IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL DIVISION

DANIL K. RIDDLE AND JANE N. RIDDLE, MICHAEL P. DAGNESE, CONSTANCE M. SPATARO, EVERT J. JELSMA AND SUSSANE H. JELSMA, as Trustee of the Evert J. Jelsma and Sussane H. Jelsma Living Trust dated July 18, 2005, MARY E. TUTTLE, as Trustee of the Mary E. Tuttle Trust dated March 12, 1991, PAUL JASIONOWSKI AND GAIL M. JASIONOWSKI, as Co-Trustees of the Jasionowski Family Trust dated May 4, 2017, NATHANIEL P. GORHAM, and C & T MANAGEMENT, LLC,

Petitioners,

v.

TOWN OF FORT MYERS BEACH, a Florida Municipal Corporation, SEAGATE FORT MYERS BEACH, LLC,

Respondents.

Case No.:

RULE 9.100 PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REFERENCES TO THE RECORD

As permitted by Fla. R. App. P. 9.220, an appendix will be simultaneously filed with this Petition. References to the appendix are cited as "(App. __)" according to the Bates numbering noted in the appendix.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to review by writ of certiorari quasi-judicial action (as that term is defined by Florida law and Town of Fort Myers Beach LDC Section 34-52(a)) under Florida Rules of Appellate Procedure 9.030(c)(3), 9.100(b) and 9.190(b)(3). The Council rendered its decision on February 4, 2025, approving Seagate Fort Myers Beach, LLC's development agreement application. *See* Ordinance 24-34 9 (App__). This petition is timely under Florida Rule of Appellate Procedure 9.100(c)(1).[1]

[1] Among other flaws, the Town of Fort Myers Beach's LDC attempts to alter the Florida Rules of Appellate Procedure, Petitioners believe the Florida Rules of Appellate Procedure control.

STATEMENT OF THE ISSUES

This Rule 9.100 Petition for Writ of Certiorari should be granted because:

1. The Town of Fort Myers Beach Council's approval of Seagate Fort Myers Beach, LLC's development agreement application was not supported by competent substantial evidence;
2. The Town of Fort Myers Beach Council's approval of Seagate Fort Myers Beach, LLC's development agreement application departed from the essential requirements of the law; and
3. The Town of Fort Myers Beach Council deprived Petitioners of due process.

NATURE OF THE RELIEF SOUGHT

Petitioners, Danil K. Riddle and Jane N. Riddle, Michael P. Dagnese, Constance M. Spataro, Evert J. Jelsma and Sussane H. Jelsma, as Trustee of the Evert J. Jelsma and Sussane H. Jelsma Living Trust dated July 18, 2005, Mary E. Tuttle, as Trustee of the Mary E. Tuttle Trust dated March 12, 1991, Paul Jasionowski and Gail M. Jasionowski, as Co-Trustees of the Jasionowski Family Trust dated May 4, 2017, Nathaniel P. Gorham, and C & T Management,

LLC ("Petitioners") respectfully request that this Court grant their petition for certiorari, and quash the Ordinance approving the Seagate of Fort Myers Beach, LLC's development agreement application.

STATEMENT OF THE FACTS AND OF THE CASE

I. The Parties

The Town of Fort Myers Beach (the "Town") is a municipal corporation formed and existing under the laws of the State of Florida with the power to adopt procedures and requirements to consider and enter into development agreements under the authority of Sections 163.3220-163.3243, Florida Statutes a/k/a the "Florida Local Government Development Agreement Act" and the Town's home rule powers as recognized under Section 163.3220(5), Florida Statutes. The Town Council is comprised of five members: Daniel Allers, Mayor; James Atterholt, Vice Mayor; John R. King; Scott Safford; and Karen Woodson.

Seagate Fort Myers Beach, LLC (the "Seagate") is a Florida limited liability company, and record title owner of the real properties located at 3001 Estero Blvd, 2943 Estero Blvd, 2932 Estero Blvd, 211

Donora Blvd, Fort Myers Beach, Florida 33913 (Strap Nos. 29-46-24-W1-00145.1000; 29-46-24-W1-00145.5000; 29-46-24-W1-0120A.0010; 30-46-24-W2-00001.0000) f/k/a Red Coconut RV Park (the "Red Coconut Property").

Danil K. Riddle and Jane N. Riddle are the record title owners of the real property located at 3047 Estero Blvd, Unit 9D, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-02009.00D0), ***which directly abuts*** the Red Coconut Property. The Riddles are also the record title owners of 301 Donora Blvd, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-0120A.0090) adjacent within approximately 356 feet of the Red Coconut Property.

Michael P. Dagnese is the record title owner of the real property located at 3046 Shell Mound Blvd, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-0120C.0060) adjacent within approximately 208 feet to the Red Coconut Property.

Constance M. Spataro is the record title owner of the real property located at 240 Donora Blvd, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-0120B.0080) adjacent within approximately 213 feet of the Red Coconut Property.

Evert J. Jelsma and Sussane H. Jelsma, as Trustee of the Evert J. Jelsma and Sussane H. Jelsma Living Trust dated July 18, 2005, are record title owners of the real property located at 3045 Estero Blvd, Unit 1A, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-02001.00A0) within the Gulf Westwind Condominium which directly abuts the Red Coconut Property.

Mary E. Tuttle, as Trustee of the Mary E. Tuttle Trust dated March 12, 1991, is the record title owner of the real property located at 3045 Estero Blvd, Unit 1B, Fort Myers Beach Florida 33931 (Strap No. 29-46-24-W1-02001.00B0) within the Gulf Westwind Condominium which directly abuts the Red Coconut Property.

Paul Jasionowski and Gail M. Jasionowski, as Co-Trustees of the Jasionowski Family Trust dated May 4, 2017, are the record title owners of the real property located at 220 Donora Blvd, Fort Myers Beach, Florida, 33931 (Strap No. 29-46-24-W1-0120B.0110) adjacent within approximately 50 feet of the Red Coconut Property.

Nathaniel P. Gorham is the record title owner of the real property located at 261 Donora Blvd, Fort Myers Beach, Florida

33931 (Strap No. 29-46-24-W1-0120A.0040) adjacent within approximately 68 feet of the Red Coconut Property.

C & T Management, LLC is the record title owner of the real property located at 3045 Estero Blvd, Unit 8A, Fort Myers Beach, Florida 33931 (Strap No. 29-46-24-W1-02008.00A0) within the Gulf Westwind Condominium which directly abuts the Red Coconut Property.

II. History of the Town Fort Myers Beach and its Incorporation to Control Development and the Future Redevelopment of Fort Myers Beach in General and the Red Coconut Property, In Particular

The Town of Fort Myers Beach was born of dissatisfaction with the land-use policies of Lee County. (App 30). Prior to incorporation, Fort Myers Beach was under the jurisdiction of Lee County's comprehensive plan and land development code, which many residents felt did not protect their interests, particularly with respect to growth, density, and building heights. (App. 10, 18, 60, 64-65). These concerns grew as large-scale developments were approved by Lee County, allowing taller buildings and higher densities than many residents wanted. *Id.* One of the major catalysts for incorporation was Lee County's approval of the DiamondHead Beach Resort—a 12 story

hotel, which sits at a height of approximately 154 feet. (App. 874, Pg. 41:17 – 42:4, 44:7-12; App. 679, Pg. 155:16-17; App. 1036, Pg. 141:18-20). Other pre-incorporation developments included Ocean Harbor Condominiums (16 stories and 150 dwelling units) and Caper Beach Club (12 stories and 103 dwelling units). (App. 60).

After a long community-driven effort to gain control over zoning and development on the island, the Town of Fort Myers Beach was incorporated on December 31, 1995. (App. 10, 18). In 1996, the Town Council established the Local Planning Agency ("LPA") to prepare a comprehensive land use plan "with a view toward insuring [sic] that orderly growth and development proceeds as may be consistent with the preservation of the natural and unique characteristics of the island." (App. 121). The LPA serves as an advisory board to the Town Council that reviews applications for land use changes, including applications for development agreements, including for consistency with the comprehensive plan. *Id.*

In 1997, pending the LPA's preparation of a new comprehensive plan, the Town Council imposed interim land use regulations, which included a height cap of two stories above the lowest habitable floor.

(App. 65, 66). Soon thereafter, the Town adopted its Comprehensive Plan, effective January 1, 1999. The Comprehensive Plan states that "[a] height limit similar to the 1997 interim change will be maintained, but an opportunity will be provided to owners of existing parcels ***that are so surrounded by tall buildings that it would be grossly unfair to apply the new height limit.***" (App. 66) (emphasis added).

Among its stated goals, the Comprehensive Plan seeks to "***maintain the small-town character*** of Fort Myers Beach." (App. 84, Goal 4). "Maintaining the town's current '***human scale***' is a fundamental redevelopment principle." *Id.* at Objective 4-A (emphasis added). "[N]ew buildings should be designed to encourage use or admiration by people on foot or bicycle, rather than separating them with…***unnecessary building heights***." *Id.*, at Policy 4-A-1 (emphasis added).

With respect to pre-existing parcels, such as the Red Coconut Property, the Comprehensive Plan seeks to "[t]ake positive steps to redevelop areas that are reaching obsolescence or beginning to show blight…by providing an opportunity for landowners to replace

vulnerable mobile homes and recreational vehicles with permanent structures in the Gulfview Colony/Red Coconut area." (App. 96, Objective 4-F). The Comprehensive Plan specifically provides for a "pre-approved redevelopment option" in the LDC for the Gulfview Colony/Red Coconut area. Under LDC Section 34-692(3), that "pre-approved redevelopment option" identifies as a goal, among other things, (i) traditional neighborhood design; (ii) ***detached houses or cottages*** abutting existing single-family homes; (iii) ***low-rise townhomes or apartments*** allowed toward the center; (iv) walkable narrow streets that double as view corridors; (v) ***substantial open space*** with views to be maintained from Estero Boulevard to the Gulf. (App. 97, Objective 4-F(iii)(a)-(e)); LDC Section 34-692(3)(a).

Notwithstanding these Comprehensive Plan and LDC provisions, Seagate seeks to cram, with the Town's approval, two 255-feet, 17-story condominium towers in the center of a low-density, single-family neighborhood in the "Heart of the Island."[2]

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[2] Seagate's proposal also includes additional towers which are several feet and stories beyond the maximum allowed height on Fort Myers Beach. Seagate's two 255-feet, 17 story towers are the tallest among those structures. Petitioners object to all height deviations approved by the Town.

III. The Town Council Approves Seagate's Development Agreement Application

On April 1, 2024, the Town Council adopted Resolution 24-73, which established procedures for the application and approval of development agreements with deviations under the authority of Sections 163.3220-163.3243, Florida Statutes a/k/a the "Florida Local Government Development Agreement Act" and the Town's home rule powers as recognized under Section 163.3220(5), Florida Statutes. (App. 299). LDC Chapter 2, Article III contains the Town's enabling statute for this development agreement process.

The development agreement procedures state:

> A Development Agreement with Deviations is a non-statutory development agreement that may allow for approval of amendments, modifications, variances or exceptions ("deviations") from the Town's Land Development Code, and, ***if appropriate under the provisions of the Town's Comprehensive Plan, relief from the building height limitations in the Comprehensive Plan***. Approval of a Home Rule Developer Agreement shall be considered ***tantamount to and commensurate to a planned development for purposes of determining consistency with the Comprehensive Plan***. *Id.* (emphasis added).

Thereafter, Seagate submitted its application for a development agreement with deviations (DA20240170). (App. 309). Seagate's application is the first time the Town has ever received and reviewed such an application. Prior to Seagate, neither the Town Council, nor Town staff, have ever negotiated, drafted, and reviewed a proposed development agreement.[3]

In accordance with Sections 3.1-3.2 of the development agreement procedures, Seagate negotiated and reduced to writing a proposed development agreement for the construction of a 255-feet (235 feet above base flood elevation), 17-story condominium tower on the Red Coconut Property (the "Proposed Development Agreement").

On October 22, 2024, the LPA conducted a public hearing regarding the Proposed Development Agreement. (App. 318). At that hearing the LPA reviewed reports from Seagate and Town staff, heard testimony from Seagate representative Matthew Price, received public comment, and reviewed the terms of the Proposed Development Agreement. *See generally* (App. 332-586).

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[3] Per Town attorney, Nancy Stuparich, "[t]his is the first development agreement that this town council is – will be reviewing." (App.679 Pg. 4:23-25).

Both Town staff and Seagate advised the LPA that Seagate's requested deviation for a height increase had to be reviewed under Policy 4-C-4 of the Comprehensive Plan and LDC Section 34-631(b)(5), which require the Town to "balance the public benefits of the height limit [30 feet above base flood elevation] against the other public benefits that would result from the specific proposal." (App. 319, 591, 604); (App. 332, Pg. 4:7-17). Seagate, Town staff, and the LPA could not discern an objective formula for this balancing test, nor could they define what constituted a "public benefit." Seagate representative, Matthew Price, admitted as much:

·7· ·All right. ***We've listened to public benefit, which***
·8· ·***is, I think, the most ambiguous thing that people***
·9· ·***talk about on the island because nobody really***
10· ·***understands what a public benefit is***. Now, the one
11· ·thing that we tried to do on our project is include
12· ·as many public benefits as possible. And why?· And
13· ·the reason is -- is because ***some people believe***
14· ·***restaurant is a public benefit. Others don't.***
15· ·***Some people believe a view corridor is. Others***
16· ·***don't.*** You know, again, I keep hearing the same
17· ·people that say is view corridors are not a public
18· ·benefit and point to Margaritaville. And one of
19· ·the biggest -- biggest benefits that Margaritaville
20· ·gave back was a view corridor. ***So, again, it's***
21· ·***this confusion out there that is -- that is --***
22· ·***that -- and this uncertainty that people just don't***
23· ·***understand.***

(App. 332, Pg. 14:7-23) (emphasis added).

LPA Member Douglas Eckman stated, "I don't have a formula that helps me make a decision of public benefit versus height." (App. 499, Pg. 12:11-13). LPA Member James Boan stated, "without clarification on the policy of public benefit and the tradeoff for height, I don't think we have clear enough direction to approve [the Proposed Development Agreement]." *Id.* Pg. 62:3-7. Town planner, Sarah Propst, stated "[w]e had three meetings about public benefit.... We brought in multiple examples of what public benefit could look like, how you could measure it, what the trade-offs would be, if we wanted to quantify it, if you could categorize things... And at the end of the day ***nobody wanted to really decide what it [public benefit] was***." *Id.*, Pg. 77:7-17 (emphasis added).

The LPA voted to ***recommend denial*** of the Proposed Development Agreement, stating that the proposed "public benefits" were inadequate to support the substantial deviation for the requested height. *Id.* Pg. 69:14-16; (App. 318).

On October 28, 2024, the Town Council held its first public hearing on the Proposed Development Agreement. *See generally* (App.

679). Town staff and Seagate advised the Town Council that Seagate's requested height increase from 30 feet above base flood elevation to 235 feet above base flood elevation (255 feet overall) had to be reviewed based on the "public benefit" balancing test under Policy 4-C-4 of the Comprehensive Plan. (App. 319, 591, 604); (App. 679, Pg. 27:3 – 28:15). Policy 4-C-4 limits building heights to 2 stories above base flood elevation.

At that hearing, prior to any vote on Seagate's application, Council Member King stated his unequivocal support for the Proposed Development Agreement based on the unsworn and unqualified statements of LPA member James Dunlap regarding the economic benefits of Seagate's project for the Town's financial viability. (App. 679, Pg. 189:3-15). Nowhere in the Comprehensive Plan or the LDC does it state that "financial viability" is a basis for granting a deviation from the LDC's strict height limits. Even if "financial viability" were a basis for granting a height deviation (it is not) James Dunlap is a banker, not a qualified financial expert.[4] Council Member King stated the following:

[4] (App. 499, Pg. 7:10 – 10:24).

·3· · · · ***So financial viability is still going to be a***
·4· ·***concern of mine.*** And I think this island,
·5· ·obviously, has become better off than what it was,
·6· ·but that's because of a state infusion of cash. ***I***
·7· ·***think watching the LPA meeting last week -- Jim***
·8· ·***Dunlap said it best for me when he talked about with***
·9· ·***his financial background that lack of financial***
10· ·***stability is what we've been managing here.***
11· · · · And a permanent investment with long-term
12· ·financial implications is what this island needs,
13· ·and it's not going to be 10 to 15 developments
14· ·because the capital is not there.· And it's --
15· ·and -- ***and so I will be supporting this.***

(App. 679, Pg. 189:3-15) (emphasis added).

At that same hearing, Vice Mayor Atterholt stated his support for the Proposed Development Agreement based on the need to "maintain momentum" in rebuilding Fort Myers Beach post-Hurricane Ian and his belief that Seagate's project is "in the public interest." Neither of these grounds are identified in the LDC as a basis for granting a deviation from the LDC's zoning regulations. Specifically, Vice Mayor Atterholt asserted:

10· · · · ***With the recent setbacks of Hurricane Helene***
11· ·***and Milton, we need to maintain our momentum and our***
12· ·***sense of urgency about our post-Ian rebuild or we***
13· ·***will stagnate.*** If I could quote a couple of former
14· ·U.S. presidents, "This is a time for choosing.· We
15· ·can't let the perfect be the enemy of the good."
16· · · · ***For this reason, in the aftermath of the***
17· ·***destruction of Hurricane Ian and the post-Ian***

18· ·***environment in which we now live, I believe this***
19· ·***project is in the public interest***; therefore, I move
20· ·that Ordinance 24-34 and any language that the town
21· ·attorney advises me to add on to that be adopted.

(App. 679, Pg. 184:10-21) (emphasis added).

On December 2, 2024, the Town Council held its second public hearing on the Proposed Development Agreement. Seagate's land planner, Tina Ekblad, again acknowledged that Seagate's requested height increase to 255 feet required sufficient "public benefits" under Policy 4-C-4 and that "[w]e [Seagate] have met the intent of Policy 4-C-4 along with all of the other public benefits that are being offered." (App. 874, Pg. 99:22 – 100:1). In support of its requested height deviation, Seagate used Ocean Harbor Condominiums (16 stories and 150 dwelling units) and Caper Beach Club (12 stories and 103 dwelling units) as comparable developments. *See* (App. 1014).[5]

[5] Caper Beach Club and Ocean Harbor Condominiums are not at all comparable to Seagate's proposal. Both developments existed ***prior to*** the Town's incorporation and the adoption of the Comprehensive Plan and LDC. These building do not "surround" the Seagate parcel. Ocean Harbor Condominiums and Caper Beach Club are approximately 1.4 and 0.5 miles away from the Red Coconut Property, respectively. *See* (App. 60).

On December 16, 2024, the Town Council held its third public hearing on the Proposed Development Agreement. During public comment, ProtectFMB member, Thomas Brady, pointed out that "[o]bjective criterion metrics for public benefit are as yet undefined." [Dec. 16, 2024 Hearing, Pg. 163:16-17]. Mr. Brady warned Council Member King that "[w]e have had no testimony saying the Town needs the revenues. They [the LPA] were not sworn in when they said that…. John you said one of the reasons that you wanted to approve this project is because Jim [Dunlap], who—he's a banker, but I don't know if he can speak on the financial issues—said that we need to have this project. It was not sworn testimony…. There hasn't been any evidence that's competent and substantial to this." (App. 1036, Pg. 162:13 – 164:19).

Notwithstanding the warnings of Mr. Brady and other members of the public, Council Member King doubled down on his support for the Proposed Development Agreement based on James Dunlap's unsworn statements, state politics, and his personal speculation regarding the Town's "financial sustainability." Specifically, Council Member King stated:

I've -- I've discussed this before and I know what I know and I know what I don't know and I know I'm not a smart person and I'm okay with that and I'm comfortable with who I am.· My wife likes me for who I am, so that's all that matters to me.

. . . ***But revenue -- the Town's fiscal revenue has bothered me for a while. And when I heard Jim Dunlap say it -- and I'll say it again -- and, yes, I -- I quoted him I find Jim to be a very smart person, especially when dealing with finances. We're managing a lack of financial sustainability***, and we'll be talking about that later on in this meeting when we'll be asking about -- we'll be talking about revenue replacement and moving money around, I guess.

. . . You know, we sustained significant financial revenue losses in fiscal years '23 and '24.· And the Town manager is -- and I assume it comes from the CFO as well -- is projecting additional -- sustained additional losses in fiscal year '25.

. . . We've been able to do some things because of lobbying efforts on behalf of Ron Book, who has done a great job up in Tallahassee, and the mayor for going up there and doing his -- his part, Andy and Frankie and Chris Hawley and all those folks. But that spigot is closing and we know that.

. . . ***And I saw -- and Jim, the Vice Mayor, had alluded to it earlier, at some point, not today necessarily, but the Legislature is going to be tightening the screws.*** They're going to be -- they've got a new budget chair in the senate and he -- he was on the news the other day talking about how things are going to tighten up.

. . . And that's it.· That's a concern.· So I -- I feel, again -- and I'll quote you, Jim, and I'm sorry if I've caused you some grief on that -- but

permanent investment with long-term financial

25· ·***implications is -- is what this town needs, and so***
1· ·***that's where I am.***

(App. 1036, Pg. 208:12 – 210:1) (emphasis added).

Vice Mayor Atterholt likewise doubled down on his support for the Proposed Development Agreement based on the unqualified testimony of Fran Myers, the prior owner of the Red Coconut Property, that Seagate's proposed development would "match the island" and be "one-third less density than the Red Coconut that existed pre-Ian."[6] Specifically, Vice Mayor Atterholt stated:

·2· · · · But ***the woman who owned the Red Coconut***
·3· ·***and -- and managed it for many, many years came***
·4· ·***and testified***, and she said under oath -- she said
·5· ·that this -- this proposed development -- first of
·6· ·all, she didn't sell to the highest bidder because
·7· ·she said there was some really grotesque proposals
·8· ·before her and she didn't want anything to do with
·9· ·them.· But ***this was something that she thought***
10· ·***could match the island.· But more importantly she***
11· ·***said under oath that she managed the Red Coconut***
12· ·***for decades***, first of all, didn't want to sell it,

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[6] There is no competent, substantial evidence in the record to support Ms. Myers' density claims. Indeed, Ms. Myers' claim that the density under Seagate's proposal would be "one-third" less than the Red Coconut RV Park that existed pre-Hurricane Ian is mathematically improbable. The maximum density on the Red Coconut Property was "27 RV/mobile homes per acre." LDC Section 34-692(3)(a)(8). Seagate's proposed redevelopment would reduce that number to 15 dwelling units per acre (55% of the "27 RV/mobile homes per acre" pre-existing density limit).

13· ·sold it under duress, her husband was ill, other
14· ·post-Ian challenges.
15· · · But ***she said the proposed development would***
16· ·***be one-third less density than the Red Coconut***
17· ·***that existed pre-Ian.*** So you have a potential for
18· ·a ten-acre plot of land that goes from the bay to
19· ·the gulf, the only land like that on Fort Myers
20· ·Beach, that literally potentially could have a
21· ·one-third reduction in density.

(App. 1036, Pg. 205:2-21) (emphasis added).

The Town Council voted 3-2 to adopt Ordinance 24-34, thereby approving Seagate's Proposed Development Agreement. Council Members King, Atterholt, and Woodson voted in favor of the Ordinance. None of them based their decision on the "public benefit" balancing test under LDC Section 34-631(b)(5), nor did they consider the LDC-required parameters for redevelopment of the Red Coconut Property under LDC Section 34-692(3)(a).

LAW AND ANALYSIS

I. Standard of Review

The Town's development agreement procedures state "[a]pproval of a Home Rule Developer Agreement shall be considered ***tantamount to and commensurate to a planned development for***

purposes of determining consistency with the Comprehensive Plan." (App. 299) (emphasis added).

Rezoning actions that affect only a limited number of persons or property owners are quasi-judicial actions subject to strict scrutiny on certiorari review. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993); *Alvey v. City of North Miami Beach*, 206 So. 3d 67, 73 (Fla. 3d DCA 2016) "The effect of labeling rezoning decisions as quasi-judicial is to refer them to an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1001 (Fla. 2d DCA 1993). LDC Section 34-52(a) also defines "quasi-judicial action" as "the application by the local planning agency or town council of a previously adopted general rule or policy that will have an impact on a limited number of persons or property owners, such as individual appeals, variances, rezonings and special exceptions."

"[A] landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance." *Snyder*, 627 So. 2d at 476; *see also Village of Key Biscayne v. Dade County*, 627 So.2d 1180 (Fla. 3d DCA 1993) ("burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan…."). ***This showing must overcome strict scrutiny.*** *Brevard Co v. Snyder*, 627 So.2d 469, 475-476 (Fla. 1993); *see also Sunbelt*, 619 So. 2d 996 (The term 'strict scrutiny' arises from the necessity of strict compliance with comprehensive plan). A key aspect of strict scrutiny is that ***no deference is given to the interpretation of the comprehensive plan asserted by the local government staff***. *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191, 202 (Fla. 4th DCA 2001).

On certiorari review, the circuit court reviews the town council's decision to determine (1) whether due process was afforded; (2) whether the essential requirements of law have been observed; and

(3) whether the council's findings are supported by competent substantial evidence." *Sunbelt Equities*, 619 So. 2d at 1003.

II. The Town Council Departed from the Essential Requirements of the Law When it Applied Policy 4-C-4 of the Comprehensive Plan and LDC Section 34-631(b)(5) to Approve Seagate's Requested Height Deviation

"A departure from the essential requirements of law is more than simple legal error but rather it is when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Miami-Dade Cnty. v. Publix Supermarkets, Inc.*, 305 So.3d 668, 671 (Fla. 3d DCA 2020). Departure from the law's essential requirements means completely applying the wrong law. *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995) (holding that "applied the correct law" is synonymous with "observing the essential requirements of law"); *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So.3d 1253, 1256 (Fla. 5th DCA 2015) (holding that lower court departed from the essential requirements of the law by relying on code provision for single-family development when proposed condominium clearly met code's definition of multi-family development); *Auerbach v. City of Miami*, 929 So.2d 693, 694–95 (Fla. 3d DCA 2006) (granting second-tier

certiorari relief from the circuit court's affirmance of the variance granted by the City of Miami based on the failure of both entities to apply the correct law); *Alvey*, 206 So. 3d at 68 ("Although we recognize that the scope of second-tier certiorari review is extremely limited, we are compelled to grant the instant petition based on the circuit court's failure to apply the correct law").

A city council's failure to apply the correct provisions of its LDC constitutes a miscarriage of justice which departs from the essential requirements of the law. *Surf Works, L.L.C. v. City of Jacksonville Beach*, 230 So.3d 925, 930 (Fla. 1st DCA 2017) ("We hold that when the circuit court applied the incorrect law to uphold the city council's decision to apply the provisions of [LDC] section 34–211, rather than the provisions of section 34–347(c)…[this] error resulted in a miscarriage of justice which departed from the essential requirements of law").

"All development on land covered by a local government's comprehensive plan, and ***all action taken by the government regarding that development, must comport with the plan.***" *Imhof v. Walton Cnty.*, 328 So. 3d 32, 37 (Fla. 1st DCA 2021) (citing Fla.

Stat. § 163.3194(1)(a)); *see Dixon v. City of Jacksonville*, 774 So. 2d 763, 764 (Fla. 1st DCA 2000) ("It is well established that a development order shall be consistent with the government body's objectives, policies, land uses, etc., as provided in its comprehensive plan"). "The plan is likened to a constitution for all future development within the governmental boundary." *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987).

"City ordinances, like [land development codes], are subject to the same rules of construction as state statutes." *Surf Works, L.L.C.*, 230 So.3d at 930 (citing *Great Outdoors Trading, Inc. v. City of High Springs*, 550 So. 2d 483, 485 (Fla. 1st DCA 1989). "As with statutes, the first step when construing ordinances is to discern and to give effect to the legislative will, since intent is the essence of the law." *Id.* "Intent is derived primarily from a statute's text; therefore, to discern that intent courts must look first to the language of the statute and its plain meaning." *Id.* "The words of the ordinances must be given their plain and ordinary meaning, and ***courts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear***, unless it is clear the

omission was inadvertent." *Id.* (emphasis added). "Under the plain meaning rule, which is regarded as 'the cardinal rule of statutory construction,' ***if a court finds that the language of the statute is unambiguous, it should not resort to further construction or interpretation***." *Id.* at 930-31 (emphasis added). "In addition to the statute's plain language, a basic rule of statutory construction provides that the legislature does not intend to enact useless provisions, and ***courts should avoid readings that would render part of a statute meaningless***. *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002). Adding, modifying, or limiting a statute beyond its unambiguous terms also constitutes a departure from clearly established law. *Elso v. State*, 260 So.3d 489, 493 (Fla. 3d DCA 2018) ("Where the issue before the circuit court involves statutory construction, a writ of certiorari may be appropriate where the circuit court does not apply the plain and unambiguous language of the relevant statute, resulting in an egregious error.").

A. The Town Ignored the LDC's Clear Condition Precedent

In the instant case, Seagate and Town staff advised the LPA and Town Council that Policy 4-C-4 of the Comprehensive Plan controlled

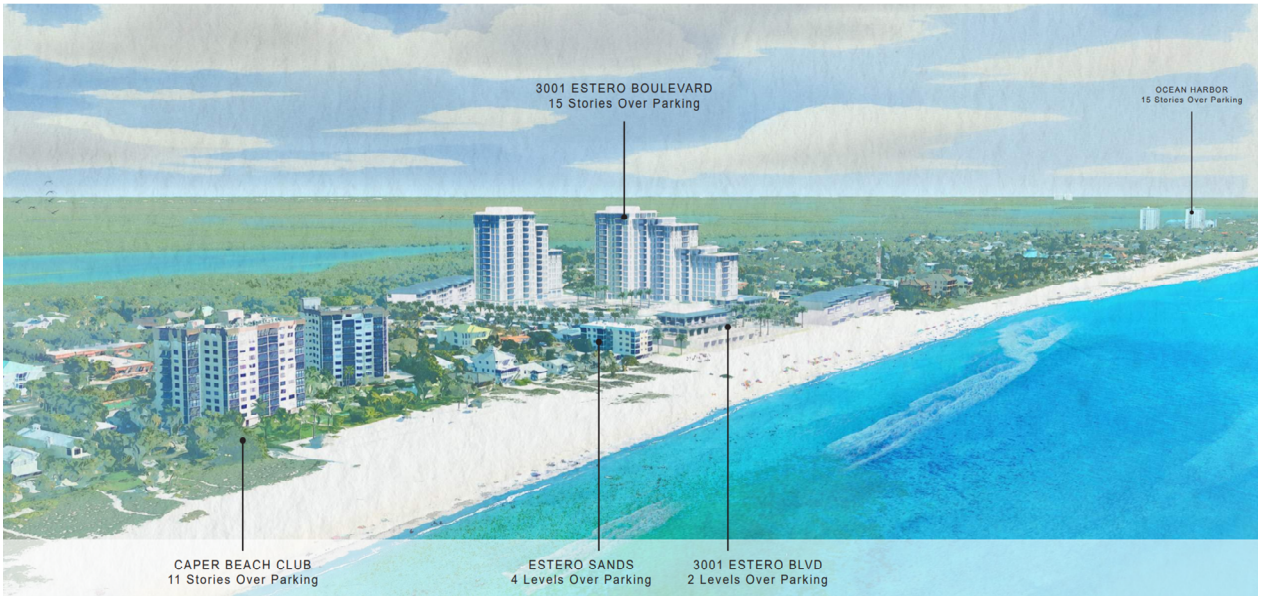
Seagate's right to a height deviation from a maximum of 30 feet above base flood elevation to 235 feet above base flood elevation (255 feet overall). LDC Section 34-631(b)(5), which is the LDC counterpart to Policy 4-C-4 of the Comprehensive Plan, states ***in full*** the following:

> ***In those few cases where individual parcels of land are so surrounded by tall buildings on lots that are contiguous (or directly across a street) that the height regulations in this chapter would be unreasonable, landowners may seek relief through the planned development rezoning process***, which requires a public hearing and notification of adjacent property owners. The town will approve, modify, or deny such requests ***after evaluating the level of unfairness that would result from the specific circumstances and the degree the specific proposal conforms with all aspects of this comprehensive plan***, including its land use and design policies, pedestrian orientation, and natural resource criteria. Particular attention would be paid to any permanent view corridors to gulf or bay waters that could be provided in exchange for allowing a building to be taller than the height limits in this chapter. ***In each case, the town shall balance the public benefits of the standard height limit against other public benefits that would result from the specific proposal.*** LDC Section 34-631(b)(5) (emphasis added).

The Town Council, LPA, Town staff, and Seagate erroneously focused exclusively on the last two sentences of LDC Section 34-

631(b)(5) as the basis for increased height on the Red Coconut Property. *See, e.g.,* Oct. 28, 2024 Hearing Pg. 27:3 – 28:15. Landowners cannot unlock the gate to gain access to the allowable "relief" unless they meet the defined predicate in the first sentence of LDC Section 34-631(b)(5). In other words, Seagate must prove it is one of the "few cases" to receive relief. The Red Coconut Property is not "so surrounded by tall buildings…that the height regulations in this chapter [30 feet above base flood elevation] would be unreasonable." All the buildings that are "contiguous to" (or across the street from) the Red Coconut Property are, at most, two stories above base flood elevation. The nearest high-rise development, Caper Beach Club, a pair of 12 story condominium towers, is located approximately half a mile from the Red Coconut Property. (App. 60). The other referenced high-rise, Ocean Harbor Condominiums, is approximately 1.4 miles to the South. The absurdity of Seagate's requested height deviation is further demonstrated by its own project

rendering, which depicts two massive condominium towers (both 255 feet tall) that tower over the Fort Myers Beach horizon.[7] (App. 1014).



The "so surrounded by tall buildings" criteria is a required factual predicate and condition precedent to the landowner's ability to even seek relief through a rezoning. The Town and Seagate either (at best) misread and misunderstood this condition precedent, but more likely, intentionally ignored the requirement Seagate must meet to seek relief as to building height.

[7] Seagate's rendering is misleading in that Caper Beach Club and Ocean Harbor Condominiums both existed prior to the Town's incorporation and the adoption of the Comprehensive Plan and LDC. Ocean Harbor Condominiums and Caper Beach Club are approximately 1.4 and 0.5 miles away from the Red Coconut Property, respectively. *See* (App. 60).

Accordingly, under the plain terms of LDC Section 34-631(b)(5), Seagate failed to prove the required condition precedent to seek relief from the LDC's strict height limitations. Neither the Town Council, nor this Court, can ignore the plain terms of LDC 34-631(b)(5), and accordingly, that Section (and its Comprehensive Plan counterpart, Policy 4-C-4) is completely inapplicable to Seagate's Proposed Development Agreement. The Town Council's application of the incorrect law, LDC Section 34-631(b)(5) and Policy 4-C-4, to Seagate's Proposed Development Agreement constitutes a departure from the essential requirements of the law. This Court must quash Ordinance 24-34 on this basis alone. *Surf Works, L.L.C.*, 230 So.3d 925.

When LDC Chapter 34 is read as a whole, it becomes clear that the Village Zoning District, in which the Red Coconut Property is located, is expressly excluded from any basis for a height deviation. LDC Section 34-1 states, "[t]he purpose of this chapter is to encourage and promote, in accordance with present and future needs, the safety, health, order, convenience, prosperity, and general welfare of the citizens of the Town of Fort Myers Beach, to recognize and promote real property rights, ***and to provide...[f]or***

development in accordance with the Fort Myers Beach Comprehensive Plan." LDC § 34-1(a)(10) (emphasis added). "These purposes are furthered by ***establishing zoning districts*** and by regulating the location and use of buildings…[and] ***height***." LDC § 34-1(b) (emphasis added).

LDC 34-661 states, "[t]he purpose of the ***redevelopment zoning districts*** is to implement ***specific redevelopment concepts*** established in the Fort Myers Beach Comprehensive Plan and for other situations where conventional or planned development zoning districts ***are inappropriate***. These districts require ***more detailed regulations*** than provided by conventional zoning districts, and use special terms as described in the following sections." LDC § 34-661. "In ***all redevelopment zoning districts***, land use is controlled through the ***more specific property development regulations*** that are provided in the remainder of this division [Division 5]." LDC § 34-666.

LDC Chapter 34, Article III, Division 5, Subdivision IV established the Village Zoning District, which controls the Red Coconut/Gulfview Colony area. Under that subdivision, LDC Section

34-691 states, "[t]he purpose of the Village district is to provide alternative futures for the Red Coconut and/or Gulf View Colony, either a continuation of the current land uses ***or their transformation into a traditional neighborhood pattern***."

LDC Section 34-693(h) sets forth specific building height limits for the Village Zoning District:

> ***For properties that front on the bay side of Estero Boulevard*** and all streets other than Estero Boulevard, ***a maximum of 30 feet above base flood elevation and no taller than two stories***. However, for mixed-use buildings and for elevated buildings without enclosed space on the first story, the maximum height is three stories (but still limited to 30 feet above base flood elevation). ***For properties that front on the beach side of Estero Boulevard***, ***a maximum of 40 feet above base flood elevation and no taller than three stories***. LDC § 34-693(h)(1)-(2) (emphasis added).

LDC Section 34-693 does ***not*** have an "exceptions" provision in the Village Zoning redevelopment zoning district. Therefore, the "general building height limits" set forth in LDC Section 34-631, and the "public benefit" exception contained therein, does not (cannot) apply to this case.

B. The "Public Benefit" Exception is Void for Vagueness

Even if LDC Section 34-631(b)(5) were the correct law (it is not), the "public benefit" balancing test contained therein is fatally vague and thus void, as a matter of law. "Consistently Florida courts have declared unconstitutional ordinances that lack objective standards to guide zoning and other quasi-judicial boards in making their decisions" *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 811 So.2d 767, 769 (Fla. 3d DCA 2002) *decision quashed on other grounds*, 863 So.2d 195 (Fla.2003) ((holding that provision of Miami–Dade County Code on unusual uses was legally deficient because it lacked objective criteria for the County's zoning boards to use in their decision-making process); *City of Miami v. Save Brickell Ave., Inc.*, 426 So.2d 1100, 1104 (Fla. 3d DCA 1983) ("[I]f definite standards are not included in the ordinance, it must be deemed unconstitutional as an invalid delegation of legislative power to an administrative board."); *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146, 149 (Fla. 1st DCA 1979) ("Any standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality.") Objective criteria are

necessary so that: (1) persons are able to determine their rights and duties; (2) the decisions recognizing such rights will not be left to arbitrary administrative determination; (3) all applicants will be treated equally; and (4) meaningful judicial review is available. *Miami–Dade County*, 811 So.2d at 769 n. 5.

"***The general rule is that a zoning ordinance must prescribe definite standards*** and that neither the ***city council***, the board of appeals created by ordinance or statute, nor the building inspector are properly vested with discretionary rights in granting building permits or variances in exception to the zoning ordinance ***unless there has been established a definite standard to guide them in the exercise of such powers***." *North Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956).

The Comprehensive Plan and LDC do not define the terms "benefit" or the "public benefit." *See generally* LDC § 34-2. The LDC does not provide any examples of "public benefit." The LPA and the Town's senior planner (the persons responsible for advising the Town Council on the application of the Comprehensive Plan and LDC) could not articulate a meaning for "public benefit." LPA Member

Douglas Eckman stated, "***I don't have a formula that helps me make a decision of public benefit versus height.***" (App. 499 Pg. 12:11-13) (emphasis added). LPA Member James Boan stated, "***without clarification on the policy of public benefit and the tradeoff for height, I don't think we have clear enough direction*** to approve [the Proposed Development Agreement]." (App. 499, Pg. 62:3-7) (emphasis added). The Town's senior planner, Sarah Propst, stated "[w]e had three meetings about public benefit.... We brought in multiple examples of what public benefit could look like, how you could measure it, what the trade-offs would be, if we wanted to quantify it, if you could categorize things... And at the end of the day ***nobody wanted to really decide what it [public benefit] was.***" *Id.* Pg. 77:7-17 (emphasis added). Even Seagate agent, Matthew Price, admitted "***nobody really understands what a public benefit is***.... some people believe restaurant is a public benefit. Others don't. Some people believe a view corridor is. Others don't." (App. 332, Pg. 14:7-23) (emphasis added). The "public benefit" balancing test lacks sufficient objective standards to allow Fort Myers Beach property owners (including Seagate) to determine their rights and duties *vis a*

vis height restrictions under the LDC. Indeed, it is unclear how much and what types of "public benefit" would justify, for example, a single additional story, versus 7 stories above base flood elevation, let alone 15 stories (13 stories above the allowable 2 stories). Accordingly, LDC Section 34-631(b)(5), and the "public benefit" balancing test contained therein, lacks sufficient objective criteria to be constitutional. The Town Council's incorrect application of this code provision, as well as its application of this fatally vague code provision, constitutes a departure from the essential requirements of the law. Ordinance 24-34 must be quashed.

III. The Town Council Deprived Petitioners of Due Process By Failing to Remand the LDC's Vague "Public Benefit" Exception and Failing to Make Any Evaluation of "Unfairness"

LDC Section 34-84 sets forth the general procedures for actions on specific zoning applications. That Section states, "[p]ublic hearings before the town council shall be held after the local planning agency has held its hearing on these applications and rendered its formal recommendation to the town council…." LDC § 34-85)(b). "***In exercising its authority, the town council shall consider the recommendation of the local planning agency*** where applicable,

but may, in conformity with the provisions of this chapter, reverse, affirm, or modify the recommendation, ***or remand the recommendation to afford due process.***" LDC § 34-84(c)(1) (emphasis added). LDC Section 34-84(c)(1) does not allow the Town Council to simply "reject" the LPA's recommendation.

The LPA voted to recommend denial of Seagate's Proposed Development Agreement, stating that the proposed "public benefits" were inadequate to support the substantial deviation for the requested height. *Id.* Pg. 69:14-16; (App. 318). Members of the LPA specifically voted to deny the proposal because they could not articulate a meaning for "public benefit" nor a formula by which to compare the proposed "public benefit" against the requested height. (App. 499, Pg. 12:11-13, 62:3-7). This vagueness is patently unlawful. *See* Section II(A), *supra*.

Under LDC Section 34-84(c)(1), the Town Council should have remanded the LPA's recommendation to afford due process. As part of that remand, the Town Council could have seized on the opportunity to work with the Town planner, Town manager, Town attorney, and the LPA to recommend a definition for "public benefit"

to add to LDC Section 34-2 (Definitions), including specific examples of what constitutes "public benefit" and to elaborate a set of objective criteria by which to evaluate such proposed benefits. Instead, the Town Council simply rejected the LPA's recommendation and approved the Proposed Development Agreement. In so doing, the Town Council deprived the public and the Petitioners of any opportunity to provide meaningful input on the (unlawfully vague) "public benefit" exception, thereby depriving them of their due process rights. Petitioners could not effectively present evidence in opposition to Seagate's proposal and were instead forced to guess and speculate as to the meaning and application of "public benefit" under LDC 34-631(b)(5). Such obtuse proceedings are manifestly unfair and in this instance deprived Petitioners of their due process rights. *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) (holding that quasi-judicial proceedings must be "essentially fair"; this means affording fair notice of the quasi-judicial hearing and ***a meaningful opportunity to be heard***); *Miami-Dade Cnty. v. Reyes*, 772 So. 2d 24, 29 (Fla. 3d DCA 2000) ("Meaningful opportunity" includes not just the ability to appear at the hearing

through counsel, present evidence and argument, and cross-examine witnesses, but that those arguments and evidence be heard by an adjudicator who is impartial).

Additionally, assuming that Seagate could meet the "so surrounded by tall buildings" condition precedent in LDC Section 34-631(b)(5) (it cannot), the Town Council was required to evaluate and make findings regarding "the level of unfairness." LDC § 34-631(b)(5) ("The town will approve, modify, or deny such requests [for relief from the LDC's height limits] ***after evaluating the level of unfairness*** that would result from the specific circumstances and the degree the specific proposal conforms with all aspects of this comprehensive plan"). The record is devoid of any evaluation or finding by the Town Council regarding the level of unfairness to both Seagate and the public, including Petitioners.[8] *See generally* (App. 986). This failure to address the level of unfairness that Seagate's proposal would cause to Petitioners (who own property adjacent to the Red Coconut Property) is yet another deprivation of Petitioners' due process rights.

[8] Town planner, Sarah Propst specifically advised the Town Council that the "level of unfairness" evaluation applies "to all parties." (App. 1036, Pg. 107:10 – 108:3).

IV. The Decisions of at Least Two Council Members Were Not Based on Competent Substantial Evidence and Departed from the Essential Requirements of the Law

A. Council Member King's Bias Deprived Petitioners of Due Process and His Decision, Which Was Not Based on Competent Substantial Evidence, Departed From the Essential Requirements of the Law

Quasi-judicial hearings on zoning matters are not controlled by strict rules of evidence and procedure. *Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Even so, the proceeding still needs to be "essentially fair." *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010). At its core, this means affording fair notice of the quasi-judicial hearing and a meaningful opportunity to be heard. *Id.* "Meaningful opportunity" includes not just the ability to appear at the hearing through counsel, present evidence and argument, and cross-examine witnesses, but that those arguments and evidence be heard by an adjudicator who is impartial. *Miami-Dade Cnty. v. Reyes,* 772 So. 2d 24, 29 (Fla. 3d DCA 2000); *see also Miami-Dade Cnty. v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020) ("[A]n impartial decision maker is a basic constituent of minimum due process." (quoting *Ridgewood Props., Inc. v. Dep't of*

Cmty. Affairs, 562 So. 2d 322, 323-24 (Fla. 1990)). The appropriate remedy for bias in a quasi-judicial proceeding is certiorari review by the circuit court. *Fla. Water Servs. Corp. v. Robinson*, 856 So. 2d 1035, 1041 (Fla. 5th DCA 2003).

Petitioners' testimony was not heard by an impartial adjudicator. Rather, as was made apparent by Council Member King's comments at the first Town Council meeting on October 28, 2024, he had predetermined to vote in favor of Seagate's Proposed Development Agreement. Specifically, Council Member King stated the following:

·3· · · · ***So financial viability is still going to be a***
·4· ·***concern of mine.*** And I think this island,
·5· ·obviously, has become better off than what it was,
·6· ·but that's because of a state infusion of cash. ***I***
·7· ·***think watching the LPA meeting last week -- Jim***
·8· ·***Dunlap said it best for me when he talked about with***
·9· ·***his financial background that lack of financial***
10· ·***stability is what we've been managing here.***
11· · · · And a permanent investment with long-term
12· ·financial implications is what this island needs,
13· ·and it's not going to be 10 to 15 developments
14· ·because the capital is not there.· And it's --
15· ·and -- ***and so I will be supporting this.***

(App. 679, Pg. 189:3-15) (emphasis added).

Council Member King's prejudgment of Seagate's Proposed Development Agreement was not based on any competent, substantial evidence, but rather unsubstantiated opinions and speculation regarding the Town's "financial sustainability" and the economic benefits that Seagate's project could bring.

In the context of a rezoning or development application, what constitutes competent substantial evidence is generally broad and will typically include documentary evidence, applications for development review, the applicable land development regulations, and the local government's interpretation of them. *See ABG Real Estate Dev. Co. of Fla., Inc. v. St. Johns Cnty.*, 608 So. 2d 59, 62 (Fla. 5th DCA 1992). "Competent substantial evidence is tantamount to legally sufficient evidence." *Dusseau v. Metropolitan Dade Cnty. Bd. of Cnty. Com'rs,* 794 So. 2d 1270, 1273 (Fla. 2001). "Competent evidence is evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.'" *City of Hialeah Gardens v. Miami-Dade Charter Foundation*, Inc., 857 So. 2d 202, 204 (Fla. 3d DCA 2003) (quoting *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla.

1957)). "Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. *Id.*; *see also Scholastic Book Fairs, Inc. Great American Div. v. Unemployment Appeals Com'n*, 671 So. 2d 287, 290 (Fla. 5th DCA 1996) ("'Substantial' requires that there be some ((more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (***as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities***) having definite probative value (that is, "tending to prove")).

Competent, substantial evidence does not include unsubstantiated statements and opinions from neighbors. *E.g., Pollard v. Palm Beach County*, 560 So. 2d 1358, 1360 (Fla. 4th DCA 1990); *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586, 588 n.1 (Fla. 5th DCA 1993). That includes speculation about "traffic problems, light and noise pollution," future construction costs, effects on property values, and any other potential unfavorable impacts of a proposed land use. *Katherine's Bay, LLC. v. Fagan*, 52 So. 3d 19, 30 (Fla. 1st DCA 2010). "Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent,

substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017). "[E]vidence that is unreliable is not competent, substantial evidence." *Id.*

In the instant case, Council Member King's financial concerns (which were irrelevant and immaterial to the Town Council's review of Seagate's Proposed Development Agreement and not supported by law) were based on his own speculation, conjecture, and the unsworn and unqualified statements of LPA member James Dunlap. In explaining the basis for his vote at the third Town Council meeting on December 16, 2024, Council Member King stated,

> "I find Jim [Dunlap] to be a very smart person, especially when dealing with finances. We're managing a lack of financial sustainability…. We've been able to do some things because of lobbying efforts…up in Tallahassee…[b]ut that spigot is closing and we know that…. [T]he legislature is going to be tightening the screws…. [P]ermanent investment with long term financial implications is what this town needs, so that's where I am." (App. 1036, Pg. 208:12 – 210:1).

There is no competent, substantial evidence in the record to support any of these assertions and there is nothing in the LDC or

the Comprehensive Plan that allows for a deviation based on "financial viability" or economic benefit. Council Member King's decision, which was not based on any published criteria, constitutes a departure from the essential requirements of the law. *Alvey v. City of North Miami Beach*, 206 So. 3d 67, 70 (Fla. 3d DCA 2016) (holding that city's decision granting developer's application to rezone property departed from the essential requirements of the law to the extent the city failed to consider whether proposed change would be consistent with and in scale with the established neighborhood land use pattern, as required under city code, but instead considered whether the proposed change would be "compatible" and economically beneficial).

B. Vice Mayor Atterholt's Biased Decision Was Not Based on Competent Substantial Evidence and Departed From the Essential Requirements of the Law

Vice Mayor Atterholt based his decision to approve Seagate's Proposed Development Agreement on (i) his improper assertion the Town must "maintain momentum" in rebuilding Fort Myers Beach post-Hurricane Ian; (ii) his gratuitous finding that approval of the Proposed Development Agreement was in the "public interest; and

(iii) the unqualified testimony of Fran Myers, the prior owner of the Red Coconut Property, that Seagate's proposed development would "match the island" and be "one-third less density than the Red Coconut that existed pre-Ian." (App. 679, Pg. 184:10-21; App. 1036, Pg. 205:2-21). None of these matters provide a proper basis for Vice Mayor Atterholt's decision.

First, the perceived need to "maintain momentum" and push for reconstruction of Fort Myers Beach post-Hurricane Ian is not an objective criteria identified in the Comprehensive Plan and LDC—this alone is a departure from the essential requirements of the law. *See Alvey*, 206 So. 3d at 70. Further, since "momentum" (i.e., the pace of development approvals by the Town) is not published in the LDC, it merely evinces an illegal mindset of this Vice Mayor to approve this development no matter the cost to the public.

Second, whether the Proposed Development Agreement serves "the public interest" is not a basis under the LDC and Comprehensive to approve the entirety of Seagate's proposal.

Lastly, nothing in the record qualifies Fran Myers as an expert witness regarding density[9] and what development characteristics "match the island"—those bald assertions cannot constitute competent, substantial evidence. *See, e.g., Pollard*, 560 So. 2d at 1360; *Town of Ponce Inlet*, 627 So. 2d at 588 n.1.

Accordingly, this Court must grant certiorari relief and quash Ordinance 24-34, which approved Seagate's Proposed Development Agreement.

V. The Town Council's Failure to Consider The LDC-Required Redevelopment Criteria for the Red Coconut/Gulfview Colony Property Constitutes a Departure from the Essential Requirements of the Law

"All development on land covered by a local government's comprehensive plan, and ***all action taken by the government regarding that development, must comport with the plan.***" *Imhof v. Walton Cnty.*, 328 So. 3d 32, 37 (Fla. 1st DCA 2021) (citing Fla. Stat. § 163.3194(1)(a)); *see Dixon v. City of Jacksonville*, 774 So. 2d 763, 764 (Fla. 1st DCA 2000) ("It is well established that a development order shall be consistent with the government body's

[9] See n. 6 of this Petition, *supra*.

objectives, policies, land uses, etc., as provided in its comprehensive plan"). "The plan is likened to a constitution for all future development within the governmental boundary." *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987).

"[A] landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance." *Snyder*, 627 So. 2d at 476; *see also Village of Key Biscayne v. Dade County*, 627 So.2d 1180 (Fla. 3d DCA 1993) ("burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan….").

Even more critical, for rezonings, such as this Seagate project, the ***Town Council is required by its own laws to consider "[w]hether the request is consistent with the goals, objectives, policies, and intent, and with the densities, intensities, and general uses as set forth in the Fort Myers Beach Comprehensive Plan."*** LDC § 34-85(b)(7). And before granting a rezoning, like in this case, the Town Council is required by its own

laws to make findings that the requested zoning district complies with the Fort Myers Beach Comprehensive Plan and LDC Chapter 34. LDC § 34-85(c)(1)-(2).

Among its stated goals, the Comprehensive Plan seeks to "***maintain the small-town character*** of Fort Myers Beach." (App. 85, Goal 4). "Maintaining the town's current '***human scale***' is a fundamental redevelopment principle." *Id.* at Objective 4-A (emphasis added). "[N]ew buildings should be designed to encourage use or admiration by people on foot or bicycle, rather than separating them with…***unnecessary building heights***." *Id.* at Policy 4-A-1 (emphasis added).

The Comprehensive Plan's Community Design Element sets forth the vision for redevelopment of Red Coconut/Gulfview Colony Property and states the following:

> The Red Coconut – Gulfview Colony area is the southern end of the "Heart of the Island," whether continuing its current use as a pleasant home for visitors and long-term residents or in some other ***traditional neighborhood form***. A vision for this area, if redeveloped at some point in the future, is as ***a complete neighborhood*** with an internal circulation system making it possible to walk or

> ride bikes to school, recreation areas, and shopping without using Estero Boulevard. ***An ideal plan would retain the psychological connection and views both directions to the preserve and the beach***, and offer a variety of housing types and opportunity for mixed uses including some continued commercial uses on the Bay side of Estero Boulevard.
>
> "In this vision, ***detached houses or cottages are located near existing areas of single-family housing***, with rowhouses, townhouses, or apartments toward the center. Mixed uses would be found along Bay side of Estero Boulevard. ***Neighborhood design is not dominated by garages and features porches on the front***, walkable narrow streets with shade trees that double as view corridors to the preserve and beach, and quiet internal street connections to the north and south. (App. 25) (emphasis added).

Drawing inspiration from the Town's "small town" concept and Seaside, Florida, the Community Design Element includes visual depictions of what redevelopment of the Red Coconut Property into a "traditional neighborhood" design should look like. (App. 25-26). By way of example:

(App. 25).

Consistent with this vision, Policy 3-A-5 and 3-A-6 of the Comprehensive Plan call for the adoption of LDC provisions which establish a "pre-approved option for future redevelopment of the Red Coconut/Gulfview Colony properties consistent with the town's vision of traditional neighborhoods…that recreate a small-town feel."

That "pre-approved option" for redevelopment of the Red Coconut Property is provided in LDC 34-692(3), which states the following:

Policies 3-A-5, 3-A-6, and 4-F-2-iii of the Fort Myers Beach Comprehensive Plan have authorized a pre-approved redevelopment option for land in the Village district.

a. The following concepts are expected in this redevelopment process:

1. ***Traditional neighborhood design*** emphasizing streets that are interconnected and dwellings with porches or balconies on the front, primary entrances visible from the street, and cars to the rear (except for on-street parking);

2. ***Detached houses or cottages*** (with optional accessory apartments) abutting existing single-family homes;

3. ***Low-rise townhouses or apartments*** allowed elsewhere on the site;

4. Walkable narrow streets with shade trees that double as view corridors to the Preserve and Gulf;

5. ***Open space that allows views to be maintained from Estero Boulevard to the Gulf***;

6. Mixed commercial and residential uses along the bay side of Estero Boulevard;

7. ***Quiet*** internal street connections to the north and south;

8. Significantly reduced density from the existing level of 27 RV/mobile homes per acre

at the Red Coconut to a maximum level of 15 dwelling units per acre; and

9. A site design that accommodates a publicly acquired access point to the Matanzas Pass Preserve. LDC Section 34-692(3)(a)(1)-(9) (emphasis added).

The Town Council failed to consider, or simply ignored, all of the criteria set forth under LDC Section 34-692(3). Nothing in Seagate's Proposed Development Agreement (which seeks to construct two 17-story, 255-feet tall, multi-family condominium towers in the "heart" of Fort Myers Beach) complies with "traditional neighborhood design." Seagate's proposal does not consist of "detached houses or cottages" and "low rise townhouses or apartments." Seagate's proposal also seeks to construct a 2-story restaurant on the beach side of Estero Boulevard, thereby occupying open space that would otherwise allow views into the Gulf. In support of its proposal, Seagate told the Town Council that "traditional neighborhood design" and "low-rise townhouses or apartments" were not possible because of current floodplain maps, which require all structures on the Red Coconut Property to be elevated above the base flood zone of approximately 14 feet. (App. 598). The Town apparently

just "took the bait" and never questioned the logic of Seagate's false assertion. The Town sought no explanation for why building 14 feet above base flood elevation requires two 255-feet condominium towers.

Seagate further claims that the high-rise nature of its proposed development, which transfers density from the Red Coconut Property's beach side parcels to its bay side parcels, constitutes a "public benefit" that justifies the requested 255-feet height. (App. 611). Such conclusory statements and circular reasoning are not competent, substantial evidence. *See Div. of Admin. v. Samter*, 393 So.2d 1142, 1145 (Fla. 3d DCA 1981) ("[n]o weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning").

The Town, having failed to follow its own laws in considering and approving this rezoning, namely LDC Section 34-85 and LDC Section 34-692, departed from the essential requirements of the law. Therefore, this Court must grant certiorari relief and Ordinance 24-34 must be quashed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for Certiorari, and quash the Town of Fort Myers Beach Ordinance 24-34 approving Seagate's development agreement.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition, which contains 9,934 words complies with the font, length, and word count requirements of Fla. R. App. P. 9.100(g).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of March, 2025, a true and correct copy of the foregoing was electronically transmitted to the Clerk of Courts via the Florida Courts E-Filing Portal for filing and a true and correct copy will be served by Certified Process Server to Respondent, Town of Fort Myers Beach, c/o Dan Allers, Mayor, Fort Myers Beach Town Hall, 2731 Oak Street, Fort Myers Beach, FL 33931 and Respondent, Seagate Fort Myers Beach, LLC, c/o Matthew C. Price, as Registered Agent, 9921 Interstate Commerce Drive, Fort Myers, FL 33913.

Respectfully submitted this 5th day of March, 2025.

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