ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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

MIAMI-DADE COUNTY,

Petitioner,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent.

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

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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INTRODUCTION[1]

Respondent prevailed upon first-tier certiorari review on three separate bases, including two violations of the Telecommunications Act of 1996 ("TCA") and the County's failure to support its decision with substantial competent evidence. *See* Cir. Ct. **Op.,** ex, **A.** The County appealed. The Third District Court affirmed and discussed an additional basis for affirmance, which gives rise to the Petitioner's request for certiorari review by this Court. (See Op.).

Perhaps, the more appropriate remedy in this case is a legislative one that addresses the unique zoning framework present in Miami-Dade County. Miami-Dade County manages growth on a neighborhood basis[2] 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 fourteen neighborhood-zoning boards[3]. The court below held that the existing zoning criteria runs afoul of the Constitution because at a minimum, there is the

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[1] Abbreviations shall be the same as those set forth in Petitioner's Amended Brief On Jurisdiction. Circuit Court Opinion will be referenced as "Cir. Ct. Op.".

[2] 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.

[3] Known as Community Zoning Appeals Boards or "CZABs".

opportunity for inconsistent, arbitrary and discriminatory zoning decisions caused by the lack of sufficient standards.

SUMMARY OF ARGUMENT

The Decision below neither procedurally nor substantively conflicts with any prior decisions of this Court or of any sister District Courts. Courts are encouraged to exercise judicial restraint in deciding constitutional issues. However, if a legislative enactment, including a zoning ordinance, runs afoul of the Constitution, it renders the ordinance fundamentally defective and unconstitutional. The court below not only has the authority, it had the duty to declare a fundamentally defective or unjust ordinance unconstitutional and to maintain the Constitution as the fundamental law of the State.

ARGUMENT

A. A District Court May Declare Legislation Unconstitutional If It Is Fundamentally Defective

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. *Cantor,* 489 So.2d at 20; *accord*

Dralus v. Dralus, 627 So.2d 505, 508 (Fla. 2nd **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. Conwuy,* 102 So.2d 622, 626 (Fla. 1958); *See also Pollock v. Dept. of Health & Rehab. Servs.,* 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 Petitioner do not prohibit courts reviewing quasi-judicial decisions from deciding issues of constitutionality that go to the fundamental nature of the case[4]. *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."). The *Mozo* Court's 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 fundamentally defective or unjust. *See e.g., Florida*

[4] *Whitted v. State, 362* So.2d *668* (Fla. 1978); *State v. Turner,* 224 So.2d 290 (Fla. 1969); and *Singletary v. State, 322* So.2d *55* 1 (Fla. 1975) involve preservation of constitutional issues relating to state statutes in a criminal trial *de novo* proceeding.

Home Builders Ass'n. v. Div. Of Labor Bureau of Apprenticeship, 367 So.2d 219 (Fla. 1979); *Miami-Dude County v. Save Brickell Ave., Inc.* 426 So.2d 1100 (Fla. 3rd DCA 1983).

Zoning ordinances are presumed valid and subject to the fairly debatable rule. *City of Miami Beach v. Ocean & Inland, Co., 3* So.2d 364, 360 (Fla. 1941). However, the fairly debatable rule does not warrant support of the proposition that zoning boards are infallible and that any kind of zoning ordinance will be upheld. *City of Miami Beach v. Lachman,* 71 So.2d 148, 150 (Fla. 1953). If an ordinance infringes upon state or federal constitutional guarantees unreasonably, such ordinance is not reasonably debatable and will be held invalid. *Id.* at 150. Consistently, Florida Courts have struck down zoning ordinances that lack clear, definite and objective criteria that permit the exercise, or the opportunity to exercise, arbitrary or discriminatory decision-making. See Op. **pp.** *5-6 citing North Bay Village v. Blackwell*, 88 So.2d 524 (Fla. 1956); *Drexel v. City of Miami Beach,* 64 So.2d 317 (Fla. 1958); *Save Brickell Ave.,* 426 So.2d at 1104; *Pinellas County v. Jasmine,* 334 So.2d 639, 640 (Fla. 2d DCA 1976); See *also Clarke v. Morgan, 327* So.2d 769 (Fla. 1975); *Effie, Inc. v. City of Ocala*, 438 So.2d 506 (Fla. 5th DCA 1983); *But cf. Life Concepts, Inc. v. Harden, 562* So.2d 726 (Fla. 2d DCA

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

1990) (holding the term "compatible" constitutional because the plain and ordinary meaning was objectively measurable within the context of the zoning ordinance); *Nostimo, Inc. v. City of Cleurwater*, 594 So.2d 779 (Fla. 5th DCA 1992) (holding the term "compatible" constitutional in consideration of the additional factors[5] set forth in the Code, but unconstitutional as applied).

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. *Lachman*, 71 So.2d at 150. 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. 7 So.2d at 150.

The Court below held the subject ordinances unconstitutional because each provides the CZABs the ability to "deny arbitrarily the provision of wireless services" stemming from the lack of "objective criteria". **(Op. pp.** 3-4). The court

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[5] The *Nostimo* opinion does not quote the "additional factors"

below quoted the Southern District Court's analysis of the identical provisions of the Code for the proposition that the Code grants "too much discretion to the CZAB" and the criteria at issue are "vague and subjective", "not precise or objective" and thus "improper". See **Op.** p. 4 *quoting University Books & Videos, Inc. v. Miami-Dude County, Fla,* 132 F.Supp.2d 1008, 1017 (S.D. Fla. 2001).

However, contrary to Petitioner's assertion, the court below did not apply a heightened scrutiny analysis by reference to *University Books* and *Lady Lingerie*[6]. (Pet. p. 8). Rather, it expressly acknowledged that *University Books* and its predecessor *Lady Lingerie* are First Amendment cases. Op. at p.5. In fact, the court below properly rejected the *Lady Lingerie* Court's dicta that stated vague zoning criteria is acceptable for other types of zoning applications as being inconsistent with Florida law. See discussion *supra p.5.* Failure to provide sufficiently definite and objective criteria thus permitting arbitrary decision-making runs afoul of the Constitution, even under the reasonable relationship standard.[7] *See* Op. at pp. 4-7. Accordingly, Petitioner's reliance upon *Acensio v. State*[8] and *Gibson v. Avis Rent-A-Car System, Inc.*[9] to establish conflict jurisdiction

[6] *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (U.S.C.A. 11 1999).
[7] *See* Pet, p. 8. Respondent agrees that the reasonable relationship standard applies.
[8] 497 So.2d 640 (Fla. 1986).
[9] 386 So.2d 520 (Fla. 1980).

does not apply because the court below expressly did not improperly apply a heightened scrutiny analysis.

The issue is not whether the zoning ordinances serve a legitimate public purpose, but rather, do the ordinances contain sufficiently clear, definite and objective criteria to guide zoning decision-making by fourteen neighborhood zoning boards throughout Miami-Dade County in a manner that does not run afoul of the Constitution? The Supreme Court in *Hartnett* explains that the requirement that a municipal ordinance be clear, definite and certain is "particularly applicable to the exercise of zoning power which is an aspect of police power." *Hartnett v. Austin,* 93 So.2d 86, 88 (Fla. 1956). The *Hartnett* Court held that "the reason for the rule is the necessity for notice to those affected by the operation and effect of the ordinance." *Id.*[10]

The test in determining whether an ordinance lacks sufficient standards is not whether the zoning authority in fact acted capriciously or arbitrarily, but whether it had the opportunity. *Drexel,* 64 So.2d at 319. It is the opportunity that renders the ordinance fundamentally defective and unconstitutional. *North Bay Village,* 88 So.2d at 526; *See also Save Brickell Ave.*, 426 So.2d at 1104. Thus, it is the opportunity for unfair, unequal and unjust results that violates the basic

[10] *See* n.5 of Op. at **p.5** noting that "sufficient guidelines are required so that: 1. Persons are able to determine their rights and duties."

foundation of our Constitution. *See Drexel,* **64** So.2d at 319. Consistent with these maxims of Florida law, the court below properly relied upon *Drexel* and held the subject ordinances unconstitutional.

Further, Petitioner erroneously contends that the Decision below "bypassed" other dispositive issues and is based *solely* on an issue of facial constitutionality, and thus, presents conflict jurisdiction. (Pet. p. *7).* Such argument ignores the Decision's affirmance of the Circuit Court's decision. Op. **p.8.** Moreover, it 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). **A** decision is neither required to discuss every argument raised by the parties, nor the reasoning of the court below to prove to the parties that it considered all relevant issues dispositive to the case. *Id.* Accordingly, the Decision below does not present conflict with other decisions of this Court or its sister courts whatsoever including its choice to only discuss the additional basis for affirmance.

B. The Decision Did Not Exceed The Scope Of Second Tier Certiorari Jurisdiction

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 demonstrate conflict by

prohibiting appellate courts from deciding constitutional issues. First, the constitutional issue did not arise from a challenge to a purely legislative enactment. *See* Cir. Ct. Op. p. 1, Ex. **A** and Op. pp. 2-3, Rather, the court below 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. *See id;* ***See*** **Op.** at p. 3-6.

Second, this same line of cases relied upon by Petitioner expressly permits consideration of issues that may constitute a departure from the essential requirements of law." 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. See discussion *supra* **pp.** 4-5. Accordingly, 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 infirm to hold such ordinance invalid.

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[11] *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).

C. Prohibition Is A Permissible Conclusion Of Law

Contrary to Petitioners assertion, the issue of whether or not prohibition of personal wireless services exists in violation of the TCA is a conclusion of law. *See e.g., National Towers, LLC v. Frey,* **164** F.Supp.2d 185 (D.Mass. 2001) (holding as a matter of law that a 2 mile gap in coverage violates the TCA's prohibition clause); *Omnipoint Communications Enter., L.P. v. Charleston Twnshp.* 2000 WL 128703, *2 (E.D. P.A. 2000) (holding same regarding a 2 ½ mile gap in coverage). Thus, Petitioner's argument that such holding by the court below constituted prohibited fact-finding under *Heggs* is without merit.

CONCLUSION

The Decision below does not conflict with prior decisions of this Court or other sister District Courts. The circumstances Petitioner complains of as a basis for granting conflict jurisdiction should be remedied by appropriate County legislative action. The County's failure to enact appropriate objective standards and criteria relating to personal wireless services as well as the myriad of other unusual uses, special exceptions and non-use variances permitted by the County in all of its zoning classifications, does not create an obligation upon the judiciary to accept jurisdiction to resolve a purely local issue.

WHEREFORE, Respondent respectfully requests that this Court decline to accept jurisdiction in this matter and deny certiorari review.

Respectfully submitted,
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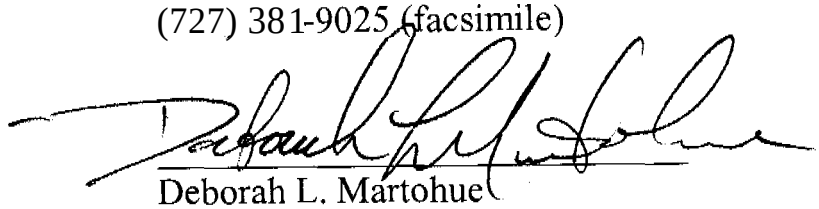

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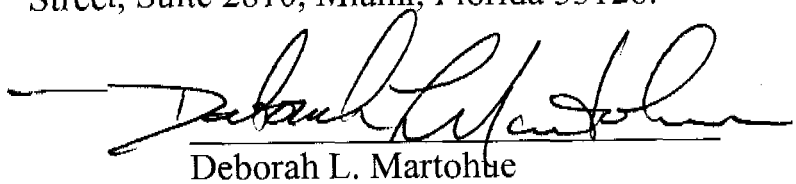
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Response To Petitioner's Amended Brief on Jurisdiction was delivered via First Class U.S. Mail this 17h day of June 2002, to: Jay Williams, Assistant County Attorney, Miami-Dade County, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128; and Robert L. Krawcheck, Esq., Assistant County Attorney, Miami-Dade County, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128.



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CERTIFICATE OF FONT COMPLIANCE

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

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Exhibit A

NOT FINAL UNTIL TIME EXPIRES
TO FILE RE-HEARING MOTION,
AND IF FILED DISPOSED OF.

IN THE CIRCUIT COURT OF
THE ELEVENIH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

APPELLATE DIVISION
CASE NUMBER 01-029 AP

OMNIPOINT HOLDINGS, INC.,

Appellant,

v.

MIAMI-DADE COUNTY,

Appellee.
_____/

Opinion filed JUL 24 2001

On appeal from a resolution of the Community Zoning Appeals Board 12, Miami-Dade County, Florida.

BERCOW & RADELL, P.A., MICHAEL RADELL, ESQ., DEBORAH L. MARTOHUE, ESQ., and MARK A. ROTHENBERG, ESQ., for petitioner, Omnipoint Holdings, Inc.

ROBERT A. GINSBERG, ESQ., and JAY W. WILLIAMS, for the Respondent , Miami-Dade County.

Before AMY STEELE DONNER, GISELA CARDONNE and MANUEL A. CRESPO.

(Crespo, J.)

Petitioner, Omnipoint Holdings, Inc., ("Petitioner"), petitions this court for the issuance of a Writ of Certiorari quashing the December 12, 2000 resolution of the Community Zoning Appeals Board 12 ("Board"), which denied the petitioner's requests for an unusual use permit to construct a 148 foot high wireless telecommunications monopole, a non-use variance of the required 164.4 foot setback and a modification of Resolution 4-ZAB-413-83. The Petitioner alleges that the Board's resolution was not supported by competent, substantial evidence and

departs from the essential requirements of the law. For the reasons stated below, we grant certiorari.

This cases involves a dispute over tlie construction of a proposed 148 foot cellular telecommunications monopole on a site located at 10460SW 73nd Street (Sunset Drive), currently occupied by a Public Storage Facility ("The Property"). The property which contains the proposed site is zoned BU-IA, (limited business). On the adjacent property to the East, there is a 150 foot BellSouth cellular telecommunications tower and immediately to the North of property, running east to west, is a corridor of 75 foot tall electric utility poles. South of the property is tlie 260 foot wide Snapper Creek Cannel[1], directly across is a fully developed residential neighborhood zoned RU-TH (residential style-Family townhomes). To tlie North, across Sunset Drive is a fully developed residential neighborhood, zoned RU-TH.

The monopole would be 148 feet tall, tlie height of a fourteen story building, and mounted with up to five sets of flush-mounted cellular antennas. The pole would taper from a diameter of six feet at the base, to four feet at the midpoint and two feet at the top. The petitioner's antennas would be mounted at a height of 120 feet, and would consist of six antennae, approximately six feet high, eight inches wide and six inches deep. The pole could accommodate tlie co-locatioti of up to four additional carriers and tlie petitioner presented evidence of letters of intent to co-locate from two other carriers.

The Staff found that the application was corisisterit with tlie Comprehensive Development Master Plan ("CDMP") arid was compatible with the surrounding area.[2] (A. at Ex. B)

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[1] Referred to in the Appendix as Sriake Creek Canal arid Snapper Creek Canal interchangably.

[2] All references to the Appendix will be cited to the section and page number. All references to the Transcript will be cited to tlie particular hearing and the page number.

Specifically, the staff found that the proposal was " . . . compatible with the business and office uses prevalent along this corridor of Sunset Drive." As such, the Staff gave its recommendation on December 4, 2000. Furthermore, the Public Works Department, the Department of Environmental Resources Management, the Miami-Dade Transit Authority, the Department of Parks, Fire and Rescue and the Police all had no objection to the application.

A public hearing was held on November 1, 2000, at which time the petitioner presented expert testimony of a radio frequency ("RF") engineer, testimony from the petitioner's technical manager, frequency propagation maps and plans. The petitioner argued that there was currently a gap in coverage for approximately a two mile radius in the proposed area, and that there were no other structures available in the area on which they could co-locate. The RF engineer explained how the monopole would look, including antenna platforms, which the Board objected to. (T. 1 at 16-18). Also present in support of the application was a representative from Verizon Wireless, who stated its intent to co-locate on the pole.

The objectors to the application were four individuals who lived in the neighborhood to the north of the proposed site across Sunset Drive. The majority of the testimony was concerned with the aesthetics of the pole. They were dissatisfied with the industrial-look of the pole and how it would be inconsistent with the residential area. They were further concerned with the height of the pole, since the tallest building in the area was only two stories, and the possibility of a future proliferation of cell poles, since the proposed pole only covered two miles of service.

The Board voted to defer the motion one month, until December 12, 2000, so that the petitioner could talk with the neighbors and address their concerns as well as prepare photo simulations. At the next public hearing, the petitioner presented essentially the same presentation, with the same expert, plus the petitioner's zoning manager. The new evidence

submitted into the record was photo simulations[3], landscape plans, photos of similar (but shorter) monopoles, and plans for the antennas to be flush-mounted, rather than on platforms, Additionally, the zoning manager for the petitioner testified that they had received letters of intent from two additional carriers to co-locate on the pole, and that the they had initiated talks with BellSouth to co-locate on the pole, since their pole was structurally unsound. (1.2 at 16-17) Five objectors testified about similar concerns of the height of the tower and its industrial nature being incompatible with the surrounding area. One of the objectors, Mr. Alvarez, from the board of the home owner's association to the north, testified that the electric poles were riot visible from their development and that the BellSouth tower could barely be seen. (T.2 at 33) The objectors testified that while they appreciated the landscaping, it would not block the view of the 148 foot tower. (T.2 at 33)

At tlie conclusion of the meeting, the Board decided unanimously to deny the application for tlie 148 foot monopole. In their deliberations, the Board noted tliat there was a need for poles, but that there must be a balancing of competing needs. Board member Vilar stated that they would rather have more poles at a smaller height, of around 75 feet than have a few tall poles that do not blend in with tlie area. (T.2 at 52)

Our review of an administrative agency decision, under Rule 9.030(c)(3) Fla. R. App. P., is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether tlie essential requirements of law have been observed; and (3) whether the administrative findings and judgments were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Certiorari in the circuit court to

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[3] The monopole in the photo simulation was 120 feet tall, as opposed to the 148 foot tall monopole in the application.

review local administrative actiuti is not truly discretionary certiorari, because the review is of right, as such this court functions as an appellate court mid cannot reweigh the evidetice or substitute its judgment for that of the agency. *Haines City Community Development v. Heggs*, *658* So. 2d **523, 530** (Fla. 1995). This court only evaluates the second and third prong of the above test, as the petitioner does riot argue that the Board violated procedural due process requirements.

Tlie petitioiier first argues that there is no substaiitial, competent evidence in the record to support the decision of the Board. In *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957), the Supreme Court defined substantial evidence as:

> . . . such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred, We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Bd. of Public Instruction*, 153 Fla.. 728, 15 So.2d 748. In employing the adjective "competent" to modify the word "substantial", we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v.* Curry, 154 Fla. 617, 18 So.2d 521. We are of the view however that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." (Citation omitted).

It is apparent from the record before this court that the board relied upon the testimony of the objectors at the two public hearings to deny the application. The respondents urge this court to find that this testimony constitutes substantial competent evidence necessary to support the resolution. To support their argument, the respondent cites numerous zoning cases concerning what constitutes substantial competent evidence, including: *Metropolitan Dade Co. v. Sportacres*, 698 So. 2d 281 (Fla. 3d DCA 1997)(approving the county commission's denial of zoning application based in part on lay testimony that the proposed development would be

incompatible with the adjacent community); *Metropolitan Dade Co. v. Section I I Property Corp.*, 719 So. 2d 1204 (Fla. 3d DCA 1998)(holding that when considering compatibility, it is proper to consider aesthetics when then testimony is fact-based); *Metropolitan Dade* County *v. Blumenthal*, 675 So. 2d 589 (Fla 3d DCA 1995)(finding citizen testimony to constitute substantial competent evidence , if it is fact-based),

While this court is aware of tlie aforementioned cases, we find tliat Jesus *Fellowship, Inc. v. Miami-Dade County,* 752 So. 2d 708 (Fla. 3d DCA 2000), controls in the instant case, In *Jesus Fellowship*, the Third District Court of Appeals held that the fact that tlie record demonstrates tliat tlie zoning autliority had before it tlie county zoning maps, the professional staff recommendations, aerial photographs, arid testimony in objection was not sufficient to support a denial; instead there must also have been relevant valid evidence to support the decision. See id at 709-10. An applicant seeking special exceptions and unusual uses need only demonstrate to the decision-making body that its proposal is consistent with tlie county's land use plan; that the uses are specifically authorized as special exceptions and unusual uses in the applicable zoning district and that the requests meet with tlie applicable zoning code standards of review, See *id.* at 709. If this is accomplished, then the application must be granted unless the opposition carries its burden, to demonstrate that the applicant's requests do not meet the standards and are in Fact adverse to the public interest. *See* Id.

The petitioner in the instant case demonstrated that tlie application was consistent with the CDMP, was a permitted use within the zoning district and was not incompatible with the surrounding area. As such, tlie burden shifted to tlie Board to show that the application did not meet the standards arid is, iti fact, adverse to the public interest. See *id,* at 708. The Board here tried to cliaracterize the objectors' testimony as substantial competent evidence to meet this

burden. We do iiot find that this testimony rises to tlie level of substantial competent evidence, and as result, does riot support the denial of tlie application.

The petitioner's second argument is that the Board failed to follow tlie essential requirements of the law because their decision violates the Federal Telecommunications Act ("TCA"). 47 U.S.C. § 332 (1996). Specifically, the petitioner alleges that the decision of the board violates § 332 (7)(B)(i) (I) and (II), which in pertinent part states:

> (i) The regulation of the placement, construction', and modification of persorial wireless service facilities by any State or local government or instrumentality thereof-
> (I) shall riot unreasonably discriminate among providers of functionally equivalent services; and
> (II) shall iiot prohibit or have tlie effect of prohibiting the provision of personal wireless services.

In the petition, the petitioner does not state how the board's action violates the TCA, nor does it cite any cases to support their proposition. However, upon review of the statutes and case law, we find that the Board's decision violated (B)(i)(I).

In the instant action, the Board's decision to deny the petitioner's application to construct a 148 foot monopole discriminates against functionally equivalent services since BellSouth was permitted to construct a 150 foot monopole on tlie adjacent property.[4] The TCA explicitly contemplates that some discrimination among providers of functionally equivalent services is allowed, any discrimination need only be reasonable. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2nd Cir. 1999)(quoting *AT & T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423,427 (4th Cir. 1998)). The legislative history of the TCA provides:

> the plrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to tlie extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent

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[4] It should be noted that tlie BellSouth pole was constructed in 1982.

services.

H.R. Conf. **No. 104-458, at** 208, ***reprinted! in*** 1996 U.S.C.C.A.N. at 222.

The court in AT & T Wireless rioted that in most of tlie **cases in which district courts have** found unreasonable discrimination under **the** TCA, **the** facility was **proposed either for a** commercial use **or** for a location where other towers or similar structures already existed. AT & *T Wireless*, 155 F.3d at 428. In that case, **the** wireless company was attempting to place **two** telecommunication towers in a residential area **which** was very natural and contained **no** similar **structures** or **even above-ground** power lines. **That** court upheld **the** zoning **board's** decision **to preserve** the character **of the** neighborhood and avoid aesthetic **blight.** *Id.* That case is factually distinguishable from the instant case.

Here, the proposed monopole would be located in a district that is **zoned BU-1A (limited** business), **and** is **adjacent to a** 150 foot wireless telecommunications monopole. While **the surrounding areas** are residential, it cannot be argued that tlie monopole would **be out** of character for tlie neighborhood. It is apparent in the record that the two functionally equivalent services are being treated differently.

We find that the County's argument, that the BellSouth tower is **structurally** unsound **and will** soon be removed, appears to be without merit. There is **no evidence** in **the record before this court** from BellSouth or any engineers **that** tlie tower will need **to** be taken **down.** Tlie only **reference to the structural soundness of the tower in the record is from the** petitioner's **zoning manager** put **forth** to demonstrate **why** they are not locating **on** the tower **and** why the co-location ability of tlie tower is important. **In** fact, he states that the petitioner has initiated talks with BellSouth, arid that BellSouth has **made** no commitments to co-locate.

While not raised by **the** petitioner, it is **apparent** from the record that the Board failed to make

any findings of fact in its written decision, but merely stated the standards which they found applicable. The TCA requites local boards to issue a written denial separate from the written record. 47 U.S.C. § 322 (7)(B)(iii) (1996); *Southwestern* ***Bell Mobile Svstems. Iiic. v. Todd. 244*** F.3d 51, 60 (1st Cir. 2001). The written denial must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. Id.

While there is disparity between the courts as to what is actually required, the Middle District of Florida has interpreted the language to mean that the decision must contain written findings of fact tied to the evidence of tlie record. ***See AT & I' Wireless Services of Florida, Inc. v. Orange County,*** 982 F. Supp. 856, 859 (M.D. Fla. 1997). The court in that case found that absent a rudimentary explanation for the Board's decision, a court cannot conduct the review required by the TCA. ***Id.;see also Riverside*** *Roof Truss, Inc.* ***v. Board of*** *Zoning Appeals of the* ***City of*** *Palatka,* 734 So. 2d 1139 (Fla. 5th DCA 1999). The court held that this ground alone is sufficient to quash the decision. *Smart SMR of N.Y., Inc.,* ***v. Zoning Commission of the Town of*** *Statsford,* 995 F.Supp 52, ***56*** (D. Conn. 1998)(quoting ***Orange County,*** 982 F.Supp at 859). The written decision in the instant case does not meet this standard and as a result, requires that this court grant tlie petition.

According, we grant the Petition for Writ of Certiorari and quash the decision of the Board. This matter is remanded to the Board with instructions to determine the application in accordance with this opinion.

It is *so* ordered.

PETITION IS GRANTED AND **REMANDED.**

DONNER arid CARDONNE, JJ., concur.