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 REPLY BRIEF ON THE MERITS BY PARK OF COMMERCE

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PREFACE

This reply brief by Park of Commerce is directed to the answer briefs of Land Resources Investment Co. (Florida Power & Light) and the City Of Delray Beach plus the amicus brief filed by the Association of County Attorneys. All emphasis in this brief is supplied by the writer. Since the reply brief responds to three separate briefs containing different arguments, it will exceed the normal 15 page limitation.

FPL's Statement of the Case and Facts

FPL concludes its Statement by asserting that Park of Commerce was really the prevailing party below and should not be allowed to seek review of the certified questions before this court. This assertion is later incorporated into a Motion to Dismiss contained in the brief. The FPL Statement also totally fails to recognize the content of the certified questions from the Fourth District Court of Appeal. Obviously, FPL does not like the fact that the Fourth District Court of Appeal stated that it relied upon City of Boynton Beach v. V.S.H. Realty, Inc., 443 So. 2d 452 (Fla. 4th DCA 1984) in affirming the buy-back money judgments in favor of FPL. In footnote 5, p.13, FPL says Park of Commerce is being "highly misleading" in suggesting that the Fourth District affirmed the money judgments based upon Boynton Beach. The certified question to this court specifically so stated and the fact that FPL wishes to close its eyes to the content of the certified question does not mean it does not exist.

On the question of whether Park of Commerce was the prevailing party we certainly wish that it were so. As previously stated, Park of Commerce won a battle but lost the war. FPL and Park of Commerce filed jointly for appellate/certiorari review of the site plan denial in November of 1986. As of January 4, 1993, (the date of the Fourth DCA's certified questions), one might say that FPL and Park of Commerce had both prevailed in obtaining an appellate ruling that FPL was entitled to a site plan in 1986. However, in the same case, the Fourth District Court of Appeal simultaneously but affirmed the money judgment based on the buy-back provision of the contract between FPL and Park of Commerce. Thus Park of Commerce stands in the position of having been told that it was really entitled to immediate appellate review which would have ended in its favor in 1986 but that due to the error of the trial court it did not receive appellate review and instead Park of Commerce now has a money judgment against it plus 12% interest for all the intervening years.

Without question, if the trial court had ordered that FPL was entitled to its site plan in November or December of 1986, then FPL would have never even filed the buy-back money judgment suit on January 22, 1987. In short, if immediate appellate review had been granted FPL would have had its site plan within 60 days and the building would have been constructed almost seven years ago. For FPL to now suggest that Park of Commerce won the case is frivolous.

In footnote on page 9, FPL suggests that the case is now moot due to the passage of time and that FPL has gone elsewhere and

built its necessary building. FPL concedes that this fact is totally outside the record and suggests only in a footnote that this court should consider it. None of the years of delay are attributable to Park of Commerce. The delay is attributable to the City of Delray in leading the trial court into reversible error. There was inordinate delay in the District Court; over three years after the last judgment and more than one year elapsed between the oral argument and the first PCA. Any delay attributable to the parties in the appeal was due to FPL. FPL filed numerous motions to relinquish jurisdiction delaying the appeal so that it could have its attorney's fees and costs judgement determined before the appeal was finalized. Indeed, if this whole controversy is now moot then at least the trial court with discretion and equity powers should judge the effect of this mootness and the fault for the delay. If FPL wishes to stipulate that the <u>entire case</u> is now moot, then the parties should be placed in a pre-suit status quo position and the money judgments in favor of FPL must also be vacated.

Resorting to the actual facts, footnote 2 on page 7 of the FPL brief says that Congress Avenue <u>adjoins</u> the FPL property. This is an obvious inadvertent error because the FPL three acre parcel does not adjoin Congress Avenue in any way. See map on p.5 of the initial brief. We are certain that FPL did not really mean to say this in its footnote because on the same page of the brief (p.7) it is stated that Congress Avenue is merely in the "vicinity" of the FPL property.

The City never "decreed" that access from some other "public street" was a condition precedent to site plan approval. Only such a decree and a designation of some other "public street" for access would have triggered the buy-back provision. This never occurred and indeed it could not have occurred after the City separately platted the three acre parcel without any access restriction for the specific purpose of allowing the FPL building.

City of Delray Beach Statement of the Case and Facts

The City of Delray Beach is obviously the losing party in the Fourth District Court of Appeal and has chosen not to file for review or cross-review before this Court. Instead, the City of Delray Beach simply filed a 36 page brief arguing that the Fourth District Court of Appeal was wrong and should be reversed. We recognize that the Fourth District's first certified question presents the court's question as to whether the Boynton Beach opinion correctly states the law. We will thus indulge the City's arguments even if the City should have actually filed for review.

The City says that 22/29th Street was really a residential street and not a collector road. The City should have read the transcript pages (R.512-515) cited at page 13 of the Park of Commerce factual recitation in support of the fact that the street was a collector road. There the City's own employee testified that it was a collector road. (R.515). Also as stated in the initial brief, Park of Commerce once asked the City to abandon a portion of the road and this was denied on the grounds that it was a "collector road".

Both the City and FPL attempt to rely upon a prior statement by a Park of Commerce representative that access on its 25 acre parcel would be from Congress and not 22/29th Street. Certainly that statement was made but at the time it was made the Park of Commerce entire 25 acre parcel fronted on Congress Avenue, a major arterial highway. Of course the commercial development of the commercial property would have been accessed onto the large commercial highway on which it fronted. However, with the City's full knowledge and aggressive cooperation, Park of Commerce then split off a three acre parcel at the rear of the property. FPL needed this property to build a service center. The City knew this and the City specifically agreed to the separate platting of this property to enable FPL to build this building. The City never asked for a unified plan of development with access over some other street for the separate FPL parcel. The trial court specifically so held. The fact that Park of Commerce previously said it would access the 25 acre property on Congress Avenue from Congress Avenue did not mean that if the property were subdivided and sold off to others, that access would still be solely from Congress Avenue.

The City was absolutely aware of this when it separately platted the property for the specific purpose of having FPL build this service center building. As pointed out in the initial brief, at an earlier time this was obviously a building which the City of Delray Beach wanted constructed very badly. It was approved every step of the way, zoning, platting, Planning and Zoning Board, until a group of residents showed up at the final site plan approval

meeting and "made a lot of noise" in the City Council meeting. At that meeting, Chairman Weatherspoon made his rather outrageous statements that the City would deny the site plan because he was not going to let any "commercial" traffic into a residential neighborhood and even though this was not written down anywhere in the City Ordinance, that he had the discretion to do so based on his own "common sense". (See footnote 2. p. 32 of initial brief and R.359-361).

The City also argues that it had the discretion to ask for a unified plan of development at the time of platting or at the time of site plan approval. Again, the trial court specifically found against the City on this issue and the District Court of Appeal affirmed as to this issue.

At page 9 the City says that "the actual reasons and motives for denial were irrelevant". This apparently refers to Mr. Weatherspoon's unwritten "common sense" approach to land use decisions. This assertion within the factual statement of the brief will be the subject of further argument herein. The City also says that traffic and drainage problems were "discussed" at the meeting where the site plan was denied. As a transcript reference the City simply cites the entire transcript. That transcript showed Mr. Witherspoon talking about his absolute unlimited discretion. The trial court found and the District Court found "The council denied the plan for no apparent reason other than neighborhood opposition".

SUMMARY OF ARGUMENT

The two questions certified by the Fourth District Court of Appeal raise the issue of whether the Boynton Beach decision is correct or incorrect. This issue is properly before the Court and the Fourth District is correct on the eventual site plan issue. However, the district court should not have affirmed the money judgments which were based upon the denial of site plan approval. Appellate review was a right in the circuit court which was erroneously denied. This fundamental error requires reversal of all judgments. The circuit court would have never required a buy-back of the property if the circuit court had simply proceeded with appellate review and granted the site plan to FPL.

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.

II.

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FPL's Motion to Dismiss and Merits Arguments

The above are the two certified questions from the Fourth District Court of Appeal. FPL chooses not to respond to them nor to respond to any of the arguments in the initial Park of Commerce brief.

FPL argues that Park of Commerce won the case and is merely seeking to have this court put its stamp of approval on the abandonment of the Boynton Beach case as controlling precedent. The Fourth District Court of Appeal said several things in its first certified question of January 4, 1993. Initially the court said specifically and expressly that it had relied upon City of Boynton Beach in the November 18, 1992, en banc opinion affirming the money judgments. The November 18, 1992 document was entitled

"Opinion on Motion for Rehearing and Clarification" and was the opinion which affirmed the money judgment in favor of FPL and against Park of Commerce. As this case now sits, the initial panel opinion affirming three cases based on Boynton Beach is still on the books and is still good law.

The fact that most of this is illogical, with all due respect, is not the fault of Park of Commerce. The Fourth District Court of Appeal initially per curiam affirmed with a dissent and a special concurring opinion agreeing with the dissent. That opinion was totally lacking in logic or sense. The Fourth District seems unable to rid itself of the Boynton Beach precedent. The Fourth District has specifically asked this Court to state whether Boynton Beach accurately states the law. If this Court does not wish to answer this specific question it of course has the discretion to do so. However, Park of Commerce timely filed for review based on both conflict and certified questions and this Court has jurisdiction to at least consider those questions. Certainly the money judgments growing out of the combined trial and the combined appeal are 100% adverse to Park of Commerce and 100% in favor of FPL.

FPL cites Credit Industrial Co. v. Remark Chemical Co., 67 So. 2d 540 (Fla. 1953) and Petrik v. New Hampshire Ins. Co., 400 So. 2d 8 (Fla. 1981) and Revitz v. Baya, 355 So. 2d 1170 (Fla. 1978) in support of its motion to dismiss. Strangely, FPL even quotes from the Credit Industrial Co. opinion that a "party ... may appeal only from a decision in some respect adverse to him." Without doubt,

the Fourth District's decision is at least "in some respect adverse to" Park of Commerce. The Petrik case and Davis v. Mandu, 410 So. 2d 915 (Fla. 1981) both deal with situations where a district court issued a certificate and no one filed an application for review to this Court based on the certification. Under these circumstances, the District Court's certification died on the vine because no one brought review. These cases have nothing to do with the present situation. Revitz is even further removed. There a district court wrote an opinion certifying a question and in the same opinion expressly stated that it did not reach that question.

The FPL motion to dismiss has no arguable merit and must be denied. The District Court expressly decided the site plan issue and overruled the Boynton Beach case but certified the question to this Court as to whether the Boynton Beach case was in fact a correct statement of the law. Thus the District Court both decided and certified the question. The Court also decided the question of whether the money judgments based on the buy-back contract should be affirmed. The Court stated that it relied upon the Boynton Beach case in affirming those money judgments and did so in both certified questions. The Court asked whether the process followed in this case concerning the en banc constitutes a proper application of the en banc review process. Obviously, the Fourth District passed upon the question of whether it acted correctly in its affirmance. In addition to everything else, there is an entire line of cases holding that once this Court accepts jurisdiction, it may review the entire decision and record. This is particularly

true as to outcome determinative questions. See Bell v. State, 394 So. 2d 979 (Fla. 1981); Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961), and Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970).

On the merits of the affirmance of the money judgments, FPL devotes that last two pages of its brief to a request for affirmance. FPL sums it all up at page 25 by finally dealing with the obviously pointed issue that the trial court never considered or answered the question of whether FPL would have been entitled to force a buy-back if FPL had received appellate review and approval of its site plan. At page 25 FPL's brief states:

> 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 Park of Commerce perform its obligation to repurchase the property.

This statement is at the very end of the FPL brief and FPL does not bother to say why or how.

The FPL petition for certiorari was filed in the circuit court in November of 1986. Under applicable Appellate Rules FPL might well have received the decision in less than 60 days. The entire appellate file including the transcripts of the City Council meetings were before the trial court at that time. The trial court had only to issue an order to show cause directing the City to respond, and if necessary, have one oral argument. Every judge who has looked at this case from an appellate point of view, including the entire en banc panel of the Fourth District Court of Appeal, has held that the City wrongly denied the site plan and that certiorari/appellate review would have resulted in granting the site plan. In short, FPL would have had its site plan by December

of 1986 and it would have never even needed to file its buy-back lawsuit. At the very least, a trial judge, with discretion, would have been able to judge the equitable relief sought by FPL in its buy-back lawsuit. This issue has never been before a trial judge with equitable jurisdiction discretionary power to grant or deny relief. The Fourth District Court of Appeal was absolutely in error in ruling as a matter of law that somehow FPL was absolutely entitled to both its money judgment plus its site plan approval. This question was never presented to or passed upon by the trial judge. It was clear error for the Fourth District Court of Appeal to rule to the contrary and FPL does not even suggest a reason in its brief before this Court to support such a ruling.

The Arguments of the City and the Amicus

The City has filed an extensive brief supplemented by the County Attorney's Association. Both briefs argue in the abstract that cities may pass whatever ordinances they wish vesting themselves with unlimited discretion to deny site plan applications. The City argues that it could have passed an ordinance with absolutely no standards and absolutely no restrictions on the city council whatsoever. The City says that its council members can grant or deny approval of site plans and that their reasons for doing so are absolutely irrelevant and immaterial and can never be inquired into. The City says that if anyone ever wants to question why a site plan was granted or denied they simply cannot do so. Their sole and singular remedy is to file a lawsuit for declaratory decree and to go to court to prove

that the "ordinance" denying approval is somehow unconstitutional. The City urges that at this trial the owner will, for the first time, find out what new reasons the City Council can come up with in retrospect. The City says it could have granted or denied this application for any reason or for no reason whatsoever but that it is then entitled to come to court and prove what reasons there might have been or what new reasons they have come up with in the meantime.

The City urges that the Boynton Beach case is really right and that the City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. 4th DCA 1983) case is wrong. After discussing numerous abstract cases and without responding to any of the case law cited in the initial Park of Commerce brief, the City finally and at long last gets to the point of analyzing its own Ordinance 30-22 on site plan approval. This finally occurs in the City's brief at pages 20 and 21. Analysis of the actual city ordinance never occurs in the amicus brief. The City's argument is a serious misrepresentation.

We invite the Court to carefully review Ordinance 30-22 entitled "Site and Development Plan Approval" as contained on pages 26 through 32 of the Appendix accompanying the City's brief. This ordinance provides for an administrative process in the approval of site plans. Absolutely no unlimited legislative discretion is provided for. The City has not even bothered to correctly read its own ordinance and indeed has misrepresented its content at page 20 of its brief.

Section 30-22 is a very complex, detailed and technical ordinance providing a procedure for the site plan application and approval or denial of that plan. First the completed application with required minute details goes to the planning director and he refers it to the Planning and Zoning Board. This board must conduct a hearing and a review in accordance with the ten specific standards contained in subsection (D) of the ordinance. After that review the P and Z Board must make a recommendation and must reduce it all to a written "report and recommendation" with "the board's findings" which must be forwarded to the City Council. The City Council then must review those findings. Subsection (5) states "upon receipt of any report and recommendation, the City Council, at a regular meeting, shall review the application and plans, subject to the standards of subsection (D) below". The City must issue a grant, denial or a grant with conditions and the City "records" must affirmatively show that standards 1-10 were considered. This is a substantial oversimplification of Ordinance 30-22.

The City has told this Court at page 20 of its brief that no hearing is required and no notice is required. However the City's own ordinance specifically says that site plan review must occur at a regular City Council meeting. Such meetings are subject to the Sunshine Law requirement of notice. Regular City Council meetings require an agenda. Does the City seriously suggest to this Court that a site plan can be granted or denied at a secret meeting with no notice? The City next suggests that there is no requirement for

the presentation of evidence at the hearing. This is absolutely false. The ordinance is extremely detailed in its requirements as to the "contents of the site plan application". Subsection (G) goes on for three pages listing exactly and precisely all the measurable and technical information that must be included within the application. Again, we invite the Court's attention to the extremely specific requirements for what must be included in the application. The zoning district, the area of the subject property including square feet and acreage, the specific type of development, the number of parking spaces required, the number of parking spaces provided, the ground floor building area in square footage and percentage of the overall site, the total floor area in square footage and percentage of the overall site, the landscaped area in square footage and percentage of the overall site, parking and street area, a traffic analysis, etc., etc. The ordinance requires all of this information to be included in the application in excruciating detail. This application is then to be reviewed by the City Council. To suggest that there is no requirement as to the presentation of <u>evidence</u> is ludicrous.

The City argues that there is no requirement for the issuance of an order by the City Commission. Again this is a misrepresentation. The ordinance specifically requires the City Council to review the application in accordance with all ten of the standards for evaluation contained in subsection (D) of the ordinance and it then requires that the City Council approve the

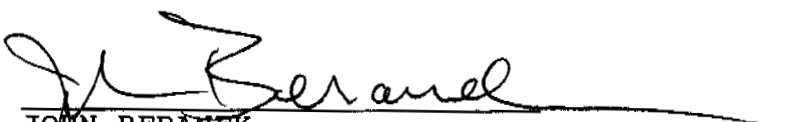
application, approve with conditions or deny the application. An order is required under the ordinance.

The City says that there is no requirement of any type of record of the proceedings. Again the ordinance is directly to the contrary and states that the City Council must review the application in accordance with the specific standards of subsection (D) and that the City Council "shall show in its records that each was considered". There are minutes of all regular City Council meetings and even if there were none, the specific ordinance requires a record and a specific record of specific consideration. There are many more misrepresentations as to this city ordinance but it is not necessary to go on with this. The only thing accurate which the City has stated is that there is no requirement that witnesses be sworn under the ordinance. This is correct. But the swearing of witnesses is not a requirement. See Irvine v. Duval County, 495 So. 2d 167 (Fla. 1980).

The City's ordinance provided for an administrative quasi-judicial proceeding. The fact that the City did not give appropriate consideration and instead simply voted based upon how much noise was being made in Council chambers does not mean that constitutional guarantees of due process were not required.

CONCLUSION

The Fourth District Court of Appeal erred in affirming the money judgments based upon a case which it simultaneously overruled. This was an abuse of the en banc process. The Fourth District Court of Appeal initially erred when it issued a per curiam affirmance accompanied by a dissent and a special concurrence agreeing with the dissent. The trial court never determined the buy-back issue in any sort of correct posture. If the trial court had already granted FPL its site plan approval the trial court would have never ordered that FPL be awarded a money judgment or be allowed to force a buy-back. FPL would not have even wanted this relief had it been able to promptly get is site plan approved. The error in denying appellate review was absolutely fundamental and all judgments based upon that fundamental error must be reversed.



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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 24th day of May, 1993.