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 RESPONDENTS ON JURISDICTION

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AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The STATEMENT OF THE CASE AND FACTS set forth in the BRIEF OF PETITIONER ON JURISDICTION is too argumentative and cannot be accepted by Respondents. The following is Respondents' version.

Petitioner, EDUCATION DEVELOPMENT CENTER, INC., is the owner of real property located at 2300 Parker Avenue, West Palm Beach, Florida. Petitioner filed a petition with the West Palm Beach Zoning Board of Appeals (Board) on September 5, 1984, to operate a school at that location. The Board had jurisdiction to hear the matter by virtue of Sec. 53-6.1.d. of the West Palm Beach zoning ordinance, which provided:

> Sec. 53-6. "R-1" Single-Family Residential District Regulations.
>
> * * * * *
>
> 1. Use Regulations - A building or premises shall be used only for the following purposes:
>
> * * * * *
>
> 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.

On November 1, 1984, the matter was heard. The Board denied the petition.

Petitioner's Amended Petition for Writ of Certiorari was filed in the circuit court on December 3, 1984. The circuit court reversed the decision of the Board in its OPINION entered February 28, 1986:

> "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..."

The trial court did not examine the record to decide whether there was competent substantial evidence to support the decision of the Board.

Consequently, the Board petitioned the Fourth District Court of Appeal for a Writ of Certiorari (Case No. 4-86-0687) on March 31, 1986, arguing that the trial court failed to apply the proper standard for review in its OPINION. The Fourth DCA granted the petition, quashed the order of the circuit court and remanded with instructions that a redetermination be made applying the correct standard of review. City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 504 So.2d 1385 (Fla.App. 4th DCA 1987).

On remand the circuit court scheduled additional oral argument of counsel for July 13, 1987. Following argument, the court entered a second OPINION on October 7, 1987, which OPINION is virtually identical to the OPINION of February 28, 1986, which had been reversed, with one exception. The court inserted a single sentence:

> "Likewise, there was not substantial competent evidence to support the CITY's denial of the petition."

In all other respects, the two judgments are identical.

The Board again petitioned the Fourth DCA for a Writ of Certiorari (Case No. 87-2889) on November 6, 1987, arguing that the trial court again did not correctly apply the law. Specifically, the trial court substituted its judgment for that of the Board and re-weighed the evidence reaching a contrary conclusion. The Fourth DCA agreed in City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 13 FLW 1412 (1988) and again reversed the trial court finding that there was competent substantial evidence to support in the record the Board's determination.

Petitioner now seeks to have this opinion of the Fourth DCA reversed by writ of certiorari on the basis of conflict jurisdiction.

SUMMARY OF THE ARGUMENT

The three cases cited by Petitioner for conflict jurisdiction for review of the Fourth DCA's decision in City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 13 FLW 1412 (1988) do not conflict with this decision. The Fourth DCA determined that the circuit court, in reviewing by certiorari a decision of the West Palm Beach Zoning Board of Appeals, did not apply the correct law. This determination by the Fourth DCA does not conflict with any decision of the Florida Supreme Court or other Florida DCA.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN CITY OF WEST PALM BEACH ZONING BOARD OF APPEALS V. EDUCATION DEVELOPMENT CENTER, INC., 13 FLW 1412 (1988) DOES NOT CONFLICT WITH ANY DECISION OF THE FLORIDA SUPREME COURT OR ANY DECISION OF A FLORIDA DISTRICT COURT OF APPEAL.

The decision of the Fourth DCA attacked here by Petitioner does not conflict with a decision of the Florida Supreme Court or of any Florida District Court of Appeal. The decision certainly does not conflict with the holdings cited by Petitioner in City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982), or Norwood-Norland Homeowners Association, Inc. v. Dade County, 511 So.2d 1009 (Fla.App. 3rd DCA 1987) orHenshaw v. Kelly, 440 So.2d Page 2 (Fla.App. 5th DCA 1983).

Petitioner has miscomprehended these cases:

> "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." Petitioner's Brief, page 6.

These cases do not require that the matter of competent substantial evidence be ignored by the DCA. These cases simply recite the rule, which is in no way inconsistent with the decision of the Fourth DCA sub judice, that the DCA's scope or review is limited to whether the circuit court afforded procedural due process and applied the correct law.

In fact, in Vaillant, Norwood and Henshaw the Florida Supreme Court, the Third DCA and the Fifth DCA, respectively, analyzed the judgment of the circuit court in light

of the content of the record made before the quasi-judicial administrative body. This analysis of the record is essential to determine whether or not the circuit court applied the correct law. The analysis by the DCA of the circuit court's application of law cannot be made in a vacuum.

True, the DCA cannot re-decide specifically whether there is competent substantial evidence in support of the agency's decision. That is the exclusive function of the circuit court. But that is not what the Fourth DCA did in this case. The Fourth DCA decided that the circuit court did not apply the correct law.

Several laws are applied by the circuit court in its certiorari review of a quasi-judicial administrative decision of a local agency:

1. the court shall uphold the decision if supported by competent substantial evidence in the record;
2. the court cannot reverse the decision of the administrative board unless the record is devoid of supporting competent substantial evidence;
3. the court must not re-weigh the evidence in the record to find the greater weight of evidence; and
4. where conflicts of reasonable positions appear in the record, the court cannot substitute its judgment for that of the local agency.

These several legal principles relative to the evidence in the record are applied by the circuit court.

Whether these principles are correctly applied requires an analysis by the DCA of the judgment of the circuit court in light of the content of the record made before the administrative agency.

The Fourth DCA found competent substantial evidence in the record made before the West Palm Beach Zoning Board of Appeal to support either an approval or a denial of Petitioner's application to locate a pre-school. Consequently,

> "we conclude that the lower tribunal either re-interpreted the inferences which the evidence supported or reweighed that evidence; in either event substituting its judgment for that of the zoning board, which it may not properly do." 13 FLW 1412, at 1413.

How else could the Fourth DCA decide whether the circuit court had invaded the province of the Board if the DCA failed to evaluate the evidence in the record?

Stated another way, the DCA must limit its critique to the judgment of the circuit court, while the circuit court necessarily limits its critique to the decision of the agency. The DCA does not ignore the judgment of the circuit court and does not decide whether there is competent substantial evidence in the record to support the decision of the agency. The DCA decides whether the circuit court correctly applied the above legal principles.

There are several on point examples of this system of certiorari review where the Florida Supreme Court and a Florida DCA has reversed a circuit court on considerations of competent substantial evidence. In Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978), the record before the county

commission was evaluated by the Florida Supreme Court to test the judgment of the circuit court:

> "We find that the conflicting interpretations urged by petitioner and respondents are both reasonable and, consequently, find that the Board of County Commissioners acted in accordance with the essential requirements of law in reaching its decision. The circuit court, therefore, transcended the scope of its certiorari review by substituting its judgment for that of the local zoning authority. Because zoning or rezoning is the function of the appropriate zoning authority and not the courts, the circuit court was not empowered to disapprove the finding of the Board unless the record was devoid of substantial competent evidence to support the Board's decision." Id., at 1091.

In Bell v. City of Sarasota, 371 So.2d 525 (Fla.App. 2nd DCA 1979), the Second DCA held:

> "In review of the transcript of the zoning board proceedings, we note that the board was presented with facts meeting each of the required criteria. Discussion before the vote indicated board members were basing their decision on those criteria. We hold that there was sufficient competent evidence before the board to justify its action. There is no evidence or indication in the transcript or record on appeal that the board's action was arbitrary, discriminatory, or unreasonable." Id, at 527.

The same DCA held in Sarasota County v. Purser, 476 So.2d 1359 (Fla.App. 2nd DCA 1985):

> "Because there was sufficient competent evidence that Respondents had not met their burden of proof, the Board's denial of the special exception was not arbitrary, discriminatory, or unreasonable. Therefore, the circuit court erred in granting certiorari by which it quashed the Board's decision. The circuit court's order is quashed and set aside." Id., at 1363.

The Fourth DCA is well acquainted with the rule which limits its certiorari review of a circuit court judgment.

> "As indicated above, it is not our function to determine whether the county commission decision is supported by substantial competent evidence - that was the circuit court's function. For us to now to duplicate that determination would afford petitioner two full appeals. On the contrary, we must look only to see if, first, due process was afforded petitioner and, second, if the correct principles of law were applied. Having thoroughly examined the record, we find the circuit court properly fulfilled its function and thus we deny the petition for writ of certiorari." Tomeu v. Palm Beach County, 430 So.2d 601 (Fla.App. 4th DCA 1983).

Of course the Fourth DCA looked at the record made before the West Palm Beach Zoning Board of Appeals to determine whether the circuit court had applied the correct law. So did the Florida Supreme Court in Skaggs, supra, and the Second DCA in Bell, supra, and Purser, supra.

It is in the best interest of the public that the DCA assure that the circuit court observe these principles. Otherwise the local board becomes nothing more than an evidence gathering mechanism for the judiciary where, upon certiorari petition, the real decision is made.

Consider this issue from the perspective of the local agency. The local agency knows per Vaillant that if its record contains competent substantial evidence to support its decision, the agency will win in court. The agency also knows per Skaggs that its record can legally contain competent substantial evidence in support of more than one potential decision. Where

both "pro" and "con" have presented competent substantial evidence, in other words, the agency cannot lose. Its decision is virtually "reversal proof."

It is in the best interest of the local board, then, that the record be well developed and that ample evidence be invited from both sides of a controversy. In this way the agency is encouraged to receive all relevant evidence available and to give all parties their "day in court." The public is not only encouraged to participate, but the ultimate decisions of the agency are based upon a greater amount of information and should be better reasoned.

The Fourth DCA determined here that competent substantial evidence existed in the record before the Zoning Board to support both the "pro" and "con" side of the issue. The reversal of the circuit court, therefore, was error. The circuit court misapplied the correct law.

This petition for certiorari review of the decision of the Fourth DCA should be denied.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy hereof has been furnished by United States mail this 10th day of August, 1988, to James K. Green, Esquire, 301 Clematis Street, Suite 200, West Palm Beach, Florida 33401.

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