IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 95,674
L.T. CASE NOS. 97-2791 & 97-2861 (Consolidated)

LAS OLAS TOWER COMPANY,

Petitioner

vs.

CITY OF FORT LAUDERDALE,

Respondent

ANSWER BRIEF ON JURISDICTION OF RESPONDENT CITY OF FORT LAUDERDALE

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION

Petitioner seeks discretionary review of the District Court's decision [App. 1] on the basis it expressly and directly conflicts with Haines Citv Communitv Develonment vs. Heggs, 658 So.2d 523 (Fla. 1995) as to the proper standard of review for a second level certiorari on a zoning matter.

Respondent argues that there is no express or direct conflict with Haines City, supra and that the decision of the District Court comports with Haines City, supra.

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CERTIFICATION OF TYPE SIZE AND STYLE

Respondent CITY certifies that the type size and style used in this Answer Brief on Jurisdiction is 14 point proportionately spaced Times New Roman.

STATEMENT OF THE CASE AND FACTS

Respondent is satisfied with the Statement of the Case and Facts contained in Petitioner's Brief and does not choose to disagree with any part thereof,

In this Brief on Jurisdiction, LAS OLAS TOWER COMPANY, JNC. is the Petitioner and will be referred to herein either as Petitioner or "LOT". CITY OF FORT LAUDERDALE is the Respondent and will be referred to herein either as Respondent or "CITY".

References to CITY's Appendix shall appear as [App. 1 at].

References to LOT's Brief shall appear as [LOT Brief at].

SUMMARY OF ARGUMENT

LOT asserts that this Court should take discretionary jurisdiction to review a second level certiorari review of the District Court on the basis that the District Court's decision expressly and directly conflicts with Haines City, supra with respect to its second level certiorari review. In particular LOT asserts that the error of law on which the District Court granted certiorari did not amount to a "miscarriage of justice." Additionally, LOT argues that the District Court's endorsement of an "essentially standardless" decision is in direct conflict with established Florida precedent.

CITY's positon is that the District Court complied with the second level certiorari review standards in Haines City, supra. A review of the record demonstrates that the circuit court exceeded its authority and violated clearly established principles of law amounting to a miscarriage of justice. This is particularly evident when viewing the gravity of the results flowing from the fundamental departure from controlling law in this zoning case concerning a 32 story condominium tower (Tower 11).

Furthermore, since the circuit court reserved jurisdiction on the issue of whether the underlying zoning ordinance provided reasonable standards, that issue was never presented to the District Court and therefore the District Court's holding could not conflict with established Florida precedent.

ARGUMENT

LOT seeks discretionary review pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) of the underlying Fourth District's decision as to Tower II on the basis that it expressly and directly conflicts with Haines City Community Development vs. Heggs, 658 So.2d 523 (Fla. 1995) with respect to second level certiorari review. Haines City, supra, when contrasting the holdings in Combs vs. State, 436 So.2d 93 (Fla. 1983) and Education Development Center, Inc. vs. City of West Palm Beach, 541 So.2d 106 (Fla. 1989) ("EDC") on a certified question found that the Combs

and EDC standards "'departure from the essential requirements of the law" and "applied the correct law" are essentially the same. EDC had reaffirmed City of Deerfield Beach vs. Vaillant, 419 So.2d 624 (Fla. 1982) which had used the "applied the correct law" standard of review for second level certiorari.

The Fourth District's decision [App. 1] in evaluating the circuit court's holding [App. 2] as to Tower II cited Haines City, supra, indicating its review was limited to whether procedural due process was afforded and whether there had been application of the correct law, noting that the only challenge was as to whether the circuit court had failed to apply the correct law. [App. 1 at 3]. The Fourth District, consistent with Haines Citv, supra, found the circuit court had failed to apply the correct law in ruling in favor of LOT on Tower II. [App. 1 at 7].

The underlying ordinance for this development review, City Code Sect. 47-33.1, is set out in pertinent part at Appendix, pg. 3-4. The development must be viewed against such criteria as "location," "size," "height," "design," "open spaces," "relationship to adjacent property," and "proximity to New River" as well as a component under City Code Sect. 47-59.7(v), "Neighborhood Compatibility and Preservation" which seeks to ensure the development will be "compatible with and preserve the character and integrity of adjacent neighborhoods." [App. 4].

City Code Sect. 47-33.1 provides that the "director may condition approval

of the setbacks . . . by imposing one (1) or more setback requirements exceeding the minimum . . ." [Id.]. (Emphasis supplied,) Because Tower II is situated on New River, under Sect. 47-33.1(d), the Planning & Zoning Board conducts the approval of development plan instead of the planning director. The circuit court found that the failure to exercise the foregoing discretionary power constituted a departure from the essential requirements of the law, in that the City should have informed LOT what the Tower II setbacks should have been prior to denial of the development plan. [App. 2 at 10]. The circuit court did not fmd this to be a procedural due process violation. Nor did the circuit court cite any authority whatsoever, Id., for judicially transforming into a mandatory or obligatory act, that which the legislature clearly intended to be permissive or discretionary.

Clearly, the legislative body could have drafted the ordinance in such a manner, but it did not. The circuit court exceeded its jurisdiction and violated principles of separation of powers when it took upon itself that task of re-writing that which was left to the legislative branch, This usurpation of legislative power by the judiciary amounted to a violation of "a clearly established principle of law resulting in a miscarriage of justice." Combs, supra, at 96. The circuit court acted in excess of its jurisdiction in perpetrating this essential illegality and, without authority, substituted its wisdom and judgment for that of the legislative body's as

to how the ordinance should be structured and administered. As such the trial court's holding constituted a "fundamental departure from the controlling law resulting in a miscarriage of justice," Bird-Kendall Homeowners Association vs. Metronolitan Dade County, 695 So.2d 908 (Fla. 3rd DCA, 1997), rev. *denied, 701* So.2d 867.

The circuit court relied on an "incorrect principle of law", EDC, at 108, the gravity of which would be a monument in the form of a 32 story modernistic condominium incompatibly shoehorned on the narrow contours of New River', on a parcel only varying in depth of only 150' to 220', dwarfing the one and two story Rio Vista residences 120' across the New River, overshadowing a contiguous seven story Chateau Mar condominium[2] and the nearby historic Stranahan House (Fort Lauderdale's oldest home and former Indian trading post) and standing in stark contrast to a Las Olas corridor, the uniqueness of which is almost beyond

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[1] The 32 story Tower II is a mere 20' from New River at its closest point. By comparison single family dwellings on a waterway require a minimum rear yard of *25'*.

[2] Chateau Mar condominium borders the Tower II site to the East. Tower II on the East is a mere 12' off the Chateau Mar property line, where the proposed Tower II would rise over 280' to the 30th floor before it steps back from the Chateau Mar property to a height of 325', atop of which rises another 65' of appurtenances.

comparison. Tower IT would prejudicially and permanently alter the streetscape, neighboring properties, neighborhood, Las Olas community and skyline of this area. Such a monument is "serious enough to result in a miscarriage of justice." Haines City Community Development vs. Heggs, 647 So.2d 855,856 (Fla. 2nd DCA, 1994). To not correct such a prejudicial injustice would be tantamount to clothing "trial judges with powers of absolute czars in zoning matters." EDC at 109 (J. MacDonald, dissenting).

Of paramount importance to the approval of such a project is its design relationships (such as size, height, scale, mass, open space) to its location, to adjacent properties, proximity to New River and compatibility to and preservation of adjacent neighborhoods, The uncontroverted evidence shows that Tower I went through a staff Development Review Committee ("DRC") review, five (5) days of proceedings (1300 pages of transcript) before the Planning & Zoning Board, a staff memorandum evaluating the relationship of the project to the relevant criteria and an appeal to the City Commission before embarking upon approvals for Tower II. As to Tower II, the developer indicated he had listened fully to the Tower I proceedings and made appropriate adjustments in the Tower II design. Tower II also went through a preliminary staff DRC review and had the benefit of staffs memorandum evaluating the project's relationship to the relevant criteria prior to its

presentation to the Planning and Zoning Board. It even had the benefit of the Planning Director's visit to the site with the developer and the Director's analysis of the factors and recommendations as to compatibility and size of project. [App. 5]. Rather than being "blind sided" as to Tower II, LOT proceeded with its eyes wide open to the calculated risks and probable outcomes, making adjustments and proceeding accordingly, without surprise. The foregoing is presented not as a demonstration of how the evidence should be re-weighed, as there is no conflict as to such evidence. Rather, the foregoing is a demonstration of how LOT did not suffer prejudice or surprise in the Tower II proceedings and how the trial court applied the wrong principles of law to the facts.

It should be noted that this is not a case of the district court re-weighing the competent, substantial evidence reviewed by the trial court as was done in City of Dania vs. Florida Power & Light Company, 718 So.2d 8 13, 816 (Fla. 4th DCA, 1998) and EDC, supra. Indeed, the trial court found competent, substantial evidence to support denial. [App. 2 at 10].

LOT has argued that the circuit court held the setback could not be lawfully denied without an "objective standard" to follow [LOT Brief, pg. 1] and that the circuit court held that LOT had been treated "unfairly." [LOT Brief, pg. 6]. A review of the circuit court holding however fails to support such arguments. [App.

2, pg. 10]. Similarly, LOT argues that the District Court observed the obligation to apply objective standards in land use appeals is hardly "an unreasonable requirement." [LOT Brief, pg. 1]. Contrary to LOT's assertion, the District Court observed that informing LOT what setbacks would be acceptable was a proposition that although "might appear at first blush as not an unreasonable requirement, we think it is neither feasible nor the law." [App. 1 at 6].

LOT next advances the arguments that the ordinance fails to set up reasonable standards. That argument should not serve as a basis for direct and express conflict because, as the district court observed, the circuit court had

> " . . . reserved jurisdiction as to Counts II, IV and VI which sought a declaratory judgment that the setback requirements in the CBD zoning ordinance were void for lack of clear standards and criteria." [App. 1 at 2].

Accordingly, the issue of whether the underlying ordinances set reasonable standards or criteria was not an issue visited by the District Court and hence could not form the subject matter of an express and direct conflict. That constitutional challenge has been properly left to a declaratory judgment action. City of St. Petersburg v. Gabbay's Industries Development Cornoration, 493 So.2d 535,536 (Fla. 2nd DCA, 1986).

CONCLUSION

Based on the foregoing, CITY requests this Court deny jurisdiction for discretonary review in this cause.

Respectfully submitted,

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CERTIFICATEOFSERVICE

I HEREBY CERTIFY that a copy of this Answer Brief on Jurisdiction was mailed this 23rd day of June, 1999 to:

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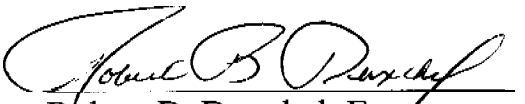

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APPENDIX

1. DISTRICT COURT OF APPEAL DECISION.

2. CIRCUIT COURT DECISION.

3. CITY CODE SECT. 47-59.7(v), NEIGHBORHOOD COMPATIBILITY AND PRESERVATION.

4. EXCERPT FROM TRANSCRIPT / TOWER II / DAY 3 / PLANNING & ZONING BOARD / PG. 119-120

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1999

LAS OLAS TOWER COMPANY,

Petitioner,

v.

CITY OF FORT LAUDERDALE,

Respondent.

CASE NO. 97-279 1

CITY OF FORT LAUDERDALE,

Petitioner,

v.

LAS OLAS TOWER COMPANY,

Respondent.

CASE NO. 97-2861

ELIZABETH BUNTROCK, STEVEN BERRARD, et al.,

Petitioners,

v.

THE CITY OF FORT LAUDERDALE, a Florida municipal corporation, and THE LAS OLAS TOWER COMPANY, INC., a Delaware corporation authorized to do business in the State of Florida, and THELMA HARRIS, ROBERT ARRINGTON, FELICE ARRINGTON, STEVE SHELTON, DIANA SHELTON, DANE HANCOCK, CYNTHIA HANCOCK, ROBERT M. CURTIS, MARIE C. CURTIS, JACK 0. DEMYAN, JEAN M. DOOLEY, GALL M. SULLIVAN, DOROTHY MENZA, PRINCESS MACE, ELIZABETH I. HABOIAN, HELEN F, ATHERTON, and MARJORIE M, WHEELER,

Respondents.

CASE NO. 97-3209

Opinion filed May 12, 1999

Petitions for writ of certiorari to the Circuit Court of the Seventeenth Judicial Circuit, Broward County; Robert Lance Andrews, Judge; L.T. Case Nos. 95-10455 (09) and 96-3704 (09).

Thomas F. Gustafson, Jon M. Henning, and Philip E. Rothschild of Custafson, Tilton, Henning & Metzger, P.A., Fort Lauderdale, for Elizabeth Buntrock, Steven Berrard, et. al.

Dennis E. Lyles, City Attorney, and Robert B. Dunckel, Assistant City Attorney, Fort Lauderdale, for City of Fort Lauderdale.

Richard G. Coker, Jr. of Brady & Coker, Fort Lauderdale, and Arthur J. England, Jr., Clifford A. Schulman, and Elliot H. Scherker of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, for Las Olas Tower Company, Inc.

ON MOTION FOR REHEARING AND REHEARING EN BANC

PER CURIAM.

The court's opinion in these three cases, consolidated for purposes of opinion, was filed January 6, 1999. Timely motion for rehearing and for rehearing en banc was filed in Cases No. 97-279 1 and 97-286 1 only; thus, the mandate issued in due course in Case No. 97-3209. The court's opinion filed January 6, 1999 is withdrawn as to Cases No. 97-2791 and 97-2861 only, and as to

. those cases the following revised consolidated opinion, of substantially identical import, is substituted. The motion for rehearing and rehearing en banc is denied.

RE VISED CONSOLIDA TED OPINION

The three above captioned cases arose out of related zoning issues reviewed by the Circuit Court of Broward County acting in its appellate capacity. Although this revised consolidated opinion applies to Cases No. 97-2791 and 97-286 1 only, we have included for purposes of clarity a discussion of the issues in Case No. 97-3209.

In 1995, Las Olas Tower Company ("LOT") applied to the City of For& Lauderdale for site plan approval for a proposed 45 story residential condominium ("Tower I") to be built in the Central Business District ("CBD"), an overlay zoning district,' and for an allocation of additional dwelling units ("density bonus"). The underlying zoning district for the Tower I site is the "R-3" district. Upon the application being denied, LOT petitioned the circuit court for certiorari review of the denial of its Tower I application.[2]

With that suit pending, LOT applied for site plan approval of a 32 story scaled-down version of the residential condominium ("Tower II"). That application was likewise denied. LOT amended its then pending circuit court action to seek review also of the denial of its Tower II application[3].

Ms. Buntrock and others (herein collectively "Buntrock") are resident property owners near LOT's proposed building site whose property would be adverseiy affected if Tower II were to be built as proposed. While LOT's Tower II application was still under review by the City's planning staff, Buntrock became aware that planning staff would recommend denial of the Tower II site plan for its failure to meet setback *requirements of the CBD Zoning.* Buntrock appealed to the Board of Adjustment ("BOA") for a ruling that the Planning and Zoning Board ("PZB"), in its consideration of the application, should apply the *setback requirements of the underlying R-3 zoning.*[4] The BOA upheld the planning staffs interpretation of the setback requirements to be applied, as a result of which Buntrock filed petition for certiorari in the circuit court for review of the BOA decision.

In LOT's suit, the court entered an order that (a) denied certiorari as to Tower I (Counts I and III), based on a finding that LOT was accorded procedural due process, the administrative findings of the City's agencies were supported by competent substantial evidence, and the essential requirements of law were observed; (b) granted certiorari as to Tower II (Count V), upon a finding that procedural due process was afforded and the agencies' findings were supported by substantial competent evidence, but denial of the setback approval was a departure from the essential requirements of law; and (c) reserved jurisdiction as to Counts II, IV, and VI which sought a declaratory judgment that the setback requirements in the CBD Zoning ordinance were void for lack of clear standards and criteria. LOT filed certiorari here (Case No. 97-279 1) for review of denial of certiorari on Tower I ("LOT's Petition"). The City of Fort Lauderdale filed certiorari here (Case No. 97-2861) for review of the grant of certiorari on Tower IX ("City's Petition").

In Buntrock's separate suit the court entered its

'In overlay districts, where there is a conflict between the provisions of the underlying district and the overlay district, the provisions of the overlay district supersede or override the provisions of the underlying district to the extent of the confl ict.

[2]Counts I, II, III, and IV of LOT's petition in the circuit court pertain to Tower I.

'Counts V and VI *of* LOT's amended petition pertain to Tower II.

[4]The practical effect of which would essentially limit Tower II to a height of six or seven stories.

*order denying certiorari (thereby uphoiding the BOA's interpretation of the setback requirements) upon a finding that the agency's interpretation was not clearly erroneous and therefore should not be overturned. Buntrock filed certiorari here (Case No. 97-3209) to review that decision ("Buntrock's Petition").

On certiorari review of a circuit court order entered in its appellate capacity, our review is limited to whether procedural due process has been afforded and whether there has been application of the correct law. See Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla 1995). In each of these cases the respective petitioner asserts only that the court failed to apply the correct law.

BUNTROCK'S PETITION

The R-3 zoning (multifamily residential) provides for a maximum building height of 55 feet, and for definitive setbacks on all sides of a building, subject to a minimum of not less than one-half the height of the building. When the CBD was created in 1970 and codified as section 47-33, City Code, it expressly provided that the *maximum height* and *minimum yard restrictions* generally applicable in R-3 zoning "shall not apply" in the CBD. In 1985, section 47-33 was reworded. Although it expressly provided that ". , . building sites within the central business district shall be exempt from the maximum height restrictions established by the applicable zoning regulations . . . ,"[5] it no longer contained an express exemption of the minimum yard restrictions except as discussed in the footnote below. In 1986 the CBD regulations were further amended by creating section 47-33.1, entitled "Setbacks." The relevant provisions of section 47-33.1, are as follows:

> Setbacks.
>
> (a) Despite the provisions of section 47-33 pertaining to setbacks, there shall be a minimum twelve-foot setback for any structure erected in the central business district, subject to the foilowing requirements:
>
> (1) For purposes of section 47-33.1, the term "setback" means the minimum horizontal distance between a principal structure and each interior curb line, existing as of January 1, 1986 (or if a curb does not exist, the edge of the improved roadway) adjacent to the land on which the structure is to be situated,
>
> (2) The setback shall apply to the first ten (10) feet of the height of the structure;
>
> * * *
>
> (4) 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 setback imposed by this section may be modified by the planning director, subject to the requirements prescribed below.
>
> (b) No structure, or part thereof, shall be erected or used, or land or water used, or any change of use consummated, nor shall any building permit or certificate of occupancy be issued therefor, unless a development plan for such structure or use shall have been reviewed

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'Section 47-33 aiso provided: "The planning and zoning board, subject to the considerations set out above, may require a minimum setback of twenty (20) feet from all property lines for [residential buildings]." All parties have interpreted this language as applying onlv if the property owner is seeking approval for additional dwelling units over and above the density permitted by the applicable zoning regulations ("density bonus"). While it seems clear to us that the language is not so restricted but rather was intended to apply to all residential property in the CBD, consistent with the provisions of section 47-33 as they existed prior to the 1985 rewording, we do not make that holding since the consuuction of this language has not been made an issue in any of the three petitions.

and approved by the planning director and, where applicable, after deveiopment 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 deveiopment 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 deveiopment plan by imposing one (1) or more setback requirements exceeding the minimum requirements prescribed by this section.

* a *

(d) Any development plan which provides for erection of a new structure in the central business district, . . to be located on land adjacent to New River,. . . shall be submitted directly to the planning and zoning board for review of the setbacks. The board shall render its decision after consideration of all factors identified above.

The Tower II application did not seek a density bonus. The City's planning staff reviewed the site plan for setback requirements on the basis of criteria in section 47-33.1. Bunt-rock sought a ruling from the BOA that the underlying R-3 zoning setback requirements should be the proper standard to be considered by the planning staff Buntrock's position. simpiy stated, was that the rewording of section 47-33 in 1985, and the wording of section 47-33. I in 1986, showed clear legislative intent to no longer exempt residential property in the CBD overlay from the minimum setbacks of the underlying zoning.[6] The City's Planning Director, the City's Planning Staff, and the Zoning Administrator all took the position before the BOA that section 47-33.1(d) was intended to require all proposed projects in the CBD located on New River to be submitted to the PZB for review of *all* setbacks, applying to such review all the factors found in sections 47-33.1(a) and (b). The BOA upheld the staff's interpretation and Buntrock sought certiorari review in the circuit court.' The circuit court, citing Fortune Insurance Co. v. Department of Insurance, 664 So. 2d 3 12 (Fla. 1st DCA 1995), upheld the BOA ruling on the finding that the staffs interpretation and the BOA's affirmance of the same were not clearly erroneous. Our inquiry is whether, in so doing, the circuit court properly applied the correct law.

Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. See Winemiller v. Feddish, 568 So. 2d 483,485 (Fla. 4th DCA 1990); Amisub (North Ridge Hosp., Inc.) v. Department of Health and Rehabilitation Servs., 577 So. 2d 648,649 (Fla. 1st DCA 1991). Of course, that deference is not absolute, and

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[6]Except for the street setback as provided in section 47-33.1 (a}, and then only for the first ten feet in height.

[7]Buntrock appears to have taken the position before the BOA and in the circuit court that setbacks and minimum yard restrictions are interchangeable terms. Buntrock argues here that they are not the same, and that there is nothing in section 47-33.1 which conflicts with (and thereby supersedes) the R-3 minimum *yard* requirements. Aside from the fact that Buntrock may not take a position here inconsistent with the position taken before the lower tribunal, we find that notwithstanding the technical distinction made between "setbacks" and "yards," they are the same for all practical purposes.

when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. Set Legal Envtl. Assistance Found., Inc. v. Board of County Comm'rs of Brevard County, 642 So. 2d 108 1, 1083-84 (Fla. 1994); Woodley v. Department of Health and Rehabilitative Servs., SO5 So. 2d 676, 678 (Fla. Ist DCA 1987); Kearse v. Department of Health and Rehabilitative Servs., 474 So. 2d 819, 820 (Fla. 1st DCA 1985).

Was the interpretation which the BOA placed on section 47-33.1 unreasonable or clearly erroneous? We think not. In statutory construction a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legisiative intent or result in a manifest incongruity. See Winemiller; State v. Miller, 468 So. 2d 105 1, 1053 (Fla. 4th DCA 1985); Ferre v. State ex rel Reno, 478 So. 2d 1077 (Fla. 3rd DCA 1985). True, section 47-33.1(a)(1) does state in unambiguous language that, *for the purposes of section* 47-33. *1,*[8] the term "setback" means the horizontal distance between a principal structure and the edge of the interior curb of [Sagamore Street, in this case]. But it is apparent to us that such meaning applied literally to the word "setback" (whether in the singular or the plural) as it is used in subsections (b) and (d) would itself be unreasonable and would effectively render those subsections a nullity. By way of example, the entire mechanism created in section 47-33.1 (d) for Planning and Zoning Board "review of setbacks" for projects located on New River, directing it to consider the factors set out in 47-33.1(b), would be manifestly incongruous.

The circuit court, sitting in review of the decision of the Board of Adjustment, correctly appliedthe law in reaching the determination that the BOA had not departed *from* the essential requirements of the law. Buntrock's petition for certiorari shouid be and is denied,

LOT'S PETITION

LOT's application for site plan approval of a 45 story residential condominium also sought additional dwelling units over and above the density permitted by the applicable zoning regulations ("density bonus"). To obtain additional units the applicant must first obtain site plan approval from the PZB. Although LOT was denied both the density bonus and site plan approval, the denial of the former becomes immaterial if the denial of the latter is upheld.

LOT argues that the City based denial of site plan approval on aspirationai goals delineated in the City's Future Land Use Plan which had not been adopted by ordinance. The circuit court found, however, that the City, in denying approval, had relied *on* evidence presented by LOT as well as on recommendations of staff and relevant city ordinances, and that the evidence relied upon met the competent, substantial test. That finding, which puts to rest LOT's argument on this issue, is not open for our review.

The circuit court also found that the City properly used the height of the proposed development as a factor in denying LOT's application for site plan approval. LOT particularly challenges the use of height as a criterion, noting that section 47-33(1) exempts central business district buildings from "the maximum height restrictions." However, as the circuit court observed, section 47-33.1(a)(4) explicitly provides that the provisions of section 47-59 shall apply despite any provision found in section 47-33.1 appearing to be to the contrary.[9] Section 47-59 calls for every development project

[8]The City suggests in its response that by viewing this as clerical or scrivener's misprision which should have been written as *47-33.1 (a)*, the resulting clause would bring all parts of the ordinance into harmony with the legislative intent. We agree it should be so viewed.

[9]Even without the linkage between *section 47-*33.1(a)(4) and section 47-59, the latter would apply independently for projects located in the CBD.

to meet ail the criteria ouriined therein. Of significance to this point, one of the criterion is that the development be compatible with, and preserve the character of, the adjacent neighborhoods, residential as well as commercial. This requirement of neighborhood compatibility and preservation requires a consideration of several factors, including the scale, mass, location, size and height *of* the proposed project. The PZB and its staff objected to the height of Tower I because such height was not compatible with the buildings on nearby properties. LOT and the City agree that compatibility is a valid standard for review of site development. See, e.g., City of St. Petersburg v. Cardinal Indus. Dev., 493 So. 2d 535 (Fla. 2d DCA 1986). While we note LOT's argument that adherence to a compatibility standard would effectively prohibit the high density development contemplated by the CBD, that argument is one better addressed to the legislative body.

The circuit court, sitting in review of the decision of the City Commission and the City's Planning and Zoning Board, correctly applied the law in reaching the determination that the City and its agency had not departed from the essential requirements of law. LOT's petition for certiorari should be and is denied.

THE CITY'S PETITION

The last question before this court is whether the circuit court correctly applied the law in granting LOT certiorari on Count V, which concerned tbe PZB's and the City Commission's denial of setback approval for Tower II.

The circuit court agreed with LOT that Tower II met the minimum setback requirements set out in section 47-33.1 (a)," but also agreed with the City that it has the discretion under section 47-33.1 (b) to require more than the minimum setback, or, put another way, to condition approval of setbacks by imposing one or more setback requirements in excess of the minimum. Notwithstanding, the circuit court found that the City had failed to exercise the discretion allowed it under section 47-33.1 before denying LOT's application,[11] and thus held its denial of setback approval for Tower II constituted a departure from the essential requirements of law.

We understand the words of the circuit court 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. Though that might appear at first blush as not an unreasonable requirement, we think it is neither feasible nor the law.

Section 47-33.1(a) authorizes the planning director to modify setback requirements in specified circumstances. Section 47-33.1 (b) states the director may condition approval ofsetbacks in a development plan by imposing one or more setback requirements in excess of the minimums stated in the section. In accordance with section 47-33.1(d), this became the responsibility of the PZB, rather than the director, in the instant case, because the property is located along the New River.

Whether such responsibility rests with the planning director or, as in this case, with the PZB,

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[10]In making this finding, the court was apparently speaking only of the front setback which did conform to the minimum front setback stated in the ordinance; the setbacks on 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.

[11]Apparently this was in reference to the court's understanding that the City did not inform LOT of the setback requirements it would impose, but allowed the developer to revise its plan twice before informing it merely that the plans did not conform to the code requirements.

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 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.

The issue here, however, is 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.

We hold the circuit court failed to apply the correct law in ruling in favor of LOT on Count V. We therefore grant the City's petition for certiorari and quash the circuit court's ruling as it relates to Count V, with directions to deny LOT's petition for certiorari as to that Count.

GRANTED IN PART AND DENIED IN PART.

POLEN. GROSS, JJ., and OWEN, WILLIAM C., JR., Senior Judge, concur.

IN TEE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

LAS OLAS TOWER COMPANY,
Plaintiff/Appellant

CASE NO. 95-010455 (09)

vs.

JUDGE: ROBERT L. ANDREWS

CITY OF FORT LAUDERDALE, a
Florida municipal corporation,
Defendant/Appellee

ORDER ON PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court on Plaintiff, LAS OLAS TOWER COMPANY'S, ("LOT") Petition for Writ of Certiorari and Declaratory Judgment. This Court having heard argument of counsel, having carefully read the file, having considered all applicable law, and being duly advised in the premises, finds as follows:

Plaintiff, LOT, submitted an application to the Planning and Zoning Board ("P & Z Board") of the City of Fort Lauderdale for site plan approval pursuant to Fort Lauderdale Code, Ordinance No. C-86-33, Section 47-33.1(d). That section provides that structures located adjacent to the New River go directly to the P & Z Board for setback review. The proposed Tower project is located adjacent to the New River on the south side of Sagamore Road on the north bank of the New River. The proposed Tower project is zoned in the

R-3 district' in the Central Business District overlay adjacent to the New River.'

LOT, ultimately, submitted two applications to the P & Z Board. The first application, "Tower One", is a 71 unit/45 story condominium project, requesting 37 additional dwelling units and setback approval. The second application "Tower Two" is a 34 unit/32 story condominium project only requesting setback approval.

The P & Z Board denied LOT's application for additional dwelling units and setback approval for Tower One. Subsequently, on July 27, 1995, LOT petitioned the Court for a Writ of Certiorari on two counts.[3]

LOT, then, pursuant to Section 47-33.1(e)[4], appealed to the City Commission as to the denial of setback approval for Tower One. The City Commission upheld the denial by the P & Z Board. Thereafter, LOT amended its original Petition for Writ of Certiorari on April 18, 1996 by adding Count III[5] and IV[6].

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[1] See exhibit B attached, which is the Official Zoning Map of the City of Fort Lauderdale.

[2] The zoning regulations of the Central Business District overlay trump the zoning regulations of the underlying R-3 district where there is a conflict between the two. "When two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent." McKendry v. State of Florida 641 So 2d. 45, 46 (Fla. 1994).

[3] Count I to quash the P & Z Board's action and Count II for Declaratory judgment that section 47-33.1 is void for lack of standards.

[4] Sec. 47-33.1(e) "If the proponent of the development plan disagrees with the decision of the P & Z Board made with respect to setbacks, the proponent may appeal the decision to the City Commission".

[5] Count III requests review of the denial of setback approval for Tower One by the P & Z Board and the City Commission. LOT request this court to quash the P & Z Board and the City Commission's action.

Simultaneously, LOT revised Tower One decreasing its size and density. LOT then filed an application for setback approval as to Tower Two on September 8, 1995. Tower Two is 'a 34 Unit/32 story condominium project. On October 18, 1995, November 15, 1995, and December 20,1995 hearings were held before the P & Z Board on LOT's amended application for setbacks. Tower Two met the minimum setback requirement pursuant to Section 47-33.1'. Nevertheless, the P & Z Board voted to deny Tower Two's application for setback approval. Consequently, LOT appealed to the City Commission pursuant to Section 47.33.1(e). On May 21, 1996 the City Commission also voted to deny Tower Two's application for setback approval. Therefore, on June 20, 1996 LOT amended its original Petition by adding Count V[8] and Count VI[9].

This Court, in reviewing the decision of the P & Z Board and the City Commission of the City of Fort Lauderdale, sits in its appellate capacity. where a Circuit Court reviews the decision of an administrative agency the standard of certiorari review is threefold: 1)whether procedural due process is accorded; 2)whether the administrative findings and judgment are supported by competent

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[6] Count IV requests Declaratory Judgement that the standards in Section 47-33.1, specifically subsections (b), (d), and (e) are void for lack of standards or criteria by which the City is to grant or deny application for setback approval.

[7] The City admitted that LOT met the minimum setback requirements- See FN 5.

[8] Count V appeals the denial of setback approval for Tower Two.

[9] Count VI is for Declaratory Judgment that the standards in section 47-33.1, specifically subsection (b), (d) and (e) are void for lack of standards and criteria by which the City is to grant or deny applications for setbacks.

Substantial evidence and 3)whether the essential requirements of the law have been observed. Citv of Deerfield Beach v. Vaillant, 419 so. 2d 624 (Fla. 1982).

The reviewing court does not reweigh or evaluate the evidence but merely examines the record to determine whether the tribunal or agency had before it competent evidence to support its finding and judgment, which also must be in accord with the essential requirements of law. DeGroot v. Sheffield, 95 so. 2d 912, 916 (Fla. 1957). The Florida Supreme Court in DeGroot described competent substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Id.

A review of the record indicates that LOT was afforded procedural due process by the P & Z Board and the City Commission respectively[10]. First, LOT received the required hearing from each administrative board. Second, LOT was given an opportunity to be heard before each tribunal. Hence, LOT has not proven that they were denied procedural due process.

Alternatively, LOT has argued that they were denied "procedural due process" because they did not receive a finding of

[10] LOT has not made an argument that the procedure provided under section 47-33.1 or section 47-33 of the Fort Lauderdale Code denied it of its procedural due process rights.

fact from the P & Z Board or the City Commission.[11] The Court is of the opinion that this is a substantive due process argument and as such would more appropriately be litigated at another time,

The record further indicates that the findings and judgment of the P & Z Board and the City Commission each were supported by competent and substantial evidence. The P & Z Board and the City Commission relied on the evidence presented to them during hearings by LOT.[12] The P & Z Board also relied on the recommendations of staff, and relevant city ordinances.[13] LOT's argument that the City improperly relied on height and compatibility solely to deny LOT's application fails. Section 47-33(1) provides that "buildings in the central business district are exempt from the maximum height restrictions...." However, because of the linkage" to section 47.59, the City properly used height as a factor in denying LOT's

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[11] " We believe that the lack of specific finding is a violation of the procedural due process rights *under* Planning Commission of the City of Jacksonville vs. Brooks and City of Apopka vs. Orange County." [transcript March 21st pg 1281.

[12] LOT presented to the court shadow studies, site zoning studies, setback studies, economic impact analysis, height comparisons, etc, for the city to evaluate in deciding whether to grant LOT's application.

[13] The relevant code provision relied *on* by the P & Z Board and the City Commission were, section 47-33(1), 47-33.1, 47-33.1(e), and section 47.59. Section 47-33(1) governs this development project because it will be located in the central business district. Section 47-33.1 controls as it relates to setback requirements. Section 47-33.1(e) provides that because ehis property is located adjacent to the New River, that the setback approval application goes directly to the P & Z Board. Section 47-33.1 is linked to section 47.59 because section 47-33.1 states chat no provision in this section overrides anything in section 47.59. Section 47.59 requires a development project to meet all *of* the criteria outlined in section 47.59 including neighborhood compatibility.

[14] Section 47-33.1(a)(4) states "the provisions of section 47-59 ("Development Review Requisites") shall apply, despite any provision in this section 47-33.1 which may appear to be to the contrary."

application.[15] The Court finds that the evidence relied on by the City was sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

As to the departure from the essential requirements of law factor, this Court concludes that there has not been a departure from the essential requirements of law by the P & Z Board or the City Commission as it relates to Count I and Count III of Plaintiff's Petition.

In Count I, LOT appeals the P & Z Board's denial of LOT's application for site plan approval, and additional dwellings units[16] for Tower One. LOT requested an additional 37 dwelling units for a total of 71 units with a density of 52 dwelling units per acre.[17] Section 47-11.3 of the Fort Lauderdale Code provides that "the maximum number of dwelling units per net acre of plot area shall not exceed twenty-five (25) . . . ." Therefore, because Tower One contains 52 dwelling units per acre and the maximum allowed per acre is 25, LOT is required to go to the P & Z Board to receive approval for the additional dwelling units requested.

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[15] Section 47.59.7 (v) neighborhood compatibility and preservation In order to ensure that a development will be compatible with, and preserve the character and integrity of adjacent neighborhood, 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 neighbwrhwode....

[16] Section 47.33(1) states " building sites within the central business district... shall be eligible to apply for additional dwelling units over and above the density permitted by the applicable zoning regulations, provided such additional dwelling units are available for distribution in the central business district. However, in order to obtain such additional dwelling units, a site plan of the development proposed must be reviewed and approved by the P & Z Board prior to the issuance of a development permit."

[17] These facts were alleged by LOT in its original complaint for certiorari.

The P & Z Board pursuant to section 47.33(1)[18] may rely on a myriad of factors in determining whether to approve LOT's application requesting additional units. Therefore, LOT's argument that the City does not have the discretion to deny LOT's application fails. The Court in looking at the totality of circumstances, concludes that the P & Z Board did not depart from the essential requirements of law when it denied LOT's application for additional dwelling units.

In Count III, LOT appealed the denial of setback approval from the P & Z Board and the City Commission for Tower One. This Court finds that Tower One fails as a matter of law because the Tower maintains a zero setback on the west perimeter.[19] Section 47-33.1 clearly requires: (1) a "minimum twelve foot setback for any structure erected in the central business district. " and (2) the minimum setback shall be calculated between the principal structure and each interior curb line applying to the first ten feet of the height of the structure. Consequently, Tower One does not meet the minimum setback requirement and so must fail as a matter of law. Therefore, the P & Z Board and the City Commission did not depart

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[18] Section 47-33(1) states "... such approval shall be based upon consideration of the number of additional dwelling units available under the City Land Use Plan, the number of additional dwelling units requested, the impact of the proposed development on abutting residential areas, the proposed residential density of the proposed development, location of the proposed development, the sensitivity to adjacent development of the site design and proposed orientation of the proposed development (including proposed setbacks), pedestrian movements associated with the proposed development, proposed landscaping and traffic and parking impacts of the proposed development on the transportation network.

[19] See attached exhibit D.

from the essential requirements of law when they denied LOT's application for setback approval.

Additionally, this Court finds that it was within the discretion of the P & Z Board and the City Commission to require more than the minimum 12 foot setback requirement for Tower One. Section 47.33(1) permits the P & Z Board to establish a minimum setback requirement of twenty (20) feet from the property line for applications requesting additional units.[20] Section 47.33(1) gives the P & Z Board the authority to deny LOT's application for setback approval, even if LOT had met the minimum setback requirements. Once Again, the decision of the P & Z Board in denying LOT's application is not a departure from the essential requirements of law.

In sum, this Court finds that, as to Count I and Count III, Plaintiff was accorded procedural due process, the administrative findings of the P & Z Board and the City Commission were supported by competent substantial evidence, and the essential requirements of law were observed.

Putting that matter aside, this Court now considers Count V which appeals of the denial of setback approval for Tower Two by the P & Z Board and the City Commission. Tower Two met the minimum setback requirements under Section 47-33.1(a).[21] Tower Two does

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[20] **47-33(1) Central Business District states** that " **The** P & *Z Board,* **subject** to the consideration set out **above,** may **require** a minimum setback of twenty feet (20') **from all property** lines for every building used exclusively for residential purposes."

[21] Section **47-33.1(a)** states "... there **shall be a minimum twelve** foot setback for any structure erected *in* the **central** business district...."

'not request additional dwelling units; thus, it is not subject to the P & Z Board's discretion to require a minimum 20 foot setback from all property lines under Section 47-33(1). After carefully reviewing all of the pertinent testimony and evidence this Court finds that Tower Two has met the minimum setback requirements. Therefore, the P & Z Board and the City Commission departed from the essential requirements of law when they denied Tower Two's application for setback approval.

In his argument to the Court regarding setback approval for Tower Two, the Assistant City Attorney conceded that Tower Two had met the minimum setback requirements.[22] The City argued that although Tower Two had met the minimum requirements that it was within the discretion of the City to require more than the minimum. The court agrees with counsel that the City can require more than the minimum setbacks. Because the Court construes section 47.33.1 as conferring upon Planning Director and the P & Z Board equivalent power to require more than the minimum setback requirement, the Planning Director under section 47-33.1(a) has the discretion to modify the setbacks imposed by section 47-33.1. The Planning Director also has the discretion under 47-33.1(b) to condition approval of setbacks of an development plan, by imposing one or more setback requirements exceeding the minimum requirements.

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[22] "Yes, you could write it 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 interjected in it. The Board can ask for more. What they've done with regard to Tower Two is they've designed it to the very minimum standard. Your Honor, I would submit to you that something as large as this needs something more than the absolute minimum." (Transcript, March 21, 1997, page 153, line 9-18)

However, the 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. Clearly, the City had ample opportunity to inform LOT that the setback requirements needed to be modified or that it was conditioning setback approval by imposing one or more requirements exceeding the minimum requirements. The City could have accomplished its goal to have Tower Two scaled down, so that it would be more compatible with the neighborhood, 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.

This Court finds as to Count V, that Plaintiff was afforded procedural due process and that the P & Z Board and the City Commission relied on competent and substantial evidence. However the actions of the P & Z Board and the City Commission in denying Tower Two setback approval was a departure from the essential requirements of law.

Accordingly, for the above stated reasons it is hereby,

ORDERED AND ADJUDGED that Plaintiff's Petition for Writ of Certiorari is DENIED as to Count I and Count III. It is further ORDERED AND ADJUDGED that Plaintiff's Petition for Writ Of

Certiorari is GRANTED as to Count V. It is further ORDERED AND ADJUDGED that as to Count II, IV, and VI for Declaratory Judgement the Court RESERVES ruling so that those matters may further litigated.

DONE AND ORDERED in Chambers, at the Broward county Courthouse, Fort Lauderdale, Florida, this 11th day of July, 1997.

/S/ ROBERT LANCE ANDREWS
ROBERT LANCE ANDREWS
CIRCUIT COURT JUDGE

A TRUE COPY

Copies to counsel of record

EXHIBIT B

NORTH

SITE ZONING STUDY

PREPARED BY:

CONNOR PLANNING DIVISION
3000 S. UNIVERSITY DRIVE #205
DAVIE, FLORIDA 33328
(954) 475-7868

LAS OLAS TOWER

SETBACK, DENSITY AND HEIGHT ANALYSIS
COMPARISON WITH SIMILAR TYPES OF HIGH
DENSITY/INTENSITY DEVELOPMENTS

	I. EXISTING BUILDING SURROUNDINGS THE SITE						APPROX. SETBACK MINIMUM			
	NAME OF DEVELOPMENT	UNITS	FLOORS	HEIGHT	SITE AREA	DENSITY	FRONT	SIDE	SIDE	REAR ADJ TO WATER
	RIVERVIEW	81	3		1.59					
1	GARDEN CONDO		STORY	27'	ACRES	50 DU/AC	31'	10' E	100' W	15
2	RIVERCREST APT. NEW RIVER	25 30	STORY 2	53	.79 ACRES	31.6 DU/AC	20'	15' E	15' W	10
3	RESIDENCES		STORY	18	.57 ACRES	52.6 DU/AC	20'	10' E	30' W	20'
4	CHATEAUMAR CONDO	36	7 STORY	63'	.57 ACRES	63.2 DU/AC	20'	30' E	25' W	20'
5	CHASE BLDG. COMMERCIAL	N/A	7 STORY	70		N/A				
	RECENTLY APPROVED HIGHRISE BUILDINGS									
	GRAND PAVILLIAN (GAMPEL TOWER)	400	41 STORY	470	2.08 ACRES	192 DU/AC	12	10' E	SW	13' to PROP. LINE
	NOTE: 154,400 SQ. FT. OF RETAIL ALSO APPROVED									
	RIVERWALK PLACE TWIN TOWERS TRIBUNE PROPERTIES	404	25 STORY	251'	2.97 ACRES	136 DU/AC	15'			
	NOTE: 29,364 SQ. FT. OF RETAIL ALSO APPROVED									
	BIRCH POINTE	17	11 STORY	144'	.43 ACRES	395 DU/AC	20'	30' N	20' S	20
	HARBORAGE	48	22 STORY	224'	.79 ACRES	59.50 DU/AC	20'	35' N	32' S	41'
	CASA VECCHIA	24	10 STORY	139'	.78 ACRES	30.8 DU/AC	30	30' N	20' S	20'
	THE LAS OLAS TOWER									
	PROPOSED SITE	71	45 STORY	446' - 9"	1.38 ACRES GROSS 1.00 NET ACRES	51.45 DU/AC GROSS 71.0 DU/AC NET	12	0' W	36' E	20'

NOTE: INFORMATION OBTAINED FROM FIELD SURVEYS & REVIEW OF CITY RECORDS WITHOUT INFORMATION FROM OWNERS

4/8/95

EXHIBIT n

APPENDIX 3

City Code Section 47-59.7(v)

Sec. 47-59.7(v), ***Neighborhood compatibility and preservation.*** In order to ensure that a development 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. Roadway adjustments, traffic control devices or mechanisms, and access restrictions may be required to control traffic flow or divert traffic as needed to reduce or eliminate development generated traffic on neighborhood streets.

The DRC shall take into consideration the recommendations of the adopted neighborhood master plan in which the proposed development is to be located, or which it abuts, although such neighborhood master plan shall not be considered to have the force and effect of law. When any DRC recommended improvements for the mitigation of impacts to any neighborhood conflicts with any applicable zoning code provision, then the provisions of the zoning code shall prevail.

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APPENDIX 4

Excerpt from Transcript / Tower II / Planning & Zoning Board / Day 3
Pages 119-120

CHRIS WREN: 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 positoned 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 toldthe 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.

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