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' REPLY 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 County's answer brief shall be referred to as [C.B. p.]. The Applicant's answer brief shall be cited as [A.B. p.]. The neighbors' initial brief shall be cited as [I.B. p.]. Citations to the appendix to the neighbor' initial brief shall be denoted as [App.].

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.]. The supplemental record shall be cited as [SR. Vol. p.].

CERTIFICATION OF TYPE SIZE AND STYLE

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

By: _____

JEFFREY S. BASS, ESQ.

ARGUMENT

I. THE THIRD DISTRICT IMPERMISSIBLY EXCEEDED THE EXTRAORDINARILY LIMITED SCOPE OF ITS SECOND-TIER CERTIORARI REVIEW AND IMPROPERLY USURPED THE ROLE OF THE CIRCUIT COURT WHEN IT REVEIWED THE RECORD TO REDETERMINE THE QUESTION OF SUBSTANTIAL COMPETENT EVIDENCE - A QUESTION WHICH WAS PREVIOUSLY AND PROPERLY DECIDED BY THE CIRCUIT COURT ON FIRST-TIER REVIEW.

The ink is barely dry on this Court's decision in *Florida Power & Light Company v. City of Dania*, --So.2d--, 2000 WL 766487, at *3 (Fla. June 15, 2000)(hereinafter, "*Dania")* – a decision which confirms with absolute certainty that:

> the district court on second-tier certiorari review may not review the record to determine whether the agency decision is supported by substantial competent evidence.

See, Dania, slip op. at *3. Reversal of the Third District's decision is thus mandated by *Dania* because in both cases the district court improperly reviewed the record evidence to redetermine the question of substantial competent evidence – a question which is decidedly beyond the district court's reach on second-tier certiorari review. *Id.* Because *Dania* so completely refutes the respondents' jurisdictional arguments, the neighbors shall dedicate the lion's share of this reply to addressing only those arguments raised by the respondents which are not disposed of directly by *Dania.*

A. The Third District Exceeded The Scope Of Its Second-Level Certiorari Review And Usurped The Role Of The Circuit Court When It Reversed That Court On The Sole Question Of Substantial Competent Evidence.

The respondents' jurisdictional arguments suffer from an elementary misunderstanding of the nature, purpose, and boundaries of the discretion afforded to the district courts in the discharge of their second-level certiorari review.[1] The

[1] *Dania* confirms that a district court can not exercise "discretion" to override the fundamental limitation on second-tier

district courts are afforded discretion to determine which departures from the essential requirements of law ***RESULT IN A MISCARRIAGE OF JUSTICE*** AND WHICH DEPARTURES FROM THE ESSENTIAL REQUIREMENTS OF THE LAW DO NOT. ***SEE, E.G., HAINES CITY COMMUNITY DEV. V. HEGGS,*** 658 SO.2D 523, 527-31 (FLA. 1995)("***HAINES CITY***"). THE RESPONDENTS MISAPPREHEND THE BASIC FACT THAT NOT ALL DEPARTURES FROM THE ESSENTIAL REQUIREMENTS OF THE LAW ARE REMEDIABLE ON SECOND-LEVEL CERTIORARI. ***ID.***[2] It is this defining characteristic of second-level certiorari review that distinguishes such review from a constitutionally prohibited second appeal. ***SEE, HAINES CITY***, 658 SO.2D AT 526 N.4.

The discretion that is reposed in the district courts on second level certiorari exists *solely* to correct those few extreme departures from the essential requirements of the law that rise "far beyond legal error". *Haines City,* 658 So.2d at 527. [Citations omitted]. This Court has delimited the boundary between the two categories of error as follows:

> [E]ven 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...[W]e are unable to conclude that is one of "those few extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected. This analysis captures the essence of our holdings in *Combs* and *EDC*.

Haines City, 658 So.2d at 531(affirming the district court's decision as an "excellent example of the correct application of the limited standard of review")(citations omitted).

Importantly, the Third District's decision does not label the circuit court's decision as a miscarriage of justice, an act of judicial tyranny, or a fundamentally illegal decision perpetrated with disregard of procedural requirements. *See*,

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certiorari review that prohibits a district court from reaching the record to determine the existence or nonexistence of substantial competent evidence.

[2] Certainly, a disagreement with the circuit court's administration of the substantial competent evidence test does not automatically result a miscarriage of justice. *See, Education Dev. Cntr. v. City of West Palm Beach Zoning Bd. Of Appeals*, 541 So.2d 106, 108 (Fla. 1989)("*EDC*"). Not even the circuit court's express application of the wrong standard of review automatically results in a miscarriage of justice. *See, Rancho Sante Fe, Inc. v. Miami-Dade County*, 709 So.2d 1388 (Fla. 3d DCA 1998)(denying certiorari notwithstanding the fact that "the Circuit Court applied the wrong standard of review").

Haines City, 658 So.2d at 527-529. To the precise contrary, the Third District clearly credits the circuit court with stating the correct and applicable law. S*ee, Dusseau*, 725 So.2d at 1171. The respondents do not contend that the circuit court applied the wrong law. Instead, they contend that the circuit court merely erred in its application of the correct law – alleging that the circuit court "reweighed" evidence.

Even if such error occurred, the district court was not presented with a legitimate opportunity to exercise its limited discretion in the absence of a finding that the circuit court "applied the wrong law", s*ee, City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982)("Vaillant"), or, alternatively, a finding that the departure from the essential requirements of the law resulted in a miscarriage of justice. *See, Haines City*, 658 So.2d at 526-8.[3] As noted above, a contrary rule collapses second-tier certiorari review into an impermissible second appeal. ***Id.* at 526 n. 4**.

B. The Circuit Court Applied the Correct Law And, Therefore, Observed The Essential Requirements Of The Law, Thus Foreclosing The District Court From The Exercise Of Its Second-Level Certiorari Review.

This Court concluded in both *Haines City* and *Dania* that a court observes the essential requirements of law when it applies the correct law: the two standards are the same. *See, Dania,* slip op. at *3 (the "essential requirements of the law" and "applied the correct law" prongs are equivalent); *citing*, *Haines City*, 658 So.2d at 530 ("[W]e conclude that 'applied the correct law' is synonymous with 'observing the essential requirements of law'."); *see also*, *Vaillant*, 419 So.2d at 626 (Fla. 1982)(district court determines whether the circuit court "applied the correct law"). The circuit court in this matter applied the correct law. This point is beyond dispute – the face of its order confirms the

[3] In *EDC*, this Court importantly observed that "the district court of appeal did not find that the trial judge "applied an incorrect principle of law." In recognition of this fact, this Court quashed the district court's decision in accordance with *Vaillant*. Notably, the district courts in *EDC* and *Dusseau* both expressly accuse the circuit court of "reweighing" evidence. In *EDC*, this was the *sole* error assigned by the district court – it is the *sole* error assigned herein. In *EDC*, such alleged error was insufficient under *Vaillant* to vest the district court with second-level certiorari jurisdiction. It is equally insufficient here. Thus, the quashal of the Third District's decision is in perfect keeping with both the rule and the remedy of *EDC*.

circuit court's faithful adherence to the decisions of this Court which delineate the scope of judicial review of quasi-judicial action.

The respondents nevertheless argue that the circuit court implicitly applied the wrong law by reweighing the record evidence.[A.B. p. 25; C.B. p.21].[4] That argument is directly refuted by the face of the circuit court's majority opinion which sets forth the law upon which it relied as follows:

> [c]ertiorari review by the Circuit Appellate Panel of an agency decision is governed by a three part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Community Dev. Co. v. Heggs*, 658 So.2d 523 (Fla. 1995). In this review, the Circuit Court Appellate Panel functions as an appellate court and is not entitled to reweigh the evidence or substitute its judgment for that of the administrative agency. *Education Development Center v. City of West Palm Beach*, 541 So.2d 106 (Fla. 1989).
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> In 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. *Board of County Commissioners of Brevard County v. Snyder*, 627 so.2d 469, 476 (Fla. 1993).

[App. 4-5; R. Vol. I. pp. 75-86].[5]

In their answer briefs, the respondents misunderstand the fact that the job of the Third District ended once that court determined that the circuit court applied the correct law – even if that court disagreed with the circuit court's application of

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[4] An accusation of "reweighing" alone does not constitute a departure from the essential requirements of the law resulting in a miscarriage of justice. *See supra* note 3; *compare*, *Dania*, slip op. at *4 (noting that circuit court applied wrong law by applying the *Irvine* standard of proof as compared to the *Vaillant* standard of review).

[5] In *Dania*, unlike the present case, the circuit court failed to apply the *Vaillant* standard of review and, as a result, it "applied the wrong law". *See, Dania*, slip op. at *4. As noted above, the circuit court panel in this case dutifully applied the correct review standard as articulated by the decisions of this Court in *Haines City*, *Snyder*, and *EDC*.

the correct law. *Dania*, slip op. at *4; *Haines City*, 658 So.2d at 531; *EDC*, 541 So.2d at 108 ("the district court of appeal did not find that the trial judge applied an incorrect principle of law."); *Vaillant*, 419 So.2d at 626.[6] That is because the Third District did not determine that the circuit court: (1) denied due process of law; or, (2) departed from the essential requirements of the law in a way that resulted in a miscarriage of justice. ***SEE, HAINES CITY*, 658 SO.2D AT 527; *COMBS V. STATE*, 436 SO.2D 93, 95-96 (1983); *VAILLANT*, 419 SO.2D AT 626. UNDER THE PROPER SECOND-TIER CERTIORARI STANDARD, THE CIRCUIT COURT' MAJORITY DECISION, BUILT UPON ITS RESOLUTE RELIANCE ON THIS COURT'S CONTROLLING PRECEDENT, FAILS TO EVIDENCE ANY ERROR THAT JUSTIFIED THE THIRD DISTRICT IN THE EXERCISE OF ITS EXTRAORDINARILY NARROW CERTIORARI REVIEW BECAUSE:**

> A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to the facts, is not an illegal or irregular act or proceeding remediable by certiorari.

Id. at 525, *citing, Basnet v. City of Jacksonville*, 18 Fla. 523, 526-27 (1882)(noting that *Basnet* is "an opinion which retains its currency and whose clarity remains a hallmark"). Like Third District, the respondents point to nothing more than disagreement with the circuit court's conclusions concerning the question of substantial competent evidence - a decidedly illegitimate use of second-level certiorari. *Id.*

C. Staff Recommendations Do Not Always Constitute Substantial Competent Evidence And The Third District Exceeded The Permissible Scope Of its Second-Tier Review When It Revisited Such Recommendations.

The respondents contend that second-tier certiorari review was justified because the circuit court disregarded favorable staff recommendations. [C.B. pp. 21-28; A.B. pp. 33-4]. The respondents construct this specious argument upon the false assumption that staff recommendations *always* constitute

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[6] *See generally,* William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U.FLA.L.REV. 477, 502(1951)("Under the Constitution, the circuit court has just as much right to be "wrong" in such cases as the Supreme Court has when it has final appellate jurisdiction; regardless of any purported improvement in "justice", the merits of litigation should be finally decided by the circuit court, as the Constitution clearly provides.")(cited in *Haines City*, 658 So.2d at 526).

substantial competent evidence. The problem with their argument, as practically explained below, is that such a bright line rule effectively handcuffs the circuit court in its proper administration of its first-tier certiorari review.

Why have judicial review in the circuit court of the question of substantial competent evidence if, as the respondents argue, staff recommendations *always* constitute substantial competent evidence? After all, the County correctly notes that staff recommendations are always of record. [C.B. p. 25 n. 11]. Once this practical fact is exposed, the deficiency in the respondents' position is readily apparent: they collectively argue for a review standard that prohibits the circuit court from administering the substantial competent evidence test whenever the record discloses staff recommendations. The fallacy in the respondents' argument, however, is that they would foreclose the circuit court from *ever* considering the question of substantial competent evidence because staff recommendations are: (1) always in the record; and, (2) always substantial competent evidence. Their circular reasoning must be rejected.

Staff recommendations (like all expert opinions) are not some super-species of evidence, immune and impervious to a basic evidentiary challenge. The neighbors concede that the collection of cases cited by the respondents stand for the basic, unremarkable proposition that staff recommendations (and expert testimony) *can* constitute substantial competent evidence. Those cases, however, are but a cabinet of conclusions reached by reviewing courts based upon the specific recommendations before them.

As noted above, the circuit court panel in this case examined the record under the proper three-prong review standard and expressly acknowledged that it was prohibited from reweighing the evidence. [App. 5; R. Vol. I. pp. 77]. The circuit court applied the substantial competent evidence standard to the staff recommendations and the other testimony offered by the Applicant – it unremarkably concluded that the testimony failed the test. This is not the first time that a reviewing court has rejected staff's recommendations or purported expert testimony as legally insufficient. *See, e.g. Machado v. Musgrove,* 519 So.2d 629, 631 (Fla. 3d DCA 1987)(rejecting Zoning Director's recommendation for approval where basis for recommendation was totally irrelevant to the standard before the Commission); *Vidaurre v. Florida Power & Light Co.,* 556 So.2d 533, 534 (Fla. 3d DCA 1990)(rejecting conclusory "net opinion"); *see also, State Dept. of Trans. v. Samter*, 393 So.2d 1142 (Fla. 3d DCA), *rev. denied*, 402 So.2d 612 (Fla. 1981); *Allapattah Community Assoc. v. City of Miami*, 379 So.2d 387, 393 (Fla. 3d DCA), *cert. denied*, 386 So.2d 635 (Fla.

1980) (rejecting architect's opinion as devoid of evidentiary value).[7]

D. Several Misstatements Of Law And Fact Merit Correction.

The balance of this reply brief is devoted to untangling the misstatements of law and fact which lard the responses.

1. The Dispositive Issue Of Overcrowding.

This case ends as it started – a simple zoning case about crowd control. The record contains absolutely no substantial competent evidence whatsoever on the critical crowd control component of § 33-311(d). The Applicant attempts to sidestep this fact by mischaracterizing the neighbors' crowd control argument as a traffic argument. Specifically, the Applicant asserts, "Another argument presented by petitioners addresses the issue of "overcrowding" (meaning traffic)." [A.B. p. 41].

The Applicant's parenthetical is a false statement. Traffic and overcrowding are each separately addressed by § 33-311(d).[App. p. 15]. Each relates to a separate purpose of zoning. Under the clear and mandatory provisions of § 33-311(d), an applicant seeking a special exception must prove to the Commission with substantial competent evidence that its application will *not* provoke, *inter alia*, "traffic" or "excessive overcrowding of people or concentration of people or population". [App. p. 15]. Each requires separate proof under § 33-311(d). The code is written in the disjunctive.

In a dispositive admission, the Applicant concedes that its architect did not testify concerning the overcrowding issue. [A.B. at p. 42 n.28]. Nobody did! Consequently, there was zero evidence for either the Commission or the circuit court to weigh, let alone reweigh, on the overriding issue of overcrowding.[8] The County correctly notes that the Subject Condition is the only evidence addressing the overcrowding component of 33-311(d) - the

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[7] If, as the respondents' suggest, staff recommendations always constitute substantial competent evidence, then the Commission committed legal error when it reversed the decision of the Zoning Appeals Board ("ZAB"). After all, the only issue raised by the Applicant on appeal to the Commission was that "The Zoning Appeals Board decision was not supported by substantial competent evidence". [App. 0016]. Like the Commission, the ZAB had staff recommendations before it when it voted to deny the application.

[8] Contrary to the Applicant's mischaracterization of the neighbors' position, the neighbors never conceded that the Architect's testimony constituted substantial competent evidence. [A.B. p. 43]. Rather, the neighbors contended that because the architect's testimony was *not* competent substantial evidence, the circuit court committed no error when it rejected it.

condition that prohibits the simultaneous use of two contiguous structures (the sanctuary and fellowship hall) for worship services. [C.B. p. 26]. Both the County and the Applicant admit that the Subject Condition allows the simultaneous use of the same structures for activities ***OTHER* THAN WORSHIP SERVICES.**

The problem with the Subject Condition, as the circuit court correctly concluded, is that it is "meaningless". On its face, the Subject Condition does not regulate against overcrowding. It does nothing to limit the intensity of the property's use by capping the maximum number of people at the facility. *See, e.g., City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 733, 115 S.Ct. 1776, 1781 (1995)(holding that the purpose of maximum occupancy restrictions "is to protect health and safety by preventing overcrowding"). The Subject Condition is not a limitation on occupancy - it is a limitation on worship. It only regulates where and when occupants of the facility may worship once they arrive. The Subject Condition is irrelevant to crowd control. In sum, the Subject Condition is not such relevant evidence as a reasonable mind would accept as adequate to support the conclusion that the facility would not provoke overcrowding. *DeGroot* v. *Sheffield*, 95 So.2d 912, 916 (Fla. 1957). Thus, the circuit court was eminently correct to conclude that "there was no competent substantial evidence that the church met the criteria for a special exception." The overcrowding component of the special exception standard remained wholly unaddressed by any competent and substantial evidence.[9]

2. Value.

The respondents similarly concede that property value is not a legitimate factor for the Commission to consider when passing on an application for a special exception. Because value is irrelevant, evidence of value can not be substantial competent evidence. *See, Degroot*, 95 So.2d at 916.

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[9] The two cases cited by the Applicant address conditions that regulate the use and limitations on intensity of use of real property. The first case, *In re Sardi*, 751 A.2d 772, 775 (Vt. 2000), concerns a condition which was "unqualified and definite" – it limited the "maximum of 1,440 gallons of wastewater per day". *Id.,* at 775. The second case, *Twin Town Little League, Inc. v. Town of Poestenkill*, 249 A.D.2d. 811, 671 N.Y.S. 2d 831, 833, limited without qualification the maximum number of baseball games to be played (20 games), the termination of all operations (9:30 p.m.), and the posting of signage. Each of these conditions regulates a legitimate purpose of zoning in a clear, unqualified, and definite way. The circuit court correctly concluded that the Subject Condition does not.

3. "Pagans" and "Satan Worshipers"

"It never hurt anyone to have more religion"

According to the respondents, this case simply presents quasi-judicial business as usual and, they collectively contend that there is nothing that this Court (or any court) can do to discourage the extreme bias evidenced by certain sitting Commissioners during their consideration of a zoning matter. Instead, the Applicant categorically contends that the remarks of sitting Commissioners are beyond judicial review, no matter how outrageous, because municipal bodies speak only through their written resolutions. [A.B. p. 45].

There are two interrelated flaws in this argument. First, if true, the Applicant's contention would place the entire quasi-judicial record, except the resolution, beyond the scope of meaningful judicial review. That is anathema to this Court's decision in *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 463 (Fla. 1993). Second, with the exception of the Applicant's reliance on *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3d DCA)(*en banc*), *review dismissed*, 680 So.2d 421 (Fla. 1996), the two cases cited by the Applicant for this proposition, *Penn* v. *Pensacola-Escambia Governmental Center Authority,* 311 So.2d 97 (Fla. 1975)("*Penn*") and *Beck v. Littlefield*, 68 So.2d 889 (Fla. 1953)("*Beck*"), were decided in the legislative context – a decidedly different arena. *Snyder*, 627 So.2d at 474.[10] The Applicant evidently misunderstands that in order for a circuit court to perform its three-prong standard of review under ***VAILLANT*, IT MUST REVIEW THE ENTIRE RECORD OF THE PROCEEDING BECAUSE THE COLD TYPE OF A BOILERPLATE RESOLUTION WILL RARELY (IF EVER) INDICATE WHETHER A ZONING AUTHORITY: (1) AFFORDED DUE PROCESS; (2) APPLIED THE CORRECT LAW; AND, (3) SUPPORTED ITS DECISION WITH SUBSTANTIAL COMPETENT EVIDENCE.**[11]

E. The Big Picture.

Recall, the neighbors challenged the respondents to directly explain how this case differs from the legion of cases decided by

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[10] In this regard, the neighbors contend that *Blumenthal*'s reliance on *Penn* and *Beck* in the quasi-judicial context is misplaced. *See, Blumenthal*, 675 So.2d at 605.

[11] This is particularly true post-*Snyder* where zoning boards are not required to make findings of fact. *See, Snyder2* 627 So.2d at 476.

the appellate division of the circuit court: What error or injury did the circuit court commit or cause beyond simple legal error? In light of the colorful record, how does this case result in a miscarriage of justice? Rather than directly responding to the neighbors' challenge, the Applicant instead chose to shrink behind the flimsiest of all rhetorical devices offering only that "elaboration as to what injury resulted from the circuit court's error would be superfluous." [A.B. p. 35]. The truth is that no injury results at all.

Under the circuit court's order, the Applicant is free to use the property for the purpose for which it is zoned and, moreover, it is free to reapply for a special exception without reliance upon the condition which the circuit court concluded is meaningless. In this regard, the County is free to consider a subsequent application without the meaningless condition and, hopefully, without regard to "direct attacks by pagan[s] or by Satan worshipers", or the "killing little girls" [R. Vol. III. pp. 513-516; R. Vol. III. p. 519-521]. The neighbors respectfully contend that such a result is a far cry from a miscarriage of justice. To the precise contrary, it is a just and fair result which will only serve to improve the quality of quasi-judicial proceedings administered by local government throughout the State of Florida.

CONCLUSION

The sole source of disagreement between the circuit court and the district court in this case concerns the question of "substantial competent evidence". *Dania* compels reversal of the Third District's decision on that point. No further proceedings are necessary in the circuit court because the Third District's decision fails to ascribe any other error to the circuit court's decision. Consequently, this Court should simply quash the Third District's decision.

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