ARTICLES

RIGHTS, REMEDIES, AND RATIOCINATION: TOWARD A COHESIVE APPROACH TO APPELLATE REVIEW OF LAND USE ORDERS AFTER *BOARD OF COUNTY COMMISSIONERS v. SNYDER*

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I. INTRODUCTION

Without a doubt, *Board of County Commissioners v. Snyder* "changed the rules of the game for local government land use approvals."[1] The easygoing "fairly debatable" test for site-specific

1. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993); John W. Howell & David J. Russ, *Planning vs. Zoning*: Snyder *Decision Changes Rezoning Standards*, FLA. B.J., May 1994, at 16. Howell and Russ provide a thorough examination of the antecedents of the *Snyder* decision and the forces, both political and judicial, that led to the supreme court's decision to change the rules for site-specific rezonings.

rezonings was abandoned[2] and the "strict scrutiny" standard was adopted for the review of development orders[3] under a county's comprehensive master plan.[4] Furthermore, a landowner whose proposed development passes muster under that standard – while not presumptively entitled to the requested use – secures the benefit of shifting the burden "to the governmental board to demonstrate that maintaining the existing zoning classification . . . accomplishes a legitimate public purpose."[5] Perhaps the most spectacular aspect of *Snyder*, however, was the Florida Supreme Court's announcement that proceedings before municipal and county boards on site-specific rezonings are quasi-judicial.[6] Rezonings are site-specific if the impact is restricted to a limited number of identifiable parties and interests, the decision is dependent upon facts determined from alternatives presented at a hearing, and the decision amounts to policy application, rather than the establishment of policy in the first instance.[7] As the *Snyder* court itself readily recognized,[8] this pronouncement departed from the established principles that had been drawn by the Florida courts from *Village of Euclid v. Ambler Realty Co.,* under which *all* rezonings were deemed quasi-legislative in

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2. *Snyder*, 627 So. 2d at 474–75. *Snyder* is not, however, strictly limited to rezoning resolutions. The supreme court has applied the *Snyder* principles to court review of a city council's denial of site plan approval. *See* Park of Commerce Assocs. v. City of Delray Beach, 636 So. 2d 12, 15 (Fla. 1994). In addition, the Fourth District Court of Appeal has held *Snyder* applicable to a county commission's refusal to amend its land use plan to allow a particular use by a landowner who actively participated in the proceedings which led to the commission's decision. Florida Inst. of Technology, Inc. v. Martin County, 641 So. 2d 898, 899–900 (Fla. 4th Dist. Ct. App. 1994).

3. *See* FLA. STAT. § 163.3164(7)–(8) (1993); *infra* note 134.

4. *Snyder*, 627 So. 2d at 475. The Florida Supreme Court thus gave its stamp of approval to the third district's decision in Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d Dist. Ct. App. 1987), *rev. denied*, 529 So. 2d 694 (Fla. 1988), in which the strict scrutiny approach was first proposed as appropriate for governmental planning, as opposed to zoning. *Id*. at 631–32. "Land use planning and zoning are different exercises of sovereign power": while "a zoning action is an exercise of legislative power to which a reviewing court applies the deferential fairly debatable test," the question whether a proposed project is consistent with the master plan invokes the strict scrutiny standard. *Id*. To the extent that *Machado* embraced the fairly debatable test for zoning action, however, it was overruled by *Snyder*'s flat rejection of that test. *See Snyder*, 627 So. 2d at 474–75.

5. *Snyder*, 627 So. 2d at 476.

6. *Id*. at 474–75. In Park of Commerce Assocs. v. City of Delray Beach, the Florida Supreme Court brusquely rebuffed the municipality's request that it recede from *Snyder*'s ruling. *Park of Commerce Assocs*., 636 So. 2d at 15; *see supra* note 2.

7. *Snyder*, 627 So. 2d at 474.

8. *Id*. at 472, 474.

nature.[9]

Because the board action in *Snyder,* having addressed rezoning on a relatively small site, was deemed quasi-judicial, the supreme court held that the order was reviewable by petition for certiorari.[10] The court did so in response to arguments by *amici* that the statutory action provided in section 163.3215 of the *Florida Statutes* should be invoked by a disappointed landowner,[11] referring to its simultaneously released ruling in *Parker v. Leon County*.[12] *Parker* held that the remedy in section 163.3215 is available only to aggrieved third parties and that a landowner's "common law right to petition for certiorari review in circuit court was unaffected" by the statute.[13] The court accordingly summarized its view of the functional impact of its decision:

> [I]n order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling. Further review in the district court of appeal will continue to be governed by the principles of *City of Deerfield Beach v. Vaillant*.[14]

This holding, however, is superimposed upon a patchwork quilt of remedies. Common law certiorari, "statutory" certiorari, and appeals of uncertain origin all abound in the case law as appropriate appellate remedies for review of municipal and county zoning actions.[15] For the most part, the courts apply the same substantive standards regardless of the remedy. The fairly debatable standard was applied on certiorari prior to the advent of *Snyder*,[16] and, thereafter, the *Snyder* standard has been used on an appeal from a zon-

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9. Village of Euclid v. Ambler Realty Co., 272 U.S. 395 (1926); *see, e.g.*, City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 366–67 (Fla. 1941).

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

11. *Id*. at 474–75 & n.1.

12. Parker v. Leon County, 627 So. 2d 476 (Fla. 1993).

13. *Id*. at 479; *see* FLA. STAT. § 163.3215(2) (1993).

14. *Snyder*, 627 So. 2d at 476 (citation omitted).

15. *See, e.g.*, Splash & Ski, Inc. v. Orange County, 596 So. 2d 491, 492 (Fla. 5th Dist. Ct. App. 1992) (statutory certiorari under special act); DeSmedt v. City of North Miami Beach, 591 So. 2d 1077, 1078 (Fla. 3d Dist. Ct. App. 1991) (appeal under appellate rules); City of Fort Piece v. Dickerson, 588 So. 2d 1080, 1082 (Fla. 4th Dist. Ct. App. 1991) (common law certiorari).

16. *E.g.,* Dade County v. Yumbo, 348 So. 2d 392 (Fla. 3d Dist. Ct. App.), *cert. denied*, 354 So. 2d 988 (Fla. 1977).

ing order.[17] The confusion in the precedent concerning the precise nature of first-level appellate review in the zoning context has both doctrinal and functional impact.[18]

This Article will trace the application of certiorari as a tool for review of administrative action, with particular attention to rezonings and similar site-specific orders. Unique provisions for appellate review, whether by special act or local ordinances, will then be explored and their constitutionality addressed. Finally, with the establishment of the proposition that common law certiorari is the only available remedy for first-level appellate review of site-specific orders,[19] a proposal for the implementation of *Snyder*'s newly minted principles will be set forth.

II. CERTIORARI REVIEW OF MUNICIPAL AND COUNTY LAND USE ORDERS: THE ROOTS AND BRANCHES

A. Historical Antecedents

Certiorari[20] is one of the five prerogative writs of English common law, originally classified in the Register of Writs under the post-Hastings reign of the Norman kings.[21] The writs have survived some nine hundred years of legal reforms and upheavals – not to mention a transatlantic voyage to this country.[22] Early in their development, the writs became affiliated with the king's justice, which

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17. Graham Cos. v. Metropolitan Dade County Bd. of County Comm'rs, 2 Fla. L. Weekly Supp. 241, 241–42 (Fla. Cir. Ct. Apr. 22, 1994), *vacated as moot*, No. 93-163AP (Fla. Cir. Ct. Jan. 27, 1995).

18. *See* City of Deerfield Beach v. Vaillant, 399 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1981) ("The controversy is complicated by the sometimes interchangeable use of the words `certiorari' and `appeal' with the intention, in generic terms, of denoting a seeking out of higher appellate review."), *approved*, 419 So. 2d 624 (Fla. 1982).

19. It is now firmly established that common law certiorari is the only means by which a circuit court's decision on review of an administrative order (however denominated) is subject to review in a district court of appeal. *Snyder*, 627 So. 2d at 476; Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106, 108 (Fla. 1989); City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 625 (Fla. 1982).

20. Certiorari means literally "[t]o be informed of." BLACK'S LAW DICTIONARY 228 (6th ed. 1990).

21. The other writs are habeas corpus, mandamus, prohibition, and quo warranto.

22. Alto Adams & George J. Miller, *Origins and Current Florida Status of the Extraordinary Writs*, 4 U. FLA. L. REV. 421, 426–27 & n.15 (1951). This oft-cited (and utterly delightful) recapitulation of prerogative writ history is highly recommended; it remains an unparalleled exegesis on the derivation of the common law writs.

was then considered the preeminent form of justice.[23] Certiorari played an important role in enforcing the king's justice; in the thirteenth century, it was used to remove causes from inferior courts to the royal courts.[24] Between the fourteenth and the seventeenth centuries, the use of certiorari expanded to include within its ambit administrative functions and the supervision of specialized lower tribunals and to bring before the chancery or common law courts the judicial records of inferior courts.[25] The writ thus served as one of the "chief instrument[s]" of the King's Bench.[26]

During this period, there were no distinctions drawn between the monarch's executive and judicial functions; "the king's writ was used for all purposes connected with the business of administration."[27] By the seventeenth century, however, as the battle between Roman/civil law and common law was coming to an end, the role of certiorari was expanded to accommodate review of the burgeoning number of administrative bodies.[28] The English court structure of that time embraced certiorari as a tool for commanding review of proceedings before administrative tribunals.[29]

As early as 1700, the King's Bench undertook to review the orders of quasi-judicial bodies through the use of certiorari.[30] The suitability of the writ for review of the administrative acts of local governments was established by the end of that century.[31] The

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23. *Id.* at 424.

24. *Id*. at 432.

25. *Id.* at 433; *see* S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

26. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1583 n.41 (1983).

27. 5 ROSCOE POUND, JURISPRUDENCE 446 (1959).

28. Adams & Miller, *supra* note 22, at 431, 433–34. *See generally* LORD LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 2–3 (3d ed. 1972).

29. 5 POUND, *supra* note 27, at 386.

30. Adams & Miller, *supra* note 22, at 433 & n.35. Adams and Miller discuss the decision of Groenvelt v. Burwell, 91 Eng. Rep. 1202 (K.B. 1700), in which the King's Bench reviewed by certiorari disciplinary decisions of an administrative body and note that this decision caused the King's Bench to become inundated with requests for writs of certiorari. Adams & Miller, *supra* note 22, at 433–34 & n.35.

31. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-governance*, 40 STAN. L. REV. 1371, 1396–97 (1988). The writs of certiorari and prohibition initially were employed to control the judicial functions of local governments; it was apparently "assumed that the writs . . . were equally appropriate devices for superintending the exercise of their multifarious governmental functions." *Id*. at 1397 n.124 (citation omitted).

King's Bench ultimately evolved into the common law courts, which subsumed within their jurisdiction the writ of certiorari for review of administrative actions.[32]

Presumably as a consequence of their importation into a newly born democratic nation-state, the English *prerogative writs* became the American *extraordinary writs*.[33] The writ of certiorari survived in the federal system as the primary means of securing review in the United States Supreme Court[34] and in its common law form in the states.[35] It is aptly described as "[t]he great writ of review."[36]

B. Common Law Certiorari in Florida: An Overview

Certiorari in Florida has always been a potent and elastic means of securing review. "Being discretionary, common law certiorari is not lightly granted, and it is not a substitute for appeal; but it lurks in the background as one of the most formidable weapons known to the law, ready when no other method of review is available."[37] It "exists to review and correct actions by a lower tribunal that violate the essential requirements of the law."[38] Certiorari's

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The King's Bench developed a clearly announced, if somewhat functionally fluid, standard by which it divided the functions of agencies and the courts: "`[O]rdinary facts' could be left for final administrative determination, but the superior courts would render independent judgment upon those `facts' governing the agency's `jurisdiction.'" Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249 (1985) (footnotes omitted).

32. 5 POUND, *supra* note 27, at 386; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 571 n.167 (1985) (citing 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 448 (4th ed. 1927)).

33. Jeffrey A. Zaluda, Pulliam v. Allen: *Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity,* 34 AM. U. L. REV. 523, 539 n.97 (1985); *see* Adams & Miller, *supra* note 22, at 424.

34. 28 U.S.C. § 1257 (1993). "Although the discretionary statutory writ of certiorari issued by the Supreme Court of the United States . . . was doubtless derived from [the] common law writ, they are not to be confused and do not serve the same function." ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 4.7 (2d ed. 1988).

35. STERN, *supra* note 34, § 4.7; *see, e.g.*, Specht v. Central Passenger Ry., 68 A. 785, 788 (N.J. Sup. Ct. 1908) (certiorari is "derived . . . from its prototype, the King's Bench of England"), *aff'd*, 72 A. 356 (N.J. 1909); *In re* Evingson, 49 N.W. 733, 734 (N.D. 1891) (stating that substance of definition of certiorari has not changed from writ as used by King's Bench unless broadened by statute); Ashworth v. Hatcher, 128 S.E. 93, 94 (W. Va. 1925) (stating under state constitution, court has authority to issue writ of certiorari "wherever it would lie . . . [to] the King's Bench").

36. Adams & Miller, *supra* note 22, at 447.

37. *Id*.

38. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the*

sweep extends throughout the state's judicial system and into every administrative agency that exercises quasi-judicial functions.[39]

The present uses of certiorari may (very generally speaking) be divided into three discrete categories: review by the district courts of appeal of circuit court appellate decisions;[40] review of interlocutory orders not subject to nonfinal review;[41] and review of orders of ad-

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Florida Supreme Court, 18 NOVA L. REV. 1151, 1269 (1994) (footnote omitted).

39. Adams & Miller, *supra* note 22, at 447.

40. FLA. CONST. art. V, § 4(b)(3); FLA. R. APP. P. 9.030(b)(2)(B). The governing standard for certiorari review of circuit court appellate decisions is that the decision sought to be reviewed must constitute a "`departure from the essential requirements of law,'" Combs v. State 436 So. 2d 93, 94–95 (Fla. 1983), although that wording has been given a supple meaning. The Florida Supreme Court advocates a broad construction of the phrase.

> In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. . . . [T]he district courts must be allowed a large degree of discretion. . . . [They] should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Id. at 95–96.

41. FLA. CONST. art. V, § 4(b)(1); FLA. R. APP. P. 9.030(b)(1)(B). Rule 9.130(3) of the Florida Rules of Appellate Procedure strictly limits nonfinal appeals in civil cases:

> Review of nonfinal orders of lower tribunals is limited to those that
> (A) concern venue;
> (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
> (C) determine
> (i) the jurisdiction of the person;
> (ii) the right to immediate possession of property;
> (iii) the right to immediate monetary relief or child custody in domestic relations matters;
> (iv) the issue of liability in favor of a party seeking affirmative relief;
> (v) the entitlement of a party to arbitration;
> (vi) that a party is not entitled to workers' compensation immunity as a matter of law; or
> (vii) that a class should be certified;
> (D) grant or deny the appointment of receiver, and terminate or refuse to terminate a receivership.

Orders which are outside the limited scope of rule 9.130 may be reviewed on certiorari if the moving party can demonstrate a departure from the essential requirements of law, prejudice, and a need for immediate relief. *See* Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1099–1100 (Fla. 1987); Kilgore v. Bird, 6 So. 2d 541 (Fla. 1942); Ruiz v. Steiner, 599 So. 2d 196, 197–98 (Fla. 3d Dist. Ct. App. 1992).

In criminal cases, the prosecution is entitled to nonfinal appellate review of orders which are identified in rule 9.140(c) of the Florida Rules of Appellate Procedure and may seek certiorari review if the circumstances are sufficiently pressing and the entitlement to relief sufficiently clear. *E.g., State v. Pettis,* 520 So. 2d 250 (Fla. 1988). A defendant in a criminal case has no right of appeal from nonfinal orders, FLA. R. APP. P.

ministrative tribunals which are not subject to the Florida Administrative Procedures Act.[42] The most important role of certiorari in Florida is in reviewing quasi-judicial actions of administrative agencies;[43] the subsequent portions of this Article will focus on the use of certiorari to review administrative orders, with particular focus on municipal and county land use decisions.

9.140(b), but may, under limited circumstances, seek certiorari review of interlocutory rulings. *E.g.*, Saracusa v. State, 528 So. 2d 520 (Fla. 4th Dist. Ct. App. 1988).

42. *E.g.*, Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684 (Fla. 4th Dist. Ct. App. 1982); *see infra* text accompanying notes 104–08.

43. Adams & Miller, *supra* note 22, at 447.

C. The Development of Certiorari as a Tool for Review of Administrative Action

1. The 1885 Florida Constitution

The constitution of 1885 vested both the Supreme Court of Florida and the circuit courts with common law certiorari jurisdiction.[44] This jurisdiction in certiorari was unqualified, complete, and "unquestionably concurrent."[45] With the exception of certiorari for review of circuit court orders, "the express grant" of concurrent jurisdiction limited the legislature's power to deprive the supreme court or the circuit courts of their constitutional jurisdiction.[46]

a. Scope of Review

Certiorari, at least when circuit court judgments were presented for review to the supreme court, had an imposing breadth under the 1885 constitution:

> Certiorari is not limited to an inquiry as to jurisdiction but extends to the manner in which that jurisdiction is exercised. It does not review questions of fact, yet the court may, on certiorari, examine the evidence and determine whether there is sufficient evidence to justify the finding of the inferior court . . . . [W]hat the framers of the constitution evidently intended was to cut off the right of ap-

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44. FLA. CONST. of 1885, art. V, § 5; *id*. art. V, § 11. The "certiorari" authorized by the 1885 constitution was the "common-law writ of certiorari." Great Am. Ins. Co. v. Peters, 141 So. 322, 326 (Fla. 1932). The 1868 constitution had similarly provided for certiorari jurisdiction in the supreme court and circuit courts. FLA. CONST. of 1868, art. VI, §§ 5, 8. The pre-1868 constitutions did not expressly confer certiorari jurisdiction on the Florida courts. William H. Rogers & Lewis R. Baxter, *Certiorari in Florida*, 4 U. FLA. L. REV. 477, 483 n.30 (1951).

45. Rogers & Baxter, *supra* note 44, at 483–84.

46. *Id*. at 484, 488. Prior to the 1885 Florida Constitution, the Florida Supreme Court implicitly held that where adequate procedures existed for seeking certiorari before the circuit court, the writ could not be sought in the supreme court in the first instance. Halliday v. Jacksonville & Alligator Plank Road Co., 6 Fla. 304 (1855); *see* Lorenzo v. Murphy, 32 So. 2d 421, 424 (Fla. 1947).

As William Rogers and Lewis Baxter presciently observed in 1951, looking toward the clean lines of our present constitutional structure: "The line of jurisdictional demarcation between the two courts is presently wavering and broken. As time passes, there should emerge from further decisions a rationalizing principle allocating discrete instances to their appropriate forum." Rogers & Baxter, *supra* note 44, at 488; *see infra* notes 93–100 and accompanying text.

> peal from the Circuit Court in certain cases as a matter of right, not to take from the Supreme Court the power to prevent injustice.
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> . . . .
>
> [T]he appellate court should on certiorari, in cases where there is no remedy by appeal or writ of error, inquire into all errors of law affecting the merits of the case.[47]

Early on, however, the supreme court in *Jacksonville, T. & K.W. Ry. v. Boy* noted a sharp distinction in its review of circuit court decisions, as contrasted with quasi-judicial orders.[48] In reviewing orders of the circuit courts, the supreme court would look only to the record of the proceedings to ensure that the circuit courts had not acted outside the scope of their jurisdiction. Broader review was accorded to quasi-judicial orders, and included a determination of whether the agency made any legal errors.[49] The portent of a more extensive use of common law certiorari in reviewing administrative actions, as opposed to a narrower review of the actions of lower courts, was realized in subsequent supreme court decisions.[50]

In *Florida Motor Lines v. Railroad Commissioners*, the supreme court formally adopted the broader-scope common law certiorari for its review of quasi-judicial rulings.[51] The court declared that if an agency misapplied the law in making its order, "such order may be adjudged to be invalid."[52] Thereafter, the supreme court, in *American National Bank v. Marks Lumber & Hardware Co.*, undertook to educate the bar on the court's uses of certiorari.[53] Holding that the

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47. *Lorenzo*, 32 So. 2d at 424 (citations omitted). The synthesis set forth in *Lorenzo* was derived from early cases decided under the 1885 constitution. *See* Malone v. City of Quincy, 62 So. 922, 922 (Fla. 1913) (noting superior court properly issues certiorari to determine whether inferior court "has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law"); Seaboard Air Line Ry. v. Ray, 42 So. 714, 715–16 (Fla. 1906); Mernaugh v. City of Orlando, 27 So. 34, 36 (Fla. 1899); Hunt v. City of Jacksonville, 16 So. 398, 399–400 (Fla. 1894). These cases carried forward the precepts declared by the supreme court in a trilogy of cases decided under the 1868 constitution. *See* Deans v. Wilcoxon, 18 Fla. 531, 552 (1882); Edgerton v. Mayor of Green Cove Springs, 18 Fla. 528, 530 (1882); Basnet v. City of Jacksonville, 18 Fla. 523, 526–27 (1882).

48. Jacksonville, T. & K.W. Ry. v. Boy, 16 So. 290, 291 (Fla. 1894).

49. *Id.*

50. Adams & Miller, *supra* note 22, at 465.

51. Florida Motor Lines v. Railroad Comm'rs, 129 So. 876, 885–86 (Fla. 1930).

52. *Id.* at 886; *accord* Seaboard Air Line Ry. v. Wells, 131 So. 777, 783 (Fla. 1931); Seaboard Air Line Ry. v. Wells, 130 So. 587, 592 (Fla. 1930).

53. *See* American Nat'l Bank v. Marks Lumber & Hardware Co., 45 So. 2d 336,

rule announced in *Jacksonville, T. & K.W. Ry. v. Boy* remained unaltered, the court stressed that the essence of the distinction between judicial and quasi-judicial orders on certiorari was that "[i]n the former certiorari will only issue when there is a departure from the essential requirements of law whereas in the latter simple errors may be corrected."[54]

Under the 1885 constitution, common law certiorari, though not available simply to effect a further appeal, was available as a rein on administrative agencies which exceeded their jurisdiction or disregarded due process. It was also available to rectify common errors of law.[55] So-called "simple errors," as distinct from questions of jurisdiction and procedure, were deemed within the scope of certiorari review.[56]

b. The Reviewability of Land Use Orders

In *City of Miami Beach v. Ocean & Inland Co.*, the Florida Supreme Court considered a challenge, brought as an original suit in equity, to a Miami Beach ordinance that divided a portion of the city into business and hotel/apartment areas.[57] First, the court acknowledged its task of determining whether the regulation was reasonable as it applied to the facts of the case. Then, upholding the ordinance, the court announced the principle that would influence both substantive and procedural aspects of land use law for decades to come. The court stated it would "not substitute its judgment for that of the city council; . . . the ordinance is presumed valid and . . . the legislative intent will be sustained if `fairly debatable.'"[58]

This declaration was of telling import: because the role of common law certiorari in administrative review had been so clearly

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337 (Fla. 1950).

54. *Id.*

55. Adams & Miller, *supra* note 22, at 465–66.

56. Rogers & Baxter, *supra* note 44, at 493 n.69.

57. City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 365 (Fla. 1941).

58. *Id.* at 366–67. The court cited Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), as authority for the fairly debatable standard of review. The court emphasized that, under its view of that standard, a case-specific inquiry was appropriate, and that a zoning ordinance that was necessary merely to the "general welfare" of the community would be upheld. *Ocean & Inland Co.*, 3 So. 2d at 366. Only upon a showing that the restrictions were unreasonable and arbitrary would the courts be authorized to revisit a zoning decision. *Id.* at 366–67.

defined as limited to quasi-judicial proceedings, the court's holding that zoning was legislative operated to exclude both original zoning *and* rezoning orders from the scope of the writ's application.[59] In *West Flagler Amusement Co. v. State Racing Commission*, the supreme court described a quasi-judicial order as one that determines what rules of law apply to, and what rights are affected by, past transactions.[60] The court distinguished a quasi-legislative order as one that "prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future."[61]

The supreme court's preeminent decision in *De Groot v. Sheffield* elaborated on this formulation, to the detriment of judicial review in land use matters.[62] The court announced that a judgment is quasi-judicial when "notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing."[63] The court acknowledged that historically, administrative orders have been scrutinized through both mandamus and certiorari proceedings and that "little attention has been given to the propriety of the procedure in particular cases."[64] In setting forth the rule that certiorari was the exclusive means for seeking review of quasi-judi-

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59. David La Croix, *The Applicability of Certiorari Review to Decisions on Rezoning*, FLA. B.J., June 1991, at 105; *see* Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959).

60. West Flagler Amusement Co. v. State Racing Comm'n, 165 So. 64, 65 (Fla. 1935).

61. *Id.*

62. De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957). To use the rubric "oft-cited" in describing *De Groot* would be an understatement. The formulation set forth in that case has been sufficiently elastic and of sufficient durability that it was the jurisprudential linchpin in decisions which held that rezoning is legislative and beyond the purview of certiorari. *See, e.g.*, Harris v. Goff, 151 So. 2d 642 (Fla. 1st Dist. Ct. App. 1963). *De Groot* is currently cited as the controlling explication of a circuit court's role on first-level review of land use decisions. *See* Board of County Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993).

De Groot had humble origins: Peter De Groot was discharged from his position as supervising architect with the Duval County School Board after the board abolished the position, despite a ruling by the civil service board that the position could not be abolished. *De Groot*, 95 So. 2d at 913–14. The school board sought to defend against De Groot's mandamus action by urging that the civil service ruling had not been subject to review. *Id*. at 914. After holding that the ruling was quasi-judicial and reviewable on certiorari, the supreme court held that De Groot was entitled to mandamus relief. *Id*. at 914–17.

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

64. *Id.*

cial action, the court distinguished the proper use of certiorari from that of injunction.[65] "Injunction has been many times employed to assault legislative action at the state and local level where such action allegedly impinged on some constitutional right. *Attacks on municipal zoning ordinances are typical*."[66]

Certiorari remained available, however, for lesser categories of land use decisions. In *Tau Alpha Holding Corp. v. Board of Adjustments*, the owner of a restaurant located in a small section of an area rezoned for residential use sought permission to reconstruct the restaurant.[67] Over the objections of Tau Alpha, the Board of Adjustments granted a temporary permit to the restaurant owner.[68] On review by writ of error, the supreme court affirmed the Board's decision upon a holding that the hardship on the owner justified the permit and that the public interest would not be disserved by allowing the reconstruction of the restaurant.[69]

2. The 1957 Amendments to Article V

The 1957 overhaul of article V of the Florida Constitution became effective on July 1, 1957.[70] As the precursor to the present-day court structure, the 1957 amendments created the district courts of appeal, revamped the jurisdiction of the Florida Supreme Court, and consolidated the jurisdiction of the circuit courts.[71] The supreme court's certiorari jurisdiction was drastically diminished: beyond the newly created supervisory certiorari review of district court decisions,[72] the court only had authority to "issue writs of certiorari to

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65. *Id*. at 915–16.

66. *Id.* at 915 (emphasis added). Injunction sometimes has been treated as a sixth extraordinary writ. Adams & Miller, *supra* note 22, at 424 & n.11 ("the writ of injunction has on occasion been blessed with this high-sounding name in Florida," although "[t]he context . . . indicates that `extraordinary' is used merely to indicate that injunction is not lightly granted").

67. Tau Alpha Holding Corp. v. Board of Adjustments, 171 So. 819, 819 (Fla. 1937).

68. *Id.* Tau Alpha unsuccessfully sought a writ of certiorari in circuit court. *Id*.

69. *Id.* at 820; *see infra* note 140 and accompanying text.

70. FLA. CONST. of 1885, art. V, § 26(1) (1957).

71. *Id.* art. V, §§ 4(2), 5, 6(3).

72. The 1957 amendment provided:

> [t]he supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . .

commissions established by law,"[73] i.e., to organs of the state government.[74] The supreme court's authority to issue the common law writ of certiorari was thus abrogated, for all intents and purposes, by the 1957 amendments.[75] The circuit courts, however, retained their common law certiorari jurisdiction without limitation.[76]

Perhaps most significantly for the use of certiorari in the administrative context, the 1957 amendments expressly granted the supreme court rulemaking authority over "[t]he practice and procedure in all courts."[77] Prior to 1957, time limitations and other procedural matters had been deemed within the legislative prerogative.[78]

Id. art. V, § 4(2).

73. *Id.*

74. *E.g.,* Gulf Oil Co. v. Bevis, 322 So. 2d 30 (Fla. 1975) (review of Public Service Commission order); Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166 (Fla. 1974) (reviewing Industrial Relations Commission decision). The *De Groot* standard of review applied to this last vestige of common law certiorari in the supreme court. Chicken `N' Things v. Murray, 329 So. 2d 302, 304–05 (Fla. 1976). This jurisdiction was abolished by the 1980 amendments to the 1968 constitution. *See* FLA. CONST. art. V, § 3(b)(2) (providing that supreme court "shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service" when "provided by general law"); FLA. STAT. §§ 366.10, 364.381, 75.08 (1993). The district courts of appeal, under the 1957 amendment, had jurisdiction to review administrative action only "as may be provided by law." FLA. CONST. of 1885, art. V, § 5(c) (1957).

The only other form of supreme court certiorari set forth in the 1957 amendment of article V was for direct review of "interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court." *Id*. art. V, § 4(b)(2). This provision had been carried over into the 1957 amendments from former rule 34 of the Rules of Practice of the Supreme Court, "which is not certiorari at all but a rather sadly misnamed method of taking" interlocutory appeals in equity. Adams & Miller, *supra* note 22, at 448. The 1972 amendments to the 1968 constitution abolished this form of interlocutory review. *See* FLA. CONST. art. V, § 3(b).

75. *See* Kogan & Waters, *supra* note 38, at 1269.

76. FLA. CONST. of 1885, art. V, § 6(3) (1957).

77. *Id*. art. V, § 3. That provision is now found in FLA. CONST. art. V, § 2(a).

78. *See* Cates v. Heffernan, 18 So. 2d 11, 13 (Fla. 1944); Sinclair Ref. Co. v. Hunter, 191 So. 38, 40 (Fla. 1939). Although the supreme court was first given rulemaking authority by the legislature in 1861, it "was limited to making rules of practice and procedure that were consistent with statutes" prior to the 1957 adoption of article V, section three. HENRY P. TRAWICK, JR., TRAWICK'S FLORIDA PRACTICE AND PROCEDURE v (1992). The legislature, in apparent recognition of its loss of power in this sphere, thereafter enacted section 59.081 of the *Florida Statutes* in 1967, which provides:

> The time within which and the method by which the jurisdiction of any court in this state possessed of power to review the action of any other court, commission, officer or bureau may be invoked by appeal, certiorari, petition for review or other process by whatever name designated, and the manner of computing such time shall be prescribed by rule of the Supreme Court.

FLA. STAT. § 59.081(1) (1993); *see* 1967 Fla. Laws ch. 175. Had the legislature been

In 1957, the supreme court promulgated Florida Appellate Rule 4.1, entitled "Review of Administrative Boards and Agencies," which provided that "appellate review of the rulings of any commission or board shall be by certiorari."[79] In *Codomo v. Shaw,* the first supreme court decision to construe rule 4.1, the court was asked to review by certiorari an order of the Florida Real Estate Commission.[80] The court noted that it had jurisdiction under the constitution to consider petitions of "commissions established by law."[81]

The court then considered the circuit court's possible jurisdiction, under a pre-amendment statute that had authorized an appeal from the Real Estate Commission to the circuit court,[82] and found that the newly adopted constitutional provision had eliminated the power of the legislature to augment the circuit court's appellate jurisdiction.[83] Turning to the possible availability of certiorari, the court held that the circuit courts' traditional certiorari jurisdiction had not been diminished under the 1957 amendments, and the writ was therefore available to obtain review because "no other method of appeal [was] available."[84] Moreover, in an apparent effort to undo the confusing concurrent jurisdiction of the circuit and supreme courts, the supreme court declined to assume jurisdiction of the case, "[s]ince the circuit court retain[ed] power to review the challenged order by certiorari."[85]

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granted the power that it purported to delegate, the statute would have run afoul of the separation of powers doctrine. *See* FLA. CONST. art. II, § 3; *see also* Smith v. State, 537 So. 2d 982 (Fla. 1989). In light of the constitutional provisions, however, the statute cannot be treated as other than an acquiescence in a *fait accompli*.

79. Fla. App. R. 4.1, THE FLORIDA BAR, FLORIDA RULES OF APPELLATE PROCEDURE (1957). The Florida Appellate Rules went into effect on July 1, 1957, Fla. App. R. 1.4, THE FLORIDA BAR, FLORIDA RULES OF APPELLATE PROCEDURE (1957), concurrently with the 1957 amendments to article V.

80. Codomo v. Shaw, 99 So. 2d 849, 850–51 (Fla. 1958).

81. *Id*. at 851; *see* FLA. CONST. of 1885, art. V, § 4(b) (1957); *supra* note 74.

82. *Codomo*, 99 So. 2d at 851; *see* FLA. STAT. § 475.35(1) (1957).

83. Under article V, section 11 of the 1885 constitution, the circuit court had certain identified powers and jurisdiction over "such other matters as the Legislature may provide." FLA. CONST. of 1885, art. V, § 11. This language "was eliminated from new Article V, Section 6 . . . in connection with final appellate jurisdiction, although this language was retained in connection with original jurisdiction." *Codomo*, 99 So. 2d at 851. From this omission, the court deduced "an intention on the part of the framers to remove the support for [section 475.35] and the statute, accordingly, must fall." *Id.*

84. *Codomo*, 99 So. 2d at 852 (citations omitted).

85. *Id.* The petition was transferred to the circuit court. *Id*.; *cf.* Diamond Cab Co. v. King, 146 So. 2d 889, 890–91 (Fla. 1962) (involving order of Railroad and Public Utilities Commission reviewed on certiorari in supreme court); Comfort Springs v. Laiche,

The common law distinction between quasi-judicial and quasi-legislative administrative action was carried over from pre-1957 case law into the interpretation of rule 4.1,[86] and the *De Groot* formulation continued to control under the new rule:

> A literal reading of the rule might lead to the conclusion that certiorari is the only permissible method of reviewing any order entered by a board or commission regardless of whether the order in question was quasi-judicial in character, or was merely an executive, legislative or administrative order entered in a proceeding having none of the characteristics or attributes of judicial or quasi-judicial function. . . . [T]he type of certiorari to review administrative orders contemplated by Rule 4.1 is common law certiorari in which the scope of review is narrowly limited to a determination of whether the administrative agency acted without or in excess of its jurisdiction, or whether it departed from essential requirements of law in entering the order sought to be reviewed. It is settled in this state that common law certiorari is limited only to review of judicial or quasi-judicial orders of administrative boards, bodies or officers.[87]

If the order was not quasi-judicial, the only appropriate remedy was an independent action in equity for injunctive relief.[88]

Common law certiorari was thus unavailable under the 1957 amendments to article V for review of rezoning decisions which continued to be deemed quasi-legislative. Rezoning decisions were subject to review, under the fairly debatable standard, only by an origi-

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125 So. 2d 574, 575 (Fla. 1960) (involving workers' compensation certiorari heard on merits in supreme court).

86. *E.g.*, Solomon v. Sanitarians' Registration Bd., 155 So. 2d 353, 356 (Fla. 1963).

87. Bloomfield v. Mayo, 119 So. 2d 417, 420–21 (Fla. 1st Dist. Ct. App. 1960) (footnotes omitted); *accord* Dade County v. Marca, 326 So. 2d 183 (Fla. 1976).

88. Teston v. City of Tampa, 143 So. 2d 473, 476 (Fla. 1962). In this case, the court stated:

> In the absence of specific valid statutory appellate procedures to review the particular order, it becomes necessary to ascertain whether the order is quasi-judicial or quasi-legislative. If the order is quasi-judicial, that is, if it has been entered pursuant to a statutory notice and hearing involving quasi-judicial determinations, then it is subject to review by certiorari. Otherwise, remedy by equity suit and injunction is appropriate.

Id. By the same token, a declaratory action could not be used for review of quasi-judicial proceedings, and certiorari was viewed as the sole available remedy. Carol City Utils. v. Dade County, 143 So. 2d 828, 829 (Fla. 3d Dist. Ct. App.), *prohibition denied*, 149 So. 2d 49 (Fla. 1962), *cert. discharged*, 152 So. 2d 462 (Fla. 1963); City of Miami v. Eldredge, 126 So. 2d 169, 170 (Fla. 3d Dist. Ct. App. 1961).

nal action.[89] Lesser land use orders, e.g., those involving variances and uses, were subject to review by certiorari.[90]

3. The 1968 Florida Constitution and the 1972 Amendments

The 1957 amendments to article V were imported into the 1968 constitution without revision.[91] The discussion in the preceding section thus depicts the status of common law certiorari during the four years between the adoption of the 1968 constitution and the sweeping changes that the 1972 amendments wrought to article V.[92]

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89. *E.g.,* Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967); Harris v. Goff, 151 So. 2d 642 (Fla. 1st Dist. Ct. App. 1963); Alianell v. Fossey, 114 So. 2d 372 (Fla. 3d Dist. Ct. App. 1959). *See generally* Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983). In the context of common law certiorari, this rule prevailed until the advent of the *Snyder* decision. Palm Beach County v. Tinnerman, 517 So. 2d 699 (Fla. 4th Dist. Ct. App. 1987), *rev. denied*, 528 So. 2d 1183 (Fla. 1988); City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (Fla. 1st Dist. Ct. App. 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985); City of Boynton Beach v. V.S.H. Realty, Inc., 443 So. 2d 452 (Fla. 4th Dist. Ct. App. 1984).

90. *E.g.,* Walgreen Co. v. Polk County, 524 So. 2d 1119, 1120 (Fla. 2d Dist. Ct. App. 1988) (reviewing order denying variance); City Council v. Trebor Constr. Corp., 254 So. 2d 51, 53 (Fla. 3d Dist. Ct. App. 1971) (discussing certiorari under rule 4.1 for review of order denying variance), *cert. denied*, 260 So. 2d 514 (Fla. 1972). In *Walgreen Co.*, a variance to allow the operation of a package store in the applicant's pharmacy was unsuccessfully sought before the board of adjustments and then on de novo review by the county commission. *Walgreen Co.*, 524 So. 2d at 1119. The applicant's certiorari petition was rebuffed on a holding that the county commission's action was quasi-legislative and subject to review only by an independent action. *Id.* at 1119–20. The Second District Court of Appeal held as follows:

> If, as the county urges, the granting or denying of a variance is legislative in nature then the board of adjustment, a non-elected administrative board, would have been without authority in the first instance because a legislative function cannot be delegated to an administrative board. . . . Since a de novo hearing is conducted by the county commission when an appeal is taken from a decision of the board of adjustment, it follows that the county commission's determination of whether to grant a variance should be based on the same criteria the ordinance directs the board of adjustment to apply. Hence, we conclude that the action of the county commission was quasi-judicial in nature.

Id. at 1120 (citations omitted).

The Florida Supreme Court brought the distinction between rezoning and lesser land use matters into sharp focus in *Nance v. Town of Indialantic*, 419 So. 2d 1041 (Fla. 1982). The court reaffirmed the application of "the `fairly debatable' test of reviewing zoning decisions" as distinguished from variance requests, as to which *De Groot v. Sheffield* applies. *Id*. at 1041. See *supra* note 62 for a discussion of *De Groot*.

91. *See* FLA. CONST. art. V, §§ 3–6 (amended 1972).

92. Other aspects of the 1968 Florida Constitution are pertinent, however, to statutory certiorari review. *See infra* text accompanying notes 118–210.

Both supreme court and circuit court jurisdiction were redefined in the 1972 amendments to article V.[93] By far, the most dramatic change was the complete revamping of circuit court jurisdiction. Departing from the discursive approach of the 1885 constitution and 1957 amendments, the framers set forth a concise definition: "The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of . . . certiorari . . . . They shall have the power of direct review of administrative action prescribed by general law."[94]

Thus, under the authority conferred on the legislature by the Florida Constitution, the right of civil litigants to an appeal of a final order is statutory, as is the right to appeal "various specific kinds of judicial and administrative acts."[95] In the absence of statutory authority, there is simply no right to an appeal from a final order.[96] In the circuit courts, there is no right to *any* appeal absent statutory authorization.[97]

The primary source of general law governing appellate jurisdiction is section 26.012(1) of the *Florida Statutes*, under which circuit courts have jurisdiction of appeals from the county courts and "from final administrative orders of local government code enforcement

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93. The supreme court retained its limited certiorari jurisdiction over the district courts of appeal and the power to "issue writs of certiorari to commissions established by general law having statewide jurisdiction." FLA. CONST. art. V, § 3(b)(3) (amended 1980); *see supra* note 74. The court was also given "the power of direct review of administrative action prescribed by general law." FLA. CONST. art. V, § 3(b)(7) (amended 1980).

Neither certiorari nor direct administrative review under general law survived the 1980 amendments to § 3, which shaped the modern jurisdiction of the supreme court. Under that amendment, certiorari disappeared from the supreme court's jurisdiction. FLA. CONST. art. V, § 3. Replacing certiorari as a means of reviewing district court decisions was "discretionary review," under more limited circumstances than the earlier versions of article V. *Id*. art. V, §§ 3(b)(3), (4). The court's power to issue writs of certiorari to commissions and boards was eliminated, as was the 1972 provision for direct review of administrative action. Both were replaced with a grant of authority to "review actions of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service." *Id*. art. V, § 3(b)(2). For a lucid examination of the 1980 amendments to article V, see Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

94. FLA. CONST. art. V, § 5(b). Article V, § 20 of the Florida Constitution grants the legislature the power to alter circuit court jurisdiction.

95. State v. Creighton, 469 So. 2d 735, 740–41 (Fla. 1985) (citations omitted).

96. *See id.*

97. Blore v. Fierro, 636 So. 2d 1329, 1331 (Fla. 1994).

boards."[98] No other administrative orders are set forth in the statute as subject to appeal before the circuit courts.[99] The district courts of appeal were also granted appellate jurisdiction over "administrative action, as prescribed by general law."[100]

4. The Administrative Procedures Act

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98. FLA. STAT. § 26.012(1) (1993). A code enforcement board is an administrative board vested by the governing body of a county or municipality with "authority to impose administrative fines and other non-criminal penalties" in the enforcement of codes and ordinances. *Id*. §§ 162.02–.04, .09. The appellate jurisdiction granted by § 26.012 is enabled by § 162.11 of the *Florida Statutes*, which permits an aggrieved party to "appeal a final administrative order of an enforcement board to the circuit court." *Id*. § 162.11; *see* Holiday Isle Resort & Marina Assocs. v. Monroe County, 582 So. 2d 721, 721–22 (Fla. 3d Dist. Ct. App. 1991) (holding that circuit court has jurisdiction of appeals from county code enforcement board).

99. The only other source of general law under which final administrative orders are directly appealable is § 120.68 of the *Florida Statutes*, a component of the Administrative Procedure Act (APA). The statute grants a right of judicial review to a party "who is adversely affected by final agency action." FLA. STAT. § 120.68(1) (1993). Unless judicial review must be had before the Supreme Court of Florida, "all proceedings for review shall be instituted . . . in the *district court of appeal* in the appellate district where the agency maintains its headquarters or where a party resides." *Id*. § 120.68(2) (emphasis added); *see infra* text accompanying notes 118–35.

100. FLA. CONST. art. V, § 4(b)(2). The jurisdiction of the district courts of appeal is couched somewhat differently from that of the circuit courts:

> (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

Id. art. V, § 4(b)(1). In the 1957 amendments, the jurisdiction of the district courts was somewhat broader, encompassing appeals "as a matter of right, from all final judgments or decrees" not reviewable in the supreme or circuit courts. *Id*. art. V, § 5(3) (amended 1972). This language led the supreme court to conclude that "[t]he right to appeal from the final decisions of trial courts to the Supreme Court and to the District Courts of Appeal has become a part of the Constitution and is no longer dependent on statutory authority or subject to be impaired or abridged by statutory law." Crownover v. Shannon, 170 So. 2d 299, 301 (Fla. 1964).

The slight change in language in 1972, i.e., to appeals "that may be taken as a matter of right," was given great significance by the supreme court: "The elimination of the language found dispositive in *Crownover* must be taken as having intended to negate the interpretation given by *Crownover* that the constitution had bestowed a right of appeal." State v. Creighton, 469 So. 2d 735, 739 (Fla. 1985). Final appeals are therefore allowed only by statutory authorization, *see supra* text accompanying notes 96–97, while nonfinal appeals in the district courts are, in contradistinction, exclusively within the province of the Supreme Court of Florida, *see supra* note 41. The administrative/appellate jurisdiction of the district courts of appeal is discussed in the next section of this Article.

Under the pre-1972 constitutions and the pre-1975 administrative statutes,[101] judicial review of final, quasi-judicial administrative action of state agencies was by certiorari in the district courts of appeal.[102] Rule 4.1 of the Florida Appellate Rules thus governed the procedure by which these reviews were conducted.[103]

A drive for reform of administrative procedures, beginning in 1972, led ultimately to the legislature's adoption of the Florida Administrative Procedures Act (APA), which became effective on January 1, 1975.[104] The APA was intended as nothing less than a comprehensive replacement of pre-existing law, including that which governed judicial review of quasi-judicial state administrative action.[105] To this end, section 120.68 of the *Florida Statutes*, provides for review of quasi-judicial agency rulings in the district courts of appeal (or the supreme court, where specifically provided by general law).[106]

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101. *See* 1961 Fla. Laws ch. 280, §§ 1–4, *codified in* FLA. STAT. ch. 120 (1961).

102. FLA. STAT. § 120.31(1) (1961). This section states:

> As an alternative procedure for judicial review, and except where appellate review is now made directly by the supreme court, the final orders of an agency entered in any agency proceedings, or in the exercise of any judicial or quasijudicial authority, shall be reviewable by certiorari by the district courts of appeal within the time and manner prescribed by the Florida appellate rules. . . . The venue of the proceedings for such review shall be the appellate district which includes the county wherein hearings before the hearing officer or agency, as the case may be, are conducted, or if venue cannot be thus determined, then the appellate district wherein the agency's executive offices are located.

Id.

103. Meiklejohn v. American Distribs., Inc., 210 So. 2d 259, 262–63 (Fla. 1st Dist. Ct. App. 1968). Declaratory actions were available for challenges to agency rules, but only certiorari could be invoked for review of quasi-judicial action. *E.g.,* School Bd. v. Hauser, 293 So. 2d 681, 682 (Fla. 1974).

104. FLA. STAT. §§ 120.50–.73 (1975). An historical summary of the events leading to the adoption of the APA is set forth in 1 ARTHUR J. ENGLAND, JR. & L. HAROLD LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL, § 1.02(b) (1993).

105. *See* FLORIDA LAW REVISION COUNCIL, REPORTER'S COMMENTS ON PROPOSED ADMINISTRATIVE PROCEDURE ACT 3 (1974), *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 3 (Reporter's Comments).

106. FLA. STAT. § 120.68(2) (1993). This essential aspect of the statute has remained unchanged since the reporter's final draft of the proposed APA was submitted to the legislature on March 1, 1974. FLORIDA LAW REVISION COUNCIL, REPORTER'S FINAL DRAFT (1974), *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 1 (Reporter's Final Draft Statute). Review is provided "in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides." FLA. STAT. § 120.68(2) (1993).

This provision was intended to eliminate common law distinctions and fine points, with the goal being a unified method of review.[107] The abolition of certiorari was not a mere matter of semantics or form. "Because the term `certiorari' generally connotes discretionary review, the term `petition for review' will better describe appeals as of right from agency action. It would be desirable to allow reviewing courts to entertain all petitions for review without regard to the formalities of their title . . . ."[108]

5. The 1977 Florida Rules of Appellate Procedure

The drafters of the APA recognized that their proposed form of unified judicial review would necessitate a change to Florida Appellate Rule 4.1, which denominated the review of agency actions as "certiorari."[109] The Florida Rules of Appellate Procedure, however, which had been in the works during the same time period as the APA,[110] replaced the former Florida Appellate Rules on March 1, 1978.[111] Included therein were numerous provisions aimed at achieving expeditious judicial review of administrative action and

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107. 2 ENGLAND & LEVINSON, *supra* note 104, § 15.04(a). "In proposing the APA, the Law Revision Council used the constitutional term `review' as a common denominator to characterize the judicial process of direct review in the appellate courts, rather than distinguishing the possible forms of judicial inquiry by reference to `appeal' or `certiorari.'" *Id*.

108. FLORIDA LAW REVISION COUNCIL, *supra* note 105, at 26, *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 26 (Reporter's Comments). At the time of the APA's adoption, there were a vast assortment of statutes that provided for review of administrative rulings. *E.g.,* FLA. STAT. §§ 458.123, 459.141 (1973) (authorizing certiorari review in district court of appeal of orders of Board of Medical Examiners and Board of Osteopathic Medical Examiners); *id*. § 461.10 (authorizing certiorari review in circuit court of revocation order by Board of Podiatry Examiners); *id*. § 464.21(6) (prescribing unspecified review in Leon County circuit court of disciplinary orders by Board of Nursing); *id.* § 471.28 (prescribing certiorari review in circuit court of revocation orders by Board of Professional Engineers and Land Surveyors); *id*. § 527.17 (prescribing unspecified review in First District Court of Appeal of Department of Insurance orders pertaining to liquified petroleum gas).

109. FLORIDA LAW REVISION COUNCIL, *supra* note 105, at 26–27, *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 26–27 (Reporter's Comments). In the immediate aftermath of the APA, the Florida courts were forced to apply rule 4.1 and to treat the petitions for review as certiorari petitions, with all attendant procedural niceties that appertained to such petitions still required. Shevin *ex rel.* State v. Public Service Comm'n, 333 So. 2d 9, 11 (Fla. 1976); Yamaha Int'l Corp. v. Ehrman, 318 So. 2d 196, 197 (Fla. 1st Dist. Ct. App. 1975).

110. 1 ENGLAND & LEVINSON, *supra* note 104, § 1.03(b).

111. *In re* Proposed Florida Appellate Rules, 351 So. 2d 981, 982 (Fla. 1977).

thereby to enable section 120.68.[112]

Rule 9.100(c) nonetheless recognizes two forms of certiorari: "A petition for writ of common law certiorari," and a "petition for review of final quasi-judicial action of agencies, boards and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari."[113] Both types of petitions must be filed within thirty days of rendition of the order to be reviewed on certiorari.[114]

While the rules did not endow the district courts of appeal with jurisdiction to review administrative action,[115] the vision behind the APA's judicial review provision of "characterizing all forms of review under one label" was realized with their implementation.[116] Common law certiorari was fully supplanted for review of agencies which

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112. "Administrative action" is defined in rule 9.020(a):

> An order of any public official, including the governor in the exercise of all executive powers other than those derived from the constitution, or of a judge of compensation claims on a claim for birth-related neurological injuries, or of any agency, department, board, or commission of the state or any political subdivision, including municipalities.

FLA. R. APP. P. 9.020(a). This definition "was intended to include all administrative agency action as defined in the Administrative Procedure Act." FLA. R. APP. P. 9.020(a) committee notes (1977), *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 2 (Relevant Appellate Rules); *see infra* note 118 and accompanying text. Rule 9.030(b)(1)(C) authorizes the direct review in the district courts of appeal that is reflected in § 120.68(2). Rule 9.030(c)(1)(C) provides for direct appellate review in the circuit courts of administrative action "if provided by general law." FLA. R. APP. P. 9.030(b)(1)(C), (c)(1)(C); *see supra* note 100.

113. FLA. R. APP. P. 9.100(c)(1), (2).

114. *Id.* Rule 1.630(c) of the Florida Rules of Civil Procedure similarly imposes a thirty-day time limit for certiorari petitions in the circuit courts. *In re* Amendment to Florida Rule of Civil Procedure 1.630(c), 639 So. 2d 22 (Fla. 1994). That rule provides for an abbreviated application of the Rules of Civil Procedure to petitions for extraordinary writs filed before a circuit court, as is appropriate to the forum. FLA. R. CIV. P. 1.630(a), (b), (d), (e). Realistically, "rule [9.100] is difficult [for trial courts] to apply" because the practice and procedure of trial courts is not conducive to appellate proceedings. *In re* Amendments to Rules of Civil Procedure, 458 So. 2d 245, 258 (Fla. 1984) ("Experience has shown that Rule 9.100 is not designed for use in trial court.") (quoting commentary to proposed rule). The amendment retains "the uniform procedure concept of Rule 9.100" but institutes "changes making the procedure fit trial court procedure." *Id*. (quoting commentary to proposed rule). "[P]ractice under rule 1.630 is intended to be, to a great extent, parallel to the practice in ordinary civil cases." Board of Trustees v. Mendelson, 601 So. 2d 594, 596 (Fla. 1st Dist. Ct. App. 1992).

115. *See* FLA. R. APP. P. 9.030 committee notes ("This rule is not intended to affect the substantive law governing the jurisdiction of any court and should not be considered as authority for the resolution of disputes concerning any court's jurisdiction."), *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 8 (Relevant Appellant Rules).

116. 2 ENGLAND & LEVINSON, *supra* note 104, § 15.02.

were brought within the scope of the APA.[117]

III. PRESENT-DAY JUDICIAL REVIEW OF LAND USE DECISIONS: AN UNHEALTHY AMALGAM OF REMEDIES

The preceding section has explicated the vast strides made in recent years to reform judicial review of the quasi-judicial acts of administrative agencies. The land use decisions of local governments, however, have been left behind in this movement toward a rational approach to remedies in the administrative context.

A. The Administrative Procedures Act and Common Law Certiorari

The APA defines "agency" as the governor; state officers, boards, and agencies; and "[e]ach other unit of government in the state, including counties and municipalities, to the extent they are *expressly made subject to this act* by general or special law or existing judicial decisions."[118] Absent a general or special enactment of the Florida Legislature, a city or county commission is not an agency under the APA.[119] Section 166.021 of the *Florida Statutes* sets forth the powers of Florida municipalities, but does not designate any municipal governmental unit as an agency for the purposes of the

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117. Where certiorari had once been the exclusive remedy for quasi-judicial agency action, the APA dictated that, "in the vast majority of cases, the sole method of challenging agency action . . . as it affects the substantial interests of a party is by petition for review to the appropriate District Court of Appeal." School Bd. v. Mitchell, 346 So. 2d 562, 567–68 (Fla. 1st Dist. Ct. App. 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978). The right to seek relief through an independent declaratory action, while not wholly vitiated, was strictly limited. *See* FLA. STAT. § 120.73 (1993); Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc., 361 So. 2d 695 (Fla. 1978); State *ex rel.* Department of Gen. Servs. v. Willis, 344 So. 2d 580 (Fla. 1st Dist. Ct. App. 1977).

118. FLA. STAT. § 120.52(1)(a)–(c) (1993) (emphasis added). The exclusion of local governmental units was deliberate:

> Local and regional government units of all types are brought under the act to the extent that the legislature chooses to do so by separate enactments . . . . Variations among these types of agencies are so widespread, both in functions and in resources, that their general inclusion in the proposed act does not seem warranted. The approach of the proposed act will allow selective inclusion after an opportunity for legislative analysis and debate . . . .

FLORIDA LAW REVISION COUNCIL, *supra* note 105, at 9, *reprinted in* 3 ENGLAND & LEVINSON, *supra* note 104, app. at 9 (Reporter's Comments).

119. Hill v. Monroe County, 581 So. 2d 225, 226–27 (Fla. 3d Dist. Ct. App. 1991).

APA, and no local law seems to have done so.[120]

Rule 9.110 of the Florida Rules of Appellate Procedure sets forth only the procedure to be used for review of administrative action which is appealable under general law, and neither does, nor could, prescribe jurisdiction.[121] The reported decisions recognize the exclusion of local governmental units from the APA and uniformly hold that certiorari is the only available remedy for quasi-judicial land use rulings.[122]

With the advent of *Board of County Commissioners v. Snyder*, common law certiorari has been enlarged far beyond its prior scope. For the first time, at least on a statewide basis, site-specific rezonings are *included* within the range of quasi-judicial decisions that are subject to review by certiorari.[123] Rezonings, site plans, building permits, and all other development orders are now subject to review by common law certiorari under the standards established in *Snyder*.[124]

Common law certiorari is, as has been set forth earlier, a *dis-*

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120. *See* FLA. STAT. § 166.021 (1993).

121. *See supra* note 115. Because the circuit courts, even under FLA. R. APP. P. 9.030(c)(1)(C), only have appellate jurisdiction over administrative action "if provided by general law" – and no general law provides for such jurisdiction – rule 9.110 is a dead letter in the circuit court context. Nonetheless, a fair number of reported cases treat proceedings in the circuit court for review of local government land use orders as "appeals" – albeit without any identifiable statutory basis. *E.g.*, Maturo v. City of Coral Gables, 619 So. 2d 455, 456 (Fla. 3d Dist. Ct. App. 1993) (involving district court certiorari review of circuit court decision on appeal from city's grant of zoning variances); DeSmedt v. City of North Miami Beach, 591 So. 2d 1077, 1078 (Fla. 3d Dist. Ct. App. 1991) (ordering circuit court to treat as appeal a mistakenly filed declaratory action challenging city's site plan, under authority of FLA. R. APP. P. 9.030(c)(1)(A)).

122. *E.g.*, Rubinstein v. Sarasota County Pub. Hosp. Bd., 498 So. 2d 1012 (Fla. 2d Dist. Ct. App. 1986); Sporl v. Lowrey, 431 So. 2d 245 (Fla. 1st Dist. Ct. App. 1983); Ceslow v. Board of County Comm'rs, 428 So. 2d 701 (Fla. 4th Dist. Ct. App. 1983); Cherokee Crushed Stone, Inc v. City of Miramar, 421 So. 2d 684 (Fla. 4th Dist. Ct. App. 1982); *see* Cohn v. Zoning Bd. of Appeals, 420 So. 2d 403 (Fla. 4th Dist. Ct. App. 1982); Sweetwater Util. Corp. v. Hillsborough County, 314 So. 2d 194 (Fla. 2d Dist. Ct. App. 1975).

123. Board of County Comm'rs v. Snyder, 627 So. 2d 469, 474–75 (Fla. 1993); *see infra* notes 203–04 and accompanying text.

124. *See* Park Commerce Assocs. v. City of Delray Beach, 636 So. 2d 12 (Fla. 1994); Florida Inst. of Technology, Inc. v. Martin County, 641 So. 2d 898 (Fla. 4th Dist. Ct. App. 1994). A development order is "any order granting, denying, or granting with conditions an application for a development permit," and a development permit is "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." FLA. STAT. § 163.3164(6), (7) (1993).

cretionary writ.[125] Applying that fundamental principle literally, unsuccessful applicants for county and municipal development orders (and the local government itself, if the applicant prevails over staff recommendations) are bereft of a right to call upon the courts for review; they are left only to invoke the court's discretion to issue its extraordinary writ of certiorari.[126]

In an apparent effort to sidestep this unpalatable result, the Fourth District Court of Appeal, in *Cherokee Crushed Stone, Inc. v. City of Miramar*, attempted to create a right to *mandatory* review on certiorari by an application of a prior decision, which had been approved by the supreme court.[127] The issue in the prior decision, *City of Deerfield Beach v. Vaillant*, concerned the jurisdiction of the district courts of appeal to review circuit court orders entered on review of local government quasi-judicial actions.[128] The district court held that certiorari was the appropriate vehicle.[129] The supreme court upheld the court's ruling, finding that "[w]here a party is entitled as a matter of right to seek review in the circuit court from administrative action," subsequent review in the district court of appeal must be by certiorari and must be limited to a determination of whether the circuit court accorded due process and applied the correct rule of law.[130]

In *Cherokee Crushed Stone,* the Fourth District Court of Appeal seized on the language in *Vaillant* and held that, although review by certiorari is generally afforded when there is *no* entitlement to review as a matter of right, the court would nonetheless "interpret the supreme court's holding in *Vaillant* as impliedly affirming [the] underlying premise . . . that *review by certiorari under these circumstances is mandatory, not discretionary*."[131] When, however, one

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125. *See supra* notes 41, 65.

126. *E.g.*, Boalt v. City Comm'rs, 408 So. 2d 1080, 1082 (Fla. 3d Dist. Ct. App. 1982) (noting that "by definition, certiorari review is not direct appellate review and is not provided for by law, but, entirely to the contrary, is only available, at the discretion of the court, when there is no other right to review provided by law").

127. Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684 (Fla. 4th Dist. Ct. App. 1982).

128. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 625 (Fla. 1982), *approving* 399 So. 2d 1045 (Fla. 4th Dist. Ct. App. 1981).

129. City of Deerfield Beach v. Vaillant, 399 So. 2d 1045, 1047 (Fla. 4th Dist. Ct. App. 1981).

130. *Vaillant*, 419 So. 2d at 626.

131. *Cherokee Crushed Stone*, 421 So. 2d at 689 (emphasis added).

looks to the fourth district's *Vaillant* decision for the source of the "mandatory" right of review in that case, it is revealed as a municipal ordinance.[132] The court in *Cherokee Crushed Stone* thus read *Vaillant* completely out of context in finding therein a heretofore unknown right of mandatory review on common law certiorari.

Indeed, while declaring that the administrative action in *Cherokee* (a ruling on a request for a special exception) was not subject to direct review, the court – in all but name – afforded the aggrieved party that right.[133] The essential distinction between certiorari and appeal is that there *is* a mandatory right of review on appeal. "[Certiorari] is a discretionary writ used to determine whether the essential requirements of the law have not been complied with to the material injury of petitioner. An appeal or writ of error is taken as a matter of right to have determined whether harmful error has been committed."[134] It is the very nature of common law certiorari to allow discretion in the decision whether to grant the writ, and it is this discretion that is at the very heart of the distinction between review on appeal and common law certiorari.[135] If indeed it is common law certiorari that is being used by the courts in their scrutiny of local government land use orders, then any notion of *mandatory* review cannot be sustained.

B. Statutory Certiorari

1. Overview

In the pre-*Snyder* era, despite the protestations by the courts that rezoning was legislative, rezoning decisions were reviewed on

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132. *Vaillant*, 399 So. 2d at 1046. "[T]he `Civil Procedure for Appeals' written up for Deerfield Beach provides for review of Civil Service Board decisions by `petition [to] the Circuit Court for a review by certiorari.' However, this is not a discretionary review and inescapably the circuit court must review it." *Id.* (citations omitted). The ramifications of special acts and ordinances that purport to authorize various forms of appellate review will be addressed in the next section.

133. *See Cherokee Crushed Stone*, 421 So. 2d at 685 ("there is no provision of general or special law permitting appeal of this municipality's administrative action to the circuit court").

134. State v. Furen, 118 So. 2d 6, 12 (Fla. 1960) (citations omitted); *accord* City of Fort Lauderdale v. Couts, 239 So. 2d 874 (Fla. 4th Dist. Ct. App. 1970); Arvida Corp. v. City of Sarasota, 213 So. 2d 756 (Fla. 2d Dist. Ct. App. 1968).

135. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983). Indeed, "[a] district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law." *Id*.

certiorari.[136] This was usually done, however, not on a principled distinction between one type of rezoning proceeding and another, but usually because a special act, charter, or zoning ordinance provided for certiorari review.[137] The example presented by the *Vaillant* decision is particularly trenchant: the entire basis for the court's holding that a mandatory right to review existed in common law certiorari was a municipal ordinance.[138]

Intrusion by legislative bodies into the operation and use of the writ of certiorari has a long history in Florida. In 1915, the Florida Legislature passed an act creating civil courts of record and restated the supreme court's certiorari jurisdiction with regard to second-level appeals from the newly-created courts.[139] However, the legislature also directed that, on certiorari to review an appellate decision of the circuit court rendered on an appeal from the civil court of record, the supreme court would have "the same power and authority in the case as if it had been carried by writ of error to the Supreme Court."[140] This statute prompted a swift response from the supreme court. Choosing to ignore the statutory command, the court held that it would, "on writs of certiorari issued within the discretion of the court, review and determine all matters that may properly be done on such writs as their appropriate scope and use have been or may be developed by the decisions of this court."[141] The court adhered to this view, later observing that the statute could not be interpreted to enlarge or extend the court's appellate jurisdiction.[142]

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136. *See* La Croix, *supra* note 59, at 105.

137. *Id.* In other instances, "site specific rezonings have, for no apparent reason, been reviewed in certiorari proceedings." Paul R. Gougelman III, *The Death of Zoning as We Know It*, FLA. B.J., Mar. 1993, at 25.

138. City of Deerfield Beach v. Vaillant, 399 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1981), *approved*, 419 So. 2d 624 (Fla. 1982); *see supra* note 132.

139. 1915 Fla. Laws ch. 6904, § 13 (codified at FLA. REV. GEN. STAT. § 3322 (1920)).

140. *Id*. The common law writ of error was the equivalent of the proceeding now called an appeal; it provided "a means of having the judgment and record reviewed by a higher court," while "[a]n appeal at common law was in the nature of a trial de novo in a court of superior jurisdiction." State v. Creighton, 469 So. 2d 735, 740 n.6 (Fla. 1985) (citation omitted). The writ of error was abolished in 1945 by the enactment of § 59.01(3) of the *Florida Statutes*, which provided instead for review by appeal. FLA. STAT. § 59.01(3) (1945)); *see* Crownover v. Shannon, 170 So. 2d 299, 301–02 (Fla. 1964).

141. American Ry. Express v. Weatherford, 98 So. 820, 822–23 (Fla. 1924).

142. Atlantic Coast Line R. v. Florida Fine Fruit Co., 112 So. 66, 68 (Fla. 1927). The court carefully noted that there could be no distinctions drawn in the scope of its review based upon legislative direction and stated, "whether or not a cause brought here for review, under the act or otherwise, presents a case cognizable for this court to review on

Thereafter, in *Brinson v. Tharin*, the court directly confronted the statute.[143] Included within the statutory provisions was a requirement that a certiorari petition be filed within thirty days of the rendition of the circuit court's judgment on appeal from an inferior tribunal.[144] The petition in *Brinson* was filed outside of these time limits, but the court firmly rebuffed a motion to quash because of that dereliction. The court reasoned that the power to issue the writ could not be altered or regulated by statute because it was conferred by the constitution.[145] Legislative time limitations could not be superimposed on the court's power to issue the writ *at any time* in order to correct a lower court's failure to observe the essential requirements of the law.[146]

The legislature nonetheless continued to create statutes authorizing and/or regulating certiorari proceedings, such that by 1951 the subject of certiorari review was embraced in "two constitutional provisions, fourteen statutory provisions, six Supreme Court rules, one common law rule, and more than two hundred fifty Supreme Court decisions."[147] The supreme court itself added to the doctrinal confusion in 1940, declaring that a distinction existed between *common law* and *statutory* certiorari. The application of common law certiorari was limited, said the court, "to cases in which the inferior court was said to be exceeding its jurisdiction or was not proceeding according to the essential requirements of law."[148] The court noted that common law certiorari had been extended beyond its original scope by statute and through judicial interpretation to include within its ambit state boards, administrative tribunals, and other agencies.[149]

Remarking on the flood of legislative enactments, a contemporary writer observed that the certiorari statutes were both superfluous, in that they purported to bestow the same jurisdiction as the constitution and, to the extent that de novo review was provided

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writ of certiorari must depend on the showing made in the individual petition." *Id*.

143. Brinson v. Tharin, 127 So. 313 (Fla. 1930).

144. FLA. REV. GEN. STAT. § 3322 (1920), *reenacted as* FLA. COMP. GEN. LAWS § 5167 (later codified at FLA. STAT. § 33.12 (1949), repealed by 1972 Fla. Laws ch. 404).

145. *Brinson*, 127 So. at 316.

146. *Id*.; *accord* Edwards v. Knight, 132 So. 459 (Fla. 1931).

147. Rogers & Baxter, *supra* note 44, at 477.

148. Greater Miami Dev. Corp. v. Pender, 194 So. 867, 868 (Fla. 1940).

149. *Id.*

thereby, a significant departure from the traditional role and function of certiorari.[150] The commentator was moved to suggest that the legislature had intruded too far on the writ and questioned whether the "statutes prescribe[d] new types of statutory `certiorari,' in which controversies are to be retried on both the facts and the law rather than reviewed on limited legal questions[.] If so, the word `certiorari' has lost all meaning."[151] At the present time, there remain a goodly number of statutory certiorari provisions in the *Florida Statutes*.[152]

2. Prior General Laws Governing Certiorari Review of Local Government Land Use Orders

Section 176.16 of the *Florida Statutes* provided for statutory certiorari review of quasi-judicial local government land use orders.[153] The statute required an affirmative act of the local govern-

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150. Rogers & Baxter, *supra* note 44, at 490; *see* FLA. STAT. § 176.16 (1949).

151. Rogers & Baxter, *supra* note 44, at 490.

152. *See* FLA. STAT. § 112.317(2) (1993) (providing certiorari in district court of appeal for review of civil penalties imposed by state Ethics Commission); *id*. § 125.018 (providing "impositions and exactions" by county taxation authority are subject to review by certiorari); *id*. § 165.081 (providing special laws and ordinances pertaining to incorporation or dissolution of local governments "shall be reviewable by certiorari"); *id*. § 171.081 (providing aggrieved party in municipal annexation or contraction may seek review by certiorari in circuit court); *id*. § 190.046(5) (providing board of supervisors of community development district may seek certiorari review in circuit court of local government's transfer plan ordinance); *id*. § 212.16(9) (providing claimant of goods seized for noncompliance with permit requirements for importation of goods into state by means other that common carrier may seek review by certiorari of confiscation decision); *id*. § 320.781(7) (providing mobile home trust fund payment of unsatisfied judgment against mobile home dealer or broker "shall be reviewable only by writ of certiorari" in circuit court); *id*. § 321.051 (providing orders of highway department denying, suspending, or revoking a wrecker operator's permit reviewable "only by a writ of certiorari" in circuit court); *id*. §§ 322.2615(13), .31, .64(13) (providing driver license suspensions and revocations reviewable by certiorari); *id*. § 333.11(1) (providing airport zoning decisions reviewable by certiorari in circuit court); *id*. § 337.404 (providing order directing relocation of utility facilities reviewable by certiorari in circuit court or under APA if respondent is agency covered by Act); *id*. § 601.152(5)(a) (providing special marketing orders of Citrus Commission reviewable by certiorari in district court of appeal).

153. FLA. STAT. § 176.16 (1963) (originally enacted as 1939 Fla. Laws ch. 195, § 9). Originally, the statute had set a thirty-day time limit for filing the petition. Sunset Islands 3 & 4 Ass'n v. City of Miami Beach, 214 So. 2d 45, 46 (Fla. 3d Dist. Ct. App. 1968). In 1963, the statute was amended to require the petition for certiorari be filed "within the time provided by the Florida appellate rules." FLA. STAT. § 176.16 (1963) (amended by 1963 Fla. Laws ch. 512, § 44).

ment electing to proceed under its provisions.[154] The certiorari created by section 176.16 was, however, not orthodox.[155] The circuit court was permitted to hear new evidence, to enter original findings of fact, and to determine independently whether the order at issue was correct.[156] Certiorari under section 176.16 was thus very similar to an original proceeding.[157]

By its terms, the statute did not exclude from its ambit rezoning or other large-scale land use orders of county commissions and similar bodies; however, so strong was the view that rezoning was legislative that the courts readily held section 176.16 inapplicable to rezoning orders.[158] Original suits in equity remained the appropriate means for directly challenging a county or city commission's zoning resolutions.[159]

Section 176.16 was repealed in 1973, when the legislature enacted the Municipal Home Rule Powers Act.[160] It was replaced by section 163.250 of the *Florida Statutes*, which gave a dissatisfied party a choice of two remedies: a trial de novo or certiorari.[161] Fol

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154. FLA. STAT. § 176.16 (1963). Section 176.24 of the *Florida Statutes* provided that the remedies were "supplemental and cumulative." *Id*. § 176.24. The Florida Supreme Court, interpreting that statute, held that "[u]nless a city elects to proceed under Chapter 176, . . . it is not bound by its provisions." Thompson v. City of Miami, 167 So. 2d 841, 843 (Fla. 1964). Once adopted by a municipality, however, the statute (and its attendant time limitations) were binding. *E.g.,* Carlson v. Town of West Miami, 118 So. 2d 835, 836 (Fla. 3d Dist. Ct. App. 1960).

155. Josephson v. Autrey, 96 So. 2d 784, 787 (Fla. 1957); *accord* Dade County v. Markoe, 164 So. 2d 881 (Fla. 3d Dist. Ct. App. 1964), *cert. denied*, 172 So. 2d 454 (Fla. 1965); Union Trust Co. v. Lucas, 125 So. 2d 582 (Fla. 2d Dist. Ct. App. 1960).

156. *Josephson*, 96 So. 2d at 787. Section 176.19 of the *Florida Statutes* provided:

> If, upon hearing, it shall appear to the court that the testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

FLA. STAT. § 176.19 (1963).

157. *Josephson*, 96 So. 2d at 787.

158. *See, e.g.*, Dade County v. Carmichael, 165 So. 2d 227 (Fla. 3d Dist. Ct. App. 1964); Harris v. Goff, 151 So. 2d 642 (Fla. 1st Dist. Ct. App. 1963); Village of Pembroke Pines v. Zitreen, 143 So. 2d 660 (Fla. 2d Dist. Ct. App. 1962).

159. *Harris*, 151 So. 2d at 745.

160. *See* FLA. STAT. §§ 166.011–.411 (1993) (originally enacted as 1973 Fla. Laws 129, § 5(1)).

161. FLA. STAT. § 163.250 (1973). The statute provided in pertinent part: "Review in the circuit court shall be either by a trial de novo, which shall be governed by the Florida Rules of Civil Procedure, or by petition for writ of certiorari, which shall be governed by the Florida Appellate Rules. The election of remedies shall lie with the appel-

lowing in the tradition of section 176.16, the legislature gave local governments the option of electing to proceed under this section by the passage of an appropriate ordinance.[162]

Section 163.250 was viewed as the functional equivalent of section 176.16, but the legislature's line of demarcation between certiorari and de novo review had the effect of returning certiorari to something that resembled its common law form.[163] Certiorari no longer had the attributes of an original proceeding that had attached under section 176.19, and a party who elected to proceed by certiorari waived the broader scope of review that would be available in a de novo trial under the statute.[164] A party that elected to proceed by certiorari under section 163.250 was invoking a very narrow remedy: the scope of review was "limited to a determination of whether the zoning action is arbitrary, discriminatory, or unreasonable."[165]

If, however, a local government chose not to elect section 163.250 remedies, common law certiorari remained the only mode of review for quasi-judicial land use orders.[166] With the repeal of sec-

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lant." *Id*.

162. *Id*. §§ 163.175, .315. The election provision of the statute did not, however, require a specific adoption of § 163.250 by the local government unit. In Boalt v. City Comm'rs, 408 So. 2d 1080 (Fla. 3d Dist. Ct. App. 1982), the dispositive question was whether the city of Miami had elected to proceed under § 163.250 because the unsuccessful applicant for a variance sought review in circuit court by a trial de novo under the statute. *Id.* at 1081. Although the city strenuously contended that it had *not* elected the § 163.250 remedies, the court held to the contrary. *Id.* at 1081–83. It is possible that this sort of litigation, *see id*., hastened the ultimate demise of § 163.250 and the "local option" approach to the review of land use orders. *See infra* note 167 and accompanying text.

163. *Boalt*, 408 So. 2d at 1082.

164. Odham v. Petersen, 398 So. 2d 875, 876–77 (Fla. 5th Dist. Ct. App. 1981), *approved,* 428 So. 2d 241 (Fla. 1983). The fifth district's decision pre-dated the supreme court's ruling in City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982), that second-level review of local government administrative action must be by common law certiorari. *Id*. at 625. Accordingly, when *Odham* was before the supreme court on discretionary review, the court disapproved "only that portion of the Fifth District Court's decision which conflict[ed] with *Vaillant*." Odham v. Petersen, 428 So. 2d 241, 241 (Fla. 1983).

165. Bell v. City of Sarasota, 371 So. 2d 525, 527 (Fla. 2d Dist. Ct. App. 1979) (citation omitted).

166. *See* City of Lakeland v. Florida S. College, 405 So. 2d 745 (Fla. 2d Dist. Ct. App. 1981); Grefkowicz v. Metropolitan Dade County, 389 So. 2d 1041 (Fla. 3d Dist. Ct. App. 1980); G-W Dev. Corp. v. Village of North Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828 (Fla. 4th Dist. Ct. App. 1975). Under this view, the provision in article V, § 5(b) of the Florida Constitution for "direct review of administrative action prescribed by general law" authorized statutory certiorari as something distinct and apart from the

tion 163.250 in 1985, statutory certiorari as a separate remedy provided by general law disappeared.[167]

3. Special Laws

There are a legion of special laws enacted by the legislature while the 1885 constitution was in force that established zoning boards and other bodies in various counties. Many of those laws set forth mechanisms for judicial review of land use orders.[168] Special laws were governed by article III, section 20 of the 1885 constitution, under which the legislature was prohibited from enacting special laws "regulating the practice of the courts of justice, except municipal courts."[169] The constitution required such regulation to be by general law, to achieve "uniform operation throughout the State."[170]

Under the 1885 constitution, the legislature was empowered to establish, by general law, time limitations and other procedural

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separate jurisdiction to issue writs of certiorari.

> They cannot . . . possibly refer to one and the same power, because, by definition, certiorari is not direct appellate review and is not provided for by law . . . .
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> Once it is determined that the Constitution confers two separate types of certiorari jurisdiction upon the circuit court, there is no problem in concluding that where the legislature fails to provide for statutory review, or statutory certiorari as it is called, common law certiorari is still available.
>
> . . . Wherever the legislature has seen fit to vest the circuit court with statutory certiorari jurisdiction, such jurisdiction is independent and cumulative . . . .

G-W Dev. Corp., 317 So. 2d at 831 (citations omitted); *see* Reed v. City of Hollywood, 483 So. 2d 759 (Fla. 4th Dist. Ct. App. 1986).

167. 1985 Fla. Laws ch. 55 (repealing FLA. STAT. § 163.250 (1983)); *see G-W Dev. Corp.*, 317 So. 2d at 831. "[W]here the statutory remedy . . . is simply rescinded . . . common law certiorari is still available to review, at least to the limited extent that review is permitted under the writ, the quasi-judicial action of inferior tribunals." *Id*.

168. *See* 1973 Fla. Laws ch. 1132, § 10 (Bradford County); 1963 Fla. Laws ch. 1822, §§ 7, 15 (Polk County); *id*. ch. 1716, § 16 (Orange County); *id*. ch. 1563, § 7 (Leon County); 1961 Fla. Laws ch. 2990, § 16 (Washington County); *id*. ch. 2901, § 8 (Sumter County); *id*. ch. 2728, § 8 (Putnam County); *id*. ch. 2405, § 10 (Lee County); 1959 Fla. Laws ch. 1176, § 8 (Citrus County); *id*. ch. 1158, § 3(i) (Broward County).

169. FLA. CONST. of 1885, art. V, § 20. The Florida Supreme Court, early in the life of the 1885 constitution, differentiated between special laws and general laws. "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition." Bloxham v. Florida Cent. & Peninsular R.R., 17 So. 902, 924–25 (Fla. 1895).

170. FLA. CONST. of 1885, art. III, § 21.

constraints to govern judicial proceedings.[171] Moreover, the supreme court accorded the legislature great deference in the enactment of special laws that affected judicial review by limiting the definition of "practice" to "the method of conducting litigation involving rights and corresponding defenses."[172] Under this generous standard, the court readily upheld special laws that affected the conduct of judicial proceedings.[173]

Even under this deferential approach, however, the supreme court struck as unconstitutional a special act that purported to establish de novo appeals from criminal convictions in the St. Augustine municipal courts.[174] The court held that the special act improperly regulated the practice of the circuit court sitting in its appellate capacity.[175]

Similarly, in *Board of County Commissioners v. Casa Development Ltd. II*, the court held unconstitutional a special act that purported to give the circuit court appellate jurisdiction over any rule, regulation, or action promulgated by the county commission.[176] Relying on the constitutional provision that the jurisdiction of the state's circuit courts is uniform,[177] the court held that circuit courts "have jurisdiction of appeals and the power of direct review of administrative action" only as provided through general law.[178] Because the legislature had attempted to enlarge the jurisdiction of the circuit court through a special act, the court ruled that the act "was ineffective to confer jurisdiction on the circuit court to hear an appeal from [a] commission order."[179]

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171. *E.g.,* Sinclair Ref. Co. v. Hunter, 191 So. 38, 40 (Fla. 1939) ("[I]t has ever been recognized that it is competent for the legislature to prescribe the time within which writs of error should be sued out after judgment . . . .").

172. Skinner v. City of Eustis, 2 So. 2d 116, 116 (Fla. 1941).

173. *See, e.g.*, Olivier v. City of St. Petersburg, 65 So. 2d 71, 72–73 (Fla. 1953) (upholding special act barring tort actions against city without written notice to city manager within sixty days after injury).

174. Neely v. City of St. Augustine, 170 So. 2d 291, 293 (Fla. 1964).

175. *Id.* at 292–93.

176. Board of County Comm'rs v. Casa Dev. Ltd. II, 332 So. 2d 651, 653 (Fla. 2d Dist. Ct. App. 1976).

177. FLA. CONST. art. V, § 5(b).

178. *Casa Dev. Ltd.*, 332 So. 2d at 654.

179. *Id.* at 653. In Harley v. Board of Pub. Instruction, 103 So. 2d 111 (Fla. 1958), the court addressed the provisions of the Duval County Teacher Tenure Act, which imposed a 10-day time limitation for certiorari petitions by discharged teachers. *Id*. at 112; *see* 1941 Fla. Laws ch. 21,197. The petition in that case was dismissed as untimely; the court rejected the petitioner's argument that he could avail himself of a 60-day time

Of the special acts that established zoning boards and other bodies in several counties,[180] most simply provide for an unspecified form of judicial review in the circuit courts.[181] Judicial review under this sort of special act is treated as common law certiorari.[182] Other special acts, however, seem to authorize a form of statutory certiorari, most notably the Orange County zoning act, which has received considerable attention from the Fifth District Court of Appeal.[183]

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limit set forth in the 1954 Rules of Civil Procedure. *Harley*, 103 So. 2d at 112. The court held that the Duval County act was a "special statutory proceeding" and as such was exempted from the purview of the Rules of Civil Procedure. *Id*. Therefore, the statutory time limitation controlled. *Id*. The Duval County act survived the APA as the exclusive remedy for county teachers seeking review of discharge orders. Alford v. Duval County Sch. Bd., 324 So. 2d 174, 177 (Fla. 1st Dist. Ct. App. 1975); *accord* Denson v. Sang, 491 So. 2d 288 (Fla. 1st Dist. Ct. App. 1986); Seitz v. Duval County Sch. Bd., 346 So. 2d 644, 645 n.1 (Fla. 1st Dist. Ct. App. 1977). Its constitutionality has not, however, been re-evaluated since the adoption of article V, § 5(b) of the Florida Constitution in 1972.

180. *See supra* note 168.

181. *E.g.*, 1963 Fla. Laws ch. 1132, § 10 (Bradford County zoning act); *see id*. ch. 1563, § 7 (Leon County); 1961 Fla. Laws ch. 2901, § 7 (Sumter County); *id*. ch. 2728, § 8 (Putnam County); *id*. ch. 2405, § 9 (Lee County); 1959 Fla. Laws ch. 1176, § 10 (Citrus County). The special act for Washington County, in a slight variation, provides for relief to be sought by "a verified petition setting forth the facts and specifying the grounds of illegality" in the circuit court within 30 days of the board's decision. 1961 Fla. Laws ch. 2991, § 16.

182. Teston v. City of Tampa, 143 So. 2d 473, 475–76 (Fla. 1962); Dabbs v. City of Tampa, 613 So. 2d 1378, 1379–80 (Fla. 2d Dist. Ct. App.), *rev. denied*, 623 So. 2d 493 (Fla. 1993). In Grady v. Lee County, 458 So. 2d 1211 (Fla. 2d Dist. Ct. App. 1984), the Second District Court of Appeal held that the Lee County act could not truncate a petitioner's right to seek common law certiorari. *Id*. at 1212; *see* 1961 Fla. Laws ch. 2405, § 10. The issue arose because the petition was filed 30 days after a request for rehearing was denied by the county commission. While the act does not allow for an extension of its 30-day time limit, the definition of rendition in the Florida Rules of Appellate Procedure, which is applicable to common law certiorari, permitted the petition to be filed within 30 days from the denial of rehearing. *Id.* at 1212; *see* FLA. R. APP. P. 9.020(g), 9.100(c). Holding that "neither the special act nor the ordinance can affect the plaintiffs' right to certiorari review by the circuit court," the court ruled that the circuit court had erred in dismissing the petition as untimely. *Grady*, 458 So. 2d at 1212 (citing City of Lakeland v. Florida S. College, 405 So. 2d 745 (Fla. 2d Dist. Ct. App. 1981)). The court, however, observed that the scope of review on common law certiorari might be less generous: "Although treating the plaintiffs' complaint as a petition for common law writ of certiorari will not afford the plaintiffs the scope of review which they seek, nevertheless it will provide them with a vehicle for judicial review of the action of the County Commissioners." *Id*. The opinion does not explicate in what manner the scope of review is more restricted on common law certiorari than on the unspecified "review" set forth in the special act. *See id*.; 1961 Fla. Laws ch. 2405, § 9. The murky underpinnings of the decision have been noted in La Croix, *supra* note 59, at 107–08.

183. *See* 1963 Fla. Laws ch. 1716. Another special act established a Planning and Zoning Board in Polk County and authorizes appeals from that board to the county com-

The act provides for certiorari review, instigated by a "notice of intention" within ten days after the county commission's adverse decision.[184]

The Fifth District Court of Appeal has construed this form of statutory certiorari as consistent with common law certiorari, but also as a nonexclusive remedy.[185] In *Battaglia Fruit Co. v. City of Maitland*, the Maitland Homeowners' Association, which sought review of an Orange County commission order, failed timely to file the statutory notice and the Fifth District held that this omission deprived the association of its right of review under the statute.[186] The court continued, however, to address the association's possible entitlement to common law certiorari review, ultimately holding that the petition had been untimely under the appellate rules.[187]

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mission. 1963 Fla. Laws ch. 1822, §§ 1, 7. Review of commission decisions on such appeals is in the Polk County Circuit Court by "a petition for certiorari, duly verified, setting forth that such decision is illegal or inequitable" filed within 30 days of the order sought to be reviewed. *Id.* § 7. The act also authorizes certiorari review in the circuit court of decisions by the Board of Adjustments, under the same conditions. *Id.* § 14. Review in the circuit court is to be conducted under certain statutory provisions which have since been repealed. *Id*. § 15; *see* FLA. STAT. §§ 176.17–.20 (1963) (repealed 1973). These unique procedural aspects of the act do not appear to have been addressed in reported decisions.

The Broward County act requires application for a writ of certiorari to be made within five days after an adverse decision. 1959 Fla. Laws ch. 1158, § 5(i). This highly restricted form of statutory certiorari has not been the subject of appellate interpretation.

184. The act specifically provides that any person aggrieved by a decision of the board of county commissioners "may file a petition for writ of certiorari as provided by the Florida Rules of Civil Procedure in the Circuit Court of Orange County . . . to review the decision. . . . The Court shall not conduct a trial de novo . . . ." 1963 Fla. Laws ch. 1716, § 16.

185. First City Sav. Corp. v. S & B Partners, 548 So. 2d 1156 (Fla. 5th Dist. Ct. App.), *rev. dismissed*, 554 So. 2d 1168 (Fla. 1989). The court noted:

> In a common law certiorari proceeding to review a zoning decision, a circuit court is restricted solely to the record of the proceeding conducted by the zoning authority. Orange County's statutory certiorari also provides for a limited review of the county commission's zoning decisions since a trial de novo is prohibited.

Id. at 1158 (citations omitted).

186. Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 942 (Fla. 5th Dist. Ct. App.), *cause dismissed*, 537 So. 2d 568 (Fla. 1988).

187. *Id*. The court stated:

> The remedy of statutory certiorari is independent and cumulative to common law certiorari. Common law certiorari is available if a statutory remedy fails. However, Maitland Association did not file its petition for certiorari within the 30 day jurisdictional period established by the special act nor within the identical jurisdictional period for common law certiorari by Florida Rule of Appellate

In its most recent review of the Orange County act in *Splash & Ski, Inc. v. Orange County,* the fifth district took a step away from *Battaglia*'s application of the act's ten-day notice rule and also acknowledged the act's vulnerability to constitutional attack.[188] The challenge in *Splash & Ski* was that the act violated constitutional provisions which grant the supreme court sole authority over practice and procedure in the courts.[189]

The court recognized the seriousness of the constitutional issues, noting that "the legislature has the power to alter jurisdiction only by general law."[190] The court expressed concern that, if the Orange County special act were to be viewed as precluding common law certiorari, the act might well be unconstitutional: it is only the supreme court that may establish the time limitations for seeking appellate review.[191] The court also noted the anomaly that, except in Orange County, the circuit court's certiorari jurisdiction is invoked simply by filing a certiorari petition within thirty days.[192] It concluded that "[s]ince we can conjure up no substantive feature for this filing deadline, we conclude it is a procedural requirement unlikely to be sanctioned by the supreme court."[193] The court, however, ac-

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Procedure 9.100(c).

Id. at 942–43 (citations omitted).

In another aspect of the decision, the district court held that the City of Maitland could not seek review by certiorari because it had not appeared before the county commission to demonstrate its standing and present objections to the order. *Id.* at 943; *accord First City Sav. Corp.*, 548 So. 2d at 1158. This holding has been criticized. *See* Gougelman, *supra* note 137, at 30 n.18. Gougelman argued that "[t]he problems faced by [Maitland] in obtaining effective review of zoning actions under certiorari standards is ample proof that the practice should be abolished on policy grounds, if not legal grounds." *Id.* (citation omitted).

188. Splash & Ski, Inc. v. Orange County, 596 So. 2d 491, 492–93 (Fla. 5th Dist. Ct. App. 1992).

189. *Id.* at 493; *see* FLA. CONST. art. V, § 5(b); *id.* art. V, § 2(a). The prohibition against special acts "regulating the practice of the courts of justice" in the 1885 constitution, FLA. CONST. of 1885, art. V, § 20, was replaced in 1972 with a prohibition against special acts pertaining to "rules of evidence in any court." FLA. CONST. art. III, § 11(3). The provision which grants the supreme court authority over practice and procedure, *id.* art. V, § 2(a), recodifies the authority granted by FLA. CONST. of 1885, art. V, § 3 (1957). *See supra* note 77 and accompanying text.

190. *Splash & Ski*, 596 So. 2d at 492 n.2 (citing FLA. CONST. art. V, § 20).

191. *Id.* at 492–93.

192. *Id.* at 494–95.

193. *Id.* at 495. The court rather derisively referred to the 10-day notice deadline as "an effective procedural trap for those who have not figured out that the requirements for certiorari review by a Florida court can be found in a county ordinance instead of the

cepted the petitioner's further contention that his right to common law certiorari remained intact and thereby avoided reaching the constitutional questions.[194]

4. Municipal Ordinances

As appears to have been the case with many local governments that were the beneficiaries of special zoning acts, the Orange County commission adopted the special act as a local ordinance – including the provision for judicial review.[195] This approach is even less constitutionally acceptable than that of using special acts to confer jurisdiction on the Florida courts: the constitutional provision concerning circuit court jurisdiction is utterly inconsistent with this sort of "local option" approach.[196]

The Florida courts consistently have rejected attempts to regulate circuit court jurisdiction through municipal or county ordinances. In *Winn-Dixie Stores, Inc. v. Ferris,* the Fourth District Court of Appeal struck as unconstitutional a Broward County ordinance that purported to give the circuit court jurisdiction to enforce employment discrimination rulings by a county board.[197] Only the constitution and the legislature may confer jurisdiction on the circuit court.[198]

Florida appellate rules." *Id.* at 495 n.12.

194. *Id*. at 494. The court also noted a distinction between statutory and common law certiorari.

> The distinct spheres of statutory and common law certiorari in zoning cases is well recognized. The most common distinction is that the scope of review is greater (or potentially greater) in statutory certiorari, whereas common law certiorari more narrowly limits review to whether the challenged order was entered according to law.

Id. at 493–94 (citations omitted).

195. ORANGE COUNTY, FLA. CODE § 30–46 (1993) (originally enacted in 1965); *see* La Croix, *supra* note 59, at 105 & n.9. With the 1973 adoption of the Municipal Home Rule Powers Act, all special laws "pertaining exclusively to the power or jurisdiction of a particular municipality" became municipal ordinances, except for those special acts addressing matters which are beyond the scope of home rule authority, e.g., subjects "expressly preempted to state . . . government by the constitution or by general law." FLA. STAT. § 166.021(3)(a)–(d), (4), (5) (1993).

196. *See* FLA. CONST. art. V, § 5(b).

197. Winn-Dixie Stores, Inc. v. Ferris, 408 So. 2d 650, 652 (Fla. 4th Dist. Ct. App. 1981), *rev. denied*, 419 So. 2d 1197 (Fla. 1982).

198. *Id*. The legislature may only confer jurisdiction "where authorized by the Constitution." *Id*.; *see* FLA. CONST. art. V, § 5(b); *id*. art. V, § 20; FLA. STAT. § 26.012 (Supp. 1980).

In *Cherokee Crushed Stone, Inc. v. City of Miramar*, the petitioner sought certiorari review in the circuit court based on the purported authority of a municipal ordinance and received a cold reception from the appellate court.[199]

> An ordinance of the municipality authorizes the filing of a petition for writ of certiorari with the circuit court to review agency action. While such an ordinance may confer standing on a party to proceed it may not confer jurisdiction on the circuit court where none otherwise exists nor does it determine the scope of review.[200]

Common law certiorari was, however, afforded to the petitioner.[201]

Dade County is a paradigm of the problem. That county and the Third District Court of Appeal long have been laboratories for land use law,[202] and Dade County historically has been regarded as conducting quasi-judicial proceedings in ruling on rezonings even before the advent of *Snyder*.[203] The Dade County code presently provides that "[z]oning resolutions of the board of county commissioners shall be reviewed by the filing of a notice of appeal" in circuit court.[204] This provision was a departure from the code's earlier specification of certiorari review for land use orders.[205]

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199. Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684, 685 (Fla. 4th Dist. Ct. App. 1982).

200. *Id.*

201. *Id.* at 689.

202. *See* Gougelman, *supra* note 137, at 25; La Croix, *supra* note 59, at 108 n.8.

203. *E.g.*, Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648 (Fla. 3d Dist. Ct. App. 1982). This was viewed as "a notable exception to the general rule" that site-specific rezonings were legislative. Gougelman, *supra* note 137, at 25. It stemmed from the procedural protections afforded for rezonings under the Dade County code, which, the third district noted, were identical to those provided for lesser land use proceedings:

> Each contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses; and it is the existence of these safeguards which makes the hearing quasi-judicial in character and distinguishes it from one which is purely legislative. The procedure utilized by Dade County in zoning matters . . . has quite clearly been recognized as quasi-judicial.

Coral Reef Nurseries, 410 So. 2d at 652–53 (citations and footnote omitted).

204. DADE COUNTY, FLA. CODE § 33-316 (1992).

205. *Id*. In its original incarnation (as adopted in 1961), § 33-316 provided:

> In view of the lack of a legislatively prescribed method to apply to a court of competent jurisdiction to review a decision of the Board of County Commissioners, when adopted pursuant to this article, it is intended that such decisions shall be reviewed by the filing of a petition for writ of certiorari in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in

The amendment of section 33-316 was, apparently, based upon a mistaken reading of the 1977 Rules of Appellate Procedure. That section of the county code was modified in 1979, on the recommendation of the county attorney that the amendment would "bring the Code of Metropolitan Dade County into complete compliance with the new Florida Rules of Appellate Procedure."[206] The recommendation understandably appears to have been grounded on the provision in the appellate rules that circuit courts "shall review, by appeal . . . administrative action if provided by general law."[207] Apparently,

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accordance with the procedure and within the time provided by the Florida Appellate Rules for the review of the rulings of any commission or board . . . .

DADE COUNTY, FLA., ORDINANCE ch. 30 (1961) (amending DADE COUNTY, FLA. CODE § 33-316). Section 33-316 remained essentially unchanged until 1976, when the introductory clause was stricken. *See id*. ch. 74 (1976) ("[z]oning resolutions . . . shall be reviewed by the filing of a petition for writ of certiorari"). The ordinance remained substantively unchanged until 1979, when the review provision for land use orders was changed from certiorari to appeal.

Certiorari under § 33-316 was regarded as "traditional certiorari," Dade County v. Markoe, 164 So. 2d 881, 882 (Fla. 3d Dist. Ct. App. 1964), *cert. dismissed*, 172 So. 2d 454 (Fla. 1965), and an independent action was required when the validity of an ordinance was challenged. *E.g.,* Bama Investors, Inc. v. Metropolitan Dade County, 349 So. 2d 207 (Fla. 3d Dist. Ct. App. 1977), *cert. denied*, 359 So. 2d 1217 (Fla. 1978); Metropolitan Dade County v. Greenlee, 213 So. 2d 485 (Fla. 3d Dist. Ct. App. 1968); *cf*. Ollos v. Dade County, 242 So. 2d 468, 469 (Fla. 3d Dist. Ct. App. 1970) (holding § 33-316 "conforms to the requirement" of appellate rule 4.1 that certiorari be used for review of administrative rulings).

Because of the courts' strict adherence in the pre-*Snyder* era to the fairly debatable standard for the review of rezoning orders, Dade County became something of an anomaly. *See supra* notes 89, 90 and accompanying text. It applied the fairly debatable standard – one devised, and used by all other state courts, for review of quasi-*legislative* acts in an independent action – for the review, on certiorari, of quasi-*judicial* action. *E.g.,* Metropolitan Dade County v. Fletcher, 311 So. 2d 738, 739 (Fla. 3d Dist. Ct. App. 1975), *cert. denied*, 327 So. 2d 32 (Fla. 1976); Metropolitan Dade County v. Crowe, 296 So. 2d 532, 533 (Fla. 3d Dist. Ct. App. 1974); Baker v. Metropolitan Dade County, 237 So. 2d 201, 202 (Fla. 3d Dist. Ct. App. 1970). Indeed, an effort to compel application of the review standard ultimately adopted in *Snyder* was rejected: it was held that the depiction of rezoning proceedings in Dade County as quasi-judicial addressed only "the procedure utilized to seek judicial review" and did not compel the abandonment of the fairly debatable standard in favor of the substantial competent evidence rule usually applied on certiorari review of quasi-judicial rulings. Dade County v. Yumbo, 348 So. 2d 392, 393–94 (Fla. 3d Dist. Ct. App.) (citations omitted), *cert. denied*, 354 So. 2d 988 (Fla. 1977). It would have been difficult to recognize in this formulation a traditional certiorari approach.

206. Memorandum from Stuart L. Simon, Dade County Attorney, to Mayor and Members of Dade County Board of County Commissioners 1 (Oct. 2, 1979) (on file with Authors and in county clerk's office with DADE COUNTY, FLA., ORDINANCE ch. 91 (1979); Minute Book 8, p. 1056).

207. FLA. R. APP. P. 9.030(c)(1)(C).

Dade County amended its code in the belief that the 1977 rules had *created* appellate jurisdiction in the circuit courts – when no such jurisdiction was, or could have been, created.[208]

The nomenclature of the code, not surprisingly, influenced the local practice.[209] The Dade County code, which originally – and unnecessarily – had directed that review be sought by certiorari, erroneously abandoned that mode of review in favor of prescribing unauthorized appeals.[210]

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208. *See supra* note 121 and accompanying text.

209. *E.g.,* Norwood-Norland Homeowners' Ass'n v. Dade County, 511 So. 2d 1009, 1011 (Fla. 3d Dist. Ct. App. 1987) (involving "appeal" taken to circuit court from county commission), *rev. denied*, 520 So. 2d 585 (Fla. 1988). This perhaps was the natural result of history: prior to the 1979 amendment of the code, many of the reported decisions reflected that certiorari to review land use orders of the Dade County Commission was authorized by the code, as opposed to any authority of statewide application. *E.g.,* Land Corp. v. Metropolitan Dade County, 204 So. 2d 222, 223 (Fla. 3d Dist. Ct. App. 1967) (noting "the method prescribed for review of the commission's ruling was by certiorari"); Dade County v. Metro Improvement Corp., 190 So. 2d 202, 204 (Fla. 3d Dist. Ct. App. 1964) (stating code remedies "are exclusive"). The code gave way only in the face of conflicting general law. General Elec. Credit Corp. v. Metropolitan Dade County, 346 So. 2d 1049, 1054 (Fla. 3d Dist. Ct. App. 1977) (determining statutory requirement that development of regional impact be reviewed by Florida Land and Water Adjudicatory Commission "prevail[ed] over the zoning review procedures of section 33-316 of the Code of Metropolitan Dade County to the extent that the two conflict").

210. Indeed, as recently as April 1994, the Dade County Circuit Court was reviewing – by appeal *and* under the *Snyder* standard – county commission land use orders. *See* Graham Cos. v. Metropolitan Dade County Bd. of County Comm'rs, 2 Fla. L. Weekly Supp. 241 (Fla. Cir. Ct. Apr. 22, 1994), *vacated as moot*, No. 93-163AP (Fla. Cir. Ct. Jan. 27, 1995).

IV. A MODEST PROPOSAL

> *What is needed is just this: A rule eliminating the word "certiorari," for it is a source of confusion . . . in short, a rule which lets lawyers utilize all their time and energy on the merits of their appeals without unnecessary worries or perils as to procedure*.[211]

The eminent good sense of those words, first penned in 1951, has led, in time, to sweeping change in the Florida appellate structure, most notably in the APA and in the supreme court's supervisory jurisdiction.[212] When statutory remedies are created by the legislature to provide for expeditious and uncomplicated review in the appellate courts, the writ of certiorari is neither diminished nor supplanted; rather, the writ retains its essentially interstitial function:

> A new remedy created by statute does not infringe upon the extraordinary writs; it merely reduces the demand for them. Cutting into the scope or nature of the extraordinary writs by statute is one thing; creating an adequate remedy for a sector of the right-enforcement front formerly within extraordinary range only is another. This latter process merely brings up an ordinary weapon to cover an area formerly within extraordinary range only; it does not alter the extraordinary implement. The writs themselves are always ready to take over if the range of the new statutory cannon proves too short . . . .[213]

Indeed, the legislature took exactly that course in its 1984 adoption of section 163.3215 of the *Florida Statutes*, under which aggrieved third parties may file an independent circuit court action to challenge a development order under a county's comprehensive development plan.[214] Prior to the enactment of the statute, the Florida Supreme Court permitted third parties to intervene and challenge development orders under a county's master plan,[215] but the legisla-

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211. Rogers & Baxter, *supra* note 44, at 534 (footnote omitted).

212. *See supra* notes 101–108; *supra* note 93.

213. Adams & Miller, *supra* note 22, at 464–65 (footnote omitted).

214. FLA. STAT. § 163.3215 (1993). The noted remedy is "the sole action available to challenge the consistency of a development order with a comprehensive plan." *Id*. § 163.3215(3)(b).

215. *See* Citizens Growth Mgmt. Coalition, Inc. v. City of West Palm Beach, 450 So.

ture supplanted common law remedies with the statutory rights created in section 163.3215.[216]

This remedy, however, was distinct and stood apart from the circuit court's appellate jurisdiction, "i.e., the power to issue writs of certiorari and review administrative action."[217] The supreme court accordingly ruled in *Parker v. Leon County*, the companion case to *Snyder*, that landowner applicants retained their right to seek review of land use orders by common law certiorari.[218] It is not a quantum leap to apply this rationale to the establishment of a comprehensive, statutorily imposed, appellate structure for the review of development orders entered in quasi-judicial proceedings.

The APA's judicial review provision in section 120.68 of the *Florida Statutes*, could serve as a model for such a statute.[219] The present airport-zoning statute, under which certiorari (readily replaceable by the APA's "petition for review") is prescribed and a statutory review structure is created could also serve as a model.[220]

2d 204 (Fla. 1984).

216. *See* Southwest Ranches Homeowners Ass'n v. County of Broward, 502 So. 2d 931 (Fla. 4th Dist. Ct. App.), *rev. denied*, 511 So. 2d 999 (Fla. 1987).

217. John E. Fennelly, *ELM Street Revisited: The Florida Supreme Court's Rulemaking Authority and the Circuit Court's Subject Matter Jurisdiction Under the Local Government Comprehensive Planning Act – Real or Imagined?*, 18 NOVA L. REV. 1289, 1308 (1994) (footnote omitted).

218. Parker v. Leon County, 627 So. 2d 476, 479–80 (Fla. 1993). The incongruity of this construct is remarkable. Aggrieved third parties have a right of *independent* action in the circuit court when a claim of inconsistency with the master plan is raised — they are unbound by the record of the proceedings before the county commission. *Cf.* Dade County v. Marca, 326 So. 2d 183, 183 (Fla. 1976) (stating "reviewing court's consideration shall be confined strictly and solely to the record of the proceedings by the . . . agency [or board] on which its questioned order is based"). Aggrieved third parties are also free of the usual deference accorded by a reviewing court to an administrative body's decisions. *See, e.g.*, Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106, 108 (Fla. 1989) (finding circuit court, on certiorari, "is not permitted to reweigh the evidence nor to substitute its judgment for that of the agency"). Unsuccessful landowners, on the other hand, must abide by the onerous procedural burdens imposed by appellate rule 9.100 — submission of an appendix and a complete petition within 30 days of the order sought to be reviewed — and are limited to a *review* proceeding. FLA. R. APP. P. 9.100.

219. The section provides: "Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides." FLA. STAT. § 120.68 (1993).

220. *See* FLA. STAT. § 333.11(1)–(4) (1993). This section provides:

> (1) Any person aggrieved, or taxpayer affected, by any decision of a board of adjustment, or any governing body of a political subdivision or the Department of Transportation or any joint airport zoning board, or of any administra-

Statutory recognition would bring land use review within the scope of article V, section 5(b) of the Florida Constitution and rule 9.110 of the Florida Rules of Appellate Procedure, thus eliminating the confusing array of special acts, local ordinances, and extraordinary writ jurisprudence that form the present landscape. "[T]he entire area of land use law has been described as a legal fault line,"[221] and it would well behoove the legislature to shore up the foundations of judicial review.

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tive agency hereunder, may apply for judicial relief to the circuit court in the judicial circuit where the board of adjustment is located within 30 days after rendition of the decision by the board of adjustment. Review shall be by petition for writ of certiorari, which shall be governed by the Florida Rules of Appellate Procedure.

(2) Upon presentation of such petition to the court, it may allow a writ of certiorari, directed to the board of adjustment, to review such decision of the board. The allowance of the writ shall not stay the proceedings upon the decision appealed from, but the court may, on application, on notice to the board, on due hearing and due cause shown, grant a restraining order.

(3) The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(4) The court shall have exclusive jurisdiction to affirm, modify, or set aside the decision brought up for review, in whole or in part, and if need be, to order further proceedings by the board of adjustment. The findings of fact by the board, if supported by substantial evidence, shall be accepted by the court as conclusive, and no objection to a decision of the board shall be considered by the court unless such objection shall have been urged before the board, or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Id. This statute was amended in 1988 to eliminate references to the Florida Appellate Rules and conform to the present Rules of Appellate Procedure. *See* 1988 Fla. Laws ch. 356, § 7.

221. Fennelly, *supra* note 217, at 1304 (footnote omitted).