IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,755

EDUCATION DEVELOPMENT CENTER, INC.,

Petitioner,

vs.

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

Respondents.

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

BRIEF OF PETITIONER ON JURISDICTION (With Separate Appendix)

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STATEMENT OF THE CASE AND FACTS

This is a petition for review by the 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 5, 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 pubic schools, testimony by Ms. Betty Bell, the 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, (TR 40, 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 no 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. Petitioner EDC seeks jurisdiction for review of that decision.

SUMMARY OF THE ARGUMENT

In the case at bar the district court expressly held that the circuit court had "substituted its judgment for that of the zoning board" because "[t]here was substantial evidence to support [the Zoning Board's] denial of the application...". 13 FLW 1412.

In so holding, the district court announced a rule of law which expressly and directly conflicts with the rule of law announced by this Court in City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982), which prohibits a district court from redetermining whether the agency's decision was supported by substantial competent evidence, Id. at 626. The district court's decision conflicts as well with decisions of other district courts which are in accord with Valliant.

POINT INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN THE CASE AT BAR IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW?

ARGUMENT

The district court's decision in this case is in direct conflict with this court's decision in City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982); decision of the District Court of Appeal, Third District, in Norwood-Norland Homeowners Ass., Inc. v. Dade County, 511 So. 2d 1009 (Fla. 3d DCA 1987); and a decision of the District Court of Appeal, Fifth District, in Henshaw v. Kelly, 440 So. 2d. 2 (Fla. 5th DCA 1983).

These decisions unequivocally establish the respective scopes of review of a circuit court and district court of appeal. As this court explained in Valliant, supra, in approving the decision of the District Court of Appeal, Fourth District:

> "where full review of admininistrative action is given in the circuit court as a matter of right, one appealing the circuit court's judgment is not entitled to a second full review in the district court. Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is

> accorded, whether the essential requirements of the law have been observed and whether the administrative findings and judgment are supported by competent substantial evidence. **The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process[1] and applied the correct law.**

419 So. 2d at 626. (emphasis added)

Accord Norwood-Norland, supra; Henshaw, supra.

Although the circuit court remained within its proper scope of review, reversing the Zoning Board's decision because it found no substantial competent evidence to support denial of petitioner's application, the district court exceeded its scope of review. By revisiting the existence of substantial competent evidence, which led to its reversal of the circuit court's decision, the district court contradicted the rule of law announced in the opinions above. Accordingly, this court should exercise its discretionary jurisdiction to review the conflict.[2/]

1/ There has never been any contention or finding that the circuit court denied the Zoning Board procedural due process.

2/ The fact that the District Court did not expressly acknowledge conflict with other decisions does not preclude this court's exercise of discretionary jurisdiction to review conflict. As this Court noted in Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981), the district court opinion need not identify a conflict. All that is required is that the district court's discussion of the legal basis for its decision reveal a conflict with the decision of another district court or the supreme court. Id. at 1342.

I. THE CIRCUIT COURT APPLIED THE CORRECT LAW.

On remand the circuit court considered the correct standard of review supplied by the Fourth District Court of Appeal:

> 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) Accord Henshaw, supra.

As a result, the circuit court rendered a second opinion on October 7, 1987, which, with one exception, was virtually identical to the first opinion of February 28, 1986. The court inserted a single sentence to demonstrate its application of the correct standard of review:

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

Order, p. 4.

The only evidence relating to curriculum offered in support of the Zoning Board's decision was a letter from Associate Superintendent Joseph Orr and testimony of 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 pre-school 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 constituted substantial competent evidence in support of 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 determined, contained "no substantial competent evidence to support the City's denial of the petition." Id. Such a determination was within the circuit court's appropriate scope of review.

II. THE DISTRICT COURT EXCEEDED THE SCOPE OF ITS LAWFUL REVIEW BY RESTING ITS REVERSAL OF THE CIRCUIT COURT ON ITS OWN DETERMINATION THAT THE BOARD'S DENIAL OF EDC'S APPLICATION WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, THEREBY CONFLICTING WITH OTHER DECISIONS.

"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, supra, at 1012. The district court is limited to a determination of whether the circuit court accorded procedural due process and applied the correct law. Valliant, etc., supra.

Once the circuit court had determined there was no substantial competent 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 Board's decision for the circuit court's determination that there was not. The district court's deviation from established law is manifested in its statement that "[t]here was substantial evidence to support denial of the application.

Id. The rule of law announced in Valliant, etc., supra, precludes district courts from second-guessing circuit courts' determination regarding the existence of substantial competent evidence.

CONCLUSION

Petitioner respectfully urges that there is a direct conflict between the decision of the District Court of Appeal, Fourth District, in the case at bar and the decisions cited herein of this Court and the other district courts of appeal. Petitioner respectfully prays this court to exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal pursuant to Article V, Section 3(b)(3), Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail this 22 day of July, 1988, to Carl V. M. Coffin, Esquire, P. O. Box 3366, West Palm Beach, Florida 33402.

Respectfully submitted,

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