IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER SC02-815

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MIAMI-DADE COUNTY,

Petitioner,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent.

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

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INITIAL BRIEF OF MIAMI-DADE COUNTY, PETITIONER

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STATEMENT OF THE CASE AND FACTS

Omnipoint Holdings, Inc. ("Omnipoint"), applied for an unusual use for a 148-foot high (14-story) telecommunications tower on a parcel of land in Miami-Dade County. R. 73-78, 132. The parcel was zoned for limited business and developed with a low profile mini-storage facility. R. 75. Under the County's zoning ordinance, the limited business district does not permit telecommunications towers as of right, but only as an unusual use after a public hearing. App. 2. Omnipoint also applied to modify the prior site plan for the parcel (which did not include a tower), and to vary the zoning regulations to allow the tower 84 feet from the rear property line, about half of the 164 feet required. R. 73.

At public hearing, professional staff reports, photographs, zoning maps and testimony depicted two fully developed single-family, town-home neighborhoods in the area, lying immediately north and south of the site. R. 73-81. The tallest building in the area was two stories, and the limited business district regulations restricted building height to 45 feet for all uses permitted as of right. R. 132, 192-93; App. 4. Prior to the public hearing, staff recommended approval. R. 77-78. At the hearing, homeowners testified that the tower, by virtue of its size, use, aesthetics, and location on the site, would be incompatible with the surrounding area's character. R. 124-34, 190-99. The zoning appeals board denied Omnipoint's application. R. 71-72.

On certiorari review, the circuit court quashed the denial, finding it to be unsupported by substantial competent evidence. App. 1. Noting that another carrier's telecommunications pole had been erected nearby, the circuit court also concluded that denying the application would constitute "unlawful discrimination among providers of equivalent services" under the Federal Telecommunications Act, 47 U.S.C. §332 (1996). The court remanded, not directing outright approval of the application, but instead "with instructions to determine the application in accordance with this opinion." No party raised or discussed the facial constitutionality of any zoning ordinance provision, nor did the circuit court address the topic. R. 62-70.

On second-level certiorari review, the district court denied relief. The court found no error below, but substituted different grounds for the same outcome. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 811 So.2d 767 (Fla. 3d DCA 2002) ("Omnipoint"). The circuit court, it said, "reached the right result (although on a different basis)." *Id.* at 770. The district court never addressed whether the circuit court applied the correct law of substantial competent evidence or of the Telecommunications Act. Instead, the district court, *sua sponte* and without briefing, ruled that three decades-old provisions of the County's zoning ordinance were facially unconstitutional, for lack of criteria sufficiently definite and objective to guide zoning boards. Employing the strict scrutiny review applicable to regulations limiting free speech, the court struck the provisions governing how

every type of special exception, unusual use, modification of prior approvals, and non-use variance is considered in every zoning district in the County's jurisdiction. *Id.*

Upon striking the provisions, the court (again *sua sponte*) concluded as a factual matter that the resulting lack of public hearing standards would result in a complete "prohibition" of personal wireless services, in violation of the Telecommunications Act. *Id.* The district court did not remand to the circuit court to ascertain whether the record could support this conclusion, nor did it provide the County an opportunity to show whether telecommunications towers are allowed in other zoning districts as of right and without a public hearing. Granting relief beyond what even the circuit court had granted, the district court mandated the outright approval of Omnipoint's application, including the tower's placement within the prohibited setback area and contrary to the approved site plan. The court did so even though, by its own hand, there were no longer any zoning standards by which Omnipoint's requests for an unusual use, modification or variance could be considered. *Id.*

After that opinion issued, Omnipoint filed a motion with the district court requesting mandamus, albeit to enforce the circuit court's order, not the district court's order directing approval of its entire application. R. 589-615.

The County moved to stay the effect of the opinion and to withhold the mandate. It first noted the risk that one or more telecommunications towers now

would be allowed as of right in any zoning district, without regard to public health, safety or welfare. Further, the County explained that striking the provisions on their face and requiring that any substitute zoning criteria be drafted to pass strict scrutiny standards would halt the County's processing of most of its zoning applications for an extended period of time. Such delay and inconvenience, the County urged, would be to the serious detriment and confusion of the public, the real estate and financial communities, and other local governments in the district court's jurisdiction that had adopted similar public hearing standards. R. 634-654.

The district court denied Omnipoint's request for mandamus and the County's request for stay. R. 726.

This petition is from the district court's decision.

SUMMARY OF THE ARGUMENT

The Third District Court *sua sponte* struck, as unconstitutional, several isolated but essential provisions of the County's zoning code where the issue had never been raised or briefed by the parties and was not necessary to the decision. The court suddenly labeled as "fundamentally unfair and unjust" regulations that the same court had based its review and decisions upon for decades. *Omnipoint,* at 769 n.6. Because the provisions affect almost all zoning applications, their striking has essentially frozen the zoning process in Miami-Dade County, impacting every sector of the community and economy.

In striking these zoning provisions, the court applied the strict scrutiny

review normally reserved for prior restraints of free speech protected by the First Amendment. The court thereby disallowed the deference and presumption of correctness that it was required to afford the legislative enactments of a coordinate branch of government. *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439, 443-44 (Fla. 1959). [1] Although the County code contains extensive objective criteria, the decision below requires such exactness that, as with free speech restraints, discretion will be virtually eliminated. What was lawfully designed to be a deliberative process for the protection of both private property rights and the public interest on a case by case basis, is effectively reduced to a one-size-fits-all bureaucratic checklist. Such a requirement is in conflict with Supreme Court precedent, which has both relied upon the County's zoning provisions in conducting review, and upheld other jurisdictions' zoning

[1] There is nothing specific to the Telecommunications Act that would weaken the presumption of correctness. In any event, the court struck the zoning provisions as being unconstitutional "facially," *i.e.*, in *all* instances, and not simply for being unconstitutional "as applied" to telecommunications facilities.

regulations having fewer criteria. *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270 (Fla. 2001); *Pylant v. Orange County*, 328 So. 2d 199 (Fla. 1976). The precedent of the district court's decision casts a cloud over all kinds of state, county, and municipal legislation, which will now be required to meet First Amendment strict scrutiny standards. The holding will also virtually eliminate the fact-based, quasi-judicial public hearing process carefully delineated by this Court in *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 473 (Fla. 1993).

Although, as discussed *infra*, the district court lacked jurisdiction to reach and adjudicate the constitutional issue in the posture of this case, the matter nevertheless is now in issue. The issue is of great public importance and, until resolved, will have a chilling effect on all types of legislation and economic activity throughout the state's most populous judicial district and, indeed, the entire state. This Court should therefore reestablish the applicable standard of review and adjudicate the constitutionality of the provisions in question.

The district court's striking of legislation *sua sponte* would violate principles of judicial restraint and separation of powers even in a plenary appeal. *State v. Turner*, 224 So. 2d 290 (Fla. 1969); *Williston Highlands Dev. Corp. v. Hogue*, 277 So. 2d 260, 261 (Fla. 1973). Coming during the district court's limited "second-tier" certiorari review, the decision is all the more erroneous. Indeed, it is the latest of several decisions wherein the Third District Court has exceeded its

jurisdiction, despite recent reversals by the Supreme Court on that very ground. *Dusseau*, 794 So. 2d at 1270; *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000). Compounding the error, the district court: (a) made its own findings of fact; and (b) ordered the County to approve the zoning application. Both of these actions exceed the court's jurisdiction on second-tier certiorari. Moreover, the finding of fact was totally unfounded and erroneous.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY CONSIDERED THE FACIAL CONSTITUTIONALITY OF ISOLATED PORTIONS OF THE MIAMI-DADE COUNTY ZONING CODE, APPLIED THE WRONG LEGAL STANDARD, AND INCORRECTLY HELD THEM UNCONSTITUTIONAL, ALL IN CONFLICT WITH SUPREME COURT AND OTHER DISTRICT COURT PRECEDENT.

This Court must review the district court's conclusion of law on a *de novo* basis. *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001); *Medina v. Gulf Coast Linen Serv.*, 825 So.2d 1018, 1020 (Fla. lst DCA 2002). The district court's conclusion that the County's zoning provisions are unconstitutional carries no presumption of correctness—to the contrary, the zoning provisions at issue come to this Court clothed with a presumption of constitutionality. *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879, 880-81 (Fla. 1983)*; Kass v. Lewin*, 104 So. 2d 572, 576 (Fla. 1958).

A. The District Court Overlooked Supreme Court and District Court Precedent on Constitutional Zoning Standards.

Relying upon federal First Amendment case law, the district court *sua sponte* declared three isolated provisions of the County code facially unconstitutional pursuant to the strict scrutiny standard uniquely applicable to prior restraints of free expression. Both the standard applied and the result reached are in conflict with the decisions of the Supreme Court and other district courts and are otherwise erroneous.

The County zoning provisions in question provide for the granting of (a) special exceptions, unusual and new uses, (b) non-use variances, and (c) modification of conditions of prior zoning resolutions. Sections 33-311(A)(3), 33-311(A)(4)(a) & (b), and 33-311(A)(7), respectively. *See* App. 6. These code sections include and exceed the kind of standards which are both typical of this type of legislation and which have been previously relied upon and upheld by the Supreme Court and the district courts. While relying upon two federal First Amendment strict scrutiny cases, discussed *infra*, the opinion below conspicuously makes no mention of Supreme Court of Florida or other district court case law on point, or of the Third District's own long history of reviewing zoning actions pursuant to these very provisions.

In *Pylant v. Orange County*, 328 So. 2d 199 (Fla. 1976), the Supreme Court of Florida expressly upheld the constitutionality of state and local special exception legislation with broad standards and far fewer objective criteria than contained in

the County code sections in question.[2] *Pylant* involved a First Amendment freedom of religion challenge by a church complaining that it was required to carry

[2] The district court set forth § 33-311(A)(3) of the Miami-Dade County Code in pertinent part as follows:

> 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 sit 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 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 create 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.

Omnipoint at 768. (The County Code defines the record to include "any and all portions of the zoning code, Chapter 33, and the [Comprehensive Plan]." App. 5.)

The district court did not recognize that the County code also contains a statement of the purpose of zoning with extensive criteria, § 33-311(A), App. 6, and mandates an extensive professional staff analysis and recommendation for each application. That analysis must state "all facts relevant to the application including an accurate depiction of known living, working, traffic and transportation conditions in the vicinity of the property that is the subject of the application, and also a description of all projected effects of the proposed zoning action on those conditions." § 33-310(b), App. 5. *See infra*, n.10.

the burden of proving that granting the special exception "shall *not* adversely affect the public interest."[3] *Id*. at 201. The Court quoted in pertinent part from the Orange County Planning and Zoning Act,[4] which provided for the granting of special exceptions upon meeting the foregoing broad standard. *Id*. The Court also addressed, and quoted in pertinent part from, the implementing Orange County Planning and Zoning Resolution, as follows:

> "'The following uses *may* be permitted as a special exception [upon] ... consider[ing] the character of the neighborhood in which the proposed use is to be located and its affect on the value of surrounding lands and further the area of the site as it relates particularly to the required open spaces and off-street parking facilities….'"

Id. at 200 (edited in original). Miami-Dade County's special exception provisions contain more objective criteria than the foregoing. *See* App. 5, 6.

Thus, even in a First Amendment freedom of religion context, this Court has upheld standards more broad than those contained in the provisions of the County code which the district court *sua sponte* struck in the present case. Furthermore, the Third District Court has held, consistent with other district courts, that under the County's ordinance the burden is not upon the applicant but upon "the opposition" [to show] that the public interest will *not* be served or the result will be incompatible with the surrounding area if it is granted." *Metro. Dade County v.*

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[3] All emphasis in this brief is supplied or modified unless otherwise indicated. Citations within quoted material are generally deleted.

[4] Chapter 63-1716, Section 13(b), Special Acts, Laws of Florida, as amended by Chapter 71-795, Special Acts, Laws of Florida 1971.

Fuller, 515 So. 2d 1312, 1313 (Fla. 3d DCA 1987) (emphasis in original). Because, as a matter of law, the County's ordinance does not place that burden upon the zoning applicant, the grounds for upholding its constitutionality are, for this additional reason, stronger than those in *Pylant.*

In *Troup v. Bird*, 53 So.2d 717, 721 (Fla. 1951), this Court recognized the following broad standard typically pertaining to special exceptions: "'[T]he power to vary the application of zoning regulations, or to permit special exceptions thereto, is commonly expressly limited to such variations or exceptions as *are consistent or in harmony with, or not subversive or in derogation of, the spirit, intent, purpose or general plan of such regulations.*' 58 Am. Jur. Sec. 200, P. 1049." *Id.* at 721.

In *Florida Power and Light Co. v. City of Dania*, 761 So.2d 1089 (Fla. 2000), this Court had no difficulty reviewing lower courts' actions involving standards, quoted by the court, which are decidedly similar to Miami-Dade County's. *Id.* at 1091. Indeed, as recently as May 2001, this Court had no difficulty conducting its review and reversing the Third District Court with regard to a special exception under the very code provisions now invalidated by the district court. *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270 (Fla. 2001).

Other district courts have upheld, against constitutional challenge, zoning provisions similar to or less objective than the County's provisions at issue.

Nostimo, Inc. v. City of Clearwater, 594 So. 2d 779 (Fla. 2d DCA 1992) (zoning ordinance's "compatibility" and "excessive burden" standards, resembling those in the instant case, not facially unconstitutional); *Life Concepts v. Harden*, 562 So. 2d 726, 728 (Fla. 5th DCA 1990) (word "compatible" in zoning ordinance sufficiently definite to provide limits on zoning boards discretion); *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985) (ordinance provisions, allowing special use permits to be granted only if they cause no "substantial detriment to the public good" and if they "will not substantially impair the intent and purpose" of comprehensive plan or zoning regulations, held not to constitute an unlawful delegation of legislative authority). Moreover, for more than thirty years, the Third District Court itself has relied upon and conducted review pursuant to the now-struck zoning provisions. [5]

[5] *See, e.g., Grovpac Corp. v. Metropolitan Dade County*, 232 So. 2d 416 (Fla. 3d DCA 1970) (finding County's denial of unusual use, variances, and special exceptions "was amply supported *in law* and fact"); *B.S. Enterprises, Inc. v. Dade County*, 342 So. 2d 117 (Fla. 3d DCA 1977) (holding that "Board of County Commissioners acting *under the zoning regulations* had the responsibility of determining whether the granting of the special exception would *adversely affect the public interest*," and affirming denial); *Dade County v. Florida Mining & Materials Corp.*, 364 So. 2d 31, 34 (Fla. 3d DCA 1978) (reversing in part and affirming circuit court's directive that county grant an unusual use and variance based upon evidence that mining operation "would not constitute a land use *detrimental to the public health, safety, welfare or morals*"); *Bd. of County Comm'rs of Dade County v. First Free Will Baptist Church*, 374 So. 2d 1055 (Fla. 3d DCA 1979) (finding that burden of proof is the same as to both an unusual use and an "exceptional use", *i.e.*, special exception, reversing circuit court, and reinstating county zoning resolution); *Metro. Dade County v. Fuller*, 497 So. 2d 1322 (Fla. 3d DCA 1986) (requiring adherence to County code standards, holding that "an unusual use, like a special exception, is subject only to the test enunciated in Section 33-311(d) of the Code, which is essentially *whether the proposal serves the public interest*"); *Metro. Dade County v.*

B. The District Court Improperly Negated the Presumption of Correctness and Applied the Wrong Standard of Review.

Under Florida case law and the state constitutional doctrine of separation of powers, courts must afford legislation adopted by a coordinate branch of government a presumption of constitutionality. *See* Fla. Const. art. II, § 3; *see generally Agency for Health Care Admin. v. Hameroff*, 816 So.2d 1145 (Fla. 1st DCA 2002) ("presumption of constitutionality is a paradigm of judicial restraint and an acknowledgment of separation of powers principles"), *rev. denied*, __ Fla. L. Weekly __ (Fla. Dec. 30, 2002). Like other legislation, zoning regulations are entitled to that presumption. "Zoning regulations duly enacted pursuant to lawful authority are *presumptively valid*…." *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 So.2d 439, 443-44 (Fla. 1959); *see also Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 737 (Fla. 2002).

Only when the legislation attempts to regulate constitutionally protected fundamental rights such as free speech or religious worship, or to regulate based on

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Fuller, 515 So. 2d 1312 (Fla. 3d DCA 1987) (clarifying burden of proof, recognizing that "unusual use (or special exception) is … presumptively permissible," *Id*. at 1312 n.3, articulating standard of judicial review as "whether the commission's decision that the proposal was *not* inimical to the public welfare is supported by competent substantial evidence and expressly "[a]pplying this standard," to find "ample evidence … to support [both] the conclusion that the public interest would not be disserved and the consequent decision to grant the application." *Id*. at 1313); *Metro. Dade County v. Sportacres Dev. Group, Inc.*, 698 So. 2d 281, 282 (Fla. 3d DCA 1997), (upholding denial of unusual use and non-use variance based upon substantial and competent evidence, *inter alia*, establishing "incompatibil[ity] with the surrounding neighborhood."). *Also see* more recent cases discussed *infra*, § I.D.

constitutionally protected suspect classifications such as race or national origin, do the courts reverse the presumption of validity and resort to a more stringent standard of review. Thus, when reviewing a prior restraint upon free speech, the courts apply "a heavy presumption *against* its constitutionality." *University Books & Videos, Inc. v. Miami-Dade County, Florida*, 132 F.Supp.2d 1008, 1016 (S.D. Fla. 2001), *aff'd*, 163 F.3d 1359 (11th Cir. 1998). The degree of specificity required of regulatory criteria is markedly higher in such cases, to reduce the chance that bureaucrats or administrative boards may exercise discretion to "covertly discriminate" against the exercise of fundamental rights. *See Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1361(11th Cir. 1999)(zoning ordinance regulating adult entertainment), *cert. denied*, 529 U.S. 1053 (2000); *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969)(ordinance requiring permits for civil rights demonstrations required to have specific standards to prevent local governments from preventing protected expression entirely).

Thus, the standard of judicial review for free speech regulation (presumption *against* validity) is the exact opposite of the proper review standard for ordinary zoning and other regulations that do not reach protected fundamental rights or suspect classes (presumption *of* validity). The opposing presumptions maintain proper separation of powers between branches of government. *See generally Hameroff*, 816 So.2d at 1149.

The district court overlooked this crucial distinction when it used *University*

Books & Videos as authority to hold the County's special exception/unusual use ordinance facially unconstitutional for lack of specific criteria. Although *University Books & Videos* found the criteria of the ordinance, *as applied*, lacking the specificity required for regulation of free speech, it expressly found that the County's "special exception criteria *may still be used to grant or deny applications by applicants who are not entitled to First Amendment protection.*" *University Books & Videos*, 132 F. Supp. 2d at 1017.

The district court also erroneously relied on *Lady J. Lingerie*. In an *as-applied* challenge, *Lady J. Lingerie* struck the City of Jacksonville's special exception ordinance for lack of sufficiently specific criteria for limiting free expression. The court, however, expressly approved the criteria for use outside the context of such fundamental rights:

> "to be clear, the city may still use the [zoning ordinance] criteria for applicants who are not entitled to First Amendment protection. We only find troublesome the *application* of the *otherwise-valid criteria* to adult businesses like the plaintiff's."

Lady J. Lingerie, 176 F.3d at 1362. Although the district court labeled this holding "gratuitous," *Omnipoint* at 769, it was an essential delineation of the scope of the federal court's ruling.[6]

[6] In a recent federal court challenge to the validity to the County's ordinance by a telecommunications service provider, the United States District Court for the Southern District of Florida rejected an argument identical to the district court's reasoning below. In *BellSouth Mobility, Inc., v. Miami-Dade County, Florida*, Case No. 98-2724-CIV-JORDAN (order denying Rule 59(e) motion), App. 12, the federal district court concluded that the telecommunications provider had "fundamentally misconstrued the significance of the *University Books* decision" in arguing that the

C. The District Court Improperly Reviewed the Zoning Provisions Out of the Context of the Remainder of the County's Zoning Ordinance and the County's Comprehensive Land Use Plan.

Basic tenets for construing legislation, including zoning ordinances, call for the legislation to be "construed in its entirety and as a whole." *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961, 967-68 (Fla. 2000). Further, "words take their meaning based on their context or their association with other words in the statute," and courts must "presume that the legislature puts every provision in a statute for a purpose." *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989*), aff'd*, 888 F.2d 766 (11th Cir. 1989), *citing Carroll v. City of Miami Beach*, 198 So. 2d 643, 646 (Fla. 3d DCA 1967) (Pearson, J., dissenting).

Thus, the district court erred by construing the stricken zoning provisions in artificial isolation, outside the context of the County's whole zoning ordinance. Numerous other provisions of the County's zoning ordinance define and limit the meaning of the stricken provisions, and would be an integral part of any proper consideration of constitutionality. Further, the stricken provisions' requirements for compatibility determinations after public hearing have clear meaning in the context

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special exception/unusual use criteria in the County's ordinance lacked specificity sufficient to pass constitutional scrutiny. Quoting from *University Books*, the court ruled that the County's special exception criteria were valid outside the First Amendment area. *See also Rectory Park, L.C. v. City of Delray Beach,* 208 F. Supp. 1320 (S.D. Fla. 2002) (federal court expressly declining to rely on the *Omnipoint* decision in finding a zoning ordinance not void for vagueness).

of these other provisions.

Black-letter law recognizes that quite broad language is acceptable in special exception, unusual use and variance provisions, in part because the language is limited by other ordinance provisions. 3 Kenneth H. Young, Anderson's *American Law of Zoning*, §21.09 at 713 (4th ed. 1996)("Anderson's"). For example, the zoning ordinance provisions governing the district in which a special exception or unusual use is sought are an important limiting factor, providing guidance on the general character of uses and physical restrictions on development intended for the district. Whether a particular requested special exception would be "compatible" at a location in a district would take meaning from these regulations. *See, e.g.*, App. 4 (County limited business district regulations relevant to Omnipoint application).[7]

Indeed, special exception, unusual use and variance provisions exist in nearly all zoning codes, for the very purpose of refining otherwise rigid zoning district regulations and providing necessary flexibility for certain uses thereunder. *See* Anderson's §21.01 at 693-95. Although certain uses may be generally

[7] Because the County's non-use variance provision, by definition, does not permit deviation from permitted uses, it comes well within the kinds of approvals that, like special exceptions, qualify for broad standards and administrative flexibility.

acceptable in a district, *e.g.*, churches in the residential district, it is impossible to predict whether a particular application will be acceptable, due to the unique circumstances of the application itself, *e.g.*, a large church versus a small church, and the unique characteristics of the application site, *e.g.*, a large corner parcel versus a mid-block parcel on an interior side street. It is the nature of the underlying district that helps define what is compatible with and appropriate to the application site. *See* 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Planning and Zoning* § 41.08 at 41-34—41-46 (4th ed. 2001) ("Rathkopf's"); Matthew Bender, *Law of Planning and Zoning* §44.04[2] at 44-82—44-88 ("Bender"). To require, as did the district court below, outcome-predicting compatibility criteria[8] for the near-infinite array of unpredictable circumstances for such conditionally permitted uses (if that drafting feat could ever be accomplished) would defeat the very purpose of the special exception. 3 Rathkopf's §41.11 at 41-49, *citing Tutin Heights Ass'n v. Board of Supervisors*, 339 P.2d 914 (1959). It is therefore necessary to consider the underlying district regulations as an essential part of construing the special exception, unusual use and variance provisions in the County's zoning ordinance.

Other ordinance provisions, too, limit and define the special exception, unusual use and variance provisions. These include the provisions articulating the

[8] The court held that "[s]ufficient *guidelines are required* so that … persons are able to *determine their [development] rights and duties*," *i.e.*, every property owner must know in advance whether a zoning application will be granted and, if so, what conditions and obligations will be attached. *Omnipoint*, at 769 n.5.

overall intent of the zoning code[9] and the provisions outlining required County staff analysis of the area surrounding an application site (indicating relevant compatibility considerations). [10] App. 6, 5.

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9 Section 33-311(A) of the zoning ordinance provides:

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

10 Section 33-310 of the zoning code provides:

> Applications filed hereunder shall be promptly transmitted to the appropriate board, together with the written recommendation of the Director. … All such recommendations shall state all facts relevant to the application, including an accurate depiction of known living, working, traffic and transportation conditions in the vicinity of the property that is the subject of the applications, and also a description of all projected effects of the proposed zoning action on those conditions. Before reaching a conclusion, each recommendation shall list all known factors both in favor of and against each applications. All such recommendations shall be signed and considered final no earlier than thirty (30) days prior to the public hearing to give the public an opportunity to provide information to the staff prior to the recommendations becoming final.

Of at least equal defining importance is the County's Comprehensive Development Master Plan. As this Court, the Third District Court and other district courts throughout the state have recognized, a local government's land use plan "sets a zoning norm for each zone," restricting and defining how the zoning code will be both written and applied. The comprehensive plan is compared to a "constitution of land use," designating and defining the parameters of all development in the jurisdiction. *Machado v. Musgrove*, 519 So.2d 629, 632, 634 (Fla. 3d DCA 1988); *see also Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469, 473 (Fla. 1993) (land development regulations must be consistent with the comprehensive plan); *Franklin County v. S.G.I., Ltd.*, 728 So.2d 1210 (Fla. 1st DCA 1999) (specific provisions in comprehensive plan formed limitation on zoning ordinance and development thereunder); *Gardens Country Club, Inc. v. Palm Beach County*, 590 So.2d 488 (Fla. 1992)(because zoning laws implement the comprehensive plan, "the comprehensive plan is a limitation on a government's otherwise broad zoning powers"); *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So.2d 257 (Fla. 1st DCA 1985)(necessary specificity in zoning ordinance provided by county's comprehensive plan). *See also* § 163.3194(1)(b), Fla. Stat. (requiring local land development regulations to be consistent with the plan).

Had the district court considered the applicable Miami-Dade County comprehensive plan provisions, it would have found further defining provisions.

Policy 4A of the Land Use Element, for example, explains what kinds of considerations go into a compatibility determination:

> When evaluating compatibility among proximate land uses, the County shall consider such factors as noise, lighting, shadows, glare, vibration, odor, runoff, access, traffic, parking, *height, bulk, scale of architectural elements*, landscaping, hours of operation, buffering, and safety, as applicable. App. 8.

Also relevant are the Land Use Element's textual description of the intended character of the Business and Office designation, and the provision governing unusual uses, which provides that such may be approved only in a designation that "authorizes uses substantially similar to the requested use." App. 8. The courts have held that agency discretion will be subject to "strict scrutiny" for consistency with the comprehensive plan. *Snyder*, 627 So. 2d at 475; *Machado*, 519 So. 2d at 632.

By considering the stricken ordinance provisions in isolation, and declining to employ the whole zoning ordinance and the comprehensive plan to define and limit those provisions, the district court below erred in concluding that the provisions lacked objectivity and specificity.

The ultimate impact of eliminating the regulatory flexibility provided through special exceptions, unusual uses, modifications and non-use variances would be to change the zoning public hearing process as it presently operates throughout the State of Florida. Citizen participation through appropriate lay testimony about compatibility would be greatly reduced if not eliminated. Elected and appointed

public zoning officials' roles in exercising discretion to determine compatibility would be virtually eliminated, notwithstanding the clear case law reserving that role to them. *See Metro. Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3d DCA 1996) ("when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice, not the circuit court"). Circuit courts reviewing decisions on certiorari would be divested of the "substantial competent evidence" prong of review on most applications, and would decide zoning cases on questions of law. Finally, the district courts would be tasked to engage in what would in effect be a second plenary appeal through the certiorari process, conducting most of their review on a *de novo* basis, since most questions presented would be questions of law. These results are not consistent with the precedent of this Court or the other district courts of this state.

D. Under the Correct Standards of Review, the County's Ordinances Are Constitutional.

In Florida, legislative programs can be carried out by administrative bodies so long as some "*minimal* standards and guidelines ascertainable by reference to the enactment establishing the program" have been promulgated to direct the body in its administration of the program. *Microtel, Inc. v. Florida Public Service Commission*, 464 So. 2d 1189, 1191 (Fla. 1985), *citing Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978). Such minimal standards need not be

detailed or specific, particularly in situations where they allow for the administration of policy by an agency with the "*expertise* and *flexibility* needed to deal with complex and fluid conditions." *Microtel*, 464 So. 2d at 1191.

The application of the policy of providing for special exceptions and non-use variances within a comprehensive zoning plan requires both the *expertise* and the *flexibility* discussed in *Microtel*. For example, this Court has held that, in reviewing the grant or denial of special exceptions, circuit courts should defer to zoning boards' "superior technical *expertise* and special vantage point in such matters…" *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001). In addition, the need for "flexibility" in zoning is the underlying reason behind the legislative enactment of special exception/unusual use ordinances. *See* discussion, *supra*, § I.C.

One test of constitutionality is whether the administrative agency and the Courts can perform pursuant to the regulation. *Askew*, 372 So. 2d at 918-919. If "neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature," the regulation may be constitutionally infirm. *Id.* at 918-919. As discussed *supra*, § I.A., this Court has had no difficulty conducting review pursuant to the Code section in question or similar regulations. Moreover, for decades, the Third District Court has consistently applied the now-invalidated provisions of the County's zoning code to determine whether zoning authorities

have carried out the intent of the legislative body. *See supra*, n.5. [11]

As recently as February 2000, the Third District Court based relief upon and *quoted, almost in its entirety*, the County code standard for non-use variances. In contrast to the present case, the district court recognized that these standards must be applied in the larger context of the underlying zoning requirements, *i.e.*, minimum lot size. Applying all these standards, the Court found that, based upon substantial competent evidence, the Commission properly considered "the *compatibility* of the request on the surrounding land uses and whether it was detrimental … and *lawfully exercised its discretion*…." *Miami-Dade County v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 So. 2d 738, 739 (Fla. 3d DCA 2000).[12]

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[11] Other district courts have also had no difficulty applying standards similar to those at issue. *See, e.g., Marion County v. Priest*, 786 So. 2d 623 (Fla. 5th DCA 2001) (ordinance required determination that special use permit, if granted, "would not adversely affect the public health, safety, and general welfare" if controlled "as to number, area, location, or compatibility"), *rev. denied*, 807 So. 2d 655 (Fla. 2002); *Redner v. City of Tampa*, 827 So. 2d 1056, 1058 (Fla. 2nd DCA 2002) (whether waiver of spacing requirement is appropriate and *compatible* to existing uses of surrounding and contiguous property and will not encourage incompatible uses); *Pinecrest Lake, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001) (requirement in comprehensive plan for property abutting single family residents to have *compatible* structures).

[12] *Omnipoint* holds the County's non-use variance provision unconstitutional, relying upon the concurrence in *Miami-Dade County v. Brennan*, 802 So. 2d 1154 (Fla. 3d DCA 2001). *Omnipoint*, at 770 n.8. The *Brennan* concurrence relies upon the fact that the non-use variance provision does not contain an "unnecessary hardship" requirement, and the court's view that the standards are otherwise insufficient. The concurrence further relies, *inter alia*, upon *Clarke v. Morgan*, 327 So. 2d 769 (Fla. 1975), and *Tau Alpha Holding Corp. v. Board of Adjustments of City of Gainesville*, 171 So. 819 (Fla. 1937).

Tau Alpha authorized the issuance of special exceptions and the authorization

In *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 709 (Fla. 3d DCA 2000) (Fletcher, J.), the district court held that: "[a]n applicant seeking

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of variances based upon "'unnecessary hardship, and so that the *spirit of the ordinance* shall be observed and *substantial justice* done.'" *Id*. at 820. This court found that the ordinance would not unlawfully delegate the power to amend the ordinance.

Clarke v. Morgan upheld the constitutionality of legislation providing for such [non-use] variance *or* use variance … as will *not be contrary to the public interests*, where owing to special conditions, a literal enforcement … will result in *unnecessary hardship*, and so that *substantial justice* may be done…." *Clarke*, 327 So. 2d at 770. In holding that the act was not unconstitutional as an unlawful delegation, the court did not find the undefined "unnecessary hardship" standard dispositive. Significantly, it held:

> "Additionally, *and of equal significance*, such change in *use* cannot be '*contrary to the public interest*' and must serve '*substantial justice*'. The quoted terms make it clear that in considering an application the board of adjustment must take into cognizance *the scheme of comprehensive zoning* reflected in the ordinances and may not upset the balance between the public interest served by the comprehensive plan and the individual interest of an applicant who makes the requisite showing of 'unnecessary hardship.'
>
> * * *
>
> We believe that the *standards and guidelines* expressed in the enabling act *provide an adequate framework for review* by the courts to determine whether the administrative agency has exceeded the authority granted it…."

If these very generalized provisions are sufficient to allow a change of *use*, then clearly the County code provisions for a *non*-use variance do not constitute an unlawful delegation given the considerable criteria contained both in the non-use variance section, 33-311(A)(4)(a) and (b), and in all of the other relevant Code and Comprehensive Plan provisions. *See* discussion *supra*, § I.C. Because non-use variances, by definition, do not change the use, they are limited to matters such as adjustments to setbacks *provided* these adjustments comply with the compatibility and other requirements of the Code and Comprehensive Plan.

special exceptions and unusual uses need only demonstrate [*inter alia*,] that its proposal is consistent with the 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 the applicable zoning code standards of review* [whereupon] the application *must* be granted unless the opposition carries its burden, which is to demonstrate that the applicant's requests *do not meet the standards* and are in fact *adverse to the public interest*."). It also held that "where technical expertise is required lay opinion testimony is not valid evidence upon which a special exception determination can be based.…" *Id*. at 710. *Jesus Fellowship* also underscores the importance of viewing the standards in question in the larger context of the underlying zoning regulations, the land use plan, and the applicable case law, all of which inform, and assure the constitutional application of, these standards. *Accord*, *First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114, 1115 (Fla. 3d DCA 2000), *rev. denied*, 790 So. 2d 1103 (Fla. 2001); *see also Baker v. Metro. Dade County*, 774 So. 2d 14, 17 (Fla. 3d DCA 2001) (Fletcher, J) (reversing the County's grant of special exception, non-use variances, and an unusual use, relying upon the applicable standards as set forth in the court's prior decisions), *rev. denied*, 791 So. 2d 1099 (Fla. 2001).

The County's ordinances are clearly constitutional when reviewed under general due process vagueness standards. In cases that do not implicate

fundamental rights or suspect classifications, an ordinance is to be judged under a "reasonable relationship" standard. *Ilkanic v. City of Fort Lauderdale,* 705 So.2d 1371, 1372 (Fla. 1998). A regulation cannot be unconstitutionally vague unless it is so utterly devoid of meaning that it "simply has no core." *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982); *High Ol' Times v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982). Moreover, an ordinance is not *facially* vague unless it is incapable of *any* valid application. *Flipside,* 455 U.S. at 495; *accord DeSisto College,* 706 F. Supp. at 1497 (M.D. Fla. 1989); *cf. State v. Hagen*, 387 So. 2d 943, 945 (Fla. 1980) (test is whether provision is so vague that people of common intelligence must necessarily guess at its meaning).

The ordinances invalidated by the district court are clearly not so devoid of meaning that they simply have no core. *See, e.g.*, *Life Concepts, Inc.,* 562 So. 2d at 728 ("the word 'compatible' has a plain and ordinary meaning which can be readily understood by reference to a dictionary"). Further, as established above, the standards contained in the unusual use and non-use variance ordinances have been validly applied by the Supreme Court and by the district court itself on numerous occasions. If indeed the County's zoning provisions are unconstitutionally vague, then the district court and this Court have written many opinions over the last thirty years analyzing or relying upon the application of an ordinance that has no core meaning, as well as requiring circuit courts to determine whether there is substantial competent evidence in the records of such cases to support the zoning boards'

determinations that such "meaningless" standards have or have not been met.

The district court, relying on only four Florida decisions, opined, "Consistently Florida courts have declared unconstitutional ordinances that lack objective standards to guide zoning and other quasi-judicial boards in making their decisions." *Omnipoint*, at 767.[13] None of the cases were decided in the context of any overall zoning code or comprehensive plan.[14] This may be because all of the cases were decided before this Court's decision in *Snyder*, which clarified that zoning decisions are quasi-judicial and that land development regulations must be consistent with the comprehensive plan. *Snyder*, 627 So. 2d at 474, 475. Indeed, all of the cases were decided before the initial adoption of the "Growth Management Act" in 1985, which also required [and continues to require] consistency with the comprehensive plan. *See* Fla. Stat., § 163.3194(1)(b). At least since the advent of such statutory and legal authority, courts in Florida have been required to review zoning provisions in the context of a given jurisdiction's general zoning scheme and its comprehensive plan. *See* discussion *supra*, § I.C. The district court below failed to follow this requirement when reviewing the County's zoning provisions, and thus

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[13] The four Florida cases cited below are *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). *Omnipoint*, at 769.

[14] *Compare*, *Eagles Nest Farms*, 473 So. 2d at 260 (Alachua County's generalized special use criteria specific enough to satisfy constitution because of, *inter alia*, their interplay with that county's comprehensive plan and zoning regulations).

improperly relied on decisions that also reviewed zoning legislation in isolation.[15]

Additionally, none of those four decisions construed ordinances which contained standards based on compatibility.[16] Moreover, the standards and criteria of the zoning ordinances found to be unconstitutional in the four cases did not contain the detailed objective criteria found in the County's zoning provisions. Accordingly, the Florida cases cited by the court below do not compel or even support a finding that the County's zoning provisions are unconstitutional.

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[15] The *Save Brickell Avenue* opinion did *discuss* the larger context of the City's zoning scheme, but the specific provisions there under attack expressly provided that deviations from other zoning regulations would "*not be affected by existing zoning regulation, but shall be subject to the approval of the City Commission*." *Save Brickell Avenue*, 426 So. 2d at 1104 (emphasis in original).

[16] As discussed, *supra*, § I.A., the *Life Concepts* and *Nostimo* cases found that mandatory standards based on compatibility are sufficiently objective to be constitutional and provide an adequate framework for judicial review.

E. This Court Should Rule on the Constitutionality of the Ordinances at Issue and the Standard of Review for Such Determination.

This Court should rule on the constitutionality of the County's zoning provisions, instead of simply reversing the district court because it exceeded its jurisdiction on second-tier certiorari and violated notions of judicial restraint (*see infra*, § II). The constitutional issue is of great public importance, is likely to recur, and a ruling upon it would prevent future problems that will undoubtedly be caused by the district court's incorrect resolution of the constitutional question.

It is well established that once this Court has accepted jurisdiction it may consider any issue affecting the case. *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986). Even where issues in a case have become moot prior to their adjudication in this Court, this Court is warranted in adjudicating them if they are of great public importance, the real merits of the controversy are unsettled, and the issue is likely to recur. *Cook v. City of Jacksonville*, 823 So. 2d 86, 87 n.1 (Fla. 2002); *Tau Alpha Holding Corp. v. Bd. of Adjustments*, 171 So. 819, 820 (Fla. 1937). Adjudication is especially appropriate where the district court's incorrect resolution of a legal issue will cause more problems in the future. *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) (citing *Tau Alpha*).

The district court's incorrect resolution of the constitutional issue has already created problems. Since the decision below was rendered, at least two Eleventh Circuit Court appellate panels have overruled zoning boards' decisions,

and mandated approval of cellular towers, based solely upon the precedent of the opinion below. Because of the *Omnipoint* opinion, these appellate panels did not even feel it necessary to determine whether substantial competent evidence supported the zoning boards' decisions that such towers would be incompatible with the area concerned. *Nextel South Corp. v Miami-Dade County*, App. 9; *Omnipoint Holdings, Inc. v. Miami-Dade County*, App. 11 ("Omnipoint II") ("Omnipoint II" involved a different tower and location than the case *sub judice*). Moreover, at least one appellate panel of the Eleventh Circuit Court has construed the *Omnipoint* opinion as relieving it of any obligation to follow the express mandate of this Court. *See Dusseau v. Metro. Miami-Dade County Bd. of County Comm'rs*, App. 10 (holding, *inter alia*, no need to determine if substantial evidence supported zoning board's decision, despite Supreme Court mandate to do so), *reversed* 826 So. 2d 442.

The district court's ruling is a fundamental departure from established principles. It held regulations unconstitutional by relying upon the as-applied holding of a federal First Amendment "prior restraint" case to determine that the County's decades-old zoning standards are facially unconstitutional in a non-First Amendment context. This has created issues of great public importance.

On two very recent occasions, the Third District Court showed that it has already decided the County's zoning provisions are unconstitutional, without the benefit of any party actually raising the constitutional issue. In *Miami-Dade County*

v. Brennan, 802 So. 2d 1154, 1157 (Fla. 3d DCA 2001), three judges flatly opined that the County's non-use variance ordinances were unconstitutional. This concurring opinion, however, did not constitute the official ruling in the case and could not be appealed because, as stated by the court: "*[N]o party in this case has challenged the code provision's validity*. We have no choice but to … allow the board to exercise its non-use variance power as it sees fit *(in this case)*." *Id.* at 1156.

This temporary reprieve from the effects of the Third District Court's predetermination of the constitutional issue did not last long. The *Brennan* decision was rendered on November 21, 2001. On March 6, 2002, a panel including two different judges issued the decision here appealed, finding officially that the County's non-use variance standards, as well as its standards for special exceptions and modifications of conditions, were unconstitutional, relying on the *Brennan* concurring opinion as authority. Once again, however, no party had raised any constitutional issue or briefed the merits of such issue.

Given this history, there is a reasonable apprehension that, if this case is simply remanded to the Third District Court on the basis that the district court exceeded its second-tier certiorari jurisdiction, the issue of the facial constitutional validity of the County's zoning provisions may again be erroneously addressed. This creates a cloud over all manner of state and local regulation and economic activity pursuant thereto.

II. THE DISTRICT COURT EXCEEDED BOTH ITS JURISDICTION AND THE PRINCIPLES OF JUDICIAL RESTRAINT, AND FAILED TO CONDUCT A PROPER SECOND-TIER CERTIORARI REVIEW.

This Court makes a *de novo* determination, based upon the record, of whether the district court properly performed its second-tier certiorari review. The district court's review was limited to determining whether the circuit court afforded procedural due process and applied the correct law. The circuit court, in turn, was required to determine whether, in the zoning proceeding, due process was accorded, the essential requirements of law were observed, and the administrative findings and judgments were supported by substantial and competent evidence. In determining whether the district court properly performed its review of the circuit court, this Court considers whether the circuit court's decision should have been quashed by the district court. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982); *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270 (Fla. 2001); *Florida Power and Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000).

A. The District Court Improperly Considered *Sua Sponte* the Constitutionality of the County's Code Provisions.

Even if the district court were conducting a plenary appeal rather than limited second-tier certiorari, reaching the constitutional issue would have been improper. The district court *sua sponte* struck the County code provisions as unconstitutional where that issue had never been raised or briefed by the parties, and did not even review the circuit court's alternate grounds for reaching the same result, *i.e.*, the reversal of the County's zoning decision. *Omnipoint* at 770. The decision below thus conflicts with many decisions of this Court, which "has, on a number of occasions, held that it was 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 (Fla. 1969).

Additionally, "[i]t is a fundamental maxim of judicial restraint that 'courts should not decide constitutional issues unnecessarily.'" *State v. Efthimiadis*, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997); *accord State v. Mozo*, 655 So. 2d 1115, 1116 (Fla. 1995) (recognizing "the settled principle of constitutional law that courts should endeavor to implement the legislative intent of statutes and *avoid constitutional issues*"). "It is a fundamental principle that Courts will not pass upon the validity of a statute where the case before them may be disposed of upon *any other ground*," *Williston Highlands Dev. Corp. v. Hogue*, 277 So. 2d 260, 261

(Fla. 1973).[17] The district court overlooked these principles by striking the County's zoning provisions as unconstitutional, while holding that the circuit court had reached the right result for "different" reasons. *Omnipoint* at 770.[18]

[17] The district court, by footnote, cited *Pollock v. Department of Health and Rehabilitative Services*, 481 So. 2d 548 (Fla. 5th DCA 1986), for the proposition that, even where a party failed to properly raise and preserve constitutional issues in the lower court, the appellate court could nevertheless review and invalidate a statute on the grounds that it was "fundamentally unfair and unjust." *Omnipoint*, at 769 n.6. *Pollock*, however, expressly found that "the [constitutional] issue *was properly preserved*." *Pollock*, 481 So. 2d at 549. Thus, the *Pollock* court's comment that a "fundamentally defective and unjust" statute permitting the severance of parental rights with "*no* standards or guidelines" *could* provide an independent basis for review was gratuitous dicta. The district court's reliance on *Pollock* to reach an otherwise unreachable constitutional issue is therefore not only misplaced, but also ironic, given the district court's own rejection of what it viewed as "gratuitous" comments in *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). *Omnipoint*, at 769. More significantly, it is nowhere established that the invalidated zoning provisions are "fundamentally defective and unjust", a conclusion for which the Third District court provided no standards.

[18] The district court also overlooked two additional restraints. First, a zoning applicant has no standing before the circuit court to attack the facial constitutionality of the very ordinance under which it seeks relief, at the time it seeks such relief. *Josephson v. Autry*, 96 So.2d 784 (Fla. 1957); *Servatt v. Dade County*, 173 So.2d 175 (Fla. 3d DCA 1965). Second, the zoning applicant could not have raised the constitutional issue for the first time on second-tier certiorari review, having never asked the circuit court to address it. *First Baptist Church*, 768 So.2d at 1118, n.4.

B. Even If the Constitutional Issue Had Been Raised and Preserved, the District Court Had No Authority to Declare the Zoning Ordinances Facially Unconstitutional.

The limited jurisdiction of the courts in conducting certiorari review of administrative, quasi-judicial decisions is as follows:

> [T]he circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law.

City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982). This Court has recently reaffirmed the principle that "'[a]s a case travels up the judicial ladder, review should consistently become narrower, not broader.'" *Broward County v. GBV Int'l, Ltd.*, 787 So. 2d 838, 843 n.15 (Fla. 2001) (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995)). Here the district court not only broadened its review, but it broadened that review even beyond that conducted by the circuit court. By denying certiorari yet holding certain provisions of the County Code unconstitutional, the district court decision is in conflict with the foregoing case law as well as with several other Supreme Court decisions: *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679 (Fla. 2000); *Florida Power and Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000); and *Dusseau v. Metropolitan Dade*

County Board of County Commissioners, 794 So. 2d 1270 (Fla. 2001).[19].

In *Heggs*, this Court clarified the "departure from the essential requirements of law," as "apply[ing] the correct law." 658 So.2d at 530. The Court held that certiorari jurisdiction should be exercised "only where there has been a violation of clearly established principle of law resulting in a *miscarriage of justice*." *Id*., at 528. The Court noted that "if the role of certiorari was expanded to review the correctness of the circuit court decision, it would [improperly] amount to a second appeal." *Id*., at 526 n.4. Even a misapplication of the law resulting in legal error is an insufficient basis for the exercise of certiorari jurisdiction where no manifest injustice is demonstrated. *Id.* at 528; *Ivey*, 774 So. 2d at 682; *see also City of Dania*, 761 So. 2d at 1092 ("As a practical matter, the circuit court's final ruling in

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[19] The district court's error is perhaps best illustrated by its own holding, in similar litigation, that the issue of constitutionality "must" be determined in original proceedings, not certiorari proceedings:

> The Church attempts to challenge the constitutionality of section 33-311 of the Miami-Dade County Code .... [A] petition for certiorari is *not the proper procedural vehicle* to challenge the constitutionality of this ordinance. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982) .... The constitutionality of the ordinance *must be determined in original proceedings* before the circuit court, not by way of a petition for writ of certiorari. *See Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779 (Fla. 2d DCA 1992). Furthermore, this issue was *never brought before the circuit court* in the proceedings below and should not be considered initially by this Court.

First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114, 1115 n.1 (Fla. 3d DCA 2000).

most first-tier cases is conclusive, for second-tier certiorari is extraordinarily limited."); *GBV Int'l*, 787 So. 2d at 842 (second-tier certiorari "functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists." Certiorari review is never to redress "mere legal error."); *accord Cantrall v. Dep't of Highway Safety and Motor Vehicles*, 828 So. 2d 1062 (Fla. 2nd DCA 2002); *Town of Malapan v. Gyongyos*, 828 So. 2d 1029 (Fla. 4th DCA 2002).

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. Thus, the district court exceeded its certiorari jurisdiction by ruling on the constitutionality of these zoning provisions. This Court disallowed precisely such an action in *Ivey*, saying, "There is a great temptation in a case like this one to announce a miscarriage of justice simply to provide precedent where precedent is needed. We do not interpret *Heggs* as giving this Court that degree of discretion in a certiorari proceeding." *Ivey*, 774 So. 2d at 683.[20]

[20] Ironically, *Omnipoint* itself has made perhaps the most compelling argument for quashing the district court opinion. Subsequent to the Third District Court's decision, Omnipoint filed in the Third District Court a motion for writ of mandamus based not upon the opinion of the district court, but upon that of the circuit court. Effectively recognizing that the district court had exceeded its jurisdiction, Omnipoint argued:

> In accordance with ... *Vaillant*, ... *Heggs*, ... *Ivey* ..., [and] ... *GBV Int'l*, ... *the inquiry upon second-tier certiorari*

Moreover, on second-tier certiorari, the error which must be demonstrated is error *of the circuit court*, not of the zoning board or the legislative body. *Morris v. City of Hialeah*, 140 So. 2d 615, 617 (Fla. 3d DCA 1962). It was thus improper for

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> *review is deliberately circumscribed and narrowed to avoid granting the extraordinary remedy of a forbidden second appeal*. The purpose of second-tier certiorari review is to permit the District Court of Appeal to exercise discretion *only* when there has been a violation of clearly established principle[s] of law "*resulting in a miscarriage of justice*." *Ivey*, 774 So. 2d at 683. * * *
>
> … Pursuant to the Panel Opinion, *the correct result was reached below* and a *miscarriage of justice did not occur*. Hence, [Omnipoint] is entitled to a Writ of Mandamus directed toward the *circuit* court to remand back to the CZAB in accordance with the *Circuit* Opinion.

R. 591-593 (emphasis modified).

the lower court to reach the facial constitutionality issue because the circuit court could not possibly have committed any error on that issue—the issue was never raised before or considered by the circuit court.

C. The District Court Expressly Declined to Apply the Correct Standard of Review, and Exceeded its Jurisdiction by Making its Own Finding of Fact and by Directing Approval of Omnipoint's Application.

Failure to Review

At the outset of its opinion, the district court observed the two grounds for the circuit court's opinion, lack of substantial competent evidence and discrimination under section I of the Telecommunications Act (TCA). The district court then affirmatively decided not to consider either ground. ("Our decision turns only on Section…(II), rather than (I)." Omnipoint, at 768. "We do not reach the various questions as to substantial competent evidence." *Id*., n.1.) The court thus failed to conduct the required review of whether the circuit applied the correct law. In *Dusseau* the Supreme Court reversed the Third District Court, holding: "Once the district court determined from the face of the circuit court order that the circuit court had applied the wrong law [of substantial competent evidence], *the job of the district court was ended*." *Dusseau*, 794 So. 2d. at 1275, quoting from *City of Dania*, 761 So. 2d at 1093. The effect of the district court decision is to avoid the foregoing limitation by never determining in the first instance whether the circuit court applied the correct law. At its conclusion the district court opinion observed

that the circuit court had ruled on a "different basis" than the district court, a basis that the district court never even considered. *Omnipoint*, at 770.

As demonstrated in the county's district court petition, R217-269, the circuit court, by reweighing the evidence, had failed to follow the essential requirements of law, just as it had done in *Dusseau*. *See Dusseau*, at 1274-75. The circuit court had also failed to apply the correct law in finding discrimination under Section I of the TCA. The result was to effectively approve a 14 story telecommunications tower not only in a prohibited setback area, but also in violation of a previously approved site plan under which the property had already been permitted to develop with low profile mini storage. The tower was approved in the face of substantial competent evidence that it was not compatible with adjacent residential neighborhoods. The circuit court simply failed to apply the correct law, an issue which the district court held: "We do not reach…." *Omnipoint*, at 768 n.1.

Improper Directive to Grant Application

The circuit court had instructed the county to "*determine the application* in accordance with [its] opinion." App 1 at 9. The district court went much further. While leaving the remand "intact", the district court restated it as being for the express purpose of "the Board's *granting approval* of Omnipoint's application." *Omnipoint*, at 770. By effectively directing the county to approve the application, the district court exceeded its jurisdiction. "'The appellate court has *no power* in exercising its jurisdiction in certiorari … to direct the [county] to enter *any*

particular order or judgment,'" GBV Int'l, 787 So. 2d, 844 quoting from *Tamiami Trail Tours v. Railroad Commission,* 128 Fla. 25, 174 So. 2d 451, 454 (1937) (on rehearing).

Improper Finding of Fact and Erroneous Conclusion of Law

The basis for the district court requiring the immediate approval of cellular towers was the court's factual finding that its striking of the Code provisions would "have the effect of prohibiting the provision of personal wire[less] services…." This led to the erroneous legal conclusion that such a prohibition was in violation of the TCA. *Omnipoint,* at 770.

Not only was the foregoing factual finding totally unfounded, but also it was in conflict with the district court's discrimination holding, which was based upon the *fact* of competing service in the area. Moreover, the County Code provides for the vast provision of such services by permitting cellular antennas and towers, *as of right,* in various locations and circumstances. First, cellular towers of up to one hundred feet in height are permitted in all BU-3 Liberal Business districts and in all Industrial Districts. Sec. 33-63.2(c). App. 3. Second, the code permits the co-location of additional wireless antennas and equipment on all existing wireless facility sites *as a matter of right in any district*. Sec. 33-63.3. *Id*. Third, subject to specific height regulations, cellular antennas are permitted "[I]n hotels, motels, and apartment hotels in an RU-4A district; in all RU-5, RU-5A, OPD [and] in all

business and industrial districts." Section 33-63.2(a)(1). *Id*.[21]

A district court is precluded from making its own findings of fact. *See generally*, *Dusseau*, 794 So. 2d 1270. The foregoing errors, therefore, were particularly egregious because, based upon the erroneous finding of a prohibition of wireless services, the district court *required the approval* of cell towers in residential and all other neighborhoods where public hearings were previously required. The result is to unnecessarily put a large portion of the County at the risk of having cellular towers constructed without the safety and compatibility protections previously afforded by the stricken code provisions.

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[21] Both the district court and the circuit court below applied the wrong law under the Telecommunications Act. The circuit court incorrectly concluded that the presence of one other telecommunications tower in the vicinity of Omnipoint's application site meant that it would be illegal discrimination to disallow Omnipoint's tower, regardless of lawful compatibility considerations. App. 1. Correctly understood, the TCA does not preempt the authority of local government to deny a telecommunications tower whenever the applicant's competitor has placed one or more near the applicant's desired application site. *See, Riverside Roof Truss, Inc. v. Board of Zoning Appeals of the City of Palatka*, 734 So.2d 1139,1141-42 (Fla. 5th DCA 1999); *Benjamina Nursery Farm, Inc. v. Miami-Dade County*, 170 F. Supp. 2d 1246, 1250-51 (S.D. Fla. 2001); *Primeco Personal Communications Limited Partnership v. Lake County, Florida,* 1998 WL 565036 (M.D. Fla. 1998).

The district court applied the wrong law when it concluded that the absence of a special exception process would automatically constitute the prohibition of personal wireless services in the County. Correctly understood, a single denial of a telecommunications tower does not constitute an unlawful prohibition of services in a community. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998)(prohibition provision not applicable to individual zoning decision).

CONCLUSION

This Court should (a) reverse the district court's holding that portions of the County zoning code are unconstitutional, (b) set down the proper presumption and standards for reviewing such legislation, and (c) hold that the Code sections are constitutional. This Court also should find that the District Court failed to conduct properly its limited second tier certiorari review of the Circuit Court's decision and require the Circuit Court to apply the correct law as to substantial competent evidence and the Telecommunications Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 3rd day of February, 2003, to: ***Deborah L. Martohue, Esq.***, Hayes & Martohue, 5959 Central Avenue, Suite 104, St. Petersburg, Florida 33710.

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Jay W. Williams
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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

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER SC02-815

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MIAMI-DADE COUNTY,

Petitioner,

v.

OMNIPOINT HOLDINGS, INC.,

Respondent.

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

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APPENDIX TO INITIAL BRIEF OF MIAMI-DADE COUNTY, PETITIONER

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