IN THE SUPREME COURT OF FLORIDA

BROWARD COUNTY,

Petitioner,

Case No. 93,115

v.

G.B.V. INTERNATIONAL, LTD., etc., at al.,

Respondents.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is

14 point Times New Roman, proportionately spaced.

SUMMARY OF ARGUMENT

The Fourth District's conclusion that the circuit court departed from the essential requirements of law by considering the issue of estoppel, and by determining that the Commission's decision was quasi-judicial, rather than legislative, simply cannot withstand scrutiny. Given the fact that the Commission's decision should be upheld on any basis supported by the record, the Circuit Court properly considered the estoppel issue. Moreover, in light of the Florida Supreme Court's decisions in Snyder and Yusem, the Circuit Court properly found that the Commission's decision was legislative and therefore subject to the "fairly debatable" standard of review.

In any event, the remedy granted by the Fourth District Court of Appeal was improper. By not only quashing the Circuit Court's order, but also remanding the case to the Circuit Court with directions for that court to enter an order requiring the Commission to approve the plat as requested, the district court exceeded the scope of its authority on certiorari.

ARGUMENT

I
THE DISTRICT COURT ERRED IN GRANTING CERTIORARI

A
THE DISTRICT COURT'S CONCLUSION THAT THE COMMISSION BASED ITS DECISION ON INCOMPATIBILITY IS NOT SUPPORTED BY THE RECORD AND DOES NOT CONSTITUTE A BASIS TO QUASH THE ORDER OF THE CIRCUIT COURT

In its Answer Brief, G.B.V. International claims that the Fourth District Court of Appeal was correct in finding that the County Commission's decision was based on "incompatibility," and that the Circuit Court reached beyond the Commission's "stated reasons" and decided the application on a basis not raised before the County Commissioners in the proceedings.

However, noticeably absent from G.B.V. International's argument is any citation to anywhere in the record where the commissioners "stated reasons" for their decision. G.B.V. International completely ignores the fact that not one commissioner voting in the majority stated the reason for his or her vote, and the fact that neither the motion to approve the plat at six units per acre, nor the second to that motion, were based on any specific rationale. There is simply no way to

determine the basis (if there was only one) for the Commission's decision.[1]

Even assuming that the Commission's decision was based on incompatibility, the circuit court still cannot be said to have departed from the essential requirements of law in considering the estoppel issue. G.B.V. International cannot and does not cite to any case law to support its attack on the well-established principle of law which holds that a reviewing court should uphold the lower tribunal's decision if there is any basis in the record to do so. G.B.V. International simply argues that the record does not support the circuit court's decision to uphold the Board's decision on the basis of estoppel.

In fact, the record does show that G.B.V. International, through the actions of its attorney, waived its right to "flex." Although G.B.V. International now claims that this waiver was intended to be contingent upon the Commission's allowance of ten (10) units per acre on the property, the record discloses that no such condition was placed on the waiver when it came up at the hearings. There simply was no statement that G.B.V. International would not seek to utilize flex, "if this occurs," or "if we get x." G.B.V. International's attorney simply said that the applicant would voluntarily not use the City of Coconut Creek's flexibility provisions.

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[1] In fact, at no time prior to the Fourth District Court of Appeal's decision did G.B.V. International ever claim that the Commission's decision was based on incompatibility.

G.B.V. International's argument that the circuit court erred in considering transcripts from the hearings that took place prior to November 12, 1996, is plainly without merit. Simply because this matter came before the Commission on a series of occasions does not mean that the Circuit Court should have ignored those portions of the record that related to any hearing other than the one at which the decision from which they sought review was rendered. This is the equivalent of arguing that in reviewing a final judgment, an appellate court cannot properly consider anything that happened during pretrial hearings. Indeed, G.B.V. International can cite to no authority to support its claim and instead relies on the general principle that appellate courts cannot consider matters outside the record. That principle simply has nothing to do with the present case. The prior documents and transcripts here were without dispute part of the record regarding this matter and were properly considered.[2]

In any event, even if the Circuit Court's consideration of portions of the record from prior proceedings could be said to have been "legal error," it cannot be said to have amounted to a "departure from the essential requirements of law," as

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[2] G.B.V. International's reliance on certain statements made by the County Attorney at the final hearing of November 12, 1996 to support its arguments is misplaced. Comments by the County Attorney are simply irrelevant to the issues at hand.

defined by Haines City Community Development v. Heggs, 658 So.2d 523, 528 (Fla. 1995), nor did it amount to a denial of due process. Representations by G.B.V. International's counsel clearly led the Commission to believe that G.B.V. International had waived its right to seek flex from the City of Coconut Creek, which resulted in the Commission giving G.B.V. International part of what it was requesting, an increase in density from five (5) to six (6). Simple fairness dictates that G.B.V. International should not be allowed to make certain representations to obtain a benefit, and then turn around and renounce those representations in an effort to obtain further benefits. Even if the Circuit Court's decision could be said to have been "legal error," it cannot be said to have constituted an act of illegality or judicial tyranny amounting to a departure from the essential requirements of law. Moreover, it cannot be said that G.B.V. International was denied due process by the consideration of these proceedings, especially in light of the fact that the issue was raised by Commissioners at the final hearing of November 12, 1996.

B

THE DISTRICT COURT IMPROPERLY APPLIED THE STANDARDS APPLICABLE TO ZONING ISSUES OF LIMITED IMPACT TO A LARGE SCALE DEVELOPMENT

The Circuit Court properly began its analysis of the question of whether the

particular decision at issue was legislative or quasi-judicial with the Florida Supreme Court's decision in Board of County Commissioners v. Snyder, 627 So.2d 469 (Fla. 1993). As the Circuit Court noted, Snyder itself (which marked a departure from the long standing rule that rezoning actions are legislative in nature) indicated that that decision applies only to rezoning actions which have an impact on just a "limited number of persons or property owners."

In the recent decision of Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), the Florida Supreme Court for the first time interpreted Snyder, stating:

> We recognized [in Snyder] that comprehensive rezonings which affect a large portion of the public are legislative determinations; however, *we also recognized that rezonings which impact a limited number of persons and in which the decision is contingent upon evidence presented at a hearing are quasi-judicial proceedings* properly reviewed by petition for certiorari.

The Court then noted that it was adhering to its analysis in Snyder "with respect to the type of rezonings in that case." The Court then went on to refuse to extend Snyder any further, rejecting an effort to have its reasoning apply to rezoning decisions which require an amendment to a comprehensive land use plan. The Court, in Yusem, indicated that Snyder should not be extended beyond the relatively limited circumstances specifically dealt with in that case. Yusem in essence put to rest the thought that Snyder could constitute a wholesale departure from the

traditional analysis and that it could be applicable to all land use matters. It is therefore against the backdrop of the relatively limited exception carved out by Snyder that the Circuit Court considered this case. Viewed in such manner, G.B.V. International's contentions were properly rejected.[3]

C

THE FACT THAT PLAT APPROVAL REQUIRED THE AMENDMENT OF THE CITY OF COCONUT CREEK'S LAND USE PLAN SHOWS THAT THE DETERMINATION HERE WAS LEGISLATIVE

The Circuit Court found, as an independent reason for determining that the determination in this case was legislative, the fact that plat approval here required the amendment of the land use plan of the City of Coconut Creek.

In that respect, the Circuit Court found:

> Here, the request for plat approval was predicated upon the City of Coconut Creek's use of flex, which was based

[3] G.B.V. International also implies that the particular action at issue must be deemed quasi-judicial because the hearing that took place before the Commission was conducted as a quasi-judicial. That fact is irrelevant for at least two (2) reasons. First, because it is the nature of the acts performed that determines whether the proceedings are legislative or quasi-judicial, not the manner in which the hearing is conducted. Put simply, a rose by any other name is still a rose. And second, because the same argument has been addressed and rejected in Yusem, where, like in this case, a property owner was given a hearing similar to the one here and the supreme court rejected his argument that this fact made his hearing quasi-judicial in nature.

> on the city's amendment to its land use plan (May 1 Transcript, 45). Moreover, the use of the flex units required the recertification of the plan by the Broward County Planning Council (November 12 Transcript, 34; August 27, 1996 Memorandum from Susan M. Tramer to Elliot Auerhahn). Thus, the plat approval here could not have even reached the Commission without the amendment to the City's land use plan. Under the bright line test of *Yusem*, which states that all rezoning decisions that require land use plan amendments are legislate, the decision here must be deemed to be legislative.

There is no dispute that the application of flex at least required a recertification of the plan by the Broward County Planning Council, and Broward County submits that therefore the *Yusem* rationale applies. In any event, even if the application of flex units did not require an amendment to the City's land use plan, it still involves a decision that impacts the community on a large scale, and for the reasons set forth in Broward County's Answer Brief, must be deemed legislative in nature.

D
G.B.V. INTERNATIONAL'S FAILURE TO PROVE THAT ITS REQUEST FOR PLAT APPROVAL WAS COMPATIBLE WITH SURROUNDING LAND USES REQUIRED THE CIRCUIT COURT TO REJECT THE REQUEST FOR CERTIORARI

G.B.V. International ignores the fact the Circuit Court's finding that the

proposed change simply was not compatible with surrounding uses. For the reasons stated in Broward County's initial brief, this fact alone was reason to deny the requested plat approval, and the Circuit Court did not depart from the essential requirements of law by upholding that decision.

II

THE DISTRICT COURT ERRED WHEN, IN GRANTING CERTIORARI, IT WENT BEYOND QUASHING THE ORDER UNDER REVIEW AND ISSUED DIRECTIONS TO THE CIRCUIT COURT

In Tamiami Trail Tours v. Railroad Comm., 128 Fla. 25, 174 So. 451, 454 (1937), the Florida Supreme Court clearly stated that on certiorari review, the appellate court **only** determines whether or not the lower tribunal whose order or judgment is to be reviewed has, in the rendition of such order, departed from the essential requirements of law, and upon that determination will either quash the writ of certiorari or quash the order under review. The Court held that:

> When the order is quashed,...it leaves the subject matter, that is, the controversy pending before the tribunal, commission, or administrative authority, as if no judgment or order had been entered and the parties stand upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of

> their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not been entered.

The Court further held that the appellate court has no power when exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration, nor to direct the respondent to enter any particular order or judgment. This holding has been strictly followed for the last sixty (60) years, as evidenced by the cases cited in Broward County's initial brief, emanating from the Second, Fourth and Fifth District Courts of Appeal.

There can simply be no dispute that the Fourth District Court of Appeal's decision in this case, which went beyond quashing the order under review and directed the circuit court to direct the Broward County Commission to approve the plat as requested, directly conflicts with Tamiami and every subsequent case that has considered the issue of whether, on certiorari review, a court can direct a lower tribunal to take a particular action. The Florida Supreme Court has clearly held that an appellate court has no power to do so.

G.B.V. International has conceded direct conflict. However, in an effort to avoid the clearly established law which limits the scope of an appellate court's power on certiorari review, G.B.V. International argues that the district court's

directions to the circuit court in this case should be affirmed because the district court (despite the fact that G.B.V. International did not appeal the Circuit Court's denial of its Complaint for Mandamus) determined that the Commission had a ministerial duty to approve the plat as requested on remand. This argument should be rejected for a number of reasons.

Certiorari proceedings are intended to be narrow in scope. The appellate court is limited to a determination as to whether the lower tribunal departed from the essential requirements of law or denied due process.[4] In such proceedings, it is not the place of the reviewing court to go beyond these parameters and, when it determines that the lower tribunal has departed from the essential requirements of law or denied due process, consider whether the lower tribunal also has a ministerial duty to act in some other specific manner. Instead, as this Court recognized in Tamiami, when an order is quashed on certiorari review, it properly leaves the controversy pending before the lower tribunal, as if no order or judgment had been entered. At that point, there is no question that the lower tribunal must abide by the law as decided by the reviewing appellate court. However, the lower tribunal is free to conduct other proceedings, and make further decisions, so long as it does not

[4] Of course, on certiorari review of an administrative decision in the circuit court, the court also considers whether there is competent substantial evidence in the record to support the decision below.

violate the "law of the case" as established by the higher court. Thus, certiorari proceedings are intentionally narrow, recognizing that the lower tribunal is in the best position to determine whether it is appropriate to conduct other proceedings or make other decisions not inconsistent with the decision of the reviewing court.[5] Of course, if there is a ministerial duty to act in one particular manner, it is appropriately presumed that the lower tribunal will act accordingly.

On the very rare occasion when certiorari does not provide an adequate remedy, arguably because, (despite the fact that there is a "ministerial duty" to act in one specific way), there is some evidence that the lower tribunal will not follow the law as established by the reviewing court, the law does provide a vehicle by which a party may seek to have a higher court compel that certain action; that is, via complaint for mandamus.

In this case, G.B.V. International filed both a petition for writ of certiorari and a complaint for mandamus in the circuit court, challenging the Broward County Commission's denial of the request for plat approval, and seeking an order from the Circuit Court directing the Commission to grant the request. When the Circuit

[5] In fact in this case, if the district court of appeal's conclusion that the Commission based its decision on incompatibility is found to be improper, then the Commission should have the opportunity to consider the estoppel issue which the district court found never to have been addressed.

Court denied both, G.B.V. International chose only to file and petition in the district court challenging the Circuit Court's denial of the initial petition for writ of certiorari. G.B.V. International clearly stated that the only relief being sought was to have the district court of appeal quash the order of the circuit court. G.B.V. International chose not to appeal the circuit court's denial of its complaint for mandamus. Had G.B.V. International believed that certiorari alone would not provide adequate relief, then it could have and should have appealed that decision. It did not.

G.B.V. International is essentially asking this court to expand certiorari review to include automatic mandamus proceedings, when there has been no request for this review from the party seeking certiorari.[6] However, mandamus is and should be a separate proceeding and remedy, reserved for the rarest of occasions. The acceptance of G.B.V. International's position would be to expand not just the remedy available on certiorari review, but also the scope of review that is conducted in each and every certiorari proceeding. Rather than the limited scope of review that now exists, appellate courts conducting certiorari proceedings would be forced in each case to consider not just whether there has been a departure from the essential requirements of law or a violation of due process, but also whether there is

[6] And no notice to Broward County that such relief was being requested.

a "ministerial duty" of the lower tribunal to act in just one particular manner. Such determination would vastly expand the scope of review, and result in the appellate court's consideration of all alternative courses of action that the lower tribunal could take on remand. Ultimately, this would not only infringe on the jurisdiction of the lower tribunal to make this determination, but would also result in a waste of judicial resources when there is no reason to believe that the lower tribunal would not have followed the law as established without a mandate from the appellate court. There is simply no valid reason to expand certiorari proceedings to this extent. If necessary in a particular case where certiorari is not adequate, a party can request mandamus review.[7] This will ensure that the reviewing court will only need to delve into the question of whether there is a ministerial duty to act in the cases where it is necessary and where it can be shown that certiorari review is inadequate.

On certiorari review in this case, the Fourth District Court of Appeal simply went beyond the scope of its review and in essence performed an appellate review of the Circuit Court's denial of the complaint for mandamus. This issue was simply not on appeal. Certiorari and mandamus are appropriately two separate proceedings

[7] This is exactly what the petitioners did in Broward County v. Narco Realty, Inc., 359 So.2d 509 (Fla. 4th Dca 1978).

and should remain so.

CONCLUSION

For the reasons set forth above, Broward County respectfully requests this Court enter an order reversing the Fourth District Court of Appeal's order granting certiorari; or, alternatively, reverse that portion of the district court's order which directs the Circuit Court to enter an order directing Broward County to approve the plat as requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail this ____ day of _____, 1998 to: **JAMES C. BRADY, ESQ.,** Brady & Coker, Attorneys for Respondents, 1318 S.E. 2nd Avenue, Fort Lauderdale, Florida 33316.

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