MEMORANDUM

To: Rules of Judicial Administration Committee
of the Florida Bar

From: Ad Hoc Committee on *Broward v. G.B.V.*;
Environmental and Land Use Law Section
of the Florida Bar

Re: The Question Referred by the Supreme Court in
*Broward County v. G.B.V. International, Inc.*

Date: November 29, 2001

The Florida Supreme Court, in *Broward County v. G.B.V. International, Ltd.*, 787 So.2d 838 (Fla. 2001), referred the following question to the Rules of Judicial Administration Committee for study:

> Whether the Court should 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.
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> *Id.*, 787 So.2d at 846.

Many members of the Environmental and Land Use Law Section of the Florida Bar practice before local governments, and occasionally seek review of local land use decisions in the courts. The question referred by the Supreme Court is of great interest to the membership of the Section.

The Section has appointed an "Ad Hoc GBV Committee," composed of attorneys who represent land owners, developers, public interest groups, and local governments. These attorneys have experience with the wide variety of local land use decisions, which range from complex planned unit development rezonings to simple building permits. These attorneys also have insights concerning the burdens which the proposed rule might place on local governments, citizens and land owners, as well as the potential benefits to each group.

The Ad Hoc Committee is pleased to have the opportunity to submit this memorandum on the question referred by the Supreme Court. The Ad Hoc Committee recommends against the adoption of a judicial rule, but recognizes that the Supreme Court can declare that the Constitutional guarantee of due process requires written final decisions with detailed findings of fact for local land use actions. The Ad Hoc Committee is divided regarding the wisdom or necessity of requiring detailed findings of fact, and hopes that the following observations will assist the Rules of Judicial Administration Committee and the Court.

## I. The Ad Hoc Committee Recommends Against Promulgation of a Judicial Rule.

David L. Jordan, Esq.

The Ad Hoc Committee recommends against promulgation of a judicial rule purporting to regulate procedure in local governments, because such a rule would encroach upon the authority of the legislative branch.

Article II, § 3 of the *Florida Constitution* states,

> Section 3. Branches of government.-- The powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"As this text demonstrates, each branch of government has certain delineated powers that the other branches of government may not intrude upon." *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 407 (Fla. 1996).

The rulemaking authority of the Supreme Court is conferred by section 2(a) of Article V of the *Florida Constitution*.

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.
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> Art. V, § 2(a), *Fla. Const.*

The term "all courts" in section 2(a) does not include local governments. Section 1 of Article V of the *Florida Constitution* provides,

> The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.
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> Art. V, § 1, *Fla. Const.*

The *Florida Constitution* grants authority over local governments to the legislative branch. *Weaver v. Heidtman*, 245 So.2d 295 (Fla. 1st DCA 1971). Local governments have the power of self-government, except as provided by general or special law. See, Art. VIII, §1(f)(non-charter counties), §1(g)(charter counties) and §2(b)(municipalities), *Fla. Const.* The Legislature has granted broad self-government powers to counties, *Speer v. Olson*, 367 So.2d 207 (Fla. 1978); *Lowe v. Broward County*, 766 So.2d 1199 (Fla. 4th DCA 2000), and to municipalities, *City of Boca Raton v. State*, 595 So.2d 25 (Fla. 1992); *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992).

The courts have recognized the authority of the Legislature to govern the procedures of local governments. See, *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3d DCA 1984)(Legislature has power to regulate disqualification of county commissioners); and *Verdi v. Metropolitan Dade County*, 684 So.2d 870 (Fla. 3d DCA 1996)(Legislature or local governments can establish code enforcement proceedings with hearing officers). The Legislature has provided by general law that counties may adopt their own rules of procedure. § 125.01(1)(a), *Fla. Stat.* (2001). The Legislature has also provided that municipalities may "enact

legislation on any matter upon which the Legislature may act," § 166.021(3), *Fla. Stat.* (2001), evidently including adoption of their own rules of procedure. The Legislature has exercised its authority to require findings of fact and conclusions of law for a specialized type of local government land use decision: development-of-regional-impact development orders. § 380.06(15)(c), *Fla. Stat.* (2001).

Justice Pariente's dissent stated that she "would require written findings, as would be required of any other administrative agency sitting as a fact-finder." *G.B.V.*, 787 So.2d at 849. The Legislature requires findings of fact by administrative agencies. §§ 120.569(2)(*l*) & (m), 120.57(1)(h), (j), (k) & (*l*), and 120.574(2)(f)1., *Fla. Stat.* (2001). Counties and municipalities are not governed by the Administrative Procedure Act, "except to the extent they are expressly made subject to this act by general or special law or existing judicial decision." § 120.52(1)(c), *Fla. Stat.* (2001).

For the reasons stated above, the Ad Hoc Committee respectfully recommends against the promulgation of a judicial rule requiring written final decisions with detailed findings of fact in local land use actions.

## II. Due Process

Even if the Judicial Rules Committee and the Court accept the above recommendation, the Court might determine in an appropriate case that the Constitutional guarantee of due process of law requires local governments to issue written final decisions with detailed findings of fact for local land use actions that are subject to review in the courts. The membership of the Ad Hoc Committee is divided concerning the necessity and the wisdom of such a ruling. This section of the memorandum is intended to elucidate several viewpoints on the issue.

### A. Due Process Requires Written Findings in the Review of Quasi-judicial Decisions, Including Rezonings: An Applicant's Viewpoint.

T.R. Hainline, Esq.

Until the Florida Supreme Court's decision in *Board of County Commissioners of Brevard v. Snyder*, 627 So. 2d 469 (Fla. 1993), it was axiomatic that due process requires written findings in quasi-judicial decisions. *See, e.g., Irvine v. Duval County Planning Commission*, 466 So. 2d 357, 366 (Fla. 1st DCA 1985) (Zehmer, J., *dissenting*), *approved*, 495 So. 2d 167 (Fla. 1986), *adopted after remand*, 504 So. 2d 1265 (Fla. 1st

DCA 1986); *Lee County v. Sunbelt Equities*, 619 So. 2d 996 (Fla. 2d DCA 1993). These authorities set forth logical and articulate arguments why written findings are essential in quasi-judicial decisions, both to enable the proper certiorari review of such decisions and to ensure rationality in such decisions. More recent authorities have repeated these arguments in the context of the *Snyder* decision. Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. Land Use & Envtl. L. 243; T.R. Hainline, Jr. & Steven Diebenow, *Snyder House Rules? The New Deference in the Review of Quasi-Judicial Decisions*, Fla. B. J., Nov. 2000.

To summarize these arguments, written findings are both the starting point and guideposts in a circuit court's review of quasi-judicial decisions.[1] With findings, the reviewing circuit court "can first determine whether or not the facts found by the agency constitute lawful grounds for its action and, then, determine whether the evidence supports the finding[s]."[2] Findings thus benefit a reviewing circuit court by exposing the "decisional referents"[3] below and eliminating "guess-work as to what facts alleged were

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1 "It has been repeatedly held by the courts of this state that in order to assure due process and equal protection of the laws, every final order entered by an administrative agency in the exercise of quasi-judicial functions must contain specific findings of fact upon which its ultimate action is taken." *Irvine v. Duval County Planning Comm'n*, 466 So. 2d at 366 (Fla. 1st DCA 1985) (Zehmer, J., *dissenting*) (*quoting Gentry v. Department of Prof'l & Occupational Regulations*, 283 So. 2d 386, 387 (Fla 1st DCA 1973); *Accord*, *e.g.*, *Hickey v. Wells*, 91 So. 2d 206 (Fla. 1957); *Laney v. Holbrook*, 8 So. 2d 465, 467 (Fla. 1942); *Harvey v. Nuzum*, 345 So. 2d 1106 (Fla. 1st DCA 1977); *Edwards v. Division of Beverage, Bd. of Bus. Regulations*, 278 So. 2d 659 (Fla. 1st DCA 1973); *McCulley Ford, Inc. v. Calvin*, 308 So. 2d. 189 (Fla 1st DCA 1975); *Ford v. Bay County School Board*, 246 So. 2d 119 (Fla. 1st DCA 1970); *Powell v. Board of Public Instruction of Levy County*, 229 So. 2d 308 (Fla 1st DCA 1970); *Polar Ice Cream & Creamery Co. v. Andrews*, 150 So. 2d 504 (Fla. 1st DCA1963); *see also Sunbelt Equities*, 619 So. 2d 996, 998 n.1, 1000-1002 (Fla. 2d DCA 1993); *City of Apopka v. Orange County*, 299 So. 2d 657, 660 (Fla. 4th DCA 1974).

2 *Id.* (Zehmer, J., *dissenting*) "It is not sufficient that the cited findings merely be general conclusions in the language of the statute or ordinance because such conclusions provide no way for the court to know on judicial review whether the conclusions have sufficient foundations in findings of fact." *Id.* (Zehmer, J., *dissenting*).

3 *Irvine*, 466 So. 2d at 366 n. 5 (Zehmer, J., *dissenting*) (*quoting McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 583 n. 12 (Fla. 1st DCA 1977)).

found not to be true."[4] In this way, findings operate to prevent a reviewing circuit court from "re-weighing" evidence or substituting its judgment for that of the local zoning board.[5] Written findings also operate to "de-politicize" and promote "objective rationality" in zoning decisions. [6]

As argued in recent authorities, *Snyder* has radically altered appellate review of quasi-judicial decisions by circuit courts:

> First, in removing findings as the starting point for appellate review, *Snyder* forces circuit courts to begin with the *outcome* (denial or approval) of the local zoning board's vote and then review the *entire* record for *any* evidence supporting *the outcome*.[7] By contrast, the review contemplated in *Irvine* begins with the *actual decision*, including its reasoning and findings, followed by a review of the record to determine whether the evidence supports *the findings*.[8]
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> . . .
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> Second, . . ., the absence of written findings or a reliance on written findings necessarily forces circuit courts to "re-weigh" evidence because they are provided no indication of what "weight" a local zoning board assigned to the evidence in the first instance. . . .

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4 *Id.* (Zehmer, J., *dissenting*) *(quoting Laney v. Holbrook*, 8 So. 2d 465, 468 (Fla. 1942)).

5 *Id.; see, e.g., Lynch-Davidson Motors Inc. v. Calvin*, 308 So. 2d 197 (Fla. 1st DCA 1975); *McCulley Ford, Inc. v. Calvin*, 308 So. 2d 189 (Fla 1st DCA 1975); *Bill Kelley Chevrolet, Inc. v. Calvin*, 308 So. 2d 199 (Fla. 1st DCA 1975); *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA 1974).

6 *Irvine*, 466 So. 2d at 366 n. 5 (Zehmer, J., *dissenting*) *(quoting McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 583 n. 12 (Fla. 1st DCA 1977)).

7 See *Id.*

8 *See Irvine v. Duval County Planning Comm'n*, 466 So. 2d 357 (Fla. 1st DCA 1985) (Zehmer, J., *dissenting*). *See also* cases cited in Endnote 16, *supra*.

Third, the result of circuit court review without findings is that rezoning outcomes are afforded great deference. If the record contains *any* evidence supporting the outcome, it will most likely be upheld.[9] As a practical matter, the requirement that the evidence be "competent and substantial" does not diminish the deference given the decision. The tests to determine whether evidence is either competent or substantial in this context can hardly be described as "bright line" tests.[10] . . . The prohibition on "re-weighing" evidence clearly makes it difficult for circuit courts to determine that evidence is not "substantial."[11]

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9 *See Florida Power & Light Co. v. City of Dania*, No. SC 93940, 2000 Fla. LEXIS 1220 (Fla. June 15, 2000); *Section 11 Property Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998); *Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1995); *Multidyne Med. W. Mgt.*, 567 So. 2d 955 (Fla. 4th DCA 1990).

10 "Substantial evidence has been described 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. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities and the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent, the 'substantial' evidence should also be 'competent.'" (Citations omitted.) *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *Pollard v. Palm Beach County*, 560 So. 2d 1358 (Fla. 4th DCA 1990).

11 *Florida Power & Light Co. v. City of Dania*, No. SC 93940, 2000 Fla. LEXIS 1220 (Fla. June 15, 2000).

> Finally, *the result of this deferential review is that local zoning boards actually place themselves at a disadvantage if they adopt written findings.* If, indeed, a reviewing circuit court must uphold a rezoning decision if there is *any* competent and substantial evidence in the record which supports the outcome, then why would a local board ever wish to limit the potential grounds for its decision by specifically identifying them? If a board relied on the testimony of a traffic expert in opposition to a rezoning and ignored the testimony of a an environmental expert also in opposition, why would it ever limit its potential grounds on review to only the traffic expert? Clearly there is no incentive for local zoning boards to adopt written findings explaining the basis of its decisions.[12]

Hainline & Diebenow, *supra*, at 54-55.

In *Snyder*, the Florida Supreme Court offered no explanation for its holding that findings are not required to support rezoning decisions.[13] The Court did not distinguish its holding in *Irvine*, which involved a zoning exception, or distinguish rezonings from zoning exceptions and other quasi-judicial zoning changes in which findings have been required.[14]

It is remarkable that a requirement held in *Irvine* to be fundamental to the judicial review of quasi-judicial decisions may have been deemed in *Snyder* to be unnecessarily burdensome. Prior to 1993 (the Florida Supreme Court's decision in *Snyder*), written findings were required in all zoning exceptions and variances. (*Irvine* confirmed this

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[12] This result is contrary to the explicit reasoning in *Irvine* that, "[t]o meet due process requirements, it is necessary that the agency set out detailed facts found from the evidence so that a court authorized to review the matter on certiorari can first determine whether or not the facts found by the agency constituted lawful grounds for its action and, then, determine whether the evidence supports the findings." *Irvine*, 466 So. 2d at 366 (Zehmer, J., *dissenting*).

[13] *Snyder*, 627 So. 2d at 471.

[14] *See Sunbelt Equities*, 619 So. 2d at 998, n.1 (holding that written findings are beneficial in review of a rezoning); *Irvine*, 466 So. 2d at 365-366 (holding that written findings are required in review of a zoning exception); *City of Apopka v. Orange County*, 299 So. 2d at 660 (holding that written findings required in review of a zoning exception).

requirement, but, as demonstrated by the decisions cited in *Irvine*, written findings were required by several district courts prior to *Irvine*.) During that time, planning commissions and zoning boards in communities across Florida adopted findings to support their actions on these types of zoning changes. There is no data to suggest that the adoption of written findings in the context for these zoning changes was an undue burden to communities.

As the Florida Supreme Court held eight years ago, rezonings are quasi-judicial decisions which "'have an impact . . . on identifiable parties and interests'" and therefore should be subject to strict scrutiny on review. *Snyder*, 627 So. 2d at 474, *citing Snyder Board of County Comm'rs of Brevard County*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991). Written findings are an essential element in such decisions, not only for the benefit of the reviewing courts but also for the benefit of the identifiably affected parties.

### B. Written Findings of Fact Should Not be Required for Local Government Quasi-Judicial Land Use Decisions: A Local Government Viewpoint.

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We have been asked to respond to the Florida Supreme Court's request for a study of whether all quasi-judicial land use decisions of local governments should be required to be based on written findings of fact and expressed in a written order, in the case of *Broward County v. G.B.V. International, Ltd.* Specifically, at page 15 of the slip opinion, the majority (Harding, Lewis, Quince, and Shaw) refers the following question to the Rules of Judicial Administration Committee of The Florida Bar for study: "Whether the Court should 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."[15]

Those who challenge local land use actions have considered the lack of written findings and orders to be an issue ever since the Supreme Court, in *Board of County*

[15] As a preliminary matter, we note that the inquiry as phrased is overbroad; it encompasses legislative land use decisions subject to de novo review, while the *GBV International* decision seems to address only quasi-judicial land use decisions subject to certiorari review. This memo addresses only the latter issue.

*Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), held that decisions on rezonings, site plan approvals, plats and other such land use approvals are quasi-judicial in nature, similar to variances and special exceptions. That opinion recommended, but specifically did not require, that local governments provide written findings of fact for such quasi-judicial actions, despite the fact that the only method to challenge these decisions was via petition for writ of certiorari on the record below.

In short, we conclude that the courts should not require detailed findings of fact in local quasi-judicial land use actions because doing so would inevitably limit local discretion to choose from a range of legally permissible options and interfere with the ability of local officials to represent their constituents, without necessarily improving the quality of decision making. We also conclude that such a requirement would complicate, not streamline, circuit court review, and increase the likelihood of violation of separation of powers. The records of most local land use decisions are sufficient to guide circuit court review, especially with the assistance provided by the local government attorney's response to the petition for certiorari. Therefore, we conclude that the proper response to the few cases where the record is not sufficient is for the court to grant certiorari to the petitioner, quash the decision and remand the matter to the local government.

**1. Requiring findings of fact would limit the exercise of discretion by local land use authorities and interfere with democratic representation of their constituents.**

Requiring local zoning authorities to articulate the precise factual basis for every zoning decision would necessarily circumscribe their discretion to make decisions within a range of perfectly legal choices. Zoning boards are quasi-judicial; they are not judicial or ministerial. Their members are expected to bring to these collegial bodies their background in and knowledge of the community, as well as an experience-based vision of how their constituents want their communities to look and function. Indeed, land use authorities are the people's elected representatives (or their direct appointees), chosen to effectuate the people's vision of what the community should look like. Florida courts have recognized the matter of local land use as one integral to the functioning of our representative democracy. *See Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. 1st DCA 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978) (land use issue "affects the right of access to government—the right of the people effectively 'to instruct their representatives and to petition for redress of grievances'– on which other cherished rights ultimately depend.")

The task of land use decision-making requires an exercise of discretionary judgment that is not completely susceptible of detailed factual explication. Indeed, forcing a precise, mathematical delineation of every fact about a community's characteristics to justify a particular decision would fly in the face of the exercise of discretionary judgment. It effectively would reduce zoning actions to the level of ministerial permitting. It would also truncate the ability of arguably the most democratic level of government to exercise the scope and direction of judgment allowed by law, thereby expressing constituent preferences.

To allow for the exercise of discretion in land use, and to avoid usurpation of that role by the courts, the law has long recognized that zoning boards are entitled to choose from a wide range of legal choices that zoning decision that will implement the community's vision. *See Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993) ("…an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable"), *quoting Lee County v. Sunbelt Equities II, Limited Partnership*, 619 So. 2d 996, 1005-06 (Fla. 2d DCA 1993); *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1996) ("… when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice, not the circuit court.") It is essential to that range of lawful choice that land use authorities be able to bring to bear their background knowledge of the community, their knowledge of past decisions in the area, their vision of the future, and other intangible considerations. These intangibles have nothing to do with whether a particular decision is lawful, but everything to do with whether it is the right choice for a neighborhood or the larger community, or in the words of the *Sunbelt Equities* court, "desirable."

This exercise of discretion is important to local authorities in every aspect of their zoning decision-making, because most decisions necessarily carry with them some degree of policy-shaping. Although *Snyder* and *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997), made it clear that legislative activities such as comprehensive planning are policy formulation while zoning actions are policy implementation, that distinction does not reduce the zoning action to a mere ministerial act. The decision to rezone a large parcel of land, while quasi-judicial, may involve an exercise of significant discretion. For example, a property may currently be zoned agricultural allowing one dwelling unit per ten acres, while the comprehensive plan may allow a maximum of up to ten units per acre over the twenty-year planning period. The appropriate zoning for the property in year two of that planning period may very well be different from the proper zoning in year

nineteen, and the decision at either time will be heavily influenced by the development of neighboring properties and availability of public facilities.

*Snyder* recognizes that comprehensive plans are long term documents for the future, and that there is not an automatic right to the most intense zoning permitted under the future land use category for a parcel of land. Deciding which level of zoning is appropriate today involves determinations of compatibility with the present development of neighboring properties, with the governmental plan for development of facilities and services in the area, and with environmental constraints on a particular property. These judgments are definitely not ministerial, and may result in significant impacts on the character and future development of a local government. They are best made by those who are locally elected or appointed to deal with such issues. They are more accountable to the citizens who will be most affected by these decisions than a circuit court judge. Indeed, even a decision on a minor amendment to a site plan or plat, seemingly almost ministerial in nature, may nonetheless have significant precedential or cumulative import for the future of a neighborhood and therefore requires the exercise of considered judgment.

The very requirement of factual findings may also impose reservations on the part of board members trying to reach a decision. For example, although a board likely could put together some set of facts to defend a particular decision, no set of factual findings could truthfully include the kinds of perfectly lawful but intangible considerations that go into discretionary decision-making. Further, in some instances, forcing factual detail will herd decision-makers into the choice with the easily articulable defense, even though their knowledge of the community suggests a different or new kind of choice that has not been tried before. Boards may also tend to favor decisions based on factual grounds that a court has upheld in a prior decision, even though the choice is not the most appropriate in the instance at hand. Such pressures clearly limit the exercise of lawful discretion.

**2. Requiring findings of fact complicates the task of the circuit courts, and increases the risk of judicial usurpation of the land use decision-making role in violation of the separation of powers between the judicial and executive branches.**

Requiring detailed findings of fact would require reviewing courts to invest much more than an overview of the record to ascertain the legality of the decision under review. The court would be required to review each and every factual finding to ensure that the record supports individual facts, as opposed to merely determining whether the record

supports the overall decision. Although a detailed outline of specific grounds for the land use decision under review might initially seem to simplify the circuit court's role, Justice Grimes in *GBV International* accurately assessed such as requirement as one ripe for additional litigation arguments: "Does the order setting out the findings of fact accurately reflect the grounds articulated by the zoning board?" "Is every fact supported by the record, or do other facts call that particular fact into question?" "What if one of the facts listed is not supported by the record, but the remaining facts would have supported the decision?" "Even though the record as a whole supports the decision, is the failure to point out a crucial fact, without which the decision could not have been reached, always fatal to the decision?" "What if the zoning board members agree on a decision, but cannot agree on the factual basis that persuaded differing members to a single result?"

Moreover, a court reviewing a zoning decision for the sufficiency of factual findings could no longer defer even to facts of record, if they have not been expressly articulated by the zoning authority. Therefore, even though the zoning boards are supposed to have wide discretion within the applicable legal bounds, a requirement of specific findings will not allow the circuit court to affirm if the zoning board's decision is right for the wrong reason (the Tipsy Coachman rule). *See Suburban Medical Hospital, Inc. v. Dep't of Health and Rehabilitative Services*, 600 So. 2d 1195, 1197 n.3 (Fla. 3d DCA 1992) (holding "we see no reason not to apply to our review of agency action the familiar adage that a trial court will be affirmed if correct for any reason appearing in the record"); *see also Springfield v. Dep't of Environmental Protection*, 648 So. 2d 802 (Fla. 1st DCA 1994). In this way, these boards with supposedly wide discretion to act in the public interest are effectively reduced to much more limited discretion.

Furthermore, a findings of fact requirement necessarily limits the deference a circuit court can afford a zoning decision. Today, a reviewing court may read the record and decide that the overall substantial competent evidence would support an ultimate factual conclusion, such as the compatibility of a proposed site plan or rezoning with the neighborhood. Under a requirement of factual findings, the reviewing court would have to examine the record to assess the evidentiary support for each finding. Under this type of non-deferential analysis, the temptation to reach a different factual conclusion may be even greater than it is today. If a court does reach a different factual conclusion, it will have violated the separation of powers doctrine by encroaching on the exclusive jurisdiction of the local governing and land use bodies.

**3. The requirement of written findings of fact will not necessarily increase the quality of decision-making or the quality of circuit court review.**

Justice Pariente's *GBV International* opinion places on local land use authorities a part of the blame for the persistent tendency of the circuit courts to reweigh the evidence and substitute their judgment for that of local authorities. The concern is that local authorities do not spell out for the courts the factual basis for their decisions, but instead rely on the reviewing courts to sort through weighty records for evidence sufficient to sustain what the authorities do. The apparent hope underlying the Justice's request for mandatory factual findings is that a good explanation will constrain the circuit courts' tendency to look for evidence that would support a different result, rather than simply determining whether the evidence supports the decision reached by the local authority as required by certiorari review standards.

The practicality of that hope is open to question. In several recent cases decided by the Supreme Court, the circuit court opinions laid out on their face facts that would have supported the land use decision if the court had not reweighed them against the countervailing facts. *See Dusseau v. Metropolitan Dade County*, 794 So. 2d 1270 (Fla. 2001); *Florida Power & Light v. City of Dania*, 761 So. 2d 1089 (Fla. 2000). In those cases, the governmental parties, represented by experienced legal counsel, had placed the factual record basis for their clients' decisions before the circuit court. Even so, the circuit courts were unable to resist revisiting the decisions under review, and substituting their own judgment for that of the local authority. Findings of fact will not assure a different result as long as circuit courts decide to undertake their own review of the competing record evidence.

Just as findings of fact would not assure a better circuit court review, so they would also not guarantee a better local land use decision. As Justice Scalia so scathingly put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), written governmental findings are not necessarily a guarantee of improved decision-making. In evaluating whether written legislative findings established that a regulation was benefit conferring (so that compensation would be required) or harm preventing (and thus requiring no compensation), he asserted that the distinction is in the eye of the beholder. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires

courts to do more than insist upon artful harm-preventing characterizations." *Id.* at page 1026, note 12.

In a similar way, written findings are no guarantee of good decision-making in zoning or other quasi-judicial actions. A proficient draftsman may weave findings that obscure, rather than clarify, a poor yet minimally lawful decision. In contrast, a less sophisticated local government, or a successful citizen objector who is asked to submit proposed findings, may not adequately explicate the sound basis for a good decision. As a result, on the same set of facts, the ultimate judgment on these kinds of decisions may well be determined by who gets to draft the findings supporting them as much as by the merits.

This risk is particularly great when the land use authority is dealing with criteria that require judgment calls. Examples of "judgment call" criteria, found in state statutes and in most local codes of ordinances, include consistency with the comprehensive plan and compatibility with the neighborhood. Nothing in a findings of fact requirement will cause a better or wiser decision under those criteria, but the ability of a local government to persuade a court to uphold a judgment call decision will depend greatly on how well the findings of fact are drafted, even if an ample record exists to sustain a good decision. And even if there are clear written findings and conclusions, an applicant who disagrees with the local decision maker will find a way to cast doubt under judgment call criteria.

**4. Most records of local land use decisions contain sufficient written descriptions of the evidence supporting the decision to guide the circuit courts.**

The first thing to understand about *GBV International* is that it is not typical of the local government quasi-judicial land use decision. The flex unit provisions of Broward County's Land Use Plan and Code are quite unusual. As applied here, they result in the project being able to use the platting process to nearly double its density and impacts without a comprehensive plan amendment. Also, the dispositive issues on certiorari review in the circuit court were estoppel and misrepresentation, rather than any issue regarding the criteria for perimeter plat approval or the applicants' ability to satisfy them. Finally, the County Commission made a decision that was not urged by the applicant's request, the staff's recommendation or a third party, and therefore did not have the benefit of supporting written submissions from any of these interests. For all of these reasons, it

is inadvisable to generalize from the facts of this case in deciding whether written findings of fact or orders should be required in all local land use decisions.

The typical procedures for considering quasi-judicial land use decisions include a great deal of written evidence. Normally, a written application is submitted to the local decision-making body, supported by an oral presentation from the applicant. The application may have been revised in the process of being reviewed by the government's staff and/or an advisory board. Staff prepares a written report analyzing the application and usually providing a written recommendation for approval, approval with specified conditions or denial. More than one staff report may be prepared for the various steps of the review process. Staff also usually makes an oral presentation to the decision-making body. Finally, an ordinance or resolution is usually necessary to approve the application, and a draft of this document is prepared for the decision making body prior to the hearing.

At the hearing, in addition to presentations from applicant and staff, the decision-making body usually hears input from the public and from any third parties such as a neighbor or environmental group. The members of the body discuss the application, ask questions, and express their individual positions on the application. Finally, a vote is taken and the application is either approved or denied, usually in line with the position urged (and documented) by the applicant, staff or a third party. Any additional conditions on approval of the application will be reflected in the motion or second, and in the ordinance or resolution of approval. The hearing is memorialized in the minutes of the decision-making body, in audio or video tapes of the meeting, and possibly in a transcript prepared by a court reporter if one is ordered by the applicant.

If a petition for writ of certiorari is filed, then the petitioner must assemble the record appendix and identify the reasons why the decision should be quashed. If an order to show cause is issued, then the government must prepare a response showing the court how the decision is supported by competent substantial evidence and meets the other requirements of certiorari review. Sometimes, a third party participates in the litigation, and the circuit court will have the benefit of a third written brief and argument on the record.

Thus, in the vast majority of cases, there are a variety of sources of written evidence providing a basis for the quasi-judicial decision. Rather than *Snyder* acting as an incentive not to provide any basis for a decision, as feared by Justice Pariente and authors Hainline and Diebenow, it actually provides an incentive to provide as many

bases as possible to support the result being urged. There is no requirement that a land use decision be based on one factor only and, in fact, such decisions often involve a number of competing concerns. The staff reports, applicant justifications and other written input are often necessary, independent of any judicial review concerns, to allow for a group decision making process by elected or appointed officials in the public hearing on sometimes complex and arcane land use issues.

Moreover, before the circuit court decides whether to grant certiorari, it is presented with a written argument from the government's attorney justifying the decision and pointing out the competent substantial evidence in the record. Furthermore, the petitioner has a duty of candor to the court, and is therefore obligated to point out the evidence supporting the decision and argue why it is not competent or substantial. It is simply not accurate to state that, without a written order or findings of fact, circuit courts are forced to comb the record and weigh the evidence themselves in order to carry out certiorari review.

In the unusual cases where there truly is no evidence of record for the circuit court to review or where the attorneys fail to bring that evidence to the court's attention, then certiorari should be granted based on the lack of competent substantial evidence supporting the decision, and the matter should be remanded to the local government for reconsideration and for the preparation of such a record. But the unusual cases should not be used to justify a burdensome, costly and unnecessary requirement for all quasi-judicial land use decisions, as Justice Wells points out in his concurring opinion in *GBV International*.

Imposing the findings of fact requirement suggested by the *GBV International* dissenters will increase costs and delays because additional staff and applicant effort will have to be devoted to the drafting of (and argument over) the proposed written order and findings of fact. If the drafts have not perfectly predicted what the decision maker finds and does at the hearing, or if proposed findings are not prepared before the hearing, then the matter may have to come back to the decision maker at a future meeting for adoption of the final written order and findings. These findings and orders will surely open up many new bases for litigation, without necessarily improving the substance of local decision-making.

Practical and legal reasons limit local governments' ability to prepare and submit to the courts detailed findings of fact to support every quasi-judicial land use decision.

For most local governments in Florida, zoning and other quasi-judicial decisions are reached by a collegial body. Several hearings are often scheduled for the same meeting, sometimes held at night to accommodate working citizens or follow statutory mandates for public participation, and many hours can be consumed in the public hearing part of the process. Meetings can run late into the night.

Unlike a single judge or hearing officer system, the local collegial board is subject to certain constraints that would make the preparation and approval of thorough findings of fact a difficult task. For example, the individual members of a collegial body may each have very different reasons for voting to grant or deny an application. Indeed, part of the reason different people are elected or appointed to boards is to bring different backgrounds and visions for the future to bear on decisions. Requiring them to articulate and agree on a single factual basis for approving a decision may be exceedingly difficult. The U.S. Supreme Court often has difficulty with this task, as evidenced by the multiplicity of opinions it issues in close land use cases; a board of elected or appointed citizen volunteers can hardly be expected to do better. Further, the board members are subject to the Government in the Sunshine Law, which would prohibit them from circulating discussion drafts or talking about the matter between meetings as judges are permitted to do.

If the proposed order and findings are not prepared ahead of time or must be revised based on the board's discussion, and those documents are brought back to the board at a future meeting where a board member may be absent, other procedural difficulties and delays arise. Must the same board members vote for the final findings of fact as originally voted for the item at the earlier meeting?

Today, zoning boards issue decisions promptly after the public hearing, while the evidence is still fresh in their minds. Were there a findings of fact requirement, the decision could be delayed while appropriate findings were prepared or proposed findings revised, to reflect the board's decision after public hearing. Because citing as many factual bases as possible would provide the greatest level of security that a decision would be upheld, and because local government staffs would be preparing such documentation for several decisions at once in fast-growing communities, considerable time could be required to satisfy a findings of fact requirement.

The additional staff time and expense devoted to drafting proposed findings of fact (and arguing over them with the applicant or a third party) places a burden on local government taxpayers without ensuring a commensurate benefit in the quality of decisionmaking. Moreover, such a process certainly would not favor the unrepresented applicant or objector. Sophisticated applicants would likely prepare and submit to staff proposed findings, either before or during staff's presentation. Staffs may also prepare a laundry list of boilerplate findings that can be adapted to a particular decision. Citizens who are neither sophisticated enough to prepare their own proposed findings nor wealthy enough to hire someone to do it for them, would be at a distinct disadvantage. Even in the early stages of the application process, sophisticated applicants will use proposed findings to seek to persuade professional staff to issue a favorable recommendation. The tactic might work, not only because of the convenience to staff, but also because the written word is sometimes the most convincing, even when submitted months in advance of the actual hearing.

Based on the foregoing, the best course of action is to not require written findings of fact for local government land use decisions, whether in a judicial rule or in a judicial interpretation of constitutional due process.

### C. Whether Local Governments Must Provide Findings of Fact for Land Use Decisions: A Citizen's Position.

Terrell K. Arline, Esq.

Introduction. There are actually two groups of "citizens" affected by local land use decisions. The developer, whose project is being evaluated by the local government, and the neighbor, who has to live with the project once it's constructed. While their personal motivations may differ, both groups are entitled to seek and receive meaningful judicial review of local land use decisions that may affect their interests. This important goal of effective review should guide the Florida Supreme Court in its evaluation of the question posed in *Broward County v. G.B.V. International, Ltd. et al.*, 787 So. 2d 838 (Fla. 2001), which is whether written, detailed findings of fact should be provided for all local land use actions.

To answer the question and promote judicial review, the Court should be reminded that it has helped to create a situation where there are two, wholly different procedures to review local land use decisions, at least as it regards consistency with the local comprehensive plan. Developers who are denied permits use one system. They must

file a petition for writ of certiorari. Review is on the record prepared at the local level and examination by the district courts is limited. Neighbors who oppose the issuance of permits use another system. They get a trial de novo under Section 163.3215, *Fla. Stat.* (2001). This difference in the process of review of local land use decisions is further compounded by the fact that it is not entirely clear how issues of consistency with local land use regulations are to be reviewed.

Therefore, while every citizen, the developer and neighbor alike may benefit from the requirement that local governments include written "findings of fact" to support their land use actions, until Florida simplifies the different systems of judicial review of local land use decisions, the Court will accomplish little to really ease the plight of the party-litigants below by just requiring findings of fact for local development orders.

Should findings of fact be required? A system of judicial review that employs too much deference to a local government's land use decision restricts the ability of both the developer and the neighbor to obtain meaningful consideration by the judiciary. Both groups certainly benefitted from the demise of the "fairly debatable standard of review" occasioned by *Snyder v. Board of County Commissioners of Brevard County*, 627 So.2d 469 (Fla. 1993), which often sponsored "neighborhoodism and rank political influence." Id at 473.

If for no other reason than to obviate the presumption of validity previously attached to local land use decisions deemed "legislative" in nature, *Snyder* empowered the courts to accomplish more effective review of local land use decisions when it construed rezonings to be quasi-judicial in nature.

As it regards consistency with the local comprehensive plan, both groups of citizens also benefit from the application of the "strict scrutiny" standard of review. *Snyder* at 475. Given the importance of the local comprehensive plan to all citizens, this vigorous standard of review is essential for the plan to be meaningful. See Section 163.3194, *Fla. Stat.* (2001); *Pinecrest Lakes Inc. et al., v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001).

Based on this line of analysis, it follows that both the neighbor and the developer would benefit if "findings of fact" were required for certain local land development decisions, especially those such as rezonings, PUDs, special exceptions, site plans, and the like. While a probable outcome of such a requirement could be orders that contain nonspecific policy statements to support local land use decisions, the party litigants and

the reviewing courts would still be able to test the sufficiency of these "findings." If nothing else, this new tool should help dispose of clearly arbitrary decisions.

Unfortunately, the simple deduction that findings of fact are helpful to both the neighbor and the developer does not completely address the goal of improving the judicial review of local land use decisions. This is because there are currently different processes for review of local land use decisions depending on the type of decision at issue and the type of "citizen" bringing suit.

Two different systems of review. At the same time the Court issued its opinion in *Snyder*, it released *Parker v. Leon County*, 627 So.2d 476 (Fla. 1993). *Snyder* required local governments to hold evidentiary hearings in order to build a record for review. *Parker* construed the statutory remedy of de novo review provided in Section 163.3215, Florida Statutes not to apply to developers who were denied local permits. Notwithstanding the fact that the statute appears to extend to both groups, the Court in *Parker* concluded that the statute only provides a remedy for third parties to challenge the consistency of development orders that in fact issued. The Court reasoned the statutory cause of action was not available to test the consistency of local government decisions that denied applications for development.

The combined result of *Parker* and *Snyder* is that there are now different remedies, different time lines, different degrees of deference, and different standards of review applied to local land use disputes depending on whether the local government has issued or denied a local development order. From the developer's standpoint, this means it may have to "try" its case twice. Once before the local government in the quasi-judicial hearing required by *Snyder* and again before a circuit court under the statute if the neighbors challenge the permit. From the neighbor's standpoint, if they don't attend the local land use hearing and "build a record" supporting denial, they could be deprived of victory upon certiorari review. So they also have to "litigate" twice. This raises the cost to the public to police the plan. *Snyder* also turned local public hearings into mini trials, elected officials into judges, and "lawyerized" a process, which was historically more democratic.

Further compounding things is the fact that issues of consistency with land development regulations, under some authority, are reviewed by a petition for writ of certiorari. This can create a situation where there are simultaneous certiorari and de novo proceedings pending in the circuit court over the same development. The

difference in appellate review between these remedies adds another layer of concern. See *Florida Power and Light Company v. City of Dania*, 761 So. 2d 1089 (Fla. 2000), and Justice Pariente's concurring opinion in *GBV*.

Some would argue this is the Legislature's problem. It could fix the problems that flow from having different review processes by creating a uniform way to review local land use decisions, such as the separate Land Use Board of Appeals used by the states of Washington and Oregon. Others worry that a legislative approach would further complicate litigation at the local government level and further deprive the appellate courts of their appropriate oversight of land use law. The point is, these discussions are avoided by the conclusion that *Parker* was wrongly decided in the first place.

If the Court were to reexamine its decision in *Parker* it could conclude that it mistakenly construed Section 163.3215 Florida Statutes. The statute certainly appears on its face to provide a remedy to <u>all</u> participants to seek de novo review. The statute authorizes a cause of action to enjoin an "action on a development order, as defined in s. 163.3164". Notably, this section defines the terms "development order" to include an order granting <u>or denying</u> an application for development permit. Some in the profession believe that is was the Legislature's intent to create a uniform system to review land use decisions. Remember, the statute was adopted at a time when rezonings were legislative in nature and there was no real effective judicial review, which a statutory remedy provided.

If the Court were to employ a broad rather than a narrow construction of this remedial statute, then "findings of fact" for orders at local quasi-judicial hearings would be unnecessary, because local governments would not need to hold record-building hearings.

If developers that were <u>denied</u> permits and neighbors who oppose them could both get a trial on the merits under Section 163.3215 Florida Statutes before a local circuit judge, then the various complications caused by the requirement to hold a *Snyder*-type quasi-judicial hearing at the local level would vanish. The local public hearing would return as a benefit of local democracy, rather than remain a burden to all parties and the local government concerned with building a proper record for certiorari review.

Finally, on the issue of land development regulations, if the Court were to construe the definition of "consistency" contained in Section 163.3194(3)(b), *Fla. Stat.* (2001), and specifically the terms "meets all other criteria enumerated by the local government" to

include consistent with all applicable land development regulations, then parties could bring all disputes in one action before a trial judge under Section 163.3215. Appeals would follow to the District Courts and Florida would continue to promote a statewide lexicon of land use law. Certiorari review would be relegated to the past where code pleading had been wisely been discarded.

Conclusion. For brevity, the author has refrained from an in depth analysis of the effects of *Snyder* and *Parker* at the local government level. Suffice it to say, the current system of judicial review of local land use disputes is not very efficient. The result of the conclusion that the statutory remedy provided in Section 163.3215, Florida Statutes was not available to all citizens has complicated and confounded the resolution of land use disputes much more than the lack of findings of fact.

Certainly on the question at hand, findings of fact can only help the public at large. In balancing the proper level of discretion to be afforded local governments, this requirement does not appear to be too onerous. That being said, if the Court were inclined to really improve the lot of land use lawyers, it would be well advised to reexamine *Parker*.

## III. Conclusion

The Ad Hoc Committee urges the Rules of Judicial Administration Committee to recommend against the promulgation of a judicial rule requiring written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts. If the Court decides to take further action regarding written final decisions with detailed findings of fact, the Ad Hoc Committee hopes that these comments will be useful.

Respectfully submitted,

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