SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/ SB 162

SPONSOR: Comprehensive Planning Committee and Senator Bennett

SUBJECT: Land Development Regulation

DATE: March 3, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/CS
2.			JU	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill provides that a quasi-judicial development order issued by a local government under its adopted land development regulations, which is not the subject of a pending appeal and the time for filing an appeal has expired, may not be abrogated by a subsequent judicial determination that such land development regulations, or a portion thereof, are invalid because of a deficiency in approval standards. The bill states that it does not preclude or affect a timely common law writ of certiorari proceeding under Rule 9.190, Florida Rules of Appellate Procedure or an original proceeding pursuant to s. 163.3215, F.S. This bill contains a retroactivity clause.

This bill amends section 163.3167 of the Florida Statute.

II. Present Situation:

Section 163.3164(23), F.S., defines the term "land development regulations" as ordinances enacted by local governments relating to any aspect of development, including zoning, rezoning, subdivision, building construction, sign regulations, or any other regulations controlling land development. All zoning and development permitting must be consistent with the local government's comprehensive plan. However, the Local Government Comprehensive Planning and Land Development Regulation Act does not limit the broad statutory and constitutional powers of a local government to plan for and regulate land use.[1]

Judicial Review of Development Orders Based on Consistency

The term "development order" is defined in s. 163.3164(7), F.S., as "any order granting, denying, or granting with conditions an application for a development permit." Section

[1] S. 163.3161(8), F.S.

163.3215, F.S., creates a civil cause of action for an aggrieved or adversely affected party to challenge the consistency of a development order with an adopted local comprehensive plan. An aggrieved or adversely affected party may challenge any action on a development order by a local government which: "materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan..."[2] The definition of "an aggrieved or adversely affected party" who may maintain an action under this section differs from the definition of affected person under s. 163.3184(1), F.S. For the purposes of s. 163.3215, F.S., the term "aggrieved or affected party" is defined as:

> any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large, but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.[3]

An aggrieved or affected party may maintain a de novo action for declaratory, injunctive, or other relief against a local government to challenge its decision on a development order. However, the de novo action must be filed within 30 days of the local government's issuance of a development order or other written decision, or the exhaustion of all local administrative appeals, whichever is later.[4] Alternatively, if a local government adopts the standards established in s. 163.3215(4), F.S., which provide for a quasi-judicial hearing before a special master, the aggrieved or affected party's sole method to challenge the development order is to file a petition for a writ of certiorari in the circuit court within 30 days after issuance of the order or the exhaustion of all local administrative appeals, whichever is later.[5] Furthermore, the principles of administrative or judicial res judicata, as well as collateral estoppel, will apply to these proceedings.[6]

Quasi-judicial Development Orders

The Florida Supreme Court has addressed the issue of whether a local government's decision to deny a rezoning application is quasi-judicial or quasi-legislative. In *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), the court opined that rezoning actions that have a limited impact on the public and can be characterized as policy applications rather than policy setting, are quasi-judicial decisions. As quasi-judicial decisions, review of the local government's action is reviewable by petition for certiorari and must be supported by competent and substantial evidence.[7] Such a quasi-judicial decision is also subject to strict scrutiny review, referring to the necessity that the decision strictly comply with the local government's

[2] S. 163.3215(3), F.S.
[3] S. 163.3215(2), F.S.
[4] S. 163.3215(3), F.S.
[5] S. 163.3215(4), F.S.
[6] S. 163.3215(4), F.S.
[7] *See Snyder*, 627 So. 2d at 474.

comprehensive plan.[8] In a quasi-judicial rezoning proceeding, the landowner has the burden of proving that the rezoning is consistent with the comprehensive plan and complies with the procedural requirements of the zoning order before the burden shifts to the local government to prove that maintaining the existing zoning accomplishes a legitimate public purpose.[9]

Later, in *Park of Commerce Assoc. v. City of Delray Beach*, 636 So. 2d 12 (Fla. 1994), the Florida Supreme Court reaffirmed its holding in *Snyder*, stating that the law regarding appellate review of a local government's decision on a building permit, site plan, or other development order is quasi-judicial in nature and, thus, subject to certiorari review.[10] The court agreed with the appellate court's finding that "a [rezoning] decision [that] is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of … quasi-judicial action…."[11]

Judicial Review of Administrative Action

Rule 9.190(b)(3) of Appellate Procedure provides for the review of quasi-judicial decisions of any administrative body that is not subject to the Administrative Procedure Act if commenced by filing a petition for certiorari in accordance with rules 9.100(b) and (c), unless judicial review by appeal is otherwise provided in general law. Under Rule 9.100(c) of Appellate Procedure, a petition to review the quasi-judicial action of a commission or board of a local government that is not appealable under other any provision of general law, but may be subject to review by certiorari, must be filed within 30 days of the rendition of the order to be reviewed.

Equitable Estoppel

The doctrine of equitable estoppel may be invoked against a governmental entity under certain circumstances. For example, a local government may be estopped from enforcing a change in zoning regulations against a property owner who substantially altered his or her position in reliance on the zoning regulation as it existed prior to the change. [12]A plaintiff must show good faith reliance on some act or omission of the governmental entity and that the plaintiff has made a substantial change in position or the incurring of excessive obligations such that it would create an inequitable and unjust situation result to destroy the right acquired by the plaintiff.[13]

Development Order Approval Standards

In a recent decision, *Miami –Dade County v. Omnipoint Holdings, Inc.,* 811 So. 2d 767 (Fla. 3d DCA 2002), the Third District Court of Appeal invalidated certain sections of the Miami-Dade County Code, relating to the approval of special exceptions, unusual and new uses, as unconstitutional because the provisions lacked objective standards. [14] The court stated that sufficient guidelines were required to ensure that: "persons are able to determine their rights and

[8] *See id.* at 475.
[9] *See Snyder*, 627 So. 2d at 476.
[10] *See Park of Commerce*, 636 So. 2d at 15, *citing City of Lauderdale Lakes v. Corn*, 427 So. 2d 239 (Fla. 4th DCA 1983).
[11] *See Snyder*, 627 So. 2d at 474, *citing Snyder v. Board of County Comm'rs*, 595 So. 2d 65, 78 (Fla. 5th DCA 1991).
[12] *See City of Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 571, 572 (Fla. 2d DCA 1975).
[13] *See Lyon v. Lake County*, 765 So. 2d 785, 790-91 (Fla. 5th DCA 2000), citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976); *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1983).
[14] The Court noted this constitutional issue may not have been preserved. *See Omnipoint,* 811 So. 2d at 769.

duties; the decisions recognizing such rights will not be left to arbitrary administrative determination; all applicants will be treated equally; and meaningful judicial review is available."[15]

Miami-Dade County sought a writ of certiorari quashing the lower court's order directing the county zoning board to grant an application from Omnipoint to erect a 148-foot telecommunications monopole, an unusual use under Miami-Dade's land development regulations. The Third District Court of Appeal did not disturb the lower court's remand to the zoning board, but reached this holding on different grounds than the lower court. Although the plaintiff never alleged the county code at issue was unconstitutional, the Third District Court of Appeal affirmed the lower court's ruling on the grounds that the county's "unconstitutional hearing criteria" had the effect of prohibiting the provision of personal wireless services in violation of the Federal Telecommunications Act.[16]

On review, the Florida Supreme Court quashed the Third District Court of Appeal's decision in *Omnipoint* and remanded the case for further review.[17] The Court explained that circuit court review of a zoning board's decision on an application for a special use exception is restricted to: "(1) whether procedural due process is afforded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence."[18] Further, the scope for an appellate court review of the zoning board's decision is limited to whether the circuit court afforded procedural due process and applied the correct law.[19] This is the two-prong test for second-tier certiorari review. The Court found that the district court in *Omnipoint*, reached beyond this two-prong test for "second-tier" certiorari review and addressed an issue, the constitutionality of a portion of Miami-Dade county's code, that was never raised in the proceedings below.

The district court was instructed on remand to review the circuit court's decision in light of the Florida Supreme Court's decisions in *Valliant; Broward County v. G.B.V. International, Ltd*., 787 So. 2d 838 (Fla. 2001); and *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000).[20] On remand, the Third District Court of Appeal found the circuit court had applied the correct law and, therefore, affirmed the circuit's decision without passing on the sufficiency of the evidence that the circuit court relied on to reach its decision.[21]

III. Effect of Proposed Changes:

Section 1 amends s. 163.3167, F.S., to provide that a quasi-judicial development order approved by a local government under its adopted land development regulations, which is not the subject of a pending appeal and the time for filing an appeal has expired, may not be abrogated by a subsequent judicial determination that the regulations, or a portion thereof, are invalid because of

[15] *See Omnipoint,* 811 So. 2d at 769 ,citing *North Bay Village v. Blackwell,* 88 So. 2d 524 (Fla. 1956)*; Drexel v. City of Miami Beach,* 64 So. 2d 317 (Fla. 1953).
[16] *See Omnipoint*, 811 So. 2d at 770.
[17] *See Omnipoint,* 863 So. 2d 195 (Fla. 2003).
[18] *See Omnipoint*, 863 So. 2d at 198-99, citing *City of Deerfield Beach v. Vaillant*, 719 So. 2d 626 (Fla. 1982).
[19] *See Omnipoint*, 863 So. 2d at 199.
[20] *See Omnipoint*, 863 So. 2d at 201.
[21] *See Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 375, 377-78 (Fla. 3d DCA 2003).

a deficiency in approval standards. The bill states that this provision does not preclude or affect a common law writ of certiorari proceeding under Rule 9.190, Florida Rules of Appellate Procedure, or an original proceeding pursuant to s. 163.3215, F.S. Further, these provisions apply retroactively to any development order granted before the effective date of the bill.

Section 2 provides the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The prohibition on abrogating a quasi-judicial development order, that was approved under applicable standards and is not the subject of a pending appeal, because of a subsequent invalidation of the approval standards under which the order was issued may have a positive impact on the private sector. Proponents of the bill contend the *Omnipoint* decision from the Third District Court of Appeal made financial lending institutions reluctant to finance certain projects.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.