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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

PRESERVE FLAGLER BEACH AND BULOW CREEK, INC., a Florida not for profit corporation, and STEPHEN NOBLE,

Petitioners,

vs.

FLAGLER COUNTY, FLORIDA, a political subdivision of the State of Florida, and PALM COAST INTRACOASTAL, LLC, a Florida limited liability company,

Respondents.
_______________________________/

Filed Pursuant to Fla. R. App. P. 9.100(f)

Case No. 20-CA-565

AMENDED PETITION FOR WRIT OF CERTIORARI

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PREFACE

Petitioners Preserve Flagler Beach and Bulow Creek, Inc., and Stephen Noble will be collectively referenced herein as the "Petitioners." Petitioner Preserve Flagler Beach and Bulow Creek, Inc., will be individually referred to herein as the "Preserve." Petitioner Stephen Noble will be individually referred to herein as "Mr. Noble."

Respondent Flagler County, Florida, will be referenced herein as the "County." The Flagler County Board of County Commissioners, which rendered the quasi-judicial decisions at issue in this proceeding, will be referenced herein as the "BOCC."

Respondent Palm Coast Intracoastal, LLC, will be referenced herein as "PCI."

References to the Amended Appendix that the Petitioners have submitted in support of this Amended Petition for Writ of Certiorari will be denoted in parentheses by "App" followed by the appropriate bates stamp page number, *e.g.*, "(App.5)."

I.

INTRODUCTION

This case involves a challenge by the Petitioners of the BOCC's quasi-judicial decision on November 16, 2020 ("November 16 Decision"), to approve a modification to the Planned Unit Development ("PUD") Site Development Plan for the Hammock Beach River Club PUD and a Preliminary Plat for the Hammock Beach River Club PUD (collectively, the "Development Applications"). Notwithstanding the analysis and testimony by the County's own legal counsel that the Development Applications did not comply with Ordinance 2005-22 and the County's Land Development Code ("LDC"), and over the objections of the Petitioners and the City of Flagler Beach, the BOCC voted to approve the Development Applications.

The Petitioners respectfully submit that the BOCC's November 16 Decision is erroneous because:

A. The BOCC deprived the Petitioners of due process in denying the Petitioners standing to have "party status" during the quasi-judicial hearing below, thereby depriving the Petitioners of the right to cross examine witnesses;

B. The BOCC departed from the essential requirements of law by approving the Development Applications in violation of the terms of Ordinance 2005-22 and the County's LDC; and

C. The BOCC's decision is not supported by competent substantial evidence where the record establishes on its face that the Development Applications did not comply with the terms of Ordinance 2005-22 and the County's LDC.

Accordingly, this Court must quash the BOCC's November 16 Decision approving the Development Applications.

II.

BASIS FOR INVOKING JURISDICTION

Jurisdiction to review this action is based upon Florida Rule of Appellate Procedure 9.030(c)(3) and Article V, Section 5(b) of the Florida Constitution.

III.

FACTUAL BACKGROUND

A. The 2005 Hammock Beach River Club PUD Approval

In 2005, the BOCC approved Ordinance 2005-22, thereby rezoning approximately ±1,999 acres located on the south side of State Road 100 and east and west of John Anderson Highway to "Planned Unit Development" and creating the Hammock Beach River Club PUD. (App.39-87). The Hammock Beach River Club PUD entailed a residential/golf community consisting of a maximum of 453 residential units (150 of which could be multi-family residential units), an 18-hole golf course, a dedicated utility site, 230,694

square feet of retail/commercial uses, and various parcels dedicated for County facilities (*i.e.*, a fire station, a public boat ramp, and mosquito control). (App.45).

Section 2.B of Ordinance 2005-22 provided that:

> Development within the boundaries of the PUD District as approved shall take place in accordance with . . . the PUD Concept Plan . . . received by Flagler County on 10/26/05 and The Hammock Beach River Club PUD Development Agreement executed by owner and Flagler County pursuant to this Ordinance. A copy of said Agreement containing the PUD Concept Plan is attached hereto as and made a part hereof.

(App.40).

The Conceptual Site Development Plan attached to Ordinance 2005-22 ("2005 Conceptual Site Plan") reflects a residential/golf community being developed on the west and east sides of John Anderson Highway, with a commercial/multi-family component located along the property's boundary with State Road 100 and Colbert Lane. (App.87). Significantly, the 2005 Conceptual Site Plan shows access to the community being solely from a signalized intersection at State Road 100 and Colbert, with an above-grade crossing of John Anderson Highway for the residents living in the eastern

portion of the PUD near the Intracoastal Waterway. (*Id.*). The approved 2005 Conceptual Site Plan is depicted below:

(*Id.*).

Pursuant to Ordinance 2005-22, and the approved Development Agreement and 2005 Conceptual Site Plan, the BOCC approved a Site Development Plan for the Hammock Beach River Club PUD on or about July 10, 2006 ("2006 Site Development Plan"). The 2006 Site Development Plan included an 18-hole golf course, with 234 single-family residential units located west of John Anderson Highway and 219 single-family residential units located east of John Anderson Highway, and a commercial tract located at State Road 100 and Colbert Lane. (App.88).

Consistent with Ordinance 2005-22, the 2006 Site Development Plan depicted the sole access to the project being located at State Road 100 and Colbert Lane, with an above-grade crossing of John Anderson Highway for residents to access the property located east of John Anderson Highway. (*Id.*). The 2006 Site Development Plan also depicted the required "utility site" as "Proposed Public Land 'A.'" (*Id.*). The approved 2006 Site Development Plan is depicted below:

HAMMOCK BEACH RIVER CLUB

FLAGLER COUNTY SITE DEVELOPMENT PLAN

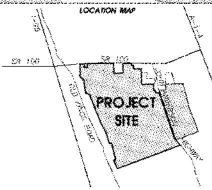
Building Height

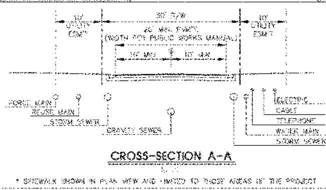
Building Setbacks

Hammock Beach River Club
Preliminary Development Program

STATE ROAD 100

1A 1B 2 3 4 5 6 7 8 8 9 10 11 12 13 14 14 P-15





Revised: June 5, 2006

(*Id.*).

In September 2006, the BOCC approved the Plat for The Gardens at Hammock Beach, Phase 1. (App.89). The 2006 Plat consisted of 221 single-family residential lots located east of John Anderson Highway. (App.90). Consistent with Ordinance 2005-22, the 2006 Plat depicted access to the PUD being provided via an entrance at State Road 100 and Colbert Lane with an off-grade crossing of John Anderson Highway. (*Id.*).

Following unsuccessful attempts at developing the property, the BOCC approved Resolution 2012-05 on February 6, 2012, thereby partially vacating the 2006 Plat. (App.101). Thereafter, on or about May 24, 2018, PCI acquired title to the Hammock Beach River PUD property. (App.121).

B. <u>August 2019 Plat Sketch Submittal</u>

On August 30, 2019, PCI submitted an Application for Sketch Plat Review with the County. (App.95). The Application for Sketch Plat Review was for the subdivision of 329.01 acres of the Hammock Beach River PUD located east of John Anderson Highway into 335 single-family residential lots, common area, and unspecified future development parcels. (App.95-96).

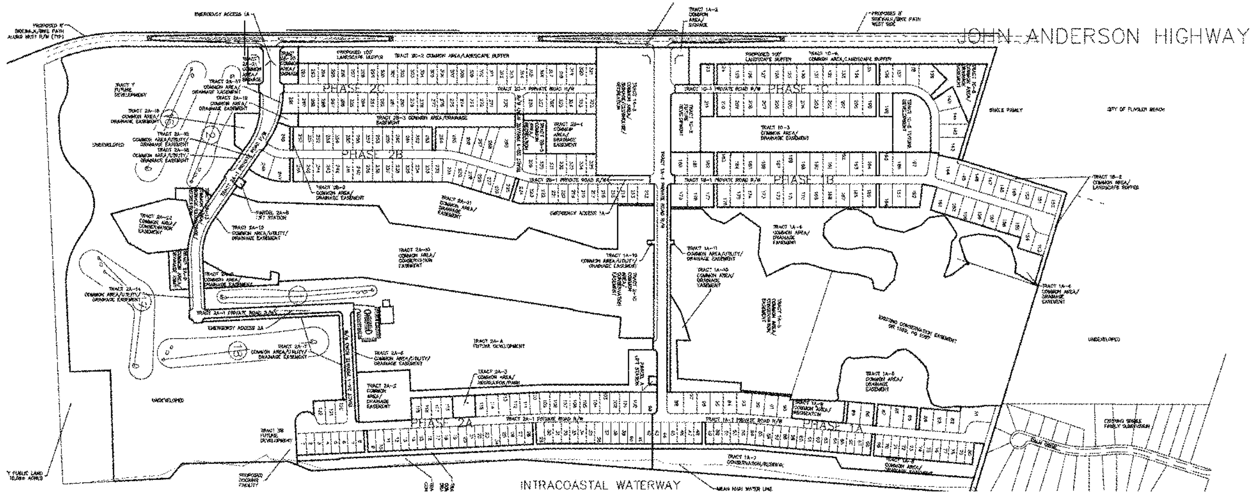
By letter dated October 11, 2019, the County's Growth Management Director – Adam Mengel – advised PCI that the proposed Sketch Plat was "***<u>not</u>*** in accordance with the entitlements granted in the original PUD."

(App.97-98) (emphasis supplied). Among numerous deficiencies, Mr. Mengel determined that the proposed Sketch Plat "ha[d] direct roadway access onto John Anderson Highway (where the previous approval did not include direct roadway access onto John Anderson Highway)." (App.97). Mr. Mengel further determined that the proposed Sketch Plat "shift[ed] all development to the East side of John Anderson Highway" and "the proposed Sketch Plat represents a development plan that concentrates the approved development within roughly a third of the Gardens project area, resulting in a density and spatial development pattern that differs significantly from the 2005 PUD . . . and which is not consistent with the underlying Agriculture & Timberlands Future Land Use designations." (App.97-98). Accordingly, Mr. Mengel concluded that "[a] rezoning to Planned Unit Development (PUD) is necessary, together with a Future Land Use amendment to the Future Land Use designation consistent with the proposed project density." (App.98).

Mr. Mengel's October 11 non-compliance determination advised PCI that, "[s]hould you choose to appeal this determination of non-compliance with the original PUD entitlement, because it is a land use matter, your appeal will be heard before the [BOCC]." (*Id.*). There is no record of PCI appealing Mr. Mengel's October 11 non-compliance determination to the BOCC.

C. **Application to Modify the Hammock Beach River PUD Site Development Plan**

Notwithstanding Mr. Mengel's October 11 non-compliance determination and PCI's failure to timely appeal the same to the BOCC, PCI proceeded to file an "Application for Review" and an "Application for Preliminary Plat" with the County on December 18, 2019 – *i.e.*, the Development Applications. (App.120, 147). The Application for Review requested to modify the approved 2006 Site Development Plan for the Hammock Beach River PUD. (App.120). Similar to the proposed Sketch Plat that Mr. Mengel found non-compliant with the Hammock Beach River PUD only two (2) months prior, the Application for Preliminary Plat sought approval for 335 single-family residential lots on that portion of the Hammock Beach River PUD located east of John Anderson Highway. (App.147). Further, contrary to Mr. Mengel's October 11 non-compliance determination, the Development Applications proposed direct access from the PUD to John Anderson Highway. (App.116-17).



(App.116).

During technical review of the Development Applications, the Assistant County Attorney identified numerous legal deficiencies with the submittal. (App.101-02, 124-26). Among other deficiencies, the Assistant County Attorney commented:

> That the access to the PUD via State Road 100 (requiring a grade-separated crossing and prohibiting direct access to John Anderson Highway except for emergency access) must be part of Phase 1A of the development because this was a material term upon which the County Commission approved the rezoning to PUD in order to alleviate impacts on John Anderson Highway.

(App.102).

D. <u>Initial County Commission Quasi-Judicial Hearing</u>

On September 21, 2020, the BOCC conducted the initial quasi-judicial hearing on PCI's Development Applications. (App.323-570). At the outset of

the September 21 hearing, the Preserve moved for "party status" to ensure that it would be afforded the full panoply of due process rights afforded to parties during a quasi-judicial hearing, including the right to cross examine witnesses. (App.331-62).

In support of its request for "party status," the President of the Preserve testified that many of its members own property and reside within a 300-foot radius of the proposed development and will be directly impacted by the proposal. (App.342-43). Counsel for the Preserve further asserted that the group's members who reside in the immediate area will be adversely impacted by the increased density and incompatibility of the proposed development, increased traffic and impacts to hurricane evacuation along John Anderson Highway, and increased flooding to properties along Palm Drive bordering the proposed development. (App.343-47, 350). Notwithstanding such facts and adverse impacts, the BOCC denied the Preserve standing to be recognized with "party status," fearing that conferring standing would create a "slippery slope." (App.359, 362).

Thereafter, the County's Growth Management Director presented an overview of the Development Applications, including the background regarding the County's original approval of the Hammock Beach River PUD

in 2005. (App.362-95). In his opinion, the Development Applications presented three (3) major issues for the BOCC's consideration: (1) the location of 335 single-family lots east of John Anderson Highway, versus the approved 2006 Site Development Plan that only had 219 single-family lots east of John Anderson Highway; (2) the placement of at-grade intersections onto John Anderson Highway, versus the approved 2006 Site Development Plan that had an above-grade crossing and no direct access to John Anderson Highway; and (3) utilities being provided by the City of Flagler Beach, versus the approved 2006 Site Development Plan that required a dedicated utility site for an on-site water treatment system. (App.364).

Notably, during his testimony, the County's Growth Management Director made no mention of his earlier October 2019 determination that PCI's proposal to develop 335 single-family units east of, and with direct at-grade access to, John Anderson Highway violated the terms of the original PUD approval and was inconsistent with the County's Comprehensive Plan. (App.97-98). During questions by the County Commissioners, however, the Growth Management Director acknowledged that the 2005 Conceptual Site Plan attached to Ordinance 2005-22 and the 2006 Site Development Plan

reflected an off-grade crossing with no direct access from the PUD to John Anderson Highway. (App.374, 391).

Following the Growth Management Director's presentation, the Assistant County Attorney made a supplemental presentation regarding the Development Applications. (App.396-410). The Assistant County Attorney testified:

> The 2005 PUD Agreement envisioned a residential golf community. It emphasized the minimization of impacts on John Anderson Highway, and required the access to this development to be at State Road 100. The access, the only access to this development was at State Road 100 and Colbert Lane.

(App.399).

Relying upon the 2005 Development Agreement and showing close up excerpts from the 2005 Conceptual Site Plan, the Assistant County Attorney visually demonstrated to the BOCC that the only access provided in the original PUD was from State Road 100 and Colbert Lane with an "off-grade" crossing of John Anderson Highway. (App.401-02, 160-63). Aside from County facilities, the Assistant County Attorney explained that the "only access onto John Anderson was a secondary emergency access" and that "residents of the development would be crossing above or below grade of John Anderson and accessing the site at State Road 100." (App.402). To the

extent any potential ambiguity existed in the 2005 Development Agreement with regard to access, the Assistant County Attorney testified that both the Planning Board and the BOCC expressly concluded in 2005 that the proposed PUD complied with the County's LDC because "[t]he southerly extension of Colbert Land will provide a controlled, signalized intersection, and a grade-separated crossing is proposed for John Anderson Highway." (App.403-04, 164-65).

In addition to no direct access to John Anderson Highway being authorized pursuant to the Hammock Beach River PUD, the Assistant County Attorney further testified that the 2005 Development Agreement, as written, requires the developer to provide a dedicated utility site. (App.405). If the City of Flagler Beach is expected to provide water and sewer to the site, the Assistant County Attorney indicated that the 2005 Development Agreement should first be amended to reflect this fact. (*Id.*).

Following the Assistant County Attorney's supplemental presentation, PCI's counsel made his presentation in support of the Development Applications. (App.410-30). During his presentation, PCI's counsel claimed the Development Applications were consistent with Ordinance 2005-22, including the Development Agreement and 2005 Conceptual Site Plan. (*Id.*).

In so doing, PCI's counsel disagreed with the contention that the Development Agreement and 2005 Conceptual Site Plan did not authorize direct access from John Anderson Highway, claiming the Assistant County Attorney "did not represent . . . the entire facts as to this issue." (App.421). PCI's counsel also claimed that "[t]he requirement to build a [utility] plant, to build a reuse [facility] and deed it over, that all went away" because the City of Flagler Beach is supposed to service the property with water and sewer. (App.426).

The Preserve, as well as numerous other interested persons, attended the BOCC's September 21 quasi-judicial hearing and spoke in opposition to the Development Applications, asserting, among other issues, that the Development Applications violated the County's Comprehensive Plan, including the prohibition on increasing densities in the Coastal High Hazard Area, and violated Ordinance 2005-22 by providing direct access onto John Anderson Highway, increasing density east of John Anderson Highway, and labeling numerous areas as unspecified "future development." (App.431-97). At the conclusion of the September 21 hearing, the BOCC voted to table the matter. (App.569).

E. Second County Commission Quasi-Judicial Hearing

On November 16, 2020, the BOCC conducted a second quasi-judicial hearing on PCI's Development Applications. (App.571-792). At the outset of the November 16 hearing, the Petitioners, along with the City of Flagler Beach, moved for "party status." (App.573-611, 219-57). Despite PCI's contention to the contrary, the County Attorney confirmed that persons, such as the Petitioners, had a right to request standing as a "party" during a quasi-judicial hearing before the BOCC. (App.602). The County Attorney further confirmed that "party status," if granted, would, among other guarantees, give the Petitioners and the City of Flagler Beach the right to cross examine witnesses. (App.581).

Notwithstanding the direct and adverse impacts of the proposed development upon the Preserve and its members, including Mr. Noble, and the City of Flagler Beach, the BOCC concluded, "we're not doing official standing." (App.611). Consequently, the Petitioners, as well as the City of Flagler Beach, were precluded from cross examining any witnesses during the November 16 hearing. (App.571-792).

Thereafter, the County's Growth Management Director presented an overview of the Development Applications. (App.613-36). Like at the BOCC's

September 21 hearing, the Growth Management Director opined that the Development Applications presented three (3) major issues for the BOCC's consideration: (1) the location of 335 single-family lots east of John Anderson Highway, versus the approved 2006 Site Development Plan that only had 219 single-family lots east of John Anderson Highway; (2) the addition of at-grade intersections onto John Anderson Highway, versus the approved 2006 Site Development Plan that had an above-grade crossing and no direct access to John Anderson Highway; and (3) utilities being provided by the City of Flagler Beach, versus the approved 2006 Site Development Plan that required a dedicated utility site for an on-site water treatment system. (App.632).

Following the Growth Management Director's presentation, PCI's counsel made his presentation in support of the Development Applications. (App.636-65). In so doing, PCI's counsel again claimed the Development Applications were consistent with Ordinance 2005-22, including the Development Agreement and 2005 Conceptual Site Plan. (*Id.*).

Upon the conclusion of PCI's presentation, the City of Flagler Beach appeared in opposition to the Development Applications. (App.666-92, 203-11). Relying upon the Assistant County Attorney's analysis, the City Attorney argued, in part, that the Development Applications violate Ordinance 2005-22

because the plans seek to add direct access from the PUD to John Anderson Highway when the off-grade crossing of John Anderson Highway formed the basis of the County's approval of the Hammock Beach River PUD in 2005. (App.669-71). The City Planner for Flagler Beach – Larry Torino – also testified during the City's presentation. (App. 676-92). Mr. Torino, who has more than fifty-three (53) years of experience as a professional land use planner, testified that the Development Applications: (1) did not comply with the submittal requirements for site development plans in Section 3.04.03 of the County's LDC; and (2) exceeded the purpose and intent of the 2005 Development Agreement. (*Id.*; App.258-94).

The Preserve, including Mr. Noble, also made presentations in opposition to the Development Applications at the BOCC's November 16 hearing. (App.693-718, 729-30). The Preserve's land use expert – David Tillis – who has over thirty (30) years of planning experience, testified that the Development Applications failed to comply with Ordinance 2005-22 and the County's LDC. (App.694-705). Among other deficiencies, Mr. Tillis testified that the Development Applications provide direct access to John Anderson Highway when the original PUD approval was based upon a grade-separated crossing of John Anderson Highway. (*Id.*; App.295-301). Additionally, like the

City Planner of Flagler Beach, Mr. Tillis testified that the Development Applications were legally deficient and did not comply with the site plan submittal requirements in the County's LDC. (*Id.*).

The Preserve also called Walter Fufidio, who was the County's Planning and Zoning Director when the Hammock Beach River PUD was originally approved in 2005. (App.706-10). During his testimony, Mr. Fufidio reiterated that a grade-separated crossing of John Anderson Highway was part of the PUD approval because the County "wanted to preserve the ambiance of John Anderson Highway," which is "a very unique area." (App.707). The Preserve also called Barbara Revels, who is a realtor with more than forty (40) years of experience. (App.710-13). Ms. Revels opined that, if the project were permitted to have direct access to John Anderson Highway, the property values of the surrounding properties "will go down significantly" and the "'small-town' cohesive neighborhood will be destroyed." (*Id.*; App.304). The Preserve also submitted a report from John E. Noble, P.E., a licensed engineer with more than twenty (20) years of experience, raising drainage concerns and objections based upon non-compliance with the County's Comprehensive Plan and the County's LDC. (App.713, 305-08).

Petitioner Stephen Noble, who is a member of the Preserve and owns property abutting the proposed development, also testified in opposition to the Development Applications. (App.729-30). Mr. Noble objected to the Development Applications, reiterating that the proposed direct access to John Anderson Highway violated the Development Agreement and 2005 Conceptual Site Plan, and would "destroy the lives of the people who live on the north side of John Anderson Highway which is myself included." (*Id.*).

Following the Preserve's presentation, numerous members of the public and surrounding property owners testified in opposition to the Development Applications. (App.731-58). Such individuals raised objections to the Development Applications based ongoing flooding issues, the lack of the required utility site, the removal of the grade-separated crossing of John Anderson Highway, and the substantial deviations and material changes from the 2005 Conceptual Site Plan and 2006 Site Development Plan. (*Id.*).

At the conclusion of the November 16 hearing, the BOCC, by a 3-to-2 vote, approved PCI's modified Site Development Plan for the Hammock Beach River PUD. (App.785). Thereafter, the BOCC approved PCI's Application for Preliminary Plat. (App.791). The BOCC's November 16

Decision was subsequently memorialized in separate letters of approval dated November 20, 2020. (App.6-38).

On December 16, 2020, the Petitioners timely invoked this Court's certiorari jurisdiction to challenge the BOCC's November 16 Decision.

IV.

STANDARD OF REVIEW

The Petitioners seek review of the BOCC's November 16 Decision and have timely invoked this Court's jurisdiction pursuant to Florida Rule of Appellate Procedure 9.100(c). The Florida Supreme Court has held that such review, although undertaken pursuant to a petition for writ of certiorari, is a matter of right, and not discretionary:

> [C]ertiorari review in circuit court to review local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3) is not truly discretionary common-law certiorari, because the review is of right. In other words, in such review the circuit court functions as an appellate court. . . .
>
> We have held that circuit court review of an administrative agency decision, under Florida Rule of Appellate Procedure 9.030(c)(3), is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) (citations omitted).

The Circuit Court on certiorari review of a governmental board's quasi-judicial zoning action is the first tier of judicial review, and the scope of review is akin to a direct appeal. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Thus, a "departure from the essential requirements of the law" for purposes of first-tier certiorari review can be "no more than the same level of error that would require reversal on a direct appeal – a substantive or procedural error that was not harmless error." *Patel v. Gadsden Cty.*, 20 Fla. L. Weekly Supp. 124 (Fla. 2d Cir. Ct. Sept. 14, 2012). A "departure from the essential requirements of law" occurs when a lower tribunal fails to apply or adhere to the plain language of a statute or ordinance. *See Justice Admin. Comm'n v. Peterson*, 989 So. 2d 663, 665 (Fla. 2d DCA 2008).

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Conclusory testimony, including from an expert witness, does not constitute competent substantial evidence. *See City of Hialeah Gardens v.*

Miami-Dade Charter Found., Inc., 857 So. 2d 202, 204 (Fla. 3d DCA 2003) ("[G]eneralized statements . . . even those from an expert, should be disregarded.").

V.

ARGUMENT

As discussed separately below, this Court must quash the BOCC's November 16 decision to approve the Development Applications because:

A. The BOCC deprived the Petitioners of due process in denying the Petitioners standing to have "party status" during the quasi-judicial hearing below, thereby depriving the Petitioners of the right to cross examine witnesses;

B. The BOCC departed from the essential requirements of law by approving the Development Applications in violation of the terms of Ordinance 2005-22 and the County's LDC; and

C. The BOCC's decision is not supported by competent substantial evidence where the record establishes on its face that the Development Applications did not comply with the terms of Ordinance 2005-22 and the County's LDC.

A.

THE BOCC DEPRIVED THE PETITIONERS OF DUE PROCESS IN DENYING THE PETITIONERS STANDING TO HAVE "PARTY STATUS"

As a threshold matter, the BOCC deprived the Petitioners of their due process rights by concluding that the Petitioners lacked standing to be recognized with "party status" during the quasi-judicial hearing. Consequently, the Petitioners were deprived of the ability to cross examine any witnesses during the quasi-judicial hearing, including, but not limited to, the County's Growth Management Director and PCI's witnesses. On this basis alone, the Court must quash the BOCC's November 16 Decision.

The procedural due process requirements for quasi-judicial zoning proceedings are well established. As explained in *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991):

> [C]ertain standards of basic fairness must be adhered to in order to afford due process. . . . In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.

Id. at 1340 (citations omitted).

To ensure that they would be afforded the full panoply of due process rights during the quasi-judicial hearing, including the right to cross examine

witnesses, the Petitioners moved for "party status" at the outset of the BOCC's September 21 and November 16 quasi-judicial hearings. Notwithstanding the unrefuted testimony and evidence of the adverse impacts of the proposed development to the Petitioners' interests, including the Preserve's members, the BOCC denied the Petitioners standing to be recognized with "party status."

To have "standing" to be recognized with party status, the County Attorney advised the BOCC that the Petitioners would need to meet one of two standards. (App.605-06). First, for alleged violations based upon the County's Comprehensive Plan, the Petitioners could demonstrate that they meet the definition of "aggrieved of adversely affected party" in Section 163.3215(2), *Florida Statutes*. Second, for alleged violations based upon Ordinance 2005-22 or the County's LDC, the Petitioners could demonstrate that they satisfy the test for standing set forth in *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). As discussed below, and contrary to the BOCC's decision, the Petitioners satisfied both of the foregoing tests for "standing" and, thus, should have been granted "party status" during the quasi-judicial hearing, including the right to cross examine witnesses.

Turning to the first standard, Section 163.3215(2), *Florida Statutes*, defines an "aggrieved or adversely affected party" as:

> [A]ny person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. . . .

As the County Attorney acknowledged below, the "aggrieved or adversely affected party" standard in Section 163.3215 "liberalized the standing requirements for enforcing a comprehensive plan." *See Stranahan House, Inc. v. City of Ft. Lauderdale*, 967 So. 2d 427, 433 (Fla. 4th DCA 2007). Consistent therewith, Florida courts have recognized that Section 163.3215 "enlarged the class of persons with standing to challenge a development order as inconsistent with the comprehensive plan" and is to be "liberally construed." *See Save Homosassa River Alliance, Inc. v. Citrus Cty.*, 2 So. 3d 329, 336 (Fla. 5th DCA 2008); *see also Nassau Cty. v. Willis*, 41 So. 3d 270, 278 (Fla. 1st DCA 2010) ("Section 163.3215 establishes a broad legislative grant of standing which we are not at liberty to reject."). In this

regard, Florida courts have held that "[t]he 'greater-in-degree' part of the test self-evidently would be met if the plaintiff is an adjacent property owner." *See Save Homosassa River Alliance, Inc.*, 2 So. 3d at 339.

Here, the Preserve and Mr. Noble alleged that the Development Applications were inconsistent with interests protected and furthered by the County's Comprehensive Plan, including interests relating to density of development, transportation facilities, environmental and natural resources, and health and safety. (App.219-57). Additionally, the Preserve asserted that a significant number of its members own property and/or homes either adjacent to the proposed development, or within the immediately proximity thereof along John Anderson Highway. (App.593-97). Indeed, it is indisputable that Mr. Noble owns property on John Anderson Highway immediately adjacent to the proposed development. (App.219-21, 729). The Preserve further asserted that a significant number of its members, including Mr. Noble, will be adversely impacted by the proposed development, including, but not limited to, reductions in their property values, an increased flood risk to their property, adverse impacts to their hurricane evacuation route, increased density and incompatible development on the adjacent

property, and adverse impacts to the adjacent and surrounding natural resources and wildlife. (App.219-57, 593-97).

Such allegations were legally sufficient to demonstrate standing under the liberalized "aggrieved or adversely affected party" definition in Section 163.3215, *Florida Statutes*. *See Save Homosassa River Alliance, Inc.*, 2 So. 3d at 331, 340 (holding association "committed to the preservation and conservation of environmentally sensitive lands and the wildlife in and around the Homosassa River" and individuals "who own property in the area" had standing as "aggrieved or adversely affected parties"); *Stranahan House, Inc.*, 967 So. 2d at 433-34 (holding adjoining property owner and association had standing as "aggrieved or adversely affected parties" where the adjoining property owner would be "negatively affected by 'increased traffic and the activity, lights, alteration of [the owner's] enjoyment of light and air, the visual and audio pollution caused by the development'" and one of the association's purposes was "to protect Stranahan House as a historic resource").

Likewise, the record establishes that the Petitioners sufficiently demonstrated standing under the common law *Renard* standard. In *Renard v. Dade County*, 261 So. 2d 832, 832 (Fla. 1972), the Florida Supreme Court defined an "aggrieved or adversely affected person" for standing purposes as

> a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good share in common with all citizens.

In determining the sufficiency of a person's interest for standing purposes, the Florida Supreme Court stated that factors such as "the proximity of his property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations." *Id*. The fact that a person is among those entitled to receive notice under the zoning ordinance is also "a factor to be considered on the question of standing," although not determinative. *See id*.

As previously discussed, a significant number of the Preserve's members own property and/or homes either adjacent to the proposed development or within the immediate proximity thereof along John Anderson Highway. (App.291-57). Members of the Preserve, including, Mr. Noble, also received mailed notice regarding the proposed development pursuant to Section 2.07.00 of the County's LDC. (App.132, 149, 219.). The record

further establishes that a significant number of the Preserve's members, including Mr. Noble and other members living along John Anderson Highway and Palm Drive, will experience adverse impacts to their recognizable interests that exceed in degree, and differ in kind, from the general interest of the Flagler County community as a whole – such as a reduction in their property values, adverse flooding impacts to their property, increased density along John Anderson Highway which they utilize for hurricane evacuation from their property, adverse impacts to surrounding natural resources and wildlife, and incompatible development adjacent to or in the immediate proximity of their property. (App.219-57, 593-97, 304).

Such allegations were legally sufficient to demonstrate standing under the common law *Renard* standard. *See Rinker Materials Corp. v. Metro. Dade Cty.*, 528 So. 2d 904, 906 (Fla. 3d DCA 1987) (holding adverse impact to property value is a legally recognizable interest which would establish standing); *S.W. Ranches Homeowners Ass'n v. Broward Cty.*, 502 So. 2d 931, 934-35 (Fla. 4th DCA 1987) (holding association, which was comprised of "a group of property owners whose land adjoins the proposed development and stands to be directly affected by the alleged aspects of the development . . ., *i.e.* pollution, flooding, and deterioration of potable water supply," had

standing); *see also Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc.*, 744 So. 2d 1242, 1243 (Fla. 5th DCA 1999) (holding association had standing to intervene where its "residents, who border or are in close proximity to the proposed development, would definitely be affected"); *City of St. Petersburg, Bd. of Adjust. v. Marelli*, 728 So. 2d 1197, 1198 (Fla. 2d DCA 1999) (rejecting argument that neighboring property owners lacked standing, stating "[a] multitude of cases recognize that neighboring property owners affected by zoning changes have standing").

In sum, by erroneously concluding that the Petitioners lacked standing to be recognized with "party status" during the quasi-judicial hearing, the BOCC deprived the Petitioners of their due process rights, including the right to cross examine witnesses during the quasi-judicial hearing. On this basis alone, the Court must quash the BOCC's November 16 Decision.

B.

THE BOCC DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN APPROVING THE DEVELOPMENT APPLICATIONS IN VIOLATION OF ORDINANCE 2005-22 AND THE COUNTY'S LDC

Notwithstanding the testimony and analysis of the County's own legal counsel that the Development Applications did not comply with Ordinance 2005-22 and the County's LDC, the BOCC voted to approve the Development

Applications. In so doing, the BOCC failed to adhere to the applicable criteria in the County's LDC, thereby departing from the essential requirements of law. Accordingly, this Court must quash the BOCC's November 16 Decision.

It is well established that quasi-judicial zoning boards, like the BOCC, "do ***not*** have the power to ignore . . . the legislated criteria they utilize in making their quasi-judicial determinations," nor are such quasi-judicial boards "permitted to . . . detract from these criteria." *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 376 (Fla. 3d DCA 2003) (emphasis supplied). In other words, "quasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions." *Id*. at 377.

Turning to the instant case, Section 3.04.03.C of the County's LDC, which governs the review and approval of development plans, provides, in part, that the BOCC

> shall review the site development plan for conformance with the ordinance passed under subsection 3.04.02.

(App.321). Section 3.04.02.F of County's LDC, which governs the County's enactment of an ordinance approving a PUD, such as the Hammock Beach River PUD, in turn, provides that, if a PUD ordinance is approved:

> All maps, plans, documents, agreements, stipulations, conditions, and safeguards constituting the

> development plan as finally approved shall be placed on file . . . and shall constitute the regulations for the specific PUD district that has been approved. All development within the boundaries of the PUD district as approved shall take place in accord with such regulations. . . .

(App.318-19). Thus, to be lawfully approved, the Development Applications were required to comply with Ordinance 2005-22, including all plans, agreements, stipulations, conditions and safeguards associated therewith, as well as the County's LDC.

1. <u>No Access Allowed From John Anderson Highway</u>

As previously discussed, the County approved the Hammock Beach River PUD through Ordinance 2005-22. Section 2.B of Ordinance 2005-22 states:

> Development within the boundaries of the PUD District as approved shall take place in accordance with . . . the PUD Concept Plan . . . received by Flagler County on 10/26/05 and The Hammock Beach River Club PUD Development Agreement executed by owner and Flagler County pursuant to this Ordinance. A copy of said Agreement containing the PUD Concept Plan is attached hereto as and made a part hereof.

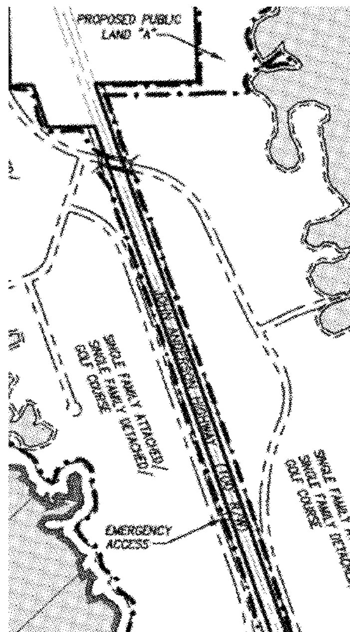
(App.40); *see also* § 1.1, 2005 Development Agreement (App.44) (providing "[t]he purpose of the rezoning is to facilitate development of the property . . . as depicted on the Conceptual Site Development Plan").

With regard to "access" to the Hammock Beach River PUD, Section 5.5 of the 2005 Development Agreement provides in relevant part:

> ***<u>Access to the Project shall be provided</u>*** from the following public roads ***<u>as generally depicted on the Conceptual Site Plan</u>***: State Road 100 and John Anderson Highway. . . .

(App.54) (emphasis supplied).

Significantly, the 2005 Conceptual Site Plan attached to the Development Agreement does ***<u>not</u>*** depict any direct access from the PUD to John Anderson Highway. Rather, as shown below and attested to by the Assistant County Attorney during the BOCC's quasi-judicial hearing, the 2005 Conceptual Site Plan shows "off-grade crossings of John Anderson Highway and only an Emergency Access onto John Anderson Highway." (App.162).



(*Id.*; App.87). Note 3 on the 2005 Conceptual Site Plan further confirms the limited access to John Anderson Highway, stating that "access points for ***County facilities*** will be from John Anderson Highway" – *i.e.*, the public boat ramp, fire station site, and mosquito control site. (App.163, 87) (emphasis supplied). In other words, except for "County facilities," the 2005 Conceptual Site Plan did not authorize direct access to John Anderson Highway. Rather, access to the PUD was required to be solely from SR 100 and Colbert Lane.

Further, as required by Section 3.04.02.F.2 of the County's LDC, the BOCC made an express finding in approving Ordinance 2005-22 that "[t]he proposed PUD will not adversely affect the health and safety of residents and workers in the area and will not be detrimental to the use of adjacent properties or the general neighborhood." (App.39, 318). Significantly, as the Assistant County Attorney attested to below, the BOCC's determination in this regard was based upon the finding that:

> The southerly extension of Colbert Lane will provide a controlled, signalized intersection on S.R. 100. The grade separated road crossing on John Anderson Highway results in a marginal number of trips on that segment.

(App.404, 164-65). Thus, the BOCC's 2005 approval of the Hammock Beach River PUD, including the required finding of compliance with the County's

LDC, was expressly based upon access to the PUD being provided solely from a signalized intersection at SR 100 and Colbert Lane with an off-grade crossing of John Anderson Highway.[1]

Notwithstanding the above-stated requirements of the Hammock Beach River PUD and in direct violation of the County's LDC, the BOCC approved the Development Applications with multiple direct access points to John Anderson Highway. (App.7-8). As previously stated, quasi-judicial zoning boards, like the BOCC, "do not have the power to ignore . . . the legislated criteria they utilize in making their quasi-judicial determinations," nor are such quasi-judicial boards "permitted to. . . detract from these criteria." *See Omnipoint Holdings, Inc.*, 863 So. 2d at 376. Thus, the BOCC was not authorized to approve the Development Applications with access from the

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[1] The requirement that the Hammock Beach River PUD would have no direct access to John Anderson Highway is further confirmed by the original traffic impact study filed with the County, which reflected one access from an internal roadway at SR 100 and Colbert Lane and a bridge/tunnel across John Anderson Highway. (App.437). Consistent with the 2005 Development Agreement and Conceptual Site Plan approved by Ordinance 2005-22, the original Site Development Plan for the Hammock Beach River PUD that the County approved in 2006 also depicted the PUD's sole access being from SR 100 and Colbert Lane with an overpass/underpass across John Anderson Highway. (App.88). The only direct access points to John Anderson Highway on the 2006 Site Development Plan were an "emergency access" and a "County future access" for the public boat ramp site. (*Id.*).

PUD to John Anderson Highway in direct contravention of Ordinance 2005-22, Section 5.5 of the 2005 Development Agreement, the 2005 Conceptual Site Plan, and Section 3.04.02.F of the County's LDC.

In sum, by failing to adhere to the access requirements imposed by Ordinance 2005-22 and the Hammock Beach River PUD, and approving the Development Applications with access from the PUD to John Anderson Highway in direct violation thereof, the BOCC departed from the essential requirements of law. *See Justice Admin. Comm'n*, 989 So. 2d at 665 (holding failure to apply plain and unambiguous language of relevant statute constitutes a departure from the essential requirements of law). Accordingly, on this basis, the Court must quash the BOCC's November 16 Decision.

2. <u>No Water Treatment/Utility Site</u>

As previously noted, Ordinance 2005-22 mandates that "[d]evelopment within the boundaries of the PUD District . . . shall take place in accord with the . . . PUD Concept Plan . . . and The Hammock Beach River Club PUD Development Agreement." (App.40). Pursuant to Section 2.0 of the 2005 Development Agreement, "[t]he project as depicted on the Conceptual Site Plan includes . . . a dedicated utility site." (App.45). Consistent therewith,

Sections 4.4.1 and 4.6.1 of the 2005 Development Agreement require the dedication of the designated "utility site." (App.48, 50).

Consistent with Ordinance 2005-22 and the terms of the 2005 Development Agreement, both the Conceptual Site Plan and the 2006 Site Development Plan included the required "utility site." (App.87-88). Contrary to Ordinance 2005-22 and the 2005 Development Agreement, however, the Development Applications do not include the dedicated "utility site" required thereunder. Rather, the Development Applications depict more than a dozen single-family residential lots on the area designated on the 2005 Conceptual Site Plan for the required "utility site." (App.7).

During the November 16 quasi-judicial hearing, the County's Growth Management Director suggested that the "utility site" was no longer required because of a settlement agreement entered in a prior lawsuit involving the boundaries of the various local governments' water service areas. (App.632). To the extent such settlement agreement purported to amend the terms and requirements of Ordinance 2005-22, including the 2005 Development Agreement and Conceptual Site Plan incorporated therein, any such alleged amendment was ineffectual. By law, an ordinance – such as Ordinance 2005-22 – may only be amended by another ordinance. *See City of Coral Gables*

v. City of Miami, 190 So. 427, 429 (Fla. 1939) ("Any revision of the ordinance comprising the franchise to be binding . . . could have been effected only by an act equal in dignity to the first one, namely, by ordinance."); *Bubb v. Barber*, 295 So. 2d 701, 702 (Fla. 2d DCA 1974) ("It is well established in this state that a municipal ordinance cannot be repealed by a mere resolution, this result can only be accomplished by the passing of a new ordinance.").[2]

No evidence was introduced in the record below demonstrating that Ordinance 2005-22 was ever lawfully amended by ordinance to remove the dedicated "utility site" required therein. Accordingly, by approving the Development Applications without the "utility site," as required by Ordinance 2005-22, the BOCC departed from the essential requirements of law. *See Justice Admin. Comm'n*, 989 So. 2d at 665. Accordingly, on this additional basis, the Court must quash the BOCC's November 16 Decision.

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[2] *See also* 6 McQuillin, Mun. Corp. § 21:4 (3rd ed.) ("The general rule is that an ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by a council of less dignity than the ordinance itself."). Further, to extent the County "agreed" in any settlement agreement to automatically amend a zoning ordinance, such settlement provision would be in violation of Florida law, which prohibits a local government from contracting away its police powers. *See*, *e.g.*, *Chung v. Sarasota Cty.*, 686 So. 2d 1358, 1359-60 (Fla. 2d DCA 1996) (holding settlement agreement that obligated county to rezone property was invalid contract zoning).

3. <u>Legally Deficient Site Plan Submittal</u>

Even assuming the BOCC did not depart from the essential requirements of law in approving the Development Applications with direct access from the PUD to John Anderson Highway and without the required utility site, which the BOCC did, the BOCC's approval nevertheless must be quashed because PCI's site plan submittal was deficient and failed to comply with the County's LDC. Accordingly, on this additional basis, the Court must quash the BOCC's November 16 Decision.

Section 3.04.03.B of the County's LDC, which specifies the legal requirements for a site development plan, states in part:

> B. *Submittal Requirements*. ***The site development plan*** and any necessary supporting documents or exhibits ***shall contain the following*** information:
>
> * * *
>
> 2. A PUD master plan at an appropriate scale for presentation, showing and/or describing the following:
>
> (a) ***Proposed land uses and their location*** and acreage;
>
> * * *
>
> (g) ***A table showing acreage for each category of land use*** . . . .

(App.319-20) (emphasis supplied).

As established during the BOCC's quasi-judicial hearing, PCI's site development plan did ***not*** comply with the above-referenced submittal requirements. Among other things, PCI's site development plan failed to delineate ***all*** "proposed land uses and their location and acreage," as required by Section 3.04.03.B.2.(a) of the County's LDC. For example, PCI's site development plan depicts several areas generally as "undeveloped," "golf," and "future development." (App.681-82). "Undeveloped" and "future development" are ***not*** land uses, and while "golf" is a land use, PCI's site development plan fails to provide any acreage total for such land use. (*Id.*).

Compounding the above-stated violation of the County's LDC, PCI's site development plan also failed to include a complete and legally sufficient "table showing acreage for each category of land use." First, while PCI's site development plan includes "tables" purporting to show the acreage for the "East Side Development," the "West Side Development," and the "Total Site Development," such tables do not include specific acreage for any "golf" use within the project. Likewise, while the table for East Side Development includes 57.47 acres as "Undeveloped" (which as noted above is not a land

use), the table for Total Site Development does not include a line item for any "Undeveloped" acreage. (App.683-85, 265-73).

Second, the purported acreage "tables" on PCI's site development plan are facially deficient. For example, the tables for East Side Development and West Side Development specify 68.38 acres and 29.61 acres of "Single Family Lot Area," respectively (a total of 97.99 acres), yet the table for Total Site Development specifies 211.7 acres for "Single Family Lot Area" – a discrepancy of 113.71 acres. (*Id.*). Similarly, the tables for East Side Development and West Side Development specify 122.00 acres and 399.09 acres as "Open Space/Conservation Area," respectively (a total of 521.09 acres), yet the table for Total Site Development specifies only 373.00 acres as "Open Space/Conservation Area" – a discrepancy of 148.09 acres. (*Id.*). The table for East Side Development denotes 11.64 acres as "Amenity Area," yet the table for Total Site Development specifies 12.5 acres as "Amenity Area" – a discrepancy of 0.86 acres. (*Id.*). The tables for East Side Development and West Side Development specify 24.38 acres and 30.94 acres as "Private Road Area," respectively (a total of 55.32 acres), yet the table for Total Site Development specifies only 17.8 acres as "Private Road Area" – a discrepancy of 37.52 acres. (*Id.*). Likewise, the tables for East Side

Development and West Side Development specify 45.14 acres and 19.09 acres as “Stormwater Area,” respectively (a total of 64.23 acres), yet the table for Total Site Development specifies 156.6 acres as “Stormwater Area” – a discrepancy of 92.37 acres. (*Id.*).

Inherent in the requirement of Section 3.04.03.B of the County’s LDC that a site development plan for a PUD identify all proposed land uses, their location, and their acreage thereon, and include a table showing the acreage for each land use, is that the required site plan information be complete and accurate. *See Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) ("As the wording of its laws binds the legislature, [a local government] is bound by the wording of its Code. This mounts a bulwark against the [local government's] unfettered exercise of power.”). By failing to adhere to the site plan submittal requirements imposed by Section 3.04.03.B of the County’s LDC, and approving the Development Applications in direct violation thereof, the BOCC departed from the essential requirements of law. *See Justice Admin. Comm’n*, 989 So. 2d at 665. Accordingly, on this additional basis, the Court must quash the BOCC’s November 16 Decision.

C.

THE BOCC'S DECISION IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

To be upheld, the BOCC's November 16 Decision must also be supported by competent substantial evidence in the record that the Development Applications comply with the Ordinance 2005-22 and the County's LDC. *See Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993). A review of the record in the instant case, however, establishes that the BOCC's November 16 Decision to approve the Development Applications is not supported by competent substantial evidence. Accordingly, on this alternative basis, the Court must quash the BOCC's November 16 Decision.

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "For the action to be sustained, it must be reasonably based in the evidence presented." *Town of Indialantic v. Nance*, 400 So. 2d 37, 40 (Fla. 5th DCA 1981), *approved*, 419 So. 2d 1041 (Fla. 1982).

In this regard, Florida courts have consistently held that "no 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." *Div. of Admin., State Dep't of Transp. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981). Moreover, if an expert's opinion is based upon an erroneous concept of law, it is equally devoid of competency and should be disregarded. *See Stubbs v. State Dep't of Transp.*, 332 So. 2d 155, 157 (Fla. 1st DCA 1976). Likewise, "[t]he opinion of an expert witness does not constitute proof that the facts necessary to support the conclusion exist." *Mercy Hosp., Inc. v. Johnson*, 431 So. 2d 687, 688 (Fla. 3d DCA 1983); *see also Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957) ("It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value.").

Turning to the instant case, the record is devoid of any competent substantial evidence to support the BOCC's November 16 Decision approving the Development Applications. Rather, the record evidence establishes, on its face, that the Development Applications do not comply with the requirements of Ordinance 2005-22 and the County's LDC by, among other things, allowing direct access from the PUD to John Anderson Highway, omitting the dedicated utility site, and failing to comply with the site plan

submittal requirements. Indeed, the County's own legal counsel testified during the quasi-judicial hearing that the Development Applications did not comply with the original Hammock Beach River PUD approvals by providing direct access from the PUD to John Anderson Highway. Further, as previously discussed, the record is devoid of any evidence establishing that Ordinance 2005-22 was ever lawfully amended to remove the dedicated utility site, or that PCI's site development plan complied with the minimum submittal requirements under the County's LDC.

In sum, the record is devoid of competent substantial evidence supporting the BOCC's November 16 Decision to approve the Development Applications. To the contrary, the record establishes that the Development Applications do ***not*** comply with Ordinance 2005-22 and the County's LDC. Accordingly, the Court must quash the BOCC's November 16 Decision.

VI.

CONCLUSION

For the reasons set forth above, the BOCC's November 16 Decision to approve the Development Applications: (1) deprived the Petitioners of their right to procedural due process; (2) departed from the essential requirements

of law; and (3) was not supported by competent substantial evidence. As aptly stated in *Auerbach v. City of Miami*, 929 So. 2d 693 (Fla. 3d DCA 2006):

> The law . . . will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will.

Id. at 695 (quashing city commission's approval of variance which violated code criteria). Accordingly, this Court must quash the BOCC's November 16 Decision. *See Maturo v. City of Coral Gables*, 619 So. 2d 455, 457 (Fla. 3d DCA 1993) ("[A court] cannot, and should not, turn a blind eye to an incorrect application of the law.").

WHEREFORE, Petitioners PRESERVE FLAGLER BEACH AND BULOW CREEK, INC., and STEPHEN NOBLE request that the Court:

A. Accept jurisdiction to hear this case;

B. Issue an Order to Show Cause pursuant to Florida Rule of Appellate Procedure 9.100(h);

C. Quash the BOCC's November 16 Decision approving the PD Development Applications; and

D. Grant such other relief as the Court deems just and appropriate.

RESPECTFULLY SUBMITTED on this 12th day of February 2021.

/s/ *S. Brent Spain*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the *ePortal* system and served a copy thereof via e-mail to:

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on this 12th day of February 2021.

/s/ *S. Brent Spain*

S. BRENT SPAIN, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amended Petition complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word count limit of Florida Rule of Appellate Procedure 9.100(g).

/s/ *S. Brent Spain*

S. BRENT SPAIN, ESQUIRE