PRACTICE COMMENTARY

PRACTICAL ASPECTS OF QUASI-JUDICIAL HEARINGS: BASIC TOOLS AND RECENT FINE-TUNING

Joni Armstrong Coffey*

INTRODUCTION

After some groundbreaking years throughout the 1980s and 1990s, land use law in Florida has seen a slow down in dramatic legal developments. The last few years have solidified established principles through continued application to new fact patterns. The end of the last decade saw a number of courts apply existing law at the furthest boundaries of existing principles. Some encroaching inconsistencies are beginning to call for Florida Supreme Court consideration or legislative adjustment, but in great part, the cases have produced predictable results based on known standards. Perhaps the newest development is judicial expectation that the land use community readily will understand and properly apply the legal principles in this field.[1]

Thus, it is incumbent on the land use practitioner to have a ready command of established principles that will enable him or her to advise a client on how to accomplish the following:

 Assistant Miami-Dade County Attorney (1982–present). B.A., Florida State University, *summa cum laude*, 1976; J.D., University of Florida School of Law, *with honors*, 1979. Ms. Coffey was an editor on the *Florida Law Review*, a judicial law clerk for the Honorable Peter T. Fay, of the United States Court of Appeals for the Fifth Circuit, 1979–1980, an adjunct instructor in the masters program in urban planning at Florida International University, 1996–1997, chair of the City, County and Local Government Law Section, 1996–1997, and the recipient of the section's Ralph A. Marsicano Award in 2000.

1. *See e.g. Atkin v. Tittle & Tittle*, 730 S.2d 376, 378 (Fla. Dist. App. 3d 1999) (affirming a legal malpractice award against a real estate attorney when the jury found negligence in the attorney's failure to investigate sufficiently existing zoning restrictions on property purchased by the client).

1. identify and initiate the correct procedural course for the client, whether legislative, quasi-judicial, or executive;

2. plan for those facts that the client must prove in the forum of choice;

3. plot a course of activity that adheres to the limitations of the chosen forum; and

4. sustain the desired decision under judicial review, whether in the appellate courts or in original proceedings.

Both the courts and the legislature have fashioned fairly complex procedural requirements for reaching land use decisions in each category of decision-making. In the comprehensive planning area, for example, statutes prescribe detailed procedural requirements for seeking relief. Failure to meet the statutory requirements may cause a party to forfeit a case brought under the statute or perhaps to lose a hard-won plan amendment on grounds unrelated to the merits of the change. In zoning decisions, the courts continue to refine strictures governing quasi-judicial processes. Failure to adhere to those principles can undo well-deserved victories or leave even a prevailing client exposed to long-term risk of loss.

The following discussion is designed to show how the courts are applying established principles to new fact patterns. These recent case law developments will reveal how courts across Florida interpret and apply existing land use principles and what they expect from practitioners in this area who represent property owners, governments, or neighborhood or civic interests.

I. SELECTING THE RIGHT FORUM

The critical threshold decision in seeking a land use approval is determining whether the land use decision at hand is quasi-judicial, quasi-legislative, or executive/administrative. That choice will set the course for all future local government proceedings and judicial review. Because the decision-making process and the scope of judicial review are so markedly different for these functions, identifying at the outset the correct process for seeking approval and for sustaining it against challenge is crucial for the practitioner. It is a costly error to go through the local government public hearing process, and one or more levels of appellate review, only to learn

that the wrong process has been selected and that the appellate courts are without jurisdiction to sustain the decision or to afford relief.[2] Conversely, bringing an improper original action to challenge a quasi-judicial decision may waste time and resources and, worse, may foreclose a timely request for appellate review.[3]

Selecting the proper forum depends on careful analysis of the essential character of the governmental decision being made, not the outer trappings, such as prior notice of and public participation in the decision-making process, the specificity of facts presented, or the number of persons or size of land parcels involved.[4] Regardless of the stage in which a decision is reached or the decision's potential impact, policy formulation or reformulation always is a legislative function.[5] In contrast, applying already formed policy to particular facts can be only adjudicative.[6] The straightforward implementation of policy decisions previously reached, without the need for the exercise of discretion, is likely to be executive or administrative.[7] To put the matter to the test, one can ask whether the local government is establishing a standard by which other, subsequent decisions will be made (a legislative function), whether it is reaching a judgment call decision by applying external standards that already exist to specific facts (a quasi-judicial function), or whether the local government is approving a near-automatic implementation

---

2. *See e.g. City of Jacksonville Beach v. Coastal Dev. of N. Fla., Inc.*, 730 S.2d 792, 792–793 (Fla. Dist. App. 1st 1999) (reversing the circuit court's grant of relief for lack of certiorari jurisdiction over small-scale comprehensive plan amendments).

3. *E.g. Am. Riviera Real Est. Co. v. City of Miami Beach*, 735 S.2d 527, 528 (Fla. Dist. App. 3d 1999) (requiring dismissal of a suit for declaratory and injunctive relief because the city's quasi-judicial decision was subject only to certiorari review and no petition for such review had been timely filed).

4. *See Bd. of County Commrs. of Brevard County v. Snyder*, 627 S.2d 469, 474 (Fla. 1993) (stating that "[i]t is the character of the hearing that determines whether or not board action is legislative or quasi-judicial"); *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 S.2d 648, 652 (Fla. Dist. App. 3d 1982), *rev'd in part on other grounds, Nordqvist v. Nordqvist*, 586 S.2d 1282 (Fla. Dist. App. 3d 1991) (stating that the character of the hearing determines the classification).

5. *Snyder*, 627 S.2d at 474.

6. *Id.*; *Kahana v. City of Tampa*, 683 S.2d 618, 619–620 (Fla. Dist. App. 2d 1996) (application for rezoning to allow sale of alcohol at specific site was not legislative simply because of the significant number of persons who potentially would be impacted by an approval).

7. *E.g. Broward County v. Narco Realty, Inc.*, 359 S.2d 509, 510 (Fla. Dist. App. 4th 1978) (a ministerial task to approve plat where statutory requirements were satisfied).

of established policy without the significant exercise of discretion (an executive/administrative function).[8]

Case law in recent years has afforded some shortcuts through this analysis. For example, land use law practitioners by now have a clear, general understanding that future land use planning is a legislative, not a quasi-judicial, function.[9] Of even longer standing is the general principle that zoning decisions by local governments are quasi-judicial in nature.[10]

Among the most significant recent developments is a new, and so far uniform, line of cases from the district courts of appeal holding that small-scale comprehensive plan amendments are legislative in nature. *Martin County v. Yusem*[11] left for future consideration the question whether small-scale amendments would be found more in the nature of a quasi-judicial (policy application) or legislative (policy formulation) decision.[12] As the appellate courts applied the standards announced in *Yusem*, each found the land use decisions before them to be legislative.[13] In *Fleeman v. City of St. Augustine Beach*,[14] the court reasoned that

> even a small-scale development amendment requires a legislative, policy decision. Although it is true that the amount of land involved in the proposed amendment in this case is small, it is also true that the location of the land, on a major thoroughfare, close to the ocean, and perhaps near environmentally sensitive land, surely implicates important policy concerns which are better left to the legislative body, with limited judicial review.[15]

---

8. *E.g. Hernando County v. Leisure Hills, Inc.*, 689 S.2d 1103, 1104 (Fla. Dist. App. 5th 1997) (decision sought "was more legislative than judicial"); *Machado v. Musgrove*, 519 S.2d 629, 632 (Fla. Dist. App. 3d 1988) (holding that a "zoning action is an exercise of legislative power to which a reviewing court applies the . . . 'fairly debatable test'").

9. *Martin County v. Yusem*, 690 S.2d 1288, 1293 (Fla. 1997); *Thomas v. Suwannee County*, 734 S.2d 492, 494 n. 1 (Fla. Dist. App. 1st 1999).

10. *Snyder*, 627 S.2d at 474.

11. 690 S.2d 1288 (Fla. 1997).

12. *Id.* at 1293 n. 6.

13. *E.g. Minnaugh v. County Commn. of Broward County*, 752 S.2d 1263, 1265–1266 (Fla. Dist. App. 4th 2000); *Palm Springs Gen. Hosp., Inc. v. City of Hialeah Gardens*, 740 S.2d 596, 596 (Fla. Dist. App. 3d 1999); *Coastal Dev. of N. Fla. Inc.*, 730 S.2d at 794; *Fleeman v. City of St. Augustine Beach*, 728 S.2d 1178, 1180 (Fla. Dist. App. 5th 1998).

14. 728 S.2d 1178 (Fla. Dist. App. 5th 1998).

15. *Id.* at 1180.

A few months later, the First District Court of Appeal applied similar reasoning in *City of Jacksonville Beach v. Coastal Development of North Florida, Incorporated.*[16] There, the court ruled:

> It seems to us that *all* comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application. Regardless of the scale of the proposed development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. This will, in turn, require that it consider the likely impact that the proposed amendment would have on traffic, utilities, other services, and future capital expenditures, among other things.... Such considerations are different in kind from those which come into play in considering a rezoning request.[17]

Both the *Fleeman* and *City of Jacksonville Beach* decisions also recognized that a contrary approach would add confusion to the very legal issue that the supreme court sought to put to rest in *Yusem*. As the *Fleeman* court observed, "How small must the parcel be? How many other people must be affected?"[18]

The Third District Court of Appeal followed the reasoning in those two cases in *Palm Springs General Hospital, Incorporated v. City of Hialeah Gardens*.[19] The court also joined in certifying to the Florida Supreme Court the question whether all small-scale plan amendments are legislative in nature, calling for de novo rather than certiorari review.[20]

The Fourth District Court of Appeal recently followed the lead of the other three courts. In *Minnaugh v. County Commission of Broward County*,[21] the court agreed that decisions on small-scale amendments are legislative and joined the other district courts in certifying the question to the Florida Supreme Court.[22]

The strong opinions of the appellate courts in this area suggest that the more flexible legislative procedural requirements will apply

---

16. 730 S.2d 792, 794 (Fla. Dist. App. 1st 1999).
17. *Id.* (emphasis in original).
18. 728 S.2d at 1180.
19. 740 S.2d 596, 596 (Fla. Dist. App. 3d 1999) (affirming the circuit court's dismissal of a petition for certiorari challenging a small-scale plan amendment).
20. *Id.*
21. 752 S.2d 1263 (Fla. Dist. App. 4th 2000).
22. *Id.* at 1265–1266.

to the small-scale plan amendment decision-making process. However, the prudent practitioner should keep in mind that a small-scale amendment request that is travelling along the same path as a joint rezoning request may be placed at risk by an advocate's failure to observe the requirements of the quasi-judicial process. The strictures on ex parte communications in the quasi-judicial process, for example, may be applicable in a setting in which the small-scale amendment addresses exactly the same property and impacts as the rezoning request.

Other types of local government decision-making call for similar functional analysis before a decision is made about filing a challenge. A challenge to the facial validity of a zoning regulation, for example, must be raised in an original proceeding due to the regulation's legislative character.[23] Even though the controverted issue may arise in the context of an individual zoning application, the facial validity of the underlying regulation may not be attacked in the context of a quasi-judicial proceeding or in any appeal that follows.[24] The courts are clear that an applicant may not seek relief under procedures established by a regulation and later claim that the very procedures that the applicant invoked were unconstitutional or otherwise invalid.[25]

Advisory decisions of local boards also call for care. Often advisory boards are established to review and comment on proposed developments. These boards do not make any final or binding decision approving or rejecting an application for development, but only render focused or expert advice to the final decision-making body. Examples of such boards include advisory architectural and design review boards. Although their legal role is limited to an advisory capacity, these boards, by virtue of their members' expertise or the political significance of the matters on which they advise, frequently exert a powerful influence on the ultimate decision.

Nonetheless, the recommendation by an advisory board is not a final, quasi-judicial decision reviewable through appellate certiorari. The appellate rules call for finality in the orders to be reviewed. Rule 9.100(c) expressly established rendition of the quasi-judicial order as the date from which the appellate deadline for

---

23. *Nostimo, Inc. v. City of Clearwater*, 594 S.2d 779, 782 (Fla. Dist. App. 2d 1992); *Hirt v. Polk County Bd. of County Commrs.*, 578 S.2d 415, 417 (Fla. Dist. App. 2d 1991).

24. *Nostimo*, 594 S.2d at 782.

25. *Id.*; *Hirt*, 578 S.2d at 417.

filing a petition is measured.[26] Rendition, in turn, is defined as the event that occurs "when a signed, written order is filed with the clerk of the lower tribunal."[27] Because advisory recommendations are not "orders" allowing or denying development and are not filed with the clerk of the board as a permanent record of the final decision, such advisory recommendations are not appealable.[28]

II. ESTABLISHING A FACTUAL FOUNDATION FOR THE LAND USE DECISION

A. The Burden of Proof in a Quasi-judicial Case

The Florida Supreme Court, in *Board of County Commissioners of Brevard County v. Snyder*,[29] plainly and succinctly enunciated the evidentiary burden in a quasi-judicial land use case.

> Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that *the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance.* At this point, the burden shifts to the governmental board to demonstrate that *maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose.* In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application should be denied.[30]

This simple statement of the law imposes substantial obligations on land use law practitioners, with potentially enormous consequences for their clients. These obligations fall upon the applicants' counsel, counsel for objecting parties, and government counsel. Failure or inability to marshal or present the requisite

---

26. Fla. R. App. P. 9.100(c) (2000).

27. *Id.* at R. 9.020(h) (2000).

28. In extreme instances of irreparable injury arising from an advisory board's decision-making, an extraordinary writ may be sought in the circuit court under the court's original jurisdiction. *Id.* at R. 9.030(c)(3) (2000). Also, interlocutory review may be sought before the appellate court in a narrow class of specified matters, pursuant to Rule 9.130. *Id.* at R. 9.130(a)(3) (2000).

29. 627 S.2d 469 (Fla. 1993).

30. *Id.* at 476 (emphasis added).

evidence will not only have direct consequences for the particular application at hand, but may also affect future use of the property that is the subject of the application (through, for example, the doctrine of administrative res judicata, local limitations periods barring refiling of applications, or claims for inverse condemnation). It is therefore critical to understand what these burdens of proof require.

1. The Applicant's Burden

First, applicant's counsel must address the local comprehensive plan's requirements, by identifying all provisions pertinent to the application, including textual provisions, and then by gathering the requisite evidence to establish consistency. With a view toward possible future appeal, the practitioner must bear in mind the strict scrutiny standard of review for consistency established by *Machado v. Musgrove*[31] and adopted in *Snyder*.[32] Once established by facts on the record and accepted by the local governing body, consistency with the local plan can be defended in a future judicial challenge. Conversely, failure to establish a record demonstrating consistency with the comprehensive plan provides an ample basis for reversal, even when the zoning code lacks relevant criteria upon which to deny an application.[33]

The applicant's obligation to establish consistency with the comprehensive plan is a continuing one at every stage of development approval. Even where a city council had given final zoning approval allowing a mixed-use project, the applicant who subsequently requested a site plan approval for the project was again required to prove consistency for the development. At the hearing on the site plan request, the city council found that the applicant had not continued to show that the mixed-use project would be consistent as it was located on land marked in the plan for a single type use. A newly elected council rejected the site plan. On certiorari review, the circuit court reversed, finding that the issue of consis-

---

31. 519 S.2d 629, 632 (Fla. Dist. App. 3d 1988).

32. 627 S.2d at 475.

33. *See e.g. Buck Lake Alliance, Inc. v. Bd. of County Commrs. of Leon County*, 765 S.2d 124, 127 (Fla. Dist. App. 1st 2000) (applicant must prove consistency with explicit plan provisions — goals, objectives and policies — not with ordinances implementing the plan provisions); *Franklin County v. S.G.I. Ltd.*, 728 S.2d 1210, 1211 (Fla. Dist. App. 1st 1999) (affirming local government's determination that a proposed development was inconsistent with the comprehensive plan because there was evidence that development could harm a nearby oyster bed).

tency had been decided previously when the project's zoning was determined. The Third District Court of Appeal reversed the circuit court decision, holding that each and every development plan was required to be consistent with the comprehensive plan.[34] No deprivation of due process occurred under that scenario.[35]

The proper forum for challenging consistency remains less than completely clear. Although Florida Statutes Section 163.3215 purports to be the exclusive avenue for challenging consistency, a prudent practitioner will be prepared for consistency challenges either on certiorari review or in original actions under the statute.[36] Because standing to bring a Section 163.3215 action is often a cloudy issue,[37] it may be in the interest of both the applicant and the objector to contest the matter of consistency at the quasi-judicial stage and on certiorari review rather than to endure lengthy and expensive litigation only to find out that the objector lacks standing to bring an original action. These factors, too, command strict attention to evidentiary detail at the quasi-judicial stage.

After establishing consistency with the comprehensive plan, the applicant must next present evidence that the application satisfies the substantive requirements of the local zoning ordinance for the particular type of zoning relief sought. This requirement means that

---

34. *Village of Key Biscayne v. Tesaurus Holdings, Inc.*, 761 S.2d 397, 398 (Fla. Dist. App. 3d 2000).

35. *Id.*

36. *See Buck Lake Alliance*, 765 S.2d at 127 (declining to apply the doctrine of collateral estoppel because the particular questions of plan consistency had never been raised at the public hearing level and leaving open the prospect that consistency issues raised at the quasi-judicial level can be addressed finally on certiorari review).

37. *Compare e.g. Parker v. Leon County*, 627 S.2d 476, 479 (Fla. 1993) (Section 163.3215 action available only to "third-party intervenors," not landowners); *Fla. Rock Props. v. Keyser*, 709 S.2d 175, 177 (Fla. Dist. App. 5th 1998) (neither property ownership, business ownership, nor individual's quality of life in the jurisdiction was sufficient to grant standing under Section 163.3215); *Bal Harbour Village v. City of N. Miami*, 678 S.2d 356, 361 (Fla. Dist. App. 3d 1996) (Section 163.3215 claim was barred for failure to meet a strict statutory time deadline) *with e.g. Buck Lake Alliance*, 765 S.2d at 128 (must plead failure to comply with the procedural requirements of Section 163.3215 to sustain a defense based on failure to comply); *Putnam County Envtl. Council, Inc. v. Bd. of County Commrs. of Putnam County*, 757 S.2d 590, 594 (Fla. Dist. App. 5th 2000) (granting standing to environmental group to challenge the consistency of building a public school on private property); *Educ. Dev. Ctr., Inc. v. Palm Beach County*, 751 S.2d 621, 623 (Fla. Dist. App. 4th 1999) (requiring verification of preliminary complaint by only one plaintiff so long as the local government is informed of all parties to the proposed Section 163.3215 action and of the basis for their concerns); *Thomas*, 734 S.2d at 498 (holding that a premature Section 163.3215 action by concerned neighbors should not have been dismissed by the circuit court, but rather abated until requisite statutory time passed for filing the complaint).

the applicant or applicant's counsel must review the local code and applicable case law carefully to determine the specific requirements of the particular zoning requests at hand. *Snyder* endorsed, and did not abrogate, regulatory requirements for the approval of variances, rezonings, unusual uses, special exceptions, special permits, and indeed, the full panoply of potential local zoning actions.[38] Establishing consistency with the local comprehensive plan simply will not carry the day alone.[39]

On appellate review, the courts still enforce local code requirements by searching the record for the applicable criteria and for evidence to sustain the decision under those criteria.[40] Perhaps the most unpredictable evidentiary burdens for the applicant come with "planned developments" — negotiable zoning districts that afford professional zoning and planning staff considerable discretion in interpreting and applying the relevant zoning code provisions regulating such developments. An applicant seeking zoning approval in one of these categories will do well to remember that the courts defer to professional staff to interpret the provisions of the zoning code in the first instance and will reverse only when the interpretation is found to be "clearly erroneous."[41]

Occasionally, special land use regulatory requirements outside the local zoning code necessitate submission of evidence different from the usual fare. Federal regulation of the telecommunications field, for example, posed some novel requirements. The United

---

38. 627 S.2d at 475.

39. *Miami-Dade County v. Walberg*, 739 S.2d 115, 117 (Fla. Dist. App. 3d 1999) ("Although a zoning change may be consistent with the comprehensive plan, the landowner is not presumptively entitled to such use. Additionally, a property owner is not entitled to relief by proving consistency alone when the board action is also consistent with the comprehensive zoning plan.").

40. *E.g. Windward Marina, L.L.C. v. City of Destin*, 743 S.2d 635, 638–639 (Fla. Dist. App. 1st 1999) (observing that a local government's land use decisions must "be based on specific criteria set forth in its duly enacted land use regulations" and finding that the city had a sufficient reason to deny a proposed marina development under the "nuisance" criterion in its code, when the proposed marina would pose a risk to the safety of the boating public at the location requested); *City of Jacksonville v. Taylor*, 721 S.2d 1212, 1214 (Fla. Dist. App. 1st 1998), *rev. denied*, 732 S.2d 328 (Fla. 1999) (reversing the circuit court's grant of certiorari when the lower court erroneously ruled that the granting of prior variances near the application site required the city to grant the application at hand; the circuit court instead should have considered the criteria in the city's zoning code).

41. *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 S.2d 308, 312 (Fla. Dist. App. 4th 1999) (finding zoning staff's interpretation of the city's variable setback requirements of the central business zoning overlay district to be reasonable, although the applicant could not know precisely what the setback requirements would be before submitting proposed plans).

States Telecommunications Act of 1996[42] proscribes the introduction of evidence relating to certain environmental concerns in connection with the presence of telecommunication towers in a community. The Act further prohibits discrimination between telecommunication service providers in the granting of land use approvals and also prohibits creating a pattern of land use decisions that prevent the provision of personal wireless services in a community.[43] Furthermore, the Act requires that any land use decision be made on the basis of a written record.[44] If, however, these federal requirements are met, the local land use authority remains empowered to issue decisions based on applicable zoning regulations.[45]

In presenting the applicant's case, appropriate evidence must be collected to overcome any potential legal bars to the application, such as the doctrine of administrative res judicata.[46] Another potential bar to an application or subsequent challenge is the doctrine of exhaustion of administrative remedies. That doctrine requires a party wishing to preserve any argument to present it at the earliest opportunity and to continue to advance the argument through all stages of the proceeding.[47]

Recent case law confirms that establishing a case for estoppel against the local land use authority sufficient to require the granting of a zoning approval is very difficult.[48]

---

42. 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. 1998).

43. *Id.* § 332(c)(7)(B)(i).

44. *Id.* § 332(c)(7)(B)(iii).

45. *See e.g. Riverside Roof Truss, Inc. v. Bd. of Zoning App. of the City of Palatka*, 734 S.2d 1139, 1142 (Fla. Dist. App. 5th 1999) (holding that the "statute does not obviate the need to comply with local governmental requirements").

46. *E.g. Miller v. Booth*, 702 S.2d 290, 291 (Fla. Dist. App. 3d 1997) (affirming county commission's factual determination that the present application was sufficiently like the prior application and that the circumstances were sufficiently unchanged since the prior application, that doctrine of administrative res judicata should bar present application); *but see Shalimar Pointe Owners Assn. v. JMJ / Bayclub, Inc.*, 745 S.2d 1129, 1130 (Fla. Dist. App. 1st 1999) (holding that appellate litigation over issuance of a building permit was not barred by collateral estoppel where prior litigation did not involve the identical parties or anyone in privity with the present litigants).

47. *E.g. Sarasota County v. Kemper*, 746 S.2d 539, 541 (Fla. Dist. App. 2d 1999) (reversing circuit court's grant of certiorari on grounds that had not been raised at the administrative proceeding below); *Citrus County v. Fla. Rock Indus., Inc.*, 726 S.2d 383, 387 (Fla. Dist. App. 5th 1999).

48. *See City of Miami Beach v. S. Beach Ocean Parcel, Ltd.*, 1998 WL 842790 at *1 (Fla. Dist. App. 3d Dec. 2, 1998) (reversing the trial court's injunction against the city, thus preventing the application of repeatedly revised zoning regulations).

2. The Objectors' Burden

Objectors and their counsel must marshal evidence to show the converse of the applicant's case. Additionally, objectors must carefully observe the need to prove standing — the cornerstone of their right to present any case at all. The appellate courts still observe the requirement that a party seeking to prevent or overturn a zoning action must show an interest greater than the general public's interest at large.[49]

3. Local Government's Burden

The local government decision-making body typically does not present evidence, but rather, at the time of decision, must comb the record of the public hearing for facts to support approval or denial. If there are facts to support either approval or denial, the local government is vested with discretion to approve the application, approve less than that which was requested, or deny the application.[50] All that need be shown on appeal is that the record contains substantial competent evidence to support whatever alternative was chosen.[51] In the absence of any facts to establish that a particular

---

49. *E.g. Renard v. Dade County*, 261 S.2d 832, 837 (Fla. 1972); *Kern v. Miami-Dade County*, 766 S.2d 1080, 1080–1081 (Fla. Dist. App. 3d 2000) (disappointed zoning applicant who lost by a unanimous nine to zero vote of the county commission lacked standing to challenge the ordinance imposing a supermajority vote provision); *Wingrove Ests. Homeowners Assn. v. Paul Curtis Realty, Inc.*, 744 S.2d 1242, 1244 (Fla. Dist. App. 5th 1999) (granting neighboring homeowners associations standing to participate in certiorari review of the county's denial of the zoning application where member residents lived in close proximity to the proposed development); *Messett v. Cohen*, 741 S.2d 619, 622–623 (Fla. Dist. App. 5th 1999) (holding that a claim of an "obstructed view" was an insufficient basis to grant standing to a neighboring property owner who sought to challenge the zoning staff's interpretation of regulations without granting notice or an opportunity to be heard on the issue); *City of Sarasota v. Windom*, 736 S.2d 741, 743–744 (Fla. Dist. App. 2d 1999) (finding that plaintiffs lacked interest sufficiently different in kind from the public at large to give them standing to challenge the city's installation of traffic controls on city streets and observing that some remedies are to be found at the polls and not in the courts); *City of St. Petersburg Bd. of Adjustment v. Marelli*, 728 S.2d 1197, 1198 (Fla. Dist. App. 2d 1999) (holding that neighboring property owners had standing to participate in certiorari proceedings to review a variance from parking regulations for a laundromat and a restaurant; simultaneously denying a successful applicant's motion to intervene, holding that the applicant was not an indispensable party to certiorari review).

50. *Snyder*, 627 S.2d at 475 (quoting *Lee County v. Sunbelt Equities, II, Ltd. Partn.*, 619 S.2d 996, 1005–1006 (Fla. Dist. App. 2d 1993)).

51. *Id.* at 476.

decision accomplishes any legitimate public purpose, that decision cannot withstand appellate challenge.[52]

B. Substantial Competent Evidence

To sustain a zoning decision on appeal, the record must include evidence of sufficient quality and quantity to demonstrate that the comprehensive plan and zoning code criteria have been met. The standard for that quantum and nature of evidence has long been known as the "substantial competent evidence" standard.[53] Much discussion in the last several years has centered on what kind of evidence is substantial and competent enough to sustain a decision on appeal. Long ago the Florida Supreme Court defined substantial competent evidence as

> such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.[54]

Several recent cases have addressed specific forms of oral and documentary evidence often sought to be introduced at zoning hearings.

1. Lay Testimony

Some reluctance to rely on lay citizen testimony seems to have arisen in the years following *City of Apopka v. Orange County*,[55] which held that zoning decisions cannot be based on citizens' "wishes" or on a public opinion poll unsubstantiated by any competent facts.[56] Clarifying the scope of admissible lay testimony, the court in *Metropolitan Dade County v. Blumenthal*[57] explained as follows:

> Under the correct legal standard, citizen testimony in a zoning matter is perfectly permissible and constitutes

---

52. *Id.*

53. *Metro-Dade County v. Dusseau*, 725 S.2d 1169, 1171 (Fla. Dist. App. 3d 1998).

54. *De Groot v. Sheffield*, 95 S.2d 912, 916 (Fla. 1957).

55. 299 S.2d 657 (Fla. Dist. App. 4th 1974).

56. *Id.* at 659–660 (citing Robert M. Anderson, *American Law of Zoning* vol. 3, § 15.27, 155–156 (Law.'s Coop. Publg. Co. 1968)).

57. 675 S.2d 598 (Fla. Dist. App. 3d 1996).

> substantial competent evidence, so long as it is fact-based. Mere generalized statements of opposition are to be disregarded, but fact-based testimony is not.[58]

In *Blumenthal*, the lay testimony, which went to incompatibility of the proposed development, was found to be sufficient, based on essentially undisputed facts in the record about the density of adjacent existing development and already approved zoning around the subject site.[59] The only documentary information apparent from the face of the *Blumenthal* opinion included a diagram of existing development and zoning introduced by the lay witness without objection from the applicant and a county planning map of the general area.[60] Later cases would apply the *Blumenthal* principle to citizen testimony and other evidence in different settings, further explicating the standard.[61]

2. Records, Maps, and Reports

Besides forming a foundation for opinion testimony, maps, diagrams, reports, and other official records are substantial competent evidence in themselves sufficient to form a basis for zoning action. As the court remarked in *Blumenthal*,

---

58. *Id.* at 607 (citations omitted).

59. *Id.*

60. *Id.*

61. *See Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 S.2d 738, 739 (Fla. Dist. App. 3d 2000) (finding neighbors' testimony to be "factual, relevant and material" on the issue of compatibility of a proposed church and day care in the neighborhood, where six separate variances were needed to "shoehorn" the church onto a substandard parcel); *Walberg*, 739 S.2d at 116, 117 (finding neighbors' testimony and site map to constitute substantial competent evidence upon which to uphold the denial of the zoning application); *Metro. Dade County v. Sec. 11 Prop. Corp.*, 719 S.2d 1204, 1205 (Fla. Dist. App. 3d 1998), *rev. denied*, 735 S.2d 1287 (Fla. 1999) (upholding the county commission's denial of a special exception for a mini self-storage facility, based on lay testimony on incompatibility, plus documentary evidence of record, including a proposed site plan, elevation drawings, and an aerial photograph introduced by the applicant); *Metro. Dade County v. Sportacres Dev. Group, Inc.*, 698 S.2d 281, 282 (Fla. Dist. App. 3d 1997) (approving the county commission's denial of a zoning application based in part on lay testimony that the proposed development would be incompatible with the existing adjacent community, bolstered by maps and other zoning records); *but see Jesus Fellowship, Inc. v. Miami-Dade County*, 752 S.2d 708, 709–710 (Fla. Dist. App. 3d 2000) (zoning maps, photographs, lay testimony on development's prospective traffic generation, and evidence of past violations on the property were not relevant, competent evidence to support a restriction on the number of private school students allowed when churches and schools were allowed as special exceptions).

> This court has said that in a zoning matter, it is appropriate to consider whether the proposed zoning "is consistent with the properties adjacent to [the to-be-rezoned] property and is consistent with the actual development of the area."[62]

It therefore will behoove all parties to make sure that such documentary evidence is not only shown to the decision-maker, but also preserved for the record.

3. Expert Testimony

The opinions and recommendations of professional planning and zoning staff, which are deemed expert testimony, clearly constitute substantial competent evidence sufficient to sustain a decision.[63] Of course, the local zoning authority is not required to follow a professional staff's recommendations when other evidence of record supports a contrary result.[64]

Although not typically offered as often as expert testimony on behalf of applicants, expert testimony provided by citizens and objectors during the public hearing also is admissible.[65]

Once the appropriate body of evidence has been collected and prepared for submission, the land use practitioner must consider at what point and in what order in the proceedings to present the evidence to make the best case.

---

62. 675 S.2d at 605 (quoting *Dade County v. Inversiones Rafamar, S.A.*, 360 S.2d 1130, 1132 (Fla. Dist. App. 3d 1978) (alteration in original).

63. *E.g. Hillsborough County Bd. of County Commrs. v. Longo*, 505 S.2d 470, 471 (Fla. Dist. App. 2d 1987) (expert staff testimony admissible on the issue of character of an area and compatibility); *Riverside Group, Inc. v. Smith*, 497 S.2d 988, 990 (Fla. Dist. App. 5th 1986); *Alachua County v. Eagle's Nest Farms, Inc.*, 473 S.2d 257, 260–261 (Fla. Dist. App. 1st 1985) (staff testimony admissible on whether an airstrip would impair a comprehensive plan provision regarding the compatibility of proximate land uses).

64. *E.g. Solomon v. Metro. Dade County*, 253 S.2d 886, 886–887 (Fla. Dist. App. 3d 1971).

65. *E.g. Walberg*, 739 S.2d at 116 (approving denial of zoning application based in part on the testimony of a registered professional engineer, general contractor, and environmental consultant who testified about the aesthetics of a proposed new elevated development); *City of Ft. Lauderdale v. Multidyne Med. Waste Mgt., Inc.*, 567 S.2d 955, 957 (Fla. Dist. App. 4th 1990) (veterinarian objecting to application appropriately testified as an expert regarding the dangers inherent in dealing with medical waste); *Salvation Army v. Bd. of County Commrs., Metro. Dade County*, 523 S.2d 611, 612–613 (Fla. Dist. App. 3d 1988) (architectural expert presented admissible testimony on the incompatibility of a proposed project).

III. PROCEDURAL REQUIREMENTS FOR QUASI-JUDICIAL PROCEEDINGS

Once the decision-making event is identified as quasi-judicial and procedural due process kicks in, "the question remains what process is due."[66] The answer lies in the "balancing of the competing interests at stake."[67] The familiar triad of notice, opportunity to be heard, and an impartial decision-maker always will be present, but the degree of each will vary with "the competing interests involved."[68]

A. Notice

Prior notice of proposed decision-making that will affect a party's interest must include enough information to give the party a fair opportunity to prepare and respond.[69] This requirement means that a local government can never "expand[] the scope of a hearing to address and determine matters not noticed for hearing."[70] If less than the full property at issue is advertised, the local government should defer the hearing and readvertise. Further, "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties."[71] Thus, when a city had actual notice of the correct address of a party, the city's failure to send notices of lien foreclosure required the foreclosure to be set aside.[72]

A defect in notice has serious potential consequences. The Florida Supreme Court in *Renard v. Dade County*[73] placed no deadline for seeking to set aside an improperly noticed decision-making event. Further, even a subsequent de novo administrative

---

66. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

67. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

68. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

69. *Morgan v. U.S.*, 304 U.S. 1, 18–19 (1938); *Metro. Dade County v. P.J. Birds, Inc.*, 654 S.2d 170, 180 (Fla. Dist. App. 3d 1995) (written staff reports issued well in advance of historic preservation designation hearing provided adequate notice of matters under consideration).

70. *Epic Metals Corp. v. Samari Lake E. Condo. Assn.*, 547 S.2d 198, 198 (Fla. Dist. App. 3d 1989).

71. *Quay Dev., Inc. v. Elegante Bldg. Corp.*, 392 S.2d 901, 903 (Fla. 1981).

72. *Little v. D'Aloia*, 759 S.2d 17, 20 (Fla. Dist. App. 2d 2000); Debra Belniak Tuomey, Student Author, *Recent Developments*, 30 Stetson L. Rev. 1090, 1090–1092 (2001) (providing a summary of *Little*).

73. 261 S.2d 832, 838 (Fla. 1972).

hearing may not cure the impact of a notice error.[74] However, recent cases seem to turn on whether technical defects caused prejudice to the party who did not receive proper notice and state that a defect in procedural requirements may be cured by a subsequent de novo hearing.[75]

B. Fair Opportunity to Be Heard

1. Right to a Fair and Orderly Hearing Process

Interested parties are not entitled to a full blown trial in a quasi-judicial proceeding, but are entitled to a fair opportunity to be heard in person and through counsel, to have an opportunity to rebut the case against their interests, and to be heard fully before any final decision is reached.[76] Thus, the right to rebut the opposition's case, combined with the shifting burden of proof prescribed in *Snyder*,[77] suggests fairly strict adherence to a prescribed order of presentation similar to the following:

1. applicant's case;
2. supporters' case;
3. objectors' case;
4. other interested parties' participation;
5. optional comments by professional staff;
6. rebuttal by applicant;
7. deliberation and questions by the board; and
8. final determination by the board.

Board members should be discouraged from articulating any tentative position before all the evidence is received.

---

74. *E.g. Gulf & E. Dev. Corp. v. City of Ft. Lauderdale*, 354 S.2d 57, 61 (Fla. 1978) (setting aside the city commission's de novo rezoning decision when objecting neighbors failed to receive prior notice of the advisory planning and zoning board hearing).

75. *See e.g. City of Jacksonville v. Huffman*, 764 S.2d 695, 696–697 (Fla. Dist. App. 1st 2000) ("Although strict compliance with statutory notice requirements is mandatory, a contesting party's right to assert a defect in such notice may be waived if the party appeared at the hearing and was able to fully and adequately present his or her objections.").

76. *Morgan*, 304 U.S. at 18–19.

77. 627 S.2d at 476.

2. Right to Representation by Counsel

The right to representation by counsel may or may not extend to representation by "zoning consultants" or other laypersons. For the protection of local boards, any nonlawyer representative should be required to have the represented party, if present, verify consent to the representation. If the represented party is not present, a nonlawyer representative should present a properly executed power of attorney authorizing the representation. A nonlawyer representative who fails to do either probably is not legally authorized to bind the party as to waiver of procedural informalities, agreement to conditions on a zoning request, agreement to deferrals or continuances, withdrawals of applications, or other significant matters.

Noteworthy is the fact that representation by legal counsel apparently may affect the represented party's claim of due process deprivation.[78]

3. Language Barriers

A non-English speaking party who is unable to understand the proceedings or speak on his or her own behalf is entitled to a translation of the proceedings. Ideally, the translation should be performed by a qualified interpreter who has taken an interpreter's oath.[79]

4. The Right to Present Evidence

The rules of evidence are not strictly observed in administrative proceedings.[80] Whether and how evidence is presented often "boils down to a question of fundamental fairness."[81] A series of often-asked questions about evidence follows, with answers derived from relevant case law.

---

78. *P.J. Birds*, 654 S.2d at 179.

79. Florida Statutes Section 90.606 requires that witnesses in court proceedings who cannot speak or understand English be provided with an interpreter who has been sworn to translate for them. Fla. Stat. § 90.606(1)(a) (2000). It seems prudent to ensure similar processes are followed in quasi-judicial proceedings.

80. *E.g. Jones v. City of Hialeah*, 294 S.2d 686, 687–688 (Fla. Dist. App. 3d 1974).

81. *Id.* at 688.

1. Can a party require attendance of witnesses and compulsory production of documents? Probably, if the request for subpoenas is timely and the need for the testimony or document is real.[82]

2. Is prior discovery required? Probably not, especially when no authorization for it exists.[83]

3. Must witnesses be sworn? Probably, since the oath presumably affects the competence of the evidence. Although the Second District Court of Appeal stated in *City of St. Petersburg v. Cardinal Industries Development Corporation*,[84] that swearing of witnesses was not required, it found in another case that the absence of sworn testimony contributed to a conclusion that the hearing at issue was not even quasi-judicial.[85] Similarly, the court in *City of Apopka* sharply criticized the Board of County Commissioners's failure to swear witnesses.[86] Some jurisdictions deal with this potentially sensitive issue by swearing in all witnesses, including professional staff, en masse at the start of the zoning meeting.

4. Must cross-examination of adverse witnesses be allowed? Probably. *Board of County Commissioners of Hillsborough County v. Casa Development Limited, II*[87] required an opportunity for cross-examination.[88] *City of Apopka* criticized the absence of this opportunity.[89] Failure to allow cross-examination upon request opens the local government's decision to attack.[90] The court in *Jennings v. Dade County*[91]

---

82. *Drogaris v. Martine's, Inc.*, 118 S.2d 95, 97 (Fla. Dist. App. 1st 1960).

83. *State ex rel. Vining v. Fla. Real Est. Commn.*, 281 S.2d 487, 492 (Fla. 1973).

84. 493 S.2d 535, 538 (Fla. Dist. App. 2d 1986).

85. *Bd. of County Commrs. of Hillsborough County v. Casa Dev. Ltd., II*, 332 S.2d 651, 654 (Fla. Dist. App. 2d 1976).

86. 299 S.2d at 660.

87. 332 S.2d 651 (Fla. Dist. App. 2d 1976).

88. *Id.* at 654.

89. 299 S.2d at 660.

90. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170–171 (1988) (holding that cross-examination of a witness is necessary to prevent the creation of a distorted perception of his testimony).

91. 589 S.2d 1337 (Fla. Dist. App. 3d 1991).

considered cross-examination an essential element of due process.[92]

5. Is hearsay evidence admissible? Yes, but such evidence will be insufficient on its own to support a decision if the hearsay proffered would not be admissible over objection under the rules of evidence; hearsay evidence can, however, be used to support other substantial competent evidence.[93]

6. Is lay testimony admissible? Yes, fact and even opinion testimony are admissible if such testimony is based upon fact.[94]

5. Right to Be Heard and Obtain a Final Decision on a Timely Basis

Sometimes the adjudicatory process consumes years. Two cases decided in the 1990s seem to relieve local governments of the costs to developers associated with litigation delay even when the local government is ultimately proved wrong.[95] Future litigation must reconcile those decisions, however, with other recent decisions granting damages for temporary takings when challenged land use regulations are stricken as arbitrary and unrelated to a legitimate state interest.[96]

---

92. *Id.* at 1340.

93. *Spicer v. Metro. Dade County*, 458 S.2d 792, 794 (Fla. Dist. App. 3d 1984); *see Beech Aircraft*, 488 U.S. at 170 (admitting government records under hearsay exception in federal rules); *Jones*, 294 S.2d at 688 (admission of hearsay evidence is "a question of fundamental fairness").

94. *E.g. Section 11 Prop. Corp.*, 719 S.2d at 1205 (lay opinion testimony on aesthetics admissible); *Sportacres Dev. Group, Inc.*, 698 S.2d at 282 (lay opinion on compatibility admissible); *Blumenthal*, 675 S.2d at 607; *but see Chon v. Lake County Bd. of County Commrs.*, 682 S.2d 696, 696 (Fla. Dist. App. 5th 1996) (neighbors' protest letters, apparently not fact-based, were insufficient to constitute competent evidence).

95. *Mandelstam v. City of S. Miami*, 685 S.2d 868, 869–870 (Fla. Dist. App. 3d 1997); *Jacobi v. City of Miami Beach*, 678 S.2d 1365, 1367 (Fla. Dist. App. 3d 1996).

96. *See generally City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 720–721 (1999) (granting right to jury trial in 42 U.S.C. § 1983 (1994) claim when the local government had denied five different development applications on the same parcel).

6. Record of Proceedings

The burden is on the appellant to preserve the record.[97] Prudent practitioners will therefore ensure an accurate record of the zoning hearing proceedings, including preservation of relevant exhibits, written staff recommendations, and a transcript of testimony, because appellate courts will not review matters outside the zoning record.[98]

Some local government jurisdictions take special care to include the record of pertinent advisory board proceedings (including transcripts of prior proceedings) in their own record, as well as prior zoning history and zoning maps of record. These materials can provide a wealth of factual evidence to help sustain a board's decision.

7. Findings

Under *Snyder*, findings of fact clearly are not required.[99] Some authorities nonetheless suggest they may be useful to rebut "charges of arbitrariness or improper motive" and to establish consistency with the land use plan.[100]

8. Necessity of a Written Final Decision

Issuing a final written decision on every development application, whether for approval or denial, has substantial merit for the local zoning authority and the parties. Among the advantages are a clear date of final order entry to start the appeal clock ticking, a definitive ruling on the application, and a clear record of the local

---

97. *E.g. DiPietro v. Coletta*, 512 S.2d 1048, 1050 (Fla. Dist. App. 3d 1987).

98. *See generally Baez v. Padron*, 715 S.2d 1128, 1128 (Fla. Dist. App. 3d 1998) (appellant's duty to present record for appellate review; in the absence of an adequate record, appellate court was unable to resolve issues); *Metro. Dade County v. Hernandez*, 708 S.2d 1008, 1010 n. 2 (Fla. Dist. App. 3d 1998) (no consideration of matters outside record, even where proof of dog's death would have foreclosed need for rabies vaccination); *Hammock v. DeFrancesco*, 699 S.2d 342, 342 (Fla. Dist. App. 5th 1997) (appellate court unable to determine if lower tribunal erred when the record contained no transcript or stipulated statement of evidence).

99. 627 S.2d at 476.

100. *Sunbelt Equities, II, Ltd.*, 619 S.2d at 1002.

government's full decision, devoid of extraneous, individual board members' comments.[101]

9. Rehearing, Reconsideration, and Reformation

Generally, administrative boards may correct or amend their decisions prior to the time the decision has been appealed.[102] In zoning, however, the best practice is not to allow rehearing or reconsideration after the public hearing and vote on an item are over, particularly if the next item on the agenda has been called. Serious due process problems may arise if proceedings begin again after interested parties have left. A potential appropriate cure would be either to ask the appellate court for a remand if the decision is appealed or to direct staff to file a new application expeditiously.

C. Right to an Impartial Decision-Maker

1. Hearing All the Evidence

Board members sitting in a quasi-judicial capacity should hear all the evidence.[103] It may be permissible for an absent board member to review videotapes or audiotapes or to read a complete transcript in order to participate in the vote.

2. Combining Investigation or Prosecution and Decision-Making

Generally, quasi-judicial board members should not testify at the hearing, should not engage in independent fact-finding, and should not expect staff or counsel to act as both advocate and advisor.[104] However, this analysis must be performed on a case-by-

---

101. *E.g. Blumenthal*, 675 S.2d at 604 ("It is axiomatic that the County Commission speaks through its written Resolution.... It is the collective ruling of the Board, as expressed in the County Commission Resolution, which is at issue here.").

102. *Vey v. Bradford Union Guidance Clinic, Inc.*, 399 S.2d 1137, 1138 (Fla. Dist. App. 1st 1981) (citing *Mills v. Laris Painting Co.*, 125 S.2d 745 (Fla. 1961)).

103. *Morgan v. U.S.*, 298 U.S. 468, 480 (1936).

104. *Cherry Commun., Inc. v. Deason*, 652 S.2d 803, 805 (Fla. 1995); *Ridgewood Props., Inc. v. Dept. of Community Affairs*, 562 S.2d 322, 323 (Fla. 1990).

case basis. Not every dual role by an administrative official or employee will violate procedural due process requirements.[105]

3. Ex Parte Communications

The supreme court still has not approved definitely the proscription on ex parte communications and presumption of prejudice dictated by the *Jennings* court,[106] but the court did make reference to a portion of *Jennings* in *Snyder*.[107] Thorough preparation demands a clear understanding of how the local jurisdiction addresses the *Jennings* restriction, including whether the local authority has adopted any measures to limit the reach of *Jennings*, such as pursuant to Florida Statutes Section 286.0115.[108] The prudent practitioner also carefully will consider whether any such measures can circumvent the federal and state due process principles from which the *Jennings* court derived its prohibition on ex parte communication.[109]

4. No Contract Zoning

Quasi-judicial board members may not contract away their due process obligations to conduct an impartial zoning hearing with full notice and an opportunity for all potential interested parties to be heard.[110] However, the courts continue to validate voluntarily proffered restrictive covenants provided by zoning applicants as an inducement to the zoning authority to grant the relief requested.[111]

---

105. *E.g. GTECH Corp. v. State Dept. of Lottery*, 737 S.2d 615, 621 (Fla. Dist. App. 1st 1999) (holding that no due process violation occurred simply because the agency head had "exercised executive and quasi-judicial functions in the same case"); *Fla. Rock Indus., Inc.*, 726 S.2d at 387–388 (holding that evidence did not support a finding of a due process violation, when the county attorney provided legal advice to county development Department, litigated on behalf of the county before an independent hearing officer, then advised Department again on reconsideration).

106. 589 S.2d at 1341.

107. 627 S.2d at 472.

108. *See* Fla. Stat. § 286.0115(1)(a) (2000) (permitting cities and counties to adopt ordinances that eliminate the "presumption of prejudice from ex-parte communications with local public officials" if the ordinance also prescribes procedures for disclosing such communications).

109. 589 S.2d at 1340–1341.

110. *Chung v. Sarasota County*, 686 S.2d 1358, 1359–1360 (Fla. Dist. App. 2d 1996).

111. *E.g. Metro. Dade County v. Fontainebleau Gas & Wash, Inc.*, 570 S.2d 1006, 1006–1007 (Fla. Dist. App. 3d 1991).

The courts have not hesitated to enforce such restrictive covenants years after their proffer and acceptance.[112]

D. Procedural Practice Pointer

Practitioners should stay to wrap up after the zoning hearing. At the conclusion of the zoning hearing, the practitioner's job is not over. The only meaningful chance to ensure that the record is properly preserved occurs immediately following the hearing. This important task is easy to forget in the thrill of victory or the agony of defeat, but if this chance is lost, there may be costly and time-consuming battles in the appellate court over the record. The careful practitioner will stay to ensure that the following items are safely lodged with the local government clerk or the court reporter, as appropriate and depending on local practice:

1. all documentary evidence, including large exhibits, maps, and photographs;

2. pertinent provisions of the comprehensive plan and the zoning code (which should have been photocopied and presented at the hearing);

3. the court reporter's notes for the transcript; and

4. the professional staff recommendations.

Even if the local government is experienced and generally reliable about maintaining the record, the practitioner should take a quick look at what is being preserved. It is easy to overlook that the opposing party has accidentally walked away with a large exhibit that the party had brought to the hearing. Taking a moment may save literally hours of effort before the appellate court, which likely will not be thrilled about sorting out a record dispute between the parties. Additionally, the court will cast a greater burden on the applicant, since it is clearly the duty of the applicant to preserve the record for judicial review.[113]

---

112. *Imperial Golf Club, Inc. v. Monaco*, 752 S.2d 653, 654 (Fla. Dist. App. 2d 2000) (enforcing a restrictive covenant prohibiting construction that blocked a golf course view).

113. Fla. R. App. P. 9.100(g)(4), 9.190(c)(4), 9.220 (2000).

IV. SUSTAINING A ZONING DECISION AGAINST JUDICIAL CHALLENGE

A. Certiorari Procedure

Competent handling of a certiorari challenge to a quasi-judicial decision begins with a clear grasp of the applicable appellate procedural rules.[114]

Rule 9.190, adopted in 1996 and approved in final form in 1997, governs judicial review of administrative actions. Rule 9.190(b)(3) expressly provides the mechanism for judicial review of all administrative actions for which general law does not prescribe review by appeal. In such instances, including all quasi-judicial zoning decisions, the appropriate review mechanism is by petition for certiorari in accordance with the requirements of Rules 9.100(b) and (c). De novo, original actions in the trial court are not available for reviewing quasi-judicial administrative actions.[115]

1. Applicable Appellate Rules

The appellate rules with greatest particular pertinence to certiorari review of quasi-judicial decisions include Rules 9.100(c), (f), (g), (h), (i), (j), and (k), which concern appellate certiorari procedures before all courts with equitable jurisdiction; Rule 9.190, which specifically addresses the process for judicial review of administrative action; Rule 9.210, which concerns form, contents, deadlines, and filing requirements for briefs; and Rule 9.220, which provides for preparation and filing of an appendix.

2. Jurisdictional Deadline for Invoking Circuit Court's Review

The deadline for filing a request for certiorari review is precisely thirty days after rendition of the lower tribunal's written order.[116] Failure to file by that deadline irreversibly forecloses certiorari

---

114. All references to rules in Part IV of the text are to the Florida Rules of Appellate Procedure.

115. *E.g. Am. Riviera Real Est. Co.*, 735 S.2d at 528; *Grace v. Town of Palm Beach*, 656 S.2d 945, 945 (Fla. Dist. App. 4th 1995).

116. Fla. R. App. P. 9.100(c).

review.[117] Practitioners who consider relying on recent Florida legislature efforts to suspend that jurisdictional deadline will do well to weigh the exclusive constitutional authority of the Florida Supreme Court to establish the time for filing an appeal against the legislature's presumed authority to pass laws suspending the deadline.[118]

3. Petition Required to Be Filed Timely

Filing a complete petition is the exclusive manner of invoking certiorari review.[119] A notice of appeal will not suffice. The petition must include the following: "(1) the basis for invoking the jurisdiction of the court; (2) the facts on which the petitioner relies; (3) the nature of the relief sought; and (4) argument in support of the petition and appropriate citations of authority."[120] An appendix containing record documents relevant to the relief sought, including the order to be reviewed, must be included if an order is sought directing the reversal of the decision below.[121] The petition must "contain references to the appropriate pages of the supporting appendix."[122]

It is often difficult to draft and file a thorough petition together with a complete appendix and citations to that appendix, all within the thirty-day jurisdictional deadline. The practitioner who faces a nearly insurmountable challenge in extracting the pertinent documents from the local government and copying those documents for inclusion in the appendix may consider filing an abbreviated petition that contains the essential elements prescribed by the rules and at the same time informing the court that, with its leave, a more complete petition and appendix will be filed shortly. In this manner, the thirty-day jurisdictional deadline will be respected, and

---

117. *E.g. Battaglia Fruit Co. v. City of Maitland*, 530 S.2d 940, 943 (Fla. Dist. App. 5th 1988) (quashing an order that granted a petition of certiorari because the petition was not filed within the thirty-day period prescribed in Rule 9.100(c)).

118. *See e.g. Florida Land Use and Environmental Dispute Resolution Act*, Fla. Stat. § 70.51 (2000) (purporting to toll the deadline for seeking certiorari review pending disposition of a mandatory post-quasi-judicial decision mediation process); *Poulos v. Martin County*, 700 S.2d 163, 164–165 (Fla. Dist. App. 4th 1997) (holding that Florida Statutes Section 163.3215 had to be read to create a new, de novo cause of action; otherwise, the statute's built-in prerequisites to suit would have created an unconstitutional statutory delay in excess of the appellate rules' thirty-day deadline for filing a petition for certiorari).

119. Fla. R. App. P. 9.100(b), 9.190(b)(3).

120. *Id.* R. 9.100(g).

121. *Id.*; *id.* R. 9.220.

122. *Id.* R. 9.100(g).

the court's authority over the case will not be subject to challenge. The possibility that the court will deny the right to file an amended petition will encourage the most complete initial petition possible, but if genuine constraints that are not self-induced are explained to the court, the possibility is substantial that the court will grant leave to amend.[123]

4. The Appendix

It is the petitioner's responsibility to prepare and file the appendix as required by the appellate rules.[124] The clerk of the zoning authority is specifically excused from the requirement to prepare a record or record index as would be required in an appeal from a trial court decision.[125] An advocate for a party who is preparing the appendix may face the temptation to include documents or other matters that were not part of the record before the zoning authority below to bolster the party's position. Including those matters, however, is expressly forbidden by the rules, which provide that "the record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court."[126] Ignoring that plain requirement may subject the petitioner to sanctions. By express appellate rule, the official record is not to be transmitted to the reviewing court unless the court orders it.[127]

5. Order to Show Cause

The respondent need not provide the court with a response to the petition unless the court so requires through an order to show cause.[128] Generally, the appellate court will issue an order if the petition states "a preliminary basis for relief [or] a departure from the essential requirements of law."[129] In issuing an order to show

---

123. *N. Beach Assn. of St. Lucie County, Inc. v. St. Lucie County*, 706 S.2d 62, 63 (Fla. Dist. App. 4th 1998) (allowing the circuit court to consider an amended petition for certiorari and quoting the 1997 committee note to 9.040(d) which provides that "[a]mendments should be liberally allowed under this rule . . . if it would not result in irremediable prejudice").

124. Fla. R. App. P. 9.100(g).

125. *Id.* R. 9.190(c)(4).

126. *Id.* R. 9.190(c).

127. *Id.* R. 9.100(i).

128. *Id.* R. 9.100(h).

129. *Id.*

cause, the court will set a date for filing a response.[130] Unlike the initial petition, extensions of time may be readily requested and granted for both the response brief and the reply brief, because the jurisdiction of the court has already been invoked such that the deadlines are within the control of the court and not of jurisdictional consequence.

6. Response Brief

The response brief must include argument and citations of authority in support of the respondent's position. The respondent may file a supplemental appendix that includes other record materials that were not provided by the petitioner. The response brief is subject to the same general requirements as the petition, including the requirement to provide argument, citations to authority, and references to appropriate pages of the appendix.[131]

7. Reply Brief

This brief by the petitioner may likewise include yet another supplemental appendix. By recent supreme court order, it also is subject to the same fifteen-page limit to which reply briefs in other appeals are subject.[132]

8. Devil in the Details

Few surprises arise from this overview of the rules on certiorari review. Nonetheless, although the certiorari review process is now firmly in place, practitioners still must exercise caution with the details. In a hotly contested matter, for example, it might be easy to overlook that the local zoning authority whose decision is being appealed is an indispensable party to a petition for certiorari.[133] A petition that fails to name the local zoning authority as a party is subject to dismissal.[134]

---

130. *Id.*
131. *Id.* R. 9.100(j).
132. *Id.* R. 9.100(g), (i), (k) (as amended Nov. 24, 1999).
133. *Oceania Jt. Venture v. Ocean View of Miami, Ltd.*, 707 S.2d 917, 918 (Fla. Dist. App. 3d 1998).
134. *Id.*

Further, the practitioner must be careful to make a timely objection to irregularities in observing local rule requirements.[135] In addition, adequate notice of any challenge to procedural defects in a petition must be afforded the petitioner prior to an adverse judicial determination on the defect.[136] In the appropriate circumstances, it also is useful to keep in mind that the rule governing disqualification of a trial judge applies in the same manner to a circuit judge considering a petition for certiorari from a quasi-judicial decision.[137]

B. Standard and Scope of Review

1. Deference Due the Local Government Decision

In weighing how to advise a client who is considering filing a petition for certiorari, an attorney must understand and convey to the client the deference accorded the local government decision. The reviewing circuit court must defer to the zoning authority. The court in *City of Jacksonville Beach v. Marisol Land Development, Incorporated*[138] explained the nature of certiorari review of quasi-judicial actions as follows:

> Although original in form, a certiorari proceeding in circuit court to review local governmental denial of a rezoning request is "appellate in character in the sense that it involves a limited review of the proceedings of an inferior jurisdiction." Even when review entails "strict scrutiny," the circuit court is not authorized to decide questions of zoning policy or comprehensive plan compliance *de novo*. Local government has primary jurisdiction over such questions.[139]

2. Standard of Appellate Review

Once the decision to seek certiorari relief has been reached, it is necessary to understand and convey to the client the role of the

---

135. *Id.* at 920 (a petitioner's complaint that the prior decision was improperly made by a single judge rather than the required three-judge panel was barred as untimely).

136. *Putnam County Envtl. Council, Inc. v. Bd. of County Commrs. of Putnam County*, 750 S.2d 686, 688 (Fla. Dist. App. 5th 1999).

137. *Smith v. Santa Rosa Island Auth.*, 729 S.2d 944, 946 (Fla. Dist. App. 1st 1998).

138. 706 S.2d 354 (Fla. Dist. App. 1st 1998).

139. *Id.* at 355 (quoting *Haines City Community Dev. v. Heggs*, 658 S.2d 523, 525 (Fla. 1995)) (emphasis in original) (citations omitted).

reviewing circuit court. The scope of review is rather narrow. Circuit courts conduct a first level review of zoning authorities' quasi-judicial decisions as an appeal as of right, although pursuant to the certiorari procedures under Rule 9.100.[140] The standard of review requires the circuit court to determine the following:

1. whether the parties were afforded procedural due process in the quasi-judicial zoning procedure;

2. whether the zoning authority observed the essential requirements of law; and

3. whether the zoning authority's decision is supported by substantial competent evidence.[141]

To review the sufficiency of record evidence, the reviewing court must determine whether any substantial competent evidence was introduced that supports the zoning decision.[142] Even if there is substantially more evidence that would support a different result, the reviewing court must affirm the decision if there is also substantial evidence to support it.[143] The circuit court may not reweigh the evidence and thereby substitute its judgment for that of the local zoning authority.[144]

3. The Type of Relief Available on Certiorari

A petitioner for certiorari must understand that the court sitting in its review capacity may quash a zoning decision, but has no authority to direct that a particular zoning action be approved.[145] The proper relief is remand for appropriate further action by the zoning authority consistent with the court's decision. Remand affords the zoning authority an opportunity to approve an appropri-

---

140. Fla. R. App. P. 9.100(c)(2), (f).

141. *City of Deerfield Beach v. Vaillant*, 419 S.2d 624, 626 (Fla. 1982); *Miami-Dade County v. Hernandez*, 738 S.2d 407, 407 (Fla. Dist. App. 3d 1999).

142. *Hernandez*, 738 S.2d at 407.

143. *Blumenthal*, 675 S.2d at 606, 608 (citing *Multidyne Med. Waste Mgt.*, 567 S.2d at 957–958).

144. *Hernandez*, 738 S.2d at 407.

145. *E.g. Seminole County Bd. of County Commrs. v. Eden Park Village, Inc.*, 699 S.2d 334, 335 (Fla. Dist. App. 5th 1997).

ate application, complete with zoning conditions and other protections to protect the public interest.

C. Discretionary Certiorari Review in the District Courts of Appeal

The second level of certiorari review, conducted by the district courts of appeal on a discretionary basis, has a more limited scope of review, which entails evaluation of the record to determine the following:

1. whether the parties were afforded procedural due process; and

2. whether the circuit court observed the essential requirements of law.[146]

Application of the second standard — whether the circuit court observed essential legal requirements — has given rise to substantial discussion in the district courts' opinions in recent years. Of particular interest to the district judges is the extent to which they are entitled to review the evidence introduced at the zoning hearing, as opposed to how much they must rely on the assessment of the evidence by the reviewing circuit court. Recently, the Florida Supreme Court again sought to provide guidance for applying this difficult standard of review.

In *Florida Power and Light Company v. City of Dania*,[147] the court declared that "the district court on second-tier certiorari review may *not* review the record to determine whether the agency decision is supported by competent substantial evidence."[148] However, the supreme court did allow the district court to reverse a decision of the circuit court that had reweighed the evidence improperly.[149] It was apparent from the face of the circuit court opinion that the court had reviewed the record to determine whether the objectors had met their burden, when the circuit court instead should have considered only whether there was sufficient evidence

146. *Vaillant*, 419 S.2d at 626.
147. 761 S.2d 1089 (Fla. 2000).
148. *Id.* at 1093 (emphasis in original).
149. *Id.*

to support the city's denial of Florida Power's application.[150] Even with the error apparent from the face of the record, however, the district court still was not allowed to assess the record to decide whether it contained evidence to support the city's decision.[151] Instead, the supreme court mandated that the matter be remanded to the circuit court for a proper review and assessment of the record.[152]

As a result of the *City of Dania* decision, the district courts may be expected to remand cases in which they find error rather than to review the record to assess whether it contains evidence to sustain the original quasi-judicial decision. The impact of that result alone probably will increase the time required to complete the appellate process after a quasi-judicial decision. Additionally, the decision undoubtedly will focus the district courts' review more precisely on the face of the circuit courts' opinions and less upon a comprehensive review of the record.

A few months after its decision in *City of Dania*, the Florida Supreme Court issued yet another opinion emphasizing the limited certiorari review power of the district courts.[153] In *Ivey v. Allstate Insurance Company*,[154] the court quashed a second-level certiorari decision of the Third District Court of Appeal.[155] The district court had "merely disagreed with the circuit court's interpretation of the applicable law," an improper ground for the exercise of its jurisdiction.[156] Together with *City of Dania*, the *Ivey* case represents the supreme court's continuing insistence that the district courts not act as courts for "second appeals," but instead as correctors of violations of clearly established law that result in serious miscarriages of justice.

Whatever fine distinctions may be drawn about second-level certiorari review, at least one district court has not lost sight of a basic appellate principle — the "Tipsy Coachman" rule.[157] In more mundane terms, that district court recognized that circuit courts

---

150. *Id.* at 1090 (quoting *Fla. Power & Light Co. v. City of Dania*, No. 96-5631, slip op. at 3–4 (Fla. Cir. 17th Dist. Apr. 16, 1997)).

151. *Id.* at 1093.

152. *Id.* at 1094.

153. *Ivey v. Allstate Ins. Co.*, 2000 WL 1785994 at **2–3 (Fla. Dec. 7, 2000).

154. 2000 WL 1785994 (Fla. Dec. 7, 2000).

155. *Id.* at *6.

156. *Id.* at *3.

157. *Rancho Santa Fe, Inc. v. Miami-Dade County*, 709 S.2d 1388, 1388 n. 1 (Fla. Dist. App. 3d 1998) (rule that permits a reviewing court to affirm a lower court's correct decision when the lower court's articulated reason was incorrect).

must be affirmed if the ruling below is right for any reason even if the articulated reason is wrong.[158]

CONCLUSION

With increasing population numbers and urbanization, Florida land use disputes are being resolved in more structured legal environments than ever before. Land use practitioners will serve their clients best by familiarizing themselves early with the appropriate forum for resolving the dispute at hand and with the procedural rules for operating in that forum. Further, steps taken in the local government decision-making process must be with a view toward potential future judicial challenges. Regular review of recent court decisions is especially important in this constantly evolving practice area. A ready command of all these tools will equip a practitioner to be an effective and persuasive advocate for clients' treasured land use interests.

158. *Id.* at 1388.