O/A 2-10-89.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,755

EDUCATION DEVELOPMENT CENTER, INC.,

Petitioner,

v.

CITY OF WEST PALM BEACH ZONING BOARD OF APPEALS, et al.,

Respondents.

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This court has granted review to EDUCATION DEVELOPMENT CENTER, INC., from a decision of the District Court of Appeal, Fourth District, which held that the Circuit Court of Palm Beach County exceeded its scope of review by reversing the decision of the West Palm Beach Zoning Board of Appeals to deny petitioner's application for conversion of its property.

Petitioner, respondent below, EDUCATION DEVELOPMENT CENTER, INC. ("EDC"), is a Florida corporation doing business in Palm Beach County, Florida. It owns real property located in the City of West Palm Beach which it plans to convert from a residence to a pre-school.

On or about September 4, 1984, EDC filed an application for private school with the West Palm Beach Building and Zoning Department. This application was referred to the Zoning Board of Appeals (Zoning Board) pursuant to Section 53-6(1)(d) of the zoning code, which provides:

> 1. Use Regulations - A building or premises shall be used only for the following purposes:
>
> a. One (1) single-family dwelling;
>
> b. Parks, playgrounds and community buildings owned or operated by public agencies;
>
> c. Public libraries and museums;

> d. Public schools or private schools having a curriculum corresponding to that offered in comparable public schools having no rooms regularly used for housing or sleeping purposes of the students provided that before any building occupied by a private school, the applicant shall be required to appear before the Zoning Board of Appeals and prove, by substantially competent evidence, that the proposed occupancy will be by a school offering a curriculum substantially similar to that offered in comparable public schools. (Emphasis added.)

On November 1, 1984, EDC appeared before the Zoning Board and introduced evidence of its future curriculum. This evidence, Petitioner/Respondent's Exhibit 1, was the state-approved curriculum for "Three-, Four-, and Five-year old Migrant Children." In addition to this evidence which established that EDC's curriculum was identical to that offered in comparable public schools, testimony by Ms. Betty Bell, Director of Elementary Education for the Palm Beach County School Board, indicated that this curriculum was substantially similar to that offered in comparable public schools (TR 20-22, 24).

Despite this competent testimony that EDC's state-approved curriculum was substantially similar to that offered in comparable public schools, the Zoning Board denied EDC's application based on inappropriate considerations. To begin with, the Zoning Board heard and apparently relied upon testimony that EDC's curriculum must be "certified" to comply with the Code (TR 51), and that Palm Beach County has no standardized pre-school curriculum (TR40, 50), neither of which is required by the Code. On the basis of these two irrelevant considerations, the Zoning Board attempted to classify the proposed pre-school as a

day care facility, which would require a special exception under another provision of the Code. (TR 40-41)

In addition, the Zoning Board considered factors wholly unrelated to the "substantially similar" curriculum standard set forth in the ordinance. These irrelevant factors included: EDC's instructional personnel (TR 24) and physical environment (TR 25); the appropriateness of the proposed use in a residential district (TR 42); and the impact of the proposed use on the surrounding community (TR 48-50).

As a result of this denial, EDC sought full review in the circuit court, which reversed the Zoning Board on February 28, 1986. While the circuit court found that there was substantially competent evidence to support EDC's position, it failed to make any finding regarding whether there was <u>any</u> substantially competent evidence to support the decision of the Zoning Board.

The Zoning Board petitioned for review by certiorari, which was granted. The district court quashed the February 28th order and "remanded with instructions that a redetermination be made applying the correct standard of review," 504 So.2d 1386. On remand, the circuit court applied the correct standard of review, found there was <u>no</u> substantially competent evidence to support the decision of the Zoning Board, and again reversed the Zoning Board's decision.

Nevertheless, the district court once again reversed the circuit court decision. This court has granted review of the district court's reversal.

SUMMARY OF THE ARGUMENT

The district court erred in redetermining whether the agency's decision was supported by substantial competent evidence.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT

A circuit court reviewing a decision of an administration agency determines (1) whether the agency afforded procedural due process; (2) whether the agency observed the essential requirements of the law; and (3) whether the administrative finding and judgment are supported by substantial competent evidence. City of Deerfield Beach v. Vaillant, 399 So.2d 1045 (Fla. 1982), aff'd 419 So.2d 624 (Fla. 1982).

A district court reviewing a circuit court decision makes only two determinations: (1) whether the circuit court afforded procedural due process; and (2) whether the circuit court applied the correct law. Id.

The outcome of this case turns on whether the circuit court applied the correct law in its review of the Zoning Board's decision. Although this court has refused in the past to "determine whether the [administrative] decision [was] supported by substantial competent evidence" because "that was the circuit court's function[,]" Vaillant at 603, it may have to make a related determination in this case. Whether the circuit court applied the correct law depends on whether it based its reversal of the Zoning Board on its finding the administrative record

"devoid of substantial competent evidence[,]" Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082, 1091 (Fla. 1978), or whether it impermissibly "re-evaluated" the evidence, thus substituting its judgment for that of the Zoning Board.

Circuit courts have been granted very little leeway in their review of administrative decisions. Where the record has contained any substantial competent evidence in support of the administrative decision, the agency's decision has been upheld, even there the court, given the evidence, would have come to a different conclusion. Metro Dade County v. Mingo, 339 So.2d 302 (Fla. 3rd DCA 1976).

District courts have held the following evidence supporting an administrative decision to constitute substantial competent evidence: a stipulated statement of facts revealing violation which was basis of administrative order, City of Clearwater v. Studebaker's Dance Club, 516 So.2d 1106 (Fla. 2nd DCA 1987); medical and employment data as to the need and staffing of a new hospital, Manasota Osteopathic General Hosp. v. State, 523 So.2d 710 (Fla. 1st DCA 1988); and extensive expert testimony with respect to violation of a city fire code, City of Deland v. Benline Process Color Co., 493 So.2d 26 (Fla. 5th DCA 1986).

In addition, a circuit court's finding of no substantial competent evidence has been reversed where there was no administrative record provided, DiPietro v. Coletta, 512 So.2d 1048, 1050 (Fla. 3rd DCA 1987); and where the circuit court based its reversal on "a theory espoused for the first time" on appeal.

Ft. Lauderdale Bd. of Adjust. v. Nash, 425 So.2d 578 (Fla. 4th DCA 1983).

The language of a circuit court's decision reversing an administrative agency is instructive as well. In City of Deland v. Benline Process Color Co., Inc., 493 So.2d 26 (Fla. 5th DCA 1986), the district court determined that the circuit court had applied the incorrect law. Crucial to the district court's ruling was the language the circuit court used in its opinion. In the words of the district court: "[t]he order of the circuit court, in stating that the [agency] 'did not have sufficient competent, substantial evidence before it' by its own terms implies that there was some competent, substantial evidence presented." Id. at 28.

The present case is distinguishable from the preceding ones. First, the circumstances and language of the circuit court's opinion reflect its understanding and application of the correct law. Second, in contrast to the above cases, the circuit court found there was no substantial competent evidence in support of the Zoning Board's decision. The circuit court in this case considered the evidence only to the extent required to determine the evidence in support of the Zoning Board's decision was weightless, which would certainly not be substantial and/or competent.

The circuit court's second ruling came on remand from the district court, which supplied the appropriate standard of review:

> The question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support a position contrary to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion.

504 So.2d at 1386 (emphasis added). As a result, the circuit court rendered a second opinion, on October 7, 1987, which, with one exception, was identical to the first one. The court inserted the following sentence:

> Likewise, there was no substantial competent evidence to support the City's denial of the petition.

Order, p.4. Having been reminded of the correct standard of review, the court was careful to demonstrate its application by expressly stating so in the opinion.

The circuit court's application of the correct law is demonstrated as well in its discussion of relevant testimony offered in support of the Zoning Board's decision: a letter from Associate Superintendent Joseph Orr and testimony from Mr. William Smith, Deputy Planning Director for the City of West Palm Beach. The letter stated that the School Board of Palm Beach County did not have any approved curriculum for children at the nursery school level or below. Mr. Smith testified that a preschool curriculum must be certified (TR 51) and standardized (TR 40,50). The circuit court determined that neither Orr's letter, Smith's testimony, nor Ms. Bell's lack of personal knowledge, together or separately, constituted substantial competent evidence in support of the denial:

> While there was discussion by the Board concerning Ms. Bell's lack of personal knowledge, there was no question but that it was her understanding that the curriculum represented in Exhibit 1 was substantially similar to that offered in the public schools. Further, the Code does not require that curriculum be substantially similar to comparable schools in Palm Beach County, and such a curriculum approved by the State of Florida, which might not yet be implemented in Palm Beach County, would still be sufficient to meet the Code requirements.
>
> In view of the testimony of Betty Bell, there was substantially competent evidence that the curriculum which the Petitioner was going to use in the operation of its pre-school was substantially similar to that offered in comparable public schools, even though the Palm Beach County School Board might not have approved a curriculum for children at the nursery school level or below.

Order, p.4 (emphasis added). The record, the circuit court concluded, contained "no substantial competent evidence to support the City's denial of the petition." Id.

The procedural circumstances, the express language of the opinion, and the court's discussion of the testimony all manifest the circuit court's application of the correct law. The circuit court's conclusion that the Zoning Board's decision was unsupported by any substantial competent evidence required its reversal of the Zoning Board.

The scope of [a district] court's review of a circuit court order rendered in its appellate capacity in an administrative action is even narrower than that of the circuit court. Norwood-Norland Homeowners Ass., Inc. v. Dade County, 511 So.2d 1009 (Fla. 3rd DCA 1987). Once the circuit court determined there was no substantial evidence in support of the Zoning Board's decision, the district court was prohibited from revisiting that

determination. Although the district court accuses the circuit court of "substituting its judgment for that of the zoning board[,]" 13 FLW 1412, it is the district court which substituted its own judgment that there was substantial competent evidence in support of the Zoning Board's decision for the circuit court's determination that there was not. The district court was limited to determining whether the circuit court afforded due process and whether it applied the correct law. Because the circuit court based its reversal on its finding of no substantial competent evidence, it applied the correct law.

Valid policy concerns underly the differing scopes of review. First, this court has determined administrative decisions are not subject to two full reviews. Vaillant, supra. Second, a progressively narrowing scope of review acknowledges the courts' decreasing proximity to the administrative record.

As the Fourth District observed in Vaillant, 399 So.2d at 1047:

> 'Appellants . . . would seem to suggest that as a case moves up the appellate ladder, each level of review becomes more broad . . . than the one preceeding it. In effect, appellants desire to invert the pyramid.'
>
> We ascribe to the pyramid analogy, but, like the appellee, believe its vertex must be uppermost. This being so, we cannot consider the question of substantial competent evidence already reviewed by the Circuit Court.

In Vaillant, the Fourth District was correct in not considering the question of substantial competent evidence already reviewed by the circuit court. In this case, however, the Fourth District did precisely what it held it could not do in Vaillant: it conducted a plenary review of the evidence already

reviewed by the circuit court. To approve the Fourth District's opinion would serve only to invert the pyramid.

CONCLUSION

Wherefore, EDC requests this Court to quash the decision of the district court and remand with instructions to affirm the judgment of the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by regular U.S. Mail to Carl V. M. Coffin, Esq., P.O. Box 3366, West Palm Beach, FL 33402, on this 22nd day of November, 1988.

Respectfully submitted,

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