IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95217

CHARLES DUSSEAU, Et Al.,

Petitioners,

v.

METROPOLITAN DADE COUNTY, BOARD OF COUNTY COMMISSIONERS, Et Al.,

Respondents.

PETITIONERS' INITIAL BRIEF

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PREFACE

In this brief, Petitioners, Charles Dusseau, Joseph M. Burke,

June Burke, Christine Harris, and Albert Armada shall be referred to collectively as the “neighbors”. Respondent Metropolitan Miami-Dade County shall be referred to as the “County”. Respondent University Baptist Church shall be referred to as the zoning Applicant.

The record on appeal as prepared and paginated by the Clerk of the Third District Court of Appeal shall be cited as [R. Vol. p.]. For the Court’s convenience, an indexed appendix is attached to this brief. It is cited as [App.].

CERTIFICATION OF TYPE SIZE AND STYLE

I hereby certify that the typeface used in this brief is no smaller than 12 point nonproportionately spaced Courier New.

BY: _____
Jeffrey S. Bass, Esq.

STATEMENT OF THE CASE AND FACTS

The relevant background and procedural facts are set forth below at great length in order to place the circuit court and district court opinions within the full context of the colorful record of this dispute.

A. THE ZONING APPLICATION.

This case derives from a zoning application for a special exception filed by University Baptist Church ("Applicant") to build a 185,000 square foot multi-purpose facility in unincorporated Miami-Dade County in a residential neighborhood on land zoned and planned for estate homes ("Application"). The subject zoning application was presented in two (2) phases totaling one hundred and eighty-five thousand square feet (185,000). Phase I consisted of a two-story, sixty-five thousand square foot (65,000 sq. ft.) multi-purpose building with a pre-school, storage building, optional chapel and maintenance building.[R. Vol. IV. pp. 620-623].

The multi-purpose facility, as shown on the plans submitted, also contained a basketball court, ticket sales booth, video reproduction booth, lighting and sound controls, an informational booth, and a 24-hour prayer center. [R. Vol. I. pp. 30-38]. Despite the fact that the Application sought to establish a religious facility, Phase I of the development did not include a sanctuary. In this regard, the Applicant's long range planning coordinator explained as follows:

> During phase one we chose not to build the worship center, the sanctuary, because that is a single purpose room and we could only use it for one purpose, basically worship.

[R. Vol. III. p. 327].

Phase II was scheduled to include an additional sixty three thousand square foot (63,000 sq. ft.) worship center, an adult/youth classroom building, a 5,400 square foot chapel, and a 3,000 square foot maintenance building. [R. Vol. I. p. 39]. In order to accommodate all of the people that would inevitably be drawn to the facility when completed, the proposed development provided in excess of 1000 off-street parking spaces.[R. Vol. I. 39].

B. THE STANDARD THAT GOVERNS SPECIAL EXCEPTIONS UNDER THE MIAMI-DADE COUNTY ZONING CODE.

Neither the Miami-Dade County Zoning Appeals Board ("ZAB") nor the Miami-Dade County Commission ("Commission") may grant a special exception unless a zoning applicant satisfies §33-311(d) of the Miami-Dade County Zoning Code ("Zoning Code").[App. 0015].[1] Thus, an applicant for a special exception must demonstrate by competent and substantial evidence that the requested special exception:

> would not generate excessive noise or traffic, cause undue or excessive burden on public facilities, including...streets, roads, or highways..., **or provoke excessive crowding or concentration of people or population,** when considering the necessity for and reasonableness of such applied for exception or use in relation to

[1] Inexplicably, the district court decision references § 33 – 311(A)(3). By comparison, the circuit court correctly predicated its decision on § 33 – 311(d), the Zoning Code section that governed the proceedings below. [App. 003-10].

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

[App. 0015].[Emphasis Supplied].

[2]

C. THE NEIGHBORHOOD.

The Application targeted a neighborhood of estate density single family homes along Sunset Drive (SW 72nd Street) near SW 72nd Court. According to the County's analysis, the surrounding properties are uniformly zoned for estate density residential uses: the land to the north is zoned EU-M (Modified Estate – one home per 15,000 sq. ft.) and is improved with a single family residence; a natural forest is located on the south side of the subject property on land zoned EU-1 (Estate Density – one home per acre); a single family residence is located to the east on land zoned EU-1; and a church and single family residence is located to the west on land similarly zoned. [R. Vol. IV. p. 616-619].

D. STAFF RECOMMENDATIONS.

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[2] It is imperative to note that the standard is written in the negative and, therefore, the burden of proof is on the Applicant to demonstrate that the Application would not provoke an overcrowding of people. *See, Board of County Commissioners v. First Free Will Baptist Church*, 374 So.2d 1055, 1056 (Fla. 3d DCA 1979). As such, unlike other municipal jurisdictions, a special exception is not presumptively permissible under the plain language of § 33-311(d). *Compare*, *Irvine v. Duval County Planning Commission*, 495 So.2d 167 (Fla. 1986)(special exception presumptively permissible under language of the ordinance).

The Application was reviewed by staff from the Miami-Dade County Departments of Planning and Zoning. Upon their initial review, both the Planning Department and the Zoning Department recommended denial of the project, citing its inappropriate size in relation to the neighborhood. The Planning Director set forth his initial written recommendation as follows:

> The Planning Division is recommending, at this time, approval of only phase one of this application. That would permit a total seating capacity of 1,500. The main sanctuary proposed in conjunction with this hearing as indicated as a part of phase 2 is far too ambitious for the site. Phase 2 will consist of a two-story auditorium consisting of 2,190 seats. Phase II further consists of numerous administrative and support offices. Approval of Phase I will permit the applicant reasonable use of the property without overwhelming the neighborhood. As currently proposed, the 1,500 seat atrium and multi-purpose building coupled with the proposed 2,190 seat auditorium will create an adverse impact on the neighboring properties with such as nuisances as parking, dust, noise, glare, and the like, especially considering the proposed scale and scope of the build out site plan.

[R. Vol. IV. pp. 618-620].

The Zoning Director similarly recommended denial of the application in his initial written recommendation to the ZAB as follows:

> [S]taff objects to this application and feels that the site plan, as submitted, is incompatible with the neighborhood…Staff feels that the size, scale, and location of the buildings on the site is not acceptable and would have a detrimental impact on the surrounding residents…

[R. Vol. IV. p. 621

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E. THE HEARING BEFORE THE ZAB.

The Application was first heard by the ZAB. There, the Applicant attempted to satisfy the burden imposed by the Zoning Code and, moreover, to demonstrate that a church use is compatible with the neighborhood. The neighbors did not challenge the use of the property for a church. They did, however, challenge the sufficiency of the evidence in support of the Application. In this regard, the neighbors contended that the Applicant failed to satisfy the standards of § 33-311(d). Specifically, they argued that the magnitude of this proposed one hundred and eighty five thousand square foot (185,000 sq. ft.) multi-purpose facility was out of scale and not compatible with the pattern of development in their estate-density residential neighborhood. [R. Vol. II. pp. 192-207].

The architect for the project conceded that the size of the facility was unprecedented in his experience. Specifically, he testified as follows on cross-examination:

Mr. Bass:	Could you identify for me how many churches you have built that are 185,000 square feet?
Mr. Henser:	Well, first of all, we don't build churches, we design churches. We're an architecture firm.
Mr. Bass:	I stand corrected. How many churches have you designed that are 185,000 square feet?
Mr. Henser:	We have probably only received six church submissions in the history of our practice. If you were to ask that of someone---
Mr. Bass:	It's a simple question.
Mr. Henser:	I just did.

Mr. Bass: So the answer is zero?

Mr. Henser: Right.

[R. Vol. II. p. 121].

The Applicant's traffic engineer testified that he did not perform an analysis based on a similarly sized church in a similar neighborhood. The explanation was simple – he could not identify a church of comparable size in a comparable estate neighborhood. Such large facilities only existed in "downtown" settings.

[3] Specifically, the Applicant's traffic expert testified as follows:

Mr. Bass:	Did you examine any other church of the magnitude of this church in performing your calculations?
Mr. Finade:	Yes, we did. We consulted with First Baptist Church of Fort Lauderdale, which is of similar, perhaps even larger in size. They are a downtown church so the parking arrangement is different, but we consulted with them as far as vehicle occupancy and the way the church services are arranged and how the traffic moves in and out.
Mr. Bass:	When you say "downtown" and you are an expert so I just need some clarification, when you say a "downtown church" does that mean a church in an urban environment?
Mr. Finade:	That particular church is in downtown Fort Lauderdale, but it was of a similar size, so I contacted them to find out about their operation.
Mr. Bass:	I don't get out much so you're going to have to help me. Is downtown Fort Lauderdale a residential area or is it a business area?
Mr. Finade:	It is a business area.

[R. Vol. II. pp. 138-139].

[3] The Zoning Code clearly requires that facilities of this size be located in commercial or industrial areas. *See*, 33-17 "Buildings For Public Assemblage". [R. Vol. IV. p. 625]. None of the County's recommendations references this section.

The Applicant also presented the testimony of a real estate appraiser who could not identify a single church in a similar neighborhood upon which to base his analysis that contained either one hundred and eighty-five thousand square feet (185,000 sq. ft.) or four thousand seats (4,000). [R. Vol. II. pp. 150-155]. The Applicant further presented the testimony of a pastor and several members who testified concerning the good work of the University Baptist Church. [R. Vol. II. pp. 171-183]. Not persuaded by this testimony, and recognizing that the Applicant did not satisfy § 33-311(d), the ZAB voted to deny the Application.[R. Vol. II. p. 269].

F. THE APPEAL TO THE COUNTY COMMISSION.

The Applicant filed a Petition Of Appeal from the decision of the ZAB to the Commission. The sole basis of the appeal was stated as follows:

> The Zoning Appeals Board decision was not supported by substantial competent evidence.

[App. 0016]. Even though the appellate issue before the Commission did not require the presentation of any additional evidence, the Applicant chose to present testimony in support of its appellate position.

Much of the testimony before the County Commission mirrored the testimony before the ZAB with the exception that the Applicant was then represented by two (2) sets of lawyers after the defeat at the ZAB. Further, a rabbi was added to the roster, as were several pastors from the leading religious congregations throughout Miami-Dade County, none of whom lived near the neighborhood at issue. Changes in testimony or additional witnesses are highlighted below.

1. The Planning Department's Changed Recommendation Was Predicated Upon A Condition That The Circuit Court Determined To Be "Meaningless".

Notwithstanding the fact that the size of the facility did not change between the ZAB hearing and the hearing before the County Commission, and, despite the fact that the number of parking spaces provided did not decrease, the Planning Department nevertheless changed its written recommendation to approval predicated upon the following condition ("Subject Condition"):

> *Staff is conditioning this request to prohibit the simultaneous use of the sanctuary and fellowship hall during worship services.*

[Vol. I. p. 65]. [Emphasis supplied]. As is self-evident, the Planning Department's conditional recommendation for approval does not prohibit the simultaneous use of the sanctuary and fellowship hall. Quite the contrary, it only prevents their simultaneous use for worship services. Thus, the Subject Condition permits the repeated and simultaneous use of the sanctuary and fellowship hall for all sorts of activities, *provided that they are not both used for worship services at the same time.* [R. Vol. III. pp. 495-97, 512]. The Zoning Department recommended approval. [R. Vol. I. p. 61].

2. The Applicant's Appellate Presentation.

One of the attorneys for the Applicant framed the appellate issue before the Commission as follows:

Mr. Rasco: If you looked around at all of the problems we have, read the headlines in our newspapers, our children are being killed by family and by other children, husbands are beating their wives and abusing children, once again, we have racial tension in this community, and University Baptist is part of the solution. They have been doing something about it for seven years and they're going to continue doing something about it *unless we let a very small but very loud minorities confuse the issues.*[4]

They say the problem is that it is too big, but they're not opposed to a smaller church. The real issue for you to decide is, do you allow this church to continue to thrive for the needs of our community with the resources it now requires or do you choke it and run the risk that it would stagnate and lose its effectiveness. Let me put it another way. Should the objectors and their attorneys dictate the size of this church? I respectfully submit to you that should not be the case. [R. Vol. III. p. 235]. [Emphasis Supplied].

The Applicant also offered testimony from religious and civic leaders of the community.

The flavor and spirit of the Applicant's presentation is revealed by the following excerpts:

Pastor White: [O]ur members reside in 68 of the 69 zip codes of our county. We come from over 40 different nationalities. We speak 17 different languages. We're young and old, Black, Hispanic, Anglo, Asian, Native American. We're from every economic and educational background. In short, we are simply a microcosm of Dade County...Our basic commitment is to help people build lives for a better tomorrow, one life at a time...We're a happy church. We're a healthy church. We're a place where people are willing to come and say we like it, we want it. [R. Vol. III. pp. 286-291].

Dr. Richardson: I am the senior pastor of Sweet Home Missionary Baptist Church located in West Perrine...We need houses of worship, not just Christian, not just Islam people, not just Jewish, but houses of worship where people can learn and have their moral faith strengthened. [R. Vol. III. pp. 292-293].

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[4] *This warm reference is clearly directed to the Petitioners who happen to own homes and live in the neighborhood.*

Mr. Fernandez: My name is Jose Fernandez, religious coordinator for Metro-Dade Department of Corrections...We live in a time where there is drugs, children killing children, parents killing children. It is a great blessing that a church like this is in a neighborhood that can serve and not serve that neighborhood but all of Dade County…I besiege you as a County employee…support this church. [R. Vol. III. pp. 301-304].

Rabbi Schiff: [M]y name is Rabbi Solomon Schiff...I reside at 2443 Meridian Avenue on Miami Beach. I'm here to urge you to allow University Baptist Church to build its church and education center on Sunset Drive. In this day and age, we see the breakdown of decent values, we see crime and drugs, and hate so rampant in our communities. A total disrespect and disregard for all moral values. This threatens the very survival of our society. [R. Vol. III. pp. 304-305].

Father Sullivan: My name is Father Sullivan, and I'm the priest at the Little Flower Church of Coral Gables. My address- I reside at 1270 Anastasia Avenue in Coral Gables... Reverend Dan Eiry was a famous man here in town, very powerful. He gave of himself extensively. He worked with me on the prevention of drug addiction programs for many years. And now we have Reverend Bill White, who is a colleague of mine, we go to the same rotary club, and I must say that I'm very impressed with him, not because he is a Rotarian, but because he has helped me tremendously in my endeavors to promote substance abuse ministry throughout South Florida....

We have a lot of people in this country who are anti-religion and anti-church, and I'm not saying that the people who are- the neighbors here are or that were inclined, but I think they have to realize that churches, big churches- especially like University Baptist Church is going to make a tremendous contribution to the community. [R. Vol. III. pp. 350-354].

Reverend

Coach: My name is Reverend Joe Coach. I'm a pastor of Glendale Baptist Church in South Florida... I would like to see the churches come together and we need for citizens, like the University Baptist. If you're wondering why I'm here, representing them is, because I'm a one-man church. They are all of my brothers and we need each other badly in this fight we have today. The crime has taken over because we're so divided. Once they see us come together like this, they're going to have to think. And I think it's time for the government to back up the churches and help them out to do what God says do... [W]e are the church, God made one church, and we come before you today saying, please. Let us look at this thing and get going and let us stop crime in the street by putting a church together, and we're going to stop all of the crime. We will stop more crime than all of your pistols will, because they can't take God out of your heart. [R. Vol. III. pp. 354-357].

3. The Neighbor's Presentation.

The neighbors presented the testimony of an expert land planner, Mr. Matthew Schwartz, who possessed twenty-eight (28) years experience in land planning. He testified concerning the incompatibility of the proposed facility with the pattern of development in the surrounding estate density neighborhood. His testimony is highlighted below:

Mr. Schwartz: [T]he real issue is the issue of compatibility. Is a church compatible in this neighborhood? Of course, it is. But is a religious institution that will ultimately have a 2,190-seat sanctuary, a 1,500-seat fellowship hall and over 1,000 parking spaces compatible with this low-density residential neighborhood? And the answer is no. The proposed facility represents a non-compatible intrusion into this low-density neighborhood. This neighborhood that has experienced significant growth over the last few years. [R. Vol. III. pp. 390-391].

Mr. Schwartz further testified about the specific pattern of development in the area as it relates to non-residential uses as follows:

Mr. Schwartz: Sunset Drive, if you start at US-1 moving toward 67th Avenue, is a mixture of commercial and residential, basically commercial and at 62nd Avenue you do have the concentration of the South Miami Hospital. But there is a unique break at 67th Avenue, it is residential all the way to 77th, the Palmetto but then it heads another 10 blocks over to 87th Avenue.

Within that stretch, there are only four churches located between 77th and 67th. They range in size from 750 seats to approximately 300... [R. Vol. III. pp. 391].

Mr. Schwartz next testified as to the size of the proposed church compared to the pattern of development in the area and compared to the magnitude of the proposed facility to other institutional uses throughout Dade County.[5]

Mr. Schwartz: How does [the proposed facility] compare with other facilities? I think that's very important. Churches within the immediate neighborhood range from 300 to 750 [seats]. They are in scale with the community. The other churches which we discussed this morning, St. Richards, Old Cutler Presbyterian and St. John Newman, which are in similar neighborhoods, are much smaller. They range from 800 to 1,000 seats.

> But to give you an idea of the magnitude of this with what the public facilitates are, how this ranks, Dade County Auditorium has 2,429 seats, Gusman Hall has 1,700, the proposed performing art center has 4,600 seats, of the 2,400 approximately are in the opera ballet and 2,200 in the symphony hall...And even looking at Parrot Jungle when it's going to be relocated to Watson Island, we're talking about the maximum capacity of seating in three different facilities of 3,000 seats. So the scale of this is out of whack with the immediate neighborhood.[6] [R. Vol. III. p. 393].

The neighbors also presented the testimony of Miles Moss, a traffic expert and engineer. His testimony regarding the size of the proposed facility in relation to other comparable uses is highlighted below:

> Mr. Moss: We've looked at other facilities that would be generating something in the order of 1,000 vehicles exiting.

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[5] Mr. Schwartz generated and presented graphic exhibits to illustrate his conclusions. [R. Vol. IV. pp. 623-624].

[6] To put the size of the proposed church within a global context, the Great Hall of The People, in Tianamen Square, can only accommodate 5,000 people. *Tiananmen: Hallowed Ground in Beijing*, N.Y. TIMES, June 27, 1998, at A6.

> Just to have a better understanding of what the conclusions that we reach and if they are in alignment with what you see at other regional shopping centers, major shopping centers, major shopping centers but they don't generate 1,000 vehicles exiting one location, and the major problem that we're having here is all of the traffic is pouring onto Sunset Drive and not pouring into multiple different roadways. It's not like the Orange Bowl where you may have many different roads that have access out of the facility. It's more like the Joe Robbie Stadium situation where all of the traffic is being poured into one specific area.
>
> Facilities that might be comparable, I think we talked about before, Coconut Grove Exhibition Center, Miami Beach Convention Center, but again those types of facilities have more than one roadway that takes the traffic and disperses it. [R. Vol. III. pp. 404-405].

In addition to the testimony presented by the neighbors, certain individuals who live in the immediate vicinity of the project addressed the Commission. One such neighbor, Petitioner Charles Dusseau, spoke as follows:

Mr. Dusseau: [The] issue really is, if you look at it, there's 1,100 classroom [seats] in this total facility, 2,200 seats in the sanctuary, 1,500 in the multi-purpose facility and 1,100 parking spaces. It's like saying would you put Signature Gardens in your neighborhood? Of course, you wouldn't.
If they're going to hold religious services there, would you put it in there? I don't think so, but that's what's being asked of you. And the only difference between this and Signature Gardens is, is that Signature Gardens is less than one third of the size.

Second is this whole issue about because it's 20 acres, it doesn't seem so big. We won't notice. Well if that's the criteria, you can say the First Union Tower, The Southeast Bank Tower, which is probably on about six acres, then you can build three Southeast Bank Towers on this because it's 20 acres, and because its 20 acres we wouldn't notice. The size of the lot does not have a bearing on how big the facility is and the impact it would have on the neighborhood, because it has 1,000 cars coming out of it, and the fact that you can somehow disperse those cars on a bigger lot, does not have an impact on the kind of outcome it would have in terms of the traffic and... decline in the value of that single-family neighborhood in which we all live... The issue really is, its compatibility, which there is not here...
[R. Vol. III. pp. 417-427].

4. The Commission's Decision-Making Process.

In order to accurately preserve the spirit of the Commission's decision-making process, representative remarks from the Commissioners speaking in favor of and opposed to the Application are set forth below. Speaking in support, Commissioner James Burke addressed the Commission as follows:

Commissioner Burke: Now I'm not a great biblical scholar, but I'm doing some study of the Old Testament and one of the questions that kept coming up was how could a nation like this, so blessed by God, keep kind of coming up to having a situation where they're offending God and receive some punishment for it.

And it wasn't that they were direct attacks by pagan or by Satan worshipers, it was generally somehow it just got to be kind of just normal and it was almost intellectualized about why you could do something different than what has been asked by the entity that was really, you know, this blessing, and somehow, you know, we talk about this being a nation of – a nation – we can invoke the name of God on our coins, on everything that we do, we start out with prayers and yet we're saying somehow we treat the church like it's just – I forgot some of the analogies that were used, like its' some kind of non-spiritual entity.

Somehow, I just haven't figured out the intellectual way to say that. We're not dealing with something that's spiritual. I think it's great and wonderful, and to anybody that said, well, look, I don't want to live across from a big church, I mean there's a lot of other things we live across from that could be a lot worse, and we have them coming up here almost every time and even, you know – and this is not even the situation of other things that I support like a home for young ladies who may be pregnant and we have other kinds of things for juveniles that need correction...

Now finally let me just say, I'm told – I understand that governments are instituted by God, I mean they're God blessed, so we're not – We can't just take ourselves out of it. We shouldn't try to intellectualize that it's something different, it is not something different. [R. Vol. III. pp. 513-516].[Emphasis supplied].

Also speaking in favor of the application was Commissioner Javier Souto. Offering an explanation of his motion to approve the application, Commissioner Souto addressed the Commission as follows:

Commissioner Souto: ...[W]e have been blessed by the presence of so many distinguished individuals, learned persons, members of all different religions in front of us...

> I believe a church, betterment of having a church, absolutely in all of the facts and figures and after listening to everyone, we offset all of the other things that may have in that community as a consequence of attending the church services or kids going to the church. We talk a lot these days in this commission, in this town about building a stronger community and that is exactly what churches do...
>
> Our community is ill. Is sick, I believe, in my humble and honest opinion. I don't have to go into details... We need to do something for our community, and we need to leave aside all of the small stuff and think about not only our block or the block next door to our block, we have to look at the whole picture, we're going to succumb and this community will face horrible times, mark my words. [R. App. Vol. III. pp. 469-471].

By comparison, the comments of Commissioner Miguel Diaz De La Portilla in opposition to the application are excerpted below:

Commissioner Diaz De La Portilla:

> The problem is that, you know, there are no strict rules of evidence in this type of procedure, obviously, and you get a lot of extraneous information, probably irrelevant to the land use decision we're going to make and, you know, indeed, I think that probably about 80 percent of what we heard in favor of the applicant's application had to do with the good works that the church is engaged in and that's wonderful except that it isn't relevant to the land use decision that we need to make today.

> *...I know that there is a Federal rule of evidence... which compares the prejudicial value of testimony with the probative or relative value, and if that rule, which I understand doesn't strictly apply here, but in terms of what this decision is from a common sense approach perhaps it would. The prejudicial testimony, if you will, greatly exceeded the probative value of what was presented on the applicant's side, from a land use perspective because a lot of it had to do with things that are irrelevant to land use...*
>
> I think if we really take a look at this from a land use perspective, it's a facility. It is a structure that is roughly the size of the Dade County Auditorium. The depth of this structure into the neighborhood is very different from the depth of other churches in the same area, so it is inconsistent with the land use pattern for churches, for institutions of this type in the area.
>
> The fact that it is going to have an impact on traffic patterns in the neighborhood, and there was clear substantial competent evidence, testimony to that effect, is something from a land use perspective we also have to take a look at, there is a street closure involved.
>
> There is also the issue of precedent. If you take a look at the pattern of development here, yes, there are some churches. There is the Episcopal Church to the west of this. There are other churches along the major arterial, which is 72nd, Sunset, but again, not of this scale, not of this size, not of this depth.
>
> *And, you know, as far as the condition goes of limiting the number of people that can actually attend this structure, this facility at the one time, you can place that condition but for all facts and purposes it's an unenforceable condition. You can't enforce it*. You're not going to have someone from the County's Team Metro or Code Enforcement with a clicker. [R. Vol. III. pp. 500-503]. [Emphasis supplied].

Commissioner Ferguson also addressed her comments to the land use issue before the Commission. Her comments, spoken in opposition to the motion to approve, are excerpted below:

Commissioner
Ferguson: This is a facility in my opinion that is simply not comparable, not compatible rather for the neighborhood. It is a facility that from all that I can tell is simply too large, will generate too much traffic, and for this particular neighborhood it is just not compatible with the neighborhood. And we need to keep the focus on the facility itself.

It's so difficult when you get off into the types of activities that will take place there, or the good work that they have done. It just takes you entirely too far off of the track in terms of what we, I think, as a quasi-judicial body ought to be focusing on when we look at whether or not a facility is compatible with the neighborhood. [R. Vol. III. pp. 488-489].

A motion to grant the appeal pursuant to the Planning Director's conditional recommendation carried by a vote of 7-2. [R. Vol. III. p. 481]. The Commission rendered its Resolution based on the Subject Condition and twenty other conditions. [R. Vol. I. p. 71].[7]

5. The Judicial Review.

The neighbors sought review of the Commission's resolution through a petition for writ of certiorari filed with the appellate division of the circuit court. In their petition they demonstrated that the Applicant failed to satisfy the standards of § 33-311(d) with substantial competent evidence. In a 2-1 decision, circuit court agreed, granted certiorari, and reversed the Commission's action. [R. Vol. I. pp. 75-86].

Specifically, the circuit court determined that the Applicant failed to satisfy the standards set forth in § 33-311(d) with sufficient evidence. [App. 0010; R. Vol. I. pp. 82]. In this regard, the majority found the Subject Condition to be "meaningless". [App. 0008; R. Vol. I. p. 80]. The dissenting judge disagreed with the majority's conclusion that the Commission was "blinded" by the fact that the Applicant was a religious institution. [App. 0013; R. Vol. I. p. 85].

Neither the County nor the Applicant moved for rehearing. Instead, they both petitioned the Third District Court of Appeal for certiorari review of the circuit court's order. [R. Vol. I. pp. 1-18; Vol. IV. pp. 1-37].

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[7] The Subject Condition is incorporated into the Commission's Resolution as condition number 14. [R. Vol. I. p. 71].

[8] After oral argument, the district court granted certiorari and quashed the decision of the circuit court opinion on the basis that the Commission's decision was supported by substantial competent evidence. [App. 0001-2; R. Vol. IV. pp. 661-665]. Specifically, the Third District held as follows:

> The circuit court's majority opinion correctly states that " [i]n order to sustain the action of the Commission, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the Commission to support its ruling." [citations omitted]. However, 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.
>
> 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. *See, Metropolitan Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3d DCA 1995)(en banc). 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.

[App. 0002; R. Vol. IV. pp. 664-665]. The neighbors' timely motion for rehearing, rehearing *en banc*, and certification was denied. [R. Vol. IV. p. 714].

The neighbors filed their petition for discretionary review with this Court based on express and direct conflict with this Court's decisions in *Haines City Community Development v. Heggs*, 658 So.2d 523, 530-31 (Fla. 1995)("*Haines City*"), *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982)("*Vaillant"*), and *Educational Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So.2d 106 (Fla. 1989)("*EDC*"). The neighbors further argued that this Court's acceptance of jurisdiction in *City of Dania v. Florida Power & Light*, 718 So.2d 813 (Fla. 4th DCA 1998), *review granted*, 727 So.2d 905 (Fla. 1998), compelled the

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[8] If the proper purpose of a motion for rehearing is to identify points of law or fact overlooked or misapprehended by a reviewing court, *See*, Fla.R.App.P. 9.330, then the entirety of the respective petitions for writ of certiorari to the district court are best characterized as belated motions for rehearing because neither petition alleged that the circuit court order caused any injury whatsoever or resulted in a miscarriage of justice. [R. Vol. I. pp. 1-18; Vol. IV. pp. 1-37]. To state the obvious, a petition for district court certiorari review should not serve as a substitute for a motion for rehearing.

acceptance of jurisdiction herein. After receiving briefs from the Respondents in opposition to jurisdiction, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal must be reversed because it applies and announces a review standard fundamentally at odds with this Court's formulation of the appropriate limited scope of district court certiorari review. Without finding any error, harm, or injury resulting in a miscarriage of justice, the district court nevertheless granted certiorari based solely and admittedly upon its disagreement with the circuit court's evaluation of the sufficiency of the record evidence – a decidedly illegitimate use of the writ. The Third District does not, as it must, give any deference whatsoever to the circuit court's conclusion that the Subject Condition was a "meaningless" way to satisfy the standards set forth in § 33-311(d) of the Zoning Code. Moreover, the Third District fails to recognize, as it must, that the administration of the substantial competent evidence test is reserved for the circuit court. It cannot erase the line of demarcation between district court and circuit court certiorari review by simply accusing the circuit court of "reweighing" record evidence. In both form and function, the Third District's decision represents nothing more than a second appeal.

The proceedings below illustrate the precise parade of horribles that this Court sought to eliminate when it ushered in a

quasi-judicial regime to govern zoning proceedings and, correspondingly, subjected such proceedings to meaningful certiorari review in the circuit court. By placing its judicial seal of approval on the inflammatory tactics utilized by the Applicant, as well as the outrageous bias evidenced by the sitting Commissioners, the Third District's decision has ensured the continued degradation of the zoning process. Its decision must be reversed accordingly.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION MUST BE REVERSED BECAUSE IT APPLIED AN INCORRECT STANDARD OF REVIEW IN DIRECT VIOLATION OF THIS COURT'S DECISIONS IN *HAINES, EDC,* AND *VAILLANT* AS WELL AS THE CONSTITUTION OF THE STATE OF FLORIDA.

The decision of the Third District in this case must be reversed because it is in direct, inescapable, and irreconcilable conflict with the unbroken line of this Court's decisions that delineates and restricts the proper role of the district courts of appeal on second-level certiorari review of quasi-judicial action. *See, Haines City Community Development v. Heggs*, 658 So.2d 523, 527 (Fla. 1995); *Board of County Commissioners of Brevard County v. Snyder;* 627 So.2d 469, 476 (Fla. 1993); *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So.2d 106 (Fla. 1989); City *of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982).

According to the Third District's decision, the circuit court applied the correct law. [App. 0002; R. Vol. IV. 664]. Moreover, due process of law is not identified by the court as a basis for relief and, importantly, the decision fails to identify or even suggest that the circuit court order results in any injury, harm, or miscarriage of justice. Notwithstanding these threshold findings (or lack of findings), the Third District nevertheless granted certiorari based upon its disagreement with the circuit court's evaluation of the record evidence. To be sure, that is not a legally permissible basis for a district court to grant certiorari review. *See, Haines City*, 658 So.2d at 527; *see also, EDC*, 541 So.2d at 108; *accord, Vaillant*, 419 So.2d at 626. To make matters worse, the decision announces and embraces the "anything goes" standard of review of quasi-judicial decisions - the antithesis of what this Court sought to accomplish when it rendered its decision in *Snyder.*

[9]

A. UNDER THE CORRECT STANDARD OF REVIEW, THE CIRCUIT COURT AND ONLY THE CIRCUIT COURT IS AUTHORIZED TO TEST A QUASI-JUDICIAL RECORD FOR SUBSTANTIAL COMPETENT EVIDENCE AND THE THIRD DISTRICT UNLAWFULLY EXCEEDED THE SCOPE OF ITS SECOND LEVEL CERTIORARI JURISDICTION WHEN IT REPEATED THE SAME TEST TO REACH A CONTRARY RESULT.

When this Court decided *Snyder*, it charged the circuit courts with the primary duty of ensuring that local governments

[9] *See generally,* 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 (2000)(a presciently titled collection and analysis post-*Snyder* land use decisions from the district courts of appeal).

predicate zoning actions on substantial competent evidence. *Snyder*, 627 So.2d at 476. Noting that strict judicial scrutiny is the best antidote to "rank political influence on the local [zoning] process", this Court abandoned the fairly debatable rule, a result-driven analysis, in favor of the substantial competent evidence rule, a substantive analysis by an appellate court of the sufficiency of record evidence presented to a quasi-judicial board. *Id.* at 475. The purpose of the switch – to improve the quality of local land use decision-making processes by subjecting such processes to *meaningful* appellate review in contradistinction to the "loose judicial scrutiny afforded by the fairly debatable rule." *Id.* at 472.[10]

To extricate litigants and the judiciary from the potentially infinite loop of litigation over the ponderous question of "substantial competent evidence", this Court tailored a tapered, interlocking certiorari review standard to govern review in the circuit courts and district courts of final quasi-judicial action. *Id.* at 476. This Court recently restated the applicable review standards as follows:

> We have held that circuit court review ... 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 judgments are supported by competent substantial evidence. *Vaillant*, 419 So.2d at 626. *The standard of review for certiorari in the district court effectively eliminates the substantial competent evidence component.*

Haines City, 658 So.2d at 530. [Emphasis supplied]. Thus, the standards of review in the circuit

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[10] *See, e.g.,* Charles L. Siemon & Julie P. Kendig, *Judicial Review Of Local Governmental Decisions: "Midnight In The Garden Of Good And Evil*, 20 Nova L. Rev. 707, 710 (the "fairly debatable rule so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power").

court and district court overlap on whether procedural due process was afforded below and whether the correct law was applied. There is no overlap, however, on the question of substantial competent evidence - that analysis is solely consigned to the circuit court as the court of final appellate jurisdiction in cases seeking review of quasi-judicial action. *See*, *Haines City,* 658 So.2d at 530; *EDC,* 541 So.2d at 108.[11]

In *Haines City,* this Court collected the policy considerations which support the separation of these appellate duties as follows:

> The circuit court is the court of final appellate jurisdiction in cases originating in county court [and cases reviewing final quasi-judicial action]. Prior to the establishment of the district courts, we noted that if the role of certiorari was expanded to review the correctness of the circuit court's decision, it would amount to a second appeal. 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. If, in cases originating in courts inferior to the circuit courts, another appeal from the circuit court is afforded under the guise of certiorari, then a litigant will have two appeals from the court of limited jurisdiction, while a litigant would be limited to only one appeal in cases originating the trial court of general jurisdiction. 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 City, 658 So.2d at 526 n.4. Where, as here, the Third District predicates its entire decision upon its independent finding of "competent substantial evidence", it effectively fuses the separate and distinct components of district court and circuit court certiorari review into the same appellate standard, causing a meltdown of meaningful review in the circuit court.

The result: two appellate courts review the same evidence under the same standard. Such is reversible error.

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[11] *See*, *Martin County v. City of Stuart*, 736 So.2d 1264, 1267-8 (Fla. 4th DCA 1999)(*en banc*)(second level certiorari review in the district court does not include the question of substantial competent evidence), *receding from City of Dania v. Florida Power & Light,* 718 So.2d 813 (Fla. 4th DCA), *rev. granted*, 727 So.2d 905 (1998); *see also*, *Manatee County v. Kuehnel*, 542 So.2d 1356, 1358 (Fla. 2nd DCA 1989)(district court "cannot disagree with the circuit court's evaluation of the evidence and substitute its judgment for that of the circuit court").

On this precise issue, *EDC* controls. There, the circuit court reversed the final action of the zoning board based on its determination that the zoning board failed to support its decision with substantial competent evidence. *See, City of West Palm Beach Zoning Board of Appeals v. Education Development Center,* 526 So.2d 775, 776 (Fla. 4th DCA 1988). On second-level certiorari review, the Fourth District reversed, finding that the record revealed substantial competent evidence to support the zoning board's ruling. *Id.* As illustrated by the following excerpt, the Fourth District's erroneous decision is indistinguishable from the Third District's decision herein:

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

Id. at 777.

Relying on *Vaillant* for the formulation of the correct review standard, this Court quashed the Fourth District's decision where, as here, the "district court simply disagreed with the circuit court's evaluation of the evidence." *EDC,* 541 So.2d at 108-109. To restate the error:

> 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 rule of law. The district court simply disagreed with the circuit court's evaluation of the evidence. Accordingly, we reaffirm *Vaillant* and quash the decision of the district court.

EDC, 541 So.2d at 108-109.

The district court decision in *EDC* and the district court

decision under review herein are the same decision. While the Third District certainly disagrees with the circuit court's evidentiary conclusions, the decision fails to characterize such error as causing any injury whatsoever, let alone an injury or error serious enough to result in a miscarriage of justice. The neighbors recognize that within the narrow confines of the appropriate certiorari review standard certain flexibility and discretion is afforded to a district court because "a reviewing court is drawing new lines and setting judicial policy." *See, Haines City,* 658 So.2d at 531. Line drawing, however, must be contrasted with line erasing and that is exactly what the Third District's decision accomplishes in this case. The decision simply erases the unbroken line of this Court's decisions spanning from *Vallaint* to *EDC* to *Snyder* to *Haines City*.

[12]

As such, it must be reversed.

B. IT'S NOT JUST SEMANTICS AND ARBITRARY LINE DRAWING – DISTRICT COURT CERTIORARI REVIEW REMEDIES ONLY THOSE FEW EXTREME CASES WHERE A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW RESULTS IN A MISCARRIAGE OF JUSTICE– A STANDARD NECESSARY TO AVOID THE USE OF CERTIORARI AS A SECOND APPEAL.

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[12] The Third District's decision neither winks nor nods at any of this Court's controlling decisions on the appropriate standard of review. Instead, the court derived its newly-minted, expanded standard of review from its prior decision in *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3d DCA), *review dismissed*, 680 So.2d 421 (Fla. 1996). A pointedly pertinent analysis of the problems attendant with such reliance is set forth in *City of Stuart*, 736 So.2d at 1267; *see also, City of Dania*, 718 So.2d at 817-819.

Certiorari review in the district court exists only to remedy those few extreme cases where the circuit court's opinion so seriously departs from the essential requirements of the law that it results in a miscarriage of justice. *See*, *Haines City*, 658 So.2d at 531. This Court's decision in *Haines City* went to great lengths to place the writ within its proper historical and procedural context in order to stress that "certiorari should not be used to grant a second appeal." *Id.* at 526. To guard against such usage while simultaneously retaining the writ's proper place as the great judicial "backstop" against manifest injustice, this Court contrasted simple "legal error", which is beyond the reach of certiorari's grasp, with the more grievous errors for which certiorari exists to correct:

> The required departure from the essential requirements of 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.*

Haines City, 658 So.2d at 527, *citing, Jones v. State,* 477 So.2d 566, 569 (Fla. 1985)(Boyd, C.J., concurring specially).

As such, even a departure from the essential requirements of the law does not justify certiorari relief unless the petitioner demonstrates and the district court finds that the departure "was serious enough to result in a miscarriage of justice." *Id.* It's not just semantics – the restricted standard is necessary to avert the use of certiorari as a second appeal. *See, e.g., Combs v. State*, 436 So.2d 93, 95-96 (Fla. 1983).

[13] To a certainty, disagreement with the circuit court's evaluation of the sufficiency of record evidence does not, as a matter of law, constitute a miscarriage of justice which justifies district court certiorari review. *EDC*, 541 So.2d at 108-09.

The Third District's decision is bereft of any claimed error by the circuit court other than in its evaluation of the sufficiency of the evidence – a decidedly illegitimate use of the writ. *Id.* The decision does not identify any harm, injury or error causing or resulting in a miscarriage of justice.[14] The circuit court's order simply quashed the quasi-judicial action of a Commission run amuck. It did so based upon its determination that the record before the Commission contained insufficient competent substantial evidence to support the conclusion that the Applicant satisfied § 33-311(d). Under the circuit court's order, the Applicant remains free to immediately reapply for a special exception and the County is free to immediately consider a subsequent application without the "meaningless" condition and, hopefully, without consideration of "attacks by pagans

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[13] The Second District's decision, commended and affirmed by this Court in *Haines City*, noted the appropriate standard as follows:

> even if we were to conclude that the circuit court's order departed from the essential requirements of the law, we cannot say that such a departure was serious enough to result in a miscarriage of justice.

See, Haines City Community Dev. v. Heggs, 647 So.2d 855, 856 (Fla. 2nd DCA 1994); *see also*, *Stilson v. Allstate Ins. Co.*, 692 So.2d 979, 982-83 (Fla. 1997)(resisting "great temptation" to "announce a miscarriage of justice" where *Haines City* does not afford the district court such discretion and, moreover, where such an interpretation of *Haines City* would "invite certiorari review of a large number of appellate decisions issued by circuit courts.").

[14] The Third District certainly knows a miscarriage of justice when it sees it. *See, e.g., Bird-Kendall Homeowners Assoc. v. Dade County*, 695 So.2d 908 (Fla. 3d DCA), *rev. denied*, 701 So.2d 867 (granting certiorari on basis of "melanoma" spot zoning); *Debes v. City of Key West*, 690 So.2d 700, 702 (Fla. 3d DCA 1997)(granting certiorari on basis of spot zoning in reverse); *compare*, *Rancho Santa Fe, Inc. v. Miami-Dade County*, 709 So.2d 1388 (Fla. 3d DCA 1998)(invoking "right for any reason" standard and denying certiorari despite circuit court's reliance upon wrong standard of review). None of the above-cited cases involves the administration of the substantial competent evidence test.

or Satan worshipers". [R. Vol. III. p. 514]. The neighbors contend that neither scenario presented the Third District with a legitimate opportunity for certiorari review and, accordingly, its decision must be reversed.

II. THE THIRD DISTRICT ERRED WHEN IT CONCLUDED THAT THE CIRCUIT COURT "REWEGHED" EVIDENCE IN ITS ADMINISTRATION OF THE SUBSTANTIAL COMPETENT EVIDENCE TEST.

Weight and sufficiency of evidence are two distinct concepts. *See generally, Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982). Sufficiency is an objective test of the adequacy of the evidence, while the weight of the evidence subjectively refers to the "balance or preponderance of evidence". *Id.* (internal citations omitted). Upon review of quasi-judicial action, it is the duty of the circuit court, not the district court, to determine the legal sufficiency of the record evidence. *See, Haines City,* 658 So.2d at 527; *Snyder*, 627 So.2d at 476; *EDC,* 541 So.2d at 108-09; *Vaillant*, 419 So.2d at 626. Moreover, this Court has repeatedly decreed that it is the duty of the circuit court, not the district court, to ensure that the evidence presented to a quasi-judicial board is both competent and substantial. *Id.* In this matter, the Third District erroneously accuses the circuit court of "reweighing" the evidence before the Commission. As set forth below, this false accusation blurs the weight/sufficiency distinction and further misapprehends the critical difference between "testimony" and "substantial competent evidence".

For starters, irrelevant evidence is not competent and substantial evidence and a reviewing court commits no error when it ignores irrelevant evidence. *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957). Moreover, a circuit court does not "reweigh" the record of a quasi-judicial proceeding when it merely measures the testimony contained therein against the substantial competent evidence standard. To the precise contrary, such a court is simply executing its affirmative charge under *Snyder* to ensure that zoning decisions are based on more than fairly debatable votes. Where, as illustrated below, the testimony contained within the record is neither relevant,

competent, nor substantial, a circuit court does not "reweigh" such testimony simply because it chooses to ignore or reject it.

A. The Circuit Court Correctly Concluded That The Subject Condition Was "Meaningless" Without Reweighing The Evidence.

As set forth above, the Commission predicated its action upon the Subject Condition to purportedly protect the neighbors against the inevitable overcrowding that would occur when the both the sanctuary and fellowship hall were used simultaneously. [R. Vol. I. p. 71; Vol. III. p. 496]. The circuit court opined that this condition was "meaningless" and, absent the condition, the court concluded that the Applicant failed to sufficiently prove that the Application satisfied § 33-311(d). [15]

It clearly reached that conclusion without reweighing the evidence. The Third District's decision does not, as it must, give any effect to that crucial finding by the circuit court which was supported by the undisputed facts, the law, and common sense.

[16]

1. Conditions Are Protections For Neighbors – A Meaningless Condition Is No Protection.

When a government attempts to restrain a special exception through the imposition of conditions,

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[15] In its petition to the district court, the County pointed solely and squarely to the Subject Condition as the exclusive proof on the overcrowding issue under § 33-311(d). [R. Vol. I. p. 14].

[16] Under the "right for any reason doctrine", it is clear that the district court erred when it reversed the circuit court's order without mention of this independent justification for the circuit court's action. *See, e.g., Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 644-46 (Fla. 1999)(holding that the district court is obliged to affirm the lower court ruling where such ruling is supported by any theory even where lower court assigns erroneous grounds for its decision.

such conditions function as protections to surrounding neighbors. While no Florida court has specifically addressed this issue, it is nationally well settled that the purpose of attaching conditions to the granting of a special exception is to protect neighbors from the nuisance, annoyance, disturbance, and loss of value which would otherwise occur if the newly approved use were permitted without restraint. 2 ANDERSON, AMERICAN LAW OF ZONING §9.20 (3RD ED); 8A MCQUILLIN MUN CORP § 25.271 (3RD ED); 3 RATHKOPF, THE LAW OF ZONING AND PLANNING, § 40.00 *et seq*. (4TH ED 1994); Walter M. Strine, JR., *Use of Conditions in Land Use Control*, 67 DICK. L. REV. 109 (1963). In this case, the circuit court concluded without reweighing the evidence that the Subject Condition, prohibiting the simultaneous use of the sanctuary and fellowship hall for worship, is "meaningless". [App. 0008]. Stated another way, the condition offers the neighbors no protection against the recognized and inevitable disturbance caused by the number or frequency of visitors to the facility. As such, the circuit court correctly reversed the Commission's action because the entirety of such action was squarely predicated upon the "meaningless" condition.

2. The Condition Is Fatally Vague.

What is a worship service or, for that matter, what is worship? By what caliper shall a worship service be measured? How many worship services can the Applicant hold a day? What effect does the answer to these questions have upon the number of people who visit the site, the number of cars that visit the site, and the attendant noise, traffic, and crowding that will occur if 3,700 people come and go several times a day? These questions confirm that the condition is "meaningless" as a means of ensuring compliance with § 33-311(d).

[17]

3. The Condition Bears No Reasonable Relation To The Problem Sought To Be Eliminated.

The issues addressed by Zoning Code § 33-311(d) relate to the overcrowding of people, the number of cars, the generation of traffic, and the disturbances caused by all of the foregoing. *What the crowd does once it assembles at the facility is totally irrelevant!* Accordingly, the Subject Condition bears no reasonable relation to the problem sought to be eliminated – it does not limit or regulate the crowd-producing attributes of the facility. Whether a crowd of people attends worship services, or whether half the crowd attends worship services while the other half attends bible study, a concert, a lecture, or a party, the condition offers no protection against overcrowding.[18] A crowd is a crowd is a crowd!

In this regard, the condition is simultaneously underprotective and overprotective. The condition is overprotective to the extent that it would prohibit a worship service for three (3) people from being held in the fellowship hall if a worship service for two (2) people were at the same time being conducted in the sanctuary. Alternatively, the condition would not prohibit 2,190 people from attending a worship service in the sanctuary provided that the 1,500 people in the fellowship hall were participating in Bible studies.

A similarly meaningless condition was annulled together with the zoning approval in the analogous case of *Pearson v. Shoemaker*, 202 N.Y.S. 2d 779 (N.Y.App.Div. 1960). There, a

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[17] One would need to be a member of the Applicant's congregation in order to be charged with any reasonable knowledge of the extent to which the property can be used, at what hours, for what purposes, and by how many people. To the neighbors, the public, prospective purchasers of real property, and the County, the Subject Condition is meaningless, fatally vague, and unrelated to a legitimate purpose of zoning.

[18] Imagine the code enforcement officer's conundrum: Is a service organized for the study of scripture a worship service? Is a meeting organized for the singing of religious songs a worship service?

restriction was imposed in connection with the granting of a special permit to allow a community recreation club, with a swimming pool, on a tract of land situated in a residential neighborhood. *Id.* at 780. In order to mitigate the impact of the use on the surrounding properties, the zoning authority imposed a condition to limit club membership to 150 families. *Id.* The court concluded that the condition was "decidedly of little value if members can bring an unlimited number of guests." *Id.* at 782. In passing on the role of the condition to the preservation of the character of the surrounding neighborhood, the court held as follows:

> 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. This reasoning must not be lost on this Court. The circuit court got it right and the Third District committed error when it ignored this essential finding.

4. The Condition Creates An Unconstitutional Administrative Entanglement With Religion.

Government may not entangle itself with a church's on-site, day-to-day operations. *Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378, 395, 110 S.Ct. 688, 699 (1990); *citing, Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 675, 90 S.Ct. 1409, 1413 (1970)(government may not enforce restriction upon a church that results in "continuing surveillance" and excessive involvement in its operations); *Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1536 (11th Cir. 1993)(the imposition of civil authority in matters of church policy and administration by itself may pose a substantial danger that the State will become entangled in essentially religious controversies).

[19]

Assuming *arguendo* that the Subject Condition possessed any intrinsic meaning related to

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[19] *See generally,* Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders Into The Neighborhood*, 84 KY. L.J. 507 (1995).

a legitimate purpose of zoning, it would nevertheless be impossible to enforce it without continuing surveillance leading to an impermissible entanglement. Thus, the Subject Condition can boast of being both fatally vague and unconstitutional for separate but related reasons.

5. The Fatal Condition Is Not Severable From The Balance Of The Resolution Because It Formed An Essential Ingredient Of The Approval And, Accordingly, the Circuit Court Correctly Reversed The Entire Resolution Without Reweighing The Evidence.

As set forth more particularly above, the Subject Condition formed the basis for the Planning Department's changed recommendation of approval and, moreover, it was expressly made a part of Commissioner Souto's motion for approval. Any doubt on this point is clarified by Commissioner Souto's following statement:

> I believe we've changed the – after we spoke with Mr. Olmedillo and we accepted all of the different points mentioned by Mr. Olmedillo. In effect, we changed it to planning[‘s recommendation].

[R. Vol. III. p. 481].

As to the condition's role in his recommendation, the Planning Director explained as follows:

Mr. Olmedillo: That's one of the conditions. That's one of the 10 conditions that we say will bring it down to something that is manageable, something that could be mitigated enough to –

[R. Vol. III. pp. 490,496].

It is indisputable that the Subject Condition formed an essential ingredient of the Commission's action. While no Florida case has specifically addressed this issue, the wisdom, logic, and number of out-of-state decisions on this narrow point confirms that such a condition is not severable from the balance of the resolution and, accordingly, the special exception falls together with the "meaningless" condition. *Board of Zoning Adjustment v. Murphy*, 438 S.E.2d 134 (Ga.Ct.App.1993)(special exception granted upon invalid condition should be remanded for reconsideration without the condition); *Orloski v. Borough of Ship Bottom*, 545 A.2d 261, 267

(N.J.Super.Ct.Law Div. 1988); *Vaszaukas v. Zoning Board of Appeals of Town of Southbury*, 574 A.2d 212 (Conn. 1990);*Farina v. Zoning Bd. Of Appeals of Town of Trubull*, 254 A.2d 492, 495 (Conn. 1969)(A special exception is void where an invalid condition is an integral part of approval); *Pearson v. Shoemaker*, 202 N.Y.S. 2d at 782.

No aspect of the foregoing analysis required the circuit court to reweigh the record evidence. To the extent that the Third District's decision characterizes the circuit court as reweighing the evidence relative to the Subject Condition, it is clear that such mischaracterization is clearly erroneous and merits reversal by this Court.

B. THE DISTRICT COURT ERRED WHEN IT REWEIGHED THE EVIDENCE IN ITS ADMINISTRATION OF THE COMPETENT SUBSTANTIAL EVIDENCE TEST – A TEST THAT IT IS NOT EVEN AUTHORIZED TO ADMINISTER IN THE FIRST PLACE.

Notwithstanding the fact that the question of substantial competent evidence was outside the scope of its review, the Third District nevertheless characterizes the following evidence as competent and substantial: (1) the County Staff recommendations; (2) the testimony of the project architect; (3) the testimony of an "independent" real estate appraiser; and (4) a traffic engineer. The neighbors will briefly place this testimony within its proper evidentiary context to demonstrate how the Third District's decision must be reversed on this point as well.

1. The County Staff Recommendations.

First, the Commission itself rejected the Zoning Department's recommendation. [R. Vol. III. p. 481]. Instead, it adopted the Planning Department's recommendation together with the Subject Condition. [R. Vol. I. p. 71; Vol. III. p. 481]. As a matter of simple logic, the circuit court's rejection of the Subject

Condition compelled its rejection of the Planning Department's recommendation - the entirety of the Planning Department's recommendation was based upon a "meaningless" condition. [R. Vol. I. p. 80]. The same logic compelled the circuit court to reject all of the Applicant's expert's testimony because all such testimony was predicated upon a "meaningless" assumption.

[20]

2. The Project Architect.

The project architect did not testify concerning the overcrowding issue under § 33-311(d). Rather, he relied on the Subject Condition. [R. Vol. III. pp. 322-324]. Thus he offered no testimony on that point which the circuit court could possibly reweigh. Moreover, he was unfamiliar with the zoning on Subject Property, the zoning in the surrounding neighborhood, and he did not know the height of the structures surrounding the Subject Property [R. Vol. III. p. 320-321]. Further, he *never* designed a church of a similar size. [R. Vol. II. p. 121]. Thus, the circuit court committed no error when it determined his testimony to be insufficient competent and substantial evidence relative to § 33-311(d). *See generally*, *Allapattah Community Assoc. v. City of Miami,* 379 So.2d 387 (Fla. 3d DCA), *cert. denied*. 386 So.2d 635 (Fla. 1980)(rejecting conclusory net opinions of purported expert).

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[20] The value of opinion evidence rests not in the conclusion reached but in the factors considered and where an expert bases his or her conclusions on factors that are "meaningless", speculative, remote, or conjectural, the expert opinion cannot rise to the dignity of substantial evidence. *See, e.g., Arkin Construction Co. v. Simpkins*, 99 So.2d 557, So.2d (Fla. 1957); *Federated Dep't Stores v. Equity Properties and Development Co.,* 454 So.2d 10, 12 (Fla. 3d DCA 1984)(expert opinion based on erroneous concept of law is devoid of competency); *accord, Pacific Gas & Electric Co. v. Zuckerman*, 234 Cal. Rptr. 630, 643 (Cal.Ct.App. 1987).

3. The Traffic Experts.

The Applicant's first traffic expert could not find a comparable church in a comparable neighborhood upon which to basis his analysis. [R. Vol. II. pp. 138-139]. Not surprisingly, neither could the Applicant's second traffic expert. [R. Vol. III. p. 370]. Collectively, they could not even identify a single church half the size in a comparable neighborhood. Both experts failed to offer legally sufficient proof that the Application satisfied the overcrowding component of § 33-311(d). Thus, it cannot be said that their testimony was improperly rejected by the circuit court as insufficient relative to § 33-311(d). *See, Department of Transportation v. Samter,* 393 So.2d 1142, 1144 (Fla. 3d DCA 1981)(rejecting appraisal testimony where compared properties were "so dissimilar as to the pertinent factors of location, size, use and character as to render evidence inadmissible as a matter of law").

4. The Independent Appraiser.

First, property value is not a listed criterion under § 33-311(d). [App. 0015]. As such, testimony related to value is not relevant evidence. Therefore, it cannot be considered competent and substantial evidence. *DeGroot,* 95 So.2d at 916. Furthermore, the appraiser presented by the Applicant could not identify a single facility of comparable size, location, and use in all of South Florida upon which to base his analysis. [R. Vol. II. pp. 144-155; Vol. III. pp. 341-342]. Thus, the circuit court correctly rejected such testimony for at least two independent reasons and the Third District erred when it concluded that such testimony constituted "competent and substantial evidence." *Samter*, 393 So.2d at 1144; *see also*, 5 Nichols, EMINENT DOMAIN, § 21-04 (3d ed. 1979).

III. THE DISTRICT COURT ERRED WHERE, CONTRARY TO THE CIRCUIT COURT, IT PLACED THE JUDICIAL SEAL OF APPROVAL ON THE TACTICS UTILIZED BY THE APPLICANT AND THE EXTREME PRO-RELIGION BIAS EVIDENCED BY THE COMMISSION.

This Court has stated:

> The public can have little confidence in the impartiality of a decision when ... the decision maker's demeanor bears all the indicia of prejudice and a closed mind ... We take this opportunity to remind ourselves that tyranny is nothing more than ill-used power.

See, In re Inquiry Concerning a Judge, Judge E.L. Eastmoore, 504 So.2d 756, 758 (Fla. 1987). The

neighbors contend that a sitting commissioner's indecorous comments spoken during the course of a quasi-judicial hearing damage the public's confidence in the soundness of local government decision-making just as the inflammatory and inappropriate remarks of a trial judge damage the public's confidence in the judiciary. *See, Judicial Inquiry and Review of Board of Supreme Court of Pennsylvania v. Fink*, 532 A.2d 358, 368 (Pa. 1987)(condemning the interjection of religion and religious bias in judicial proceedings); *see generally,* Jeffrey M. Shaman, JUDICIAL CONDUCT AND ETHICS § 3.02 (2nd ed. 1995). The neighbors further contend that the remarks of specific commissioners during the debate of this matter revealed all the indicia of minds closed to the consideration of the merits of the zoning application and preoccupied with the importance of religion. *See, In re Eastmoore*, 504 So.2d at 758.

The neighbors are not asking this Court to embark on a subjective determination of each individual commissioners' motivations, but to review the record comments against the standards set forth above.

[21] Specifically, just prior to the vote on the matter, Commissioner Souto, the maker of the motion, framed the issue as follows:

> So it transcends legalese, it transcends cars, per second, you know, how many feet or it's beyond that. I mean, we surpass all of that. *We are way, way out of there*. Why are people killing people here in this community? Why are they killing little girls? Why? Why? Why is all of this happening in our community? I mean, then maybe we don't need religion. We don't need anything in our lives and, you know, let's see what happens then....*[S]o, you know, it never hurt anyone to have more religion.* I never heard that it is bad for a community to have more synagogues or more Baptist churches or more Catholic churches or more Methodist churches or anything, and religion. I never heard of that.

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[21] *See*, *City of Opa Locka v. State of Florida*, 257 So.2d 100 (Fla. 3d DCA 1972)(motives of governing body in adopting legislation are not the proper subject of judicial inquiry but the actions of quasi-judicial bodies are subject to such review); *City of Miami Beach v. Schauer*, 104 So.2d 129 (Fla. 3d DCA 1958); *Cf. Izaak Walton League of America v. Monroe County*, 448 so.2d 1170(Fla. 3d DCA 1984)(decided prior to *Snyder* and *Jennings* when zoning decisions were deemed legislative).

[R. Vol. III. pp. 519-521]. Preceding Commissioner Souto's comments, the debate reached its nadir with Commissioner Burke's biblical exegesis on religion, society, and numismatics ("we can invoke the name of God on our coins, on everything that we do…yet we're saying somehow we treat the church like it's just…some kind of non-spiritual entity"). [R. Vol. III. p. 514].[22] Unfortunately, none of this was remotely related to an issue framed by either the Zoning Code or the Applicant's Petition For Appeal.

The record discloses that the timing and substance of such remarks served to frame the vote as one solely concerning the religious benefits of a church and, as a result, tainted the Commission's collective action beyond repair. *See generally*, 4 ANDERSON, AMERICAN LAW OF ZONING, § 23.22 (4th ed. 1997)(self-interest of a single member is said to infect the board, and a personal interest sufficient to disqualify a member was detected where said member was a communicant of church which would benefit from decision at issue); 2 RAPTHKOPF, THE LAW OF ZONING AND PLANNING, § 22.04 (4th ed.)(one board member's self-interest may taint proceeding by effecting or influencing the votes of other board members even where said member does not vote). By any measurable standard, the highlighted comments demean the zoning process and serve to erode the public's confidence in it.

In this matter, the Applicant invited the Commission's derailment into the spiritual realm and away from the relevant questions in the Zoning Code through a presentation permeated with preaching. They did the same thing before the ZAB. When an Applicant of awesome political power wields the weapons of religion in order to gain a zoning approval, the neighbors' only shield is their constitutionally guaranteed independent review of the record evidence by the circuit court. Upon that review, the circuit court concluded that something was very, very wrong with these proceeding.

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[22] Would a civil litigant be entitled to a new trial if the judge were to speak of the attacks of pagans or Satan worshipers after the close of the evidence and just prior to ruling from the bench on a breach of contract action against a church?

[23] *See, e.g., Trujillo v. Uniroyal Tire Co.*, 2000 WL 205188 (Fla., opinion filed Feb. 24, 2000)(circuit court can grant new

The Third District does not, as it must under *Haines City, Snyder, EDC,* and *Vaillant,* give any deference whatsoever to the circuit court's favored position relative to the question of substantial competent evidence. Instead, the Third District concludes that the Commission's action had evidentiary support, casts off the circuit court's findings as simply incorrect, and reweighs the evidence itself in the face of this Court's repeated and clear instruction that such is not the proper use of district court certiorari review.

Under any formulation of the proper certiorari standard, this case correctly ended at the circuit court. The Third District's conclusion to the contrary represents fundamental and dangerous error because it placed the seal of district court approval on both the Applicant's tactics and the extreme bias evidenced by certain Commissioners during the debate. Such a result portends the death of zoning as a quasi-judicial process and effectively places any zoning action, no matter how outrageous, beyond the scope of meaningful judicial review. The Third District's decision sends us backward, not forward. It must be reversed.

CONCLUSION

For all of the reasons set forth above, the Third District's decision must be reversed and the case remanded to reinstate the circuit court's decision.

Respectfully Submitted,

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trial even where it is not clear, obvious, or indisputable that verdict was wrong and an order granting new trial cannot be overturned absent an abuse of discretion); *see also, Brown v. Estate of Stuckey,* 749 So.2d 490 (Fla. 1999)(circuit court should always grant new trial where jury is deceived as to the force of the evidence or influenced by improper motives).

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