IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC95674
L.T. Case Nos. 97-2791 & 97-2861 (Consolidated)

LAS OLAS TOWER COMPANY,

Petitioner,

v.

CITY OF FORT LAUDERDALE,

Respondent.

ANSWER BRIEF ON THE MERITS OF RESPONDENT CITY OF FORT LAUDERDALE

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PREFACE

Petitioner, LAS OLAS TOWER COMPANY, shall be referred to herein as LOT. Respondent, CITY OF FORT LAUDERDALE, shall referred to herein as CITY.

LOT's first proposed development, a 45 story condominium, shall be referred to herein as Tower I. LOT's second proposed development, a 32 story condominium, shall be referred to herein as Tower II. Proceedings for both Tower I and Tower II were consolidated both in the Circuit Court and in the District Court, with the Circuit Court reserving jurisdiction [2 CITY App. 1:11] with respect to the constitutional challenges [2 CITY App. 3:22; 2 CITY App. 5:4; 2 CITY App. 7:8] of vagueness and lack of standards as to underlying zoning ordinances.

References to the Appendices will be referenced in the following format: "1 LOT App. 1:2-3" meaning LOT's Tower I Appendix, Tab 1, pages 2-3; "2 CITY App. 1:11" meaning CITY's Tower 2 Appendix, Tab 1, page 11.

CERTIFICATION OF TYPE SIZE AND STYLE

The type size and style used in this Brief is proportional "Times New Roman," 14 point.

STATEMENT OF THE FACTS AND CASE

1. Tower I and Tower II

In 1995 LOT filed an application (P&Z Case No. 11-R-95) for development of a 71 unit, 45 story (446 ft.) residential condominium (Tower I) on a 1.37 acre site on the banks of New River 1 block south of the Las Olas Boulevard corridor in Fort Lauderdale. The application proceeded through a staff Development Review Committee (DRC) review before being referred to the CITY's Planning and Zoning Board (P&Z Board) for review. After five days [1 LOT App. 10, 11, 12, 13, & 14] of hearings, the P&Z Board denied Tower I by a vote of 0-6 both as to (i) development plan review under CITY Code § 47-33.1 and (ii) density bonus allocation under CITY Code § 47-33. [2 CITY App. 2].

The Tower I denial of development plan was appealed to the CITY Commission pursuant to CITY Code § 47-33.1(e), *Id.*, while the denial of density bonus proceeded to circuit court on certiorari review. [2 CITY App. 3]. The CITY Commission approved the P&Z Board's denial of Tower I development plan [1 LOT App. 15], whereupon LOT proceeded with certiorari review in the circuit court. [2 CITY App. 5]. In the circuit court proceedings, Counts II and IV were for declaratory judgment attacking the constitutional validity of the underlying zoning

ordinances on the basis of vagueness and lack of standards. [2 CITY App. 3 & 5].

While the Tower I matters were proceeding in circuit court, LOT filed another application (P&Z Case No. 111-R-95) for development plan review for a 32 story, 34 unit residential condominium (Tower II) on the same 1.37 acre site. While Tower I had a proposed density of 71 units per acre, Tower II's proposed density of 25 units per acre met the maximum density allowable without a density bonus allocation under CITY Code § 47-33. Accordingly, the 32 story Tower II proceeded through preliminary staff DRC review before being referred to the P&Z Board for a development plan review of setbacks under CITY Code § 47-33.1.

2. Land Use Plan

The site for Tower II is located on the Eastern fringe of an area designated under the CITY's Comprehensive Plan / Future Land Use Plan (LUP) as the "Regional Activity Center" (RAC). [1 LOT 34:41 (Map Series); 1 LOT 34:119 (Map 7)]. Map 7 is part of the *adopted* portion of the LUP. Within the RAC, Map 7 designates an "Urban Core," and, in the very heart of the downtown area, a "Central Urban Core." The subject site is not in the heart of the downtown area, in the Central Urban Core, but rather, is outside that designated area, within the "Urban Core."

The *sole* goal of the LUP is to encourage land use that will "preserve and

enhance the character of Fort Lauderdale" and "ensure compatibility of land uses." (Emphasis supplied.) [1 CITY App. 33]. Predominant among those themes is the preservation of neighborhoods and New River.

New River plays a prominent role in the history, development, character and splendor of Fort Lauderdale. It flows past this site through the center or heart of the City. Policy 1.6 of the LUP speaks of " . . . preserving the open character and vistas along New River by moderating building heights on the riverfront." [1 CITY App. 39:5].[1]

3. Underlying zoning regulations and criteria.

A. Underlying R-3 Zoning District.

The site is located within an underlying "R-3" zoning district. CITY Code § 47-11, et seq. [1 CITY App. 6]. The R-3 zoning district regulations provide for a maximum height of 55' with a maximum density of 25 units per acre. The R-3 zoning district generally requires a minimum 25' front yard; minimum 10' side yard; and minimum 20' rear yard. CITY Code § 47-11.4(b) & (c). [1 CITY App. 6]. However, superimposed upon the foregoing minimum yard requirement is that the required yard not be less that ½ the height of the building.

[1] Interestingly, the Intracoastal Waterway does not play as prominent a role as New River does under either the LUP or the zoning regulations.

B. Overlaying Central Business District (CBD).

The site is within the Central Business District which, at this location, overlays the underlying R-3 zoning district. To the extent the CBD overlay zoning regulations conflict with the underlying R-3 regulations, the CBD provisions supersede and prevail. The boundaries of the CBD coincide with the Urban Core designation in Map 7 of the LUP. The CBD regulations are found at CITY Code § 47-33 and 47-33.1 [2 CITY App. 2] and exempt building sites ". . . from the maximum height restrictions established by the applicable [R-3] zoning regulations." *Id.* The CBD regulations call for a development (site) plan review and approval of setbacks by the P&Z Board for any structure located on New River, as this site is. CITY Code § 47-33.1(d). [2 CITY App. 2]. Until there is approval of a development plan, no development can take place in the CBD.

C. CITY Code § 47-33.1, Setbacks.

As to the setbacks and development plan review for Tower II, the criteria for review and approval by P&Z Board is generally set forth at CITY Code § 47-33.1(b) requiring:

> . . . a development plan for such structure or use shall have been reviewed and approved by the planning director and, where applicable, after development review as prescribed by section 47-59. In approving such development plan, the planning director shall consider the location; size; height; design; character and ground floor utilization of

> any structure or use, including appurtenances; access and circulation for vehicles and pedestrians; streets; open spaces, relationship to adjacent property; proximity to New River and other factors conducive to development and preservation of a high quality central business district. The director shall not approve the setbacks shown on the development plan unless a determination is made that the setbacks conform to all applicable provisions of the zoning ordinances, including the requirements of this section, that the safety and convenience of the public are properly provided for and that adequate protection and separation are provided for contiguous property and other property in the vicinity. The director may condition approval of the setbacks of a development plan by imposing one (1) or more setback requirements exceeding the minimum requirements prescribed by this section.

[2 CITY App. 2].

D. CITY Code § 47-59, Development Review Requirements

Interwoven into the fabric of the site plan review for Tower II is a requirement in CITY Code § 47-33.1 (a)(4) that:

> The provisions of section 47-59 (Development review requisites) shall apply, despite any provision in this section which is or may appear to be to the contrary.

The Development Review Ordinance, CITY Code § 47-59, et seq. (DRC Ordinance or DRC) [1 CITY App. 3] is a link between the CITY's LUP and the zoning regulations and is intended to " . . . ensure that new developments are <u>compatible</u> with <u>surrounding land use</u> . . . " *Id.* (Emphasis supplied.) Independent of the CBD regulations, § 47-33.1 (a)(4), the DRC Ordinance would require review of the Tower II site. CITY Code § 47-59.5. [1 CITY App. 3:2-3].

The DRC review criteria are set forth at CITY Code § 47-59.7. [1 CITY App. 3:5-11]. A development permit must comply with *all* of the development review requirements. DRC review examines a number of components, but of particular concern to the Tower II review is *Neighborhood compatibility and preservation* found at CITY Code § 47-59.7(v). [1 CITY App. 3].

> (v) *Neighborhood compatibility and preservation.* In order to ensure that a development will be compatible with, and preserve the character and integrity of adjacent neighborhoods, the development shall include improvements or modifications either on-site or within the public rights-of-way to mitigate adverse impacts, such as traffic, noise, odors, shadow scale, visual nuisances, or other similar adverse effects to adjacent neighborhoods. These improvements or modifications may include, but shall not be limited to, the placement or orientation of buildings and entryways, parking areas, bufferyards, alteration of building mass, and the addition of landscaping, walls, or both, to ameliorate such impacts . . . .

Therefore, a development plan review and approval is guided by consideration of such issues as "location," "size," "height," "relationship to adjacent property," "proximity to New River," "adequate protection and separation for contiguous property and other property in the vicinity," "open spaces," "compatible with surrounding land use," "traffic," "shadow scale," "visual nuisance," "placement and orientation of buildings . . . parking areas, bufferyards," and "alteration of building mass."

4. Tower II development plan and relationship to surrounding uses.

The proposed development site is located at the 700 block of Sagamore

Road, approximately 1-2 blocks East of the Federal Highway New River Tunnel on the North banks of New River, one block South of East Las Olas Boulevard. [1 LOT App. 3; 1 CITY App. 33:40]. The Tower II site is a small (relative to the location and intensity of the proposed development) 1.37 acres consisting of seven (7) 50' lots. The depth of the lots range from 220' ± on the East; 150' ± in the middle; and 170' ± on the West. [1 CITY App. 41; 42].

The site is surrounded by other adjacent developments, both residential and commercial. The site is located on one of the narrowest sections of New River in this general vicinity. A mere 120' of the quiet waters of New River separates the Tower II site from one of Fort Lauderdale's oldest and most desirable one and two story single family neighborhoods to the South.

To the East lies the residential and commercial portions of Coolee Hammock. Immediately East of the Tower II site is an adjacent seven (7) story residential condominium, the Chateau Mar Condominium at 800 Sagamore. Immediately East of the Chateau Mar is a two (2) story New River Residence Apartments at 808 Sagamore. A five (5) story Rivercrest Condominium at 818 Sagamore lies East of the Rivercrest Condominium. To the East thereof lies a two (2) story residence. Farther East, down New River, lies the affluent waterfront Las Olas Isles subdivisions of predominantly one and two story residences.

One block to the North of the site is the trendy Las Olas Boulevard corridor. Las Olas is a low-rise, upscale commercial corridor of pedestrian friendly shops, restaurants and offices. It's character and flair are sometimes mentioned in the same breath as Palm Beach's Worth Avenue, Miami's Coconut Grove, or New Orleans' Bourbon Street. [1 CITY App. 44:154-155]. Las Olas is laced with one-of-a-kind shoppes, jazz lounges and restaurants featuring sidewalk cafes and open air dining. Las Olas creates an atmosphere that beckons strolling pedestrian window shoppers, sightseers and an occasional horse drawn carriage. Las Olas is a unique asset of the CITY, worthy of cultivation and preservation.

The only development separating the Tower II site from Las Olas Boulevard is the Riverside Hotel. [2 LOT App. 4; 1 CITY App. 38]. Most of the Riverside Complex consists of three (3) one story CBS structures with front footages of 110' ±, 75' ±, and 260' ±. [2 LOT App. 4; 1 CITY App. 38:2]. The Riverside Complex also has a three (3) story hotel with accompanying six (6) story tower. The six (6) story tower is only 57' ± in width, the rough equivalent of seven (7) Tower II parking spaces. The Riverside Hotel also has a large garden patio area for strolling patrons and pedestrian friendly landscaped surface level parking on both sides of Sagamore Road. *Id.*

Sagamore road fronts the North boundary to the Tower II site, separating it

from the Riverside Hotel. Sagamore Road is an undersized 30' right-of-way. This two (2) lane roadway services patrons and suppliers of the commercial strip along the South side of Las Olas Boulevard. Almost all of the parking for the Riverside Hotel, shops, restaurants along this stretch of Las Olas are serviced by Sagamore Road. Las Olas Boulevard, being closed to vehicular traffic from time to time for special festive events, Sagamore becomes the only means of ingress and egress to and from that portion of the Coolee Hammock subdivision South of Las Olas, West of Himmarshee Canal and East of the Tower II site. Sagamore often becomes vehicularly impassable. [1 CITY App. 34; 1 CITY App. 46:221-229].

Approximately 200' to the West of the Tower II site, nestled strategically at the bend in New River is the famed historic Stranahan House. This two story structure was once home to one of Fort Lauderdale's first families and served as a trading post to the early settlers and Seminole Indians peddling their wares along New River.

Much farther to the West, divided by a six (6) lane Federal Highway lies the core of Fort Lauderdale's downtown area. This core is the area of the highest intensity of development highlighted by tall office towers with heightened floor area ratios.

<u>Height / FAR Examples Within the Central Urban Core</u>

	Project	Location	Height (appox.)	FAR
1.	Barnett Bank	1 E. Broward	250'	4.1
2.	One Corporate Plaza	110 E. Broward	300'	5.4
3.	NationsBank	300 E. Broward	360'	1.9
4.	Broward Financial Center	500 E. Broward	300'	2.6
5.	New River Center	200 E. Las Olas	300'	3.7
6.	SunBank Center	515 E. Las Olas	230'	2.1
7.	110 Tower	110 S.E. 6 St.	390'	3.8
	Height / FAR Examples Outside Central Urban Core in Proximity			
8.	Chase Building	888 E. Las Olas	110' (includes surface parking lot)	.6
9.	Chateau Mar	800 S.E. 4 St.	65'	.8
10.	Rivercrest	818 S.E. 4 St.	50'	.8
11.	Las Olas Tower II (Proposed)	700 Sagamore Rd.	325'	4.4

As the table above demonstrates, Tower II represents an intensity of development which is more compatible with the surrounding land uses within the Central Urban Core, West of the six lane Federal Highway, but is incompatible with its surrounding land uses East of Federal Highway, within the Las Olas / New River corridor.[2]

As New River flows Westward from this site, through the downtown area, it can be seen that development has proceeded with a much greater sensitivity "to preserving the open character and vistas along New River by moderating building heights on the

[2] The 41 story Grand Pavillion, 25 story Riverwalk Place, 110 Tower and NationsBank buildings referred to at page 7 of LOT's Brief are all located West of Federal Highway within the more intensively developed Central Urban Core.

riverfront." Policy 1.6, LUP. [1 CITY App. 39:5].

The development plan for Tower II shows a 32 story residential condominium tower with a height of 325' to an uppermost observation level, with 65' ± of additional structures atop thereof, for a total height of almost 400'. The 34 dwelling units in this 32 story structure occupy only 7-8% less square footage than the 45 story Tower I. [2 CITY App. 9]. The 34 units of Tower II consist of 24 units between 5,000 and 6,000 sq. ft.; 8 penthouse units of approximately 11,000 sq. ft.; 1 townhouse penthouse at 22,126 sq. ft.; and 1 garden penthouse at 23,329 sq. ft.

Along the 226' ± of Sagamore Road frontage, the parking garage rises three and four levels above grade with a 12' setback from the edge of the curb. On the roof of the parking garage is a tennis facility. To the front exposure of the site, on Sagamore Road, the parking garage is a 5' landscape strip with a 7' sidewalk adjacent thereto.

To the East of the parking garage the tower envelope comes all the way out to the North property line. Farther East is an entrance ramp graduating to a height of 10'8" situated within 12' of the abutting seven (7) story Chateau Mar . The axis of the tower projects Eastward to within 12' of the Chateau Mar property. This should be contrasted with the Eastern setback of 24' for Tower I. As can be seen, in the transition from Tower I to Tower II, the decrease in height was accomplished at the expense of an increase in mass.

On the South, the "tower envelope" is generally set back 50' from New River. On the other hand the "parking envelope," with a tennis facility five levels above grade, proportionately occupies a much larger footprint and comes as close as 20' to New River. By comparison the CITY Codes require a 25' minimum rear yard for single family dwellings [1 CITY App. 5], while the R-3/RM-30 district requires a minimum 20' rear yard, but in no event less than ½ the height of the building, with a maximum allowable height of 55'. [1 CITY App. 6]. Five floors above grade, in the parking envelope, is a tennis facility, with light stanchions for night playing. This fifth level tennis facility is a mere 120' across the quiet waters of New River from the 1-2 story single family residences of the Rio Vista neighborhood. The parking envelope, which rises three (3) above-grade levels on the West, has a 12' setback. The mass, scale and intrusive setbacks relative to adjacent properties and New River and placed on such a small parcel of land has been likened to placing an elephant on a dime.

5. Tower II proceedings below.

Against this factual backdrop and criteria, after three days of hearings [2 LOT App. 5, 6 & 7] the P&Z Board denied the Tower II site plan setback review by a vote of 1 to 6. The matter was appealed to the City Commission which upheld the P&Z Board's denial by a vote of 0 to 5.

LOT sought certiorari review of the Tower II denial in circuit court in Count V

of the pending action. Count VI was a declaratory judgment attacking the constitutional validity of the underlying zoning ordinance on the grounds of vagueness and lack of standards. [2 CITY App. 7].

The circuit court proceeded with certiorari review of Tower I and Tower II. As to Tower I the circuit court denied certiorari, upholding the denial of both the density bonus allocation and the site plan setback review. [2 CITY App. 1]. As to Tower II, the circuit court found that the proceedings below complied with procedural due process and that the denial of the development plan was supported by competent substantial evidence. [2 CITY App. 1:10]. Although the ordinance requires a minimum 12' front street setback (which may be increased in the discretion of the Board), there is no numerically mandated minimum for the sides and rear setbacks for this proposed project.[3] The ordinance permits discretion in the approval of those setbacks after considerations of the above referenced legislatively mandated criteria.[4] However, the

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[3] The district court characterized that other than the front street setbacks (this site has only one street frontage) "the other sides are not specified by ordinance and are in the power of the Planning and Zoning Board to accept or reject, applying criteria set forth in the ordinances." *Las Olas Tower Company v. City of Fort Lauderdale*, 742 So.2d 308, 314, fn. 10 (Fla. 4th DCA, 1999)

[4] The ordinance does not resort to expressing setbacks in terms of numerical niceties because of the varied conditions throughout the CBD. Mathematical formulae for setbacks were expressly rejected in the drafting of the ordinance, in part as a method of inspiring creative designs as opposed to a "box" as a building.

circuit court found the CITY departed from the essential requirements of the law in denying Tower II's development plan by not informing LOT, before denial, as to what setbacks or development plan modifications the Board would find acceptable. [2 CITY App. 1:10]. Curiously, the circuit court found no such departure from the essential requirements of the law in the Tower I denial.

6. District Court of Appeal.

LOT sought filed a petition for writ of certiorari in the district court of appeal seeking review of the CITY's Tower I denial. Correspondingly, CITY filed a petition for writ of certiorari in the district court of appeal also seeking review of the circuit court's grant of certiorari. The district court denied LOT's petition as to Tower I. As to Tower II, the district court granted the CITY's petition for writ of certiorari as to Count V on the grounds that the circuit court failed to apply the correct law.

The district court found that the determination of whether to modify the setbacks or condition approval of the development plan upon modifications cannot be made until the development plan is reviewed against the legislatively mandated criteria. It found the Board had discretion in determining whether a particular criterion required modification of a setback, but that the exercise of such discretion was neither ". . . unfettered nor freely subject to whim or caprice . . . " as there is a " . . . review process through which abuse of discretion can be overcome." *Las Olas Tower Company,* supra

at 314.

In granting certiorari and quashing the circuit court's order as to Tower II, the district court framed the issue as:

> . . . not whether this legislative scheme vesting such discretion is void for lack of objective standards (that issue being still before the circuit court in Counts II and IV and VI over which the court retained jurisdiction), but whether the City had a duty to notify a developer what would be required in order to avoid denial of approval of a development plan. We find no language in the ordinance requiring that such be done. It would appear, however, that in this instance the issue is moot. A member of the City's planning staff did meet with LOT's representative at the proposed site prior to the submission of the site development plan on Tower II and outlined with a reasonable degree of specificity what the developer needed to do in order to obtain site plan approval.

Id. at 314-315.

This matter is now before this Court upon LOT's Petition for Discretionary Review of the district court's granting of the CITY's Petition for Writ of Certiorari as to Tower II on the basis that the district court exceeded the second level certiorari scope of review as set forth in *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995).

SUMMARY OF ARGUMENT

The district court granted certiorari and quashed the order of the circuit court. The circuit court in construing the underlying zoning ordinance, effectively re-wrote it,

thereby transforming into a mandatory obligation that which had been written as a discretionary function. The circuit court was requiring that the P&Z Board exercise its discretion and inform LOT as to what setbacks it would approve the development plan, prior to announcing that it had denied approval to the proposed development plan. In doing so the district court, following *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla. 1995) utilized a standard of review predicated on the "applied the correct law" standard announced in *Education Development Center, Inc. v. City of West Palm Beach*, 541 So.2d 106 (Fla. 1989) and *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982).

CITY contends that the district court's application of the "applied the correct law" standard of review, under the circumstances of the case at bar, was the appropriate standard of review. CITY holds out for review a series of cases flowing from quasi-judicial tribunals in which the "applied the correct law" standard was utilized where "errors" are of no greater magnitude than herein.

LOT applies an inflexible singular rule of "gross miscarriage of justice" in arguing the district court exceeded its scope of review. CITY subscribes to a more flexible rule which requires the exercise of discretion on the part of the district court as it draws new lines determining which errors are of sufficient magnitude to merit the additional level of review.

Over the years the enunciated standards are many and varied. A review of those standards contrasted with the errors committed by the circuit court below demonstrate how the district court's scope of review is within the discretionary limits suggested by *Heggs,* supra. The circuit court lacked jurisdiction and authority to re-write an ordinance that was clear and unambiguous on its face. It violated one of our most fundamental constitutional principles -- separation of power -- when it invaded the legislative province in re-writing the ordinance substituting its judgment for that of the legislative body. In its constructive redraft of the ordinance, the circuit court presumed the ordinance's invalidity while the law carries a contrary presumption of validity, until declared invalid beyond a reasonable doubt.

The underlying invalidity which it sought to cure was that of vague standards. The issue of the constitutional validity of the ordinance had been left on the table for later review in Count VI of the Complaint, upon which the court retained jurisdiction. This was a procedural irregularity for which discretionary certiorari has traditionally been entertained. There was ample law upholding the standard of *compatibility* upon which the underlying ordinance is based.

Upon this basis CITY urges that the scope of review employed by the district court herein was eminently correct.

ARGUMENT

In *Las Olas Tower Company v. City of Fort Lauderdale,* 742 So.2d 308 (Fla. 4th DCA 1999) the district court started its second level certiorari review of the circuit court's order by articulating the standard of review from *Haines City Community Development v. Heggs*, 658 So.2d 523 (1995): (i) whether procedural due process had been afforded and (ii) whether there had been an application of the correct law. In this case the key inquiry was whether the correct law had been applied.

The circuit court had found that the P&Z Board and CITY had departed from the essential requirements of the law when, "before denying LOT's application" [2 CITY App. 1:10] it failed to exercise its discretion to inform LOT what setbacks it would find acceptable or, alternatively, to approve the development plan conditioned on a number of modifications. *Id.*

CITY Code § 47-33.1 requires that no structure be erected within the CBD "unless a development plan . . . shall have been reviewed and approved by the planing director" applying the standards and criteria in § 47-33.1 and the DRC Ordinance, §47-59. [1 CITY App. 2 & 3]. The CITY Code provides that the

"director *may* condition approval of the setbacks of a development plan" by imposing setbacks that exceed the minimum. CITY Code § 47-33.1(b). [1 CITY App. 2]. Because this project is located on New River, review and approval of the development plan is the responsibility of the P&Z Board. CITY Code § 47-33.1(d).

The district court crystallized the issue as "whether the City had a duty to notify a developer what would be required in order to avoid a denial of approval of a development plan." *Las Olas Tower*, at 315. Against arguments that the lower court assumed the legislative prerogative of re-writing the legislation, thereby transforming a discretionary function of the Board into a mandatory obligation, the district court found "no language in the ordinance requiring that such be done." *Id.* at 315.

The district court also found that the CITY staff[5] met with LOT representatives at the site prior to its submission of Tower II to the P&Z Board and outlined "with a reasonable degree of specificity" what was needed to obtain site approval. *Id.* at 314. In so finding, the district court followed *Heggs* and *Education Development Center, Inc. v. City of West Palm Beach,* 541 So.2d 106 (Fla. 1989) (*EDC*) when it found the lower court "failed to apply the correct law." *Las Olas*

[5] The record reveals that it was the Planning Director. [2 LOT App. 7:119-120].

Tower, at 314.

1. Overview of *Heggs, Combs* and *EDC*.

In *Heggs* the Supreme Court had before it a certified question of whether, after *EDC* does the *Combs v. State*, 436 So.2d 93 (Fla. 1983) standard of review still govern a district court in its review of a circuit court order acting in its review capacity over a county court? The certified question was answered in the affirmative, "holding that the standards of review in *Combs* and *Educational Development Center* are the same." *Heggs,* at 525.

The *Heggs* analysis starts with an historical overview of certiorari identifying it as a discretionary writ addressing whether the lower court had "exceeded its jurisdiction" or "not proceeded according to law" *Id.* at 525 citing *Basnet v. City of Jacksonville,* 18 Fla. 523 (1882) as an opinion "which retains its currency and whose clarity remains a hallmark." *Heggs* at 525. *Heggs* also refers to *Jacksonville, T. & K.W. Railway Co. v . Boy,* 34 Fla. 389, 393, 16 So. 290, 291 (1894) as setting the standard for review with "exceeded its jurisdiction" criteria as well as "methods unknown to law" or "essential irregularity in procedure." *Heggs* at 525.

Although CITY is not unmindful that second level certiorari review should not be used as a second appeal to correct merely erroneous conclusions, CITY

nonetheless contends that the circuit court "exceeded its jurisdiction" utilizing "methods unknown to law" when it assumed the mantle of legislative powers in re-writing the underlying ordinance. There was an "essential irregularity in procedure" when the lower court apparently *presumed* the ordinance unconstitutional and proceeded to re-write the legislation to "save the CITY from its folly" when jurisdiction had been retained (and the question never litigated) in Count VI to test the constitutionality of the ordinance as against allegations of vagueness and lack of standards. It follows therefore that the district court utilized the correct standard of review in accordance with *Heggs, Basnet* and *Jacksonville, T. & K.W. Railway Co., supra.*

Heggs proceeded to analyze *Combs*, supra which involved a county court conviction for driving while intoxicated. The Defendant objected to certain testimony on the grounds it was privileged relative to his duty to make an accident report. The objections were overruled by the county court. The circuit court affirmed the county court upholding the conviction. The district court of appeal denied certiorari review on the basis that certiorari was not available to review errors of law made by a circuit judge sitting in review of county court judgments and that certiorari was only available for violations of due process which effectively denied review "such as the circuit court judge rendering a decision without allowing

briefs to be filed and considered." *Combs* at 94. The Supreme Court found the district court had taken too narrow a view of second level certiorari review. CITY contends that re-writing the ordinance because of a presumed invalidity while Count VI remained open is an error, the magnitude of which is akin to a circuit judge rendering a decision without allowing briefs to be filed.

The *Combs* court indicated that district courts should conduct second level certiorari review not only where there are violations that (i) "effectively deny appellate review" or (ii) "which pertain to regularity of procedure" but should also conduct second level certiorari review where (iii) there has been a "violation of clearly established principle of law resulting in a miscarriage of justice." *Combs* at 95-96.

Because it is impossible to list all the legal errors serious enough for this second level certiorari review, the *Combs* court indicated the district courts should be granted "a *large degree of discretion* so that they may judge *each case individually*." *Combs*, at 95 (emphasis supplied). This discretion should be used "cautiously" to avoid a second level certiorari review as a vehicle for a second appeal. *Id.*

The *Heggs* court next proceeded to discuss *EDC*, supra. *EDC* like *Las Olas Tower*, supra, starts as a quasi-judicial proceeding in an application to the Zoning

Board of Appeals to convert a residential property to a private preschool. The circuit court on certiorari review quashed the Board's decision. The district court granted certiorari quashing the circuit court's order on the basis that it had applied an incorrect legal standard in its review of competent substantial evidence. On remand, the circuit court found the Board's decision was not supported by competent substantial evidence and therefore quashed the Board's order. On appeal the district court granted certiorari and quashed the circuit court's order on the basis that the circuit court either reinterpreted the inferences or reweighed the evidence. The Supreme Court found the district court exceeded its scope of review, reaffirming *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982) as "clearly setting forth" that the proper standard of review for a second level certiorari review of a quasi-judicial proceeding as whether the circuit court afforded due process and whether "it applied the correct law." *Vaillant* at 626; *EDC* at 107. The *EDC* court held "the principles expressed by the court in *Vaillant* clearly define the standards of review applicable here." *EDC*, at 107 (emphasis supplied).

In comparing *Combs* and *EDC*, the *Heggs* court announced that when the standards are reduced to their core, "they appear to be the same." *Heggs*, at 529. While conceding that there is no complete catalog to which the court may turn to resolve a particular case, *Heggs,* was quick to note that the standard is intended to

have a "degree of flexibility and discretion." *Id*. at 530. *Heggs* anticipates a course where the court is "drawing new lines" as it "individually determines those errors sufficiently egregious or fundamental to merit the extra review." *Id.* at 529.

As can be seen, the descriptive terms used to define the contours of discretionary second level certiorari review are many and are varied. They include "whether the lower court has exceeded its jurisdiction," "applied the correct law," "essential irregularity in the proceedings," "not observed the requirements of the law essential to the administration of justice," "procedure is illegal, unknown to law or essentially irregular," "violation of a clearly established principle of law resulting in a miscarriage of justice" to name a few. Of the numerous standards, LOT chooses to concentrate solely on one: "gross miscarriage of justice." CITY disagrees that *Heggs,* supra, intended that only one singular, inflexible standard be used to set the contours of second level certiorari review. Instead, CITY contends the proper *Heggs* standard of review for a second level certiorari proceeding on an underlying quasi-judicial decision is much more flexible that than espoused by LOT and requires a district court to exercise a range of discretion in determining which errors are of sufficient magnitude to warrant this additional level of review. CITY contends that the errors before the district court below are sufficiently within that range of discretion intended by *Heggs,* supra.

With the foregoing predicate, we must distinguish the case at bar from the species of cases involving inquiries on a second level certiorari review as to whether the circuit court applied the correct law in its evaluation of whether the lower quasi-judicial tribunal had competent substantial evidence upon which to base its decision. *Martin County v. City of Stuart*, 736 So.2d 1264 (Fla. 4th DCA 1999); *City of Dania v. Florida Power & Light*, 718 So.2d 813 (Fla. 4th DCA, 1998) *receded from by Martin County, supra.*; *Manatee County v. Kuehnel*, 542 So.2d 1356 (Fla. 2nd DCA 1984) *review denied* 548 So.2d 663 (Fla. 1989); *St. Johns County v. Owings*, 554 So.2d 535 (Fla. 4th DCA 1989), *review denied* 564 So.2d 488 (Fla. 1990).

Although *Heggs* declares the standard of review under *Combs* and *EDC* as "the same," CITY prefers to follow the *Deerfield Beach v. Vaillant*, *supra*, line of cases where the court articulated the "applied the correct law" standard of review for those cases climbing the appellate ladder from a decision of a quasi-judicial body. This is to be distinguished from the line of cases emanating from a decision of a county court.

Simply, by the time the matter arrives at the district court for a second level certiorari review under a *Combs* analysis, the matter is being judicially scrutinized for the third time, having already received two full judicial reviews by the county

court and the circuit court sitting in its appellate capacity. On the other hand, where the matter flows from a zoning decision of a quasi-judicial tribunal, by the time the matter climbs to the district court, it has only received one judicial review, and in the *Las Olas Tower, supra* case here under review that one judicial review was conducted by a single circuit judge sitting in an appellate capacity. We should be mindful of Justice MacDonald's dissent warning of clothing "trial judges with power of absolute czars" in zoning matters, *EDC* at 106 and the need for "flexibility and discretion" in "drawing new lines" in the discretionary second level certiorari review. *Heggs,* at 529. CITY contends that this Court should grant the district court that "flexibility and discretion" in the drawing of lines in the *Las Olas Tower* case here at issue.

2. "Applied the correct law" standard of review.

This Court denied review in *Herrera v. City of Miami*, 600 So.2d 561 (Fla. 3rd DCA 1992), *review denied*, 613 So.2d 2 (Fla. 1992) where a parking variance was granted for a 100 unit apartment complex which was a federally sponsored project for the elderly. The circuit court affirmed the granting of the variance. In developing the standard of certiorari review, the district court wrote that merely by incanting the principles of law for variance cases, the matter may not be placed beyond the district court's certiorari review. The test applied was "whether that law

had been correctly applied." *Id.* at 562. The district court found the findings of the circuit court did not satisfy the legal requirements for a variance, granted certiorari and quashed the circuit court's order granting a variance. The application of "applied the correct law" was left undisturbed by this Court. The circuit court's misapplication of law in the *Las Olas Tower* case at bar is violative of much graver essentials of law than found in *Herrera, supra* and therefore the district court's scope of review in *Las Olas Tower, supra*, should be sustained.

In *Matura v. City of Coral Gables*, 619 So.2d 455 (Fla. 5th DCA 1993) the district court utilized the "applied the correct law" standard of review in quashing a circuit court order approving the grant of a zoning variance. In analyzing whether the correct law was applied, the court noted:

> It is our responsibility, as part of the judicial review process, to ensure that the Circuit Court has properly applied the law in order to maintain the integrity of the legal system and legal processes. We cannot, and should not, turn a blind eye to an incorrect application of the law. To allow a decision to stand where the correct law was wrongly utilized, simply because that particular law itself was applicable, does not provide a valid or just reason sufficient to support a legal decision.

Id. at 457. In the case at bar, not only was there an incorrect application of law, but there was a want of the correct law being wrongly utilized. This misapplication of law, as will be seen, is of constitutional proportions, to which a blind eye should not be turned.

Just as the district court below in *Las Olas Tower,* the district court in *City of Jacksonville v. Taylor,* 721 So.2d 212 (Fla. 1st DCA 1998), *review denied*, 732 So.2d 328 (Fla. 1999) followed the "applied the correct law" standard of review in quashing the circuit court's order and reinstating the City Council's denial of a zoning variance. The circuit court had failed to apply the correct law when it relied on the fact that other properties in the vicinity had already received similar variance. The district court also found that the circuit court's failure to apply the correct law amounted to a miscarriage of justice relying on cases that equated miscarriage of justice with "fundamental departures from controlling law." *Id.* at 1213. This Court denied further review. The departures from controlling law in the *Las Olas Tower* circuit court ruling are significantly more fundamental than the departures in *City of Jacksonville v. Taylor, supra*, where the court denied review.

Similarly, where the district court in *Equity Resources, Inc. v. County of Leon*, 643 So.2d 1112 (Fla. 1st DCA 1994), *review denied*, 651 So.2d 1194 (Fla. 1995) utilized the "failed to apply the correct law" standard of review, it granted certiorari quashing the circuit court's order upholding a denial of a vested rights application. The district court found the trial court "applied incorrect legal principles in ruling on the merits of the estoppel claim" departing from the essential requirements of the law. *Id.* at 1119. There too this Court denied review. The

circuit court's application of incorrect legal principles in *Las Olas Tower*, *supra* is as compelling, if not more egregious than that found in *Equity Resources, supra*.

3. Lower court "exceeded its jurisdiction" standard of review.

In its historical overview *Heggs, supra*, cites with approval to a standard of review in *State v. Smith*, 118 So.2d 792 (Fla. 1st DCA 1960) that would grant certiorari where the inferior court had "exceeded its jurisdiction." *Heggs,* at 525**.** The circuit court below in mandating that the P&Z Board is obligated to exercise a power that was unambiguously drafted as a discretionary power, went beyond merely using an incorrect principle of law. It took upon itself the legislative prerogative of re-drafting the legislation.

In doing so it exceeded its jurisdiction. Courts are "without power" to construe an unambiguous statute or ordinance that results in extending or modifying its express terms. *American Bankers Life Assurance Company of Florida v. Williams,* 212 So.2d 777, 778 (Fla. 1st DCA 1968); *State v. Barnes*, 595 So.2d 22, 24 (Fla. 1992) (Supreme Court has no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent.). See also *Holly v. Auld,* 450 So.2d 217, 218-19 (Fla. 1984) where courts are "without power" to modify statutes unambiguous on its face; *Sarasota Herald Tribune Co. v. Sarasota County,* 632 So.2d 606, 608 (Fla. 2nd DCA 1994):

> Courts are not authorized to embellish legislative requirements with their own notions of what might be appropriate. If additional requirements are to be imposed, they should be inserted by the legislature. (Emphais supplied.) (Citations omitted.)

Such actions as were undertaken by the circuit court below are in excess of the court's jurisdiction and authority. Such departures from the correct principles of law have traditionally been deemed of sufficient magnitude under the "applied the correct law" standard of review to fall within the district court's discretionary second level certiorari review.

4. "Violation of fundamental principles of law" standard of review.

The *Las Olas Tower* circuit court, in transforming a discretionary function into an obligatory function, re-wrote clear and unambiguous legislative text. In the process it substituted its wisdom and judgment, in what it perceived as a better, fairer construction of the ordinance, for that of the legislative branch. In doing so it breached one of our most elemental doctrines of jurisprudence and governance.

A bedrock principle of Florida's Constitution the division of the governance of the state into three branches -- legislative, executive and judicial -- under which it would be a violation of the constitutional principle of separation of powers for a court to compel the exercise of a purely legislative prerogative. *Dade County Classroom Teachers Association v. Legislature*, 269 So.2d 684, 685-86 (Fla.

1972).

Under the constitutional doctrine of separation of powers, the courts may not substitute their judgment for another coordinate branch of government. *Askew v. Schuster,* 331 So.2d 297 (Fla. 1976). Under separation of powers principles, the judicial branch may "not interfere with the discretionary function of the legislative or executive branches." *Trianon Condominium Assn. v. City of Hialeah,* 468 So.2d 912, 918 (Fla. 1985)

In the case at bar, the circuit court's application of incorrect principles of law amounted to a breach of one of our most cherished and fundamental principles of constitutional law. Discretionary certiorari review should never turn a blind eye to departures of such great moment as to not extend to violations of constitutional proportions.

5. Vagueness of zoning standards.

LOT complains and the circuit court notes that only after LOT had gone back to the drawing board twice did the CITY inform LOT that its development plan failed to gain approval. Central to that complaint is the notion that LOT was somehow "blindsided" by not understanding what the zoning criteria meant in relationship to this site and LOT's development plan.

The City's Planning Director, Chris Wren, met with LOT representatives in

the very early stages of drafting Tower II, prior to staff's preliminary DRC review, a review which precedes the P&Z Board review. He indicated that an appropriate setback for the project on New River might be 30' to 40' for a "small scale townhouse project" and that a 50' setback would be appropriate for portions of the garage structure were it not topped off with a massive 32 story tower. [2 LOT App. 7:118].

Mr. Wren continued to explain:

> Yeah, I was trying to explain to the applicant that if it didn't have a tower on it and all it was the 50 foot garage positioned as it was, it would seem appropriately set back.
>
> Interestingly enough what was not put in those minutes was a very pointed question they asked me: Well, what would we support. And I said, well, without seeing the specifics of the project, I could give you a range.
>
> I went out to the site and even instructed the applicant how I would go about looking at this neighborhood compatibility. You go around out there and you look at the buildings out there and try to envision what would be compatible within a range.
>
> And I told the applicant at those meetings that we could support something in the range of a 10 to 15 story project, depending on the design of the project; not be held to those specifics but in that range, after I went and visited the site and specifically looked at the applicant's request.

[2 LOT App. 7:119-120].

With that backdrop, LOT went forward preparing the Tower II development plans, submitting them to a preliminary staff DRC review of the project. From the staff

DRC review were generated staff comments on the project. A staff memorandum with a very thorough analysis of the project in light of all the relevant criteria was prepared and distributed in advance of presenting the case to the P&Z Board for review.

LOT opened its Tower II case before the P&Z Board with a statement as to how it ". . . took stock of the situation and the comments of staff, the comments of the Board . . ." as a result of the lengthy Tower I proceedings. [2 LOT App. 5:62]. They "thought hard about how to address all . . . the issues that arose during that period [which] we heard very carefully." *Id.* They then announced that as a result of that process they had redesigned the building to make it acceptable to the City and the community.

Only after "taking stock" and "very carefully hearing all the issues" in the lengthy Tower I proceedings; after detailed discussions with the Planning Director prior to staff DRC review; after a staff DRC review and comments on the project; and after a very thorough staff memo analyzing the project did LOT go forward with the P&Z Board review. Rather than walking into the P&Z Board review blindly, LOT had been thoroughly apprised with a reasonable degree of specificity of the appropriate *range* of development for this project, at this site, at this location.

Nonetheless the circuit court effectively re-wrote the ordinance to madate that the Board inform the developer prior to denial exactly what it would approve. It

should be noted that the circuit court in electing to rewrite the ordinance to mandate the exercise of a discretionary power does so without citation to any authority. There is "no such language in the ordinance requiring that such be done." *Las Olas Tower*, supra at 314. In support of the circuit court's rewritten construction, LOT now argues on the strength of *State v. Stadler*, 630 So.2d 1072 (Fla. 1994) and *Firestone v. News-Press Publishing Co. Inc.*, 538 So.2d 457 (Fla. 1989) that whenever possible, a court should construe an ordinance to bring it within constitutional boundaries.

A closer reading of the cases reveals that *Firestone*, supra, is an overbreadth challenge where it was also cautioned that courts may place narrowing constructions on enactments, but only when it "does not effectively re-write the enactment." *Id.* at 459. *State v. Stadler*, supra, warns that the power to engraft a narrowing construction on an enactment in favor of its constitutionality is limited (i) by the legislative intent, where, as in the case at bar, it is clear and unambiguous on its face, and (ii) the court may not effectively re-write the legislation. *Id.* at 1075-76. Here the circuit court breached both conditions in its unauthorized re-written construction of the ordinance.

In *Brown v. State*, 358 So.2d 16 (Fla. 1978) the court indicated that all doubts as to the validity of an enactment must be resolved in favor of its constitutionality.

In construing an enactment a court must be wary of "transcending its constitutional authority by invading the province of the legislature" and it should never re-write an enactment in suggesting a saving constitutional construction. *Id.* at 20. In this regard the circuit court acted contrary to fundamental principles of law for which discretionary certiorari review should lie.

6. "Procedural irregularities" standard of review.

A further flaw in LOT's proffered justification for the circuit court's re-written ordinance is that all legislative acts are presumed valid and the presumption continues until the invalidity has been shown to be "free from doubt." *Campbell v. Johnson*, 182 So.2d 244, 246 (Fla. 1966). 10 Fla. Jur. 2d, Constitutional Law § 10. The enactment's unconstitutionality must be demonstrated "beyond all reasonable doubt." *Id.* ; *Bonvento v. Board of Public Instruction of Palm Beach County*, 194 So.2d 605, 606 (Fla. 1967); *State v. Kinner*, 398 So.2d 1360, 1363 (Fla. 1981).

Here the circuit court indulged in the species of procedural irregularity for which discretionary certiorari review has historically been recognized. *Heggs*, supra, at 525-26; *Basnet,* supra, at 526-27; *Jacksonville T.&K.W. Railway Co.,* supra, at 393; *Mernaugh v. City of Orlando*, 41 Fla. 433, 442, 27 So. 34, 36 (1899). In engrafting the new re-written construction, the circuit court apparently presumed the ordinance to be unconstitutional as LOT argues, contrary to the correct

presumption of validity until declared invalid beyond all reasonable doubt. Such a procedure is flawed in that the constitutional attack for Tower II had been saved for Count VI of the Complaint while certiorari review proceeded only on Count V. See *Nostimo, Inc. v. City of Clearwater,* 594 So.2d 779, 781 (Fla. 2nd DCA 1992); *Bama Enterprises, Inc. v. Metropolitan Dade County,* 349 So.2d 207 (Fla. 3rd DCA 1977), *cert. denied,* 359 So.2d 1217 (Fla. 1978); *Thompson v. City of Miami*, 167 So.2d 841 (Fla. 1964); *City of Coral Gables v. Deschamps*, 242 So.2d 210, 212 (Fla. 3rd DCA, 1971). The circuit court indulges in the presumption of constitutional invalidity while at the same time reserving jurisdiction as to the underlying constitutional attack in Count VI.

According to LOT's argument, this presumption of invalidity seems to be founded in what is argued as a lack of objective standards in the ordinance which leaves the P&Z Board with "unfettered discretion" in making a decision that is "unreviewable." With respect to that argument, the district court below found the criteria to be considered by the P&Z Board is

> . . . not discretionary but is legislatively mandated. Discretion is involved, however, in determining whether a particular criterion requires or justifies some modification of the setback. The exercise of that discretion is neither unfettered nor freely subject to whim or caprice, as there is a clear appeal and review process through which abuse of discretion can be overcome.

Las Olas Tower, supra at 314.

In the CITY's Statement of Facts we have set forth with sufficient clarity an abbreviated review of the characteristics found in the record below as to the surrounding area against which the "compatibility" of the proposed development plan must be judged. The ordinance calls for the P&Z Board to apply the facts against such criteria as "location," "size," "height," "relationship to adjacent property," "proximity to New River," "adequate protection and separation for contiguous property and other property in the vicinity," and "open spaces."

Under the LUP the sole goal is "to encourage the use of land in a manner that will preserve and enhance the character of Fort Lauderdale" and "ensure *compatibility* of land uses." LUP at 5. [1 CITY App. 39:5]. From that flows the DRC Ordinance which is intended to ensure that developments are "*compatible* with *surrounding land use*." CITY Code § 47-59.1. [1 CITY App. 3]. Within the structure of the DRC Ordinance is CITY Code § 47-59.7 (v), *Neighborhood compatibility and preservation*, which addresses issues such as "traffic," "shadow scale," "visual nuisance," "placement and orientation of buildings . . . parking areas, bufferyards," and "alteration of building mass." Competent substantial evidence was found in the record from which to support the Board's denial of the development plan.

All of these factors are subsets of the universe of *compatible land uses*. Indulging in the presumption of invalidity in rewriting the new construction into the ordinance, while simultaneously reserving jurisdiction on the very same issue the circuit court overlooks a line of cases on the *compatibility* standard which have a bearing on the circuit court's presumption of invalidity. *Alachua County v. Eagle's Nest Farms, Inc.,* 473 So.2d 257, 260 (Fla. 1st DCA 1985) upheld an ordinance by which a special use permit will be granted if it will not substantially impair the intent and purpose of the comprehensive plan, the goals and objectives of which included "protect land uses from encroachment of *incompatible* land use types" and "encourage orderly, harmonious and judicious use of land." *City of St. Petersburg v. Cardinal Industries Development*, 493 So.2d 535 (Fla. 2nd DCA 1986) upheld the denial of a special exception application of an apartment complex against a standard of "*compatibility* of the use with properties in the neighborhood." *Salvation Army v. Bd. County Commissioners,* 523 So.2d 611 (Fla. 3rd DCA 1988) upheld denial of a development order where *compatibility* of building elevations, renderings and perspectives were at issue and the evidence showed "tremendous scale of the proposed Salvation Army Center was *incompatible* with the surrounding residential area." *Id.* at 613 (emphasis supplied). *Life Concepts v. Harden*, 526 So.2d 726 (Fla. 5th DCA 1990) upheld an ordinance against a facial constitutional

attack against the criterion "*compatible* with surrounding residential uses." *Melton v. Monroe County*, 622 So.2d 481 (Fla. 3rd DCA 1993), *review denied*, 634 So.2d 625 (Fla. 1994) upheld the denial of a conditional use permit application for a dock that was *three times*[6] that of other surrounding docks when judged against the criterion of "consistent with the community character of the immediate vicinity."

7. Impracticality of re-written construction.

There is a certain fundamental impracticality in having a quasi-judicial body, after 3 - 5 days of hearings, to announce at what modified setbacks, heights, scale, orientation of building, and bufferyards a proposed development plan such as Tower II would be approvable *before* announcing that the proposed Tower II development plan is not approved. There are a myriad of factors which a design professional must orchestrate in proposing a development plan.

If the development plan, through minor "tweaking" and "fine-tuning" may be made approvable, then the P&Z Board may, in its discretion, condition approval upon implementing such fine-tuned modifications. The greater the magnitude of the modifications needed, the more likely the responsibility of creatively orchestrating the myriad of design factors would lie with the design professional rather than the

[6] TOWER II at 32 stories is almost five times the height of the adjacent Chateau Mar Condominium and 16 to 32 times the height of the Rio Vista single family dwellings 120' across New River.

quasi-judicial board. For example, moving garage setbacks by 5' both on the front and rear of Tower II may alter the internal geometrics of the garage to the point where it would need to be totally redesigned resulting in additional levels of parking to accomodate the projected needs of the project. Such calls are better left to the contemplation, calculations and re-drawings of architects and engineers in the quiet confines of their offices, as opposed to the public arenas of quasi-judicial boards. Requiring a massive redesign of a development plan in the midst of a public hearing is not unlike requiring findings of fact by a quasi-judicial tribunal, a concept that was expressly rejected by *Board of County Commissioners of Brevard County v. Snyder,* 627 So.2d 469, 476 (Fla. 1993).

CONCLUSION

Second level discretionary certiorari review standards have been expressed in a multitude of ways: "whether the lower court has exceeded its jurisdiction," "applied the correct law," "essential irregularity in the proceedings," "procedure is illegal, unknown to law or essentially irregular," "not observed requirements of the law essential to the administration of justice," "disregard of procedural requirements resulting in a gross miscarriage of justice," "concerned not with the mere existence of legal error as much as the seriousness of the error," "violation of a clearly

established princple of law resulting in a miscarriage of justice,"[7] "applied the correct law," and "observed the essential requirements of the law."

We have seen the circuit court exceeding its jurisdiction, contravening fundamental principles of law of constitutional proportions and indulging in procedural irregularities not known to the law. It is submitted that all of the above criteria are inherent in the district court's review of the circuit court errors in *Las Olas Tower,* supra.

Second level certiorari review requires "flexibility" and "discretion" in drawing the lines as to whether the magnitude of the errors are "sufficiently egregious or fundamental to merit the extra review." *Heggs,* supra at 529. Under all the circumstances of the case at bar, the district court properly exercised that degree of "flexibility" and "discretion" called for in *Heggs*, supra.

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[7] "Miscarriage of justice" being construed sometimes as a "fundamental departure from the controlling law."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's CITY's Answer Brief On The Merits was mailed this 13th day of June, 2000 to Arthur J. England, Esq. And Elliot H. Scherker, Esq. of Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131 and to Richard G. Coker, Esq. of Brady & Coker, 501 N.E. 8th Street, Ft. Lauderdale, FL 33304, both Attorneys for Petitioner Las Olas Tower Company.

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