IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No.: 1D19-2137
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.

RESPONSE TO PETITION FOR 2nd TIER WRIT OF CERTIORARI

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Introductory Statement

Respondent, City of Neptune Beach, Florida, ("City") hereby responds to the Petition for Second Tier Writ of Certiorari filed by Neptune Beach, FL Realty, LLC, ("Petitioner") and this Court's Order to Show Cause entered on June 14, 2019. The writ should be denied both because the Petitioner has provided no record of the proceeding below against which its arguments can be evaluated[1] and because the Circuit Court below both afforded procedural due process to Petitioner and applied the correct law in denying the petition on first-tier review. *Haines City Community Development v. Heggs*, 658 So.2d 523, 530-531 (Fla. 1995). Accordingly, there has been no "departure from the essential requirements of law." *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 722 (Fla. 2012).

References to the original appendix filed by Petitioners will be cited as "App. Ex. __, p. __." References to the appendix filed by City will be "Supp. App. Ex. __, p. __." References to the Petition for Second Tier Writ of Certiorari will be cited as "Pet., p. __."

[1] Petitioner's appendix contains no reference to either a written transcript of the August 13, 2018 City Council meeting, the Circuit Court arguments or even a link to an audio recording of same. This is a fundamental flaw in the petition warranting dismissal *sua sponte*. *See, e.g., Harrison v. Harrison*, 909 So.2d 318, 319 (Fla 2d DCA 2004) (appellate court must presume trial court's decision correct unless appellant provides record sufficient to evaluate appellant's contentions of error).

Statement of the Case & Facts

While Petitioner, for the most part, accurately recites the factual and procedural background of the case, the petition contains several errors by omission that must be addressed here. For example, at page 9 of the petition, Petitioner states that it filed an application for special exception for planned unit development to allow "175 multi-family dwelling units; 74 hotel rooms; and 107,400 square feet of commercial development." Pet., p. 9. What Petitioner fails to mention is that this application was the sixth amendment to its plan and was not filed until July 2, 2018. App. Exs. B, p. 25; M, p. 200. This is important to an understanding of Councilman Rory Diamond's April 21, 2018 comment, cited in the petition as evidence of bias, because it addressed an entirely different plan[2] than the one presented months later in August, rejected unanimously by both the Community Development Board and the City Council, and at issue before this Court. App. Ex. B, p. 25-35; Supp. App. Ex. 6, p. 64; Supp. App. Ex. 2, p. 29.

In the petition, when complaining about allegedly inadequate *ex parte* disclosures made at the council meeting during which the special exception was rejected, Petitioner fails to mention that it never objected to the adequacy of the

[2] Petitioner's initial plan consisted of a large 313-unit apartment complex. Supp. App. Ex. 1, p. 15.

disclosures which were in fact made. Pet., pp. 12, 14.[3] Indeed, Petitioner never even asked any councilmember for additional information about *ex parte* communications prior to the hearing and accepted the disclosures as made without objection, reservation or comment. Supp. App. Ex. 2, p. 25. This failure to timely object was fatal to any claimed due process violation based upon inadequate *ex parte* disclosures at the hearing and is likely why Petitioner did not pursue this argument further here than its misleading references, now clarified, in its statement of facts.

Finally, in a bold and unique gambit, Petitioner chastises the Circuit Court for denying City's motion to supplement the record with a transcript of proceedings before the City Council, thus making it "unclear how the Circuit Court had a record upon which it could have made" its finding "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." Pet., pp. 14-15.[4] Disingenuously, Petitioner fails to mention certain specific facts of which this Court should be aware.

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[3] The meeting minutes reveal that each councilmember disclosed at the meeting that they had met with and received communications from both members of the Petitioner's development team and concerned citizens opposed to the development. Supp. App. Ex. 2, p. 25.

[4] As set forth *infra*, the burden to provide this Court and the Circuit Court a complete record lies solely with the Petitioner and its failure to do so should bar it from any relief requested in the Petition. *See infra* pp. 6-10.

First, the Circuit Court denied City's motion to supplement the record with a written transcript of the City Council meeting because Petitioner opposed it. Supp. App. Exs. 3, p. 32; 4, p. 36.

Second, despite not having the burden to provide the Court with a complete record, Respondent provided the Circuit Court with an online link to full audio recordings of both the CDB meeting and the City Council meeting so that Judge Foster could listen to everything that occurred at both meetings. App. Ex. M, pp. 203, 208. Accordingly, it is clear the Circuit Court had a record upon which to make the findings expressed in the order now being appealed.

And last, it is beyond argument that it was Petitioner's obligation, not the Circuit Court's and not the City's, to provide a complete record to the Circuit Court upon which a decision could be made. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (party seeking appellate review has the burden of providing the court with an adequate record). Had the record been lacking, Judge Foster would have been obligated to find in favor of the City regardless of the arguments being advanced by Petitioner.

Summary of Argument

The Petitioner makes several fact-based arguments that depend entirely on what was and wasn't presented, disclosed, objected to or decided at the City Council meeting of August 18, 2018 when the City Council unanimously denied its application for special exception. However, Petitioner fails to provide this Court or the City any transcript or even audio recordings of any of the proceedings which it has asked this Court to retrospectively review. Without this foundational material it is impossible for this Court to fairly evaluate whether the Circuit Court properly applied the correct law or afforded Petitioner due process on first-tier review. This is a fatal mistake which – standing alone – justifies denial of the instant petition.

Substantively, Petitioner has both misstated and misinterpreted the Neptune Beach City Code in arguing that the Circuit Court applied the wrong law when reviewing the City's decision to deny Petitioner's special exception. To the contrary, the Circuit Court correctly did what Petitioner failed to do – it read and interpreted the code *in pari materia* and determined that Petitioner had not demonstrated by competent substantial evidence a *prima facie* case that it was entitled to the special exception. Accordingly, the burden never shifted to the City to show that the special exception was adverse to the public interest.

Additionally, Petitioner has impermissibly reargued the Circuit Court's finding of competent substantial evidence which the Florida Supreme Court

definitively "eliminated" on second-tier review more than 19 years ago. *Florida Power & Light Company v. City of Dania*, 761 So.2d 1089, 1093 (Fla. 2000) (competent substantial evidence component eliminated on second-tier review).

Finally, Petitioner cites the Circuit Court's discounting of a single pre-hearing Facebook post from a single council person as proof that it was denied due process. This absurd notion not only ignores the case law and reasoning cited by the Circuit Court in its decision but also the practical fact that the vote to deny the special exception was a unanimous 5-0.

These arguments fall far from the standard on second-tier review that the Circuit Court "depart[ed] from the substantial requirements of law." *Nader*, 87 So. 3d at 722.

Argument

1. PETITIONER'S FAILURE TO PROVIDE A COMPLETE RECORD PRECLUDES THIS COURT ON SECOND-TIER REVIEW FROM CONCLUDING THE CIRCUIT COURT FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF THE LAW.

The bulk of Petitioner's arguments on second-tier review can be summarized as follows:

- The Circuit Court and the City applied the wrong code section and standard for reviewing and ultimately denying the application for special exception. Pet. pp. 17-20;

- The Petitioner met its initial burden of proving a *prima facie* case that it was entitled to the special exception. Pet. pp. 20-23;

- The City's denial of the special exception was not supported by competent substantial evidence and the City made no finding that the special exception was adverse to the public interest. Pet. pp. 23-24;

- The Circuit Court impermissibly relied on lay testimony as to the project's compatibility with the general character of the area, which is neither germane to whether a special exception should be granted nor does it constitute competent, substantial evidence to uphold the City's action. Pet. pp. 24-31; and

- The Circuit Court failed to follow the essential requirements of the law by concluding pre-hearing statements by a single council member did not violate Petitioner's due process rights. Pet. pp. 32-34.

Notwithstanding that these arguments largely and impermissibly focus on the inapplicable competent, substantial evidence standard (*see infra* at pp. 5, 12), the overarching problem with analyzing and responding to them, and the underlying

legal conclusions of the Circuit Court which they attack, is that Petitioner has failed to provide the Court and the Respondent with a complete record. *Applegate*, 377 So. 2d at 1152 (without record of trial proceedings, appellate court cannot resolve underlying factual issues to conclude that trial court's judgment is not supported by evidence or an alternative theory); *Strickland v. Lewis*, 328 So. 2d 244 (Fla. 1st DCA 1976) (trial court affirmed where appellate record lacked the testimony adduced and considered at final hearing). The Petitioner's Appendix before this Court does not include: (1) a complete record of what was presented to the Circuit Court; and (2) complete transcripts of the July 18, 2018 Community Development Board hearing, the August 13, 2018 hearing before the City Council, or the April 16, 2019 oral argument before the Circuit Court. App. Exs. A-R. With the possible lone exception of whether the Circuit Court applied the wrong legal standard to review a special exception, all of Petitioner's arguments are inextricably intertwined with and require examination of the facts upon which they are based.

For example, Petitioner asserts citizen testimony presented at the Community Development Board meeting (Pet., p. 10), and the evidence and testimony submitted at the City Council meeting, as well as the City Commissioners' statements there, (Pet., pp. 12-13) did not constitute competent, substantial evidence and violated Petitioner's due process rights. Concomitantly, Petitioner argues the Circuit Court's consideration of same failed to comply with the essential requirements of the law.

Pet., pp. 13-14. Thus, the Petition unequivocally asks this Court to draw conclusions about the evidence and testimony presented at multiple hearings and before the Circuit Court. However, "[w]ithout knowing the factual context, . . . an appellate court [cannot] reasonably conclude that the [Circuit Court] so misconceived the law as to require [quashing its decision.]" *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

The well-established and fundamental appellate principle, reiterated by the Florida Supreme Court in *Applegate*, is that "the party seeking appellate review has the burden of providing the court with an adequate record. . . ." *Kass Shuler, P.A. v. Barchard*, 120 So. 3d 165, 168 (Fla. 2d DCA 2013) (internal quotations omitted and applying *Applegate*'s complete record requirement to second-tier certiorari proceedings). Where the petitioner fails to provide a complete record the Court is required to deny the petition. *Id*. at 168.

Petitioner's failure to provide a complete record while simultaneously seeking to have this Court draw conclusions based on those missing facts, evidence, and/or testimony should doom the instant petition because it makes evaluating the merits of same impossible – especially when judged against Petitioner's high burden on second-tier certiorari to demonstrate a violation of a "clearly established principle of

law resulting in a miscarriage of justice." *Custer Medical Center v. United Auto. Ins. Co*., 62 So. 3d 1086, 1092 (Fla. 2010).

Any assertion that the complete record before the Circuit Court and the transcripts are unnecessary to evaluate Petitioner's arguments and the legal conclusions drawn by the Circuit Court is not credible, particularly when the challenged order broadly states that "sufficient competent substantial evidence is found in the record." App. Ex. P, p. 257. Moreover, when citing to the record below[5] the challenged order uses the qualifier "for example," indicating that the record contains additional competent substantial evidence which it does not specifically cite to. *Id*. Thus, even were this Court concerned – which it should not be - as to the nature of the evidence cited by the Circuit Court in its order, under "tipsy coachman" principles[6] this Court would be required to uphold the ruling if there was evidence elsewhere in the record to support it.

By failing to provide complete transcripts of the proceedings under review, Petitioner has neglected its obligation to provide this Court with the minimum tools

[5] While the Petitioner also failed to provide a transcript of the August 13, 2018 special council meeting to the Circuit Court on first-tier review, the City's Response to Petition for Writ of Certiorari provided a link and citations to online audio which, although difficult to hear and understand at points, was available to the Circuit Court for review. App. Ex. M, p. 208.

[6] *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (if any theory or principle of law would support the trial court's judgment, the district court is obliged to affirm judgment).

necessary for it to fairly consider Petitioner's arguments or for the City to adequately respond to Petitioner's bald and incomplete factual assertions. Accordingly, without a complete record, given the fact the Circuit Court's order comes clothed with a presumption of correctness, this Court must deny the second-tier petition. *See Biscaro v. Euclid 1610, Inc*., 255 So. 3d 485 (Fla. 3d DCA 2018); *Strickland*, 328 So. 2d at 244.

2. THE CIRCUIT COURT AND THE CITY COUNCIL CORRECTLY INTERPRETED THE CITY CODE *IN PARI MATERIA* WHEN DETERMINING THE APPLICABLE STANDARDS PETITIONER WAS REQUIRED TO MEET TO OBTAIN A SPECIAL EXCEPTION.

In its only pure legal argument directed to the "essential requirements of the law" standard of review, Petitioner asserts that the Circuit Court "failed to follow the correct law" in holding that § 27-160, rather than § 27-244 of the Neptune Beach Land Development Code ("LDC") contains the applicable standards for the City Council to consider on an application for a special exception. Pet., pp. 17-24. This argument completely disregards the plain language of the code and impermissibly asserts competent, substantial evidence existed to support a different decision on Petitioner's application.

First, Petitioner claims that § 27-244 contains the only standards applicable to the special exception required for its PUD application (Pet., pp. 17-20) despite the plain language of § 27-244(f) which provides, in pertinent part:

> (f) *Application for a PUD.* The application for a PUD shall proceed as other applications for development as outlined in article II; and, in addition to the information required for such development application the PUD shall be required the following . . .

Section 27-244(f), Neptune Beach Land Development Code (emphasis added). Thus, the standards required for a PUD are "in addition to," *inter alia*, the standards for obtaining a special exception, which are found in Division 9 of the LDC.

Division 9 of the City of Neptune Beach's Code is entitled "SPECIAL EXCEPTIONS" and sets forth the procedures and standards for considering a special exception within the City. §§ 27-156 through 27-164. Specifically, and for reasons only known to it, Petitioner ignores Division 9, § 27-159(d) of the LDC requiring the City Council to utilize the standards set forth in § 27-160 of the LDC when considering any application for special exception. § 27-159(d) of the LDC provides as follows:

> Sec. 27-159. *Procedures for applying for and issuing a special exception*."
> *
> *
> *
> (d) *City council action.* At the next available meeting of the city council, allowing for required notice as described in this division, the city council **shall** approve, deny, or approve with conditions said application after consideration of the comments and recommendations of the community development board, based on the standards set forth in this division.[7] (Emphasis added).

[7] Division 9 of the LDC is entitled "Special Exceptions" and includes both Sections 27-159 and 27-160.

Supp. App. 5, p. 50.

Thus, § 27-160 provides the standards the Community Development Board is required to follow and that an applicant is required to initially meet before the board may recommend a special exception be approved by the City Council. Supp. App. Ex.5, p. 51. Section 27-159(d) then directs the City Council to apply the same standards when determining whether to approve, deny, or approve with conditions the application and recommendation of the Community Development Board. *Id*. at p. 50. It is hard to imagine a clearer directive for the City Council to follow and harder still to understand why Petitioner would ignore Division 9 and § 27-159(d) when making its baseless argument.

Moreover, the case law cited by the Petitioner is perfectly consistent with the City's standards and procedures followed in this case. "In the case of a special exception, where the application has otherwise complied with those conditions set forth in the zoning code, the burden is upon the [city] to demonstrate by competent substantial evidence that the special exception is adverse to the public interest." Pet., p. 20 (emphasis removed and citing *Irvine v. Duval Cty. Planning Com*., 466 So. 2d 357, 364 (Fla. 1st DCA 1985) (dissenting), adopted in part by *Irvine v. Duval Cty. Planning Com*., 495 So. 2d 167 (Fla. 1986)). Here, the "conditions set forth in the zoning code," which the applicant must first comply with before the burden shifts to the city to determine whether the special exception is adverse to the public interest,

are the standards set forth in Division 9, § 27-160.[8] Both the Community Development Board and the City Council determined that the Petitioner failed to meet those standards, and the Circuit court determined that that decision was supported by competent substantial evidence. App. Ex. P, pp. 256-57.

Based on a plain reading of cited code provisions, the Circuit Court applied the correct law in determining the City could deny the special exception based on Petitioner's failure to make a *prima facie* showing that all standards under Section 27-160 of the LDC had been met. This finding, when coupled with the Petitioner's failure to provide this Court with a complete record as set forth *supra*, scuttles any claim that Petitioner now makes that it did, in fact, make a *prima facie* showing on special exception standards, that it claims never applied to its application, so as to shift the burden to the City to find the application is adverse to the public interest. Pet., pp. 20-23.[9] Moreover, Petitioner cites to no portion of the record where the

[8] Notwithstanding this lack of burden shifting, the City in fact found the special exception was "adverse to the public interest" when it specifically adopted the written findings of the Community Development Board recommending denial of the special exception. App. Ex. K, p. 190. In those findings, five of six members found the special exception to be inconsistent with the City's comprehensive plan. Supp. App. Ex. 6, pp. 61, 65-72. That finding alone also constitutes a finding that the special exception is "adverse to the public interest" because any development in violation of the comprehensive plan is illegal. § 163.3194(1)(a), Fla. Stat. (2018); *see, e.g., Citrus County v. Halls River Development,* 8 So. 3d 413, 421 (Fla. 5th DCA 2009) (zoning action not in accord with the comprehensive plan is unlawful).

[9] Petitioner's argument is akin to the frequently raised but always impermissible argument on first-tier review that the decision should be quashed because competent,

City Council, sitting in its quasi-judicial capacity, ever agreed that Petitioner met its initial, *prima facie* burden. Petitioner's self-proclaimed crowing that it did so, besides being wholly irrelevant on either first or second-tier review (*see supra* n. 9), is no substitute for what the unprovided record would show and underscores the petition's frivolousness.

3. THE CIRCUIT COURT'S FINDING OF COMPETENT SUBTANTIAL EVIDENCE SUPPORTING THE CITY'S DENIAL OF PETITIONER'S SPECIAL EXCEPTION IS NOT SUBJECT TO REVIEW ON SECOND-TIER CERTIORARI AND CIRCUIT COURT'S PARTIAL RELIANCE ON LAY WITNESS FACT-BASED TESTIMONY COMPLIED WITH THE ESSENTIAL REQUIREMENTS OF LAW.

Petitioner invites this Court to do what it should know is forbidden on second-tier review: evaluate the record for competent substantial evidence to support the City's decision to deny the special exception. Pet., pp. 20-21 ("Petitioner provided competent substantial evidence that the special exception met all the applicable standards contained in Sec. 27-160, LDC."). *See also City of Dania*, 761 So. 2d at 1093. Apparently, Petitioner is unaware that the Florida Supreme Court definitively eliminated competent substantial evidence from second-tier review holding that a district court is "precluded from assessing the record evidence" and may only look to the face of the Circuit Court order to determine whether it applied the correct law.

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substantial evidence exists in the record to support an applicant's request for relief. *See City of Dania*, 761 So. 2d at 1093.

Id. Because it has been conclusively established that the Circuit Court applied the correct law *supra*, this issue doesn't merit further discussion.

Moreover, Petitioner mistakenly argues that the Circuit Court failed to follow the essential requirements of the law by relying on fact-based lay witness testimony as an example of the competent, substantial evidence upon which the City made its decision to deny the special exception. Pet., pp. 22-23 ("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."). Compatibility "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" is the second standard listed in § 27-160 of the LDC, which the City Council is required to apply when considering a special exception. Section 27-160(2), Neptune Beach Land Development Code. It is also the textbook example of a standard upon which expert testimony is not required because, as the Circuit Court determined here, lay witnesses are fully capable of articulating and supporting with appropriate exhibits, photographs and diagrams fact-based reasons why a particular use is incompatible with the general character of the surrounding area. *Metropolitan Dade County v. Section II Property Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998). Accordingly, the Circuit Court complied with the essential requirements of

the law when it relied, in part, on the fact-based testimony of lay witnesses regarding the general character of the surrounding area. *Id*.

4. THE CIRCUIT COURT CORRECTLY RULED THAT A FACEBOOK POST BY A SINGLE COUNCIL MEMBER IN OPPOSITION TO "ONE BIG APARTMENT BUILDING" REGARDING A DIFFERENT APPLICATION THAN THE ONE ACTUALLY VOTED ON MONTHS LATER DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHT TO IMPARTIAL DECISION MAKERS.

In analyzing the Facebook post of City Councilmember Rory Diamond, the Circuit Court correctly noted the statement in question was consistent with the competent substantial evidence that "an apartment complex would be incompatible with the low-density residential character of the City." App. Ex. P, p. 258.[10] It is equally true that five out of six CDB members found the apartment complex would be inconsistent with the City's comprehensive plan[11] and thus could not be approved less the applicant risk the fate that befell the developer in *Pinecrest Lakes, Inc. et al. v. Shidel* - the bulldozing of its project after construction. *Pinecrest Lakes, Inc. et*

[10] In the background facts section of its brief Petitioner mentions a meeting and comments made there by the Mayor prior to the City Council meeting at issue. Pet., p. 11. However, Petitioner does not make any substantive arguments concerning the Mayor's meeting (*id*. at pp. 31-34). As the United States Seventh Circuit Court of Appeals memorably stated, appellate judges "are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Accordingly, this Court should limit its analysis to the arguments actually raised in the brief, *i.e.*, those related to Councilmember Diamond's statements. Pet., pp. 31-34.

[11] Supp. App. Ex. 6, pp. 61, 65-72.

al. v. Shidel, 795 So. 2d 191, 196 (Fla. 4th DCA 2001) (demolition of apartment buildings upheld as inconsistent with comprehensive plan). As the Circuit Court noted, the City Council unanimously accepted the CDB's findings and denied Petitioner's application. App. Ex. P, p. 255. Accordingly, since approval of the special exception would have been unlawful based on inconsistency with the comprehensive plan, Councilmember Diamond's statement was correctly interpreted by the Circuit Court, and only amounted to a commitment to honor his oath of office to faithfully perform the duties of his office, including upholding state law and the ordinances of the City of Neptune Beach. Supp. App. Ex. 7.

The record is also clear that Councilmember Diamond's Facebook comment made in April 2018, three months before the application at issue was even filed by Petitioner, referenced a different plan containing even more apartments. Supp, App. Ex. 8, p. 76; App. Ex. J, p. 188. Nevertheless, the Circuit Court properly reviewed the case law and determined that statements like the one attributed to Councilmember Diamond "fall well short of the types of conduct that have previously been found to violate a party's due process rights in quasi-judicial proceedings." App. Ex. P, p. 258. For example, Petitioner was not denied the right to cross-examine witnesses at the hearing; Petitioner was not denied the right to present evidence in support of its application; and Petitioner was not denied the opportunity to request more specific ex parte disclosures from councilmembers.

Supp. App. Ex. 2; *See, e.g. Carillon Community Residential v. Seminole County*, 45 So. 3d 7, 10 (Fla. 5th DCA 2010) (party to quasi-judicial hearing must be able to present evidence and cross examine witnesses). Moreover, Petitioner, who doesn't deny being aware of Councilmember Diamond's Facebook post before both the CDB meeting and the final City Council meeting, never objected at the hearing or even asked that Councilmember Diamond disqualify himself from the matter. Supp. App. Ex. 2, p. 25. The failure to object or at least request additional inquiries at the hearing under such circumstances provides further support for the Circuit Court's decision that no due process violation occurred. *See, e.g., Rosenzweig v. DOT*, 979 So. 2d 1050, 1056 (Fla. 1st DCA 2008) (failure to preserve issue for appellate review requires affirmance of order on appeal).

Finally, it is significant that the vote of City Council to deny the application was unanimous and followed the unanimous recommendation of the CDB to deny the application. Supp. App. Ex. 2, p. 5. Petitioner makes no complaint of procedural due process violations at the CDB meeting and it is clear the outcome would have been the same at the City Council meeting even had Councilmember Diamond recused himself. Thus, the Circuit Court's determination that Councilmember Diamond's pre-hearing statement, which amounted to nothing more than a confirmation that he would follow the requirements of the City's comprehensive plan, which was not timely objected to by Petitioner, and which would not have

changed the outcome of the proceedings below, did not rise to the level of a due process violation requiring a new hearing. *See Jennings v. Dade County*, 589 So. 2d 1337, 1340-41 (Fla. 3d DCA 1993) (collecting cases and holding the "occurrence of such a communication . . . does not mandate actual reversal" if there is no prejudice to the complaining party). In this case, the disclosure of the communication, the fact it was directed to a different application or plan, the Petitioner's utter failure to object or make further inquiry, and the absence of any evidence of prejudice warrants the denial of the petition. *See generally Hortonville Joint School Dist. v. Hortonville Education Ass'n*, 426 U.S. 482, 493 (1976) ("Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances."). Accordingly, the Court should deny the petition.

Conclusion

The Circuit Court properly set forth the scope of its review on first-tier certiorari and determined 1) the City's decision was supported by competent substantial evidence; 2) the Petitioner received procedural due process; and 3) the City followed the essential requirements of law. On second-tier review the only issue is whether the Circuit Court – not the City – afforded Petitioner due process and applied the correct law. "[A] district court should exercise its discretion to grant review only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Custer*, 62 So. 3d at 1092.

The City has demonstrated here that the Circuit Court correctly performed its functions on first-tier review and that there has been no violation of a clearly established principle of law. The decision of the Circuit Court should be affirmed and the petition for second-tier review denied.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Clifford B. Shepard

Certificate of Service

I certify that a copy of this response brief was served via Registered e-mail on July 9, 2019, on:

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