IN THE
SUPREME COURT OF FLORIDA

Case No. 93,940
(Fourth DCA Case No. 97-1657)

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

CITY OF DANIA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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PREFACE

In this brief, Florida Power & Light Company shall be referred to as "FPL" and the City of Dania shall be referred to as "the City" or "Dania."

Reference to the Appendix to FPL's Initial Brief shall be designated by the symbol "A" followed by the tab page number (e.g. "A-1" means Appendix tab 1; "A-1" at 2-3 means Appendix tab 1 at pages 2 and 3). References to FPL's Initial Brief shall designated as "I.B. at ___." References to the City's Answer Brief shall be designated as "A.B. at ____."

All citations to Florida statutes are to the 1997 edition, unless otherwise noted. All emphases to quotations are in the original, unless otherwise noted.

CERTIFICATION OF TYPE SIZE AND STYLE

I hereby certify that the typeface used in this brief is 14 point proportionately spaced Times Roman.

By:_____

John W. Little, III, P.A.

STATEMENT OF THE CASE AND FACTS

FPL takes issue with a number of the factual assertions contained in this and other sections of the City's answer brief because they are inaccurate or misleading. These issues are addressed in the argument section below.

ARGUMENT

I. The District Court Of Appeal Does Not Have Jurisdiction To Redetermine The Issue Of Competent Substantial Evidence Under The Guise Of The Departure From The Essential Requirements Of Law Component Of Its Certiorari Review

FPL's initial brief demonstrates, in detail, how closely the Fourth District's decision below mirrors its decision in City of West Palm Beach v. Education Development Ctr., Inc., 526 So. 2d 775 (Fla. 4th DCA 1988), which was reversed by this Court in Education Development Ctr., Inc. v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989) ("EDC"). (I.B. at 24-30). This Court held in EDC that where the circuit court applies the correct standard of review -- whether the lower tribunal's decision is supported by substantial competent evidence -- the district court cannot conduct a *de novo* review of the record and decide that the circuit court incorrectly applied that standard based on the district court's disagreement with the circuit court's conclusion. FPL's initial brief also details why the Fourth District's decision below directly conflicts with this Court's decisions in Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) ("Haines") and City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982) ("Vaillant"). (I.B. at 17-35).

The City's answer brief does not, and cannot, reconcile the Fourth District's decision with this Court's decisions in Haines, EDC and Vaillant. Instead, the City attempts, through a series of faulty legal constructs, to circumvent those decisions by arguing that (1) the district court's certiorari jurisdiction is "flexible and discretionary," (A.B. at 12-14); (2) where the district court reviews the record and disagrees with the

circuit court's *conclusion* concerning the substantial competent evidence issue, the district court must be permitted, under the departure from essential requirements of law component, to reverse the circuit court even when there is nothing on the face of the circuit court's decision to suggest that it reweighed the evidence or substituted its judgment, (A.B. at 14-17); and (3) post-EDC cases (although none from this Court) do not support FPL's position. (A.B. at 17-21). As discussed below, none of these arguments change the fact that the Fourth District exceeded the scope of its limited certiorari review in this case, precisely as it did in EDC.

A. In Exercising Its Certiorari Jurisdiction, The District Court Of Appeal Does Not Have "Flexibility And Discretion" To Expand Its Limited Certiorari Jurisdiction

The City's first argument -- that the district court's certiorari review "includes a degree of flexibility and discretion" -- misses the issue in this case. The "flexibility and discretion" afforded to the district court only applies to the district court's decision as to whether a failure to afford procedural due process or a departure from the essential requirements of law rises to the level of a miscarriage of justice requiring certiorari relief. This "flexibility and discretion" is *not* a means to expand the scope of the district court's certiorari jurisdiction into the substantial competent evidence component.

Although the City quotes a portion of this Court's decision in Haines, the City leaves out several important sentences that follow the language which it quotes in the answer brief:

> It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari. A district court may refuse to grant a petition for common-law

> certiorari even though there may have been a departure from the essential requirements of law. *District courts should use this discretion cautiously so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal.*

Haines, 658 So. 2d at 528 (quoting Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983)) (emphasis added). As this Court has repeatedly held, the district court's certiorari review is not intended to create a second plenary appeal and does not include a reexamination and redetermination of the substantial competent evidence issue. Haines, 658 So. 2d at 530.

Further, the language quoted by the City is intended to narrow, not broaden, the district court's exercise of certiorari review. This language discusses what constitutes a departure from the essential requirements of law, pointing out that not all legal errors constitute such a departure for which the district court should exercise its certiorari jurisdiction. Simply put, neither this language, nor the Court's holdings in Haines, EDC or Vaillant, support the proposition that the district court can redetermine the substantial competent evidence issue under the guise of exercising "flexibility and discretion." See, e.g., Stilson v. Allstate Ins. Co., 692 So. 2d 979 (Fla. 2d DCA 1997).

B. Correcting "Miscarriages Of Justice" Under The Departure From Essential Requirements Of Law Component Does Not Include Redetermining The Issue Of Substantial Competent Evidence

The City next attempts to maneuver around this Court's decisions by arguing that correcting "miscarriages of justice" includes reversing a circuit court when the district court disagrees with the circuit court's conclusion on the question of substantial competent evidence. The City concedes, as it must, that the district court cannot simply disagree with the circuit court's evaluation of the evidence. (A.B. at 15). Having conceded this point, the City nonetheless argues, in complete disregard for the record in this case, that the Fourth District did not "simply disagree" with the circuit court but

rather found that the circuit court had incorrectly applied the law by reweighing the evidence. (Id.). As discussed at length in FPL's initial brief, there is nothing on the face of the circuit court's decision to indicate that it reweighed the evidence or substituted its judgment for that of the City Commission. To the contrary, the circuit court applied the correct standard of review and concluded that there was no substantial competent evidence to support the City's denial of FPL's application. (A-9 at 3-4).

How then does the City support its contention that the circuit court incorrectly applied the law by reweighing the evidence? By arguing that "because the record contained competent, substantial evidence supporting the Commission's decision, the circuit court exceeded its jurisdiction when it found to the contrary." (A.B. at 26). In other words, the City attempts to support the Fourth District's decision that the circuit court "must have" applied the wrong law based on the Fourth District's disagreement with the circuit court's evaluation of the substantial competent evidence issue. Haines, EDC and Vaillant expressly prohibit such an approach.

A district court of appeal cannot unilaterally broaden its jurisdiction by reviewing the record for itself, reaching a different conclusion on the competent substantial evidence question based upon its *de novo* application of the law to the facts and reversing the circuit court based merely upon an inference that the circuit court must have exceeded its own scope of review because the district court reached a different conclusion. This is true even in a case when the district court independently believes that substantial competent evidence exists below. To do otherwise is to allow the district court to expand its limited certiorari jurisdiction by merging the third component of circuit court review of agency action -- the competent substantial evidence question -- into the more limited inquiry of whether the circuit court applied the correct law.

C. The City Has Mischaracterized FPL's Position In An Attempt To Blunt The Force Of *Vaillant*, *EDC* and *Haines*

The City attempts a slight of hand in section I C of its answer brief. It mischaracterizes FPL's position, then argues that the law does not support this "position," citing district court cases that do not lessen one iota the force with which this Court's prior decisions in Vaillant, EDC and Haines require reversal of the decision below.

Contrary to what the City states, FPL's initial brief does not maintain that "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" (A.B. at 17), an extremely broad, formless concept that was not before either of the courts below and is not before this Court. Rather, FPL's brief faithfully recites this Court's decisions in Vaillant, EDC and Haines prohibiting district courts from reconsidering the question of substantial competent evidence already reviewed by the circuit court even when the district court believes that the circuit court's conclusion on this question is erroneous.[1] The district court below violated this prohibition, just as it did in EDC, and must be reversed based on the straightforward application of Vaillant, EDC and Haines.

The City argues that there are post-EDC decisions by every district court of appeal in the State of Florida holding that a circuit court departed from the essential requirements of law by ignoring evidence before the lower tribunal, reweighing such

[1] See, e.g., Haines, 658 So. 2d at 525 ("A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by certiorari.").

evidence or substituting its judgment for that of the lower tribunal, and cites various district court decisions as examples. The City further argues that "on numerous occasions, this Court has refused to review these decisions by the district courts, presumably because they are in accord with established precedent." (A.B. at 10). The City's reliance on these district court decisions and this Court's refusal to review them is misplaced.

First, there is nothing on the face of the circuit court decision below to indicate that it ignored or reweighed evidence or substituted its judgment on the merits for that of the zoning authority. Therefore, to the extent any of the district court cases cited by the City permit a district court to grant certiorari relief on such bases, they have no application to this case. Second, none of the cases cited by the City changes the fact that the Fourth District's decision in this case is virtually indistinguishable from its decision in EDC that was reversed by this Court. Third, to the extent any of the decisions cited by the City conflict with Vaillant, EDC or Haines (which some appear to do as suggested by Judge Warner below), they do not render the decision below any less reversible. To the contrary, multiple examples of such conflicts underscore the need for this Court to reverse the decision below in order to prevent further confusion, inconsistent application and violations of the principles set forth in the prior decisions of this Court. Fourth, it is axiomatic that this Court's decision not to review a district court opinion has no precedential value and cannot be argued as an approval of such opinion by this Court.[2]

Finally, while the limited space in a reply brief does not permit detailed discussion of the district court case cited by the City, most if not all of the cases are distinguishable from the instant case in that, among other things:

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[2] Southern Bell Telephone & Telegraph Company v. Bell, 116 So. 2d 617, 619 (Fla. 1959) (holding that a case which the Court previously refused to review was nonetheless in direct conflict with a prior decision of the Court).

(A) they do not address the substantial competent evidence component of certiorari review by circuit and district courts (e.g., Omni Insurance Company v. Special Care Clinic, Inc., 708 So. 2d 314 (Fla. 2d DCA 1998); Hillsborough County v. Westshore Realty, Inc., 444 So. 2d 25 (Fla. 2d DCA 1983));

(B) their conclusion that the circuit court departed from the essential requirements of law is not based (exclusively or at all) on the circuit court's allegedly erroneous application of the substantial competent evidence standard to the facts of the case, but is based (in whole or in part) on the circuit court's express application of an incorrect standard of review or other failure to apply an established principle of law (e.g., City of Jacksonville Beach v. Taylor, 721 So. 2d 1212 (Fla. 1st DCA 1998) (express application of incorrect standard contrary to zoning code); Orange County v. Lust, 602 So. 2d 568 (Fla. 5th DCA), rev. den., 613 So. 2d 6 (Fla. 1992) (express application of incorrect standard (correct standard not even mentioned); express reliance on opposition evidence rather than review of record to see if any competent substantial evidence supported zoning board's decision[3]); City of Jacksonville Beach v. Marisol Land Development, Inc., 706 So. 2d 354 (Fla. 1st DCA 1998) (application of incorrect standard of review; *de novo* review, findings and conclusions on the merits); Board of County Commissioners of Sarasota County v. Webber, 658 So. 2d 1069 (Fla. 2d DCA 1995) (express application of incorrect standard of review; no review of whether zoning board's decision was supported by substantial competent evidence))[4]; or

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[3] "[W]e quash the circuit court's decision, not because we disagree with the circuit court's evaluation of the evidence, but because the trial court failed to perform its proper review function." 602 So. 2d at 572.

[4] In Webber, the Second District remanded the matter to the circuit court "to redetermine the appropriateness of the Board's denial using the correct standard.... In doing so, however, we emphasize that nothing in this opinion should be construed as indicating whether such evidence does or does not exist because that is beyond the reach of our certiorari jurisdiction in this case." 658 So. 2d at 1073.

(C) it is clear from the face of the circuit court's order that it expressly reweighed the evidence and/or substituted its judgment on the merits for that of the zoning authority (e.g., Metropolitan Dade County v. Dusseau, 25 Fla. Law Weekly D10 (Fla. 3d DCA 1998) (express reweighing of evidence; express reliance on opposition evidence rather than review of record for substantial competent evidence supporting zoning board's decision); City of DeLand v. Benline Process Color Company, Inc., 493 So. 2d 26 (Fla. 5th DCA 1986) (circuit court order determining that board's findings were supported by *insufficient* substantial competent evidence demonstrated improper reevaluation of the weight and credibility of conflicting substantial competent evidence); Town of Mangonia Park v. Palm Beach Oil, Inc., 436 So. 2d 1138 (Fla. 4th DCA 1983), rev. den., 450 So. 2d 487 (Fla. 1984) (court's express reevaluation of critical piece of evidence usurped function of code enforcement board)).

In sum, none of the district court cases cited by the City change the inescapable conclusion that the decision below directly conflicts with Vaillant, EDC and Haines, and must be reversed.

II. The Fourth District Exceeded The Proper Scope Of Its Certiorari Jurisdiction When It Reviewed And Redetermined The Substantial Competent Evidence Issue

The circuit court below articulated the correct standard of review, analyzed the record before the Commission, and determined that there was no substantial competent evidence to support the denial of FPL's application (i.e. that FPL's application failed to meet the requirements of the code *and* was adverse to the public interest).[5] (A-9 at 3-4).

[5] It should be noted that the City misstates the legal standard by which an application for a special exception must be measured. Compare (A.B. at 21) with (I.B. at 21).

Therefore, the City's argument that the circuit court failed to specify *which* testimony it found to be not competent or substantial is simply wrong. (A.B. at 22). The circuit court found the entire record to be wanting. As to the City's argument that the circuit court failed to explain "how" or "why" the evidence was not competent or substantial, the law does not impose such a requirement as the City readily admits elsewhere in its brief. Indeed, when a similar issue was raised in the context of zoning applications, this Court specifically declined to require specific findings. See Board of County Commissioners v. Snyder, 627 So. 2d 469, 476 (Fla. 1993) ("While they may be useful, the board will not be required to make findings of fact.").[6]

The City concludes its legal argument by asserting that a district court has certiorari jurisdiction to review whether the circuit court applied the correct legal standard to the facts of the case, and that such review cannot be prevented by a circuit court's conclusory statement that the lower tribunal's decision is not supported by competent substantial evidence, citing to Haines and EDC. (A.B. at 23). Haines and EDC, however, *do not* support this proposition. In fact, this same argument was made by Justice McDonald in his dissent in EDC, 541 So. 2d at 109, which this Court rejected in its majority opinion.

Furthermore, as this Court recognized in Haines, it makes absolutely no sense to have two courts reviewing the same issue. For example, if the circuit court's review of

[6] The City suggests that in the future this Court should require the circuit court to state its reasoning on the record if it determines that the lower tribunal's decision should be quashed, analogizing to Chapter 120. (A.B. at 27-28). The analogy does not fit. The APA requires specific findings by the hearing officer and the agency in the event that the agency disagrees with the hearing officer. Here, as the City concedes, there is no requirement that the zoning authority make specific findings to support its grant or denial of a special exception application. To suggest that the circuit court, sitting in its appellate capacity, should be required to make such findings is the equivalent of saying that all district courts of appeal should make specific findings when they review circuit court decisions. That is not the law, however, as many district court decisions are rendered without opinion, much less specific findings.

the substantial competent evidence issue under the standard articulated in De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957) (De Groot") is subject to subsequent review by the district court, that will mean that the district court is performing the same analysis for a second time. This conclusion is inescapable because application of the De Groot standard necessarily involves application of the law to the facts. If the City's position were adopted, the review by the circuit court of this issue might as well be eliminated because it would be completely superfluous in all cases other than those in which the district court agreed with the conclusion reached by the circuit court. And, in those cases where the district court agreed with the circuit court's conclusion, two courts would be performing the exact same analysis resulting in a second plenary appeal of the issue. For the reasons recognized by this Court in Haines, such an approach cannot and should not be adopted. See Haines, 658 So. 2d at 526 n.4.

The City then moves to the facts in this case and asserts that the issue of substantial competent evidence should not be "relitigated for the fourth time before this Court." (A.B. at 23). Indeed, as FPL argued to the Fourth District, the issue should not have been relitigated for a "third time" before the district court.

Having made this statement, the City nonetheless proceeds to argue before this Court that "all of the evidence in opposition to FPL's application satisfied . . . [the] standard for competent substantial evidence." (A.B. at 23-27). These arguments, with one notable addition, essentially parrot the arguments made to the circuit court prior to its determination that there was no substantial competent evidence in the record to support the City's denial of FPL's application.

The notable exception concerns staff recommendations. For the first time in this case, the City asserts that staff recommendations supporting a zoning authority's decision may constitute substantial competent evidence. (A.B. at 22). With no citation to the record, the City then boldly asserts that "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." (A.B. at 25). The reason that there is no record citation for this "fact" is because *there is none*. There is no testimony or other evidence in the record concerning a staff recommendation against FPL's application and the case law cited by the City in this regard has absolutely no application here.[7]

Moreover, as FPL demonstrated in its petition and reply before the circuit court, and as the circuit court correctly determined, the testimony of the "two experts" presented by the neighborhood coalition that opposed FPL's application did not constitute substantial competent evidence. (A-5 at 16-25, 44-54; A-8 at 3-12). The appraiser called by the opposition testified with respect to six sets of paired sales. Each of those paired sales purported to show a difference between a residential home in *direct view* of a substation compared to another home *located in the same immediate area without a direct view* of the substation. As FPL demonstrated in the circuit court, this evidence did not meet the De Groot standard with respect to the issues before the Commission. Among other things, the evidence in the record established that the substation in question here will be heavily landscaped, with extensive set backs and will *not be in direct view* of any of the surrounding properties. These arguments do not go to the weight of the evidence; rather, they go to the competency of the evidence under the De Groot standard, a standard applied in the circuit court and one which is not subject to reexamination and redetermination by the district court on petition for certiorari.

The City also argues that the testimony of the land planner constituted substantial competent evidence. His testimony was essentially that, in his opinion, there was nothing an applicant could ever do to make an electric substation compatible with an abutting

[7] The City's resort to non-existent "facts" in its fourth attempt to relitigate the substantial competent evidence issue also speaks volumes about the deficiencies in the evidence previously relied upon by the City in its argument to the circuit court and later, improperly, to the Fourth District.

residential use; substations were *per se* incompatible with residential areas (even though this site and most surrounding property was zoned C-2) and the City should not approve FPL's application. As FPL pointed out before the circuit court, this was not competent or substantial evidence concerning the issues before the Commission because, among other things, (i) the land planner was totally unaware of the fact that the City Code provided that substations are permitted special exceptions in all residential zoning classifications in the City; and (ii) the land planner's "opinion" that substations are *per se* incompatible with residential areas -- even when they are in commercial areas which happen to abut a residential area on one side -- cannot override the prior legislative determination by the City that substations are permitted in *all* zoning districts and therefore such uses are presumed to be necessary and in the public interest.

Finally, as to the testimony of nearby landowners, FPL argued in the circuit court that testimony such as "I would not have bought here" is not "fact-based" and instead is mere speculation and unsubstantiated opinion. Furthermore, from a practical standpoint, if a special use, which enjoys the legislative presumption that it is necessary and in the public interest, can be defeated by one person in a neighborhood coming forward and stating that "he or she would not have bought" if they had known this type of facility might be built, all special use applications could be defeated by a single dissenting voice providing entirely subjective speculation and unsubstantiated opinion. This is particularly unfair and unlawful here considering that those opposed to the substation had at least constructive knowledge that they were buying properties adjacent to a commercially zoned area and that substations are permitted as special exception uses in commercial and residential areas.

The circuit court applied the correct standard of review to the facts and the Fourth District exceeded its certiorari jurisdiction when it reexamined and redetermined that issue.

III. The Fourth District Erred In Reversing The Circuit Court's Grant Of Certiorari That Imposed A Heightened Burden On The City To Support Its Denial Of A Special Exception Application For Essential Services

In its initial brief, FPL discussed both the law and the sound public policy that support the proposition that where the requested special exception is for essential services and the utility has shown that its proposed use meets the statutory criteria, the burden should be especially heavy on the zoning authority to show by competent substantial evidence that the proposed use does not meet the statutory criteria and is adverse to the public interest. (I.B. at 38-44). Stated another way, the fact that a special exception is sought for essential public services is a valid additional consideration and the denial of a special exception for such services should properly receive greater scrutiny. The City did not respond to FPL's public policy arguments or to the cases from other jurisdictions which have adopted similar approaches in connection with essential services.

Instead, the City cites Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So. 2d 955 (Fla. 4th DCA 1990), a case which adds nothing to this determination. Multidyne did not involve a statutorily-mandated public utility service as is the case here. Further, the City's attempt to distinguish Southwest Ranches Homeowners Ass'n., Inc. v. Broward County, 502 So. 2d 931 (Fla. 4th DCA), rev. den., 511 So. 2d 998 (Fla. 1987), misses the point. The case was cited not because it involved an application for a special exception but rather because, in a related land use context, the court noted a difference between the facility in question and "nearly every other form of residential or commercial development" which, in the district court's view, constituted "a valid additional consideration to the overall determination of consistency." Id. at 939.

The testimony relied upon by the City in this case dramatically underscores the need for a heightened burden, whether defined as "closer scrutiny," "additional consideration" or otherwise. Electric substations must be located in the area of demand

to effectively serve that demand. (A-2 at 24-25). It is for this reason that over 85% of the substations in FPL's system are located in residential/commercial areas. (A-2 at 201-02). If this need for essential services can be defeated by the type of speculative neighborhood testimony and other incompetent testimony offered here, the utility's statutory duty to provide safe, efficient and reliable electric service can be thwarted. The circuit court was correct.[8]

CONCLUSION

For the foregoing reasons and for those set forth in the initial brief, the Fourth

[8] Even if this Court were to conclude that a heightened burden is inappropriate, the result should be a remand to the circuit court for the sole purpose of clarifying whether it relied on such a "heightened burden" in making the competent substantial evidence determination and, if so, whether its determination of this issue would remain the same without applying such a burden. See Board of County Commissioners of Sarasota County v. Webber, 658 So. 2d 1069, 1073 (Fla. 2d DCA 1995) ("We . . . remand with directions that it review the record of the proceedings before the board and determine whether there exists substantial, competent evidence to support the denial of respondent's variance. In doing so, however, we emphasize that nothing in this opinion should be construed as indicating whether such evidence does or does not exist because that is beyond the reach of our certiorari jurisdiction in this case.").

District's decision should be reversed and the case remanded to reinstate the circuit court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31st day of March, 1999 to Michael T. Burke, Esquire, Johnson, Anselmo, Murdoch, Burke & George, Attorneys for City of Dania, 790 East Broward Boulevard, Suite 400, P.O. Box 030220, Fort Lauderdale, Florida 33303-0220.

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