IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

Case No.:

L.T. No.: 16-2018-AP-104

NEPTUNE BEACH, FL REALTY,
LLC, a Florida limited liability company

Petitioner

v.

CITY OF NEPTUNE BEACH, FLORIDA

Respondent

PETITION FOR SECOND TIER WRIT OF CERTIORARI REVIEW

Petitioner, Neptune Beach FL Realty, LLC, (hereafter the "Petitioner") files this Petition for Second Tier Writ of Certiorari Review seeking review of an Order Denying Petition for Writ of Certiorari rendered on May 13, 2019, (hereinafter the "Order"), by the Honorable Robert Foster in favor of the City of Neptune Beach (hereafter the "Respondent"). Judge Foster reviewed a final order rendered by the Respondent on August 13, 2018. The Order failed to observe the essential requirements of law in reviewing the actions of Respondent.

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I. JURISDICTION OF THE COURT.

This Court has jurisdiction of this matter pursuant to Article I, Sec. 21 of the Florida Constitution and Rule 9.030(b)(2)(B), Florida Rules of Appellate Procedure ("Fla.R.App."). Petitioner has submitted an Appendix of portions of the record necessary to understand the issues presented. Rule 9.220, Fla.R.App.

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW.

Petitioner is the owner of approximately seventeen (17) acres of real property in Neptune Beach, Florida located at 500 and 572 Atlantic Boulevard, Florida (the "Property"). Exhibit A.[1] The Property is currently zoned C-3, the most intensive commercial zoning category allowed under the City's Land Development Code. *See Sec. 27-222(b)(8), LDC*. The Property is designated Commercial High on the City's Future Land Use Map ("FLUM") of the Comprehensive Plan (the "Plan"). Commercial High allows for residential development up to a density of up to seventeen (17) units per acre. *See Plan Policies A.1.4.2(c)(3) and A.1.1.1*. The Property currently consists of a vacant Kmart retail shopping center which was constructed in the 1970s. Exhibit B. Specifically, the Property is currently developed with approximately 147,000 square feet of commercial space. Exhibit B. The Property as currently developed does not meet the City's landscaping code nor does it comply with the applicable storm water requirements. Exhibit B.

[1] References to Exhibits shall refer to the Appendix filed by Petitioner.

Under the existing zoning, without a rezoning, special exception or other approval by the City Council or Community Development Board, the Property can – by right – be redeveloped with approximately 396,200 square feet of commercial space. Page 25, Exhibit C. This redevelopment will generate 14,957 gross daily vehicular trips. Page 26, Exhibit C. The Property as currently developed generates 5,549 gross daily vehicular trips. Page 26, Exhibit C.

Petitioner filed with the City an application for special exception for planned unit development to allow the following on the Property: 175 multi-family dwelling units; 74 hotel rooms; and 107,400 square feet of commercial development (including refurbishing existing commercial space). Exhibit B.

The Plan allows residential uses pursuant to a planned unit development within the Commercial High FLUM designation if: 1) it is in conjunction with commercial development and redevelopment and 2) the density does not exceed the residential high density category (seventeen 17 units per acre). *See A-5, Plan*. The development proposed would feature a residential density of approximately eleven (11) units per acre. Exhibit B.

The uses allowed pursuant to the special exception generate almost one-third of the traffic generated by the uses allowed by right on the Property. Said uses would result in less of a demand for water and sewer service than what is currently permitted by right on the Property. Exhibits D, G, and F. The uses proposed by

special exception would: significantly reduce the amount of impervious surface on the Property (Exhibit G); improve drainage to meet state and local standards (Exhibit (F and G); provide new water and sewer infrastructure (Exhibit F and G); and bring the Property in compliance with the City's landscaping standards. (Exhibit B and F).

After Petitioner submitted the application for special exception, area residents began a political campaign in order to pressure local officials to deny the application. Exhibit H.

The professional planning staff for the City reviewed the application and issued a report. Exhibit G. The report does not state that the application fails to meet the applicable requirements of the Comprehensive Plan or the applicable requirements of the Land Development Code. Exhibit G. Specifically, the report takes no issue with the proposed residential uses on the property or the proposed density. Exhibit H. The report also provides that the proposed uses meet concurrency for traffic and that concurrency will be met for water, sewer and stormwater. Exhibit H.

At the meeting before the City's Community Development Board, Petitioner submitted affidavits and expert testimony as to the application and the relevant portions of the Land Development Code. Pages 1-47, Exhibit C. Respondent's staff also submitted its report. Members of the general public in opposition provided

non-expert testimony as to what they would want to be developed on the Property. Pages 48-82, Exhibit C. By their own admission, those in opposition did not present any expert testimony and concede that they did not provide competent substantial evidence necessary to deny the application. Exhibit J.

On July 18, 2018, the Community Development Board voted to recommend denial of the application.

Following the Community Development Board meeting, but prior to the vote by the City Council on the application, Mayor Elaine Brown met with several members of the public in opposition to Petitioner's application. Exhibit I. Mayor Brown votes on quasi-judicial matters such as Petitioner's application. The meeting was filmed and uploaded to the Facebook site, "Neptune Beach Kmart." During the meeting, Mayor Brown complimented those in opposition to the special exception stating that they have, "done a fabulous job" before stating that the decision on Petitioner's application would be judged on, "quality of life, what the community wants and what they're proposing and we will make that decision." Exhibit I.

During the meeting, the organizer of the opposition asked for the City to fund experts in opposition while admitting that there was no expert testimony at the Community Development Board Meeting to refute the testimony and expert opinions provided by the Petitioner. Exhibit I.

On April 21, 2018, prior to the City Council meeting and before hearing any evidence on Petitioner's application for special exception, City Councilman Rory Diamond posted on the Facebook page created by those in opposition to the special exception the following,

> Just so you all know where I stand, I am not going to vote in favor of apartments. I'm open-minded to all sorts of other ideas, but the residents have made their position crystal clear on there just being one big apartment building. *Exhibit J.*

The City Council met to vote on Petitioner's application for special exception on August 13, 2018. In quasi-judicial matters elected officials are required by state law and the City's Ordinance Code (*See Sec. 27-23, LDC and Sec. 286.0115, Fla. Stat*.) to disclose who they met with regarding the quasi-judicial matter and the substance of said discussion prior to voting, otherwise it is presumed prejudicial to the matter.

Prior to voting, a motion was made to accept the recommendation of the Community Development Board to deny the special exception. Exhibit K. Following this motion, Councilman Rory Diamond read the following previously written and prepared statement,

> (reading from a statement) I have carefully reviewed the application and related materials regarding CDB SE18-02 including but not limited the application on July 18 2018 Community Development Board meeting notes and tapes **and various affidavits of experts and exhibits. Based exclusively on those materials**, this evening I have concluded that the community development board appropriated denied CBD SE18-02 and again based exclusively and solely on those

> materials we'll vote to uphold CDBs decision. Exhibit K. (emphasis added).

The reports in opposition to the Application referenced in the statement were not available at the Community Development Board, which only had affidavits from experts that supported approval of the special exception submitted by Petitioner and Respondent's staff.

The City Council voted to deny the application.

Petitioner subsequently filed a Petition for Writ of Certiorari (the "Petition") asking the Circuit Court to quash the decision of the City Council, stating it failed to provide due process to Petitioner, failed to follow the essential requirements of the law and that its decision was not supported by competent substantial evidence. The Lower Court issued an Order to Show Cause directing Respondent to provide information as to why this Court should not grant the petition. Exhibit L. Respondent filed a response. Exhibit M. Petitioner then filed a reply. N. Oral arguments on this matter were held on April 16, 2019. Exhibit O.

On May 13, 2019 the Court entered the Order, which denied the Petition. The Order held that the testimony of residents at the Community Development Board meeting was "undisputed" and sufficient "fact based testimony" that Petitioner's Application is "incompatible with the general character of the area." Specifically, the Order reasoned that testimony from "various property owners" that "residential-zoned areas in the City are almost entirely comprised of low-

density, single family homes" was sufficient competent substantial evidence that apartments would be incompatible with the general character of the area. Exhibit O.

The Order further held that the comments made by quasi-judicial officers prior to hearing any evidence on the application did not constitute a due process violation because said comments were, "in-line with the competent substantial evidence suggesting that an apartment complex would be incompatible with the low-density residential character of the City." Exhibit O. The Order does not explain how comments made four (4) months prior to hearing any testimony could be "in-line" with said testimony.

In a footnote, the Order held that the failure on the part of the quasi-judicial officers to disclose the details and substance of prior conversations and statements with those in opposition to Petitioner's Application did not violate mandatory ex parte disclosure laws pursuant to violation of Sec. 286.0115, Fla. Stat. and Sec. 27-23, LDC. Exhibit O.

In a separate Order the Circuit Court denied a motion by Respondent to supplement the record with a transcript of proceedings before the City Council. Exhibit Q. Strangely, the Court found that there was competent substantial evidence presented, "at both the CDB and City Council hearings" to deny the special exception based upon the testimony of property owners. Exhibit O. In

rejecting to allow a transcript of the testimony before the City Council it is unclear how the Circuit Court had a record upon which it could have made such a finding.

Finally, the Order held that as to special exceptions Respondent only had to have competent substantial evidence per Sec. 27-160, LDC. Exhibit O. The Order is silent on the legal requirement that Respondent could only deny Petitioner's Application if it found competent substantial evidence that the special exception would adversely affect the public interest. Exhibit O.

THE NATURE OF RELIEF SOUGHT

Petitioner seeks issuance of a writ of certiorari quashing the Order Denying the Petition of the Circuit Court with directions that the Circuit Court follow the essential requirements of law.

III. SUMMARY OF ARGUMENT

The Circuit Court's denial of Petitioner's Petition for constitutes a failure to follow the essential requirements of law by failing to follow the correct law. The Circuit Court failed to follow the correct law as the applicable standards for Petitioner's initial burden and failed to follow the correct law as to the applicable standard Respondent was mandated to follow in order to deny the special exception.

In holding that testimony that is not germane to the legally mandated criteria for special exceptions, the Circuit Court failed to follow the essential requirements

of law. In holding that lay person testimony constituted competent substantial evidence sufficient to deny Petitioner's application, the Circuit Court failed to follow the essential requirements of law.

As to due process, the Circuit Court failed to follow the correct law as to the mandatory requirement that Petitioner's right to due process included the right to impartial quasi-judicial decision makers.

IV. SCOPE AND METHOD OF REVIEW OF THIS COURT.

District Courts of Appeal in the State of Florida have jurisdiction to review by writ of certiorari final orders of Circuit Courts, acting in their review capacity pursuant to Rule 9.030(b)(2)(B) of Fl. R. App. P. which provides as follows:

> (2) Certiorari jurisdiction. The certiorari jurisdiction of District Courts of Appeal may be sought to review…
>
> (B) Final orders of Circuit Courts acting in their review capacity.

The review of this Court on matters such as this has been deemed by the Florida Supreme Court as "second tier cert review." *Florida Power and Light Company v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *Dusseau v. Metro Dade County Board of County Commissioners*, 794 So. 2d 1270, 1274 (Fla. 2001) and *Parker Family Trust v. City of Jacksonville*, 804 So.2d 493 (Fla. 1st DCA 2001). In second tier review, this Court should determine whether the Circuit Court "afforded due process" and "applied the correct law." *Parker Family Trust* at 496.

A. THE CIRCUIT COURT FAILED TO OBSERVE THE ESSENTIAL REQUIREMENTS OF LAW BY FAILING TO APPLY THE CORRECT LAW AS TO SPECIAL EXCEPTIONS.

The Order held that it was permissible for the City Council to deny the special exception based upon layman testimony that the special exception did not meet the "general character" of the area. This "standard" is not the applicable standard as to special exceptions. Thus, the Circuit Court did not apply the correct law and, as such, did not follow the essential requirements of law in holding that Respondent could deny the special exception based upon this standard.

1. The Circuit Court failed to follow the correct law in holding that the standards in Section 27-160, LDC are applicable standards for the City Council to consider as to special exceptions.

Sec. 27-160, LDC provides as follows,

> The **community development board may not recommend for approval a special exception unless it makes a positive finding, based on substantial competent evidence, on each of the following, to the extent applicable**:
>
> (1) The proposed use is consistent with the comprehensive plan;
> (2) The proposed use would be compatible with the general character of the area, considering the population density; the design, density, scale, location, and orientation of existing and permissible structures in the area; property values; and the location of existing similar uses;
> (3) The proposed use would not have an environmental impact inconsistent with the health, safety and welfare of the community;
> (4) The proposed use would not generate or otherwise cause conditions that would have a detrimental effect on vehicular traffic, pedestrian movement, or parking inconsistent with the health, safety and welfare of the community;
> (5)The proposed use would not have a detrimental effect on the future development of the area as allowed in the comprehensive plan;

> (6)The proposed use would not result in the creation of objectionable or excessive noise, light, vibration, fumes, odors, dust or physical activities inconsistent with existing or permissible uses in the area;
> (7)The proposed use would not overburden existing public services and facilities; and
> (8) The proposed use meets all other requirements as provided for elsewhere in this Code. (emphasis added).

Sec. 27-160, LDC contains standards applicable to the **community development board** as to its **recommendation** on a special exception not the standards applicable to the City Council in approving or denying a special exception.

The Order ignores the plain reading of the Ordinance Code in holding that the City Council could deny the special exception by the criteria in Sec. 27-160, LDC. "Municipal ordinances are subject to the same rules of construction as are state statutes." *Rose v. Town of Hillsboro Beach,* 216 So. 2d 258, 259 (Fla. 4th DCA 1968). The analysis of a statute/ordinance begins with the plain meaning of its language. *Parker v. Bd. of Trs. of the City Pension Fund for Firefighters & Police Officers in the City of Tampa*, 149 So. 3d 1129, 1133 (Fla. 2014). The plain reading on this section is it concerns the Community Development Board's recommendation not the City Council's approval or denial.

Moreover, the City Council is not referenced in Sec. 27-160, LDC.

> Under the established statutory construction principle, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is to be construed as excluding

> from its operation all those not expressly mentioned. *Hillsborough County v. NcJ Inv. Co*, 605 So. 2d 1287, 1288 (Fla. 2d DCA 1992).

The express inclusion of the Community Development Board in Sec. 27-160, LDC means the exclusion of the City Council as to the standards contained therein. Again, the Circuit Court ignored this maxim in holding that the City Council could deny the special exception

The professional planning staff employed by Respondent to analyze special exception applications agrees that the standards contained in Sec. 27-160, LDC are inapplicable to the City, as its report makes no reference to any of the criteria in Sec. 27-160, LDC. Exhibit G. Instead, Respondent's professional planning staff reviewed Petitioner's Application pursuant to the standards in Sec. 27-244, LDC[2] which contains the applicable standards as to planned unit development approved by special exception. The staff even included a copy of Sec. 27-244, LDC in its report, a copy of which was included in the record submitted to the Circuit Court.

Strangely, Respondent agreed in its Response to the Petition that the criterion applicable to Petitioner's initial burden is that which is contained in Sec. 27-244, LDC. Exhibit M.

[2] Petitioner pointed out that the initial burden is the standards in Sec. 27-244, LDC in its Petition. Exhibit R.

As explained by Judge Zehmer (quoting Yokley, 3 Zoning Law and Practice, § 20-1, pp. 212-213, 219-220 (4th ed. 1979)) in his opinion which was adopted by the Florida Supreme Court,

> In rezoning, the burden is upon the applicant to clearly establish such right (as hereinabove indicated). In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent substantial evidence that the special exception **is adverse to the public interest**. *Irvine v. Duval Cty. Planning Com*., 466 So. 2d 357, 364 (Fla. 1st DCA 1985). (emphasis added, internal citations omitted), adopted by *Irvine v. Duval Cty. Planning Com*., 495 So. 2d 167 (Fla. 1986).

Petitioner's compliance with Sec. 27-244, LDC shifted the burden so that the City Council could only deny the special exception if it had competent substantial evidence that the special exception would be adverse to the public interest.

2. The Circuit Court failed to follow the correct law as special exceptions by applying the incorrect standard as to Petitioner's initial burden

The Order holds that the City Council denied the special exception based upon layman testimony that the special exception did not meet one of the criteria contained in Sec. 27-160, LDC. Exhibit O.

Even though Respondent, Respondent's staff and the LDC agree that Sec. 27-160, LDC does not contain the criteria as to the initial burden (and that the criteria in Sec. 27-244, LDC is applicable), Petitioner provided competent

substantial evidence that the special exception met all the applicable standards contained in Sec. 27-160, LDC. Exhibits C, D, E, F and G.

Respondent's professional planning staff did not find that Petitioner failed to meet it initial burden. Exhibit G. Nor did Respondent argue to the Circuit Court that Petitioner failed meet its initial burden. Exhibit M.

The law as to special exceptions is the applicant must make a *prima facie* showing that the special exception meets the criteria for its initial burden. *Irvine* at 365. "Prima facie" in this context, is defined as, "a party's production of enough evidence to allow the fact-trier to inter the fact at-issue and rule in the party's favor." *Nationstar Mortg., LLC v. Wing*, 210 So. 3d 216 (Fla. 5th DCA 2017) citing Black's Law Dictionary (10th ed. 2014). After such *prima facie* showing is made, the special exception can be denied only if the quasi-judicial body shows by competent substantial evidence that the special exception is adverse to the public interest. *See Irvine at 365, Fla. Mining & Materials Corp. v. Port Orange*, 518 So. 2d 311, 312 (Fla. 5th DCA 1987; *Odham v. Petersen*, 398 So.2d 875 (Fla. 5th DCA 1981), *approved*, 428 So.2d 241 (Fla. 1983) and *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th DCA 1975).

The foregoing standards and applicable burden shifting are what distinguish special exceptions from rezoning. This is because special exceptions have a presumption of being in the interest of the general welfare. Irvine at 365.

> In rezoning, the burden is upon the applicant to clearly establish such right (as hereinabove indicated). In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent substantial evidence that the special exception is adverse to the public interest. *Rural New Town* at 480.

The Circuit Court failed to apply this standard and the applicable burden shifting. Specifically, the Circuit Court held that there was evidence that the special exception did not meet what it deemed to be the initial criteria for the special exception. Exhibit P. For special exceptions, that it not the correct line of inquiry. The law only requires that the applicant make a prima facie showing as to the initial criteria. All that is required for the initial burden is that the ordinance criteria is "established" and that there must be some "evidence on each of these factors in the record." *Odham* at 877. The initial burden is simply that the applicant "complied with" the applicable criteria. *Pollard v. Palm Beach Cty.,* 560 So. 2d 1358 (Fla. 4th DCA 1990). The Petitioner made such a showing. Exhibits B, D, and F. As to special exceptions, that there may or may not have been evidence that the special exception did not meet these criteria is irrelevant. All that is relevant is whether the applicant presented evidence to comply with the initial criteria, not that there may be contradictory evidence as to that initial burden.

In holding that testimony from the public as to the initial criteria for a special exception was sufficient to deny said special exception, the Circuit Court applied the incorrect legal standards and burdens. Specifically, the Circuit Court

ignored that, as to the initial criteria, Petitioner was only required to make a prima facie showing in order to shift the burden to Respondent to find that the special exception was adverse to the public interest. As to that initial burden, contrary evidence – such as that cited by the Circuit Court – is irrelevant and cannot be the basis for denial. As to special exceptions, the only evidence that can support denial is competent substantial evidence after Petitioner's initial showing that the special exception will be adverse to the public's interest.

The Circuit Court's failure to follow the legally mandated standards and appropriate burden shifting constitutes a failure to follow the correct law. As such, the Circuit Court failed to follow the essential requirements of law.

3. The Circuit Court failed to follow the correct law as to the applicable standard for denial of a special exception.

As discussed above, the burden is on an applicant for a special exception to make a prima facie showing that a special exception complies with the mandated criteria. *Irvine* at 364. Following this initial burden, the quasi-judicial body can only deny the application if it has competent substantial evidence that the application is adverse to the public interest. *Id*.

Instead of applying the foregoing legally mandated standard, the Circuit Court held that the City Council did not need to have competent substantial evidence that the special exception was adverse to the public interest. Instead, the Circuit Court held that it was sufficient to deny the exception based upon layman

testimony that the special exception was not in keeping with the "general character" of the City, specifically that multi-family dwellings as part of a mixed used development on land designated in the Plan for residential development up to a density of 17 units an acre was inappropriate in Neptune Beach. Exhibit P.

The law requires a quasi-judicial body to provide competent substantial evidence that a special exception is adverse to the public interest in order to deny the special exception. By not following this requirement, the Circuit Court failed to follow the correct law and therefore failed to follow the essential requirements of law.

B. THE CIRCUIT COURT FAILED TO FOLLOW THE ESSENTIAL REQUIREMENTS OF LAW AS TO THE MANDATORY REQUIREMENTS FOR COMPETENT SUBSTANTIAL EVIDENCE

The Circuit Court held that layman testimony that the special exception was incompatible with the "general character of the area" was sufficient competent substantial evidence to support a denial.

1. In citing to evidence that is not germane to the applicable standard for a special exception, the Circuit Court failed to follow the essential requirements of law.

To be competent the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. *City of Fort Lauderdale v.*

Multidyne Medical Waste Management, Inc., 567 So.2d 955, 957 (Fla. 4th DCA 1990) (citing *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957).).

As discussed above, because the application was a special exception Petitioner was required to provide prima facie evidence that it met the requirements applicable criteria in the Land Development Code. *Irvine* at 365. Per the staff report and the affidavits of experts, Petitioner met this burden. Exhibits D, E, F, and G. In order to deny the special exception, the City was required to have competent substantial evidence that the special exception would be adverse to the public interest when compared to what is allowed by right on the Property. *Planning Com. of Jacksonville v. Brooks*, 579 So. 2d 270, 273 (Fla. 1st DCA 1991) citing *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th DCA 1975).

"General character of the area" is not the standard Respondent needed to meet in order to deny the special exception. "Adverse impact to the public interest" is the standard. The Circuit Court ignores this standard by citing to testimony that is divorced by the legally mandated standards. As such, the Circuit Court failed to follow the essential requirements of law by holding that evidence that is not germane to the applicable standard was sufficient to support denial of the special exception.

2. The Circuit Court failed to follow the essential requirements of law by holding that testimony from the general public constitutes competent substantial evidence.

The Circuit Court held that testimony from the public that the City of Neptune Beach is primarily low density residential was competent substantial evidence that the special exception was not in the "general character" of the area[3].

As a preliminary matter, the criterion referenced by the Circuit Court is incorrect. The preliminary burden criterion for a special exception applicant is not whether the special exception is compatible with the "general character" of the area, but whether it is compatible with the general character based upon specific factors. The standard mistakenly advocated by the Circuit Court would constitute a facial denial of substantive due process because it is so vague it would allow the granting or denial of a special exception based on the unbridled discretion of the City Council. *See Effie, Inc. v. City of Ocala*, 438 So.2d 506 (Fla. 5th DCA 1983); *Friends of the Great S., Inc. v. City Of Hollywood,* 964 So. 2d 827 (Fla. 4th DCA 2007); *Windward Marina, L.L.C v. City of Destin*, 743 So. 2d 635 (Fla. 1st DCA 1999)*ABC Liquors, Inc. v. City of Ocala*, 366 So. 2d 146 (Fla. 1st DCA 1979)and *Drexel v. City of Miami Beach*, 64 So. 2d 317 (Fla. 1953).

[3] Those in opposition to the special exception admitted there was no competent substantial evidence at the Community Development Board meeting. Exhibit I. Moreover, the Circuit Court rejected Respondent's attempt to supplement the record with testimony presented to the City Council.

Instead, the actual criteria bases compatibility on design, scale, location, orientation and density of existing and **permissible structures**. Sec. 27-160, LDC (emphasis added). No evidence was cited by the Circuit Court or Respondent that complained about the design, orientation or scale of the special exception. As to location, the Property is currently the site of a vacant Kmart not a low density residential community. *Id*. As to density, as explained by Respondent's professional staff in its report, the property at-issue is allowed pursuant to the Plan a residential density of up to seventeen (17) units per acre. As to permissible structures, the Petitioner can currently build, by right, 396,200 square feet of commercial space. Exhibit B.

Instead, the Circuit Court hinges support on the denial solely upon testimony that the majority of homes in Neptune Beach are in low density residential. Exhibit C. If the Circuit Court's reasoning is correct that such testimony constitutes competent substantial evidence than any special exception for any use that is not low density residential could be denied because it is "incompatible with the general character of the area." Per the Circuit Court, any and all uses allowed by special exception that are not low density single family homes should be denied because the "general character"- based on the testimony of laymans - is only single family. Using the "general compatibility" as the defining metric means the allowance of multi-family, per the LDC and the densities permitted by right in the Plan, is

simply a fiction and the only residences allowed, even in high density areas under the Plan, are single family. Specifically, it means that sixty-three (63) of the sixty-five (65) uses allowed by special exception in the LDC should never be allowed because they are not single family and thus not compatible with the general character of Neptune Beach. Exhibit P. More specifically it means that the thirteen (13) uses allowed by special exception in the C-3 Zoning District are disallowed because they are not single family residences and therefore not compatible with the general character of Neptune Beach.

The logical conclusion of the Circuit Court's order is that single family residential on the Property would be the only type of residential development that would be compatible with the "general character of the area." The Circuit Court is silent as to the fact that single family development on the Property would be forbidden per the Plan because the Plan mandates a minimum density of 10.1 residential units per acre – which is more than double what the Plan defines as "low density." See. Plan Policy A.1.1.1.

The foregoing is why, as a matter of law, courts have continually held that general and conclusory statements from the public cannot constitute competent substantial evidence as to special exceptions. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So. 2d 202, 204 (Fla. 3d Dist. 2002)'; *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 31 (Fla. 1st DCA 2010); *Apopka v. Orange Cty.*,

299 So. 2d 657 (Fla. 4th DCA 1974); *Pollard v. Palm Beach Cty.*, 560 So. 2d 1358 (Fla. 4th DCA 1990) and *Jesus Fellowship, Inc. v. Miami-Dade Cty.*, 752 So. 2d 708 (Fla. 3d DCA 2000).

The reasoning such testimony cannot be competent or substantial is because an analysis as to compatibility, per the LDC, requires more than generalized conclusory opinions that "most of Neptune Beach" is low density residential. It requires analysis as to design, orientation, scale, property values and the permissible densities and uses already allowed. The Circuit Court's reasoning means that anytime a sufficient number of laymans disagree with a special exception that would constitute competent substantial evidence. This unlawfully converts a quasi-judicial proceeding to a political arena whereby approval or denial of an application is dependent upon the subjective polling of the public. *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996, 999 (Fla. 2d DCA 1993).

To be competent and substantial the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. *City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc*., 567 So.2d 955, 957 (Fla. 4th DCA 1990) (citing *DeGroot v. Sheffield,* 95 So.2d 912 (Fla. 1957).). Per this definition, as a matter of logic and law, the lay person testimony cited by the

Circuit Court can not be competent or substantial. The testimony referenced argued that only low density single family residential would be compatible with the general character of the area. Basic math demonstrates why this testimony cannot be competent or substantial. The Plan provides that the minimum density for the Property is 10.1 units per acre. The smallest single family residential lot allowed in the City of Neptune Beach is 4,356 square feet. *See Table 27-229-1, LDC*. The Property is seventeen (17) acres in size. Exhibit B. Because the LDC requires development to provide stormwater drainage areas, open space, parking, roads, active recreation and other areas, one could not cover the Property completely with single family lots. Because of this it would be impossible to comply with the LDC and the Plan and build a single family development on the Property that has a minimum density of 10.1 units per acre. Per. Thus, testimony from lay persons that only single family low density residential development on the Property would be compatible with the "general character" cannot be competent or substantial because such development is disallowed by the LDC, Plan, and basic math.

The only case cited by the Circuit Court for support is *Metropolitan Dade Cnty. V. Sec. II Prop. Corp*., 719 2d 1204 (Fla. 3d DCA 1998). Exhibit P. It is important to note that the Order identifies this case as an opinion by the Florida Supreme Court when it is not. Exhibit P.

Section II concerned an application for an industrial use in a residential area. *Id*. The testimony specifically cited by the district court as competent substantial evidence supporting denial of the application concerned the "aesthetics" of the proposed building, not the density of the proposed use. *Id*. The Order leaves out that this testimony was sufficient to support denial when, "coupled with the site plan, elevation drawings and aerial photographs." In short, the Circuit Court's basis in law that layman testimony was sufficient to deny the special exception on density concerns is a single case wherein the competent substantial evidence was testimony as to aesthetics and supporting documentation.

Respectfully, the Circuit Court's opinion ignores decades of precedent holding that layman testimony is not competent substantial evidence. In classifying the testimony provided to the Community Development Board (as the Circuit Court had no testimony presented to the City Council in the record) as competent and substantial the Circuit Court has essentially delegated approval or denial of special exceptions to the whims and opinions of the general public as to what they believe constitutes "compatibility." Classifying such evidence as competent and substantial is counter to the law in the State of Florida and therefore is a failure of the Circuit Court to follow the essential requirements of law.

3. THE CIRCUIT COURT FAILED TO FOLLOW THE ESSENTIAL REQUIREMENTS OF LAW AS TO WHAT IS REQUIRED FOR DUE PROCESS IN A QUASI-JUDICIAL HEARING.

The Circuit Court failed to follow the essential requirements of law in holding that Respondent provided adequate due process to Petitioner.

The Circuit Court held that prior statements by members of the Neptune Beach City Council, including comments specifically arguing that they would never support multi-family development on the Property, do not show prejudgment and bias so as to be a denial of due process. Exhibit P.

The Order strangely cites to *Izaak Walton League v. Monroe Cty.*, 448 So. 2d 1170 (Fla. 3d DCA 1984). *Izaak* concerned a legislative action[4] by a political body not a quasi-judicial action. *Id*. at 1172. Quasi-judicial matters, such as the one *sub judice*, require those voting to be free from prejudgment and bias. *Ridgewood Properties, Inc. v. Department of Community Affairs*, 562 So. 2d 322 (Fla. 1990) and *Verizon Bus. Network Servs. ex rel. MCI Communs., Inc. v. Dep't of Corr.*, 988 So. 2d 1148 (Fla. 1st DCA 2008). The Circuit Court applied the standard applicable to legislative matters and therefore applied the incorrect law.

As to the actual prior statements, the Order explained,

> City Councilor Rory Diamonds' (sic) Facebook post merely shows he would not support a special exception proposing an apartment complex, which is in-line with the competent substantial evidence suggesting that an apartment complex would be incompatible with low-density residential character of the City. Exhibit P.

[4] Specifically it concerned the initial zoning determination for property which is legislative, which an application for special exception is quasi-judicial. *Metro. Dade Cty. v. Fuller,* 515 So. 2d 1312, 1314 (Fla. 3d DCA 1987).

The Order goes on to argue that a City Councilmember specifically stating, prior to hearing any evidence, that one would not vote for a multi-family project on property for which the Plan allows no less than ten (10) units an acre falls short of the "type of conduct" that violates due process rights in a quasi-judicial hearing. Exhibit P. The Order then cites to *Seminole Entm't v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001), wherein the district court held that it violated due process for a presiding official to prejudge an application. *Id*. 696.

Writing on the Facebook page created by those in opposition to a special exception, prior to hearing any evidence, that one would never support a use proposed by said special exception is the very definition of "prejudging" an application. This is not mere "political bias" or "adverse political philosophy" but a demonstrative statement by a quasi-judicial officer that he has already determined that he will vote against the special exception regardless of what evidence is presented.

Due process demands an impartial decisionmaker. *Verizon Bus. Network Servs. ex rel. MCI Communs., Inc. v. Dep't of Corr*., 988 So. 2d 1148 (Fla. 1st DCA 2008). The pre-hearing, pre-evidence statements made by quasi-judicial officers show unapologetic partiality and by law violated Petitioner's right to due process.

The Circuit Court failed to follow the essential requirements of law by citing to standards on impartiality and due process applicable to legislative matters not quasi-judicial matters. Furthermore, the Circuit Court failed to follow the essential requirements of law by reasoning that pre-evidentiary statements that a councilmember would never support a Petitioner's application do not show prejudice and partiality as to the special exception and thereby denied due process.

V. CONCLUSION.

Based on the foregoing reasons, Petitioner respectfully requests this Court enter an Order granting the Petition, quashing the Order of the Circuit Court denying the Petition and ordering the Circuit Court to follow the essential requirements of law in reviewing the quasi-judicial decision of the City of Neptune Beach. *See Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1990); *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th DCA 1975), and *Debes v. City of Key W.*, 690 So. 2d 700, (Fla. 3d DCA 1997).

RESPECTFULLY SUBMITTED AND FILED the 11th day of June 2019.

CERTIFICATES OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Clifford B. Shepard, Esq., counsel for Respondent, by e-mail (cshepard@shepardfirm.com) on the 11th day of June, 2019.

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I HEREBY CERTIFY, pursuant to Florida Rules of Appellate Procedure 9.100(b)(3), that a copy of the foregoing was served on the Honorable Robert Foster, 501 West Adams Street, Room 7047 Jacksonville, Florida 32202 by U.S. Mail, this 11th of June, 2019.

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CETIFICATE OF COMPLIANCE WITH FLORIDA RULES OF APPELLATE PROCEDURE 9.100(l)

I HEREBY CERTIFY that this petition complies with the font and formatting requirements set forth at rule 9.100(l), Florida Rules of Appellate Procedure.

/s/ Paul M. Harden
Paul M. Harden, Esq.