ROETZEL

The City Attorney's Guide to Land-Use Appeals

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This article is intended to provide city attorneys with a primer on navigating land-use appeals. That term is, of course, a misnomer because as explained below, a city's land-use decision is rarely reviewed via direct appeal. Rather, by "land-use appeal," I mean a petition for first-tier certiorari review of a city's quasi-judicial land-use decisions to a Florida circuit court. Although this is an appellate-review proceeding, it is not a true direct appeal because the circuit court's review is greatly circumscribed in deference to municipalities and to guard against courts potentially usurping the municipal police power granted by article VIII, section 2(b) of the Florida Constitution.

This deference affords municipalities broad latitude in resolving land-use requests, which resolution is generally upheld. But having a solid understanding about how land-use appeals work *before* advising municipal decisionmakers during a public meeting on the land-use request is critical to ensuring that politics or other procedural errors do not taint the city's decisions, thereby resulting in its reversal.

Therefore, the article offers city attorneys a comprehensive guide for understanding land-use appeals, advising the municipal decisionmakers during that process, and avoiding pitfalls that could undo land-use decisions. Its format is akin to the question-and-answer format of the Attorney General's *Government-in-the-Sunshine Manual*.

A. What decisions qualify for first-tier certiorari review?

Municipalities make a variety of types of decisions every day. But not all decisions can be reviewed through first-tier certiorari relief. Knowing the differing methods for reviewing municipal decisions is not only a threshold jurisdictional question, but it can also save the city tremendous time and money. After all, if an applicant selects the wrong method of review, this can often result in foreclosing the correct method of review.

1. Are ministerial decisions reviewable by certiorari?

No, ministerial decisions are not reviewed via first-tier certiorari. *Fla. Motor Lines v. R.R. Comm'rs*, 129 So. 876, 883–84 (Fla. 1930). Ministerial decisions are reviewed via a petition for mandamus relief to the circuit court. *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999). Certiorari is the only available method to review discretionary decisions. *Fla. Motor*, 129 So. at 883–84.

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a. How do ministerial and discretionary decisions differ?

A "ministerial decision" is one that the law compels a city or public official to perform out of a legal duty. *RHS Corp.*, 736 So. 2d at 1213. True ministerial decisions are ones that leave no room for discretion. *Id.* Rather, the city or public official must perform the act as a matter of law, and a petitioner has a clear legal right to the act's performance. *Id.* If the law affords the city or public officer any discretion whatsoever, then the act is discretionary—not ministerial. *Id.*

b. What are examples of ministerial versus discretionary decisions?

Two examples illustrate the difference between ministerial versus discretionary decisions.

First, if the Florida Statutes or local ordinances require a city to convene a hearing, then this is a ministerial act. *DeNigris v. City of Fort Lauderdale*, 518 So. 2d 469, 470 (Fla. 4th DCA 1988). If refused, then an aggrieved party can petition for mandamus to compel the hearing. *Id.* On the other hand, if the municipal board must interpret its rules to determine whether it has jurisdiction to have a hearing, then the board's failure to convene a hearing is discretionary and cannot be reviewed via mandamus. *Id.*

A second example is "rendering" quasi-judicial decisions. As elaborated below, Florida Rule of Appellate Procedure 9.020(i) requires all lower tribunals—including cities when sitting in their quasi-judicial capacity—to "render" a decision by reducing the oral pronouncement to writing, executing that written decision, and delivering it to the lower tribunal's clerk. *Id.* Thus, cities have a ministerial duty to comply with all three steps and failure to do so—such as failing to file the written decision with the city clerk—can be compelled through mandamus relief. *Sowell v. State*, 136 So. 3d 1285, 1288 (Fla. 1st DCA 2014). On the other hand, mandamus is not available to compel a particular outcome.

The vast majority of municipal decisions are discretionary and, thus, not reviewed via mandamus relief. These discretionary decisions fall into one of three general categories: executive decisions, legislative decisions, and quasi-judicial decisions.

2. Is certiorari available to review all three classes of discretionary decisions—i.e., executive, legislative, and quasi-judicial?

No, only quasi-judicial decisions are reviewable by first-tier certiorari. *E.g.*, *De Groot v. Sheffield*, 95 So. 2d 912, 914–16 (Fla. 1957); *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001). In fact, certiorari is the exclusive method to review municipal quasi-judicial decisions. *Park of Commerce Assoc. v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994). They cannot be reviewed via declaratory or injunctive relief. *City of Fort Pierce v. Dickerson*, 588 So. 2d 1080, 1081–82 (Fla. 4th DCA 1991). On the other hand, declaratory or injunctive relief is the proper method to review executive or legislative decisions. *E.g.*, *id.* at 1082; *Hirt v. Polk Cnty. Bd. of Cnty. Comm'rs*, 578 So. 2d 415, 417 (Fla. 2d DCA 1991).

The difference between executive, legislative, and quasi-judicial turns on (1) the nature of the decision and (2) the procedural manner in which the local government made the decision. *Hirt*, 578 So. 2d at 417. Each category is individually addressed below.

a. What are executive decisions?

Executive decisions are typically those made by a single government official simply carrying out the law at his desk without notice or a hearing. They should not be mistaken for ministerial decisions because the government official may have some discretion on whether to act—such as whether to approve a permit or not. But the decision is summarily made after applying the law outside of a hearing.

For example, a single city official making an executive decision to deny a property owner's permit application without a hearing because it did not comply with the local code is not reviewable by certiorari. *Pleasures II Adult Video, Inc. v. City of Sarasota*, 833 So. 2d 185, 189 (Fla. 2d DCA 2002). A city manager's decision to terminate a 15-year employee without a hearing on the recommendation of the director of financial management is an executive decision that is not reviewable by certiorari. *Kremps v. Manatee Cnty. Bd. of Cnty. Comms.*, 233 So. 3d 526, 528 (Fla. 2d DCA 2018). And a city official's grant of a building permit without a hearing to allow a property owner to build a four-unit apartment complex is an executive decision that is not reviewable by certiorari relief. *City of St. Pete Beach v. Sowa*, 4 So. 3d 1245, 1247 (Fla. 2d DCA 2009).

These decisions are technically reviewed in a lawsuit for declaratory or injunctive relief. *Kemps*, 233 So. 3d at 528; *Sowa*, 4 So. 3d at 1247. But, as a practical matter, many local codes have a method for administratively appealing a single city official's land-use decision to the municipal board or its planning-advisory board, which method must be exhausted before seeking declaratory or injunctive relief. *See City of Sunny Isles Beach v. Publix Super Markets, Inc.*, 996 So. 2d 238, 239 (Fla. 3d DCA 2008). And since that administrative appeal proceeding before the municipal board would have to be noticed and heard at a public hearing—i.e., since the administrative appeal would be quasi-judicial—all roads would eventually lead back to certiorari review.

b. What are legislative decisions?

Differentiating between legislative decisions and quasi-judicial decisions can be difficult, especially in the zoning context. Perhaps the easiest shortcut to understanding the difference is that legislative decisions create or make new law and quasi-judicial decisions interpret or apply existing law. *Hirt*, 578 So. 2d at 417. Legislative decisions typically look to the future and change existing conditions by formulating a new law of general applicability for everyone. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). In other words, legislative decisions change existing laws by creating general rules of policy in the form of ordinances through the procedures in section 166.041, Florida Statutes (2018). *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1000 (Fla. 2d DCA 1993). These decisions ask the question: "What should the law be?" *Id.*

Although legislative decisions must comply with sections 166.041, 286.011, and 286.0114, Florida Statutes (2018)—including affording notice so many days before a

public hearing, requiring municipal decisionmakers to reach these decisions in public meetings, and allowing public comment before adoption—legislative decisions do not typically require due process. *See Hirt*, 578 So. 2d at 417; *Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1343 n.1 (Fla. 3d DCA 1991) (Jerguson, J., concurring) (recognizing that a legislative act is still legislative even if due process is not afforded). The decisionmakers have very broad legislative authority that is only tempered by perhaps its charter, its comprehensive plan, and state and federal preemption.

For example, challenging the enactment or validity of an ordinance creating a zoning district is challenging legislative action. *Snyder*, 627 So. 2d at 474; *Hirt*, 578 So. 2d at 417. Challenging the enactment of or amendment to a comprehensive code is challenging legislative action. *Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1294 (Fla. 1997). So is challenging the enactment of a small-scale comprehensive-plan amendment. *Minnaugh v. Cnty. Comm'n of Broward Cnty.*, 752 So. 2d 1263, 1265 (Fla. 4th DCA 2000), *approved*, 783 So. 2d 1054 (Fla. 2001).

All of these are reviewed via declaratory or injunctive relief. *Hirt*, 578 So. 2d at 417; *Walgreen Co. v. Polk Cnty.*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988).

c. What are quasi-judicial decisions?

Quasi-judicial decisions have two defining attributes. First, these are judicial inquiries that investigate, declare, and enforce rights and liabilities based on specific facts and existing laws. *Lee Cnty.*, 619 So. 2d 1000. In other words, quasi-judicial decisions enforce or apply the law to a specific situation; they do not create new law. *Id.* These decisions tend to answer the questions: "Did a party do something to violate the law" or "Does the law authorize a party to do what it requests? *Id.* And these decisions tend to directly impact a more limited number of persons or property owners than legislative decisions. *Alvey v. City of N. Miami Beach*, 206 So. 3d 67, 73 (Fla. 3d DCA 2016).

Second, quasi-judicial decisions can only be reached after affording due process. *De Groot*, 95 So. 2d at 914–15. This includes affording parties and participants notice and a meaningful opportunity to be heard. *Lee Cnty.*, 619 So. 2d 1001–02; *Walgreen*, 524 So. 2d at 1120. It also includes reaching the quasi-judicial decision by neutrally applying the evidence presented to pre-existing legal standards, rather than through the whims and promises of politics. *Id.*

Most, if not all, land-use decisions are quasi-judicial and will generally be reviewed by certiorari. *Lee Cnty.*, 619 So. 2d 1001. The following is a non-exclusive list of land-use decisions that courts have already declared are quasi-judicial and thus reviewable via certiorari: Conditional-use or special-use permits, *id.*; site-specific rezoning requests, *id.* at 1001; variances, *Walgreen*, 524 So. 2d at 1120; site-plan approvals, *Broward Cnty.*, 787 So. 2d at 842 & 845; building permits, *Webb v. Town Council of Hilliard*, 766 So. 2d 1241, 1243 (Fla. 1st DCA 2000); and other development orders, *id.*

As city attorney, it is critical that you advise the decisionmakers that when resolving land-use disputes, they are sitting in a quasi-judicial capacity—not a legislative capacity. Cities cannot legislate through quasi-judicial decisions. *See Verizon Wireless Pers. Comms., L.P. v. Sanctuary at Wulfert Point Cmty. Ass'n, Inc.*, 916 So. 2d 850, 854–85 (Fla. 2d DCA 2005). City decisionmakers must also ignore the politics and neutrally

resolve the dispute based on the argument and evidence presented at the hearing and in the matter's file. *Lee Cnty.*, 619 So. 2d at 1001 (Fla. 2d DCA 1993) ("The effect of labeling rezoning decisions as quasi-judicial is to refer them to an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches."); *Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981) ("Their decision . . . amounted to no more than a popularity poll of the neighborhood."). Failure to do so could deprive an aggrieved party of due process, thereby nullifying the city's decision. *E.g.*, *Jennings*, 589 So. 2d at 1342.

3. Why does it matter whether a decision is reviewed by certiorari or declaratory/injunctive relief if both are reviewed by the same circuit court?

The short answer is that it matters because the Florida Supreme Court has repeatedly held that certiorari is the method to challenge quasi-judicial decisions. *Park*, 636 So. 2d at 15.

But there are also substantial differences between certiorari and declaratory or injunctive relief that favor municipalities. Chief among them is that certiorari has very limited review. Unlike declaratory or injunctive relief, certiorari review is not de novo review, but is limited to reviewing the record before the city and arguments in the briefs. *City of Jacksonville Beach v. Marisol Land Dev., Inc.*, 706 So. 2d 354, 355 (Fla. 1st DCA 1998). Certiorari has much more limited standards of review, as explained further in section (B) below. The circuit court also cannot order discovery, mediation, or take additional evidence at a trial on certiorari review. *E.g.*, *Evergreen Tree Treasurers of Charlotte Cnty., Inc. v. Charlotte Cnty. Bd. of Cnty. Comm'rs*, 810 So. 2d 526, 530–31 (Fla. 2d DCA 2002); *Areizaga v. Bd. of Cnty. Comm'rs of Hillsborough Cnty.*, 935 So. 2d 640, 642 (Fla. 2d DCA 2006). Nor can the court issue an injunction or award damages on certiorari. *Seminole Entm't, Inc. v. City of Casselberry, Fla.*, 813 So. 2d 186, 188 n.1 (Fla. 5th DCA 2002).

4. What if a landowner chooses the wrong remedy and tries to challenge quasi-judicial action via declaratory relief?

If a landowner chooses the wrong remedy, then you should move to dismiss the action because a circuit court simply lacks subject-matter jurisdiction to review quasi-judicial action through any other point-of-entry than certiorari. *Dickerson*, 588 So. 2d at 1082. If the circuit court denies the motion to dismiss, then you should petition for a writ of prohibition to the district court of appeal having plenary jurisdiction over the circuit court. *Bd. of Cnty. Comm'rs of Manatee Cnty. v. Circuit Court of Twelfth Judicial Circuit In & For Manatee Cnty.*, 433 So. 2d 537, 538 (Fla. 2d DCA 1983). While a full discussion of this writ is beyond the scope of this article, a writ of prohibition is the method to prevent a circuit court from wasting everyone's time and money by litigating an issue over which the circuit court lacks subject-matter jurisdiction. *See generally*, *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 853 (Fla. 1992).

If a landowner chooses the wrong remedy, there is at least one case that has affirmed dismissal with prejudice of a declaratory action with no opportunity to amend the cer-

tiorari petition in the quasi-judicial context. *Dabbs v. City of Tampa*, 613 So. 2d 1378, 1380 (Fla. 2d DCA 1993). But that case is an aberration. Typically, a circuit court must either give at least one opportunity to amend or treat the declaratory complaint as if certiorari had been sought (if the complaint was timely when initially filed). Fla. R. App. P. 9.040(c); *Dickerson*, 588 So. 2d 1082.

5. Are there any exceptions to the requirement that quasi-judicial decisions must be reviewed via certiorari relief?

There are several exceptions, but all are narrowly construed and rarely apply. Each exception is addressed below.

The Administrative Procedures Act, Chapter 120, Florida Statutes. Section 120.68, Florida Statutes (2018), provides for direct appellate review either to the First District Court of Appeal or to the district court where the appellant resides. But generally, Chapter 120 only applies to State agency action. *Hill v. Monroe Cnty.*, 581 So. 2d 225, 226 (Fla. 3d DCA 1991). It rarely, if ever, applies to municipal quasi-judicial land-use decisions. *See id.*; *accord Sweetwater Util. Corp. v. Hillsborough Cnty.*, 314 So. 2d 194, 195 (Fla. 2d DCA 1975); *Broward Cnty.*, 787 So. 2d at 842.

Comprehensive-Plan Challenges. Section 163.3215, Florida Statutes (2018), carved out an exception to challenging quasi-judicial land-use decisions when the challenge concerns their consistency with the city's comprehensive plan. Consistency challenges must be pursued in a de novo action for declaratory, injunctive, or other relief within 30 days of the land-use decision. § 163.3215(3), Fla. Stat. If aggrieved parties argue in their certiorari petition—as they often do—that the circuit court should quash the quasi-judicial decision because it is inconsistent with the city's comprehensive plan, then you should move to dismiss that argument because the circuit court lacks subject-matter jurisdiction to consider that issue via its certiorari jurisdiction. *Seminole Tribe of Fla. v. Hendry Cnty.*, 106 So. 3d 19, 23 (Fla. 2d DCA 2013); *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 1121, 1126 (Fla. 4th DCA 2007); *but see Heine v. Lee Cnty.*, 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017) (suggesting by inference that a consistency challenge could be raised in a certiorari action if consistency challenge does not concern use, density, or intensity of use).

Code-Enforcement Decisions. Section 162.11, Florida Statutes (2018), also creates an exception to seeking certiorari review of a city's land-use decision. If those decisions arise in the code-enforcement context, then review is by direct appeal to the circuit court under Florida Rules of Appellate Procedure 9.110 and 9.190. § 162.11, Fla. Stat.; *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187, 1189 (Fla. 5th DCA 2007); *accord City of Ocala v. Gard*, 988 So. 2d 1281, 1283 (Fla. 5th DCA 2008) (finding circuit court erred in granting writ of prohibition where landowner failed to timely seek appellate review of code-enforcement decision via direct review under section 162.11). Typical appellate rules apply in terms of briefing, record, and deadlines. *See* Fla. R. App. P. 9.110, 9.190, 9.200, & 9.210.

Challenging Prejudicial Ex Parte Communication. In 1991, the Third District in *Jennings v. Dade County*, 589 So. 2d 1337, 1339 (Fla. 3d DCA 1991), carved-out a very limited, judicially created exception to the rule that quasi-judicial decisions

can only be reviewed via certiorari. That case concerned whether ex parte communications between an applicant's agent and the county commission deprived a party to a quasi-judicial proceeding of due process. *Id.* The court noted that while such decisions are generally limited to only certiorari relief, that remedy was inadequate since certiorari review is limited to the existing record before the commission and that, by their nature, ex parte communications would not be in the record. *Id.* at 1340. Given that "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings," the court held that an equitable claim such as declaratory relief could be used for the limited purpose of proving a prejudicial ex parte communication. *Id.* at 1341–42.

No reported case has expressly discussed *Jennings* in terms of allowing parties to challenge a quasi-judicial decision on grounds of ex parte communication through a declaratory-relief action instead of certiorari. Although *Jennings* has not been overturned, abrogated, or even disagreed with on this ground, section 286.0115, Florida Statutes (2018), raises doubt about its continued validity in most instances. That statute allows cities to adopt a procedure by which the decisionmakers announce any ex parte communications or site visits on the record at the beginning of a quasi-judicial hearing. § 286.0115(1), Fla. Stat. If the city adopts an ordinance consistent with the statute's requirements and if the substance of any ex parte communication is placed on the record in time for someone to express their contrary view, then the presumption that the ex parte communication was harmful is removed. *Id.*

Although no reported case has discussed *Jennings*'s limited declaratory-relief exception and section 286.0115(1)'s procedure, logic compels that if an ex parte communication is put on the record, then a party or participant would have no need to challenge the ex parte communication via declaratory relief since it was placed on the record and could be challenged during the quasi-judicial hearing and on first-tier certiorari review. On the other hand, if a city lacks section 286.0115 procedures or undisclosed ex parte communications are later discovered, then *Jennings*'s limited declaratory-relief exception remains viable.

Whether a city has adopted this statutory "safe harbor" provision is something every city attorney must know or should find out. Likely, it would have been enacted in the City's records sometime between 1995 and today. After confirming that your city has procedures akin to section 286.0115(1) (or, if need be, adopting them as soon as possible), city attorneys should then encourage the city's decisionmakers to fully disclose *all* ex parte communications.

Constitutional challenges. Neither facial nor as applied constitutional challenges can be raised in a certiorari review proceeding. They can only be raised in a direct action seeking declaratory or injunctive relief. *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003); *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 782 (Fla. 2d DCA 1992); *Bama Inv'rs, Inc. v. Metro. Dade Cnty.*, 349 So. 2d 207, 209 (Fla. 3d DCA 1977); *Nannie Lee's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004).

Whenever Florida Statutes provide a different method of review. As illustrated in the first three exceptions, if the Florida Constitution or Florida Statutes provide a method of reviewing a particular type of quasi-judicial decision that is different

from certiorari, then that method must be followed. Certiorari is the available point-of-entry when no other method of appellate review is available. *De Groot*, 95 So. 2d at 916.

6. Can a city pass an ordinance changing the method of review for particular kinds of land-use decisions from certiorari review to direct appeal or some other review method?

No, under the Florida Constitution, only the Florida Legislature has authority to expand or alter appellate remedies—which can only happen through a general law, not a special act. Art. V, § 5(b), Fla. Const.; *Pleasures II*, 833 So. 2d at 188–89. A municipal law endeavoring to expand appellate jurisdiction is unconstitutional and should be disregarded in favor of certiorari review.

7. Can the petitioner join a declaratory or injunctive count and certiorari count in the same pleading and action?

Stated differently, could one challenge in the same the underlying quasi-judicial action by certiorari and the underlying zoning ordinance that was applied during the quasi-judicial action—say on the grounds that it was void for some reason like violation of the single-subject rule? Or would one have to bring two separate actions?

Arguably, no. At least two different appellate courts have expressly disclaimed joining certiorari and an equitable proceeding like declaratory or injunctive relief in the same action. *Loew v. Dade Cnty.*, 188 So. 2d 869, 870 (Fla. 3d DCA 1966); *Rhyne v. City of Wilton Manors*, 392 So. 2d 992, 992 (Fla. 4th DCA 1981). Given the substantial differences between the two types of actions discussed above, this makes some sense.

But there are also some good arguments favoring joining both actions, including judicial economy and the fact that inconsistent remedies have long been permissibly joined. The *Loew* and *Rhyne* decisions are early decisions that did not address either of these arguments. Plus, consistency challenges via declaratory relief under section 163.3215(3) did not exist when *Loew* and *Rhyne* were decided. Ch. 2002-296, § 10, Laws of Fla. Given that certiorari and consistency challenges are typically directed at the same quasi-judicial decision, joining them in the same action makes logical sense.

B. What procedures apply on certiorari review?

Most of the procedural requirements for seeking first-tier certiorari and preparing the briefs and record are covered, in detail, by the Florida Rules of Appellate Procedure. For example, rule 9.100(c) makes clear that first-tier certiorari review must be sought within 30 days after the city's order is rendered. Rule 9.100(f) includes some technical requirements for these proceedings in the circuit court, including the fact that the petition's caption must expressly refer to rule 9.100. This helps the circuit court clerk identifying the fact that this is an appellate proceeding and not a regular lawsuit. Rule 9.100(g), (j)–(*l*) cover the technical requirements for the petition, response, and reply, and rule 9.220 discusses the technical requirement for the appendix—i.e., the record.

Many of these technical requirements are the same as when a direct appeal is litigated. But there are few critical matters worth discussing and elaborating on below.

1. Although the introduction referred to the appellate rules, doesn't Florida Rule of Civil Procedure 1.630 apply since first-tier certiorari proceedings are filed in the circuit court?

No, only the Florida Rules of Appellate Procedure and, where applicable, the Florida Rules of Judicial Administration apply to first-tier certiorari proceedings. After rule 1.630 was created in 1984, it created much confusion about which rules applied to certiorari review of municipal quasi-judicial decisions in the circuit court. In 2013, all references to certiorari were removed from rule 1.630 to make it clear that only the appellate rules apply to first-tier certiorari proceedings in the circuit court. *In re Amendments to Florida Rules of Civil Procedure*, 131 So. 3d 643, 652 (Fla. 2013).

Insofar as other writs apply—such as mandamus or prohibition—then rule 1.630 would still apply. But even then, the appellate rules control over all rules insofar as a conflict exists. Fla. R. App. P. 9.010.; Fla. R. Jud. Admin. 2.130.

2. Can one extend the 30-day deadline to seek certiorari review?

Most deadlines in appellate proceedings are extendable. But not this one. It's jurisdictional. So, if the petitioner misses it for any reason, then the circuit court lacks subject-matter jurisdiction, and the court should dismiss the appeal. § 59.081(2), Fla. Stat. (2017); *Roadrunner Const., Inc. v. Dep't of Fin. Servs., Div. of Workers' Comp.*, 33 So. 3d 78, 79 (Fla. 1st DCA 2010).

If the circuit court does not dismiss on its own, but instead issues a show-cause order, then the city should immediately move to dismiss.[2] *Id.* The motion to dismiss tolls the deadline to file a response brief set by the show-cause order until after the motion is resolved. Fla. R. App. P. 9.300(b); *Downey v. Zier & Hacker, P.A.*, 556 So. 2d 509, 509 (Fla. 4th DCA 1990). If the trial court refuses to dismiss the case—and this happens sometimes because many circuit-court judges lack appellate experience in appellate proceedings and land-use issues—then the city should file a petition for writ of prohibition in the governing district court of appeal. *E.g.*, *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187, 1188 (Fla. 5th DCA 2007) (granting prohibition and compelling circuit court to dismiss untimely first-tier certiorari).

3. But what if a transcript of the land-use meeting is not finished in time to prepare a proper certiorari petition?

It bears repeating: Everything—including the fully researched petition, the record, and a transcript of the quasi-judicial hearing—are all due within 30 days. That's an extremely difficult deadline to meet even if everything goes right.

While there is not really an exception to the 30-day deadline, there is some authority allowing a "bare bones" petitions be filed with an immediate motion for extension of time to amend the petition and appendix and that explains why a complete petition and appendix were not initially filed. The Fifth District described this as the better alternative

[2] The city, as respondent, has no need to respond or move to dismiss until after the show-cause order issues. Fla. R. App. P. 9.100(g). After all, the circuit court should resolve timeliness before issuing the show-cause order, which would save the city's taxpayers the time and expense of proceeding further.

to simply filing an untimely certiorari petition when a petitioner did not receive the quasi-judicial decision until the 24th day after rendition. *Penate v. State*, 967 So. 2d 364, 364 (Fla. 5th DCA 2007) (finding no jurisdiction because this procedure was not followed). Even timely filing a one-page notice of intention to file a petition for writ of certiorari was deemed sufficient to trigger jurisdiction and avoid dismissal. *Holden Ave. Inter-Neighborhood Council, Inc. v. Orange Cnty.*, 719 So. 2d 1002, 1003 (Fla. 5th DCA 1998). In fact, the Second District has held that refusing to allow amendments generally deprives petitioners of procedural due process and warrant reversal on second-tier review. *Cook v. City of Winter Haven Police Dep't*, 837 So. 2d 492, 494 (Fla. 2d DCA 2003).

But doing these "bare bones" petitions are risky, and some courts may affirm their dismissal. *E.g.*, *James v. Crew*, 132 So. 3d 896, 897 (Fla. 1st DCA 2014) (affirming the dismissal of a pro se complaint for mandamus as legally insufficient because amendment of "complaint for extraordinary relief is not contemplated").

4. Does the 30 days begin to run when the city's decisionmakers vote or when the mayor executes the written ruling?

Neither; the 30-day deadline does not begin runing until the land-use decision is "rendered." Rendition occurs when a "signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(i). The date the mayor signs the land-use decision is irrelevant and does not start the petitioner's deadline. *5220 Biscayne Blvd., LLC v. Stebbins*, 937 So. 2d 1189, 1192 (Fla. 3d DCA 2006). If the written land-use decision is never filed with the city clerk, then the petitioner's 30-day deadline never begins to run. *Smull v. Town of Jupiter*, 854 So. 2d 780, 783 (Fla. 4th DCA 2003). The city cannot change when the 30-day deadline starts through local ordinance. *Id.* at 782. Even a letter advising petitioner about an oral decision can constitute a "rendered" decision if the letter is filed with the city's clerk. *Kowch v. Bd. Of Cnty. Comm'rs*, 467 So. 2d 340, 341 (Fla. 5th DCA 1985).

Therefore, city attorneys must make sure that the decisionmakers' decisions are reduced to writing, executed by one with authority, and—most importantly—filed with the city clerk so that the appellate deadline has a clear beginning and ending. In fact, it would behoove a city attorney to also include an explicit endorsement reflecting the rendition date on each written decision, such as: "Date filed with the City Clerk _____."

5. Will a motion for rehearing toll the 30-day deadline for certiorari review?

Possibly. Florida Rule of Appellate Procedure 9.020(i) recognizes that if a petitioner files an "authorized and timely" motion for rehearing, then the 30-day deadline for certiorari review is tolled until the rehearing is resolved. Thus, critical here is whether the rehearing motion is "authorized and timely" under local ordinance or administrative rules.

If the city's code expressly authorizes motions for rehearing by a certain date, then a timely rehearing motion will toll the certiorari deadline. *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187, 1189–90 (Fla. 5th DCA 2007). On the other hand, if the city's code is silent on the matter, then the rehearing motion will *not* toll the deadline. *Id.*

Of course, petitioners can still move for rehearing—because all judicial and quasi-judicial bodies have inherent authority to reconsider their own rulings—but the rehearing only tolls the appellate deadlines if expressly authorized by the local code. *Id.*

6. Will FLUEDRA toll the deadline for seeking certiorari review?

Yes, if timely. While a full discussion of the Florida Land Use and Environmental Dispute Resolution Act (FLUEDRA), section 70.51, Florida Statutes (2017), is beyond this article's scope, section 70.51(3) and (10) recognizes that a timely application under this statute tolls the deadline for certiorari review until the FLUEDRA proceeding concludes. *Scott v. Polk Cnty.*, 793 So. 2d 85, 87 (Fla. 2d DCA 2001).

Two additional matters worth noting: First, it's not clear whether FLUEDRA tolls "rendition" of the quasi-judicial decision in the same manner as a motion for rehearing would under Florida Rule of Appellate Procedure 9.020(i). If it does, then a party has a full 30-days after the FLUEDRA proceeding finally concludes to petition for certiorari. But notably, "rendition" is a term of art that is completely absent from section 70.51(10), which only generally says that the time for judicial review is tolled. Since FLUEDRA and certiorari are both due within 30 days of the quasi-judicial decision, it is possible that filing a FLUEDRA action on the 29th day could mean that once it concludes, a party has only one day left to file the certiorari petition and appendix. The statute is ambiguous on this point, and no reported case has yet decided it.

Second, a party cannot stack the rehearing, FLUEDRA, and certiorari deadlines. In other words, say a local code permits rehearings to be filed within 15 days of rendition. A party cannot move for rehearing, wait for its denial, then apply for FLUEDRA, wait for its adverse decision, and then petition for certiorari relief. Unlike rule 9.020(i), which, as noted above, recognizes that an "authorized and timely" rehearing will toll appellate deadlines like certiorari, section 70.51 makes no mention of rehearings tolling FLUEDRA's deadlines. While no appellate court has expressly held this in binding precedent, the Twentieth Judicial Circuit reached this conclusion when it dismissed an untimely petition that endeavored to stack the deadlines, which dismissal was affirmed per curiam. *Cardome, LLC v. City of Bonita Springs*, No. 16-CA-863, _____ WL _____ (Fla. 20th Jud. Cir. Sept. 15, 2016), *aff'd*, 226 So. 3d 825 (Fla. 2d DCA 2017) (table).

7. Who prepares the record and what are the city's obligations in that respect?

Unlike direct appeals, the city clerk does not transmit a record to the circuit court. Fla. R. App. P. 9.100(i). Rather, the party who petitions for certiorari relief bears the burden of preparing the record on appeal in the form of an appendix that complies with rule 9.220. Fla. R. App. P. 9.100(g); *Baez v. Padron*, 715 So. 2d 1128 (Fla. 3d DCA 1998). Without an adequate record, the circuit court cannot review the quasi-judicial decision and must deny certiorari. *DiPietro v. Coletta*, 512 So. 2d 1048, 1050 (Fla. 3d DCA 1987); *Pleasures II*, 833 So. 2d at 189.

That said, the city and its clerk does have a duty to keep track of what constitutes the "record" of the quasi-judicial hearing, which should include everything that was considered by the city council in reaching its decision, including the application; its attachments; the applicant's exhibits and PowerPoint presentation; the staff's

recommendations, memorandums, and exhibits; the planning advisory board's recommendation; meeting notices; and any other written submissions, such as citizens' letters and statements. These can be kept online so that the petitioner can simply download them or keep them in a three-ring notebook with a table of contents so that a petitioner can photocopy them.

8. If a petitioner fails to include the landowner applicant who prevailed before the city, can the certiorari petition be dismissed for failing to include indispensable parties?

No, the landowner applicant is automatically a respondent in a first-tier certiorari proceeding even if not expressly named in the petition or served with the petition and show-cause order. Fla. R. App. P. 9.020(g)(4); 9.100(b)(1).

For years, there has been confusion on this issue because of an early supreme court case holding that a petition for certiorari cannot be dismissed for failing to join the applicant landowner because he or she is not an indispensable party. *Brigham v. Dade Cnty.*, 305 So. 2d 756, 758 (Fla. 1974). This decision was, in part, based on the fact that nothing in the appellate rules required joining the original applicant as a party. *Id.* But in 1992, rule 9.100(b) was amended to recognize that "all parties in the lower tribunal be named as either petitioners or respondents." *In re Amendments to Florida Rules of Appellate Procedure*, 609 So.2d 516, 517 (Fla.1992).

To make things more confusing, the Second District has twice relied on *Brigham* to find certiorari petitions could not be dismissed for failing to join the applicant as an indispensable party despite the 1992 rule change. *City of St. Petersburg, Bd. of Adjustment v. Marelli*, 728 So. 2d 1197, 1198 (Fla. 2d DCA 1999); *Concerned Citizens of Bayshore Cmty., Inc. v. Lee Cnty. ex rel. Lee Cnty. Bd. of County Comm'rs*, 923 So. 2d 521, 523 (Fla. 2d DCA 2005). The latter case recognized the requirement in rule 9.100(b) that the petitioner name the landowner respondent, but held that rule 1.630 controlled over 9.100(b) and that rule 1.630 makes no mention about who are respondents. *Concerned Citizens*, 923 So. 2d at 523.

But the Fifth District has recognized that the rule changes to rule 9.020(g)(4) and 9.100(b)(1) abrogated *Brigham*, *City of St. Petersburg*, and *Concerned Citizens*' precedential value. *Highwoods DLF EOLA, LLC v. Condo Developer, LLC*, 51 So. 3d 570, 572–73 (Fla. 5th DCA 2010). The Second District's *Concerned Citizens* is also undercut by the fact that, as noted in an earlier question, references to certiorari have been removed from rule 1.630, which are strictly controlled by the appellate rules. *In re Amendments*, 131 So. 3d at 652.

Therefore, despite some early confusion, landowner applicants are "indispensable parties." But that's a bit of a misnomer because they are technically automatically parties even if not expressly mentioned in the petition. Fla. R. App. P. 9.020(g)(4). If for some reason they are not mentioned or served, then the city attorney should send the applicant a courtesy copy so that he or she can intervene, which the circuit court must grant. *Highwoods*, 51 So. 3d at 572–73.

As an aside, the city is, of course, an indispensable party to any review of its quasi-judicial decision. *Zimmerman v. Civil Serv. of City of Boca Raton*, 366 So. 2d 24, 24 (Fla. 1978).

9. Who has standing to petition for first-tier certiorari review and when must they prove standing?

Standing is an important, often overlooked issue by petitioners. The Supreme Court has long recognized that to challenge a quasi-judicial land-use decision the petitioner must have and prove standing. *Renard v. Dade Cnty.*, 261 So. 2d 832, 836 (Fla. 1972). Although one could devote an entire article to this topic, the city attorney should primarily keep two issues in mind concerning standing, especially when someone other than the landowner applicant petitions for certiorari review.

First, city attorneys should know the test for standing in the land-use context, which is not governed by any particular statute, but instead by Florida common law. The Supreme Court has long recognized that standing requires showing that one will suffer special damages that differ in kind, rather than degree, from others in the community. *Id.* at 837. Merely being an abutting property owner or one entitled to notice of the quasi-judicial proceeding may be a factor, but it generally cannot be the sole factor. *Id.* One must still show that their affected interest is different from others in the community at large. *Id.*

Each case must be independently researched based on the nature of the challenge. For example, merely alleging that the proposed development will increase traffic is generally insufficient because everyone in the community will suffer from the increased traffic. *Skaggs-Albertson's Props., Inc. v. Michels Belleair Bluffs Pharmacy, Inc.*, 332 So. 2d 113, 116–117 (Fla. 2d DCA 1976). On the other hand, a liquor business affected by a zoning decision allowing a competitor to open a nearby liquor store would have standing because of the increased competition. *ABC Liquors, Inc. v. Skaggs-Albertson's*, 349 So. 2d 657, 660 (Fla. 4th DCA 1977); *Rayan Corp., Inc. v. Bd. of Cnty. Comm'rs of Dade Cnty.*, 356 So. 2d 1276, 1277 (Fla. 3d DCA 1978) (same). *But see Michels Belleair*, 332 So. 2d at 116 (suggesting the loss of business due to increased competition would *not* support standing). Of course, the desperate argument that if the petitioner lacks standing, no one would have standing to challenge a city's decision has been repeatedly rejected. *Solares v. City of Miami*, 166 So. 3d 887, 889 (Fla. 3d DCA 2015).

The second important issue city attorney's should keep in mind is whether the appellate record contains a sufficient showing of standing. Many petitioners forget to present evidence showing their standing during the quasi-judicial hearing and instead attempt to argue standing—with no evidentiary support—to the circuit court in their certiorari petition. But the case law is clear that standing must be first proven through evidence at the quasi-judicial hearing before the municipal decisionmakers. *E.g.*, *City of Ft. Myers v. Splitt*, 988 So. 2d 28, 32–33 (Fla. 2d DCA 2008); *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943–44 (Fla. 5th DCA 1988). It cannot be argued for the first time on appeal, and the circuit court cannot go outside the appellate record to take additional evidence of standing. *Id.* Rather, if there is no evidence supporting standing, the petition for certiorari must be dismissed. *Id.*

10. Do typical appellate doctrines like preservation, harmless error, tipsy-coachman, and mootness apply in first-tier certiorari proceedings?

Yes, since certiorari is a review proceeding, traditional appellate doctrines would apply. City attorneys should be aware of these doctrines because they can be very helpful in denying certiorari.

The first of these critical doctrines is the rule of preservation. This rule prohibits circuit courts from considering new arguments for the first time on appeal that were not raised and considered by the lower tribunal. *See generally Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). This has been routinely applied on first-tier certiorari review of quasi-judicial decisions. *E.g.*, *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200–01 (Fla. 2003) (finding district court erred by considering unpreserved issue on second-tier review from zoning board's decision); *Clear Channel Comm., Inc. v. City of N. Bay Vill.*, 911 So. 2d 188, 189 (Fla. 3d DCA 2005) (finding legal challenge to municipal decision unpreserved and questioning of witness was insufficient to preserve the issue); *Minnaugh v. Cnty. Comm'n of Broward Cnty.*, 752 So. 2d 1263, 1266 n.2 (Fla. 4th DCA 2000) (refusing to consider unpreserved procedural due process violation). This doctrine can be especially effective in countering petitions from objecting neighbors and residents because they are often unrepresented at the quasi-judicial hearing and often have only a few minutes to voice their objections. Thus, their arguments below are often conclusory and incomplete.

Another helpful doctrine is the harmless-error doctrine, which requires denying first-tier certiorari despite an error where it did not really prejudice the petitioner or effect the outcome. *See generally Dennis v. State*, 51 So. 3d 456, 463 (Fla. 2010). For example, the First District in *City of Jacksonville v. Huffman*, 764 So. 2d 695, 696 (Fla. 1st DCA 2000), found that while the city failed to strictly comply with the statutory notice requirements, the petitioner suffered no prejudice because they appeared and fully participated at the final quasi-judicial hearing. Similarly, the Fifth District recognized in *Seminole Entertainment, Inc. v. City of Casselberry, Florida*, 813 So. 2d 186, 189 (Fla. 5th DCA 2002), that the circuit court can find that a city's evidentiary rulings did not violate a petitioner's procedural due-process rights because they were harmless in light of the city's ultimate final ruling.

A third important appellate doctrine is the tipsy-coachman doctrine, which requires affirming a lower tribunal's decision if it was correct for the wrong reasons. *Dade Cnty. Sch. Bd. v. Radio Stat. WQBA*, 731 So. 2d 638, 644 (Fla. 1999). This doctrine has also been applied in the quasi-judicial land-use context. *E.g.*, *Rancho Santa Fe, Inc. v. Miami-Dade County*, 709 So. 2d 1388 (Fla. 3d DCA 1998), (refusing to quash a circuit court's denial of first-tier certiorari despite admitting that the court applied the wrong standard of review because it ultimately reached the correct result in denying certiorari).

Finally, the mootness doctrine also applies in the land-use context. *E.g.*, *Nannie Lee's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004) (finding circuit court properly dismissed as moot certiorari petition directed at a site plan approved in a 2002 ordinance because city a year later approved a revised site plan approved in a 2003 ordinance).

C. What are certiorari's standards of review?

Common-law certiorari has existed since the early days of the English common law as a special mechanism for allowing an upper court to become informed about the proceeding in a lower tribunal and evaluate it for regularity. *Broward Cnty.*, 787 So. 2d at 842; *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995). The writ serves as a safety net for halting a miscarriage of justice when no other legal remedy exists. *Broward Cnty.*, 787 So. 2d at 842. Although certiorari is typically discretionary in other contexts, it is a matter of right in the land-use context for those with standing. *Id.* at 843.

Despite being a matter of right, however, first-tier certiorari review is extremely limited out of deference to the local government's superior expertise in local land-use affairs and because, at their core, land-use decisions are a mix of both judicial and legislative action. *Id.* Thus, the circuit court's standard of review on first-tier certiorari is limited to three narrow inquiries that the petitioner must show:

(1) Was procedural due process afforded before the quasi-judicial decision was reached?

(2) Does the decision depart from the essential requirements of the law?

(3) Is the decision supported by competent, substantial evidence?

Even when a city farms out their certiorari actions to outside counsel who specializes in land-use appeals, the city attorney should have a working understanding about these three standards because succeeding on certiorari begins at the hearing before the city's decisionmakers. If both the city's decisionmakers and their staff (who often testify for or against land-use applications) understand the legal framework under which a prospective decision will be reviewed, then they can often avoid mistakes that result in having the decision quashed and unnecessarily wasting everyone's time and money.

1. What is procedural due process in the quasi-judicial context?

In general terms, procedural due process is the method for ensuring fair treatment through the proper administration of justice when substantive rights are at issue. *J.B. v. Fla. Dep't of Children & Family Servs.*, 768 So. 2d 1060, 1063–64 (Fla. 2000). No single, inflexible test exists for satisfying procedural due process. *Id.* at 1064. Rather, the requisite level of due process hinges on the character of the interests and the nature of the proceedings involved. *Id.*; *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010).

The requisite level of procedural due process in the quasi-judicial land-use context is much less stringent than in the judicial context. *Carillon*, 45 So. 3d at 9. For example, quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. *Jennings*, 589 so. 2d at 1340. Rather, the proceeding need only be "essentially fair." *Carillon*, 45 So. 3d at 9. At its core, this means affording fair notice of the quasi-judicial hearing and a meaningful opportunity to be heard. *Id.* "Meaningful opportunity" generally means the ability to appear at the hearing through counsel, present evidence and argument, and cross-examine witnesses before an impartial adjudicator. *Id.*; *Miami-*

Dade Cnty. v. Reyes, 772 So. 2d 24, 29 (Fla. 3d DCA 2000); *Cherry Comms., Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995).

While the quasi-judicial proceedings may not have the same formal due-process requirements as judicial proceedings, this does not mean that some minimum level of due process is not required. *Jennings*, 589 so. 2d at 1340. Landowner applicants, city decisionmakers, and objecting residents alike often think that quasi-judicial proceedings are informal meetings where anything goes, which can often result in quasi-judicial decisions that are politically motivated, rather than based on the rule of law. *E.g.*, *Casselberry*, 811 So. 2d at 696–97. Therefore, it is incumbent on city attorneys to regularly remind everyone, including the municipal decisionmakers, that the ultimate decision should only be reached after hearing the evidence and argument and applying both to the relevant established criteria for that particular land-use request.

2. Does a city have to afford objecting neighbors and other residents procedural due process?

Yes, but not as much as a party. As noted above, the level of due process required depends on the interests at issue and the nature of the proceeding. *Carillon*, 45 So. 3d at 9. In this respect, the law draws an important distinction between parties to quasi-judicial proceedings, like the landowner applicant, and mere participants to those proceedings, like the throngs of neighbors and residents who often appear to advocate for or against controversial projects. *Id.* at 10. Only parties must be given the full panoply of rights, such as the right to cross-examine witnesses, due to their direct interest in the proceeding's outcome. *Id.* Participants, on the other hand, have only the right to speak about the matter subject to the decisionmaker's control. § 286.0115(2)(b), Fla. Stat. Participants do not have the right to cross-examine witnesses. *Id.*; *Carillon*, 45 So. 3d at 10–12.

3. What are some examples of procedural due-process violations?

There are too many examples to fully categorize, and most are quite obvious, like the first one below. But here are a handful of examples:

Failing to afford notice. The city attorney should ensure that the city's staff has strictly complied with the statutory notice requirements because that can result in a due-process violation. *Gulf & E. Dev. Corp. v. City of Fort Lauderdale*, 354 So. 2d 57, 59 (Fla. 1978). Of course, this violation can be waived if the party or participant ultimately discovered the hearing in sufficient time to prepare, appear, and argue at the hearing. *City of Jacksonville v. Huffman*, 764 So. 2d 695, 696 (Fla. 1st DCA 2000). Indeed, early due process violations—such as the failure to provide notice before a planning-advisory board—can be cured if notice is afforded before the final de novo hearing by the municipal decisionmakers. *Id.*

Curtailing a party's opportunity to be heard. Although many quasi-judicial hearings may have some time restraints because they are held during the City's regular meetings, which often have many other agenda items to be heard, city attorneys should avoid overly restricting a party's ability to present his or her evidence, especially if the city's staff are not given the same restrictions. For example, in *Kupke v. Orange County*, 838 So. 2d 598, 599 (Fla. 5th DCA 2003), the court found a landowner's due-process

rights violated when the county was permitted to present as many witnesses as it wished on a variety of relevant subjects, but the landowner was limited on the evidence and subjects he could present. The Second District reached a similar conclusion when a local board prohibited the petitioner from presenting—or even proffering—evidence of selective enforcement based on a person's race. *Powell v. City of Sarasota*, 953 So. 2d 5, 7 (Fla. 2d DCA 2006).

As an aside, even if a city attorney or the decisionmakers wish to limit a party's presentation because they think certain evidence or testimony is irrelevant, cumulative, or otherwise inadmissible, the city should at least allow the party to proffer the evidence or testimony—if requested. *See generally Mosley v. State*, 91 So. 3d 928, 930 (Fla. 1st DCA 2012) (finding error in refusing proffer because it greatly limits appellate review).

Bias, impartiality, and prejudging the issue. While, as a practical matter, it is often very difficult to show that municipal decisionmakers are bias, impartial, or have prejudged the quasi-judicial application, especially if section 286.0115(1)'s procedures are followed, city attorneys should regularly remind the decisionmakers that they should be careful about commenting on upcoming quasi-judicial matters and they should avoid prejudging those matters. Rather, each quasi-judicial issue should be decided only after hearing the evidence and applying the city's published criteria (i.e., ordinance or code provision). *See e.g.*, *St. Johns Cnty. v. Smith*, 766 So. 2d 1097, 1099 (Fla. 5th DCA 2000) (illustrating such a friendly reminder). Otherwise, the quasi-judicial decision could be reversed as it was in *Casselberry*, 811 So. 2d at 695–97, because the mayor's and other commissioners' comments and actions before the hearing reflected "a bias so pervasive as to have rendered the proceeding violative of the basic fairness component of due process."

Misapplying evidentiary rules, such as by creating improper presumptions or inferences. While quasi-judicial proceedings may have less formal evidentiary and procedural structure than judicial proceedings, this does not mean that no evidentiary rules apply. For example, in *Reyes*, 772 So. 2d at 29–30, a landowner challenging his water bill's correctness was denied due process when, before the hearing, the county advised him via letter that there was "a very strong presumption" in favor of the bill's accuracy. This not only created a near irrebuttable presumption—which itself was a due-process violation—but it was also contrary to the county code, which required the landowner to only present a prima facie showing of inaccuracy. *Id.* Similarly, in *City of Miami v. Jervis*, 139 So. 2d 513, 515 (Fla. 3d DCA 1962), a city's civil service board denied police officers due process when during a challenge to their suspension, many board members expressed improper inferences and presumptions about the officers' failure to submit to lie detector tests.

4. What does "departure from the essential requirements of the law" mean?

Although this may sound like a broad standard of review, it is really quite narrow and deferential to a city's decision. It is not de novo review. *City of Jacksonville Beach v. Marisol Land Dev., Inc.*, 706 So. 2d 354, 356 (Fla. 1st DCA 1998). Rather, "departure from the essential requirements of the law" means "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of proce-

dural requirements, resulting in a gross miscarriage of justice." *Haines City*, 658 So. 2d at 527. It requires something more than the city's decisionmakers simply making a legal error or interpreting the law contrary to how the circuit court may have interpreted it. *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683 (Fla. 2000).

In short, departure from the law's essential requirements means completely applying the wrong law. *Haines City*, 658 So. 2d 530. It is effectively an act of either judicial tyranny by refusing to apply binding law or gross incompetence by applying a law that is not relevant to the dispute. *E.g.*, *Progressive Exp. Ins. Co. v. Devitis*, 924 So. 2d 878, 880 (Fla. 4th DCA 2006).

But, importantly, applying the correct law incorrectly does *not* rise to the level of a departure from the law's essential requirements. *Id.* Many petitioners miss this nuance.

To illustrate, consider *Martin County v. City of Stuart*, 736 So.2d 1264, 1266 (Fla. 4th DCA 1999). In that case, the county sought second-tier review of the circuit court's first-tier decision concerning a city's annexation of 29 parcels. *Id.* at 1265. The county acknowledged that the circuit court had identified the correct statute, but it argued that the court erroneously applied it. *Id.* at 1266. The Fourth District denied second-tier certiorari because the circuit court did, in fact, apply the correct law. *Id.*

Another example outside of the land-use context is *Department of Highway Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090, 1091 (Fla. 2d DCA 2012). That case concerned second-tier review of a circuit court's order invalidating a driver's license suspension because the court construed a particular statute as requiring an arresting officer to appear at the suspension hearing. *Id.* at 1092. The Second District denied certiorari, reasoning that the circuit court identified the correct statute and that since there was no binding precedent concerning the statute's correct interpretation, there was no departure from the law's essential requirements. *Id.* at 1093.

This illustrates the importance of advising the city's decisionmakers on the correct statute or ordinance applicable to the particular land-use request—maybe even mentioning that law in the resolution or ordinance that resolves the land-use request. Doing so could make reversal on this standard of review extremely difficult even if the decisionmakers ultimately misapply the correct law because that does not rise to the level of a departure from the law's essential requirements.

5. What are some examples of cases finding a departure from the law's essential requirements?

Often many of the due-process violations mentioned above can also constitute departure from the law's essential requirements. But here are a few other examples:

Deviating from the published criteria. Many land-use requests have published criteria or factors in a city's land-development code that must be satisfied before the requests can be granted. Sometimes, however, a city will base its decision on something other than the established criteria, which constitutes a departure from the law's essential requirements. For example, in *Wolk v. Board of County Commissioners of Seminole County*, 117 So. 3d 1219, 1220 (Fla. 5th DCA 2013), the county reached the unusual

decision of granting a variance after finding that a variance was unnecessary. That decision is not only counterintuitive (since one only needs a variance when property violates the code in some fashion), but also a departure from the law's essential requirements because it granted a variance without considering the code's six criteria for variances. *Id.* at 1223–24. The First District reached a similar conclusion in *City of Jacksonville v. Taylor*, 721 So. 2d 1212, 1214 (Fla. 1st DCA 1998), when a variance was granted based on the fact that certain other property owners had received similar variances, which was not one of the code's published criteria for a variance.

Applying the wrong code provisions. It's important to ensure that the decisionmakers decide the land-use request by using the correct code provisions. In *Surf Works, L.L.C. v. City of Jacksonville Beach*, 230 So. 3d 925, 930 (Fla. 1st DCA 2017), the First District found that the circuit court and the city departed from the law's essential requirements when the city denied a rezoning application by relying on a code section concerning zoning amendments instead of the section concerning redevelopment districts, which governed this type of application. *See also Metro. Dade Cnty. v. Fuller*, 497 So. 2d 1322, 1322 (Fla. 3d DCA 1986) (finding on second-tier review that circuit court erroneously applied the "use variance" code provision instead of the "unusual use" code provision, which are governed by entirely different standards).

Refusing to apply a local ordinance's plain language or declining to apply an allegedly invalid ordinance. This is a tricky example because, as noted in the section above, mere disagreement with how cities interpret their local ordinances typically does not result in a departure from the law's essential requirements. Indeed, circuit courts must generally give great deference to a city's interpretation of its own code unless that interpretation is clearly erroneous. *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002).

But this examples goes beyond a mere disagreement and occurs when a city decides, in a quasi-judicial hearing, to decline to apply an existing ordinance either because the current decisionmakers think it is now unlawful or because they have traditionally allowed certain development despite the existing ordinance's express language prohibiting it. *E.g.*, *Verizon Wireless*, 916 So. 2d at 854–55 (finding city properly applied pre-existing ordinance despite opposition's argument that it violated a previous settlement agreement prohibiting that type of construction); *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) (finding a long-standing tradition of allowing similar nonresidential development cannot displace an ordinance's plain language prohibiting it). The point here is that city decisionmakers cannot perform the legislative task of invalidating or changing an existing ordinance within the confines of a quasi-judicial hearing merely because the current decisionmakers do not like the result mandated by the existing ordinance. *Id.* Such a blending of legislative and quasi-judicial functions in the same hearing is not permitted; the decisionmakers can only apply the existing ordinance to the present land-use request and then change the ordinance at a later time through legislative means. *Id.*

6. What does "competent, substantial evidence" in the third standard of review mean?

The phrase "competent, substantial evidence" is somewhat misleading because it does not refer to the quality, character, convincing power, or even the weight of the evidence presented. *Scholastic Book Fairs, Inc. Great Am. Div. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996). Rather, "substantial evidence" is evidence that establishes a substantial basis of fact from which the ultimate fact at issue can be reasonably inferred. *De Groot*, 95 So. 2d at 914. In other words, "substantial evidence" is such relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. *Id.* And in using the adjective "competent" to modify the word "substantial," the Supreme Court intended that the evidence used to sustain the ultimate factual finding should be sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. *Id.* In other words, to the extent that the "substantial evidence" exists, it should also be "competent." *Id.*

The Fifth District summarized this somewhat circuitous tautology as follow:

> "Competency of evidence" refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

Scholastic Book, 671 So. 2d at 289 n.3.

7. Can the circuit court quash the city's decision if there is "competent, substantial evidence" supporting that decision *and* the petitioner's position?

No, and this is a very important distinction that most petitioners miss. While the standard may sound as if a court can determine whose evidence is more competent or more substantial, it generally is not.

Rather, the circuit court's inquiry is limited to determining whether competent, substantial evidence exists in the record to *support* the city's decision. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275–76 (Fla. 2001). In short, this inquiry is not really a factual inquiry, but a legal one: Is the quasi-judicial decision supported by *any* evidence in the record. *Lee Cnty.*, 619 So. 2d at 1003. If it is, then the circuit court's inquiry is over; it must close the file and deny certiorari. *Dusseau*, 794 So. 2d at 1275–76.

On first-tier review, the circuit court cannot take new evidence, reweigh the evidence in the record, draw different inferences from the record evidence, re-evaluate witnesses' credibility, or otherwise substitute its factual determination for the city's. *St. Johns Cnty.*, 766 So. 2d at 1100; *Metro. Dade Cnty. v. Mingo*, 339 So. 2d 302, 304 (Fla. 3d DCA 1976). Indeed, even if only one witness supports the city's decision despite eight

witnesses to the contrary, then *some* evidence exists to support the decision and certiorari must be denied. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

This is by far the most difficult standard for petitioners to prove on certiorari, and it illustrates why city attorneys should repeatedly remind the decisionmakers to reach their decision based on the evidence presented, rather than the political popularity or notoriety of the land-use request. *Compare St. Johns Cnty.*, 766 So. 2d at 1099 (illustrating such a friendly reminder), *with Conetta*, 400 So. 2d at 1053 (quashing a decision that was based more on a "popularity poll of the neighborhood" than evidence relevant to the variance criteria in the city code).

That said, city attorneys should be aware of two recent cases that suggest an alarming erosion of this standard when video recordings are exist.

The first arose in the context of a driver's license suspension in the administrative context for driving under the influence. *Wiggins v. Florida Dep't of Highway Safety & Motor Veh.*, 209 So. 3d 1165, 1167–69 (Fla. 2017). Despite a factual conflict between the arresting officer's live testimony and the dashboard-camera video, which told a different story from the officer's recount, the administrative hearing officer relied on the officer's testimony and suspended the driver's license. *Id.* But on first-tier certiorari review, the circuit court quashed that decision, holding that, as a matter of law, it was unreasonable for the hearing officer to rely on the officer's testimony when the video was a more "objective and neutral" depiction of the event. *Id.* at 1169. The First District, on second-tier review, held that the circuit court departed from the law's essential requirements by reweighing the officer's testimony and the video contrary to the Supreme Court's precedent in *Dusseau*, 794 So. 2d at 1275–76. Surprisingly, the Supreme Court disagreed. *Id.* According to the Court, the circuit court's first-tier decision was correct because, as a matter of law, a court can properly reject "testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence." *Id.* at 1175.

A year later, the Fourth District independently reached a similar conclusion in the sunshine-law context when both the appellate court and the circuit court reviewed the same video of a public meeting to determine whether it cured an earlier sunshine law violation, but reached "different impression[s] of the proceeding" in the video, which led to the district court reversing the trial court's cure finding. *Transparency for Fla. v. City of Port St. Lucie*, 240 So. 3d 780, 786 (Fla. 4th DCA 2018).

Given that many cities around the state video their public meetings, including their quasi-judicial hearings, petitioner could arguably use *Wiggins* and *Transparency* to argue that, as a matter of law, the video shows the absence of competent, substantial evidence to support the city's quasi-judicial decision. Or perhaps rely on *Wiggins* and *Transparency* to ask circuit courts to reweigh the evidence or witnesses' credibility because the objective real-time video arguably puts the circuit court in as good of a position as the city's decisionmakers to neutrally resolve factual disputes. While no reported case has yet discussed *Wiggins* and *Transparency* in this context, the city attorney should be cognizant of these decisions.

8. What are examples of competent, substantial evidence?

What constitutes "competent, substantial evidence" is actually quite broad, especially in the administrative context. Here's a bullet-point list of evidence sufficient to support a quasi-judicial decision:

- The landowner applicant's sworn testimony, his evidence (diagrams, etc.), and his witnesses, including expert witnesses. *E.g.*, *Riverside Group, Inc. v. Smith*, 497 So. 2d 988, 988, 990 (Fla. 5th DCA 1986).
- The recommendation and testimony of the city's professional staff, who are generally recognized as experts in their field. *E.g.*, *Payne v. City of Miami*, 52 So. 3d 707, 761 & n.13 (Fla. 3d DCA 2010); *Palm Beach Cnty. v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989). *But see Town of Longboat Key*, 95 So. 3d at 1040–42 (rejecting planning director's testimony about the city code's meaning as "evidence" of a particular interpretation because courts are just as capable to determine code's meaning using canons of statutory interpretation).
- The written report of the city's professional staff, which one court described as "strong evidence" supporting a decision. *E.g.*, *ABG Real Estate Dev. Co. of Fla., Inc. v. St. Johns Cnty.*, 608 So. 2d 59, 62 (Fla. 5th DCA 1992).
- The planning advisory board's recommendation and file. *Palm Beach*, 547 So. 2d at 694; *Riverside Group*, 497 So. 2d at 990.
- Even hearsay can support a quasi-judicial decision as long as it is not the only evidence supporting the decision. *Jones v. City of Hialeah*, 294 So. 2d 686, 688 (Fla. 3d DCA 1974); *Spicer v. Metro. Dade Cnty.*, 458 So. 2d 792, 794 (Fla. 3d DCA 1984).

9. Is there anything that would not qualify as competent, substantial evidence?

Despite the standard's breadth, it does have at least three limitations. First, an attorney's statements and arguments about the evidence or about why the city should vote for or against a land-use request is generally not "competent" to support a quasi-judicial decision. *Nat'l Advert. Co. v. Broward Cnty.*, 491 So. 2d 1262, 1263 (Fla. 4th DCA 1986) (finding the only evidence supporting the variance grant was argument of counsel, which is not evidence).

Second, evidence that is flawed as a matter of law cannot constitute competent, substantial evidence. For example, in *First Baptist Church of Perrine v. Miami-Dade Cnty.*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000), the county considered a church's special-exception application to expand its K-6 grade school to include seventh and eighth grade. *Id.* at 1115. The court found that the county properly rejected the church's traffic study as legally flawed because it accounted for less than 100% of the additional students expected for the expanded grades. *Id.* Thus, the study could not constitute

competent, substantial evidence in favor of granting the application. *Id.* at 1116. (Perhaps the video cases discussed above fall into this limitation).

Third, the unsubstantiated opinions and statements for or against a project by neighbors and residents are generally *not* competent, substantial evidence. *Pollard v. Palm Beach Cnty.*, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990); *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586, 588 n.1 (Fla. 5th DCA 1993). But some courts have recognized that if the residents are presenting actual and specific facts relevant to the land-use request—rather than generalizations, conjecture, and opinions—then their statements *can* constitute competent, substantial evidence. *Marion Cnty. v. Priest*, 786 So. 2d 623, 625–27 (Fla. 5th DCA 2001); *City of Jacksonville Beach v. Car Spa, Inc.*, 772 So. 2d 630, 632 (Fla. 1st DCA 2000).

Some courts have also suggested that if lay witnesses offer testimony on technical matters that require expertise—such as potential traffic problems, light and noise pollution, or the impact on home values—then the testimony is not competent, substantial evidence unless the witness is qualified as an expert in that area. *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 30 (Fla. 1st DCA 2010); *Metro. Dade Cnty. v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995). But if the testimony is on subjective matters that do not require expertise—such as the development's impact on the area's natural beauty—then the testimony can constitute competent, substantial evidence (if, of course, the subjective matter is relevant to the legal inquiry). *Id.*; *Jesus Fellowship, Inc. v. Miami-Dade Cnty.*, 752 So. 2d 708, 710 (Fla. 3d DCA 2000) (finding testimony about the church's operation was irrelevant because it did not bear on the code's special-exception standards).

The city attorney should be aware, however, that section 286.0115(2)(b), Florida Statutes, may have abrogated the decisions above like *Pollard*, *Ponce Inlet*, *Katherine's Bay*, and *Blumenthal*. Section 286.0115(2)(b) states:

> [A] person who appears before the decisionmaking body who is not a party or party-intervenor shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, and may be requested to respond to questions from the decisionmaking body, but need not be sworn as a witness, is not required to be subject to cross-examination, and is not required to be qualified as an expert witness. *The decisionmaking body shall assign weight and credibility to such testimony as it deems appropriate.*

Contrary to *Pollard*, *Ponce Inlet*, *Katherine's Bay*, and *Blumenthal*, this statute appears to recognize that residents' statements *can* constitute evidence—even if not sworn as a witness or qualified as an expert—because it gives the city's decisionmakers the exclusive authority to assign weight and credibility to the residents and neighbors' testimony. And since, as noted above, the circuit court cannot invade the city's ability to reweigh the evidence or witness's credibility, then a circuit court may have to deny certiorari even if the only "evidence" supporting the city's decision comes from a lay person. *See Mingo*, 339 So. 2d at 304. But to date, no reported case has invalidated *Pollard*, *Ponce Inlet*, *Katherine's Bay*, and *Blumenthal*, all of which stem from a pre-286.0115(2)(b) line of cases—or discussed their interplay with section 286.0115(2)(b).

D. What relief is available on or after first-tier certiorari review?

Petitioners and their attorneys often misconceive what relief is available for succeeding on certiorari. This section answers the two basic questions about what relief the prevailing party can receive versus the relief the losing party can obtain from further review.

1. What relief is available to the party who prevails on first-tier certiorari?

Unlike direct appeals and declaratory or injunctive actions, the ultimate relief on first-tier certiorari review is very, very limited. *Broward Cnty.*, 787 So. 2d at 843–844. The sole goal in certiorari is to halt the miscarriage of justice—nothing more. *Id.* In this respect, the only relief a circuit court can afford, if it finds the land-use decision was improper, is to quash the decision—that's it. *Id.* at 844.

Quashing the land-use decision merely leaves the parties and the controversy pending in the city as if no decision had ever been entered. *Id.* The parties' stand on their pleadings and proof as it existed before the decision, and the city can proceed to rehear the land-use issue, accept additional evidence, and even grant or deny the land-use request again, albeit on a different ground. *See Dorian v. Davis*, 874 So. 2d 661, 664 (Fla. 5th DCA 2004). The law-of-the-case doctrine will preclude the city from disregarding the circuit court's ruling and reaching the same result on the same ground that the court previously found erroneous. *Dougherty ex rel. Eisenberg v. City of Miami*, 23 So. 3d 156, 157 (Fla. 3d DCA 2009).

When it quashes the land-use decision, the circuit court lacks jurisdiction to adjudicate the land-use dispute on the merits, such as by ordering the city to grant or deny a land-use application. *Broward Cnty.*, 787 So. 2d at 844; *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1034 (Fla. 4th DCA 2002). It cannot even quash and remand with specific directions. *St. Johns Cnty.*, 766 So. 2d at 1100. *But see Volusia County v. Transamerica Bus. Corp.*, 392 So. 2d 585, 586 (Fla. 5th DCA 1980) (finding the circuit court's order compelling the city to take a particular action on remand from first-tier certiorari was harmless under the facts of the case because no other result was possible on remand).

2. What relief is available to the party who loses on first-tier certiorari?

A party unhappy with the circuit court's first-tier decision, can seek further certiorari review to the district court of appeal that presides over the circuit court. This is often called "second-tier" certiorari review.

But as the case moves up the ladder, the standard of review becomes narrower and narrower. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The district court's review on "second-tier" is limited to determining whether the circuit court "afforded procedural due process and applied the correct law." *Haines City*, 658 So. 2d at 529 (citations & quotations omitted). The phrase "applied the correct law" is synonymous with the "departed from the essential requirements of the law" standard employed in first-tier review. *Id.* at 530.

Two things are worth noting about this standard. First, the focus on second-tier certiorari is on whether the *circuit court* afforded procedural due process and applied the correct law—not the city. *Casselberry*, 813 So. 2d at 188.

Next, second-tier review notably does not permit the district court to consider whether the decision is supported by competent, substantial evidence. Only the circuit court can make that determination; the district court cannot. *Fla. Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092–1093 (Fla. 2000). As a practical matter, the circuit court's ruling on the competent-substantial-evidence standard is conclusive. *Fla. Power*, 761 So. 2d at 1092.

But if the circuit court misapplied the competent-substantial-evidence standard on first-tier review, then the district court can review that issue. *E.g.*, *id.* at 1093; *Dusseau*, 794 So. 2d at 1275. For example, as noted above, this standard requires the circuit court to determine whether the record before the city contains competent, substantial evidence *supporting* the city's decision. *Id.* If the circuit court instead looked for evidence *supporting* one party's position, rather than evidence supporting the city's decision, then the circuit court has applied the wrong law by misapplying first-tier's standard of review. *Id.* The district court can correct this issue on second-tier certiorari. *Id.* But that's all it can do; it cannot go the extra step and determine whether the record supports the city's land-use decision. It can only quash the circuit court's decision and remand it back to the circuit court to perform the necessary record review.

E. Conclusion

The city attorney's role in guiding the city through the minefield of politically charged quasi-judicial proceeding is critical in preventing costly litigation—whether the city wins or loses. Hopefully, this paper provided a good and up-to-date summary of challenges to municipal quasi-judicial action.