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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.: 2025-CA-1263

PETITIONERS' REPLY TO RESPONDENTS' RESPONSE IN OPPOSITION TO CERTIORARI RELIEF

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 (the "Petitioners"), Reply to Respondents, SEAGATE FORT MYERS BEACH, LLC's and TOWN OF FORT MYERS BEACH's Response in Opposition to Certiorari Relief, and state:

I. Petitioners Have Standing To Seek Certiorari Relief

Seagate argues that Petitioners' claims should be dismissed for lack of standing and lack of any "special injuries." That argument fails for two reasons.

First, Seagate did not challenge Petitioners' standing or "special injuries" at the quasi-judicial hearing, thereby waiving that argument. *Maynard v. Florida Bd. of Educ. ex rel. Univ. of S. Florida*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009) ("standing may not be raised for the first time on appeal"); *Alger v. United States*, 300 So. 3d 274, 277 n. 3 (Fla. 3d DCA 2019) ("When a party seeks certiorari

review…of a decision of an administrative body acting in a quasi-judicial capacity…the issue of standing is waived if it was not raised before the administrative body").

Second, even if Seagate properly preserved its standing argument, Petitioners' status as abutting landowners establishes standing, as a matter of law.

In evaluating standing "a court must consider the proximity of the party's property to the property to be zoned or rezoned, the character of the neighborhood, and the type of change proposed." *Save Calusa, Inc. v. Miami-Dade Cnty.*, 355 So. 3d 534, 540 (Fla. 3d DCA 2023) (citing *Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972)). "Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning." *Save Calusa*, 355 So. 3d at 540 (citing *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985); *see also Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959). "Such proximity generally establishes that the homeowners have an interest greater than the general interest in [the] community good shared in common with all

citizens." *Save Calusa*, 355 So. 3d at 540 (citing *Renard*, 261 So. 2d 832).

Adjacent landowners have standing to challenge proposed developments that will cause obstructed views and place their land in shade. *See, E.g., Edgewater Beach Owners Ass'n, Inc. v. Walton Cnty.*, 833 So. 2d 215 (Fla. 1st DCA 2002) (holding condominium owners association had standing to challenge proposed development where members' ocean views would be blocked by the development and would place association's recreational facilities in the shade until noon); *State ex rel. Gardner v. Sailboat Key, Inc.*, 306 So. 2d 616 (Fla. 3d DCA 1974); *Setai Resort & Residences Condo. Ass'n, Inc. v. BHI Miami Ltd. Corp.*, No. 2021-36-AP-01, 2023 WL 4450343, at *2 (Fla. 11th Cir., July 10, 2023) (holding that condominium association within 375 feet of proposed development had standing to seek certiorari relief and claimed legally sufficient "special injury" based on allegations that members' view of the ocean would be obstructed). Petitioners are all within 500 feet of Seagate's proposed

development.[1] Petitioners, Danil K. Riddle and Jane N. Riddle, Evert J. Jelsma and Sussane H. Jelsma Living Trust dated July 18, 2005, Mary E. Tuttle Trust dated March 12, 1991, and C&T Management, LLC, own units within the Gulf Westwind Condominium, which directly abuts the proposed 17-story project. Pet. Pg. 3-6.

Seagate's Response concedes that Dagnese and the Riddles challenged the Town's deviation from the LDC's height restrictions and complained that the proposed 17-story condominium building would increase traffic, block natural light, and cast shade on their properties. Resp. Pg. 28., (App. 937-939, 1180-1183). Gail Jasionowski also challenged the Town's height deviation. (App. 1325-1330). Those are not speculative harms. They constitute concrete, special injuries under Florida law.

Accordingly, Seagate's (unpreserved) standing/"special injury" argument fails and should be rejected.

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[1] Under the Town's code, Petitioners received notice as landowners within 500 feet of Seagate's proposed development. LDC §§ 2-98, 34-236; (App. 1331, Form Public Hearing Notice). The Riddles, Mr. Dagnese, and Mrs. Jasionowski also stated their property addresses on the record. (App. 937, 1180, 1326).

II. Petitioners Preserved Their Objections To The Town's Height Deviation

"In order to preserve an issue for appeal, the issue must be timely raised and ruled on by the trial court and it must be sufficiently precise to apprise the trial court of the relief sought and grounds for the objection." *State v. Murray*, 161 So. 3d 1287, 1289 (Fla. 4th DCA 2015) "However, ***a general objection will suffice*** where the basis of the objection is clear from the context or where it is clear that the trial court was aware of the legal errors associated with its ruling and therefore had the opportunity to correct it." *Id.* (emphasis added). "***[N]o magic words are needed to make a proper objection.***" *State v. Johnson*, 990 So. 2d 1115, 1116 (Fla. 3d DCA 2008) (emphasis added). "If an attorney's articulated concern informs the court of the alleged error, then the issue is properly preserved for appeal." *Id.*

Seagate claims that Petitioners failed to preserve objections to the Town's deviation from the LDC's strict height limitations. The record shows otherwise.

Petitioners raised specific objections regarding the Town's deviation from the LDC and Comprehensive Plan's strict height

restrictions, thereby preserving the objections raised in this certiorari proceeding. *See, E.g.,* (App. 937) (Dagnese stated, "they shouldn't be building anything that high. What they need to do, our Comp Plan's two stories."); (App. 1180-81) (Mr. Riddle stated, "more height is going to be necessary, but there's a huge difference between three stories above and 15 stories above.... That ordinance that you read, 4.1…small-town feel, community, that sort of thing, that will be disrespected totally if this gets approved."); (App. 1183) (Mrs. Riddle stated, "[a] 17-story building will block natural light…and simply does not blend with the one to three-story homes that are in the neighborhood."); (App. 1325-1330) (Mrs. Jasionowski's written submission for the October 28, 2024 Town Council hearing stated, "[t]he primary concern with this agreement is the proposed public benefits and height.... [The Town] should have established protocol before companies arbitrarily come forth with what they perceive as being a public benefit.") Those objections squarely challenged the Town's departure from height limits in the LDC and Comprehensive Plan. The Town was fully aware of its potential errors.

Additionally, quasi-judicial proceedings are informal proceedings that "are not controlled by strict rules of evidence and procedure." *Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Under the Town's meeting rules, Petitioners were only allotted three (3) minutes to state their objections, which they did. (App. 944). Florida law did not require Petitioners to assert detailed and precise legal objections at the Town meeting. Their objections were preserved.

III. Seagate And The Town Are Estopped From Claiming Policy 4-C-4 And The Provisions Of Chapter 34 Of The LDC Are Inapplicable

Seagate claims that LDC § 34-631(b)(5) and Chapter 34 generally do not control; rather, the development agreement process described in LDC §§ 2-91 to 2-102 is the only applicable law. The representations of Seagate and Town staff at the public hearings contradict that contention. Additionally, the language of LDC § 2-101 itself is fatal to this contention.

Town staff specifically applied Comprehensive Plan Policy 4-C-4 and LDC §§ 34-692, 34-693, and 34-631 in its report, (App. 319-

321), as well as the LPA's recommendation that "the proposed public benefits were inadequate for requested height," (App. 318).

Town planner, Sarah Propst, testified, under oath, that Comprehensive Plan Policies 3-A-5, 3-A-6, and 4-F-2 applied to Seagate's proposal and that those provisions are mirrored in LDC §§ 34-691 and 34-692. (App. 1133). She further testified that "[t]he LDC and Policy 4-C-4 of the Comprehensive Plan allow the Town to consider different heights for the Red Coconut redevelopment.... The Town Council ***must*** balance the requested height against the proposed public benefit.... If, after considering the Comprehensive Plan ***and*** LDC, the Council considers the public benefit provided by the applicant's development proposal to be greater than the benefit of abiding by the by-right height limitations, Town staff recommends approval of the project." (App. 1133-1136) (emphasis added).

Seagate's Applicant Report and PowerPoint expressly cited LDC § 34-631 and Policy 4-C-4 as governing height deviations for its proposed development. (App. 594-595, 617). Seagate's expert planner, Tina Ekblad, also testified, under oath, that Policy 4-C-4 applied to Seagate's proposed development and required the Town to

"balance the public benefits of height against other public benefits that would result from the proposal." (App. 705).

This "balancing test" requirement comes straight from Policy 4-C-4 and LDC § 34-631(b)(5).[2]

Seagate and the Town are estopped from arguing that LDC Chapter 34 and LDC § 34-631(b)(5) and Policy 4-C-4 do not apply. *See Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975) ("[E]quitable estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced.... ***A citizen is entitled to rely on the assurances and commitments of a zoning***

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[2]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.... The town will approve, modify, or deny such requests after evaluating the level that would result from the specific circumstances and the degree the specific proposal conforms with all aspects of this comprehensive plan.... ***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 § 34-631(b)(5) (emphasis added); *see also* Policy 4-C-4.

authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds") (emphasis added)).

The development agreement provisions under LDC §§ 2-91 to 2-102 reinforce Petitioners' position. LDC § 2-101 states that to the extent a development agreement purports to "grant deviations or variances from [the LDC]…***the development agreement must explicitly identify each instance of conflict with other ordinances…or else the provisions of such other ordinances shall control***…. Any ambiguity with respect to whether a development agreement or an ordinance is to control shall be interpreted to favor the ordinance." (Emphasis added).

Paragraph 4Q (Conflicts) of the development agreement mirrors LDC § 2-101 and defines the instances of conflict with the LDC as "Deviations." (App. 993). Under Paragraph 9 (Deviations), the Town excepted LDC §§ 34-693(h), 34-692(3)(a)(1), and 34-631(b)(3) as conflicts with the development agreement.

The Town did not except LDC § 34-691, which states, "the Village district is to provide alternative futures for the Red

Coconut…either a continuation of the current land uses or [its] transformation into a ***traditional neighborhood pattern***…. in accordance with the Fort Myers Beach Comprehensive Plan."[3]

The Town did not except the remainder of LDC § 34-692(3)(a), which sets forth the nine redevelopment criteria for Red Coconut, nor LDC § 34-692(3)(b), which incorporates the redevelopment regulations in LDC § 34-693.

The Town also did not except LDC § 34-631(b)(5), which sets forth the "so surrounded by tall buildings" condition precedent and public benefit balancing test.

Paragraph 10 of the development agreement (Consistency with the Comprehensive Plan) admits that Policy 4-C-4 applies but does not identify any deviation from that Policy. Instead, it says Seagate can be more than 2 stories above base flood elevation as a matter of right, but that is simply wrong.

The Town and Seagate knew that LDC §§ 34-691, 34-692, 34-631, and Policies 4-C-4 and 4-F-2 applied to Seagate's proposed

[3] The development agreement identifies Seagate's property as being in the Village Zoning District. (App. 991).

development agreement and did not identify conflict with those provisions. Under the plain terms of LDC § 2-101 and Paragraph 4Q of the development agreement, those unidentified and un-excepted Land Development ordinances control, limiting the height of the development.

Seagate next argues that the first sentence of Policy 4-C-4 excludes designated redevelopment areas, including the Red Coconut Property, from ***all*** height limitations. Resp. Pg. 41. This is not only contradicted by the Town and Seagate's representations, *supra*, but also departs from fundamental rules of statutory interpretation and the broader purpose of the Comprehensive Plan, which was adopted to limit heights, not increase them. *See Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) ("the plainness or ambiguity of statutory language is determined by reference to…***the broader context of the statute as a whole***.") (emphasis added)).

Seagate also contends that this Court cannot grant certiorari relief based on the Town's misapplication of LDC § 34-631(b)(5) and Policy 4-C-4 because Petitioners' claims represent a "mere disagreement of interpretation" and "no clearly established precedent

has reached a contrary interpretation." That is not the standard for certiorari relief. The Town's failure to apply the plain and unambiguous terms of the LDC and Comprehensive Plan constitutes a departure from the law's requirements. *Mt. Plymouth Land Owners' League, Inc. v. Lake Cnty.*, 279 So. 3d 1284, 1287 (Fla. 5th DCA 2019); *Verizon Wireless Pers. Communications, L.P. v. Sanctuary at Wulfert Point Cmty. Ass'n, Inc.*, 916 So. 2d 850, 856 (Fla. 2d DCA 2005). Even under the certiorari standard requiring that weight be given to a local government's construction of its code, "a court cannot afford such deference when the interpretation is unreasonable or erroneous." *Town of Longboat Key v. Islandside Prop. Owners Coal.*, LLC, 95 So.3d 1037, 1042 (Fla. 2d DCA 2012).

IV. The Town's Application Of The Vague "Public Benefit" Exception Constitutes A Departure From The Essential Requirements Of The Law Subject To Certiorari Relief

Seagate claims that the vagueness of the Town's "public benefit" test can only be raised through a de novo action for declaratory judgment where the court can declare LDC § 34-631(b)(5) unconstitutional. Seagate mischaracterizes Petitioners' claim.

Petitioners are not seeking a declaration from this Court that the "public benefit" test is unconstitutional. Rather, Petitioners seek an order quashing Ordinance 24-34 because the Town applied a standard that lacked any definition or objective criteria.

The record confirms that the Town and Seagate do not know what the undefined term "public benefit" means. *See* Pet. Pgs. 12-13. By way of example, Seagate's principal, Mathew Price, admitted public benefit is "the most ambiguous thing that people talk about on the island because ***nobody really understands what a public benefit is***." (App. 332, Pg. 14:7-23) (emphasis added). Town planner, Sarah Propst, stated "[w]e had three meetings about public benefit…. And at the end of the day ***nobody wanted to really decide what it [public benefit] was***." (App. 499, Pg. 77:7-17) (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. It is clear

from the record that the Town did not (and could not) articulate a meaning for "public benefit" in evaluating Seagate's requested height deviation under LDC § 34-631(b)(5) and Policy 4-C-4. The Town's decision to apply an undefined, unknown standard without any explanation or finding as to how such "public benefits" are measured, constitutes a departure from the essential requirements of the law.

V. Petitioners Were Denied Due Process

Seagate contends that Petitioners' due process claims fail for procedural and substantive reasons. Each fails.

Petitioners were not required to file a motion for rehearing to protect their due process rights. LDC § 34-93 states, "[t]he pursuit of a request for rehearing is not required in order to exhaust administrative remedies as a condition precedent to seeking judicial review in the circuit court." That provision does not bar Petitioners from asserting their due process rights through certiorari relief.

Petitioners' due process arguments are not in the vain of "departure from the law's essential requirements." LDC § 34-85(b) states the Town Council may "reverse, affirm, or modify the recommendation, ***or remand the [LPA's] recommendation to***

afford due process." Petitioners seek to enforce the express terms of LDC § 34-85(b).

Petitioners apply the correct law. *See* Section III, *supra*. Both Seagate and the Town admitted at the public hearings that the LDC and Comprehensive Plan apply to the development agreement. Accordingly, the due process requirements under LDC § 34-85(b) and the "level of unfairness" evaluation under LDC § 34-631(b)(5) and Policy 4-C-4 apply to this case.

Seagate next argues that even if LDC § 34-85(b) applies (it does), that code provision allows the Town Council to simply reject the LPA's recommendation. That claim is belied by the fact that, recognizing the gaping hole in its land development regulations, the Town Council held a joint meeting with the LPA on November 13, 2024 (separate from Seagate's pending application and before the Town's approval of the development agreement) to work on a definition of the term "public benefit." (App. 1319-1324). At that joint meeting the LPA and Town Council proposed numerous examples of "public benefits" and considered a definition for the term. *Id.* Some members of the LPA and Town Council proposed a "tiered" list of public benefits. *Id.*

Members also considered a quantitative public benefit "formula" like the one used in Polk County. *Id.*; *see also* (App.1311-1315). The record establishes that the Town knew of the required balancing test under Policy 4-C-4 and LDC § 34-631(b)(5). It also knew that the term "public benefit" lacked any definition or objective criteria, and should have remanded the LPA's recommendation to articulate such criteria in order to afford due process to both the applicant and the public. Instead, the Town Council chose to simply reject and ignore the LPA's recommendation, thereby denying Petitioners of due process.

Seagate also argues that, "even though it technically does not apply," the Town Council did evaluate the "level of unfairness." Seagate points to Mayor Allers' questioning of Seagate's planner, Tina Ekblad, on "unfairness." (App. 1102-04). That questioning did not meet the "level of unfairness" evaluation test, as evidenced by the fact the Town Council did not make any findings on that issue. Paragraph 9 (Deviations) of the development agreement, (App. 998), is the only mention of "public interest"—but there is no finding or mention of the public benefits outweighing the "level of unfairness," thus depriving Petitioners of due process.

VI. Councilman King And Atterholt's Biased Decisions Warrant Certiorari Relief

Seagate claims that Councilman King and Atterholt's bias is immaterial because the cited evidence does not reflect bias and even if their decisions were biased and not based on competent, substantial evidence, certiorari review cannot pick off individual council members. Seagate's argument is incorrect.

Under Florida law, the appropriate remedy for bias in a quasi-judicial hearing is certiorari review. *See Seminole Entm't, Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) (holding that mayor's evidentiary rulings reflected a "bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process").

Other jurisdictions have similarly applied due process principles to overturn biased decision-making based on evidence specific to only one member of the tribunal. *See, e.g.*, *Stivers v. Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995) (holding that "where one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process, without a demonstration that the biased vote

was decisive or that it influenced other members"); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (recognizing due process claim where plaintiff showed bias on part of one member of tribunal); *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970) (remanding because of biased commissioner and observing, "[l]itigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured"); *Buell v. City of Bremerton*, 495 P.2d 1358 (Wash. 1972) (en banc) (invalidating rezoning ordinance and holding that "[t]he self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness.").

The record establishes that Councilman King had predetermined to vote in favor of Seagate's proposed development on the first day of public hearings based on unqualified testimony regarding "financial viability." (App. 679, Pg. 189:3-15). Councilman Atterholt's decision was based on the perceived need to "maintain momentum" in reconstruction post-Hurricane Ian. (App. 679, Pg.

184:10-21; App. 1036, Pg. 205:2-21). "Financial viability" and "momentum" of reconstruction are not published criteria under the LDC and Comprehensive Plan for granting a height deviation. King and Atterholt's "findings" and predetermined approval based on those irrelevant factors were not based on competent, substantial evidence and deprived Petitioners of due process.

VII. The Town Council Failed To Consider The LDC-Required Redevelopment Criteria for the Red Coconut Property

Seagate claims (i) the redevelopment criteria contemplated under Policies 3-A-5, 3-A-6, and 4-F-2 and LDC § 34-692 are "purely optional" and do not apply to Seagate's development agreement; and (ii) even if those criteria apply, Seagate implemented most of those criteria.

Again, Seagate's argument is contradicted by the record. Town planner, Sarah Propst, advised the Town council, under oath, that Policies 3-A-5, 3-A-6, and 4-F-2, and their code counterpart LDC § 34-692, applied to Seagate's development agreement. (App. 1133). Seagate's Applicant Report stated that the design concepts in LDC § 34-692 are "expected" in any redevelopment of the Red Coconut

Property. (App. 590). Likewise, most of the requirements of LDC 34-692 were not identified as deviations in the development agreement, (App. 998-99), and therefore control the Seagate project.

Policy 4-F-2(iii) states that its criteria "***shall*** form the basis" for a pre-approved redevelopment option, unless proceeding through the planned development process—which Seagate did not pursue.

Nothing in Seagate's proposed development agreement, which seeks to construct two 17-story, 255-feet tall, multi-family condominium towers complies with "traditional neighborhood design." It does not consist of "detached houses" and "low rise townhouses or apartments."

Seagate does not even comply with the six design principles under Policy 3-A-6 that it claims apply. The gulf-side view corridor is exaggerated—the public beach park (which purportedly provides a 120-feet view corridor) is only 90-feet at its narrowest point and will be obstructed by Seagate's beach club, restaurant, and pool. (App. 616) Seagate's development does not provide "a variety of housing types rather than uniformity"—Seagate seeks to build only 4 single family homes among 137 multi-family condominium units. *Id.*

Seagate's development does not provide "local streets…interconnected from Donora and Shell Mound through to the North"—in fact, those streets are unchanged. *Id.*

The Town failed to enforce or otherwise consider the redevelopment criteria for Seagate's property, set out in the Comprehensive Plan and LDC, from which no deviations were taken, thus departing from the essential requirements of the law.

CONCLUSION

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition, which contains 3,779 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 this 9th day of September, 2025, a true and correct copy of the foregoing was filed electronically with the Florida Courts E-filing Portal, which will email a copy to all attorneys of record.

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