ANOTHER REVIEW OF PETITIONS FOR WRIT OF CERTIORARI IN ZONING CASES: PROPERTY RIGHTS, POLICE POWER, AND THE RIGHT TO APPEAL*

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Many have written before about first- and second-tier certiorari review in zoning cases, and have done so from a variety of perspectives.[1] That is not surprising considering the importance of the rights at issue. Each zoning case involves at least two competing interests: the private property owners' rights that form the basis of our constitutional freedoms and the state's police power that is exercised for the general welfare of all citizens. Consequently, each case involves balancing individual rights with the rights of the many—represented by the governmental authority that serves to promote these rights.

Litigants supposedly always have a constitutional right under Florida law to appeal an adverse governmental decision.[2] Currently, however, zoning decisions are primarily, and sometimes finally, reviewed by circuit courts only via first-tier certiorari, which is a much more limited review than a plenary appeal.[3]

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1. *See e.g.* Joni Armstrong Coffey, *Practical Aspects of Quasi-Judicial Hearings: Basic Tools and Recent Fine-Tuning*, 30 Stetson L. Rev. 931, 955–963 (2001) (discussing the procedure followed in Florida courts when filing a certiorari challenge to a quasi-judicial decision in a zoning case, the standard and scope of review of such quasi-judicial decisions, and the discretionary nature of the review in a district court of appeal).

2. Fla. Const. art. V, §§ 3–5.

3. Cory W. Eichhorn, *Second-Tier Certiorari Standard of Review under Florida Law: A Practitioner's Guide*, 81 Fla. B.J. 30 (Feb. 2007). Plenary is defined as: "Full; entire;

Rather, the common law writ of certiorari is a discretionary "safety net" that gives an upper court "the prerogative to reach down" to a lower court and "halt a miscarriage of justice where no other remedy exists."[4] It "never was intended to redress mere legal error, for common law certiorari—above all—is an extraordinary remedy, not a second appeal."[5] This Article discusses current standards of certiorari review in zoning cases, compares them to standards applied on plenary appeal, and explores a potential change in the law that would offer greater protection of the rights of all of the parties involved and minimize inconsistent land use decisions.

I. CERTIORARI AS WE NOW KNOW IT

First-tier certiorari review by a circuit court is available with respect to quasi-judicial orders of local governmental agencies if the orders are not subject to review under the Administrative Procedure Act and there is no other method of review available.[6] Pursuant to the Florida Supreme Court's seminal decision in *City of Deerfield Beach v. Vaillant*,[7] the circuit court applies a three-pronged test: (1) whether procedural due process was afforded; (2) whether the "essential requirements of the law" were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.[8] Because the circuit court functions as an appellate court, it may not reweigh evidence or make its own findings by reviewing the record itself.[9]

The district court then has discretion to review the circuit court decision using a more limited two-pronged test: whether the circuit court (1) afforded procedural due process; and (2) applied the correct law, which courts have held to be synonymous with

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complete; unabridged." The Law Dictionary, *What Is Plenary?* http://thelawdictionary.org/plenary (accessed Apr. 2, 2013).

4. *Broward Co. v. G.B.V. Int'l., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

5. *Id.*

6. Generally, parties affected by a final agency decision have a right of judicial review. Fla. Stat. § 120.68. Agencies below the state level, whether county or municipal, are exempted from the definition of "agency," and their decisions therefore do not fall within the scope of Chapter 120. *Id.* at § 120.52(1)(c).

7. 419 So. 2d 624 (Fla. 1982).

8. *Id.* at 626.

9. *See id.* (explaining that the circuit court was in effect operating on appeal and thus must act in a reviewing capacity).

observing the essential requirements of the law.[10] The district court cannot enter a judgment on the merits or direct the agency to enter a particular order.[11]

Thus, "[t]he inquiry at both levels is deliberately circumscribed out of deference to the agency's technical mastery of its field of expertise, and the inquiry narrows as a case proceeds up the judicial ladder."[12] In the Supreme Court's words, "first-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal, whereas second-tier certiorari review is more restricted and is similar in scope to true common law certiorari."[13] In 1951, two knowledgeable commentators concluded that "despite the announcement of a narrow standard of review, the scope of substantive review by certiorari actually applied was often, for all practical purposes, fully as broad as review by appeal."[14] According to the Supreme Court's 2001 decision in *Broward County v. G.B.V. International, Ltd.*,[15] however, "the modern trend in this Court's decisions has been to further restrict—not expand—the scope of this writ."[16]

Should that "trend" be halted—and even reversed—given the importance of local land use decisions in today's world? Is first-tier certiorari truly "akin" to a plenary appeal, and if not, should there be at least the right to one true appeal where the reviewing court reviews the record to determine if the agency has abused its discretion, made findings of fact that are clearly erroneous, or misapplied the law? Should the agency be required to enter findings of fact and conclusions of law to aid the reviewing court, a question that the Supreme Court has grappled with for years?[17] Should the current standard of review for determining whether to

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10. *Id.*

11. *See id.* (stating that "as a case moves up the appellate ladder," the review power does not get broader).

12. *G.B.V. Int'l., Ltd.*, 787 So. 2d at 843 (footnote omitted).

13. *Id.*

14. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 526–527 (Fla. 1995) (citing William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U. Fla. L. Rev. 477, 498, 500 n. 90 (1951)).

15. 787 So. 2d 838.

16. *Id.* at 844.

17. *See e.g. Dusseau v. Metro. Dade Co. Bd. of Co. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) (quoting *Irvine v. Duval Co. Plan. Comm'n*, 466 So. 2d 357, 366 (Fla. 1st Dist. App. 1985) (Zehmer, J., dissenting)) (Pariente, Anstead & Lewis, JJ., concurring) (agreeing with Judge Zehmer that it is necessary for the agency to make written findings of fact to aid the reviewing court).

issue the writ be clarified and sharpened for the benefit of practitioners and courts? In that regard, would the standard recently proposed by Judge Chris A. Altenbernd and Jamie Marcario for common law certiorari review of non-final orders[18] also serve for certiorari review of land use decisions? This Article begins with a review of some history and some basic lessons from history. It then offers the conclusions that the Authors draw from those lessons.

II. VIOLATION OF THE "ESSENTIAL REQUIREMENTS OF THE LAW"—WILL YOU KNOW IT WHEN YOU SEE IT?

The Florida Supreme Court first sat in 1846,[19] and it has been trying to articulate the proper standard for certiorari review ever since. Consider these decisions from the 1800s:

> [A] writ of certiorari will lie from this court to any of the inferior jurisdictions, whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice.[20]

> A writ of certiorari will lie whenever the lower court judge "exceeded his jurisdiction in hearing the case at all, or adopted any method unknown to the law or essentially irregular in his proceeding under the statute. A decision made according to the forms of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by certiorari."[21]

> In issuing the writ of certiorari, the superior court determines "whether the inferior court had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law."[22]

18. Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21 (Feb. 2012) [hereinafter Altenbernd & Marcario I]; Chris Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Trying On a Functional Certiorari Wardrobe, Part II*, 86 Fla. B.J. 14 (Mar. 2012) [hereinafter Altenbernd & Marcario II].

19. *Stewart v. Preston*, 1 Fla. 1 (Fla. 1846).

20. *Halliday v. Jacksonville & Alligator Plank Rd. Co.*, 6 Fla. 304, 305 (Fla. 1855).

21. *Basnet v. City of Jacksonville*, 18 Fla. 523, 526–527 (Fla. 1882) (emphasis omitted).

22. *Jacksonville, T. & K. W. Ry. Co. v. Boy*, 34 Fla. 389, 393 (Fla. 1894).

As these cases illustrate, the precise standard and requirements for common law certiorari have long been the subject of judicial consideration in Florida. More recently, Florida courts have continued to try to "captur[e] the essence of the appropriate use of the writ."[23] As quoted in *Haines City Community Development v. Heggs*,[24] the First District described that "essence" as follows:

> Certiorari is a common[ ]law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of an appeal, but to cause the entire record of the inferior court to be brought up in order that it may be determined from the face thereof whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of law. Confined to its legitimate scope, the writ may issue within the court's discretion to correct the procedure . . . .[25]

Focusing on the nature of a departure from the "essential requirements of the law," the *Heggs* court also quoted Chief Justice Boyd's concurring opinion as "captur[ing] the essence of the standard"[26] in *Jones v. State*:[27]

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.[28]

Two years before Justice Boyd addressed the standard in his concurring opinion in *Jones*, the Supreme Court itself attempted to "elaborate[ ] on the meaning and boundaries of 'departure from the essential requirements of law'"[29] in *Combs v. State*.[30] The

23. *Heggs*, 658 So. 2d at 527.
24. 658 So. 2d 523.
25. *Id.* at 527 (quoting *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st Dist. App. 1960)).
26. *Id.*
27. 477 So. 2d 566 (Fla. 1985).
28. *Id.* at 569.
29. *Heggs*, 658 So. 2d at 528.
30. 436 So. 2d 93 (Fla. 1983).

Court concluded in *Combs* that the second-tier district court of appeal applied a "too narrow" standard of review—i.e., the Fifth District wrongly concluded that its review was limited to "violations which effectively deny appellate review such as the circuit judge rendering a decision without allowing briefs to be filed and considered, a circuit judge making a decision without a record to support the decision[,] or the circuit court dismissing an appeal improperly."[31] In the Supreme Court's words:

> [T]he phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common[ ]law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.[32]

The Court went on to stress the highly discretionary nature of second-tier certiorari review:

> It is this discretion which is the essential distinction between review by appeal and review by common[ ]law certiorari. A district court may refuse to grant a petition for common[ ]law certiorari even though there may have been a departure from the essential requirements of law. The district courts should use this discretion cautiously so as to avert the possibility of common[ ]law certiorari being used as a vehicle to obtain a second appeal.[33]

31. *Combs*, 436 So. 2d at 94 (citation omitted). Although holding that this was an erroneous standard of review, the Supreme Court affirmed the result as being "right for any reason," meaning that the trial court reached the right conclusion even though it based its decision on incorrect reasoning. *Id.* at 96.

32. *Id.* at 95–96.

33. *Id.* at 96 (citations omitted).

The *Combs* Court's elucidation of the correct standard of certiorari review with respect to a violation of the "essential requirements of the law"[34] failed to eliminate the "confusion" surrounding the standard. Six years later, the Supreme Court again tried to clarify the correct standard in *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals* (*E.D.C.*),[35] in which the Court concluded that the district court had applied too broad a standard of review.[36] Rather than holding that the circuit court "applied an incorrect principle of law" in quashing a zoning board decision for lack of supporting evidence, the district court in *E.D.C.* "simply disagreed with the circuit court's evaluation of the evidence" and found there was substantial competent evidence to support the zoning board's denial of the property owner's application.[37] Reaffirming the narrow standard of review set forth in *Vaillant*, the Supreme Court quashed the district court's decision.[38] While declaring that "the circuit court is not permitted to reweigh the evidence nor to substitute its judgment for that of the agency,"[39] the Supreme Court in *E.D.C.* held that the district court overreached in trying to correct the circuit court's error.[40]

Justice McDonald dissented.[41] He pointed to the district court's statement that the circuit court "either reinterpreted the inferences which the evidence supported or reweighed that evidence," and noted that, either way, the circuit court had erroneously "substitut[ed] its judgment for that of the zoning board, which it may not properly do."[42] In Justice McDonald's view, that was "equivalent" to saying that "in assessing the facts[,] the trial judge failed to apply the right law," and thus the district court's review "comported" with *Vaillant*.[43]

Although acknowledging that the circuit court had expressly said "there was no substantial competent evidence" to deny the zoning application, that statement was not, in Justice McDonald's

34. *Id.* at 95.
35. 541 So. 2d 106 (Fla. 1989).
36. *Id.* at 107.
37. *Id.* at 108–109.
38. *Id.* at 109.
39. *Id.* at 108.
40. *Id.* at 109.
41. *Id.* at 109–110 (McDonald, J., dissenting).
42. *Id.* at 109.
43. *Id.*

view, dispositive.[44] Justice McDonald was "not willing to accept the proposition that the inclusion of the magic words by the circuit judge, particularly when this resulted in a reversal of the zoning board, precluded the appellate court from reviewing his conclusion that no competent substantial evidence supported the zoning board's denial."[45] Acceptance of that proposition "would clothe trial judges with powers of absolute czars in zoning matters" and "insulate" them from review.[46] No other justice, however, joined in Justice McDonald's concern, and the district court's decision was quashed, leaving the circuit court order in place.[47]

Far from ending the confusion over the proper standard for certiorari review, *E.D.C.* only added to it. In *Heggs*, the Supreme Court accordingly addressed the following certified question, determined "to be of great public importance": whether, after *E.D.C.*, the standard of review set forth in *Combs* still governs a district court of appeal in reviewing "an order of a circuit court acting in its review capacity over a county court."[48] The Supreme Court answered that question in the affirmative.[49]

Although characterizing *Combs* and *E.D.C.* as "the bookends of appellate certiorari review," with "one pointing out an overly strict standard, while the other quashes the use of an overly broad standard," the Court held that the standards of review announced in the two decisions are "the same" when "reduced to their core."[50] The Court explained that the standard of certiorari review by the district court is "limited" to determining whether the circuit court "afforded procedural due process" and "applied the correct law."[51] The Court declared that "these two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law," but ultimately the Court ordered no change in the standard.[52]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (majority).
48. 658 So. 2d at 524 (typeface altered).
49. *Id.* at 524–525.
50. *Id.* at 529–530.
51. *Id.* at 530.
52. *Id.*

After this pronouncement, however, the Supreme Court went on to say that "[t]his standard, while narrow, also contains a degree of flexibility and discretion. For example, a reviewing court is drawing new lines and setting judicial policy as it individually determines those errors sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari."[53] In a vast understatement, the Court admitted that "[t]his may not always be easy since the errors in question must be viewed in the context of the individual case."[54]

The Court was prophetic. In 2000, the Supreme Court granted jurisdiction in *Florida Power & Light Co. v. City of Dania*,[55] finding conflict with *E.D.C.*'s holding that "a district court on 'second-tier' certiorari review cannot re-assess the record for competent substantial evidence to support the underlying agency decision."[56] Citing *Vaillant*, the Court declared that the "competent substantial evidence" prong of the circuit court's review "is absent from the district court standard."[57] The salient facts of *Florida Power & Light Co.* are as follows:

A utility applied for a special zoning exception to build a substation on property within the City of Dania that was zoned for commercial use.[58] A substation was not a commercial use permitted under the City's code but was "a permitted special exception use."[59] The City's zoning board recommended denial of the application, and after a lengthy hearing at which all parties presented their cases, the City Commission unanimously denied the application.[60]

Thereafter, a single circuit court judge quashed the City Commission's decision, saying that the opponents of the application had failed to present competent substantial evidence that the proposed use was inconsistent with the City's Code.[61] The district court in turn quashed the circuit court's decision, saying that "the circuit court departed from the essential requirements of law" by

53. *Id.* at 530–531.
54. *Id.* at 531.
55. 761 So. 2d 1089 (Fla. 2000).
56. *Id.* at 1091.
57. *Id.* at 1093.
58. *Id.* at 1090.
59. *Id.*
60. *Id.*
61. *Id.*

"substitut[ing] its evaluation of the evidence for that of the City."[62] Citing the *Vaillant* standard of review, the Supreme Court held that the district court's ruling was correct.[63]

Then, however, the Supreme Court held that the district court had improperly concluded that "[t]he record as a whole contain[ed] substantial competent evidence to support a denial of the special exception."[64] The Supreme Court explained that "[o]nce the district court determined—from the face of the circuit court order—that the circuit court had applied the wrong law, the job of the district court was ended."[65] The district court could not assess the record evidence itself—that was the circuit court's job.[66]

In returning the case to the circuit court for review of the record under the *Vaillant* standard of review, the Supreme Court stressed that the circuit court should conduct the review solely to determine whether the City's "decision is *supported* by competent substantial evidence."[67] The Court declined to review the record itself to determine if the City's decision was supported by competent substantial evidence, saying that to do so would "usurp" the circuit court's jurisdiction.[68] Indeed, that was exactly how the district court had erred.[69]

As to the circuit court's exercise of that jurisdiction on remand, the Supreme Court in *Dusseau v. Metropolitan Dade County Board of County Commissioners*[70] pointedly said as follows:

> We reiterate that the "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise"

62. *Id.* at 1093 (quoting *City of Dania v. Fla. Power & Light*, 718 So. 2d. 813, 817 (Fla. 4th Dist. App. 1998)) (internal quotation marks omitted).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1094 (emphasis in original).
68. *Id.* at 1093.
69. *Id.*
70. 794 So. 2d 1270 (Fla. 2001).

> decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters.[71]

Finally, the Court speculated that the district court might have done its own review of the record because a single judge overrode the City's decision by reweighing the evidence in reaching his decision.[72] Unlike some circuits that require multi-judge panels for first-tier certiorari review, the circuit in that case permitted review by a solitary judge.[73] Because of the disparate practice statewide in this regard, the Court referred the "matter to the Rules of Judicial Administration Committee of The Florida Bar for study."[74] Ultimately, however, the Court did not order any change in that regard.[75]

Just one year after *Florida Power & Light Co.* was decided, the Supreme Court again found conflict with *E.D.C.* in *Dusseau v. Metropolitan Dade County Board of County Commissioners*.[76] In *Dusseau*, the Supreme Court once again found that, just as had been the case in *Florida Power & Light Co.*, the district court correctly quashed the circuit court's decision, holding that the circuit court violated the essential requirements of the law by reweighing the evidence and disregarding evidence that supported the

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71. *Id.* at 1275–1276.

72. *Fla. Power & Light Co.*, 761 So. 2d at 1094.

73. *Id.*

74. *Id.*

75. The Rules Committee recommended against adoption of a rule that would implement three-judge panels for first-tier certiorari review. Ltr. from Charles J. Kahn, Jr., Chair, Fla. R. of Jud. Administration, to Charles Wells, C.J., Fla. Sup. Ct., *First-Tier Certiorari Review* 2 (Sept. 20, 2000) (copy on file with *Stetson Law Review*). The Court requested that the Rules Committee further consider the possible rule requiring three-judge panels for circuit courts reviewing county court orders. Ltr. from Charles T. Wells, C.J., Fla. Sup. Ct., to Charles J. Kahn, Jr., Chair, Fla. R. of Jud. Administration, *Rules of Judicial Administration Committee* 1–2 (Oct. 20, 2000) (copy on file with *Stetson Law Review*). In response, the Committee again recommended against any such rule, saying that such a rule could misuse or waste scarce judicial resources: it could delay "routine" appellate review, it could "result in awkwardness" in circuits unaccustomed to such panels, and it "seems incongruous to require three circuit judges to decide cases such as routine zoning matters when a single circuit judge may sentence a person to death." Ltr. from Charles J. Kahn, Jr., Chair, R. of Jud. Administration Comm., to Charles T. Wells, C.J., Fla. Sup. Ct., *Review in the Circuit Courts of County Court Orders* (Jan. 29, 2001) (copy on file with *Stetson Law Review*).

76. 794 So. 2d 1270.

local agency's decision, but then erred by proceeding in a second-tier certiorari review to determine that there was competent substantial evidence supporting the agency's decision.[77] That was a determination to be made by the circuit court on remand.[78]

The Supreme Court reiterated its admonition in *Florida Power & Light Co.* regarding the "competent substantial evidence" standard and then added to it, stating that "[a]s long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended."[79] The existence of "[e]vidence contrary to the agency's decision is outside the scope of the inquiry" on first-tier certiorari review because "it is irrelevant to the lawfulness of the decision."[80]

In a concurring decision in which Justices Anstead and Lewis joined, Justice Pariente wrote separately to express two concerns about the current procedures for first-tier certiorari review.[81] First, she agreed with Judge Zehmer's observations in his dissent in *Irvine v. Duval Co. Planning Commission*, in which he urged that the agency should be required to make written findings of fact in light of the deference given by the reviewing court "to the agency's superior expertise and vantage point."[82] Second, she referenced the "disparity" among the circuits regarding whether such review must be conducted by a three-judge panel or merely a single judge.[83] Noting "the far-reaching impact of zoning decisions," she said that a single judge should not have "the identical appellate reviewing authority as a three-judge panel," especially since the district court must defer to that first-tier decision.[84]

As demonstrated by these Supreme Court decisions quashing district courts' decisions on second-tier review and by the dissents to some of those Supreme Court decisions, the proper application of the standard of review for certiorari review of local land use decisions is no easier today than in years past. The confusion as

77. *Id.* at 1275.
78. *Id.*
79. *Id.* at 1276.
80. *Id.*
81. *Id.* at 1276–1278 (Pariente, Anstead & Lewis, JJ., concurring).
82. *Id.* at 1276 (citing 466 So. 2d 357, 366 (Fla. 1st Dist. App. 1985) (Zehmer, J., dissenting)).
83. *Id.* at 1277.
84. *Id.*

to how to apply this standard continues; circuit court decisions continue to be quashed for improperly conducting first-tier review, and district court of appeal decisions continue to be quashed for improperly conducting their second-tier certiorari review.[85]

In the end, the standard of review in these certiorari cases may come down to a protestation that, like obscenity, "I know a violation of the essential requirements of the law when I see it."[86] Certainly, had Justice McDonald been the single circuit judge providing first-tier certiorari review in *E.D.C.*, he would have quashed the zoning board's decision, just as the district court did, only then for his decision to be quashed by the Supreme Court. It is difficult for parties to challenge decisions based on such a subjective standard and difficult for courts to apply the current standard for certiorari review.

III. RINKER *AFTER* VAILLANT: *WOULD THE DECISION BE THE SAME?*

At a bare minimum, given the "narrow" constraints of the *Vaillant* standard of review, it cannot be said that a circuit court's first-tier review provides a "plenary appeal." And, given the even narrower standard of any second-tier review of the circuit court's decision, Justice McDonald's warning that circuit courts can, by artful drafting of their orders, immunize those orders from review appears to be exactly the case. Indeed, as discussed in Part IV, the agency may effectively insulate itself from any effective first-tier review merely by the way it writes its order.

Most troubling of all, perhaps, because of its very narrow scope, courts applying the *Vaillant* standard of review cannot assure that the agency is acting in a consistent manner on land

85. *See e.g. Clay Co. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st Dist. App. 2007); *Sarasota Co. v. BDR Inv., L.L.C.*, 867 So. 2d 605, 608 (Fla. 2d Dist. App. 2004); *City of Miami v. Cortes*, 995 So. 2d 604, 606 (Fla. 3d Dist. App. 2008); *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1034 (Fla. 4th Dist. App. 2002); *Wekiva Springs Reserve Homeowners v. Binns*, 61 So. 3d 1190, 1191 (Fla. 5th Dist. App. 2011) (all quashing circuit court orders for failing to apply the correct standard); *see also Miami-Dade Co. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 201 (Fla. 2003) (quashing a district court order for failing to apply the correct standard).

86. *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (explaining that he could not define the material that fit into the definition of obscenity in advance but that he would know it when presented with it).

use issues or that it is affording the proper level of respect to the property owner's rights long required in this country.[87] That becomes apparent from an analysis of the Supreme Court's pre-*Vaillant* grant of certiorari in *Rinker Materials Corp. v. City of North Miami*[88] and a consideration of the likely result under the *Vaillant* standard of review.

In *Rinker Materials Corp.*, the petitioner sought a permit to build a concrete batching plant within the industrial area of the City on property bounded by other industrial plants, including a concrete batching plant.[89] The application was denied based on the planning director's interpretation of a change to the City's zoning code that deleted "cement products such as concrete blocks, pipe, etc." from the approved industrial uses.[90] The Supreme Court quashed the Third District's affirmance of the circuit court's affirmance of the City's denial of the petitioner's application for a building permit "upon its property in the City's industrial zone."[91]

Concluding that the City's zoning code did not preclude a concrete batching plant in its industrial park, the Supreme Court held that by "failing to apply the plain and ordinary meaning and common usage of the language of the ordinance in determining intent, the district court misapplied the established decisional rules of statutory construction."[92] The Supreme Court then set forth numerous rules of statutory construction, which it held the district court failed to follow.[93] One such rule requires that "[s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary[,] and the ordinance should be interpreted in favor of the property owner."[94]

87. *E.g. CNL Resort Hotel, L.P. v. City of Doral*, 991 So. 2d 417, 420 (Fla. 3d Dist. App. 2008). "Private property rights have long been viewed as sacrosanct and fundamentally immune from government interference. The strong tradition of protecting private property rights against governmental interference stems back to both English common law and Lockean philosophy." *Id.*

88. 286 So. 2d 552 (Fla. 1973).

89. *Id.* at 554.

90. *Id.* at 555.

91. *Id.* at 553, 556.

92. *Id.*

93. *Id.* at 553.

94. *Id.*

Then, however, in concluding that the zoning code did not preclude a concrete batching plant as an approved industrial use, the Supreme Court unabashedly looked to the evidence before the City when it denied the application.[95] It described the nature of the area where the proposed plant could be built and observed that "[t]he fact that another company ha[d] a concrete batching plant already in operation right across the street from petitioner's proposed site is not mentioned below."[96]

The Court also noted that, before the petitioner purchased the property, the then City officials told the petitioner that its intended use of a concrete batching plant met the zoning requirements.[97] The Court stressed that this "inquiry" did not give the petitioner "a vested guarantee in the issuance of its permit," but found that it "show[ed] what the true 'intent' of the legislative body in question was as to the zoning use intended for the area."[98] The Court also looked to statements in the record of certain City Council members who had passed the ordinance deleting "cement products" as an approved industrial use to discern the intent of that deletion.[99] Those statements made it clear that the deletion was "directed at" a concrete beam manufacturing plant that "was very noisy, very unsightly and was expanding even beyond the large size it had," and it was "in no way . . . meant" to eliminate a concrete batching plant.[100]

Declaring that "[s]eldom do we have such evidence of the clear legislative intent of the change (deletion) upon which to rely and it should not be ignored," the Supreme Court quashed the district court's opinion with directions that the circuit court's order denying relief be set aside and an order directing that the City issue the building permit that the property owner requested be entered.[101] Although the Court also explained why the City's interpretation of its code violated the rules of statutory interpretation set forth in the Court's opinion, it is plain that the Court was heavily influenced by the fact that the City's interpretation

95. *Id.* at 554–555.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 556.
100. *Id.*
101. *Id.*

was "completely at odds with the approval of a competitive 'cement batching plant' already in operation across the street."[102]

Would the same result occur under a *Vaillant* standard of review? It almost certainly would not. Indeed, if all that was truly involved was a "misapplication" of the correct law, today the inquiry should end with that conclusion, as a violation of the essential requirements of the law cannot rest on "a mere misapplication of the law; it must be an application of the wrong law."[103] "Given that in many cases only a Zen master could distinguish between a misapplication of the law and an application of the wrong law, this principle only adds to the rhetoric."[104] This raises the question: should a court be able to insulate itself from review by merely reciting that there was an application of the wrong law rather than a misapplication of the correct law? Aren't both worthy of reversal, as in a plenary appeal?[105]

Furthermore, the reviewing court could not even consider evidence of the nature relied on by the *Rinker* Court regarding the industrial area and the existing cement batching plant. This is not evidence *supporting* the agency's decision and thus is evidence beyond the inquiry even on first-tier certiorari review.[106] Nor could the former City Council members' statements have been considered because they conflicted with the zoning director's testimony as to the interpretation of the City's code—an interpretation requiring deference unless "clearly erroneous or contrary to law."[107] Without all of that evidence, however, the Court almost certainly would not have disturbed the City's denial of the application.

Thus, applying the *Vaillant* standard of review in *Rinker* would almost certainly have resulted in inconsistent land use decisions, as well as a decision in derogation of the property own-

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102. *Id.* at 555.

103. Altenbernd & Marcario I, *supra* n. 18, at 22–23; Altenbernd & Marcario II, *supra* n. 18, at 14.

104. Altenbernd & Marcario I, *supra* n. 18, at 22–23; Altenbernd & Marcario II, *supra* n. 18, at 14.

105. *See infra* n. 152 and accompanying text (explaining the nature of review by plenary appeal).

106. *See Fla. Power & Light Co.*, 761 So. 2d at 1094 (explaining that in conducting its review, the circuit court should determine only whether the "decision [was] *supported* by competent substantial evidence") (emphasis in original).

107. *See e.g. U.S. Blood Bank, Inc. v. Agency for Workforce Innovation*, 85 So. 3d 1139, 1142 (Fla. 3d Dist. App. 2012) (deferring to the agency's determination because it was supported by competent substantial evidence).

er's right to use its property in the manner desired. Is that the right result for that case? And, if not, is it likely that the wrong result has been reached in other first-tier and second-tier cases due to application of the stringent *Vaillant* standard of review? Almost certainly in some of these cases. Consideration needs to be given to whether those decisions, which currently are not subject to even one true appeal, should be.

There can be no doubt that local agencies must be afforded deference in their land use decisions. At the same time, zoning boards are comprised of elected officials, subject to the will of the electorate, and our country has a strong independent judiciary to protect legal rights against majority rule. Under Florida's current system of limited judicial review of such decisions, however, property owners can be deprived of their property rights, sometimes by a single judge who can exercise only a narrow standard of review of the agency action, and review of that decision is subject to an even narrower review. And, as now discussed, this limited review may have to be made of an agency decision that does not even identify the factual or legal basis for the decision.

IV. SNYDER—*TO FIND OR NOT TO FIND, THAT IS THE QUESTION*

In *Board of County Commissioners of Brevard County v. Snyder*,[108] the Supreme Court addressed a conflict in district court decisions with respect to certiorari review of site-specific decisions of local zoning boards.[109] Holding that such proceedings are "quasi-judicial" rather than "legislative," the Court abandoned the "fairly debatable" test in favor of a "strict scrutiny" standard.[110] Then, rejecting the property owner's argument that Florida Statutes Section 163.3215[111] provides a means for review of the denial of the rezoning application, the Court said that the

108. 627 So. 2d 469 (Fla. 1993).

109. *Id.* at 470–471.

110. *Id.* at 471, 474–475. The "fairly debatable" standard of review requires courts to uphold zoning decisions as long as they are "fairly debatable," while the "strict scrutiny" standard of review requires zoning boards to strictly comply with the comprehensive plan. *Id.* at 474–475.

111. Section 163.3215 allows "aggrieved or adversely affected part[ies]" to "challenge the consistency of a development order with a comprehensive plan." Fla. Stat. § 163.3215 (2012). The statute is not applicable, however, to property owners. *Parker v. Leon Co.*, 627 So. 2d 476, 480 (Fla. 1993).

only remedy was by a common law petition for certiorari in the circuit court.[112]

The Court wrote as follows in that regard:

> 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*.[113]

Snyder was a six-to-one decision, with Justice Shaw dissenting without opinion.[114] The decision led to several scholarly articles.[115] One advanced a self-described "modest proposal" that the legislature take steps to "shore up the foundations of judicial review" of land use decisions by "eliminating the word 'certiorari,' for it is a source of confusion."[116] Specifically, the authors proposed that Section 120.68 of the Florida Statutes "could serve as a model"[117] that would allow lawyers to "utilize all their time and energy on the merits of their appeals without unnecessary worries or perils as to procedure."[118]

Other articles addressed the Supreme Court's holding that the local agency need not make findings of fact in rendering its decision.[119] One article criticized that holding, saying that it had

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112. *Snyder*, 627 So. 2d at 474–475, 475 n. 1.

113. *Id.* at 476.

114. *Id.*

115. *See e.g.* Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. Land Use & Envtl. L. 243, 245 (1994) (discussing the consistency requirement in *Snyder* and the changes brought about in the function of zoning decisions); *see also* Scott D. Makar & Michael L. Buckner, *Son of* Snyder*: Municipal Annexations and Quasi-Judicial Proceedings*, 1 Fla. Coastal L.J. 133, 139 (1999) (discussing *Snyder*'s impact on the judicial review available for annexation actions); Graham C. Penn, *Trying to Fit an Elephant in a Volkswagen: Six Years of the* Snyder *Decision in Florida Land Use Law*, 52 Fla. L. Rev. 217, 218 (2000) (exploring the judicial reaction to the new standard of review created in *Snyder*).

116. Lucia A. Dougherty & Elliot H. Scherker, *Rights, Remedies, and Ratiocination: Toward a Cohesive Approach to Appellate Review of Land Use Orders after* Board of County Commissioners v. Snyder, 24 Stetson L. Rev. 311, 349, 352 (1995) (typeface altered).

117. *Id.* at 351.

118. *Id.* at 349–350 (typeface altered).

119. *See e.g.* Craig Coller, *Should the Narrowing Scope of Second-Tier Certiorari Mandate Findings of Fact in Local Government Quasi-Judicial Decisions?* 76 Fla. B.J. 67

"radically altered appellate review of [quasi-judicial remaining decisions] by circuit courts."[120] In that author's view, Judge Zehmer and the First District got it right in recognizing the need for such findings, as the findings plainly benefit the circuit court in making its first-tier certiorari review.[121] In particular, findings by the agency allow the circuit court to determine whether "the facts found by the agency constitute lawful grounds for its action" and whether the evidence supports the agency's findings.[122] This, in turn, prevents the circuit court "from 'reweighing' evidence or substituting its judgment for that of the local zoning board."[123] Such findings "operate to 'de-politicize' and promote 'objective rationality' in zoning decisions."[124]

On the other hand, first-tier certiorari review of a zoning decision made without accompanying findings of fact, in the view of those authors, results in more deferential circuit court review; it must affirm the agency decision if there is any evidence in the record supporting it, regardless of whether the agency's decision in fact rested on its acceptance of that evidence.[125] The authors stressed that "the result of this deferential review is that local zoning boards actually place themselves at a disadvantage if they adopt written findings," thus providing a disincentive to provide findings explaining the basis of the decision.[126]

Eight years after *Snyder* was decided, an entirely new court decided *G.B.V. International, Ltd.* Justice Shaw, who had dissented without explanation in *Snyder*, was the only remaining justice from the *Snyder* case, and he now wrote for the Court in *G.B.V. International, Ltd.*[127] Finding conflict with its decisions limiting a district court's second-tier certiorari review to the two-step assessment set forth in *Vaillant*, the Supreme Court approved in part and quashed in part the district court's deci-

(July/Aug. 2002) (arguing that the reasons for a zoning board's decisions should be clear from its minutes, whether explicitly or implicitly).

120. T.R. Hainline, Jr. & Steven Diebenow, Snyder *House Rules? The New Deference in the Review of Quasi-Judicial Decisions*, 74 Fla. B.J. 53, 54 (Nov. 2000).

121. *Id.* (citing *Irvine*, 466 So. 2d at 366).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 55 (typeface altered).

127. 787 So. 2d at 840.

sion.[128] The Court held that, under *Vaillant*, the district court "was limited to a two-pronged review of the *circuit court* decision, not a de novo review of the *agency* decision."[129]

In directing that the case be remanded to the circuit court "to apply the three-pronged standard of review set forth in *Vaillant*," the Supreme Court observed that the zoning commission had done "little to facilitate judicial review or to bolster its own decision; it made no findings, stated no formal reason for its decision, and issued no written order."[130] Although acknowledging that *Snyder* permitted the agency to do that, the Supreme Court also recognized that the ruling in *Snyder* had been "called into question."[131] The Court accordingly asked the Rules of Judicial Administration Committee of The Florida Bar to consider whether the Court should adopt "a rule requiring written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts."[132]

Joined by Justice Anstead, Justice Pariente wrote in dissent to say that, rather than refer the matter to the Rules Committee, she would recede from *Snyder* to the extent that it held findings of fact are not required.[133] Reviewing in some detail the various articles addressing that holding in *Snyder*, as well as some earlier district court decisions requiring such findings, Justice Pariente concluded that the circuit court's review of an agency decision made without factual findings "is rendered virtually unreviewable."[134] Consequently, "we may have unintentionally vested too much discretion in a single circuit court judge whose decision is virtually shielded from appellate review—subject to reversal only if it has resulted in a denial of procedural due process or an application of the wrong law."[135]

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128. *Id.*
129. *Id.* at 845 (emphasis in original).
130. *Id.* at 846.
131. *Id.* (citing Hainline, Jr. & Diebenow, *supra* n. 120, at 53).
132. *Id.*
133. *Id.* at 849 (Pariente & Anstead, JJ., dissenting).
134. *Id.* at 850–854.
135. *Id.* at 850. Justice Wells wrote separately to express his "disagreement with Justice Pariente's view that written statements must be required in *all* cases where a local government is acting in a quasi-judicial capacity in a zoning hearing and decision." *Id.* at 848–849 (Wells, C.J., concurring) (emphasis in original). In his view, "[T]his requirement [was] too cumbersome and could lead to delay, boilerplate writings, and, likely, to litigation over whether the local government's written statements are sufficient. Not every zoning decision needs written findings." *Id.* at 849. Justice Wells approved of the referral of

Thus, like Justice McDonald's dissent in *E.D.C.*, the dissent in *G.B.V. International, Ltd.* rested on the concern that first-tier certiorari decisions by circuit courts can escape meaningful review.[136] Those concerns continue to exist today, as the Court never receded from *Snyder* and instead accepted the recommendation of the Rules of Judicial Administration Committee that the Court should not implement "a rule requiring written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts."[137] After receiving "input" from the Environmental and Land Use Law Section of the Florida Bar and the Florida Association of County Attorneys, the Rules Committee unanimously concluded that such a rule "would be in violation of the separation of powers between the judicial and executive branches."[138]

V. DO FIRST-TIER AND SECOND-TIER CERTIORARI REVIEWS SATISFY THE CONSTITUTIONAL RIGHT TO APPEAL?

The right to appeal derives from Article V of the Florida Constitution, which sets forth the appellate jurisdiction of Florida courts.[139] Although this right was questioned after the 1968 revisions to the Florida Constitution,[140] it is now accepted that liti-

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the issue to the Rules Committee, declaring that it should make a recommendation "after hearing input from local governments and others who have a stake in land use decisions." *Id.*

136. *Id.* at 850 (Pariente & Anstead, JJ., dissenting).

137. *Id.* at 846; *see* Memo. from Ad Hoc Comm. on *Broward v. G.B.V.*, Envt'l & Land Use Sec. of the Fla. Bar, to R. of Jud. Administration Comm. of the Fla. Bar, *The Question Referred by the Supreme Court in* Broward County v. G.B.V. International, Inc. 19 (Nov. 29, 2001) (copy on file with *Stetson Law Review*) (concluding that "the best course of action is to not require written findings of fact for local government land use decisions").

138. Ltr. from Nelly N. Khouzam, Chair, R. of Jud. Administration Comm., to Thomas D. Hall, Clerk of Ct., *Rules Committee Recommendation* 1 (Jan. 18, 2002) (copy on file with *Stetson Law Review*).

139. Fla. Const. art. V, §§ 3–5.

140. *See State v. Creighton*, 469 So. 2d 735, 739 (Fla. 1985) (holding that language used in Florida's constitution "indicates that the question of when an aggrieved litigant is entitled to an appeal is a matter to be determined by sources of authority other than the constitution"); *Amends. to the Fla. R. App. P.*, 696 So. 2d 1103, 1104 (Fla. 1996) (stating that the Court "now recede[s] from *Creighton* to the extent that [it] construe[s] the language of [A]rticle V, [S]ection 4(b) as a constitutional protection of the right to appeal"). As explained in Justice Anstead's concurrence, the *Creighton* court compared the current and previous language of Article V, Section 4(b) and concluded that a change in language eliminated the constitutional right of appeal, when it should have applied the standard set forth in *Hayek v. Lee County*, 231 So. 2d 214 (Fla. 1970), where the court looked closely at

gants have a constitutional right of appeal in Florida.[141] Due to their constitutional origin, the respective jurisdictions of the Florida Supreme Court and the five district courts cannot be altered by the legislature.[142] In contrast, the appellate jurisdiction of circuit courts, although also constitutional in origin, is "provided by general law."[143] Thus, it is left to the legislature to define circuit court appellate jurisdiction, and it may grant broader review powers than first-tier certiorari currently provides.[144]

Review of governmental agency action is generally governed by Florida Statutes Chapter 120.[145] Most state agency action falls within the procedures set forth in Chapter 120 and may be appealed as a matter of right to a district court of appeal.[146] Municipal agency actions, and in particular local zoning board decisions, however, are expressly exempt from Chapter 120.[147] Instead, as discussed in Parts I through IV, local zoning board decisions are "appealed" as of right to circuit courts that are required to apply the narrow certiorari standard established in

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sources describing the revision proceedings rather than relying on the presumption that a change in language is evidence of intent. *Amends. to the Fla. R. App. P.*, 696 So. 2d at 1108–1109 (Anstead, J., concurring).

141. *See e.g. Bain v. State*, 730 So. 2d 296, 298 (Fla. 2d Dist. App. 1999) (holding that there is a constitutional right to appeal in Florida and questioning whether the legislature may condition the right when the constitution itself does not).

142. *See* Fla. Const. art. V, §§ 4–5 (providing that the "[d]istrict courts of appeal shall have jurisdiction to hear appeals" and that "[t]he circuit courts shall have original jurisdiction not vested in the county courts").

143. Fla. Const. art. V, § 5(b).

144. Accordingly, the legislature could, as suggested under the "modest proposal" by Lucia A. Dougherty and Elliot Scherker, create review along the lines of Florida Statutes Section 120.68, which governs judicial review under the Administrative Procedure Act. Dougherty & Scherker, *supra* n. 114, at 349–352; Fla. Stat. § 120.68 (providing for and delimiting judicial review of agency decisions).

145. Fla. Stat. §§ 120.50–120.81 (delineating the Administrative Procedure Act).

146. *Id.* at § 120.52(1) (defining agency as "the [listed] officers or governmental entities if acting pursuant to powers other than those derived from the constitution"); *Id.* at § 120.68(1)–(2)(a).

147. *Id.* at § 120.52(1)(c). This definition excludes:

> [A]ny municipality or legal entity created solely by a municipality; any legal entity or agency created in whole or in part pursuant to [P]art II of [C]hapter 361; any metropolitan planning organization created pursuant to [Section] 339.175; any separate legal or administrative entity created pursuant to [Section] 339.175 of which a metropolitan planning organization is a member; an expressway authority pursuant to [C]hapter 348 or any transportation authority under [C]hapter 343 or [C]hapter 349; or any legal or administrative entity created by an interlocal agreement pursuant to [Section] 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

Id.

Vaillant on that appeal.[148] In turn, review of the circuit court decision may be sought from a district court of appeal,[149] which must apply an even narrower certiorari standard of review and has complete discretion to refuse review even if there has been a violation of the essential requirements of the law.[150] When that discretion is exercised, a local land use decision that is admittedly erroneous is nonetheless allowed to stand. For attorneys, it is challenging to explain to the client that clear error in the circuit court's decision cannot be remedied.

This certiorari track of appeal has been described as "akin in many respects to a plenary appeal" presumably because the first tier of review is available as a matter of right.[151] What courts have not confronted is the effect of the differing standards of review available in plenary appeals and the first tier of certiorari review of agency action taken in Florida. It is precisely that different scope of review that makes the limited certiorari review currently available to parties aggrieved by local zoning board decisions wholly unlike a plenary appeal. It is without question that a circuit court's scope of review on a petition for writ of certiorari is not at all like a district court's scope of review on plenary appeal.[152] Petitions for certiorari do not approximate plenary

148. Fla. R. App. P. 9.030(c)(1)(C) (stating that circuit courts have appellate jurisdiction to review "administrative action if provided by general law," the same standard set forth in Chapter 120 for state-level agencies). All other agency orders are reviewable by certiorari. *Id.* at 9.030(c)(2).

149. *Id.* at 9.030(b).

150. *See Heggs*, 658 So. 2d at 526–527 (explaining the narrow standard of review); *Bared & Co., Inc. v. McGuire*, 670 So. 2d 153, 157 (Fla. 4th Dist. App. 1996) (stating that even when a court determines that an order departs from the essential requirements of the law, the court may in its discretion decide not to exercise its jurisdiction and simply deny the petition for certiorari).

151. *E.g. Dusseau*, 794 So. 2d at 1273–1274 (citing *Fla. Power & Light Co.*, 761 So. 2d at 1092). This creates tension with the fact that certiorari is, by definition, discretionary and not taken as of right. *See Abbey v. Patrick*, 16 So. 3d 1051, 1053 (Fla. 1st Dist. App. 2009) (explaining that "unlike an appeal, certiorari is not a remedy that is available as a matter of right[; it] is an extraordinary remedy that is entirely within the discretion of the court").

152. *See Heggs*, 658 So. 2d at 526–527 (noting that the scope of review by certiorari is much narrower than on appeal); *Abbey*, 16 So. 3d at 1054 (stating that "[a]ppellate courts do not issue writs of certiorari merely to correct an erroneous application of the law, as would be the case in a plenary appeal"); *State v. Wagner*, 403 So. 2d 1349, 1352 (Fla. 5th Dist. App. 1981) (Cowart, J., dissenting) (explaining that "on review by appeal, all three types of errors may be corrected: (1) jurisdictional, (2) procedural, and (3) substantive"). Justice Cowart further states, "However[,] when confined to its legitimate scope, review by common law certiorari is strictly limited to only (1) the jurisdiction of the lower tribunal

appeals. Yet, Florida law currently relegates zoning board decisions to narrow certiorari review, despite the fact that important and fundamental rights often are at issue. Does this limited appellate review truly satisfy the constitutional right to be heard?

VI. AT STAKE IN ZONING DECISIONS: THE BALANCE BETWEEN INDIVIDUAL PROPERTY RIGHTS AND STATE POLICE POWER

At issue in many local land use decisions are the competing rights of private property owners to the enjoyment and use of their own property as they see fit and the right of the state to exercise its police power to impose order and protect the needs of the community at large.[153] Property owners' rights are a cornerstone of all the freedoms we enjoy[154] and an essential component of a market economy.[155] As Justice Story wrote:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.[156]

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and (2) the regularity of the procedure followed below. It does not extend to the correctness of rulings of lower courts on substantive law." *Wagner*, 403 So. 2d at 1352.

153. *See e.g.* Or. Granting Pet. for Writ of Cert., *Islandside Prop. Owners Coalition, LLC v. Town of Longboat Key*, http://www.yourobserver.com/resources/pdf/file -20120103205210.pdf, at 2 (Fla. 12th Cir. Dec. 30, 2011) (No. 2010CA8261NC) (involving a petition for certiorari to review a town commission's amendment of a local development plan).

154. Clarence B. Carson, *The Property Basis of Rights*, 30 The Freeman (Sept. 1980) (available at http://www.thefreemanonline.org/columns/the-property-basis-of-rights/) (stating that "[p]roperty rights are basic to all rights"). "This relationship first occurred to me while studying the loss of rights in totalitarian countries. My general conclusion was that the loss of property rights either preceded or accompanied the loss of other rights. This was so in Hitler's Germany. It was so in Lenin's and Stalin's Russia." *Id.*

155. The Framers are the fathers of our Constitution, upon which our market economy is based, and John Locke is the grandfather. In *Two Treatises of Government* (1689), John Locke advocated the division of the legislative, judicial, and executive powers; advocated individual equality; and set forth a theory of natural rights of men, even going so far as to say revolution was a moral choice when governments infringed those rights. *The Columbia History of Western Philosophy*, 382, 388–389 (Richard H. Popkin ed., Columbia U. Press 1999).

156. *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829); *see also CNL Resort Hotel*, 991 So. 2d at 420 (confirming that "[p]rivate property rights have long been viewed as sacrosanct and fundamentally immune from government interference").

In addition to protections contained in the U.S. Constitution,[157] Floridians enjoy state constitutional protection of their property rights:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . .[158]

Florida courts have considered property rights in numerous contexts in which owners had access to plenary appeals in district courts by virtue of their right first to try cases in circuit court.[159]

One such category of cases is private property disputes between citizens, as happened in *DeRoche v. Winski*.[160] In *DeRoche*, the appellees successfully disputed in circuit court the appellant's placement of a fence on his property that barred access to the driveway they used to access their adjacent property.[161] The district court concluded that it was a case of boundary by acquiescence and held that the appellant must remove the fence.[162] Thus, when one property owner, by legitimate use of his property, affected another property owner's right to the use and enjoyment of his property, the parties' competing rights were vindicated through a complete judicial process involving a trial and then a plenary appeal. That full judicial process served to protect the rights of both parties.

In contrast to the judicial process available to private citizens seeking to settle their property disputes, property owners adversely affected by government action generally are limited to

157. U.S. Const. amends. V; X; XIV, § 1.

158. Fla. Const. art. I, § 2; *see also id.* at art. I, § 9 (providing that "[n]o person shall be deprived of life, liberty[,] or property without due process of law").

159. *See Moore v. City of Tallahassee*, 928 F. Supp. 1140, 1145–1146 (N.D. Fla. 1995) (citing *State of Washington v. Roberge*, 278 U.S. 116, 121 (1928)) (stating that "[i]ndividuals' ability to own land and put it to lawful use is a fundamental American freedom"); *Battaglia Props., Ltd. v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 164 (Fla. 5th Dist. App. 1993) (explaining that "governmental action in the application of general laws limiting or restricting the use of property impacts basic property rights under the constitution and requires close judicial scrutiny").

160. 409 So. 2d 41, 42 (Fla. 2d Dist. App. 1981).

161. *Id.*

162. *Id.* at 44.

certiorari review in state court.[163] This is because most zoning decisions do not impact property owners' rights at the extremely high level required to establish a Fifth Amendment taking. And, while Florida's Protection of Private Property Rights Act provides a cause of action in cases that cannot meet the high takings standard, its fee-shifting provisions are a significant risk for parties considering pursuit of a claim under the Act.[164] Other constitutional and legal challenges may be available as well, but are fact-specific and not applicable in all cases.[165] In addition, each of these options requires a much lengthier process than a direct appeal from the zoning decision, as they require appearances in both a trial court and an appellate court.

For these reasons, property disputes between private citizens almost certainly receive greater scrutiny than government intrusion affecting individual property rights.[166] This can be viewed as entirely appropriate given that, in the context of zoning decisions, the government is acting on behalf of *all* citizens and not just some specially affected citizens. To the contrary, there may be tension in that regard with the fundamental concept of liberty as rooted in constitutional protections of citizens' rights to enjoy their property free from improper government interference. While certainly substantial, it goes without saying that these private

163. Property owners can seek appeal on the basis of Fifth and Fourteenth Amendment takings law, but that is a difficult standard to meet. *See e.g. St. Johns River Water Mgt. Dist. v. Koontz*, 77 So. 3d 1220, 1229–1230 (Fla. 2011), *cert. granted*, 133 S. Ct. 420, 421 (2012) (endorsing a narrow application of the *Nollan/Dolan* test, which requires (1) an "essential nexus" between the asserted state interest and the permit condition imposed, and (2) "rough proportionality" between the condition that was placed on the land and the projected impact of the proposed development). *Id.*

164. Fla. Stat. § 70.001. The Act provides a right of action in cases that do not rise to the level of a taking. This action could then lead to a plenary appeal, but the lengthy delay before a final decision and the Act's fee-shifting provision would likely dissuade most property owners. *See id.* at § 70.001(a)–(c)(2) (West 2012) (detailing the right to a cause of action under Section 70.001).

165. Additional challenges may be available depending on the facts surrounding a zoning decision. For example, when a zoning decision is made in conjunction with passing a new ordinance to allow such a change, the ordinance may be challenged on constitutional grounds.

166. There are means to pursue constitutional and other legal challenges to ordinances, including comprehensive plans, but this same review is not available to challenge the approval or denial of the zoning requests themselves, only whether they are consistent with the comprehensive plan. *See Bush v. City of Mex. Beach*, 71 So. 3d 147, 150 (Fla. 1st Dist. App. 2011) (explaining that petitioners are entitled to certiorari review to the extent that they raise issues other than those concerning the consistency of a zoning authority's order).

property rights are not unfettered.[167] Under the current system of review, however, local governments may wrongfully deprive a property owner of the right to use his or her property in the way he or she desires, leaving him or her with no effective remedy on appeal.[168]

It bears emphasis that the impact of the limited review available through first- and second-tier certiorari is not an issue for property owners alone. The State, as promoter of the common good, has significant rights at issue in local zoning decisions, and it is sometimes the zoning authority that is aggrieved by the limited review available on second-tier certiorari review of even a single judge's decision.[169] Although private property rights are the bulwark of virtually all of our individual freedoms, no man may be a law unto himself such that he infringes on the rights of other members of society.[170] This principle was recognized long ago, most notably by Christopher Tiedeman in his two-volume work, *A Treatise on the Limitations of the Police Power in the United States*:

> This police power of the State extends to the protection of the lives, limbs, health, comfort[,] and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo, ut alienum non laedas*, it being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.[171]

Over time, state police power evolved from its narrow application of preventing direct harm, as described by Tiedeman and others, to the broader application of promoting the public welfare.[172] Today, Florida law recognizes that the exercise of police

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167. *See e.g. United States v. Causby*, 328 U.S. 256, 264–265 (1946) (noting that "if the landowner is to have full enjoyment of the land, he [or she] must have exclusive control").

168. Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 Fla. St. U. L. Rev. 315, 356 (1995).

169. *See e.g.* Or. Granting Pet. for Writ of Cert., http://www.yourobserver.com/resources/pdf/file-20120103205210.pdf at 18 (finding that "the Town Commission departed from the essential requirements of law" by approving the development order at issue).

170. Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 Hastings Const. L.Q. 511, 511 (2000).

171. *Id.* at 511 (citing Christopher G. Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* 4–5 (1886)) (typeface altered).

172. *See Pasternack v. Bennett*, 190 So. 56, 57 (Fla. 1939) (citing *State ex rel. Davis v. Rose*, 122 So. 225, 226. (Fla. 1929)) (stating that "[t]he possession and enjoyment of all

power is legitimate when used "for the protection of the public welfare, health, safety[,] and morals" of the public.[173] To that end, the State has exercised its police power successfully in numerous regulatory contexts.[174]

One such application is *Florida Game & Fresh Water Fish Commission v. Flotilla, Inc.*,[175] in which the court concluded that the exercise of police power at issue was entirely legitimate.[176] The case involved a property developer who acquired a large parcel of land, received local approval to develop the land for residential use, and began construction.[177] While construction was ongoing, Flotilla discovered a bald eagle nest in a tree on the property.[178] An anonymous report that the bald eagle nest had been knocked out of its tree led to an investigation, but the developer continued with construction.[179] When the eagles returned to build their nests, the developer adjusted its plans to accommodate federally mandated zones of protection for the nests.[180]

After the discovery of yet more nests on the property, the developer abandoned its project and sold the parcels to other developers at prices far less than expected before the nesting eagles triggered the federal regulations.[181] Upon review, the court determined that no taking occurred and that enforcement of such regulation was lawful "to conserve and protect these [endangered and threatened] species as a natural resource."[182] Many would

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rights are subject to the police power, and property of every kind, including contract rights, and rights in things intangible as well as tangible, is held subject to general regulations which are necessary for the common good and general welfare").

173. Fla. Stat. § 849.46 (2012) (stating that regulating gambling is a lawful exercise of the State's police power); *see e.g. Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 781–782 (Fla. 2004) (holding that the Citrus Canker Law, used to prevent the spread of citrus canker, is a valid exercise of the State's police power); *State v. Baal*, 680 So. 2d 608, 610 n. 2 (Fla. 2d Dist. App. 1996) (stating that as long as a city's ordinance closing the beach to the public is for the public good, then the ordinance is "a valid and reasonable exercise of the police power of a governmental entity").

174. *E.g. Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 765 (Fla. 2d Dist. App. 1994) (citing Fla. Stat. § 372.072(2) (1989)). The current version of the statute cited by the court is Florida Statutes Section 379.2291(2), which contains the same language quoted from the 1989 version.

175. 636 So. 2d 761.

176. *Id.* at 764–765.

177. *Id.* at 763.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 765 (quoting Fla. Stat. § 372.072(2) (1989) (alteration in original)).

agree that restrictions such as the zones of protection for bald eagles that do not take the property itself are an appropriate limitation on property rights in light of the social value of protecting important endangered species, especially in the case of bald eagles, our national symbol. In fact, restrictions on the use of particular parcels of land may be the only effective remedy for endangered species as expanding land use impacts their habitats.

Flotilla illustrates the appropriate use of police power and its importance in serving the rights of all citizens. But *Flotilla* involved state agency action and therefore received a plenary appeal directly to a district court of appeal.[183] If it had been a case involving local agency action, where a single circuit judge could rule, the state's power to regulate might have been denied, and it would have had no effective review.

VII. THE TWO-TIER CERTIORARI SYSTEM CAN LEAD TO UNEVEN RESULTS

Administrative law has developed to allow agencies to perform important functions, delegated by the legislature, because agencies possess specialized expertise and function more efficiently than an entire legislative body when addressing issues related to their areas of expertise.[184] What the legislature cannot do is delegate judicial functions, as those functions are not the legislature's to delegate.[185] And yet, Florida law recognizes that agencies conduct quasi-judicial proceedings.[186] Although *Snyder* established that local zoning authority decisions are quasi-judicial proceedings, they nonetheless receive very limited review.[187] This limited review results in much more than mere

183. *Id.* at 763–764.

184. *See Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011) (stating that "[t]he Legislature delegates rulemaking authority to state agencies because they usually have expertise in a particular area for which they are charged with oversight").

185. *Id.* at 708 (citing *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004)).

186. *E.g. Snyder*, 627 So. 2d at 474–475.

187. *Id.* It is interesting to note here that, as Florida law has developed, quasi-judicial does not equal judicial in terms of due process. *See Bush*, 71 So. 3d at 149–150 (citing *Jennings v. Dade Co.*, 589 So. 2d 1337, 1340–1341 (Fla. 3d Dist. App. 1991)) (stating that "[a]t the outset of our review of the trial court's dismissal, we note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled"). Thus, zoning decisions afford less due process *and* receive narrower review than cases involving property rights impacted by state agencies rather than local ones. *Id.* at 149–150; *Snyder*, 627 So. 2d at 474–475.

deference to zoning authorities' expertise and can be seen to effectively deprive private property owners of their constitutional right to appeal. At the same time, certiorari review is just as limited for the government when a zoning board's decision is quashed on the first tier, and the board can seek review of that decision only by the discretionary second-tier process.[188]

Moreover, the current system of certiorari review can lead to uneven results. This is due, in part, to the fact that different judges and parties often have different ideas, at different points in time, as to what violates "the essential requirements of the law."[189] The dissents discussed above make that point clear.[190] It is also due to the fact that even when judicial standards are not as vague and amorphous as the certiorari standard, judicial minds can quite legitimately differ.[191]

In addition, under the current certiorari system of review, each case is its own separate proceeding, and judges need not take into account the results of previous decisions.[192] There is no vehicle to address differing decisions among courts. This is the case when a circuit court reviews decisions applying the same ordinances within one municipality and is also the case when a circuit court addresses issues with broader and more general application to zoning decisions statewide. This plainly can lead to uneven results, which in turn provide no guidance for future decisions.[193]

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188. *See supra* nn. 6–11 and accompanying text (describing the standards of review available for quasi-judicial decisions under first-tier and second-tier certiorari).

189. *See G.B.V. Int'l, Ltd.*, 787 So. 2d at 843 (citing *Vaillant*, 419 So. 2d at 626) (stating that district court review of agency decisions is limited to whether the lower court applied due process and whether the lower court applied the correct law).

190. *See id.* at 850–851 (Pariente & Anstead, JJ., dissenting) (recounting the difficulty that the district courts have encountered in determining whether the circuit courts correctly applied the law while avoiding review of the evidence in the record) (citing Hainline & Diebenow, *supra* n. 120).

191. District courts sometimes differ in their interpretations of the same question of law, as courts can certify conflict as a basis for Supreme Court jurisdiction. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv) (stating that parties can seek Supreme Court review of appellate court decisions that "expressly and directly conflict with a decision of another district court of appeal or of the [S]upreme [C]ourt on the same question of law").

192. *See G.B.V. Int'l, Ltd.*, 787 So. 2d at 843 (explaining that the court's inquiry in both first-tier and second-tier review is deliberately limited to maintain deference to the agency's expertise).

193. *See Snyder*, 627 So. 2d at 476 (holding that a board does not have to make findings of fact, but that the circuit court must find competent substantial evidence supporting the board's ruling if the circuit court affirms the board). It can also be said that district court opinions issued on second-tier review offer less guidance than they might if those courts

A comparison of two cases illustrates this result. The first is *Lee County v. Sunbelt Equities, II, L.P.*[194] In *Sunbelt Equities*, the owner of property currently zoned as agricultural sought rezoning to accommodate future commercial office development.[195] Although supported by the planning staff and hearing officer who evaluated the request, the county commission denied the request.[196] The property owner sought certiorari relief in the circuit court.[197] The court granted certiorari and found that the denial was not supported by the evidence.[198] The county then sought certiorari review in the district court.[199]

Upon review, the Second District Court of Appeal quashed the circuit court's order.[200] Regarding the property owner's argument concerning consistency with the comprehensive plan, the court wrote:

> [W]hen 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.[201]

The court went on to explain that while the comprehensive plan is a "ceiling" on the kind and amount of development allowed, "[i]t does not give developers carte blanche to approach that ceiling immediately."[202] Thus, "the mere fact of consistency with the comprehensive plan" does not establish a right to imme-

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were reviewing, even under a common law certiorari standard, a plenary appeal taken in circuit court, rather than performing an even more limited review than first-tier certiorari provides.

194. 619 So. 2d 996 (Fla. 2d Dist. App. 1993). Although decided pre-*Snyder* (by several months), and therefore also pre-*Heggs*, *Sunbelt Equities* comports with principles set forth in both cases. *Id.* at 1001–1002. In *Sunbelt Equities*, the Second District Court of Appeal concluded that rezoning decisions should be treated as quasi-judicial, as the *Snyder* court later decided. *Id.* The court also applied the *Vaillant* standard, later clarified in *Heggs*, setting forth the three-pronged first-tier standard and the two-pronged second-tier standard. *Id.* at 1003–1004.

195. *Id.* at 998.

196. *Id.* at 998–999.

197. *Id.* at 999.

198. *Id.*

199. *Id.*

200. *Id.* at 1008.

201. *Id.* at 1005–1006 (typeface altered).

202. *Id.* at 1008 (typeface altered).

diate development to the maximum of the plan, and the court held that the county's denial, supported by competent substantial evidence, would stand.[203]

The opposite result, however, was reached in *Town of Juno Beach v. McLeod*.[204] There, the property owner sought rezoning for part of its 0.57 acre lot, seeking commercial office rezoning on the portion fronting U.S. Highway One.[205] The remainder, which bordered a single-family residential zone, would remain as a buffer between the residential and commercial zones.[206] After two hearings on the subject, in which expert and lay witnesses testified both for and against the proposed use, the Town approved the request and amended the land use map of the comprehensive plan accordingly.[207] A neighboring homeowner then sought relief in the circuit court, which quashed the Town's approval, concluding in part the record contained "'no competent substantial evidence' to support the rezoning."[208] A group of neighbors also sought a formal administrative hearing in the Department of Community Affairs, but after a two-day hearing, they were denied relief when the Department issued an order finding that the amendment was in compliance with the overall comprehensive plan.[209]

The Town sought relief in the district court, and the Fourth District Court of Appeal quashed the circuit court's order.[210] The court held that the circuit court had gone beyond the scope of first-tier review and substituted its judgment for that of the local zoning authority.[211] The court went on to say that "[t]he circuit court applied the wrong law, in that it did not evaluate this zoning request within the context of the Town's comprehensive plan, which designates this property for commercial rather than residential use."[212] When the designation for the property was changed to commercial, it was actually the residential use pro-

203. *Id.*
204. 832 So. 2d 864 (Fla. 4th Dist. App. 2002).
205. *Id.* at 865.
206. *Id.*
207. *Id.*
208. *Id.* at 865–866.
209. *Id.* at 866 n. 1.
210. *Id.* at 865.
211. *Id.* at 866.
212. *Id.* (citing *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001)).

posed as the "buffer zone" that was inconsistent with the comprehensive plan.[213]

In comparing these cases, it is easily seen that the same legal standard was purportedly applied in each case. In each, the local zoning authority decision was quashed and then restored, in part because the circuit courts went beyond the limits of certiorari review by substituting their judgment for that of the local authority. And yet, each court reached those results based on contrary applications of the same principle: the effect of consistency with the comprehensive plan on rezoning requests. In *Sunbelt Equities*, the district court declared that consistency with a comprehensive plan is not conclusive when reviewing a denial of a consistent zoning request.[214] In *McLeod*, on the other hand, the district court held that the circuit court *applied the wrong law* when it failed to consider that the approved zoning change was consistent with the comprehensive plan.[215]

While both cases restored the original decision of the local zoning authority, one rejected the argument that denial of a rezoning request that is consistent with the comprehensive plan is not a departure from the essential requirements of the law, while the other held that failing to consider whether the rezoning request was consistent with the comprehensive plan is a departure from the essential requirements of the law. These two cases, with their contradictory reasoning, demonstrate that certiorari review of land use cases can leave citizens and courts without guidance for future cases.

If these zoning decisions were reviewed in plenary fashion, as other agency decisions are, such disparate results might be avoided. This is because certiorari review only proceeds under the vague standards discussed above, which courts have had great difficulty in applying. A plenary appeal could result in a clear picture of applicable legal principles. On such an appeal, circuit courts would have an opportunity to apply existing principles of law to more issues and therefore provide more guidance to both property owners and zoning authorities. This guidance would in turn assist parties currently facing difficulty in evaluating their chance of success on appellate review. It would possibly help

213. *Id.* at 867.
214. 619 So. 2d at 1008.
215. 864 So. 2d at 866.

them avoid the cost and delay of litigation by establishing clear standards to guide the decision whether to pursue appellate review.

VIII. CERTIORARI VERSUS PLENARY APPEAL: A COMPARISON OF STANDARDS OF REVIEW

With regard to factual determinations in a zoning case, first-tier certiorari review is somewhat similar to plenary appeal: factual determinations are the province of the zoning board,[216] evidence is not to be reweighed,[217] and such determinations cannot be assailed provided that they are supported by competent substantial evidence.[218] Likewise, in a plenary appeal, factual determinations are given great deference.[219] Appellate courts can review evidence, however, both as a whole and specific factual conclusions, and appellate courts can undo factual conclusions on bases other than complete lack of evidentiary support. For example, unlike first-tier certiorari, where the court cannot consider opposing evidence, factual findings on plenary appeal may be assailed by arguing that they are against the manifest weight of the evidence.[220] Additionally, factual findings may be undone if they were "motivated by prejudice, passion, mistake[,] or some other improper cause,"[221] or are clearly erroneous.[222]

It is true that, even with these grounds for reversal available, factual findings are not often reversed on appeal. Reversal is always possible, however, and this availability of appellate relief is meaningful. For example, under current Florida law, if the evidence before a zoning board overwhelmingly supports only one conclusion, and yet the board decides the opposite, there is no relief for the aggrieved party because evidence contrary to the

216. *Fla. Power & Light Co.*, 761 So. 2d at 1092; *Heggs*, 658 So. 2d at 530.

217. *Heggs*, 658 So. 2d at 530.

218. *Fla. Power & Light Co.*, 761 So. 2d at 1092.

219. *See Davis v. State*, 928 So. 2d 1089, 1103 (Fla. 2005) (stating that the trial court's factual determination was supported by competent substantial evidence, and thus, the defendant's claims were untenable).

220. *E.g. Brown v. Est. of A.P. Stuckey*, 749 So. 2d 490, 498 (Fla. 1999).

221. *E.g. Thompson v. Jacobs*, 314 So. 2d 797, 800 (Fla. 1st Dist. App. 1975).

222. *E.g. Tropical Jewelers Inc. v. Bank of Am.*, 19 So. 3d 424, 426 (Fla. 3d Dist. App. 2009) (citing *Universal Bevs. Holdings, Inc. v. Merkin*, 902 So. 2d 288, 290 (Fla. 3d Dist. App. 2005)).

decision on review *cannot* be considered.[223] On plenary appeal, the aggrieved party could argue, perhaps successfully, that the board's factual findings were flawed and find relief.[224]

Consequently, the differences in review of factual conclusions between certiorari and plenary appeal are potentially quite meaningful. Where the difference becomes most critical, however, is in the review of conclusions of law. On plenary appeal, conclusions of law are reviewed de novo, whether it is a district court reviewing a trial court's conclusions, or the Florida Supreme Court reviewing a district court.[225] Even in cases in which district courts must give deference to an agency's interpretation of a statute it administers, the court may reverse the agency's decision if a correct interpretation of the statute would compel a particular action.[226] Florida courts have held that this amounts to de novo review.[227]

In stark contrast, on first-tier certiorari review in land use cases, a circuit court may only inquire whether the zoning board observed the essential requirements of the law.[228] On second-tier certiorari review, the standard narrows even further, and the only relevant consideration is whether the agency applied the correct law.[229] Therefore, a decision that flows from an agency or a circuit court applying the correct law, but applying it incorrectly, does not warrant relief.[230]

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223. *See Dusseau*, 794 So. 2d at 1276 (stating that "[e]vidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence").

224. *E.g. Taylor v. Richards*, 971 So. 2d 127, 131 (Fla. 4th Dist. App. 2007) (holding that the trial court's factual finding was clearly erroneous).

225. *E.g. Execu-Tech Bus. Sys. v. New Oji Paper Co., Ltd.*, 752 So. 2d 582, 584 (Fla. 2000).

226. *Arza v. Fla. Elections Comm'n.*, 907 So. 2d 604, 606 (Fla. 3d Dist. App. 2005) (stating that "[t]he standard of review of an agency decision based upon an issue of law is whether the agency erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action") (citation omitted) (internal quotation marks omitted).

227. *E.g. Jerry Ulm Dodge, Inc. v. Chrysler Group LLC*, 78 So. 3d 20, 23 (Fla. 1st Dist. App. 2011) (citing *S. Baptist Hosp. of Fla., Inc. v. Welker*, 908 So. 2d 317, 319 (Fla. 2005)); *M.H. v. Dep't of Children & Fam. Servs.*, 977 So. 2d 755, 759 (Fla. 2d Dist. App. 2008); *I.B. ex rel. R.B. v. State*, 87 So. 3d 6, 9 (Fla. 3d Dist. App. 2012); *Dorcely v. State Dep't. of Bus. & Prof'l Reg.*, 22 So. 3d 834, 836 (Fla. 4th Dist. App. 2009).

228. *Heggs*, 658 So. 2d at 530.

229. *See Vanderbilt Shores Condo. Ass'n v. Collier Co.*, 891 So. 2d 583, 585 (Fla. 2d Dist. App. 2004) (explaining that a clearly erroneous interpretation of the law cannot stand).

230. *See Hous. Auth. of the City of Tampa v. Burton*, 874 So. 2d 6, 9 (Fla. 2d Dist. App. 2004) (stating that "[u]nlike application of incorrect law, misapplication of correct law by a

Consider, for instance, when a court considers issues of law on first or second-tier review under the current standards. Suppose the legal issue on review is whether a particular interpretation of a zoning code is correct. The result, regardless of whether the reviewing court agrees with the agency's interpretation, may be utterly incorrect under established legal principles. As long as the trial court looked at the correct statute and cited legal principles established by caselaw in its written decision, that incorrect conclusion is unassailable.

Thus, under the current system, a trial court reviews a zoning board's conclusions of law to determine if they are unreasonable or clearly erroneous, and then a district court determines only whether the zoning board applied the correct law without any regard to the result of that application.[231] This is in stark contrast to plenary appeals, in which all questions of law are reviewed de novo.[232] Looking at the scope of review available in both systems, it can be seen that they are not equivalent, and any similarity between the two is extremely limited.

Given all this, it can be rightly said that certiorari review does not give either property owners or the government, both of whom have significant rights at stake, an appeal that would satisfy the constitutional right to such review. That being said, we discuss in the next Part some proposed actions to address those issues.

IX. CONCLUSION

A review of land use cases over the years leads the Authors to conclude that the current standard of review in zoning cases has maintained its currency due more to inertia than reason. Any rationale for such an outlier standard is not compelling today, when land use decisions can be so critical to both the government and to property owners. Indeed, this distinct standard for first-tier review is not like true certiorari, as it is not discretionary and its contours on both levels of review are quite different from

circuit court sitting in its appellate capacity generally does not constitute a violation of clearly established law resulting in a miscarriage of justice").

231. *Id.*

232. *E.g. Execu-Tech Bus. Sys.*, 752 So. 2d at 584.

common law certiorari. The Authors suggest that it is time to look anew at this historical oddity.

There are various approaches that could be considered. One possible way to address the issues raised above is to enact or modify a general law expanding the appellate jurisdiction of circuit courts to include a right to plenary appeal of zoning decisions. The legislature could amend Florida Statutes Chapter 26, which sets forth the jurisdiction of the courts, or the legislature could modify the Bert Harris Act to provide an avenue of appeal, rather than certiorari, in circuit courts. Or the legislature could even add a section to Florida Statutes Chapter 120 to specify that zoning decisions must receive full appellate review in circuit courts rather than district courts.[233]

Or, as others previously have suggested, Florida Statutes Chapter 120 could be modified so that district courts could directly review local zoning board decisions.[234] Rather than add a new section setting forth specific appellate procedures, the legislature could simply remove the exemption for local zoning decisions from Florida Statutes Chapter 120, thus making such decisions subject to review under the Administrative Procedure Act, as many agency decisions are already. That likely would result in more consistency in decisions. Not every local zoning decision may be deemed worthy of a full appeal. But, if one of the parties believes the decision is important enough to warrant the time and cost of an appeal, the Authors believe that party should be able to pursue an appeal. Providing that remedy ensures that litigants will perceive they have been afforded their full day in court. That perception is important and will serve to assure a proper respect for our judicial system, particularly by property owners whose rights have been impacted by government action.

Short of providing a full appeal, another possible remedy would be to broaden the scope of review for certiorari review of land use decisions. At a minimum, this appears warranted by the importance of the significant rights involved for both private property owners and municipal governments. The very fact that so many judges' orders are being quashed for "reweighing" the evidence suggests that judges often are not comfortable that the

233. While the scope of this Article is limited to land use decisions, the need for broader appellate review may also apply to other local agency decisions.

234. Dougherty & Scherker, *supra* n. 116, at 349–352.

underlying decision reached the right result under the facts and the law.

Why shouldn't a district court be able to look at the record to determine whether it supports the agency's action? Quashing a circuit court order granting certiorari, as the current law requires, can lead to the incongruous situation that a circuit court could find on remand that there is no competent substantial evidence supporting the agency's decision when the district court found there was such evidence. There currently is no recourse in this bizarre situation. Yet, that does not seem to be a matter of saying that the agency did not make the best decision or substituting a reviewing court's own judgment for that of the agency. Rather, it is a matter of saying what the evidence in the record supports, something that district courts of appeal have particular experience in determining.

At the very least, shouldn't there be a more lenient standard of review if the agency makes no findings for its decision (or only "boilerplate" findings), allowing the court to review the record in that event? By the same token, a more lenient standard of review also could be adopted where only a single judge conducted the first-tier review. Neither would appear to create any concern over the types of separation of powers concerns that a rule requiring findings or a three-judge panel may create.

So, what should the new standards of review look like? Borrowing from the Altenbernd/Marcario proposal, the Supreme Court could allow second-tier district court certiorari review "under exceptional circumstances to review an erroneous circuit court decision in a land use case."[235] Likewise, the Court could provide the same standard of review for first-tier circuit court review of zoning decisions. In this way, the currently vague and limited certiorari standard could be traded for a more workable formula that would satisfy each party's right to a true appeal and give heed to the important property rights and police power interests at stake. Caselaw development would in turn provide guidance for courts and litigants.

235. *See* Altenbernd & Marcario I, *supra* n. 18, at 23–24 (proposing that a functional definition of certiorari review for non-final orders would read: "A district court of appeal may use certiorari under exceptional circumstances to review an erroneous non[-]final order in a pending trial court proceeding").

The Authors believe it is time to focus on the disparities identified above and to ensure true appellate review for all parties to zoning decisions. To that end, the Authors hope this Article prompts a new conversation, both in the appellate and land use communities.