IN THE SUPREME COURT
STATE OF FLORIDA

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

LAS OLAS TOWER COMPANY,

Petitioner,

v.

CITY OF FORT LAUDERDALE,

Respondent.

BRIEF ON JURISDICTION OF PETITIONER LAS OLAS TOWER COMPANY

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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

Richard G. Coker, Esq.
Brady & Coker
1318 S.E. 2nd Avenue
Fort Lauderdale, Florida 33315
Telephone: (954) 761-1404
Facsimile: (954) 761-1489

Counsel for Las Olas Tower Company

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

Page

CERTIFICATE OF TYPE SIZE AND STYLE

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

INTRODUCTION

This case brings to the Court the same issue that is before the Court, with oral argument set for June 1, in *City of Dania v. Florida Power & Light Co.*, 718 So. 2d 813 (Fla. 4th DCA 1998), *review granted,* Case No. 93,940 (Fla. Dec. 29, 1998). That issue is the Fourth District's exercise of *second-level* certiorari jurisdiction to quash a first-level grant of certiorari by a circuit court taken on review of action taken by a governmental agency. In *City of Dania*, the court purported to apply the principles announced in *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995). So, too, did the district court in this case. The court's decision, however, expressly and directly conflicts with *Haines City*, and should be reviewed by the Court in conjunction with its review of *City of Dania.*

In this case, Las Olas Tower Company ("Las Olas") sought setback approval for a residential tower to be built along the New River in downtown Fort Lauderdale. Its setback met the minimum requirements of the applicable zoning ordinance, but approval was nonetheless denied by the City's Planning and Zoning Board ("P&Z Board"), and the City Commission upheld that ruling. On certiorari review, the circuit court reversed the P&Z Board and the Commission on the basis that the P&Z Board had never prescribed any greater setback requirement for Las Olas to meet, and the court held that setback could not be lawfully denied without any objective standard for Las Olas to follow in the application process.

On second-level certiorari, the Fourth District observed that the obligation of a municipality to provide and apply objective standards in its land use approval process is hardly "an unreasonable requirement." Nonetheless, the court struck down the circuit court's decision and arrogated to itself the role of a first-level reviewing court by revisiting the record. The court did not, as *Haines City*

mandates, limit its constrained role on second-level certiorari to whether the circuit court's first-level certiorari ruling was a miscarriage of justice.

STATEMENT OF THE CASE AND FACTS

In 1995, Las Olas sought site plan approval from the City for a 45-story residential condominium building (referred to as Tower I) to be built in the City's Central Business District ("CBD"). (App. at 1). The CBD is an "overlay zoning district" with provisions which "supersede or override the provisions of the underlying district" where the zoning regulations conflict. *Id.* One provision of the CBD ordinance exempts buildings within the CBD from height restrictions found elsewhere in the zoning code. *Id.* at 5. Building setbacks are governed by a code provision that requires a minimum 12-foot setback from the curb line, and for projects on New River like that of Las Olas the initial review of setbacks is conducted by the P&Z Board rather than, as for other projects, by the planning director. *Id.*

Tower I was rejected because the height of the proposed building was not compatible with the buildings on nearby properties, whereupon Las Olas submitted a plan for approval of a 32-story, scaled-down version of the project (referred to as Tower II) and sought setback approval. (App. at 2, 6). The City's planning staff reviewed the application and met with a representative of Las Olas during the application process, following which Las Olas submitted a revised plan for Tower II. *Id.* at 4, 6-7. The P&Z Board denied setback approval again, and the City Commission affirmed. *Id.* at 6.

Addressing Las Olas' challenge to the denial of setback approval for Tower II, the circuit court found that "the City had failed to exercise the discretion allowed it under the [ordinance] before denying [the] application," and that its ruling thus constituted a departure from the essential requirements of law. *Id.* at

6. The circuit court interpreted the City's ordinances for New River projects as imposing a duty on the P&Z Board "to inform [Las Olas] what setbacks it would find acceptable before [Las Olas] went to the trouble of revising plans only to have them rejected." *Id.* at 6.

The Fourth District granted certiorari and quashed the circuit court's construction of the ordinances on the ground that "it is neither feasible nor the law." (App. at 6). The court recognized that the responsibility of imposing setback requirements in excess of the minimum set forth in the ordinance falls on the P&Z Board when an application is made for development along the New River, and set forth the following rationale for disagreeing with the circuit court:

> Whether such responsibility rests with the planning director or, as in this case, with the [P&Z Board], 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 subject 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 6-7.[1] The court accordingly held that the circuit court "failed to apply the correct law" in granting Las Olas' petition challenge to the denial of setback approval for Tower II. *Id.* at 7.

SUMMARY OF ARGUMENT

The Fourth District egregiously has put itself at odds with this Court's established rules governing second-level certiorari in the district courts of appeal. Arrogating to itself the role assigned to the circuit court on first-level certiorari, the Fourth District quashed the circuit court's ruling on the sole basis that it disagreed with the circuit court's analysis of a Fort Lauderdale municipal ordinance. No precedent of any kind was violated by the trial court and no cardinal rules of law were flouted. To the contrary, the circuit court merely engaged in its proper function on first-level certiorari in granting relief upon a finding that the unfair proceedings conducted by the City violated the essential requirements of law. The Fourth District's overly-broad review in this case runs directly afoul of this Court's precedent.

Moreover, the Fourth District's endorsement of essentially-standardless decision making by the City on setbacks in one area of Fort Lauderdale is in direct conflict with established Florida precedent commanding that landowners must have notice of the requirements for obtaining land use permits *before* being subjected to a quasi-judicial hearing. The circuit court's decision had insulated

---

[1] 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 7. This appears to be dicta because the court did not conclude that the case was moot, and because such a meeting would be irrelevant in light of the obligation of ***the Board*** to exercise setback discretion.

the City's ordinance from constitutional challenge by reading the ordinance to provide the same level of protection for landowners throughout the downtown Fort Lauderdale CBD. This entirely-proper exercise of the circuit court's authority to construe legislative enactments as constitutional whenever possible was inexplicably declared by the Fourth District to constitute *grounds for reversal* on second-level certiorari.

The Fourth District's exercise of its second-level certiorari jurisdiction is currently under review by this Court in *City of Dania v. Florida Power & Light,* 718 So. 2d 813, 815 (Fla. 4th DCA 1998), *review granted,* Case No. 93,940 (Fla. Dec. 29, 1998). That court's complete misunderstanding of the proper role of the district courts of appeal on second-level certiorari is nowhere more evident than in the present case.

ARGUMENT

In *Haines City,* the Court drew sharp distinctions between first-level certiorari review by the circuit court of administrative rulings and discretionary second-level certiorari review of circuit court decisions by the district courts of appeal. Reaffirming *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982), the Court held that the district courts of appeal are limited to inquiring as to "whether the circuit court afforded procedural due process and . . . applied the correct law." 658 So. 2d at 530. That distinction, however, is far more significant than the mere removal of the third level of inquiry before the circuit court, *i.e.,* whether the administrative decision is supported by competent substantial evidence. *Id.* at 530.

Certiorari review before the circuit court functions as the equivalent of a *direct appeal as of right,* while second-level certiorari in the district courts of appeal is *a discretionary writ,* limited to "those few extreme cases where the

appellate court's decision is so erroneous that justice requires that it be corrected." *Id.* at 531 (citations omitted). Indeed, even a departure by the circuit court from the essential requirements of law in a particular case does not necessarily entitle the losing party to certiorari relief absent a showing that the departure "was serious enough to result in a miscarriage of justice." *Id.* at 531. As the Court cautioned:

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. . . .

Id. at 527 (citation omitted).

As interpreted by the district courts of appeal, *Haines City* empowers the district courts to grant second-level certiorari relief where the circuit court's decision "represents a fundamental departure from the controlling law resulting in a miscarriage of justice." *Bird-Kendall Homeowners Ass'n v. Metropolitan Dade County Board of County Commissioners,* 695 So. 2d 908, 909-10 (Fla. 3d DCA), *review denied,* 701 So. 2d 867 (Fla. 1997). The Fourth District, however, has taken a far more expansive view of its proper role on second-level certiorari, as demonstrated in its *City of Dania* decision. Its misapprehension as to its strictly-limited role on second-level certiorari permeates its decision in this case, as well. The court abandoned the carefully-crafted constraints on its second-level certiorari jurisdiction and stepped into the shoes of the circuit court.

The circuit court's ruling in this case was simple and straightforward. The court held that Las Olas had been treated unfairly by the City as Las Olas was attempting to present a project that would be blessed with setback approval by the City's administrative tribunals. (App. at 6). This happened, as the circuit court

found, under a zoning ordinance which establishes a unique procedure for setback approval when a project is located along the City's New River. Setback approval for projects that are not located adjacent to the river is obtained by submitting plans to the City's planning director, who may "condition approval of setbacks in a development plan by imposing one or more setback requirements in excess of the minimums" set forth in the governing ordinance. *Id.* at 6. The planning director's ruling thus advises the developer of the City's requirements for setbacks on a particular project before the long process of obtaining quasi-judicial approval commences. For projects adjacent to the New River, however, the City's P&Z Board has the initial responsibility, superseding the role of the planning director. *Id.*

Attempting to obtain the approval of the P&Z Board, Las Olas submitted three versions of its proposed project, ultimately scaling down to a 32-story residential condominium that met the established setback requirement — all without *ever* being informed of a minimum setback that would be acceptable to the City for this project. In other words, unlike developers of projects that are not located adjacent to the New River, Las Olas never knew "the rules of the game." Instead, Las Olas was required to proceed blindly, without any objective standards for approval of its project.

The circuit court believed that this was unfair and held that "in order for the City to exercise properly the discretion afforded it by the ordinance, the City . . . had a duty to inform [Las Olas] what setbacks it would find acceptable before [Las Olas] went to the trouble of revising plans only to have them rejected." (App. at 6). The Fourth District, while compelled to concede that this is not "an unreasonable requirement," simply *disagreed* with the circuit court's interpretation of the governing ordinances because, in the court's view, there is "no language in the ordinance requiring that such be done." *Id.* at 6-7.

But this sort of first-level appellate analysis is not what the Fourth District is commanded to perform by this Court's precedent. *Only* upon a finding that the circuit court's interpretation of the City's ordinances constituted the requisite *miscarriage of justice* was the Fourth District entitled to intervene on second-level certiorari. No explanation appears in the Fourth District's decision as to how the circuit court's construction of the ordinances resulted in a "miscarriage of justice," and no such explanation is possible. The circuit court merely extended to property owners along the New River the same rights as are extended by the ordinance to other property owners within downtown Fort Lauderdale's CBS — hardly a "miscarriage of justice." That the Fourth District granted second-level certiorari relief based on nothing more than a different view of the manner in which the ordinances should operate demonstrates that court's complete misunderstanding of its second-level certiorari jurisdiction.[2]

---

[2] Indeed, the manner in which the Fourth District ran roughshod over the limitations on second-level certiorari is perhaps best exemplified by that court's observation, in *dictum,* that "the issue is moot" because the planning staff of the city met with Las Olas' representative 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." (App. at 7). In other words, the Fourth District revisited the record, found a fact that it deemed significant, and used that fact to *disagree* with the circuit court's assessment of the evidence in the record as to whether *the P&Z Board* had set a different setback requirement. Even before *Haines City*, this Court firmly had spoken to this issue, quashing *another* Fourth District ruling in a zoning case in which the Fourth District had granted certiorari because it "simply disagreed with the circuit court's evaluation of the evidence." *Education Development Center, Inc. v. West Palm Beach Zoning Board of Appeals,* 541 So. 2d 106, 108-09 (Fla. 1989). The Fourth District's continued willingness to grant second-level certiorari based on little more than a disagreement with the circuit court's ruling creates direct conflict.

Moreover, the Fourth District's endorsement of an essentially-standardless zoning procedure serves only to sharpen the conflict of decisions. The Fourth District seems to believe that it is perfectly permissible to allow the City's zoning authority to make the setback determination without *any prior notice* to the landowner because the setback determination is subject to "a clear appeal and review process through which an abuse of discretion can be overcome." (App. at 7). Well-established Florida precedent, however, commands that a property owner be apprised of the governing standards *before* an application is reviewed by a quasi-judicial tribunal. "Owners are entitled to fair play; the lands which may represent their life and 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).

An ordinance that grants "arbitrary and unfettered authority . . . without at the same time setting up *reasonable standards* which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment." *North Bay Village v. Blackwell,* 88 So. 2d 524, 526 (Fla. 1956) (emphasis supplied); *accord, e.g., Metropolitan Dade County v. P. J. Birds, Inc.,* 654 So. 2d 170, 175 (Fla. 3d DCA 1995). A zoning ordinance that permits a board "to base a decision upon criteria that are not listed or no criteria at all" is unconstitutional. *City of Miami v. Save Brickell Avenue, Inc.,* 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983).

The circuit court's construction of the ordinance at issue as operating consistently *throughout* the CBD, *i.e.,* when the P&Z Board steps into the quasi-executive shoes of the City's planning director, landowners along the New River are entitled to the same notice of excess setback requirements as would be extended to other landowners within the CBD, effectively saved the City from its own folly by reading standards into the ordinance as a whole. It is, of course,

the *duty* of a court to construe a statute in a constitutional manner whenever possible. *E.g., State v. Stalder,* 630 So. 2d 1072, 1076 (Fla. 1994). The Fourth District, however, granted second-level certiorari *because* the circuit court performed that duty. In so doing, the court not only departed from its limited role on second-level certiorari and brought itself into conflict with this Court's controlling decisions, it endorsed essentially standardless zoning procedures.

CONCLUSION

Based on the foregoing, Las Olas requests this Court to grant discretionary review in this cause.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022720
Elliot H. Scherker, Esq.
Florida Bar No. 202304
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

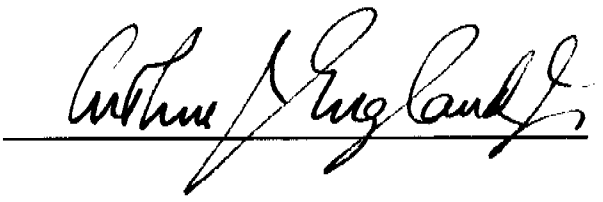
- and -

Richard G. Coker, Esq.
Florida Bar No. 338842
Brady & Coker
1318 S.E. 2nd Avenue
Fort Lauderdale, Florida 33315
Telephone: (954) 761-1404
Facsimile: (954) 761-1489

Co-counsel for Las Olas Tower Company

CERTIFICATE OF SERVICE

I certify that a copy of this brief on jurisdiction was mailed on May 25, 1999 to Robert B. Dunckel, Esq., Assistant City Attorney, City of Fort Lauderdale, 100 North Andrews Avenue, Fort Lauderdale, Florida 33301, *counsel for respondent*.



MIAMI/SCHERKERE/1045788/m#x_051.DOC/5/25/99/21762.010100