IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,973

PARK OF COMMERCE ASSOCIATES, etc.,

Petitioner,

v.

CITY OF DELRAY BEACH, a Florida municipal corporation, DOAK S. CAMPBELL, III, MAYOR, JAMES WEATHERSPOON, RICHARD DOUGHERTY, MALCOLM BIRD, and MARIE HORENBURGER, City Council Members, and Land Resources Investment Company,

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS BY PARK OF COMMERCE

JOHN BERANEK
Florida Bar No. 005419
Aurell Radey Hinkle Thomas
& Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, FL 32301
(904) 681-7766

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Preface

This is a petitioner's brief on the merits by Park of Commerce Associates, Anthony V. Pugliese, III, Dominic Alfieri, Harvey Schultz, P&P Associates and A&A Associates. The petitioners will generally be referred to as "Park of Commerce". The respondents are Land Resources Investment Company and the City of Delray Beach. The Land Resources Company is totally owned by Florida Power & Light Company and exists solely for the purposes of buying and developing property for Florida Power & Light. Land Resources will be referred to throughout this brief as FPL and was so designated in the district court opinions herein.

This is controversy over the use of certain land by the owner FPL and the denial by the City of Delray Beach of an FPL application for site plan approval on that land. In addition, when FPL could not use the land for its intended purpose, the trial court ordered the seller of the land (Park of Commerce) to buy the property back from FPL and eventually entered a money judgment to carry out a buy-back provision as contained in the contract between FPL and Park of Commerce.

The trial court actually entered four different judgments and the Fourth District Court of Appeal dealt with those four judgments in a single consolidated appeal. The case was eventually affirmed as to three judgments and reversed as to one judgment by the Fourth District which issued three consecutive opinions over a period of one year plus a fourth certification to this court. The Fourth District opinions are: (1) the panel opinion, (2) the en banc

opinion, (3) the en banc opinion on clarification and (4) the certification.

The record is extensive and will be referred to as (R._). An appendix accompanying this brief contains the four circuit court judgments, the three district court opinions plus the en banc certification and other relevant documents. The appendix is designated (A._).

Statement of the Case and Facts

This is an extremely complex case which the Fourth District Court of Appeal has obviously had a great deal of difficulty with. The Fourth District consolidated the four appeals and initially affirmed all four cases. (A.14). The district court then reconsidered and reversed all four cases. (A.17). Then, the court further clarified and affirmed three cases and reversed one case. (A.25). Eventually the court certified two questions finding conflict and questions of public importance. (A.28-33). The difficulty seemed to arise primarily from the existence of two conflicting opinions on the issue of site plan approval by a local government.

A motion to amend the petitioner's notice invoking discretionary jurisdiction was filed with this court on January 14, 1993 and remains pending as of this time. The present brief will address all arguments which would be appropriate in the event the court allows the amendment. The only additional argument is limited to direct conflict with two cases and is on page 30 herein.

The Parties

Generally, the parties are as follows:

Park of Commerce -- the owner/developer of 25 acres of unimproved land located in Delray Beach. After rezoning the property from residential to "planned office center" (POC), Park of Commerce sold off three acres to Florida Power & Light (FPL) for the purposes of building a two story customer service center. The building was to be used for customers paying their electric bills and other similar administrative matters. The property was zoned commercial and the use was designated commercial as an office center. The three acre parcel was separately platted by the city to allow for construction of this specific building by FPL. The platting occurred shortly before the sale of the parcel to FPL. The three acre parcel had access to only one street known as 22nd Avenue/29th Street, hereafter designated as 22/29th Street. The three acre parcel did not abut any street other than 22/29th Street.

Land Resources Investment Company -- this company is a wholly owned subsidiary of FPL and existed solely for the purposes of buying and developing property. FPL intended to build a new customer service facility and thus bought the three acre parcel which was zoned POC (Planned Office Center) by the City of Delray Beach. This three acre parcel was separately platted specifically for construction of the FPL office building.

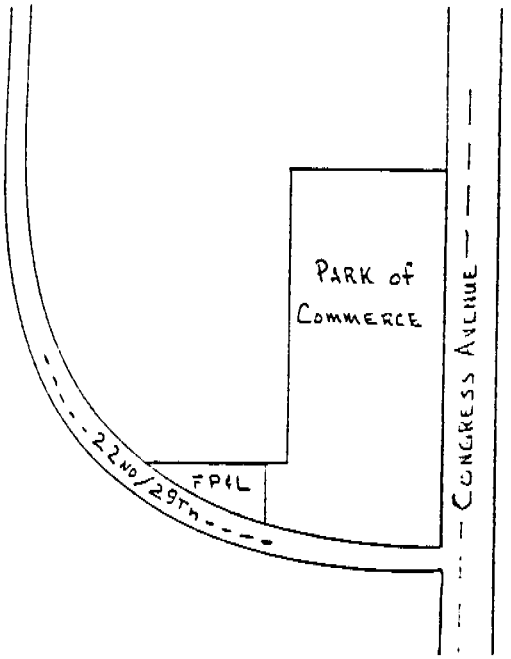
Despite the zoning and platting which allowed the building, the site plan was eventually denied by the city. When FPL submitted its initial site plan it cooperated with all of the city's staff and boards in making suggested changes as to the location, appearance, configuration and other details of the site and building. Eventually, site plan approval was sought from the city council which denied approval solely because of neighborhood complaints that the FPL building would result in commercial traffic on 22/29th Street. The sales contract between Park of Commerce and FPL included a buy-back provision requiring the seller to repurchase the property if the city "decreed" that access from "some other public street" would be a condition precedent to a permit or site plan.

The City of Delray Beach -- The City of Delray is a municipality and the local zoning authority. The city initially granted permission to build the FPL building on the site in question but eventually denied the site plan necessary for actual construction

Factual Overview

This property can best be described by the following graphic representation which is not to scale but shows the location of the property as owned by FPL and the adjoining property as owned by

Park of Commerce. The street in question (22/29th Street) is a curved thoroughfare joining Congress Avenue.



Opinions and Rulings of the Fourth District Court of Appeal and the Judgments Below

In this consolidated appeal involving four case numbers, the Fourth District Court of Appeal has now issued three opinions plus a certification. (A.14-33). The district court initially affirmed all four cases, then reconsidered and reversed all four cases, then further clarified and affirmed three cases and reversed one case and finally certified the whole matter to this court. Only one oral argument occurred and the court's last opinion of November 18, 1992 stated that no further motions for rehearing could be filed. Park of Commerce won the battle, then lost the war and was foreclosed from further argument on rehearing.

The trial court had previously issued four separate judgments all resulting from a single trial as follows:

1. Final Judgment on site plan denial in favor of the City of Delray Beach as defendant and against Florida Power & Light and Park of Commerce as Plaintiffs - appealed as Case No. 88-3192.

2. Final Judgment on contract buy-back provision in favor of FPL as plaintiff and against Park of Commerce as defendant - appealed as Case No. 88-3193.

3. Final Judgment of $740,655.00 in favor of FPL as plaintiff and against Park of Commerce as defendant - appealed as Case No. 89-1387. This money judgment was entered when Park of Commerce did not repurchase the property.

4. Judgment for FPL as plaintiff for attorney's fees and costs against Park of Commerce as defendant - appealed as Case No. 89-2654.

All four judgments were appealed and consolidated before the Fourth District Court of Appeal and dealt with in the three different opinions plus the certification.

Opinions by the Fourth District Court of Appeal

After the oral argument of October 19, 1990, the court did not issue its first opinion for over one year. The court was faced with an obvious conflict in its own opinions. The City of Boynton Beach v. V.S.H. Realty, Inc., 433 So. 2d 452 (Fla. 4th DCA 1984) opinion holds that a city denial of a site plan is legislative and can only be reviewed by a trial de novo and not by certiorari/ appellate review. In contrast, City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. 4th DCA 1983) had held directly to the contrary concluding site plan denial was quasi-judicial and thus subject to appellate review by certiorari in circuit court. The trial court had accepted the Boynton Beach opinion and rejected the

Corn opinion. The district court had great difficulty in choosing and issued the following.

1. A Panel Opinion of November 27, 1991, affirming all four judgments based on Boynton Beach. This mere Citation PCA was accompanied by a dissent relying on Corn and a special concurrence agreeing with the dissent and Corn.

2. An En Banc Opinion on Rehearing of September 2, 1992, reversing all four judgments based on an overruling of Boynton Beach and the adoption of Corn as the law of the Fourth District Court of Appeal.

3. An En Banc Clarification Opinion of November 18, 1992, affirming three cases in reliance on Boynton Beach and reversing one case based on the overruling of the same Boynton Beach opinion, no further rehearing to be considered.

4. Mandate of November 20, 1992, issued two days after the last opinion.

5. En Banc Certification to Supreme Court of January 4, 1993.

The initial notice of appeal had been filed in the Fourth District Court of Appeal on November 23, 1988 and the en banc certification occurred approximately four years later on January 4, 1993. Only one oral argument occurred.

Certified Questions

The Fourth District Court of Appeal certified the following questions:

1. Whether City of Boynton Beach v. V.S.H. Realty, Inc, 433 So. 2d 452 (Fla. 4th DCA 1984) as relied upon in

this court's November 18, 1992, en banc opinion, accurately states the law concerning appellate review of decisions of local governments on building permits, site plans and other development orders.

2. Whether this court's affirmance of three cases based on City of Boynton Beach v. V.S.H. Realty, Inc., and the simultaneous reversal of one case based on an overruling of City of Boynton Beach v. V.S.H. Realty, Inc. constitutes a correct application of the en banc review process.

The Park of Commerce motion for certification in the Fourth District sought to have the court determine that a conflict existed with Snyder v. Board of County Commissioners of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991) and Colonial Apartments, L.P. v. City of Deland, 577 So. 2d 593 (Fla. 5th DCA), review denied, 584 So. 2d 997 (Fla. 1991). The Snyder case was argued before this court on March 1, 1993 and presents some similar issues. Although the Fourth District's certification order does not directly state that a conflict was found, the order grants the motion as filed and thus a direct conflict with both Snyder and Colonial will be the subject of very limited argument herein. Obviously, this court has jurisdiction in any event.

Underlying Circuit Court Actions

The case was instituted with a complaint filed by both FPL and Park of Commerce seeking appellate review of site plan denial by a petition for certiorari and a petition for mandamus. (R.1591-1631). The entire record of city proceedings including hearing transcripts were attached. FPL was the owner and Park of Commerce the recent seller of the property. This petition was filed November 26, 1986 and was designated as Case No. 86-11052 AJ in the

Circuit Court. Based on the Boynton Beach decision, certiorari review was dismissed as an improper remedy by order of February 9, 1987 (R.1639). Suit by FPL on the buy-back provision of the sales contract between FPL and Park of Commerce was filed January 22, 1987 and designated as Case No. 87-586 in the circuit court. The initial complaint in the main case, now amended by FPL to seek a trial de novo rather than certiorari review, and the subsequently filed repurchase suit under the sales contract by FPL were consolidated before the trial court and tried together in an extensive non-jury declaratory decree trial. (R.1645-1765).

The trial court ruled, based on Boynton Beach, that the city's denial of the site plan could be reviewed only in a declaratory decree action in the nature of a trial de novo with the "fairly debatable rule" as the standard of evidentiary proof. (R.17-19). As a result of this ruling the city was not limited to the record of what had actually been considered in denying the site plan and was instead allowed to present new reasons as to why it might have denied the site plan application. (R.426-431). The city was allowed to present experts to testify to various drainage problems and other problems which had never been previously mentioned to FPL and which could have been easily remedied had they been brought to FPL's attention. (A.3).

The evidence from the city's own record was clear that FPL had done all that it was asked to do to change its site plan to satisfy the city. This was the "record" which would have been the basis for appellate review had certiorari been allowed. However, in the

trial de novo the city came up with new and different reasons which had never been mentioned before. Obviously this was not appellate review of a record but was instead a total trial de novo based on new evidence never previously considered by the city council. The court judged the credibility of the witnesses. (A.3). The presence or absence of valid reasons for the initial denial became irrelevant. The court applied the fairly debatable standard to all these new reasons and found denial to be debatable. (A.3). The FPL site plan was held to be properly denied and FPL could not use the property.

At the same time as it was hearing the de novo evidence regarding the site plan, the court also heard minimal evidence on FPL's claim that Park of Commerce should be required to buy back the property under the contract between the parties. (A.5-8). The buy-back provision was as follows:

> 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 purchase shall be concluded within thirty (30) days from and after Buyer's election to resell the property to Seller. (Emphasis supplied).

The trial court held that Park of Commerce should be required to buy the property back from FPL because the city had "decreed" that access should be from some other public street. (A.6). The court initially entered a judgment ordering a buy back and when

Park of Commerce did not repurchase, then entered a money judgment against Park of Commerce for the value of the property. (A.9-10). Eventually the court also entered a judgment for attorney's fees and costs in favor of FPL against Park of Commerce. (A.11-13).

In a bizarre twist, the trial court invalidated and held illegal the city's denial of the site plan based upon neighborhood complaints about access to the only adjoining street. The court held that this was the real reason for denial but that it was totally illegal for the city to deny access to the street and that the FPL property which abutted only one street, was entitled to access from that street. (A.2). The city never really asserted it was proper to totally cut off access to the property but instead relied upon its new, de novo, evidence of additional reasons as to why, in retrospect, the city might have earlier denied the application. The trial court held that the site plan denial was proper because it was fairly debatable as to whether drainage, etc., was proper. However, the trial court also held that the real denial was access based and thus the buy-back provision was triggered. The court allowed the city to rely upon its new reasons (drainage and a bridge problem) but did not allow Park of Commerce to rely upon those same new reasons to avoid the buy-back requirement.

There were basically two rulings by the trial court on the merits. Initially the city was held to have properly denied the site plan because of the new reasons. Secondly, the trial court found that since the real reason for denial, rather than the de

novo trial reasons, was access based, that the buy-back provision in the contract was triggered.

All four of the trial court's judgments were appealed and considered by the Fourth District Court of Appeal in a consolidated fashion. Park of Commerce and FPL sought reversal of the denial of appellate review arguing that certiorari should have been granted and that the circuit court should simply have ordered the city to approve the site plan. Park of Commerce also argued that the buy-back/money judgment should also be reversed if the main judgment was reversed.

The district court initially issued a panel opinion after over a year affirming all four judgments based upon Boynton Beach. Amazingly, two judges disagreed with the majority Citation PCA holding that Corn was correct. Next the court issued an en banc opinion reversing all the judgments based upon an overruling of Boynton Beach and adoption of Corn as correct. Next the court issued an en banc opinion on clarification stating that the three buy-back money/judgments were affirmed based upon Boynton Beach and the one judgment on the site plan was reversed based upon an overruling of Boynton Beach. Next the court certified the entire matter to this court in two questions. (A.32-33).

Underlying Facts

Since the first certified question directly raises the correctness of the Boynton Beach opinion it is necessary to consider the basic facts. Park of Commerce initially owned approximately 25 acres and had the property rezoned from residen-

tial to POC -- Planned Office Center. In doing so, a preliminary plan showing access onto Congress Avenue and access onto 22/29th Street was supplied to the city. The property, before the sale of three acres to FPL, fronted on Congress Avenue which was a major arterial highway. Under the City Code, 22/29th Street was described as a "collector road." (R.512-515). No residences actually abutted or accessed onto 22/29th Street but the area was generally considered residential in nature. The first site plan by Park of Commerce was changed at the request of city staff to eliminate access onto 22/29th Street. (R.501-503). This second site plan showed access solely onto Congress Avenue on which the 25 acres fronted. The city denied approval of this site plan for the stated reason of insufficient ingress and egress. (R.501-503). Eventually, on March 18, 1985, the site plan was withdrawn and it was never further acted upon by the city. (R.482, 527).

On March 19, 1985, when the 25 acres were rezoned from RM-10 to POC, the rezoning documents did not restrict access to Congress Avenue or any other street. Although the city was free to ask for conditions on the rezoning, it did not do so. Eventually, Park of Commerce petitioned the city to abandon a portion of 22/29th Street so that it could be used in the development of the property. (R.P.Ex.9). The city refused the request to abandon the street and specifically stated the denial was because 22/29th Street was a collector road. (R.Pl.Ex.14). In May of 1986, Park of Commerce advised the city that it was abandoning any intent to develop the property.

The Platting of the FPL Property

FPL needed to construct a new customer service center facility and bought three acres out of the 25 acre tract from Park of Commerce for the building. It was to be a two-story office building of 23,000 square feet. Customers of the Delray Beach area would come there to pay their electric bills. Other administrative functions would be performed in the building. The building was much smaller than the square footage allowed under the zoning code. The structure fit within the requirements of the zoning code in every respect and there were no comprehensive plan problems or consistency issues. Unfortunately, this office zone was viewed by the surrounding residents as a commercial endeavor. (R.198-202). In actuality, it was a buffer between residential areas and more intensive areas.

The City of Delray Beach was at all times advised of the intended use by FPL for the property. On January 16, 1986, FPL and Park of Commerce initially signed a contract on the three acres which was to be excised out of the original 25 acre tract. Before the sale was closed, the three acre parcel was separately platted on June 24, 1986. The plat was filed in the public records on August 1, 1986.

The platted three acres had no access other than to 22/29th Street. There were absolutely no restrictions placed on access on the plat or in any of the accompanying documentation as approved by the city. The city knew the purpose for the plat was to allow construction of the FPL service center building. (R.544-555, 548).

In fact the city attorney became involved and specifically allowed the separate platting of the three acres for the FPL building. (R.547). The motion to approve the plat separately made specific reference to the FPL building. (R.544). The plat was approved over adverse comment from staff by a unanimous vote of the city council. (R.544). The "entire purpose" was so the property could be sold to FPL for use as a district office site. (R.548). This was apparently a building the city council wanted built.

Although a unified plan of development for the entire 25 acres might have been requested by the city, there was no such request. In fact, the city exempted FPL from any requirement of a Unified Master Development Plan covering the entire 25 acres which was then owned by both FPL and Park of Commerce. There were no access or easement agreements between FPL and Park of Commerce and none were requested by the city. (A.2). The plat had eight conditions and none mentioned access or any limitation on access. (R.Def.Ex.39 and 50). This was not a mere mistake by the city in approving the plat. Indeed, after plat approval a member of the Planning and Zoning Board, wrote a letter to the City Mayor, Doak Campbell, asking the city council to reconsider the separate plat of the three acres. (R.Pl.Ex. 28). The council chose not to reconsider.

The FPL Purchase and Site Plan

After formal approval of the plat, FPL went forward with the purchase of the property for $686,070. (R.71). Thereafter, FPL submitted a site plan in accordance with the city's ordinance § 30-22. The site plan was considered by the Planning and Zoning Board

which made 22 suggestions, none of which was against access to 22/29th. Every single suggestion was accommodated by FPL and the plan was changed in substantial respects. (R.75-81, 128). Initially, the plan showed two exits and entranceways onto 22/29th Street. Of course, the site plan did not show access onto Congress Avenue since FPL owned no land abutting Congress Avenue. The Planning and Zoning Board suggested a change from two access points on the street to one access point. FPL made the change. Eventually, the Planning and Zoning Board suggested that a drive-thru payment window be deleted from the plan. FPL acceded to the suggestion and deleted the drive-thru window. (R.137). Finally, after doing every single thing which staff requested, the matter went to a city council meeting on October 28, 1986, with the favorable recommendation of the Planning and Zoning Board as to site plan B.

The meeting was crowded with local residents adverse to the FPL building. Site plan approval should have been merely an administrative matter. Instead, the council voted to deny approval solely because the property had no access other than to 22/29th Street. (A.3-6). The council members repeatedly stated that the FPL building was commercial, that the traffic would be commercial and that absolutely no such commercial traffic would be allowed because the surrounding area was residential in nature. The council members said they had an unwritten policy not to allow any commercial traffic, "not one car", into a residential area. (R.391-395).

The council disregarded its own zoning which specifically provided for an office building in this area and further disregarded its own recorded plat passed by this same city council specifically to allow for construction of this building. The city made it very clear that the three acre parcel would simply remain undeveloped so long as it would generate "commercial traffic". (R.423). The city did not designate some other public street for access to the property. Instead of expeditious appellate review of this decision, the vote of October 28, 1986, was to be the subject of future protracted litigation and appellate review of the city's denial has yet to occur.

The sales contract between FPL and Park of Commerce contained the buy-back provision previously stated herein at page 10. This provision became the basis for the repurchase suit between FPL and Park of Commerce and was tried on the same evidence.

The Litigation Details -- Appellate Review and De Novo Trial

Florida Power and Light and Park of Commerce both filed jointly in circuit court for appellate review of the site plan denial. Count I was a petition for common law certiorari directed to the city council to review the denial of the site plan. (R.1592-1599). Count II sought a petition for mandamus to compel the city to grant approval of the site plan. (R.1600). The record of the city proceedings including the transcript of meetings were attached to the complaint. The city moved to dismiss the certiorari count on the ground that the city's action was legislative rather than quasi-judicial and that certiorari was an improper

remedy. (R.1634). The city relied upon Boynton Beach so holding and FPL relied upon Corn holding directly to the contrary. The circuit court adopted Boynton Beach as the later case and granted dismissal. In accordance with Boynton Beach the court ruled that the only remedy was a de novo suit for declaratory decree or injunction. (R.1639). This ruling obviously deprived FPL and Park of Commerce of appellate review on the record. The complaint was amended by deleting the certiorari count for appellate review and by instead seeking declaratory relief and an injunction. (R.1645).

Based upon the pleadings and the court's ruling as to a de novo trial, the matter proceeded to a three-week non-jury hearing. Throughout, the court announced that the "fairly debatable" rule would be applied to test the validity of the site plan denial. (R.350-441). The trial, on the FPL/Park of Commerce side, consisted of extensive review of the transcript of the city council hearing and the evidence which had actually been before the city council as of October 28, 1986. The entire transcript was argued and admitted. (R.432-442). Of course, this transcript had been made a part of the original complaint seeking certiorari review. (R.1596-1597 and attached complete transcript). In addition, transcripts of all the various hearings before the Planning and Zoning Commission were minutely studied and introduced into evidence. All of the applications and other documentation regarding the initial zoning of the property, the sale of the property, the platting of the property and the eventual site plan application were introduced. (R.Pl.Ex.1-75).

Based upon the court's de novo trial ruling, the city was then allowed to present voluminous new evidence as to matters which had not been considered by the City Council at the time of the denial of the site plan. (R.426-431). The city produced substantial evidence regarding adverse public sentiment in the community and the city's strong view that no commercial traffic should ever be allowed in a residential neighborhood. Extensive evidence was presented concerning adverse traffic impacts on 22/29th Street and impacts on the Germantown Bridge. Evidence was also presented regarding environmental concerns and the adequacy of the drainage plan for the building.

The trial also concerned the buy-back provision in the sales contract. FPL asserted in the alternative that the site plan approval had been denied based solely on access to 22/29th Street. FPL argued it could not use the property without site plan approval and that it could not use the property for a customer service center at all if it did not have physical access to the street. It also showed that access across the remaining 23 acre Park of Commerce parcel was impossible. Customers would have to drive over approximately an 800 foot alleyway from Congress Avenue. (R.311). In addition, FPL had no legal right to obtain such an easement. (R.297-300).

On September 20, 1988, the court entered two judgments, one in favor of the City of Delray Beach finding that denial of the site plan was fairly debatable based on the new evidence and the other

in favor of FPL ordering Park of Commerce to repurchase the property. (A.1-8). The court made the following rulings:

1. That as a matter of law, FPL as the owner of the platted three acre parcel was entitled to access to its property from the only available street.

2. That the site plan with access to 22/29th Street had been disapproved solely because traffic would use 22/29th Street and that this denial was a completely illegal act by the city.

3. That the city misunderstood the legal effect of the separate plat of the three-acre parcel and that, by platting by the property without limiting access, the city waived the right to deny access to the only available road.

4. Despite the above, the court ruled that the city's denial of the site plan was proper and "fairly debatable" because of the new evidence of new reasons of inadequate drainage and adverse traffic impacts.

5. That FPL was entitled to exercise the buy-back provision against Park of Commerce. Although denial of access to the street was illegal, the city was held to have "decreed" that access had to be from some "other public street".

Park of Commerce did not repurchase the property and on May 23, 1989, the court entered a money judgment against Park of Commerce and in favor of Florida Power & Light in the amount of $740,655.52. Execution on this judgment was never allowed. (A.10).

By a separate judgment of September 28, 1989, the court assessed attorney's fees and costs in favor of FPL against Park of Commerce. Park of Commerce filed four separate notices of appeal on November 23, 1988, November 23, 1988, May 30, 1989 and October 12, 1989. FPL joined Park of Commerce in the first appeal. These four notices were designated with separate case numbers and were all consolidated before the Fourth District Court of Appeal which both reversed and affirmed.

Summary of Argument

FPL and Park of Commerce both sought certiorari appellate review of the city's denial of the FPL site plan. The trial court ruled that there could be no appellate review and instead ordered that a de novo trial based on new reasons was the only appropriate mode of review. FPL also sued to get out of the land purchase contract and have Park of Commerce buy the property back pursuant to a repurchase provision in that contract.

The procedure was wrong from the very first moment and constituted fundamental error infecting all other aspects of the case. Certiorari review was a legal right and should have been granted. Certiorari review would have resulted in immediate issuance of the site plan and FPL could have never resorted to the buy-back contractual provisions. The fundamental error of denial of a right to appellate review also rendered the buy-back judgments error.

The trial judge never answered the question of whether the buy-back would be appropriate if site plan approval had been granted. This question thus could not be answered in the district court as a matter of law.

The Fourth District Court of Appeal issued three consecutive opinions plus a certification. The district court had substantially confused the law by issuing two previous conflicting opinions on site plan approval and had great difficulty in deciding the correct view of the law. The district court now appears to have resolved the conflict but the district court erred in

reversing in part and affirming in part. The proceedings before the trial court were all in substantial and fundamental error and all judgments arising from that erroneous proceeding must be reversed. The trial court would have never granted the buy-back judgments if FPL had been granted site plan approval under certiorari review.

Issues on Review

I.

Whether City of Boynton Beach v. V.S.H. Realty, Inc, 433 So. 2d 452 (Fla. 4th DCA 1984) as relied upon in this court's November 18, 1992, en banc opinion, accurately states the law concerning appellate review of decisions of local governments on building permits, site plans and other development orders.

II.

Whether this court's affirmance of three cases based on City of Boynton Beach v. V.S.H. Realty, Inc., and the simultaneous reversal of one case based on an overruling of City of Boynton Beach v. V.S.H. Realty, Inc. constitutes a correct application of the en banc review process.

Argument

I.

Whether City of Boynton Beach v. V.S.H. Realty, Inc, 433 So. 2d 452 (Fla. 4th DCA 1984) as relied upon in this court's November 18, 1992, en banc opinion, accurately states the law concerning appellate review of decisions of local governments on building permits, site plans and other development orders.

This question raises the simple question of whether City of Boynton Beach v. V.S.H. Realty, Inc., supra, is correct. Also within both certified questions is a clear statement that the district court did rely on the Boynton Beach decision in its November 18, 1992 en banc opinion to affirm three cases. The November 18, 1992 opinion was entitled "Opinion on Motion for Rehearing and Clarification" and stated:

> The motion for clarification is granted to the limited extent of acknowledging that the court's original panel opinion [of November 27, 1991] affirmed the decisions of the trial court in all four appeals: Case Nos. 88-3192, 88-3193, 89-1387, and 89-2654. The panel opinion [of November 27, 1991] has been overruled by the en banc opinion [of September 2, 1992] only in Case No. 88-3192. No further motions for rehearing will be considered.

Under this point we will thus discuss (1) whether Boynton Beach is a correct statement of the law, (2) whether Boynton Beach should have been relied upon to affirm the three buy-back/money judgments and (3) whether those judgments were erroneous on the merits and the result of fundamental error.

These three issues are fairly presented by the certified questions and in any event, once this court accepts a case for consideration, review is not limited to only the particular

questions certified. Bell v. State, 394 So. 2d 979, 980 (Fla. 1981) and Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961). Also see Trushin v. State, 425 So. 2d 1126 (Fla. 1983). Clearly in this case the certifications do encompass the affirmance of the buy-back money judgments and these issues are outcome determinative. This court has jurisdiction to consider all such issues.

Boynton Beach is Erroneous -- Corn is Correct.

Obviously, the most compelling argument that the Boynton Beach opinion is an incorrect statement of law and that Corn correctly states the law is the argument put forth in Judge Anstead's en banc opinion of September 2, 1992. As Judge Anstead put it: "We now resolve that conflict [between Boynton Beach and Corn] by adhering en banc to the views expressed in Corn and receding from any contrary expressions set out in Boynton Beach". The court cited and discussed City Nat'l Bank of Miami v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985); Broward County v. Narco Realty, Inc., 359 So. 2d 509 (Fla. 4th DCA 1978); Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593 (Fla. 5th DCA), rev. denied, 584 So. 2d 997 (Fla. 1991) and both the Boynton Beach and Corn decisions. The court held that site plan approval or denial was quasi-judicial and had to be based upon a set of clear and existing standards and guidelines. The court held that such a quasi-judicial decision by the city was subject to certiorari review and not de novo trial review.

This case involves site plan approval and this is one of the very last steps in land use permissions which must be gained from a local government. Such a last step should not be the place where the neighbors can pack the hall and convince the city council that the whole idea of allowing any building or traffic was a bad idea to start with. This is not the point in the process where the property owner FPL could be "subjected to ad hoc legislation". Site plan approval is quasi-judicial and not legislative. Once the city has already passed the appropriate zoning and appropriately platted the property the city does not get to go back at the time of site plan review and decide whether the whole thing was a bad idea because the citizens really do not want any more development of any sort in the town.

Unlike Snyder v. Board of County Commissioners of Brevard County, supra, this case does not involve zoning or rezoning, does not involve a change in a comprehensive plan, does not involve consistency issues and does not even involve platting. This property had already been rezoned and had already been separately platted for the specific FPL building in question.

The Fourth District's September 2, 1992 en banc opinion is correct insofar as it goes. The opinion should have more clearly reversed all four judgments but that ruling is still implicit in the opinion.

Since the Fourth District seems to have questioned the validity of its own decision overruling the Boynton Beach opinion we will further address that issue.

The Boynton Beach case holds as follows:

The City denied approval of a site plan which was necessary for a building permit. The property owner sued for declaratory decree in a de novo trial proceeding. The City moved to dismiss contending review should be by appellate/certiorari. The trial court denied the motion to dismiss and on appeal this Court affirmed the ruling holding that the City's decision on the site plan was legislative and not quasi-judicial. The District Court stated: "The decision of the City that is assaulted in this case was not a quasi-judicial decision as defined in DeGroot and thus certiorari was not the appropriate remedy. While not deciding the propriety thereof under the facts before it, the DeGroot court noted by contrast that the equity injunction has often been used to challenge legislative action at the state and local level where such action is claimed to adversely affect some constitutional right, such as an attack on a municipal zoning ordinance".

The Corn case holds as follows:

A property owner's site plan application was denied and the property owner sought mandamus in the circuit court which ruled that the City was required to grant site plan approval and a building permit. The Fourth District affirmed holding that the "same reasoning applies to approval of site plans" as applies to approval of plats. At page 244 the Court stated: "To the extent, also, that the [appellant's] point suggests that approval of a plat or a site plan is a legislative function, we disagree and adhere to the view that such a function is administrative rather than legislative."

The Boynton Beach case has never been cited with approval by any other court and is at odds with many cases holding that appellate/certiorari or other extraordinary writs in the circuit court are the proper way to review rezoning, comprehensive plan amendments, platting, special exceptions and building permits. See, Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th DCA 1975), (county commission denied rezoning and a special exception - certiorari review before circuit court proper mode of review); City National Bank of Miami v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985), (city approved plat that imposed conditions - circuit court review by certiorari held

proper); Broward County v. Narco Realty, Inc., 359 So. 2d 509 (Fla. 4th DCA 1978), (county denied plat approval and mandamus held proper mode of review before circuit court); Porpoise Point Partnership v. Johns County, 470 So. 2d 850 (Fla. 5th DCA 1985) and 532 So. 2d 727 (Fla. 5th DCA 1988), (two cases in which certiorari was held proper mode of review as to a rezoning decision in circuit court); Hillsborough County v. Putney, 495 So. 2d 224 (Fla. 2d DCA 1986), (certiorari in circuit court to review rezoning); Machado v. Musgrove, 519 So. 2d 629 (Fla. 3d DCA 1987), review denied, 529 So. 2d 693, (consistency between land use plan and rezoning reviewed in circuit court in its appellate capacity on "a verbatim record"); Battaglia Fruit Company v. City of Maitland, 530 So. 2d 940 (Fla. 5th DCA 1988), (certiorari in circuit court to review rezoning); Irvine v. Duval County Planning Commission, 495 So. 2d 167 (Fla. 1986), (circuit court certiorari to review special exception held to be quasi-judicial); Cherokee Crushed Stone v. City of Miramar, 421 So. 2d 684 (Fla. 4th DCA 1982), (special exception denied by city and certiorari review before circuit court approved); Tomeu v. Palm Beach County, 437 So. 2d 601 (Fla. 4th DCA 1983), (certiorari review in circuit court of a special exception, review in such "administrative proceedings" not "mere legal mumbo-jumbo"); Education Development Center, Inc. v. City of West Palm Beach Zoning Board, 451 So. 2d 106 (Fla. 1989), (municipal land use decisions may be reviewed on the record by certiorari in circuit courts).

The existence of both the Corn case and the Boynton Beach case creates confusion in the Fourth District. When faced with a local government's grant or denial of site plan approval, or indeed rezoning or any number of other similar land use decisions, neither the litigants or trial courts know whether review should be in the circuit court by certiorari or in the circuit court in a separate de novo declaratory decree action. If the remedy is by declaratory decree then the standard of proof should be a preponderance of the evidence and not the fairly debatable rule used by Judge Lupo herein.

To the extent that the Boynton Beach case remains the law of the Fourth District Court of Appeal it is also in obvious and direct conflict with Snyder v. Board of County Commissioners of Brevard County, supra and Colonial Apartments L.P. v. City of DeLand, supra. Indeed the Fourth District even cited Colonial for receding from Boynton Beach.

Error in Affirmance of Buy-Back/Money Judgments

The Fourth District erred in relying upon Boynton Beach in its November 18, 1992 opinion which was the en banc opinion on clarification which affirmed the three buy-back/money judgments.

Preliminarily, it seems almost uncontested that there was no real need for a remand to the circuit court to enable the circuit judge to perform certiorari/appellate review. Obviously the district court was in the same position to read the record that the circuit court would have been in and the numerous opinions of the district court make it absolutely clear that the circuit judge

should have granted certiorari and should have simply ordered site plan approval. The complete record of all administrative proceedings were before the circuit court and the district court of appeal.

The opinions of Judge Anstead and Judge Stone which accompanied the original citation PCA are particularly important here. Judge Anstead stated:

> I would reverse with directions that the case be remanded to the trial court with directions that the case be reviewed [on certiorari] .... Having appropriate zoning for the use of the property sought by appellant, the municipality cannot rescind that decision by unreasonably refusing to approve the site plan for the specific building contemplated to be constructed.

Judge Stone stated:

> If the trial court had applied certiorari standards, based solely on the record before the city commission, the commission decision would have been quashed.

Had Judge Lupo of the circuit court not been faced with the conflict between Boynton Beach and Corn, she would have simply issued a summons or order to show cause directed to the city in November of 1986. (R.1592). A response would have been required within 20 days under Rule 1.630 and 1.140. This appellate review based on the record would have resulted in an order directing the city to grant the site plan. No trial would have been necessary and it would have never been necessary for FPL to even file the January 22, 1987 suit on the buy-back provisions of the contract. In short, FPL would have never needed to resort to the buy-back remedy if it had been granted its site plan through appropriate appellate review before the circuit court. It was the circuit

court's error, albeit attributable to the Fourth District, which caused the delay. Park of Commerce should not be made to suffer by virtue of this error.

The conflict between Boynton Beach and Corn has been at the root of all of the difficulties in this case. There is simply no question but that if Corn had been the only decision on the books, Judge Lupo would have granted certiorari and ordered the city to grant the site plan. If any case ever cried out for an appellate reversal this one did -- the city council's desire to simply please the voters in attendance was painfully obvious.[1] The only proper remedy is to put the parties back where they would have been if the error had not been committed. In short, what would have happened if certiorari had been granted instead of summarily dismissed?

The Merits of the Buy-Back Judgment

Further, Park of Commerce respectfully submits that the buy-back judgment and related money judgments should never have been

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[1] Mr. Jimmy Weatherspoon was chairman of the city council meeting which denied site plan approval and his testimony was a disgrace. He suggested that the city had complete discretion to deny site plan approval if any new vehicle was allowed onto 22/29th Street. (R.359). He stated that he had this discretion based upon "pedestrian safety" and "common sense". (R.361). He was convinced by the citizens who testified at the hearing saying that "commercial [traffic] should not be using the residential road". He said that we don't allow commercial establishments to enter residential areas and that this is not written down anywhere but is an "implied policy". (R.391). The fact that Mr. Weatherspoon thought that he had this vast discretion did not turn the city council meeting into a purely legislative matter not subject to review. The legislative decision had already been made at the rezoning level. Site plan review was quasi-judicial under the city's code § 30-32. In any event, even purely legislative zoning decisions are still subject to certiorari review.

entered at all. The evidence did not support a triggering of the buy-back provision. The Park of Commerce briefs before the Fourth District argued the circuit court erred in ordering the buy-back of the property instead of simply ordering the city to grant the site plan. Obviously if FPL had its site plan (which it was suing for) it was not entitled to require a buy-back and would never have been entitled to the money judgment enforcing the buy-back order. Park of Commerce also argued that the buy-back provision was never properly triggered in any event because the city's actions were totally illegal and because the city never designated another public street as an access point.

If the site plan had simply been approved then FPL would have gotten exactly what it bargained for -- land on which it could build its service center building. This would have been the result six years ago but for the error which hopefully has now been reversed. The Fourth District's en banc opinion of September 2, 1992 should simply be reinstated as a reversal of all four judgments. The site plan should be deemed approved and the matter remanded to the trial court for further proceedings if necessary concerning the buy-back provisions. The related buy-back/money judgment and attorney's fee judgment based on the ruling in the main case must fall along with the main reversal. Clearly, the Fourth District's initial en banc opinion was a complete reversal and not a partial affirmance and a partial reversal and that result is proper.

FPL relied upon provision 13dd from the contract between the parties which has been previously set out. The buy-back would be triggered only if the "city or some other governmental agency having jurisdiction declares or decrees that access from some other public street ... is a condition precedent to any building permits issuance...."

This contractual provision did not require a repurchase under the facts and circumstances actually presented in this case. Looking closely at the contract, the city never decreed "that access from some other public street is a condition precedent to any building permits issuance". This did not mean some other imaginary street or access from the sky. The city had to actually designate and allow access from "some other public street" and this was never done. The city never designated any street for access and in the absence of such a designation the buy-back provision never came into effect. The trial court also expressly held as a fact that no development by FPL whatsoever on this property would be allowed by the city. Park of Commerce well knew that access to this properly was limited to a single street and that the city would in all likelihood never designate another street as appropriate access. The citizens would have been outraged. The town council would not have granted a site plan in any event and Judge Lupo so held. (A.6). Also, the only thing the city did was deny a site plan and the trial court erred in concluding this was a "decree" by a municipality.

The citizens in the surrounding residential areas simply wanted no commercial development whatsoever on this land the city went along with that unlawful view which directly contradicted the city's zoning and platting. As stated in the Fourth District's initial en banc opinion: "The council denied the plan for no apparent reason other than neighborhood opposition". As previously pointed out, this was even recognized in the trial court's own findings when Judge Lupo said it was completely futile for FPL to submit any sort of plan because it would be denied by the city in any event. (A.6).

The logic of this whole proceeding was twisted. The trial court held that the city's denial was access based but that that denial was totally invalid and a sham. The trial court then justified the denial based upon new supposed drainage and bridge problems. Then the court held the buy-back provision applicable because the denial was access based rather than drainage based. We are at a loss to understand why the trial judge or the district court of appeal did not simply order the city to grant approval of the site plan. As soon as that occurred, all of the other problems ceased to exist. The sham denial should have been swept aside and would have been had appellate review been allowed.

Fundamental Error

The error in this case -- denial of appellate review -- was absolutely fundamental and even a partial affirmance based on that fundamental error was improper. Certainly, Judge Lupo's first ruling denying the site plan greatly influenced her second ruling

on the buy-back provision which was equitable in nature. FPL sought equitable relief; specific performance of the buy-back provision and Judge Lupo had discretion in granting or denying that. Judge Lupo was never faced with the choice which the Fourth District Court of Appeal eventually made as a matter of law when it affirmed the buy-back and money judgments. Judge Lupo never answered the question of what the result would have been if she had granted approval of the site plan and thereafter considered the buy-back questions. Since this issue was never presented or even considered by Judge Lupo it was absolute error for the district court of appeal to rule on it as a matter of law. Issues never considered by a trial court cannot possibly be ruled upon by an appellate court. See 3 Fla. Jur. 2d, Appellate Review § 92 citing numerous cases including Jacques v. Wellington Corp., 183 So. 718 (Fla. 1938). This is fundamental error.

If Judge Lupo had proceeded with certiorari/appellate review she would have ruled in FPL's favor probably before the second suit on the buy-back issue was even filed. Even if certiorari review had been delayed, that petition was ready for decision as filed in November of 1986 and it would have certainly been decided long before the buy-back suit filed on January 22, 1987 could have been actually tried and decided. The certiorari case based on the record would never have been consolidated with the equitable contract case and there could never have been a joint trial. Almost all the evidence of new reasons offered by the city was

never even admissible because the de novo trial should never have occurred.

The entire proceeding was fundamentally flawed and in substantial error and this was the proceeding which produced the buy-back/money judgments. The two basic rulings -- (a) denial of the site plan and (b) granting buy-back relief, were directly related. The Fourth District had no idea how Judge Lupo would have ruled on the second issue if she had ruled differently and correctly on the first issue.

FPL's position is similar to a wife arguing for an affirmance of her high alimony award despite the fact that her divorce judgment has just been reversed. FPL litigated before Judge Lupo to obtain its site plan approval and appealed to the Fourth District to obtain its site plan approval. FPL has finally gained that approval and is not also entitled to the buy-back judgment. If two different judgments result from a single proceeding which is substantially and fundamentally erroneous, then both must be reversed. At the very least, a new judge must decide both issues from the beginning.

II.

Whether this court's affirmance of three cases based on City of Boynton Beach v. V.S.H. Realty, Inc., and the simultaneous reversal of one case based on an overruling of City of Boynton Beach v. V.S.H. Realty, Inc. constitutes a correct application of the en banc review process.

The Fourth District Court of Appeal erred in affirming the three buy-back/money judgments based on the Boynton Beach opinion. First, Boynton Beach is wrong and the Fourth District Court of Appeal seems to have said so by expressly receding from it. (A.18). It is obvious however, that the court is not quite sure and seems to have some sort of undying allegiance to the case. The district court has directly stated that it has affirmed the three judgments based on Boynton Beach and this was its last expression in point of time.

A second but equally obvious reason why it was error to affirm the three judgments based on Boynton Beach is the fact that the Boynton Beach case has absolutely nothing to do with the buy-back/money judgments. It is totally irrelevant. In all likelihood FPL will argue that the district court really did not mean to cite that case on the buy-back issues and that it was just a mistake and that anyone familiar with the case should realize it. This might make sense but for the fact that the Fourth District Court of Appeal has now expressly told this court that it indeed did affirm the three cases based upon City of Boynton Beach. See the January 4, 1993 certification stating "... this court's affirmance of three cases based on City of Boynton Beach..." Also, the Fourth District

granted two consecutive motions for reconsideration and then refused to even allow the filing of a third motion. The question asks whether this has been a correct application of the en banc review process.

Appellate Rule 9.331 governs En Banc Proceedings in the district courts of appeal and is designed to maintain uniformity within the decisions of a given district. There has been obvious error in the application of the en banc process herein.

The first panel opinion of the district court is indeed strange. This opinion was a "Citation PCA" as discussed in Dodi Publishing Company v. Editorial America S.A., 385 So. 2d 1369 (Fla. 1980). The "Citation PCA" relied solely on the Boynton Beach opinion. This panel opinion was accompanied by a dissent by Judge Anstead holding that Boynton Beach was inapplicable and that the circuit court should have granted certiorari review and that the municipality could not deny the site plan for the building which was already specifically approved. Judge Anstead held that the Corn decision was proper and controlling. Judge Stone then concurred specially and was basically in agreement with Judge Anstead except for his conclusion that the Boynton Beach case was indistinguishable. Judge Stone also found that if the trial court had applied certiorari standards that based on the record before the city commission the denial of site plan review "would have been quashed". Judge Stone also concluded that the Boynton Beach decision was wrong and that the Corn decision was right.

Counsel for Park of Commerce was shocked upon receipt of the initial opinion. Two out of three judges favored the Park of Commerce position but Park of Commerce had lost. With trepidation he moved for en banc reconsideration of the Citation PCA.

When a district court already has two conflicting cases in Southern Reporter and is then again presented with the same question, an obvious en banc situation occurs. Judge Stone was no more bound by Boynton Beach than by Corn. Petitioner thus suggests the correct procedure would have been for the court to simply en banc the case on its own motion and invite the parties to brief the issue, which in this case had already been done. This might well have avoided over one year of delay herein.

The initial decision and the subsequent en banc proceedings also point out an important problem in the current jurisprudence of this state. This court has institutionalized the "PCA". It is now a code word for "no further review" under Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) and Dodi Publishing Company v. Editorial America S.A., supra. When a district court issues a PCA or a Citation PCA, further review is absolutely foreclosed and this court never sees the hundreds of cases which litigants desperately wish could be further reviewed.

The words "per curiam" mean "by the court". Black's Law Dictionary, 4th Ed., states:

> Per curiam. Lat. By the court. A phrase used in the reports to distinguish an opinion of the whole court from an opinion written by any one judge.

It is an anomaly to suggest that the first "per curiam" decision herein was a decision "by the court". Two judges expressly disagreed with it. Simply put, a district court should not be allowed to affirm a decision based upon express reliance on a case which two judges disagree with or which has absolutely nothing to do with the case before it. We suspect that FPL will urge that what the district court really did was to affirm the buy-back judgments and to intentionally not say why.

Rarely can this court acquire jurisdiction over such issues because once a district court issues a PCA or Citation PCA the jurisdictional curtain is down and review cannot occur. This case presents one of the rare circumstances where the court does have jurisdiction.

At the very least this court should clarify the appropriate use of the now institutionalized PCA. PCA should mean "By the court" and should also mean that <u>at least two judges of the district court are in basic agreement on a settled principle of applicable law</u>. A PCA should not be used to avoid answering or deciding issues which the judges disagree on. It should not be used to simply prohibit this court from further review. En banc review under Rule 9.331 should be available in the district courts to review both a PCA and a Citation PCA. This court should instruct the district courts that en banc review is appropriate under such circumstances.

The committee notes to the en banc rule provide:

> The ground, maintenance of uniformity in the courts' decisions, is the equivalent of decisional conflict as

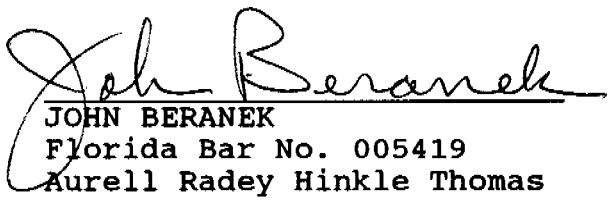
> developed by Supreme Court precedent in the exercise of its conflict jurisdiction. The district courts are free, however, to develop their own concept of decisional uniformity.

The en banc rule was enacted effective January 1, 1980, and the district courts have yet to develop and enunciate a clear concept of decisional uniformity. See Green v. Green, 501 So. 2d 1306 (Fla. 4th DCA 1986). We respectfully suggest that this court should clarify and instruct the district courts that en banc review is available to review a PCA or Citation PCA. A PCA should indicate substantial agreement rather than disagreement. This court should further instruct that if a court overrules one of its own decisions it may not rely upon that overruled and inapplicable decision to simultaneously affirm other cases.

As applicable to this case, it was clear error to affirm the three judgments in question based on Boynton Beach. The case had been overruled and had nothing to do with the affirmed judgments.

Conclusion

The Fourth District issued an en banc opinion reversing all four judgments on September 2, 1992. This opinion should be reinstated and construed to require the circuit court to grant certiorari review, order the approval of the site plan application and to further consider other matters based on appropriate pleadings on remand.



JOHN BERANEK
Florida Bar No. 005419
Aurell Radey Hinkle Thomas
& Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, FL 32301
(904) 681-7766

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to L. MARTIN REEDER, JR., 1900 Phillips Point West, 19th Floor, 77 South Flagler Drive, West Palm Beach, Florida 33401-6198 and to SUSAN A. RUBY, Assistant City Attorney, 100 N. W. First Avenue, Delray Beach, Florida 33444, this 4th day of March, 1993.

JOHN BERANEK
Florida Bar No. 005419
Aurell Radey Hinkle Thomas & Beranek
101 North Monroe Street
Suite 1000, Monroe-Park Tower
Post Office Drawer 11307
Tallahassee, FL 32302
(904) 681-7766