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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 INITIAL BRIEF

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PREFACE

Appellant, Florida Power & Light Company, applicant for a special exception use before the City of Dania, petitioner in the Circuit Court of the Seventeenth Judicial Circuit, Appellate Division and respondent in the District Court of Appeal, Fourth District, shall be referred to in this brief as "FPL." Appellee, City of Dania, respondent in the circuit court, appellate division and petitioner in the Fourth District Court of Appeal, shall be referred to in this brief as "the City" or "Dania."

References to the Appendix to FPL's Brief shall be designated by the symbol "A" followed by the tab page number (e.g. "A-1" means Appendix at tab 1; "A-1 at 2-3" means Appendix tab 1 at pages 2 and 3). The record on appeal had not been prepared by the Fourth District at the time this brief was served. Accordingly, references to the record will be by description without a record cite.

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

This case began in October 1995 when FPL filed an application for a special exception with the City of Dania for the construction and operation of an electrical substation.[1] (A-1). The proposed substation is needed to meet the growing demands for electric service by FPL customers in the City and surrounding area. (A-2 at 20-26).

The property on which FPL proposes to construct and operate its substation is zoned C-2, for commercial use by the City. (A-2 at 4-6). The parcel is rectangular in shape and is approximately five acres in size. (A-2 at 4-5; A-3 at Ex. 34 and 35). The property is bounded on the east and west by vacant property which is also zoned C-2, and on the south by a public road. (A-2 at 5, 107; A-3 at Ex. 3-5; Transcript before Dania Planning and Zoning Board at 7-8). The north 333 feet of the parcel is adjacent to property zoned residential, with one single family residence abutting the property on the northeast corner and one four-unit residential property abutting the parcel on the northwest corner, with a small lake in between. (A-2 at 5, 104; A-3 at Ex. 3-5, 34-35).

Under the City's Code, special exception uses in a C-2 district include "essential services." (A-2 at 6-8). The proposed use by FPL for a distribution electrical substation is an "essential service" under the Code and therefore a permitted special exception use.[2] (A-2 at 4-6, 83). The City's Code lists seven criteria for special exception uses, two of which (c and d) became an issue in this case:

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[1] FPL is a Florida public electric utility which provides electric service to the public and is regulated by the Florida Public Service Commission ("PSC") under Chapter 366, Florida Statutes. FPL plans, constructs, operates and maintains electric facilities, including distribution substations, in order to meet its statutory obligation to provide "reasonably sufficient, adequate, and efficient" electric service. § 366.03, Fla. Stat. (1997).

[2] Electrical substations are permitted special exceptions under the City's Code in all zoning districts, *including all residential districts of the City*. (A-2 at 200; Dania Code § 4.20). Therefore, under Florida law, the City has already determined as a matter of legislation that such use — even within residential districts — is in the public interest if certain conditions are met.

(a) That the use is permitted special exception use as set forth in the Schedule of Use Regulations, City of Dania, in Article 4 hereof.

(b) That the use is so designed, located and proposed to be operated that the public health, safety, welfare and morals will be protected.

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

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

(e) That adequate landscaping and screening is provided as required herein.

(f) 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 street.

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

(A-2 at 6-8; Dania Code § 6.4).

On March 26, 1996 FPL's application was considered by the City Commission at a public hearing. (A-2). The Commission's review of the application was *de novo*.[3] (A-2 at 6-7). Will Allen, the Growth Management Director for the City, identified FPL's request, stated that the property in question is currently vacant with residential

[3] On November 15, 1995 the City's Planning and Zoning Board reviewed FPL's application for purposes of making an advisory recommendation to the City Commission. (Transcript before Dania Planning and Zoning Board). At the hearing before the Board, FPL presented testimony on each of the seven criteria and the Board heard public comment. Only one Board member commented at the conclusion of the hearing, stating in part, "since the opposition in this hall is very much against it . . . I don't see how you can expect this Board to come up with a recommendation for it." (Id. at 125-26). The Board voted to recommend denial of the special exception. (Id. at 137-38).

development to the north partially in the City of Hollywood and identified section 6.4 of the Zoning Code as setting forth the requirements for a special exception. (A-2 at 4-6). Mr. Allen noted that the "special exception . . . needs to be reviewed in the context of the proposed site plan and variance in terms of . . . the layout and height and how it effects the criteria" and then read the seven criteria. (A-2 at 7-8). The City staff did not make written recommendations or offer any testimony.

At that point, FPL proceeded with extensive testimony as to each of the seven criteria as applied to FPL's proposed use to comply with its burden under this Court's holding in Irvine v. Duval County Planning Commission, 495 So. 2d 167 (Fla. 1986) (applicant must initially make a *prima facie* showing that the proposed conditional use meets the criteria of the code; applicant who meets this initial burden is entitled to the conditional use requested unless the zoning authority demonstrates, by competent substantial evidence presented at the hearing and made part of the record, that the exception requested does not meet the criteria of the code and is adverse to the public interest). (A-2 at 9-152; A-3). Although not required under the Code, FPL also presented testimony as to the need for the substation and the need for the particular location in question. (A-2 at 20-49). The need for this substation has been created by increased demands for electricity in the City and the surrounding area from existing homes and businesses, new construction and redevelopment of existing sites. (A-2 at 20-26). The specific location for the substation was chosen because it is the best solution for providing cost-effective, reliable and adequate service to the City. (A-2 at 39, 49).

The testimony established that an unmanned substation will occupy a one-acre footprint within the middle of the approximately five acre parcel, with the remaining four acres being used for extensive landscaping and for setbacks. (A-2 at 2-4, 52, 91, 99-110, 123, 145). With respect to both landscaping and setback distances from

residences, FPL's proposed use far exceeds the City's own Code requirements.[4] (A-2 at 99-110, 145; A-11 at 9-10 n. 3).

As FPL's registered landscape architect testified, the substation site will be effectively hidden and buffered from view by the different lines of vegetation. (A-2 at 99-110; A-3 at Ex. 30-32). Existing mature mangrove stands will be preserved and complimented by extensive landscaping surrounding the site planted on top of a berm to be constructed by FPL. On the north side of the parcel in front of a large existing mangrove stand, FPL plans a closely spaced double row of oaks (over 16 feet at the time of planting) on top of the berm, on the eastern portion FPL will plant a double row of palms (12 feet plus at the time of planting) on top of the berm, on the western side FPL will plant hedges (at a height exceeding the City's Code) on top of a berm, and in front of the property FPL will maintain the existing mangrove stand as secondary buffering supplemented by the installation of oaks, a hedge and a curving driveway as primary buffering so that there is not a clear line of site into the substation from the road. (A-2 at 103-110; A-3 at Ex. 30-32).[5]

Mr. Bruce Roe, a professional real estate appraiser, testified on behalf of FPL that actual comparable sales data showed no negative effect as to property values. (A-

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[4] For example, Code requirements for the north side of the parcel mandate eight trees and approximately 62 shrubs, FPL's plan calls for 25 trees, 90 shrubs and a berm; the Code requires 38 total trees around the east and west sides, FPL is providing 63 trees (26 trees plus 37 large palms) and a continuous row of hedging in addition to a six foot berm; the Code requires only a single row of trees, FPL is planning a double row; the City Code requires trees to be 12 to 14 feet at the time of planting, FPL will be planting trees at 16 plus feet. (A-2 at 104-110). The substation itself will be set back approximately 185 to 200 feet from the northern boundary of the parcel, many times the required setback. (A-2 at 145; Dania Code, Art. 22; §§ 22.1 and 22.60).

[5] As the Mayor noted in his final comment, "I think you went and gave us a fantastic site. No one could have gone any further with landscaping or with trying to conceal this than anybody possibly could [do]." (A-2 at 238).

2 at 67-98). Mr. Roe performed a survey of all residential sales over a 30 year period in the neighborhood adjacent to the only other substation in the City of Dania. (A-2 at 68-98, A-3 at Ex. 21-28). Mr. Roe organized the sales as being less than 100 feet from the substation, within 300 feet of the substation and more than 300 feet from the substation, all within the same neighborhood. (A-2 at 69; A-3 at Ex. 22). Based upon his analysis of the sales data, Mr. Roe concluded that the homes in close proximity to the substation increased in value at relatively the same rates as those homes that were further away from the substation in the same neighborhood. (A-2 at 70-72). Mr. Roe further opined that if the substation is visually protected, being next to a substation, in and of itself, is not adverse to the property values. (A-2 at 72-73). In the context of section 6.4(c) of the Code, Mr. Roe concluded that if the substation is visually buffered and the setbacks are 175 feet between the substation and the adjoining residences, the substation will not cause substantial harm to the value of neighboring properties. (A-2 at 73, 98) ("So my conclusion is that the substation wouldn't be adverse to property values in the area.").

FPL's engineers testified as to the other statutory criteria for the special exception. (A-2 at 20-67, 122-29, 143-46).

Owners of the property abutting the east, west and south boundaries of the proposed site did not object to FPL's application. (A-2 at 126-28, 132-34). Only landowners to the north of the site objected. These landowners formed a "citizen coalition" to hire a land planner and an appraiser to testify in opposition to FPL's application. (A-2 at 152-57). In addition, several laypersons opposing the application stated that if they had known that a substation was going to be built, they would not have bought their homes. (A-2 at 216-17, 227). Finally, the Commission heard comment and testimony from citizens which can be generally classified as (1) put the substation in someone else's "backyard," i.e., in the City of Hollywood and not in

Dania; (2) the substation would affect property values just because it was a substation; and (3) the substation would cause negative health effects.[6] (A-2 at 31, 34, 39, 55, 59, 75-77, 88-89, 92, 96, 111-12, 139-41, 214).

At the close of the evidence, a motion was made to deny FPL's request for a special exception. Prior to voting, each commissioner stated the basis upon which he or she would vote. (A-2 at 228-40). Reasons articulated in support of the motion to deny FPL's request for a special exception included:

- Commissioner Grace: [Y]ou also chose us to be representatives to look over your concerns and your affairs. Now, without you, there would be no us. There would be no Dania. There would be no need for a substation. . . . And I am concerned that if you do not want this power station in that area, then we should consider your thoughts and your needs, because you are, not part of Dania, but you are Dania. . . . So I'm going to support this motion . . . because you, the residents of Dania have spoken and said that you don't want that substation and I heed to your needs. (A-2, 231-33).

- Commissioner Jones: I support it because hey, you're here. And you're saying to me, hey, we don't want it. And if you don't want it I don't want it because I want the same things that you do. (Id. at 235).

- Mayor Bertino: Home rule said that we want people to have the right of self-determination. . . . And this is the concept of home rule. You should be able to do this. And I think that basically that as good a job as FPL has done, they didn't really prove to me, to my satisfaction, that this

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[6] FPL's engineers testified that the proposed substation meets or exceeds all requirements of the PSC, the National Electrical Safety Code and the Florida Department of Environmental Protection, including those concerning electric and magnetic fields. See § 403.061(30), Fla. Stat. (1995) (Department of Environmental Protection has exclusive jurisdiction over electric and magnetic fields associated with all electrical . . . substation facilities). (A-2 at 21-49, 143-46). Recognizing that it lacks jurisdiction to regulate substations in this regard, the City did not attempt to rely upon this testimony in the appellate proceedings below to support its decision, even though it was given consideration by the Commission as reflected in the comments prior to the vote. (A-2 at 147-48, 230-31).

> wouldn't be one hundred percent not harmful. And I think that the people have indicated the fact that this is the direction they want to take. And this is our City, and we should take the direction that the people in our City want us to take. (Id. at 238-40).

The Commission voted unanimously to deny FPL's application. (A-2 at 240; A-4).

FPL filed a petition for writ of certiorari in the circuit court for the seventeenth judicial circuit, appellate division. (A-5). In its petition, FPL argued that there was no competent substantial evidence in the record to support the denial of FPL's application. (A-5 at 16-25; 43-54). FPL also argued that the City departed from the essential requirements of law by: (a) basing its decision on an incorrect determination of FPL's burden at the hearing; (b) failing to look at the specific site plan application and ignoring the City's prior legislative determination that essential services such as substations are permitted in every zoning district and are therefore presumed provisionally compatible with all residential uses, instead permitting FPL's application to be decided by public plebiscite thereby abdicating its responsibilities under its Code and Florida law; and (c) attempting to apply "its home rule" powers in a manner that is inconsistent with general zoning laws and its own zoning code. (A-5 at 42, 54-66). Finally, FPL asserted it was denied due process because of prior undisclosed contacts between one or more of the City's commissioners and members of the public who opposed FPL's proposed use and the pre-disposition against FPL's application. (A-5 at 43, 66-71).

As to the first issue, FPL argued that the testimony of the opposition's land planner, real estate appraiser and the lay witnesses did not constitute competent substantial evidence under the standard established by this Court in De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (competent substantial evidence is "evidence as will establish a *substantial* basis of *fact* from which the *fact at issue* can be reasonably inferred. [It is] such *relevant* evidence as a reasonable mind would accept

as adequate to support a conclusion. [T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached."). (A-5 at 44). In its petition, FPL demonstrated why the evidence presented in opposition to FPL's application failed under this standard as both a matter of fact and of law. (A-5 at 16-25, 44-54; A-8 at 5-9).

For example, the testimony offered by the land planner was purportedly to address the criteria in the Code concerning "compatibility with the adjoining development and the intended purpose the district in which it is to be located." Dania Code § 6.4(d). However, the land planner did not identify or testify specifically about the adjoining properties in the City or how this particular substation could be any different from any other substation that might be constructed on the parcel. Rather, his testimony was essentially that in his opinion there was nothing that an applicant could ever do to make any electric substation compatible with an abutting residential use, that substations were *per se* incompatible with residential areas (even though the site and most of the surrounding property is zoned commercial), and that the City should not approve FPL's application. (A-2 at 193-94, 196-99, 203, 206).

As a factual matter, this was not competent substantial testimony because it failed to address the issue to be decided under section 6.4(d) of the Code. The fact to be decided was not whether substations in general are ever compatible with residential properties. Under Florida law, by permitting the substation as a special use in all zoning classifications, including a C-2 district, the City as a matter of legislative enactment had already determined the general compatibility of a substation use in commercial and residential districts and had also determined that such use was in the interest of the general welfare. Accordingly, FPL argued that the land planner could not substitute his judgment for the legislative judgment of the City, and that if such

testimony were accepted as competent substantial evidence, the City's zoning code providing for such special exception use would be negated and rendered meaningless.[7] (A-2 at 200-01; A-8 at 5-9). Thus, the land planner's testimony was not competent or substantial as a matter of law because it was in conflict with the City's own Code and Florida law.

In its petition, FPL also argued that the testimony of the real estate appraiser did not constitute competent substantial evidence to deny the application because it did not address the fact to be decided: whether FPL's proposed use would cause "substantial injury to the value of other property in the neighborhood where it is to be located." (Dania Code § 6.4(c); A-5 at 18-24, 47-49; A-8 at 9-12). His testimony did not address the facts of FPL's application or the site plan upon which the City was asked to make its determination — a plan which calls for a fully landscaped site with extensive setbacks which will effectively hide the substation from view. Rather, the appraiser presented a "paired sales analysis" at the hearing comparing the sales data of six homes in direct proximity and with a direct view of an unlandscaped substation (the "affected" half) with six similar homes that did not have a direct view of the substation (the "unaffected" half). (A-2 at 160-73, 176-77, 180). The appraiser did not indicate in his testimony the distance between the substations and the six affected residences that were in direct view. Nonetheless, he opined that "residential dwellings [were] [adversely] affected by extreme proximity of the direct view of the . . .

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[7] According to the City in its appellate papers below, the land planner also purported to offer an opinion concerning the impact of the substation on property values. Apart from the fact that such testimony is not evident from a fair reading of the record, any such testimony would not be competent or substantial under Florida law because he was not an expert on valuation issues. (A-8 at 5-9). Indeed, the land planner acknowledged that he was not an expert regarding real estate sales. (A-2 at 205).

substation as opposed to a similar home located elsewhere in the same subdivision." (A-2 at 174).

From this paired sales analysis, the appraiser concluded that any electric substation would cause a diminution in residential property value resulting from the visibility of the substation and its distance from the residence. (A-2 at 173-74, 178-82). FPL argued that such evidence is not relevant to the site plan and the use contemplated in this situation, nor is it competent substantial evidence because no reasonable mind would accept such evidence of an unlandscaped substation in direct view of a directly adjacent residence of some unknown and unspecified distance as establishing "a substantial basis of fact" supporting a conclusion of "substantial injury to the value of the other property in the neighborhood" where the substation is effectively hidden from view and setback more than 175 feet from the closest residence. (A-5 at 47-49; A-8 at 9-11).

FPL also demonstrated why the layperson's testimony and comments, including that they would not have bought their home if they knew a substation was going to be built, did not constitute competent substantial evidence. (A-5 at 49-54; A-8 at 12-15). Such testimony does not constitute "factual" evidence upon which a decision can be based. Rather, it constitutes mere conjecture, speculation or supposition as to what one might or might not have done. Apart from the legal failings of such testimony, as FPL noted, if citizen testimony to this effect were considered, then any special exception application could be defeated by one or more citizens living in the area (not just those with property abutting the subject property), stating at a public hearing that he or she would not have purchased their residence if they had known that a nursery school, church, or whatever the special exception application was for would be granted, regardless of the site designed, setbacks or buffering for that particular project.

On September 20, 1996 the circuit court, appellate division, issued an order to show cause why FPL's petition should not be granted. (A-6). The circuit court heard oral argument on March 26, 1997 and on April 16, 1997 granted the writ of certiorari. (A-9). In its order, the circuit court applied this Court's holding in Irvine and found that the City failed to show by competent substantial evidence that the proposed use would cause substantial injury to the value of other property in the neighborhood where it was located, that the use was not compatible with adjoining development and the intended purpose of the district in which it was to be located and that the proposed substation was adverse to the public interest. (A-9 at 3-4). The circuit court also found that the Commission departed from the essential requirements of law in denying FPL's petition. (Id. at 4). Accordingly, the circuit court quashed the decision of the Commission denying FPL's application for special exception and remanded with directions to proceed consistent with the court's decision. (Id.).

The City responded by filing a petition for writ of certiorari in the District Court of Appeal, Fourth District. (A-10). Although the City's argument was couched in terms of the circuit court's alleged departure from the essential requirements of law (supposedly for misapplying the law to the facts of the case and reweighing the evidence which the circuit court did not do), the City was actually arguing that the Fourth District should reexamine the record and grant certiorari because there was competent substantial evidence to support the City's denial of FPL's application. (A-10 at 6-10, 11-12). In its response, FPL pointed out that the circuit court did not reweigh the evidence or substitute its judgment for that of the Commission and that what the City was really doing was requesting the Fourth District to exceed its proper scope of certiorari review by again examining the issue of competent substantial evidence in the record. (A-11 at 4-5, 45-47). FPL also demonstrated why its

arguments in the circuit court went to the *competency* of the evidence as a matter of law and fact and not to the weight or credibility of the evidence. (A-11 at 28-45).

The Fourth District granted the City's petition and quashed the circuit court's opinion. (A-13). In its opinion, the Fourth District initially acknowledged the limitation placed on its scope of review by this Court in Haines City Commission Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) stating, "[o]ur review of the circuit court's decision is limited to a determination of whether the circuit court applied the correct law, which is synonymous with a determination of whether the circuit court departed from the essential requirements of law." (A-13 at 1-2).

Having expressly recognized this limitation, the Fourth District nonetheless proceeded to exceed this scope of review. Based on the fiction that the circuit court must have reweighed the evidence — even though there was nothing in the circuit court's opinion to indicate that it did — the Fourth District reviewed the record and made its own determination that the record contained competent substantial evidence to support the City's denial of the special exception. Specifically, the Fourth District held: "the record as a whole contains competent substantial evidence to support a denial of the special exception to build an electrical substation based upon two of the City's seven criteria: 'substantial injury to the value of the property' and incompatibility with 'adjoining development and the intended purpose of the district.'" (Id. at 3) (citations omitted). The Fourth District also concluded that the circuit court improperly imposed a higher burden of proof on the City than permitted by law. (Id. at 4).

FPL filed a motion for rehearing, motion for rehearing *en banc* and alternative motion for certification. Although that motion was denied by the Fourth District, in a specially concurring opinion, Judge Warner concluded that she could not reconcile the Fourth District's holding with earlier decisions of this Court and the Second and

Fifth District Courts of Appeal concerning the proper scope of certiorari review by the district courts of appeal:

> I cannot reconcile *Multidyne*, *Blumenthal*, and the instant case with *Owings* and *Kuehnel*. More importantly, I think *Multidyne* and *Blumenthal* are directly contrary to *Education Development*. It appears to me that confusion continues as to the appellate courts' proper scope of review in certiorari proceedings from the Circuit Court sitting in its appellate capacity. *Multidyne* and *Blumenthal*, as well as our majority opinion in this case, have simply collapsed the third component of circuit court review of agency action, namely its authority to review whether the administrative findings and judgment are supported by competent substantial evidence, into the consideration of whether the circuit court applied the correct law. This was disapproved by *Education Development* in quashing this court's decision, and nothing in *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995), would suggest that district court review should be expanded to review competent substantial evidence determinations.

(A-14 at 3). FPL filed its petition for discretionary review based upon express and direct conflict with these decisions and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

I.

Under Florida law, a party is entitled to only one plenary appeal. In a case that begins in the circuit court, that appeal begins and ends with the district court of appeal. The Supreme Court has no general certiorari jurisdiction in that case. In a case that begins in county court or with a quasi-judicial decision of a local governmental authority, the one appeal begins and ends with the circuit court sitting in its appellate capacity. Although a district court does have discretionary certiorari jurisdiction to review the circuit court's decision, the district court's review is strictly limited to determining whether due process of law was afforded and whether the circuit court applied the correct law. The district court *does not* have jurisdiction to also review the record for competent substantial evidence and determine whether it agrees with the circuit court's conclusion in this regard. In other words, as this Court has repeatedly held, a district court's certiorari jurisdiction cannot be utilized as a means for a second plenary appeal of a local quasi-judicial decision.

In this case, FPL applied to the City of Dania for approval of a special exception for an essential service (i.e. an electric substation) in a commercial zone. The City denied FPL's application for a special exception based upon generalized non-fact-based neighborhood opposition that was neither competent nor substantial. On appeal from that decision, the circuit court applied the correct law, reviewed the record, and determined that the City's denial was not based upon competent substantial evidence and was a departure from the essential requirements of law. That should have been the one and only plenary appeal in the case, but it was not.

On petition for certiorari to the district court of appeal, the Fourth District reversed the circuit court after it broadened its certiorari jurisdiction, *reintroduced*

competent substantial evidence as an issue for its determination, reweighed and redetermined that issue, and concluded that the circuit court "appear[ed] to have" exceeded its scope of review because the district court reached a different conclusion. Pursuant to a long line of decisions from this Court that narrowly define the district court's certiorari jurisdiction and preclude the district courts from granting a litigant a second plenary appeal, the Fourth District's decision in this case must be reversed. See Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995); Education Dev. Ctr., Inc. v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989); and City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982).

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. Even in a case where the district court independently believes that competent substantial evidence existed below, district court certiorari review of the circuit court's appellate determination on this issue is not available. Otherwise, a district court could expand its limited 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. That merger clearly violates a Florida district court's certiorari jurisdiction and the Florida Constitution that leaves the final appellate determination in a case that begins with quasi-judicial action to the circuit courts of Florida.

This case presents the Court with yet another opportunity to reaffirm its decisions in Haines, EDC, and Vaillant, and to reassert the settled principles that should continue to guide Florida's courts in exercising their certiorari jurisdiction:

> *The circuit court is the court of final appellate jurisdiction in cases originating in county court [and cases reviewing quasi-judicial actions]. . . . If an appellate court gives what amounts to a second appeal, by means of certiorari, it is not complying with the Constitution, but is taking unto itself the circuit court's final appellate jurisdiction and depriving litigants of final judgments obtained there. . . . There are societal interests in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals.*

Haines, 658 So. 2d at 526 n.4.

This Court, therefore, should reverse the Fourth District's decision and remand the case to the circuit court to enforce its final appellate determination, based upon these sound, long-held principles of Florida certiorari jurisdiction, and pursuant to principles of *stare decisis* that require reversal of the Fourth District's conflicting decision.

II.

The Fourth District's conclusion that the circuit court improperly imposed a higher burden of proof on the City than the law allows should also be reversed. There is both law and sound public policy to support the principle that where the requested special exception is needed for essential public services and the applicant has shown that its proposed use meets the statutory criteria, a heightened burden (whether defined as "closer scrutiny," "additional consideration or otherwise") should be imposed on the zoning authority to show by competent substantial evidence that the proposed use at the particular location does not meet the specific statutory criteria and is adverse to the public interest.

ARGUMENT

I. The Fourth District's Decision Should Be Reversed Because It Broadens Its Certiorari Jurisdiction In Direct Conflict With This Court's Decisions In *Haines, EDC* And *Vaillant*

"In the past, there was some confusion as the proper standard of review by a circuit court acting in its appellate capacity and subsequent district court review [of an administrative/quasi-judicial action]. The Florida Supreme Court . . . put any confusion to rest." 2 Arthur J. England, Jr. and L. Harold Levinson, Florida Administrative Practice Manual § 15.14 (c), at 130 (1997). Unfortunately, it has not been that simple. Whether the result of confusion, philosophical disagreement or otherwise, some district courts of appeal, including the Fourth District in the decision below, continue to exceed their proper scope of review in certiorari proceedings. See, e.g., (A-14 at 3) (Warner, J., specially concurring) ("It appears to me that confusion continues as to the appellate courts' proper scope of review in certiorari proceedings from the Circuit Court sitting in its appellate capacity.").

Less than three years ago, this Court thoroughly analyzed and harmonized this Court's prior decisions delineating the proper scope of review of a circuit court sitting in its appellate capacity from a local quasi-judicial decision as well as subsequent district court certiorari review. The Court, for at least the *third* time in just over a decade, reaffirmed the fundamental and unwavering principle of Florida law that a district court's certiorari jurisdiction cannot be utilized as a vehicle for a "second appeal" of an administrative agency or quasi-judicial decision that has already been reviewed on plenary appeal to the circuit court:

> *As a case travels up the judicial ladder, review should consistently become narrower, not broader.* We have held that circuit court review of an administrative agency decision . . . is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by substantial competent evidence.
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> . . . .
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> *The standard of review for certiorari in the district court effectively eliminates the substantial competent evidence component. The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law.*

Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) ("Haines") (emphasis added) (following Education Dev. Ctr., Inc. v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989) ("EDC") and City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982) ("Vaillant")).

Having closed the front door — several times — in Haines, EDC and Vaillant, the Court should now close the back door in this case. District courts, including the Fourth District here, have attempted to circumvent this Court's prior holdings by conducting their own review of the record to determine whether there was competent substantial evidence, under the guise of reviewing whether the circuit court departed from the essential requirements of law. Simply put, the Fourth District exceeded its certiorari jurisdiction when it effectively *reintroduced* competent substantial evidence as an issue for its determination, thereby broadening the standard of district court review of a circuit court's decision sitting in its appellate capacity. Pursuant to Haines, EDC, and Vaillant, the Fourth District's decision in this case should be reversed and this Court should once again reaffirm the principle that *"certiorari should not be utilized to provide a "second appeal."* Haines, 658 So. 2d at 529 (emphasis added).

A. District Courts Have Strictly Limited Certiorari Jurisdiction and Cannot Redetermine the Competent Substantial Evidence Issue

FPL will briefly review what was thought to be settled Florida law concerning the proper scope of review of an administrative or quasi-judicial action such as the one at issue in this case — the City's denial of FPL's request for a special exception.

1. Only The Circuit Court Reviews Whether Competent Substantial Evidence Supports The Quasi-Judicial Action

Under the provisions of Article V, section 5(b), of the Florida Constitution, the circuit courts have the power of "direct review of an administrative action when provided by law." A circuit court has common law certiorari jurisdiction to undertake direct review of administrative action in the form of quasi-judicial orders of local agencies and boards (that are not subject to the Administrative Procedures Act). E.g., De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957).

This procedure is recognized as a unique species of certiorari jurisdiction because the scope of review is actually more like a plenary appeal. E.g., Haines, 658 So. 2d at 530 (analyzing historical roots and application of Florida certiorari jurisdiction); Vaillant, 419 So. 2d at 626 ("Regardless of the nomenclature, . . . the review sought in the circuit court was effectually an 'appeal.'"). This is so because under Rule 9.030(c)(3), Florida Rules of Appellate Procedure, this form of certiorari jurisdiction is not truly a discretionary writ; a party's right to certiorari review is a matter of right. Haines, 658 So. 2d at 530; EDC, 541 So. 2d at 108.

Upon exercising its certiorari jurisdiction to review a decision of a local administrative body, the circuit court's scope of review consists of "*three discrete components*":

> We have held that circuit court review of an administrative agency decision . . . is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) *whether the administrative findings and judgment are supported by substantial competent evidence.*[8]

Haines, 658 So. 2d at 530 (emphasis added).

In the case of a denial of a special zoning exception, the "essential requirements of law" that the circuit court must enforce are set forth in Irvine v. Duval County Planning Comm'n, 495 So. 2d 167 (Fla. 1986). Irvine held that by recognizing a special exception use in a city code, a local government has already legislatively determined that such use is necessary for the public welfare and conditionally permissible, depending on the specific design and site-specific characteristics in relation to the special exception criteria. Id. As stated by Judge Zehmer in Irvine v. Duval County Planning Comm'n, 466 So. 2d 357, 364-65 (Fla. 1st DCA 1985) (dissenting opinion adopted by this Court in Irvine, 495 So. 2d at 167):

> [a] conditional use or special exception, as it is generally called, is a part of the comprehensive zoning plan sharing the presumption that as such it is in the interest of the general welfare and, therefore, valid . . . . The special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to permit

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[8] This Court's definition of "competent substantial evidence" is:

> evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. [It is] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. [T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (citations omitted).

> enumerated uses the legislature has determined can be allowed, properly albeit *prima facie*, absent any fact or circumstance negating the presumption.

Irvine, 466 So. 2d at 364-65 (citing 3 Yokley, Zoning Law & Practice, § 20-1 (4th ed. 1979)).

Thus, in the case of a denial of a special exception and appeal of that denial, the circuit court must ensure that the city code has established definite standards and conditions for approval of a special exception by the zoning authority that do not leave the zoning authority with unbridled discretion. E.g., North Bay Village v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956). Where the applicant has made a *prima facie* showing that the proposed conditional use meets the criteria of the code, the circuit court must review whether the local government's zoning authority has satisfied its burden of demonstrating through "competent substantial evidence" in the record that the requested special exception does not meet the criteria of the code *and* is adverse to the public interest. Irvine, 495 So. 2d at 167; e.g., Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478, 480 (Fla. 4th DCA 1975); Conetta v. City of Sarasota, 400 So. 2d 1051, 1052 (Fla. 2d DCA 1981).

The circuit court thus stands in the shoes traditionally worn by district courts of appeal in most other cases to review the record for error. Haines, 658 So. 2d at 530; Vaillant, 419 So. 2d at 625-26. The circuit court must evaluate the record in search of competent substantial evidence to support the decision below, but is not permitted to reweigh the evidence or to substitute its judgment for that of the agency. E.g., EDC, 541 So. 2d at 108 (citing Bell v. City of Sarasota, 371 So. 2d 525 (Fla. 2d DCA 1979)); Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1091 (Fla. 1978); cf. Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976) (district courts on appeal may not substitute their judgment for trial court through re-evaluation of the testimony and

evidence below; the test is whether the judgment of trial court is supported by competent substantial evidence).

2. The District Court's Jurisdiction Does Not Include The Competent Substantial Evidence Component

This Court has repeatedly held that a district court, on certiorari jurisdiction from a circuit court's judgment on appeal from a quasi-judicial action, *cannot and should not* grant a party a second plenary appeal by reevaluating the record to determine if competent substantial evidence exists to support the local authority's decision. Haines, 658 So. 2d at 529 ("certiorari should not be utilized to provide a 'second appeal'"); EDC, 541 So. 2d at 108-09 (district courts cannot "simply disagree[] with the circuit court's evaluation of the evidence"); Vaillant, 419 So. 2d at 626 ("one appealing the circuit court's judgment is not entitled to a second full review in the district court").

The Court first tried to resolve any question over the proper standard of review in Vaillant, a case dealing with the termination of a city worker and the city's civil service board's decision to uphold the termination. Vaillant, 419 So. 2d at 625. On appeal from that decision to the Supreme Court via conflict jurisdiction, this Court adopted the "common sense" reasoning that a district court cannot even look at or consider the question of competent substantial evidence if that determination has already been made by the circuit court:

> We hold that where full review of administrative action is given in the circuit court as a matter of right, one appealing the circuit court's judgment *is not entitled to a second full review in the district court.* . . . The district court, upon review of the circuit court's judgment, then determines [only] whether the circuit court afforded procedural due process and applied the correct law.

419 So. 2d at 626 (emphasis added).

After Vaillant, it appeared to some that this Court had settled the issue once and for all. See England, supra, § 15.14(c) at 130 ("The Florida Supreme Court in City of Deerfield Beach v. Vaillant put any confusion to rest [as to the proper standard of review by a circuit court and district court]"). That was not the case.

In EDC — a case with striking similarities to the present case — this Court was faced with the same question concerning scope of review, this time in the context of a zoning request. 541 So. 2d at 107. After the city's zoning authority denied the application, the property owner appealed to the circuit court, which in turn granted certiorari relief and reversed the City's decision under the competent substantial evidence component. On certiorari review to the district court, the Fourth District reversed the circuit court after it undertook an independent evaluation of the record and concluded that the circuit court got it wrong. City of West Palm Beach v. Education Dev. Ctr., Inc., 526 So. 2d 775, 777 (Fla. 4th DCA 1988).

On appeal to this Court based upon conflict with Vaillant, this Court held that the Fourth District exceeded the proper scope of review by reversing the circuit court's order on the issue of competent substantial evidence in the record. EDC, 541 So. 2d at 107. This Court concluded that the Fourth District's decision could not be reconciled with Vaillant, and reaffirmed that "[t]he standard [of review] for the district court *has only two discrete components*. . . . whether the circuit court afforded procedural due process and applied the correct law." Id. at 108 (citing Vaillant, 419 So. 2d at 626) (emphasis added). Because the Fourth District in EDC had undertaken a reexamination of the competent substantial evidence component, albeit because the Fourth District *inferred* (as in this case) that the circuit court "must have" improperly reweighed the evidence, this Court reversed. "The district court of appeal simply disagreed with the circuit court's evaluation of the evidence." Id. at 108-09.

In Haines, this Court later reviewed and reaffirmed its holdings in Vaillant and EDC. After conducting a complete review of the history of certiorari jurisdiction in Florida and acknowledging the inconsistency of application of standards of review in certiorari cases, the Court held that EDC and Combs v. State, 436 So. 2d 93 (Fla. 1983), in effect established the same standard — "both decisions mandate a narrow standard of review and emphasize that certiorari should not be utilized to provide a 'second appeal.'" Haines, 658 So. 2d at 529. The Court reached this conclusion by reaffirming the holding in Vaillant as the standard of review in any case that passes through a circuit court for appellate review.

As a result, in this or any case where an appeal is taken for the first time in the circuit court, either by way of certiorari from an administrative action or by appeal from a county court judgment, the circuit court is the *one and only* source of full plenary review. That means that the circuit court decides whether (1) due process was accorded; (2) whether the essential requirements of law have been observed (*i.e.* whether the quasi-judicial body or county court applied the correct law); and (3) whether the decision on appeal is supported by competent substantial evidence. Haines, 658 So. 2d at 530. The circuit court's judgment on the latter "discrete" component — the competent substantial evidence in the record — should be the *one and only* plenary appellate review a party may have. EDC, 541 So. 2d at 108; Vaillant, 419 So. 2d at 625-26.

B. The Fourth District Must Be Reversed Because it Provided a Second Plenary Appeal by Redetermining the Competent Substantial Evidence Issue

The Fourth District's decision here failed to faithfully apply the clear jurisdictional parameters that this Court has repeatedly reaffirmed. Although the

Fourth District purported to apply the standard of review set forth in Haines, (A-13 at 1-2), it misunderstood or ignored this Court's application of that standard in both Vaillant and EDC. Indeed, the decision below never even cited these cases before engaging in the very analysis that these cases expressly preclude — reviewing the record and disagreeing with the circuit court over whether there was competent substantial evidence to support the City's denial of FPL's application for a special exception.

The Fourth District's decision reached this result by (1) reexamining the testimony before the City Commission, (2) noting that the circuit court's order consisted of "conclusory statements" rather than specific findings, (3) finding that "the record as a whole contains substantial competent evidence to support a denial of the special exception" and (4) concluding that "because the circuit court *appears to have* substituted its evaluation of the evidence for that of the City . . . the circuit court departed from the essential requirements of law." (A-13 at 4) (emphasis added).

The Fourth District thus exceeded the proper scope of its review by reexamining the record and redetermining the competent substantial evidence issue under the guise of applying the Haines standard of review. As Judge Warner acknowledged in her specially concurring opinion on rehearing, the Fourth District has indeed not "faithfully applied" this Court's limitations on a district court's narrow scope of review from the judgment of a circuit court sitting in its appellate capacity:

> What I must conclude from both the majority and dissent in [EDC] is that the district courts do *not* have the review power to reverse a trial court's determination regarding whether competent substantial evidence exists to support the agency action.

(A-14 at 2).

Judge Warner's analysis and reconsideration of this issue on rehearing is compelling. The Fourth District's decision must be reversed because it ignored the holding of this Court in EDC that *reversed* the Fourth District for undertaking the exact same analysis as it did below with respect to the competent substantial evidence component. (Id. at 1) (citing EDC, 526 So. 2d 775, 777 (Fla. 4th DCA 1988), rev'd, 541 So. 2d 106 (Fla. 1989)). Upon carefully reviewing the EDC litigation, especially the Fourth District's EDC decision that almost identically parallels its opinion here, it is readily apparent that the Fourth District's decision is wrong.

As noted above, EDC was also a zoning case. There, the petitioner sought permission from the West Palm Beach zoning board to convert its residential property to a private preschool and kindergarten. The petitioner's application was rejected by the zoning board. As in this case, the circuit court granted the writ of certiorari and reversed the zoning board's decision to deny the application because "there was no substantial competent evidence to support the City's denial of the petition." EDC, 541 So. 2d at 108.

On certiorari from the circuit court's appellate determination, the Fourth District in EDC reversed the circuit court *for the very same reason that the Fourth District reversed the circuit court in this case:*

> *The record contains competent evidence supporting both sides of the controversy* presented to the zoning board. There was substantial evidence to support denial of the application . . . . *To find to the contrary, we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed that evidence*; in either event substituting its judgment for that of the zoning board, which it may not properly do.

526 So. 2d at 777 (emphasis added).

This Court reviewed the Fourth District's opinion based on conflict with Vaillant and considered whether the Fourth District had exceeded the proper scope of review by reversing the circuit court's order on the competent substantial evidence question. EDC, 541 So. 2d at 107. The Court reversed the Fourth District in a 6-1 decision because it could not reconcile the Fourth District's analysis with the scope of review set forth in Vaillant:

> We hold that the principles expressed by the Court in Vaillant clearly define the standards of review applicable here. There was no contention of a denial of due process and the district court of appeal did not find that the trial judge applied an incorrect principle of law. The district court of appeal simply disagreed with the circuit court's evaluation of the evidence. Accordingly, we reaffirm Vaillant and quash the decision of the district court.

Id. at 108.

Justice McDonald was the sole dissent because he believed that the district court should have been able to reexamine the evidence in the record to determine whether in fact the circuit court had applied the correct law. Id. at 109. Justice McDonald was concerned that circuit judges could act as zoning "czars" if Vaillant was strictly applied in zoning cases and urged the Court to allow district courts to "pass on the issue of whether there was, indeed, competent substantial evidence to support the conclusion of the zoning board." Id.

This proposition, however, was rejected by the Court in EDC, and again by a unanimous Court in the later Haines decision that expressly reaffirmed the standard of review set forth in EDC and Vaillant. Haines, 658 So. 2d at 530 ("The standard of review for certiorari in the district court effectively *eliminates* the substantial competent evidence component.") (emphasis added).

EDC, therefore, requires that the Fourth District's opinion below be reversed for the same reasons that the Fourth District was reversed in EDC. *First,* the circuit court orders in both cases were materially the same as they both stated the correct rule of law and found (without specific findings or conclusions) that the local authority had failed to meet its burden by competent substantial evidence. Compare EDC, 541 So. 2d at 108 ("there was no substantial competent evidence to support the City's denial of the petition"), with Circuit Court Order (A-9 at 3-4) ("The CITY failed to show by competent substantial evidence that such use . . . caused substantial injury to the value of other property in the neighborhood . . or that the use was not compatible with the adjoining development, . . . or was adverse to the public interest.").

Second, in both cases the Fourth District reversed those circuit court orders based upon the same deductive reasoning: that the circuit courts *must have* reweighed the evidence and substituted their judgments for the zoning board because the record, in the Fourth District's view, *did* contain competent substantial evidence. Compare EDC, 526 So. 2d at 776-77 ("The record contains competent evidence supporting both sides of the controversy presented to the zoning board."), with Fourth District Opinion (A-13 at 3) ("The record as a whole contains substantial competent evidence to support a denial of the special exception. . . .").

Third, in both cases the Fourth District acknowledged that the circuit court orders on their face purported to apply the proper rule of law, but concluded nonetheless that the circuit courts *must have* applied the wrong standard, thereby requiring the Fourth District to prevent a departure from the essential requirements of the law. Compare EDC, 526 So. 2d at 777 (reversing the circuit court for failure to apply the correct legal principles by ignoring competent substantial evidence in the record), with Fourth District Opinion (A-3 at 2,4) ("it is part of this court's responsibility to determine whether the circuit court exceeded its scope of review and

substituted its own factual findings for those of the City. . . . Because the circuit court *appears* to have substituted its evaluation of the evidence for that of the City . . . the circuit court departed from the essential requirements of law") (emphasis added).

Fourth, this Court reversed the Fourth District in EDC because its opinion effectively broadened the district court's certiorari jurisdiction by allowing the district court to reexamine the circuit court's review of the record and redetermine whether competent substantial evidence existed to support the zoning authority's denial. 541 So. 2d at 108. This is precisely what the Fourth District did below and why its decision must be reversed.

A district court cannot second-guess the circuit court's judgment, sitting as an appellate court, as to whether competent substantial evidence supports the ruling of the zoning authority — the third discrete component of the standard of review on appeal. Id. at 108-09. The district court only examines the proceedings in the circuit court and the face of the circuit court's order to determine: (1) whether the circuit court afforded procedural due process, and (2) whether the circuit court applied the correct law. Haines, 658 So. 2d at 530; EDC, 541 So. 2d at 108; Vaillant, 419 So. 2d at 626. In this case, the circuit court met both requirements and therefore should have been affirmed.

There are no exceptions. The Fourth District cannot broaden its jurisdiction by *inferring* that the circuit court *must have* exceeded its own scope of review, or *must have* reweighed the evidence, based upon its own review of the record below and its disagreement with the circuit court's *conclusion* on the competent substantial evidence issue. See, e.g., (A-13 at 3-4). This Court, over Justice McDonald's dissent, overwhelmingly rejected that same argument for a back door exception to Vaillant in EDC. 541 So. 2d at 108.

The Fourth District's decision below argued nevertheless that "[i]f we failed to grant relief where a single circuit court judge sitting in his appellate capacity

disregarded substantial competent evidence relied on by a governmental entity in making a zoning decision, this could, in itself, constitute a miscarriage of justice." (A-13 at 2). This rationale, however, was expressly rejected by the Fourth District itself in its 1981 opinion that this Court *affirmed* in Vaillant. As then Chief Judge Letts explained in his opinion for the Fourth District in Vaillant, a district court "cannot consider the question of substantial competent evidence already reviewed by the Circuit Court," *even when the district court independently believes that competent substantial evidence does exist*, as Judge Letts "frankly" conceded in that case. Vaillant, 399 So. 2d at 1046-47, aff'd, 419 So. 2d at 625-26. There is no miscarriage of justice in that situation because further appellate relief simply is "not available." Id. at 1047.

The Fourth District's decision in this case simply discards Judge Letts' analysis in Vaillant in favor of a broader, more expansive interpretation of its certiorari jurisdiction. Finding no support for its position in this Court's decisions, the Fourth District looked to its prior decision in City of Fort Lauderdale v. Multidyne Med. Waste Mgmt., 567 So. 2d 955 (Fla. 4th DCA 1990), and the Third District's decision in Metropolitan Dade County v. Blumenthal, 675 So. 2d 598 (Fla. 3d DCA 1995) (Cope, J., dissent adopted as the opinion of the court *en banc*), rev. dismissed, 680 So. 2d 421 (Fla. 1986). See Fourth District Opinion (A-13 at 2-3).

In Multidyne, the parties mistakenly agreed, and the Fourth District incorrectly accepted, that "the real issue [before the district court was] whether there was substantial competent evidence in the record before the City Commission to support its denial of the application." Multidyne, 567 So. 2d at 957. Based on this false premise, the court reviewed the conflicting evidence presented to the City Commission and, based on its belief that there was competent substantial evidence to support the Commission's decision, concluded that the circuit court must have "substituted his

judgment as to the weight of the evidence for that of the Commission . . . " Id. Blumenthal, quoting Multidyne at length, also reviewed the evidence before the zoning authority and, finding that its decision was supported by substantial competent evidence, concluded that the circuit court's contrary conclusion departed from the essential requirements of law. 675 So. 2d at 607-08. To the extent that the district courts in Multidyne and Blumenthal based their decisions on their own reevaluation of the record and redetermination of the competent substantial evidence issue, their holdings directly conflict with Haines, EDC, and Vaillant.[9]

Certiorari jurisdiction in the district court, however, is *not* intended as a vehicle for reexamination of the record to determine whether the appellate court ultimately reached the correct conclusion. As this Court's thorough review and analysis of Florida certiorari jurisdiction in Haines explained:

> The question which this certiorari brings here is . . . whether the Judge exceeded his jurisdiction in hearing the case at all, or adopted any method unknown to the law or essentially irregular in his proceeding under the statute. *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.*

Haines, 658 So. 2d at 525 (quoting with approval a case "which retains its currency and whose clarity remains a hallmark," Basnet v. City of Jacksonville, 18 Fla. 523, 526-27 (1882)) (emphasis added).

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[9] As Judge Warner stated, "Although I was a member of the panel in [Multidyne], I question whether we faithfully applied the holding of [EDC]." (A-14 at 1).

This Court's decision in Haines also relied upon Judge Wiggington's opinion in State v. Smith, an opinion that "captur[es] the essence of the appropriate use of the writ of certiorari:"

> Confined to its legitimate scope, the writ may issue within the court's discretion to correct the procedure of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice. . . . *Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void.* . . .

Haines, 658 So. 2d at 527 (quoting State v. Smith, 118 So. 2d 792 (Fla. 1st DCA 1960)) (emphasis in original); see also Jones v. State, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, J.) ("The required 'departure from the essential requirements of the law' *means something far beyond legal error.* It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. *The writ of certiorari properly issues to correct essential illegality but not legal error.*") (quoted with approval in Haines, 658 So. 2d at 527).

Blumenthal and Multidyne did not reverse the circuit courts' appellate judgments because the circuit courts had failed to accord the litigants due process of law, or had committed errors so "grievous and fundamental" or "tyrannical" that they rendered the judgments "void." Quite the contrary, Blumenthal and Multidyne acknowledged that in most cases the determination of what evidence is competent and substantial to sustain a zoning authority's action is often a close call. Blumenthal, 675 So. 2d at 608 (quoting Multidyne, "in its order the circuit court was careful to acknowledge the teachings of [Vaillant] . . . enjoining the circuit court from

reweighing the evidence. Nevertheless, we believe the judge fell into error in his application of the rules set out in those cases. *And we hasten to add, that's not hard to do in these cases.*") (emphasis added).

Nevertheless, the Third District in Blumenthal and the Fourth District (both in Multidyne and in the case below) concluded that the circuit courts simply "fell into error" and reached the wrong result. As this Court has repeatedly held in Haines, EDC, and Vaillant, the district courts' certiorari jurisdiction does not permit a second appellate review of the record to remedy what the district court perceives to be the wrong result.[10] That is a matter for the appellate court to decide — which in these cases means the circuit court. That is why the district court's certiorari jurisdiction in cases like this is as limited as the Supreme Court's certiorari jurisdiction in most other cases. Haines, 658 So. 2d at 530 ("we have the same standard of review as a case which begins in the county court"); see also William H. Rogers & Lewis Rhea Baxter, Certiorari in Florida, 4 U. Fla. L. Rev. 477, 502 (1951) ("Under the Constitution, the circuit court has just as much right to be 'wrong' in such cases as the Supreme Court has when it has final appellate jurisdiction; regardless of any purported improvement in 'justice,' the merits of litigation should be finally decided by the circuit court, as the Constitution clearly provides.") (cited in Haines, 658 So. 2d at 526).[11]

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[10] "The policy behind this rule is simple. The circuit court is the court of final appellate jurisdiction in cases originating in county court [and cases reviewing quasi-judicial actions]. . . . If an appellate court gives what amounts to a second appeal, by means of certiorari, it is not complying with the Constitution, but is taking unto itself the circuit courts' final appellate jurisdiction and depriving litigants of final judgments obtained there. . . . There are societal interests in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals." Haines, 658 So. 2d at 526 n.4 (citing William A. Haddad, The Common Law Writ of Certiorari in Florida, 29 U. Fla. L. Rev. 207, 227 (1977)).

[11] Indeed, in other contexts, the Fourth District has argued for a strict and narrow application of its certiorari jurisdiction to prevent a county court litigant from receiving a "second appeal" at the district court level. See Rich v. Fisher, 655 So. 2d

The Fourth District's decision below expanded its jurisdiction based on the fundamental error of "collapsing" the third component of circuit court review of quasi-judicial action — the competent substantial evidence question — into the more limited inquiry of whether the circuit court applied the correct law. See Judge Warner's specially concurring opinion (A-14 at 3). The merging of these two components, under the guise of correcting the misapplication of the law, squarely violates the scope of certiorari review established by this Court. EDC specifically defined the scope of review for the district court as having only "two discrete components" (*i.e.* two separate and independent components), 541 So. 2d at 108, and Haines expressly held that the third component was eliminated at the district court level. 658 So. 2d at 530.[12]

The Second District recognized this well-established limitation on a district court's scope of review in Manatee County v. Kuehnel, 542 So. 2d 1356 (Fla. 2d DCA 1989), where it held that it had no jurisdiction to reexamine a circuit court's appellate determination of the competent substantial evidence question. "The circuit court . . . reviewed the record . . . and determined that no substantial, competent evidence

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1149 (Fla. 4th DCA 1995). The Fourth District in that case recognized that an error of law is not necessarily a departure from the essential requirements of law, and that certiorari was not an available remedy to correct an appellate decision of a circuit court merely because the district court did not agree with the application of a point of law. Id. at 1149-51 (citing Combs v. State, 436 So. 2d at 95-96 ("the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error"). Ironically, in Rich the Fourth District was urging this Court "not to expand our scope of review" when it was considering the Second District's decision in Haines that this Court subsequently affirmed. 655 So. 2d at 1150. The Fourth District decision below, however, did not explain why its analysis in Rich should not govern this case.

[12] Indeed, Haines recognized that over its history even this Court has not always consistently applied its limited certiorari jurisdiction based upon a misunderstanding of the term "essential requirements of law." 658 So. 2d at 526-27. That has again occurred here. See Rogers & Baxter, supra, at 498 ("Frequently, in the very same case, the Court first states that it cannot review such-and-such a proposition on certiorari, although it could do so on appeal, and then does the very thing it says it cannot do, namely, treat the case on certiorari just as if it were an appeal.").

supported the county commission's decision. . . . This court cannot disagree with the circuit court's evaluation of the evidence and substitute its judgment for that of the circuit court." Id. at 1358 (cited with approval in Haines, 658 So. 2d at 530) (emphasis added).

The Fifth District reached the same conclusion in St. Johns County v. Owings, 554 So. 2d 535, 537 (Fla. 5th DCA 1989) ("Only the circuit court can review whether the judgment of the zoning authority is supported by competent substantial evidence. . . . Again, the circuit court's weighing of the evidence is not subject to review by this court, as long as the correct standard of law has been applied. . . . [A]*nother full review would render meaningless the circuit court's action.*") (emphasis added), rev. denied 564 So. 2d 488 (Fla. 1990).

Under long settled precedents of this Court, the Fourth District is expressly precluded from reexamining the record below and second-guessing the circuit court's appellate determination that there was no competent substantial evidence to support the denial of FPL's application. As Judge Warner acknowledged on rehearing, there is no way around the fact that the Fourth District's decision cannot be reconciled with Haines, EDC, and Vaillant, and that it expressly conflicts with the Second District's decision in Manatee County and the Fifth District's decision in Owings. (A-14 at 3). The Fourth District's decision should be reversed and remanded with instructions to reinstate the decision of the circuit court.

C. The Fourth District Erred When it Concluded That FPL's Arguments Concerning Expert and Lay Testimony Went to the Weight and Credibility of the Evidence

Although the Court should not reach this issue because the Fourth District exceeded the proper scope of its certiorari review, the Fourth District also erred when

it concluded that FPL's arguments that the neighbors' "expert" and lay testimony was neither competent nor substantial went instead to the weight and credibility of the evidence. (A-13 at 3). In its petition to the circuit court, and in its response to the City's petition in the Fourth District (after pointing out that the issue was beyond the proper scope of the Fourth District's review) FPL demonstrated why the "expert" testimony of the opposition's land planner and real estate appraiser and the lay person testimony did not constitute competent substantial evidence. (A-2 at 25-26; 29-34 [testimony of appraiser in opposition]; 34-41 [testimony of land planner in opposition]; 41-45 [testimony of residents in opposition]). See also supra at 7-11. As discussed above, the circuit court, after stating the correct rule of law to be applied in this case, held that the City failed to show by competent substantial evidence that the proposed use would cause substantial injury to the value of other property, was not compatible with adjoining development, or was adverse to the public interest. (A-9 at 3-4). The Fourth District proceeded to reevaluate this evidence and, in addition to ignoring this Court's holdings in Haines, EDC and Vaillant, erroneously concluded that FPL's arguments "addressed the weight and credibility of the expert opinions — issues that were for the City as fact finder to decide, not the circuit court as a reviewing court." (A-13 at 3).

In the appellate proceedings before the circuit court, both parties relied on the De Groot standard of "competent substantial evidence" and judicial precedent in this area in arguing why the testimony before the Commission did or did not constitute competent substantial evidence to support the denial of FPL's application. Clearly, FPL must be able to challenge, and the circuit court must be able to decide, whether the testimony is competent and substantial. If such challenges and decisions can be overcome simply by characterizing them as addressing the weight and credibility of testimony and therefore placing them beyond the reach of the circuit court on certiorari

review, the competent substantial evidence component of certiorari review will be effectively eliminated.

Here, the circuit court concluded that the record lacked competent substantial evidence to support the denial of FPL's application. It did not reweigh the evidence. It did not address the weight and credibility of the evidence. It did not disagree with the City's evaluation of the evidence. As noted in the Fourth District's decision, it made no factual findings. In short, there is nothing in the circuit court's decision to support the Fourth District's improper conclusion — based on an inference which it cannot make under EDC — that the circuit court *must have* reweighed the evidence and therefore did not apply the correct law. Once again, the only way the Fourth District reaches this issue is by its own reevaluation and redetermination of the evidence, which is outside its scope of review.

While FPL will not reargue the point because this Court should not reach the issue, there is ample case law and extensive record support for the circuit court's conclusion that the testimony (both lay and expert) presented to the City in opposition to FPL's application did not meet the De Groot test for competent substantial evidence. See, e.g., Irvine v. Duval County Planning Comm'n, 466 So. 2d 357, 365 (Fla. 1st DCA 1985) ("Since the zoning regulations expressly contemplated the sale of beer and wine, whether for consumption on or off the premises, as a permissible use, *that fact alone* could not be treated by the Planning Commission as contrary to the public interest."), dissent adopted, 495 So. 2d 167 (Fla. 1986); Metropolitan Dade County v. Fuller, 515 So. 2d 1312, 1313 n.3 (Fla. 3d DCA 1987) ("The unusual use [or special exception] is by definition listed as a permissible use within the zone in question . . . the use is, as it were, presumptively permissible and may be denied only if the presumption of propriety is overcome."); Pollard v. Palm Beach County, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990) ("opinions of residents are not factual evidence and

not a sound basis for denial of a zoning change application"); City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th DCA 1974) (City could not deny application based on residents' testimony that "speculated about what would happen to the area's zoning").

There is no basis in fact or law to infer that the circuit court reweighed the evidence in this case. To the contrary, the circuit court applied the correct standard of review and determined whether in the context of this case, and as related to the City's criteria for special exceptions, the evidence presented in opposition to FPL's application for *this particular substation* met the definition of competent substantial evidence. The circuit court correctly concluded pursuant to De Groot that it did not. That is the end of the matter, at least with respect to the competent substantial evidence issue. Haines, 658 So. 2d at 530.

II. 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 decision, the Fourth District also granted certiorari on the ground that the circuit court improperly imposed a higher burden of proof on the City than the law allows. (A-13 at 4).[13] Specifically, the Fourth District stated "[w]e find no case law to support the circuit court's conclusion that, because the special exception is for essential services, the City had an 'especially heavy burden.'" Id. Determining that

[13] The circuit court stated: "This Court finds that [FPL] met its burden of showing that its proposed use satisfied the statutory criteria for the granting of a special exception. The burden then shifted to the CITY to show by competent substantial evidence that the proposed special exception use did not meet the statutory criteria and is adverse to the public interest. The City's burden is especially heavy where, as in that [sic] case, the special exception request is for essential services." (A-9 at 3).

there is no basis for imposing a different standard for special exceptions related to a public purpose, the district court concluded that the imposition of a higher burden on the City than that enunciated in Irvine constituted a departure from the essential requirements of law and "may have contributed to its erroneous conclusions concerning the lack of substantial competent evidence." (Id.) In reaching these conclusions, the Fourth District was wrong.

There is both law and sound public policy to support the proposition that where the requested special exception is for essential services and the utility has shown that its proposed use has met 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. Stated another way, the fact that a special exception is sought for essential public services should be a valid additional consideration and the denial of a special exception for such services should receive greater scrutiny.

Unlike private development, the provision of utility service is recognized by the City Code as an essential service (Dania Code § 2.10 (23); A-2 at 6) and the provision of electric service is recognized by Florida law as a matter of state police power for the protection of public welfare. § 366.01, Fla. Stat. (1997). The property use at issue in this case is for such an essential and public purpose; namely, to meet FPL's statutory duty to provide reasonably sufficient, adequate and efficient electric service to its customers. § 366.03, Fla. Stat. (1997). Electric substations cannot be built anywhere. They must be centrally located in the geographic area where the growing demand for electricity -- which is the result of land uses (including residential) previously authorized by the local government -- has necessitated the substation in the first place. (A-2 at 23-25, 32, 37-39, 44, 49).

FPL has approximately 500 substations in its systems, with over 85% located in residential/commercial areas. (A-2 at 201-02). The reason is simple. Florida is predominantly residential and commercial in nature and substations are needed in the areas of demand to effectively serve that demand. (A-2 at 24-25). Electric substations therefore are generally designated (as they are in this case) as permitted special exceptions or conditional uses in *all* zoning districts. As such, they are presumed to be valid, compatible and in the public interest and must be approved absent competent substantial evidence that something *peculiar* about the *particular* substation proposed to be constructed violates the code criteria and is adverse to the public interest. To deny a special exception for electric substations based upon generalized opposition to such uses constitutes a departure from the essential requirements of law. Irvine, 466 So. 2d at 368 ("In determining whether to grant the exception, the Commission was required to base its decision on the specific standards and criteria set forth on the zoning regulations; it was reversible error to base the decision on other grounds.").

As the court stated in Mossburg v. Montgomery County:

> It is not whether a use permitted by way of a special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses). . . . The appropriate standard . . . is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

666 A.2d 1253, 1257-58 (Md. App. 1995), cert. denied, 672 A.2d 623 (Md. 1996).

The need for this rule is particularly applicable to essential services such as electric substations as demonstrated in this case. There was no evidence that the proposed substation would have more adverse effects than would any other substation located on this site or elsewhere within any of the districts where substations are a permitted special exception, including all residential districts in the City. To the contrary, the evidence showed that landscaping and setbacks for this particular application far exceed the City's own Code requirements, that the preservation of 70% green space on the site far exceeds what could reasonably be expected of other permitted uses on C-2 property (retail stores, businesses, professional offices, restaurants and bars, hotel/motel), that the unmanned substation will be virtually noiseless, and that it will be effectively hidden from view in the middle of the approximately five-acre site. (A-2 at 91, 99-110, 125-26, 145).

Nonetheless, FPL's application was defeated based on testimony that substations in *general* are incompatible with or devalue residential property (regardless of the merits of this specific application) and the rank speculation of a few property owners that they would not have purchased their property if they had known (which they constructively or actually did) that such use would be permitted by the local government. As noted above, this constitutes a denial of FPL's application on grounds other than the specific standard and criteria of the City's Code, which departs from the essential requirements of law. Furthermore, if this type of testimony is permitted to defeat special use applications for essential services, the efforts of FPL and other public electric utilities to construct substations to meet their statutory duty to provide electric service to *all* of their customers can — and undoubtedly will —

be frustrated by the generalized opposition of a select few.[14]

To insure that this does not occur, it is appropriate to place a heightened burden on the zoning authority to demonstrate why the application for a special exception for essential services does not meet the criteria of the code and is adverse to the public interest. As argued in a well recognized treatise on American zoning law:

> In general an administrative board has a narrower range of discretion in dealing with special-permit applications filed by public utilities than is true in the case of the generality of permit applications. *Because the utility furnishes an essential service, denial of permit may have serious consequences and accordingly may be more closely scrutinized by the court.* It is said that the zoning regulations such not be applied to public utilities with "all force and vigor" . . . .

2 Kenneth H. Young, Anderson's American Law of Zoning § 12.34 (4th ed. 1996) (citations omitted) (emphasis added).

The policy reasons underlying these authorities have been recognized in Florida. For example, Southwest Ranches Homeowners Ass'n, Inc.v. Broward County, 502 So. 2d 931 (Fla. 4th DCA 1987), involved a challenge to two zoning ordinances enacted by Broward County to facilitate the location of a sanitary landfill and resource recovery plant. One of the challenges raised by the homeowners was

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[14] These are arguments raised by FPL in its petition for certiorari review asserting that the City departed from the essential requirements of law by, among other things, relying upon incompetent testimony opposing substations generally without regard to anything peculiar to the specific substation proposed and improper public plebescite. (A-5 at 54-66; A-8 at 16-17). The circuit court found that the City Commission departed from the essential requirements of law in denying FPL's application. (A-6 at 4). This finding was not addressed by the Fourth District's decision below. Thus, even if this Court finds that the Fourth District did not commit reversible error on the competent substantial evidence issue, the circuit court's finding that the City Commission departed from the essential requirements of law constitutes an independent basis upon which its order should have been affirmed.

whether the zoning changes violated the consistency provisions of the Local Government Comprehensive Planning and Land Development Act and thus constituted an invalid exercise of the County's discretionary land use authority. Evaluating this issue, the Fourth District stated:

> Common sense tells us that few persons will want . . . a waste disposal facility in their neighborhoods. Government, however, is saddled with the reality that some provision must be made for such facilities. Offending the fewest people may appear to be a cop-out, especially to the "fewest," but that does not change the fact that prisons, waste disposal facilities and other indispensable components of our infrastructure must be located somewhere. This fact, while certainly not providing the County with a blank check, distinguishes such facilities from nearly every other form of residential or commercial development and constitutes, in our view, *a valid additional consideration* to the overall determination of consistency.

Id. at 939 (emphasis added).

Public utilities and other providers of essential services must be permitted to meet their statutory obligations to serve their customers. While the facilities required to provide these services may not be popular, they are nonetheless essential. If such permitted uses — which have already been legislatively determined to be in the interest of the general welfare and therefore valid and compatible by their inclusion in the zoning code — can be defeated by arguments of a generalized nature against such uses, or objections of "not in my backyard," essential services can never be placed in the areas where they are needed. Therefore, the circuit court was correct.

In any event, FPL disagrees that the circuit court's determination of the competent substantial evidence component was erroneous, and believes that this

determination was not dependent on the "heightened burden" to which the Fourth District referred. Accordingly, even if this Court concludes 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.

Finally, FPL submits that any error committed by the circuit court on this issue does not rise to the level required for certiorari relief. See Haines and Jones supra.

CONCLUSION

Based on the foregoing reasons, the Fourth 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 5th day of February, 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.

By: _____

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