IN THE SUPREME COURT
STATE OF FLORIDA

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

LAS OLAS TOWER COMPANY,

Petitioner,

v.

CITY OF FORT LAUDERDALE,

Respondent.

REPLY BRIEF OF PETITIONER LAS OLAS TOWER COMPANY

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE FACTS

In its Statement of the Case and Facts, the City states that Las Olas Tower II is located "on the Eastern fringe" of the CBD, as set forth in the "Future Land Use Plan" of the City's comprehensive master plan, which the City had adopted. (Answer Brief at 2). The implication of the City's recitation is that a "Central Urban Core" was part of the zoning ordinances in effect when Las Olas applied for site plan approval for Tower II, and therefore would govern site plan application proceedings when the City considered and denied approval for Tower II. No such implication is warranted, however.

The map which portrayed the City's comprehensive master plan was indeed adopted by the City, but the City ***never*** acted to adopt the *Future* Land Use Element of its comprehensive master plan. (LOT App. 1:34). At the time that Las Olas sought site plan approval from the City, the "aspirational" *Future* Land Use Element of the master plan remained *un*adopted, (LOT App. 1:10 at 98-99), and the "Central Urban Core" had no legal efficacy for any purpose. The ordinance which *was* in effect at the time, and which governed Las Olas's site plan application, was the City's overlay ordinance which created the "Central Business District" ("CBD") to override all other zoning requirements. The CBD was first adopted in 1970, but more significantly for this case was expanded eastward in 1985 to encompass the very land on which Las Olas sought to build Tower II, for the express purpose of attracting "high-density residential development" to that locale. (LOT App. 1:26 and 1:29).

ARGUMENT

In its answer brief, the City offers an array of creative arguments to justify the district court's exercise of second-level certiorari to set aside the trial court's rectification of the city's arbitrary denial of Las Olas's site plan application for Tower II. In large measure, the City supports its position by attacking the ruling of the circuit court, rather than addressing the reasons offered by the district court for its reversal of the circuit court's order. The City's justifications for the district court's action do not address the rationale provided by that court, and they do not comport with established precedent in this area of the law. The City essentially asks the Court to depart from its seminal decision of *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995), by widening the standard of second-level certiorari review and parsing that expanded standard into heretofore unrecognized compartments.

The Court need not dwell extensively on the City's position, as it has rejected each of the innovations proposed by the City as recently as two weeks ago in *Florida Power & Light Company v. City of Dania,* 25 Fla. L. Weekly S461 (Fla. June 15, 2000) ("*FP&L"*). Admittedly, the City did not have the benefit of the *FP&L* decision when it filed its answer brief. Nonetheless, that latest pronouncement is no more than a reaffirmation of principles fully articulated in *Haines City.* The *FP&L* decision ploughs no new ground regarding second-level certiorari. It simply restates the Court's commitment to a very narrow and restricted application of second-level certiorari jurisdiction.

The City makes essentially three arguments here. It argues that the standard of review in second-level certiorari is a "flexible" one which allows the district court to exercise a "range of discretion" — a concept nowhere suggested in this Court's decisions and flatly rejected by the Court on more than one occasion. The City conjectures that a circuit judge who exercises first-level certiorari by applying governing legal principles of administrative due process to a zoning ordinance is impermissibly "re-writing" the ordinance. This argument is woven out of whole cloth, without any attempt to acknowledge or distinguish the case law that was being applied by the court, and without any concern that the district court did not premise its decision on any such contention when it vacated the circuit court's ruling.

Through coloration provided in its brief but nowhere argued as a justification for sustaining the district court's decision, the City talks of traffic concerns on Sagamore Street, which had nothing whatever to do with the City's denial of La Olas's site plan,[1] and of the ambience associated with the New River, Los

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[1] Las Olas had cured all concerns of the City regarding (continued...)

Olas Boulevard and the upscale neighborhood across the river from Tower II. These matters weighed heavily on City officials when they denied approval for Las Olas's site plan (Initial Brief at 8-9), but they are completely irrelevant here.

Perhaps the most significant feature of the City's brief is its omission of any discussion regarding the binding effect of the CBD. The City fathers had *invited* high-density residential units onto the very site where Las Olas has proposed its high-rise condominium by knowingly extending the eastern boundary of the CBD to encompass this very parcel. Only low-rise units surrounded the expanded boundary at the time, and only the modest width of the New River separated the expanded CBD from the upscale residential community across the river. Nonetheless, those City fathers brought the Las Olas parcel within the CBD's uniformly applicable directive that all height restrictions were overriden for properties within the CBD boundaries. The City fathers then knowingly and affirmatively declined to distinguish properties located within the CBD as either "core" or "fringe" properties, by affirmatively ***declining*** to adopt the aspirational provisions of the *Future* Land Use Element of the City's comprehensive master plan.

(...continued)

> Sagamore Street, to the satisfaction of the staff of the City and the Planning and Zoning Board, well before its site application was turned down. (LOT App. 2:5 at 16-17).

Whatever picturesque visions of Ft. Lauderdale may have motivated the present City Commission to deny site plan approval to a project which admittedly met every requirement of applicable zoning ordinances (LOT App. 2:5 at 16-17), the City was legally bound to apply the zoning ordinances adopted by City fathers in 1970 and 1985. By the same token, whatever motivations prompted the district court to set aside the circuit court's correction of the City's unlawful action, the district court was legally bound to apply second-level certiorari in accordance with the restrictions imposed by this Court in *Haines City*, and now re-affirmed in *FP&L*. In the paragraphs that follow, Las Olas offers the Court a more complete discussion of the several reasons why the City's position in this case is inconsistent with existing law.

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

The City evinces a recognition of the standard established in *Haines City* when it says it "is not unmindful that second level certiorari review should not be used as a second appeal to correct merely erroneous conclusions." (Answer Brief at 20). Nonetheless, in asking the Court to uphold the Fourth District, the City urges the Court to *depart* from the clear strictures of *Haines City* in favor of a so-called "flexible standard" that would allow a district court "to exercise *a range of discretion* in determining which errors are of sufficient magnitude to warrant this additional level of review." *Id.* at 24 (emphases supplied). The City then asks the Court to parse *Haines City* even farther by limiting this "range of

discretion" to only those cases which originate in an administrative tribunal, as opposed to a county court. *Id.* at 25-26.

The obvious incompatibility of the City's position and *Haines City* speaks volumes about the underpinnings of the Fourth District's decision, for apparently the City realizes that it cannot sustain that decision unless the Court *recedes* from *Haines City* to endorse a more expansive review standard for second-level certiorari than is presently in place. But that option is foreclosed. The Court has just held in *FP&L* that the *Haines City* standard will *not* be watered down.

In holding that the Fourth District had applied an overly-expansive scope of review on second-level certiorari in *FP&L*, the Court not only reaffirmed the strict constraints imposed by *Haines City* on the district courts for second-level certiorari proceedings, but it did so in the strongest possible terms:

> As a practical matter, the circuit court's final ruling in most first-tier cases is conclusive, *for second-tier review is extraordinarily limited*.

FP&L, supra at S462 (footnotes omitted; emphasis supplied).

The *FP&L* case involved review of a circuit court decision which had quashed an administrative decision denying a variance request, followed by the Fourth District's subsequent quashal of the circuit court's decision on second-level certiorari. In evaluating that second-level quashal, the Court reaffirmed both

Haines City and *Vaillant*,[2] and applied those decisions to hold that the circuit court judge had erroneously "substituted his judgment for that of the Commission as to the relative weight of the conflicting testimony." *Id.* at S462.

No such first-level certiorari error exists in this case, and none is asserted by the City or articulated by the Fourth District. *See, Las Olas Tower Co. v. City of Fort Lauderdale,* 742 So. 2d 308, 314-15 (Fla. 4th DCA 1999). Here, the misapplication of *Haines City* and *Vaillant* by the district court flows from an express and direct declaration that second-level certiorari review is being exercised inconsistently with those decisions. In seeming recognition of its inability to justify what the Fourth District has said it was doing, the City has asked the Court to formulate a new and more flexible standard for review — one that does not presently exist in the jurisprudence of second-level certiorari review. The City cannot prevail here by ignoring those governing precedents in order to secure a standard of review more to its liking, however. It could not do so before *FP&L*, and it assuredly cannot do so after the Court's most recent adherence to pre-existing standards.

The Court has never given district courts a free hand to redefine the scope of second-level certiorari jurisdiction on a case-by-case basis. The Court's recognition of some modicum of flexibility and discretion for the district courts in the *Haines City*

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[2] *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982).

decision[3] was tempered by the admonition that discretion "should not be an unprincipled or arbitrary discretion but should depend on the court's assessment of the gravity of the error." 658 So. 2d at 530.[4]

As for the City's suggestion that a separate standard of review should be created within an undefined "range of discretion" for cases arising from administrative tribunals, that argument was specifically addressed and affirmatively foreclosed in *Haines City*. There, the Court harmonized two prior decisions — *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals,* 541 So. 2d 106 (Fla. 1989) (*EDC*), and *Combs v. State,* 436 So. 2d 93 (Fla. 1983) — to hold that "when the *Combs* and *EDC* standards are reduced to their core, *they appear to be the same*." 658 So. 2d at 530

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[3] *Haines City*, 658 So. 2d at 530 & n.14.

[4] To make the point unmistakably clear, the Court quoted from the district court's *Haines City* opinion:

> In this case, even if we were to conclude that the circuit court's order departed from the essential requirements of the law, we cannot say that such a departure was serious enough to result in a miscarriage of justice .... Thus, we are unable to conclude that this is one of "those few extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected." *Combs,* 436 So. 2d at 95.

Haines City, 658 So. 2d at 531 (citation omitted). The Court observed that "[t]his analysis captures the essence of our holdings in *Combs* and *EDC*." *Id.*

(emphasis supplied).[5] In *FP&L*, the Court again refused to create different standards of review based on the tribunal being evaluated, quoting its *Haines City* holding that, "[i]n short, we have the same standard of review as a case which begins in the county court." *FP&L, supra* at S462 (quoting *Haines City*, 658 So. 2d at 530).

Combs, of course, was the decision in which the Court firmly declared that there must be a "a violation of a clearly established principle of law resulting in a miscarriage of justice" before intervention on second-level certiorari is permissible. *Combs* 436 So. 2d at 95-96. *FP&L* continues the same, uniform standard for second-level certiorari in administrative tribunal cases.

Contrary to an impression the City seeks to create, Las Olas has no quarrel with the proposition that a "fundamental departure[] from controlling law" constitutes the sort of "miscarriage of justice" that warrants second-level certiorari review, as two other district courts have stated.[6] (See Answer Brief at 28). The City cites to *Taylor* and several pre-*Haines City* district court decisions as a basis to argue that this Court's denial of constitutionally

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[5] Stridently, the City disdains the sameness stated in *Haines City* and "prefers to follow the ... line of cases where the court articulated the 'applied the correct law' standard of review." (Answer Brief at 25). Following this Court's precedent is not optional for the City, however, any more than it was for the district court.

[6] *See, City of Jacksonville v. Taylor,* 721 So. 2d 1212, 1214 (Fla. 1st DCA 1998), *review denied,* 732 So. 2d 328 (Fla. 1999); *Bird-Kendall Homeowners Association v. Metropolitan Dade County Board of County Commissioners,* 695 So. 2d 908 (Fla. 3d DCA 1997), *review denied,* 701 So. 2d 867 (Fla. 1997).

discretionary review in those cases signifies that a circuit court's failure to apply the correct law is coextensive with a miscarriage of justice. (Answer Brief at 26-29). That is obviously not the case,[7] and any less stringent standard of review from pre-*Haines City* can no longer be read to endorse a standard different from that announced in *Haines City* and *FP&L.* Thus, the City's argument certainly provides no doctrinal support for a departure from the *Haines City* standard, even if *FP&L* had not reaffirmed that standard.

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

The City severely criticizes the circuit court for quashing the City's denial of site plan approval to Las Olas. It goes so far as to assert that the court breached one of the "most elemental doctrines of jurisprudence and governance" by holding that the City had departed from the essential requirements of law by failing to modify setback requirements in time for Las Olas to act upon them prior to submitting its application to the P&Z Board. (Answer Brief at 30). Inexplicably, however, the City has made no mention whatever of the precedential line of authority on which the circuit court's decision was in fact based -- the line of decisions

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[7] In point of fact, the decision in *Taylor* is a paradigm of second-level certiorari review under *Haines City*, holding properly that a circuit court's legal error which "constitutes a miscarriage of justice" *should be* redressed on second-level certiorari. *Taylor,* 721 So. 2d at 1215. The Fourth District's decision under review here, on the other hand, ranges far beyond that narrow scope and cannot be squared with either *Haines City* or with *FP&L*.

epitomized by *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). (See Initial Brief at 16-19). The City frames its precedent-less argument by contending that the circuit court rewrote the City's ordinances after presuming them to be unconstitutional, and thereby invaded the province of "architects and engineers in the quiet confines of their offices." (Answer Brief at 30-40).

These oratorical flourishes are just that, and no more. They do not come to grips with the circuit court's *stated* rationale for holding that the City had departed from the essential requirements of law, as the Fourth District was at least straightforward in doing.

The City's ordinances contemplate that the City's planning director may modify the 12-foot minimum setback requirement within the City's CBD with respect to development plans for *non*-riverfront projects prior to their submission to the P&Z Board. Landowners whose property lies along the New River, however, are treated differently because their applications are required to go directly to the P&Z Board. Consequently, the Board sits in the initial, quasi-executive role otherwise occupied by the planning director, and has the same obligation to set appropriate setbacks beyond the minimum prior to plan submittals. (Initial Brief at 17-18). The circuit court ruled, consistent with well-established precedent, that as a matter of fairness *all* property owners within the undifferentiated CBD must be given prior notification of a

setback requirement greater than the ordinance-created minimum – not just those whose properties do not have footage on the river.

This is hardly an undoing of one of the most "elemental doctrines of jurisprudence and governance." It has long been the essence of elemental jurisprudence that a zoning ordinance cannot grant "arbitrary and unfettered authority . . . without at the same time setting up reasonable standards which would be applicable alike to *all* property owners similarly conditioned." *North Bay Village v. Blackwell,* 88 So. 2d 524, 526 (Fla. 1956). This elemental doctrine of jurisprudence was applied by the Fourth District, sitting *en banc*, in *Park of Commerce.* The panel of that court which rendered the decision in this case was no less than the circuit court obliged to follow that precedent.

Nor does the action by the circuit court reflect a presumption that the City's ordinances are unconstitutional as the City contends. (Answer Brief at 35-37). Nowhere in the circuit court's order is there any indication that the court applied what the City calls a "presumption of invalidity" (Answer Brief at 16), and nowhere does the Fourth District suggest that the circuit court acted from any such premise. Las Olas, not the courts, offered the characterization that the circuit court's action had saved the City from its own folly in arguing for a patently unconstitutional construction of the setback ordinance. (Initial Brief at 18-19). That characterization seems all the more apt now that the City has nowhere chosen to suggest that its interpretation of the ordinance could ever pass constitutional muster.

This last "straw man" argument by the City, in any event, cannot be reconciled with the long-standing doctrine that courts are obliged to avoid reaching constitutional issues which need not be decided — which is exactly what the circuit court did here in light of pending counts directed to constitutionality which were left open for later consideration. (Initial Brief at 19).

Simply put, the circuit court did no more than its constitutional duty – to rationally interpret municipal enactments. *See, e.g., Rinker Materials Corporation v. City of North Miami,* 286 So. 2d 552, 553 (Fla. 1973). Its exercise of first-level certiorari is precisely what *Haines City,* and now *FP&L*, contemplate.

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

The issue in this case is whether the district court performed its duty responsibly in accordance with *Haines City.* Once it is recognized that the City has misconstrued and unfairly maligned the circuit court's decision, the City's merits defense for the Fourth District's ruling all but self-destructs.

The great bulk of the City's argument is directed to the circuit court's purported arrogation to itself of powers that are legislative in nature. The Fourth District, however, never said that the circuit court did what the City charges. The Fourth District merely *disagreed* with the circuit court's construction of the ordinance, and held that property owners along the New River simply do not get pre-hearing notice of setback requirements that extend beyond the minimum. *Las Olas Tower Co.,supra* at 314-15. *The City offers no defense*

of this ruling. Indeed, it would appear that the City, wed to a newly-contrived standard of unfettered second-level certiorari, does not defend the Fourth District's decision as proper under *Haines City* or as a valid exercise of district court's "extraordinarily limited" certiorari powers, as *FP&L* requires. Certainly the City does not suggest to the Court that a district court may grant second-level certiorari based on nothing more than a *disagreement* with a circuit court's interpretation of a municipal enactment, where there is demonstrably an absence of any *Haines City* "miscarriage of justice."

This Court is standing, at best, in the shoes of the Fourth District in performing the review function it has undertaken under its constitutional review authority. When the City asks the Court to descend to the level of a court exercising first-level certiorari review and, from that perspective, to decide this case in the City's favor because Las Olas's proposed Tower II development is "incompatible" with the surrounding neighborhood,[8] the City shows only its inability to mount a doctrinally-sound defense.[9]

The circuit court never reached the issue of compatibility because, as the court determined, Las Olas was never given a fair

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[8] Answer Brief at 36-39.

[9] This section of the City's brief presumably pertains to the otherwise-inexplicable inclusion in the City's factual recitations concerning the height of buildings surrounding but standing outside the CBD, and the more colorful recitations concerning ambience in the family neighborhoods just across the CBD boundary. (Answer Brief at 7).

opportunity to present a project for which compatibility considerations would be decided on the basis of applicable ordinances and *articulated* standards. Likewise, the appellate court never addressed the question of whether the Las Olas project would be compatible with the surrounding neighborhood. Undeterred, the City demands that *this Court* address, in the first instance, the question of whether Tower II is compatible with the surrounding neighborhood. (Answer Brief at 36-39). That request has been pretermitted by the decision in *FP&L*, however, where the Court has announced its unwillingness to undertake precisely the sort of first-level certiorari task that the City demands of the Court in this case.

> We decline to conduct our own review of the present record to determine whether the Commission's decision is supported by competent substantial evidence, for to do so would perpetuate the district court's error and usurp the first-tier certiorari jurisdiction of the circuit court.

FP&L, supra at S463.[10]

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[10] This refusal to perform first-level certiorari review dispatches as well the Fourth District's "fallback" holding that Las Olas's claim for relief "is moot" because a member of the City's planning staff purportedly had met with Las Olas prior to the P&Z Board's hearing. 742 So. 2d at 315. The City goes on at some length to defend this aspect of the Fourth District's decision, by relying on the testimony of its planning director to his conversations with Las Olas principals for the proposition that Las Olas "had been thoroughly apprised with a reasonable degree of specificity of the appropriate *range* of development for

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It bears mentioning, though, that the City's "compatibility" argument shows, perhaps more dramatically than any of the other arguments it has advanced, how right the circuit court was to impose due process minima on the approval process for development within Fort Lauderdale's CBD. As the record shows, Fort Lauderdale's City Commission elected to *expand* the CBD from its original boundaries to include an area on the east side of Federal Highway along the New River (in which area the Las Olas property is located), because the City believed that doing so would "encourage the construction of high-density residential structures in the area immediately surrounding the redeveloping downtown." (LOT App. 1:29). By including this area within the CBD, *all* height restrictions on development within the area added to the CBD were abolished, and Section 47-33(1) of the City Code was written to exempt *all* building sites within the CBD from any applicable height restrictions. The City Commission was fully aware that the portion of the expansion area that includes the Las Olas site would be attractive to developers, and it adopted the new

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this project." (Answer Brief at 31-33) (original emphasis). In other words, the City is asking this Court to find the existence of competent substantial evidence on this point as a basis to uphold the Fourth District's alternate ground for quashing the circuit court's ruling. The Court's decisions in both *Haines City* and in *FP&L* utterly foreclose the City's attempt to impose *first-level* certiorari responsibilities on this Court. (See Initial Brief at 22-24).

boundaries for the CBD only after allowing itself time to consider the impact of the expansion on adjacent neighborhoods. (LOT App. 1:29).[11]

The City now asserts that Las Olas's project can be deemed incompatible with development in the surrounding neighborhood, *outside the CBD boundary*, which existed *prior to* the expansion of the CBD to the Las Olas site. (Answer Brief at 7-10, 38-39 & n.6).[12] This, of course, is asking the Court to give the City unreviewable and unfettered discretion to impose *ad hoc* criteria in the midst of a zoning proceeding. The City's argument on compatibility,

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[11] Indeed, the City acceded to objections to high-rise development in a low-rise area of the expanded CBD immediately to the north of the easterly-expanded border, based on the imprecations of a local homeowners association. *Id.*

[12] In any event, as noted in the Statement of the Facts, the City's first-level certiorari argument that Tower II "is more compatible with the surrounding land uses within the Central Urban Core [w]est of the six lane Federal Highway, but is incompatible with its surrounding land uses [e]ast of Federal Highway, within the Las Olas/New River corridor" (Answer Brief at 10), is based on distinctions that simply *do not exist* in the CBD ordinances. The City is here peddling *unadopted*, aspirational provisions of the City's *Future* Land Use Element, under which City planners were suggesting that the City *ought to* adopt differing development schemes in various sections of the CBD. (LOT App. 1:34:5, 70-72, 82, 85, 90-91). The City *did not adopt* these recommendations, however, and *none* of the aspirational goals upon which the City relies were in effect when Las Olas's application was pending before the City.

obviously, illustrates why the circuit court was eminently correct in interpreting the City's ordinances to impose *some* degree of due process control over the zoning decisions of the City's current Commission.

CONCLUSION

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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