IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 93,940

DCA No. 97-1657
District Court of
Appeal, Fourth District

FLORIDA POWER & LIGHT COMPANY,

Petitioner,
vs.

CITY OF DANIA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

At the outset of these proceedings, FLORIDA POWER & LIGHT COMPANY, had applied to the CITY OF DANIA, for a special exception. After the CITY OF DANIA denied its application, FLORIDA POWER & LIGHT COMPANY filed a Petition for Writ of Certiorari in the Circuit Court for the Seventeenth Judicial Circuit. In that proceeding, FLORIDA POWER & LIGHT COMPANY was the Petitioner; the CITY OF DANIA was the Respondent. After the Circuit Court granted the Petition, the CITY OF DANIA filed a Petition for Writ of Certiorari in the Fourth District Court of Appeals. In that proceeding, the CITY OF DANIA was the Petitioner; FLORIDA POWER & LIGHT COMPANY was the Respondent.

In the Petition filed before this Court, FLORIDA POWER & LIGHT COMPANY, is the Petitioner; it will be referred to as "FPL." The CITY OF DANIA is the Respondent; it will be referred to as the "CITY."

References to the Appendix will be as follows: Appdx-___ at ___.

References to FPL's Initial Brief will be as follows: I.B. at ___.

CERTIFICATION OF TYPE SIZE AND STYLE

Respondent, CITY, certifies that the type size and style used in this Answer Brief is 14 point proportionately spaced Times New Roman.

STATEMENT OF THE CASE AND FACTS[1]

A.

BACKGROUND AND PROCEDURAL HISTORY

On October 1, 1995, FPL, a provider of electrical service, applied for a special exception with the CITY. (Appdx-1 at 1-2). FPL sought to construct an electrical substation on property zoned C-2 (commercial). Appdx-1 at 1; Appdx-2 at 5. While the property is zoned C-2, it is adjoined on the north by residential property, including the Sheridan Ocean Club, Watermark Condominium, and Cluster Single Family Apartments. Appdx-2 at 5.

An electrical substation, as proposed by FPL, is not a permitted use in the C-2 zoning district. However, such a use may be allowed by special exception. Appdx-2 at 5, 6. In order to qualify for a special exception use, FPL was required to meet seven criteria:

1. That the use is a permitted special exception use as set forth in the Schedule of Use Regulations, City of Dania.

2. That the use is so designed, located and proposed to be

[1] Because FPL's Statement of the Case and Facts contains material omissions, as well as improper argument, the CITY, pursuant to Florida Rule of Appellate Procedure 9.210(c), submits its own Statement of the Case and Facts.

operated that the public health, safety, welfare and morals will be protected.

3. That the use will not cause substantial injury to the value of other property in the neighborhood where it is to be located.

4. That the use will be compatible with adjoining development and the intended purpose of the district in which it is to be located.

5. That adequate landscaping and screening is provided.

6. That adequate off-street parking and loading is provided and ingress and egress is so designed as to cause minimum interference with traffic on abutting streets.

7. That the use conforms with all applicable regulations governing the district where the property is located, except as may otherwise be permitted for planned unit developments.

Appdx-2 at 7-8.

The CITY's Planning and Zoning Board ("Board") considered FPL's application for a special exception use. Appdx-2 at 7. The Board recommended that the special exception for a substation be denied. Appdx-2 at 8.

Subsequently, on March 26, 1996, the CITY Commission reviewed FPL's application for the special exception at a public hearing. Appdx-2, passim. The Commission's review was de novo. After hearing testimony and receiving evidence both in favor of and against the special exception, the Commission unanimously voted to deny FPL's application. Appdx-2 at 240.

From the Commission’s denial, FPL filed a Petition for Writ of Certiorari in the

Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida. Appdx-5. After the parties submitted their respective briefs, one judge, the Honorable Herbert Moriarty, sitting in his appellate capacity, heard oral argument on FPL's Petition for Writ of Certiorari.[2] On April 16, 1997, the circuit court issued an Order Granting Writ of Certiorari and Quashing Commission's Denial of Special Exception. Appdx-9.

Thereafter, the CITY filed a Petition for Writ of Certiorari in the Fourth District Court of Appeals. Appdx-10. After the matter was fully briefed, the Fourth District granted the CITY's Petition and quashed the circuit court's decision. City of Dania v. Florida Power and Light Co., 718 So.2d 813 (Fla. 4th DCA 1998); Appdx-13.

FPL then sought, and obtained, discretionary review in this Court.

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[2] The Seventeenth Judicial Circuit is one of the few judicial circuits in Florida which does not use three judge panels to hear appeals. Fortune Insurance Co. v. Everglades Diagnostics, Inc., 721 So.2d 384, 384 n. 1 (Fla. 4th DCA 1998); City of Dania v. Florida Power & Light Co., 718 So.2d 813, 815 n.1 (Fla. 4th DCA 1998), (citations omitted).

B.

FACTUAL HISTORY

At the public hearing held on March 26, 1996, to consider FPL's application for a special exception use for the construction of a substation, FPL presented evidence regarding its application for a special exception. After FPL's witnesses, two experts, as well as citizens, testified in opposition to FPL's application.

Steve Molay, one of the experts retained by some of the affected residents of the neighborhood, is a real estate appraiser with over nine years of experience. Appdx-2 at 159. Molay has achieved the highest level of certification for a real estate appraiser in the State of Florida. Appdx-2 at 159. Ninety-five percent of Molay's work involves narrative appraisal studies, such as the one he conducted in the instant case. Appdx-2 at 159.

In his study, Molay evaluated 64 FPL facilities, including switchyards. Appdx-2 at 160. Over 30 of these facilities were FPL substations. Appdx-2 at 160. Molay also spoke with brokers involved in some of the transactions. Appdx-2 at 162.

In his study, Molay used paired-data analysis.[3] Appdx-2 at 160. Paired-data analysis involves comparing the value of homes in Broward County with a view of a

[3] While for purposes of brevity and illustration, Molay presented six paired-data sets to the Commission, his report containing many more data sets was provided to the Commission at the public hearing and made a part of the record. Appdx-2 at 177.

substation with similar homes in Broward County without a view of a substation. Appdx-2 at 160. Molay's study kept all other variables, including size of the home and other characteristics, as constant as possible. Appdx-2 at 160. Molay considers pair-data analysis the "highest form of adjusting proving methodology available to appraisers in the market place, and basically you are taking apples against apples and comparing them." Appdx-2 at 160-61. Molay's study established a pattern which showed a decrease in value attributable to the property's location adjacent to an FPL residential substation in Broward County:

> It is the consensus of the United Appraisal Associates that the Broward County real estate market clearly shows that evidence, case after case of single family residential market values being directly affected by the presence of an adjacent substation.
>
> The downward pressure on residential real estate manifests itself in two important aspects, protracted marketing times and lower selling prices being attained by residential dwellings affected by extreme proximity of the direct view of the Broward County Florida Power & Light substation as opposed to a similar home located elsewhere in the subdivision.
>
> In each case the causation of noticeable value losses were traced directly to the locational aspects of being directly adjacent to a Broward County, FP&L substation.

Appdx-2 at 173-74.

Christopher Coutro ("Coutro"), a certified land planner and the other expert who testified against FPL's application, listed among his credentials being the principal

planner for the City of Hollywood for approximately 10 years. Appdx-2 at 192-93. At the time of the public hearing, Coutro had more than 24 years experience as a planner. Appdx-2 at 192. In addition, Coutro belongs to several professional associations and was the planning and zoning director for the City of Boynton Beach for three years. Appdx-2 at 192-93.

Coutro testified that the substation would be an incompatible use. Appdx-2 at 193. Coutro explained that throughout history, utility uses have been separated, whenever possible, from residential uses. Appdx-2 at 193. Coutro testified that the area where the proposed substation would be is residential in character. Appdx-2 at 195. When the land was vacant, the substation may have been more acceptable as a special use. Appdx-2 at 194. However, now that the area is residential--780 houses just to the north--a substation is incompatible with the area. Appdx-2 at 195. Despite the use of foliage as a buffer, Coutro testified that people's perception is such that they do not want to live near a substation. Appdx-2 at 193. Based upon these factors, Coutro opined that FPL's proposed substation should not be approved as a special exception use. Appdx-2 at 197.

In addition, several citizens testified in opposition to the substation. Appdx-2 at 211-28. This citizen testimony was fact-based. Alex Caiscus testified that he would not have bought his home if he knew that a substation would be located nearby. Appdx-2 at 227. Similarly, Robert Dresser testified that, had he known about a substation when his

development was built, he personally would not have bought there either. Appdx-2 at 216-17. Another resident, Bill Webber, inquired as to whether FPL owned the property where the proposed substation was to be located, which it does not. Appdx-2 at 217.

After hearing all of the evidence, the Commission unanimously voted to deny FPL's application. Appdx-2 at 240. FPL sought review of the denial by filing a Petition for Writ of Certiorari in the circuit court. Appdx-5. In its opposition to FPL's Petition, the CITY refuted FPL's claim that the Commission's decision was not supported by competent, substantial evidence. Appdx-6 at 5-11.

After the circuit court granted FPL's Petition, the CITY, in its Petition to the district court, argued that the circuit court had exceeded its jurisdiction by improperly reweighing the evidence and substituting its judgment for that of the fact-finder in this case, the Commission. Appdx-10; Appdx-12. In addition, the CITY asserted that the circuit court applied the wrong law when it imposed a higher burden because the special exception at issue involved an essential service. Appdx-10; Appdx-12. The Fourth District agreed with the CITY, granted the Petition, and quashed the lower court's decision. Appdx-13.

FPL then sought jurisdiction in this Court. The Court granted FPL's request for review.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeals should be affirmed.

Pursuant to this Court's precedent, the district courts' jurisdiction on certiorari review is flexible and discretionary. Under Florida law, writs of certiorari always have been available to correct miscarriages of justice. In actions originating in quasi-judicial proceedings, the district court is the final arbiter and as such is the last opportunity to seek relief for such miscarriages of justice.

On certiorari review, a district court may exercise its discretion to correct erroneous decisions of circuit courts sitting in their review capacities. When a circuit court has exceeded its own certiorari jurisdiction by ignoring or reweighing the evidence before the lower tribunal, the circuit court has committed a miscarriage of justice requiring the intervention of the district court. This exercise of jurisdiction does not create a second appeal. Rather, certiorari review by a district court is entirely in harmony with this Court's precedent.

FPL maintains that the circuit court has the absolute last word on all evidentiary matters, to the complete exclusion of any further review by the district court, even where the circuit court's decision is tantamount to a miscarriage of justice. Both this Court and the district courts have held otherwise.

Each and every district court of appeals in the State of Florida has exercised its

certiorari jurisdiction where the circuit court has exceeded its jurisdiction by improperly reweighing or ignoring the evidence before the lower tribunal. Moreover, on numerous occasions, this Court has refused to review these decisions by the district courts, presumably because they are in accord with established precedent. In essence, where a circuit court improperly reweighs or ignores evidence in excess of its jurisdiction, it has usurped the role of fact-finder from the lower tribunal, which this Court expressly has prohibited.

In the instant case, the Fourth District Court of Appeals properly exercised its certiorari jurisdiction to correct a departure from the essential requirements of law by the circuit court. The circuit court had exceeded its own jurisdictional limits when it ignored and reweighed the evidence before the CITY Commission, thereby committing a miscarriage of justice.

The record is replete with evidence supporting the Commission's denial of FPL's application. The opposition to the application hired not one, but two experts. Furthermore, the citizens themselves offered fact-based testimony in opposition to FPL's application. All of this evidence constitutes competent, substantial evidence pursuant to this Court's standards.

While the Fourth district properly exercised its certiorari jurisdiction in the instant case, its task was made more difficult by the circuit court's failure to provide specific

reasons for quashing the Commission's decision. The CITY suggests that, to avoid such difficulties in the future, the better practice would be to require the circuit courts to state with particularity why the evidence is not competent or substantial, how the lower tribunal departed from the essential requirements of law, or why the lower tribunal failed to afford due process. By requiring the circuit courts to state their reasoning with specificity, this procedure, used in proceedings under the Administrative Procedure Act, Chapter 120, Florida Statutes, would ensure that any subsequent exercise of certiorari jurisdiction by the district courts does not exceed the limited scope of their review.

In addition to departing from the essential requirements of law by exceeding the parameters of its certiorari review, the circuit court incorrectly applied the law when it imposed a heightened standard. The circuit court never defined this heightened standard. Moreover, the court did not cite any authority for the heightened burden. Indeed, the heightened burden imposed by the circuit court has no basis in law. In fact, when given the opportunity, Florida courts have declined to apply a heightened burden to applications for special exceptions involving essential services. Accordingly, the circuit court applied the wrong law, thereby justifying certiorari jurisdiction in the district court.

For all these reasons, the Fourth District Court of Appeals should be affirmed.

ARGUMENT

I.

UNDER THE FLORIDA SUPREME COURT PRECEDENT, THE DISTRICT COURTS HAVE JURISDICTION TO CORRECT, ON CERTIORARI REVIEW, ERRONEOUS DECISIONS OF THE CIRCUIT COURTS SITTING IN THEIR REVIEW CAPACITY WHICH CONSTITUTE A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW

A.

THE DISTRICT COURT'S EXERCISE OF CERTIORARI JURISDICTION IS FLEXIBLE AND DISCRETIONARY

Pursuant to this Court's directives, certiorari review by a district court of appeal is not as mechanical and restrictive as FPL suggests. While district courts must be prudent and deliberate when deciding to exercise certiorari jurisdiction, they should not be "so wary as to deprive litigants and the public of essential justice." Stilson v. Allstate Ins. Co., 692 So.2d 979 (Fla. 2d DCA 1997).

In Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), this Court thoroughly analyzed the standard of review for certiorari, both in the circuit and district courts. In discussing the district court's standard of review, which is limited to determining whether the circuit court afforded due process and followed the essential

requirements of law,[4] the Court explained:

> the phrase "departure from the essential requirements of law" should **not** be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common law certiorari, the district courts of appeal should not as concerned with the mere existence of legal error as with the seriousness of the error. **Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually.** The district courts should exercise this discretion only when there had been a violation of clearly established principle of law resulting in a miscarriage of justice.

Id. at 528 (quoting Combs v. State, 436 So.2d 93, 95-96 (Fla. 1983)) (emphasis added).

Thus, while the district court's standard of review on a writ of certiorari is limited, it also includes a degree of flexibility and discretion. Id. at 530. In exercising this discretion, district courts draw new lines and set judicial policy as they individually determine those errors sufficiently egregious or fundamental to merit the safeguard provided by certiorari. Id. at 531. Because it depends on the specific facts and context, this evaluation is done on a case-by-case basis. Id.

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[4] The "essential requirements of law" standard is also known as "application of the correct law." Haines, 658 So.2d 529.

Moreover, the limited assessment by the district court does not usurp the authority of the lower reviewing court or create a "second appeal," the specter of which FPL repeatedly invokes. Id. at n. 14; I.B. at 18, 22, 24. Rather, certiorari review by the district courts is the last bastion against grievous errors, for which the great writ was designed. Id.[5]

B.

THE DISTRICT COURTS' CERTIORARI JURISDICTION ALLOWS THE COURTS TO CORRECT MISCARRIAGES OF

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[5] In addition, as at least one judge has observed:

> in Florida there has always been a right to at least one review or appeal from a court decision. An agency or zoning body is not a court. Thus, there really are not two sets of reviewing court in these types of cases.

St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989), pet. rev. den., 564 So.2d 488 (Fla. 1990) (Sharp, J. dissenting) (citations omitted).

JUSTICE WHICH CONSTITUTE DEPARTURES FROM THE ESSENTIAL REQUIREMENTS OF LAW

Despite the discretion with which district courts are vested on certiorari review, FPL urges a mechanical, and erroneous, application of the law, which virtually ignores the purpose of the great writ as described by this Court. See supra. In contrast to FPL's inflexible approach, the position advocated by the CITY is in harmony with this Court's precedent.

In Education Development Center v. City of West Palm Beach, 541 So.2d 106 (Fla. 1989), this Court found that the district court did **not** conclude that the circuit court had applied an incorrect principle of law. EDC, 541 So.2d at 108. Rather, what this Court found improper in EDC was that the district court "simply disagreed with the circuit court's evaluation of the evidence." Id. at 108-109.

In contrast, in the instant case, the district court did not "simply disagree" with the circuit court. City of Dania v. Florida Power & Light Co., 718 So.2d 813 (Fla. 4th DCA 1998). Rather, it found that the circuit court had incorrectly applied the laws by reweighing the evidence, which this Court consistently has proscribed. Id. at 815-16.

Notwithstanding FPL's contentions to the contrary, a distinction exists between disagreeing with the circuit court's evaluation of the evidence, which is improper by a district court on certiorari review, and determining that the circuit court applied the wrong law. I. B. at 29-29. This distinction is borne out by the case law. See infra.

The district courts will exercise their limited authority where certiorari is needed to correct a miscarriage of justice.[6] See, Combs, Haines, supra. Such cases include where the circuit court incorrectly has applied the law by exceeding the scope of its review, thereby acting in excess of its prescribed certiorari jurisdiction. See, Maturo v. City of Coral Gables, 619 So.2d 455 (Fla. 3d DCA 1993); see also, Fortune Insurance Co. v. Everglades Diagnostics, Inc., 721 So.2d 384 (Fla. 4th DCA 1998); Netz v. Jacksonville Sheriff's Office, 668 So.2d 235 (Fla. 1st DCA 1996). Review in such cases is **not** inconsistent with the district court's limited certiorari jurisdiction:

> [i]t is our responsibility, as part of the judicial review process, to insure that the Circuit Court has properly applied the law in order to maintain the integrity of the legal system and legal processes. **We cannot, and should not, turn a blind eye to an incorrect application of the law...**
>
> [judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logically valid reason

[6] Importantly, the district courts have noted that the cases are "rare" which are serious enough to constitute miscarriages of justice such to engage the certiorari jurisdiction of the district courts. G.B.V. International, Ltd. v. Broward County, 709 So .2d 155 (Fla. 4th DCA 1998), reh'g granted, 719 So.2d 286 (Fla. 4th DCA 1998); Fortune Insurance Co. v. Everglades Diagnostics, Inc., 721 So.2d 384 (Fla. 4th DCA 1998); Wincel Alphonse Estapa v. Giller, 706 So.2d 404 (Fla. 3d DCA 1998).

> for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice may just as well have been decided by the toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar. Such an appellate decision would be a "cop out..."

Maturo, 619 So.2d at 457 (quoting Utica Mutual Ins. Co. v. Clonts, 248 So.2d 511, 512 (Fla. 2d DCA 1971)) (emphasis added). Only by exercising this discretion, can the district courts correct the "vagaries and vicissitudes of the law." Id. (Gersten, J., concurring).

C.

WHEN A CIRCUIT COURT EXCEEDS ITS OWN CERTIORARI JURISDICTION BY IGNORING OR REWEIGHING THE EVIDENCE IN THE LOWER TRIBUNAL, IT HAS COMMITTED A MISCARRIAGE OF JUSTICE AND HAS DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW, THEREBY REQUIRING INTERVENTION BY THE DISTRICT COURT ON CERTIORARI REVIEW

FPL erroneously maintains that the circuit courts have the final word on all evidentiary matters, thereby absolutely depriving the district court of further review, even where the circuit court commits a miscarriage of justice. The law does not support this position.

In the post-EDC era, each and every district court in the State of Florida has held

that, where the circuit court ignored the evidence before the lower tribunal, reweighed such evidence, or substituted its judgment for that of the lower tribunal, the circuit court departed from the essential requirements of law. See e.g., City of Jacksonville Beach v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1988); Omni Insurance Co. v. Special Care Clinic, 708 So.2d 314 (Fla. 2d DCA 1998); Metropolitan Dade County v. Blumenthal, 675 So.2d 598 (Fla. 3d DCA 1995), rev. dism., 680 So.2d 421 (Fla. 1986); Herrara v. City of Miami, 600 So.2d 561 (Fla. 3d DCA 1992,), pet. rev. den., 613 So.2d 2 (Fla. 1992); Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992) pet. rev. den., 613 So.2d 6 (Fla. 1992); City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So.2d 955 (Fla. 4th DCA 1990), pet. rev. den., 581 So.2d 165 (Fla. 1991).[7] As recently as December 1998, at least two different district courts, expressly relying on EDC, exercised their certiorari jurisdiction in the context of a land use case to conclude that the circuit court had departed from the essential requirements of law when it improperly reweighed the evidence and substituted its judgment for that of the lower tribunal. See, Taylor, supra; Metropolitan Dade County v. Dusseau, 24 Fla.L.Weekly D10 (Fla. 3d DCA 1998); see also, City of Jacksonville Beach v. Marisol Land Development, Inc., 706

[7] Notably, each of these cases, save one (Omni), involves review of a public entity's land use decision.

So.2d 354 (Fla. 1st DCA 1998).[8] Interestingly, this Court previously has refused to review the district courts' decisions when they have exercised their certiorari jurisdiction in this context. See, Blumenthal, Herrara, Lust, Multidyne, supra.

Thus, Multidyne and Blumenthal are not the aberrations that FPL hypothecates. I.B. 30-32. Instead, Multidyne and Blumenthal represent the progeny of EDC and Haines in which district courts have intervened in the extraordinary instances in which circuit courts have exceeded their limited certiorari jurisdiction.

These district court decisions comport with this Court's precedent regarding the respective standards of review for circuit and district courts when exercising their certiorari jurisdiction. In the context of an administrative action, the initial review by the circuit court is not truly discretionary common law certiorari, because the review is of right. City of Deerfield Beach v. Valliant, 419 So.2d 624, 625-26 (Fla. 1982); see also, Haines, 658 So.2d at 530. In such cases, the circuit court functions as an appellate court and is not entitled to reweigh the evidence or substitute its judgment for that of the agency, a point with which FPL agrees. EDC, 541 So.2d at 108 (citations omitted); I.B. at 21. Rather, a circuit court's role on certiorari is merely to review the record to

[8] The rule in the pre-EDC era was the same: a circuit court exceeds its certiorari jurisdiction when it reweighs the evidence or substitutes its judgment for that of the lower tribunal. Skaggs-Alberton's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978).

determine (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the lower tribunal's decision is supported by competent substantial evidence. Valliant, 419 So.2d at 626. Thus,

> [t]he question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support a position contrary to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion.

EDC, 451 So.2d at 107-08; see also, Board of County Commissioners of Sarasota County v. Webber, 658 So.2d 1069, 1072 (Fla. 2d DCA 1995). If the evidence is conflicting, but competent and substantial, the circuit court may not second-guess the fact-finding lower tribunal by re-evaluating the evidence. See, Rivera v. Dawson, 589 So.2d 1385 , 1388 (Fla. 5th DCA 1991).

If a circuit court strays beyond its limited jurisdictional role by reweighing the evidence, it fails to apply the correct law. Lust, 602 So.2d at 572. Indeed, if a circuit court reweighs the evidence, then it has **usurped the lower tribunal's function**, thereby departing from the essential requirements of law. City of Deland v. Benline Process Color Company, Inc., 493 So.2d 26 (Fla. 5th DCA 1986); see also, Hillsborough County v. Westshore Realty, Inc., 444 So.2d 25 (Fla. 2d DCA 1983); Town of Mangonia Park v. Palm Beach Oil, Inc., 436 So.2d 1138 (Fla. 4th DCA 1983), pet. rev. den., 450 So.2d

487 (Fla. 1984).

II.

THE FOURTH DISTRICT COURT OF APPEALS PROPERLY EXERCISED ITS CERTIORARI JURISDICTION BECAUSE THE CIRCUIT COURT EXCEEDED ITS OWN JURISDICTION BY IGNORING THE EVIDENCE BEFORE THE CITY COMMISSION, THEREBY COMMITTING A MISCARRIAGE OF JUSTICE WHICH DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW

In the case of a special exception, the initial burden is on the applicant to demonstrate that it has complied with all conditions set forth in the municipal code. Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986) (subsequent history omitted); see also, Pollard v. Palm Beach County, 560 So.2d 1358 (Fla. 4th DCA 1990) (citations omitted); Metropolitan Dade County v. Fuller, 515 So.2d 1312 (Fla. 3d DCA 1987). Only if the applicant has met the statutory criteria is the public entity required to demonstrate that the special exception being requested is adverse to the public interest. Id.

In special exception cases, the initial determination of whether the applicant has met the prescribed standards is entrusted **not** to the courts, but rather to the city commission. See, Fuller, 515 So.2d at 1313; see also, B.S. Enterprises, Inc. v. Dade County, 342 So .2d 117 (Fla. 3d DCA 1977). On certiorari review, the circuit court only has authority to determine whether there is substantial competent evidence to support the commission's decision. See, EDC, 541 So.2d at 107-08; see also, Fuller, 515 So.2d 1314

n.4 (citations omitted). In addition to testimony and other material, staff recommendations may serve as competent substantial evidence. Fuller, 515 So.2d at 1314; see also, Hillsborough County Board of County Commissioners v. Longo, 505 So.2d 470 (Fla. 2d DCA 1987).

In the instant case, the record before the circuit court was replete with evidence supporting the Commission's decision to deny FPL's application. Nowhere in its order did the district court find that any of the specific testimony in opposition to the FPL's application was not competent or substantial:

> The CITY[9] failed to show by competent substantial evidence that such used caused substantial injury to the value of other property in the neighborhood where it was located or that the use was not compatible with adjoining development and the intended purpose of the district in which it is to be located, or was adverse to the public interest.

Appdx-9 at 3-4. The circuit never explained how, why or which testimony it found to be

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[9] To clarify the circuit court's decision, the **CITY** did not offer any evidence at the public hearing. A concerned citizens group, as well as others, including experts, presented evidence in opposition to FPL's application. The CITY's only role was that the Commission was present as a quasi-judicial body to hear testimony from both FPL as the applicant and those opposed to the application. Thus, it is not at all accurate to say that the **CITY** "failed in its burden."

insufficient. Appdx-9.

A circuit court cannot prevent certiorari review by a district court merely by stating that the lower tribunal's decision is not supported by competent substantial evidence. This is only a statement of a legal standard. Application of that standard to the facts is a matter of whether the correct law was applied, which **is** an issue for the district court. See, Haines, EDC, supra.

As FPL admits, this is not the issue to be re-litigated for the fourth time before this Court. I.B. at 35. Nonetheless, briefly stated, all of the evidence in opposition to FPL's application satisfied this Court's standard for competent substantial evidence.

Under DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957), competent evidence is that which is sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. Id. Similarly, substantial evidence is evidence that a reasonable mind would accept as **adequate** to support a conclusion. Id.

Applying this standard, in Pompano Beach Police and Fireman's Fund v. Franza, 405 So.2d 446 (Fla. 4th DCA 1981), the district court quashed a circuit court decision quashing the decision of an agency. The court found that, despite his opinion being in conflict with three other doctors, the dissenting doctor's testimony was neither inherently incredible nor improbable; accordingly such testimony constituted competent substantial

evidence upon which the Board could rest its decision. Id.

In the instant case, the testimony of the two experts, Steve Molay and Christopher Coutro, who testified in opposition to FPL's application, constituted competent, substantial evidence.[10] Molay, a license real estate appraiser with over nine years experience, considered pair-data analysis the "highest form of adjusting proving methodology available to appraisers in the market place, and basically you are taking apples against apples and comparing them." Appdx-2 at 160-61. Furthermore, despite being in conflict with FPL's experts, Molay's testimony was neither "inherently incredible nor improbable" and thus constituted competent substantial evidence upon which the Commission could base its decision. See, Franza, supra.

Similarly, Christopher Coutro's ("Coutro"), testimony was both competent and substantial. Respondent has never challenged Coutro's credentials as a land planner. He was qualified to testify on perception and in fact offered a historical analysis to support his opinion. Appdx-2 at 193. Coutro's testimony was sufficiently relevant and material

[10] As the CITY successfully argued to the Fourth District, the aspects of Molay and Coutro's testimony with which FPL takes issue went to the weight, not the validity of the evidence. The weight such evidence was the function of the Commission, the fact-finder in this case.

so that a reasonable mind would accept it as at least **adequate** to support the conclusion reached, and therefore, was competent. See, DeGroot, supra. Similarly, Coutro's testimony was such that a reasonable mind would accept as adequate to support a conclusion and, therefore, was substantial. Id.

Moreover, while the Commission's review was de novo, the staff recommendation supporting the Commission's decision to deny FPL's application also constitutes competent, substantial evidence. See, Fuller, Longo, supra; see also, Riverside Group, Inc. v. Smith, 497 So.2d 988 (Fla 5th DCA 1986); Alachua County v. Eagle's Nest Farms, Inc., 473 So.2d 257 (Fla. 1st DCA 1985), pet. rev. den., 486 So.2d 595 (Fla. 1986); Walker v. Indian River County, 319 So.2d 596 (Fla. 4th DCA 1975). In addition to the expert testimony and staff recommendations, because it was fact-based, the testimony of the citizens before the Commission constituted competent, substantial evidence, under the correct legal standard. Such testimony is **perfectly permissible** and constitutes substantial competent evidence. Blumenthal, 675 So.2d at 607, see also, City of St. Petersburg v. Cardinal Industries Development Corp., 493 So.2d 535 (Fla. 2d DCA 1986); Board of Commissioners of Pinellas County v. City of Clearwater, 440 So.2d 497 (Fla. 2d DCA 1983); Grefkowicz v. Metropolitan Dade County, 389 So.2d 1041 (Fla. 3d DCA 1980).[11]

[11] Contrary to so-called "Apopka Witnesses," the citizen testimony before the

Commission in this case was far more than that of local residents "who simply wish the facility to be established elsewhere." Multidyne, 567 So.2d at 957-58.

Because the record contained competent, substantial evidence supporting the Commission's decision, the circuit court exceeded its jurisdiction when it found to the contrary. In exceeding its jurisdiction, the circuit court departed from the essential requirements of law and committed a miscarriage of justice. Accordingly, the district court properly exercised its limited certiorari jurisdiction to correct this manifest injustice. See, Haines, Taylor, Dusseau, Marisol Land Development, Herrera, Blumenthal, Multidyne, Lust, Webber, Dawson, supra.

In the instant case the Fourth District court acted entirely properly and within its jurisdictional limits. See supra. However, the CITY suggests that any future questions as to whether a district court has exceeded the proper scope of review in exercising its certiorari jurisdiction could be avoided by applying the procedures presently used in proceedings arising under the Administrative Procedure Act ("APA"), Chapter 120, Florida Statutes.

Pursuant to the APA:

> an agency may not reject or modify a hearing officer's factual findings without first conducting a review of the entire record and then stating **with particularity** in its final order which findings of fact are being rejected and why those findings of fact were not based upon competent substantial evidence or why the proceedings did not comply with the essential requirements of law.

Fla. Stat. Sec. 120.57(1)(b)(b)10; Florida Power & Light Co. v. State, 693 So. 2d 1025,

1027 (Fla. 1st DCA 1997) (emphasis in original). As the court explained, "[t]he critical reason for requiring an administrative agency to state their conclusions and orders with specificity is to facilitate judicial review." Id. (citations omitted).

As the Fourth District noted in the instant case, the circuit court's order contains "many conclusory statements, but fails to include specific finding and reasons for its conclusions, hampering our review." City of Dania, 718 So. 2d at 816. Although the law currently does not require the circuit courts to do so, the CITY submits that if the circuit court determines on certiorari review that the lower tribunal's decision should be quashed, then the court should be required to state on the record its reasoning.

Sound policy reasons, as well as consistency, support the application of the APA requirements to the circuit courts. In cases arising under the APA, review by the district courts is provided by the Florida Rules of Appellate Procedure, whereas the grant of a petition for writ of certiorari by the district court is extraordinary relief. Fla.R.App.P. 9.030; see also, Metro Ford, Inc. v. Green, ___ Fla.L.WeeklyD__, (Fla. 3d DCA 1999). Therefore, because the APA requires specific findings for appeals which are a matter of right, then, a fortiorari, the circuit courts should also be required to provide such findings for granting the more extraordinary relief of certiorari review.

Furthermore, because review before the circuit court is the first judicial proceeding

in actions arising from lower tribunal such as municipal commissions,[12] specific findings by the circuit court would afford more guidance to the district courts, as well as a provide a greater degree of due process. Typically, quasi-judicial proceedings are less formal and do not require findings of fact. See, Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993). With neither the lower tribunal nor the district court required to provide findings of fact or reasons for their decisions, the district courts are, as here, at a serious disadvantage when they seek to exercise their own certiorari jurisdictions.

Findings of fact and legal analysis by the circuit courts exercising their certiorari jurisdiction to review decisions of lower tribunal will provide guidance to the district courts conducting their own review. The CITY suggests that requiring circuit courts to follow the same requirements as prescribed by the APA when they exercise their certiorari jurisdiction will ensure that any subsequent exercise of such jurisdiction by the district courts does not exceed their limited scope of their own review.

III.

THE CIRCUIT COURT INCORRECTLY APPLIED THE LAW WHEN IT IMPOSED A HEIGHTENED STANDARD

A circuit court departs from the essential requirements of law, thereby invoking

[12] See, footnote 5, supra.

the certiorari jurisdiction of the district court, when it applies the wrong legal standard. Las Olas Tower Co. v. City of Fort Lauderdale, ___ Fla.L. Weekly D___ (Fla. 4th DCA 1999); Taylor, supra; see also, Metropolitan Dade County v. P.J. Birds, Inc., 654 So.2d 170 (Fla. 3d DCA 1995); Lee County v. Sunbelt Equities II, Limited Partnership, 619 So.2d 996 (Fla. 2d DCA 1993). Most recently, in Las Olas Tower, the district court found that the circuit court applied the wrong law when it imposed a notice standard which was not required by the controlling law.

In the instant case, the circuit court incorrectly applied the law when it imposed a higher standard on the CITY:

> The City's burden is especially heavy where, as in that case, the special exception request is for essential services.

Appdx-9 at 3. The circuit court never defined this higher standard, either in terms of the quantity or quality of evidence required to satisfy it. Appdx-9. Moreover, the circuit court did not cite any authority or reason for the imposition of a higher burden on the CITY and, in fact, none exists. Appdx-9.

Neither this Court, nor any other Florida court, ever has held that an applicant for a special exception is entitled to "additional consideration" where a essential service is concerned. Indeed, when confronted with applications for special exceptions by providers of essential services, Florida courts have declined to impose a higher burden. See,

Multidyne. Thus, when the opportunity has presented itself in the appropriate context, the court did **not** find that the burden of the party opposing the application is greater when an essential service is involved. Id.

FPL has failed to cite any authority which would support the imposition of a higher burden. I.B. at 38-44. Southwest Ranches Homeowners Assoc., Inc. v. County of Broward, 502 So.2d 931 (Fla. 4th DCA 1987), pet. rev. den., 511 So.2d 998 (Fla. 1987), upon which FPL relies, arose in the context of a suit challenging two zoning ordinances. The case did **not** involve an application for a special exception. Instead, whether the zoning change enacted to accommodate a proposed landfill violated the consistency provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, was the dispositive issue. The only mention of "additional consideration" was in the context of determining whether a specific facility was consistent with the county's land use plan.

The circuit court applied the incorrect law in imposing a heavier burden upon the CITY. Accordingly, the district court properly exercised its certiorari jurisdiction. See, Las Olas Tower, Taylor, P.J. Birds, Sunbelt Equities, supra.

CONCLUSION

For the foregoing reasons, the Fourth District Court of Appeals should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **JOHN W. LITTLE, III, ESQ.**, Steel, Hector & Davis, LLP, 1900 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 and **JEAN G. HOWARD, ESQUIRE**, Florida Power & Light, Law Dept., P.O. Box 029100, Miami, FL 33102-9100, this ____ day of March, 1999.

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