IN THE SUPREME COURT
STATE OF FLORIDA

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

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LAS OLAS TOWER COMPANY,

*Petitioner*,

v.

CITY OF FORT LAUDERDALE,

*Respondent*.

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# INITIAL BRIEF ON THE MERITS OF PETITIONER LAS OLAS TOWER COMPANY

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ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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## TABLE OF CONTENTS

**Page**


TABLE OF CITATIONS . . . . . ii

CERTIFICATE OF TYPE SIZE AND STYLE . . . . . v

IDENTIFICATION OF THE CITATION REFERENCES USED IN THIS BRIEF vi

INTRODUCTION . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . 2

1. The Fort Lauderdale ordinances. . . . . 2

2. The Las Olas project applications. . . . . 6

3. The circuit court's decision. . . . . 9

4. The district court's decision. . . . . 10

SUMMARY OF ARGUMENT . . . . . 11

ARGUMENT . . . . . 13

1. The second-level certiorari standard established by the Court. . . . . 14

2. The first-level certiorari standard applied by the circuit court. . . . . 16

3. The Fourth District's misapplication of the second-level certiorari standard. . . . . 19

CONCLUSION . . . . . 24

CERTIFICATE OF SERVICE . . . . . 25

## TABLE OF CITATIONS

**Page**

### Cases

*Board of County Commissioners of Brevard County v. Snyder*
627 So. 2d 469 (Fla. 1993) . . . . . 14

*Building Code Advisory Board v. Southern Building Products, Inc.*
622 So. 2d 10 (Fla. 4th DCA 1993) . . . . . 18

*City of Dania v. Florida Power & Light*
718 So. 2d 813 (Fla. 4th DCA),
*review granted*, 727 So. 2d 905 (Fla. 1998) . . . . . 13

*City of Deerfield Beach v. Vaillant*
419 So. 2d 624 (Fla. 1982) . . . . . 14, 15, 21

*City of Pompano Beach v. Capalbo*
455 So. 2d 468 (Fla. 4th DCA 1984),
*review denied,* 461 So. 2d 113 (Fla.),
*cert. denied,* 474 U.S. 824 (1985) . . . . . 19

*Colonial Apartments, L.P. v. City of Deland*
577 So. 2d 593 (Fla. 5th DCA),
*review denied,* 584 So. 2d 997 (Fla. 1991) . . . . . 17

*Combs v. State*
436 So. 2d 93 (Fla. 1983) . . . . . 14, 15

*Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals*
541 So. 2d 106 (Fla. 1989) . . . . . 14, 15, 21, 23

*Firestone v. News-Press Publishing Co., Inc.*
538 So. 2d 457 (Fla. 1989) . . . . . 19

*Garvin v. Baker*
59 So. 2d 360 (Fla. 1952) . . . . . 19

## TABLE OF CITATIONS
(Continued)

**Page**

*Haines City Community Development v. Heggs*
658 So. 2d 523 (Fla. 1995) . . . . . passim

*Las Olas Tower Co. v. City of Fort Lauderdale*
742 So. 2d 308 (Fla. 4th DCA 1999) . . . . . passim

*Martin County v. City of Stuart*
736 So. 2d 1264 (Fla. 4th DCA 1999) . . . . . 13, 23

*Metropolitan Dade County v. P.J. Byrds, Inc.*
654 So. 2d 170 (Fla. 3d DCA 1995) . . . . . 18

*North Bay Village v. Blackwell*
88 So. 2d 524 (Fla. 1956) . . . . . 18

*Park of Commerce Associates v. City of Delray Beach*
606 So. 2d 633 (Fla. 4th DCA 1992),
*approved,* 636 So. 2d 12 (Fla. 1994) . . . . . 17

*State v. Stalder*
630 So. 2d 1072 (Fla. 1994) . . . . . 19

### Other Authorities

§ 47-33(1), City of Fort Lauderdale Code . . . . . 2

§ 47-33(2), City of Fort Lauderdale Code . . . . . 4

§ 47-33, City of Fort Lauderdale Code . . . . . 2

§ 47-33.1(a)(1)-(4), City of Fort Lauderdale Code . . . . . 5

§ 47-33.1(a), City of Fort Lauderdale Code . . . . . 5

## TABLE OF CITATIONS
(Continued)

**Page**

§ 47-33.1(b), City of Fort Lauderdale Code . . . . . 5, 18

§ 47-33.1(d), City of Fort Lauderdale Code . . . . . 6, 18

§ 47-33.1(e), City of Fort Lauderdale Code . . . . . 22

§ 47-33.1, City of Fort Lauderdale Code . . . . . 5

§ 47-59.7(v), City of Fort Lauderdale Code . . . . . 5

§ 47-59.7, City of Fort Lauderdale Code . . . . . 5

## CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is “CG Times,” 14 point.

## IDENTIFICATION OF THE CITATION REFERENCES USED IN THIS BRIEF

Three appendices were submitted to the Fourth District in these consolidated certiorari proceedings. The two appendices submitted by Las Olas will be referenced as "LOT App. 1" and "LOT App. 2." The appendix submitted by the City will be referenced as "City App."

## INTRODUCTION

The Court accepted the decision of the Fourth District in this case — *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d 308 (Fla. 4th DCA 1999) — for review on the basis of an asserted conflict with *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995). The conflict is posed because the Fourth District did not limit itself to the strictures of *Haines City*, or the Court's requirement that reversal is only available to rectify a "miscarriage of justice," when the Fourth District exercised second-level certiorari jurisdiction to review a circuit court decision which had reviewed the administrative action of the City of Fort Lauderdale on first-level certiorari.

This case began with the City's denial of a site plan presented by Las Olas for a high-rise residential unit in a special zoning district which the City had created for the specific purpose of inducing the development of high-rise residential units in the district. A second site plan offered by Las Olas, scaled down to meet City objections after the first plan had been rejected, met all requirements of the zoning ordinance (including one which required a minimum 12-foot setback). The City nonetheless denied approval, grounding its action (among other reasons) on a finding that the minimum setback was insufficient for Las Olas' proposed building, although no greater setback had been specified by the City for the project.

On first-level certiorari review in circuit court, the City argued that its Planning and Zoning Board (P&Z Board) had discretion under the ordinance to require a setback in excess of 12 feet, and that something greater than 12 feet was necessary for the Las Olas project. Las Olas pointed out that the P&Z Board had never prescribed a setback requirement in excess of 12 feet, and had never advised Las Olas what setback greater than 12 feet would be acceptable. The circuit court found that the denial of approval under these circumstances — admitted compliance

with all requirements of the ordinance, and a failure of the P&Z Board to establish a setback greater than 12 feet or to notify Las Olas what would be acceptable — constituted a departure from the essential requirements of law.

On second-level certiorari review, the Fourth District overturned the circuit court's ruling, although it acknowledged that it was not unreasonable to require that the City exercise its setback-setting discretion *before* serially rejecting site plans. The district court made no determination that the circuit court's decision — requiring only advance notice of the standards for applying an ordinance — resulted in a miscarriage of justice.

## STATEMENT OF THE CASE AND FACTS

### 1. The Fort Lauderdale ordinances.

In 1970, the City Commission adopted Section 47-33 of the City Code to establish a "Central Business District" ("CBD") in downtown Fort Lauderdale. (LOT App. 1:26). The CBD is an "overlay" district that supersedes restrictions, otherwise applicable within a zoning district, with respect to height restrictions and dwelling units in excess of the density permitted by the applicable zoning regulations. Section 47-33(1), City Code.

[1]

The CBD's original eastern boundary was Federal Highway. (LOT App. 1:26). In 1985, when the CBD was sparsely populated,

[2] the eastern border was expanded to include an area east of Federal Highway and

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[1] Las Olas' entitlement to additional units was not an issue before the circuit court or the Fourth District.

[2] The 1980 census showed only 100 residents in the district. (LOT App. 1:34 at 69).

north of the New River "[i]n order to encourage the construction of high-density residential structures in the area immediately surrounding the redeveloping downtown." (LOT App. 1:28-29). The enlargement of the CBD was adopted by the City to

> foster increased activity downtown, particularly after business hours, *by attracting high-density residential development* and possibly hotels to complement the extensive office and cultural projects recently completed and underway . . . .

LOT App. 1:29 (emphasis added).

Las Olas' property and proposed high-rise residential unit are located within the area that was added to the CBD in 1985:

(LOT App. 1:7; LOT App. 1:34 at 69). The City Commission was fully aware, when it moved the border to the east of Federal Highway, that the expansion area which includes the Las Olas site would be attractive to developers, having considered concerns about the eastern boundary and actually adjusted that border

in part to address the impact of high-rise expansion on adjacent neighborhoods. (LOT App. 1:29).

[3]

As enacted in 1970, Section 47-33 provided for a minimum setback of 20 feet for residential buildings in the CBD, and a density limitation of 100 residential units per net acre. (LOT App. 1:27). In 1985, Section 47-33 was rewritten to continue the exemption from otherwise-applicable height restrictions, to eliminate the minimum setback requirement, and to authorize additional dwelling units in the CBD over and above density requirements of otherwise-applicable zoning regulations. (LOT App. 1:28).

Recognizing that the abolition of setback requirements deprived it of the power to require *any* setbacks in the CBD after the 1985 amendments, the Commission undertook consideration of a new section within Chapter 47 "to establish minimum setbacks" within the CBD in conjunction with "a comprehensive evaluation and restructuring of CBD zoning." (LOT App. 1:31). Pending that process, it was decided that "some measures need to be taken to require setbacks on an interim basis to assure desirable development within the Downtown," and staff recommended a 12-foot minimum as "a bench mark" which was "much more" than was then being used within the CBD. *Id.*

In considering the proposed ordinance in 1985, the Commission agreed that

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[3] The City staff and the City Commission were responsive to the recommendation of the residential Holiday/Victoria Park Civic Association that a portion of the originally-proposed eastern boundary to the north of the Las Olas site be moved back to Federal Highway. (LOT App. 1:29). The CBD boundary adopted by the city accommodates the Associations' recommendation. Section 47-33(2), City Code.

"setback requirements should be incorporated into [a] comprehensive restructuring of our zoning ordinances" because the "CBD is the only sector of the City that currently has no setback requirements." (LOT App. 1:32). The Commission decided to "adopt some setback requirements on an interim basis to assure desirable development within the downtown," and at staff's request granted a one-year period within which to accomplish the setback re-evaluation. (LOT App. 1:32).[4]

In 1986, the Commission adopted Section 47-33.1 of the City Code to establish threshold setback requirements within the CBD, which section provides that:

> Despite the provisions of section 47-33 . . . there shall be a minimum twelve-foot setback for any structure erected in the central business district.

Section 47-33.1(a)(1)-(4), City Code. Section 47-33.1-33.1-33.1(b)§ 47-33.1(b), City of Fort Lauderdale Code-33.1(b)-33.1(d)§ 47-33.1(d), City of Fort Lauderdale Code *Company v. City of Ft. Lauderdale,* 742 So. 2d at 313-14. Tower I issues are not before the Court in this proceeding.

Following the adverse ruling on Tower I by the P&Z Board, Las Olas submitted an application for setback approval of a second, scaled-down, proposed residential building of 32-stories (Tower II). (LOT App. 2:1). In addressing the P&Z Board with its new application, Las Olas explained that it had taken "very seriously" the comments of the public and Board members on their "major areas of concern: the height of the residential tower, [and] the setbacks from the New

---

[4] The one-year deadline for revamping downtown zoning ordinances was not met. (LOT App. 1:35-37).

River," and that the revised plan addressed each of those concerns "significantly." (LOT App. 2:1 at 1).

Las Olas had learned that the City had approved two other projects: the Grand Pavilion for 41 stories at a height of 470 feet; and Riverwalk Place for 25 stories at a height of 251 feet. (LOT App. 1:2-A at 4; LOT App. 1:4). It reduced Tower II from a 445-foot high, 45-story building to a 325-foot high, 32-story building (LOT App. 2:1 at 1-2; LOT App. 2:2), making it smaller than the two tallest buildings within the same CBD boundary in Fort Lauderdale — the 396-foot high 110 Tower, and the NationsBank building. (LOT App. 1:2-A at 4; LOT App. 1:7; LOT App. 1:8).

Las Olas was also aware that setbacks from the New River for the five buildings that surround the Las Olas site ranged from 10 to 20 feet. (LOT App. 1:4). It increased the setback for Tower II to a minimum of 50 feet from any point along the New River. (LOT App. 2:1 at 1-2; LOT App. 2:2; LOT App. 2:3 at 1).

[5]

In reviewing the application for Tower II, the City's staff took the position that "a tower of this height at this *location*, is undesirable at any setback." (LOT App. 2:3) (original emphasis). The City's staff believed the City could deny setback approval upon a determination that otherwise-sufficient setbacks are "insufficient

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[5] Outside the CBD boundaries — *i.e.,* in zoning districts that impose height restrictions, and further east along the Intracoastal — the City has approved three high-rise residential projects with setbacks ranging from 10 to 20 feet from the Intracoastal. (LOT App. 1:4).

for a structure of this height" because "[t]he height, size, and character of the proposed project is not compatible with the immediate neighborhood or the neighborhood across the New River." *Id.* at 8.

At the P&Z Board hearing, the City's staff acknowledged that Tower II met all existing requirements of the Fort Lauderdale zoning ordinance. (LOT App. 2:5 at 16-17). Staff nonetheless opposed the application for Tower II, basing its objections on unadopted goals and objectives in the City's master plan for future land use regulations which included a proposed re-classification of the CBD into an "Urban Core" and a "Central Urban Core." (LOT App. 1:10 at 98-99; LOT App. 1:15 at 29-30).

[6] The P&Z Board nonetheless accepted the City's unadopted, aspirational provisions as a basis to deny the Las Olas application for Tower II. (LOT App. 2:7 at 131-43). Board member Chappell voted against Las Olas with the observation that "our true Central Business District is to the west of U.S. 1." (LOT App. 2:7 at 131). Board member Hubert stated his assumption that "there would always be some kind of scaling down from the high intensity of the mid portion of the Central Business District down into the residential neighborhoods of which this proposed project is located." (LOT App. 2:7 at 134). Board member Hubert relied on the non-existent "scaling down requirement." (LOT App. 2:7 at 134). Board member Sanders believed the Board should look to "land use policies, goals and objectives" although he recognized there "may not [be] . . . a zoning ordinance to reflect that."

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[6] Las Olas repeatedly objected to the staff's reliance on future objectives and unadopted studies to displace the plain language of the CBD ordinances. (LOT App. 1:10 at 112-13, 117; LOT App. 1:15 at 15-16; LOT App. 2:7 at 64-65, 98, 100).

(LOT App. 2:7 at 143).

The City Commission utilized the same non-ordinance aspirations for future land use development to deny Las Olas' application. (LOT App. 2:8 at 49, 50-51, 59-60). Commissioner Aurelius summarized the position of the Commission, stating:

> It hurts me — and I mean this sincerely . . . to say that I have to agree with the Planning and Zoning Board. [The Las Olas project is] just not right and . . . .
>
> What is it somebody in the Supreme Court said: I can't define pornography but if I see it, I can tell you. Something like that. Well, I can't define what's wrong with this location exactly but it's just not right, so I have to agree with the Planning and Zoning Board.

(LOT App. 2:8 at 58-59).

**3. The circuit court's decision.**

On first-level certiorari in circuit court, Las Olas argued that the City had failed to comply with its own ordinances and erroneously relied on unadopted, aspirational provisions of its master plan. (LOT App. 2:9 at 15-30). The City acknowledged that its staff had relied on policies and unadopted studies in recommending denial of Las Olas' application (City App. 8 at 36), but it argued in support of the City's denial that setback requirements were not met because the P&Z Board had discretion to require something in excess of the 12-foot minimum (and inferentially more than Las Olas' actual 50-foot setback for the proposed 32-story building):

> [Y]ou could write [the ordinance] so that it has that 12 feet like we do on the front street setback, but you can see that there's a modicum of discretion that's injected in it. The Board can ask for more. But

> they've done with regard to Tower Two is that they've designed it to the very minimum standard.
>
> . . . I would submit to you that something as large as this needs something more than the absolute minimum. We get down to a smaller structure of ten stories, seven stories, and it might be more appropriate to talk in terms of minimum.

(LOT App. 2:10 at 153).

The circuit court found that Tower II "has met the minimum setback requirements," and agreed that "the City can require more than the minimum setbacks." (City App. 1 at 9). It concluded, however, that the City had departed from the essential requirements of law by failing to exercise its setback-setting discretion and by failing to give Las Olas notice of any increased setback requirement:

> [T]he fatal flaw in the City's argument is that the City never exercised any of the discretion allowed under sections 47-33.1(a) or (b) before denying LOT's application. Only after LOT had gone back to the drawing board twice did the City inform LOT that their plans did not conform to the code requirements . . . . The City could have accomplished its goal to have Tower Two scaled down . . . by notifying LOT that the City was modifying the setback requirements for Tower Two. However, because the City never modified the setback requirements in time for LOT to act upon them, it was departing from the essential requirements of law when it denied LOT's application for setback approval.

(City App. 1 at 10).

**4. The district court's decision.**

On second-level certiorari, the Fourth District stated that it understood the circuit court's decision

> to mean that in order for the City to exercise properly the discretion afforded it by the ordinance, the City or its appropriate agency had a duty to inform LOT what setbacks it would find acceptable before LOT went to the trouble of revising plans only to have them rejected.

*Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d at 314. It then held that

> the determination of whether to modify setback requirements, or to condition approval of setbacks by imposing requirements in excess of the minimums, cannot be made until the development plan is submitted and the various criteria applicable thereto considered. The criteria to be considered is [sic] not discretionary but is [sic] 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 subjected to whim or caprice, as there is a clear appeal and review process through which abuse of discretion can be overcome.
>
> The issue here . . . [is] 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 . . . .

*Id.* at 314-15.

[7] On that basis, the court held that the circuit court "failed to apply the correct law." *Id.* at 315.

## SUMMARY OF ARGUMENT

The Fourth District applied a manifestly-erroneous standard of review in passing on the City's petition and quashing the circuit court's decision. On second-

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[7] The court also suggested that "the issue is moot" because a member of the City's planning staff had met with Las Olas and had outlined with a reasonable degree of specificity what the developer needed to do in order to obtain site plan approval. *Id.* at 315.

level certiorari, this Court's decision in *Haines City* imposes sharply-drawn constraints on the district courts of appeal. So far as is relevant here, the district court's inquiry is limited to the question of whether the circuit court applied the correct law — meaning that reversal is warranted only if the circuit court's decision wrought a "gross miscarriage of justice." The Fourth District did not confine itself to that standard of review.

The circuit court rendered an unremarkable and fully supportable decision which construes the City's ordinance for the CBD to forbid the imposition of site plan requirements on an *ad hoc* retroactive basis, without giving a property owner any prior notice of the requirements which have to be met. Saving the ordinance from constitutional challenge — as is undeniably the duty of the courts — the circuit court construed the City's ordinance as requiring the same notice to landowners whose property lies along the New River as is extended to *other* property owners within the CBD. The court applied the well-established principle that an ordinance cannot grant arbitrary and unfettered authority to a municipality to deny a zoning application on a standardless *ad hoc* basis, and then held that without any prior notice requirement the ordinance would implicate serious constitutional issues. The circuit court's interpretation of the ordinance, which even the Fourth District recognized as not "unreasonable," simply requires the City to apply its zoning ordinances evenhandedly throughout the CBD. When that decision is examined through the *proper* perspective — *i.e.,* applying the correct second-level certiorari review standard of a gross miscarriage of justice — no error conceivably can be found therein.

The Fourth District overstepped the narrow boundary of its review function by granting relief to the City simply because it disagreed with the circuit court's

entirely-reasonable and precedent-compelled construction of the City's governing ordinance. The circuit court had carefully performed its function on first-level certiorari by granting relief to Las Olas on a finding that the arbitrary, *ad hoc* and standardless proceedings conducted by the City departed from the essential requirements of law. This Court's plainly-stated intention to *narrow* the scope of review as administrative cases travel further up the judicial ladder was simply ignored by the Fourth District.

## ARGUMENT

The decision of the Fourth District begins with an acknowledgement that its certiorari review was limited by *Haines City* to "whether procedural due process has been afforded and whether there has been application of the correct law," and it notes that only the latter issue was presented by the parties as an issue in this case. *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d at 310. This identification of the standard for second-level certiorari review is an accurate restatement of the *Haines City* formulation.

In *applying* that standard, however, the court departed from the narrow role which this Court has prescribed for second level certiorari review, and lapsed into the more expansive review mode which the Court has expressly condemned.[8] A brief history of the "application of correct law" standard for second-level

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[8] Prior to its decision in this case, the Fourth District had demonstrated a willingness to expand second-level certiorari review to the point of being co-extensive with first-level certiorari review. In *City of Dania v. Florida Power & Light*, 718 So. 2d 813 (Fla. 4th DCA), *review granted*, 727 So. 2d 905 (Fla. 1998), the court held that it could re-examine evidence submitted to the administrative tribunal and determine if the administrative tribunal's decision was supported by competent substantial evidence. After the decision in this case, however, the district court receded from its *City of Dania* decision in

(continued...)

certiorari will set the stage for exposing the district court's misapplication of the second-level standard.

**1. The second-level certiorari standard established by the Court.**

In *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982), the Court carefully distinguished between first-level certiorari review in the circuit courts and second-level certiorari in the district courts of appeal. The Court held that the circuit courts have three responsibilities in reviewing administrative action: to determine whether procedural due process is accorded; whether the essential requirements of the law have been observed; and whether the administrative findings and judgment are supported by competent substantial evidence. Thereafter, the "competent substantial evidence" evaluation drops out and a district court reviewing a circuit court's judgment "determines whether the circuit court afforded procedural due process and applied the correct law." *Id.* at 626.

These principles have been held applicable to second-level certiorari for cases arising from circuit court decisions on review of local government land-use decisions. *Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106 (Fla. 1989) ("*EDC*"). There, the Court quashed the district court's reversal of a circuit court ruling because, in contravention of *Vaillant,* "[t]he district court simply disagreed with the circuit court's evaluation of

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(...continued)

recognition of its conflict with *Haines City*. *See Martin County v. City of Stuart,* 736 So. 2d 1264 (Fla. 4th DCA 1999) (*en banc*). The *City of Dania* decision has been accepted by this Court for review, and the Court has already heard oral argument on the case. It has also accepted for review a decision from the Third District which similarly involves *Haines City* issues.

the evidence." *Id.* at 108-09.

[9]

The *Vaillant* standard for second-level certiorari resurfaced, and was resoundingly approved again, in *Haines City*. There, the Court was called upon to address the interaction between *EDC* and *Combs v. State*, 436 So. 2d 93 (Fla. 1983), in which the Court had endorsed the "departure from the essential requirements of law" standard and stressed that the district courts should exercise their discretion to grant certiorari "*only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." 436 So. 2d at 95-96 (emphasis supplied). The Court found both decisions to be rooted in respect for the finality of appellate decisions made at the circuit court level, where review was based on an appeal as of right, and it restated the controlling principle that "certiorari [in the district courts] should not be used to grant a second appeal." *Haines City,* 658 So. 2d at 526.

The Court held in *Haines City* that both *EDC* and *Combs* "mandate a narrow standard of review" in harmony with *Vaillant*, for the sound reason that

> As a case travels up the judicial ladder, review should consistently become narrower, not broader.

*Id.* at 530. The Court reasserted the *Vaillant* formulation that the inquiry on second-level certiorari in the district courts "is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law" (*Id.*),

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[9] The continuing viability of the *Vaillant* standard in land-use cases was reaffirmed in *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993).

but the Court explained that the "application of correct law" standard limits relief to "those few extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected." *Id.* at 531. The "essence of the standard," the Court explained,

> 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***.

*Id.* at 527 (citation omitted; emphasis supplied).

Whether the Court's prescription for second-level certiorari review was in fact followed by the Fourth District is the issue presented in this appeal. The determination of whether it did begins with an explanation of what action was taken by the circuit court in its first-level certiorari review, with careful attention to what "law" the circuit court applied.

**2. The first-level certiorari standard applied by the circuit court.**

The circuit court held that the City had departed from the essential requirements of law when the P&Z Board and the City Commission withheld approval for Las Olas' ordinance-compliant project without adopting any ordinance-exceeding setback requirement which it intended to apply to the project. Based on an undisputed record showing that the City had *never* established setback requirements in excess of the minimum, and had *never* informed Las Olas of what setback would be required for its project, the court found the essential requirements of law to be absent when the City exercised its discretion retroactively to impose additional requirements on an *ad hoc* basis. (City App. 1 at 3, 10).

Holding that a municipality which has chosen to vest itself with setback

discretion ought to inform zoning applicants of the standards it will apply in evaluating any particular application, the court ruled that the City must exercise its setback discretion in a manner that allows a zoning applicant to know what standards are going to be applied *before* the City conducts its only quasi-judicial hearing. The court rejected the City's contention that it could retain discretion to deny an application by applying an *ad hoc,* undefined standard at the applicant's first and only quasi-judicial hearing.
[10]

This decision by the circuit court was not just eminently reasonable; it followed the well-established precept, approved by this Court, that "[p]roperty owners are entitled to notice of the conditions they must meet in order to improve their property in accord with the existing zoning and other development regulations of government." *Park of Commerce Associates v. City of Delray Beach,* 606 So. 2d 633, 635 (Fla. 4th DCA 1992) (*en banc*), *approved,* 636 So. 2d 12 (Fla. 1994). The *Park of Commerce* decision was grounded on the fundamental and common-sensical principle that

> Owners are entitled to fair play; the lands which may represent their life fortunes should not be subjected to *ad hoc* legislation.

*Colonial Apartments, L.P. v. City of Deland,* 577 So. 2d 593, 598 (Fla. 5th DCA), *review denied,* 584 So. 2d 997 (Fla. 1991).

The circuit court's interpretation of the City's ordinance — to require prior notice of non-minimum setback requirements for property fronting on the New

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[10] The circuit court noted that it was only after Las Olas "had gone back to the drawing board twice" that the City informed Las Olas that its plans still "did not conform to the code requirements." (City App. 1 at 10).

River — is patently reasonable (as the district court half-heartedly noted

[11]), and arguably the *only* rational and appropriate means of interpreting the City's ordinance, for two reasons.

First, a prior notice requirement equates procedures for the two application tracks, which the City Code prescribes for projects in the CBD, by providing equivalent procedural steps for projects located on the New River and projects which are located elsewhere in the CBD. For non-riverfront projects in the CBD, the City's planning director is authorized to modify the 12-foot minimum setback requirement. Section 47-33.1(b)-33.1(b)-33.1(d)*Building Code Advisory Board v. Southern Building Products, Inc.*

622 So. 2d 10 (Fla. 4th DCA 1993)*Metropolitan Dade County v. P.J. Byrds, Inc.*

654 So. 2d 170 (Fla. 3d DCA 1995)*North Bay Village v. Blackwell*

88 So. 2d 524 (Fla. 1956)*Garvin v. Baker*
59 So. 2d 360 (Fla. 1952)*State v. Stalder*
630 So. 2d 1072 (Fla. 1994)*Firestone v. News-Press Publishing Co., Inc.*
538 So. 2d 457 (Fla. 1989)*City of Pompano Beach v. Capalbo*
455 So. 2d 468 (Fla. 4th DCA 1984),
*review denied,* 461 So. 2d 113 (Fla.),
*cert. denied,* 474 U.S. 824 (1985)*,* 455 So. 2d at 472.

No error can be found in the circuit court's construction of the ordinance or its avoidance of a constitutional confrontation.

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[11] "Though that might appear at first blush as not an unreasonable requirement, we think it is neither feasible nor the law." 742 So. 2d at 314.

### 3. The Fourth District's misapplication of the second-level certiorari standard.

Despite the rectitude and rationality of the circuit court's construction of the ordinance to require prior notice of the standards to be applied to property fronting on New River, the Fourth District held that the court had "failed to apply the correct law." 742 So. 2d at 315. This holding of the district court must be examined against this Court's explanation that, for purposes of second-level certiorari review, a failure to accord due process and a failure to apply the correct law are "merely expressions of ways in which the circuit court decision may have departed from the essential requirements of law." *Haines City,* 658 So. 2d at 530. In that context, this means either

> the commission of an error so fundamental in character as to fatally infect the judgment and render it void
>
> [or]
>
> 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.

*Haines City,* 658 So. 2d at 527.

The Fourth District did not view the circuit court's decision as fundamentally fatal, inherently illegal or irregular, an abuse of judicial power, or a gross miscarriage of justice. Rather, it merely disagreed with the circuit court's construction of the City's CBD ordinance as requiring for riverfront property owners the same due process requirement of prior notice that the Code accords to off-river property owners within the CBD. It was the district court's view that no such notice was required because the City Code had no express provision saying so:

> The issue here . . . is . . . 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.

742 So. 2d at 314-15. On this basis alone, the district court set aside the circuit court's well-reasoned harmonization of disparate procedures for property owners within the CBD, and the circuit court's exercise of judicial restraint to avoid a constitutional issue which would otherwise inhere in the City Code. Patently, the district court did not review the circuit court's decision under the criteria for second-level certiorari which are mandated by *Vaillant, EDC* and *Haines City.*

Aside from its fundamental error in overriding the circuit court's decision on grounds expressly found improper for second-level certiorari review — providing nothing more than a second appeal for the City, and issuing a writ of certiorari not to correct essential illegality but to point out mere legal error (*Haines City,* 658 So. 2d at 526, 527) — the district court predicated its decision on a misunderstanding of the essential requirements of law for administrative due process. The court stated that discretion to modify setback requirements cannot be made until a development plan is submitted and the applicable criteria are considered, irrespective of whether the exercise of discretion rests with the planning director or the P&Z Board.

It then observed that while the criteria are legislatively mandated, discretion comes into play "in determining whether a particular criterion requires or justifies some modification of the setback," and the exercise of 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.

742 So. 2d at 314.

The court's advertance to "appeal and review," however, can only refer to review before the City Commission for riverfront property owners in the CBD. Unlike non-riverfront property owners who first submit plans to the planning director and for whom the City Code then provides quasi-judicial review by the P&Z Board, the first and only administrative process for riverfront property owners comes from a ruling of the P&Z Board, which is then taken to the City Commission.

The Commission, however, "reviews" the standardless P&Z Board ruling in an *equally* standardless proceeding: the absence of any identifiable criteria against which the proposed setbacks can be measured. Thus, the Commission's review is as constitutionally defective as the initial proceeding before the P&Z Board.[12] The nature and quality of the Commission's review is perhaps best illustrated by Commissioner Aurelius' frank statement that he was voting to approve the P&Z Board's decision because "I can't define what's wrong with this location exactly but it's just not right, so I have to agree with the Planning and Zoning Board." (LOT App. 2:8 at 58-59). How a standardless review can cure the constitutional defects inherent in a standardless initial decision, let alone whether a requirement for prior notice by the City constitutes a gross miscarriage of justice, is neither addressed nor explained by the Fourth District.

Nor did the district court justify its decision with its suggestion that the issue of prior notice appeared to be "moot" since a member of the City's planning staff met with a Las Olas representative prior to the submission of plans for Tower II and "outlined" what the developer needed to do in order to obtain site plan approval.

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[12] In reviewing a P&Z Board setback decision, the Commission may take action "either rejecting, approving or amending" the P&Z Board's decision. Section 47-33.1(e), City Code. No standards are prescribed for the Commission's review.

742 So. 2d at 315. This fall-back justification for the court's decision is a paradigm of the overbroad form of second-level certiorari review condemned in *Haines City* — revisiting the record to find a fact which the court deemed significant and using that fact to *disagree* with the circuit court's express finding that: "Only after LOT had gone back to the drawing board twice did the City inform LOT that their plans did not conform to the code requirements." (City App. 1 at 10).

Even before the *Haines City* decision, the Court had spoken directly to the issue of record review on second-level certiorari review by quashing a Fourth District zoning case decision in which, as here, the Fourth District had granted certiorari because (in this Court's words) the Fourth District "simply disagreed with the circuit court's evaluation of the evidence." *EDC,* 541 So. 2d at 108-09. As the Fourth District has since recognized in its *Martin County* decision, this sort of review is precisely what *Haines City* prohibits. *Martin County*, 736 So. 2d at 1267-68.

The district court's alternative "mootness" theory, in any event, is both legally incorrect and lacking in record support. Whatever might have been conveyed by a City staff member to an unidentified Las Olas representative about a setback requirement in excess of the 12-foot minimum would not be prior notice of what might be required under the ordinance. Legally, only *the P&Z Board* was empowered by the City Code to prescribe a setback minimum greater than 12 feet. No staff communication prior to action by the Board itself could guarantee approval, or estop the Board from imposing some other or different requirement when it convened.

Factually, moreover, there was *no* communication by staff as to what Las Olas needed to do to gain approval. The only record reference which could possibly

meet the Fourth District's reference to a meeting is a statement made to the P&Z Board by the City's zoning manager, Chris Wren (LOT App. 2:7 at 117-21), who told the P&Z Board that he had met with Las Olas' representatives and that he told them that the proposed 50-foot setback for Tower II would be acceptable *only* if Las Olas ***did not build the tower***! Mr. Wren's only advice to Las Olas representatives was that *his staff could support* a setback of 50 feet ***for a garage***, but he never identified *any* setback range that would be suitable for the high-rise residential project being proposed by Las Olas:

> I was trying to explain to the applicant that *if it didn't have a tower on it* and all it was was the . . . garage positioned as it was, it would seem appropriately set back.

*Id.* at 119 (emphasis supplied). His staff, he said, "could support something in the range of a 10 to 15 story project, depending on the design of the project" (*Id.* at 119), *but he never identified any setback range for the project as proposed by Las Olas.*

## CONCLUSION

When viewed against the *correct* standard for second-level certiorari review, the district court's decision is erroneous and cannot stand. The circuit court's decision which the district court set aside is impregnable. Accordingly, Las Olas respectfully requests that the Court quash the decision of the Fourth District, and remand with directions that the district court enter an order denying the City's certiorari petition.

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## CERTIFICATE OF SERVICE

I certify that a copy of this brief was mailed on May 2, 2000, to Robert B. Dunckel, Esq., Assistant City Attorney, City of Fort Lauderdale, 100 North Andrews Avenue, Fort Lauderdale, Florida 33301.