IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR SARASOTA COUNTY, FLORIDA

NORTH VENICE NEIGHBORHOOD
ALLIANCE INC,
GARY SCOTT,
KENNETH BARON,
SETH THOMPSON,
Plaintiff,

v.

CASE NO. 2023 CA 006165 SC
DIVISION H CIRCUIT

CITY OF VENICE,
BORDER AND JACARANDA
HOLDINGS LLC,
Defendant.

ORDER DENYING PETITIONERS'
AMENDED PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court without oral argument on Petitioners' Amended Petition for Writ of Certiorari (DIN 14), Respondent City of Venice's Response to Amended Petition for Writ of Certiorari (DIN 19), Respondent Border and Jacaranda Holding's Response to Amended Petition for Writ of Certiorari (DIN 22), and Petitioners' Reply (DIN 26). The Court has reviewed the Court's file, including all Appendices and Exhibits, and is otherwise fully advised in the premises, and hereby ORDERS and ADJUDGES as follows:

Requested Relief

In their Amended Petition, Petitioners "seek judicial review of a quasi-judicial rezoning." DIN 14. More specifically, Petitioners request this Court to quash Ordinance No. 2023-11, the City of Venice Ordinance which approved Respondent, Border and Jacaranda Holdings' ("BJH"), application for a zoning map amendment of the Milano Planned Unit Development ("Milano PUD") in the City of Venice. *See* DIN 14.

Jurisdiction

The Court has jurisdiction to review quasi-judicial municipal rezoning approvals. Art. V, §5(b), Fla. Const.; *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993); Fla. R. App. P. 9.030(c)(3). In this "first tier" certiorari review, the Court is limited to determining: (1) whether the City afforded procedural due process to the parties; (2) whether the City observed the essential requirements of the law; and (3) whether the City's decision is supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Martin County v. City of Stuart*, 736 So. 2d 1264, 1266 (Fla. 4th DCA

1999). The Court's review of the City of Venice's quasi-judicial rezoning decision is limited to these considerations; it is not a plenary appeal.

Given the Court's limited review, Petitioners' requests in their Petition for this Court to do anything but to quash the City of Venice's quasi-judicial rezoning decision and adoption of Ordinance No. 2023-11 is legally improper. *See Miami-Dade County v. Snapp Industries, Inc.*, 319 So. 3d 739, 741 (Fla. 3d DCA 2021) (on a petition for certiorari, "[t]he remedy available to the circuit court was limited to quashing the hearing officer's order, and nothing more"). On a petition for certiorari, the Court "has no authority to take any action resulting in the entry of a judgment or order on the merits or to direct that any particular judgment or order be entered." *Snyder v. Douglas*, 647 So. 2d 275, 279 (Fla. 2d DCA 1994) (citation omitted). Further, the Court has no authority to direct the municipality to take any particular action. *See Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 844 n. 18 (Fla. 2001).

Procedural Due Process

The Petitioners do not argue in their Amended Petition or in their Reply that the City did not afford procedural due process. Therefore, the Court does not address procedural due process further in this Order and finds that this prong has been satisfied by the City.

Essential Requirements of the Law

Petitioners argue that the City did not observe the essential requirements of the law in approving BJH's application for a zoning map amendment of the Milano PUD and, thereafter, adopting Ordinance No.: 2023-11, using several arguments.

Application of the Old Land Development Code

Petitioners first argue that the City should have reviewed BJH's application under Ordinance No. 2022-15, the City's new Land Development Code, which was adopted on 12 July 2022. The Court disagrees and rejects this argument. Rather, the City's review of BJH's application was properly subject to Section 86-130 of the old Land Development Code (the Land Development Code in effect prior to the adoption of Ordinance No. 2022-15).

Ordinance No. 2022-15 (the new Land Development Code) specifically states "[a]pplications for land development accepted by the City prior to the effective date of this ordinance shall be processed under the requirements of the land development ordinance in effect at the time of application." Ordinance No. 2022-15 goes on to state, "[h]owever, applicants shall be given the option to have applications processed under the requirements of this Ordinance No. 2022-15."

Petitioners state in their Petition that "BJH should have elected to have its petitions processed under the city's new Land Development Regulations…that were adopted by the City Council on July 12, 2022, but chose not to." DIN 14. There is no question that BJH's application for rezoning was submitted on 14 June 2022, prior to the adoption of Ordinance No. 2022-15. There is also no question, and Petitioners' Amended Petition admits, that BJH "chose not to" have their application processed under the new Land Development Code.

Therefore, the City properly processed BJH's application for a zoning map amendment under the proper version of the LDC. Based on this, the Court does not address Respondents' estoppel arguments based on Petitioners failure to preserve this issue and takes no position on same herein.

Section 86-130(j)

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-130(j) of the old Land Development Code. Section 86-130(j) states:

> (j) *Land use intensity; open space; dedication of land for municipal uses.*
>
> (1) In a PUD a maximum density of 4.5 dwelling units per gross acre shall be allowed, provided that such maximum density may be varied by city council, after recommendation by the planning commission, where a showing is made that such maximum density is inappropriate based upon the intensity and type of land use in the immediate vicinity and the intent of the comprehensive plan for the area requested. A minimum of 50 percent of the PUD shall be open spaces.
>
> (2) A maximum of eight percent of the gross project site may be required for dedication to municipal uses for all projects in excess of 25 acres in area, after a determination by the city council that a demonstrated public need exists for municipal facilities such as parks, fire stations or other public uses.
>
> (3) Land in a PUD designated as open space will be restricted by appropriate legal instrument satisfactory to the city attorney as open space perpetually, or for a period of not less than 99 years. Such instrument shall be binding upon the developer, his successor and assigns and shall constitute a covenant running with the land, and be in recordable form.

Petitioners argue that "[t]he legal instruments required by [Section] 86-130(j)[(3)] should have been executed and submitted to the city for approval and recording no later than September 14, 2021, thereby protecting the open space within the Milano, Cielo and Aria subdivisions from redevelopment for 99 years." DIN 14. This argument is based on Petitioners' interpretation of Section 86-130(j)(3). Under Petitioners' interpretation, open space land dedications, restricting the land as open space, should be recorded by legal instrument following the final approval of a final plat for each subdivision within a PUD.

Both Respondents argue that Section 86-130(j)(3) was historically interpreted by the City to require dedication of land in a PUD designated as open space upon the final platting of the last phase of the entire PUD, regardless of when subdivisions within said PUD obtained final approval for their final plats. Argues Respondents, since there is still a development area of

residential lots for the Milano PUD that has not been memorialized through preliminary or final plats, the recording of legal instruments restricting open space is premature.

In *Haines City Community Development v. Heggs*, the Florida Supreme Court, in considering whether the essential requirements of the law were observed, held that observing the essential requirements of law is synonymous with applying the correct law. 658 So. 2d 523, 530 (Fla. 1995). Overlooking sources of established law or applying an incorrect analysis of the law results in a departure from the essential requirements of law. *See City of Tampa v. City Nat'l Bank of Fla.*, 974 So. 2d 408, 411 (Fla. 2d DCA 2007).

The Court believes that the City's interpretation of Section 86-130(j)(3) is sound based on the text. First, the Court notes that Section 86-130(j)(3) does not give a timeline for the restrictive dedication of open space in a PUD. Rather, Section 86-130(j)(3) states "will be restricted", indicating an undetermined time in the future. Second, Section 86-130(j)(3) begins with "Land in a PUD". It does not state "Land in a subdivision within a PUD". This indicates that Section 86-130(j)(3) requires the dedication of open space in a PUD, completed in its entirety. The text does not suggest the piecemeal approach that Petitioners posit. Lastly, Section 86.130(j)(3) uses the singular version of the word "instrument." Section 86-130(j)(3) does not utilize the plural form: "instruments." This gives further credibility to the City's interpretation that the restrictive dedication of open space within a PUD would occur, using one legal instrument, after *all* the lands within the PUD had been finally platted. Regarding the City's interpretation of Section 86.130(j)(3), the Court finds that the City did not depart from the essential requirements of the law.

Section 86-231

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-231(c)(2)(n) of the old Land Development Code. Petitioners argue that BJH's application violated Section 86-231(c)(2)(n) "because the proposed commercial use would violate dedicated open space that was to be required on the final plat of the Cielo subdivision plat to include the dedication to public use of all open spaces." DIN 14.

Section 86-231 is titled "Plat requirements". This section applies to plat approvals. BJH's application was *not* at plat approval. Rather, BJH's application was for a zoning map amendment of the Milano PUD. The decision made by the City to approve BJH's application and adopt Ordinance No. 2023-11 was not a decision to accept or reject a plat. Therefore, Section 86-231 does not apply and the City did not depart from the essential requirements of the law by not considering it.

To the extent that Petitioners are attempting to collaterally attack the City's approval of the Cielo subdivision plat (which occurred in 2019), their arguments are untimely. Petitioners made no challenge to the approval of the Cielo subdivision plat at the time it was approved by the City. They cannot now, five years later, attack the City's decision to accept the Cielo plat by shoehorning it into this action.

Section 86-130(b)(8)

Petitioners also argue that the City did not observe the essential requirements of Section 86-130(b)(8) of the old Land Development Code. Section 86-130(b)(8) states:

> Permitted principal uses and structures in PUD districts are:
>
> …
>
> (8) Neighborhood commercial uses which are determined at the time of approval for the PUD to be compatible with the existing and future development of adjacent and nearby lands outside the PUD.
>
> …

Petitioners argue that, since there was no determination of compatibility made at the time of the Milano PUD approval, that BJH's application for zoning map amendment should have been denied. Petitioners' argument fails as Petitioners' narrow reading of Section 86-130(b)(8) fails to recognize Section 86-130(b)(9)—the next permitted principal use in the list.

Section 86-130(b)(9) states:

> Permitted principal uses and structures in PUD districts are:
>
> …
>
> (9) Other uses of a nature similar to those listed, after determination and recommendation by the planning commission, and determination by the city council **at the time of rezoning** that such uses are appropriate to the PUD development.
>
> …

(emphasis added).

Section 86-130(b)(9) clearly shows that Petitioners' arguments based on Section 86-130(b)(8) fail. Section 86-130(v) allows for changes in plans for a PUD and Section 86-130(b)(9) allows for "uses of a nature similar", after certain determinations, at the time of the application for a zoning map amendment. This shows that zoning map amendments were anticipated and that the compatibility determination for "neighborhood commercial uses" was not locked in at the time of the initial PUD approval.

Section 86-130(r)

Petitioners further argue that the City did not observe the essential requirements of Section 86-130(r) of the old Land Development Code. Section 86-130(r) states:

> *Commercial uses.* Commercial uses located in a PUD are intended to serve the needs of the PUD and not the general needs of the

> surrounding area. Areas designated for commercial activities normally shall not front on exterior or perimeter streets, but shall be centrally located within the project to serve the residents of the PUD.

Section 86-130(r) does not restrict the commercial use to solely serving the residents of the PUD. Further, Section 86-130(r) does not prohibit the commercial use from being built on exterior or perimeter streets. While Section 86-130(r) could certainly provide the City a basis for denying a developer's PUD application or zoning map amendment, Section 86-130(r) does not impose any prohibitions on the City from approving an application wherein the proposed commercial uses have an intent to serve the needs of residents of the PUD.

Section 86-570

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-570 of the old Land Development Code. Petitioners argue that "[t]he open space which BJH is attempting to utilize for this commercial use is not controlled solely by BJH." DIN 14. Petitioners' argument is completely without merit.

Petitioners' theory completely ignores age-old legal requirements for the transfer and dedication of real property—something that can only be accomplished through a legal instrument of conveyance. Petitioners' reliance on a definition in a Land Development Code has no basis in Florida's real property jurisprudence.

Denial by Planning Commission

Petitioners argue that the City did not observe the essential requirements of the law because the City of Venice Planning Commission recommended to the City Council that BJH's application should have been denied.

Section 86-47(h) of the old Land Development Code, however, states: "The report and recommendations of the planning commission regarding rezoning or amendment of this code shall be advisory only and shall not be binding upon city council."

Contrary to the arguments made by Petitioners, a recommendation of the Venice Planning Commission is solely that—a recommendation—that may be adopted or rejected by the City Council. The City Council did not fail to observe the essential requirements of the law because it chose not to adopt the recommendation of the Planning Commission.

Failure to Apply Correct Law under Brevard County v. Snyder

Petitioners also argue that the City did not observe the essential requirements of the law because they should have been instructed to apply the rezoning test established by the Florida Supreme Court in *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). Petitioners' reliance on *Snyder* is misplaced. *Snyder* relates to a municipality's *denial* of a landowner's permitting application. *See* 627 So. 2d 469.

Further, while there is no legal requirement that the City Council be instructed on applicable law, the record makes it clear that the City Council was advised by the City attorney on the record of the correct legal standard for review.

Milano PUD Residents' Reliance

Petitioners argue that residents of the Milano PUD relied on the belief that the "open space" depicted in the original approval would remain "open space". This argument lacks legal basis, and the Court rejects it without further comment.

Breach of Agreement with the City and Breach of Cielo Declaration of Restrictive Covenants

Petitioners next argue that the City did not observe the essential requirements of the law because BJH, as successor to Neal Communities of Southwest Florida, LLC, allegedly breached the Open Space Agreement with the City that, under Petitioners' interpretation, required the recording of a restriction preserving open space within the Milano PUD. The Court rejects this argument.

The Open Space Agreement is exclusively between the property owner and the City. The Open Space Agreement specifically states that "[n]o right or cause of action shall accrue upon or by reason hereof, to or for the benefit of any third party."

While this Court takes no stance as to the allegation of breach, the only entities that have rights that may be enforced under the Open Space Agreement are the parties that entered it. In this case, neither appear to have sought any enforcement of their rights under the Open Space Agreement. If there was a breach of the Open Space Agreement, the City's choice not to enforce against same does not equate to a failure to observe the essential requirements of the law as it relates to its decision to approve BJH's application.

Similarly, Petitioners argue that the City did not observe the essential requirements of the law because the approval of BJH's application causes a violation of the Cielo Declaration of Covenants, Conditions and Restrictions. The Court also rejects this argument.

While this Court takes no position as to the allegations of a violation of the Declarations, the Cielo Declaration of Covenants, Conditions and Restrictions does not apply to the City's decision-making authority to approve BJH's application. A municipality may approve a rezoning application whilst observing all essential requirements of the law, despite the Declarations. If certain usages are prohibited by the Declarations, then a Writ of Certiorari is not the appropriate avenue for relief.

Competent, Substantial Evidence

To determine whether Petitioners are entitled to have their Petition for Writ of Certiorari granted and the decision to approve BJH's application quashed, "[t]he court must review the record and determine *inter alia* whether the agency decision is supported by competent substantial evidence." *Dusseau v. Metropolitan Dade County Bd. Of County Com'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). "Competent substantial evidence is tantamount to legally sufficient evidence." *Id.* It is not this Court's role to usurp the fact-finding authority of the City. *Id*. at 1275. This

Court is not permitted to reweigh the evidence or to determine whether the City's decision was opposed by competent substantial evidence. *See Id*.

The Florida Supreme Court made the court's role in analyzing the "competent substantial evidence" prong of certiorari review very clear in *Dusseau*. The Florida Supreme Court stated as follows:

> [T]he "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-à-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Id. at 1275-76.

This Court has done exactly what the Florida Supreme Court mandated in *Dusseau*. It has reviewed the record to assess the evidentiary support for the City's decision to approve BJH's application for zoning map amendment and adopt Ordinance No. 2013-11. It has set aside evidence contrary to the City's decision as said evidence is outside the scope of inquiry. This Court has abstained from reweighing the "pros and cons" of conflicting evidence. And, in performing its review, this Court finds that the record contains competent substantial evidence to support the City's decision.

Other Issues Raised

To the extent there are any other issues raised by the Parties, the Court has considered said arguments and rejects them without further comment.

NOW, THEREFORE, based on the foregoing, this Court finds as follows:

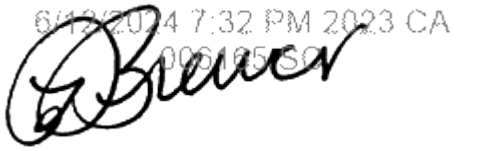
The City afforded procedural due process to the parties in deciding to approve BJH's application for a zoning map amendment and adopting Ordinance No. 2013-11.

The City observed the essential requirements of the law in deciding to approve BJH's application for a zoning map amendment and adopting Ordinance No. 2013-11.

The record contains competent substantial evidence to support the City's decision to approve BJH's application for a zoning map amendment and adopt Ordinance No. 2013-11.

FURTHERMORE, based on the foregoing, Petitioners' Amended Petition for Writ of Certiorari (DIN 14) is hereby **DENIED.**

DONE AND ORDERED in Sarasota, Sarasota County, Florida, on June 12, 2024.



e-Signed 6/12/2024 7:32 PM 2023 CA 006165 SC

DANIELLE BREWER
Circuit Judge

SERVICE CERTIFICATE

On June 12, 2024, the Court caused the foregoing document to be served via the Clerk of Court's case management system, which served the following individuals via email (where indicated). On the same date, the Court also served a copy of the foregoing document via First Class U.S. Mail on the individuals who do not have an email address on file with the Clerk of Court.

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

NORTH VENICE NEIGHBORHOOD ALLIANCE INC., GARY SCOTT, KENNETH BARON, and SETH THOMPSON,

Petitioners,

Case No.: 2023 CA 006165 SC

v.

CITY OF VENICE, and BORDER AND JACARANDA HOLDINGS, LLC,

Respondents.
_____/

RESPONDENT BORDER AND JACARANDA HOLDING'S RESPONSE TO AMENDED PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

Introduction

Respondent Border and Jacaranda Holdings, an affiliated entity of Neal Communities, Inc. ("BJH"), is the developer and owner of the 500+ acre Milano Planned Unit Development ("Milano PUD") in the City of Venice ("City"). (BJH App. p. 1).[1] BJH applied to the City for a zoning map amendment in order to amend the PUD concept plan's description of 10.42 acres of the overall PUD property to commercial use and to apply specific standards for this commercial development. (*Id.*) Commercial use unquestionably is permissible within the Milano PUD under the City's Comprehensive Plan and Land Development Code ("LDC").[2] (App. Vol. 1 p. 7).[3]

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[1] Petitioner did not file a complete documentary record of the proceedings below. The record below contained thousands of pages of materials; therefore, BJH is filing a Supplemental Appendix with such additional documents as are necessary to support its Statement of Facts. Citations to BJH's Supplemental Appendix shall be "BJH App. p. __."

[2] The subject land development application was submitted and reviewed under the prior version of the City's Land Development Code. Subsequently, the City adopted a substantial rewrite of its code, which shall be referred to herein as the "New Land Development Code." All other references to the Land Development Code or LDC shall refer to the prior code that this application was subject to.

[3] Petitioners have filed three separate appendices, Volumes 1, 2, and 3. Volume 1 was filed August 10, 2023 (DIN 3), Volume 2 was filed December 6, 2023 (DIN 11 and 12), and Volume 3 was filed October 22, 2023 (DIN 7). Volume 3 consists of the transcripts of the hearings before the City Council. Citations shall be "App. Vol. __ p. __."

After five days and over 30 hours of public hearings before City Council and the submission of voluminous record materials, Council voted 5-2 to approve the application through the adoption of Ordinance No. 2023-11 (the "Approval"). (App. Vol. 3 p. 1415). Council considered all of the evidence in support of and against the application, applied the relevant provisions of the City's Comprehensive Plan and LDC, and found that the application met the requisite criteria for approval. (App. Vol. 1 pp. 3-4). In addition to amending the description of the 10.42 acre property within the Milano PUD to commercial use, the Approval limits the total commercial square footage to 70,240 square feet, and requires buffering between the commercial and residential uses. (App. Vol. 1 p. 4).

Petitioners—residents and a citizen group formed to oppose BJH's development—filed an Amended Petition ("Petition") requesting certiorari relief quashing Council's Approval. The sole basis for certiorari relief asserted by Petitioners is that the City's Approval allegedly is a departure from the essential requirements of law. However, the City observed the essential requirements of law because Council properly applied the relevant provisions of the

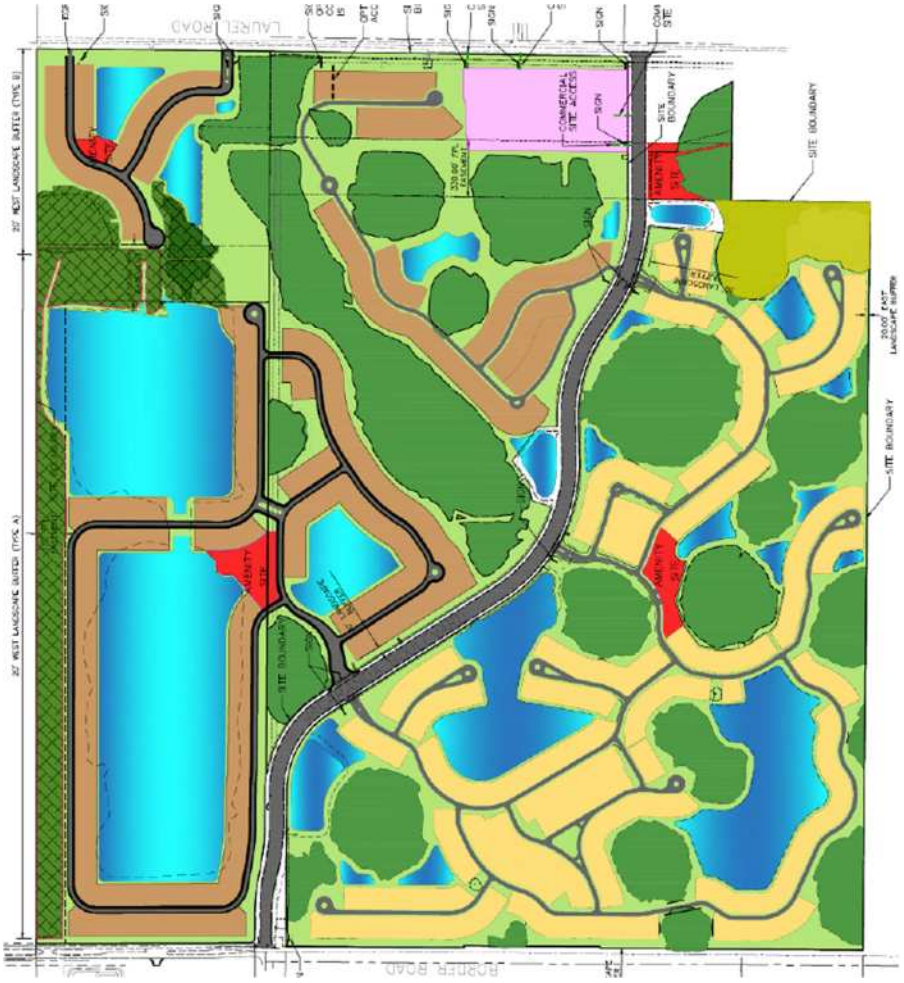
Comprehensive Plan and LDC in considering the application. Council also correctly applied the law, and based its decision on competent substantial evidence demonstrating that the legal requirements for approval were met. The Petition fails to meet the requisite legal standard for certiorari relief and, therefore, must be denied.

The Property, the Milano PUD, and the Application

The subject property ("Property") is a 10.42 acre parcel of land located at the southwest corner of the intersection of Laurel Road and Jacaranda Boulevard. (BJH App. p. 4). Across Jacaranda Blvd to the east is a City fire station. (BJH App. p. 7). Across Laurel Road to the north is a subdivision and the Venetian Golf and River Club. (*Id.*) The Property is within the 500+ acre Milano PUD and is depicted below:

(BJH App. p. 4).

The Property was rezoned to Planned Unit Development (PUD) by the City in 2017. (App. Vol. 1 p. 7). The Milano PUD is a planned community approved for 1,350 homes. (*Id.*) The overall PUD property, its uses, and acreages pursuant to BJH's amendment application is shown in the depiction and table below:



LAND USE AREA TABLE		
LAND USE	ACRES	%
SINGLE FAMILY/PAIRED VILLAS/MULTI-FAMILY SINGLE FAMILY/PAIRED VILLAS	182.0	36.1%
AMENITY AREA	5.0	1.0%
COMMERCIAL SITE	10.4	2.1%
R.O.W.	50.0	9.9%
OPEN SPACE		
WETLANDS	122.2	24.2%
LAKES	92.2	18.3%
CONSERVATION AREA	9.0	1.8%
OTHER OPEN SPACES	57.2	11.4%
LESS OPEN SPACE TRANSFER TO GCCF PUD	(24.1)	4.8%
TOTAL OPEN SPACE	256.5	50.9%
TOTAL ACREAGE	503.9	100.0%

(BJH App. p. 41). As shown, the commercial acreage represents 2.1% of the overall Milano PUD acreage. Importantly, even after the

Approval, the ***open space acreage is 50.9%*** of the Milano PUD acreage. (*Id.*)

BJH's application sought a zoning map amendment to amend the description of the 10.42 acre Property at the intersection of Border and Jacaranda to commercial use. (App. Vol. 1 p. 7). Prior to BJH's proposed amendment, the Milano PUD had been amended several times (as is common practice and the case with many PUD zonings in the City). In 2020, the Milano PUD was amended by Ordinance 2020-40, which revised the PUD concept plan in several respects, including the location of access points, alteration of townhome lot and driveway standards, addition of areas designated for amenities, and revisions to roadway sections, street parking, and stormwater pond configurations. (App. Vol. 1 p. 7).

In 2022, the Milano PUD was amended by Ordinance 2022-23, which removed 24.1 acres of open space along the western boundary. (App. Vol. 1 p. 7). The removal of the 24-acre parcel reduced the overall Milano PUD acreage to 503.9 acres and the percentage of open space from 55.2% to 53%, ***which remained <u>above</u> the LDC requirement of 50% open space***. (App. Vol. 1 p. 7; BJH App. p. 7). BJH's application to amend 10.42 acres to commercial use would

result in reducing open space acreage from 53% to 50.9%, maintaining the LDC requirement that at least half of the land in the Milano PUD be set aside as open space. (BJH App. p. 7).

Petitioners did not legally challenge these previous amendments which, like the Approval, amended the description of uses of land within the Milano PUD and reduced the percentage of open space within the Milano PUD in a manner compliant with the City's Comprehensive Plan and LDC.

The Relevant Land Use and Land Development Regulations

Development in the City is controlled by the City's Comprehensive Plan and LDC. The City's Comprehensive Plan is a statutorily mandated legislative plan to control the use and development of property—a "constitution" for future land development. *Gardens Country Club, Inc. v. Palm Beach Cnty.*, 590 So. 2d 488, 490 (Fla. 4th DCA 1991); *see* Fla. Stat. § 163.3167(1). The Comprehensive Plan provides Goals, Objectives, and Policies for future land development, and includes a Future Land Use Map ("FLU Map") that designates future land use categories for areas of the City.

The Property is designated Mixed Use Residential (MUR) under the FLU Map. The MUR land use category provides for a maximum

residential density of five units/acre, and ***allows a maximum of 5% nonresidential uses in a PUD*** (again, after the BJH Approval, only ***2.1%*** of the PUD property is nonresidential use). (BJH App. pp. 7, 59). The Comprehensive Plan provides that the intent of nonresidential uses is to provide neighborhood scale and serving uses, rather than for regional purposes. (BJH App. p. 59). A "regional" purpose is one that "is not readily available elsewhere in the City and would draw users from multiple other jurisdictions."[4] (BJH App. p. 7). The MUR FLU Map category also requires a minimum 50% of open space—area that is not developed—within a PUD. (BJH App. p. 59).

The Comprehensive Plan and FLU Map designation govern generally the type of development contemplated for a property. But a property must also have the appropriate zoning to allow for a proposed development. The City adopts a quasi-judicial ordinance pursuant to the LDC in order to amend the zoning or zoning map for a property.

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[4] *See also* Comprehensive Plan Strategy OS 1.12.6 (providing that the City will pursue funding from "county, regional, state, or federal sources," ***indicating the term "regional" encompasses an area beyond the City and County***) (Supp. App. p. 60); *See generally* Comprehensive Plan (repeatedly using the phrase "local and regional" indicating that "local" is the City and County and "regional" is beyond the City and County).

The City's Planned Unit Development (PUD) zoning district typically consists of large tracts of land to be planned and developed in a coordinated manner. (BJH App. p. 62). PUDs in the MUR land use category are generally intended to allow for residential planned developments ***with neighborhood commercial uses***. (*Id.*) Design and development standards are established at the time of rezoning the property to PUD, at which time there is a concept plan approved showing the locations of the different proposed uses, dwelling types, access/traffic/parking, and tabulations of the density and intensity of development. (BJH App. pp. 67-68).

The more specific details of a PUD development occur at a separate, later stage of site and development plan review. (BJH App. pp. 7, 9, 68-69). Given that PUDs consist of large tracts of land, portions of a PUD are often developed in multiple phases over a span of years, with each phase going through its process of site plan approval and platting, until the last portion is developed and the overall PUD is completely and finally developed. (BJH App. p. 10; App. Vol. 3 pp. 91-92, 562). PUDs are designed to be flexible, and amendments may be permitted so long as they are compliant with the LDC and Comprehensive Plan. (BJH App. p. 69; App. Vol. 3 p.

133). Like the Comprehensive Plan, the LDC also requires that at least 50% of the PUD remain open space. (BJH App. p. 64).

BJH's application to amend the description of the 10.42 acre Property to commercial use was submitted on June 14, 2022. (BJH App. p. 1). LDC § 86-130(v) permits a developer to apply for—and City Council to review and approve—amendments to the concept plan approved by a PUD zoning. BJH's application was submitted and reviewed pursuant to the requirements of LDC § 86-130. (BJH App. p. 69). The City adopted the New Land Development Code on July 12, 2022, ***after*** BJH submitted its application. (BJH App. p. 73)

The New Land Development Code provides in its "Introductory Provisions":

> *Transitional Provisions*
>
> A. Applications for land development accepted by the City prior to the effective date of this ordinance ***shall be processed under the requirements of the land development ordinance in effect at the time of application***. However, applicants shall be given the option to have applications processed under the requirements of this Ordinance No. 2022-15.

(BJH App. p. 84) (emphasis supplied). Therefore, the mandatory regulations required the application to be processed under the ***prior***

LDC, unless BJH elected to proceed under the New Land Development Code, which it did not.

Report of City's Planning and Zoning Department

The City's Planning and Zoning Department consists of qualified professionals in the field of land use and planning. On a daily basis, these professionals review and apply the City's Comprehensive Plan and LDC in connection with their review and evaluation of land development applications within the City. As part of this process, the P&Z Department issues a report describing the proposed development and analyzing its compliance with the relevant provisions of the City's Comprehensive Plan and LDC.

Here, the P&Z Department's report ("Staff Report") found that the application was consistent with the MUR Comprehensive Plan land use category's requirements because: (1) the amendment to 10.42 commercial acres out of 504 overall acres resulted in only 2.1% nonresidential acreage (much less than the maximum of 5%); and (2) even with the amendment to 10.42 acres, there remained 50.9% open space, in excess of the 50% requirement. (BJH App. p. 7).

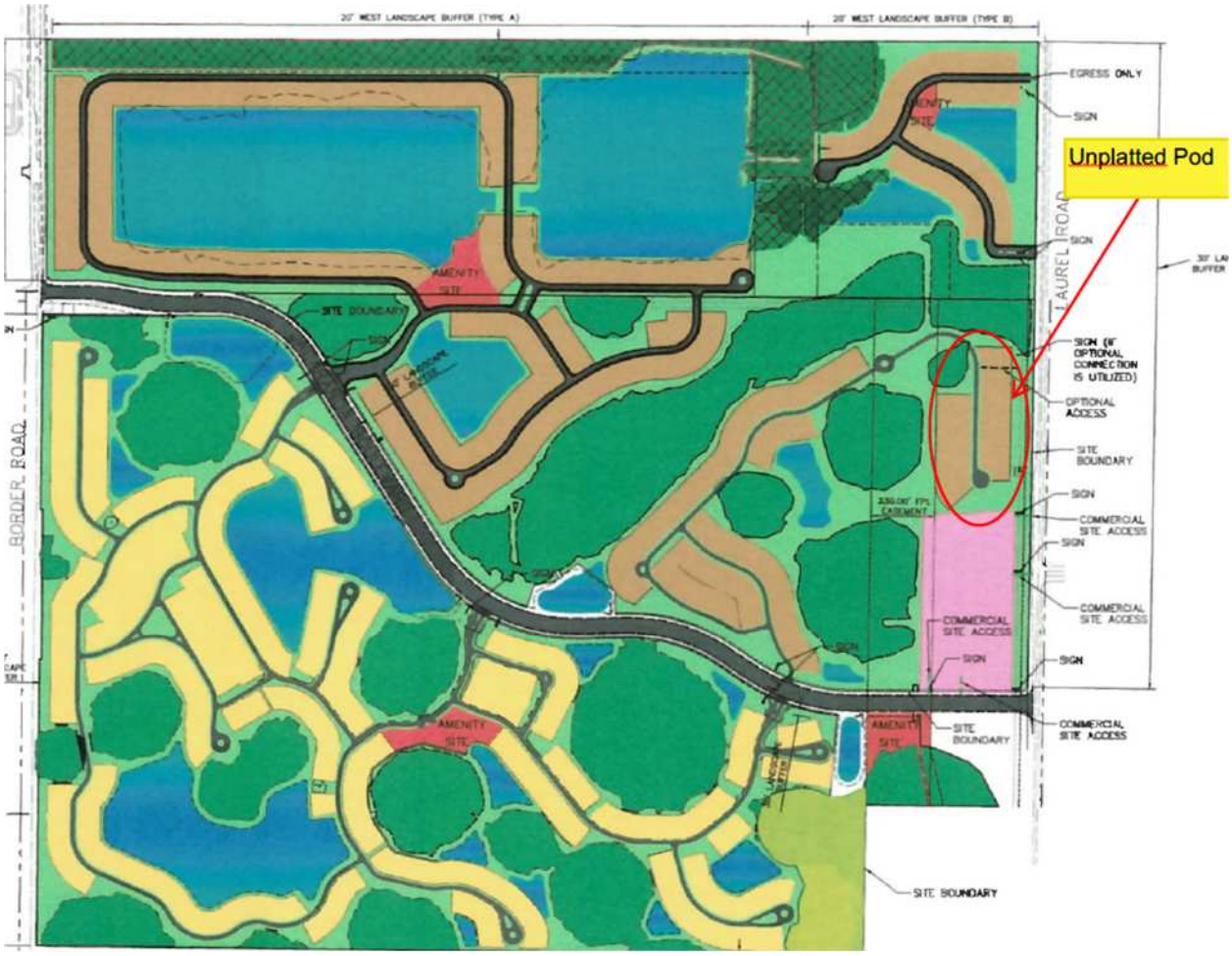
The Staff Report also identified Comprehensive Plan Strategy LU 1.2.16.7(b), which provides that the "intent of the non-residential

portion of the MUR is to provide for neighborhood scale and serving uses; not for regional purposes." (*Id.*) The City's professional staff correctly noted that a "regional" purpose is one that "is not readily available elsewhere in the city and ***would draw users from multiple other jurisdictions***." (*Id.*) (emphasis supplied).

Regarding compatibility of the proposed commercial use, staff noted that the LDC provides for compatibility to be reviewed at the time of the PUD zoning and, since the subject application was a zoning amendment, compatibility with the ***existing*** surrounding uses needed to be determined ***at the time of this amendment***. (BJH App. p. 9). Staff commented that the proposed amendment would be consistent with the intensity standards for commercial development in MUR and open space requirements for MUR. (BJH App. pp. 8-9). Finally, staff noted that the 330-foot wide FPL easement that runs east/west along the southern boundary of the Property (see notation identifying easement location adjacent to the southwest corner of the Property on the map at page 6 *supra*)—and additional open space south thereof—provided a substantial buffer from the residential development, furthering compatibility. (BJH App. p. 10).

Regarding compliance with the LDC, staff identified the relevant code section as Section 86-130. (BJH App. pp. 10). With respect to Section 86-130(r), providing that commercial uses in a PUD "***normally***" shall not front on exterior or perimeter streets, staff pointed out that "the majority of the City's existing PUDs that have commercial uses have them along the perimeter," and that locating a commercial use on the interior of a gated PUD would not be "economically feasible" and would not be "in the interests of the City or its residents." (BJH App. p. 10).

Staff also identified Section 86-130(j)(3), providing that land in a PUD designated as open space be restricted for 99 years in a recorded legal instrument. Staff commented that the City had consistently interpreted this code provision to require the recorded restriction at the time of the ***final*** plat of the ***last*** phase of a PUD—in other words, the last developable area of the PUD. (BJH App. pp. 10-11). Staff pointed out that there exists a development area of residential lots in the Milano PUD which still remains to be developed and, therefore, the last final plat triggering the requirement of restricting open space had not yet occurred. (BJH App. pp. 10-11). That pod of unplatted property within the PUD is depicted below:



Therefore, because there still existed unplatted development available in the Milano PUD, staff commented that the final recording restricting the open space had not yet occurred. (*Id.*) Because BJH's requested amendment is entirely consistent with the City's historical practice, it would be unfair to treat BJH's application differently than the other PUD zoning amendments that preceded it.

Hearings and Evidence Presented

BJH's application came before City Council for hearings on May 23 and 24, June 15 and 16, and July 11, 2023, with the collective hearings lasting for over 30 hours. (App. Vol. 3). In addition to hearing lengthy testimony and argument, Council received voluminous materials submitted by BJH and the resident opposition.

City Senior Land Planner Nicole Tremblay introduced the application. She explained that the application was received on June 14, 2022 and, therefore, the prior LDC applied. (App. Vol. 3 p. 74). She informed Council that the Comprehensive Plan designation for the property is Mixed Use Residential (MUR) -- which allows a maximum of 5% nonresidential uses through a PUD -- and that the application proposed only 2% of the PUD property to be utilized for nonresidential development. (App. Vol. 3 pp. 75-76).

Ms. Tremblay further explained that: (1) a minimum of 50% open space in the overall PUD is required; (2) the Milano PUD was originally approved with 55.2% open space; (3) a prior PUD amendment reduced the open space to 53%; and (4) the subject application's reduction of open space to 50.9% was consistent with the Comprehensive Plan and LDC. (App. Vol. 3 p. 76). Regarding the

intensity of commercial use, Ms. Tremblay advised Council that it was required to be of neighborhood scale rather than "regional," and that "regional" was defined as drawing users from multiple other jurisdictions. (App. Vol. 3 p. 76).

Referring to LDC § 86-130(b)(8) providing for compatibility of neighborhood commercial uses in the PUD, Ms. Tremblay explained that the City's "Commercial Neighborhood" zoning district allowed for the commercial uses proposed by BJH, e.g., retail stores for sale of food. (App. Vol. 3 p. 82). Therefore, Ms. Tremblay opined that the proposed commercial uses were "neighborhood" in scale under the City's LDC. (*Id.*)

Ms. Tremblay addressed LDC § 86-130(r) -- providing for commercial uses in the PUD being intended to serve the needs of the PUD and "normally" being located within the PUD. She explained that the City historically interpreted this section—consistent with its language—such that commercial uses on the perimeter were not prohibited. (App. Vol. 3 p. 83). Therefore, as explained by Ms. Tremblay, existing PUDs in the City have commercial uses along the perimeter. (*Id.*) Indeed, Mr. Roger Clark, the City Planning Director, also testified that prior PUDs in the City have commercial uses

located on the perimeter and that, in addition to serving the residents of the PUD, they also serve the needs of customers from the surrounding area. (App. Vol. 3 pp. 118-19).

Ms. Tremblay also identified Section 86-130(j)(3), providing for designated open space in a PUD being restricted in a recorded instrument. She explained that at the time of the prior Milano PUD approvals, the City applied its LDC to require such restriction to be made at the time the ***last*** final plat for the PUD development was recorded. Therefore, the City did not require an open space restriction upon recording of the final plats of ***previous phases*** of the Milano PUD, because there was still an area of the PUD that had not been developed and platted. (App. Vol. 3 pp. 83, 91-92, 105-06).

Mr. Clark, the City's Planning Director, also confirmed that the City had required the dedication of open space at the time of the ***last*** final plat, when there were no remaining development entitlements for the property. (App. Vol. 3 pp. 1081-83). He further explained that when there remains undeveloped area in a PUD, final plats can be amended and replatted. (App. Vol. 3 pp. 297-98).

BJH then presented its witnesses in support of its application. Attorney Ed Vogler, a real estate lawyer with over 40 years of

experience who prepared the homeowners association documents for the subdivisions within the Milano PUD, testified first. Mr. Vogler confirmed that BJH retained ownership over the Property when it had been platted in connection with the Cielo subdivision—one of four subdivisions within the Milano PUD—and that the title insurance company had also confirmed that BJH held title to the Property. (App. Vol. 3 pp. 310-11, 316).

Mr. Vogler also explained that the recorded HOA Declaration for the Cielo subdivision specifically disclosed in the public records that "commercial and other nonresidential uses" may be developed in the communities, and reserved the right to make changes to the development plan and replat the property. (App. Vol. 3 pp. 313-14; App. Vol. 2 p. 55). Mr. Vogler further testified that he had analyzed the City's open space requirements and reviewed the surveying and engineering information for the development, and confirmed that the application met the City's open space criteria. (App. Vol. 3 pp. 315-16). Finally, Mr. Vogler explained that under the LDC a property owner can always replat its property, and demonstrated numerous other instances in which PUD property in the City had been replatted. (App. Vol. 3 pp. 316-17).

Mr. Jim Collins, an expert land planner with decades of experience processing land development applications in the City, testified next. He opined that the proposed commercial use is compatible with the surrounding neighborhood, because it is: (1) neighborhood in scale; (2) consistent with the City's Commercial Neighborhood zoning district uses; and (3) substantially separated and buffered from the residences. (App. Vol. 3 pp. 319-23, 1292-93). Mr. Collins pointed out that a shopping center of less than 125,000 square feet -- which this proposed use is well below at 70,240 square feet – ***is classified by the International Council of Shopping Centers as neighborhood in scale***, rather than regional. (App. Vol. 3 pp. 323-24). Mr. Collins informed Council that although a maximum of 227,000 commercial square feet was allowable at this site, only 70,240 square feet (or 31% of the maximum) was proposed. (App. Vol. 3 p. 324). Mr. Collins demonstrated the substantial distance and buffering between the commercial and residential uses, which provides greater buffering than other shopping centers and residential areas in the City and County that were approved as—and known to be—compatible. (App. Vol. 3 pp. 1287-90).

Mr. Pat Neal, principal of BJH, testified that the proposed commercial use is intended to serve the needs of the homes in the Milano PUD. (App Vol. 3 p. 452). His intent is to sell homes within the Milano PUD, and a shopping center is an amenity for the sale of homes. (App Vol. 3 p. 455). He explained that the commercial use is ***not*** intended to serve the needs of the surrounding area, but that if area residents choose to shop there, they cannot be prevented from doing so. (App Vol. 3 pp. 453-55).

Importantly, Petitioners' own land planning expert, Mr. Norsoph, admitted that the Milano PUD's concept plan can be amended and that a PUD can be amended. (App. Vol. 3 pp. 955-56).

Following five days of hearings and overwhelming evidence supporting the application, City Council voted 5-2 to approve and adopted Ordinance 2023-11. (App. Vol. 3 p. 1415).

Cielo Replat

Subsequent to the challenged Approval, BJH replatted the Property (the "Cielo Replat"). (BJH App. pp. 85-86). Notably, for all their complaints about the alleged failure to comply with platting requirements and BJH's alleged inability to replat the Property, Petitioners did not legally challenge the Cielo Replat.

Standard of Appellate Review

As City Council sat in its quasi-judicial capacity, this Court's review is limited to the following narrow grounds:

(1) whether procedural due process was accorded;

(2) whether the essential requirements of the law were observed; and

(3) whether the Commission's findings and judgment were supported by competent, substantial evidence.

Broward Cnty. v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001).

Petitioners contend that this Court should quash the Approval on the sole ground that City Council's decision allegedly departed from the essential requirements of law.

Argument

I. CITY COUNCIL OBSERVED THE ESSENTIAL REQUIREMENTS OF LAW.

While the arguments in the Petition are confusing, Respondent hereby responds in the order in which the arguments appear. Petitioners introductory paragraphs to their argument (at pp. 9-10) misrepresent the facts, as demonstrated by the Statement of Facts above. In particular, Petitioners mischaracterize (at p. 9) the initial PUD approval. While the proposed PUD at the time did not include

identified commercial use on the concept plan, there was no representation or stipulation that there would never be any commercial contained within the PUD. Had there been such a stipulation, it would have been included as a requisite condition of approval of the PUD. It was not. The applicant simply did not identify a commercial use on the PUD concept plan at that time.

Further, Petitioners' reference (at p. 9) to planning staff's discussion of compatibility in connection with the 2017 approval of the Milano PUD is misleading. Petitioners notably omit staff's 2017 statement that "[l]and use compatibility will be further evaluated when ***subsequent*** land development applications are submitted to implement the Milano PUD." (App. Vol. 1 p. 26) (emphasis supplied). As demonstrated herein, compatibility is to be—and was in fact—addressed at the time of this proposed amendment.

Petitioners represent that the four subdivisions within the Milano PUD have been platted -- again providing the Court an incomplete picture -- as they omit that land previously approved for residential development within the Milano PUD has ***not*** yet been platted. (BJH App. pp. 10-11). Petitioners also exaggerate the extent of the proposed commercial use as a "super-market and a dozen

other shops and stores" – whereas the approved commercial use is limited to a maximum of 70,240 square feet. (App. Vol. 1 p. 4).

Finally, Petitioners (at p. 10) urge the Court to quash the Approval "based upon the fact that a shopping center is not needed and generally not wanted in the neighborhood." Petitioners invite the Court to err, as their argument has been repeatedly rejected by Florida appellate courts, which uniformly hold that sentiments of residents are not a valid basis to deny a quasi-judicial land development application. *Balm Road Inv., LLC v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 336 So. 3d 776, 777 n.2 (Fla. 2d DCA 2022); *Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981); *Pollard v. Palm Beach Cnty.*, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990); *City of Apopka v. Orange Cnty.*, 299 So. 2d 657, 659–60 (Fla. 4th DCA 1979).

Legal Standard – Essential Requirements of Law

A local government observes the essential requirements of law so long as it "applie[s] the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). A departure from the essential requirements of law "is synonymous with the failure to apply the correct law." *United Auto. Ins. Co. v. Peter F. Merkle, M.D.,*

P.A., 32 So. 3d 159, 161 (Fla. 4th DCA 2010). Petitioners must prove "something ***more than simple legal error***" constituting "a ***violation of a clearly established principle of law resulting in a miscarriage of justice***." *Heggs*, 658 So. 2d at 528 (emphasis supplied); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) (emphasis supplied).

Indeed, there is a ***critical distinction*** between a departure from the essential requirements of law and a misapplication of the correct law. Indeed, "a decision made according to the form of the law and rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Id.* (quoting *Heggs*, 658 So. 2d at 525). In other words, mere disagreement with ***how*** a local government applies the correct law does not constitute a departure from the essential requirements of law. *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004) (reasoning a "misapplication of the correct law or an erroneous interpretation of a law does not rise to the necessary level"); *Dep't of Hwy. Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012) ("Applying the correct law incorrectly does not warrant certiorari review.").

Therefore, where the local government applies the correct code provision in its analysis of an application, but merely applies it incorrectly, that is ***not*** a departure from the essential requirements of law. *See Ivey*; *Heggs*; *Fassy*; *Robinson.* Petitioners carry a high burden to meet this standard. Petitioners fall far short of meeting that burden, and they cannot show any legal error whatsoever.

1. The City correctly applied the prior version of the LDC.

Petitioners first argue (at p. 10) that "BJH should have elected to have its petitions processed under the City's new Land Development Regulations that were adopted by the City Council on July 12, 2022, but chose not to."

Petitioners' argument is frivolous. The New Land Development Code provides the following in its "Introductory Provisions":

> *Transitional Provisions*
>
> J. Applications for land development accepted by the City prior to the effective date of this ordinance ***shall be processed under the requirements of the land development ordinance in effect at the time of application***. However, applicants shall be given the option to have applications processed under the requirements of this Ordinance No. 2022-15.

(BJH App. p. 84) (emphasis supplied).

It indisputable that BJH's application was submitted on June 14, 2022, and that the New Land Development Code was not adopted until July 12, 2022. (BJH App. pp. 1, 73). Therefore, the application was ***required*** to be processed under the prior LDC, and only "could" be processed under the New Land Development Code if BJH affirmatively elected to do so, which it did not.

Therefore, Petitioners' ***first*** argument is patently meritless, and demonstrates the overall lack of merit of their Petition.

Even more egregious, Petitioners admitted in the proceedings before City Council that the prior LDC applied to the subject application. Therefore, they are estopped from arguing on appeal to the contrary. Attorney Dan Lobeck, counsel for Petitioners at the City Council hearing as conceded in the Petition, represented to City Council that the applicant "is bound by this version [the ***prior*** LDC] because he filed under this version." (App. Vol. 3 pp. 1007-08). Counsel's statements are binding on his client. *See State ex rel. Gutierrez v. Baker*, 276 So. 2d 470, 471 (Fla. 1973); *Bank of Am., N.A. v. Leonard*, 212 So. 3d 417, 418 (Fla. 1st DCA 2016); *State v. Daniels*, 826 So. 2d 1045, 1047 (Fla. 5th DCA 2002). Petitioner Gary Scott (a retired attorney from Wyoming) likewise argued to the Council why

the application should be denied based on the ***prior*** LDC. (App. Vol. 3 pp. 1247-48).

Petitioners are estopped from taking a contradictory position before this Court that the New Land Development Code applied. *Bove v. Naples HMA, LLC*, 196 So. 3d 411, 414 (Fla. 2d DCA 2016) (recognizing that it is a well-settled rule that "litigants are not permitted to take inconsistent positions" in judicial proceedings) (holding rejected on other grounds by *Boyle v. Samotin*, 337 So. 3d 313 (Fla. 2022); *see also MCG Fin. Servs., L.L.C. v. Technogroup, Inc.*, 149 So. 3d 118, 120 (Fla. 4th DCA 2014) (same); *Ross v. Hacker*, 284 So. 2d 399, 399 (Fla. 3d DCA 1973) (same); *AON Trade Credit, Inc. v. Quintec, S.A.*, 981 So. 2d 475, 479 (Fla. 3d DCA 2008) (holding party was estopped from making "eleventh-hour argument" that was "in direct contradiction to its own statements to this court.").

Relatedly, it is axiomatic that litigants must preserve issues for appeal by presenting them to the lower tribunal with the "specific legal argument or ground to be argued on appeal." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). The failure to preserve an issue before the local government waives the right to seek certiorari review in the circuit court based on that alleged error.

See Clear Channel Communications, Inc. v. City of North Bay Village, 911 So. 2d 188, 189-90 (Fla. 3d DCA 2005) (denying second-tier petition for writ of certiorari because the circuit court properly held that petitioners failed to preserve legal challenges by not filing proper objections before the city commission); *City of Miami v. Cortes*, 995 So. 2d 604, 606 (Fla. 3d DCA 2008) (holding the circuit court failed to apply the correct law when it accepted arguments from the property owners that they failed to preserve during a city code enforcement hearing).

Accordingly, Petitioners are estopped from contending that the New Land Development Code applied to BJH's application. Indeed, Petitioners argued to the contrary. Accordingly, Petitioners' first argument is unpreserved and therefore waived.

A. LDC § 86-130(j)

Petitioners argue (at p. 12) that the Approval violates LDC § 86-130(j), but the quoted language and argument in the Petition is from Section 86-130(j)**(3)**, which provides, "Land in a PUD designated as open space will be restricted by appropriate legal instrument satisfactory to the city attorney as open space perpetually, or for a period of not less than 99 years." Petitioners argue that the open

space restriction should have occurred at the time of the Cielo plat approval and, had that occurred, then BJH would not have been able to later amend the Property to a commercial use.[5]

Notably, the LDC is silent on ***when*** the land in the PUD identified as open space is to be restricted. The identification of open space first occurs upon the initial approval of the conceptual plan of the PUD. There is nothing in Section 86-130(j)(3), or anywhere else in the LDC, that provides whether the restriction must be made: at the time of approval of the PUD; at the time of approval of site plans for each phase; at the time of the plat approvals for each phase; or at the time when the entire development is complete and fully platted.

Further, nothing in Section 86-130(j) or elsewhere in the LDC requires land "designated" (or "labeled," "identified," "described," or "depicted") on a PUD concept plan as open space to be ***restricted*** open space. To the contrary, because Section 86-130 provides for amendments to land use designations within PUDs and only requires 50% of such uses to be restricted open space, then PUD property above the 50% requirement may be approved for other permissible

[5] Petitioners (at p. 14) once again misrepresent the facts. Tracts 306 and 501 of the Cielo plat, portions of which make up the 10.42 acres, are ***not*** designated as Open Space as misrepresented by Petitioners. (Supp. App. p. 91).

uses within a PUD—like commercial use. PUD open space is only restricted upon the recording of a legal instrument (i.e., restrictive covenant, plat).

Under decades of controlling precedent on the interpretation of zoning regulations, the Court cannot interpret the City's zoning ordinances to restrict the free use of property where the ordinances themselves do not clearly do so. *Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach*, 310 So. 3d 493, 495-96, 498 (Fla. 2d DCA 2020) (citing *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973) and *City of Miami Beach v. 100 Lincoln Rd., Inc.*, 214 So. 2d 39, 39 (Fla. 3d DCA 1968) ("Since zoning laws are in derogation of the common law, as a general rule they are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property."); *see also City of Tampa v. City Nat'l Bank of Florida*, 974 So. 2d 408, 414-15 (Fla. 2d DCA 2007) (construing ambiguous land use regulations in favor of zoning applicant).

Therefore, as a matter of well-established Florida law, Section 86-130(j)(3) cannot be interpreted to restrict BJH's free use of its property, when the ordinance does not clearly dictate the time at

which the open space must be restricted. "The correct law applicable in this case is that the ordinance should be given its plain meaning and that any doubts should be construed in favor of a property owner." *Colonial Apartments, L.P. v. City of DeLand*, 577 So. 2d 593, 598 (Fla. 5th DCA 1991). By not requiring the restriction of open space at the random and unspecified time suggested by Petitioners, the City ***followed the essential requirements of Florida law***.

Moreover, City Council received ample testimony and evidence from the City's planning staff that Section 86-130(j)(3) had historically and consistently been interpreted to require the open space restriction at the time when the development was complete, at the ***last final plat*** within the PUD. (App. Vol. 3 pp. 83, 91-92, 105-06, 297-98, 1081-83; BJH App. pp. 10-11). Because PUDs like the Milano PUD are large tracts developed in multiple phases over many years, and because PUDs can be amended and plats can be replatted, the restriction was not required or appropriate until the Milano development is complete. (*Id.*)

Indeed, as evidence of this application of the LDC, the City and Neal Communities of Southwest Florida, LLC (BJH's affiliate and predecessor) entered into an Agreement Regarding Open Space

Restriction and Covenant Pursuant to City of Venice Land Development Regulations ("Open Space Agreement") on October 25, 2016, which pertains to the Milano PUD property. (App. Vol. 2 p. 2). The Open Space Agreement provided that the owner/developer would record "the restriction of open space on all then existing, approved and recorded plats, prior to or ***at the time of final plat approval for the last plat, platting substantially all of the remaining residential property***." (App. Vol. 2 p. 2).

The record evidence establishes conclusively that there remained undeveloped area in the Milano PUD at the time of the Cielo plat (and still remains said undeveloped area) -- including a residential pod of development adjacent to the 10.42 acre Property at issue here. (BJH App. pp. 10-11; App. Vol. 3 pp. 83, 91-92, 105-06). Further, the Approval results in the amount of open space remaining above the 50% requirement. (App. Vol. 1 p. 7).

"Great weight must be given to the administrative construction of a statute by the officials charged with its administration." *Vanderbilt Shores Condo. Ass'n, Inc. v. Collier County*, 891 So. 2d 583, 585 (Fla. 2d DCA 2004) (recognizing this same weight must be afforded to ***local government codes***); *see also Pruitt v. Sands*, 84 So.

3d 1267, 1268 (Fla. 4th DCA 2012) (same). Courts may only depart from such a construction where it is "an unreasonable interpretation, or is ***clearly erroneous***." *Id.* (emphasis supplied). "If the [local government's] interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed." *Pruitt*, 84 So. 3d at 1268. "The [local government's] interpretation need not be the only one or the most desirable; it is enough if that interpretation is permissible under the language of the statute." *Id.* at 1268-69.[6] Because the City's "last final plat" interpretation of 86-130(j)(3) is entirely reasonable, Petitioners' argument fails for this additional reason.

[6] In 2018, Article V, Section 21 of the Florida Constitution was adopted, which provides: "In interpreting a ***state statute or rule***, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of ***such statute or rule***, and must instead interpret ***such statute or rule*** de novo." This constitutional amendment by its plain terms applies only to ***state*** statutes and rules, and does ***not apply*** to a municipality's interpretation of its own land development code. *Evans Rowing Club, LLC v. City of* J*acksonville*, 300 So. 3d 1249 (Fla. 1st DCA 2020) (Wolf., J., concurring) (finding that the constitutional amendment does not apply to local land use regulations or zoning decisions); *see also Alliance Starlight III, LLC v. City of Coral Gables, Florida*, Case No. 2019-000118-AP-01, 2021 WL 1115280, at *4 n. 8 (Fla. Cir. Ct. March 23, 2021) (commenting that "by its plain language, Florida's new 'Anti-Chevron' doctrine would appear to apply only to interpretation of a 'state statute or rule.' A municipal zoning ordinance is a local ordinance, not a state statute or rule.")

Finally, Petitioners' argument is an untimely, impermissible collateral attack on the City's alleged failure to ***previously*** require BJH to permanently restrict the 10.42 acre Property as open space when the Cielo subdivision plat was approved in ***2019*** -- rather than a departure of essential requirements of law in evaluating ***this*** zoning map amendment application. If there was a failure to enforce/comply with the LDC as Petitioners allege (there was not), then Petitioners (several of whom reside in the Milano PUD subdivisions), should have brought their action at the time of the recording of the subdivision plats. But their time to do so has long since expired. Having sat on their hands, they cannot now claim that, because something "should" have been done years ago, the City ***now*** fails to observe the law by approving an amendment to the use of property for which there exists no restriction.

Therefore, Petitioners have failed to establish that City Council committed any error, let alone a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Heggs*, 658 So. 2d at 528.

B. LDC § 86-231(c)(2)(n)

Similar to their argument regarding Section 86-130(j)(3), Petitioners argue (at p. 16) that the Approval allegedly violated Section 86-231(c)(2)(n), because a dedication of open space purportedly ***should have been*** included on the final plat of the Cielo subdivision. Petitioners argue that if the open space restriction under some legal instrument (restrictive covenant, etc) pursuant to Section 86-130(j)(3) was not previously required, then instead it should have been later restricted through a dedication of the open space on the final plat. Accordingly, they argue that ***if*** the open space had been dedicated on the Cielo final plat, BJH could not now amend the use of the Property to commercial.

Section 86-231(c)(2)(n) provides that a final plat is to include, "Signature and acknowledgement of the owners to the plat and restrictions, including dedication to public use of all streets, alleys, parks or other open spaces shown thereon and the granting of easements." (BJH App. p. 102).

LDC § 86-231 is entitled "Plat requirements" and, as the title indicates, this section pertains to the procedures and requirements for ***plat approvals***. The Approval being challenged by Petitioners is

not a plat approval, it is a ***zoning map amendment*** to amend the description of the use of land within a PUD pursuant to LDC § 86-130. It is ironic that Petitioners are challenging the Approval based on an alleged departure from the essential requirements of law, and yet are relying on LDC provisions that do not even apply to the Approval. Platting requirements under Section 86-231 are entirely irrelevant to BJH's application, such that Petitioners' argument should be rejected out of hand by this Court.[7]

In addition, Petitioners confuse the ***identification*** of open space as a ***use*** of land, versus private rights of ***ownership*** of land and ***dedication*** of land to public or community use. The uncontroverted evidence before City Council was that: (1) BJH owned the Property; (2) the Property was ***not dedicated*** on the plat as open space; (3) PUDs can be amended (hence the filing of BJH's application); (4) land identified within a PUD as open space ***use*** can be amended; and (5) the Approval reduced the open space percentage

[7] Where, as here, a petition for writ of certiorari contains arguments that are not relevant or applicable to the approval being challenged, it is appropriate for the reviewing court to strike those arguments. *See Davis v. Fla. Linen Serv.*, 170 So. 2d 289, 289 (Fla. 1964); *see also Hamel v. Danko*, 82 So. 321, 322 (Fla. 1955) (striking from petition for writ of certiorari five arguments for which there was no legal basis for review). However, the Court's denial of this argument would obtain the same result.

from 53% to 50.9%, exceeding the 50% requirement. (App. Vol. 3 pp. 297-98, 310-11, 316-17, 570; BJH App. pp. 7, 91).

Put simply, the City's LDC allowed BJH to amend the identification of ***use*** for the Property to commercial use. Accordingly, there was no departure from the essential requirements of law -- the City followed its LDC.

Finally, Petitioners' "86-231" argument—like the preceding argument—fails because it constitutes an untimely, impermissible collateral attack on the ***2019*** Cielo subdivision plat approval. There was no challenge to the purported failure of the plat to permanently dedicate the Property as open space ***at that time***. Petitioners cannot challenge the plat five years later.

Therefore, Petitioners have failed to establish that City Council committed any error, let alone a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Heggs*, 658 So. 2d at 528.

C. LDC § 86-130(b)(8)

Section 86-130(b)(8) contains a list of permitted principal uses in the PUD zoning district, including, "Neighborhood commercial uses which are determined at the time of approval for the PUD to be

compatible with the existing and future development of adjacent and nearby lands outside the PUD." (BJH App. p. 62). Petitioners argue (at p. 17) that the application should not be approved because there was no determination made in 2017 at the time of the ***initial*** Milano PUD approval that commercial use was compatible.

Petitioners' argument is absurd. Of course there was no such determination made in 2017, because commercial use was not being proposed at that time. But it is undisputed that PUDs can be amended under the LDC, and that PUDs are phased and developed over a lengthy period of time. BJH's application was an amendment to the PUD zoning and, therefore, compatibility is required to be reviewed under Section 86-130(b)(8) at the time of approval of this application. Petitioners impermissibly add language to the LDC, as their interpretation would require the LDC to provide that compatibility must be determined at the time of approval of the "initial" PUD. *See Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008) (holding courts are not at liberty to add words to a statute that were not placed there by the legislative body); *Rinker Materials*, 286 So. 2d at 553 ("Municipal ordinances are subject to the same rules of construction as are state statutes.").

Petitioners' overly narrow interpretation is impractical, and does not work in harmony with the remainder of Section 86-130. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (recognizing well-settled rule that related statutory provisions must be construed in harmony with one another). Such an interpretation would permanently bar consideration of commercial uses in an existing PUD forever, regardless of changing conditions and regardless of whether the application for an amendment to the PUD met the criteria for approval—like it did here.

Compatibility is a concept that necessarily must be determined at the time of the proposed application -- here, an amendment to the identified use of a portion of the land within the PUD. The City's Comprehensive Plan defines "compatibility" as follows:

> Compatibility is defined as the characteristics of different uses or activities or design which allow them to be located near or adjacent to each other. Some elements affecting compatibility include the following: height, scale, mass and bulk of structures, pedestrian or vehicular traffic, circulation, access and parking impacts, landscaping, lighting, noise, odor and architecture. Compatibility does not mean "the same as." Rather, it refers to the sensitivity of development proposals in maintaining the character of ***existing*** development.

(BJH App. p. 103) (emphasis supplied).

Section 86-130(v), allowing for amendments to a PUD, provides that changes must be compliant with all regulations in effect at the time of the request and the intent and purpose of the Comprehensive Plan at the time of the proposed change. Read together with Section 86-130(b)(8) -- and applying the definition of compatibility which requires review of the then-***existing*** development -- it is abundantly clear that the proposed commercial use must be reviewed for compatibility with surrounding uses ***at the time of application***.

Petitioners' suggestion that compatibility can only be determined at the time of the initial PUD impermissibly reads Section 86-130(b)(8) in isolation. Section 86-130 must be read as a whole, and must be read in a way that would avoid rendering any provision meaningless or absurd—therefore compatibility must be determined at the time of the proposed amendment. *Woodham v. Blue Cross & Blue Shield, Inc.,* 829 So.2d 891, 898 (Fla.2002); *Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008); *see also Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (holding that in interpreting statutes courts must exhaust all textual and structural clues, by reference to the language of the text, the context, and the broader

context of the statute as a whole, and utilizing the canons of statutory interpretation in the interpretive process from beginning to end).

Indeed, the City's professional planning staff specifically noted that Section 86-130(b)(8) provides for compatibility to be reviewed at the time of the approval. Staff commented that "compatibility of the proposed commercial use with the ***existing*** surrounding uses needs to be determined with this application and confirmed through future site and development plan review." (BJH App. p. 9). Again, the City's application of its code must be given great weight and may only be disturbed if it is clearly erroneous—which it clearly is not. *Vanderbilt Shores*, 891 So. 2d at 585; *Pruitt*, 84 So. 3d at 1268.

Petitioners also argue that the proposed commercial uses are not "neighborhood in scale" and are not compatible. The evidence received by City Council from the City's professional planning staff and BJH's land planning expert overwhelmingly demonstrated that the proposed commercial use is "neighborhood in scale" and compatible:

(1) up to 5% of the PUD property is allowed to be commercial use and the application only proposed 2.1% of the acreage;

(2) 227,000 square feet of commercial use was allowable on the 10.42 acre Property and the application only proposed 70,240 square feet;

(3) shopping centers less than 125,000 square feet are considered neighborhood rather than regional;

(4) neighborhood scale grocery and retail are permitted under the City's "Commercial Neighborhood" zoning district, as opposed to "regional" purposes;

(5) substantial distance (500 feet) between commercial and residential uses;

(6) buffers between commercial and residential uses; and

(7) comparable shopping centers in the City closer to residential uses that have been found to be compatible from experience.

(BJH App. pp. 7, 9-10; App. Vol. 3 pp. 75-76, 82, 319-24, 1287-93).

City Council correctly determined that the proposed commercial use is neighborhood scale and compatible. Even so, on certiorari review this Court cannot find fault with Council's application of the facts to the law or reweigh the evidence -- where there is ***any*** competent substantial evidence supporting Council's decision, it must be upheld. *Orange Cnty. v. Butler*, 877 So. 2d 810, 813 (Fla. 5th DCA 2004); *Dep't of Hwy. Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014); *Dorian v. Davis*, 874 So. 2d 661, 663 (Fla. 5th DCA 2004) ("In general, a local government's quasi-

judicial decision, such as Orange County's in this case, should be upheld if there is any competent, substantial evidence in the record to support it."). Further, Petitioner has not sought certiorari relief on the basis of a lack of competent substantial evidence and, therefore, has not preserved this argument. City Council correctly applied the evidence of compatibility to the law to determine that the proposed use is compatible at the time of ***this*** Approval.

Therefore, Petitioners have failed to establish that City Council committed any error, let alone a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Heggs*, 658 So. 2d at 528.

D. LDC § 86-130(r)

Section 86-130(r) provides, "Commercial uses located in a PUD are intended to serve the needs of the PUD and not the general needs of the surrounding area. Areas designated for commercial activities ***normally*** shall not front on exterior or perimeter streets, but shall be centrally located within the project to serve the residents of the PUD." (BJH App. p. 66) (emphasis supplied).

Petitioners argue (at p. 18) that the Approval purportedly violates this section because the ***evidence*** at the hearing allegedly

showed that the proposed commercial use is to serve the needs of surrounding areas and not solely the needs of the PUD residents, and that the Approval violates this section because the Property is at the perimeter of the Milano PUD.

First, Petitioners cannot argue over the evidence presented to Council, as they have only sought certiorari relief based on alleged departure from the essential requirements of law. Additionally, Petitioners are impermissibly asking this Court to reweigh the evidence and substitute its judgment for that of the lower tribunal, which on certiorari review the Court cannot do. *Butler*, 877 So. 2d at 813; *Wiggins*, 151 So. 3d at 464; *Dorian*, 874 So. 2d at 663.

In fact, there unquestionably was competent substantial evidence supporting Council's finding that the application complies with Section 86-130(r). Under the City's Comprehensive Plan and LDC, up to 5% of the acreage is permissible as a commercial use and only 2.1% of the acreage is proposed (40% of the maximum). (BJH App. p. 7). On that 2.1% acreage, 227,000 square feet of commercial use is permissible, and only 70,240 square feet is proposed (31% of the maximum). (App. Vol. 3 p. 324). Therefore, only ***12%*** of the permissible commercial use acreage within the Milano PUD is

proposed. There are 1,350 homes approved in the Milano PUD, and the approved grocery and retail uses are commercial ***neighborhood*** scale uses allowed in the City's Commercial Neighborhood zoning district. (App. Vol. 3 pp. 319-24, 1292-93). Finally, BJH's representative testified that the commercial use ***is*** intended to serve the needs of the PUD because it is BJH's intent to sell homes within the PUD, and the commercial uses are an amenity for PUD residents to shop there. (App Vol. 3 pp. 453-55).

Second, Section 86-130(r) does not restrict the commercial use to ***solely*** serving the PUD residents, and it does not ***prohibit*** the commercial use from being at the perimeter of the PUD. It merely states that commercial uses are "intended" to operate in such a manner and therefore "normally" should not be located on the perimeter.

As the Florida Supreme Court has stated, "Although the term 'shall' normally has a mandatory connotation ... it may be construed as permissive only." *Belcher Oil Co. v. Dade County*, 271 So. 2d 118, 122 (Fla. 1972). This quote from the Supreme Court also demonstrates the meaning of the term "normally," as it means that

which is usually the case but not all the time.[8] In section 86-130(r), the use of the term "normally" modifies the term "shall," such that it is not an absolute requirement.

Reading Section 86-130(r) as a whole as one must, it is generally desired that the commercial use be located within the PUD and serve the needs of the PUD residents, but the LDC does not prohibit the commercial use from being located on the perimeter or from serving residents outside the PUD. *See, e.g., B.B. McCormick & Sons, Inc. v. City of Jacksonville*, 559 So. 2d 252 (Fla. 1st DCA 1990) (interpreting policies that there "should be no filling in of wetlands" and "discouraging" related activities as not proscribing such activities); *County of Volusia, et al. v. Department of Community Affairs et al.*, 2009 WL 3049355, at *18 (Fla. Div. Admin. Hrgs. Sept. 22, 2009) (interpreting policy providing that the county "shall encourage" infill development within urban area as not creating a prohibition on contrary action). To read LDC § 86-130(r) otherwise to create an absolute prohibition and restriction—as Petitioners invite this Court to do—would impermissibly rewrite the code section, which the Court

[8] *See, e.g.*, Cambridge Dictionary, "Normally," "If you normally do something, you usually or regularly do it." https://dictionary.cambridge.org/us/dictionary/english/normally.

cannot do. *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 321 (Fla. 2016).

Therefore, because placing commercial on the perimeter of a PUD that may serve residents outside the PUD is not prohibited, the City's Approval allowing commercial on the perimeter cannot—as a matter of law—be a departure from the essential requirements of law. *Heggs*, 658 So. 2d at 528 (requiring a "violation of a clearly established principle of law resulting in a miscarriage of justice.").

Further, the evidence presented to City Council was that the City had consistently interpreted this LDC section such that commercial uses on the perimeter of a PUD were permissible (App. Vol. 3 p. 83)—and properly so, given the use of the term "normally." Indeed, the City Planning Director Mr. Clark testified that prior PUDs in the City have had their commercial uses located on the perimeter, and they serve the needs of residents of the PUD and other residents who may choose to go there. (App. Vol. 3 pp. 118-19). Council also received evidence demonstrating that the PUD master plans for Venetian Golf and River Club (where Petitioner Scott resides), Toscana Isles, and Capri Isles have approved commercial uses on the perimeter. (App. Vol. 3 pp. 1280-83). The City's historical

interpretation and application of Section 86-130(r) is correct. But even if not, the Court must give deference to the City's interpretation of Section 86-130(r) because it is not clearly erroneous. *Vanderbilt Shores*, 891 So. 2d at 585; *Pruitt*, 84 So. 3d at 1268; *Dorian*, 874 So. 2d at 663.

Finally, to apply Section 86-130(r) to mandatorily restrict the use of property where it does not clearly do so—as Petitioners invite—would again violate the aforementioned and settled principle of law that zoning regulations must be construed in favor of the free use of property. *Persaud Properties*, 310 So. 3d at 495-96; *Rinker Materials*, 286 So. 2d at 553.

Therefore, Petitioners have failed to establish that City Council committed any error, let alone a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Heggs*, 658 So. 2d at 528.

E. LDC § 86-570

Somewhat astonishingly, Petitioners rely on a ***definition*** in the LDC to argue that City Council departed from the essential requirements of law. Petitioners go back to the well on their flawed "open space" argument, again arguing that the identification of use

could not be amended from "open space" to "commercial" by citing to the definition of the term "open space." Section 86-570 contains a lengthy definition of "open space" which includes the statement, "Such open space shall be held in common ownership by all owners within the development for which the open space is required." (BJH App. p. 104).

With all due respect to Petitioners, a definition in a municipal code does not—as a matter of law—convey title to real property in the State of Florida, or anywhere in the United States. If it did, it would be a taking entitling the property owner to compensation under the Fifth Amendment.

Petitioners' argument must be categorically rejected for the same reasons set forth in Sections A and B above concerning Sections 86-130(j)(3) and 86-231(c)(2)(n), respectively. BJH provided uncontroverted evidence at the hearing that it owns and controls the Property. (App. Vol. 3 pp. 310-11, 317).

Therefore, Petitioners' argument relying on the definition of "open space" in the LDC is frivolous and should be categorically rejected by this Court.

II. MISCELLANEOUS COMPLAINTS

Beginning at page 23 of the Petition, Petitioners lodge a number of complaints without any structure or legal basis. They are addressed in turn.

A. Planning Commission's Recommendation of Denial

Petitioners argue that because the Planning Commission recommended that the application be denied, City Council "should" have denied the application. Needless to say, such argument is a far cry from establishing that City Council departed from the essential requirements of law.

The Planning Commission is a City body that holds public hearings and makes ***recommendations*** to the City Council on quasi-judicial land development applications for zoning map amendments, like the application here. New LDC § 1.1.2(M)(1) (BJH App. p. 112); Prior LDC § 86-47(e) and (h) (BJH App. pp. 106, 108). City Council, on the other hand, has "final decision authority" on quasi-judicial applications for zoning map amendments. LDC § 1.1.1(B)(1) (BJH App. p. 110); Prior LDC § 86-47(i) (BJH App. p. 108). City Council hears such applications *de novo*, and receives evidence and argument that is not presented to the Planning Commission.

Here, Planning Commission recommended denial by a 4-3 vote. The Approval (the Ordinance adopted by the City) explicitly provides that City Council received and considered the Planning Commission's report and recommendation. (App. Vol. 1 p. 4). City Council held five days of public hearings and received new and additional evidence that was not presented to the Planning Commission. There was overwhelming competent substantial evidence in the record through the documents submitted and testimony presented by BJH and the City from which City Council determined that BJH's application should be approved. City Council was the final decision maker, and was free to evaluate the evidence and come to its own conclusion based on the application of the evidence to the relevant LDC provisions. They did so by 5-2 vote for approval.

Again, Petitioners have not sought certiorari relief based on a lack of competent substantial evidence. Petitioners' argument that this Court should quash City Council's Approval simply because it received a 4-3 recommendation of denial from the Planning Commission is frivolous.

B. Failure to Apply Correct Law under *Brevard County v. Snyder*

Petitioners argue (at p. 25) that City Council did not apply the correct law because it was not instructed on the test set forth by *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). In the seminal case of *Snyder*, the Florida Supreme Court held that government action on a land development application for a particular piece of property is quasi-judicial rather than legislative. *Id.* at 474. In that case, the property owner filed a petition for writ of certiorari against the County, which had denied the rezoning application. The *Snyder* court held that the property owner had the initial burden to demonstrate that the criteria for approval were met. Once meeting that burden, the property owner is not automatically entitled to approval, but the local government may only lawfully ***deny*** the application if there exists competent substantial evidence in the record that the criteria were not met, and the denial accomplishes a legitimate public purpose. *Id.* at 475-76; *see also Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

Therefore, if the City had ***denied*** BJH's application, in order to prevail on certiorari review, BJH would need to demonstrate

pursuant to *Snyder* that it met its initial burden of pointing to competent substantial evidence of compliance with the criteria, and that there was no competent substantial evidence supporting the City's denial.

Petitioners' reliance on *Snyder* is entirely misplaced. Petitioners have not and cannot argue that BJH failed to meet its initial burden of presenting competent substantial evidence that it met the approval criteria. Petitioners strangely argue instead that Council "should have been instructed" on *Snyder*. Petitioners' argument is, respectfully, ridiculous and patently false.

There is no legal requirement that City Council be "instructed" on the applicable law -- it simply must follow the law applicable to quasi-judicial hearings, which it did. Even so, the City attorney at commencement of the hearings properly informed Council:

> Your role as Council is to determine whether there is competent, substantial evidence in the record that's going to be formed today to support the approval of the petition. The term 'competent' means that the people testifying are qualified to provide evidence and testimony on the subject. 'Substantial' means that there is sufficient relevant and credible evidence upon which you are able to base a decision.

(App. Vol. 3 pp. 11-12). The City attorney further stated that the applicant BJH had the burden of proving that its application met the legal requirements for approval. (App. Vol. 3 p. 1094).

At the close of the hearings, the City attorney informed Council:

> Your decision in a quasi-judicial forum is based on three things. You get evaluated on three things by a review in court: Number one, whether procedural due process was afforded in these proceedings; number two, whether the essential requirements of law were followed; and number three, whether your decision is based on any competent substantial evidence in the record. ***The applicant in quasi-judicial proceedings has the burden of demonstrating through competent, substantial evidence that they have complied with the City's land use regulations and Comprehensive Plan. Once that burden is met, the burden shifts to anybody opposing the application and the submittal to prove, again by competent substantial evidence, that there's legitimate public purpose in denying the request***.

(App. Vol. 3 pp. 1325-26) (emphasis supplied).

Petitioners' argument that Council was not instructed on the appropriate standard is plainly refuted by the record and is demonstrative of the overall weakness of Petitioners' position.

In this section of their Petition, Petitioners also seem to argue the issue of consistency with the Comprehensive Plan. Such argument is likewise frivolous. Florida law is crystal clear that the exclusive remedy for challenging consistency with the

Comprehensive Plan is through a statutory cause of action brought pursuant to Section 163.3215, Florida Statutes (which Plaintiffs have not brought), and not via petition for writ of certiorari. *See* Fla. Stat. § 163.3215(1) (mandating that "subsections (3) and (4) [of Section 163.3215] provide the ***exclusive methods*** for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan.…") (emphasis supplied); *Poulos v. Martin Cty.*, 700 So. 2d 163, 164-65 (Fla. 4th DCA 1997); *Seminole Tribe of Florida v. Hendry County*, 106 So. 3d 19, 22 (Fla. 2d DCA 2013); *Bush v. City of Mexico Beach*, 71 So. 3d 147, 150 (Fla. 1st DCA 2011); *Stranahan House v. City of Ft. Lauderdale*, 967 So. 2d 1121, 1125-26 (Fla. 4th DCA 2007).

Petitioners' arguments, again, must be rejected.

C. Milano PUD Residents "Belief" That The Open Space Property Could Not Be Amended.

Petitioners complain (at p. 28) that home purchasers within the PUD may have believed that the Property shown as open space in the Milano PUD would remain open space and could not be amended to commercial use. Such complaints and beliefs of purchasers are not only irrelevant to this proceeding, but are belied by the prior

recording in the public record of the Declaration establishing it was not final. (App. Vol. 3 pp. 313-14; App. Vol. 2 p. 55). Sections 2.03 and 12.04 of the Declaration provide that commercial uses may be developed on the Cielo property; that the developer reserves the right to change/amend/modify in any way the Cielo project, the subdivision, and the property in its sole and absolute discretion; and that no representation is made that the property will be developed in conformance with any approvals or permits. (App. Vol. 2 pp. 21, 55). Petitioners were on notice of these provisions as a matter of law. *B.A. Mortg., LLC v. Baigorria*, 300 So. 3d 198, 201 (Fla. 4th DCA 2020).

A certiorari petition to review the City's Approval is limited to narrow grounds, and Petitioners only argue that the approval was a departure from the essential requirements of law. Home purchasers' alleged ***beliefs*** about what could or could not be done with the Property in the PUD is entirely impertinent to whether the City applied the correct law to BJH's amendment application.

In connection with Petitioners' complaints, they cite *City of New Smyrna Beach v. Andover Development*, 672 So. 2d 618 (Fla. 5th DCA 1996). That case actually supports ***Respondents***. It discusses how a PUD zoning is a specialized zoning that adopts a particular

development plan for a property and, in order to make material changes to that plan, there must be a PUD amendment approved by the City. BJH did that here -- it applied under the City's LDC criteria to amend the designated use of property within the PUD, and met the requirements for approval.

In any event, Petitioners' complaints about what they may have believed about the property within the Milano PUD is not a basis for this Court finding that the City's Approval departed from the essential requirements of law.

D. Alleged Breach of Agreement with the City.

Petitioners complain (at p. 29) that BJH, as successor to Neal Communities of Southwest Florida, LLC, allegedly breached the Open Space Agreement with the City that purportedly required the recording of a restriction preserving open space within the Milano PUD.

The Open Space Agreement is exclusively between the property owner and the City. Paragraph 5 provides:

> No Third Party Rights. This Agreement is solely for the benefit of the City of Venice and is provided by Owner solely for the purpose of complying with applicable zoning requirements of the Venice Land Development Regulations. ***No right or cause of action shall accrue***

> ***upon or by reason hereof, to or for the benefit of any third party.***

(App. Vol. 2 p. 2) (emphasis supplied).

The Open Space Agreement pertains to the VICA PUD. (App. Vol. 2 p. 2). The VICA PUD was amended and combined with the Laurel Lakes PUD to form the Milano PUD, yet another example of amendments to a PUD. (App. Vol. 3 pp. 1033-34). The Open Space Agreement requires the property owner to deliver to the City a restrictive covenant restricting 50% of the PUD as open space "prior to or at the time of final plat approval for the ***last plat***." (App. Vol. 2 p. 2) (emphasis supplied). As explained above, there still existed unplatted and undeveloped areas within the PUD property. (App. Vol. 3 p. 1040). Therefore, the "time of final plat approval for the last plat" had not occurred at the time of the Approval.

Further, even if a breach occurred (it clearly did not), Petitioners have no legal right to rely on or enforce the Open Space Agreement pursuant to Paragraph 5 thereof. *Walter Transp. Corp. v. Palm Beach Metro Transp., L.L.C.*, 26 So. 3d 704, 705 (Fla. 4th DCA 2010).

Petitioners also allege that the City's written agreement with Neal Communities entered into seven years ago in ***2016*** did not

comply with the City's regulations. Petitioners cannot now challenge via certiorari an agreement entered into seven years ago.

Therefore, Petitioners' complaint that there was a purported violation of the Open Space Agreement with the City (there was not) does not establish a basis for certiorari relief.

E. Cielo Declaration of Restrictive Covenants

Petitioners claim (at p. 30) that an amendment to commercial use on the Property is a violation of the Cielo Declaration of Covenants, Conditions and Restrictions, recorded by Neal Communities of Southwest Florida, LLC. Whether Neal Communities or its affiliate BJH has breached a private restrictive covenant with the Cielo homeowners (it has not) is not reviewable by certiorari, and is irrelevant to whether the City's Approval followed the essential requirements of the LDC.

Notwithstanding, there has been no breach of the Cielo Declaration whatsoever. The Property was never turned over as "common property" under the Declaration, and the Cielo plat did not dedicate the property as "open space" or "common property" -- the developer retained ownership over the land. (App. Vol. 3 p. 316; BJH App. p. 91). And Petitioners were on notice of the developer's

reservation of rights to change/amend/modify the Cielo project. (App. Vol. 2 pp. 21, 55). Therefore, there has been no breach of the Declaration.

In any event, Petitioners' complaint of a purported breach of the Declaration (there was none) does not establish a basis for certiorari relief on the City's decision on a land use application.

CONCLUSION

Petitioners have not established the high standard required for this Court to find that the City's Approval departed from the essential requirements of law. City Council followed the essential requirements of law by applying the relevant sections of the LDC to BJH's application and following well-settled principles of Florida law concerning its review and approval of same. While the City could have approved the application based on any competent substantial evidence, there was an overwhelming amount of competent substantial evidence supporting the application. Petitioners repeatedly invite this Court to err and not follow the law. The Petition must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2024 the foregoing document has been served via the Florida Courts E-Filing Portal to: Ralf Brookes, Esq. at ralf@ralfbrookesattorney.com and RalfBrookes@gmail.com and Kelly Fernandez, Esq. at kfernandez@flgovlaw.com.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045 and Rule. 9.100(j). The font is 14-point Bookman Old Style. The word count is 11,757. It has been calculated by the word-processing system, excluding the content authorized to be excluded under the rules.

/s/ *Scott A. McLaren*
Attorney

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

NORTH VENICE NEIGHBORHOOD ALLIANCE INC., GARY SCOTT, KENNETH BARON, and SETH THOMPSON,

Petitioners,

v. Case Number: 2023 CA 006165 SC

CITY OF VENICE and BORDER AND JACARANDA HOLDINGS, LLC,

Respondents.
_____/

RESPONDENT CITY OF VENICE'S RESPONSE TO AMENDED PETITION FOR WRIT OF CERTIORARI

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STANDARD OF REVIEW

Rezoning approvals by a local government require quasi-judicial hearings. *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 474 (Fla. 1993). Appellate review of a quasi-judicial action is sought through a writ of certiorari. As the local governing body is considered to be the lower tribunal, the appropriate appellate venue is the circuit courts. *See* Fla. R. App. P. 9.030(c).

The scope of review is limited to the record created in the proceeding before the local government. This Court in conducting "first-tier" review must review the record and apply the following three-prong test: (1) was procedural due process accorded; (2) were the essential requirements of law observed; and (3) are the administrative findings and judgment supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). The court must either quash the writ of certiorari, thereby upholding the local government's decision, or grant the writ of certiorari, thereby overturning the local government's final action. This Court lacks the authority "to enter a judgment on the merits of the controversy under consideration [or] to direct respondent to enter any particular order or judgment."

Broward County v. G.B.V. Int'l, Ltd, 787 So.2d 838, 844 (Fla. 2001).

Petitioners have only directly asserted that the City's decision fails prong two, that it does not observe the essential requirements of law. In *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995), the Supreme Court held that the "departure from the essential requirements of law" and "applied the correct law" tests are equivalent. Therefore, observing the essential requirements of law merely requires that the appropriate law be applied, even if done incorrectly and resulting in what is otherwise legal error. *Id.* at 525 (emphasis added). Furthermore, "a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration." *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So.2d 308, 312 (Fla. 4th DCA 1999).

A court may deny a "petition for common-law certiorari even though there may have been a departure from the essential requirements of law." *Combs v. Florida*, 436 So.2d 93, 95 (Fla. 1983). The concern is not so much "the mere existence of legal error as much as the seriousness of the error." *Id.* at 96. In *Heggs*, the Supreme Court included the following comment from a critic:

Some errors are so fundamental as to clearly fall within

> the term; others clearly do not fall within any reasonable interpretation. The vagueness of the phrase, however, means that there is a large grey area. Properly conceived, the discretion often mentioned in relation to common law certiorari should be exercised in this grey area. This should not be an unprincipled or arbitrary discretion but should depend on the court's assessment of the gravity of the error and the adequacy of other relief. A judicious assessment by the appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy, but will preserve the function of this great writ of review as a "backstop" to correct grievous errors that, for a variety of reasons, are not otherwise effectively subject to review. 658 So.2d at 530.

The appellate courts are, therefore, left to decide whether the actions taken by the City met the requirements of the law in a way that serves the interests of justice or whether any error is sufficiently egregious to render the decision inappropriate. Certiorari should be granted only when a decision is so erroneous that justice requires it to be corrected. *Id.* at 525 (citing *Combs v. State*, 436 So.2d 93 (Fla. 1983)).

Although the City contends that the scope of this Court's review is limited to whether the essential requirements of law were observed, Petitioners have also obliquely alleged that the City's decision is not supported by competent substantial evidence. "Substantial" evidence also constitutes "competent" evidence if the evidence relied upon is

"sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Marion County v. Priest*, 786 So.2d 623, 625 (Fla. 5th DCA 2001). Therefore, this Court must find the City's decision to approve Ordinance No. 2023-11 proper if it is "reasonable based on the evidence presented." *Lee County v. Sunbelt Equities, II, Ltd.*, 619 So.2d 996, 1003 (Fla. 2d DCA 1993).

Only if the City's decision is unsupported by competent substantial evidence may the court overturn the decision, even if it disagrees with the local government's factual determination. *See Chicken 'N' Things v. Murray*, 329 So.2d 302, 305 (Fla. 1976). This Court is also not permitted to reweigh the evidence or to substitute its judgment for that of the local governing body. *See Sunbelt Equities*, 619 So.2d at 1003. Review of the City's decision is purely a legal question of whether the record contains the necessary quantum of evidence and if such evidence does exist, the presence of opposing evidence becomes irrelevant. *Dusseau v. Metropolitan Dade County Bd. Of County Com'rs*, 794 So.2d 1270, 1276 (Fla. 2001).

STATEMENT OF FACTS

Respondent City adopts the Statement of Case and Facts

contained in Respondent Border and Jacaranda Holdings, LLC's (BJH's) Response to Amended Petition for Writ of Certiorari in its entirety.

ARGUMENT

I. THE CITY OBSERVED THE ESSENTIAL REQUIREMENTS OF LAW IN APPROVING ORDINANCE NO. 2023-11.

A. The City Correctly Applied the City Land Development Regulations in Effect at the Time the Rezoning Application was Filed.

On July 12, 2022, the City adopted Ordinance No. 2022-15, which approved and put into effect a complete rewrite of the City's Land Development Regulations. The rezoning application at issue in this case (Petition No. 22-38RZ)[1] was filed with the City on June 14, 2022. Therefore, the City properly applied the "old" Land Development Regulations to the application.

Under "Transitional Policies" in the Preface to the City's new Land Development Regulations, the City provides that: "Applications for land development accepted by the City prior to the effective date of this ordinance [No. 2022-15] shall be processed under the

[1] Petition No. 22-38RZ is referred to throughout this Response as either "the application" or "the Petition."

requirements of the land development ordinance in effect at the time of application. However, applicants shall be given the option to have applications processed under the requirements of this Ordinance No. 2022-15." (BJH p. 84)[2] Respondent BJH did not elect to have the new Land Development Regulations applied to its application. (Pet. Vol. III p. 1021)[3] Consequently, the testimony and evidence submitted during the public hearing for this application pertained to the provisions of the prior Land Development Regulations. Petitioners themselves based their presentation of testimony and evidence on the prior Land Development Regulations, with their counsel, Dan Lobeck, stating during the hearing: "We're operating under the previous Code[4] because the application was filed under the previous Code." (Pet. Vol. III p. 134) Petitioners waived any right to assert on appeal that the incorrect Code was applied. *See Clear Channel*

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[2] Citations to the portions of the record contained in Respondent BJH's Supplemental Appendix are stated as "BJH p. _."

[3] Citations to the portions of the record contained in Petitioners' Appendix Volume I, Appendix Volume II, and Appendix Volume III are stated as "Pet. Vol. _ p. _."

[4] The Land Development Code ("Code") is a Chapter of the Land Development Regulations, both under the City's prior and new Land Development Regulations. In relation to the review of a development application, the term "Land Development Code" and "Land Development Regulations" tend to be used interchangeably.

Communications, Inc. v. City of North Bay Village, 911 So. 2d 188, 189-90 (Fla. 3d DCA 2005).

The adoption process for a new set of land development regulations typically, including in this case, occurs over an extended period of time and involves numerous opportunities for input from the public and interested parties as well as required public hearings. Until final adoption, there is no certainty for an applicant what requirements will apply to an application submitted under new land development regulations. As the crafting of a development application also takes a great deal of time and effort, it is logical and common for an applicant to file its application while an existing, known set of land development regulations is in effect.[5]

Based on the foregoing, it is entirely irrelevant to this proceeding what provisions of the new Land Development Regulations could have applied to this application had it been filed after the adoption of the new Land Development Regulations or had Respondent BJH elected to have the new Land Development Regulations apply to its

[5] The City did not adopt "zoning in progress", which would have placed a moratorium on development applications being approved while the new Land Development Regulations were in the process of being adopted.

application. The only set of Land Development Regulations the City was able to properly apply to the application was that in existence on June 14, 2022, the date the application was filed. That is what the City did.

The City met the essential requirements of law by applying the correct law. Alternatively, at a minimum the actions taken by the City are not sufficiently erroneous to render the decision inappropriate. *Haines City Community Development v. Heggs*, 658 So.2d 523, 525 (Fla. 1995) (citing *Combs v. State*, 436 So.2d 93 (Fla. 1983)).

B. The Open Space Requirements of Section 86-130(j) of the City Code Were Properly Applied to the Petition.

Petitioners incorrectly argue that the City has failed to properly apply Section 86-130 of the City Code. Section 86-130(j)(3) states: "Land in a PUD designated as open space will be restricted by appropriate legal instrument satisfactory to the city attorney as open space perpetually, or for a period of not less than 99 years." (BJH p. 64) Subsection (j) does not provide a definitive time for when the restriction must be obtained -- it is silent -- and the City's policy (both current and former) for the timing of such restriction is reasonable

and consistent with the wording of the Code.

Prior to discussing the formal restriction of open space, it is important to understand what open space is required. Section 86-130(j)(1) of the City Code provides that "a minimum of 50 percent of the PUD shall be open spaces." (BJH p. 64) Open Space is defined in Section 86-570 of the City Code as follows:

> …property which is unoccupied or predominantly unoccupied by buildings or other impervious surfaces and which is used for parks, recreation, conservation, preservation of native habitat and other natural resources, or historic or scenic purposes. It is intended that this space be park like in use. The term "unoccupied or predominantly unoccupied by buildings or other impervious surfaces," as used in this definition, shall mean that not more than five percent of the area of any required open space, when calculated by each area shall be occupied by such surfaces. Such open space shall be held in common ownership by all owners within the development for which the open space is required. Any property within 20 feet of any structure (except accessory structures within the designated open space) or any proposed open space area having any dimension of less than 15 feet, shall not be considered open space in meeting the requirements of this chapter. Where areas within a development are identified as native habitat, such areas shall be utilized to fulfill the open space requirements of this chapter. (BJH p. 104)

Prior to and after the adoption of Ordinance No. 2023-11, at issue in this proceeding, the Milano Planned Unit Development ("PUD") has had at least 50% of its land classified as open spaces. With the

adoption of Ordinance No. 2023-11, the Milano PUD has 50.9% open space. (Pet. Vol. III p. 76) Attorney Ed Vogler, an expert in real estate law testifying for Respondent BJH, stated: "[W]e've identified each piece of land and how much open space there will be, and we do not need this ten acres." [Pet. Vol. III p. 582) Mr. Vogler further testified, "When we get down to the end of our project, we look at all the lands that we have to meet the open space requirement for, but we don't just willy-nilly give up lands, particularly a 10-acre contiguous parcel." (Pet. Vol. III p. 621-22)

Until 2021, the City interpreted Section 86-130(j)(3) to mean that a property owner had to formally restrict all required open space in a PUD by the date of City approval of the last final plat for the PUD. (Pet. Vol. III p. 83, 91) A "plat or replat" means "a map or delineated representation of the subdivision of lands, being a complete exact representation of the subdivision and other information in compliance with the requirement of all applicable sections of this part [Ch 177, Part 1] and of any local ordinances." *See* § 177.031(14), Fla. Stat. A PUD does not have to be platted all at once, and instead can be platted in multiple phases over a span of years. (Pet. Vol. III p. 91-92) While the City's interpretation provided flexibility to address any

modifications to a PUD that might be warranted prior to final buildout, before the last final plat is approved property ownership can change or fractionalize and market forces can cause portions of anticipated development to be significantly delayed or terminated. (Pet. Vol. III p. 107-8) As a result of these and other potential contingencies, the City revised its interpretation of Section 86-130(j)(3) in 2021 to require any open space required by the PUD appearing on a plat to be restricted at the time of the approval of that plat. (Pet. Vol. III p. 108) Thus, the City no longer waits for the last final plat to be approved before restricting PUD open space. (Pet. Vol. III p. 108)

The Milano PUD covers approximately 500 acres, and final plats have been recorded for the subdivisions of Villages of Milano, Cielo, Fiore, and Aria. (Pet. Vol. III p. 100) The final plat for Fiore, approved on July 13, 2021, was approved after the City revised its interpretation of Section 86-130(j)(3), and, therefore, required open space on that plat is restricted for 99 years on its face. (Pet. Vol. III p. 199) Approvals of the final plats for Milano, Cielo, and Aria, predate the City's revised interpretation and thus they contain no restriction on open space either on their face or through a document

simultaneously recorded.[6] Once again, the City's interpretation and intent at that time was that open space would be restricted upon approval of the last final plat for development allowed in the Milano PUD. (Pet. Vol. III p. 1081-83) As testified to by City Planning Director Roger Clark and City Senior Planner Nicole Tremblay, while plats exist for the entire Milano PUD, a portion of residential land depicted in the Milano PUD Binding Master Plan had yet to be platted at the time the subject application was filed. (Pet. Vol. III p. 105-7, 221) Therefore, the last final plat had not yet been approved, which would trigger the requirement to restrict all remaining required open space.[7]

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[6] An appropriate time for Petitioners to have contested the City's interpretation and application of its Code related to the restriction of open space would have been at the time the City approved the final plats. No such challenges were filed and the respective appeal periods have long passed. It is impermissible for Petitioners to now attempt to challenge the lack of restriction of open space on those plats as part of this proceeding.

[7] During the public hearing, the undersigned, as City Attorney, stated the City would be seeking to have the dedication of open space completed regardless of whether the subject application was approved. (Pet. Vol. III P. 226-27) As part of the City's later approval of the related Cielo Replat on November 28, 2023, Respondent BJH contemporaneously restricted the remaining required open space for the Milano PUD contained in Aria, Aria Phase III, Cielo, and Milano. (C. p. 15-16) This resulted in a total of 294.87 acres of open space being restricted for 99 years, or 58.69% of the land within the Milano PUD. (C. p. 15, 26) [Citations to Respondent City's Supplemental Appendix are stated as "C. p. _."]

Petitioners placed into the record an Agreement Regarding Open Space Restriction and Covenant ("Agreement") between Neal Communities of Southwest Florida, LLC[8] and the City which provides the following in Paragraph 2:

> Open Space Restriction. The Owner shall deliver to the City a fully executed Restrictive Covenant in a form satisfactory to the City Attorney that meets the Minimum Requirements of the *Venice Land Development Regulations* and sufficiently provides for the restriction of open space on all then existing, approved and recorded plats, prior to or at the time of final plat approval for the last plat, platting substantially all of the remaining residential property, filed in connection with the land development project identified as VICA PUD (a/k/a Villages of Milano), Ordinance No. 2014-16, as amended from time to time. (Pet. Vol. II p. 2)

In concert with the City's then existing policy, this Agreement recognizes that the Milano PUD open space will not be fully restricted until the last final plat. (Pet. Vol. III p. 218-19) Petitioners appear to be attempting to have this court determine that the Agreement has been breached by Respondent BJH. Besides being outside the scope of this proceeding, by its express terms the Agreement provides no right or cause of action for any third party. (Pet. Vol. I p. 2) To the

[8] Neal Communities of Southwest Florida, LLC is a predecessor-in-interest to Respondent BJH.

extent the Agreement has any relevancy to this proceeding, the City has not found or alleged that Respondent BJH is in breach of its terms. *See* Footnote 7, *supra*.

In furtherance of demonstrating Respondent BJH's compliance with the City's interpretations of Section 86-130(j)(3) as to the timing of the restriction of open space, attorney and real estate law expert Ed Vogler testified as follows:

> When we got around to Fiore, this new concept was being developed, probably at the same time or as influenced by what you're trying to do with your LDRs, right? And so they said, well, we want you to put this dedication on the plat, which we did. But that's not to the exclusion of these other legal instruments that we're doing timely. [….] And if you'll just humor me for one more minute, this is what he's [Lobeck] really saying to you: He says, if the City would have demanded that this became open space dedicated at the time, then we could not apply for a replat and we could not apply for a Milano PUD amendment, but the reality is, it is not restricted today, and we fully comply with the City codes and ordinances and the policies and the historical implementation of those policies.
> (Pet. Vol. III p. 582-83)

The City concurs with Respondent BJH that the subject property, while originally shown as open space on the Milano PUD Binding Master Plan, was not "restricted" open space at the time of Council consideration of the application, did not need to be restricted open space, was not required land area to meet the open space

requirements of the City Code, and was subject to modification if approved by City Council.

Petitioners base their arguments about Section 86-130(j)(3) on the interpretation they prefer the City to make regarding the formal restriction of PUD open space. The City's interpretation of Section 86-130(j)(3), both present and former, is reasonable, meets the intent of the provision, and has been consistently applied. The courts have held that:

> Generally, a reviewing court should defer to the interpretation given to a statute or ordinance by the agency responsible for its administration ... Of course, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. *Las Olas Tower Company v. City of Fort Lauderdale*, 742 So.2d 308, 312 (Fla. 4th DCA 1999).

"If an agency's interpretation of a rule is one of several permissible interpretations, the agency's interpretation must be upheld despite the existence of other reasonable alternatives." *Suddath Van Lines, Inc. v. State of Fla. Dept. of Environmental Protection*, 668 So. 2d 209 (Fla. 1st DCA, 1996).

Based on the foregoing, the City met the essential requirements of law by applying the correct law. Alternatively, at a minimum the

actions taken by the City are not sufficiently erroneous to render the decision inappropriate. *Haines City Community Development v. Heggs*, 658 So.2d 523, 525 (Fla. 1995) (citing *Combs v. State*, 436 So.2d 93 (Fla. 1983)).

C. The City Properly Applied Section 86-130 of the Land Development Code in Authorizing the Addition of Commercial Uses to the Milano PUD.

The subject property has a future land use classification of Mixed Use Residential in the City's Comprehensive Plan which allows up to 5% of the PUD to be nonresidential uses. (Pet. Vol. III p. 95) Respondent BJH's application requests to modify the Binding Master Plan of the Milano PUD to identify a 10-acre portion as Commercial, which equates to approximately 2% of the PUD having a nonresidential use. (Pet. Vol. III p. 1181) Section 86-130(b)(8) and (r) of the City's prior Land Development Regulations addresses the inclusion of commercial uses in PUDs. Petitioners desire a narrow reading of these provisions to make the addition of commercial uses to an existing PUD prohibited. In contrast, the City's interpretations are reasonable and consistent with the language and intent, reflecting the reality that conditions change over time and permitted

commercial uses should be allowed provided applicable requirements are met through the public hearing process.

Section 86-130(b)(8) of the Land Development Regulations permits in a PUD, "[n]eighborhood commercial uses which are determined at the time of approval for the PUD to be compatible with the existing and future development of adjacent and nearby lands outside the PUD." (BJH p. 62) The Land Development Regulations do not define "neighborhood commercial uses". (Pet. Vol. III p. 82) However, Jim Collins, an expert planner for Respondent BJH, testified that the commercial uses proposed for the Milano PUD are all similar to those found in the City's Commercial Neighborhood zoning district, confirming that they are in fact neighborhood in type. (Pet. Vol. III p. 320-21) Furthermore, Subsection (b)(8) does not limit the inclusion of commercial uses in a PUD to only the time of initial approval of the PUD. The application at issue is considered a rezone and thus the inclusion of commercial uses into the PUD as part of this application is occurring at the "time of approval of the PUD." Petitioners overly narrow interpretation would disallow the consideration of commercial uses in an existing PUD forever and always, regardless of changing conditions and regardless of whether

the other applicable Land Development Regulations are met.

Petitioners also argue for an overly narrow interpretation of Section 86-130(r), which provides:

> *Commercial uses*. Commercial uses located in a PUD are intended to serve the needs of the PUD and not the general needs of the surrounding area. Areas designated for commercial activities normally shall not front on exterior or perimeter streets, but shall be centrally located within the project to serve the residents of the PUD. (BJH p.66)

As it pertains to the first sentence of this subsection, Pat Neal, a principal of Respondent BJH, testified numerous times that the proposed commercial center is intended to be an amenity for, and serve the needs of, the residents of the Milano PUD, but may also serve residents of the surrounding areas. (Pet. Vol. III p. 452, 454-55, 479-80, 487-88, 539-40) To prevent the possibility of a large, regional retailer, Respondent BJH proffered, and the City included in Ordinance No. 2023-11 as Stipulation 1., the following: "The total commercial square footage shall be limited to 70,240 square feet (reflected in the Milano PUD BMP Amendment dated July 3, 2023)." (Pet. Vol. III p. 324; Pet. Vol. I p.4) Furthermore, no single user is allowed in excess of 65,000 square feet. (Pet. Vol. III p. 79-80; Pet. Vol. I p. 9) Planning expert Jim Collins testified that: "The limitation

of the commercial uses to 16 percent of the maximum commercial square footage permittable in the PUD is evidence of its intent to serve the needs to the PUD and not the general needs of the surrounding neighborhoods. (Pet. Vol. III p. 639, 641)

While Petitioners assert in the Amended Petition that their appeal is based only on the City's alleged failure to follow the essential requirements of the law, they have also argued that the proposed commercial uses are "not compatible with the surrounding residential neighborhoods." There is competent substantial evidence in the record that the proposed commercial uses are in fact compatible with the surrounding residential neighborhoods, and this court may not reweigh the evidence. Mr. Collins opined that: "The proposed commercial use with its extensive separation from nearby single-family homes is compatible. Moreover, single-family neighborhoods will benefit from the provision of such services." (Pet. Vol. III p. 634) Mr. Collins also drew corollaries to other existing similar sites within or near the City to show the commonality of this interface of land uses (residential next to commercial) as well as the beneficial impact of intervening buffers, easements, and roadways. (Pet. Vol. III p. 1287-91)

As to the second sentence of subsection (r), it specifically provides that commercial activities normally shall not front exterior or perimeter streets. Such location is not prohibited. The proposed commercial uses for the Milano PUD are located at the corner of Laurel Road and Jacaranda Road. City Senior Planner Nicole Tremblay testified that existing PUDs in the City have commercial uses along their perimeter. (Pet. Vol. III p. 83) Planning Director Roger Clark also testified that: "I don't think we have one PUD in the city that has nonresidential uses where they're not located on the perimeter." (Pet. Vol. III p. 118) Furthermore, he testified: "It does say 'normally' located – 'normally' not located on perimeter streets. So apparently, there are some cases where they would be, and it seems to me that in the case of our PUDs, they all have that." (Pet. Vol. III p. 119)

Mr. Neal testified to the logic and often necessity of locating commercial uses on perimeter streets, stating: "I [] demonstrated a number of PUDs that had failed because you can't put the commercial uses in the middle of the community and bar the use of those facilities by others. And I demonstrated that with pictures and with empty stores." (Pet. Vol. III p. 482-83) Likewise, Mr. Clark

testified as follows:

> But when it comes down to the – where the rubber meets the road, every one of our PUDs, the commercial nonresidential uses are located on the perimeter, and they don't only serve the needs of the PUD, they serve the needs of whatever customers go there that are in the surrounding area. And I'm not only talking about the old PUDs, but the new ones as well. Toscana Isles comes to mind every time somebody talks about this. They have nonresidential land areas designated on Knight's Trail Road. GCCF, which was very recently approved, has nonresidential uses approved on Laurel Road. So you look back at Capri Isles, Pinebrook Bird Bay, all have nonresidential uses on perimeter roads that do not only serve the needs of the PUD. (Pet. Vol. III p. 118-19)

Petitioners request this Court to ignore the plain language of Section 86-130(b)(8) and (r). The rules of statutory construction require a court to interpret the provisions of a code *in pari materia* in a manner that gives meaning to the whole and does not render any provision meaningless. *Fla. Dept. of Envtl. Protection v. ContractPoint Fla. Parks*, 986 So.2d 1260, 1265-66 (Fla. 2008). In the case of *Overstreet v. Blum*, 227 So.2d 197, 198 (Fla. 1969), the Court recognized that the clear intent of the drafters controls. Mr. Clark informed Council: "There is a couple of words in there that you can consider. 'Intent' is identified in there, and also the term 'normally.' So I think that gives some room for interpretation, which is exactly

what we indicated in the staff report, that the decision-makers will need to interpret this Code standard in the way that they feel appropriate. But I think also, as I've indicated multiple times, that you have a lot of evidence out there in the community regarding that Code section, considering the existing -- the existing PUDs and their commercial locations." (Pet. Vol. III p. 1184)

Based on the foregoing, there is competent substantial evidence in the record that the proposed commercial uses are of a "neighborhood commercial use" and they are compatible with the surrounding residential. This court may not reweigh the evidence. *See Sunbelt Equities*, 619 So.2d at 1003. Furthermore, the City met the essential requirements of law by applying the correct law. Alternatively, at a minimum the actions taken by the City are not sufficiently erroneous to render the decision inappropriate. *Haines City Community Development v. Heggs*, 658 So.2d 523, 525 (Fla. 1995) (citing *Combs v. State*, 436 So.2d 93 (Fla. 1983)).

D. Respondent BJH has Demonstrated Ownership and Control of the Subject Property.

Petitioners' allegations pertaining to Section 86-570 are oblique,

but they appear to be seeking to contort the definition of "open space" in the City Code to dictate who was authorized to file the application at issue in this proceeding. Section 86-570 provides that open space is to be held in common ownership by all owners within the development for which the open space is required. (BJH p. 104) This is typically accomplished through the inclusion of the open space in the common area of the homeowners' association ultimately responsible for operating the community. Respondent BJH provided ample evidence during the public hearing that it remained in control of the homeowners' association and was the sole owner of the entire property the subject of the application. (Pet. Vol. III p. 310-11, 317)

The City met the essential requirements of law by applying the correct law. Alternatively, at a minimum the actions taken by the City are not sufficiently erroneous to render the decision inappropriate. *Haines City Community Development v. Heggs*, 658 So.2d 523, 525 (Fla. 1995) (citing *Combs v. State*, 436 So.2d 93 (Fla. 1983)).

II. WHEN CONSIDERING REZONING PETITIONS, THE CITY PLANNING COMMISSION PROVIDES A NON-BNDING RECOMMENDATION TO CITY COUNCIL.

Petitioners' argument that the City Planning Commission's

recommendation of denial to City Council should have some binding effect on Council's ultimate decision is without merit. The recommendation of the Planning Commission, while appropriate for the City Council to consider, is advisory and in no way binding on the Council. (C. p. 7) The final decision-making authority lies with the Council, and the Council in this case, upon consideration of the entire record developed during the quasi-judicial public hearings, determined that the application met the requirements of the Land Development Regulations and Comprehensive Plan and should be granted.

The Planning Commission's recommendation of denial to City Council was a split vote of 4-3. (Pet. Vol. III p. 1284) The City Council hears a rezoning application *de novo*, meaning additional evidence may be presented and argument may occur that the Planning Commission was not privy to. That is even more likely in a public hearing process that spans five days. Furthermore, the considerations in Section 86-47(f) of the City Code that the Planning Commission must make when providing a report and recommendation to City Council on a rezone are applicable only to the Planning Commission and are not considerations that the City

Council must also make. (C. p. 6)

III. THE CITY COUNCIL APPLIED THE CORRECT STANDARD OF REVIEW TO THE REZONING APPLICATION.

Petitioners argue the City Council was not instructed on the correct standard of review for a rezoning application and, therefore, did not apply the correct law. However, the record reflects the detailed guidance on the applicable legal standards provided to the City Council prior to their deliberations. (Pet. Vol. III p. 11-13, 1325-29) Assistant City Attorney Maggie Mooney provided a lengthy discussion of the standard of review after the public hearing was closed and before Council deliberations began. In part, Ms. Mooney stated: "The applicant in quasi-judicial proceedings has the burden of demonstrating through competent, substantial evidence that they have complied with the City's land use regulations and Comprehensive Plan. Once that burden is met, the – the burden shifts to anybody opposing the application and the submittal to prove, again by competent, substantial evidence, that there's legitimate public purpose in denying the request." (Pet. Vol. III p. 1326) Even if the record had no indication of Council being instructed

on the standard of review, that would not invalidate a properly rendered decision.

IV. PETITIONERS' ALLEGATIONS RELATED TO THE RESTRICTIVE COVENANTS AND 'BAIT AND SWITCH' TACTICS FALL OUTSIDE THE SCOPE OF THIS PROCEEDING.

Petitioners' allegations about potential "bait and switch" tactics by Respondent BJH in the sale of lots or Respondent BJH's alleged violations of the Declaration of Restrictive Covenants, to which Respondent City is not a party, are outside the scope of this proceeding and should be rejected. A substantial portion of the public hearing was spent on whether Respondent BJH accurately marketed homes in the Milano PUD to prospective home purchasers. The City has no involvement in, or regulatory oversight of, a developer's marketing, as expressed in the following exchange between Council Member Helen Moore and expert witness attorney Ed Vogler:

> COUNCIL MEMBER MOORE: If some of the parties who are against this application feel that there -- that there have been deceptive practices on the part of the developer, is this where we would resolve that?
>
> MR. VOGLER: No. And let me -- let me just broadly say, if somebody feels that way, they have remedies against the developer. There are laws. There are protections,

> consumer protections. Of course, we evaluate them as we make all of our decisions, right? Risk analysis and exposure. But a City Council in a zoning hearing does not adjudicate those private matters. They just don't -- or you don't.
> (Pet. Vol. III p. 625-26)

Furthermore, Petitioners attempt to utilize *City of New Smyrna Beach v. Andover*, 672 So. 2d 618 (Fla. 5th DCA 1996) to claim that a PUD cannot be amended to add or modify development potential after its initial adoption. In reality, *Andover* provides there is no permanent waiver of any entitlement to seek an amendment to a PUD, but a developer must make application to a government and receive its approval for an amendment, as Respondent BJH has done here. *Id.*; *See also TBCom Properties, LLC v. City of New Smyrna Beach*, No. 06-cv-1677-Orl-28KRS, 2007 WL 1970863, FN4 (M.D. Fla. July 3, 2007). An applicant can choose to seek to amend a PUD and the role of the local governing body is to decide whether the application meets all applicable requirements of the land development regulations. If it does, the application must be approved regardless of whether homeowners oppose the change. *Conetta v. City of Sarasota*, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981); *City of Apopka v. Orange Cnty.*, 299 So. 2d 657, 659–60 (Fla. 4th DCA 1979).

CONCLUSION

Petitioners have not shown that the City violated the essential requirements of law in approving Ordinance No. 2023-11. Even if this Court finds the City misapplied the law, the result is not sufficiently egregious to render the decision inappropriate. In addition, to the extent relevant, Petitioners have not shown that the City's decision is unsupported by competent substantial evidence.

WHEREFORE, Respondent City of Venice requests that this Court quash the Writ of Certiorari.

PERSSON, COHEN, MOONEY,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed with the Clerk via the Florida Courts State-Wide e-Filing Portal and furnished via e-Mail this 6th day of February, 2024, to the persons listed below.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response complies with the font and word count requirements provided in Rule 9.045 and 9.100(j) of the Florida Rules of Appellate Procedure. The brief was prepared using Bookman Old Style font with 14 point type. The word count does not exceed 13,000.

/s/Kelly M. Fernandez
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