IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC95217

CHARLES DUSSEAU, ALBERT ARMADA, JUNE BURKE, JOSEPH BURKE, CHRISTINE HARRIS and BURTON HARRIS,

Petitioners,

v.

METROPOLITAN DADE COUNTY and UNIVERSITY BAPTIST CHURCH, INC.,

Respondents.

BRIEF ON MERITS OF RESPONDENT UNIVERSITY BAPTIST CHURCH, INC.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

Arthur J. England, Jr., Esq.
Elliot H. Scherker, Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for University Baptist Church, Inc.

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INTRODUCTION

This appeal asks the Court to perform a *third* appellate review of an administrative determination made by the Miami-Dade County Commission in a zoning case. Petitioners argue that the district court's application of second-level certiorari creates appellate decisional conflict, but the district court's decision expressly and directly reflects complete harmony with the standard of review established by this Court in *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995). Petitioners' central argument — that the Third District re-weighed the evidence and "granted certiorari based upon its disagreement with the circuit court's evaluation of the record evidence" (Initial Brief at 25-26) — is based upon a demonstrably-inaccurate premise.

Facially, the Third District's opinion reflects that the court exercised second-level certiorari to rectify the circuit court's misapplication of first-level certiorari jurisdiction through a re-weighing of the evidence, in order to reach a result contrary to the zoning decision of the administrative tribunal. This Court has unambiguously *forbidden* the circuit courts, sitting in first-level certiorari, to re-weigh or reevaluate the quantum of evidence submitted to an administrative tribunal. The Third District was duty-bound to set aside a circuit court ruling which overstepped the boundary prescribed by this Court in *Haines City* for first-level certiorari review.

The Third District exercised its second-level certiorari jurisdiction to quash a circuit court decision which overtly and avowedly departed from the essential requirements of law by re-weighing evidence adduced in the administrative proceeding before the County Commission. Unlike the decision of the Fourth District which is now pending before the Court and has been recognized by the Fourth District itself as having applied a too-generous exercise of second-level

certiorari review,[1] the decision of the Third District in this case could not be overturned without a complete *abolition* of second-level certiorari.

Petitioners are simply asking this Court itself to re-weigh the evidence and side with the circuit court on the merits of the zoning dispute, despite the absence of any showing that the Third District created disharmony in the law by its exercise of second-level certiorari jurisdiction. Petitioners' passionate arguments about such matters as the Commission's purported "pro-religion bias," and the impending demise of constraints on second-level certiorari, are mere coloration for their request that *this* Court step back three levels and decide this zoning dispute as they had hoped it would have been decided by the County Commission.

The Third District's unremarkable application of this Court's second-level certiorari standard, exercised to rein in a circuit court which exceeded its authority, must be sustained either on the merits or on a jurisdictional determination that review was improvidently granted.

STATEMENT OF THE CASE AND FACTS

I. The property.

University Baptist Church (UBC), the owner of the property, has existed in Miami-Dade County since 1926. (R. 283-84).[2] The church presently has 2,500 members residing throughout Miami-Dade County and Broward County (R. 278-

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1 *City of Dania v. Florida Power & Light,* 718 So. 2d 813 (Fla. 4th DCA 1998), *review granted*, Case No. SC93940 (Fla. Dec. 29, 1998), acknowledged to have misapplied *Haines City* in *Martin County v. City of Stuart,* 736 So. 2d 1264 (Fla. 4th DCA 1999) (*en banc*).

2 The symbol "R" designates the original record prepared for this proceeding by the Third District clerk and the symbol "S.R." designates the subsequently-transmitted supplemental record.

79), and has outgrown its present 2.6 acre site in Coral Gables. *Id.* at 289-90. In 1991, UBC purchased a 20-acre site on Southwest 72nd Street (Sunset Drive), a major section line road, which site extends south to Southwest 76th Street and is located approximately three blocks east of the Palmetto Expressway, hoping to build a new church facility to accommodate its members and provide education for their children. *Id.* at 279, 285-91.

The site is located adjacent to the residential area that extends from the Palmetto Expressway east to U.S. Highway 1, in which area several houses of worship are also located. (S.R. 33, 83-84). While the UBC membership extends throughout Miami-Dade County and into Broward County (R. 278, 285-86; S.R. 26), 988 of its families live within the same zip code as the site or within five immediately-adjacent zip codes. (S.R. 26). The property is designated for "Estate Density Residential Development," not to exceed 2.5 units per acre, in the Miami-Dade County Comprehensive Development Master Plan. (S.R. 27). Under the Master Plan, the County is required "to facilitate the planning of residential areas as neighborhoods which include recreational, educational and other public facilities, [and] houses of worship." (S.R. 99). The Master Plan expressly provides that such facilities as "neighborhood and community services including schools, parks, houses of worship, [and] day care centers" are permitted in areas designated for residential development when such facilities are consistent with the goals, objectives and policies of the Master Plan and compatible with the neighborhood. *Id.* at 106.

In 1996, having secured the financial resources to develop the site, UBC applied to Miami-Dade County for a special exception for the church facility (including a pre-school), for two unusual uses (a day nursery and a lift station), for non-use variances (accessory structures, setback requirements and parking on natural terrain), and for a special exception for building height. (R. 279; S.R. 29-30). UBC's application presented the County with a floor plan that is typical for

churches, *i.e.,* the plans provide for a sanctuary, fellowship hall, Sunday School, and administrative offices. (R. 314; S.R. 7-23). The application also sought approval for a day care center to replace the current facility at the Coral Gables site, a sewer lift station, and attendant non-use variances to implement the plan. (S.R. 1, 29). The floor plans show that the 20-acre site is sufficiently spacious to accommodate both the structures and adequately buffered parking. (S.R. 15-16). The requested floor area ratio (the ratio of building area to land area) is relatively modest as compared to major churches in Miami-Dade County. (S.R. 25).

II. The County's evaluation of the application.

The initial analysis of UBC's application was performed by the County's Department of Planning Development and Regulation (Planning Department). (S.R. 82-85). After consultation with the Planning Department, UBC submitted a revised site plan which eliminated requests for an oversized sign and reduced rear setbacks. *Id.* at 82. The Planning Department report sets forth the two-phase plan for development of the property: in Phase I, the main church building and preschool will be erected on the site; in Phase II, to be built approximately five years later, a 63,000 square-foot worship center and adult/youth classroom building, a 5,400 square-foot chapel and a 3,000 square-foot maintenance building will be erected. *Id.* at 82-83.

The Planning Department recommended approval of the application, setting forth its analysis as follows:

> Staff supports the establishment of a religious and day nursery facility on this property. The revised site plan is also acceptable as it has adequately addressed staff's original concerns . . . . The [Master Plan] states that community serving uses, including schools, day care centers and houses of worship, are permitted in areas designated as Residential Communities when consistent with other goals, objectives and policies of the Plan and when compatible with the neighborhood. Further, the

> [Master Plan] states that daytime service uses such as day care centers, are best located on major or minor roadways, adjacent to commercial or institutional areas, to public uses or to other areas of high activity or accessibility. In this regard, the requested uses are consistent with the Plan, in that they will serve the surrounding community, [are] located on Sunset Drive, a major east-west roadway which offers good accessibility to the Palmetto Expressway to the West and US-1 to the East and where church facilities abound, including an Episcopal Church which abuts the subject property to the west. In this regard staff feels that the requested uses are compatible with the area.
>
> In keeping with other existing religious facilities located on Sunset Drive, including St. Matthew Episcopal Church to the west, the revised plan orients the proposed buildings closer to Sunset Drive with the remainder of the property to be used as parking and passive open space . . . . The main building and maintenance building at the rear of the property are setback at least 75' from the property lines and the 25' landscape buffering proposed between the homes and the facility will serve to buffer the residents from any visual and audible impacts such as noise, light and glare which would be generated.
>
> The pump station with generator is acceptable to staff since it is necessary in order to serve the proposed facility and will be located in the northeasterly corner of the property adjacent to Sunset Drive where it will have less of an impact . . . . Accordingly, staff recommends that the requested religious facility and day nursery along with the companion requests, be approved subject to conditions.

Id. at 83-84.

The County's staff recommended 12 conditions, including submission of the site plan to the Planning Department prior to the issuance of a building permit, submission for review and approval of a landscaping plan, compliance with all requirements for the nursery and restriction of the nursery to a maximum of 98 children between the hours of 9:00 a.m. and 1:00 p.m., and compliance with all requirements imposed by the County's Department of Environment Resources

Management (DERM) and the County's Public Works Department (Public Works). *Id.* at 85.

III. The Zoning Appeals Board hearing.

UBC's counsel and the project's architect presented the site plan to the County's Zoning Appeals Board (ZAB). (R. 93-119). UBC also presented the testimony of a traffic expert, who explained that the overall impact on Sunset Drive "would be minimal," with the exception of Saturday night and Sunday morning, at which times UBC would use off-duty police officers to control traffic. *Id.* at 128-131. UBC also presented the testimony of an expert real estate appraiser, who testified that the market values of the surrounding residential properties would not be affected by the church facility, basing his opinion on studies of nearby neighborhoods in which major churches presently exist. *Id.* at 139-158.

Counsel for neighbors who objected to the application argued to the ZAB that the scale of the project was such as to warrant denial of the application. (R. 191-205).[3] Charles Dusseau, a former County Commissioner who resides in the surrounding neighborhood, *id.* at 207-08, argued that the neighborhood is of "a rural character" and that the project "is way out of the scale" of the neighborhood. *Id.* at 211.[4]

ZAB members expressed their opinions in opposition to the application, suggesting that, among other things, UBC was "no longer in the business of just

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[3] According to the neighbors' counsel, the neighbors have no objection to a church being located on the site, but prefer "a scaled back facility." *Id.* at 205.

[4] Mr. Dusseau also believed that the church would have a negative impact on the value of his home. *Id.* at 218-19. Other residents expressed various objections to new development of any kind in the neighborhood. *Id.* at 220-38.

worshiping God and teaching family values," that churches "make a heck of [a] lot of money" and should "play by the big boy's rules," and that the church was overextending itself financially and would either "fall on its face or have to close." (R. 246-261). The ZAB voted to deny the application. *Id.* at 264-268.

IV. The County's recommendation for approval by the County Commission.

On UBC's appeal of the ZAB's decision (S.R. 45-47), the County submitted reports reflecting review by all 12 County agencies required to evaluate the project. *Id.* at 27-28. DERM, the County's environmental agency, determined that the project meets environmental requirements under the County's code, and that approval of the project will not affect the required level of service for public water and sewer facilities. *Id.* at 40. DERM further determined, after reviewing the general "environmental impact" of the project, that it had no objections to approval. *Id.* at 42. Public Works determined that the application satisfies the County's traffic concurrency criteria, and that its approval would not affect the level of service on adjacent roadways. *Id.* at 43-44. Other agencies that were required to review the application — the County's water and sewer, parks, fire, transportation, solid waste, police and aviation departments, and the School Board — had no objections to approval of the project. *Id.* at 28. The Planning Department determined that the project met the County's concurrency requirements. *Id.*

The County's Planning Director recommended approval of the project by the Commission:

> The Planning Division is recommending approval of the proposed church facility. The church campus will be developed in two phases. The first phase will consist of a multi-purpose building and atrium with a total seating capacity of 1,500 and the second phase will consist of the main auditorium with a total seating capacity of 2,190 . . . . Staff is conditioning this request to prohibit the simultaneous use of the

> sanctuary and fellowship hall during worship services. There will also be Sunday school classrooms, administrative offices and general offices which are ancillary to the day-to-day operation of the church. The proposed day care for 98 children will be located on the southeast corner of the main building. The day care will conform to all private school requirements and will maintain its own separate drop-off area and outdoor play area. Originally, the majority of the parking was located in front of the church and the church was cited on the rear of the lot. The applicant has revised his site plan, shifting the church closer to the front property line and relocating the parking closer to the entrances of the church. Further, the applicant has redesigned the church's motif incorporating a more residential character of the building, as well as [a] shift of the maximum height of the building to the center of the structure. This will help alleviate the impact of the height variance requested on adjoining properties. The church is internal to itself . . . . This church will be entirely internally oriented. Parking, as proposed, would limit the impact of the use on adjoining neighbors. Coupled with Staff's recommended landscaping, berm and trees, such negative aspects as glare, noise and fugitive dust should be reduced considerably.
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> . . . [T]he Planning Division recommends approval of Phase I of this application. The applicant has modified his original site plan. The revised site plan is far more sensitive to the surrounding neighbors, than the one originally submitted . . . . Coupled with a landscaped campus-like environment, the site plan as now proposed should negate any adverse impact on adjoining residential properties.

Id. at 37-38. The Planning Director recommended the imposition of 10 conditions: (1) removal of the proposed maintenance building on the southeast corner of the property; (2) no simultaneous use of the sanctuary and fellowship hall for worship services; (3) landscape buffers (minimum of 25 feet); (4) a double row of trees with a minimum height of 16-18 feet at the time of planting along the east and west property lines; (5) submission for approval of a landscaping plan; (6) a prohibition on outdoor amplification; (7) a prohibition on night lighting, except for parking

areas; (8) no private school on the property, except for day care; (9) no temporary structures; (10) ingress and egress limited to Sunset Drive. *Id.* at 39.

The Zoning Director determined that the church facility would be compatible with the neighborhood and that the proposed landscaping buffers would protect neighborhood residents from adverse effects. (S.R. 33-34). Restating the conditions originally recommended before the ZAB, the Zoning Director recommended approval of the application. *Id.* at 34-35.

V. The Commission hearing.

A. UBC's presentation.

In addition to the staff recommendations, UBC presented three expert witnesses. Bill Hanser, the project architect, explained to the Commission that the revised site plan places the main church buildings along Sunset Drive at a depth that is consistent with neighboring churches, including the Episcopal church immediately adjacent to UBC's site. (R. 306-07). The revised plan creates "a village like arrangement" around the central space, and preserves natural forests on the site in excess of legal requirements. *Id.* at 307-08. Mr. Hanser illustrated the proposed landscaping buffers, which comprise 13% (2.6 acres) on the site and that the buffers, in combination with the setbacks, will create a minimal visual impact on the neighborhood. *Id.* at 309, 312-13. With Sunset Drive as the sole point of access, the vehicular impact will be negligible and the proposed parking is more than 50% in excess of that required by the County's code. *Id.* at 310-11. Finally, the internal orientation of the church and the lack of outdoor uses were proposed "out of respect for concerns the neighbors have expressed." *Id.* at 314-15.[5]

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[5] McDonald West, the chairman of UBC's Long Range Planning Committee, explained to the Commission that the phasing of the development was dictated by the cost of the project. (R. 323-24). The first phase will cost

(continued . . .)

Bob Gallagher, an expert real estate appraiser, testified that locating houses of worship on major section line roads (such as Sunset Drive) for ease of access is a common practice. (R. 336). Thus, while nearby residences may have a lower value than comparable homes located in other areas, "usually that's because of their exposure to traffic on major thoroughfares, not the presence of the religious institution." *Id.* at 336. To evaluate the potential impact of UBC's new church on the surrounding neighborhood, Mr. Gallagher compared neighborhoods located near other major churches and found that "proximity to a . . . church facility does not adversely affect real estate property values for surrounding residential homes." *Id.* at 337-39.[6] Mr. Gallagher also explained that the floor area ratio of UBC's new church falls into the mid-range for major churches in Miami-Dade County. (R. 346-48; S.R. 25).

David Rhinard, an expert traffic engineer, testified that the traffic flow on Sunset Drive would not be adversely affected, even assuming an increase in traffic up to 50% more than would reasonably be expected by the new church, with the exception of a 15-minute peak traffic period on Sunday mornings. (R. 362-64). The

(… continued)

approximately $13 million and the second phase, to begin in 2005, will cost approximately $15 million. *Id.* at 324. The membership has pledged $4.3 million to be paid over the next three years and the remaining monies will be raised by selling the existing facility, augmented by a mortgage on the new property and a forthcoming campaign for additional contributions. *Id.* at 324-25. Based on these financial considerations, UBC will go forward with its "multi-purpose" building in the first phase and will build a sanctuary in the second phase "because that is a single purpose room." *Id.* at 326. Upon the completion of the sanctuary, the first-phase building will be used as a fellowship hall. *Id.* at 326-27.

[6] The churches used in Mr. Gallagher's analysis are surrounded by properties that are zoned for estate residential density similar to the neighborhood that adjoins UBC's site. (R. 344).

additional traffic would not "come anywhere close" to requiring traffic signals or deceleration lanes. *Id.* at 364, 367. Mr. Rhinard recommended that UBC use two off-duty police officers during these peak hours, and he advised the Commission that UBC had agreed to do so despite his calculations showing that the average delay on Sunset Drive will be approximately 30 seconds during the Sunday morning peak period. *Id.* at 363-66. Mr. Rhinard concluded that, in his professional judgment, he "[a]bsolutely" believes that traffic will not unduly burden the area. *Id.* at 366.

UBC also presented the testimony of its pastor, William White, who provided the Commission with a historical perspective of UBC and its programs. (R. 283-91). Jose Fernandez, the chaplain for the County's Corrections Department, testified to UBC's leadership in the community, including UBC's status as the first church to commit its resources to counsel County inmates. *Id.* at 300-03. Other members of the clergy also testified in support of the application. *Id.* at 291-92, 303-04, 348-60.

B. The objections to the application.

Counsel for the objecting neighbors advised the Commission that "we just want a simple church." (R. 379). Matthew Schwartz, a land planner retained by the neighbors, testified that a church would be compatible with the neighborhood but that UBC's project "represents a non-compatible intrusion into this low density neighborhood." *Id.* at 390-91, 394.[7] Miles Moss, a traffic engineer, testified that

[7] Asked to suggest an appropriate size for the facility, Mr. Schwartz suggested that "it would be comparable to what was built in similar type[s] of neighborhoods," such as the Old Cutler Presbyterian Church, which has a seating capacity of 1,000. *Id.* at 396. Mr. Schwartz was unaware, however, of the size of that church's property. *Id.* He also testified that he was not familiar with UBC's programs. *Id.* at 397.

the traffic that would be generated by the church "would have an indefinite effect on the service and the roadway in the area and it generates substantial delays to the people travelling through the area and the residents." *Id.* at 397-406. He estimated that there will be a 3.3-second "headway" delay for each vehicle leaving the church property after services. *Id.* at 399-400.[8] Public Works' director, Russell Kelly, disputed Mr. Moss's testimony, telling the Commission that "it's going to be a lot quicker than what the opposition has said." *Id.* at 511.

Mr. Dusseau again spoke in opposition to the project. (R. 413). He criticized the application and questioned the sincerity of the staff's findings and recommendations. *Id.* at 416, 424-25. Father Reed, the pastor of St. Matthew Episcopal Church, told the Commission that UBC would "create some huge traffic jams and that's going to create problems" for his church. *Id.* at 431-32. Shina Stein, a neighborhood resident, stated her opinion that the proposed facility "is way out of scope and it will ruin whatever good life that we have in that neighborhood." *Id.* at 434-35. Adam Amata, a neighborhood resident who works as a real estate appraiser, testified that approving the application will have an effect on the value of surrounding properties. *Id.* at 435-39.

Frank Jimenez told the Commission that he is opposed to the application because of his concern that it will cause additional traffic. (R. 440-42). Michael Bass suggested that the additional vehicles will "drip[] oil and transmission fluid" that will "go right down into our drinking water." *Id.* at 443. Mr. Bass also expressed his belief that the additional traffic will have an impact on the neighborhood. *Id.* at 443-45. Ann Martin, a neighboring property owner, stated her opposition to the church because of "traffic congestion and general invasion into the

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[8] This estimate was based on Mr. Moss's belief that there will be only a single exit on Sunset Drive, while UBC will provide for three exits. *Id.* at 407-08.

residential area." *Id.* at 445. Other neighborhood residents expressed similar objections. *Id.* at 447-59.

VI. The Commission's decision.

Commissioner Souto expressed his view that the "betterment of having a church . . . [will] offset all the other things that they may have in that community." (R. 470).[9] He moved to approve the application:

> [M]y [motion] would be to accept the Zoning Department's . . . recommendations . . . and also add to that that . . . the church will somehow try to maximize . . . the use of plants and trees that will beautify [it] to the public . . . [a]nd to do the others, to facilitate all of those movements of cars and people that will occur . . . .

Id. at 472.[10]

Commissioner Reboredo seconded the motion (R. 473, 475), and stated his view that church services are important to the community. *Id.* at 475-76. Commissioner Moss inquired of the County Attorney as to the Commission's role, and the County Attorney advised that the hearing was "a *de novo* matter coming before you on the identical standard that would come before you if they had never gone to the ZAB, which is a substantial competent evidence rule." *Id.* at 477. The

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[9] The Commissioner expressed his view that the Miami-Dade County community "is ill" and that churches can play a role in healing the community. *Id.* at 470-71.

[10] The County Attorney, addressing the motion, noted the existing recommendation for landscaping, and the Commissioner accepted Director Olmedillo's suggestion that UBC agree to provide "whatever landscaping is necessary." *Id.* at 474-75.

Commissioner then questioned the staff and UBC's counsel as to the use of the facility. *Id.* at 479-82.[11]

Commissioner Ferguson stated her opinion that the proposed facility is "not compatible . . . for the neighborhood." (R. 487-88). Under her questioning, Director Olmedillo explained the staff's recommendations:

> [I]t's compatible . . . . It's one of the uses contemplated in any residential district.
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> * * *
>
> . . . [W]e went into how we can mitigate the impact so that the immediate neighborhood is not negatively affected, the way[] we revised that was making changes to the application, to the site plan . . . eliminating access points that would lead the traffic into neighborhood. Creating buffer zones, as you saw in the plans . . . where you can see . . . there is a buffer created with a berm so that . . . the car lights are not shining on the houses that are immediately to the east and west of the property.
>
> There are [a] number of mitigating factors . . . and the 10 conditions that we added to it, we felt with that it would be a compatible use to the neighborhood, recognizing that it's a different use, but recognizing also that a church is one of the permitted uses in a residential district.

Id. at 489-91.

Commissioner Carey also questioned the director on compatibility, and he responded:

> [I]t's trying to find what size will not create that disruption with the rest of the neighborhood, having accepted that the use is acceptable

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[11] Commissioner Moss asked why the sanctuary was not being built first, and Mr. West, addressing that issue, explained that the multi-purpose building that will be erected in the first phase will be used as a sanctuary until the permanent sanctuary is built. *Id.* at 483-84.

> within the area. And that's what we tried to address when I say we place[d] conditions so that we direct traffic away from the neighborhood.
>
> We create landscaping buffers so as to mitigate whatever noise may be coming out of it. Creating distances between buildings, the residential building and the church buildings so that there is a separation there. Those are the mitigating elements that we have.
>
> * * *
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> Our opinion is that the way that the building is placed on the site, centrally located, that the buffers that are created by the landscaping and the direction of traffic and the elimination of certain things . . . and the fact that the worship services are not to be [in] the fellowship [hall] or the sanctuary at the same time, . . . that would create enough conditions to make it compatible to the rest of the neighborhood.

Id. at 494-95.[12]

Commissioner Diaz de la Portilla, stating his view that the application should be denied, concluded that there was competent substantial evidence to deny the application but found there was competent substantial evidence "for an approval also." (R. 500-05). Commissioner Burke expressed his view that approval of the church would be a positive step for the community. *Id.* at 513-16.

By a 7-2 vote, the Commission voted to approve UBC's application. (R. 521). The Commission's resolution imposes the conditions recommended by the County's staff, and finds that "the requested special exceptions, unusual uses and

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[12] Under further questioning by Commissioner Ferguson, Mr. Olmedillo explained that a violation of a condition prohibiting simultaneous use of the fellowship hall and the sanctuary would be punishable by a fine of $500 per day. *Id.* at 496-97. Both Mr. Olmedillo and the County Attorney advised the Commissioner that the County also could file an application to revoke the resolution approving the special exception in the case of repeated violations. *Id.* at 497-98.

non-use variances would be compatible with the area and its development and would be in harmony with the general purpose and intent of the regulations and would conform with the requirements and intent of the Zoning Procedure Ordinance." (S.R. 1-6).

VII. The circuit court's decision.

The circuit court reassessed the evidence presented to the Commission under the provision of the Miami-Dade County Code that states, for a special exception to be approved, the exception must not "generate or result in excessive noise or traffic, cause undue or excessive burden on public facilities, including, water, sewer, solid waste disposal, recreation, transportation, streets, roads, highways or other such facilities." (S.R. 113-14). Under this standard, the court determined that the testimony of the architect, Mr. Hanser, "failed to address the traffic situation." *Id.* at 114. Looking to the other testimony on potential traffic impacts, the court addressed the parties' expert witnesses by noting that "[t]estimony regarding the traffic situation was markedly divergent." *Id.* at 114-15.

The court next addressed the testimony of Mr. Schwartz, the land planner called by the objecting neighbors, and found that Mr. Schwartz's testimony that UBC's facility "was not compatible with this estate-density residential neighborhood" was not refuted by UBC, such that "the commission should have denied the application for special exception because Schwartz's testimony showed that the church as planned was incompatible with the surrounding area." *Id.* at 115-16.

Noting the condition imposed by the Commission prohibiting simultaneous use of the sanctuary and fellowship hall, the court determined that the condition "was meaningless because it was unenforceable," in that "[t]his condition could only be enforced if an individual was assigned the task of ensuring that both

buildings were not used simultaneously." *Id.* at 116. Finally, the court discounted testimony from various witnesses as to "the importance of religion in our fragmented society" because this testimony "was not based on fact" and provided no basis for approving the application. *Id.* at 116-17.

On a 2-1 vote, the court concluded

> there was competent substantial evidence adduced at the hearing before the commission that granting the special exception here would generate excessive traffic and cause an undue burden on public facilities.
>
> As there was no competent substantial evidence that the church met the criteria for a special exception and there was competent substantial evidence that the church did not meet the code criteria for the grant of a special exception, certiorari is hereby granted . . . .

Id. at 118.

The dissenting opinion elucidates the competent substantial evidence ignored by the majority:

> The record on appeal includes detailed reports and recommendations from the County's professional staff. In the opinion of the zoning staff, the uses requested by appellee were compatible with the area. The proposed church facility was also found to be compatible with the Comprehensive Development Master Plan ("CDMP"). A detailed evaluation was also performed by the planning department director, who recommended that the proposed church facility be approved. Appellee's application was also reviewed by the Department of Environmental Resources Management, the Water and Sewer Authority Department, the Public Works Department, the Fire Department, the Transportation Department, the School Board, the Solid Waste Department, the Public Safety Department, and the Aviation Department, all of which did not object to the approval of appellee's application. Thus, the County's professional staff recommended that the Commission permit construction of this project. I find their professional opinions, that the impact of this project would

> not place an undue burden on public facilities, to be competent substantial evidence upon which the Commission could rely. The recommendations of professional staff constitute competent substantial evidence and can sustain a commission decision. Therefore, competent substantial evidence was adduced before the Commission which was sufficiently relevant and material to support its conclusion.

(S.R. 119-20).

The dissent also spoke to the majority's denigration of the testimony on the pertinent factors, including the testimony directed to the benefit provided by religious institutions to the community:

> It was the function of the zoning authority — in this case the Commission — to determine whether appellee's application met the factors enunciated in Section 33-311(d) of the Metropolitan Dade County Code. Numerous witnesses testified before the Commission in support of this issue. The test enunciated in that section is essentially whether the project serves the public interest. One of the stated goals of the [Master Plan] is "to support and promote the cultural arts and spiritual values of our citizens." . . . "[S]piritual values are relevant in the consideration of the public interest." The record before the Commission is replete with such testimony. Accordingly, the testimony of members of the community who spoke at the Commission hearing on behalf of the applicant establish that the proposed project met the "public interest" criteria, consistent with the Commission's obligation to protect the public interest under the [Master Plan]. I view, and apparently the Commission likewise viewed, their testimony as substantial competent evidence and not mere generalizations supporting the construction of religious institutions. I find no basis which would indicate that the Commission was "blinded" by the fact that the applicant was a religious institution, as suggested by appellants . . ., with which suggestion my colleagues seem to agree. Further, the totality of the record does not indicate that the Commission's granting of the application was without reason supported by facts which were as a matter of law arbitrary and unreasonable.

Id. at 120-21 (citations omitted).

VIII. The Third District's decision.

The Third District pointed to evidence in the record that the County's staff "found that UBC's application was compatible with the existing neighborhood" and, accordingly, had recommended approval of the application. *Metropolitan Dade County, Board of County Commissioners v. Dusseau,* 725 So. 2d 1169, 1170 (Fla. 3d DCA 1998) (hereafter "*Dusseau*"). The court also pointed out that the Planning Director had made a finding that "the proposed church was in compliance with the Miami-Dade County Code, consistent with the Comprehensive Development Master Plan, and compatible with the surrounding area." *Id.* Additionally, the court noted the record contained approvals of the application from all County agencies charged with examining the request. *Id.* at 1170.

Addressing the evidence adduced at the hearing, the court stated as follows:

> During the hearing, UBC explained that all the county agencies that examined the application . . . recommended approval of the application. Further, UBC presented evidence that indicated that the project complied with or exceeded the Miami-Dade County Code, was consistent with the Comprehensive Development Master Plan, and was compatible with the surrounding area. Other experts also testified in support of the project, including the project architect, an independent real estate appraiser, and a traffic engineer. Finally, UBC's pastor and other clergy also testified in support of the application.
>
> The attorney for the neighbors who opposed the project then spoke in opposition. He stated that the neighbors are not opposed to a church, but that they just "want a simple church." The neighbors' experts, including a land planner and a traffic engineer, testified in opposition to the project. Neighbors also spoke in opposition to the project.

Id. at 1170-71.

The Third District faulted the circuit court because, "in finding that the Commission's ruling was not supported by competent substantial evidence, the

circuit court primarily focused on the testimony presented by the neighbors' attorney and their expert witnesses." 725 So. 2d at 1171. The court accordingly quashed the circuit court's decision:

> We find that the circuit court departed from the essential requirements of law when it reweighed evidence and completely ignored evidence that supported the Commission's ruling. Further, a review of the evidence clearly demonstrates that the Commission's ruling was supported by competent substantial evidence — the recommendations of the Zoning and Planning Departments, and the testimony of the project architect, an independent real estate appraiser, and a traffic engineer. Accordingly, we grant the petition.

Id. (citation omitted).

SUMMARY OF ARGUMENT

There is neither decisional conflict nor any reason for the Court to review, much less to vacate, the district court's decision in this case. The fundamental predicate for petitioners' challenge to the Third District's decision — that the court granted certiorari based upon its disagreement with the circuit court's evaluation of the record evidence — is demonstrably and utterly *incorrect*. On its face, the Third District's decision holds that the circuit court departed from the essential requirements of law when it expressly re-weighed evidence and completely ignored evidence in support of the administrative tribunal's ruling. Petitioners do not, and cannot, argue that a circuit court on first-level certiorari is empowered to re-weigh evidence or to ignore competent substantial evidence that supports an administrative decision.

Petitioners' contention that the Third District's decision is flawed due to an absence of the words "miscarriage of justice" is untenable, being completely foreclosed by this Court's decision in *Haines City.* There the Court held that a

"departure from the essential requirements of law" is the *equivalent* of a "miscarriage of justice."

Should the Court elect to look behind the Third District's decision, it will find no conceivable error. The record before the Third District affirmatively reflects the existence of competent substantial evidence to support UBC's application, consisting of the findings and recommendations of the County's professional zoning and planning staff, and testimony from the project architect, a real estate appraiser, and a traffic engineer.

The Third District acted in accordance with the *Haines City*-prescribed second-level certiorari responsibility in concluding that contradictory evidence from an expert land planner and neighborhood residents, on which the circuit court exclusively relied, may have been competent substantial evidence but did not justify the circuit court's re-weighing of the evidence and refusal to consider the competent substantial evidence, submitted by UBC and the County staff, that *supported* the Commission's decision. The job of the circuit court on first-level certiorari was most assuredly *not* to re-weigh competing pieces of competent substantial evidence, choose the version most to the court's liking, and then quash the Commission's decision based on such a re-weighing. Indeed, petitioners do not vigorously defend the circuit court's decision-making.

The decision of the district court is unassailable on the multiple grounds that petitioners have raised, a key one of which would have required the presentation of evidence in the administrative proceeding but which stands without any supporting record evidence — a finding by the County Commission which upheld a condition that prohibits UBC's simultaneous use of its fellowship hall and sanctuary for worship services. This is but one of the many threadbare arguments by the petitioners which reflect an inability to find *any* cognizable error in the Third District's decision.

ARGUMENT

The Third District applied the correct standard of review to rectify the circuit court's departure from the essential requirements of law.

The standards for the courts' review of a zoning decision made by a local government are by now well-established in the decisions of this Court. The seminal decision, of course, is *Haines City*. The petitioners in this case do not in any way challenge the standards expressed in *Haines City*, and they do not suggest that the district court was unaware of the scope of its authority in applying second-level certiorari review under the *Haines City* standard. The sole criticism of the Third District's decision is its direct application of the *Haines City* standard of review to invalidate a result favorable to petitioners which was adopted by a circuit court panel majority impermissibly.

Petitioners assail the Third District's decision, which reversed a circuit court appellate panel for re-weighing evidence acknowledged by the panel majority to be competent and substantial, without ever suggesting that the principles established in *Haines City* would tolerate the circuit court's selection of one party's evidentiary presentation at a zoning hearing to justify the court's disagreement with a local government's decision. Petitioners' pique with the County's decision does not present an occasion for this Court's *fourth* evaluation of the merits of their challenge to UBC's proposed land use. Nowhere have they shown the decision of the Third District to be either in direct conflict with applicable precedent or out of harmony with any Florida appellate decision.

UBC begins this brief with a summary review of the standards by which the courts are directed to evaluate governmental zoning decisions, mindful that the Court is fully familiar with the standards it has formulated after years of defining and redefining the standards for successive appellate reviews.

I. The second-level certiorari standard.

In *Haines City*, the Court distinguished between first-level certiorari review as of right in the circuit courts and discretionary second-level certiorari in the district courts of appeal. Circuit court review of an administrative agency decision is governed by a three-part standard of review involving whether procedural due process is accorded (not an issue in this case), whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. A district court is limited to determining whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. 658 So. 2d at 530.

In *Haines City*, the Court defined the "application of the correct law" standard by revisiting and reconciling its prior decisions on the respective standards for second-level certiorari review in cases arising from county court judgments[13] and from administrative cases.[14] The Court first reaffirmed that first-level certiorari review functions as the equivalent of a direct appeal as of right, while discretionary second-level certiorari serves the more limited function of addressing extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected. 658 So. 2d at 530-31. Both first-level and second-level certiorari, however, were held to encompass review for a "departure from the essential requirements of law." 658 So. 2d at 530.

In an effort to explain the "departure from the essential requirements of law" component of certiorari, the Court returned to its primordial explication of second-level certiorari in *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982).

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13 *Combs v. State,* 436 So. 2d 93 (Fla. 1983).

14 *Education Development Center v. City of West Palm Beach,* 541 So. 2d 106 (Fla. 1989) (hereafter *EDC*).

There, the Court had approved characterizations of that standard as constituting either a "failure to accord due process of law . . . or the commission of an error so fundamental in character as to fatally infect the judgment and render it void" – something "far beyond legal error." 658 So. 2d at 527. The Court reiterated that the departure from essential requirements of law

> 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.

Petitioners seize on the phrase "miscarriage of justice" to support a resurrection of the circuit court panel majority's decision, but in doing so they completely misapprehend *Haines City* by suggesting that second-level certiorari review includes a *separate* "miscarriage of justice" requirement. This Court has been clear in equating that phrase with the "departure from the essential requirements of law," in light of the contours for second-level certiorari established in its earlier precedents:

> [W]e conclude that 'applied the correct law' is synonymous with 'observing the essential requirements of law.'

658 So. 2d at 530. Consequently, the issues of whether the circuit court afforded the parties due process and applied the correct law "*are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law.*" *Id.* at 530 (emphasis supplied).

II. The Third District's determination that the circuit court did not "apply the correct law" is consistent with that formulation from *Haines City* and its application by other district courts.

The Third District addressed the controlling standard for second-level certiorari review in its *en banc* decision in *Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598 (Fla. 3d DCA) (*en banc*), *review dismissed,* 680 So. 2d

421 (Fla. 1996), a decision to which petitioners pay but scanty attention. (Initial Brief at 31 n.12). It found uniformity in the appellate courts on the issue which is decisive in this case.

> All the district courts that have addressed this scope of review issue are in accord that where the circuit court applies an incorrect legal standard and erroneously determines that a zoning decision is not supported by substantial competent evidence, or where the record is clear that the court has impermissibly reweighed the evidence, then the lower court has departed from the essential requirements of law and certiorari is available to the aggrieved party.

675 So. 2d at 609 (citations omitted).

The court's *en banc* opinion in *Blumenthal* was originally penned as a dissent to the panel's decision to uphold the circuit court's ruling in that case. 675 So. 2d at 599-600. On rehearing *en banc,* the court vacated the panel's decision and adopted the dissent as the *en banc* decision of the court. *Id.* at 610. The original panel decision and dissent had issued approximately two weeks prior to the advent of *Haines City*, but the *en banc* court acknowledged the controlling nature of *Haines City* and stated:

> We conclude that the issues presented by these petitions are substantial ones and fall within this court's scope of discretionary review as outlined in the Florida Supreme Court's recent opinion in *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530-31 (Fla. 1995).

675 So. 2d at 610. No clearer evidence of the Third District's full comprehension of its *Haines City* responsibility could be imagined.

The Third District again evinced its complete understanding of the *Haines City* strictures in *Bird-Kendall Homeowners Association v. Metropolitan Dade County Board of County Commissioners,* 695 So. 2d 908 (Fla. 3d DCA), *review denied,* 701 So. 2d 867 (Fla. 1997). There the court expressly recognized that

Haines City empowered the district courts to grant relief on second-level certiorari where the circuit court's decision "represents a fundamental departure from the controlling law resulting in a miscarriage of justice." 695 So. 2d at 909-10. Here again, this Court denied review. But these acknowledgments of the district courts' role in second-level certiorari are not confined to the Third District; they are shared elsewhere.

The First District has addressed second-level certiorari responsibilities in deciding whether a circuit court has "applied the correct law" in *City of Jacksonville Beach v. Marisol Land Development, Inc.,* 706 So. 2d 354 (Fla. 1st DCA 1998). In *City of Jacksonville v. Taylor,* 721 So. 2d 1212 (Fla. 1st DCA 1998), the court analyzed the "miscarriage of justice" formulation of *Haines City*, the Third District's applications of that standard in *Blumenthal* and *Bird-Kendall*, and its own application of that standard in *Marisol*. Relevant to the issue posed here, the court concluded that a fundamental departure from controlling law in the form of a miscarriage of justice had been the implicit basis for its decision in *Marisol*, and

> that the failure to apply the correct law there, by itself, constituted a miscarriage of justice.

Taylor, 721 So. 2d at 1214.[15]

As these decisions make clear, petitioners' insistence that there exists an *independent* "miscarriage of justice" standard —- one that must be both *identified* and expressly found before second-level certiorari can be granted —- is neither stated in *Haines City* nor recognized by the district courts. As these decisions also make clear, a circuit court departs from the essential requirements of law when it

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[15] The First District restated the second-level standard in the same terms more recently in *Windward Marina, L.L.C. v. City of Destin,* 743 So. 2d 635, 636 (Fla. 1st DCA 1999).

elects to re-weigh the evidence or ignore competent substantial evidence in support of an administrative tribunal's ruling. Indeed, petitioners do not appear to challenge that proposition, or disparage the Third District's holding in *Blumenthal* that errors of that nature are properly redressed by a district court on second-level certiorari review.[16]

The propriety of an exercise of discretionary, second-level certiorari review — to rectify a first-level decision in which the circuit court has exceeded its own certiorari jurisdiction by re-weighing the evidence submitted to the administrative tribunal — is indisputable. Petitioners have strained the bounds of this Court's discretionary review to shoehorn the Third District's decision in this case into the Court's pending review of the Fourth District's *City of Dania* decision.[17] Yet in

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[16] *See Blumenthal*, 675 So. 2d at 609. In a recent survey of the law in this area, which includes a critique of *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469 (Fla. 1993), on which petitioners rely (Initial Brief at 26), the author lauds the *Blumenthal* holding that a re-weighing of the evidence by a circuit court constitutes grounds for certiorari relief by noting that "a circuit court *would be exceeding its own certiorari jurisdiction if it reweighed the evidence* before the local government, or reversed the decision simply because it disagreed with the local government's evaluation of the evidence." Graham C. Penn, Note*, Trying to Fit an Elephant in a Volkswagen: Six Years of the Snyder Decision in Florida Land Use Law,* 52 FLA. L. REV. 217, 242 (2000) (footnote omitted; emphasis supplied).

[17] Sitting *en banc* in *Martin County v. City of Stuart,* 736 So. 2d 1264 (Fla. 4th DCA 1999), the Fourth District adopted Judge Warner's concurring opinion in *City of Dania* (suggesting that review of question whether circuit court properly ruled on existence of competent substantial evidence "collapse[s] the third component of circuit court review . . . into the consideration whether the circuit court applied the correct law") and receded from *City of Dania* to the extent that the scope of review applied in that case conflicts with the *Haines City* standard. 736 So. 2d at 1267-68. Petitioners recognize that, unlike *City of Dania,* this case does *not* involve a determination by a district court of

(continued . . .)

doing so, petitioners all but concede that the Third District has evinced its complete understanding of the *Haines City* standard. (Initial Brief at 33 n.14). As will be shown, that concession is warranted, inasmuch as the decision of the Third District in this case is overt, manifest and explicit in applying the *Haines City* standard to a circuit court decision which radically departed from the essential requirement of first-level certiorari review by re-weighing select evidence from the administrative proceeding.

III. The circuit court impermissibly re-weighed the evidence.

The court had before it the County Commission's approval of the special exceptions, unusual uses, and non-use variances. (S.R. 1-6). Under the Miami-Dade County Code, the Commission may grant special exceptions and approve unusual uses where, in the Commission's opinion, the approvals

> would not have an unfavorable effect on the economy . . ., would not generate or result in excessive noise or traffic, cause undue or excessive burden on public facilities, including water, sewer, solid waste disposal, recreation, transportation, streets, roads, highways or other such facilities which have been constructed or which are planned and budgeted for construction, are accessible by private or public roads, streets or highways, tend to create a fire or other equally or greater dangerous hazards, or provoke excessive overcrowding or concentration of people or population, when considering the necessity for and reasonableness of such applied for exception or use in relation to the present and future development of the area concerned and the

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(… continued)

> appeal that the circuit court applied the incorrect law in passing on the question of the existence of competent substantial evidence to support the administrative tribunal's ruling, but rather the utterly-noncontroversial question of whether the circuit court improperly re-weighed the evidence. (Initial Brief at 42-44). Consequently, the resolution of the present case does not turn on how the Court decides *City of Dania* on discretionary review.

> compatibility of the applied for exception or use with such area and its development . . . .

§ 33-311(A)(3), Miami-Dade County Code.[18] The non-use variances are governed by Section 33-311(A)(4)(b) of the Miami-Dade County Code, which provision empowers the Commission to "grant a non-use variance upon a showing by the applicant that the non-use variance maintains the basic intent and purpose of the . . . land use regulations, which is to protect the general welfare of the public, particularly as it affects the stability and appearance of the community and provided that the non-use variance will be otherwise compatible with the surrounding land uses and would not be detrimental to the community." *Id.*[19]

Under established precedent that is unchallenged by petitioners in this proceeding, special exceptions under the Miami-Dade County Code are "presumptively permissible and may be denied only if the presumption of propriety is overcome." *Metropolitan Dade County v. Fuller,* 515 So. 2d 1312, 1313 n.3 (Fla. 3d DCA 1987). As the Third District recently pointed out that

> An applicant seeking special exceptions and unusual uses need only demonstrate to the decision-making body that its proposal is consistent

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[18] Petitioners mistakenly swipe at the Third District for purportedly misciting the governing code provision as Section 33-311(A)(3). (Initial Brief at 2 n.1). The above-quoted text is from Section 33-311(A)(3), the currently-applicable version of the code. The provision cited by petitioners is Section 33-311(d), the *predecessor* to Section 33-311(A)(3), which provision was *renumbered* — although not substantively modified in any respect — when Miami-Dade County established community zoning boards. The Third District was merely citing to the most recent version of the code, and petitioners neglect to advise the Court that there is absolutely no difference in the standard as between the former and current versions.

[19] The code specifically provides that "[n]o showing of unnecessary hardship to the land is required." *Id.*

> with the county's land use plan; that the uses are specifically authorized as special exceptions and unusual uses in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. If this is accomplished, then the application must be granted unless the opposition carries its burden, which is to demonstrate that the applicant's requests do not meet the standards and are in fact adverse to the public interest.

Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708, 709 (Fla. 3d DCA 2000) (citations and footnote omitted).[20]

On first-level certiorari review of a local governmental board's ruling on a requested variance, the proper standard of review "is whether the decision is supported by competent substantial evidence." *Smith v. City of West Palm Beach,* 2000 WL 294874 (Fla. 4th DCA Mar. 22, 2000). Thus, the task of a first-level reviewing court is "to insure that the authority's decision is based on evidence a reasonable mind would accept to support a conclusion," and if such evidence was presented then the authority's determination *must stand*. *Id.* (citation omitted; emphasis supplied).

The circuit court panel majority in this case, however, ranged far beyond these limited constraints. It looked *only* to the testimony of petitioners' land planner on the critical question of compatibility with the neighborhood, and it completely ignored the uniform findings and recommendations of the county's expert staff, as well as the expert testimony presented by UBC's architect, traffic engineer and real estate appraiser. (S.R. 115-16). It is certainly true, as the circuit court noted, that petitioners had presented a witness who opined that the proposed facility was not compatible with this estate-density residential neighborhood and was not in scale

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[20] The Third District had occasion to note in *Jesus Fellowship* that, in Miami-Dade County, a church is a "permitted use[] in residential areas under the county's land use plan." *Id.* at 709 n.1 (citation omitted).

with the community. (S.R. 115). What the circuit court utterly failed to note, however, was that the County's zoning director had expressly determined that UBC's new church *will be compatible* with the neighborhood, that the planning director had also recommended approval, and that every one of the County agencies charged with reviewing the project had similarly expressed no objection to approval. *Id.* at 28, 33-34, 37-38, 40-44.

Being similarly selective, the circuit court panel majority treated the testimony of a neighboring clergyman as competent substantial evidence that a grant of the special exception would generate excessive traffic. (S.R. 115-17). It could not help noting, though, that the expert testimony on the question of traffic impact was "markedly divergent" — a back-handed acknowledgment that competing evidence of a competent and substantial nature was presented on that very point. *Id.* at 114-15.

The record reflects some conflict in the evidence before the Commission on the critical issues of compatibility and traffic impact, as well as other issues on which the parties (to use the circuit court's words) presented "markedly divergent" positions. It was not the circuit court's job — and even the petitioners do not say otherwise in any convincing way — to choose sides in the dispute. Its role was simply to determine whether the decision reached by the Commission found support in competent substantial evidence.[21] This the circuit court failed to do.

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[21] Indeed, petitioners make the same sort of acknowledgment, depicting the circuit court's decision as a "determination that the record … contained *insufficient* competent substantial evidence" to support the Commission's decision. (Initial Brief at 33; emphasis supplied). The question for the circuit court, of course, was simply whether *any* competent substantial evidence could be found in the record to support the Commission's ruling.

IV. The Third District correctly applied the standard of *Haines City* in holding that the circuit court improperly re-weighed the evidence.

In evaluating the action taken by the circuit court panel majority, the Third District began with an evaluation of the basis for the Commission's ruling: the expert recommendations; the findings of the County's professional staff; and the expert testimony in support of the project. *Dusseau,* 725 So. 2d at 1170-71. The court then noted that the circuit court majority acknowledged that it was obliged to uphold the Commission's decision if there was competent substantial evidence presented to the Commission to support its ruling, but that the court's majority "primarily focused on the testimony presented by the neighbors' attorney and their expert witnesses." 725 So. 2d at 1171. It then held that

> the circuit court departed from the essential requirements of law when it *reweighed* evidence and *completely ignored* evidence that supported the Commission's ruling. Further, a review of the evidence clearly demonstrates that the Commission's ruling *was* supported by competent substantial evidence — the recommendations of the Zoning and Planning Departments, and the testimony of the project architect, an independent real estate appraiser, and a traffic engineer.

Id. (citation omitted; emphasis supplied).

The court's decision comports in every way with *Haines City*, and with its progeny. Far from itself re-weighing the evidence or simply disagreeing with the circuit court's evaluation of the evidence as the Fourth District did in *EDC*, the Third District quashed the circuit court's decision because *the circuit court* re-weighed the evidence — a clear departure from the essential requirements of law. Petitioners suggest that the Third District remarked on the existence of competent substantial evidence to support the circuit court's decision (Initial Brief at 27-29, referencing *Dusseau*, 725 So. 2d at 1171), but the court was *actually* noting the unremarkable fact that expert opinions constitute competent substantial evidence as

a matter of law. *E.g., Jesus Fellowship, Inc. v. Miami-Dade County,* 752 So. 2d at 708-10; *Metropolitan Dade County v. Fuller,* 515 So. 2d at 1314; *Hillsborough County Board of County Commissioners v. Longo,* 505 So. 2d 470, 471 (Fla. 2d DCA 1987).[22]

In the final analysis, petitioners retreat to an argument that the Third District's decision is erroneous under *Haines City* and *EDC* because "the decision fails to characterize [the] error as causing any injury whatsoever, let alone an injury or error serious enough to result in a miscarriage of justice." (Initial Brief at 30). *Haines City* and *EDC,* however, did not impose a formulaic ritual for second-level certiorari beyond a recitation of evidence considered by the administrative body and by the circuit court, juxtaposed against the conclusion that the circuit court "departed from the essential requirements of law when it reweighed evidence and completely ignored evidence that supported the Commission's ruling." 725 So. 2d at 1171. Further elaboration as to what injury resulted from the circuit court's error would be superfluous. When an appellate tribunal disregards its appellate responsibility to deprive a zoning applicant of rightful land use benefits, the miscarriage of justice is evident.

The district court's decision in this case ploughs no new ground on the standard of review, and it does not deviate from ground already deeply furrowed. The Third District has regularly wielded its second-level certiorari jurisdiction to quash circuit court rulings which have erroneously overturned denials by an administrative tribunal of zoning applications where the circuit court has improperly

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[22] If, as petitioners seem to suggest, a district court is somehow *forbidden* to determine whether a given item or items of evidence are competent and substantial, a circuit court's blatant re-weighing of the evidence would *never* be reviewable on second-level certiorari.

re-weighed the evidence, or failed to give controlling effect to competent substantial evidence that supports the administrative tribunal's ruling. *E.g., Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.,* 750 So. 2d 738, 739 (Fla. 3d DCA 2000) (quashing circuit court's order overturning County's denial of variances for a church because County Commission resolved dispute over compatibility in favor of objecting neighbors); *Miami-Dade County v. Walberg,* 739 So. 2d 115, 117-18 (Fla. 3d DCA 1999) (quashing circuit court decision overturning denial of rezoning where administrative tribunal heard evidence that rezoning would be incompatible with the surrounding neighborhood), *review dismissed,* Case No. SC96739 (Fla. 2000); *Miami-Dade County v. Hernandez,* 738 So. 2d 407 (Fla. 3d DCA 1999) (quashing circuit court decision where circuit court "impermissibly reweighed the evidence and substituted its own judgment" for that of administrative tribunal); *Metropolitan Dade County v. Section 11 Property Corp.,* 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) (circuit court erroneously overturned denial of special exception where commission heard "fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood"), *review denied,* 735 So. 2d 1287 (Fla. 1999); *Metropolitan Dade County v. Sportacres Development Group, Inc.,* 698 So. 2d 281, 282 (Fla. 3d DCA 1997) (quashing circuit court decision overturning denial of variances where commission "had access to a record which contained maps, reports and other information which, in conjunction with testimony of the neighbors, if believed by the Commission, constituted competent substantial evidence").[23] The court also has not hesitated to use its certiorari power where a circuit court erroneously has *upheld* a denial of a zoning application where there is no competent substantial evidence to support the

[23] Petitioners inexplicably ignore these decisions in their brief.

denial. *E.g., Jesus Fellowship,* 752 So. 2d at 709-10; *Debes v. City of Key West,* 690 So. 2d 700, 702-03 (Fla. 3d DCA 1997).[24]

V. Petitioners' arguments do not support its claim that the Third District exceeded the scope of its second-level certiorari responsibilities.

The Third District held that the circuit court "departed from the essential requirements of law when it reweighed evidence and completely ignored evidence that supported the Commission's ruling." 725 So. 2d at 1171. Petitioners offer very little if anything, however, in defense of the circuit court's re-weighing of the evidence. (Initial Brief at 25-48). A review of their arguments displays an utter lack of merit in their position.

Petitioners' primary challenge to the district court's decision is an argument that the County's staff based its recommendation "upon a 'meaningless' condition" — the requirement that UBC may not simultaneously use its fellowship hall and sanctuary for worship services — and that the circuit court was "*compelled*" to disregard all staff findings and recommendations in favor of approval because the recommended condition "was meaningless because it was unenforceable." (S.R. 116; Initial Brief at 42-43). This purportedly-meaningless condition was imposed for the obvious purposes of limiting traffic impacts on the neighborhood. *Id.* at 37.

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[24] Some of the court's decisions expressly reiterate the "miscarriage of justice" of which this Court spoke in *Haines City, e.g., Walberg,* 739 So. 2d at 116; *Debes,* 690 So. 2d at 703, while others do not, *e.g., Jesus Fellowship,* 752 So. 2d at 710-11; *New Life Apostolic Church,* 750 So. 2d at 739; *Hernandez,* 738 So. 2d at 407; *Section 11,* 719 So. 2d at 1205; *Sportacres Development Group,* 698 So. 2d at 282. Each and every decision of the court, however, evinces either directly or through precedent citation the court's complete understanding of its role on second-level certiorari.

Context is critical. The Planning Director recommended approval of the project, subject to a total of 10 conditions, including a prohibition of simultaneous use of the sanctuary and fellowship hall for worship services. (S.R. 37). Compliance with this and the remaining nine conditions was sufficient, in the Planning Director's view, to "negate any adverse impact on adjoining residential properties." *Id.* at 38. *No evidence whatsoever was presented to the Commission to suggest or imply otherwise.* That is, no witness testified to the purported "unenforceability" of the condition, much less that UBC would be likely to violate the condition. To the contrary, the evidence before the Commission shows that UBC has existed in Miami-Dade County *for almost 75 years* (R. 283-84), and no evidence of *any* violation by UBC of *any* land use regulation, administrative tribunal's order, or any other County Code requirement was presented to the Commission.

The subject of enforceability arose after the evidence had closed, when a Commissioner asked the Planning Director to explain the staff recommendations. (R. 487-88). The Director repeated his recommendation that the conditions recommended by staff would cause the facility to be "compatible to the rest of the neighborhood." *Id.* at 494-95. On further questioning, the Director explained that a violation of the condition prohibiting simultaneous use of the fellowship hall and sanctuary would be punishable by a fine of $500 per day and that the County, in the case of repeated violations, could invoke the "ultimate punishment" of revoking the approval. *Id.* at 497.[25] The Commission's resolution, after imposing the conditions recommended by its staff which included a prohibition on simultaneous use of the fellowship hall and sanctuary for worship services, expressly finds that the approval

[25] The County Attorney advised the Commission that this option would be available in the case of repeated violations. *Id.* at 498.

will "be compatible with the area and its development." (S.R. 1-6). In other words, *the Commission* determined that the condition now challenged by petitioners was a *meaningful* means of maintaining compatibility.

In the end, petitioners offer the Court a fallback argument which goes something like this: (1) the Commission accepted the Planning Director's recommendation to restrict UBC from simultaneously conducting worship services in its fellowship hall and sanctuary when the final phase of construction is completed and all facilities have been built; (2) the circuit court determined that the condition is "unenforceable"; and (3) the Third District was required to uphold the circuit court's action under the rubric of "right for any reason." (Initial Brief at 34-42). The fact is, however, that the circuit court's selective use of evidence and refusal to approve action taken by the Commission based on competent record evidence presented by the County's staff and UBC was not "right" for a court prohibited from re-weighing evidence. The Third District did not need to address the "unenforceability" contention specifically or expressly, since the court made an ultimate determination that the circuit court had departed from the essential requirements of law when it "completely ignored evidence that supported the Commission's ruling." 725 So. 2d at 1171. Its decision certainly embraced the circuit court's extraordinary misstep on this point as well.

The circuit court's finding on the condition of non-simultaneous use, of course, was not exempt from the *Haines City* review standard in the circuit court, *i.e.,* that the circuit court was no more empowered to re-weigh the Commission's finding on this issue than it would be on any other finding by an administrative tribunal. Petitioners are asking this Court to indulge in virtually-conclusive presumptions that UBC *will violate* the condition and that the County will *not* enforce the condition, and, based on having so presumed, to rule that the Third District was duty-bound to uphold the circuit court's ruling on that ground. Merely

to state the argument for what it is shows its absurdity.[26] As the Vermont Supreme Court recently held in a case where, as here, residents challenged the enforceability of conditional use permit restrictions:

> [T]he conditions are enforceable in the same way that all other permit conditions dealing with water and private roads are enforceable. State agents are empowered to monitor compliance with regulations and

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[26] The sole authority cited by petitioners is a New York trial judge's 1960 ruling in *Pearson v. Shoemaker,* 25 Misc. 2d 591, 202 N.Y.S.2d 779 (1960), a case in which the court applied a local ordinance that required specific findings and conclusions of law to strike down a special permit for a community recreation facility. 202 N.Y.S.2d at 780-82. The court observed that it could not rule upon the validity of the conditions imposed by the zoning authority because "one cannot say with certainty what was intended with respect to [certain] conditions . . . and certain of the same may be beyond the powers of the Board." *Id.* at 781. The court noted that "conditions which are ambiguous and vague are of no value for the protection of the comfort, health and welfare of the community and the rights of nearby residents." *Id.* Precisely how the holding in *Pearson* or the cited proposition supports the presumption urged upon the Court by petitioners is not explained in their brief. The New York courts recognize that "[c]onditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community." *St. Onge v. Donovan,* 71 N.Y.2d 507, 522 N.E.2d 1019, 1023 (1988) (citations omitted). To this end, conditions that "restrict[] the use of the property" are also permissible. *City of New York v. Delafield 246 Corp.,* 236 A.D.2d 11, 662 N.Y.S.2d 286, 293-94 (1997), *leave to appeal denied,* 91 N.Y.2d 811, 694 N.E.2d 884 (1998). Thus, conditions that "represent a reasonable attempt to alleviate" neighborhood concerns on such matters as "noise and traffic" will be upheld if the zoning authority's action "has a rational basis supported by substantial evidence." *Twin Town Little League, Inc. v. Town of Poestenkill,* 249 A.D.2d 811, 671 N.Y.S.2d 831, 833 (citations omitted), *leave to appeal denied,* 92 N.Y.2d 805, 700 N.E.2d 320 (1998). Conspicuously absent from this line of precedent is any support for petitioners' conclusive presumption of unenforceability; to the contrary, the cases support only the result reached by the Third District.

> permits. Any violation of the requirements set forth in the conditional use permit would constitute a violation of a zoning ordinance. The zoning administrator is authorized to enforce zoning by-laws by appropriate actions . . . .

In re Sardi, --- A.2d ---, 2000 WL 335908 (Vt. Mar. 17, 2000) (citations omitted); *accord, e.g., In re Robinson,* 156 Vt. 199, 591 A.2d 61, 62-63 (1991) (conditions are enforceable by zoning administrator through imposition of fines for violations; that "permit conditions cannot insure against unreasonable use" of property does not invalidate conditions).

Petitioner's suggestion that the condition will "be impossible to enforce . . . without continuing surveillance leading to an impermissible [governmental] entanglement" with religion, in apparent violation of the First Amendment (Initial Brief at 39-40), is specious. While government may not enact laws that are intended to restrict or infringe upon religious practices, *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), it is hardly a violation of the First Amendment to impose reasonable and neutral zoning restrictions on religious institutions, *e.g., Mount Elliott Cemetery Association v. City of Troy,* 171 F.3d 398, 405 (6th Cir. 1999) (application of neutral laws governing cemeteries to Catholic cemetery did not violate Free Exercise Clause); *First Assembly of God of Naples, Fla. v. Collier Co., Fla.,* 20 F.3d 419, 422-24 (11th Cir.) (imposition of zoning laws did not violate Free Exercise Clause), *modified on rehearing,* 27 F.3d 526 (11th Cir. 1994), *cert. denied,* 513 U.S. 1080 (1995); *Daytona Rescue Mission, Inc. v. City of Daytona Beach,* 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (municipal regulations properly applied to homeless shelter and food bank located in church). *See* Alan Weinstein, *Conflicts in Regulating Religious Institutions,* LAND USE LAW & ZONING DIGEST, Mar. 2000, at 3-9.

Carried to its logical extent, petitioners' argument would forbid municipal zoning boards from imposing *any* conditions on a special exception or unusual use permit — because *any* objecting party could *always* argue that the mere *possibility* of a violation by the permittee renders the condition unenforceable. No authority is cited for such an extraordinary proposition, and none exists. The circuit court performed essentially a *de novo* evaluation and determined that the condition was unenforceable. For its part, the Third District performed no more than its required role in refusing to uphold the circuit court's manifestly-erroneously decision.

Another argument presented by petitioners addresses the issue of "overcrowding" (meaning traffic). The argument on that point is deeply flawed. The circuit court itself observed that the expert testimony "regarding the traffic situation was *markedly divergent*" (S.R. 114) (emphasis supplied), yet petitioners do not explain how competent evidence from an expert traffic engineer can be ignored and virtually-controlling *weight* be given to the lay testimony of a neighboring clergyman. (*Id.* at 117; Initial Brief at 44).[27] Petitioners also simply ignore the findings of the County's Public Works Department that the application *satisfies the County's traffic concurrency criteria*, and that its approval *will not* affect the requisite level of service on adjacent roadways. (S.R. 43-44). The obvious implication of the circuit court's commentary, and the record itself, compelled the Third District to hold accurately that the circuit court had re-weighed the evidence on this point of dispute in the proceeding. 725 So. 2d at 1171.

The next issue addresses the circuit court's ruling on "compatibility," which again was made on the basis of a mere snippet from the record — the testimony of the petitioners' land planner. (S.R. 115). The circuit court neither addressed nor

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[27] On this point also, petitioners ask this Court itself to weigh the conflicting evidence. *Id.*

took into account as competent evidence the express findings of compatibility by the County's staff.[28] In addressing this issue, petitioners mix and match the issue of compatibility with the distinctly separate issue of congestion. Even the circuit court made no attempt to draw a link between the Planning Director's recommended condition for non-simultaneous uses, crafted to address the issue of traffic, and the completely disparate issue of compatibility with the Master Plan and adjoining land uses.

Next, petitioners attempt to disparage the Third District for noting that UBC presented the testimony of a real estate appraiser regarding the value of homes in the neighborhood of the proposed facility. (Initial Brief at 44-45). Petitioners conveniently ignore their own efforts before the ZAB, through the testimony of

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[28] The project's architect, of course, *also* testified to the compatibility of the proposed facility with the neighborhood. (R. 306-15). The circuit court noted that the architect had testified, but gave absolutely *no* weight to his testimony on the subject of compatibility. (S.R. 114). Before this Court, the petitioners attempt to dismiss the architect's testimony because he "did not testify concerning the *overcrowding* issue." (Initial Brief at 43) (emphasis supplied). This is an accurate statement, but also entirely misleading: the architect's testimony addressed the issue of *compatibility.* Petitioners, showing only their inability to address the actual issues in this case, also asked this Court to step into the shoes of the County Commission, offering a number of arguments which they believe go to the weight of the architect's testimony, *e.g.,* his alleged unfamiliarity with zoning in the neighborhood. (Initial Brief at 43). The *Haines City* standard, of course, prevents *any* reviewing court — much less this Court on discretionary review — from re-weighing the evidence. Indeed, petitioners *themselves* perhaps best make the point when they assert that "[t]he circuit court committed no error when it determined [the architect's] testimony to be *insufficient* competent and substantial evidence" (Initial Brief at 43; emphasis supplied) — because the circuit court was duty-bound to end its inquiry upon finding that, as petitioners apparently concede, the architect's testimony was competent and substantial.

petitioner Dusseau, to establish that approval of the proposed facility would have a negative impact on the value of residences in the neighborhood. (R. 218-19). Similar testimony was advanced by petitioners before the Commission both by Mr. Dusseau and by another objecting resident. (R. 427-28, 435-39).

UBC can hardly be faulted for addressing the issue with expert testimony in the face of petitioners' presentations, and particularly because Section 33-311(A)(3) of the Miami-Dade County Code required the Commission to consider the "future development of the area concerned and the compatibility of the applied for exception or use with such area and its development." Similarly, inasmuch as petitioners themselves injected the issue of compatibility, future development and values into the administrative proceedings, they cannot legitimately fault the Third District for recognizing an expert's opinion on the valuation question as competent substantial evidence.

Petitioners charges become irresponsible when they assert that the Third District's decision placed its "seal of . . . approval" on the purported "extreme pro-religion bias" evinced by the remarks of individual County Commissioners. (Initial Brief at 45-49). The Court need only consider the Third District's other recent decisions in the *New Life Apostolic Church* and *Jesus Fellowship* cases.

In the *New Life Apostolic Church* case, the church sought variances to erect a new sanctuary and day care center on a much smaller lot than would otherwise be required. The Commission denied the application and the circuit court reversed the denial. Relying on precedent cited in the text, the Third District reversed the circuit court's decision and held that the circuit court had impermissibly quashed the Commission's ruling despite the existence of competent substantial evidence to support that ruling.

In *Jesus Fellowship,* the applicant church sought to expand its facilities and to erect both a private school and a day care center and the Commission denied the

majority of the requests. The circuit court upheld the Commission's ruling, but the Third District found that the circuit court had erroneously relied on evidence that was not competent or substantial as a matter of law and had disregarded the professional staff's findings in support of the project. As it did in this case, the Third District there held that the circuit court had "failed to apply the correct law" in determining what would constitute competent substantial evidence in these cases. *Id.* at 710-11.

Petitioners' disparagement of the court for purportedly ruling in accordance with a "pro-religion bias" is totally unfounded. The Third District had a job to do in each case, based on a record developed before the Commission and an articulation for the approval or rejection of Commission action by the circuit court appellate panel. The Third District is fully aware of the constraints on its role, but it is also mindful of the necessity to apply second-level certiorari standards set by this Court in each proceeding which comes before the court for review.

Were the Court to even consider the substance of petitioners' "pro-religion" contention, it should not go unnoticed that the argument is based entirely on comments made by individual Commissioners at the hearing. (Initial Brief at 46-47). Petitioners do not and cannot address the rudimentary proposition that a local governmental board speaks only as an official body, and "the law does not take cognizance of individual expressions of a single member thereof." *Penn v. Pensacola-Escambia Governmental Center Authority,* 311 So. 2d 97, 101 (Fla. 1975) (citation omitted). A municipal corporation speaks only through its records, "not through opinions of individual officers." *Beck v. Littlefield,* 68 So. 2d 889, 892 (Fla. 1953) (citations omitted). In zoning cases, it is only "the *collective ruling* of the Board as expressed in the County Commission Resolution, which is at issue." *Blumenthal,* 675 So. 2d at 604 (citations omitted; emphasis supplied).

CONCLUSION

Petitioners have had three bites at the apple in attempting to bar the construction of a Master Plan-compatible religious facility in an area of Miami-Dade County suited precisely to that purpose. Their claim of decisional conflict for a fourth review here is wanting in every respect — jurisdictionally and substantively. Accordingly, UBC respectfully requests that the Court uphold the decision of the Third District in all respects, either by affirmance or by a determination that the tentative grant of review was improvident.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for University Baptist Church, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this brief on the merits was mailed on May ___, 2000 to:

Jeffrey S. Bass, Esq.
Shubin & Bass, P.A.
46 S.W. 1st Street, 3rd Floor
Miami, Florida 33130

Augusto Maxwell, Esq.
Assistant County Attorney
Miami-Dade County Attorney's Office
111 N.W. 1st Street, 26th Floor
Miami, Florida 33128

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