IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-815

MIAMI-DADE COUNTY,

PETITIONER,

VS.

OMNIPOINT HOLDINGS, INC.,

RESPONDENT.

AMICUS BRIEF OF THE CITY OF MIAMI

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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INTEREST OF AMICUS

The City of Miami is the most populous municipality in the State. The opinion of the district court declared unconstitutional portions of Miami-Dade County's land use code. The issue is of great importance to the City of Miami. As a result of the district court opinion, a lawsuit has been filed seeking to have the City of Miami's zoning code declared unconstitutional.

STATEMENT OF THE CASE AND FACTS

We rely upon the opinion of the district court, and the briefs of the parties.

SUMMARY OF THE ARGUMENT

The opinion of the district court is wrong on various jurisdictional and procedural grounds—the district court had no jurisdiction to consider the facial constitutionality of the zoning ordinance in a case that came to the courts on certiorari review from a zoning appeals board, the court should not have decided an issue not raised by the parties, the court should not have decided a constitutional issue where the case could have been decided on non-constitutional grounds, and the court exceeded the proper scope of level-two certiorari review. But this Court, rather than

simply reversing on these grounds, should address the merits of the constitutional issue, because there is a need for resolution of the issue.

On the merits, the district court improperly held the Miami-Dade zoning ordinances to be unconstitutional. The Dade County Commission has the authority to state general principles of law, which can then be applied by a zoning board. The guidance provided here by the county commission is not so vague as to be unconstitutional, when considering the presumption in favor of the constitutionality of the ordinance, the guidance provided by the specific provisions as well as the larger zoning code, and the need for flexibility and the difficulty of drafting special use and similar provisions.

ARGUMENT

This case is ultimately about the proper role of the judiciary under our system of law. The district court's opinion repeatedly overstepped the boundaries, and in the process violated both procedural and substantive law on the limited role of the judiciary in our system. The district court overreached its authority, and the decision should be quashed.

I. IN DECLARING THE ZONING ORDINANCE TO BE UNCONSTITUTIONAL, THE DISTRICT COURT VIOLATED FUNDAMENTAL APPELLATE RULES AND PRINCIPLES

In finding Miami-Dade County's zoning ordinance to be unconstitutional, the opinion of the district court in four different ways violated procedural rules which limit the role of courts.

First, the district court did not have jurisdiction to address the issue which it decided. In a proceeding arising from a quasi-judicial decision by a county, the court lacks jurisdiction to decide on the facial constitutionality of the zoning ordinance. The district court, in deciding that the Miami-Dade ordinance was unconstitutional, was acting outside of its jurisdiction. *See Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415, 416 (Fla. 2d DCA 1991). *Second*, the courts are limited to the controversies and issues presented to them. Appellate courts are ordinarily constrained by what opposing counsel have argued, and what was decided in the lower tribunal. These limitations on the role of judges were ignored by the Third District. *Third*, courts are to decide constitutional issues only when necessary. *State v. Efthimiadis*, 690 So. 2d 1320 (Fla. 4th DCA 1997). Here, the district court could have affirmed on the nonconstitutional grounds decided by the circuit court, but instead proceeded to address the constitutional issues. *Fourth*, the district court

exceeded the limit scope of review on second-tier certiorari review. *Haines City v. Heggs*, 658 So. 2d 523 (Fla. 1995). The district court *approved* the decision of the circuit court, thereby demonstrating that there was no violation of a clearly established principle of law resulting in a miscarriage of justice. Yet the district court proceeded to address and decide another issue.

But what now? Based on the rules stated above, there are four separate bases on which the district court's decision can be reversed. But the damage has been done. Since the district court's opinion, zoning decisions in Miami-Dade have been frozen, and therefore greatly inhibited economic development. *See Ruling Leaves Many Dade Building Projects in Limbo*, Miami Herald, Apr. 20, 2002 (2002 WL 19669834). And the chilling effect has extended to the City of Miami. A lawsuit has recently been filed against the City of Miami, seeking to have the City's zoning ordinance declared unconstitutional.

Because of this harm, we hope that the Court will address the merits of the constitutionality of Miami-Dade County's zoning ordinance. If the Court were to simply point out that, for example, the district court lacked jurisdiction over the constitutional argument, then the adverse effects of the opinion will continue, with the knowledge that the district court—with obviously strong opinions on the question—will later, in a proper vehicle, strike down the same ordinances. The case

will then *again* come before this Court for a determination of the Constitutional question. We hope that the Court will short-circuit this process by expressing its views of the Constitutionality of the zoning ordinance. With that opinion, local governments and its citizens will then be able to move forward—something not possible until the Court addresses the merits of the constitutional question.

II. ON THE MERITS, THE DISTRICT COURT ERRED IN DECLARING THE ZONING ORDINANCE TO BE UNCONSTITUTIONAL

The district court was wrong on the merits of the constitutional issue.

A. Legislative delegation, and the importance of standards

It is the job of the legislative body to establish the law. *See* Fla. Const. Art. II, § 3; Art. III, § 1. The application of the principles of law to a specific situation may be delegated to another body (a commission or board). This delegation of administrative tasks is necessary in a complex society, since the legislative body is not capable of making subtle decisions on how the law should be applied to every factual situation. Delegation is necessary. *See generally* John E. Fennelly, *Non-Delegation Doctrine and the Florida Supreme Court: What You See is Not What You Get*, 7 ST. THOMAS L. REV. 247 (1995).

But there is a danger in delegation. If a matter is delegated without sufficient

guidance from the legislative body, then the commission or board will be creating law, rather than applying standards set by the legislative body.

This dilemma of delegation exists at the state level—the Florida Legislature establishes general principles of law, and then delegates the application of the law to state agencies. The dilemma also exists at the local level—county and city commission set general rules, and leave the application to local boards. "The same restrictions which apply to the Legislature's delegation of legislative authority also apply to the enactment of municipal ordinances under the general police power by municipalities in that city ordinances must not constitute an improper delegation of legislative, executive or administrative power." *City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 805 (Fla. 1972). *See also State v. Roberts*, 419 So. 2d 1164, 1166 (Fla. 2d DCA 1982).

The question of whether the agency or board is merely applying legislative priorities, or is instead creating law, is frequently determined through the void-for-vagueness doctrine. If the legislative guidelines are considered to be adequate, then the delegation of authority is proper. If the legislative guidelines provide no real guidance, then they are void-for-vagueness, and the agency or board is viewed as having improperly created law.

A person who is dissatisfied with the decision of a board can ask a court to

declare that the legislative guidelines were facially inadequate, but the courts will generally defer to the legislative body's determination of the guidelines. "Cases . . . in which local ordinances are struck for vagueness are the exception rather than the rule, and courts are extremely hesitant to accede to such facial attacks." Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STET. L. REV. 627, 670 (1996).

This judicial deference to legislative delegation to a board is particularly clear at the local level, in the context of zoning. "[T]here is a growing tendency to sustain delegations of zoning authority guided only by general policy standards." Annot., *Attack on Validity of Zoning Statute, Ordinance, or Regulation on Ground of Improper Delegation of Authority to Board or Officer*, 58 A.L.R.2d 1083, § 2 (1958). This is because experience has "shown that any attempt to limit the administrative decisions to matters of detail as to which precise standards can be laid down results only in creating an inflexible and unworkable zoning plan with resultant pressures on the legislative body for frequent amendments leading to the evils of spot zoning." *Id.*

B. Principles governing the evaluation of claims that standards for delegation are unconstitutionally vague

Courts have established a number of factors to be considered in evaluating a claim that a legislative delegation is improper because of a lack of adequate standards.

These factors counsel against a court holding the statute or ordinance to be unconstitutional.

Burden of proof. The burden on a person who attacks a zoning ordinance as unconstitutional is "extraordinary." *City of Miami Beach v. Silver*, 67 So. 2d 646, 647 (Fla. 1953). Any doubts as to the validity of an ordinance must be resolved in favor of constitutionality. *Dep't of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976); *State v. Hodges*, 506 So. 2d 437, 439 (Fla. 1st DCA 1987).

Law to be intrepted in favor of constitutionality. If a constitutional interpretation is available to the court, then the court must adopt that construction. *Miami Dolphins v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981); *Dep't of Legal Affairs v. Rogers*, 329 So. 2d 257; *State v. Hodges*, 506 So. 2d at 439.

Standard to be viewed in context. In reviewing the delegation by the legislative body, the courts use a broad perspective. The focus is not only on the narrow provision establishing standards, but on the general scheme of regulation. Even if the narrowly-viewed standards may not be extensive, the law will be upheld if the standard can be read *in pari materia* with other sections of the enabling legislation. *Miami Dolphins v. Metropolitan Dade County*, 394 So. 2d at 988.

Recognition of the need for flexibility, and the difficulty of providing detailed guidelines for every circumstance. This Court has repeatedly noted that the courts must respect the need for flexibility in standards to be applied by a board or agency. While delegations cannot be made without any standards, "it should be remembered that our Constitution does not deny to the Legislature necessary resources of flexibility and practicality, and when a general approach is required, judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility." *State of Florida Department of Citrus v. Griffin*, 239 So. 2d 577, 581 (Fla. 1970) (citation omitted). It would be unrealistic to expect legislative bodies to be able to draft standards that would cover all situations. "[T]he very conditions which may operate to make direct legislative control impractical may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable." *Id. Accord Microtel, Inc. v. Florida Public Service Commission*, 464 So. 2d 1189, 1191 (Fla. 1985).

Degree of flexibility varies with the subject matter. In some areas, a greater level of generality in legislative guidelines must be tolerated. "[T]he specificity of standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *Askew v. Cross Key Waterways,*

372 So. 2d 913, 918 (Fla. 1978). Where the police powers are involved, it may be particularly difficult to draft precise standards which will cover all circumstances. In entrusting such a matter to a board or agency, "the complex and ever-changing conditions that attend and affect such matters make it impracticable for the Legislature to prescribe all necessary rules and regulations." *Florida State Board of Architecture v. Wasserman*, 377 So. 2d 653, 655 (Fla. 1979) (*quoting Bailey v. Van Pelt*, 82 So. 789, 793 (Fla. 1919)).

Greatest degree of flexibility required for zoning. Nowhere is the task of definition more difficult, and the need for flexibility more important, than in the area of zoning, and especially special exceptions, unusual uses, and other conditional uses. These are "fail safes" built into zoning codes for those instances when the general zoning principles do not lead to a proper result. Because of the difficulty of drafting precise standards for these areas, courts commonly approve of general standards. Two leading works on zoning use the precise same words: "[G]eneralized standards are acceptable in most jurisdictions." JOHN DELANEY, STANLEY ABRAMS, & FRANK SCHNIDERMAN, LAND USE PRACTICE AND FORMS § 30:5 (1997); RATHKOPF'S THE LAW OF ZONING AND PLANNING § 61:24 (4th ed.). As one work notes, "The purpose of the special exception-conditional use technique is to confer a degree of flexibility in the land use regulations. This would be lost if overly detailed

standards covering each specific situation in which the use is to be granted or, conversely, each situation in which it is to be denied, were required to be placed in the ordinance." RATHKOPF'S THE LAW OF ZONING AND PLANNING § 61:24 (4th ed.).

C. Knowing it when you see: judicial evaluations of standards for delegation of matters by legislative bodies

To understand where the courts have drawn the line in determining whether the legislative body has provided adequate guidelines for the board or agency, it is necessary to review the facts of important cases.

Zoning guidelines held adequate. As far back as the 1930s, this Court upheld the constitutionality of general guidelines. In *Tau Alpha Holding Corp. v. Board of Adjustments*, 171 So. 819 (Fla. 1937), the ordinance authorized the board of adjustments to make "special exceptions" under the code, "to treat individual cases." *Id.* at 862. The ordinance merely required that a variance "not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." *Id.* This Court found that this was not an unconstitutional delegation of legislative authority. Similarly, in *State ex rel. Landis v. Valz*, 157 So. 651, 653 (Fla. 1934), the ordinance provided that where there were

"practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this Ordinance," the provisions could be varied upon a showing that it would be "in harmony with the general purpose and intent of the Ordinance so that the public health, safety and general welfare may be secured and substantial justice done." This Court held that the ordinance was constitutional: "The section merely vests the commission with power in certain circumstances and under certain conditions to apply the policy defined by the ordinance to changing factual conditions." *Id.* at 654.

More recently, in *Clarke v. Morgan*, 327 So. 2d 769 (Fla. 1976), this Court considered an ordinance which authorized a variance or use variance, as long as the variance "will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions of such ordinances will result in unnecessary hardship, and so that substantial justice may be done." This Court upheld the ordinance, finding that "the standards and guidelines expressed in the enabling act provide an adequate framework for review by the courts to determine whether the administrative agency has exceeded the authority granted it and is acting in a legislative capacity prohibited by the Constitution as opposed to an administrative capacity which is permissible." *Id.* at 773-74.

The district courts, by and large, have been deferential to ordinances which provided a modicum of guidance. In *Alachua County v. Eagle's Nest Farms*, 473 So.

2d 257 (Fla. 1st DCA 1985), an ordinance provided that a special use exception could be granted as long as the use would be "without substantial detriment to the public good and will not substantially impair the intent and purpose of the Alachua County Comprehensive Plan or these Regulations." *Id.* at 259. The court upheld the ordinance, finding it significant that the provision referred to the county's comprehensive plan and the zoning regulations. *Id*. at 260.

In *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 780 (Fla. 2d DCA 1992), the ordinance provided that a conditional use would be granted where "[t]he use shall be compatible with the surrounding area and not impose an excessive burden or have a substantial negative impact on surrounding or adjacent uses or on community facilities or services." The court upheld the ordinance, finding that it was "sufficiently specific to be constitutional on its face." *Id.* at 781.

In yet another case, an ordinance provided for special exceptions for group homes, as long as "[t]he maximum number of occupants to reside in the facility shall be compatible with the surrounding residential uses." *Life Concepts v. Harden*, 562 So. 2d 726, 727 (Fla. 5th DCA 1990). The court held that while the ordinance "did not contain specific quantitative guidelines for the determination of the number of occupants of a group home, that level of specificity is neither required nor workable." *Id.* at 728. The court added that the board was properly afforded some discretion, but

"the discretion is not without constraint and the parameters of the ordinance provide a court with a reasonable basis for judicial review of the board's decision." *Id.*

Zoning guidelines held inadequate, and declared unconstitutional. This Court has on a number of occasions held that zoning ordinances unconstitutionally delegated enforcement without adequate guidance.

In a series of cases in the 1950s, the Court was confronted with ordinances which contained practically no guidance. In one case, the ordinance merely provided that a multi-level parking lot would not be permitted until "after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use." *Drexel v. City of Miami Beach*, 64 So. 2d 317, 318 (Fla. 1953). In another case, the ordinance provided that gas stations were permitted "subject to approval of location and site action of Council." *North Bay Village v. Blackwell*, 88 So. 2d 524, 525 (Fla. 1956). In a third case, involving a building permit, the ordinance provided that uses in an area were permitted, "provided that no operation shall be carried on which is injurious to the operating personnel of the business or to other properties, or to the occupants thereof by reason of the objectionable emission of cinders" or other specified elements. *Phillips Petroleum Co. v. Anderson*, 74 So. 2d 544, 545 (Fla. 1954).

There is limited district court authority which has been relied upon as supporting

a greater level of specificity in special exception provisions in zoning ordinances. In *City of St. Petersburg v. Schweitzer*, 297 So. 2d 74 (Fla. 2d DCA 1974), the enabling legislation said merely that the planning commission "may permit" special exceptions. This was held to be unconstitutional. The zoning decision was defended on the basis that the planning commission itself had enacted a more detailed policy, but the court held that those guidelines were irrelevant, since the legislative body had never approved them. In *City of Homestead v. Schild*, 227 So. 2d 540 (Fla. 3d DCA 1969), the ordinance providing for special use permits stated a general standard—special use permits could be granted "where necessary and essential to preserve the health, safety and welfare of the citizens." However, the ordinance went further and provided that special use permits were excepted from the requirements of public hearings and publications of notice.

D. The Miami-Dade unusual use provision is not facially unconstitutional

With this understanding of the general approach of the courts toward legislative delegation of application of the law to zoning boards, we now proceed to demonstrate what we believe to be absolutely clear—that the Miami-Dade zoning ordinance is not facially unconstitutional.

We begin, as the district court did, with the county's unusual use ordinance.

The district court held that the unusual use ordinance was unconstitutional because "[i]t does not provide definite, objective criteria to guide the County's zoning boards in making their decisions." *Miami-Dade County v. Omnipoint Holdings*, 811 So. 2d 767, 769 (Fla. 3d DCA 2002).

The county ordinance provides that a zoning board can grant an unusual use if the board concludes that the use (1) would not have an unfavorable effect on the economy of Miami-Dade County, (2) would not generate or result in excessive noise or traffic, (3) would not cause undue or excessive burden on public facilities, (4) would not tend to create a fire or other equally or greater dangerous hazards, (5) would not provoke excessive overcrowding or concentration of people or population, when considering the necessity for and reasonableness of such applied for exception or use in relation to the present and future development of the area concerned and the compatibility of the applied for exception or use with such area and its development. § 33-311(A)(3).

We submit that these guidelines, when considered in light of the case law discussed in the previous section, compel the conclusion that the Miami-Dade unusual use provision provides adequate guidelines for the zoning boards.

But there are still other portions of the zoning ordinances which provide guidance to the zoning boards. First, the board receives and must consider the formal

recommendation of staff. §§ 33-310(b), 33-311(A). This recommendation must describe all projected effects of the proposed zoning action, and list all known factors both in favor and against each application. § 33-310(b). Second, the Miami-Dade zoning code provides guidance through the county commission's instruction to zoning boards on the purposes of zoning, which specifies various factors to be secured or avoided. § 33-311(A).[1] Third, the zoning code provides a list of five other factors to be evaluated in considering applications, among other factors related to the general welfare. § 3-311(F).[2]

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[1]The section provides:

> The Community Zoning Appeals Boards are advised that the purpose of zoning and regulations is to provide a comprehensive plan and design to lessen the congestion in the highways; to secure safety from fire, panic and other dangers, to promote health, safety, morals, convenience and the general welfare; to provide adequate light and air; to prevent the overcrowding of land and water; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements, with the view of giving reasonable consideration among other things to the character of the district or area and its peculiar suitability for particular uses and with a view to conserving the value of buildings and property and encouraging the most appropriate use of land and water throughout the County.

§ 33-311(A).

[2]The specified factors are whether and to what extent the development would (1) conform to the master plan, be consistent with area studies or plans, and serve a public benefit, (2) have a favorable or unfavorable impact on the environment and natural resources of the county, including consideration of the means and estimated

These various factors provide abundant guidance to zoning boards. With all of these instructions from the county commission, zoning boards in Miami-Dade will simply apply general principles of law, rather than impermissibly create law.

Q Q Q Q

As we have explained, the Miami-Dade unusual use provision contains much guidance for zoning boards. For this reason, the opinion of the Third District should be reversed. But there is an even greater flaw in the Third District's opinion.

One of the reasons why the courts require a degree of specificity when a legislative body delegates application of the law is to ensure that there can be meaningful judicial review. This Court has noted that "In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature." *Askew v. Cross Key Waterways,* 372 So. 2d 913, 918-19

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cost necessary to minimize the adverse impacts; the extent to which alternatives to alleviate adverse impacts may have a substantial impact on the natural and human environment; and whether any irreversible or irretrievable commitment of natural resources will occur as a result of the proposed development, (3) have a favorable or unfavorable impact on the economy of the county, (4) efficiently use or unduly burden water, sewer, solid waste disposal, recreation, education or other necessary public facilities, and (5) efficiently use or unduly burden or affect public transportation facilities, including mass transit, roads, streets and highways, including whether the development will be accessible by public or private roads.

(Fla. 1978). If it is impossible to determine the intent of the legislative body, then neither the board nor the courts can carry out their functions. *Id*. *Accord Miami-Dade County v. Omnipoint Holdings*, 811 So. 2d 767, 769 n.5 (Fla. 3d DCA 2002).

The problem in this case is that the district court never attempted to engage in meaningful judicial review, but instead preferred to find the ordinances facially unconstitutional. On direct review of the zoning board's decision, the appellate division of the circuit court found that the zoning board's denial of Omnipoint's application was unsupported by substantial competent evidence. *Omnipoint Holdings v. Miami-Dade County*, 8 Fla. L. Weekly Supp. 597 (11th Jud. Cir. App. Div. July 24, 2001). The district court, in its second-tier review, could have upheld this ruling by accepting the circuit court's determination that the zoning board's action was unsupported by competent substantial evidence. At the very least, the district court could should have *attempted* to determine whether there was competent substantial evidence. But the court instead ignored the competent substantial evidence question—"We do not reach the various questions as to substantial competent evidence." 811 So.2d at 768 n.1. This consideration of the constitutional issue, without considering whether the guidelines can be applied, undermines the district court's assertion that the guidelines were incapable of application. For this reason, in addition to all of the others, the district court should be reversed.

E. The Miami-Dade modification provision is not facially unconstitutional

The district court also held unconstitutional Miami-Dade's modification provision. The court's analysis of this issue consisted of one sentence: "As can readily be observed this section also lacks constitutionally required objective criteria and is also therefore invalid." *Miami-Dade County v. Omnipoint Holdings*, 811 So. 2d at 770.

The County's standard for modifications provides that the zoning boards can modify or eliminate a condition or part of a condition from a prior zoning resolution, if the board makes certain findings, after public hearing. § 33-311(A)(7). The board must find that the modification "would not generate excessive noise or traffic, tend to create a fire or other equally or greater dangerous hazard, or provoke excessive overcrowding of people, or would not tend to provoke a nuisance, or would not be incompatible with the area concerned, when considering the necessity and reasonableness of the modification or elimination in relation to the present and future development of the area concerned." § 33-311(A)(7).

For many of the same reasons stated above, the district court erred in finding this section of the ordinance to be facially unconstitutional. The provision provides

adequate guidelines for zoning board, and the other portions of the code described above provide further guidance.

F. The Miami-Dade nonuse variance provision is not facially unconstitutional

The district court also concluded that Miami-Dade County's nonuse variance ordinance was facially unconstitutional. 811 So. 2d at 770 n.8. The conclusion was improper.

The ordinance provides that after a public hearing, a zoning board "may grant a non-use variance upon a showing by the applicant that the non-use variance maintains the basic intent and purpose of the zoning, subdivision and other land use regulations." The ordinance states that the basic intent and purpose "is to protect the general welfare of the public, particularly as it affects the stability and appearance of the community and provided that the non-use variance will be otherwise compatible with the surrounding land uses and would not be detrimental to the community." The ordinance explicitly states that "No showing of unnecessary hardship to the land is required." § 33-311(A)(4)(b).

The district court, by reference to an earlier opinion, found the provision to be unconstitutional for three reasons. First, the district court found that the statement of standards was not sufficiently detailed—"nothing more than an abbreviated

restatement of the basic intent and general purpose of zoning." *Miami-Dade County v. Brennan*, 802 So. 2d 1154, 1156 (Fla. 3d DCA 2001). Second, the district court found it problematic that the standard did not include "unnecessary hardship" as a standard. *Id*. at 1155. "In Miami-Dade County's unincorporated area a person seeking a non-use variance based on a *legitimate* unnecessary hardship is left with no administrative remedy, there being no code authorization for hardship non-use variances." *Id.* at 1157. Third, the ordinance included the word "may" in stating that the board could grant a variance. "The non-use variance code provision's use of the word 'may' [grant a variance] also casts doubt on its validity." *Id*. at 1157 n.4.

None of these asserted grounds is sufficient to declare the ordinance facially unconstitutional.

Adequacy of standards. The district court improperly found that the ordinance did not include adequate standards for the zoning boards. The boards are affirmatively charged with carrying out the basic intent and purpose of the zoning code and other laws, and ensuring that the requested non-use variance will be compatible with the surrounding lands uses and not be detrimental to the community. Under the cases previously discussed, this is adequate guidance so that the board will be applying law, rather than creating it.

Lack of hardship exception. The ordinance is not facially unconstitutional for

failing to require that an applicant establish "unnecessary hardship." The district court's analysis on this point has several flaws.

While zoning ordinances frequently provide that hardship is a basis for granting a special exception or unusual use, the presence of a hardship exception is not a constitutional requirement. It is true that under most zoning ordinances, the authority to vary the application of the zoning regulations is limited to cases of "unnecessary hardship." 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* § 222. But the fact that something is common does not mean that the thing is constitutionally required. Indeed, a hardship provision for nonuse exceptions is *not* constitutionally required:

> The hardship that is required for a use variance, i.e., hardship that equates with a lack of a reasonable return or destruction of all beneficial use of the property, has constitutional overtones. ***The hardship, or practical difficulty, required for a nonuse variance does not, in most states, have those constitutional overtones***.

RATHKOPF'S THE LAW OF PLANNING AND ZONING § 58:6 (4th ed.) (emphasis added). *Accord State v. Outagame County Board of Adjustment*, 628 N.W.2d 376, 642-43 (Wisc. 2001).

Even assuming that a county must grant a nonuse variance where the applicant establishes a hardship, nothing in the Miami-Dade ordinance prohibits this. The ordinance does not, as the district court seems to conclude, state that an nonuse variance cannot be given if the applicant establishes an unnecessary hardship. To the

contrary, the ordinance provides that a nonuse variance can be given even if the applicant cannot show a hardship: "No showing of unnecessary hardship to the land is required." § 33-311(A)(4)(b).

Finally, even assuming that a hardship exception is constitutionally-required, and even assuming that the Miami-Dade code prohibits a variance based on a hardship showing, the district court was still wrong in declaring the ordinance to be facially unconstitutional. At most, the ordinance would be unconstitutionally as applied to an applicant who has a legitimate unnecessary hardship, but is not able to satisfy the requirements of the non-use variance ordinance.

Use of the word "may." The district court also expressed concern that the ordinance provides that a zoning board "may grant a non-use variance" upon a proper showing by the applicant.The use of the word "may" does not render the ordinance unconstitutional.

"May," although generally indicating permissive, is often interpreted as being mandatory. "In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu[ally] in an effort to effectuate legislative intent." BLACK'S LAW DICTIONARY 993 (7th ed. 1999). This Court has held that "where a statute says a thing 'may' be done by a public official which is for the public benefit, it is to be construed that it must be done." *Seaboard Air Line Ry. Co. v. Wells*, 130 So. 587, 593 (Fla.

1930). *See also Weston v. Jones*, 25 So. 888, 890 (Fla. 1899); *Comcoa, Inc. v. Coe*, 587 So. 2d 474, 477 (Fla. 3d DCA 1991); *Williamson v. State*, 510 So. 2d 1052, 1054 (Fla. 3rd DCA 1987); *Perry v. City of Fort Lauderdale*, 352 So. 2d 1194 (Fla. 4th DCA 1978).[3]

Accordingly, the courts are free to interpret "may" as mandatory. Indeed, under the principle that courts will adopt the construction that upholds the constitutionality of a zoning ordinance, the courts are obligated to interpret "may" as mandatory. *See Shannondale, Inc. v. Jefferson County Planning and Zoning Commission*, 485 S.E.2d 438 (W. Va. 1997) (upholding constitutionality of variance ordinance which provides that variance "may be granted by the Planning Commission"). The nonuse variance provision of the Miami-Dade ordinance is not facially unconstitutional.

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[3]In *City of Miami v. Save Brickell Avenue*, 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983), the Third DCA held unconstitutional an ordinance which provided that criteria "may" be used in making zoning decisions, on the basis that it was "solely permissive and not mandatory." In a later opinion, the Third District made clear that the ordinance in question had itself given a "permissive construction to the word 'may,' a point which we deem controlling." *City National Bank v. Save Brickell Avenue*, 428 So. 2d 763, 764 n.1 (Fla. 3d DCA 1983). *Compare* Miami-Dade Zoning Code §§ 33-1, 33-302, 1-2 (definitions sections of do not contain a definition for "may" which requires a permissive construction).

CONCLUSION

We respectfully request that the Court quash the Third District Court of Appeal's decision declaring the Miami-Dade zoning ordinances to be unconstitutional. The case should be remanded to the district court for a determination, under the proper second-tier certiorari standard of review, of whether the decision of the zoning board was supported by competent substantial evidence and, if appropriate, a consideration of the Federal Telecommunications Act, 47 U.S.C. § 332.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

WE HEREBY CERTIFY that true and correct copies of the foregoing were sent by Federal Express this 3rd day of February, 2003, to Deborah L. Martohue, Esq., Hayes & Martohue, 5959 Central Avenue, Suite 104, St. Petersburg, FL 33710; and mailed to Jay W. Williams, Esq., and Robert L. Krawcheck, Esq., Miami-Dade County, Stephen P. Clark Center, Suite 2810, 111 N.W. 1st Street, Miami, FL 33128-1993; and Lynn M. Dannheisser, Esq., and Hans Ottinot, Esq., City of Sunny Isles, 17070 Collins Avenue, Suite 250, Sunny Isles Beach, FL 33160.

We certify that this brief is in Times Roman, 14 point, proportional type, and in compliance with the Florida Rules of Appellate Procedure.

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