IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,973

PARK OF COMMERCE ASSOCIATES, etc.,

Petitioner

vs.

CITY OF DELRAY BEACH, a Florida Municipal Corporation, DOAK S. CAMPBELL, III, Mayor, JAMES WEATHERSPOON, RICHARD DOUGHERTY, MALCOM BIRD, and MARIE HORENBURGER, City Council Members, and LAND RESOURCES INVESTMENT COMPANY,

Respondents

ON DISCRETIONARY REVIEW OF QUESTIONS CERTIFIED BY THE COURT OF APPEAL, FOURTH DISTRICT

MOTION TO DISMISS AND ANSWER BRIEF OF RESPONDENT LAND RESOURCES INVESTMENT COMPANY

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent Land Resources Investment Company[1/] generally agrees with petitioner Park of Commerce's statement of the facts with respect to the action by Park of Commerce and Land Resources against the City of Delray Beach on the site plan issue (Case No. 88-3192). Park of Commerce's statement of the facts with respect to the action by Land Resources to have Park of Commerce perform its contractual obligation to repurchase the real property (Case Nos. 88-3193, 88-1387, and 88-2654) is superficial and incomplete. Land Resources therefore supplements Park of Commerce's statement as follows.

The Initial Contract Between Park of Commerce and Land Resources

Land Resources and Park of Commerce entered into a contract and addendum on or about March 9, 1986. Under the contract, Land Resources agreed to buy from Park of Commerce a three-acre parcel of property which was part of a larger 25-acre tract in Delray Beach owned by Park of Commerce. (R. 279-80; Land Resources' Exhibit 2).

Park of Commerce expressly represented in the contract that the property could be used for an "FP&L district office building site with drive through facilities for customer bill payments, subject to receipt of zoning approval." (Land Resources' Exhibit 2 at ¶¶ 1, 13(e)). Although the larger

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1/ Land Resources is an affiliated company of Florida Power & Light Company ("FP&L").

tract, including the three-acre parcel, had previously been rezoned from residential to "planned office center," the land was not platted and site plan approval was required as a prerequisite to obtaining a building permit to develop the site for its intended use.

The contract contained a number of conditions relating to platting, zoning, and access which had to be satisfied before Land Resources was obliged to close. (R. 280; Land Resources' Exhibit 2). Paragraph 13(j) of the addendum, for example, required Park of Commerce to obtain and record in the public records an approved plat showing the three-acre parcel as a single lot containing "no restrictions or limitations not previously approved by Land Resources." Paragraph 13(e) gave Land Resources the right to terminate the contract and obtain a refund of its deposit if it was unable, within 120 days of the execution of the contract, to obtain whatever "site plan approvals" were "necessary" to make legal use of the property.

Paragraph 13(d) contained a representation by Park of Commerce that S.W. 22nd Avenue/S.W. 29th Street, the only road abutting the property, was a "public street" and that the property to be conveyed was "contiguous" to the public right of way of that street along the entire boundary line of more than 600 feet. Finally, Paragraph 13(d) provided that "the existence of legal ingress and egress, including an entrance drive and an exit drive, to the property directly to and from 22nd Avenue/29th Street, . . . is a condition precedent to buyer's obligation to close this transaction."

John Farrell, a real estate lawyer with 37 years experience, represented Land Resources in making the purchase and was the primary draftsman of the contract. Mr. Farrell, whom the trial court recognized as an expert, testified that the language of Paragraph 13(d) regarding access and contiguity was "more or less my boilerplate" and that he was not aware of any special problem concerning access at the time he prepared the contract. (R. 281).

Land Resources and Park of Commerce Agree that Park of Commerce Will Buy Back the Property if the City Does Not Allow Access From 22nd Avenue/29th Street

During the spring of 1986 new issues arose and led the parties to enter into a second addendum to the contract in August 1986. (R. 284, 289; Land Resources' Exhibit 3). An employee of the City of Delray Beach planning department suggested that the proposed sale might subject the entire 25-acre tract to review by the Regional Planning Council as a "development of regional impact" or "DRI." (R. 285). Next, Land Resources learned that the residents of the condominium developments along 22nd Avenue/29th Street were opposed to the proposed FP&L district office having access for ingress and egress from that road. (R. 287).

Land Resources could have walked away from the deal, but suitable, reasonably-priced district office sites were hard to find. (R. 284). This site had been identified by FP&L as the "prime site" for the new Delray Beach district office as early as April 1985, and FP&L's lease on its then existing

Delray Beach office was due to expire in 1987. (R. 63). Furthermore, Park of Commerce was willing to give Land Resources certain written assurances with regard to the DRI and access issues if it would agree to close once the plat was obtained and recorded. (R. 287-88).

The plat was approved unanimously by the Delray Beach City Council on June 24, 1986, and was recorded in the public records on August 1, 1986. (R. 293; Land Resources' Exhibit 32). The second addendum to the contract was signed by the parties in August, before the closing on August 29, 1986. (R. 292).

The clause of the second addendum pertinent to the issue of access states:

> 13. SPECIAL CLAUSES (continued)
>
> dd) BUILDING PERMIT/SITE PLAN - RE ACCESS It has been suggested by others that, notwithstanding anticipated plat approval of the property as having approximately 600 ± feet of frontage contiguous to and with S.W. 22nd Avenue/S.W. 29th Street, the City of Delray Beach may refuse to grant site plan approval and/or a building permit issuance unless public access to the property is from elsewhere than those public streets. Seller denies that such is or could be the case, and is willing to provide Buyer with certain further assurances in that regard, namely:
>
> That if Buyer closes this transaction and is subsequently (within 180 days of closing) refused a City of Delray Beach building permit or site plan approval because the City or some other government agency having jurisdiction declares or decrees that access from

> some other public street (other than S.W. 22nd Avenue/S.W. 29th Street) is a condition precedent to any building permits issuance, the Buyer may elect to resell the property to the Seller, and Seller agrees that it shall repurchase the same at the same gross purchase price as this transaction. * * * Such repurchase shall be concluded within thirty (30) days from and after Buyer's election to resell property to Seller.

(emphasis added).

Mr. Farrell testified that FP&L had the legal right to ingress and egress the property from 22nd Avenue/29th Street once the plat was recorded in the public record. (R. 299-30, 1277). When asked whether, at the time he drafted Paragraph 13(dd), he contemplated that the City might refuse to approve a site plan if it permitted the property to be accessed from 22nd Avenue/ 29th Street, Mr. Farrell testified: "It seemed to me a very bizarre possibility, but I try not to let possibilities create problems for my client." (R. 1281).

In discussing the facts and circumstances which led him to draft paragraph 13(dd) and to incorporate it into the second addendum, Mr. Farrell testified:

> The seller was pressing for a closing. This project had been underway for a long time and the new building was badly needed. We were endeavoring to keep the project moving and still have some assurance that if the unexpected, incredible or bizarre occurred, that we would not be left holding a piece of real estate we could not use for company purposes.
>
> The seller was willing to give us that assurance, and we thought that we had, in

> effect, an insurance policy that if what I call the bizarre happened, that they would step up to the bat and take it back. Obviously, that didn't happen.

(R. 1284).

The City Denies the Site Plan Application Because It Does Not Want to Grant Access from 22nd Avenue/29th Street

As Park of Commerce acknowledges in pages 15-17 of its brief, Land Resources made good faith efforts to obtain site plan approval and it accepted every one of the 22 suggestions the City's Zoning Board made for modifications to the original plan. Land Resources will therefore not rehash the facts relating to those efforts.

Land Resources' site plan application was rejected by a 3 to 1 vote of the Delray Beach City Council at a public hearing on October 28, 1986. It is apparent from the transcript of the hearing and from the testimony at trial that the Council was under substantial pressure from neighboring residents to deny the site plan application. (R. 82-83, 310-11; Land Resources' Exhibit 31 at pp. 44-45). Park of Commerce had made a previous oral commitment to the City not to access the 25 acres it owned from 22nd Avenue/ 29th Street. (R. 3860; Land Resources' Exhibit 31 at pp. 44-45).

Just before voting to reject Land Resources' site plan application, the City Council suggested that the plan could be approved if FP&L would abandon its request for access from 22nd Avenue/29th Street and seek instead to negotiate with Park of Commerce an easement allowing access across its property from

Congress Avenue, the only other public street in the vicinity. (Land Resources' Exhibit 32 at pp. 72-78).[2/] Land Resources answered that it was unwilling to try to negotiate a right of access for ingress and egress from Congress Avenue, and explained that such an easement was unacceptable because it would require FP&L's customers to traverse an 800 foot driveway to pay their bills. (R. 83-84; 311-12).

The City's Denial Triggers Park of Commerce's Repurchase Obligation

Representatives of Land Resources met with representatives of Park of Commerce one week after the site plan denial, on November 4, 1986, and hand-delivered a letter advising that Land Resources had elected to re-sell the property to Park of Commerce pursuant to Paragraph 13(dd) of the second addendum and requesting that the re-purchase be performed within thirty days. (R. 1286-88; Land Resources' Exhibit 4).

On November 21, 1986, Park of Commerce responded with a letter. (R. 1290; Land Resources' Exhibit 26). Although admitting that site plan approval was denied "because the City Council did not want to allow access onto S.W. 22nd Avenue, the only public street bordering your property," the letter maintained that the City's denial was illegal and stated that Park of Commerce was not obliged to perform the repurchase "where the denial was dictated by plebiscite, rather than any

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[2/] Contrary to Park of Commerce's suggestion on page 17 of its brief, this action by the City effectively declared that access to the property had to be from Congress Avenue, the only other street adjoining Park of Commerce's tract.

fundamental or valid objections to the site plan . . . ." The letter demanded that Land Resources join Park of Commerce in suing the City in an attempt to overturn the denial. The letter suggested that Park of Commerce lacked standing to bring the suit on its own and that Land Resources was required to join in the suit as a condition precedent to triggering Park of Commerce's obligation to repurchase.

Concerned that Park of Commerce not lose its right to challenge the denial, and faced with only six remaining days before the deadline expired for seeking certiorari review, Land Resources agreed to join Park of Commerce in its suit against the City of Delray Beach. (R. 1295-96). However, Land Resources made it perfectly clear that it was not, by joining Park of Commerce's lawsuit against the City, reversing its decision to compel the repurchase -- whatever the outcome of the litigation -- and that Land Resources would, if necessary, sue Park of Commerce to enforce the obligation. (R. 1297-99). Shortly thereafter, Land Resources sued Park of Commerce to compel performance of the repurchase. (R. 3773-92).

During the period of time between the filing of the lawsuit by Park of Commerce and Land Resources against the City and the start of the trial on February 24, 1988, FP&L's lease expired on its existing office and it was forced to occupy the premises on a holdover basis. (R. 84). Needing to take action, FP&L selected an alternate district office site at Lake Ida Road and Congress Avenue in Delray Beach. (R. 85). As of the time of trial, in 1988, FP&L had not made a binding commitment to the

alternate site. (Id.). After the trial, FP&L acquired the Lake Ida site, built its new district office there, and closed its old district office.[3/]

The Trial Court Finds that Park of Commerce Was Obligated to Repurchase the Property

The two separate cases were consolidated below for purposes of discovery and trial and were tried before the trial court without a jury during three sessions totalling eight days. On September 20, 1988, the trial court rendered separate final judgments in favor of Land Resources on its claim against Park of Commerce, and against Park of Commerce and Land Resources on their action against the City of Delray Beach. These judgments and the two subsequent judgments in favor of Land Resources for damages, prejudgment interest, and attorneys' fees against Park of Commerce (the "buy-back judgments") are accurately described in Park of Commerce's brief at pages 19-20.

The trial court made the following findings regarding the reason the City denied the site plan application:

> It is unquestionable from the evidence that the only reason for the city's rejection of Site Plan B was its access onto S.W. 22nd Avenue/S.W. 29th Street.

(R. 3767).

3/ This latter information is not in the record. Land Resources brings it to the Court's attention so that the Court can evaluate whether the case is moot, and so that it will understand why Park of Commerce is incorrect when it says that it would not be unfair to make Land Resources keep the Delray Beach property. Cf. Storch v. Allgood, 184 So.2d 170, 171 (Fla. 1966) (taking into account change in facts which rendered appeal moot).

> It is clear from the overwhelming weight of the evidence that Land Resources was denied site plan approval solely because access to the parcel from S.W. 22nd Avenue/S.W.29th Street was unacceptable to the City.
>
> * * *
>
> Access from the commercial site onto the adjacent local residential street is totally unacceptable to the City. It is clear from all of the evidence that no site plan providing access onto S.W. 22nd Avenue/S.W. 29th Street would have been approved by the City Council.

(R. 3860).

The Proceedings Before the Fourth District

All four of the judgments were appealed to the Fourth District. Park of Commerce and Land Resources appealed the trial court judgment upholding the City's denial of the site plan application; Park of Commerce also appealed the three buy-back judgments in favor of Land Resources requiring Park of Commerce to repurchase the property and awarding Land Resources damages, prejudgment interest, and attorneys' fees against Park of Commerce. The four appeals were consolidated.

Park of Commerce devoted only two of its 24 pages of argument in its brief to the Fourth District to the buy-back judgments. In these two pages of its brief, Park of Commerce argued that if the City had illegally denied the site plan application, then the repurchase obligation set forth in the second addendum was not triggered. See Park of Commerce's Initial Brief in the Fourth District at 35-37. Park of Commerce did not cite any legal authority to support its position.

In its brief to the Fourth District, the City of Delray Beach recognized that the buy-back judgments in favor of Land Resources were completely independent of the judgment upholding the City's denial of the site plan application:

> The [trial court] did not act inconsistently. The [trial court] had to rule on essentially two separate issues. One dealing with the City's denial of the site plan, and the other concerning the contract dispute between FP&L and Park of Commerce. The fact that these cases were consolidated for trial and discovery did not mandate a merging of the proofs that must be made in each individual case. . . .
>
> The fact that the actual reason for denial may have been relevant to the contract dispute between FP&L and Park of Commerce does not pose an inconsistency in the verdicts.
>
> * * *
>
> The two judgments are not inconsistent. The judgments concern different issues.

City of Delray Beach's Brief in the Fourth District at 36-38.

Land Resources in turn argued that there was no basis for overturning the trial court's judgments requiring Park of Commerce to repurchase the property. The trial court had found Paragraph 13(dd) of the second addendum to be unambiguous, giving Land Resources the right to compel the repurchase if the site plan application was denied because the City refused to permit access for ingress and egress from 22nd Avenue/29th Street. The trial court had also found that Paragraph 13(dd) had been triggered because the City's denial of the site plan was based on the City's refusal to permit access to the property

from 22nd Avenue/29th Street. (R. 3767, 3860). See Land Resources' Brief in the Fourth District at 12-15.

The Fourth District panel majority opinion stated in its entirety as follows: "We affirm on the authority of City of Boynton Beach v. V.S.H. Realty, Inc., 443 So.2d 452 (Fla. 4th DCA 1984." (App. 14). The concurring opinion and the dissenting opinion each dealt with the proper standard of judicial review of site plan denials; neither of these separate opinions discussed the buy-back judgments. (App. 15-16).

On rehearing en banc, the Fourth District devoted its entire opinion to the question that had divided the panel, i.e., the proper standard of judicial review of site plan denials. (App. 17-24). There was no mention whatsoever in the en banc opinion of the repurchase provision in the addendum between Land Resources and Park of Commerce or of the trial court judgments requiring Park of Commerce to repurchase the property and awarding damages, prejudgment interest, and attorney's fees to Land Resources. With respect to the site plan issue, the en banc Fourth District ruled that a municipality's review of a site plan application was quasi-judicial in nature and therefore subject to judicial review by certiorari. Because the trial court had conducted a de novo trial, the en banc Fourth District reversed the "decision" of the trial court. (App. 21).[4/]

Land Resources moved for clarification and rehearing, arguing that the en banc decision regarding the nature of site

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4/ The en banc opinion is reported at 606 So.2d 633 (Fla. 4th DCA) (en banc).

plan review did not affect the independent buy-back judgments in favor of Land Resources. The en banc Fourth District granted the motion for clarification. It noted that the panel opinion had affirmed the buy-back judgments in favor of Land Resources requiring Park of Commerce to repurchase the property and awarding Land Resources damages, prejudgment interest and attorney's fees, and that the "panel opinion has been overruled by the en banc opinion only in Case No. 88-3192." (App. 26).[5/]

After issuance of this clarifying opinion, Park of Commerce, the party that had prevailed on the site plan issue, asked the Fourth District to certify two questions to this Court, including the question of whether the Fourth District's en banc opinion correctly decided the site plan issue in its favor. (App. 28). The Fourth District certified to this Court as questions of great public importance the two questions which Park of Commerce had asked it to certify. (App. 32-33).

Park of Commerce, the Prevailing Party on the Site Plan Issue, Asks this Court to Review the Ruling in Its Favor

The losing party below, the City of Delray Beach, did not ask the Fourth District to certify any questions as being of great public importance. The City also did not petition this

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5/ There is nothing in the opinion on clarification stating that the buy-back judgments in favor of Land Resources were affirmed on the basis of Boynton Beach. Indeed, the opinion on clarification does not even mention Boynton Beach. Park of Commerce's statements on pages 7 and 12 of its brief that the opinion on clarification affirms the buy-back judgments as a result of Boynton Beach are highly misleading.

Court for review of the certified questions. Instead, the petition for review was filed by the prevailing party, Park of Commerce. On January 15, 1993, this Court postponed a decision on jurisdiction and ordered a briefing schedule.

SUMMARY OF THE ARGUMENT

I. This Court does not have jurisdiction to answer the first certified question dealing with site plan review because the party adversely affected by the Fourth District's resolution of that issue, the City of Delray Beach, has not petitioned for review of the Fourth District's decision. Instead, Park of Commerce, the party that prevailed in the Fourth District on the standard of judicial review of municipal denials of site plan applications, is improperly seeking to invoke this Court's jurisdiction. As the prevailing party below, Park of Commerce cannot seek review to obtain a stamp of approval for the Fourth District's favorable decision. See, e.g., Petrik v. New Hampshire Ins. Co., 400 So.2d 8, 9 (Fla. 1981).

II. The Court also does not have jurisdiction to answer the second certified question because that question was never "passed on" by the Fourth District. See Fla. Const. Art. V, § 3(b)(4); Revitz v. Baya, 355 So.2d 1170, 1171 (Fla. 1977). The repurchase obligation judgments in favor of Land Resources relating to the contractual buy-back provision were independent of the question regarding judicial review of denials of site plan applications, and the Fourth District's affirmance of those judgments was not based on the Boynton Beach case that the en

banc Fourth District overruled. Nowhere does the en banc opinion of the Fourth District on clarification state that the buy-back judgments in favor of Land Resources were affirmed as a result of Boynton Beach. In sum, the second certified question is a hypothetical construct that was not germane to the proceedings below and was not "passed upon" by the Fourth District.

III. To the extent that the Court determines that it has jurisdiction, it should only answer the first certified question regarding site plan review and leave intact the judgments in favor of Land Resources on the contractual buy-back provision. Only the first certified question is of any public importance. Moreover, the buy-back judgments were based on language in the contract between Land Resources and Park of Commerce, and were independent of the question of proper judicial review of denials of site plan applications. Regardless of how the first certified question is answered, Land Resources is contractually entitled to have Park of Commerce buy back the property that was the subject of the site plan controversy.

ARGUMENT

As explained below, this Court does not have jurisdiction to answer the questions certified by the Fourth District. Because jurisdictional briefs are not filed in cases involving certified questions, Fla. R. App. P. 9.120(d), Land Resources' jurisdictional arguments and motion to dismiss are incorporated in this answer brief.

I. THIS COURT DOES NOT HAVE JURISDICTION TO ANSWER THE FIRST CERTIFIED QUESTION BECAUSE THE CITY OF DELRAY BEACH, THE PARTY ADVERSELY AFFECTED BY THE FOURTH DISTRICT'S RULING ON JUDICIAL REVIEW OF DENIALS OF SITE PLAN APPLICATIONS, HAS NOT PETITIONED FOR REVIEW OF THE FOURTH'S DISTRICT'S DECISION

In a normal appeal, the petitioner has lost below and the respondent has prevailed. The parties in this appeal are turned upside down. The petitioner, Park of Commerce, despite prevailing below on the first certified question, seeks review of the ruling in its favor. The respondent, the City of Delray Beach, lost below on the first certified question, but has not sought review of the Fourth District's decision. Unlike the normal petitioner, Park of Commerce defends the Fourth District's ruling. And unlike the normal respondent, the City attacks the Fourth District's ruling. As explained below, this topsy-turvy situation demonstrates that this Court lacks jurisdiction to answer the first certified question because the losing party has not sought review of the Fourth District's decision.

Park of Commerce prevailed on appeal in Case No. 88-3192. In its en banc opinion, the Fourth District ruled that the site plan review process is quasi-judicial in nature, and subject to certiorari review. In accordance with its ruling, the Fourth District reversed the trial court's judgment upholding the City's denial of Land Resources' site plan application. See supra at 10-14.

The party adversely affected by the Fourth District's decision in Case No. 88-3192, of course, was the City of Delray

Beach. Yet the City did not ask the Fourth District to certify any questions to this Court. Rather, the prevailing party -- Park of Commerce -- requested the Fourth District to certify to this Court the question on which it had prevailed (i.e., whether a municipality's review of a site plan application is quasi-judicial in nature). Neither did the City file a petition for discretionary review in this Court. Rather, the petition for discretionary review in this Court was filed by Park of Commerce, and not by the City. See Fla. R. App. P. 9.120(b) ("The jurisdiction of the supreme court . . . shall be invoked by filing 2 copies of a notice . . . with the clerk of the district court of appeal within 30 days of the rendition of the order to be reviewed.").

This Court does not have jurisdiction to answer the first certified question. It has long been established that a prevailing party generally cannot seek appellate review of a ruling in its favor. A "party . . . may appeal only from a decision in some respect adverse to him." Credit Industrial Co. v. Remark Chemical Co., 67 So.2d 540, 541 (Fla. 1953).

In Petrik v. New Hampshire Ins. Co., 400 So.2d 8 (Fla. 1981), this Court was faced with a situation similar to that presented in this case. The district court in Petrik had certified, as being of great public interest, a question regarding insurance coverage. Although the district court had certified the question, this Court held that it did not have jurisdiction because the losing party before the district court

had not sought to invoke the Court's jurisdiction:

> [The] party adversely affected by the district court's resolution of this question[] did not seek review of the district court's decision. Therefore, even though the district court has certified this question as being one of great public interest, we do not have jurisdiction because the certified question has not been brought to us for review. As to these parties, the district court's decision on the issue is final and is the law of the case.

Id. at 9. See also Davis v. Mandau, 410 So.2d 915 (Fla. 1981) (holding that Court will answer certified questions only if losing party seeks review of the district court's decision).

Park of Commerce merely desires this Court to put its "stamp of approval upon the decree" of the Fourth District. Bessemer Properties, Inc. v. City of Opa Locka, 74 So.2d 296, 298 (Fla. 1954) (dismissing appeal by prevailing party). This desire, though perhaps understandable, does not confer jurisdiction on this Court. See P. Padovano, Florida Appellate Practice § 2.11, at 28 (West 1988) ("[C]ertification under Section 3(b)(4) serves only as a jurisdictional basis for review; it does not automatically initiate proceedings in the Supreme Court. The party adversely affected by the decision of the district court must file a notice to invoke discretionary jurisdiction within thirty days of the certified question or the right of review will be lost.").

The only party that can invoke this Court's jurisdiction to review the Fourth District's ruling on the nature of the site plan application process is the City of Delray Beach. The City has not done so. As a result, this

Court does not have jurisdiction to answer the first certified question.[6/]

II. THIS COURT DOES NOT HAVE JURISDICTION TO ANSWER THE SECOND CERTIFIED QUESTION BECAUSE THE FOURTH DISTRICT NEVER "PASSED UPON" THAT QUESTION

The mere certification of a question by a district court is insufficient to invoke the discretionary jurisdiction this Court. The Florida Constitution states that this Court "may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." Fla. Const. Art. V, § 3(b)(4) (emphasis added). Thus, the district court must have "passed upon" the certified question in order to provide a jurisdictional basis. If the certified question is merely hypothetical, and was not "passed upon" below, this Court lacks jurisdiction to answer the question. See Revitz v. Baya, 355 So.2d 1170, 1171 (Fla. 1977) ("Since . . . the District Court specifically found it unnecessary to pass upon the question now certified to this Court, we are without jurisdiction to consider and decide the question."). This jurisdictional limitation is meant to ensure that this Court is not inundated with requests to answer questions that have not been litigated and resolved below. See

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6/ The Court lacks jurisdiction even if the asserted basis for certification is, as Park of Commerce suggests on page 8 of its initial brief, conflict between the Fourth District's en banc decision and Snyder v. Board of County Commissioners of Brevard County, 595 So.2d 65 (Fla. 5th DCA 1991), jurisdiction accepted, 605 So.2d 1262 (Fla. 1992). The undeniable fact is that Park of Commerce was the prevailing party below on the site plan issue, and cannot seek review of that favorable decision on any ground.

Cleveland v. City of Miami, 263 So.2d 573, 576 (Fla. 1972) (Supreme Court may "refrain" from answering certified questions that are "not germane" and "inapplicable" to the case).

This case presents a situation similar to that in Revitz. The second certified question asks this Court to decide whether the Fourth District correctly applied the en banc procedure by affirming three of the four consolidated appeals on the authority of City of Boynton Beach v. V.S.H. Realty, Inc., 433 So.2d 452 (Fla. 4th DCA 1984), a case which the en banc court had overruled. This question assumes that the Fourth District affirmed the three buy-back judgments in favor of Land Resources on the basis of the overruled Boynton Beach case. This assumption is both erroneous and unwarranted.[7/]

As noted earlier in the statement of the case and of the facts, the Fourth District's opinions make it clear that the en banc decision dealt solely with the question of the proper judicial review of a municipality's denial of a site plan application. See supra at 10-14. The en banc opinion left intact the panel's affirmance of the trial court's buy-back judgments. (App. 26). The panel's general citation to Boynton Beach in its summary affirmance does not mean that the independent judgments in favor of Land Resources on the

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7/ The Fourth District's reference in the second certified question to "this court's affirmance of three cases based on City of Boynton Beach" does not preclude this Court from reviewing the record to determine whether the buy-back judgments were in fact affirmed on the authority of Boynton Beach. This Court always has the duty to examine whether it has jurisdiction. Cf. Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970) (even though district court certifies question, Supreme Court is "privileged to review the entire decision and record").

repurchase disputes were affirmed because of Boynton Beach. The issue in Boynton Beach was the proper standard for reviewing the denial of a site plan application. Boynton Beach did not involve an independent breach of contract claim as was made here, arising out of a repurchase clause. No legal principle is announced in Boynton Beach which could have conceivably been relied upon as a basis for affirming the buy-back judgments in favor of Land Resources.

Moreover, the main issue briefed by Park of Commerce was the site plan issue, and Boynton Beach was cited as authority only on that point. Park of Commerce did not cite to any authority whatsoever to support its contention that the buy-back judgments were completely dependent on the judgment on the site plan issue; it is therefore not surprising that the initial panel opinion did not cite any authority on the buy-back issues.

Tellingly, Park of Commerce twice admits (on pages 38 and 42 of its brief) that Boynton Beach "has absolutely nothing to do with the buy-back/money judgments." Even Park of Commerce must recognize that the second certified question is at best a stretch, for it goes on to argue for two and a half pages (pages 40-42 of its brief) not about the merits of the second question, but rather about its displeasure with this Court's rules for dealing with "per curiam affirmances" or "PCAs."[8/]

8/ Even if there is merit to Park of Commerce's argument regarding "PCAs," that argument has no impact on this case because the buy-back judgments in favor of Land Resources were completely independent of the site plan judgment.

The en banc Fourth District's opinion on clarification confirms that Boynton Beach had nothing to do with the buy-back judgments. In its opinion granting Land Resources' motion for clarification, the Fourth District stated that the only issue addressed by the en banc Court was the site plan issue in Case No. 88-3192. (App. 26). If the site plan issue resolved by the Fourth District panel had been determinative of the buy-back issues in the other three appeals, then the repurchase issues would have also been reviewed by the en banc Court. The fact that the en banc Fourth District left intact the panel's affirmance of the three buy-back judgments in favor of Land Resources indicates that those judgments were not contingent or dependent on the resolution of the site plan issue. See also supra at 10-14 (discussing independence of repurchase and site plan judgments).

In sum, the second certified question is a hypothetical construct. The question was never "passed on" by the Fourth District because the independent judgments in favor of Land Resources requiring Park of Commerce to repurchase the property and awarding Land Resources damages, prejudgment interest and attorney's fees were not based on Boynton Beach. There is no basis for assuming that the Fourth District affirmed the three independent buy-back judgments on the authority of a case that had nothing to do with the buy-back issues.

III. THE JUDGMENTS IN FAVOR OF LAND RESOURCES ON THE CONTRACTUAL BUY-BACK PROVISION ARE INDEPENDENT OF THE JUDGMENT IN FAVOR OF PARK OF COMMERCE ON THE SITE PLAN ISSUE, AND ARE THEREFORE NOT AFFECTED BY THE FOURTH DISTRICT'S RULING ON THE LATTER ISSUE

For the reasons set forth above, the Court does not have jurisdiction to answer the two certified questions. Should the Court decide that it has jurisdiction and that it wishes to exercise that discretionary jurisdiction, Land Resources respectfully suggests that the only question that this Court should answer is the first certified question dealing with the site plan issue. That is the only question that can be characterized as having any "public importance." Regardless of how the Court resolves the first certified question -- and on that question Land Resources maintains that the en banc Fourth District correctly held that a municipality's review of a site plan application is quasi-judicial in nature and subject to judicial review by certiorari -- the buy-back judgments in favor of Land Resources must be affirmed because those judgments are not dependent or contingent on the judgment on the site plan issue.

Park of Commerce's contention at pages 33-37 of its brief that the repurchase obligation was triggered only if the City acted legally is meritless. Nowhere does Paragraph 13(dd) of the second addendum say that the repurchase right does not apply if the City acts unlawfully in denying site plan approval. To the contrary, the first sentences of Paragraph 13(dd) expressly acknowledge that the City might deny the site plan application notwithstanding the anticipated plat approval.

According to the unrebutted testimony of Mr. Farrell, a real estate law expert, and the trial court's finding, the unrestricted platting of the property carried with it the legal consequence that the owner was entitled to access for ingress and egress from 22nd Avenue/129th Street. (R. 300, 3768). The attorney for Park of Commerce confirmed in his letter of November 21, 1986 to Mr. Farrell that he shared Mr. Farrell's opinion that to deny site plan approval on the basis of the access issue after the land had been platted was illegal. (Land Resources' Exhibit 26). Indeed, it is apparent from the face of the second addendum that the whole reason for the repurchase clause was to overcome Land Resource's reluctance to close in the face of rumors that the City might unlawfully disregard the plat and deny the site plan application. (R. 1281, 1284).[9/]

The repurchase clause in Paragraph 13(dd) of the second addendum is, in essence, an insurance policy which gave Land Resources the option of undoing the sale and getting its money back if the parties' fears that the City might act unlawfully were realized. The parties allocated to Park of Commerce the

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9/ Park of Commerce contends on pages 35 and 36 of its brief that the Fourth District could not decide the validity of the repurchase obligation judgments once it reversed the trial court on the site plan issue because the trial court had not "considered" the possibility of what would happen if the City's decision was overturned. This contention is mistaken. Land Resources always maintained that the repurchase obligation was separate from the site plan issue, so that question was presented to the trial court. The very case cited by Park of Commerce states that appellate courts can "consider matters and questions which were before the lower court." Jacques v. Wellington Corp., 183 So. 718, 719 (Fla. 1938) (emphasis added).

risk of having to bear the consequences if the City illegally denied the site plan application. (R. 1281, 1284). Land Resources did not bargain for a lengthy lawsuit. What it bargained for was the unqualified right to get its money back if the City denied approval, and not a conjectural right to get the money back dependent on the results of multi-year litigation.

The fact that it took Park of Commerce six years to obtain reversal of the City's action (without counting the proceedings before this Court) well illustrates why Land Resources, as the buyer of real estate it wished to immediately develop, bargained for the right -- which it exercised on November 4, 1986 -- to require Park of Commerce to repurchase the property if site plan approval was denied. Once Land Resources made its repurchase demand, Park of Commerce was required to perform the repurchase within 30 days. As discussed infra at pages 7-10, Land Resources joined Park of Commerce's litigation against the City reluctantly to assure that Park of Commerce would have standing. Even if the trial court had promptly reversed the City's denial of the site plan application, Land Resources would have been entitled to insist that Park of Commerce perform its obligation to repurchase the property.

In any event, Park of Commerce's complaint that it "won the battle but lost the war" rings hollow. When Park of Commerce repurchases the property and Land Resources redeeds to it the property, Park of Commerce will be entitled to access the property from 22nd Avenue/29th Street. Moreover, the reversal of the City's denial removes a cloud from the title to the property, thereby making it more likely for a future buyer to obtain approval of a site plan.

CONCLUSION

This Court lacks jurisdiction to answer the first certified question because the losing party, the City of Delray Beach, has not sought review of the Fourth District's decision. This Court also lacks jurisdiction to answer the second certified question, as that question was not "passed upon" by the Fourth District. If this Court determines that it has jurisdiction and wishes to exercise it, it should answer only the first certified question and affirm the three buy-back judgments in favor of Land Resources. Those three judgments are independent of and not contingent upon the resolution of the site plan issue.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Land Resources' Motion to Dismiss and Answer Brief was sent by U.S. Mail this 28th day of April, 1993, to John Copelan, Jr., Esq., 115 South Andrews Avenue, Ft. Lauderdale, Florida 33301; Susan Ruby, Esq., 200 N.W. 1st Avenue, Delray Beach, Florida 33444; and John Beranek, Esq., Suite 1000, Monroe-Park Tower, 101 North Monroe Street, Post Office Drawer 11307, Tallahassee, Florida 32301.

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