EXECUTIVE DECISIONMAKING BY LOCAL LEGISLATURES IN FLORIDA: JUSTICE, JUDICIAL REVIEW AND THE NEED FOR LEGISLATIVE REFORM

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I. INTRODUCTION

Local governments make hundreds of decisions everyday. Most of these decisions are administrative: whether to grant a building or land clearing permit, whether to approve a site plan or a variance, whether a piece of property is or is not a wetland. At the local level, many of these administrative decisions are made by elected commissioners who also sit in a legislative capacity. The process by which these decisions are made at the local level is vital to the well being of the community.

In Florida today, the choice of procedures used in local regulations is left completely to local government discretion. Namely, the state imposes procedural requirements on the ways that counties and cities adopt ordinances,[1] comprehensive plans,[2] and land use regulations.[3] However, the state does not prescribe any methods for

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1. FLA. STAT. §§ 125.66(2)(a) (counties), 166.041(3)(a) (cities) (1995).

2. *See id.* § 163.3161–.3243 (providing methods of adoption and substantive requirements for comprehensive plans as well as substantive requirements for land use regulations).

3. *Id.* § 125.66(5) (placing notice and hearing requirements on the adoption of land development regulations by counties); *id.* § 166.041(3)(c) (providing same requirements for municipalities).

the implementation and administration of local laws. Local governments are exempt from the procedural protections of Florida's Administrative Procedures Act (APA), unless "expressly made subject . . . by general or special law."[4] To date, no functions of local commissions have been brought within the APA.[5] The only procedural requirements binding on local government administration of land use or environmental regulations are either self-imposed through local charters or are imposed by courts enforcing the state or federal constitutions. I will attempt to demonstrate in this Article that these limits are insufficient to protect citizens from unjust and unfair treatment.

Among the effects of the absence of controls on the administration of local regulations is the concentration of unconstrained and unguided administrative power in the hands of local legislative bodies.[6] Local legislatures may sit in an executive or a quasi-judicial capacity to decide how regulations should be applied in particular cases.[7] This freedom and power is denied legislative bodies at any other level of government[8] because it provides the opportunity for tyranny.[9] Traditionally, Americans have created two bulwarks against this tyranny: structurally limiting the opportunity for abuse of power through the separation of powers doctrine, and legally limiting it through judicial review.

In the case of the participation of local commissions in administrative matters, these protections fail. Historically, the separation of powers principle has not been applied to local governments for two

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4. *Id*. § 120.52(1)(c).

5. Many actions taken by school boards are covered by the APA because they are considered state agencies rather than local governments for historical reasons.

6. Local legislatures are generally known as commissions, and exist at either the county or municipal level. FLA. CONST. art. VIII, §§ 1–2. Other bodies which arguably hold local legislative power include the boards of independent special districts, community development districts, and water management districts. This Article will focus on municipalities and counties, as those governments hold the most broadly drawn powers. The term "commission" will refer to the legislative body of either.

7. Quasi-judicial decisions are otherwise executive decisions made after notice and a hearing, where the decision is contingent on the showing made at the hearing. De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957). Examples of quasi-judicial decisions frequently made by local legislatures include rezonings, special exceptions, variances, and appeals of administrative decisions. *See* Robert Lincoln, *Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine*, 7 J. LAND USE & ENVTL. L. 333, 345–48 (1992).

8. *See infra* part II.

9. *See infra* part III(A).

reasons. First, local governments were seen as mostly administrative bodies with some narrowly confined policymaking powers. Second, the issue of local power and its control has not been reopened with the advent of the broad powers local governments now command under home rule. The effectiveness of judicial review is limited both by the courts' respect for the separation of powers and by doctrines and presumptions that limit not only the scope of review, but the remedies available to the courts when local commissions act improperly. In short, current law is insufficient to keep local commissions' behavior within acceptable bounds of fairness, and only the state legislature can address the problem.

Developing and defending this proposition is not a simple matter. Many courts have seemed unable to determine whether a local government was behaving legislatively, administratively or quasi-judicially in acting on a particular issue — a confusion that directly affects the nature and form of review. The relationship between the purpose of the separation of powers doctrine and local governments had not been adequately explored, particularly in the light of the increasingly common provision of home rule powers to local governments. Finally, the scope of due process protection was often unclear (though the tests involved were more so). This was a particular problem in the area of procedural due process because so much of the litigation in recent years has involved decisions covered by some form of administrative procedures act. In this context, marshaling support for a call for significant legislative intervention in local procedures required a broad treatment of all of these issues and resulted in a five part article.

This introduction forms Part I of the Article. Part II examines the distinctions between legislative, judicial, executive and quasi-judicial actions. This discussion is included because in reviewing local actions, particularly when the commission is involved, there is often confusion about where legislation ends and administration begins. Also critical in this context is identifying which decisions should be considered quasi-judicial, an increasingly difficult issue for the Florida courts.

Part III of the Article looks at the law and policy behind the concept of separation of powers and why the doctrine does not limit local legislatures from wielding executive or quasi-judicial powers. An understanding of these issues is critical to understanding why fairness in local administration is such a tangled issue. This is par-

ticularly true in Florida, where local governments wield far more power than has been traditionally permitted.

The available means of judicial review to address the use of executive power by local legislatures in order to guarantee fairness and justice in local decisionmaking are discussed in Part IV. The legal challenges available to attack administrative action by local commissions are reviewed and their limits described. The inability of judicial review to guarantee fair treatment of those subject to local administrative control — and in today's society this includes all — indicates a need for statutory reform.

Part V reviews and suggests statutory and judicial initiatives that would address the problems of local administration. It presents views from other commentators and analyzes the benefits and limits of their suggestions. Finally, the Article provides the contours of a statutory solution to Florida's problems with local administration.

II. A TAXONOMY OF GOVERNMENT POWER: DISTINCTIONS BETWEEN LEGISLATIVE, EXECUTIVE, QUASI-JUDICIAL AND JUDICIAL POWERS

> Political power, then, I take to be a right of making laws with penalty of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good.[10]
>
> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.[11]

Governments differ from other forms of human association in that they possess the legitimate and sovereign power to enforce their decisions.[12] Thus, the government may punish disobedience by

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10. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 15 (Lester Dehoster ed., William B. Eerdmans Publishing Co. 1978) (1689). Because Locke's work was the foundation of so much of the political theory of the founders, I believe that his views should be afforded special consideration.

11. FLA. CONST. art. I, § 21.

12. *Black's Law Dictionary* defines sovereignty in government to be

> that public authority which directs or orders what is to be done by each member associated in relation to the end of the association. It is the supreme power by which any citizen is governed and is the person or body of persons in the

imprisonment or even death and may use force to require obedience to its dictates.[13] In the American tradition, the sovereign power is divided into legislative, executive and judicial branches so that no single person or body may hold the power completely.[14] However, the nature of the various types of authority is often confused, particularly in discussions of local government powers.[15] In the land use and environmental regulatory process in particular, when local legislatures approve development orders,[16] it is often unclear whether they are acting in a legislative or an executive capacity.[17] The distinction is vital for the proper determination of the type and scope of judicial review. This section will attempt to alleviate the confusion by describing the nature of the legislative, executive and judicial powers, how they are applied, and how they are reviewed.

A. Legislative Powers

The legislative power of government is the power to say what the law is, that is, to set policy.[18] In the local government framework, this authority is embodied in the power to enact ordinances

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state to whom there is politically no superior.

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

13. *See* H.L.A. HART, THE CONCEPT OF LAW 20–25 (Oxford Univ. Press 1986) (1961).

14. *See infra* part III.

15. For example, in Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1991) (Fergusen, J., concurring), *rev. denied*, 598 So. 2d 75 (Fla. 1992), the concurring opinion required three pages to clarify past decisions that had blurred the distinctions between legislative and quasi-judicial decisions in zoning matters. The Second District Court of Appeal dealt with similar problems with less success in Hirt v. Polk County Bd. of County Comm'rs, 578 So. 2d 415 (Fla. 2d Dist. Ct. App. 1991) and Manatee County v. Kuehnel, 542 So. 2d 1356 (Fla. 2d Dist. Ct. App.), *rev. denied*, 548 So. 2d 663 (Fla. 1989). These cases and similar confusions in other district courts of appeal as well as much of the related literature, are described in Lincoln, *supra* note 7, at 348–54.

16. A development order, in the growth management context, is defined by *Florida Statutes* as "any order granting, denying, or granting with conditions an application for a development permit." FLA. STAT. § 163.3164(7) (1995). A development permit is defined as "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." *Id*. § 163.3164(8).

17. Compare, for example, the court's ease in finding that a variance decision was quasi-judicial in City of Melbourne v. Hess Realty Corp., 575 So. 2d 774 (Fla. 5th Dist. Ct. App. 1991), with such tortured cases as Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993). Courts have not been able to reason their way between cases, though there has been ample opportunity. I hope to aid these discussions with this Article.

18. Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978) (noting that fundamental and primary policy decisions are and must be made by legislature).

and regulations,[19] including comprehensive plans and land use regulations[20] and ordinances that create civil liability for private actions.[21] Legislative action has been described in one oft-cited article as "open-ended, affecting a broad class of individuals or situations," "result[ing] in the form[ation] of a general rule or policy," and "prospective, determining `what the law shall be in future cases.'"[22]

The idea that legislative power is to be applied generally rather than to specific persons or situations has deep roots in our political

19. *See* FLA. CONST. art. VIII, § 1(f)–(g) (providing county governments with powers of self-government); *id*. art. VIII, § 2(b) (providing municipal governments with "governmental . . . powers to enable them to conduct municipal government"); FLA. STAT. § 125.01(1) (1995) (authorizing counties to exercise power on any subject relating to the purposes of county government); *id*. § 166.021(1) (empowering municipalities to adopt ordinances). Under Florida's policy of extending home rule to local governments, the extent of the subject matter of local authority is coextensive with that of the state absent constitutional or charter limitations. *See* City of Daytona Beach Shores v. State, 454 So. 2d 651, 654 (Fla. 5th Dist. Ct. App. 1984), *quashed on other grounds*, 483 So. 2d 405 (Fla. 1985). In Florida, local ordinances may provide criminal penalties enforceable in court. FLA. STAT. § 125.69 (1995) (listing county ordinances enforceable as misdemeanors); Thomas v. State, 583 So. 2d 336, 339 (Fla. 5th Dist. Ct. App. 1991) (stating that home rule powers of municipalities includes authority to enact ordinances with criminal penalties).

20. *See generally* FLA. STAT. § 163.3161–.3243 (1995).

21. Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962 (Fla. 1987) and Broward County v. La Rosa, 505 So. 2d 422 (Fla. 1987) indirectly upheld the ability of local governments to create new causes of action when the Florida Supreme Court upheld ordinances that provided for administrative determination of damages against separation of powers challenges.

22. Michael S. Holman, Comment, *Zoning Amendments — The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 134–36 (1972) (citations omitted). This description of legislative action has been cited in numerous cases and articles. *See, e.g.*, Snyder v. Board of County Comm'rs, 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991), *quashed on other grounds*, 627 So. 2d 469 (Fla. 1993); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973) (en banc); Carl J. Peckinpaugh, Jr., Comment, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499 (1980).

values[23] and in our concept of law.[24] John Locke's dictate against legislative rule by "extemporary arbitrary decree"[25] meant that the legislature must not make or apply policy in an ad hoc manner. Instead, "promulgated, standing laws"[26] should establish policies that could be known by and apply to all.

This idea is carried forward in the United States Constitution by the restriction against bills of attainder and ex post facto laws.[27] The Florida Constitution provides similar protections.[28] The Florida Supreme Court identified the concern that regulations be generally applicable as lying behind the prohibition against "contract zoning,"[29] arguing that if a local government could regulate pursuant to private agreements, "then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body" and reasoning that "[s]uch is certainly not consonant with our notion of government by rule of law that affects alike all similarly conditioned."[30]

A distinction, however, should be drawn between the view of the proper application of legislative power regarding regulatory policies and that involving appropriations policy. Determining how the public fisc will be expended is a legislative prerogative.[31] The legislature

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23. John Locke, in the *Second Treatise on Civil Government*, wrote of the legislative power:

> The legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated, standing laws, and known authorized judges.
>
> . . .
>
> Absolute arbitrary power, or governing without settled standing law, can neither of them consist with the ends of society and government. . . .

LOCKE, *supra* note 10.

24. "In a modern state it is normally understood that, in the absence of special indications widening or narrowing the class, its general laws extend to all persons within its territorial boundaries." HART, *supra* note 13, at 21.

25. LOCKE, *supra* note 10.

26. *Id*.

27. U.S. CONST. art. I, § 9, cl. 3.

28. FLA. CONST. art. I, § 10. In addition, article III, § 11 prohibits many types of special laws that would have application only to particular persons or situations.

29. Contract zoning occurs when the adoption of a zoning ordinance is made contingent upon the completion of a private agreement between a private party and the zoning authority.

30. Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956) (en banc).

31. *See* FLA. CONST. art. III, §§ 8(a), 12 (describing the adoption and approval of appropriations bills); Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260, 263–64 (Fla.

remains free to grant moneys to particular agencies, projects or persons,[32] subject to the limitation that the expenditure be for a public purpose.[33] The distinction is that the application of a regulation to an individual involves the coercive power of the state and can be backed by the seizure of a person or her property.[34] It is the government's application of restrictions to a specific individual backed by the threat of force or imprisonment that is antithetical to our political traditions.[35]

An additional distinction must be made between the governmental and proprietary roles of local governments. Proprietary functions of local governments include the provision of services such as libraries, marinas, towing, and recreation facilities.[36] The distinction between governmental and proprietary functions is not always clear because sovereign powers such as taxation and eminent domain may be used to support proprietary activities.[37] However, the use of regulatory authority is clearly governmental, as it reflects the use of the police power and the coercive power of the state. When acting in a

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1991) (prohibiting legislature from delegating the power to reduce appropriations to the Governor and Cabinet).

32. While article III, § 11 of the Florida Constitution limits the use of special laws and prohibits some types of special law, appropriations intended to benefit particular persons or locales are not included. Indeed, special acts are necessary to compensate a tort victim whose damages exceed $100,000.00. FLA. STAT. § 768.28(5) (1995).

33. *See* State v. City of Miami, 379 So. 2d 651 (Fla. 1980) (approving issuance of bonds for convention center although private interests would benefit). Article VII, § 10 of the Florida Constitution prohibits governments from making public expenditures for purely private purposes.

34. Professor Richard Epstein adopts the dissenting view that no such distinction should be drawn because expenditures are backed by taxes and the government's coercive force is implicated by the power to collect taxes. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

35. *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 100–02 (1927) (relating that the development of the principle that government should be a government of laws and not of men expresses the attitude that rights of citizens, in the last analysis, should be determined by a court of law). The application of legislative power to individual cases also can be seen behind the widespread dissatisfaction with the state of equal protection jurisprudence. *See, e.g.*, Arceneaux v. Treen, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring).

36. *See* 12 FLA. JUR. 2D *Counties and Municipal Corporations* §§ 85–86 (1979).

37. *Id*. The distinction has sometimes been difficult for the United States Supreme Court as well. *Compare* National League of Cities v. Usery, 426 U.S. 833 (1976) (stating that Tenth Amendment frees states from federal regulation in areas of traditional governmental activities) *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (maintaining distinctions between traditional governmental functions and proprietary functions are too difficult to use for Tenth Amendment purposes).

proprietary mode, a local government generally does not exert coercive powers.[38]

B. Executive and Quasi-Judicial Powers

The executive power is the power to administer the law, that is, to carry out the policies set by the legislature.[39] When the legislature sets policy, it decrees actions which are to take place under specified circumstances. It is the executive's role to take the prescribed action when the described conditions exist. For example, an ordinance might decree that one neighborhood park will be provided for every thousand residents in order to provide recreational facilities. The executive role under such legislation is to determine the number of residents and to purchase and equip the appropriate number of parks. Therefore, executive powers are based on the functions that the legislature desires to be performed, and they are limited to the accomplishment of those functions.[40]

Executive functions may be divided into the categories of ministerial and discretionary acts. The types of actions may be distinguished based on (1) whether the action prescribed by the legislation is mandatory or permissive, and (2) whether the conditions under which action is to be taken are readily ascertainable or whether the use of judgment is necessary to determine whether the conditions exist. Ministerial duties include those that are "positively imposed by law to be performed at a time and in a manner or upon conditions which are specifically designated by the law itself absent any authorization of discretion to the agency."[41] Whether an act is ministerial

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38. However, local governments may use their coercive authority in requiring citizens to use and pay for services, especially when the services are provided by special assessments. For example, many local governments require homeowners to "hook up" to locally owned water or sewer systems and to pay connection fees for the privilege.

39. The provisions of article IV, § 1 of the Florida Constitution describe the executive functions of the Governor. Those functions place upon the Governor the power and duty to "take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all business with the officers of government." FLA. CONST. art. IV, § 1(a). The Governor may initiate judicial proceedings, call out the militia, and fill vacant offices. *Id*. art. IV, § 1(b), (d), (f).

40. *See* State Dep't of Envtl. Regulation v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st Dist. Ct. App. 1991) (noting that it is "well recognized that the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred").

41. Solomon v. Sanitarians' Registration Bd., 155 So. 2d 353, 356 (Fla. 1963). Ministerial acts are also defined as those which a "person or board performs under a given

therefore depends on language commanding the act and the existence of readily ascertainable facts. A ministerial act is created, for example, where an ordinance commands that a permit *shall* be issued upon the proper completion of an application. The official entrusted with fulfilling the function has no discretion; if the application is complete, the permit must be issued, and little or no judgment is necessary to determine whether the application is complete.

Executive functions that are not ministerial are discretionary.[42] Discretionary functions may be created by statutory language that makes action permissible, but not required. For example, an appropriation provides that a county manager *may* hire an employee. Discretionary functions may also be created by legislation that prescribes a mandatory action, but under conditions whose existence depends on the use of judgment. Consider, for example, language in an ordinance that requires the issuance of a site plan approval when a site plan provides "adequate buffering from neighboring uses" or "ingress and egress that is safe and that disrupts traffic patterns minimally." Judgment is necessary to determine when the buffering is "adequate" or the ingress and egress is "safe" and "minimally disruptive." The amount of discretion granted by such legislation is directly dependent on how subjective or vague the language is that establishes the conditions under which action is to be taken.[43]

An executive function may be quasi-judicial regardless of whether it is ministerial or discretionary. In *De Groot v. Sheffield*,[44] the Florida Supreme Court distinguished between quasi-judicial actions and other administrative actions on the basis that "when notice and a hearing are required, and the judgment [] is contingent upon the showing made at the hearing, then [the] judgment becomes judicial or quasi-judicial . . . ."[45] Therefore, it is the procedure utilized in reaching an executive decision, rather than any underlying

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state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done." BLACK'S LAW DICTIONARY 996 (6th ed. 1990).

42. Discretionary acts are those "wherein there is no hard and fast rule as to course of conduct that one must or must not take." BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

43. If the language is too subjective or vague it will be held to be unconstitutional, either as a violation of due process or, if a state agency is involved, as an improper delegation of legislative authority. *See infra* notes 198–201 and accompanying text.

44. 95 So. 2d 912 (Fla. 1957) (en banc).

45. *Id*. at 915.

aspect of the criteria on which the decision is made, that gives a decision its quasi-judicial characteristic.

Under *De Groot* there actually are three parts to the test of whether an action is quasi-judicial. First, the action must be an appropriately delegated, authorized administrative action. This is not part of the *De Groot* verbal test, but is clear from the context: the court was distinguishing between the proper challenge of an "ordinary" administrative action, in which the key aspect of the challenge was whether the action was within the jurisdiction of the administrative body, i.e. the body was acting within its delegated authority, and challenging a quasi-judicial act.[46] The proper delegation of the subject of the action — that is, the scope of jurisdiction — was therefore the first criterion. The First District Court of Appeal made this clear in *Bloomfield v. Mayo*[47] when it noted that "[i]t is settled in this state that common law certiorari is limited only to review of judicial or quasi-judicial orders or administrative boards, bodies, or officers."[48] It is completely improper, therefore, to suggest that certiorari could be used to review a legislative decision, or that a legislative action could be quasi-judicial.

The second criterion is the famous requirement that notice be given and a hearing be afforded. This is the requirement that many courts have fastened to when evaluating whether a particular action is quasi-judicial, that is, making the existence of a noticed hearing a sufficient, rather than necessary, issue in determining the nature of the action.[49] What is forgotten in these cases is that notice and a hearing *of some sort* are required whenever an interest protected by the Fourteenth Amendment or by the Florida Constitution's due process requirement may be affected by an administrative action, or that the constitution or legislative prerogative may provide for a noticed hearing before legislative action.[50] However, as the United

46. *Id.*

47. 119 So. 2d 417 (Fla. 1st Dist. Ct. App. 1960).

48. *Id*. at 421.

49. *See, e.g.*, Hirt v. Polk County Bd. of County Comm'rs, 578 So. 2d 415, 416 (Fla. 2d Dist. Ct. App. 1991).

50. The need for notice and hearing for federal due process purposes was established in Londoner v. City of Denver, 210 U.S. 373, 376 (1908), and is, along with Bi-Mettalic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915), the fundamental basis for the order/rule distinction in administrative law. Florida courts have also recognized the need for some kind of hearing before an administrative agency determined rights. *See, e.g.*, Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974). Under

States Supreme Court has made clear, the "hearing" need not be a formal adjudicatory hearing, and in some cases an opportunity to present evidence in written form may be sufficient.[51]

Thus, the third component of the test, that "the judgment is contingent upon the showing made at the hearing,"[52] is the most overlooked requirement for a decision to be quasi-judicial. If the decision can be made on information (evidence) gained outside the hearing, then (1) the record basis of the decision may be incomplete, and (2) a party may be denied the ability to respond to or oppose the non-hearing based information. Under such circumstances, it will be impossible for a reviewing court to determine whether the decision was based on substantial, competent evidence on the record, *an ability which is fundamental to the appropriateness of certiorari or other record-based review*.[53] Indeed, it is the requirement that the decision be based on the evidence adduced at a hearing that distinguishes quasi-judicial decisions from other forms of administrative action and makes them legitimate candidates for a different form of judicial review.

C. Judicial Power

The power of the judiciary, ultimately, is the power to supervise the use of the coercive force of the state. This role can be traced in Anglo-American jurisprudence to the centuries-long struggle to es-

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article III, § 5 of the Florida Constitution, any house may hold a hearing and compel testimony. Under article III, § 4(b), the deliberations of the houses must be public, and under article III, § 10, notice must be provided prior to adopting a special law. Further, counties and cities must hold a noticed public hearing before adopting any ordinance. FLA. STAT. §§ 125.66, 166.041 (1995). If notice and a hearing were of themselves sufficient to render an action quasi-judicial, then most statutes and all local ordinances would cease to be legislative acts and become quasi-judicial.

51. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (employing a balancing test to determine amount of process due); *see also* Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973) (noting that an administrative hearing does not require full complement of judicial protections).

52. *De Groot*, 95 So. 2d at 915.

53. The importance in having a record that is appropriate to the type of decision being made cannot be over-emphasized, even if the record is merely the explanation for a largely discretionary act. This is demonstrated under the federal Administrative Procedures Act by cases such as Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) and under the Florida Administrative Procedures Act by Adam Smith Enter. v. State Dep't of Envtl. Regulation, 553 So. 2d 1260 (Fla. 1st Dist. Ct. App. 1989).

tablish the primacy of the common law over the power of the King.[54] Thus, judicial power is generally discussed in terms of the power of courts to invalidate legislation or to enjoin or order executive action, that is, in terms of the judiciary's role in maintaining the separation of powers.[55] This represents the power of the courts to ensure that a citizen's life, liberty or property are not taken under an unconstitutional authority. This power is exerted in two ways. First, the courts holding "original jurisdiction" (lower courts) manage and supervise criminal and civil trials and other actions. Second, courts with "appellate jurisdiction" supervise the actions of the "lower" courts and administrative tribunals.

Less well settled is the question of when a court, rather than an administrative tribunal, must determine the effect of a constitutional statute or regulation on a person's life, liberty or property or settle a dispute between persons or between persons and the government. In the federal system, where the separation of powers is weak, the Congress has the power to make administrative "courts" and assign civil actions to them; it appears that only criminal matters and those issues covered by the original jurisdiction of the Supreme Court must be heard by an actual, life-tenured, Article III federal judge.[56] Under the United States Constitution, therefore, the use of a court rather than an administrative body is an additional protection that may be required by due process or offered by statute, but that is not controlled by the scope of judicial power.[57] Once an issue is properly delegated to an administrative tribunal, the extent of due process protection required is measured by the three part balancing test laid out in *Mathews v. Eldridge*,[58] rather than by the extent of judicial power.[59] Under *Mathews*, the issue of whether a

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54. *See* DICKINSON, *supra* note 35, at 80–95 (discussing the development of common law as a check on the sovereign power of English kings).

55. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173 (1803); *see also* Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987) (noting that an agency cannot determine that a statute is unconstitutional).

56. For a discussion of the death of the public/private distinction in the jurisdictional boundaries of the federal courts and the relevant federal cases, see Bernard Schwartz, *Recent Administrative Law Issues and Trends*, 3 ADMIN. L.J. 543 (1990).

57. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (holding that supervision of civil attachment proceedings by a judge rather than a clerk of the court afforded necessary due process protections).

58. 424 U.S. 319 (1976).

59. *See also* Zinermon v. Burch, 494 U.S. 113, 138–39 (1990) (holding that a mental commitment process could violate a patient's due process rights if a hearing was not

particular procedure violates due process depends on (1) the importance of the right involved; (2) the ability of greater procedural protections to prevent errors that would deprive a person of the right; and (3) the burden placed on the government by providing additional procedural protections. However, the right to due process — that is, the existence of a liberty or property interest affected by the decision — must first be established.[60]

In Florida, the constitutional context is more complicated. The Florida Constitution vests four enumerated courts with the judicial power of the state, except that "administrative officers or bodies may be granted quasi-judicial power *in matters connected with the functions of their offices*."[61] This language implies that the judicial power includes the power to decide all adjudicatory matters other than those properly granted to an administrative body. In turn, a role for administrative tribunals is implied. Also creating a role for administrative tribunals by implication, article I, section 18 of the constitution provides that administrative penalties shall not be imposed except as authorized by general law. Furthermore, the Florida Constitution also guarantees that the right to a jury trial will remain inviolate.[62] Thus, the constitution implies both a role for administrative tribunals and limits on their powers.

In interpreting these provisions, the Florida courts hold that hearing officers or other officers wielding quasi-judicial powers may not "exercise powers that are fundamentally judicial in nature."[63] These include any cases for which a jury trial was guaranteed at common law and any actions or functions that were considered equi-

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held prior to commitment and implying that an administrative review could be sufficient).

60. As is discussed in part IV, if a decision involves discretion, the courts will find a "mere expectancy" rather than an "entitlement" and determine that there is no property interest in the decision. *See infra* part IV.

61. FLA. CONST. art. V, § 1 (emphasis added). The four courts permitted under article V are the supreme court, the five district courts of appeal, the 20 circuit courts, and 67 county courts. The supreme and district courts are purely appellate, while the circuit and county courts are trial courts except for limited appellate jurisdiction over administrative acts that can be given by general law to circuit courts. *Id.*

62. FLA. CONST. art. I, § 22.

63. Broward County v. La Rosa, 505 So. 2d 422, 423 (Fla. 1987) (noting that determination of non-quantifiable damages is a judicial function); *see also* Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973) (holding that administrative agencies have no general judicial powers).

table under the common law.[64] In application, these generally include the power to hear cases that involve incarceration such as criminal cases or civil commitment cases,[65] civil cases that involve the determination of non-liquidated damages,[66] and the power to control proceedings and to use contempt powers.[67] Another fundamentally judicial power is the power to declare a statute void or otherwise unconstitutional.[68]

Under these decisions, the judicial power of Florida courts is the power to adjudicate "litigated rights to determine what is the controlling law applicable to the rights being adjudged."[69] Thus, any question of rights under the United States or Florida Constitutions, statutes or the common law may be litigated in a court unless the issue can be properly delegated to an administrative agency.[70] This results, however, in the judicial power over specific kinds of questions being defined largely through defining what administrative agencies may not do; that is, the proper scope of judicial power become all matters determined not to be within the proper scope of quasi-judicial powers.

The power of courts is sometimes discussed in the context of "inherent" powers.[71] Inherent powers include the ability to control

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64. Biltmore Constr. Co. v. Florida Dep't of Gen. Servs., 363 So. 2d 851, 852 (Fla. 1st Dist. Ct. App. 1978).

65. Lampley v. State, 555 So. 2d 1242 (Fla. 4th Dist. Ct. App. 1989); *see also* Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7, 14 n.23 (1991).

66. *La Rosa*, 505 So. 2d at 423–24 n.5; *compare La Rosa*, 505 So. 2d at 422 *and* Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962, 966 (Fla. 1987) (noting that ordinances cannot authorize the award of common law damages for non-economic injuries) *with* Laborers' Int'l Union Local 478 v. Burroughs, 541 So. 2d 1160, 1163 (Fla. 1989) (stating that back pay could be awarded because it is readily quantifiable) *and* Department of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 28 (Fla. 1990) (holding that hearing officer could determine just value of destroyed citrus trees, but determination of whether just compensation for "taken" trees had been paid was a core judicial function).

67. *See* State Dep't of Envtl. Regulation v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st Dist. Ct. App. 1991) (hearing officer was without authority to sanction a party by striking pleading).

68. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987).

69. 10 FLA. JUR. 2D *Constitutional Law* § 166 (1979).

70. For the limits both to the powers that can be delegated in a quasi-judicial body and the subject of the delegation, see *infra* notes 122–28 and accompanying text.

71. *See* Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257 (1985).

proceedings through the use of contempt, if necessary, and the power to compel funding of the courts, witnesses,[72] and, if justice demands, even attorney's fees.[73] In addition, the inherent power of courts includes the exercise of their equitable powers in appropriate cases.[74] In Florida, courts are also granted the exclusive authority to set rules of procedure.[75]

D. Distinguishing Legislative from Judicial Lawmaking

One of the natural, but generally unasked questions raised by the definitions of legislative and judicial powers is the nature of the difference between the legislative power to "determine what the law shall be" and the judicial branches power to determine what the law is, particularly when the judicial branch can make expansive constitutional or common law determinations. After all, both statutes and court decisions can be "open ended" and "affecting a broad class of people."[76] The distinguishing characteristic is and must be that only the legislature has unlimited power (within the confines of the constitution) to make policy determinations on whatever matters it believes are in the public interest. While the courts can limit the scope of legislative or executive power through constitutional interpretation, their power to do so is limited by reason and politics.[77] Furthermore, the courts' ability to create law outside the constitutional realm has largely been limited to expanding the common law of torts, an area in which the legislature can and does overrule the courts when it feels necessary, and in determining the limits that the constitution puts on legislative or administrative action. The courts' ability to "make law" is therefore bound by both the constitution and the legislature itself, while the legislature is bound only by

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72. *See* Rose v. Palm Beach County, 361 So. 2d 135, 139 (Fla. 1978).

73. Silver, *supra* note 71, at 263–71.

74. *Cf*. Biltmore Constr. Co. v. Florida Dep't of Gen. Servs., 363 So. 2d 851, 853–54 (Fla. 1st Dist. Ct. App. 1978) (noting that the power to order specific performance of contract is an equitable power that is inherently judicial).

75. FLA. CONST. art. V, § 2(a).

76. *See supra* notes 22–26 and accompanying text.

77. One is reminded here of President Jackson's comment about Chief Justice John Marshall: "Marshall has made his decision, now let him enforce it." *See* Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, The Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 114 (1994).

the constitution (leaving out any debate on natural law that is bound to be unproductive in this context).

Likewise, however, there is room for the legislature to make policy in individual cases. As previously noted, what is offensive to our concept of legitimate legislative power is its use to regulate or relieve from regulation on an individual basis. In many other situations, however, local legislative acts may be less than general. For instance, a particular street may need repaving and the decision to allocate funds to do this may be legislative. Moreover, the downtown area may be blighted and a redevelopment plan that affects particular and individual properties may be adopted. So long as the plan is based on achieving goals that are of benefit to the general public, the specificity of the plan need not make it other than legislative in nature.[78]

E. Distinguishing Legislative from Executive Decisionmaking

Especially at the local level, there is often doubt regarding whether decisions — particularly land use and environmental permitting decisions — are legislative or quasi-judicial. At the state level, the separation of powers and simple practicality prevent the legislature from making many decisions that would apply on their face to specific individuals or situations. At the local level, however, many decisions are made by the commission that involve individual applicants or situations. Just as the rule/order distinction is vital in administrative law for determining how a particular decision will be reviewed, at the local level, it becomes important and difficult to separate legislative from executive decisionmaking.

The status of a particular decision matters not only in determining what form of judicial relief is appropriate,[79] but also in determining what kinds of immunity from suit the individual council members might be able to invoke.[80] The problem arises because the separation of powers doctrine does not apply to local governments,

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78. This fundamental logic has been missed by the courts when caught up in the issue of whether land use decisions are legislative or quasi-judicial. *See* Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

79. *See* Tricia Krinek, *Appellate Review in Land Use Regulation: Applying a Formal Versus a Functional Analysis*, 8 J. LAND USE & ENVTL. L. 413, 424–25 (1993).

80. *See* Marguerite N. Przybylski, Note, *Characterization of Land Use Decisions: A Zone of Uncertainty*, 37 VILL. L. REV. 663 (1992).

as will be discussed later in this Article. Many local decisions involve individual landowners or applicants and often the application of comprehensive plans or similar sources of standards, and so look like administrative decisions. However, the decisions are accomplished through the adoption (or non-adoption) of ordinances, which are traditionally the form given to local legislative actions. Thus, these decisions exhibit both administrative and legislative aspects.

Most of the problem cases involve rezoning, that is, the decision whether or not to change the zoning on a particular parcel, usually to a more intense use. While the Florida Supreme Court recently determined that rezonings are quasi-judicial actions,[81] the decision was based on a rather slipshod analysis, as will be demonstrated later. These cases are complicated by two historical remnants that greatly confuse matters. First, while Florida Statutes recognize that local governments can regulate land under home rule,[82] they also require that rezonings be both adopted by ordinance and subject to specially noticed public hearings.[83] Second, to this day, several counties have zoning ordinances that were established by special acts and that included provisions for review of rezoning decisions by certiorari.[84] These conflicting requirements, imposed by legislation, contributed much to the confusion that surrounds this issue.

Land use regulation was historically undertaken by local governments under enabling legislation. Florida, like most states, adopted a slightly modified version of the Standard Zoning Enabling Act published by the Department of Commerce in 1928. Florida's version of the Act, like most others, carefully laid out an administrative apparatus that included a Board of Appeals that heard issues such as variances and challenges to interpretations of the zoning ordinance. It also provided for "special exceptions" that could be granted by the Commission after a public hearing. These actions were historically labeled quasi-judicial by the courts.[85] However, under home rule, many local governments provided that actions

81. *See Snyder*, 627 So. 2d at 469.

82. *See* FLA. STAT. §§ 163.3161(8), § 125.01 (1995).

83. *Id*. § 125.66(5).

84. The use of certiorari to review legislative zoning decisions is not only unfair because the proponent must establish a record case during a legislative proceeding that involves no due process guarantees, but it is also in violation of the uniform jurisdiction provisions of the Florida Constitution. *See* Lincoln, *supra* note 7, at 380–81.

85. *Id*. at 347–48.

such as variances and special exceptions would have to come before the commission, and that discretionary actions such as site plan reviews and Planned Unit Development (PUD) proposals would also come before the Board. Often, the local ordinances provided that these actions would be taken by ordinance, rather than resolution.

Thus, the Florida courts have been faced with a number of land use activities that involve a confusing amalgamation of legislative and administrative aspects. Several different approaches have been taken to try to identify when and whether actions taken by local legislatures are, in fact, administrative. A great deal of recent literature and case law have wrestled with "formal" and "functional" approaches. I propose a "structural" approach that is more appropriate.

"Formal" approaches tend to examine the form of the action and tend to make the decision based on whether the action was taken by ordinance, i.e., by a legislative act.[86] This approach leads courts to look at the decision and decide that it is legislative if made by a legislative body by the adoption of an ordinance. This occurred in *City of Naples Airport Authority v. Collier Development Corp.*,[87] which involved airport zoning. This problem also has arisen in several site review cases such as *City of Boynton Beach v. V.S.H. Realty, Inc.*,[88] and similar cases where in the course of litigation the local government claims, and the courts accept, that standards of review appropriate to legislative actions should apply simply because the action is taken by ordinance.

The counterweight to the formal approach is what has been called the "functional" approach. The functional approach takes one of two tacks to analyze the decision. The more formalistic approach is to look for the trappings of a quasi-judicial hearing — notice and a hearing — and declare that a decision is quasi-judicial if it has those attributes. This was the approach taken by the Second District Court of Appeal in *Hirt v. Polk County Board of County Commissioners*,[89] which involved a PUD application. The second approach is to look at the scope and subject of the action. Under this approach, the

86. Krinek, *supra* note 79, at 425–29.

87. 513 So. 2d 247 (Fla. 2d Dist. Ct. App. 1987).

88. 443 So. 2d 452, 452 (Fla. 4th Dist. Ct. App. 1984), *abrogated*, Park of Commerce Assoc. v. City of Delray Beach, 606 So. 2d 633, 633 (Fla. 4th Dist. Ct. App. 1992).

89. 578 So. 2d 415, 415 (Fla. 2d Dist. Ct. App. 1991).

court looks to whether the commission was making or applying policy and, if the action is an owner-initiated, single parcel rezoning, finds that the commission is applying rather than making policy. This was the tack taken by the Florida Supreme Court in *Board of County Commissioners v. Snyder*,[90] following the lead set twenty years before by the Oregon Supreme Court in *Fasano v. Board of County Commissioners*.[91] Federal courts use different accents on the same theme when trying to determine the issue in the context of applying immunity rules; these courts, however, usually frame the question along the rule/order distinction familiar to them from administrative law.[92]

The formal approach is unsatisfactory because it would allow a legislative body to gain additional deference for its administrative decisions simply by providing that they be adopted by ordinance. The functional approach is problematic for several reasons. First, a decision may change form simply because the number of applicants changes. For example, a rezoning that is applied for by a group of several contiguous landowners would receive different treatment than if each came in separately with an individual application for the same use.[93] This is highly suspect logic and contrary to many other situations. For instance, one would not term a special act of the legislature other than legislative simply because it applied to a particular jurisdiction or person.

The second problem with the functional approach is that it ignores significant and perhaps appropriate distinctions between legislative and administrative action that may have been established by the constitution, the state legislature or within the local framework. For example, many statutes provide that a local com-

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90. 627 So. 2d 469, 472 (Fla. 1993).

91. 507 P.2d 23, 23 (Or. 1973) (en banc), *superseded by statute as stated in* Menges v. Board of County Comm'rs, 606 P.2d 681 (Or. Ct. App. 1980). This case is discussed in Lincoln, *supra* note 7.

92. See generally the discussion of federal court tests in Przybylski, *supra* note 80, at 663–722. All of the tests she describes being used by federal courts involve attempts to evaluate the decision by examining its context and effect, that is, trying to determine whether policymaking rather policy application is occurring by examining the process and the subject/applicant. *Id*.

93. In Oregon, where a "functional" type of rule was applied to rezonings and comprehensive plan amendments, the result was 10 years of acrimonious litigation with wildly inconsistent results. *See* Scott H. Parker & John E. Schwab, *Forecast: Cloudy But Clearing — Land Use Remedies in Oregon*, 15 WILLAMETTE L. REV. 245, 255–62 (1979).

mission must make certain findings before taking some action clearly intended to be legislative, such as adopting an ordinance controlling rents.[94] Furthermore, the functional approach does not seem to provide a principled way of determining when holding a hearing or even making factual findings in such instances would convert the process from legislative to executive. Focusing on the number of persons affected does not truly address the issue: a legislative act such as designating an area as blighted for the purpose of redevelopment may affect only a single property owner without losing its legislative character.[95]

Finally, the functional approach makes no distinction regarding why a hearing was held — ignoring, for instance, that *all* ordinances adopted by local governments must be noticed and subject to a public hearing. Clearly, then, not all actions taken after a noticed public hearing are inherently quasi-judicial. As such, cases using the "functional approach" give us no basis on which to distinguish a legislative hearing from one that is quasi-judicial in nature. Indeed, these opinions seem to take the position that if certiorari would provide a more fair basis of review, then the decision will be reframed to be quasi-judicial to reach that end, i.e., the courts seem to be forcing their logic to suit a desired outcome.[96]

I suggest that these problems in the formal and functional analysis have at least some of their genesis in a lack of rigorous analysis of the structure of the decisionmaking process, and that the rest of the problem springs from a lack of clarity regarding the legislative role of local governments. We can start clearing these problems up by recognizing that the threshold issue in distinguishing legislative from executive decisionmaking is the existence of delegated power. All administrative acts that regulate or otherwise affect persons outside the government itself must have some basis in a legislative delegation, otherwise they are void *ultra vires*, for administrative

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94. *See, e.g.*, FLA. STAT. §§ 125.0103, 166.043, 163.355–.356 (1995) (establishing a redevelopment district).

95. *See, e.g.*, Lynch v. Housing Auth., 73 So. 2d 70, 70 (Fla. 1954) (holding that findings made in establishing redevelopment districts were legislative and held to arbitrary and capricious, rather than competent and substantial evidence, test).

96. *See* Snyder v. Board of County Comm'rs, 595 So. 2d 65, 69 (Fla. 5th Dist. Ct. App. 1991) (concluding that rezonings must be quasi-judicial because an important property interest is at stake and a stricter review than is afforded legislative actions is needed to protect that interest), *quashed on other grounds*, 627 So. 2d 469 (Fla. 1993).

bodies have no inherent powers.[97] This includes local commissions in their administrative capacity: unless granted powers by the legislature, the local charter or by an ordinance of the local government, local commissions have no administrative powers.

We can construct a means by which to distinguish local executive from legislative actions based on two basic precepts. First, valid delegations of power come from legislation that directs an administrative body or actor to either act or refrain from acting with regard to some issue or policy based on established standards and/or procedures. This precept recognizes that a valid delegation must both grant and limit authority. Second, we must recall the long-standing rule that a sitting legislature may not bind a future legislature.[98] At the state level, this means that attempts to establish procedural or substantive limits on future legislatures are void unless specifically authorized by the constitution.

At the local level, this policy means that if the local commission adopts ordinances containing procedural or substantive guidelines that apply to itself in dealing with later decisions, the ordinances constitute a delegation to itself. In such a situation, the local commission must be later bound to follow either the earlier ordinance as an administrative body or amend or repeal it as a legislative body. If the commission is not so bound, that is, if it can change the substance or procedure of any decision instantaneously, then there is never a valid delegation and the earlier ordinance is a nullity. Of course, this would mean that the commission always holds unbridled discretion in any matter that comes before it, bound only by its charter and the limits of home rule and the United States and Florida Constitutions. The more reasonable position — and the position generally taken by the Florida courts — is that local commissions can delegate to themselves.[99]

Thus, there are two key determinations to make in distinguishing between executive and legislative acts at the local level. First, has a fixed procedure been established by ordinance, and are there standards to guide the decision? If procedures have been established

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97. State Dep't of Envtl. Regulation v. Puckett Oil Co., 577 So. 2d 988, 992–93 (Fla. 1st Dist. Ct. App. 1991).

98. *See* Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 824 (Fla. 1985) and cases cited therein.

99. *See* City of Miami v. Save Brickell Ave., Inc., 426 So. 2d 1100, 1104 (Fla. 3d Dist. Ct. App. 1983) and cases cited therein.

(at least by the commission itself), any action taken under them *must* be administrative. Thus, if a local ordinance provides procedures for receiving a permit or a rezoning, actions taken under those procedures are administrative. The second aspect of a delegation is standards. If a local ordinance contains standards to be used in its implementation, then actions based on those standards must be based on delegated authority. Note, however, that once any standards are provided they must be sufficiently precise to survive a vagueness challenge.[100]

It should be noted that courts have become increasingly confident in adopting this approach. Thus, in *City of Melbourne v. Hess Realty Corp.*,[101] the Fifth District Court of Appeal properly noted that the conditional use permit in question involved a quasi-judicial decision despite the fact that the local zoning code required the decision to be made by ordinance.[102] Also, it is interesting to note that the trial court found the decision to be legislative because there were no objective criteria to govern the decision — holding, in effect, that a vague delegation allowed the commission to retain legislative discretion over the decision rather than holding that the vagueness of the ordinance was a separate issue from whether the decision taken was administrative.[103] The failure to separate these distinct, litigable aspects of the local ordinance is widespread and probably the root of much of the confusion. Earlier, in *City of Miami v. Save Brickell Avenue, Inc.*,[104] the Third District Court of Appeal avoided this confusion, holding that a PUD ordinance adopted by the city of Miami was void for vagueness when it delegated unfettered authority to the commission itself to set standards for the approval of development requests.[105] These cases represent a far better approach to the analysis than that adopted by the Florida Supreme Court in *Snyder* when it found owner-initiated, site specific rezonings to be quasi-judicial.[106]

Once it is determined that an action is administrative, it can be determined to be quasi-judicial if the tests described earlier are met.

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100. *Id.*
101. 575 So. 2d 774 (Fla. 5th Dist. Ct. App. 1991).
102. *Id.* at 775.
103. *Id.*
104. 426 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1983).
105. *Id.* at 1103–04.
106. 627 So. 2d at 474.

That is, there must be a requirement that the decision be taken after a noticed hearing, with the decision being based on information made available at that hearing.[107] If the decision does not meet these requirements, the decision is either ministerial or one of administrative discretion, depending on the nature and language of the delegation. This is true at least under the law established in *De Groot v. Sheffield*[108] and *Bloomfield v. Mayo*.[109]

The main difficulty in this approach is evaluating situations where state statutes, rather than local ordinances, prescribe procedures or provide standards to be used by local governments in taking action. In the example used above, state law requires local governments to make a finding that an area is a slum, blighted, or deficient in affordable housing in order to establish a redevelopment district.[110] Furthermore, in order to use the powers of a redevelopment agency, the local government must adopt a community redevelopment plan. In light of this, there are existing standards for the content and adoption of such plans.[111] As such, the question becomes how do we establish whether the adoption of such a plan is a legislative or quasi-judicial act?

Here, the answer involves recognizing the dual nature of local governments as both a means to administer state policies and as a separate entity granted limited governmental powers by the state. To distinguish between these roles, we must closely examine whether the state statute is intended to establish a means for local governments to exercise governmental powers, such as an enabling act, or whether the structure is intended to provide a means to implement specific state policies. Where local governments are serving to administer state programs or policies, controls on their actions should be seen as creating delegations of administrative power. Where local governments are serving their own ends, the standards and procedures should be seen as creating delegations of governmental power, the assumption of which is a legislative act by the local government. In that case, the procedural and substantive requirements should be treated the same way that constitutional re-

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107. *See supra* text accompanying notes 44–52.
108. 95 So. 2d 912 (Fla. 1957) (en banc).
109. 119 So. 2d 417 (Fla. 1st Dist. Ct. App. 1960).
110. FLA. STAT. § 163.360(1) (1995).
111. *Id*. § 163.360(2)–(9).

quirements on the state legislature or requirements found in local charters are treated. However, this will not solve all of the problems. Many enabling type statutes established both policy adopting and policy implementing roles for the local commission that could not easily be separated, and these statutes remain in force despite the fact that under home rule many or all of them are now unnecessary.

F. Conclusions

This section has described the powers of the three branches of government and the means by which they may be distinguished. The legislative power is the power to say what the law is, including the power to override the common law or other judge-made rules, constrained only by the constitution. The judicial power is the power to enforce the law and to ensure that its force is only brought to bear on individuals under the circumstances established by legislation, common law and the constitution. The executive power is the power to implement the laws, including the power to bring certain matters before the courts. The executive power may also involve the formal determination of facts or policies as required by legislation; this "quasi-judicial" power is distinguished from judicial power in that it does not involve final determinations of law, nor can it be used to bring the weight of state power on individuals without judicial action.

At the local level, distinguishing some legislative from executive acts is more difficult because the local commission acts in both roles and because state or local law sometimes provides for executive action to be taken by ordinance, a form that more properly involves legislation. Nonetheless, by strictly examining the structure of the authority under which the decision is made, rather than the form of the decision, courts could distinguish local administrative acts from legislative acts in a more principled and consistent manner than has been shown by recent decisions. When standards or procedures for later action by the commission are provided by local ordinance, those actions are administrative and, if the necessary components to the decision are involved, quasi-judicial. When standards or procedures are provided by state statute, the situation is more complicated; courts should look at whether the standards or procedures are provided to enable the local government to assume some power and, if so, find that the action is still legislative. If the standards or proce-

dures are intended to instruct the local government on how to accomplish some role dictated by the state, that is, to implement state policy, then the action should be considered administrative. Statutes that are not amenable to this treatment should be identified and revised so that some consistent and principled approach can be both understood by local government officials and applied by the courts.

III. THE SEPARATION OF POWERS AND LOCAL GOVERNMENTS IN FLORIDA

> When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, one upon the other, in the slightest degree. *The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution*.[112]
>
> Power tends to corrupt and absolute power corrupts absolutely.[113]

The concept of the separation of powers has been part of the western theory of democracy even prior to the founding of the United States.[114] Under the Florida Constitution, the concept is strictly applied to the relationships between the branches of state government. Local government relationships are not so well policed. Indeed, the Florida Supreme Court recently held that "our separation of powers provision was not intended to apply to local government entities and officials, such as those identified in articles VIII and IX and controlled in part by legislative acts."[115] This holding clarified

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112. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 393 (5th ed. 1891) (emphasis supplied) (quoted in Dreyer v. Illinois, 187 U.S. 71, 84 (1902)).

113. THE QUOTABLE LAWYER 245 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting Lord Acton, Letter to Bishop Mandell Creighton (April 5, 1887)).

114. *See generally* LOCKE, *supra* note 10; THE FEDERALIST No. 47 (James Madison).

115. Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1992). This holding, made in the context of the relationship of the separation of powers to sunshine acts, was consistent with early statements on the same issue, *see, e.g.*, Kaufman v. City of Tallahassee, 94 So. 697 (Fla. 1922), but sometimes confused in later cases, particularly those involving judicial powers.

confusion that had arisen in other cases, discussed later. Despite the contradictory holdings, it is clear that local legislatures may not intrude on judicial authority, nor may they delegate their legislative power to local administrative bodies. This section reviews the purpose of the separation of powers doctrine, its incorporation into Florida law, and the reasons for the courts' failure to apply it to local governments.

A. The History and Purpose of the Separation of Powers Doctrine

The separation of powers refers to the policy of splitting the powers of the sovereign government between coordinate branches which perform separate functions. The policy behind the separation of powers is the so-called "balance of power," the idea that tyranny can be prevented by ensuring that no person or persons can control the entire power of the government.[116] At the federal level, the limited sovereign powers granted by the United States Constitution are divided between legislative, executive and judicial branches.[117] The Florida Constitution also provides for executive, legislative and judicial branches of government.[118]

The Florida Constitution, unlike the United States Constitution, has a section expressly requiring the separation of powers. Article II, section 3 provides:

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116. *See* Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973) (stating that "[t]he true meaning of the separation doctrine is that the whole power should not be exercised by the same hands which possess the whole power of either of the other departments").

117. *See* U.S. CONST. art. I (defining specific powers of the President and assigning the executive power); *id*. art. II (defining the powers of the Congress and assigning the legislative power); *id*. art. III (defining the scope of the judiciary and assigning the judicial power). No limitation appears on the face of the United States Constitution to prevent the delegation of the authority of one branch to another, and responsibility for determining the extent to which the various powers can be shared lies uneasily upon the United States Supreme Court. *See*, *e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (trying to determine when a congressional grant of authority is insufficiently precise); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (trying to establish the limits of the President's policymaking authority).

118. *See* FLA. CONST. art. III, § 1 (stating that "[t]he legislative power of the state [is] vested in a legislature of the State of Florida"); *id*. art. IV, § 1 (stating that the executive power of the state is vested in the hands of the governor); *id*. art. V, § 1 (stating that the "judicial power is vested in a supreme court, district courts of appeal, circuit courts and county courts").

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[119]

The separation of powers doctrine prohibits one branch of government from encroaching upon the powers of another and also the delegation of power by one branch to another.[120] At the state level, the most frequent issue has been the improper delegation of legislative power to the executive. Under the Florida separation of powers provision, executive agencies are given relatively prescribed policymaking powers when compared with the powers granted federal agencies.[121] The limitation on the delegation of powers to administrative agencies by the Legislature was given its modern expression by the Florida Supreme Court in *Askew v. Cross Key Waterways*.[122] In *Cross Key*, the court held that the essential policy decisions must be made by the Legislature, rejecting the premise adopted by the federal courts that affording procedural protection could protect liberty sufficiently to warrant a loosening of the general policy.[123] The court reaffirmed the fundamental nature of this policy in *Chiles v. Children A, B, C, D, E, & F*, noting that the courts had "repeatedly held that . . . the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch."[124]

Another potential separation of powers problem involves encroachment on judicial powers by the executive. Beyond the provisions of article II, section 3, two additional constitutional provisions affect the balance between these branches. While article V, section 1 of the constitution vests the judicial power of the state in four enumerated courts and prohibits the creation of other courts, it also provides that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters

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119. *Id.* art. II, § 3.

120. Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991).

121. *See, e.g.*, Burris, *supra* note 65, at 10 ("Most courts at both the federal and state levels early on abandoned their efforts at rigorously enforcing separation of powers requirements in the context of delegation of authority to administrative agencies. However, Florida courts resisted this course").

122. 372 So. 2d 913 (Fla. 1978).

123. *Id.* at 924.

124. *Children*, 589 So. 2d at 264.

concerned with the functions of their offices."[125] The "quasi-judicial" powers of administrative officers involve the determination of facts in specific situations, and the evaluation of how existing policy applies to those facts.[126] In addition, article I, section 18 permits administrative agencies to impose penalties for civil violations.[127] The courts have permitted, and even required, the evaluation of administrative action by administrative hearing officers rather than by courts so long as eventual judicial review is maintained.[128]

The delegation of "quasi-judicial" powers to administrative officers has been closely regulated by the courts. Hearing officers or other officers wielding quasi-judicial powers may not "exercise powers that are fundamentally judicial in nature."[129] As noted in section II of this Article, fundamental judicial powers generally involve issues for which the right to a jury trial are protected, equitable powers, and the inherent judicial power to control proceedings.[130] Included in these limits, "it is axiomatic that an administrative

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125. FLA. CONST. art. V, § 1.

126. Broward County v. La Rosa, 505 So. 2d 422, 423 (Fla. 1987) (stating that "[a]n administrative agency conducts quasi-judicial proceeding in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as a basis for their official actions"); Gentry v. Dep't of Professional & Occupational Regulations, 283 So. 2d 386, 387 (Fla. 1st Dist. Ct. App. 1973) (requiring an order entered by agency in the exercise of its quasi-judicial functions must contain specific findings of fact); *see also* FLA. STAT. § 120.59 (1995) (requiring final orders to contain separate findings of fact and conclusions of law based on law, policy and the facts); De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957) (stating quasi-judicial decisions differ from executive decisions in that they are made after notice and a hearing at which evidence is offered; the judgment of a quasi-judicial body must accord with the essential requirements of the law).

127. FLA. CONST. art. I, § 18. The text of the provision is: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." *Id*.

128. *See* Key Haven Associated Enter., Inc. v. Board of Trustees of the Int'l Improvement Trust Fund, 427 So. 2d 153, 160 (Fla. 1983) (holding that prudential doctrines should cause circuit courts to refrain from entertaining suits where administrative remedies remain available); Florida Bd. of Regents v. Armesto, 563 So. 2d 1080, 1081 (Fla. 1st Dist. Ct. App. 1990) (stating that companion doctrines of primary jurisdiction and exhaustion or remedies require circuit courts to abstain from exercising jurisdiction where adequate administrative remedies exist); Smith v. Willis, 415 So. 2d 1331, 1336 (Fla. 1st Dist. Ct. App. 1982) (holding that the circuit court must consider the time and expense of necessary collateral proceedings before deciding to take jurisdiction over action which can proceed in administrative forum).

129. *La Rosa*, 505 So. 2d at 423 (holding that determination of non-quantifiable damages is a judicial function); *see also* Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973) (holding that administrative agencies have no general judicial powers).

130. *See supra* notes 68–74.

agency has no power to declare a statute void or otherwise unenforceable."[131] Regardless of the purpose behind an improper delegation or encroachment, Florida courts will invalidate any action that violates article V, section 1, regardless of the application of article II, section 3. Thus, local governments are prevented from encroaching on judicial authority not by the separation of powers provision, but by the separate and distinct grant of constitutional authority to the courts.

Several other variations of encroachment or improper delegation under article II, section 3 exist. For example, the courts improperly delegate authority to the executive when they delegate decisions regarding punishment, such as eligibility for community control[132] or the amount of restitution a convict should pay.[133] Likewise, the executive's decision on the granting of pardons may not be infringed by the judiciary or the legislature.[134] The judiciary infringes on legislative powers if it tries to regulate the manner of legislators' meetings.[135]

B. The Separation of Powers Doctrine and Local Governments

Separation of power concerns arise in local government decisionmaking in several guises. A commission may grant broad authority to its administrative officers, raising issues of the proper delegation of legislative authority. A local ordinance may grant an administrative officer or board the power to hear and decide cases involving anything from code infractions to human rights abuses, threatening the encroachment of judicial power by the executive. Most importantly, the board may retain for themselves the right to make administrative determinations or hear appeals from the administrative decisions of local officers or boards, creating an encroachment on executive power by the legislative body.

Several readily ascertainable reasons exist for the failure of the

131. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987) (citing Dade County v. Overstreet, 59 So. 2d 862 (Fla. 1952) and State *ex rel.* Fronton Exhibition Co. v. Stein, 198 So. 82 (1940)).

132. *In re* T.L.D., 586 So. 2d 1294, 1294 (Fla. 4th Dist. Ct. App. 1991).

133. *See* M.G. v. State, 564 So. 2d 630, 630 (Fla. 5th Dist. Ct. App. 1990); Goodling v. State, 482 So. 2d 594, 595 (Fla. 4th Dist. Ct. App. 1986).

134. Sandlin v. Criminal Justice Standards & Training Comm'n, 531 So. 2d 1344, 1345 (Fla. 1988).

135. Moffitt v. Willis, 459 So. 2d 1018, 1022 (Fla. 1984).

courts to rigorously apply the separation of powers doctrine to local government. These reasons include the historical function and role of local governments, the inapplicability of federal constitutional principles to distributions of power between the branches of state governments, and the clear freedom granted local governments to mix legislative and administrative functions under the local government provisions of the Florida Constitution and applicable statutes.

1. History of Local Government Powers

Local governing boards in the United States have historically held both legislative and executive powers. In fact, in the early days when the states were British colonies, local magistrates who wielded judicial, legislative and administrative authority (albeit limited authority) were common.[136] "Many colonial judges of the lower courts exercised administrative as well as judicial functions. They could assess and levy taxes, license certain trades, authorize the building and repairing of jails and courthouses, and appoint certain public officials."[137] In colonial America, the "sessions" court of the local magistrates "was an institution of undifferentiated local government authority" for not only criminal and civil disputes, but for "the administrative business that came before it."[138] In Massachusetts, the genesis of a separate form of local government occurred when the Legislature removed the judicial authority of the local justices, leaving them only the legislative and executive powers and establishing them as the precursors to county commissions.[139]

In Florida, the first local governments were established by Andrew Jackson, who created two counties, local courts, and provisions for trial by jury in 1821.[140] Today, Florida is divided into 67 counties, covering all of its territory and encompassing all citizens. Counties are political subdivisions of the state,[141] and for that reason, "[m]ore overtly than cities, counties function as administrative arms of the

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136. *See* FANNIE J. KLEIN, FEDERAL AND STATE COURT SYSTEMS — A GUIDE 2–4 (1977).

137. *Id*. at 3–4.

138. Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 283–84 (1976).

139. *Id*. at 284.

140. Michael V. Gannon, *Introduction* to FLORIDA'S POLITICS & GOVERNMENT 22 (Manning J. Dauer ed., 2d ed. 1984) [hereinafter FLORIDA'S POLITICS].

141. FLA. CONST. art. VIII, § 1(a).

state. Their duties are prescribed with greater specificity, and state supervision is more comprehensive."[142] The historic character of counties was not as an independent government, but as the vehicle for the state to provide a local bureaucracy for the provision of its services.[143] Thus, "[c]ounty commissioners are clothed by law with numerous important powers and duties quasi-judicial and quasi-legislative; for example, in the discharge of their varied functions they are permitted to investigate and form judgments upon facts."[144]

Cities, on the other hand, were seen as vehicles for the provision of public services such as water and sewer systems, parks, and garbage collection, rather than governmental functions such as serving writs, making arrests, or providing courts and jails. Cities were defined "as a corporation, managed for the mutual benefit of its members and catering to their wishes . . . ."[145] In order to fulfill this purpose, the authority granted municipalities may be in a legislative, executive or quasi-judicial form and is essentially "administrative, in accordance with immemorial custom . . . ."[146]

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142. Robert Benedetti, *Local Government in Florida: Introduction, in* FLORIDA'S POLITICS, *supra* note 140, at 195.

143. *Id*. Robert Benedetti points out that:

> The historically informal nature of county government has been described as arising from the rural nature of the areas:
>
> With this kind of community to govern, local officials served only part-time and were elected from among fellow farmers. They received fees, rather than a salary, for whatever services were performed. The governing body of the county, the commission, met once a month to supervise road repair and let a contract now and then. Law was enforced in the whole county by the sheriff, who was paid a fee for each arrest, for serving legal papers, and for attending court. He was elected independently of the county commission. For minor legal matters the county was divided into justice of the peace districts. Each such district had a constable to enforce the law. Other county officials, also part-time, paid by fees, and elected directly by the voters, included the county judge, the county clerk, and some others.

Robert R. Benedetti & Manning J. Dauer, *Local Government II: Cities and Counties, in* FLORIDA'S POLITICS, *supra* note 140, at 226.

144. 12 FLA. JUR. 2D *Counties and Municipal Corporations* § 145 (1979) (citing Johnson v. Wakulla County, 9 So. 690, 694 (1891) and State *ex rel*. Hubbard v. Holmes, 44 So. 179, 180 (1907)).

145. Robert Benedetti, *Local Government in Florida: Introduction, in* FLORIDA'S POLITICS, *supra* note 140, at 195.

146. 12 FLA. JUR. 2D *Counties and Municipal Corporations* § 72 (1979). In fact, in the strictly commissioner form of municipal government, the commissioners who wield the legislative power as a whole exercise administrative power over some department of the city, for example, as water and sewer commissioner, police commissioner, or roads commissioner. *Id*. §§ 102–103.

Both counties and cities, therefore, have historically been seen in administrative, rather than governmental roles. This history is reflected in statutory provisions that expressly require local legislatures to act as administrative agents.[147] The governmental powers of local governments, reflected in the home rule provisions of the Florida Constitution and Florida Statutes, are later creations. Consistent with this mixing of roles, nothing in article VIII of the Florida Constitution, which controls the powers of local governments, establishes an office designed to bear the executive power of either cities or counties.[148] In fact, the power to establish government by charter given to both cities and counties by article VIII permits them to arrange their affairs in any manner they see fit.[149]

2. *Local Government Law and the Separation of Powers*

A second reason that courts do not apply the separation of powers doctrine to local governments is that counties and municipalities are currently authorized by statute to adopt forms of government which leave executive power in the control of the local legislature. Florida Statutes permit counties to adopt a charter that utilizes an elected county executive, but it is clear that this structure is optional.[150] Counties not electing an executive can appoint a county administrator whose described duties may be supplemented.[151] However, a county administrator is an agent of the board rather than an

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147. *See, e.g.*, FLA. STAT. § 112.215(5) (1995) (allowing county or municipality to designate itself as the administrator of a deferred compensation program).

148. Article VIII, § 1(d) of the Florida Constitution provides for five county officers: a sheriff, tax collector, tax assessor, supervisor of elections, and clerk of the circuit court. These positions, while performing some executive functions, do not have a role comparable to the governor, who has the supreme executive power of the state under article IV, § 1. Furthermore, all positions, save the clerk of circuit court, may be abolished by a county charter and their powers transferred to another office. FLA. CONST. art. VIII, § 1(d).

149. Brodie and Linde note "[w]here state constitutions empower cities or counties to define their own governmental structures and powers, local government action derived from such `home rule' authority differs from the delegated activities of statutory agencies." Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. L.J. 537, 539 n.7.

150. FLA. STAT. § 125.84(1) (1995). Under this option the county executive has the executive responsibilities assigned by the charter as well as the power to veto legislation. *Id*.

151. *Id*. § 125.74.

independent branch of government and serves at its pleasure.[152] Furthermore, nothing in the Florida Statutes expressly limits the authority of a county commission to assign itself executive responsibilities.[153]

With respect to municipalities, no provision of the Florida Constitution or Florida Statutes dictates any particular form of government.[154] The method by which local powers will be executed is left to the municipal charter,[155] and the mayor may be elected separately or merely be a member of the commission chosen to preside over its meetings.[156] A common practice in Florida is to elect a commission of five members who wield both the legislative and executive power,[157] though most cities use an appointed city manager.[158] While some large Florida cities employ a "strong mayor" form of government in which the mayor has a separate set of defined powers, most cities using a mayor have a "weak mayor" whose power is limited.[159]

As noted above, the Florida Supreme Court has held that the language of article II, section 3 of the Florida Constitution does not apply to local governments.[160] This decision was in accord with earlier decisions that held that the constitutional separation of powers clause did not apply to persons wielding local government authority, but only to those in one of the three branches of state government.[161] While local government officials may be considered state officers for some purposes,[162] they are not considered members of the state leg-

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152. *Id*.

153. Section 125.85, which describes the powers that shall be placed with the executive of a county using the statutory option for adopting a charter, provides that "[t]he executive responsibilities and power of the county shall be assigned to, and vested in, the appropriate executive officer . . . ." *Id*. While this language might be sufficient to prevent the legislative body from retaining executive or quasi-judicial powers, no case has held that it does so.

154. 12 FLA. JUR. 2D *Counties and Municipal Corporations* § 101 (1979).

155. *Id*. § 162.

156. *Id*.

157. *Id*. § 102.

158. By 1976, 50% of cities of 100,000 population or greater used the council-manager form of government, while 76% of cities of populations over 10,000 had managers. Benedetti & Dauer, *supra* note 143, at 221.

159. *Id*. at 199.

160. Locke v. Hawkes, 595 So. 2d 32, 37 (Fla. 1992).

161. Kaufman v. City of Tallahassee, 94 So. 697 (Fla. 1922).

162. For example, county commissioners are covered by state pension plans. FLA. STAT. § 122.08 (1995).

islative, executive or judicial branches of government.[163] Article II, section 3 has not been held to prohibit a local legislature from exercising administrative powers.[164]

Finally, nothing in the United States Constitution guarantees that a separation of powers will be maintained within the states. This long-standing rule was clearly described in *Dreyer v. Illinois*.[165] *Dreyer* involved a challenge to a statute that gave the Parole Board, an executive agency, the authority to determine when a prisoner had served a suitable sentence. The court held that this disposition of power violated no province of the Constitution:

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163. While county officers are defined by the constitution, they are not state officers. 12 FLA. JUR. 2D *Counties and Municipal Corporations* § 107 (1979) (citing *In re* Executive Communication, 13 Fla. 687 (1870)). Similarly, municipal officers are neither state nor county officers. *Id*. (citing *In re* Opinion of the Justices, 163 So. 410, 411 (Fla. 1935)).

164. It should be noted, however, that this point has been confused at times by both commentators and the courts. *See, e.g.*, Broward County v. La Rosa, 505 So. 2d 422, 424 (Fla. 1987) (stating "[n]or has Broward County convinced us that article II, section 3 applies only to the legislature" and not to the county's invalid delegation of judicial power); Burris, *supra* note 65, at 12–13 & n.14 (discussing cases involving the improper delegation of powers along with cases involving state agencies). It should be noted that *La Rosa* also recognized that the judicial power granted by article V to the courts is completely exclusive and includes power over local government action. *La Rosa*, 505 So. 2d at 424. Article II, § 3 is therefore unnecessary to prevent local government encroachment on local government powers. *Id*.

Confusion on this point also has been manifested by the Attorney General. In Opinion 91-24, the Attorney General stated that Dade County could not delegate the authority to amend zone district boundaries to the Dade County Zoning Board of Appeals on the basis that the authority to zone was inherently legislative; the county could only delegate the authority to enforce the zoning ordinance. 1991 Op. Fla. Att'y Gen. 24. The Attorney General cited State v. Roberts, 419 So. 2d 1164 (Fla. 2d Dist. Ct. App. 1982) for this proposition. That case, however, turned on the question of whether the Florida Legislature could vest the power to zone, that is to regulate the use of property, to a non-elected administrative body. The court in *Roberts* stated that the delegation of zoning authority improperly vested the power of the legislature in an administrative agency. *Id*. at 1166. The delegation contained no guidelines or limitations on how the zoning power could be used, but essentially delegated the complete freedom to adopt standards to the administrative body. *Id*. at 1165. The case therefore stands for the same proposition as Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978): that the standardless delegation of regulatory authority from the Florida Legislature to an administrative body violates article II, § 3 of the Florida Constitution. The Attorney General therefore reached the wrong conclusion: the only proper limitation on a local government's devolution of authority to determine zoning boundary changes is whether the enactment of that authority contains sufficient guidelines to prevent the administrative board from acting arbitrarily or capriciously. *See infra* part IV.A.

165. 187 U.S. 71, 83–84 (1902).

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.[166]

Under this doctrine, "the states enjoy complete hegemony over local governments,"[167] so the freedom of the states to arrange the disposition of their powers in any fashion without violating the federal constitution extends to its choice in how the powers of local governments are arranged.[168] No federal constitutional protection, therefore, will be violated by a state framework that permits local legislatures to undertake executive or judicial functions.[169]

Thus, there are both historical and contemporary reasons for courts to refrain from applying the doctrine of the separation of powers to local governments.[170] The policy reason for this exemption is "the idea that the administration of the affairs of a great city is more nearly analogous to the conduct of a business than to the operation of a sovereign state."[171] Local governments, in this view, primarily are service providers rather than regulators, and the administrative powers placed in the legislative body is comparable to the powers of a board of directors of a corporation. It is in the area of governmental and regulatory powers, however, that local governments have ex-

166. *Id*. at 84.

167. Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

168. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). This freedom includes the power to abolish or control the size of local governments, as there is simply no constitutional obligation to even provide local government. *Id*.

169. However, local laws or actions may implicate constitutional due process concerns. *See infra* text accompanying notes 329–43.

170. This is not limited to Florida. Brodie and Linde note that "[t]he fact that local governing officials often combine lawmaking, administrative, and sometimes judicial powers does not violate separation-of-powers provisions of state constitutions." Brodie & Linde, *supra* note 149, at 540 n.8.

171. 12 FLA. JUR 2D *Counties and Municipal Corporations* § 102 (1979).

panded their authority in recent years.[172]

C. Conclusion: Modern Powers and Modern Problems

In past times, the governmental authority of counties and municipalities was strictly limited. Local governments have no inherent authority; if local ordinances or regulations are not authorized under state law, they are void *ultra vires*.[173] Historically, local governments in Florida or elsewhere operated under Dillon's Rule, which limits local government authority to that expressly granted by the legislature or fairly implied from such an express grant.[174] Furthermore, any such enactments were to be construed strictly against finding that power had been delegated.[175] Because the powers of local government were limited, the potential for the abuse of power through its concentration in the hands of a single person or body were limited.[176] However, local governments in Florida no longer have highly restricted powers.

Municipalities were granted broad home rule powers through the passage of article VIII, section 2(b) of the Florida Constitution in

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172. Florida courts have occasionally struck local ordinances as an invalid delegation of power. The rationale behind these actions, however, has been the vagueness doctrine. *See infra* notes 206–08 and accompanying text. *See, e.g.*, City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 805–06 (Fla. 1972) (holding that ordinance permitting city rent agency to establish maximum rents based on factors bearing on equities was invalid for failing to provide objective guidelines and standards).

173. *See, e.g.*, *Fleetwood Hotel*, 261 So. 2d at 804 (holding a city rent control ordinance void where not authorized); Davis v. Gronemeyer, 251 So. 2d 1 (Fla. 1971) (holding that non-charter counties have limited constitutional authority and require statutory authority to act).

174. *See* STEPHEN SPARKMAN, STAFF REPORT: THE HISTORY AND STATUS OF LOCAL GOVERNMENTS' POWERS IN FLORIDA 25 (1972) (available at the Law Library, Florida State University College of Law, Tallahassee, Fla.); *see also* 1 JOHN F. DILLON, COMMENTARIES ON THE MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For an application of the principle, see Colen v. Sunhaven Homes, Inc., 98 So. 2d 501 (Fla. 1957) (counties have only those powers delegated by the constitution or statute).

175. *Sunhaven Homes*, 98 So. 2d at 504 (noting that "[i]t is also generally held that the strict rules of statutory construction greatly limit if not exclude, an inferred authority.")

176. *See*, *e.g.*, Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973) (stating that "[e]xcept in the comparatively rare cases where a combination of powers in a single agency was deemed to threaten, in some measure, the restrictive primacies of the Legislature or of the courts, the states have sustained the statutory delegation of combined legislative, prosecutory, and judicial powers to agencies"). The court went on to note limiting principles on such delegations. *Id*. (quoting McRae v. Robbins, 9 So. 2d 284, 290 (Fla. 1942)).

1968 and the subsequent adoption of the Municipal Home Rule Powers Act.[177] Similarly, article VIII, section 1 of the Florida Constitution recognizes two types of counties: charter and non-charter.[178] While their constitutional authority varies,[179] both have the equivalent of home rule authority under section 125.01, Florida Statutes.[180] Section 125.01 confers upon county commissions the power to carry on county government to the extent not inconsistent with general or special law,[181] and gives charter and non-charter counties home rule powers.[182]

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177. Article VIII, § 2(b) provides that "[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." FLA. CONST. art. VIII, § (2)(b).

Section 166.021 of the Florida Statutes, recites the constitutional language and goes on to provide in subsection (3) that: "The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act. . . . " FLA. STAT. § 166.021 (1995). The section then lists four exceptions: territorial issues such as merger, annexation and the exercise of extraterritorial power; subjects prohibited by the constitution; subjects preempted to state or county governments by the constitution or general law; and subjects preempted to a county under a county charter. *Id.*

178. Non-charter counties "shall have such power of self-government as provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law. . . . " FLA. CONST. art. VIII, § 1(f). Charter counties "shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." *Id.* art. VIII, § 1(g).

179. Charter counties also have the constitutional authority to alter their form of government and, if provided by the charter, to enact ordinances which supersede municipal ordinances. *Id.* art. VIII, § 1(c),(d),(e) & (g).

180. FLA. STAT. § 125.01 (1995).

181. *Id.* § 125.01(1).

182. The powers included in section 125.01 include the power to

> (g) Prepare and enforce comprehensive plans for the development of the county.
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> (h) Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.
>
> (i) Adopt, by reference or in full, and enforce building, housing, and related technical codes and regulations.
>
> (j) Establish and administer programs of housing, slum clearance, community redevelopment . . . and cooperate with governmental agencies and private enterprises in the development and operation of such programs.
>
> . . .
>
> (w) Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

Id.

Home rule gives local governments authority to legislate in any area permitted to the state government unless the legislature has expressly acted to limit their authority.[183] While some such restrictions have been adopted,[184] the primary remaining limitation on local power is a constitutional requirement that local government taxing authority be specifically authorized by general law.[185] Local governments have used their home rule powers to legislate in areas previously left to state governments such as prohibiting housing and employment discrimination,[186] creating authorities to build toll roads and bridges,[187] and requiring non-resident employees working within the territory of the government to carry identification cards.[188] Local governments may enact ordinances that criminalize certain behavior.[189] Broad authority under home rule has also been

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In Speer v. Olson, 367 So. 2d 207 (Fla. 1978), the Florida Supreme Court stated that "[t]he intent of the Legislature in enacting . . . Chapter 125, Florida Statutes, was to enlarge the powers of counties through home rule to govern themselves." *Id*. at 210.

183. *See* City of Daytona Beach Shores v. State, 454 So. 2d 651, 654 (Fla. 5th Dist. Ct. App. 1984) (municipal powers include any activity or power permitted to state or political subdivision), *quashed on other grounds*, 483 So. 2d 405 (Fla. 1985); *see also* Speer v. Olson, 367 So. 2d 207, 210–11 (Fla. 1978) (counties have general powers of self government); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 322 (Fla. 1976) (city had authority under constitution and home rule proprietary powers to enact impact fees for water and sewer systems), *cert. denied*, 444 U.S. 867 (1979); City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 765 (Fla. 1974) (per curiam) (city had authority to enact rent control ordinance; section 166.021 should be construed broadly to effectuate constitutional home rule).

184. *See, e.g.*, FLA. STAT. §§ 125.0103, 166.043 (1995) (limiting local authority to enact price or rent controls).

185. FLA. CONST. art. VII, § 1; *see also* City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972) (invalidating an occupational license tax authorized by special law).

186. *See* Laborers' Int'l Union, Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989) (existence of state human rights act dealing with employment discrimination did not prevent county from enacting ordinance in the same area); Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962, 965 (Fla. 1987) (county had authority to establish housing discrimination board under its charter); Broward County v. La Rosa, 505 So. 2d 422 (Fla. 1987) (county had authority to adopt local ordinance prohibiting racial discrimination enacted under its charter).

187. Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986).

188. After the Town of Palm Beach established the requirement that non-resident employees carry a town I.D. card, an action widely viewed as discriminatory and which drew fire from Gary Trudeau in a series of *Doonesbury* cartoons, the legislature acted to limit the power of local governments to regulate in this area. FLA. STAT. §§ 166.0443, 125.581 (1995).

189. Thomas v. State, 583 So. 2d 336, 337 (Fla. 3d Dist. Ct. App. 1991) (involving a search made after a suspect was arrested for operating a bicycle without a bell in contravention of an Orlando ordinance that made that behavior a criminal offense); *see* FLA.

found to permit local governments not only to regulate the use of land, which includes the power to adopt comprehensive plans and zoning, but to require dedications of land for drainage canals,[190] require park dedications with fees in-lieu of impact fees,[191] to enact road impact fees,[192] and to enact school impact fees.[193] Thus, local governments not only possess but wield the full range of powers of the sovereign state.

The relative immunity from the separation of powers doctrine enjoyed by local governments should be re-visited due to their extensive powers under home rule. Whatever the historic and structural reason for their past abstinence, this issue should be addressed. Because local legislatures now enjoy what amounts to "the whole power" to legislate, allowing them to continue to control the executive function, it violates the long-standing policy recognized by the Florida Supreme Court that "the whole power should not be exercised by the same hands which possess the whole power of either of the other departments."[194] Nor should the courts or the legislature forget that "[t]he fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty."[195] This is no less valid simply because the geographic scope of the power is lessened. If history and the Florida Constitution seem to argue against the radical reconstruction of local power by the courts, they do not argue against the legislature taking action.

STAT. § 125.69 (1995) (county ordinances enforceable in same manner as misdemeanors).

190. Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 863 (Fla. 3d Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977).

191. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 606 (Fla. 4th Dist. Ct. App.), *rev. denied*, 440 So. 2d 352 (Fla. 1983).

192. Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 143 (Fla. 4th Dist. Ct. App. 1983), *rev. denied*, 451 So. 2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976 (1984).

193. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 637 (Fla. 1991).

194. Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973).

195. *See* Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 263 (Fla. 1991).

IV. STRUCTURAL AND SUBSTANTIVE LIMITS ON LOCAL LEGISLATURES' ADMINISTRATIVE ACTIVITIES

As noted before, designers of American governments have used both structural limits such as the separation of powers and various doctrines of judicial review to ensure that the government does not wield tyrannical powers over the citizenry. Because the separation of powers doctrine does not apply to local governments, one of the major structural protections against tyranny is unavailable. This chapter will review other available means of constraining the decisions of local commissions when they act in an executive or administrative role.

A. Vagueness Attacks as a Constraint on Self-Delegation

Vagueness challenges seek to invalidate a delegation of power to the executive branch on the grounds that the standards in the ordinance are so vague that they permit whimsical or capricious decisions.[196] Laws that are void for vagueness may also be invalid delegations of power, if they operate at the state level. The distinction is that a vagueness claim is based on showing that the executive's actions cannot be prevented from being arbitrary and capricious,[197] while in an unlawful delegation claim the issue is whether the "legislation is so lacking in guidelines that . . . the agency becomes the lawgiver rather than the administrator of the law."[198] Delegation challenges therefore deal with *where* the Legislature puts power, while vagueness challenges ultimately involve *how* the use of power will be controlled.

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196. *See* Effie, Inc. v. City of Ocala, 438 So. 2d 506, 508 (Fla. 5th Dist. Ct. App. 1983) ("The granting or withholding of a permit to engage in a legitimate business should not depend on the whim or caprice of the permitting authority."), *rev. denied*, 444 So. 2d 416 (Fla. 1984); ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146, 149 (Fla. 1st Dist. Ct. App.), *cert. denied*, 376 So. 2d 69 (Fla. 1979) ("Any standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of unconstitutionality.").

197. For example, an ordinance governing the granting of a special permit for the sale of alcoholic beverages was overturned in *Effie*, 438 So. 2d at 506. The ordinance permitted the city council to consider, beyond enumerated criteria, "all other pertinent factors" in determining whether to grant a permit. *Id*. at 509. The court held that the ordinance permitted the council to "act upon whim, caprice or in response to pressures which do not permit of ascertainment or correction." *Id*.

198. Askew v. Cross Key Waterways, 372 So. 2d 913, 918–19 (Fla. 1978).

It should be noted that there are actually three doctrines which vague legislation may violate. First, if a delegation by the legislature to a state agency is too vague, it is invalid as a violation of the separation of powers because it effectively vests legislative power in the agency.[199] Second, if a law considered penal in nature[200] is too vague, it violates the Due Process Clauses of the Fourteenth Amendment[201] and the Florida Constitution. Finally, local ordinances that are too vague are invalid because they delegate legislative authority and local governments are not authorized to do so. That is, vague delegations are prohibited at the local level not because of constitutional provisions regarding the separation of powers, but because local government legislative powers must be authorized by the state and nothing in the constitutional or statutory provisions for home rule or other powers gives local commissions the authority to delegate their legislative powers.[202] The idea that local governments lack the authority to adopt vague delegations is critical because it means that such attacks can be taken against local legislation even if the "liberty" or "property" protected by the due process clause is not at issue.[203]

The basic policy behind vagueness challenges was described by the Florida Supreme Court in *Smith v. Portante*,[204] a case involving

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199. *Id*.

200. These include any law that has a criminal sanction, laws with civil penalties, and laws that can result in the loss of a license or privilege that is considered property.

201. *See, e.g.*, Church of Scientology Flag Servs. Org., Inc. v. City of Clearwater, 756 F. Supp. 1498 (M.D. Fla. 1991), *aff'd in part, vacated in part, rev'd in part*, 2 F.2d 1514 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 54 (1994). Criminal statutes "must be drawn with sufficient clarity so that people know the conduct they must take to avoid the sanction of the particular law." 756 F. Supp. at 1527.

202. The principle that local commissions do not have the authority to "re-delegate" the legislative powers granted them by the state has been noted in numerous contexts. *See, e.g.*, Blitch v. City of Ocala, 195 So. 406, 407 (Fla. 1940) (en banc) (ordinances must not constitute a delegation of legislative authority). Home rule, unlike Dillon's Rule, empowers local governments to establish administrative frameworks without express authorization, but I was unable to find any case holding that local commissions' power under home rule includes the power to delegate legislative authority.

An interesting problem is that the legislature is specifically authorized by article VIII to delegate legislative powers to municipalities and counties, but it remains unclear whether a vague delegation of administrative functions to a local government would be an invalid delegation of administrative power or automatically become a delegation of legislative power that would require the adoption of a local ordinance before it could be administered. *See generally* FLA. CONST. art. VIII.

203. See the discussion, *infra* part C.2 of this section.

204. 212 So. 2d 298 (Fla. 1968).

a special law that authorized jury commissioners to demand information from potential jurors without any guidelines covering the nature and extent of the information. The court struck the statute as an unconstitutional delegation, noting that "[n]o matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved . . . ."[205] The need for objective standards was similarly emphasized in *Sarasota County v. Barg*,[206] when the Florida Supreme Court struck provisions from a special act that prohibited "undue or unreasonable" dredging and filling of wetlands on the basis that the language did not adequately specify the prohibited activity.[207]

Several cases have voided local land use or environmental regulations on vagueness grounds, and these demonstrate that vague delegations are not prohibited only by the separation of powers and due process clauses, but also by inherent limits on a local commission's authority to delegate. In *Drexel v. City of Miami Beach*, the Florida Supreme Court struck down an ordinance that permitted the location of parking garages only after "a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use."[208] The court went on to hold that an ordinance that provided an opportunity for the exercise of arbitrary authority by municipal authorities was improper.[209] In *Hartnett v. Austin*,[210] the court struck down an ordinance that predicated a zoning change on the execution of a private contract on vagueness grounds. The court noted that "[i]t is a rule long recognized by the precedents that a municipal ordinance should be clear, definite and certain in its terms. An ordinance which is so vague that its precise meaning cannot be ascertained is invalid, even though it may be otherwise constitutional."[211] In *City of Homestead v. Schild*, the court overturned the city commission's grant of a special use permit under the

205. *Id*. at 299.

206. 302 So. 2d 737 (Fla. 1974).

207. *Id*. at 743.

208. Drexel v. City of Miami Beach, 64 So. 2d 317, 318 (Fla. 1953) (en banc) (citation omitted).

209. *Id*. at 319.

210. 93 So. 2d 86 (Fla. 1956) (en banc).

211. *Id*. at 88.

authority of an ordinance that permitted such permits where "necessary and essential to preserve and protect the health, safety and welfare" of the city.[212] The court noted that Florida law was committed to requiring "legislative standards which can be applied to all cases, rather than to the theory of granting an administrative board or even a legislative body the power to arbitrarily decide each case entirely within the discretion of the members . . . ."[213]

Several other cases also involve ordinances that granted administrative functions to the commission itself; in these cases the courts have consistently held that no legislative discretion attaches to the administrative function simply because the body also has legislative powers. In *North Bay Village v. Blackwell*,[214] the Florida Supreme Court held that an ordinance adopted by a city commission that gave the commission unfettered discretion to control building activities without providing standards was void. In *City of Coral Gables v. Deschamps*,[215] the Third District Court of Appeal explicitly held that a council's delegation of authority to itself was governed by the vagueness doctrine, a doctrine which it reiterated in *City of Miami v. Save Brickell Avenue, Inc.*, when the court struck a planned area development (PAD) ordinance that provided that "[c]riteria to be considered by the City Commission . . . may include but are not limited to"[216] certain enumerated factors, holding that under the ordinance the Commission could consider any factors it desired.

Vagueness attacks, however, fall ultimately on the validity of the legislation itself, rather than on the executive's use of the power granted it. Cases such as those cited above in which local ordinances are struck for vagueness are the exception rather than the rule, and courts are extremely hesitant to accede to such facial attacks.[217]

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212. City of Homestead v. Schild, 227 So. 2d 540, 542 (Fla. 3d Dist. Ct. App. 1969) (per curiam).

213. *Id*. at 543.

214. 88 So. 2d 524 (Fla. 1956).

215. 242 So. 2d 210 (Fla. 3d Dist. Ct. App. 1970) (per curiam).

216. City of Miami v. Save Brickell Ave., Inc., 426 So. 2d 1100, 1105 (Fla. 3d Dist. Ct. App. 1983).

217. *See, e.g.*, Orr v. Trask, 464 So. 2d 131 (Fla. 1985). *Orr* involved a challenge to an appropriations bill that abolished funding for one of several Deputy Director positions without providing guidelines for determining which position or officeholder should be removed. *Id*. at 132. While the court overturned the law, it also removed an injunction against the Governor that prevented him from appointing anyone else to a newly vacated position, writing

> [j]ust as we would object to the intrusion of the executive or legislative

Therefore, courts uphold many statutes that provide highly subjective standards for enforcement. For example, in *Nostimo, Inc. v. City of Clearwater*, the court upheld a requirement that a requested conditional use be "compatible with the surrounding area and not impose an excessive burden or have a substantial negative impact on surrounding or adjacent uses"[218] against a vagueness charge. The court cited *Alachua County v. Eagle's Nest Farms, Inc.*,[219] as being similar.[220] *Eagle's Nest* involved a conditional use ordinance that contained a limitation that no action could be taken if it would "substantially impair the intent and purpose of the Alachua Comprehensive Plan."[221] The ordinance was upheld on the basis that "the requirements . . . are specific enough to be uniformly applied so as to instruct an applicant as to his burden of proof, and to provide an adequate framework for review."[222]

Thus, despite the Florida Supreme Court's directive that legislative directions be "clear, definite and certain in [their] terms,"[223] vagueness challenges cannot be relied upon to protect citizens from the arbitrary application of ordinances. Ordinances — or comprehensive plans — that base approval or denial of a permit on its effect on "compatibility" without further definition are one example:

> branches into this Court's authority to promulgate rules of court procedures or to discipline parties before the courts in contempt proceedings, we must be equally careful to respect the [ ] authority of the other branches. Courts should be loathe to intrude on the powers and prerogatives of the other branches of government and, when necessary to do so, should limit the intrusion to that necessary to the exercise of judicial power.

Id. at 135 (citations omitted).

Sovereign immunity cases are another example of judicial deference to the other branches. In Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), the court was faced with a tort claim brought against a city for negligently inspecting and issuing a certificate of occupancy for a defective building. In holding that such discretionary actions could not be the basis of tort liability, for "[s]uch a holding would represent an unconstitutional intrusion by the judiciary into the discretionary judgmental functions of both the legislative and executive branches of government." *Id*. at 923. *But see* Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985).

218. Nostimo, Inc. v. City of Clearwater, 594 So. 2d 779, 780 (Fla. 2d Dist. Ct. App. 1992); *see also* Life Concepts v. Harden, 562 So. 2d 766 (Fla. 5th Dist. Ct. App. 1990) (upholding an ordinance based on similar language).

219. 473 So. 2d 257 (Fla. 1st Dist. Ct. App. 1985), *rev. denied*, 486 So. 2d 595 (Fla. 1986).

220. *Nostimo*, 594 So. 2d at 781.

221. 473 So. 2d at 259.

222. *Id*. at 260.

223. Hartnett v. Austin, 93 So. 2d 86, 88 (Fla. 1956) (en banc).

there is almost no way that an applicant could bring forward evidence that would conclusively demonstrate compatibility because the purported standard can be measured against an infinite number of potential effects. Yet, as demonstrated by the decision in *Nostimo*, courts will uphold ordinances containing open ended, completely subjective language. The result is that any competent city or county attorney can draft ordinance language that effectively vests complete, unbridled discretion in either the commission or a local agency.

B. Legal Challenges to Executive Action

Ministerial, discretionary and quasi-judicial acts are subject to different causes of action and standards of review. The key difference between these actions is that several are "original" or "de novo" actions in which that plaintiff has the opportunity to develop new evidence. The other, certiorari review of quasi-judicial action, is an appellate type review in which the court will rely on the record developed at the time the decision was made.

1. Challenges that are Original Actions

Original actions to prevent or overturn an executive or administrative decision can take several forms: a petition for a writ of mandamus, an action for a declaratory judgment, or a motion for an injunction. These actions have the advantage that new or additional material can be brought to light. They have the disadvantage that they are time consuming and expensive: de novo actions give rise to civil discovery (for example, depositions, interrogatories, and requests for admission) and may involve pre-trial motions on evidentiary or other issues, all of which take time and money.

The writ of mandamus is available to address abuses of ministerial duties.[224] Mandamus is "an original proceeding to enforce a clear legal right to . . . a clear legal duty."[225] Thus, to succeed in a mandamus action, a claimant must establish first that the appropriate facts exist, and second, that the executive officer or agency

224. *See* Broward County v. Narco Realty, Inc., 359 So. 2d 509 (Fla. 4th Dist. Ct. App. 1978) (stating mandamus is appropriate in case where county commission refused to approve plat that met all criteria in the ordinance).

225. De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

had a "clear legal duty," that is, a ministerial duty, to perform the action sought given the proven facts. If the agency has discretion, mandamus is unavailable.[226]

Abuses of discretionary (as well as ministerial) authority are subject to declaratory[227] or injunctive relief.[228] Several types of complaints are suited to this type of action. First, a suit may be maintained to determine whether the administrative body or official is within its jurisdiction, that is, whether an action sought to be taken is within the scope of the entity's delegated authority.[229] Such a suit will depend largely on the construction of the statute or ordinance involved.[230] If it is found that the action is beyond the jurisdiction and power of the agency, the action will be found void *ultra vires* and the action will be enjoined.[231]

The second basis for attacking an administrative action is that it is arbitrary and capricious.[232] In this context, "[a] capricious ac

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226. Solomon v. Sanitarians' Registration Bd., 155 So. 2d 353, 356 (Fla. 1963). Note also that if the agency has discretion, the applicant has no property right in the permit or decision and the Due Process Clause of the Fourteenth Amendment does not protect it. *See infra* part IV.C.(2).

227. *See* Alachua County v. Eagle's Nest Farms, Inc., 473 So. 2d 257 (Fla. 1st Dist. Ct. App. 1985) (challenging denial of special use permit by declaratory action), *rev. denied*, 486 So. 2d 595 (Fla. 1986).

228. *See* State Road Dep't v. Newhall Drainage Dist., 54 So. 2d 48 (Fla. 1951) (upholding injunction against discretionary action of drainage board); Friends of the Everglades, Inc. v. Board of County Comm'rs, 456 So. 2d 904 (Fla. 1st Dist. Ct. App. 1984) (permitting environmental group to pursue a statutory action for injunctive relief to compel state agency to enforce statute), *rev. denied sub nom.* Upper Keys Citizens Ass'n v. Board of County Comm'rs, 462 So. 2d 1108 (Fla. 1985).

229. *De Groot*, 95 So. 2d at 914; *see also* State Dep't of Envtl. Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 436 So. 2d 98 (Fla. 1983).

230. *See, e.g.*, State Dep't of Envtl. Regulation v. Puckett Oil Co., 577 So. 2d 988, 991–92 (Fla. 1st Dist. Ct. App. 1991) (powers of administrative agencies are measured and limited by statute granting them); *cf.* Lewis Oil Co. v. Alachua County, 496 So. 2d 184, 188–89 (Fla. 1st Dist. Ct. App. 1986) (concluding that the county did not have authority to deny permit application where ordinance adopting more strict standards had not become effective).

231. State Dep't of Envtl. Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787 (Fla. 1st Dist. Ct. App. 1982) (holding that declaratory judgment was appropriate to prevent agency from taking action outside its jurisdiction), *rev. denied*, 436 So. 2d 98 (Fla. 1983); *see* Context Dev. Co. v. Dade County, 374 So. 2d 1143 (Fla. 3d Dist. Ct. App. 1979) (holding that county officer had no authority to issue cease and desist order); *see also Lewis Oil*, 496 So. 2d at 186–87 (holding that declaratory action and injunction are appropriate where plaintiff sufficiently pleads that irreparable harm will result from enforcement).

232. *See*, *e.g.*, State Road Dep't v. Newhall Drainage Dist., 54 So. 2d 48, 50 (Fla.

tion is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic."[233] Outside the context of the APA, a charge that a decision is arbitrary and capricious also is related to the issue of jurisdiction or delegated authority because an agency cannot be delegated the power to act arbitrarily or capriciously.[234]

Such attacks are rarely pursued in state courts outside the context of an APA hearing. Several reasons might lie behind the infrequent use of the arbitrary and capricious attack in state court. First, the availability of injunctive relief, damages and attorney's fees in federal civil rights litigation may have siphoned off many of the cases during the last thirty years. The federal courts' treatment of discretionary decisions as outside the due process protection of the Fourteenth Amendment, and the recent Supreme Court case limiting the amount of attorney's fees available in civil rights cases based on the damages won,[235] may make state courts a more appealing forum for these cases in the future. Secondly, at the state level, the APA provides a statutory remedy for these claims, which also diverts them from the trial courts. Finally, the standard of review in these cases is high, and the courts are reluctant to grant relief, as described in *State Road Department v. Newhall Drainage District*:[236]

> It is well settled that a court of equity will not ordinarily substitute its judgment for that of an administrative board when acting within the scope of its authority as defined by law, neither will

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1951) (upholding injunction where the discretionary action which would intrude upon the rights of another agency and violate the substantive rights of citizens); *see also* Bayonet Point Regional Medical Ctr. v. Department of Health & Rehabilitative Servs., 516 So. 2d 995, 1001–05 (Fla. 1st Dist. Ct. App. 1987) (Ervin, J., concurring in part and dissenting in part) (discussing application of arbitrary and capricious test).

233. Agrico Chemical Co. v. Department of Envtl. Regulation, 365 So. 2d 759, 763 (Fla. 1st Dist. Ct. App. 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979).

234. *See, e.g.*, North Broward Hosp. Dist. v. Mizell, 148 So. 2d 1, 3 (Fla. 1962) ("The fundamental requirement controlling such officials . . . is that their actions, and the enabling legislation under which they act, shall involve the exercise of a reasonable, or judicially reviewable, as opposed to arbitrary discretion . . . .") (citations omitted); McRae v. Robbins, 9 So. 2d 284, 288 (Fla. 1942) (en banc) (statutes authorizing regulations "do not confer on a board or commission arbitrary or unlimited powers not granted by [their] terms and provisions"); State v. Atlantic Coast Line R.R., 47 So. 969, 978 (Fla. 1908) ("An arbitrary and unreasonable regulation is not within the authority of the commission.").

235. Farrar v. Hobby, 113 S. Ct. 566 (1992).

236. 54 So. 2d 48 (Fla. 1951).

> it move to restrain a presumptive breach of duty, a suspicion that an administrative Board will act illegally or will not follow the law. Its power will not be called into action where the right invaded is slight, technical or not substantial, where the injury may be easily compensated in damages or where the threatened injury to the one complaining would be slight in comparison to that about to be imposed on the public, or where fraud, malice, bad faith or bad motives are not shown.[237]

Newhall also indicates the kind of showing needed to overcome this deference: the court ultimately overturned the district's decision to install a culvert that would have the effect of flooding lands in a neighboring district.[238] Only because the action would harm the public without a showing that the harm was necessary or would produce useful results, can the court feel justified in upholding an injunction against the district.

Thus, when discretionary executive actions are challenged as arbitrary or capricious in common law actions (rather than under the APA), those actions are given the same kind of highly deferential review given legislative actions, with one important caveat. Legislation will be upheld on the basis of mere suppositions, or valid purposes that were not before the legislature at the time the law was adopted.[239] Executive actors, however, must demonstrate that some valid basis for the decision, however slight, was before them at the time the decision was made, as the definition of arbitrary and capricious as used in this context demonstrates.[240] In addition, where a decision is based on facts similar to those that governed a previous decision but produces a different result, an administrative actor must explain the discrepancy.[241]

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237. *Id*. at 50.

238. *Id*.

239. *See, e.g.*, DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479, 1498 (M.D. Fla.) (legislative purposes may be demonstrated by "plausible or hypothetical" reasons), *aff'd*, 888 F.2d 766 (11th Cir. 1989).

240. See, for example, Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182 (Fla. 1st Dist. Ct. App. 1981), in which the court found "no evidentiary basis . . . for the Division's factual premise that the bar spending[s] complained of gave `promotional value, competitive edge, advertising and good will' to the host bars and taverns." *Id*. The factual premise alone would have been sufficient to uphold regulatory legislation without evidence.

241. Amos v. Department of Health & Rehabilitative Servs., 444 So. 2d 43 (Fla. 1st Dist. Ct. App. 1983) (inconsistent results of administrative action based on similar facts

Another crucial point must be made about attacks on administrative decisions on the basis that they are arbitrary or capricious. First, arbitrary and capricious actions violate federal due process guarantees only if a protected property or liberty interest is involved.[242] Such an action also would implicate the due process clause of the Florida Constitution. But under Florida law, a protected property or liberty interest is not necessary for the action to be invalidated: arbitrary and capricious actions are beyond the scope of any authority that may be delegated to an agency whether to a state agency, or to a local agency, or by the local commission to itself.[243] Thus, a party should be able to attack an administrative action on this basis even without a protected property or liberty interest,[244] but only in state court.

Finally, a discretionary action may be attacked through a declaratory judgment on the basis that, as applied, the underlying ordinance violates some constitutional right or is invalid for some

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violates equal protection); Central Fla. Regional Hosp. v. Department of Health & Rehabilitative Servs., 582 So. 2d 1193 (Fla. 5th Dist. Ct. App.) (it is axiomatic that administrative due process requires similar results in similar situations), *rev. denied*, 592 So. 2d 679 (Fla. 1991).

In the legislative context, equal protection and due process offer little protection. *See* Arceneaux v. Treen, 671 F.2d 128, 136 & n.3 (5th Cir. 1982) (Goldberg, J., concurring) (under rational basis standard, "anything goes"; the standard "invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute"). The difference is that legislative decisions are upheld if a rational reason for differing treatment could *ever* be found. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). While in the case of administrative action, the agency must be explained and supported by the record. *Central Fla. Regional Hosp.*, 582 So. 2d at 1196 n.3 (decision reversed because reasons for differing application of policy either insufficient or not supported by record).

242. Board of Regents v. Roth, 408 U.S. 564 (1972).

243. State v. Atlantic Coast Line R.R., 47 So. 969, 978 (Fla. 1908); *see also* Blitch v. City of Ocala, 195 So. 406, 410 (Fla. 1940) (en banc) ("Municipalities may be enjoined from unreasonably and arbitrarily exercising a lawful power . . . for such a power cannot lawfully be so exercised as to unnecessarily violate the *organic* rights of individuals.") (emphasis added). The principle that arbitrary or capricious action is outside the power of the sovereign has its roots in the Magna Carta and was discussed extensively by Locke. *See* LOCKE, *supra* note 10, and discussion *supra* notes 25–29 and accompanying text.

244. The "property interest" approach used by the federal courts to limit the reach of the Due Process Clause should be seen as a transparent effort to limit their intrusion into state matters, particularly to limit the scope of actions under 42 U.S.C. § 1983. Given the procedural protections of the federal APA, the courts can limit the reach of constitutional protections without fear that they will lose ultimate jurisdiction over the actions of the federal government.

other reason. Rights that might be violated by a discretionary action include free speech, equal protection, due process, or takings. In such a case, however, the action is attacking the ordinance as much as the action; such "as applied" attacks will meet the same deferential review that an attack on the ordinance would receive.[245] Other legal issues, for example, such as claims that the action is taken in an area that has been preempted by the federal or state government, or that it is prohibited by a charter or statute, ultimately fall into the area of attacks on jurisdiction and receive the relatively non-deferential review reserved for questions of law.

If some method of administrative review is available under the ordinance governing the action, courts will decline to take jurisdiction over the claim until those avenues have been exhausted.[246] Many, if not most, discretionary decisions made by local officials may be appealed to an appeals board or to the local commission.[247] This means that the court usually is faced with a challenge to a quasi-judicial action: the board's decision to affirm or deny the officer's (or lower board's) discretionary decision.[248]

2. Record Review

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245. The only difference is that a "facial" attack must demonstrate that there is *no* possible way that the ordinance could be applied in a reasonable manner while an "as applied" attack tries to demonstrate that the ordinance was not applied in a reasonable manner. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (dismissing facial takings attack on federal strip mining statute). The standards of "reasonability" remain the same.

246. DeCarlo v. Town of West Miami, 49 So. 2d 596 (Fla. 1950) (en banc) (holding that action for injunction against enforcement of zoning ordinance could not be heard until available administrative remedies had been exhausted). The exhaustion doctrine is even more powerful for administrative actions covered by the APA because of the "[t]he Act's impressive arsenal of varied and abundant remedies for administrative error." State *ex rel.* Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 590 (Fla. 1st Dist. Ct. App. 1977).

247. *See, e.g.*, JACKSONVILLE, FLA. CITY CODE, Title XVII § 656.103(b) (Land Use) (providing for appeal from determinations by zoning enforcement officer to the Planning Commission); CODES AND ORDINANCES OF HILLSBOROUGH COUNTY § 29-267 (Appeals) (providing for appeals of final decisions regarding development orders to the county administrator and then to the Board of County Commissioners).

248. *See, e.g.*, Context Dev. Co. v. Dade County, 374 So. 2d 1143 (Fla. 3d Dist. Ct. App. 1979). In *Context Development*, the district court was dealing with a certiorari review of the dismissal of certiorari and declaratory actions by the circuit court; those actions had been brought to challenge the affirmance of a county officer's action by the Dade County Environmental Control Board. *Id*. While the legality of the officer's action was the ultimate issue, it was reviewed in the context of whether the Control Board's affirmance met the essential requirements of law. *Id*. at 1149–50.

Quasi-judicial actions taken by local administrative boards, including local commissions in their administrative capacity, can either be original actions, i.e., actions where the board hears the original evidence and makes the initial decision, or they may involve appeals, i.e., situations where the board hears an appeal from a decision made by an administrative officer. In either case, the decision of a local board is generally reviewable by writ of certiorari in the circuit courts.[249] As noted earlier, there is no general law providing for the judicial review of local administrative actions. Article V of the Florida Constitution provides that district courts of appeal or circuit courts may review the actions of administrative agencies "as provided by general law."[250] This provision has several ramifications. First, special acts cannot provide for the review of an administrative action by a local government.[251] Second, local ordinances may not provide a framework for judicial review of the actions of their administrative agencies.[252] Thus, the only route for appealing an administrative decision made by a local administrative agency or by a local legislature acting in an administrative capacity is through the common law certiorari in the circuit court.[253] Certiorari review is limited to the record made by the quasi-judicial hearing,[254] and the scope of review is limited to determining "whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law."[255]

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249. *De Groot*, 95 So. 2d at 915–16; *see also* Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684 (Fla. 4th Dist. Ct. App. 1982).

250. FLA. CONST. art. 5, §§ 4–5.

251. Board of County Comm'rs v. Casa Dev. Ltd., 332 So. 2d 651 (Fla. 2d Dist. Ct. App. 1976).

252. *Cherokee Crushed Stone*, 421 So. 2d at 684.

253. City of Melbourne v. Hess Realty Corp., 575 So. 2d 774 (Fla. 5th Dist. Ct. App. 1991).

For a critique of the ability of the courts to deal adequately with local government administrative decisions in certiorari actions, see Cherie L. Onkst, *Ignoring the Appeal to Reason in the Appeal of Right: Judicial Review of Administrative Action after* Valliant, 14 STETSON L. REV. 665 (1985); *see also* St. Johns County v. Owings, 554 So. 2d 535, 544 (Fla. 5th Dist. Ct. App. 1989) (Sharp, J., dissenting) (noting that public hearings before local government bodies do not produce adequate records for review, and that these are not the kind of "tribunal" that should be given the judicial deference inherent in certiorari review), *rev. denied*, 564 So. 2d 488 (Fla. 1990).

254. Dade County v. Marca, S.A., 326 So. 2d 183, 184 (Fla. 1976).

255. *De Groot*, 95 So. 2d at 916.

De Groot described substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred"; competent evidence is "sufficiently relevant and material that a reasonable mind would accept it as adequate."[256] Certiorari review is very deferential because a reviewing court may not substitute its judgment as to the weight or meaning of the evidence for that of the agency that conducted the hearing.[257] This means that the existence of *any* competent substantial evidence is sufficient to validate a decision, no matter what the evidence supporting a contrary position might be.[258] Thus, the competent substantial evidence rule gives the quasi-judicial bodies of local governments the same deference given to chancellors or independent hearing officers.[259]

Therefore, a substantial competent evidence rule allows the quasi-judicial body great discretion in making its determinations. One situation that will lead to reversing a quasi-judicial decision is the absence of *any* evidence pertinent to the standards governing the decision, that is, the standards provided by the ordinance. This occurred in *Irvine v. Duval County Planning Commission*,[260] where the Florida Supreme Court held that the commission was not free to simply reject the applicant's petition when the applicant had offered evidence supporting the petition and no contrary evidence was in the record. Similarly, in *Albright v. Hensley*,[261] the court invalidated

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256. *Id*. (citations omitted).

257. *See* Bell v. City of Sarasota, 371 So. 2d 525, 527 (Fla. 2d Dist. Ct. App. 1979) ("Where there is sufficient, competent evidence to support the decision of the zoning board, the reviewing court will not disturb the board's action.") (citing City of Tampa v. Islands Four, Inc., 364 So. 2d 738 (Fla. 2d Dist. Ct. App. 1978)).

If the circuit court, however, does reweigh the evidence in making its decision, appellate courts are restricted in their ability to correct the error. *See* Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106, 109 (Fla. 1989) (McDonald, J., dissenting); St. Johns County v. Owings, 554 So. 2d 535, 538 (Fla. 5th Dist. Ct. App. 1989) (Sharp, J., dissenting).

258. Bell v. City of Sarasota, 371 So. 2d 525, 527 (Fla. 2d Dist. Ct. App. 1979) (holding that a zoning board's action would be upheld if there is sufficient, competent evidence to support the decision).

259. In St. Johns County v. Owings, 554 So. 2d 535 (Fla. 5th Dist. Ct. App. 1989), Justice Sharp in dissent sharply criticized giving deferential review to local commissions sitting as quasi-judicial bodies, noting that "[a]n agency or zoning body is not a court" and therefore should not receive the deference given a court's findings. *Id*. at 544.

260. 495 So. 2d 167 (Fla. 1986) (adopting dissent of Zehmer, J. in case below, 466 So. 2d 357 (Fla. 1st Dist. Ct. App. 1985)).

261. 492 So. 2d 852, 852–53 (Fla. 5th Dist. Ct. App. 1986).

a variance because there was no evidence supporting several needed findings. The other situation in which competent substantial evidence is sometimes found lacking is where the only evidence against a variance or special exception is the bare opposition of the neighbors. In *Colonial Apartments, L.P. v. City of DeLand*,[262] the Fifth Circuit held that it was illegal for the city to decrease the density in the petitioner's application based solely on the opposition of neighboring landowners.[263]

The requirement that quasi-judicial decisions "comport with the essential requirements of law" allows three substantive types of claims to be raised in a petition for certiorari. First, a petitioner may claim that the agency or commission lacked the authority to make the decision.[264] A second attack charges that the agency or commission improperly interpreted the law in making a decision.[265] Finally, a petitioner may claim that the decision violated constitutional principles. Sometimes the procedural due process component is broken out so that the certiorari review explicitly includes the determination of whether procedural due process was afforded.[266] Thus, all of the types of attacks that can be made against a non-quasi-judicial

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262. 577 So. 2d 593 (Fla. 5th Dist. Ct. App.), *rev. denied*, 584 So. 2d 977 (Fla. 1991).

263. *Id*. at 596. *See also* BML Inv. v. City of Casselberry, 476 So. 2d 713 (Fla. 5th Dist. Ct. App. 1985) (holding that neighborhood opposition is insufficient to support denial of a development order), *rev. denied*, 486 So. 2d 595 (Fla. 1986). Nonetheless, neighborhood opposition will generally support a decision in legislative actions such as rezonings. *See* Allapattah Community Ass'n v. City of Miami, 379 So. 2d 387 (Fla. 3d Dist. Ct. App.), *cert. denied*, 386 So. 2d 635 (Fla. 1980).

264. *See* Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir.) (holding that county commission did not have authority to deny plat approval based on an ad hoc road access requirement not provided by ordinance), *cert. denied*, 463 U.S. 1208 (1983); Context Dev. Co. v. Dade County, 374 So. 2d 1143 (Fla. 3d Dist. Ct. App. 1979) (holding that county environmental control board had no authority to enforce decision of environmental officer when that officer had no authority).

265. *See* Henry v. Board of Comm'rs, 509 So. 2d 1221, 1222–23 (Fla. 5th Dist. Ct. App. 1987) (overturning interpretation of zoning code by code administrator as having no defensible basis). Cases in which courts overturn the interpretation of an ordinance by a local official are rare because the courts will apply the administrative law concept that agency interpretations of their governing statutes are afforded great deference. *See, e.g.*, Department of Business Regulation v. Martin County Liquors, Inc., 574 So. 2d 170 (Fla. 1st Dist. Ct. App. 1991) (noting that agencies have broad discretion to construe their governing statutes); St. Johns County v. Owings, 554 So. 2d 535, 543 (Fla. 5th Dist. Ct. App. 1989) (Sharp, J., dissenting) (stating that county's construction of comprehensive plan policy should be given deference by reviewing court).

266. *See, e.g.*, Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593, 598 (Fla. 5th Dist. Ct. App.), *rev. denied*, 584 So. 2d 997 (Fla. 1991).

administrative decision through a declaratory or injunctive action can be made in motion for a writ of certiorari. However, the fact basis necessary to support the claim must appear in the record made at the quasi-judicial hearing.

The appellate nature of certiorari review is appropriate to quasi-judicial decisions only because of the combined requirements that a hearing be held and that the decision be contingent on the showing made at the hearing. Those requirements, taken together, give a reviewing court the reasonable belief that the record to which it is limited represents the basis of the decision. This, in turn, explains the judiciary's suspicion of ex-parte contacts in quasi-judicial proceedings.[267] The same concerns lie behind decisions that overturn quasi-judicial decisions on the basis of bias in the decision maker.[268] Furthermore, the additional procedural protections generally afforded at such hearings — such as the right to swear and cross examine witnesses — are seen as increasing the reliability of the fact finding, thereby justifying the deference to fact-finding implicit in the competent substantial evidence rule.

One important factor limits the value of certiorari review as opposed to de novo review: the remedy. The remedy offered in common law certiorari is remand; that is, the agency that made the error is given the chance to correct it. The courts will not, in their review of the evidence, determine the "right" decision and order that it be entered, but will only instruct the lower body on the nature of its error. This means that even if a litigant is successful in attacking the improper actions of a local commission acting quasi-judicially, the board will get the opportunity to "fix" the error which, in many cases, means simply dressing up the record to support whatever decision the board reached in the first place. A board acting in bad faith could easily tie an applicant up for years, even if it was clear that the applicant met all the applicable standards. The Florida APA addresses this problem in cases involving state agencies by allowing the appeals court to grant relief to the applicant, including

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267. *See* Jennings v. Dade County, 589 So. 2d 1337, 1341 (Fla. 3d Dist. Ct. App. 1991) (holding that ex-parte contacts are anathema to quasi-judicial proceedings).

268. *See* Buchman v. State Bd. of Accountancy, 300 So. 2d 671, 674 (Fla. 1974) (holding that impartiality and fairness implicit requirements of a fair hearing); Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973) (dealing with biased school board members).

entering an order in the applicant's favor.[269]

3. Procedural Due Process

Procedural due process is being treated separately here because the questions involved strike at a number of the problems involved when local commissions act in an administrative capacity. As noted above, one of the fundamental questions that must be addressed in the review of a quasi-judicial decision is whether the guarantees of procedural due process were met.

Procedural due process applies only to the actions of executive and judicial actors; no constitutionally derived procedural protections attach to the adoption of local ordinances,[270] though some requirements are imposed by statute.[271] Procedural due process must be afforded before a person can be deprived of some liberty or property interest cognizable under the constitution, though the extent of the procedural protections that must be provided vary.[272] When a decision is ministerial or discretionary, procedural due process requirements can be met by making judicial review of the decision available, either as a de novo review of the ministerial decision or discretionary (non-quasi judicial) decision,[273] or in the form of appeal or writ of certiorari for a quasi-judicial administrative appeal of that decision.[274] Similarly, due process is satisfied by the availability of certiorari or appellate review of an original quasi-judicial decision.[275] The rationale for permitting the exis

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269. FLA. STAT. § 120.68(10)–(12) (1995).

270. *See, e.g.* Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989).

271. FLA. STAT. §§ 125.66, 166.041 (1995) (providing procedures for the adoption of ordinances).

272. Mathews v. Eldridge, 424 U.S. 319, 332–34 (1976).

273. *See, e.g.*, Haskell v. United States Dep't of Agriculture, 930 F.2d 816, 820 (10th Cir. 1991) ("When such an opportunity for [de novo] judicial review exists, the lack of an evidentiary hearing at the administrative level is not a denial of due process."); Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166, 172 (Fla. 1974) (citing federal and earlier state cases holding that due process is met if there is one adequate method of judicial review of administrative decisions).

274. In *Scholastic Systems*, the Florida Supreme Court held that the availability of certiorari review of the appellate decisions of the Industrial Relations Commission regarding workmen's compensation hearings was a sufficient form of review to meet the due process and open courts requirements of the Florida Constitution. 307 So. 2d at 172.

275. *Id.*; *see also* O'Neil v. Pallot, 257 So. 2d 59, 61 (Fla. 1st Dist. Ct. App. 1972) (discussing courts' role in reviewing appellate decisions reached by quasi-judicial admin-

tence of judicial review to guarantee due process is that the fundamental requirement of procedural due process is for an affected party to receive notice and an opportunity to be heard.[276] The availability of judicial review prior to any final deprivation of liberty or property provides notice and a hearing.

a. Due Process and the Problem of Property

As noted above, the Fourteenth Amendment of the United States Constitution and article I, section 9 of the Florida Constitution protect individuals from being deprived of life, liberty and property without due process of law. This means that for the protections of those clauses to apply, a petitioner must demonstrate that one of those interests is at risk of deprivation by the state, and that the determination that a liberty or property interest is at stake is a condition precedent to establishing a due process claim.[277] In the area of land use and environmental regulation, this has become problematic.

Between the 1880s and the 1930s, substantive due process under the Fourteenth Amendment was used to scrutinize any government action that regulated liberty (particularly economic contract liberty) or personal or real property.[278] What due process did not protect was government "benefits" such as jobs or welfare.[279] Then, in *Goldberg v. Kelly*,[280] the Supreme Court extended procedural due process protection to "new property," welfare benefits in that case. Later, in *Board of Regents v. Roth*,[281] the Court made it clear that procedural protections in these non-regulatory cases would only extend where some kind of "entitlement" of a clear nature was found in statute, rule or other government policy. Since then, the federal courts have used the entitlement approach to dispose of cases that

istrative bodies).

276. Canney v. Board of Pub. Instruction, 278 So. 2d 260, 262 (Fla. 1973).

277. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 533 (1985). For an application in a land use regulation setting, see, for example, Mackenzie v. City of Rockledge, 920 F.2d 1554, 1558 (11th Cir. 1991) (holding that to establish a due process claim in a land use case, plaintiff must demonstrate a protected property interest).

278. I refer, of course, to the so-called *Lochner* era. For examples of due process applied to the regulation of the use of property, see Munn v. Illinois, 94 U.S. 113 (1976) (applying Due Process Clause to statute regulating grain silos).

279. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 519 (Mass. 1892).

280. 397 U.S. 254 (1970).

281. 408 U.S. 564 (1972).

involve regulatory actions. In these cases, the courts hold that if a permit decision involves some discretion then the applicant has only a "mere expectancy" of a permit, rather than an entitlement, and, therefore, is not protected by the due process clause.[282] This means that if any discretion in a permitting process exists, the Fourteenth Amendment does not require the government to provide *any* standards, procedures or other protections.[283]

Property, for the purpose of the Fourteenth Amendment, can be in one of three forms today. First, it can be real or personal property itself; regulations or other government restrictions on the ability to hold property will always be subject to the Fourteenth Amendment.[284] Second, where a regulatory framework results in ministerial decisions — that is, there is an absence of discretion — courts will find a property interest — and entitlement — in the result.[285] Finally, if state or local law provides for a procedure for a permitting decision, then due process protects not only an applicant's interest in having the procedure followed,[286] but the fairness of the procedure itself.[287] Thus, once state law provides that a particular decision is quasi-judicial, the Fourteenth Amendment will

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282. *See, e.g.,* Mackenzie v. City of Rockledge, 920 F.2d 1554, 1558 (11th Cir. 1991) (no property interest in permit to build marina); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 30 (1st Cir.) (no property interest in preliminary development plan), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992); Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988) (no property interest in approval of minor plat).

283. *See, e.g.,* Cheek v. Gooch, 779 F.2d 1507, 1508 (11th Cir. 1986) (holding that because applicant for beer and wine license was not entitled to it under state law, local government did not have to provide procedures or standards).

284. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67, 67–68 (1972) (holding that due process requires hearing before personal property may be garnished).

285. *See, e.g.*, Littlefield v. City of Afton, 785 F.2d 596, 602 (8th Cir. 1986) (holding that, under Minnesota law, decision to issue building permit was non-discretionary and therefore protected by Fourteenth Amendment); Scott v. Greenville County, 716 F.2d 1409, 1421 (4th Cir. 1983) (building permit protected).

286. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

287. Under Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), once due process applies, the courts, rather than the statutory framework, guide the decision of how it must apply. In cases where the procedures that are guaranteed are, in fact, followed, the courts will still review the decision to determine whether it was made fairly. *See* Hortonville Joint Sch. Dist. No. 1. v. Hortonville Educ. Ass'n, 426 U.S. 482 (finding no violation where school board dismissed striking teachers, but reviewing decision for bias or prejudice); Withrow v. Larkin, 421 U.S. 35 (1975) (holding that biased decisionmakers unacceptable where due process applies); Taylor v. Lujan, 567 F.2d 1332 (11th Cir. 1978) (reversing decision of Army Corps of Engineers because petitioners not informed of all opposing arguments).

require that the procedure be fair and the decisionmaker unbiased.

It is unclear from Florida decisions how the existence of discretion affects the due process equation because recent cases do not discuss it explicitly. While the Florida courts may follow the federal courts in holding that the relevant issue is whether there is property in a particular permit, they may well take a different tack and find that when real or personal property is regulated through a permitting process, the underlying interest in using the regulated property extends due process protection to the permitting process, even if it is discretionary. The recent Florida Supreme Court decision in *Board of County Commissioners v. Snyder*[288] and the Fourth District Court of Appeal decision in *Park of Commerce Associates v. City of Delray Beach*[289] seem to indicate that due process protections will be extended to discretionary decisions by local commissions; in both cases, discretionary decisions were found to be quasi-judicial and, therefore, subject to due process protections, at least under the Florida Constitution.[290]

What is clear is that ministerial acts must comply with due process, but that the availability of judicial review (even if it is a discretionary judicial review of an administrative appeal) will satisfy those requirements. Thus, the primary procedural due process question is the extent of protections that must be afforded in quasi-judicial hearings, whether those hearings are directly required by statute or ordinance, as in traditional quasi-judicial proceedings, or by judicial decision, as in *Snyder* and *Park of Commerce*.

b. Procedural Due Process in Quasi-Judicial Hearings

Quasi-judicial proceedings are not required to provide all the safeguards of a proceeding before a court.[291] The procedural due process considerations that attach to quasi-judicial actions were well

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288. 627 So. 2d 469 (Fla. 1993).

289. 606 So. 2d 633 (Fla. 4th Dist. Ct. App. 1992) (en banc).

290. This raises an interesting spectre: it may be that some decisions that are discretionary and which therefore would not involve "property" based on federal jurisprudence will be found to be quasi-judicial under Florida law. As quasi-judicial decisions, due process will attach under Florida law, and if Florida law holds that there is a right to a procedure, federal due process should protect against its deprivation under Logon v. Zimmerman Brush Co., 455 U.S. 422 (1982). It is unclear how the federal courts in the Eleventh Circuit will react to this somewhat confusing situation.

291. Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d Dist. Ct. App. 1991).

described in *Jennings v. Dade County*:[292]

> Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. 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 hearings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.[293]

In addition, the opportunity to be heard must be at a fair hearing before an impartial body.[294]

There seem to be no cases that evaluate the necessity of particular protections in local government cases, that is, whether or not it is necessary to provide cross-examination in hearings involving land use or environmental permits. As noted earlier, under federal due process jurisprudence, the question is resolved under the three part test of *Mathews v. Eldridge*,[295] which balances the importance of the private interest against the risk of an erroneous decision and the value of particular procedural safeguards at avoiding error and the burden to the government of providing additional or substitute procedural protections. The real question in this test is whether an evidentiary, quasi-judicial hearing must be held as opposed to some less formal means of securing evidence and rendering a decision.[296]

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292. 589 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1991).

293. *Id*. at 1340–41 (citations omitted). It is important to note that all of the protections described are found in the zoning ordinance itself; the court did not seem inclined to examine which of the protections would be necessary to satisfy constitutional requirements and seemed to be indicating that it believed all of these protections were needed in zoning cases. *Id*.

294. *Canney*, 278 So. 2d at 262; *see also* Buchman v. State Bd. of Accountancy, 300 So. 2d 671, 674 (Fla. 1974) (holding that implicit in the right to be heard is the requirement that the hearing must be carried out in an atmosphere of impartiality and fairness, attendant with the safeguards of due process of law).

295. 424 U.S. 319 (1976).

296. For example, in *Mathews*, the issue was whether the Social Security Administration was required to hold a formal, evidentiary hearing before cutting off disability benefits. The Court held that such a formal hearing was not required by the Constitution and that the statutory process, which included the availability of a hearing in which the petitioner could dispute the SSA's findings, albeit after the benefits were ended, was

Once an evidentiary (i.e. quasi-judicial) hearing is to be held, it seems that requiring that the petitioner be able to formally present the evidence, cross-examine opposing witnesses, and receive a written opinion are not more burdensome than protective of the rights involved. Indeed, the only protection that might be fairly contended is the issue of cross-examination, which can be both time consuming and confrontational. Nonetheless, the strong history of cross examination as a device for ensuring the accuracy and fairness of testimony indicates that it is in just these kinds of confrontational circumstances that it is most important and useful.

The requirement of a "fair hearing before an impartial body" has been interpreted in many cases. For example, ex parte communications have been held to invalidate a hearing on the basis of fairness.[297] Due process may also be offended when the roles of prosecutor and advisor to the board are combined in the same person at a hearing, as "impartiality and zealous representation are inherently incompatible in the same person at the same time."[298] Similarly, the due process rights of an applicant are violated when a person who testifies at a hearing is also responsible for approving the decision reached at the hearing.[299] Another important aspect of fairness in the hearing is the right to see or hear and respond to the evidence that is considered.[300] In any of these situations, the fairness of the proceeding itself can be tainted because one side does not have an "equal ear" of the tribunal. Indeed, these considerations can be seen behind the third part of the definition of a quasi-judicial decision: that the decision be based on the evidence presented at the hearing.[301]

Perhaps the more important aspect of a fair hearing is an im-

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sufficient. 424 U.S. at 339–40.

297. Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1991). "Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings," so "[q]uasi-judicial officers should avoid all such contacts where they are identifiable." *Id*. at 1341.

298. McIntyre v. Tucker, 490 So. 2d 1012, 1013 (Fla. 1st Dist. Ct. App. 1986).

299. Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322 (Fla. 1990).

300. Swank v. Smart, 898 F.2d 1247, 1253–54 (7th Cir.) (holding that police officer's due process rights were violated when chief entered a witness' statement into consideration and commented on the same at the close of the hearing, and amounted to an ex parte communication), *cert. denied*, 498 U.S. 853 (1990).

301. *See supra* notes 51–52 and accompanying text.

partial decisionmaker. The existence of bias or prejudice in a decisionmaker toward either a party or the party's cause is unacceptable under both the Fourteenth Amendment[302] and the Florida Constitution.[303] At the state level, both statutory and case law have long held that quasi-judicial officers should be disqualified for the same reasons that a judge could be disqualified, including prejudice, bias, or a personal interest in the outcome.[304] At the local level, where the APA does not apply, the courts have been less scrupulous in their review, with the result that persons appearing before a local commission acting in a quasi-judicial fashion are far less protected.

Two barriers in Florida law prevent petitioners before local commissions from receiving the fair and impartial hearing guaranteed by the United States and Florida Constitutions. First, the current "ethics" law actually prevents commissioners from disqualifying themselves for bias or prejudice toward a petitioner or the petitioner's cause. Second, the courts use a presumption that elected decisionmakers will act lawfully and properly to avoid questioning whether political bias improperly enters quasi-judicial decisions.

The problems with the ethics laws that apply to local commissions are found in two statutes. Section 112.3143 of the Florida Statutes prohibits local officials from voting on issues which would produce "special private gain" for the official or someone represented by

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302. Withrow v. Larkin, 421 U.S. 35, 47 (1975) (citing *In re* Murchison, 349 U.S. 133, 136 (1955)).

303. The Florida Supreme Court has noted, "in such [quasi-judicial] proceedings it is sufficient if . . . the proceedings are conducted in a fair and impartial manner, free from any just suspicion of prejudice, unfairness, fraud, or oppression." State *ex rel*. Williams v. Whitman, 156 So. 705, 710 (Fla. 1934), *cited in* Board of Pub. Instruction v. State *ex rel*. Allen, 219 So. 2d 430, 432 (Fla. 1969).

304. *See* FLA. STAT. § 120.71 (1995) (disqualification for bias, prejudice or interest); City of Tallahassee v. Florida Pub. Serv. Comm'n, 441 So. 2d 620, 624 (Fla. 1983) (holding that standards for disqualification of quasi-judicial officer under the APA is the same as that for a judge). Earlier versions of many statutes held that commissioners or hearing officers could be disqualified for the same reasons and by the same procedures as judges. *See, e.g.*, State *ex rel.* Cannon v. Churchwell, 195 So. 2d 599, 600 (Fla. 4th Dist. Ct. App. 1967) (per curiam). For cases holding that hearing officers must be disqualified for these reasons, see State Board of Funeral Directors v. Cooksey, 4 So. 2d 253 (Fla. 1941) (en banc), and State *ex rel*. Allen v. Board of Public Instruction of Broward County, 214 So. 2d 7 (Fla. 4th Dist. Ct. App. 1968), *aff'd*, 219 So. 2d 420 (Fla. 1969).

The federal courts are more lenient in their interpretation of how the proceedings must protect fairness, and require that bias or prejudice be shown on the record rather than requiring a separate procedure for disqualification. *See* Megill v. Florida Bd. of Regents, 541 F.2d 1073, 1079 (5th Cir. 1973).

the official,[305] and to declare a conflict, but vote, when special private gain would inure to a close relative.[306] Section 286.012, Florida Statutes is the kicker: it prohibits any member of a local board who is present for a decision from abstaining, though if a conflict of interest arises the member must disclose it as above.[307] A number of Attorney General's and Commission On Ethics Advisory Opinions indicate that these provisions preclude a member of a local quasi-judicial body from either disqualification or recusal, even when personal knowledge, family relationships or other issues are involved.[308] Indeed, in one particularly onerous case, *Izaak Walton League v. Monroe County*,[309] the Third District Court of Appeal overturned a lower court decision that prevented local commissioners from voting on a quasi-judicial appeal in a matter in which they had stated opinions, citing the requirement that local officials vote[310] and holding that in the absence of a statute that permitted or required disqualification, the court usurped legislative functions by preventing the (clearly biased) commissioners from voting.[311]

The *Izaak Walton* case also demonstrates the second barrier to securing a fair and unbiased hearing in local quasi-judicial decisions: the courts seem unwilling to inquire into the actual motivation of elected decisionmakers for bias or prejudice under the doctrine that "[p]ublic officials are presumed to perform their duties in a proper and lawful manner."[312] Indeed, in the *Izaak Walton* case the

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305. FLA. STAT. § 112.3143(3)(a) (1995).

306. *Id*.

307. *Id*. § 286.012.

308. *See* 1988 Op. Fla. Att'y Gen. 62 (stating that code enforcement board member may not disqualify himself); 1987 Op. Fla. Comm'n on Ethics 13 (stating that city planning and zoning commissioner must vote on projects proposed by brother-in-law); 1984 Op. Fla. Comm'n on Ethics 80 (stating that planning commissioner must vote on matter proposed by neighborhood association of which he was a member).

309. 448 So. 2d 1170 (Fla. 3d Dist. Ct. App. 1984).

310. *Id*. at 1173 n.8.

311. The situation in this case was confused because under the zoning law of the county (adopted by special act), rezonings were voted on by a Zoning Board, the decisions of which could be *appealed* to the County Commission. *Id*. at 1173 n.7. The court buried this aspect of the case, declaring that because it involved rezoning, it was per se legislative, and that it would therefore be inappropriate to disqualify the commissioners based on their policy statements. *Id*. at 1172. The court did not discuss the fact that the status of the decision was an appeal — and therefore quasi-judicial, not legislative, at all.

312. Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976).

court noted the following:

> [T]he cases have almost unanimously declined to even consider disqualification of a responsible official merely because he has expressed, or even committed, himself publicly on a zoning issue before a formal vote has taken place. This is true both when the acts complained of are committed prior to the time the official takes office, and when his preconceived notions are aired during a political campaign.[313]

The implication of this analysis must be made clear: the court is saying that because a decision is entrusted to an *elected* official, the official is permitted to maintain any political bias or prejudice that the official may have and to bring that bias or prejudice to a hearing that involves the subject of the bias or prejudice. In short, where the political process puts a decision in the hands of a political actor, the actor's political and policy views cannot be considered to be bias or prejudice, even in an arena in which already existing policy is to be applied to the particular circumstances of a particular applicant.

In a similar vein, the Florida Supreme Court in *Bath Club, Inc. v. Dade County* refused to overturn the quasi-judicial decision of a tax appraisal adjustment board, even though the members of the board were elected officials who might be faced with raising taxes if assessments were lowered, citing this presumption.[314] In summarily rejecting the idea that the impartiality of those members should be questioned, the court noted that "[c]ourts frequently render decisions involving matters of taxation, yet no one would seriously contend that the courts are incapable of rendering fair decisions in such cases simply because the judicial branch is financially supported by tax revenues."[315] The United States Supreme Court has reached similar conclusions, holding that a school board's involvement and knowledge of striking school teachers was not enough "to overcome the presumption of honesty and integrity in policymakers with decisionmaking authority" so as to require a procedure for their disqualification from the decision to fire the teachers.[316]

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313. Izaak Walton League v. Monroe County, 448 So. 2d 1170, 1172 (Fla. 3d Dist. Ct. App. 1984) (citations omitted).

314. Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981).

315. *Id*. at 113 n.12.

316. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 497

The United States Supreme Court was not so blasé when faced with an earlier fair hearing problem in *Ward v. Village of Monroeville*.[317] *Ward* involved an Ohio statute that authorized mayors, who also had extensive executive responsibilities, to sit as judges in traffic court, fines from which made up a major part of the village income.[318] The Court held that the arrangement violated due process, noting the following:

> "[P]ossible temptation" may [ ] exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This [ ] is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law . . . ."[319]

However, the Court has refused to go into depth about what conditions might create an unconstitutional bias, and its later cases on the issue seem to change issues of political prejudice and bias into questions of personal gain.[320] While the Court seems willing to attack arrangements that might provide temptation for gain, it seems to want to avoid questioning the underlying potential for bias and prejudice in the institutional arrangements chosen by legislative bodies.

Relatedly, the Florida courts were not always lenient on elected decisionmakers. In *Board of Public Instruction v. State ex rel Allen*,[321] the Florida Supreme Court upheld a Fourth District Court of Appeal decision that overturned a school board's quasi-judicial decision to discipline teachers based on the failure of three board members to disqualify themselves after the teachers filed the proper

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(1976).

317. 409 U.S. 57, 57–58 (1972).

318. *Id*. at 82.

319. *Id*. at 60 (citing Tumey v. Ohio, 273 U.S. 510, 534 (1927)).

320. *See* Gibson v. Berryhill, 411 U.S. 564 (1973) (striking decision by Alabama Board of Optometry based on possible pecuniary advantage to board members, avoiding issue of bias based on political issues); Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (holding that neutrality requirements are not applicable to determinations of administrator in determining penalties and that fact that administrator did not have an impermissible personal interest when the administrator's agency received funds from those penalties).

321. 219 So. 2d 430 (Fla. 1969).

affidavits and motions under the APA. The Fourth District had held that not only the APA, but standards of due process required that some impartial means be available for disqualifying board members:

> It does not comport with reason and basic fairness, and certainly not with due process of law to permit board members to determine wholly subjectively their fitness to make quasi-judicial determinations. If we accept [the board's] position, a board member could freely admit to the worst possible degree of bias, yet decline to recuse himself, thereby sitting in judgment of [the teachers]. [The teachers'] only remedy would be by appeal to the state board and then to seek judicial review. But the due process guaranteed right to a fair and impartial tribunal is a present right, the denial of which would not be remedied by appeal.[322]

It should be noted, however, that the Florida Supreme Court disagreed with the prospect that self-disqualification was problematic, noting the following:

> In the absence of a statute, the facts relied upon to show bias would have to be placed in the record and a motion for disqualification made either before or during the hearing. The Board would then pass on its own qualifications and determine the matter as part of the record.[323]

Under the Supreme Court's formulation, then, due process allows quasi-judicial decisionmakers to rule on their own lack of bias, but does require them to be disqualified if bias is present. The *Bath Club* case, however, indicates that the record would have to disclose significant personal statements, rather than a general political or fiscal conflict, between the members of a commission and an applicant before disqualification would be required. Furthermore, the *Izaak Walton* case indicates that the courts may be unwilling to interfere with the decisions of local elected officials based on their

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322. State *ex rel*. Allen v. Board of Pub. Instruction, 214 So. 2d 7, 10 (Fla. 4th Dist. Ct. App. 1968), *aff'd*, 219 So. 2d 430 (Fla. 1969).

323. Board of Pub. Instruction v. State *ex rel*. Allen, 219 So. 2d 430, 432 (Fla. 1969). The court cited two administrative law treatises for the applicability of this procedure. Under the Florida Supreme Court's approach, the problematic scenario laid out by the district court does not rise to a constitutional violation. In the instant case, however, the board acted improperly by ignoring the disqualification procedure required by the APA.

political statements even when those statements indicate a prejudice or bias toward how an individual petitioner's situation should be treated. Finally, this approach is patently unfair, as it requires a petitioner to attack the fairness of an official on the record and then, if the official refuses to step down, attempt to present a case before that official.

Thus, at both the state and federal level, political bias by elected officials making quasi-judicial decisions is tolerated, if not sanctioned, by judicial hesitancy to inquire too deeply into existing political structures. Combined with the statutory ban on self-disqualification, the result is that it would be difficult, if not impossible, for a petitioner in a quasi-judicial matter before a local commission to secure the right to a fair hearing guaranteed by the United States and Florida Constitutions. Whatever other provisions are made to guarantee fairness such as limits on ex parte communications or allowing cross examination, the inability to ensure that petitioners have their causes heard by an impartial and unbiased trier of fact means that fair hearings cannot be guaranteed at the local level, particularly before local elected commissioners.

C. Conclusions

This section has reviewed the structural and substantive limits on local commissions' administrative actions provided by the constitution.[324] Two primary structural limits exist: the limits on quasi-judicial powers generally imposed by article V, section 1 of the Florida Constitution,[325] and the vagueness doctrine. While the vagueness doctrine, as applied to local legislation, should act to prevent local legislatures from granting themselves unbridled administrative powers, in practice the courts have not been willing to ensure that such self-delegations provide "clear and definite" terms necessary to discipline the decisionmaking process.[326]

In the context of judicial review of local administrative decisions, the stricture against arbitrary and capricious action is the most universal and, therefore, significant.[327] Other limits, such as

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324. The section did not delve into limits on either procedure or substance that might be found in particular statutes.

325. See the discussion, *supra* notes 122–28 and accompanying text.

326. See the discussion, *supra* notes 201–20 and accompanying text.

327. See the discussion, *supra* notes 230–38 and accompanying text.

those provided by statute or by the Equal Protection or Takings Clauses of the United States or Florida Constitutions apply in very limited circumstances or do not provide significant limits on administrative actions. Protections against arbitrary and capricious action, however, are insufficient to guarantee fair and reasonable treatment: while all arbitrary and capricious actions may be unfair and unreasonable, not all unfair or unreasonable acts will be seen as arbitrary and capricious.

The risk of unfair treatment is increased because of the ineffectiveness of the procedural safeguards that apply to the administrative decisions of local commissions. If a regulatory or permitting decision is not ministerial, due process protections do not apply to the decision itself because no property is involved.[328] If the decision is quasi-judicial, or if property is involved, petitioners are guaranteed a fair hearing by the United States and Florida Constitutions, but statutory strictures prevent the recusal of biased decisionmakers[329] and the courts seem unwilling to police the intrusion of political bias into administrative hearings at the local level.[330] Thus, the guarantee of a fair hearing is a hollow one.

The limits on the administrative actions of local commissions are simply insufficient at this time to ensure the fair treatment of applicants or petitioners. Treating this problem will require legislation, not only to remove the prohibition against the recusal of biased decisionmakers, but also to provide a fair method for challenging a local decisionmaker. Legislation is also necessary to tighten up the standards for self-delegations by local commissions, ensuring that consistent and fair procedures are provided to petitioners who come before those boards, and, finally, to define a meaningful definition of fairness.

V. STATUTORY REFORM TO CURB ADMINISTRATIVE ABUSES BY LOCAL COMMISSIONS

By this point, I hope that this Article has provided a coherent argument that under the current law, local commissions have a level of discretion in organizing the administration of local policy that

328. See the discussion, *supra* notes 274–84 and accompanying text.
329. See the discussion, *supra* notes 302–09 and accompanying text.
330. See the discussion, *supra* notes 310–21 and accompanying text.

invites abuse. To state the argument briefly, under home rule, local legislatures have, to a significant extent, sovereign power. This power includes the right to establish procedures for the administration of local regulations, and permits local commissions to allocate administrative or quasi-judicial roles to themselves. This, in turn, creates a situation in which an elected legislative body, responsible directly to the citizens, determines how its policies will be applied to individuals, even when the situation is politically charged.

This violates basic principles of American democracy by merging rather than separating the powers of the sovereign. It also violates the concepts of fair play that are inherent in our ideas of due process of law. The worst aspect of the current situation is that it operates to frustrate judicial review as though it were designed to do so. The state constitution's separation of powers requirement does not touch the administration of local governments and state statutes limiting the ability of commissioners to be recused along with the deferential review afforded by the courts preclude the effective correction of the essential problem: political pressures on elected local commissioners will prevent them from constituting an impartial body capable of providing a fair hearing. Under the current system, the courts are simply unable to prevent abuses effectively or to correct abuses when they occur.

The problem of fairness in local administration and the concomitant need for some systematic approach to judicial review of local decisions has been recognized for some time in the context of state administrative law reform. As early as 1965, Frank Cooper recognized the following:

> A need exists for legislation prescribing procedural standards for . . . municipal and county agencies. In view of the particular problems and limitations they encounter . . . it is generally thought that it would be impracticable to make them conform to all the formal procedures required of state agencies. . . . But it would serve the public interest to provide a simplified procedural code for all municipal and county agencies exercising rulemaking or adjudicatory powers, and providing a uniform method of judicial review.[331]

In a 1977 article, Professor Donald Brodie and Oregon Supreme

331. FRANK COOPER, STATE ADMINISTRATIVE LAW 97–98 (1965).

Court Justice Hans Linde argued that states should establish standards for judicial review of agency action apart from their administrative procedures acts, in part so that those statutes would apply to local government actions.[332] State statutes should allow reviewing courts to require policy explanations from agencies vested with policy discretion, thus forcing the agency or local government to articulate its reasoning for adopting the policy without dictating a particular result.[333] Where the agency engaged in formal fact finding, the agency could be required to explain its policy or legal conclusions while its fact finding was respected.[334] This approach would establish a framework under which local decisions regarding administrative procedures could be respected:

> Whether and to what extent administrative procedure legislation should be imposed on local governments is a matter of debate. However, separating a general judicial review statute from an administrative procedure act can offer agencies one degree of judicial scrutiny, limited to procedural fairness and substantial evidence, if the agency has acted on a formal record of factfinding, and another degree of independent scrutiny when there is no such record without prescribing which option the agency must choose. Thus the special problems of local government can be accommodated in a general judicial review statute.[335]

Despite the persuasiveness of this approach and the demonstrated need for a consistent approach to reviewing administrative decisions, "no state has yet enacted a comprehensive judicial review statute that provides the exclusive means for reviewing government action, regardless of the type of action challenged, the nature of the challenge, or the governing body's status as state, county, or city."[336] As one commentator noted, the end result is that "[l]itigants are forced to choose among various remedies grounded in equity, the

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332. Brodie & Linde, *supra* note 149, at 567.

333. *Id*. at 553–56. Thus, the courts would require the agency to demonstrate that it had considered the policy without second guessing the policy choice itself.

334. *Id*.

335. *Id*. at 567. This approach would parallel the "hard look" test employed by federal courts in reviewing agency action under the arbitrary and capricious standard.

336. Barbara J. Safriet, *Judicial Review of Government Action: Procedural Quandaries and a Plea for Legislative Reform*, 15 ENVTL. L. 217, 262 (1985).

common law, and statutes,"[337] remedies that are markedly different for different types of action.[338] "These choices are complicated by the infinite variety of procedures used by the various local government units" while "the increasing similarity between local and state functions has eliminated any benefit that might possibly result from these multiple forms of review."[339]

Florida provides standards of judicial review for state agencies within its APA, and statutory guidelines for reviewing administrative action are available only for those activities covered by the Act. Local governments are not covered by the APA at this time, and in the absence of general law, attacking local administrative acts in Florida involves "multiple forms" of review, including declaratory judgments, injunction and common law certiorari.[340] The question of controlling local government administrative decisions was considered when Florida's APA was adopted: in choosing to exempt local governments except by express legislative action, the drafters intended an approach that would "allow selective inclusion after an opportunity for legislative analysis and debate or after a court determination that minimum fairness is not being accorded by local agencies."[341] The result, however, is that while Florida is held out as an example of effective review of state administrative actions,[342] local administrative actions suffer from the kind of anarchy that commentators have attacked.

The answer to the dilemma described in this Article is simple to state, if complex to implement: the Florida legislature should adopt a reform package that (a) provides for a consistent means of reviewing local administrative action, including administrative and quasi-judicial acts by local commissions, (b) identifies and limits the kinds of administrative regulatory decisions that local commissions can make, and (c) reviews existing statutes that control local action to

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337. *Id*. at 266.

338. The common law actions used to challenge local government actions are discussed in section II.

339. *Safriet*, *supra* note 336, at 266. The role of home rule in expanding the powers of local governments and decreasing the distinction between state and local powers is discussed *supra* part III.C.

340. The forms of action used in challenging local administrative decisions are discussed generally *supra* part IV.B.

341. 3 ARTHUR J. ENGLAND, JR. & L. HAROLD LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE 9 (1979).

342. *See* Brodie & Linde, *supra* note 149, at 558–64.

clarify when those statutes put local commissions in administrative and legislative roles. The legislature is the only body with the power to correct existing abuses because the courts, limited by their concerns for the separation of powers and the confusion presented by the current constitutional and statutory structures of local governments, will not force the adoption of significant reforms.

Unless most administrative actions of local governments were brought under the APA, an action that is highly unlikely, a "Local Government-Administrative Procedures Act" tailored to the circumstances of local governments should be adopted. Such a LGAPA should include these provisions: Local legislatures should be prohibited by general law from exercising executive or quasi judicial powers in regulatory matters, particularly in land use and environmental matters. Where current state statutes create ambiguities about the role of the local commission, they should be amended to clearly show the intent to allow local commissions to wield legislative powers in regulatory matters, and allow them administrative powers only in non-regulatory matters. Local governments should be given the option of using either hearing officers or other administrative officers in quasi-judicial proceedings. The use of independent hearing officers would be preferable, as they could be offered protection from being fired based on the substance of their decisions.

Minimal procedures for the conduct of quasi-judicial proceedings should be mandated by statute. These procedures need not be as elaborate as those used under the APA, but should provide at a minimum for: adequate notice to all potentially affected parties; the creation of a record sufficient for judicial review, including verbatim transcripts where necessary; definitions of competent, substantial evidence that would preclude the introduction of purely political views at fact-based hearings; provisions for examination under oath and cross examination; definitions or descriptions for the type of hearsay evidence that may be introduced, and a clear requirement that the substance and basis of the decision be put in writing.[343] The statutes should also be amended to require, not prohibit, the disqualification of members of local boards or commissions when a fair

343. These requirements do not go far beyond the minimum requirements of due process that have traditionally been placed on quasi-judicial decisions. Oregon puts similar restrictions on quasi-judicial land use proceedings. *See* Lincoln, *supra* note 5, at 384 & n.346.

allegation of bias, prejudice or interest is made.

A statutory means of appeal for local administrative decisions should be provided. The statute should give the reviewing court the ability to enter mandatory, declaratory or prohibitory orders as well as orders of remand, similar to the powers of reviewing courts under the APA.[344] The legislature also should consider establishing a special administrative tribunal, whose decisions could be appealed to a district court of appeal, to hear appeals from local administrative decisions involving environmental and land use regulatory matters.[345] This would provide much greater stability and consistency in the review process.

Finally, the Florida statutes should be thoroughly examined to identify areas where now superfluous enabling legislation that predates home rule still exists, and those sections should be repealed. The varied procedures found in those statutes should be replaced by a common set of procedures found in the home rule statutes for counties and municipalities. By gathering together and simplifying the sources of local power and the limitations on the exercise of that power, the structure of local authority could be simplified, making it easier for the courts to fulfill their role in supervising the activities of local governments.

In adopting the home rule provisions of article VIII of the Florida Constitution, and through the legislative support of home rule, the people of Florida have expressed their desire to have strong, effective local government. With strong government, however, comes the possibility of the abuse of power. The current system has too few checks on the abuse of local power, particularly where local commissions delegate regulatory functions to themselves. The adoption of the reforms suggested above can ensure that these broad local powers do not corrupt those who wield them, and that the people are protected from their government just as they are benefitted by it.

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344. *See* FLA. STAT. § 120.68(8)–(13) (1995). While the statute attempts to preserve the discretion of agencies and their role in determining facts, it allows the courts to order agency action where it appears that the agency is acting in bad faith.

345. While article V, § 1 of the Florida Constitution prohibits the establishment of new courts, it does allow for the establishment of administrative tribunals to hear administrative issues. The use of such a tribunal to hear appeals from quasi-judicial determinations does not violate article V or due process. Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 172 (Fla. 1974). Such a tribunal would function much as Oregon's Land Use Board of Appeals which can be credited for much of the success in implementing Oregon's planning program.