IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER SC02-815
LOWER CASE NUMBER 3D01-2347

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MIAMI-DADE COUNTY,

Petitioner/Appellant,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent/Appellee.

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ON PETITION FOR REVIEW OF A DECISION FROM THE THIRD DISTRICT COURT OF APPEAL

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ANSWER BRIEF OF OMNIPOINT HOLDINGS

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CLARIFICATION OF THE STATEMENT OF THE CASE AND FACTS

Omnipoint generally agrees with Miami-Dade County's (the "County") description of the procedural posture of this case contained in its Statement of the Case and Facts at pages 1-4 of its Initial Brief ("IB"). However, Omnipoint disagrees with many of the County's statements characterizing the nature of the application and zoning requests, as well as the opinions of the circuit court and district court below.

This case comes before this Court upon Petition for Writ of Certiorari filed by the County requesting review of the Third District Court of Appeals opinion rendered March 6, 2003 that affirmed the circuit court opinion rendered on July 24, 2001 which granted Omnipoint's initial Petition and quashed Resolution No. CZAB12-40-00 (the "Resolution"). (R. 731; App.1). The Resolution denied Omnipoint's application for an unusual use and modification of site plan to permit a telecommunications facility (the "Application"). (R. 71-72).

The circuit court held that the Community Zoning Appeals Board ("CZAB") failed to support its decision with competent substantial evidence and failed to observe the essential requirements of law. (R. 67-70). First, the circuit court concluded, as a matter of law, that the citizen testimony did not rise to the level of competent substantial evidence and further, that the remaining evidence presented

during the public hearing into the record was undisputed and did not support the CZAB's decision. Accordingly, the circuit court held that the CZAB lacked competent substantial evidence to support its decision and therefore departed from the essential requirements of law. (App. 1; R. 66-67).

Second, the circuit court held that the CZAB's decision departed from the essential requirements of law because it constituted discrimination between providers of functionally equivalent services in violation of the Telecommunications Act of 1996 ("TCA"). (App. 1; R. 68-69). Finally, the circuit court held that the CZAB failed to make written findings of fact or give any explanation of the reasons for the denial tied to evidence in the record in violation of the TCA and thus, its Resolution failed to observe the essential requirements of law. (App. 1; R. 69-70). The district court of appeal affirmed the circuit court's decision assigning no error. Rather, it issued an opinion decreeing an additional basis for affirmance. (R. 728-731).

The zoning application that gives rise to this appeal involves a request for an unusual use to permit a 148 foot high flush-mounted monopole with ancillary equipment (hereinafter "telecommunications facility" or "facility") on a parcel of land zoned BU-1A, a commercial zoning district. (R. 73-78, 83-85, 167, 169). The subject property is located on a divided arterial roadway and is developed as a

commercial business known as Public Storage ("Property"). (R. 74-75, 79, 167). The County's Comprehensive Plan ("CDMP") designates the Property for Business and Office use. (R. 74). A telecommunications facility is permitted within the CDMP's Business and Office land use designation and is also permitted as an unusual use in the BU-1A zoning district pursuant to Section 33-13(e) of the Code. (R. 74-77, 318-319, 321; App. 2).

The area surrounding and adjacent to the Property is characterized predominately by commercial and office uses, with residential uses to the north across a divided arterial roadway, Sunset Drive, and to the south across a 260 foot wide canal. There is no residential property adjacent to the Application site. (R. 75, 79, 80). A utility corridor containing transmission electric utility poles 75 feet in height spaced every 100 feet lies immediately to the north and east of the Property running east west along Sunset Drive. (R. 82, 169, 172). A telecommunications facility 150 feet in height is located on adjacent property to the east that is developed with offices. (R. 77, 95, 102). A shopping plaza is located in a BU-1A zoning district immediately to the west of the Property. (R. 74, 102).

In addition to the unusual use request, Miami-Dade Zoning Code requires public hearing approval for site plan modifications. (R. 73). Since the prior site

plan for the mini storage warehouse did not include a telecommunications facility, a modification request was necessary. (R. 73; App. 6). Only one non-use variance was requested to permit a setback deviation from the southern property boundary, which abuts a 260-foot wide canal. (R. 73, 77).

Staff found the Application consistent with the CDMP and recommended approval of the Application to permit the location of the telecommunications facility in an area of Sunset Drive where business, office, and utility uses are predominant. (R. 77). Further, undisputed expert evidence was presented to the CZAB demonstrating why this location was a necessary and integral component of Omnipoint's telecommunications network. (R. 64, 87-88, 95). The record also contained lay opinion testimony objecting to the height of the proposed monopole, potential impact on property values, maintenance and drainage issues related to the existing Public Storage site (not related to the Application requests), alleged interference with television and telephone reception, and alleged health risks. (R. 123-133, 189-199).

The Board voted 5-0 to deny the Application. (R. 211-212).

SUMMARY OF ARGUMENT

The district court correctly affirmed the circuit court decision assigning no error. In accordance with long-standing Florida zoning and certiorari jurisprudence, absent a miscarriage of justice, this Court must affirm the circuit court decision.

The circuit court held, as a matter of law, that the record contained no competent substantial evidence to support the CZAB's decision. Such a determination of the character of evidence is within the sole authority of the circuit court upon first-tier certiorari review.

In addition, the circuit court held that the CZAB's decision violated the anti-discrimination clause of the Telecommunications Act of 1996 ("TCA") as well as its written decision requirements. Each of the circuit court's findings, standing alone, is sufficient to quash the Resolution denying Omnipoint's application requesting approval of a telecommunications facility.

The district court affirmed the circuit court decision and issued an opinion stating an additional basis for that affirmance that held certain portions of the County's zoning code facially unconstitutional. The district court also held that the lack of any zoning standards under which a telecommunications facility could seek approval ran afoul of the TCA's anti-prohibition clause.

While constitutional challenges to legislative enactments are typically brought in declaratory actions, once an appellate court has accepted jurisdiction, it has the authority and discretion to consider any issue affecting the case. Constitutional issues are questions of pure law and are subject to *de novo* review both by the district court and this Court.

The subject ordinances come before this Court cloaked in a presumption of validity. Applying the rules of statutory construction and the rational basis and fairly debatable standards of review, it cannot be said that the language of the ordinances declared facially unconstitutional by the district court do not serve a legitimate basis and are incapable of any valid application. Thus, the district court erred in declaring the subject ordinances facially unconstitutional. However, in the event this Court should affirm the district court's declaration of facial unconstitutionality, it should also affirm the district court's decision that the resulting lack of zoning standards for telecommunications facilities results in a violation of the TCA's anti-prohibition clause.

To the degree that this Court considers the constitutional validity of the subject ordinances, it respectfully requests that this Court declare the County's interpretation of the ordinances unconstitutional as applied to Omnipoint and telecommunications facilities in general. If the general term "compatibility" is

interpreted outside the context of enumerated criteria, and defined by an unmentioned and immeasurable criteria, such an interpretation not only results in unconstitutionally arbitrary and unreasonable decision-making, but also creates a standard that is impossible to satisfy by Omnipoint or any other wireless service provider in light of the other enumerated criteria requiring proof of necessity and reasonableness. Thus, taken as a whole, the County's interpretation of "compatibility" creates an impossible standard as applied to Omnipoint and telecommunications facilities in general, and therefore, is unconstitutional as applied.

ARGUMENT

I. DISTRICT COURT HAS THE POWER TO DECLARE LEGISLATION UNCONSTITUTIONAL

Deciding constitutional issues is one of policy not power. There is a distinct difference between declining to consider a matter and lacking the authority to do so. *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986). In *Cantor*, this Court announced prudence dictates that issues should be preserved for consideration on appeal in the trial court. However, once an appellate court has jurisdiction, it may, in its discretion, consider any issue affecting the case. *Id*. at 20; *accord Dralus v. Dralus*, 627 So. 2d 505, 508 (Fla. 2d DCA 1993) (holding appellate courts have

authority to address issues not raised in the trial court, however, such power should be used sparingly).

Generally, parties are restricted to theories of the case argued below. However, Florida law recognizes an exception to the general rule and requires disposal of any issues that are fundamental to the decision in the case. *Miami Gardens, Inc. v. Conway*, 102 So. 2d 622, 626 (Fla. 1958); *see also In Interest of RW*, 481 So. 2d 548 (Fla. 5th DCA 1986). While courts are encouraged to exercise judicial restraint in deciding constitutional issues, the cases relied upon by the County do not prohibit courts reviewing quasi-judicial decisions from deciding issues of constitutionality that go to the fundamental nature of the case[1]. *See State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995) (adhering to the "settled principle of constitutional law that a court should endeavor to . . . avoid constitutional issues."); *accord State v. Efthimiadis*, 690 So. 2d 1320 (Fla. 4th DCA 1997). Both the *Mozo* and *Efthimiadis* courts' use of the term "should" rather than "shall" evidences the general rule's encouragement of judicial restraint while permitting the exercise of sound judicial discretion when necessary to strike down those ordinances that are

[1] *State v. Turner*, 224 So. 2d 290 (Fla. 1969); *State v. Efthimiadis*, 690 So. 2d 1320 (Fla. 4th DCA 1997) and *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995) involve preservation of constitutional issues relating to state statutes in a trial *de novo*

fundamentally defective or unjust. *See e.g., Florida Home Builders Ass'n. v. Div. Of Labor Bureau of Apprenticeship*, 367 So. 2d 219 (Fla. 1979); *Miami-Dade County v. Save Brickell Ave., Inc.* 426 So. 2d 1100 (Fla. 3d DCA 1983).

A court has the duty to declare a fundamentally defective or unjust zoning ordinance unconstitutional and to maintain the Constitution as the fundamental law of the state. *City of Miami Beach v. Lachman*, 71 So. 2d 148, 150 (Fla. 1953). That duty is "imperative and unceasing" and applies equally against a zoning ordinance as it does against an act of the state legislature. *Id*. The ultimate power and duty to interpret legislative acts, including zoning ordinances, with reference to constitutional requirements and limitations cannot be evaded by the courts. *Waybright v. Duval County*, 196 So. 430, 440 (Fla. 1940). If a court finds that a zoning ordinance conflicts with the Constitution, the Constitution by its own force renders the zoning ordinance inoperative. In that case, the court not only has the authority but the duty to hold it invalid. *Lachman*, 71 So. 2d at 150. Thus, although such power should be used sparingly and in rare cases, nevertheless such power does reside in our appellate courts.

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proceeding. Thus, the facts and procedural requirements at issue in those cases are at material variance with those of the case at bar.

Contra the County's assertion, the scope of review set forth in *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) and its progeny do not prohibit appellate courts from deciding constitutional issues. In the instant case, while it is true that the constitutional issue did not arise from a challenge to a purely legislative enactment, the district court held the constitutional issue to be inextricably entwined to a review of the quasi-judicial decision and thus, properly within the scope of second-tier certiorari review. (R. 728-731). *Heggs* and its progeny expressly permit consideration of issues that may constitute a departure from the essential requirements of law.[2] Tantamount to a failure to accord due process of law within contemplation of the Constitution is necessarily a failure to observe the essential requirements of law. *See Heggs*, 658 So. 2d at 527 (quoting *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st DCA 1960).

A legislative enactment that violates the basic tenets of our Constitution is the quintessential example of a departure from the essential requirements of law at is most fundamental level. Thus, the certiorari review cases can be reconciled with the general rule encouraging judicial restraint while affording the courts discretion and, in fact, imposing a duty upon a court that finds an ordinance constitutionally

[2] *Heggs*, 658 So. 2d at 527-530; *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000); and *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838 (Fla. 2001).

infirm to hold such ordinance invalid. Accordingly, the district court did not exceed its second-tier certiorari jurisdiction.

The question then becomes, is the analysis and opinion of the district court holding the subject Ordinances facially unconstitutional proper on the merits? At this point, regardless of whether or not the district court had the power to hold the Ordinances facially unconstitutional, as one Amicus practically points out, the deed is done. Irreparable damage to the economy of Miami-Dade County has resulted and will continue until this cloud is lifted. As a result, Omnipoint joins the request of the County and Amici that a decision on the merits of the constitutionality of the subject Ordinances be declared by this Court. If, for example, this Court should reverse the district court for exceeding its jurisdiction without resolution of the merits, the adverse effects of the decision will continue until another case presents itself in the correct procedural posture to the district court at which time it will render the same decision that one can reasonably expect will be appealed to this Court. One could also reasonably expect local and statewide ramifications resulting from uncertainty regarding what language will constitute sufficiently clear and definite zoning standards in the interim, thus the issue is of great public importance.

However, Omnipoint does not agree with the erroneous contention of the County and its Amici arguing that the district court improperly "bypassed" other dispositive issues basing its decision *solely* on the issue of facial constitutionality, thereby concluding the district court violated procedural rules and the scope of its authority. (IB pp. 36-37, AB Miami pp. 3-4)[3]. Such argument ignores the district court's affirmance of the circuit court's decision. Omnipoint, the County and Amici all agree that the district court neither assigned error to the circuit court's opinion, nor declared that a miscarriage of justice resulted. (See R. 728-731, IB p. 40, AB Miami p. 4).

Therefore, such argument fundamentally ignores the purpose and function of court opinions which is to discuss important questions of law that will add substance to the existing body of case law, not merely reiterate it. *See Jaytex Realty Co. v. Green*, 105 So. 2d 817, 819 (Fla. 1st DCA 1958). Further, an appellate decision is neither required to discuss every argument raised by the parties, nor the reasoning of the lower tribunal to prove to the parties that it considered all relevant issues dispositive to the case. *Id*. Thus, since there was no error assigned to the circuit court's decision, whether or not the district court

[3] The citation abbreviation for the Amicus Brief of the City of Miami herein will be AB Miami p.__.

discussed each issue decided by the circuit court, does not alter the underlying decision. Only upon reversal of a circuit court decision, which is cloaked in a presumption of correctness, does an appellate court have the responsibility to write an opinion. *City of Kissimmee v. Grice*, 669 So. 2d 307, 309 (Fla. 5th DCA 1996); *Kates v. Millheiser*, 569 So. 2d 1357, 1358 (Fla. 3d DCA 1990). Accordingly, regardless of whether or not this Court decides the merits of the constitutional issue raised, Omnipoint urges this Court to uphold that portion of the district court's opinion affirming the circuit court's decision to quash the Resolution.

II. THE DISTRICT COURT ERRED DECLARING PORTIONS OF MIAMI-DADE ZONING ORDINANCE FACIALLY UNCONSTITUTIONAL

A. Standard of Review

The standard of review for pure questions of law is de novo. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

B. Standards and Principles for Legislative Delegation in the Zoning Context

Omnipoint agrees with and adopts the statements and analysis contained in Sections II A. B. & C. of the Amicus Brief of the City of Miami setting forth the established principles of legislative delegation, principles for evaluating claims that standards for delegation are unconstitutionally vague, and Florida decisions interpreting and applying these principles. (AB Miami, pp. 5-15).

C. The County's Unusual Use, Modification and Non-Use Variance Provisions Are Not Facially Unconstitutional

Applying a *de novo* standard of review, the ordinances invalidated by the district court are not facially unconstitutional. In order for regulation to be unconstitutionally vague, it must be so utterly devoid of meaning that it "simply has no core." *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 495 (1982); *High Ol' Times v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982). An ordinance is not facially unconstitutional unless it is incapable of any valid application. *Flipside,* 455 U.S. at 495. This Court announced its test of facial unconstitutionality to be whether or not a regulation is so vague that people of common intelligence must necessarily guess at its meaning. *State v. Hagen*, 387 So. 2d 943, 945 (Fla. 1980). In the interest of brevity, Omnipoint agrees with and adopts only those portions of Sections II C, D, and E of the Amicus Brief of the City of Miami setting forth the principles of law relating to a claim of facial unconstitutionality of a legislative enactment as applied to the language of the County ordinances held invalid by the district court[4]. (AB Miami pp. 15-18, 20-25).

[4] §33-311(A)(3) (standards to permit an unusual use or special exception); §33-311(A)(7) (standards to permit modifications to a prior zoning resolution which would include site plan modifications, and §33-11(A)(4)(b) (standards to permit a

Omnipoint expressly disagrees with the assertions of Amicus Miami that the district court "ignored the competent substantial evidence question" for reasons discussed below and *infra* at pp. 27-34. (AB Miami p. 19). In addition, as Amicus Miami so succinctly and correctly states:

> [t]he 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.

(AB Miami p. 4) (emphasis in original).

In a concurring analysis, the County states:

> In the district court's view of the instant case, no miscarriage of justice occurred at the circuit court level. The circuit court approved Omnipoint's zoning request, as did the district court. Indeed, given the district court's approval of the decision, the district court did not even say that the circuit court committed legal error.

(IB p. 40). Omnipoint agrees. Accordingly, the relief requested by Amicus Miami from this Court to order a remand to the district court for a determination of the question of substantial competent evidence and a reconsideration of the issues arising under the TCA is improper. See discussion *infra* pp. 33-41.

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non-use variance). In the interest of brevity and to minimize redundancy, Omnipoint refers this Court to pp. 16-17 and 20-21 of the Amicus Brief of Miami that quotes the referenced code provisions in their entirety. (See also App. 6 for certified copy of full text of the cited Code provisions).

III. MIAMI-DADE UNUSUAL USE, MODIFICATION AND NON-USE VARIANCE PROVISIONS ARE UNCONSTITUTIONAL AS INTERPRETED AND APPLIED TO OMNIPOINT AND TELECOMMUNICATIONS FACILITIES IN GENERAL

A. Legal Standard

A zoning ordinance is presumptively valid. *City of Miami v. Romer*, 58 So. 2d 849 (Fla. 1952). For purposes of constitutional equal protection scrutiny, the rational basis standard or fairly debatable rule applies. *City of Miami Beach v. First Trust Co.*, 45 So. 2d 681, 684 (Fla. 1949); *see also City of Panama City v. Head*, 797 So. 2d 1265, 1268 (Fla. 1st DCA 2001). The fairly debatable rule applies both to the ordinance itself and its application; therefore both must have a reasonable relationship to the health, safety, morals, or general welfare of the public. *Davis v. Sails*, 318 So. 2d 214 (Fla. 1st DCA 1975). Thus, although zoning regulations are presumed valid and should not be interfered with by the courts, if an ordinance is arbitrarily or unreasonably applied to a particular piece of property, then the ordinance should be held unconstitutional as applied. *Dade County v. United Resources, Inc.*, 374 So. 2d 1046, 1050 (Fla. 3d DCA 1979).

Typically, constitutional challenges to ordinances are brought in declaratory actions. *Hirt v. Polk County,* 578 So.2d 415, 416 (Fla. 2d DCA 1991). However, since this Court has accepted jurisdiction presumably to review the constitutional

issue raised by the County; under the authority of *Cantor v. Davis*[5] which grants an appellate court the authority and discretion to consider any issue affecting the case, Omnipoint respectfully requests this Court consider its contention that the County's interpretation of its zoning ordinances are unconstitutional as applied to telecommunications facilities for the reasons set forth below.

B. The County's Zoning Standards as Interpreted and Applied to Omnipoint's Zoning Request And to Telecommunications Facilities a in General are Unconstitutional

The CZAB may grant an unusual use upon a showing that the request will not unduly burden public facilities or services and will not create a hazard. Section 33-13(e) of the Code sets forth the list of unusual uses that are permitted in <u>any</u> zoning district if approved at public hearing. (See App. 2 for full text).

Reasonableness, necessity and compatibility of the zoning request with the surrounding area and a determination of whether or not it will have an adverse impact on the public must be properly evaluated with the context of the seven enumerated Code criteria[6] set forth in §33-311(A)(3) as evidenced by the comma

[5] 489 So. 2d at 20.

[6] The criteria are as follows: 1) Would not have an unfavorable effect on the economy; 2) would not generate or result in excessive noise; 3) would not generate or result in excessive traffic; 4) cause undue or excessive burden on public facilities (water, sewer, solid waste disposal, recreation, transportation, streets, roads, highways, or other such facilities); 5) would be accessible by private or

separating the enumerated criteria from the qualifying phrase which states in pertinent part:

> , when considering the necessity for and reasonableness of such applied for exception or use in relation to the present or future development of the area concerned and the compatibility of the applied for exception or use with such area and its development.

A long-standing principle of statutory construction mandates that words take meaning based upon their context or association with other words in an ordinance. *DeSisto College v. Town of Howey-In-The-Hills*, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989) (internal citations omitted). Further, the doctrine of *expressio unius est exclusio alterius* requires that an ordinance be construed by those criteria expressly mentioned, excluding from its operation those items not expressly mentioned. *Id.* at 1495 (internal citations omitted). Moreover, if one of the enumerated terms in an ordinance is a general term, the context within which the general term is used will restrict and narrow the construction of the general term. *Id*.

Thus, the County is partially correct when it states that the Board may consider the necessity for, reasonableness of, and compatibility of the zoning request in relation to the present and future development of the area. Applying

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public roads, streets or highways; 6) would not tend to create a fire of other or equally or greater dangerous hazards; or 7) would not provoke excessive

the general principles of statutory construction cited, the specific enumerated criteria exclude consideration of any unmentioned criteria when construing the meaning of the general term "compatibility". In other words, the meaning of "compatibility" is restricted by the context of the enumerated criteria.

Further, in support of this interpretation, use of a "comma" rather than the conjunction "and" after the enumerated specific criteria requires that the general term "compatibility" be evaluated within the context of the seven enumerated criteria. It is only when the term compatibility is isolated from its context and broadly interpreted to include unmentioned criteria, is the ordinance rendered unconstitutionality vague. Thus, on its face, the ordinance is constitutional. See discussion *supra* pp. 13-15.

Specifically, the issue arising under these standards is the interpretation of the general terms of "necessity", "unreasonableness" and "compatibility" as applied to telecommunications facilities. It is undisputed that the proposed telecommunications facility does not create any adverse impacts on public health and safety[7], public facilities and services, does not unduly burden the economy,

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overcrowding or concentration of people or population. §33-311(A)(3). (App. 6).

[7] The facility satisfied all Code requirements for fallzone setbacks with the exception of the setback from the south Property line which abuts a 260-foot wide canal. Staff found that a non-use variance from a rear setback under these factual

generate excessive population, or cause excessive noise, odor or traffic. (R. 77, 326-328). But for the facility's height, a function of its use and performance, for purposes of assessing impacts, an unmanned facility is most likely the least intrusive use and structure that could be located on this Property or any other parcel of land.

Adding to the complexity of the issue, is acknowledging that wireless service is a modern day necessity for a society that has become increasingly reliant upon wireless communication services for safety, emergency, business and personal purposes. Then factor in that the modern day land use pattern of development is relatively homogeneous. For example, residential, commercial, and industrial uses are typically segregated from each other by transitional dividers such as roadways, easements, canals or other natural or man-made features. The practical effect of such land use patterns combined with the needs and demands of wireless subscribers at work, at home and when traveling, unavoidably causes a need to locate some facilities within or adjacent to residential areas.

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circumstances did not pose an adverse impact to public safety reasoning that in the unlikely event the tower fell over from its base to the south, most of the tower would be contained on-site and the remaining portion would fall into the canal. This would avoid any risk to private property or human life. (R. 77).

Now consider that the inherent function of a telecommunications facility mandates that the antennae, which transmit and receive communications signals, be located at an elevation above surrounding buildings, structures and tree canopies to permit unobstructed signal coverage. Ultimately, height if combined with providing collocation opportunities for other service providers, as was done in the instant case, reduces proliferation of facilities in close proximity to each other.

While aesthetics is a legitimate goal of zoning, it should not be deemed a sufficient basis standing alone to exclude an otherwise presumptively permissible use of property[8]. Consider this, conditional uses, such as unusual uses, by their very nature are "outside the norm" of permitted uses within the zoning district. Thus, the danger of such compatibility testimony becoming the sole basis of a denial of a conditional use such as a special exception or unusual use is evident.

[8] There is disagreement amongst federal courts whether lay opinion on the issue of aesthetics satisfies the substantial competent evidence requirement of the TCA. *See e.g., MIOP, Inc. v. City of Grand Rapids*, 175 F. Supp.2d 952, 956-957 (W.D. Mich. 2001)(internal citations omitted); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Tp.*, 181 F.3d 403, 409 (3d Cir. 1999) (holding a "few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence" for purposes of §332(c)(7)(B)(iii)) (internal citations omitted).

In Florida, the line between acceptable fact-based citizen testimony and unacceptable citizen opinion testimony has been blurred beyond recognition[9]. One solution to avoid a void-for-vagueness claim is to adhere to the general principles of statutory construction. In the instant case, that would limit the compatibility evaluation within the larger context of the seven enumerated objectively measurable criteria.

Alternatively, another solution to avoid unconstitutional as applied or void-for-vagueness claims is to prohibit compatibility or aesthetics to be the sole basis for a denial of a zoning request. Permitting otherwise elevates one undefinable and immeasurable criteria above all others. In effect, it creates a standardless zoning approval process subject to the whim and caprice of the local zoning board, creating at best, the opportunity for arbitrary, inconsistent and unreasonable decision-making. Further, it undermines the effectiveness of the competent substantial evidence standard established by federal and state courts to limit arbitrary decision-making by local government zoning boards. Moreover, aesthetic

[9] *See e.g. City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 2d DCA 1974); *Metropolitan Dade County v. Sportacres*, 698 So. 2d 281 (Fla. 3d DCA 1997); *Metropolitan Dade County v. Section 11 Prop. Corp.*, 719 So. 2d 1204 (Fla. 3d DCA 1998); *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1995); *Jesus Fellowship Inc. v. Miami-Dade County*, 752 So. 2d 708 (Fla. 3d DCA 2000).

testimony standing alone with nothing more renders the burden of proof established in *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986) meaningless.

In the case at bar, the character, function and appearance of a telecommunications facility is unique and by its inherent nature will never be similar to any other neighboring structure in its use, appearance or impacts except in comparison to another facility. A standard of compatibility that requires a showing of similar uses in the immediate area but then points to the adverse visual impact caused by the cumulative effect of these similar uses as a basis for denial of the zoning request creates a standard impossible to satisfy[10]. Further, while one or more facilities located within the vicinity of each other may demonstrate compatibility, the fact these facilities exist would most often[11] negate the ability to demonstrate the necessity[12] and reasonableness of a request for another facility[13]. It

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[10] *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002) (holding such interpretation a prohibition "in effect").

[11] Except in those cases where structural incapacity or signal interference could be proven.

[12] This Court has held that if the term "need", an equivalent to the term "necessity", is used standing along in an ordinance, it is "susceptible of so many conflicting applications that the agency and the courts cannot ascertain the legislative intent." *Florida Home Builders Ass'n*, 367 So. 2d at 220.

[13] The Code standards set forth in §33-311(A)(3) include an evaluation of the necessity and reasonableness of the zoning request. (See App. 6).

is that interpretation by the CZAB and the County that creates inherently opposing criteria as applied in the instant case and in general to telecommunications facilities that is unconstitutional.

In the case at bar, the County concedes that the area immediately surrounding the Property lacks any tall buildings and towers with structural capability to support additional antennas and equipment. (IB p. 1). Omnipoint's proposed facility would permit up to five (5) telecommunications providers, including itself, thus reducing the need for additional facilities in the surrounding area. (R. 85, 95, 173-175). Omnipoint also provided evidence of an approximate four square mile "gap" where it is currently unable to provide wireless service. (R. 87-88, 170). Omnipoint was not alone. Many wireless providers were unable to provide service in this same area and were committed to collocation on Omnipoint's facility if it was approved. (R. 87-88, 95, 170, 173-175).

Facts are stubborn things. These facts demonstrate the necessity and reasonableness of Omnipoint's Application. However, if this Court accepts the County's position that the same facts demonstrate incompatibility rather than necessity, a standard is created that could never be satisfied by Omnipoint in this case or generally by any other wireless service provider.

Perhaps the facts of the instant case are as good as it gets in attempting to satisfy inherently opposing criteria as applied to zoning requests to permit telecommunications facilities. The proposed facility is located in close proximity to other utility poles (albeit not as tall but similar in function and appearance) and to another telecommunications facility 150 feet tall, two feet taller than the proposed facility, but structurally incapable of allowing the installation of Omnipoint's antenna. (R. 77, 82, 95). The facility is a permitted use under the CDMP land use designation and the BU-1A zoning district and thus is presumptively valid. (R. 75-76, App. 2 and 6). The Application site does not abut any residential property[14]. (R. 75, 79-81). It is undisputed that the proposed facility does not pose any adverse impacts on public health and safety[15], public facilities and services, and does not unduly burden the economy, generate excessive population, or cause excessive noise, odor or traffic. (R. 77, 326-328).

[14] The closest residential structure to the north is approximately 450 feet from the base of the proposed monopole. The closest residential structure to the south is approximately 550 feet from the base of the proposed monopole. (R. 79).

[15] The monopole satisfied all Code requirements for fall factor setback requirements with the exception of the setback from the south Property line which abuts a 260-foot wide canal. Staff found that a non-use variance requesting a lesser setback under that factual circumstance did not pose a adverse impact to public safety because in the event the tower was to topple over from its base to the south, most of the tower would be contained on-site and the remaining portion would fall into the canal thus avoiding any risk to private property or human life.

If the subject ordinances are allowed to be interpreted and applied to permit the term "compatibility" to be so broadly construed without respect to the context of objectively measurable criteria, the applicant is not on notice as to what standards are applicable rendering such interpretation void-for-vagueness. Finally, if the "compatibility" standard is isolated and judged solely in terms of aesthetics, which by definition, is a value judgment, it not only frustrates the intent of the TCA, it creates a threshold of evidence so minimal, immeasurable and undefinable, the zoning framework established by *Snyder*[16] is rendered meaningless.

To further support the argument that these zoning standards are unconstitutional as applied, it is important to understand the unique zoning framework employed by Miami-Dade County. Miami-Dade County manages growth on a neighborhood basis[17] rather than County-wide. This type of zoning structure is not present in any of the other sixty-six Florida Counties. In essence, Miami-Dade County has institutionalized NIMBYISM (not-in-my-backyard) by delegating the vast majority of final zoning authority in no less than thirteen

[16] *See generally Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993).

[17] With few exceptions such as comprehensive plan amendments and certain limited appeals from CZAB decisions, CZABs are the final zoning authority on a vast majority of zoning requests including the zoning requests in the case at bar.

neighborhood-zoning boards[18]. §33-311(A)(1-7) (See App. 6). A reasonable person could argue that it is even more imperative that zoning standards implemented by thirteen neighborhood zoning boards within the County be held to a higher standard of clarity, definitiveness and objectivity to ensure that there is no opportunity for inconsistent, arbitrary and discriminatory zoning decisions caused by the lack of sufficient standards.

IV. THIS COURT LACKS JURISDICTION TO CONDUCT A DE NOVO REVIEW OF THE EVIDENCE OR REVERSE THE DECISION OF THE CIRCUIT COURT ABSENT A MISCARRIAGE OF JUSTICE

The Florida Supreme Court has clearly stated that the circuit courts and the district courts are not permitted to parse through the record conducting a *de novo* review of the record below. The scope of review narrows as one climbs the judicial ladder, thus it is not proper for the Supreme Court to conduct a *de novo* review of the record contrary to the County's assertion. (IB p. 35). *Dusseau v. Metropolitan Dade County Bd. Of County Comm'rs,* 794 So. 2d 1270, 1275 (Fla. 2001) (holding that it is improper for the Supreme Court to conduct its own review of the record to determine whether the commission's decision is supported by competent substantial evidence, "for to do so would perpetuate the district court's

[18] Originally sixteen CZABs were created and then through City incorporations became fourteen CZAB's at the time of public hearing on Omnipoint's zoning

error and usurp the first-tier certiorari jurisdiction of the circuit court"); *see generally G.B.V. Int'l*, 787 So. 2d 838; *Florida Power & Light v. City of Dania,*761 So. 2d 1089 (Fla. 2001); and *Heggs,* 658 So. 2d 523 et. seq. Therefore, the County's bold assertion, with no citation to authority, that this Court's standard of review is *de novo* on all of the issues raised, including whether or not the record contained substantial competent evidence, is wrong. (IB p. 35).

Thus, absent a miscarriage of justice, which the district court did not declare in its opinion, the decision of the circuit court is final. *Id*. The only issues remaining for this Court are: 1) whether the district court exceeded its jurisdiction declaring the constitutional validity of a local zoning ordinance upon second-tier certiorari review; and 2) whether or not the subject ordinances are unconstitutional. Those issues are subject to a *de novo* standard of review since they are pure questions of law. *Armstrong*, 773 So. 2d at 11.

A. Standard of Review

Beginning with *Vaillant,* followed by *EDC*, and subsequently clarified by Justice Anstead's articulate opinion in *Haines City v. Heggs,* the Florida Supreme Court has consistently divided the certiorari standard of review between the circuit court sitting in its appellate capacity and the district court of appeal. *City of*

Application. Today, thirteen CZAB's exist.

Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982); *accord Educational Dev. Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106 (Fla. 1989) ("*EDC*"); *Heggs*, 658 So. 2d at 528-530; *City of Dania*, 761 So. 2d at 1092; *Ivey*, 774 So. 2d 679; *G.B.V. Int'l, Ltd.*, 787 So. 2d at 842-844; *Dusseau*, 794 So.2d at 1273-1274. The inquiry at both levels of appeal and particularly, the second-tier certiorari level, is deliberately circumscribed and narrowed as the case climbs the judicial ladder to avoid granting the extraordinary remedy of a forbidden second appeal. *Id*.

The scope of review for the circuit court acting in its appellate capacity includes three discrete components: (1) whether the parties have been accorded procedural due process; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment of the lower tribunal are supported by competent substantial evidence. *G.B.V. Int'l*, 787 So. 2d at 843 *quoting Heggs*, 658 So. 2d at 530.

The district court has a much narrower certiorari review. *City of Dania*, 761 So. 2d at 1092. Upon second-tier certiorari review, the district court must only determine whether the circuit court afforded the parties procedural due process and applied the correct law. *G.B.V. Int'l*, 787 So. 2d at 843 *quoting Vaillant* 419 So. 2d at 626. The district court may not reexamine the circuit court's determination

regarding the character of the evidence introduced before the lower tribunal. *City of Dania*, 761 So. 2d at 1093; *accord G.B.V. Int'l*, 787 So. 2d at 845 et. seq. (noting that competent and substantial evidence at the agency level is a level of proof, but at the appellate level, it is equivalent to legally sufficient evidence for purposes of review because the circuit court is not allowed to reweigh the evidence or substitute its judgment for that of the local zoning authority). As a practical matter, a "circuit court's final ruling in most first-tier certiorari cases is conclusive for second-tier review is extraordinarily limited". *City of Dania*, 761 So. 2d at 1092; *accord Dusseau*, 794 So. 2d 1274.

Where there is no discernible error and a miscarriage of justice has not occurred, this Court should not do what the district court is prohibited from doing upon second-tier certiorari review despite the County's pleas to the contrary. *Dusseau*, 794 So. 2d at 1274-1275; *G.B.V. Int'l*, 787 So. 2d at 844; *Heggs*, 658 So. 2d at 528 (holding that "*in granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the seriousness of the error*…[and] should exercise this discretion only when there has been *a violation of clearly established principle of law resulting in a miscarriage of justice*.") (emphasis in the original); *Ivey*, 774 So. 2d at 683 (discussing the standard of review which prohibits a district court from granting certiorari simply because it is

dissatisfied with a circuit court's appellate decision, particularly when a three-judge panel issues a well-reasoned opinion supported by appropriate references to controlling Florida law).

B. The Circuit Court Applied the Correct Standard of Review and the Correct Law

There is no dispute that Omnipoint was afforded procedural due process. (R. 66). The County alleges the circuit court incorrectly applied the law. (IB p. 43).

The circuit court's opinion held the CZAB did not support its decision with competent substantial evidence as a matter of law. (R. 68). If a circuit court's scope of review to determine whether or not the record contains competent substantial evidence is interpreted to permit the circuit court only to agree with a zoning board's decision, what is the purpose of review? Such an interpretation would undermine the rule announced in *Snyder* requiring strict scrutiny of quasi-judicial decisions. *Snyder*, 627 So. 2d at 475. That includes a determination of whether or not the record contains competent substantial evidence in accordance with *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) and satisfies the burdens of proof established in *Irvine*, 495 So. 2d at 167.

The County argues in one breath that the district court exceeded its second-tier certiorari jurisdiction in rendering its opinion regarding the facial

constitutionality of certain provisions of the County's Zoning Code (IB p. 35-41). In the next breath, ignoring the bevy of long-standing Florida jurisprudence, cited *supra* p. 28, the County boldly urges this Court to bootstrap a *de novo* review of the circuit court's decision under the premise that such investigation is necessary to determine whether the district court properly conducted its review. (IB p. 35). Such argument directly conflicts with the principles of certiorari review established by this Court. (See discussion *supra* pp. 27-30).

The Board may deny the Application only if the Board (or third party opposition) demonstrates with competent substantial evidence presented into the record during the public hearing that the zoning request fails to satisfy the published zoning criteria and the request is "in fact, adverse to the public interest." *Dusseau*, 794 So. 2d at 1273 *quoting Irvine*, 495 So. 2d at 167. The face of the circuit court's opinion clearly states that it reviewed the record in its entirety to determine only whether or not the record contained any substantial competent evidence to support the Board's decision. (R. 62-68). Applying the *DeGroot*[19] test for competent substantial evidence, the circuit court concluded that the citizen testimony did not rise to the level of competent substantial evidence and that the record contained no other competent substantial evidence to support the Board's

decision[20]. (R. 66-68). Such a determination, as a matter of law, is within the sole jurisdiction of the circuit courts. *See generally City of Dania*, 761 So. 2d 1089.

The face of the circuit court opinion clearly reveals that it did not reweigh any evidence. (R. 62-70). Rather, it expressly found there was either no evidence or legally insufficient evidence to support the CZAB's decision. (R. 68).

The County pleads with this Court to second-guess the circuit court's determination of the legal sufficiency of evidence. (IB p. 35). Such review would be improper despite the County's clever, but transparent attempt to cloak such *de novo* investigation of the record evidence under the auspices of a "departure from the essential requirements of law." *See Ivey*, 774 So. 2d at 683. Accordingly, the circuit court acted properly within its scope of review and its decision on the question of substantial competent evidence should be affirmed.

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[19] *DeGroot*, 95 So. 2d at 916.

[20] For purposes of the Telecommunications Act provision requiring that any state or local government decision to deny a zoning request to construct a telecommunications facility be in writing and supported by substantial competent evidence contained in the record, the test for substantial evidence is such relevant evident evidence as a reasonable mind might accept as adequate to support the conclusion. *Illinois v. RSA No. 3, Inc. v. County of Peroia*, 963 F. Supp. 732 (C.D. Ill. 1997); *accord AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998); *see also Western PCS II Corp. v.*

C. The District Court Properly Affirmed the Circuit Court's Decision

1. Substantial Competent Evidence

Applying the standards of review discussed *supra* pp. 27-30, the district court properly declined to investigate the circuit court's decision on the question of substantial competent evidence, as such review would exceed its jurisdiction and constitute a forbidden second appeal.

Even if this Court should disagree with the opinion of the district court that certain provisions of the Miami-Dade Zoning Code are facially unconstitutional, this Court lacks jurisdiction to conduct a *de novo* review and re-examine the circuit court's determination of the character of evidence presented to the CZAB. *See G.B.V. Int'l*, 787 So. 2d at 843 *affirming City of Dania*, 761 So. 2d at 1092; *accord Dusseau*, 794 So.2d at 1273-1275. Such action would improperly grant the County a second forbidden appeal and thus, constitute a departure from the essential requirements of law. *Heggs*, 658 So. 2d. at 530.

2. Denial of the Application Violates the Telecommunications Act of 1996

a. Denial of the Application Constitutes Discrimination Between Two Functionally Equivalent Providers in Violation of the TCA

Extraterritorial Zoning Authority of City and County of Santa Fe, 957 F. Supp. 1230 (D.N.M. 1997).

The Board's decision violates §332(c)(7)(B)(I)&(II) TCA, which provides in pertinent part that:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services[21].

Without any citation to any authority, the County argues that the circuit court "failed to apply the correct law in finding discrimination" in violation of the TCA. (IB p. 43). The TCA's legislative history expresses the conferees intent that the phrase "unreasonably discriminate among providers of functionally equivalent services" intended to provide local zoning authorities the flexibility to treat telecommunications facilities that create *different* visual, aesthetic and safety concerns differently even if those same facilities provide functionally equivalent services. H.R. Conf. Rep. No. 104-458 104TH Cong., 2d Sess. 208 (1996) (emphasis supplied).

[21] For the full text of the pertinent provisions of the TCA, see R. 90-94.

Although it may be reasonable for a zoning authority to deny a permit for a 100 foot tower in a residential district when the same zoning authority granted a competitor's permit for a 100 foot tower in a commercial district some distance away; it is not reasonable, indeed, the circuit court correctly held that the CZAB's decision was discriminatory and in violation of the TCA when it denied a 148 foot tower in a business commercial district despite the fact that a competitor was granted a permit for a 150 foot tower in a similar business district[22] on the parcel immediately adjacent to the Property. (R. 68-69).

Later, in a footnote, the County argues that the presence of another facility in the vicinity of Omnipoint's proposed facility obviates a violation of the TCA's discrimination clause. (IB p. 45 fn. 21). The County relies on *Benjamina Nursery Farm, Inc. v. Miami-Dade County*, 170 F. Supp.2d 1246 (S.D. Fla. 2001) to support this proposition. However, the facts of the *Benjamina Nursery* case are materially different than the facts of the instant case. First, in *Benjamina Nursery*, the Applicant, Nextel, alleged discrimination on the basis that two of its competitors on five separate occasions received approvals to construct a telecommunications facility while Nextel was denied its request. The *Benjamina*

[22] The County's RU-5 zoning district permits similar business office uses as those contained in the BU-1A zoning district. Both parcels have a CDMP Business and

Nursery court concluded that it was apparent from a "casual review" of the record that the five applications that Nextel relied upon involved different sites of different sizes, comparing poles of different heights, and different zoning classifications and locations. Thus, the court reasoned that the Nextel application would have different visual impacts. Accordingly, the *Benjamina Nursery* court held it was not unreasonable for the local government to reject its application.

In its analysis, the *Benjamina Nursery* court relied upon *APT Pittsburgh Ltd. Ptnshp v. Penn. Tp. Butler County of Penn.*, 196 F.3d 469, 480 (3d Cir. 1999) (hereinafter "APT"). *APT* held that "it is not unreasonably discriminatory to deny subsequent application for a cell site that is substantially more intrusive than existing cell sits [sic] by virtue of its structure, placement, or cumulative impact". The *APT* case facts are materially different from the facts of the instant case. Omnipoint's proposed facility is only two feet shorter than the BellSouth facility immediately adjacent to the Application Property to the east. (R. 77). Both sites are located south of Sunset Drive and north of a 260-foot wide canal. (R. 79). Both sites have the same CDMP land use designations that permit business development, including utilities. (R. 75). Both sites have business zoning classifications and are developed as existing businesses. (R. 75). Neither site

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Office land use designation.

abuts residential property. (R. 75, 79, 81). But for an application of another provider on the exact same site for the exact same facility, only in theory would you have applications more similar than those presented in the instant case.

In addition, the *Benjamina Nursery* court relied upon the *APT* court's analysis that it was not unreasonable for a local government to reject an application to build a telecommunications tower in an area that already had a number of telecommunication towers. *Benjamina Nursery*, 170 F. Supp. at 1251. Unlike the *APT* case, in the instant case, the only telecommunications facility available in the immediate area is the BellSouth facility next door which did not have the structural capability to install Omnipoint's antennas and equipment. (R. 95). In fact, the record contains undisputed testimony that there is a "gap" with no facilities within four square miles. (R. 170, see also R. 87-88). Further, contrast the findings in the *APT* case, the facts of the instant case do not support a finding that Omnipoint's facility, which is two feet shorter than BellSouth's facility next door, is "substantially more intrusive" than the existing BellSouth facility.

Similarly, the County's reliance upon *PrimeCo Personal Communications Ltd. Ptnshp. v. Lake County, Florida*, 1998 WL 565036 (M.D. Fla. 1998) is misplaced. Procedurally, in *PrimeCo,* the claim of discrimination in violation of the TCA was before the court on a motion for summary judgment, not under

certiorari review. The *PrimeCo* court found that a genuine issue of fact existed as to whether the County unreasonably discriminated against *PrimeCo.* The court concluded that it need not inquire as to the reasonableness of the County's decision to deny *PrimeCo*'s application on motion for summary judgment. Further, the facts outlined in the court's opinion do not allow a proper comparison analysis to the facts of the instant case. Accordingly, the decision in *PrimeCo* is not controlling or persuasive based upon the procedural posture of the case, the decision or lack thereof on the discrimination issue, and the opinion's lack of material facts to allow a reasonable comparative analysis to the instant case.

Lastly, the County relies upon *Riverside Roof Trust, Inc. v. Board of Zoning Appeals of the City of Palatka*, 734 So. 2d 1139 (Fla. 5th DCA 1999) in support of its assertion that the circuit court erred finding discrimination in violation of the TCA. The primary distinction between the *Riverside* case and the instant case is Nextel's failure to prove the required hardship under the local zoning ordinance. Contra the instant case, Omnipoint satisfied all of the criteria in the ordinance and there was no substantial competent evidence to support denial of the application. (R. 66-70).

Accordingly, the cases the County relies upon to assert that the circuit court incorrectly applied the law on the issue of discrimination in violation of the TCA

are neither on point nor are they persuasive. Rather the cases highlight the distinctions from the case at bar, both procedurally and substantively, that support the circuit court's decision on this issue.

Even if this Court should disagree with the circuit court's analysis and decision, and perhaps upon *de novo* review may have decided the issue differently, the law on the issue of what constitutes discrimination in violation of the TCA is neither fully developed nor has a bright-line test been established. Therefore it would be impossible for the circuit court to have violated a "clearly established principle of law" that would have resulted in a departure from the essential requirements of law or a miscarriage of justice warranting a reversal. *Ivey*, 774 So. 2d at 682. Accordingly, absent a miscarriage of justice, this Court should affirm the circuit court's decision.

b. Resolution Failed to Contain Written Findings as Required by TCA

The TCA requires local zoning authorities to issue a written decision separate from the written record (i.e., transcript). 47 U.S.C. § 322 (c)(7)(B)(iii)(1996); *See e.g.,. Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001). The written decision must contain an explanation of the reasons for denial tied to evidence in the record to allow a reviewing court the opportunity to make a fully informed decision in accordance with the appropriate

standards of review. *Id*. The Middle District of Florida has interpreted that requirement to mean that the written decision must contain written findings of fact tied to evidence in the record. *AT&T Wireless Services of Florida, Inc. v. Orange County*, 982 F. Supp. 856, 859 (M.D. Fla. 1997); *accord Benjamina Nursery*, 170 F. Supp.2d at 1252; *PrimeCo,* 1998 WL 565036*8; *Virginia Metronet, Inc. v. Board of Supervisors of James City County*, 984 F. Supp. 966, 972 (E.D. Va. 1998). Further, the Middle District held that such a violation standing alone is sufficient to quash a decision that is governed by the mandates of the TCA. *AT&T v. Orange County*, 982 F. Supp. at 859.

Acknowledging that *Snyder* sets forth the general rule in Florida regarding zoning decisions and further, that *Snyder* expressly does not require written findings of fact[23], nevertheless, with respect to zoning decisions involving telecommunications facilities, the requirements (or limitations upon the zoning authority of local governments) imposed by the TCA are in addition to the requirements of governing state law and must be observed. The TCA does not conflict with Florida law, rather, it requires additional procedural requirements such as a written explanation for the reasons of denial tied to evidence in the

record. 47 U.S.C. § 322 (c)(7)(B)(iii). Such procedural requirements are not mere technicalities. Rather, the requirements were created to provide for fully informed judicial review in order to expedite the appellate process[24] and avoid discrimination as well as arbitrary decision-making as prohibited by the TCA. *Western PCS II Corp.*, 957 F. Supp. at 1236.

The written decision in the instant case does not meet the standard imposed by the TCA. Accordingly, this Court should affirm the decision of the circuit court on this violation of the TCA, which standing alone is dispositive of the case.

D. The District Court Properly Concluded that the Absence of Zoning Standards For Telecommunications Facilities Would Violate the TCA's Prohibition Clause

The issue of whether the County's ordinances, or in this case, the lack of an ordinance prohibits or effectively prohibits the provision of wireless services in Miami-Dade County is determined *de novo* by the district court. *National Tower, LLC v. Plainville*, 297 F. 3d at 22. In turn, this Court reviews the district court's legal conclusions *de novo*. *Id*.

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[23] Although the Florida Supreme Court, as well as other Florida courts, have recently called this aspect of the *Snyder* decision into question. *See G.B.V. Int'l*, 787 So. 2d at 846.

[24] Clearly the expressed intent of the TCA. 47 U.S.C. § 322(c)(7)(B)(v).

"[T]here is no general rule classifying what is an effective prohibition." It is a case-by-case determination. *Second Generation Properties, L.P. v. Pelham*, 313 F.3d 620, 630 (1st Cir. 2002). The TCA's anti-prohibition clause is not restricted to blanket bans. *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999). The clause may at times apply to individual zoning decisions. *Id*.

The courts have employed several different tests to analyze violations of the TCA's anti-prohibition clause. One test analyzes whether or not a prohibition "in effect" occurs when a local zoning authority administers criteria in way that is impossible for an applicant to satisfy. *National Tower, LLC v. Plainville*, 297 F.3d at 14. Another formulation is the significant gap coverage analysis. Many courts have held that the denial of a zoning approval that would close a significant gap in coverage amounts to a violation of the anti-prohibition clause. *See e.g., APT Pittsburgh*, 196 F.3d at 479-80; *National Tower, LLC v. Plainville*, 297 F.3d at 17-18; *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000) (holding local government cannot satisfy TCA anti-prohibition mandate by simply allowing the construction of some telecommunication facilities even though services are not comprehensively available throughout the jurisdiction.); *National Tower, LLC and Omnipoint*

Communications MB OPS, LLC v. Frey, 164 F. Supp.2d at 188 (holding that a two mile gap in coverage along a heavily traveled roadway is clearly significant within the meaning of the TCA); *see also Omnipoint Communications Enterprises, L.P. v. Charleston Tp.*, 2000 WL 128703*2 (E.D. Pa. 2000) (holding service gap of close to 2 ½ miles constitutes a violation of the anti-prohibition clause of the TCA); *see generally American Cellular Network Co., LLC v. Upper Dublin Tp.*, 203 F. Supp. 2d 383 (E.D. Pa. 2002) (employing a gap in coverage analysis).

It is highly unlikely that Congress intended a flat "any service equals no effective prohibition" rule. *Second Generation*, 313 F.3d at 633-634. Use of the word "services" rather than "service" in the TCA's anti-prohibition clause[25] evidences that Congress contemplated multiple carriers competing to provide services to consumers[26]. If the anti-prohibition rule were interpreted to mean some coverage by one carrier, it would necessarily defeat the claims of other carriers and the result would be "crazy patchwork quilt of intermitted coverage" that might have "the effect of driving the industry towards a single carrier." *Second*

[25] §332(c)(7)(B)(i)(II) (for full text see R. 90-94).

[26] The TCA "provide[s] for a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition." S. REP. NO. 104-230, at

Generation, 313 F.3d at 634. Clearly, that is not the Congressional intent. (See footnote 27).

Finally, another test employed by the courts is whether or not the carrier has shown from the language of the local zoning ordinance or circumstances that not only has its application been rejected but that further "reasonable efforts are so likely to be fruitless that it is a waste of time even to try." *Town of Amherst,* 173 F.3d at 14. Under the circumstances of the case at bar, there are currently no effective zoning laws under which a carrier can seek approval of a zoning request to permit a telecommunications facility. Should this Court uphold the district court's determination that the subject ordinances are facially unconstitutional, these circumstances will remain in effect. Thus, any zoning request will not even be accepted by the County, let alone considered or rejected by the CZAB, until such time as new standards are enacted. Therefore it is not a question that efforts are "likely to be fruitless", it is inevitable that they will be fruitless because there is no opportunity to even apply for a permit to construct telecommunications facilities that would require public approval.

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1 (1996); H.R. Conf. Rep. No. 104-458 at 113 (1996), *reprinted in* 1996, U.S.C.C.A.N. 124.

Based on the foregoing authorities, the district court correctly held that without any zoning ordinance or standards to permit telecommunications facilities, those circumstances violate the anti-prohibition clause of the TCA[27].

CONCLUSION

Omnipoint prevailed upon first-tier certiorari review on three separate bases, including two violations of the Telecommunications Act of 1996 and the County's failure to support its decision with competent substantial evidence. The County appealed. The district court affirmed and discussed an additional basis for affirmance, which gives rise to this appeal. Based on the foregoing Answer,

[27] The County's allegation that the district court "required the approval of cell towers in residential and all other neighborhoods where public hearings were previously required" which "unnecessarily put a large portion of the County at risk having cellular towers constructed without the safety and compatibility protections previously afforded" is inflammatory and simply has not come to pass. (IB p. 45-46). First, the County has always had the option since March 6, 2003 of enacting new standards governing the location, placement and construction of telecommunications facilities. However, in the interim during the pendency of these appeals, the County has elected not to adopt any standards, although draft standards are pending enactment at this time. Second, the County fails to inform this Court that the wireless industry providers in the area of Miami-Dade County pledged on the record, in public hearing, to not seek such building permits absent public hearing approval, provided the County and the industry continue to work together in good faith to establish new and reasonable standards to guide the decision-making zoning process for telecommunications facilities. To date, not a single building permit has been applied for by any wireless service provider in Miami-Dade County subsequent to the district court's opinion in an effort to avoid public hearing approval.

Omnipoint respectfully requests that this Court uphold the district court's affirmance of the circuit court's decision, reverse the decision of the district court declaring the subject ordinance facially unconstitutional and declare the subject ordinances unconstitutional as applied to telecommunications facilities. Further, Omnipoint respectfully requests that this Court order the County to determine the Application consistent with the circuit court's opinion forthwith. In the event this Court affirms the district court's decision holding the subject ordinances facially unconstitutional, Omnipoint respectfully requests that this Court uphold the district court's affirmance of the circuit court's decision and affirm the district court's finding of prohibition in violation of the Telecommunications Act of 1996 for lack of zoning procedures and standards to permit application for, and approval of, such facilities as required by the TCA.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was delivered via First Class U.S. Mail this 9th day of April 2003 to: Jay Williams, Esq. and Robert L. Krawcheck, Esq. Assistant County Attorneys, Miami-Dade County, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128; Lynn M. Dannheisser, City Attorney, and Hans Ottinot, Deputy City Attorney for the City of Sunny Isles Beach, Florida, 17070 Collins Avenue, Suite 250, Sunny Isles Beach, Florida 33160; Alejandro Villarello, City Attorney, and Joel E. Maxwell, Deputy City Attorney, City of Miami, City Attorney's Office, Miami Riverside Center, 444 S.W. 2nd Avenue, Suite 945, Miami, Florida 33130-1910; William M. Grodnick, City Attorney, City of Hialeah, 501 Palm Avenue, 4th Floor, Hialeah, Florida 33010; Eileen Mehta, Esq., 200 South Biscayne Blvd, Suite 2500, Miami, FL 33131; Elizabeth M. Hernandez, City Attorney, City of Coral Gables, 405 Biltmore Way, Coral Gables, Florida 33134; Eileen Mehta, Esq., Attorney for

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief complies with the font requirements of Rule 9.210(2) *Florida Rules of Appellate Procedure*.

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