Provided by Chair Davis at the Sept. 19, 2023 Planning : Zoning Board Meeting

To: Alexander Cooke, Mayor; David Dyess, Town Manager;

Frank Davila, Director of Planning and Zoning and Len Rubin, Town Attorney

From: Diana Davis, Chair Planning and Zoning Board July 27, 2023 (as amended)

RE: Immediate Action Needed to Respond to SB 102, Live Local Act

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In a response to Mayor Cooke's request, I am providing this memorandum of initial thoughts to address issues associated with SB 102, Live Local Act, that is in effect as law of Florida allowing the highest density and the highest building height for a building, so long as it will have 40% of its floor area as affordable housing for the next thirty years. It is thought there will be a new bill next legislative session to correct the problems created by this one size fits all legislation that removes local government land use authority. It creates known immediate problems within Juno Beach and requires immediate action.

Below is an outline of immediate actions taken by other local governments to comply with the Act and to define terms, process, procedures that are not defined within the law to protect their local governments through this new State law that removes additional home rule authorities, as covered in an Orlando Regional APA sponsored presentation.[i] Len Rubin, Attorney can also assist with his firm's list of immediate actions that should be considered based on this new law. I urge the Town Council and Town Staff to act with urgency on these matters.

1. Live Local Act allows the highest density and the highest building height within one mile radius of the proposed project that will have 40% affordable housing. For Juno Beach, our worst-case scenario is 12 stories and 18 units per acre, at any commercial zoned or industrial zoned location [confirmation needs to be made on where these projects could potentially be built due to the need for mixed-use]. Our land use designations are not observed by the law; however, our comprehensive plan requirements are still observed.
    A. Suggest that Juno Beach have Town Council pass a Resolution to give notice of pending ordinance that will include processes to follow, check lists of requirements to review applications submitted, public notice provisions, enforcement requirements, potential additional setbacks or open space or parking requirements, and to address other aspects of these types of developments needed, but not specifically defined in the SB 102 or Florida Statutes; to prevent a developer or landowner who is applying for a development pursuant to this law from stating that they relied on the regulations that are currently within our municipal code, which is what will happen if we receive an application today. We need this before an application is received.

B. What does one mile mean? Can a project leap frog after the Live Local act allows one building of the highest height – can you then go a mile from this newest location? Suggest local code to define as no leap frogging because not defined by statute. Also, suggest local code to state that a special exception height increase is not the height that would be allowed.

C. Suggest to clarify in local code that the Juno Dunes Conservation Area is an exempt location as well as other residential zoned areas.

2. Juno Beach has < 20% of its land area zoned commercial so any project would have to be mixed-use according to the Live Local Act.

   A. Suggest to clarify in local code that these projects can only be located within our commercial general zoned area or other zoned area. Identify these areas to meet the October deadline in the Statute to identify these available lands. Look to Tallahassee who created a GIS layer to identify. Benchmark other towns to see how they described available project locations. Identify terms in local rules so that our deliverable meets our local requirements for items not clearly spelled out in statute.

   B. Clarify in local rule that the project would have to meet the maximum of 75% residential and of that 75% of floor area as residential 40% would have to be affordable workforce housing for the next thirty years.

3. Create the calculations called for using Florida Statute 420.0004 definitions for median adjusted gross family income; the monthly rent to be considered affordable is < 30% amount of the median adjusted gross family income. (an example calculation shows for Juno Beach is a monthly rent of $1,901.41 per month[ii] note that this is to show how these numbers are calculated and this is not the real number because the official sites cited in the statute to find these numbers was not used herein.

   A. Suggest clarify by memorandum what census data points are used to make this calculation for monthly affordable housing rental amount and make the calculations, believe this is defined; if not suggest local rules to define.

4. Live Local removes all home rule powers to regulate high-density high-rise towers within our Town, the remaining regulations to the Town are parking spaces, open space, and setbacks.

   A. Review local regulations regarding parking spaces, open spaces and set backs within our highest density and highest height zoning districts that will apply to the affordable housing projects, then determined if we need additional buffer or open space for the residential tenants in the mixed-use space and for the neighboring properties.

   B. If it is determined that additional requirements are needed, then establish the grandfathering language for any non-conforming uses for the new parking, set back, open space requirements.

5. Project Applications under Live Local Act are Administratively Reviewed within 10 day for a completeness determination with notification to applicant if not complete and then a 45 day review for sufficiency of application – the project must be consistent with the Comprehensive Plan but not with Land Use. A procedure for review needs to be adopted with appropriate forms and published, so that the public is noticed, and a public hearing is held prior to the expiration of the time window for administrative reviews.
    A. Benchmark other local government procedures adopted for review of these fast-track applications, local code definitions, and their enforcement tools adopted.
    B. Public notice an ordinance requiring a specific review process.
    C. <u>Review process must include, but not be limited to</u>:
        1) <u>Involve the Public and Public Elected Officials</u> - immediate public hearing and notification of Planning and Zoning Board and Town Council of application received with a form of the public notice and location of public notice adopted ahead of time- including notification at a minimum on Town's email blast, Town's activities report, posting on website.
        2) <u>Ensure Enforcement of Requirements for Thirty Years</u> - Adoption of contract language between the Town of Juno Beach and the developer and landowner that binds both the developer and landowner in an enforceable way with penalties of forfeiture and tax liens to the thirty year affordable housing rent amounts with language as to how the rent amounts are calculated so that tenants will know that their rents are frozen at the date of application calculation for what is an affordable rent without any increases for a thirty year period. With code enforcement to enforce and each unit a separate violation at $250 per day that becomes a lien on the property
        3) <u>Adopt by Ordinance a checklist of the site area regulations that can be controlled by the local government within this law,</u> such as architectural compatibility/harmony, parking, open space, setbacks, buffers for non-compatible uses, landscaping, and others so that it is a robust checklist that can be used for an appropriate administrative response within the ten-day period for completeness of the application. Also, there can be a review of the allowed elements and a determination made whether additional municipal code changes are needed based on the new law.

[1] I attended an APA Orlando Region lecture 7/26/2023 on the live local act and will share the presentation when it is made available. The thoughts here were collected from those presentations including the presentation of Attorney Rick Geller, and community planner, Daphne Green. I believe we need both our municipal attorney, Len Rubin and a land use attorney to help the Town navigate this new law. Our local APA region could also be of service as well as the League of Cities.

[ii] Please note that these calculations do not use the official Bureau of Vital Statistics numbers for Juno Beach, I did not have immediate access to that citation, apologies for any confusion, as these numbers are general calculations and are estimates only, and not accurate for Juno Beach.

Three sources average $63,380. Moderate Income < 120% of median annual adjusted income within MSA. $63,380 x 120% = $76,056.4

$76,056.4 x 30% = $22,816.92
$22,816.92/12 = $1,901.41 month moderate income rent for affordable housing in Juno Beach

1. Source one https://censusreporter.org/profiles/16000US1235850-juno-beach-fl/ $65,638 ±$28,267 Median household income for Juno Beach
2. Source Two https://datausa.io/profile/geo/juno-beach-fl/ $61,441 Median household income for Juno Beach (26.1% 1-year decline)

Source Three https://www.city-data.com/income/income-Juno-Beach-Florida.html Median household income in Juno Beach, FL in 2021: Juno Beach: $66,713 Florida: $63,062

Live Local Act Breakdown

Provided by the East Central Florida Regional Planning Council

Housing Policies from the Live Local Act (LLA)

o Allows cities and counties (C&C) to approve affordable housing developments, including **mixed-use residential developments (MU)**, on any land zoned for commercial or industrial use so long as at least 10% of units are affordable.

o Requires C&C to allow **multifamily (MF)** and MU as allowable uses in any area zoned for **commercial, industrial, or MU** if at least 40% of the units are affordable for at least 30 years. For MU projects, at least 65% of the total sq. ft. must be for residential purposes.

- The C&C may not require the project to obtain a **zoning or land use change**, variance, or comp. plan amendment for zoning, height, or density.
- A C&C may not restrict the **density** of the project below the highest allowed density on any land in the C&C where residential development is allowed.
- A C&C may not restrict the **height** of the project below the highest currently allowed height for a commercial or residential building located within 1 mile of the project or 3 stories, whichever is higher.
- The project must be approved if it satisfies the C&C's land development regulations for MF projects in areas zoned for such use and is otherwise **consistent with the comp. plan**, with the exception of regulations for densities, height, and land use.
- The C&C must consider reducing **parking requirements** for the project if it is within a half mile of a major transit stop.
- A C&C with less than 20% of its land designated for **commercial or industrial** uses is required to approve a MF project as a MU project.

o By October 1, 2023, and every three years thereafter, C&Cs must create an **inventory of all lands** it owns that are "Appropriate for use as affordable housing".

- Requires **independent districts** within C&Cs to also develop a similar inventory.
- Requires C&Cs to make their inventories **publicly available** on its website.

o Requires C&Cs to maintain on its website a policy on procedures and **expedited processing of building permits** and/or development orders required by law to be expedited.

o Requires each manager of conservation lands to include in its land management plan identified **conservation lands** that may be appropriate for transfer to a C&C and used for affordable housing.

o Within **10 days** of an applicant submitting a development application to a C&C, If the C&C does not provide notice that the applicant has not submitted the properly completed application, the application will be automatically deemed **completed and accepted**.

PREEMPTIONS

PROHIBITS LOCAL GOVERNMENTS FROM IMPOSING RENT CONTROLS

Housing Investments

- $259M for the State Apartment Incentive Loan (SAIL) Program
- $252M for the State Housing Initiatives Partnership (SHIP) Program
- $100M for the newly codified Hometown Heroes Program
- $100M for an Inflation Response Program
- $100M for a Live Local Tax Donation Program

Housing Incentives

- New option for C&Cs to provide tax exemptions for projects with at least 50 units, and at least 20% are affordable to households at or below 60% AMI
- Property tax incentives for non-profit owned land, leased for a minimum of 99 years and made affordable to households up to 120% AMI
- Property tax exemption for MF projects with more than 70 affordable units for households up to 120% AMI
- New sales tax refund on building materials used for affordable housing projects

Policy Takeaways for Local Governments to Consider

Comprehensive Planning and Land Development Regulations (LDR)

- Assess existing LDRs and Comp. Plan elements (FLUE) to assess the extent to which specified residential developments can be built in regard to density and height. Also consider priority land use regulations to apply to proposed housing developments that are not preempted to the State.
    - Consider how local parking requirements can be amended to facilitate new and existing development.
- Ensure policies include definitions supported by LLA: mixed-use residential, urban infill, major transit stop, manufactured homes, tiny homes, accessory dwelling units, etc.
- Use policy to support innovative housing funded by the SAIL program, which focuses on supporting seniors, disabled groups, individuals aging out of foster care, military personnel, and rural areas.
- Use Housing Element to:
    - Develop new policies to support the implementation and enforcement of programs that support affordable housing, such as inclusionary housing, first of right refusal, and density bonuses.
    - Enable tenant protection policies that buffer the impacts of rising rents on residents, such as a just cause eviction ordinance, landlord registries, rental assistance programs, and eviction education to better understand the eviction process.
    - Support homeownership stabilization programs and services that house people and keep them housed while enhancing neighborhoods, such as down payment assistance, home rehabilitation, etc.

Managing Surplus Lands

- In developing the required inventory of government-owned lands that can be used for affordable housing and related policy resolution, consider best practices in managing surplus lands:
    - Define eligibility criteria for the receipt or purchase of surplus lands.
    - Use ground leases for long-term affordability or transfer property to a Community Land Trust (CLT).
    - Support the creation of inventories for special districts, like CRAs, housing authorities, water districts, etc.
- Consider creating a CLT or Housing Trust Fund to support housing development on publicly-owned lands.
- Utilize technical assistance for managing surplus lands that is made available through the Affordable Housing Catalyst Program and other state and regional resources.

New State Housing Strategy Guidelines to Apply to Local Housing Policies

- The following four policy areas constitute the goals of the revised State Housing Strategy. The State will take on duties to implement that State Housing Strategy such as: administering effective TA and capacity building programs; maintain statewide data on housing needs and production through the Shimberg Center for Housing Studies; maintaining a website for connecting residents with affordable housing resources, setting guidelines for the roles of the Office of Program Policy Analysis and Government Accountability in monitoring affordable housing activities in the state:
    - Every five years, conduct case study analysis on affordable housing strategies from other states, best practices research on housing policies enacted in the State, and an evaluation of state housing programs' compliance with state policy and effectiveness in reaching affordable housing goals.
- *Housing production and rehabilitation programs* - develop local incentives for affordable housing, enable infill and mixed use development, and support modern concepts like resilient housing, 3-D printed homes, tiny homes, and accessory dwelling units.
    - Contends that state funds should only be available to C&Cs that provide incentives or financial assistance for affordable housing, and that funds should not be made available to C&Cs whose comp. plans are not compliant with chapter 163 of F.S. or to projects that do not comply with the C&C's comp. plan.
- *Public-private partnerships* - enable data creation/sharing, maximize receipt of TA and housing incentives.
- *Preservation of housing stock* - expand housing rehabilitation programs and neighborhood stabilization programs.
- *Unique housing needs* - support rural housing, fair housing, and the economic dignity of all residents.

Mixed Use Development and Environmental Factors

- The LLA prioritizes mixed-use development and the placement of homes closer to jobs, so consider:
    - Incorporating principles like Complete Streets that support walkability into local policies and plans.
    - Working with local transit authorities to strengthen local transit services to affordable housing projects.
    - Developing a Brownfield Program that is capable of assessing and revitalizing potential brownfields in commercial and industrial areas where housing development is proposed.
    - Consider the impact that projects may have on health determinants, like water quality and park access.
    - To provide for quality and equitable utility services for all households, consider the Florida Job Growth Grant Fund, which the LLA expands to support the construction of infrastructure for affordable housing projects.

Chair Davis provided during the 9/19/23 Planning & Zoning Board Meeting

September 19, 2023 P&Z Board - Questions from Activity Report Summary items since the last P&Z Board meeting held August 7th.

August 11, 2023 – Activity Report Statement - Staff received an application for a Major Site Plan Amendment for the Seminole Gold Club, staff subsequently distributed the submittal package to the Development Review Committee (DRC). The DRC meeting will take place on August 31st at 10:30 in the Council Chambers.

Question – What was the outcome of this DRC meeting, and was this the only invitation given to P&Z Board meeting?

August 18, 2023 Activity Report

(1) Staff and Mr. Buck Evans, the Town's Building Official, met with Mrs. Cathie Field Lloyd, HOA President of the Brigadoon, to discuss the building permit fees associated with their electric building permit and waterproofing building permits and future building permits that will be submitted in the near future. **Question – is there discussion on amending the permit fee amount (currently 3% of total project costs) based on maintenance type construction for existing residents versus new development? Any other discussion on permit fee amounts?**

(2) Staff worked with Melissa Tolbert, Environmental Program Supervisor for PBC Environmental Resource Management, to discuss the proposed Townhouse Project by Pulte Homes located at the "Christmas Tree Lot" which is adjacent to the Juno Dunes Natural Area. Staff also discussed possible property acquisitions by the County, State or the Town for vacant lots that are adjacent to the Juno Dunes Natural Areas. **Question – which vacant lots were identified by this review? Number and locations?**

(3) Staff reviewed two exterior light fixtures proposed by The Surf Condominium and Lucy Dabbs – Property Manager for possible use on the north, south and east sides of the condominium building and one exterior light fixture proposed for possible use on the west side of the condominium building. The proposed fixtures for use on the north, south and east sides appear to be acceptable for use as the fixtures are turtle-friendly / wildlife approved; however, the proposed fixture for the west side of the building is not acceptable as the light emitted from the fixture is not turtle-friendly i.e. not downward directed, and will cause light to be reflected from the east exterior wall of The Manor which would be visible from the beach. **Question – exterior lighting was identified as a priority and staff had the next project to create a description sheet for the different types of allowed lighting, when will this be completed for the P&Z Board review?**

August 25, 2023 – Activity Report

PBC continued crosswalk improvements on Ocean Drive. Question – identify the cross walks being improved by location and what are the improvements?

Activity Report dated September 15, 2023

Town Manager Dyess and staff met with Cotleur & Hearing and the Pulte Group to review and discuss the next steps to submit a Future Land Use Map Amendment, Rezoning Application, ROW Abandonment Petition, Special Exception application, and a Site Plan Application for a proposed residential project located at the south west corner of US Highway 1 and Donald Ross Road (known as the Christmas Tree Lot).
Question – what is the role of the P&Z Board in the review of: (1) Future Land Use Map Amendment, (2) Rezoning Application, (3) ROW Abandonment Petition, (4) Special Exception application, and a (5) Site Plan Application for a proposed residential project located at the south west corner of US Highway 1 and Donald Ross Road.
In your response identify for each of the (5) five review types: A. the zoning code section for the review process criteria, B. standard of review applied to that process, and C. identify the specific criteria zoning code or ordinance provisions to respond to the specifics of the proposal application.

ABCS OF LOCAL LAND USE AND ZONING DECISIONS

Provided by Chair Davis

Vol. 84, No. 1 January 2010 Pg 20 Gary K. Hunter, Jr. and Douglas M. Smith

Environmental & Land Use Law

This article targets the general practitioner who is called either to assist clients in seeking local government development approvals or in opposing such approvals. Often times, attorneys are approached on the eve of a critical public hearing to urge support for or object to a development order. Many times, clients wait until the last minute to seek legal counsel to assist in what they perceive as a local political matter. What clients may not anticipate are the vagaries of local collegial boards or the impact of well-organized or invested opposition. They may also discount the expense and uncertainty of litigation that may result from a development order being issued or denied. The purpose of this article is to arm the general practitioner with the tools demanded by this unique legal arena. The emphasis is on prevention because the outcome is often dictated by the presentation of evidence in the local government proceeding.

Expectations Associated with Local Government Boards

Securing land use approvals begins long before an application is filed or reviewed by staff. In advance of applying for local development orders, applicants and their lawyers must familiarize themselves with the filing processes, procedures, and substantive standards applicable to the application. Processes among local governments vary; one must be familiar with the relevant government's standards before proceeding with a particular project.

Once advised on the process, the lawyer should ensure that staff properly reviews the application. This review may entail analysis of staff work product and notices throughout the process to ensure completeness with both procedural and substantive criteria. Counsel should also scrutinize the work product of retained consultants as they may not appreciate the need for strict compliance with the legal requirements. Any errors in the review process ultimately harm the client, not the local government.

When dealing with staff, the attorney must remember that ethics, credibility, and integrity are paramount. While clients may become frustrated with the development review process, it is important that the attorney and client interact with local government staff honestly and with proper decorum. Threatening a lawsuit or suggesting that one will go over a reviewer's head is rarely appropriate and, more often than not, unproductive. In addition, an attorney seeking a land use approval must

remember that he or she may be called in the future to work with staff on a different development, and the attorney's dealings with staff on other projects may impact his or her ability to achieve a client's goals. Being professional with staff at all times benefits the attorney's current and future clients.

• *Types of Proceeding: Know the Rules* — There are two[1] general types of land use approval proceedings before a local government: quasi-legislative and quasi-judicial.[2] Quasi-legislative decisions are generally described as those in which the local government is tasked with formulating policy rather than applying specific rules to a particular situation.[3] A local government's approval or denial of an issue in its quasi-legislative capacity is typically subject to a fairly debatable standard of review.[4] Fairly debatable means that the government's action must be upheld if reasonable minds could differ as to the propriety of the decision reached.[5] Decisions subject to the fairly debatable standard of review need only be rationally related to a legitimate public purpose, such as the health, safety, and welfare of the public, to be valid.[6]

Quasi-judicial decisions involve the application of policy to a specific development application.[7] Quasi-judicial hearings are to be conducted with more formality than a legislative public hearing and are akin to informal trials. Quasi-judicial decisions are subject to a certiorari standard of review on appeal. The distinction between the two types of proceedings impacts the process that the applicant is due, the relative discretion the local government has in approving or denying the requested action, and the proper method for appealing an adverse decision.

• *Know What Process is Due* — Understanding whether a decision is quasi-judicial or quasi-legislative is critical, as procedural due process rights are enhanced in quasi-judicial proceedings and the standards of review differ substantially. For example, quasi-legislative hearings require little process. Indeed, allowing only 10 minutes for members of the public to speak on quasi-legislative matters comports with due process.[8] Moreover, limitations on ex parte communications with the decisionmakers that apply to quasi-judicial hearings do not apply to legislative determinations. There is no right in quasi-legislative hearings to cross-examine witnesses.[9]

contrast, in quasi-judicial hearings, parties are entitled — as a matter of due process — to cross-examine witnesses, present evidence, demand that witnesses testify under oath, and demand a decision that is based on a correct application of the law and competent

substantial evidence in the record.[10] Recent case law provides that limiting parties to only eight minutes to present positions regarding a zoning resolution violates procedural due process under the circumstances of that case.[11]

In quasi-judicial proceedings, participants must be careful to avoid contacting the members of the deciding panel prior to the hearing to urge a particular outcome.[12] If ex parte contacts have been made (which is more often than not the case), they must be disclosed at the quasi-judicial hearing or they are *presumed* prejudicial to the outcome and will likely result in a finding of a violation of procedural due process.[13] The presumption can only be overcome if the local government — not the applicant — demonstrates that the contact was not prejudicial following a multi-factor, fact-intensive analysis.[14]

· *Know the Applicable Legal Burden* — The discretion afforded decisions on quasi-legislative matters is broad, and decisions need only satisfy the "fairly debatable" standard. Given this broad discretion, only decisions that are arbitrary and capricious or illegal are subject to serious legal challenge.[15]

Quasi-judicial decisions are more involved. It is beyond the scope of this article to describe the myriad criteria that may apply to a particular application. The general rule, however, requires the *applicant* (not local government staff) to demonstrate compliance with the local government's code of ordinances, land development regulations, and comprehensive plan.

For example, to obtain a site-specific rezoning, the applicant must demonstrate that the rezoning is consistent with the local government's comprehensive plan and all procedural requirements of the zoning ordinance; if the initial burden is met, the burden shifts to the local government to demonstrate that maintaining the existing zoning on the property serves a legitimate public purpose or that the decision denying the rezoning is not arbitrary, discriminatory, or unreasonable.[16] A similar burden shifting scheme applies to site plan and plat approvals, special exceptions, and variances (although the relevant tests differ).[17] At a minimum, once the applicant makes a prima facie showing of entitlement to a development order, the burden shifts to the local government to justify denial of the order for proper reasons that are based on competent substantial evidence in the record.

The applicant bears the initial burden of presenting competent substantial evidence to support its development application. Thus, if local government staff omits a substantive item in its review, the applicant must be prepared to supplement the record with

competent evidence or risk legal challenge to an issued development order. Most Florida local governments are blessed with capable planning and legal staff; nonetheless, applicants should avoid ceding responsibility for ensuring compliance with the land development code and comprehensive plan to the local government.

Similarly, third parties challenging the issuance of a development order must be prepared to establish noncompliance through competent evidence, including witness testimony at the quasi-judicial hearing. The failure to raise an issue before the local government prevents them from raising additional issues on appeal.

· *Making the Case on the Record* — In preparing for a hearing before a local board, one must be prepared to establish a record demonstrating entitlement to the development permit sought, including submitting competent substantial evidence as proof. If an appeal is anticipated, the lawyer should ensure that the record is transcribed at the hearing or, at a minimum, the proceedings are recorded such that they can be transcribed at a later date. The lawyer must ensure that the record contains all information necessary to defend (or defeat) the development order on appeal, as the record is generally fixed in certiorari proceedings. In other words, if evidence on an issue being appealed was not presented at the hearing before the local government, the evidence does not exist as far as the appeal is concerned.[18]

In proceedings before the local board, the applicant typically addresses whether the requested development order complies with the land development code and comprehensive plan. It is also critical to make objections on the record to procedural or substantive deficiencies — as the failure to raise proper objections can result in the issues being waived for purposes of appeal.[19]

Making the case on the record in a quasi-judicial proceeding can lead to awkward interactions with collegial boards. Given the judicial nature of the proceeding, it is incumbent on counsel to ensure that testimony and evidence provided is competent and substantial.[20] Establishing that opposing evidence is neither competent nor substantial may require thorough cross-examination of staff and witnesses. Although awkward and often uncomfortable, creation and thorough development of the record is necessary if further appellate proceedings are to offer hope for success. That does not mean, however, that the lawyer should feel free to treat the local government forum like a circuit courtroom. Courtroom theatrics and aggressive treatment of witnesses are likely to solidify a board vote against one's client.

In addition, any party challenging the issuance of a development order must establish its standing on the record. Indeed, a third party challenging the development order must establish standing in the first instance before it will have standing to pursue a petition for writ of certiorari with a circuit court.[21] Third parties and special interest groups must be vigilant in establishing standing under the "special injury" test set forth in *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972).[22] That test requires the party challenging a development order to show special damages peculiar to the party which differ in kind (as opposed to degree) to the damages suffered by the community as a whole.[23] Moreover, if the challenger is a special interest group, it must demonstrate that a substantial number of its members are similarly affected.[24] This evidence must be included in the record before the local government or it will not be considered on a petition for writ of certiorari.[25]

• *It's Not Over 'Til It's Rendered* — The local administrative process is not complete until the order is "rendered" in writing and filed with the clerk. statute, all denials of development permits must be in writing.[26] Recent case law leaves little question that the time for appeal commences upon the local government's filing of the written order (either in the form of a denial or an issuance).[27]

Appeals

• *Choosing Which Way to Go* — Adversely affected parties have several avenues of appeal. Which route to take depends largely upon whether the local tribunal was acting in a quasi-legislative or quasi-judicial capacity and, if the latter, what was the underlying reasoning for the rendered decision.

Preliminarily, if the local tribunal acted in a quasi-legislative capacity, the standard of review is usually "fairly debatable," and the avenue of appeal is typically a declaratory judgment action in circuit court.[28] contrast, if the local tribunal was acting in a quasi-judicial capacity, dual appellate options exist: a petition for writ of certiorari to the circuit court or a complaint for declaratory judgment pursuant to F.S. §163.3215 (2008), also filed in circuit court.

Further, if quasi-judicial, the reasons underlying the local tribunal's decision impact the method of appeal. A decision based on code compliance is appealable by filing a petition for writ of certiorari. A decision based on consistency or inconsistency with the comprehensive plan may only be challenged by filing a declaratory judgment action under F.S. §163.3215. Moreover, many local government decisions are premised on

noncompliance with the comprehensive plan and land development code, which may necessitate the filing of a petition for writ of certiorari and a complaint for declaratory judgment under F.S. §163.3215, if all appealable issues are to be addressed.

Additionally, issues regarding the constitutionality of a local ordinance are not appealable by petition for writ of certiorari; such claims must be pursued as a declaratory judgment action.[29] Similarly, issues regarding vested rights, equitable estoppel, and waiver may not be germane to the development order being requested. If so, such issues are inappropriate for consideration by petition for writ of certiorari.[30] Other avenues of appeal may be available.[31]

Finally, nonprevailing applicants often seek to invoke federal civil rights law under 42 U.S.C. §1983 (2006), in part to take advantage of attorneys' fees shifting under 42 U.S.C. §1988. However, such claims are extremely limited in Florida and usually do not succeed.[32]

· *Timing of Appeal* — The petition for writ of certiorari must be filed within 30 days of rendition of the order by the local government. "Rendition" is defined as the date the order being challenged is signed and filed with the city or county clerk.[33] Similarly, lawsuits under F.S. §163.3215 must be filed within 30 days of rendition of the challenged order.[34]

Lawyers should familiarize themselves with the local land use code as it may provide alternative procedures for appealing a local land use decision, including special magistrate proceedings pursuant to F.S. §70.51. These proceedings may provide more cost-effective alternatives than circuit court litigation; in addition, requirements regarding exhaustion of administrative remedies may be implicated.

If circuit court is the proper venue, the practitioner must bear in mind that the filing of a complaint or a petition for writ of certiorari requires much more preparation than the filing of a notice of appeal. Writ petitions are, in essence, opening appellate briefs which must cite record evidence, cases, and arguments demonstrating a violation of procedural due process, the essential requirements of law, or a decision lacking competent substantial evidence as support.[35] Preparing the petition is typically far more time intensive than filing a notice of appeal. Likewise, while not as involved as writ petitions, complaints under F.S. §163.3215 must identify all inconsistencies between the challenged land use decision and the local comprehensive plan. Either option requires adequate lead time for preparation.

- *Standards of Review* — Under Florida law, local land use decisions made in the context of a quasi-judicial hearing are appealable as a matter of right to circuit court.[36] Certiorari review is limited in nature. The standard of review before the circuit court is as follows: 1) whether procedural due process was afforded, 2) whether the local tribunal observed the essential requirements of law, and 3) whether the local government's decision was based on competent substantial evidence. To be legally sufficient, the petition must demonstrate a preliminary basis for relief, *i.e.*, the local tribunal's decision failed to comply with one of the above requirements.[37] If the petition fails to meet this standard, it is subject to summary dismissal.[38]

In contrast to writ petitions, cases brought under F.S. §163.3215 are subject to a "strict scrutiny" standard of review. The circuit court, in a de novo proceeding, must evaluate whether the development order issued strictly complies with the local government's adopted comprehensive plan.[39] Cases brought under this section are much more involved than the aforementioned certiorari proceeding. As with any other civil proceeding, the parties are entitled to discovery, and the case is tried in a full bench trial. The matter is not limited to record evidence before the lower tribunal.[40]

- *Proceedings and Remedy* — Perhaps the most striking distinction between writs of certiorari and complaints for declaratory judgment are the procedures applicable to the cases and the available remedies. Petitions for writ of certiorari are appellate in nature. The case is pursued under the Florida Rules of Appellate Procedure.[41] Once the circuit court issues an order to show cause, appellate briefing timelines specified in Fla. R. App. P. 9.100 control. Such matters are typically resolved after an "appellate" type hearing before a circuit court judge (or in some judicial circuits, a panel of judges).

In a writ of certiorari proceeding, the circuit court's sole remedy is to issue the writ and remand the matter to the lower tribunal for further consideration (subject to the legal direction of the court).[42] In other words, the reward for prevailing on a petition for writ of certiorari is a second proceeding before the local tribunal that initially rendered the adverse decision. The circuit court cannot enter any judgment on the merits as to the underlying case or direct the lower tribunal to enter a particular order.[43]

contrast, complaints invoking equitable jurisdiction under F.S. §163.3215 offer equitable remedies.[44] Such lawsuits can be broader than the statute may suggest at first glance. F.S. §163.3215 specifies that the section is the *exclusive* method "for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan adopted under this part." "Aggrieved or adversely

affected" parties are defined as persons or local governments "which will suffer an adverse effect to an interest protected or furthered by the comprehensive plan."[45] Due to recent statutory amendments, the definition of "adversely affected party" specifically *includes* the developer/applicant for a development order. As construed by the courts, the broad definition of "adversely affected party" opens the courthouse doors to a broad class of potential plaintiffs seeking de novo review of issued development orders.[46] However, the sole issue that may be litigated in such cases is consistency (or inconsistency) with the comprehensive plan.

As noted, complaints under F.S. §163.3215 invoke the equitable jurisdiction of the court. Available remedies include declaratory and injunctive relief. Under appropriate circumstances, courts may order the removal of structures built pursuant to illegally issued development orders.[47] While an order of removal may seem unlikely, the mere potential of that remedy should sufficiently encourage developers to allow legal challenges to reach a conclusion before expending resources on the subject project. Under such circumstances, the risk and expense of delay are typically borne entirely by the developer. The delay and attendant expense only fortify the importance of ensuring compliance with the local code and comprehensive plan in the first instance.

Conclusion

Navigating local land use approvals can be harrowing. Understanding the local land development process as well as the legal burdens will go far in securing a client's objectives. Preparation and knowledge in the area is paramount to success.

Most critical is identifying the relevant legal standards and procedures by reviewing the local government's land development code and comprehensive plan. Thereafter, direct efforts toward culling competent substantial evidence to justify one's decision or refute the opponent's position. Local land use appeals are rarely "slam dunks," but such cases typically improve with considerable reflection and case adjustment before the matter is presented to the local tribunal. Waiting to establish the legally required showing until the hearing on the requested development order or an appeal thereafter may prove devastating to one's case.

[1] A third type of approval is an administratively issued development order such as a building permit. Such approvals are based on an executive decision concerning code compliance, and they are typically issued without a hearing. The determination concerning code compliance is typically made following a staff review process, and the

ultimate development order is usually issued by the appropriate local government official. Since these approvals do not entail public hearings before the local government, this article focuses on the quasi-judicial and legislative approvals only.

[2] Practitioners should be aware that whether a decision is quasi-judicial versus quasi-legislative is a matter of law that is not impacted by the nomenclature selected by the local government. *D.R. Horton v. Peyton*, 959 So. 2d 390, 400 (Fla. 1st D.C.A. 2007). It is the character of the proceeding that controls. *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 474 (Fla. 1993).

[3] *Snyder*, 627 So. 2d at 474. (distinguishing between quasi-legislative and quasi-judicial proceedings). The classic quasi-legislative decisions in land use are amendments to comprehensive plans, general zonings or rezonings, adoption of land development regulations, decisions on developer agreements, issuance of debt instruments, and decisions to enter into proportionate fair share agreements.

[4] *Id.* An atypical standard and procedure is applicable to the review of comprehensive plan amendment approvals (as opposed to denials), which are subject to review under a specific administrative scheme set forth in Fla. Stat. §163.3184 (2008).

[5] *Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204, 205 n.1 (Fla. 2001); *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).

[6] *City of Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428, 430 (Fla. 1954).

[7] *Snyder*, 627 So. 2d at 474. Common development orders that are considered in the context of a quasi-judicial hearing are site-specific rezoning, site plan approvals, variances, special exceptions, and voluntary annexations.

[8] *See, e.g., Reed v. Cal. Coastal Zone Conservation Comm'n*, 55 Cal. App. 3d 889 (Cal. Ct. App. 1975); *see also Hadley v. Dep't of Admin.*, 411 So. 2d 184 (Fla. 1982) (noting "[t]here is. . . no single, unchanging test which may be applied to determine whether requirements of procedural due process have been met").

[9] *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 652-53 (Fla. 3d D.C.A. 1982).

[10] *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 5th D.C.A. 1991).

[11] *Hernandez-Canton v. Miami City Comm'n*, 971 So. 2d 829, 832 (Fla. 3d D.C.A. 2007).

[12] *Jennings*, 589 So. 2d at 1340; *Vizcayans, Inc. v. City of Miami*, 15 Fla. L. Weekly Supp. 657 (Fla. 11th Cir. Ct. May 7, 2008).

[13] *See* Fla. Stat. §286.0115.

[14] *Jennings*, 589 So. 2d at 1340.

[15] *Bd. of County Comm'rs v. Casa Dev., Ltd.*, 332 So. 2d 651, 654 (Fla. 2d D.C.A. 1976).

[16] *Snyder*, 627 So. 2d at 476.

[17] *See Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (site plan and plat approval standard); *Premier Developers III Assocs. v. City of Fort Lauderdale*, 920 So. 2d 852, 854 (Fla. 4th D.C.A. 2006) (site plan approval standard); *Metro. Dade County v. Section 11 Prop. Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d D.C.A. 1998) (special exception standard); *Bd. of County Comm'rs v. Webber*, 658 So. 2d 1069, 1073 (Fla. 2d D.C.A. 1995) (variance standard).

[18] *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

[19] *Valdez v. Miami Dade County Bd. of County Comm'rs*, No. 07-304 AP (Fla. 11th Cir. Ct. Mar. 31, 2008). In that case, one of the commissioners on the Miami-Dade County Board of County Commissioners made inappropriate comments during a hearing concerning an application for a boundary change or a use variance. *Id.* The court concluded that procedural due process requirements had not been violated because Mr. Valdez failed to object to the commissioner's comments during the hearing. *Id.* While the hearing was informal, Mr. Valdez was required to object to any procedural irregularities to preserve his right to raise the issue on appeal. *Id.*

[20] *Vaillant*, 419 So. 2d at 624.

[21] The same is not true of a declaratory judgment action brought under Fla. Stat. §163.3215. *Save the Homosassa River Alliance, Inc. v. Citrus County*, 2 So. 3d 329 (Fla. 5th D.C.A. 2008). However, the only issue in such a proceeding is the consistency (or inconsistency) of the development order with the comprehensive plan. Issues relating to code compliance are not the proper subject of a declaratory judgment action under this section.

[22] As noted herein, a more liberal standard applies to comprehensive plan consistency challenges under Fla. Stat. §163.3215.

[23] *City of Fort Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d D.C.A. 2008) (distinguishing between standing under Fla. Stat. §163.3215, and standing to bring a petition for writ of certiorari).

[24] *See Fla. Home Builders Ass'n v. Dep't of Labor and Employment Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982); *c.f.*, *Dunlap v. Orange County*, 971 So. 2d 171, 175 (Fla. 5th D.C.A. 2007) (confirming that evidence of standing need not be established before the local tribunal for an adversely affected party to bring a lawsuit under Fla. Stat. §163.3215).

[25] *Splitt*, 988 So. 2d at 28.

[26] *See* Fla. Stat. §§125.022 and 166.033; *see also* Fla. Stat. §163.3215(3).

[27] *See 5220 Biscayne Blvd., LLC v. Stebbins*, 937 So. 2d 1189, 1190 (Fla. 3d D.C.A. 2006).

[28] As noted in endnote 4, proceedings related to comprehensive plan amendments are an exception to the rule. Approved comprehensive plan amendments are subject to appeal administratively under Fla. Stat. Ch.120, before the Department of Community Affairs or Division of Administrative Hearings. Fla. Stat. §163.3184. The appropriate forum and relative standard of review varies upon whether the comprehensive plan amendment is a small-scale or large-scale amendment and whether the Florida Department of Community Affairs found the amendment "in compliance." contrast, a decision denying a comprehensive plan amendment is appealed by filing a declaratory judgment action in circuit court; the standard of review in the proceeding is "fairly debatable."

[29] *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003).

[30] *Palazzo Los Olas Group, LLC v. City of Fort Lauderdale*, 966 So. 2d 497, 501 (Fla. 4th D.C.A. 2007).

[31] *Id.*

[32] *McKinney v. Pate*, 20 F.3d 1550 (Fla. 11th Cir. 1994); *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (Fla. 11th Cir. 1997); *Paedae v. Escambia County*, 709 So. 2d 575 (Fla. 1st D.C.A. 1998).

[33] Fla. Stat. §163.3215(3); Fla. R. App. P. 9.020(h); *5220 Biscayne Boulevard, LLC*, 937 So. 2d 1189.

[34] *5220 Biscayne Boulevard, LLC*, 937 So. 2d 1189.

[35] *See* Fla. R. App. P. 9.100(g) (listing the general requirements for the petition).

[36] *Saadeh v. City of Jacksonville*, 969 So. 2d 1079, 1082 (Fla. 1st D.C.A. 2007) (citing *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000)).

[37] Fla. R. App. P. 9.100(h). *See generally Fine v. City of Coral Gables*, 958 So. 2d 433 (Fla. 3d D.C.A. 2007).

[38] Recent case law supports the proposition that the writ petition may be dismissed without leave to amend and without oral argument if it does not demonstrate, on its face, a preliminary basis entitling the petitioner to relief. *Fine*, 958 So. 2d 433. As such, great care should be used in preparing the petition.

[39] "Strict scrutiny" in the land use context has been described as a process whereby the circuit court makes a detailed examination of a statute, rule, or order of a tribunal for exact compliance with or adherence to a standard or norm. *Snyder*, 627 So. 2d 474.

[40] Fla. Stat. §163.3194(4)(a).

[41] In *Concerned Citizens of Bayshore Comm., Inc. v. Lee County*, 923 So. 2d 521 (Fla. 2d D.C.A. 2005), the Second District concluded that Fla. R. Civ. P. 1.630 applies to common law petition for writ of certiorari proceedings. This conclusion appears unsupported in light of a 1996 amendment to Fla. R. App. P. 9.100 clarifying that petitions for writ of certiorari that are appellate in nature are governed by the appellate rules, not Fla. R. Civ. P. 1.630. *See generally* Fla. R. App. P. 9.100 comm. notes 1996 Amendment.

[42] *Clay County v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st D.C.A. 2007).

[43] *Id.*; *Broward County v. G.B.V. Int'l., Ltd.*, 787 So. 2d 838, 844 and n.18 (Fla. 2001).

[44] *See Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th D.C.A. 2001).

[45] Fla. Stat. §163.3215(2). The definition specifies that "the alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons." *Id.* However, in *Save the Homosassa River Alliance*, 2 So. 3d 329, the court broadly construed this language to allow plaintiffs with a generalized interest in environmental issues impacting the Homosassa River to proceed under Fla. Stat. §163.3215, because their interests were alleged to be adversely impacted and because the stated environmental interest was greater than a generalized interest in the community at large. *Id.* at 340.

[46] *Id.* at 345 (Pleus, J., dissenting).

[47] *See Pinecrest Lakes, Inc.*, 795 So. 2d 191.

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This column is submitted on behalf of the Environmental and Land Use Law Section, Paul H. Chipok, chair, and Gary K. Oldehoff and Kelly Samek, editors.

Environmental & Land Use Law

 Provided by Chair Davis

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589 So.2d 1337
Milton S. JENNINGS, Appellant,
v.
DADE COUNTY and Larry Schatzman, Appellees.
Nos. 88-1324, 88-1325.
589 So.2d 1337, 16 Fla. L. Week. D2059, 17 Fla. L. Week. D26
District Court of Appeal of Florida, Third District.
Aug. 6, 1991. *
On Rehearing Granted Dec. 17, 1991.

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John G. Fletcher, South Miami, for appellant.

Robert D. Korner and Roland C. Robinson, Miami, Robert A. Ginsburg, County Atty., and Eileen Ball Mehta and Craig H. Coller, Asst. County Attys., for appellees.

Joel V. Lumer, Miami, for The Sierra Club as Amicus Curiae.

Before BARKDULL, * NESBITT and FERGUSON, JJ.

ON REHEARING GRANTED

NESBITT, Judge.

The issue we confront is the effect of an ex parte communication upon a decision emanating from a quasi-judicial proceeding of the Dade County Commission. We hold that upon proof that a quasi-judicial officer received an ex parte contact, a presumption arises, pursuant to section 90.304, Florida Statutes (1989), that the contact was prejudicial. The aggrieved party will be entitled to a new and complete hearing before the commission unless the defendant proves that the communication was not, in fact, prejudicial. For the reasons that follow, we quash the order under review with directions.

Respondent Schatzman applied for a variance to permit him to operate a quick oil change business on his property adjacent to that of petitioner Jennings. The Zoning Appeals Board granted Schatzman's request. The county commission upheld the board's decision. Six days prior to the commission's action, a lobbyist Schatzman employed to assist him in connection with the proceedings registered his identity as required by section 2-11.1(s) of the Dade County Ordinances. Jennings did not attempt to determine the content of any communication between the lobbyist and the commission or otherwise challenge the propriety of any communication prior to or at the hearing.

Following the commission order, Jennings filed an action for declaratory and injunctive relief in circuit court wherein he alleged that Schatzman's lobbyist communicated with some or all of the county commissioners prior to the vote, thus denying Jennings due process both under the United States and Florida constitutions as well as section (A)(8) of the Citizens' Bill of Rights, Dade County Charter. Jennings requested

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the court to conduct a hearing to establish the truth of the allegations of the complaint and upon a favorable determination then to issue an injunction prohibiting use of the property as allowed by the county. Based upon the identical allegations, Jennings also claimed in the second count of his complaint that Schatzman's use of the permitted variance constituted a nuisance which he requested the court to enjoin. The trial court dismissed Count I of the complaint, against both Dade County and Schatzman. The court gave Jennings leave only against Dade County to amend the complaint and to transfer the matter to the appellate division of the circuit court. The trial court denied Schatzman's motion to dismiss Count II and required him to file an answer. Jennings then timely filed this application for common law certiorari.

We have jurisdiction based on the following analysis. The trial court's order dismissed

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Jennings' equitable claim of non-record ex parte communications while it simultaneously reserved jurisdiction for Jennings to amend his complaint so as to seek common law certiorari review pursuant to Dade County v. Marca, S.A., 326 So.2d 183 (Fla.1976). Under Marca, Jennings would be entitled solely to a review of the record as it now exists. However, since the content of ex parte contacts is not part of the existing record, such review would prohibit the ascertainment of the contacts' impact on the commission's determination. This order has the effect then of so radically altering the relief available to Jennings that it is the functional equivalent of requiring him to litigate in a different forum. Thus, Jennings' timely petition activates our common law certiorari jurisdiction because the order sought to be reviewed a) constitutes a departure from the essential requirements of law, and b) requires him to litigate a putative claim in a proceeding that cannot afford him the relief requested and for that reason does not afford him an adequate remedy. See Tantillo v. Miliman, 87 So.2d 413 (Fla.1956); Norris v. Southern Bell Tel. & Tel. Co., 324 So.2d 108 (Fla. 3d DCA 1960). The same reasoning does not apply against Schatzman. Nonetheless, because we have jurisdiction, there is no impediment to our exercising it over Schatzman as a party.

At the outset of our review of the trial court's dismissal, we note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled. See Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Hadley v. Department of Admin., 411 So.2d 184 (Fla.1982). Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. See Astore v. Florida Real Estate Comm'n, 374 So.2d 40 (Fla. 3d DCA 1979); Woodham v. Williams, 207 So.2d 320 (Fla. 1st DCA 1968). Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. See Hadley, 411 So.2d at 184; City of Miami v. Jervis, 139 So.2d 513 (Fla. 3d DCA 1962). Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. See Morgan v. United States, 298 U.S. 468, 480-81, 56 S.Ct. 906, 911-12, 80 L.Ed. 1288 (1936); Western Gillette, Inc. v. Arizona Corp. Comm'n, 121 Ariz. 541, 592 P.2d 375 (Ct.App.1979). A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 652 (Fla. 3d DCA 1982). [1]

The reported decisions considering the due process effect of an ex parte communication upon a quasi-judicial decision are conflicting. Some courts hold that an ex parte communication does not deny due process where the substance of the communication was capable of discovery by the complaining party in time to rebut it on the record. See, e.g., Richardson v. Perales,

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402 U.S. 389, 410, 91 S.Ct. 1420, 1431-32, 28 L.Ed.2d 842 (1971); United Air Lines, Inc. v. C.A.B., 309 F.2d 238 (D.C.Cir.1962); Jarrott v. Scrivener, 225 F.Supp. 827, 834 (D.D.C.1964). Other courts focus upon the nature of the ex parte communication and whether it was material to the point that it prejudiced the complaining party and thus resulted in a denial of procedural due process. E.g., Waste Management v. Pollution Control Bd., 175 Ill.App.3d 1023, 125 Ill.Dec. 524, 530 N.E.2d 682 (Ct.App.1988), appeal denied, 125 Ill.2d 575, 130 Ill.Dec. 490, 537 N.E.2d 819 (1989); Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth., 685 F.2d 547, 564-65 (D.C.Cir.1982); Erdman v. Ingraham, 28 A.D.2d 5, 280 N.Y.S.2d 865, 870 (Ct.App.1967).

The county adopts the first position and argues that Jennings was not denied due process because he either knew or should have known of an ex parte communication due to the mandatory registration required of lobbyists. The county further contends that Jennings failed to avail

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himself of section 33-316 of the Dade County Code to subpoena the lobbyist to testify at the hearing so as to detect and refute the content of any ex parte communication. We disagree with the county's position.

Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable. However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. Nevertheless, we hold that the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action. E.g., Waste Management; PATCO. Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. Sec. 90.304. See generally Caldwell v. Division of Retirement, 372 So.2d 438 (Fla.1979) (for discussion of rebuttable presumption affecting the burden of proof). Because knowledge and evidence of the contact's impact are peculiarly in the hands of the defendant quasi-judicial officer(s), we find such a burden appropriate. See Technicable Video Sys. v. Americable, 479 So.2d 810 (Fla. 3d DCA 1985); Allstate Finance Corp. v. Zimmerman, 330 F.2d 740 (5th Cir.1964).

In determining the prejudicial effect of an ex parte communication, the trial court should consider the following criteria which we adopt from PATCO, 685 F.2d at 564-65:

[w]hether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion.

Accord E & E Hauling, Inc. v. Pollution Control Bd., 116 Ill.App.3d 586, 71 Ill.Dec. 587, 603, 451 N.E.2d 555, 571 (Ct.App.1983), aff'd, 107 Ill.2d 33, 89 Ill.Dec. 821, 481 N.E.2d 664 (1985).

Accordingly, we hold that the allegation of a prejudicial ex parte communication

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in a quasi-judicial proceeding before the Dade County Commission will enable a party to maintain an original equitable cause of action to establish its claim. Once established, the offending party will be required to prove an absence of prejudice. [2]

In the present case, Jennings' complaint does not allege that any communication which did occur caused him prejudice. Consequently, we direct that upon remand Jennings shall be afforded an opportunity to amend his complaint. Upon such an amendment, Jennings shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred. Upon such proof, prejudice shall be presumed. The burden will then shift to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to

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determine the claim in light of all the evidence in the case. [3], [4]

For the foregoing reasons, the application for common law certiorari is granted. The orders of the circuit court are quashed [5] and remanded with directions.

BARKDULL, J., concurs.

FERGUSON, Judge (concurring).

I concur in the result and write separately to address two arguments of the appellees: (1) This court in Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648 (Fla. 3d DCA 1982), rejected attempts to categorize county commission hearings on district boundary changes as "legislative," while treating hearings on applications for special exceptions or variances as "quasi-judicial"; and (2) the petitioner does not state a cause of action by alleging simply that a lobbyist discussed the case in a private meeting with members of the County Commission prior to the hearing. It is clear from Judge Nesbitt's opinion for the court that neither argument is accepted.

Legislative and Quasi-Judicial Functions Distinct

In support of its argument, that "[t]his Court has previously rejected attempts to categorize county commission hearings on district boundary changes as 'legislative', while treating hearings on applications for special exceptions or variances as 'quasi-judicial'," Dade County cites Coral Reef Nurseries, Inc. v. Babcock Company, 410 So.2d 648 (Fla. 3d DCA 1982). The argument is made for the purpose of bringing this case within what the respondents describe as a legislative-function exception to the rule against ex parte communications. Indeed, there is language in the Coral Reef opinion, particularly the dicta that "it is the character of the administrative hearing leading to the action of the administrative body that determines the label" as legislative or quasi-judicial, Coral Reef at 652, which, when read out of context, lends support to Dade County's contentions. As an abstract proposition, the statement is inaccurate.

Whereas the character of an administrative hearing will determine whether the proceeding is quasi-judicial or executive, De Groot v. Sheffield, 95 So.2d 912, 915 (Fla.1957), it is the nature of the act performed that determines its character as legislative or otherwise. Suburban Medical Center v. Olathe Community Hosp., 226 Kan. 320, 328, 597 P.2d 654, 661 (1979). See also Walgreen Co. v. Polk County, 524 So.2d

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1119, 1120 (Fla. 2d DCA 1988) ("The quasi-judicial nature of a proceeding is not altered by mere procedural flaws.").

A judicial inquiry investigates, declares and enforces liabilities as they stand on present facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Suburban Medical Center, 597 P.2d at 661 (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908)). [1]

It is settled that the enactment and amending of zoning ordinances is a legislative function--by case law, Schauer v. City of Miami Beach, 112 So.2d 838 (Fla.1959); Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987) (en banc), rev. denied, 529 So.2d 694 (Fla.1988), by statute, sections 163.3161 and 166.041, Florida Statutes (1989), and by ordinance, Dade County Code Sec. 35-303. See also Anderson, Law of Zoning, Sec. 1.13 (2d Ed.1976) (zoning is a legislative act representing a legislative judgment as to how land within the city should be utilized and where the lines of demarcation between the several zones should be drawn); 101 C.J.S. Zoning and Land Planning Sec. 1 (1958) (same). It is also fairly settled in this state that the granting of variances,

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[2] and special exceptions or permits, are quasi-judicial actions. [3] Walgreen Co. v. Polk County, 524 So.2d 1119, 1120 (Fla. 2d DCA 1988); City of New Smyrna Beach v. Barton, 414 So.2d 542 (Fla. 5th DCA) (Cowart, J., concurring specially), rev. denied, 424 So.2d 760 (Fla.1982); City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974); Sun Ray Homes, Inc. v. County of Dade, 166 So.2d 827 (Fla. 3d DCA 1964).

A variance contemplates a nonconforming use in order to alleviate an undue burden on the individual property owner caused by the existing zoning. Rezoning contemplates a change in existing zoning rules and regulations within a district, subdivision or other comparatively large area in a given governmental unit. Troup v. Bird, 53 So.2d 717 (Fla.1951); Mayflower Property, Inc. v. City of Fort Lauderdale, 137 So.2d 849 (Fla. 2d DCA 1962); 101A C.J.S. Zoning and Land Planning Sec. 231 (1979).

Coral Reef Case Clarified

Coral Reef involved a legislative action. The issue before the court was whether

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there was a showing of substantial and material changes in a 1979 application for a rezoning so that a 1978 denial of an application for the same changes, on the same parcel, by the same applicant, would not be precluded by res judicata principles. It was not necessary to hold the 1978 hearing quasi-judicial in character in order to find that the 1978 resolution had preclusive effect on the 1979 zoning hearing. There is a requirement for procedural fairness in all land use hearings, whether on an application for a boundary change or a variance. Adherence to that constitutional standard, however, does not alter the distinct legal differences between quasi-judicial and legislative proceedings in land use cases.

We clarify Coral Reef, in accordance with its facts, as holding only that legislation denying an application for rezoning has a preclusive effect on a subsequent application for the same rezoning, unless the applicant can show substantial and material changes in circumstances. Treister v. City of Miami, 575 So.2d 218 (Fla. 3d DCA 1991), relying on Coral Reef. An interpretation of Coral Reef as holding that there is no longer a distinction between legislative actions and quasi-judicial actions of a county commission in land use cases goes far beyond the actual holding of the case, and is clearly erroneous. See note 1 supra.

Reliance by the respondents on Izaak Walton League of America v. Monroe County, 448 So.2d 1170 (Fla. 3d DCA 1984), is similarly misplaced. In that case we held that county commissioners, when acting in their legislative capacities, have the right to publicly state their views on pending legislative matters. Izaak Walton League does not address the issue of ex parte communications or prehearing pronouncements in quasi-judicial proceedings.

Lobbying

Jennings argues here that the behind-the-scenes lobbying [4] of the commissioners by Schatzman, for the purpose of influencing the outcome of an appeal from a quasi-judicial proceeding, violated the Citizens' Bill of Rights [5] of the Dade County Charter, as well as the due process provisions of the United States and Florida Constitutions. We agree, obviously, that the lobbying actions were unlawful. Dade County and Schatzman respond that Jennings is entitled to no relief because he has not alleged and demonstrated a resulting prejudice. In the opinion on rehearing this court now clearly rejects that argument.

Prejudice is to be presumed, without further proof, from the mere fact that any county commissioner granted a private audience to a lobbyist, whose purpose was to solicit the commissioner to vote a certain way in an administrative proceeding for reasons not necessarily addressed solely to the merits of the petition, and that the commissioner did vote accordingly. Starting with the legal definition of lobbying,

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see note 4 supra, and applying common knowledge as to how the practice works, there is a compelling reason for placing the burden of proving no prejudice on the party responsible for the ex parte communication.

Although an ex parte communication with a quasi-judicial tribunal makes its final action voidable, rather than void per se, the presumption which is drawn from the fact of the improper conduct, is applied to promote a strong social policy and is sufficient evidence to convince the fact-finder that the innocent party has been prejudiced; the rebuttable presumption imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact. [6] Sec. 90.304, Fla.Stat. (1991); Department of Agriculture & Consumer Servs. v. Bonanno, 568 So.2d 24, 31-32 (Fla.1990); Black's Law Dictionary 1349 (4th ed. 1968).

Ex parte lobbying of an administrative body acting quasi-judicially denies the parties a fair, open, and impartial hearing. Suburban Medical Center v. Olathe Community Hosp., 226 Kan. 320, 597 P.2d 654 (1979). Adherence to procedures which insure fairness "is essential not only to the legal validity of the administrative regulation, but also to the maintenance of public confidence in the value and soundness of this important governmental process." Id. 597 P.2d at 662 (citing 2 Am.Jur.2d Administrative Law Sec. 351). The constitutional compulsions which led to the establishment of rules regarding the disqualification of judges apply with equal force to every tribunal exercising judicial or quasi-judicial functions. 1 Am.Jur.2d Administrative Law Sec. 64, at 860 (1962); City of Tallahassee v. Florida Pub. Serv. Comm'n, 441 So.2d 620 (Fla.1983) (standard used in disqualifying agency head is same standard used in disqualifying judge). See also Rogers v. Friedman, 438 F.Supp. 428 (E.D.Tex.1977) (rule as to disqualification of judges is same for administrative agencies as it is for courts) (citing K. Davis, Administrative Law Sec. 12.04, at 250 (1972)). Ritter v. Board of Comm'rs of Adams County, 96 Wash.2d 503, 637 P.2d 940 (1981) (same).

* Judge Barkdull participated in decision only.

* Judge Barkdull participated in decision only.

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1 It was conceded at oral argument that the hearing before the commission in this case was quasi-judicial.

2 In such a proceeding, the principles and maxims of equity are applicable. See 22 Fla.Jur.2d Equity Secs. 44, et seq. (1980).

3 In rebutting the presumption of prejudice, respondent may rely on any favorable evidence presented during the claimant's case-in-chief, including that adduced during respondent's cross-examination of claimant's witnesses.

4 Under the PATCO test adopted, one of the primary concerns is whether the ex parte communication had sufficient impact upon the decision and, therefore, whether the vacation of the agency's decision and remand for a new proceeding would be likely to change the result.

5 Nothing in this decision shall affect our holding in Izaak Walton League of America v. Monroe County, 448 So.2d 1170 (Fla. 3d DCA 1984) (county commission acting in a legislative capacity).

1 Relying on Coral Reef, the majority opinion refers to "quasi-judicial zoning proceedings," a confounding phrase which has its genesis in Rinker Materials Corp. v. Dade County, 528 So.2d 904, 906, n. 2 (Fla. 3d DCA 1987). There Dade County argued to this court that the according of "procedural due process" converts a legislative proceeding into a quasi-judicial proceeding, citing Coral Reef. That proposition runs afoul of an entire body of administrative law. If an act is in essence legislative in character, the fact of a notice and a hearing does not transform it into a judicial act. If it would be a legislative act without notice and a hearing, it is still a legislative act with notice

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and a hearing. See Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894).

2 A variance is a modification of the zoning ordinance which may be granted when such variance will not be contrary to the public interest and when, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship. 7 FlaJur2d, Building, Zoning, and Land Controls, Sec. 140 (1978).

The normal function of a variance is to permit a change in "building restrictions or height and density limitations" but not a change in "use classifications". George v. Miami Shores Village, 154 So.2d 729 (Fla. 3d DCA 1963).

3 An administrative body acts quasi-judicially when it adjudicates private rights of a particular person after a hearing which comports with due process requirements, and makes findings of facts and conclusions of law on the disputed issues. Reviewing courts scrutinize quasi-judicial acts by non-deferential judicial standards. See City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974).

On review of legislative acts, the court makes a deferential inquiry, i.e., is the exercise of discretionary authority "fairly debatable." Southwest Ranches Homeowners Ass'n v. Broward County, 502 So.2d 931 (Fla. 4th DCA), rev. denied, 511 So.2d 999 (Fla.1987). Further, there is no requirement that a governmental body, acting in its legislative capacity, support its actions with findings of fact and conclusions of law.

4 " 'Lobbying' is defined as any personal solicitation of a member of a legislative body during a session thereof, by private interview, or letter or message, or other means and appliances not [necessarily] addressed solely to the judgment, to favor or oppose, or to vote for or against, any bill, resolution, report, or claim pending, or to be introduced ..., by any person ... who is employed for a consideration by a person or corporation interested in the passage or defeat of such bill, resolution, or report, or claim, for the purpose of procuring the passage or defeat thereof." Black's Law Dictionary 1086 (rev. 4th ed. 1968). (Emphasis supplied). The work of lobbying is performed by lobbyists.

A lobbyist is one who makes it a business to "see" members of a legislative body and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to the promoters. Id.

5 Section a(8), Citizens' Bill of Rights, Dade County Charter, provides in pertinent part:

At any zoning or other hearing in which review is exclusively by certiorari, a party or his counsel shall be entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The decision of any such agency, board, department or authority must be based upon the facts in the record.

6 PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (D.C.Cir.1982), relied on by Judge Nesbitt, supports this view. There the court was construing section 557(d)(1) of the Administrative Procedure Act, governing ex parte communications. The Act provides, in subsection (C), that a member of the body involved in the decisional process who receives any prohibited communication shall place the contents of the communication on public record. Subsection (D) states that where the communication was knowingly made by a party in violation of this subsection, the party may be required "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." 5 U.S.C.A. Sec. 557(d)(1)(C), (D).

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The Florida Senate

2020 Florida Statutes

Provided by Chair Davis

Title XIX PUBLIC BUSINESS	Chapter 286 PUBLIC BUSINESS: MISCELLANEOUS PROVISIONS Entire Chapter	**SECTION 0115** **Access to local public officials; quasi-judicial proceedings on local government land use matters.**

286.0115 Access to local public officials; quasi-judicial proceedings on local government land use matters.—

(1)(a) A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications with such officials pursuant to this subsection or by adopting an alternative process for such disclosure. However, this subsection does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process.

(b) As used in this subsection, the term "local public official" means any elected or appointed public official holding a county or municipal office who recommends or takes quasi-judicial action as a member of a board or commission. The term does not include a member of the board or commission of any state agency or authority.

(c) Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member. If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials.

1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter.

2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.

3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This subsection does not subject local public officials to part III of chapter 112 for not complying with this paragraph.

(2)(a) Notwithstanding the provisions of subsection (1), a county or municipality may adopt an ordinance or resolution establishing the procedures and provisions of this subsection for quasi-judicial proceedings on local government land use matters. The ordinance or resolution shall provide procedures and provisions identical to this subsection. However, this subsection does not require a county or municipality to adopt such an ordinance or resolution.

(b) In a quasi-judicial proceeding on local government land use matters, a person who appears before the decisionmaking body who is not a party or party-intervenor shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, and may be requested to respond to questions from the decisionmaking body, but need not be sworn as a witness, is not required to be subject to cross-examination, and is not required to be qualified as an expert witness. The decisionmaking body shall assign weight and credibility to such testimony as it deems appropriate. A party or party-intervenor in a quasi-judicial proceeding on local government land use matters, upon request by another party or party-intervenor, shall be sworn as a witness, shall be subject to

cross-examination by other parties or party-intervenors, and shall be required to be qualified as an expert witness, as appropriate.

(c) In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decisionmaking body by application of ex parte communication prohibitions. Disclosure of such communications by a member of the decisionmaking body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decisionmaking body. All decisions of the decisionmaking body in a quasi-judicial proceeding on local government land use matters must be supported by substantial, competent evidence in the record pertinent to the proceeding, irrespective of such communications.

(3) This section does not restrict the authority of any board or commission to establish rules or procedures governing public hearings or contacts with local public officials.

History.—s. 1, ch. 95-352; s. 31, ch. 96-324.

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Provided by Chair Davis

QUESTIONS ON MAJOR SITE PLAN AMENDMENT PROJECT CHANGES PROVIDED IN TESTIMONY ONLY BY APPLICANT

- Please provide a legal interpretation as to the propriety of a major site plan amendment being approved by Town Council in a quasi-judicial proceeding, when it is a new proposal presented verbally in testimony only at hearing by power point slides by the applicant – without prior review by staff or engineering or DRC or the P&Z board.

The process for a major amendment is the same process utilized for the initial approval (site plan and appearance review pursuant to Section 34-116 of the Town Code).

- How could the Town Council act without having a SITE PLAN official proposal to review with engineering and architectural plans that are engineering stamped and have appropriate scale and other requirements? Section 34-116

- Why doesn't this decision have to come back before Planning and Zoning? Section 34-116

- Does the developmental review committee (DRC) become involved with the underground garage being expanded to the South in the vicinity of Donald Ross Road, and where is the analysis of no impacts to the roadway. Note that the rationale of not expanding the garage as originally planned to the West was the structural impacts to a retaining wall, how are the structural impacts to Donald Ross Road considered in this decision?

- Why didn't the newly changed proposal require staff review and engineering review?

- Does the question regarding valet parking in non-striped spaces, which seems to mean aisle parking (double parked) cars, need to be reviewed by fire marshal officials or other public safety officers? Also, what about the public safety aspects of parking where valet parking will block cars, does it need a public safety review and decision?

Sec. 34-116. - Required; criteria.

No construction or clearing of land may begin in any district prior to review and approval of the site plan and appearance. The review shall consist of:

(1)Consideration of the application by the development review committee (DRC), which may recommend approval, denial, or approval with modifications and/or conditions;

(2)Consideration of the application by the town planning and zoning board, which may recommend approval, denial, or approval with modifications and/or conditions; and

(3)Final review and approval or denial, or approval with modifications by the town council.

... The criteria to be used in this review shall be to ascertain that the proposed site plan for new development meets the following criteria:

a.Site plan criteria.

1.Is in conformity with the comprehensive plan and is not detrimental to the neighboring land use;

2.Has an efficient pedestrian and vehicular traffic system, including pedestrian, bicycle, and automotive linkages and proper means of ingress and egress to the streets;

3.Has adequate provision for public services, including, but not limited to, access for police, fire and solid waste collection;

4.Complies with the provisions of chapter 20, article III, regarding potable water, sanitary sewer, solid waste, drainage, recreation and open space, and road facilities;

5.Is planned in accordance with natural characteristics of the land, including, but not limited to, slope, elevation, drainage patterns (low areas shall be used for lakes or drainage easements), natural vegetation and habitats, and unique physical features;

6.Preserves environmental features and native vegetation to the maximum extent possible, and complies with the Environmentally Sensitive Lands Ordinance;

7.Protects estuarine areas when concerning marina siting, drainage plans, alteration of the shoreline, provisions for public access and other concerns related to water quality and habitat protection;

8.Complies with all sections of this chapter.

b.Appearance review criteria.

1.Is of an architectural style representative of or reflecting the vernacular of Old Florida style which is indigenous to the town and which is commonly known and identified by its late Victorian (Key West Cracker), Spanish revival (Mediterranean), Modern (early to mid-20th century), or combination thereof style of architecture. Summarized briefly, common features of the vernacular of Old Florida style that identify the Victorian (Key West Cracker), and Spanish revival (Mediterranean) architectural style include wood or concrete block with stucco siding; simple pitched roofs; tile, metal, or asphalt roofs; ornate details such as, but not limited to, exposed soffits, individualized vent and louver shapes, reliefs, and detailed window and door treatments; lush landscaping with private yards; and use of porches, balconies and patios. Common features of the vernacular of Old Florida Style that identify the Modern (early to mid-20th century) architectural style include clean geometric lines, often at right angles; an emphasis on function; materials such as glass, steel, iron, and concrete; and the use of natural light though large and expansive windows;

2.Is of a design and proportion which enhances and is in harmony with the area;

3.Elevator and stairwell shafts and other modern operations and features of a building shall be either completely concealed or shall incorporate the elements of the architectural style of the structure; rooftop equipment and elevator and

mechanical penthouse protrusions shall be concealed; and parking garages and other accessory structures shall be designed with architectural features and treatments so that they are well proportioned and balanced and in keeping with the architectural style of the principal structure;
4.Shall have all on-site structures and accessory features (such as, but not limited to, light fixtures, benches, litter containers, including recycling bins, traffic and other signs, letter boxes, and bike racks) compatible in design, materials, and color;
5.Shall have a design in which buildings over 40 feet in height shall appear more horizontal or nondirectional in proportion rather than vertical, accomplished by the use of architectural treatments as described in these criteria;
6.Shall locate and design mechanical equipment with architectural treatments so that any noise or other negative impact is minimized;
7.Complies with the town's community appearance standards (see article IV, division 14 of this chapter).

In conclusion, please provide a legal interpretation as to the propriety of a major site plan amendment being approved by Town Council within a quasi-judicial proceeding, when it is a new proposal presented verbally in testimony only at hearing by power point slides by the applicant – without prior review by staff or engineering or DRC or the P&Z board.

Provided by Chair Davis

Proposal for Standardizing Town Staff Presentation to Planning and Zoning Board for Quasi-Judicial land development decisions

1. Identify the decision as Quasi-Judicial where facts will be determined and comprehensive plan, and zoning code and ordinances, and policies will be applied to the facts by the Board.
2. Identify the applicable due process given: Cross examine witnesses, present evidence, may demand witnesses to testify under oath, others.
3. Decision must be based on correct application of law and competent substantial evidence on the record.

For example, the Caretta Project Major Site Amendment, approved by P&Z and then the amended proposal approved by Town Council. Please note that this is not an effort to change a decision already made, but to provide an example of what is needed for continuous improvement of our processes and procedures and as a learning opportunity.

Information provided to the Planning and Zoning Board should include:

1. Description of each of the proposed Major Site Plan Amendments (there were 5 separate items) and a description of where in the application information each of those proposed amendments were addressed by description in the applicant's package submitted.
2. Procedure for review of the Major Site Plan Amendment – in this case it is Section 34-116 of the Juno Beach Land Development Code, also referred to as the Juno Beach Municipal Code and ordinances.
3. Findings as to how each of the procedural review requirements of 34-116(3)(a)&(b) were met, or not met, or where there are existing questions as to how the review requirements were met by the applicant's proposal. There was a summary statement that staff believes it was met, but no specifics and no determination as to whether other technical reviews such as the were needed.

4. Description of the Juno Beach Municipal Code sections that apply to the applicant's request and what evidence was reviewed under what criteria by which experts and any expert opinions regarding that review. If the Town's engineer is giving an expert opinion, then it should include the ordinance or code criteria that were reviewed, and a discussion of how the presented application descriptions meet the code requirements.

For example, the applicant requested reductions in parking and requested shared use for parking. However, the staff document and the engineer document did not state that all criteria in our code were arguably not met by the proposal that was before Planning and Zoning. As the applicant referenced Multifamily parking

requirements of Sec. 34-981(5) General requirements; off-street parking plan, and not Sec. 34-631. - Building site area regulations for commercial general mixed use.

Stating, "In addition, a minimum of two parking spaces shall be required per residential dwelling unit for permitted residential uses."

Also, for the request for shared use parking – there was no description of the code requirements that require additional open space by the applicant or the written agreement, unity of title or unity of control.

1.If the number of required spaces is reduced, the area that would have been used for parking shall be reserved as landscape open space. The number of spaces reduced multiplied by 200 square feet (see subsection (b)(1)a of this section) shall be required to be maintained as landscape open space and shall not be counted toward the minimum landscape open space requirement.

2.A shared parking plan shall be enforced through written agreement, unity of title, or unity of control.

I believe that the Planning and Zoning Board needs more information for its critical analysis of the proposal provided by the applicant, specifically identify the type of decision before the board, identify due process given and standard of review to apply. If all of the relevant details for decision-making are not disclosed to the Board through the Planning and Zoning packet of materials, then any decision by the Board is arguably more vulnerable to challenges from a third party who opposes the project.

The code sections should be provided for the applicable process for the review, and the code sections for the individual requests by the applicant.

If there are multiple code sections that arguably apply, then all of the code sections should be given for each of the requested site plan amendments with a description of whether the applicants meet the criteria or not.

In the case of quasi-judicial decision-making, it is critical that even criteria that are not met by the proposal are included in the staff memorandum and discussed by the Board.

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Thank you for your consideration of improvements in the format of presenting information to the Planning and Zoning Board.

Provided by Chair Davis

https://www.thepalmbeaches.com/blog/most-wheelchair-accessible-beaches-palm-beaches

The Most Wheelchair-accessible Beaches in The Palm Beaches

The Palm Beaches is home to multiple beaches that both able-bodied visitors and wheelchair users can enjoy.

Beaches are relaxing, but frequently considered inaccessible to wheelchair users. Without beach wheelchairs and rubberized access mats on the sand, going to the beach may seem impossible to those with disabilities. Unfortunately, many beaches around the world are still off-limits to wheelchair users, but thankfully, the opposite is true in The Palm Beaches.

If you dream of rolling on the sand, feeling the ocean breeze in your hair, and relaxing to the fullest extent possible, check out one or all of these wheelchair-accessible beaches the next time you are in The Palm Beaches.

South Inlet Park, Boca Raton

Located in the city of Boca Raton is South Inlet Park, an off-the-beaten-path park that is rarely crowded with beachgoers. This is a beautiful and relaxed oceanfront park that includes a nice, sandy beach, multiple barbecue pits, picnic areas, and a playground. This is a perfect spot to bring the family and spend the entire day, as there is truly something for everyone to enjoy. The park's manual beach wheelchair is free to use and is available by contacting a lifeguard on a first-come, first-served basis.

Atlantic Dunes Park, Delray Beach

Whether you want to see the dunes, roll on the sand in a beach wheelchair, or take in the ocean views in your own wheelchair, Atlantic Dunes Park in Delray Beach has options available. Wheelchair users can enjoy a boardwalk and a 300-foot, hard-packed nature trail through the dunes. Additionally, manual beach wheelchairs are available until 5 p.m. daily. They are offered on a first-come, first-served basis and are completely free to use, but visitors are kindly asked to use the beach wheelchairs for no longer than two hours at a time to give everyone an opportunity to get on the sand. These manual beach wheelchairs cannot go in the water. A Mobi-Mat is also available at Atlantic Dunes Park. At approximately 50-feet-long, it gives wheelchair users the ability to get near the water while staying in their own wheelchair.

Oceanfront Park, Ocean Ridge

Accessibility at Oceanfront Park is also spectacular. This park in the Boynton Beach community of Ocean Ridge has two manual beach wheelchairs available on a first-come, first-served basis from the lifeguard station. In addition to beach wheelchairs, there is also a Mobi-Mat here. Thanks to the mat, wheelchair users can get fairly close to the water without needing to transfer into a beach wheelchair. Aside from rolling up

and down the beach, visitors can also enjoy a variety of other amenities at Oceanfront Park. There are picnic tables and grills available if you want to cookout, or if you'd rather not cook, the on-site Turtle Cafe has food for sale from 9 a.m. to 5 p.m. every day.

Bicentennial Park at Riviera Beach Marina Village

Riviera Beach Marina Village is a destination in itself, complete with eco-tour opportunities and year-round special events. It's adjacent to the waterfront Bicentennial Park, which offers a small beach, children's splash park, concession stand, and, for wheelchair users looking for a beach day, remarkable accessibility. To start, a Mobi-Mat beach access mat on the sand allows visitors to roll on the sand in their own everyday wheelchair. The Mobi-Mat is 5-feet-wide and extends all the way from the sidewalk to down near the water. As if that isn't cool enough, two amphibious beach wheelchairs are available at Bicentennial Park. With these special beach wheelchairs, you can actually float in the water while feeling the breeze. To use one of the amphibious beach wheelchairs during your visit, call 561-707-9015 before you arrive and let them know when you will be there. The beach wheelchairs are available until 6 p.m. every day.

Phil Foster Park, Riviera Beach

Phil Foster Park can be found on an Intracoastal island in tropical Riviera Beach. This park boasts a small but amazing beach with calm, relaxing waters and hard-packed sand for easy maneuvering. Manual beach wheelchairs can be used at no cost by contacting the lifeguard on duty. This spectacular park also has an underwater snorkeling trail that visitors rave about, fishing areas, and a playground for children that want to get off the sand for a while.

Ocean Reef Park, Riviera Beach

Ocean Reef Park is also in Riviera Beach, just a little over a mile from Phil Foster Park. To enjoy the beauty of this fantastic park, you can stroll the boardwalk that includes a gradual slope to the beach. Picnic areas and grills are also available for some summertime – or pretty much anytime in South Florida – fun. If you are an early riser, Ocean Reef Park also makes for the perfect spot for a picturesque sunrise. As with other parks in The Palm Beaches, manual beach wheelchairs are available here by contacting the lifeguard on duty.

R.G. Kreusler Park, Palm Beach

R.G. Kreusler Park, located in Palm Beach just north of Lake Worth Beach, has more than four acres of beach to enjoy and is one of the most accommodating locations in The Palm Beaches. Manual beach wheelchairs are available for free on a first-come, first-served basis. To let the lifeguards know that you'd like to use one, just call the Ocean Rescue headquarters at 561-629-8770. They will bring the beach wheelchair to

you upon arrival. Accessible parking spots are available, and there is also an accessible path to the beach from the parking lot.

Carlin Park, Jupiter

Carlin Park, located in Jupiter, is a spectacularly large park with multiple recreation facilities, picnic areas, and pavilions. There is also a cafe here and grills are available for use. Your family can spend the day here enjoying the beautiful beach, as well as the Seabreeze Amphitheater that features live music and hosts special events throughout the year. For wheelchair users, the beach can be accessed from the ramp on the north end of Carlin Park and by requesting a free manual beach wheelchair from a lifeguard on duty.

Ocean Cay Park, Jupiter

Also in Jupiter, Ocean Cay Park features a large beachfront that is tucked just below the dunes. There is plenty of open grassy space and lush foliage that gives it a secluded and cozy feeling. Ocean Cay Park provides wheelchair-accessible accommodations with a ramp to the beach and the availability of a manual beach wheelchair. The lifeguard on duty will be happy to provide you with the chair so that you can fully enjoy your day at the beach with your family and friends.

DuBois Park, Jupiter

DuBois Park is another of Jupiter's amazing parks and perhaps the most wheelchair-friendly. If you are looking for a wonderful view of the iconic red Jupiter Inlet Lighthouse, this is the place to be. DuBois Park is large in size and sits right at the mouth of Jupiter Inlet. Wheelchair users are able to stroll across the sand by borrowing one of the manual beach wheelchairs, located by contacting the lifeguard on duty. There is also a small section of Mobi Mat at Jupiter Inlet that is about 27 feet long. An additional 100 to125 feet of Mobi Mat should be coming soon. Due to beach erosion, the Mobi Mat sometimes has to be rolled up and removed for safety precautions, but a small section of it is available year-round. The rubberized mat allows easy access for walkers and rollers alike to access the beach from a smoother surface.

The Palm Beaches has so many amazing parks and multiple options for fun in the sand. With any questions that you may have about accessibility at the above beaches, you can contact the friendly staff of South Ocean Lifeguards at 561-629-8770 or the North District Beaches at 561-694-7483. While the manual beach wheelchairs are given out on a first-come, first-served basis, if you call beforehand and let them know when you'll need a chair, they will try their best to have one available for you.

In addition to the complimentary manual beach wheelchairs at all six of the beaches mentioned above, motorized beach wheelchairs are available to rent within The Palm Beaches as well. Sand Helper has motorized beach wheelchairs for rent at the rate of about $200 per day, but the price does get cheaper if you book multiple days. A seven-

day rental, for example, is $400 total, so you may as well extend your stay in The Palm Beaches and take full advantage of it.

In The Palm Beaches, the weather's great any time of year, and the sparkling waters and smooth sands are ready to welcome you. Start planning your beach vacation now and rest assured that this is a remarkable destination for people of all abilities.