ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER SC02-815

MIAMI-DADE COUNTY,

Petitioner,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent.

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

PETITIONER'S AMENDED BRIEF ON JURISDICTION

ROBERT A. GINSBURG
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
Tel: (305) 375-5151
Fax: (305) 375-5634
By
Jay W. Williams and
Robert L. Krawcheck
Assistant County Attorneys

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INTRODUCTION[1]

Creating direct and express facial conflict with decisions of this Supreme Court, the Third District Court of Appeal has *sua sponte* declared legislative enactments facially unconstitutional *where no party ever raised the issue or had notice and an opportunity to brief it.* The sole basis for the district court's decision was its finding that County zoning ordinances were facially unconstitutional, even though the circuit court had reached the same practical outcome based upon dispositive *non-constitutional* grounds. The decision is thus in excess of the district court's jurisdiction and in direct and express conflict with, *inter alia*, *State v. Turner*, 224 So. 2d 290 (Fla. 1969); *Whitted v. State, 362* So. 2d 668 (Fla. 1978), and *Singletary* v. *State*, *322* So. 2d 551 (Fla. 1975).

Further exceeding its jurisdiction, the third district court improperly made its own finding of fact and decided facial constitutionality on limited *second-tier certiorari.* The court undertook these *sua sponte* acts unnecessarily, *even* ***expressly*** *concluding that the circuit court had reached the "rightresult" on "different" but not erroneous grounds.* Emphatic, recent Supreme Court decisions admonish that

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[1] Miami-Dade County (the "County") seeks to invoke this Court's discretionary jurisdiction under *Art.* V, § (3)(b)(3), Fla. Const., to review *Miami-Dade County v. Omnipoint Holdings, Inc.*, No. 3D01-2347 (Fla. 3d DCA March 6, 2002) (the "decision"), a copy of which is attached hereto (Op.). All emphasis herein is supplied by the County.

second-tier certiorari review is limited solely to correcting *departures from the essential requirements of law* that result in a *miscarriage of justice*. The district court opinion is thus in direct and express conflict with, *inter alia*, *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838 (Fla. 2001); *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679 (Fla. 2000); and *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995).

This Court should exercise its discretionary jurisdiction because this is a tnatter of great public importance. Contrary to express prohibitions of the Supreme Court, the decision below is precedent for the district and circuit courts to *sua sponte* hold *any* legislation facially unconstitutional in any procedural setting, even where a constitutional issue has neither been raised nor briefed by the parties. The opinion also establishes precedent requiring that, in the Third Judicial District alone, the vast bulk of state and local legislation must conform not to the time-honored "reasonable relationship" standard, but rather to the heightened specificity heretofore applicable only to regulations affecting free speech or suspect classes. This new rigid standard would allow little, if any, discretion by quasi-judicial bodies, forever changing the public land use hearing process. It would also eliminate the opportunity to develop a fact-based record upon which the unique aspects of particular land parcels may be considered while balancing competing

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land use considerations, and would deprive the public of a participatory process in which all constitutional interests may be protected.

As a practical matter, the decision has virtually halted the County's zoning process, which is essential to economic development. Of immediate life-safety and quality of **life** concern is the fact that the ruling effectively requires the County to allow the indiscriminate placement of telecommunications towers in residential and other neighborhoods regardless of safety and compatibility considerations.

STATEMENT OF THE CASE AND FACTS

The circuit court quashed the County's denial of Omnipoint's applicati n to erect a 148-foot high telecommunications monopole, finding that the denial was not based on substantial competent evidence, and that it unreasonably discriminated among providers of equivalent services in violation of the Federal Telecommunications Act, 47 U.S.C. § 332 (1996) **(TCA).** Op. 1-2. On second-tier certiorari review, the district court expressly bypassed these dispositive issues and *sua sponte* held the County's zoning ordinances *facially* unconstitutional, relying on out-of-context quotations from two federal First Amendment cases. Op. **2, 4-5.** The district court then directly ordered a remand requiring the County to approve the tower based upon its own factual finding that striking the ordinances would "have the effect of prohibiting the provision of personal wire[less] services in violation of the [Federa Telecommunications Act]." Op. **8.** This new factual

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TELEPHONE (305) 375-0151

finding was made without citation to either the record or the circuit court opinion, and was directly contrary to the circuit court's finding that *functionally* ***equivalent*** services already existed in the area. Op. 2. The remand requires the County to approve the tower before it can amend the County Code to address safety and compatibility.

SUMMARY OF ARGUMENT

The decision below is both procedurally and substantively in express and direct conflict with numerous decisions of the Supreme Court and of other district courts of appeal, Procedurally, the decision is precedent for any lower court within the state's most populous area to *sua sponte* strike any state or local legislation as facially unconstitutional where the parties have neither raised the *issue* nor been given an opportunity to brief it. Moreover, the decision established that conflicting precedent, made a finding of fact, and ordered a particular zoning approval while *denying second-tier certiorari,* all in express and direct conflict with several recent decisions of this Court defining and delimiting the scope of such second-tier review. Substantively, the decision means that within the Third Judicial Circuit all state and local legislation must meet a different standard of review for constitutionality than in the remainder of the state, *i.*c., the scrutiny and exactitude

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normally reserved for federal First and Fourteenth Amendment issues, rather than the historic reasonable relationship test.[2]

ARGUMENT

A. THE DECISION CONFLICTS WITH DECISIONS LIMITING THE EXERCISE OF JURISDICTION TO DECLARE LEGISLATION UNCONSTITUTIONAL

The decision below declared the County's ordinances unconstitutional even though no constitutional question was raised or preserved.[3] The decision thus conflicts with many cases of this Court, which "has, on a number of occasions, held that it is not only unnecessary, but *improper* for a Court to pass upon the constitutionality of an act, the constitutionality of which is not challenged." *State v. Turner*, **224** So. 2d 290,291 (Fla. 1969).

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[2] The decision is not distinguishable as pertaining to the Telecommunications Act because the court **struck** the ordinances as being unconstitutional "facially," *i.e.*, in *all* instances, and not simply for being unconstitutional "as applied' to telecommunications facilities.

[3] The decision below assumed *arguendo* that the constitutional issue had not been raised, stating "Arguably Omnipoint *did not preserve* the constitutional question." However, as discussed *infra*, p. 6, by characterizing the ordinances as "fundamentally unfair and unjust," the court "*therefore proceeded'* to hold them unconstitutional **even** though the issue had not been preserved. Op. 6, n.6. Any contention by Omnipoint that somehow it did preserve the question would be immaterial because conflict jurisdiction is based on what appears on the face of the decision, *Heaves v. State,* 485 So. 2d 829, 830 (Fla. 1986), and the decision assumed that the constitutional issue had not been preserved.

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TELEPHONE (305) 375-5151

In *Turner*, the circuit court *sua sponte* held statutes unconstitutional. In contrast to the instant case, however, the constitutional issue *was* briefed for Supreme Court *review*. This Court nevertheless held: "It is not part of the judicial responsibility to undertake to invalidate [legislative acts] unless the parties to the cause raise the question ...." *Id.* Similarly, where a constitutional issue *was* raised and preserved in the *lower* court, but *not* on appeal, this Court rejected the issue. *Whitted v. State, 362* So. 2d 668, 670 n.2 (Fla. 1978). The decision below presents egregious conflict because the district court passed upon a constitutional question that was *never* raised. To support its *sua sponte* decision to decide that issue, the district court, by footnote, referenced *Pollock v. Department of Health and Rehabilitative Services*, 481 So.2d 548 (Fla. 5th DCA 1986), as authority for striking legislation that is "fundamentally unfair and unjust". Op. 6, n.6. *Pollock*, however, in sharp contrast to the decision below, expressly found that "the [constitutional] issue ***was*** properly preserved." *Id.*, at 549.[4] Moreover, the *absence*

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[4] While *Pollock* also contained *dicta* suggesting that the "fundamentally defective and unjust" statute involved in that case might nevertheless be reviewed *sua sponte*, the facts underlying *Pollock's dicta* are vastly and materially at variance from those in the present case. *Pollack* involved the termination of ***parental*** *rights* by administrative "whims and caprices" pursuant to a statute with "*no* standards or guidelines" whatsoever, *id.*, whereas the present case involves legislation that not only contains standards but multiple standards, Op. 3-4, **6-7,** which the third district itself has applied in numerous cases over the decades. Moreover, *Pollock* was decided on *appeal, not* on second-tier certiorari. Thus, even

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TELEPHONE (305) 375-5151

of need to prevent "fundamental unfairness" is apparent in that the decision below *denied* certiorari, leaving the circuit court order "intact". Op. **8.**

In expressly bypassing dispositive non-constitutional issues in order to declare the County's ordinances unconstitutional, the decision below also conflicts with a time-honored line of cases holding that courts will not decide the constitutionality of legislative enactments where decisions can rest on other grounds. See, *e.g.*, *Singletary v. Slate,* 322 So. 2d 551, 552 (Fla. 1975). Conflict with *Singletary* and related cases is highlighted by the decision's express statement that the circuit court had reached the **"right** result" on "different" (but not erroneous) grounds. Op. **8.**

The decision below further conflicts with decisions of the Supreme Court and other district courts based not only upon an exceeding of jurisdiction but also upon its substantive holdings. In finding the ordinances *facially* invalid, the court relied on two inapposite federal court First Amendment heightened scrutiny

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if *Pollock's* ***dicta*** were its holding, the circuit court's reliance thereon would support conflict jurisdiction. *See Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520, 521 (Fla. 1980) (conflict jurisdiction exists where district court "misapplies the law by relying on a decision which involves a situation materially at variance with the one under review"); *Acensio v. State,* 497 So. 2d 640 (Fla. 1986). *See also Heggs*, 658 So. 2d at 526 n.3, discussed *infra* at 8-10 ("certiorari will *only* lie to review judicial or quasi-judicial action, *never* purely legislative action").

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TELEPHONE (305) 375-5151

decisions examining zoning ordinances on an "*as applied* " basis. The decision below therefore expressly and directly conflicts with two lines of cases. The first line holds that zoning ordinances are to be judged under a "reasonable relationship" standard that is far less stringent than the First Amendment heightened scrutiny analysis employed in the decision below. *See Ilkanic v. City of* ***Fort*** *Lauderdale*, 705 **So.** 2d 1371, 1372 (Fla. 1998) (test is whether statute bears a reasonable relationship to a permissive legislative objective); *United Yacht Brokers, Inc.* ***v.*** *Gillespie*, 377 So. 2d 668, 671 (Fla. 1979). The second line of cases holds that "compatibility" standards in zoning ordinances (such as the standards stricken by the decision below) ***are*** constitutional. *See Life Concepts v. Harden*, 562 So.2d 726, 728 (Fla. 5th **DCA** 1990) (word "compatible" in zoning ordinance is sufficiently definite to limit zoning board's discretion); *Nostimo, Inc. v. City of Clearwater*, 594 So.2d 779 (Fla. 2d DCA 1992) ("compatibility" and "excessive burden" standards of challenged zoning ordinance not facially unconstitutional).

B. THE DECISION BELOW CONFLICTS WITH DECISIONS LIMITING THE DISTRICT COURT'S SECOND-TIER CERTIORARI JURISDICTION.

The decision below holds the County's ordinances facially unconstitutional while simultaneously "affirming" the circuit court's non-constitutionality based decision. It therefore directly and expressly conflicts with this Court's recent

decisions reaffirming the district courts' *limited* jurisdiction on second-tier certiorari. In *Broward County* v. *G.B.V. International, Ltd.*, *787 So.* 2d **838** (Fla. 2001), this Court held that second-tier certiorari "gives the upper court the prerogative to reach down and halt a *miscarriage of justice* where no remedy exists". *Id.*, at 842. Second-tier certiorari is not used to address mere legal error. *Id. Accord Haines City Community Development v. Heggs*, 658 So. 2d **523,** 528 (Fla. 1995) (second-tier certiorari requires "*violation of clearly established principle of law* resulting in a *miscarriage of justice*"). Rather than preventing *both* a clear violation of law and a miscarriage of justice, the decision did *neither,* found no error at all, and *denied* certiorari. The court simply utilized certiorari to declare legislation unconstitutional, in conflict with *G.B.V.* and *Heggs.* The decision thus also conflicts with *Ivey* v. *Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2002) (third district court reversed for yielding to "great temptation … to announce a miscarriage of justice *simply to provide precedent....*").

The district court's fact-finding also conflicts with this Court's express prohibition of fact-finding even in broader first-tier certiorari proceedings. *See Heggs*, 658 So. 2d at 530. Moreover, by characterizing the circuit court's remand as being "for the purpose of the *Board*'s *granting (zoning] approval"*, Op. **8,** the decision below conflicts again with *G.B.V.* at 844-845 ("appellate court has *no power* … to direct the respondent to enter *any particular order* or judgment").

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TELEPHONE (305) 375-5161

Finally, the holding that the County's ordinances were *facially* unconstitutional conflicts with decisions that do not permit such holdings on certiorari. *Nostimo, Inc. v. City of Clearwater*, 594 *So.* 2d 779, **782** (Fla. 2d DCA 1992) (challenge to validity of zoning provision properly brought as *declaratory* action); *Odham v. **Peterson,** **398 So.** 2d 875, 876, n.1 (Fla. 5th DCA 1981) reversed in part on other grounds*, 428 So. 2d **241** (Fla. **1983).** *See also Heggs*, ***658*** So. 2d at 526 n.3 (certiorari will not lie to review purely legislative action).

CONCLUSION

Based upon express and direct conflict of decisions and **extreme** public importance this Court should exercise jurisdiction.

Respectfully submitted,

ROBERT **A.** GINSBURG
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. First Street
Miami, Florida 33128-1993
Tel: *(305)***375-5**151
Fax: (305) 375-5634

By: _____
Jay W. Williams
Assistant County Attorney
Florida Bar No. 379107

By: _____
Robert L. Krawcheck
Assistant County Attorney
Florida Bar No. 128019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 3rd day of May, 2002, to: ***Deborah L. Martohue, Esq.***, Hayes & Martohue, 5959 Central Avenue, Suite 104, St. Petersburg, Florida 33710.

Jay W. Williams
Assistant County Attorney

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

Jay W. Williams
Assistant County Attorney

OFFICE OF COUNTY ATTORNEY, MIAMI-DADE COUNTY, FLORIDA
TELEPHONE (305) 375-5151

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AND, IF FILED. DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2002

MIAMI-DADE COUNTY,

Petitioner,

vs.

OMNIPOINT HOLDINGS, INC.,

Respondent.

** CASE NO. 3D01-2347

** LOWER TRIBUNAL CASE NO. 01-029AP

Opinion filed March 6, 2002.

On petition for writ of certiorari to the appellate division of the Circuit Court of Dade County, Amy Steele Donner, Gisela Cardonne, Manuel A. Crespo, Judges.

Robert A. Ginsburg, County Attorney, Jay W. Williams, Assistant County Attorney, for petitioner.

Hayes & Martohue and Deborah L. Martohue (St. Petersburg), for respondent.

Before JORGENSON, GODERICH, and FLETCHER, JJ.

FLETCHER, Judge.

Miami-Dade County seeks a writ of certiorari quashing a circuit court decision which directs the County's Community Zoning Appeals Board 12 [Board] to grant the application of Omnipoint

Holdings, Inc. [Omnipoint] for an unusual use, a non-use variance, and a modification of a condition attached to an earlier resolution. This grant would result in permission for Omnipoint to erect a telecommunications monopole with a height of 148 feet.

The circuit court's decision ordering the Board to approve Omnipoint's application has two separate bases: (1) that the record before the Board reflects a lack of substantial competent evidence supporting the Board's denial of the application, and (2) that the Board's decision is in violation of section 332(c)(7)(B)(i)(I) of the Federal Telecommunications Act, 47 U.S.C. § 332 (1996) [Fed Act]. Our decision turns only on section 332(c)(7)(B)(i)(II) rather than (I).[1]

The Fed. Act states in pertinent part:

> "(i) 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."

Our first concern is what we conclude to be the ability of the

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[1] We do not reach the various questions as to substantial competent evidence.

Board to deny arbitrarily the provision of wireless services,[2] which ability stems from the County's zoning code sections **which** contain the criteria for the grant or denial of unusual uses, non-use variances, and modifications of **conditions.**

Our discussion starts with unusual uses, **which are** established by section 33-13 (e), Miami-Dade County Code. This section contains a lengthy list of uses which are conditioned an approval after public hearing. Among those uses is the requested monopole. The code section which purports to create the criteria which must be met for approval of unusual uses is section 33-311(A)(3), which provides in pertinent part:

> "Special exceptions, unusual and new uses. [The county zoning boards have authority to] [h]ear application for **and** grant or **deny special** exceptions; that is, those exceptions permitted by the regulations only upon approval after public hearing, new uses and unusual uses which by the regulations are only permitted upon approval after public hearing, provided the applied for exception or use, including exception for site or plot plan approval, in the opinion of the Community Zoning Appeals Board, would not have an unfavorable effect on the economy of Miami-Dade County, Florida, would not generate or result in excessive noise or traffic, cause undue or excessive burden on public facilities, including water, sewer, solid waste disposal, recreation, transportation, streets, roads, highways or other such facilities which have been constructed or

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[2] There is no doubt that wireless services - at least under present technology - require a series of poles of substantial height in order to function.

which are planned and budgeted for construction, are accessible by private or public roads, streets or highways, tend to create a fire or other equally or greater dangerous hazards, or 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."

This language is legally deficient because it lacks objective criteria for the County's zoning boards to use in their decision making process. As stated in University Books & Videos, Inc. V. Miami-Dade County, Fla., 132 F.Supp.2d 1008, 1017 (U.S.D.C.,S.D. 2001), in relation to this exact code section:

"First, the public hearing requirement grants too much discretion to the CZAB. The procedure for public hearings . . . allows the CZAB to accept or reject an application based on vague and subjective criteria. . . . The standards for granting or denying an application are not precise or objective. Indeed, they are almost entirely subjective. This is improper. See Lady J. Lingerie, 176 F.3d at 1362.[3]"

The court also noted that:

"Considerations of the public interest or incompatibility with surrounding land area are precisely the subjective and vague criteria that were rejected in **Lady J. Lingerie**."

The referenced Lady J. Lingerie court dealt with provisions of

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[3] Lady J. Lingerie v. City of Jacksonville, 176 F.3d **1358** (U.S.C.A. 11 **1999)**.

the Jacksonville Zoning Code,[4] which provisions are similar to those of section 33-311(A)(3), Miami-Dade County Code. As to the similar Jacksonville code language the Lady J. Lingerie court stated (at 1361):

> "None of the nine criteria is precise and objective. All of them - individually and collectively - empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general 'compatibility' or 'environmental' considerations."

We recognize, of course, that Lady J. Lingerie and University Books & Videos dealt with First Amendment issues surrounding adult bookstores and entertainment centers. The Lady J. Lingerie court, concentrating on such rights, stated en passant that Jacksonville was free to use its vague zoning criteria far other types of applications. As the federal court did not have that issue before it, the comment was gratuitous. It is also out of sync with Florida law. Consistently Florida courts have declared unconstitutional ordinances that lack objective standards to guide zoning and other quasi-judicial boards in making their decisions.[5]

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[4] The Jacksonville code language may be found at pp. 1369-70, Lady J. Lingerie.

[5] Sufficient guidelines are required so that:

1. persons are able to determine their rights and duties;
2. the decisions recognizing such rights will not be left to arbitrary

See North Bay Village v. Blackwell, 88 So. 2d 524 (Fla. 1956); Drexel v. City of Miami Beach, 64 So. 2d 317 (Fla. 1953); City of Miami v. Save Brickell Avenue, 426 So. 2d 1100 (Fla. 3d DCA 1983); Pinellas County v. Jasmine Plaza Inc., 334 So. 2d 639 (Fla. 2d DCA 1976). Thus as section 33-311(A)(3) of the county code does not provide definite, objective criteria to guide the County's zoning boards in making their decisions, it is unconstitutional.[6]

In relation to Omnipoint's request for modification of a condition contained in an earlier zoning resolution, it is section 33-311(A)(7), Miami-Dade County Code that governs.[7] It reads:

> "[The county zoning boards have authority to] [h]ear applications to modify or eliminate any condition or part thereof which has been imposed by any final decision adopted by resolution, and to modify or eliminate any provisions of restrictive covenants, or parts thereof, accepted at public hearing, except as otherwise provided in Section 33-314(C)(3);

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administrative determination;
3. all applicants will be treated equally; and
4. meaningful judicial review is available.

[6] Arguably Omnipoint did not preserve the constitutional question. However, sections 33-311(A)(3) and 33-311(A)(7) are fundamentally unfair and unjust. We therefore proceed to hold them invalid. See Pollock v. Department of Health & Rehabil. Servs., 481 So. 2d 548 (Fla. 5th DCA 1986).

[7] The earlier condition required development of Omnipoint's property in accordance with a specific site plan. The modification would amend the site plan so as to allow the monopole.

> provided, that the appropriate board finds after public hearing that the modification or elimination, in the opinion of the Community Zoning Appeals Board, 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."

As can readily be observed this section also lacks constitutionally required objective criteria and is therefore invalid.[8]

We are thus left with the question of what effect the invalidityof the criteria has on Omnipoint's application in light of the Fed. Act, whichprecludes local governments fromprohibiting the provision of wireless services. Ordinarily when the code standards far special exceptions, unusual uses, new uses, and conditional uses are declared invalid, the opportunity to obtain the exception or other use is lost. See City of St. Petersburg v. Schweitzer, 297 So. 2d 74 (Fla. 2d DCA 1974), cert. denied, 308 So. 2d 114 (Fla. 1975). Here, however, unlike Schweitzer, we are dealing with the intent behind the Fed. Act. Keeping in mind that the Board denied Omnipoint an unusual use in a zoning district in

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[8] As to Omnipoint's request for a non-use variance, the language of section 33-311(A)(4)(b) of the code (governing non-use variances) is also unconstitutional. See the discussion thereof in the concurring opinion in Miami-Dade County v. Brennan, 26 Fla. L. Weekly D2756 (Fla. 3d DCA 2001).

which that use is permitted after public hearing the County's unconstitutional hearing criteria have the effect of prohibiting the provisionof personal wire services inviolationofthe Federal Telecommunications Act, 47 U.S.C. § 332(c)(7)(B)(i)(II).

As the circuit court reached the right result (although on a different basis) we deny the County's petition for writ of certiorari and leave intact the circuit court's remand to the Board for the purpose of the Board's granting approval of Omnipoint's application for the monopole.