of board of county commissioners, in ruling on application for special exception to zoning ordinance, was to make findings as to how construction and operation of the proposed airport would affect the public and it was board's duty to base its granting or denial of the special exception upon those findings.

[3] Zoning and Planning 414 ⚿1503

414 Zoning and Planning
414IX Variances and Exceptions
414IX(A) In General
414k1503 k. Aviation and airports. Most Cited Cases
(Formerly 414k537.1, 414k537)

Where evidence in opposition to request for special exception for construction of airport consisted mainly of laymen's opinions, unsubstantiated by any competent facts, where witnesses were not sworn and cross-examination was specifically prohibited and where board of county commissioners made no findings of fact bearing on the question of the effect of the proposed airport on the public interest, there was no substantial competent evidence to support conclusion that public interest would be adversely affected by granting the special permit. West's F.S.A. § 332.01 et seq.; Sp.Acts 1963, c. 63-1716 as amended.

***657** William G. Mitchell, of Giles, Hedrick & Robinson, Orlando, for appellants.

***658** Steven R. Bechtel, of Mateer & Harbert, Orlando, for appellee Orange county.

Carter A. Bradford, of Bradford, Oswald, Tharp & Fletcher, Orlando, for appellee Clarcona Improvement Assn.

DOWNEY, Judge.

This is an appeal by the cities of Apopka, Ocoee, and Winter Garden and the Tri-City Airport Authority from a final judgment of the circuit court denying their petition for certiorari which sought review of an order denying appellants' application for a special exception. This is a companion appeal to those consolidated appeals numbered 72-1204 and 72-1209, 299 So.2d 652.

The appellant cities formed the appellant Tri-City Airport Authority pursuant to Chapter 332, F.S.1971, F.S.A., commonly known as The Airport Law of 1945, for the purpose of building an airport to serve the three cities and the surrounding area. Appropriate engineering studies were made and various sites for the proposed airport were considered. Finally, the Authority determined that a parcel of property located in Orange County outside any municipality and zoned A-1 was the most suitable site for the proposed airport. The Authority thereafter obtained options to buy that property. Orange County's zoning legislation permits construction and operation of 'airplane landing fields and helicopter ports with accessory facilities for private or public use' in an A-1 district as a special exception. Thus, the three cities and the Authority filed an application for a special exception with the Orange County Zoning Board of Adjustment to build their proposed airport. Without entering any finding of fact, the Zoning Board of Adjustment denied the application on the ground that granting it 'would be adverse to the general public interest.' On appeal to the Board of County Commissioners a de novo hearing was held with the following result:

'A motion was made by Commissioner Pickett, seconded by Commissioner Poe, and carried, that the decision of the Board of Zoning Adjustment on December 2, 1971 denying application No. 2 for a Special Exception in an A-1 District for the construction of a proposed Tri-City Airport be affirmed and upheld on the grounds that the granting of the proposed Special Exception would adversely affect the general public and would be detrimental to the public health, safety, comfort, order, convenience, prosperity and general welfare and, therefore, not in accordance with the Comprehensive Zoning Plan of Orange County.'

Appellants then filed a petition for a writ of certiorari in the circuit court in accordance with the provisions of the Orange County Zoning Act, Chapter 63-1716, Laws of Florida, as amended, to obtain review of the foregoing decision of the Board of County Commissioners. While the petition for certiorari was pending appellants filed another action in the Circuit Court of Orange County. The new action sought a declaration that implementation of Chapter 332, F.S.1971, F.S.A., by the

appellants constituted a governmental function thereby exempting appellants from the operation of Orange County zoning regulations.

In order to determine whether there was substantial competent evidence to support the decision below we must of necessity resort to the evidence introduced at the hearing before the Board of County Commissioners. The appellants adduced evidence from (a) the Tri-City Airport Authority consulting engineer, (b) a representative of the Federal Aviation Agency, (c) and a representative of the Florida Department of Transportation, Mass Transit Division. Their testimony showed that there was a definite public need for the airport; that serious in depth studies had been made to determine the most appropropriate location for the airport; that the location in question was the best available considering such factors as (1) convenience to users, (2) land and area requirements, (3) general ***659** topography, (4) 'compatability with existing land use, plans and land users', (5) land costs, (6) air space and objections, (7) availability of utilities, (8) noise problems, (9) bird habitats and other ecological problems. The mayors of the three municipalities and the members of the Airport Authority also demonstrated that the selection of the site in question resulted from long study and competent advice on the subject. Approval had been received from every interested government agency including the Federal Aviation Administration, the Florida Department of Transportation, and the Florida Department of Air and Water Pollution Control.

The evidence upon which the Board of County Commissioners relied to deny appellants' application came from one abutting owner, Richard Byrd; several other owners within a two to five mile radius of the proposed airport site; a petition signed by some two hundred members of the Clarcona Improvement Association; and approximately thirty-five people in attendance at the hearing who objected but did not testify. Byrd's testimony was mainly directed to his opinion of what the airport would do to construction costs in the area and his opinion of what would happen to zoning in the area as a result of the proposed use. It also developed that Byrd is interested in buying the property proposed to be used as the airport. Several other property owners speculated about what would happen to the area's zoning, complained about the anticipated noise, and generally wanted to keep the status quo in the area. One witness who admitted he was a layman with no special training or experience advised the Board about his opinion of the damage to the Florida aquifer which would result from the proposed airport.

[1][2] Although notice to and hearing of the proponents and opponents of an application for a special exception or other zoning change are essential and all interested parties should be given a full and fair opportunity to express their views, it was not the function of the Board of County Commissioners to hold a plebiscite on the application for the special exception. Rockville Fuel and Feed Co. v. Board of Appeals, 257 Md. 183, 262 A.2d 499, 504 (1970). As pointed out by Professor Anderson in Volume 3 of his work, American Law of Zoning, s 15.27, pp. 155-156:

'It does not follow, . . . that either the legislative or the quasi-judicial functions of zoning should be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings. Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:

'Public notice of the hearing of an application for exception . . . is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of . . . public health . . .. The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application.'

The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect. While the facts disclosed by objecting neighbors should be considered, the courts have said that:

'A mere poll of the neighboring landowners does not serve to assist the board in determining whether the exception***660** applied for is consistent with the public convenience or welfare or whether it will tend to devaluate the neighboring property."

(Footnotes omitted.)

Instead the Board's purpose was to make findings as to how construction and operation of the proposed airport would affect the public and base its granting or denial of the special exception on those findings. Cf. Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465, 146 A.L.R. 202 (1942); Veasey v. Board of Public Instruction, Fla.App.1971, 247 So.2d 80.

[3] The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts. Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly, we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for.

The judgment appealed from is therefore reversed and remanded to the circuit court with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application for special exception.

If the decision of the board is deemed to be arbitrary or unreasonable the aggrieved party will then have the option of a judicial review by certiorari pursuant to Florida Appellate Rules or a trial de novo in the circuit court pursuant to the Rules of Civil Procedure. Section 163.250 F.S.1971, F.S.A.

Reversed and remanded with directions.

WALDEN and MAGER, JJ., concur.

ON PETITIONS FOR REHEARING.

PER CURIAM.

On petitions for rehearing the parties have advised this court that Orange County has not taken formal suitable action declaring its election to proceed under the provisions of Part II of the act entitled County and Municipal Planning For Future Development (163.160-163.315, F.S.1971, F.S.A.). Accordingly, the petitions for rehearing filed by the parties are granted and we recede from all references in our opinion of February 22, 1974, to the availability of Section 163.250, F.S.1971, F.S.A., in this case.

We maintain the view however, that the judgment appealed from should be reversed with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application for a special exception, at which time said board will have the opportunity to apply the balance-of-interests test to the evidence adduced before it. Thereafter, any aggrieved party may have that decision reviewed by the circuit court on petition for certiorari pursuant to the provisions of Chapter 63-1716, Special Acts of Florida, as amended.

WALDEN, MAGER and DOWNEY, JJ., concur.

299 So.2d 657
(Cite as: 299 So.2d 657)

Fla.App. 1974.
City of Apopka v. Orange County
299 So.2d 657

END OF DOCUMENT

863 So.2d 375, 28 Fla. L. Weekly D2839
(Cite as: 863 So.2d 375)

H

District Court of Appeal of Florida,
Third District.
MIAMI–DADE COUNTY, Petitioner,
v.
OMNIPOINT HOLDINGS, INC., Respondent.

No. 3D01–2347.
Dec. 10, 2003.

Background: County sought petition for writ of certiorari to quash decision of the Circuit Court, Dade County, Amy Steele Donner, Gisela Cardonne, Manuel A. Crespo, JJ., directing county's community zoning appeals board to grant applicant permission to erect telecommunications monopole. The District Court of Appeal, 811 So.2d 767, denied petition and sua sponte declared portions of county code governing unusual uses, modifications of prior approvals, and nonuse variances facially unconstitutional. County petitioned for further review. The Supreme Court, Bell, J., quashed and remanded, 863 So.2d 195, 2003 WL 22208012.

Holdings: On remand, the District Court of Appeal, Fletcher, J., held that:
(1) trial court could not consider Federal Telecommunications Act when considering petition for certiorari, and
(2) District Court of Appeal could not review the sufficiency of the evidence to support the zoning board's decision but rather could only review whether trial court applied correct law to information offered to zoning board as evidence.

Petition denied.

West Headnotes

[1] Zoning and Planning 414 ⚿1175

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1175 k. In general. Most Cited Cases
(Formerly 414k191)

Zoning and Planning 414 ⚿1623

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k1623 k. Modification or amendment; rezoning. Most Cited Cases
(Formerly 414k604)

Neither a quasi-judicial body nor a reviewing circuit court is permitted to add to or detract from the local regulations when making its assigned determination of a zoning change application.

[2] Administrative Law and Procedure 15A ⚿305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory basis and limitation. Most Cited Cases

Administrative Law and Procedure 15A ⚿430

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak430 k. Power of agency in general. Most Cited Cases
(Formerly 15Ak330)

Quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations.

863 So.2d 375, 28 Fla. L. Weekly D2839
(Cite as: 863 So.2d 375)

[3] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In general. Most Cited Cases

Quasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions.

[4] Zoning and Planning 414 1652

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k1652 k. Matters or evidence considered. Most Cited Cases
(Formerly 414k624)

Trial court could not consider Federal Telecommunications Act when considering corporation's petition for certiorari contending that county zoning board erred in denying application to construct communications tower, as Act was not part of local zoning criteria. Communications Act of 1934, § 332, as amended, 47 U.S.C.A. § 332.

[5] Zoning and Planning 414 1754

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k1744 Scope and Extent of Review
414k1754 k. Questions of fact; findings. Most Cited Cases
(Formerly 414k747)

District Court of Appeal considering corporation's petition for writ of certiorari to quash trial court's decision upholding zoning board's denial of corporation's application for permission to construct telecommunications monopole could not review the sufficiency of the evidence to support the zoning board's decision but rather could only review whether trial court applied correct law to information offered to zoning board as evidence.

***376** Robert A. Ginsburg, County Attorney, Jay W. Williams, Assistant County Attorney, for petitioner.

Hayes & Martohue and Deborah L. Martohue (St.Petersburg), for respondent.

Before GERSTEN, GODERICH, and FLETCHER, JJ.

ON REMAND

FLETCHER, Judge.

In *Miami–Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 2003 WL 22208012 (Fla. Sept. 25, 2003), the Florida Supreme Court quashed this court's decision in *Miami–Dade County v. Omnipoint Holdings, Inc.*, 811 So.2d 767 (Fla. 3d DCA 2002) and remanded the cause with instructions for this court to review again the circuit court's certiorari decision, this time limiting our review to the standards established in *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla.1982), *Broward County v. G.B.V. Int'l, Ltd.,* 787 So.2d 838 (Fla.2001), and *Florida Power & Light Co. v. City of Dania,* 761 So.2d 1089 (Fla.2000). As a result this court is limited in its review on remand to the only remaining issue: whether the circuit court applied the correct law. *Vaillant* at 626; *G.B.V.* at 843; and *Florida Power* at 1092. (The issue as to whether the circuit court afforded procedural due process was not raised by the parties, thus need not be addressed.)

[1] Our determination here begins with the language of *Vaillant, G.B.V.*, and *Florida Power* as stated in *G.B.V.* at 842:

> "A decision granting or denying a [quasi-judicial] application *is governed by local regulations, which must be uniformly administered.* The allocation of burdens expressed in *Irvine v. Duval County Planning Commission,* 495 So.2d 167

(Fla.1986), is applicable to such proceedings:

> [O]nce the petitioner met the initial burden of showing that his application met the statutory criteria for granting such [applications], 'the burden was upon the Planning Commission to demonstrate, by competent substantial evidence presented at the hearing and made part of the record, that the [application] requested by petitioner did not meet such standards and was, in fact, adverse to the public interest.' " [e.s.]

The *G.B.V.* court went on to say:

"To deny a [quasi-judicial] application, a local government agency must show by competent substantial evidence that the application does not meet the *published criteria.*" [e.s.]

Neither a quasi-judicial body nor a reviewing circuit court is permitted to add to or detract from these criteria (the local regulations) when making its assigned determination.[FN1] Thus in ***377** *Miami–Dade County v. Omnipoint Holdings, Inc.,* 863 So.2d 195, 2003 WL 22208012 (Fla. Sept. 25, 2003) the Florida Supreme Court held that certiorari review is not the proper vehicle to challenge the constitutionality of a statute or an ordinance.

> FN1. *See City of Miami v. Save Brickell Ave., Inc.,* 426 So.2d 1100 (Fla. 3d DCA 1983), at 1104.

[2][3] Put another way, quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations. *See Baker v. Metropolitan Dade County,* 774 So.2d 14, 19–20 nn. 12–14 (Fla. 3d DCA 2001), *rev. denied,* 791 So.2d 1099 (2001). Thus quasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions.

[4] In the instant case the circuit court appellate division was petitioned by Omnipoint Holdings, Inc. to quash the Miami–Dade County zoning board's denial of Omnipoint's application (to construct a communications tower) on two grounds. First, Omnipoint argued that the board's denial is violative of the Federal Telecommunications Act, 47 U.S.C. § 332 (1996). This Act allows local governments to regulate the placement of personal wireless facilities, so long as such regulation does not unreasonably discriminate among like service providers, or prohibit the provision of wireless services. Based on Omnipoint's argument the circuit court concluded that the zoning board's denial violates the Act and thus must be quashed. By considering the Act, however, the circuit court did not apply the correct law. This is so as the Federal Telecommunications Act is not a part of the local zoning criteria, thus the circuit court's decision on certiorari review cannot validly be bottomed on the Federal Act.[FN2]

> FN2. The Act may, of course, be the basis for an original action challenging a local zoning decision.

[5] The circuit court gave a second reason for its quashal of the zoning board's denial: that the zoning board's decision is not supported by substantial competent evidence (which is defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." [FN3]) Whether there was substantial competent evidence is an issue outside our review authority. We are not, however, precluded from reviewing the circuit court's decision to assure that the court applied the correct law to the information offered to the zoning board as evidence. For example, in *Machado v. Musgrove,* 519 So.2d 629 (Fla. 3d DCA 1987), *rev. denied,* 529 So.2d 693 and *rev. denied,* 529 So.2d 694 (Fla.1988), this court observed that a zoning staff report that was irrelevant to the issue involved was entitled to no consideration in arriving at a conclusion as to whether the substantial competent evidence test had been met. In *Jesus Fellowship, Inc. v. Miami–Dade County,* 752 So.2d 708 (Fla. 3d DCA 2000), this court concluded, *inter alia,* that the circuit court, by approving the use of lay opinion testimony where technic-

al expertise was required, failed to apply the correct law.[FN4]

> FN3. *DeGroot v. Sheffield,* 95 So.2d 912 (Fla.1957).
>
> FN4. Additional examples include *Metropolitan Dade County v. Blumenthal,* 675 So.2d 598 (Fla. 3d DCA 1995), *rev. dismissed,* 680 So.2d 421 (Fla.1996)(fact based lay testimony is perfectly proper); *Pollard v. Palm Beach County,* 560 So.2d 1358 (Fla. 4th DCA 1990)(lay persons' opinions unsubstantiated by any competent facts are not evidence).

Our review of the circuit court's decision here leads us to the conclusion that the circuit court applied correct law in the process of reaching its conclusion as to the sufficiency of the evidence. As it not our ***378** function to pass on the sufficiency of the evidence itself, we stop at this point. Accordingly, the petition for writ of certiorari is denied.

Fla.App. 3 Dist.,2003.
Miami-Dade County v. Omnipoint Holdings, Inc.
863 So.2d 375, 28 Fla. L. Weekly D2839

END OF DOCUMENT