NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

CONCERNED CITIZENS OF TARPON SPRINGS, INC.,
Petitioner,
v.

CITY OF TARPON SPRINGS; KAMIL SALAME; MORGAN DEVELOPMENT GROUP, LLC,
Respondents.
_____/

CASE NO: 21-000004-AP-88B

UCN: 522021AP000004XXXXCI

ORDER AND OPINION

PER CURIAM.

THIS MATTER having come before the Court on Petitioner Concerned Citizens of Tarpon Springs, Inc.'s ("Petitioner") Amended Petition for Writ of Certiorari and Memorandum of Law on Standing, filed April 25, 2022; Respondents Morgan Development Group, LLC and Kamil Salame's (collectively, "Morgan") Response to [Amended] Petition for Writ of Certiorari, filed May 13, 2022[1]; and Petitioner's Reply to Response to Amended Petition for Writ of Certiorari, filed June 13, 2022. Having reviewed the briefs, record on appeal, and applicable law and being fully advised in the premises, **the Court hereby denies Petitioner's Amended Petition for Writ of Certiorari.**

RELEVANT FACTS AND PROCEDURAL HISTORY

Petitioner asks this Court to quash three land development approvals Morgan obtained from Respondent the City of Tarpon Springs Board of Commissioners ("City") to build a

[1] On the same day, the City of Tarpon Springs filed a Notice of Joinder in Morgan's Response to [Amended] Petition for Writ of Certiorari.

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residential development along the Anclote River. Petitioner, a Florida non-profit corporation, is comprised of a group of citizens dedicated to the preservation of the life, health, and environmental beauty of the Anclote River with the goal of minimizing and limiting new development and all sources of pollution to the Anclote River while protecting the fish and wildlife that inhabit it. Morgan is a foreign limited liability company headquartered in Houston, Texas that invests in multifamily developments.[2]

In July 2021, Morgan applied to the City for concurrent review and approval to develop a 404-unit multifamily residential project called Anclote Harbor located at 42501 U.S. Highway 19 North, Tarpon Springs, bordering the Anclote River on one side ("Project"). Morgan's application included requests for (1) a conditional use permit for residential development within the Commercial General zoning district, (2) rezoning the site to Residential Planned Development, (3) a Preliminary Development Plan, and (4) a Final Development Plan.

The City held extensive public hearings on Morgan's application over three days in late 2021 – October 26-27, October 27-28, and November 9-10. In total, the public hearings lasted more than twenty-four hours, during which the City permitted Petitioner to participate as an "affected party." Following public hearings lasting more than sixteen hours on October 26-27 and October 27-28, the City approved Morgan's conditional residential use permit in the Commercial General district by adopting Resolution 2021-52. Then, after approximately eight hours of a public hearing on November 9-10, the City approved (1) Morgan's Preliminary Development Plan and rezoning to Residential Planned Development by adopting Ordinance 2021-15 and (2) Morgan's Final Development Plan by adopting Resolution 2021-60. Resolution 2021-52, Ordinance 2021-

[2] Kamil Salame is Morgan's City Planner.

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15, and Resolution 2021-60 are herein collectively referred to as the "Approvals" and allow Morgan to develop the Project.

In response, Petitioner filed separate appeals challenging the Approvals. On March 25, 2022, this Court consolidated the appeals, dismissed Petitioner's certiorari petitions for lack of standing, and provided Petitioner with leave to amend its petition to establish standing.[3] Petitioner's timely Amended Petition followed.

This Order will cite to the record by the bates stamp number and abbreviated as follows: October 26-27, 2021 hearing transcript as "T1"; October 27-28, 2021 hearing transcript as "T2"; November 9-10, 2021 hearing transcript as "T3"; Appendices filed by Petitioner in closed case number 21-000030 as "A1"; and Appendices filed by Petitioner in closed case number 21-000031 as "A2." For example, T2.260:13-314:5 represents the October 27-28, 2021 hearing transcript, bates stamp page 260 line 13 through page 314 line 5. And A2.3533 represents bates stamp page 3533 of the Appendix filed in case number 21-000031.

STANDARD OF REVIEW

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1174 (Fla. 2017). In considering a petition for writ of certiorari, the reviewing court may only deny the petition or grant it and quash the order the petition is challenging. *Clay Cty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1180-81 (Fla. 1st DCA 2007). "The court may not enter any judgment on the merits of the underlying controversy, or direct the lower tribunal to

[3] The Court hereby adopts and incorporates by reference its March 25, 2022 Order.

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enter any particular order." *Id.* at 1181. The court's appellate review is limited to the record created before the enforcement board. Fla. Stat. § 162.11.

ANALYSIS

I. Standing

"[S]tanding is a threshold issue which must be resolved before reaching the merits of a case." *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). The Florida Supreme Court set forth three tests to determine whether one has the requisite standing to sue. *Renard v. Dade Cty.*, 261 So. 2d 832, 837-38 (Fla. 1972). Which *Renard* test a court applies depends on whether the action (1) seeks to enforce a valid zoning ordinance, (2) attacks a validly enacted zoning ordinance as being an unreasonable exercise of legislative power, or (3) attacks a zoning ordinance as void because it was not properly enacted. *Id.*

The Florida Supreme Court subsequently clarified who has standing under each *Renard* test, holding that (1) one must have special damages to enforce a valid zoning ordinance; (2) one must have a legally recognizable interest which is adversely affected to attack a validly enacted zoning ordinance as being an unreasonable exercise of legislative power; and (3) "[a]ny affected resident, citizen or property owner of the governmental unit in question has standing" to attack a zoning ordinance as void because it was not properly enacted, such as when the required notice was not provided. *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So. 2d 1082, 1087 (Fla. 1978). Under the third *Renard* test, one may attack a zoning ordinance on the basis that it is void "by reason of departure from any essential procedure preceding its enactment … in short, attack[ing] how the resolution was enacted, but not what was enacted." *City of Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100, 1102 (Fla. 3d DCA 1983).

In its previous certiorari petitions, Petitioner had argued that in adopting the Approvals the City departed from the essential requirements of law, the City denied Petitioner and members of

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the public due process, and the Approvals were not supported by competent substantial evidence. Petitioner alleged that it had standing to bring such challenges because it had suffered a special injury. Petitioner claimed that the special injury inflicted by the City's adoption of the Approvals was based on Petitioner's dedication to preserving the environment, its members' recreational use of the Anclote River and surrounding area, and the work it had done over the years in preventing development of the site for everyone's benefit.

In its Amended Petition, however, Petitioner has revised its argument. Now, Petitioner argues only that the City departed from the essential requirements of law and denied Petitioner and members of the public due process; Petitioner has abandoned its argument that the Approvals are not supported by competent substantial evidence. Under this narrowed argument, Petitioner asserts that it has standing given that it is simply attacking the Approvals as void. Meaning, Petitioner is no longer attacking the Approvals on the ground that they would allow Morgan to build the Property (*what* was enacted); rather, Petitioner is attacking the Approvals on the ground that they were improperly enacted (*how* they were enacted). Petitioner asserts therefore that the third *Renard* test applies here and it has standing because "[a]ny affected resident, citizen or property owner" has standing to attack a zoning ordinance as void.

Petitioner cites two Third District Court of Appeal cases, claiming that Florida courts recognize citizen groups as having standing to challenge ordinances as void under the third *Renard* test. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); *Save Brickell Ave., Inc. v. City of Miami*, 395 So. 2d 246, 247 (Fla. 3d DCA 1981). Morgan counters, *inter alia*, that Petitioner does not meet the third *Renard* test because Petitioner is not an "affected" party and disputes Petitioner's reliance on *Wedel* and *Save Brickell*.

In *Wedel*, appellant Upper Keys Citizens Association, Inc. was "a non-profit corporation, whose membership consists of citizens of the Upper Keys area of Monroe County, including

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residents of North Key Largo, the site of a proposed planned unit development project." 341 So. 2d at 1063. Appellant sought to have the county's zoning variance decision declared illegal and void. *Id.* The lower court dismissed the complaint for the sole reason that appellant lacked standing because "for a private non-profit citizens' association (such as appellant) to have standing to sue, said corporation must (1) allege special injury that (2) differs in kind from that suffered by the general public." *Id.* The Third District Court of Appeal reversed and remanded, holding that "no special damages need be alleged by appellant as a prerequisite for its standing. We are careful to emphasize, however, that standing is conferred upon appellant [o]nly for the above limited purpose of testing the validity of the enactment itself." *Id.* at 1064 (internal quotations omitted).

The court in *Wedel* is silent regarding whether these particular citizens and residents owned property or were neighbors of the site to be developed. However, while the court did not explicitly find that this group consisting of citizens and residents was an "affected" party or elaborate on why it may be an "affected" party, the court did find that the group had standing under the third *Renard* test to challenge the zoning variance as void. *Wedel*, therefore, weighs in favor of Petitioner having standing to challenge the Approvals as void here.

The *Save Brickell* case cited by Petitioner is one in a line of three associated *Save Brickell* cases. For our discussion and ease of reference here, we label the three cases in chronological order as follows: (1) *Save Brickell Ave., Inc., v. City of Miami*, 393 So. 2d 1197 (Fla. 3d DCA 1981) ("*Save Brickell I*"); (2) *Save Brickell Ave., Inc., v. City of Miami*, 395 So. 2d 246 (Fla. 3d DCA 1981) ("*Save Brickell II*"); and (3) *City of Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100 (Fla. 3d DCA 1983) ("*Save Brickell III*"). In these cases, appellant Save Brickell Avenue, Inc. was "a non-profit, watch-dog corporation consisting of members who own homes on a ten block stretch of Brickell Avenue … [whose] purpose is to express homeowner viewpoint to entities such as Appellee, CITY OF MIAMI, concerning development plans for Brickell Avenue property[.]"

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Save Brickell III, 426 So. 2d at 1102. Appellant sought certiorari review of the city's zoning resolution affecting certain property on Save Brickell Avenue and its development, which the lower court dismissed on the ground that appellant lacked standing. *Save Brickell II,* 395 So. 2d at 246. The Third District Court of Appeal held that "[a]s a corporation purportedly devoted to safeguarding the zoning of the area, Save Brickell Avenue is an 'affected ... citizen' which has standing to attack the enactment in question on the ground ... that is void or invalid[.]" *Save Brickell I,* 393 So. 2d at 1198 (Fla. 3d DCA 1981).

The court in the *Save Brickell* cases explicitly found that this citizen group was an "affected" party and that it had standing under the third *Renard* test to challenge the zoning resolution as void. But, as Morgan correctly notes, the *Save Brickell* cases are distinguishable because this group consisted of members who owned homes along the very street proposed for development and whose specific purpose was to express homeowner viewpoint. Here, it is undisputed that Petitioner, the citizen group Concerned Citizens of Tarpon Springs, Inc., does not own any property. Likewise, it is undisputed that no member of Petitioner is a neighboring landowner or neighboring citizen or resident of the site in question here. The *Save Brickell* cases, therefore, weigh against Petitioner having standing to challenge the Approvals as void.

In conclusion, the Court finds that whether Petitioner is an "affected" resident or citizen thereby conferring standing for purposes of appealing the City's Approvals is still debatable, even under the third *Renard* test. *See O'Connell v. Fla. Dep't. of Cmty. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004) ("Standing on appeal requires more than standing at the administrative level."). Nevertheless, in the interest of judicial efficiency and to move this matter along, the Court declines to rule on this matter as to standing and instead will address the merits of the Amended Petition.

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We now turn to Petitioner's specific arguments that the Approvals are void because the City departed from the essential requirements of law and denied Petitioner and members of the public due process.

II. Departure From the Essential Requirements of Law

Whether the essential requirements of law were observed means whether the correct law was applied. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). "Not applying the correct law must also result in a miscarriage of justice[.]" *Dep't of Highway Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 470 (Fla. 1st DCA 2014). As the Florida Supreme Court explained:

> In granting writs of common-law certiorari, the [appellate courts] should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the [appellate courts] must be allowed a large degree of discretion so that they may judge each case individually. The [appellate courts] should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983).

A. The Record

Morgan's application included several parts: (1) a conditional use permit for residential development within the Commercial General ("CG") zoning district; (2) rezoning the site to Residential Planned Development ("RPD"); (3) a Preliminary Development Plan ("PDP"); and (4) a Final Development Plan ("FDP"). [A2.591]. Because the City conducted a concurrent review of Morgan's application during the three days of public hearings, the substantive evidence presented applies to multiple parts of Morgan's application with little demarcation. Accordingly, the Court will discuss the record evidence as a whole as it occurred over the three days. Then the Court will address Petitioner's arguments individually.

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The record reflects the following:

Overview/Public Comments/City's Action

October 26-27, 2021 Public Hearing

- At the beginning of the quasi-judicial public hearing, City Attorney Mr. Thomas Trask gave the first reading of Ordinance 2021-15 (PDP and rezoning to RPD) and advised that the second reading would take place on November 9, 2021. [T1.3:14-4:8]. Mr. Trask explained the City's quasi-judicial process, including the procedures and order of appearance. [T1.4:9-6:9].
- Notice of Ordinance 2021-15 was sent to property owners within 1,000 feet and to the general public via publishing in the *Tampa Bay Times* at least twice. [A2.221-223; A2.2041; A2.2046]
- The City received witness testimony and written evidence from the parties, as well argument from the parties' attorneys. [T1.15:11-208:13].
- The following witnesses testified: (1) Ms. Renea Vincent, City Planning and Zoning Director, [T1.18:5-90:25; T1.156:25-163:6]; (2) Ms. Linda Hess and Mr. Jeffrey Novotny, City's traffic experts and licensed professional engineers, [T1.91:13-117:10]; (3) Mr. Todd Crosby, Florida Department of Transportation ("FDOT") access management engineer and licensed professional engineer, [T1.117:17-137:23]; (4) Mr. Ray Page, City's water and sewer expert, [T1.140:20-146:10]; (5) Mr. Rick Aguiar, City's storm water drainage consultant, [T1:146-21-152:23]; (6) Mr. Kevin Powell, City Building Development Director and Floodplain Manager, [T1.153:10-156:8]; (7) Mr. Dave Healy, Morgan's community planning, land use, and development expert, [T1.164:1-182:4]; and (8) Ms. Cyndi Tarapani, Morgan's land use/urban planning expert, [T1.183:13-208:13].
- During Ms. Tarapani's testimony, the Vice Mayor was called away for an emergency at approximately 12:00 a.m. and the Mayor concluded the hearing shortly thereafter, continuing it until the next day. [A2.3533, link #1; T1.209:12-15].

October 27-28, 2021 Public Hearing

- At the continuation of the October 26-27 quasi-judicial public hearing, the City received witness testimony and written evidence from the parties, as well argument from the parties' attorneys. [T2.213:2-635:24].
- The following witnesses testified: (1) Ms. Tarapani [T2.215:22-260:7; T2.627:24-628:19][4]; (2) Mr. Christopher Hatton, Morgan's traffic expert and licensed professional engineer, [T2.260:13-314:5]; (3) Mr. John Miklos, Morgan's environmental expert, [T2.314:25-350:17]; (4) Mr. Weston Rogers, Morgan's landscape engineer, [T2.351:2-353:21]; (5) Mr. Matt Brosman, Morgan's floodplain management expert and licensed professional engineer, [T2.354:3-377:16]; (6) Ms. Kelsey Riley, Morgan's air quality expert and civil engineer, [T2.378:4-392:7]; (7) Mr. Richard Gehring, Petitioner's land use planning expert, [T2.397:1-472:5]; (8) Mr. Carl Wagenfohr, Petitioner's traffic consultant and

[4] The October 27-28, 2021 transcript contains typos at T2.257:3-260:7. The court reporter erroneously listed the person testifying as Mr. Vatikiotis, however, Ms. Tarapani is the correct person testifying.

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automotive racing enthusiast, [T2.473:1-509:15]; and (9) Mr. Peter Dalacos, president of Concerned Citizens of Tarpon Springs, Inc., [T2.510:7-552:17].

- The City received considerable comment from the public. [T2.555:7-626:4].
- Petitioner and Morgan each gave closing arguments. [T2.629:11-635:24].
- City Attorney Trask read Resolution 2021-52 and the quasi-judicial hearing requirements, advising the City that its role here was not to make law but rather to apply law that had already been established, stating that:

  [I]n a quasi-judicial hearing, the [City] is required by law to make findings of fact based upon the evidence presented at the hearing and apply those findings of fact to previously established criteria contained in the Code of Ordinances in order to make a legal decision regarding the application before it. The [City] may only consider evidence at this hearing that the law considers competent, substantial, and relevant to the issues. If the competent, substantial, and relevant evidence at the hearing demonstrates that the applicant has met the criteria established in the Code of Ordinances, then the [City] is required by law to find in favor of the applicant. By the same token, if the competent, substantial and relevant evidence at the hearing demonstrates that the applicant has failed to meet the criteria established in the Code of Ordinances, the [City's] required by law to find against the applicant. [T2.639:24-640:18; T2:649:2-12].
- Following a lengthy open discussion, the City adopted Resolution 2021-52 (conditional residential use permit) by a vote of 3-1. [T2.640:19-647:11].

November 9-10, 2021 Public Hearing

- City Attorney Trask gave the second reading of Ordinance 2021-15 (PDP and rezoning to RPD). [T3.3:10-24].
- City Attorney Trask advised that the quasi-judicial hearing on Ordinance 2021-15 was conducted on October 26-27 and October 27-28 and had been concluded. Mr. Trask also advised that because there had been no change to Morgan's application, the City would not take additional testimony or evidence during this hearing, however, because Morgan had proposed two changes to the language of the Ordinance itself, the City would take testimony and evidence only as to those two changes. Mr. Trask again read the requirements for the quasi-judicial hearing that concluded on October 27-28, 2021. [T3.3:24-6:18].
- City Attorney Trask advised that no witnesses would be permitted to testify via remote methods and that he had previously advised the attorneys for Petitioner and Morgan of that on numerous occasions. [T3.6:20-7:9].
- Petitioner made several motions, including moving for approval to have Petitioner's witnesses testify remotely. [T3.15:21-16:4]. The City Mayor denied Petitioner's motion regarding remote testimony stating, "[i]n regards to the Zoom remote testifying, this is decided it will be treated like any other item. There will be no exceptions to that. A person must be present to testify in order to be examined." [T3.21:14-22:1].

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- Morgan requested two changes to the language of Ordinance 2021-15; specifically to conditions 3 (conservation easement) and 6 (floor elevation) of the PDP. [T3.5:13-13; T3.25:18-28:16; A.2810-2813]. The City objected to the requested change to condition 3, but agreed with the change to condition 6. [T3.36:11-38:2]. See testimony of Ms. Renea Vincent and Ms. Cyndi Tarapani below for further details.
- The City received considerable comment from the public. [T3.46:5-121:12].
- The City held a lengthy open discussion, including hearing further testimony from Ms. Vincent and Ms. Tarapani as to Morgan's two requested changes to Ordinance 2015. [T3.123:3-169:23].
- City Attorney Trask read the quasi-judicial requirements and the six review criteria for plan developments the City must apply pursuant to § 79.00 of the City's Land Development Code ("Code"). [T3.141:24-145:3].
- The City adopted Ordinance 2021-15 (PDP and rezoning to RPD) by a vote of 3-1, with Morgan's requested change to condition 3 but not to condition 6. [T3.141:2-6; T3.170:1-7].
- City Attorney Trask read Resolution 2021-60 (FPD). [T3.170:13-23].
- The following witnesses testified: (1) Ms. Vincent [T3.179:24-229:3; T3:240:18-241:21]; (2) Mr. Ray Page [T3.230:9-232:10]; (3) Ms. Linda Hess [T3.232:18-239:9]; (4) Ms. Tarapani [T3.243:12-269:23]; (5) Mr. Nathan Lee, Morgan's drainage expert and licensed professional engineer, [T3.270:3-273:6]; (6) Mr. Christopher Hatton [T3.273:11-275:12]; (7) Mr. John Miklos [T3.275:22-279:13]; (8) Mr. John Seals, Morgan's traffic expert and licensed professional engineer, [T3.279:20-284:11]; (9) Mr. Carl Wagenfohr [T3.287:7-303:5]; and (10) Mr. Peter Dalacos [T3.303:8-320:9].
- The City received considerable comment from the public. [T3.321:3-331:5].
- Petitioner and Morgan each gave closing arguments. [T3.332:17-342:10].
- City Attorney Trask again read the quasi-judicial requirements and the six review criteria for plan developments the City must apply pursuant to § 79.00 of the City's Code. [T3.356:22-358:14].
- Following extensive open discussion, the City adopted Resolution 2021-60 (FPD) by a vote of 3-1. [T3.359:14-364:5].

City's Witnesses (Staff/Consultants) and Evidence

Ms. Renea Vincent, City Planning and Zoning Director

- Ms. Vincent testified that City staff conducted a very thorough review of the Project for consistency with the City's Comprehensive Plan ("CP") and found that the Project "as presented and condition[ed], does comply with the overall intent and is consistent with the Comprehensive Plan." [T1.23:13-24].
- City staff conducted its concurrent review of Morgan's entire application pursuant to the following review criteria as set out in the City's Code: (1) consistency with the CP; (2) public facilities availability; (3) environmental and historical resources; (4) appropriateness and compatibility of use; (5) PDP, § 79.00; (6) Waivers of Design Requirements, § 83.00; (7) Rezoning, § 207.03; (8) Conditional Use, §

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209.01; and (9) Concurrency, §§ 122.00 and 122.02(B)(3). [A2.2093]. The City's staff reports were entered into evidence. [A2.2014-2068; A2.2080-2101].

- See section II.D. below for a complete discussion of the staff's review and report finding that Morgan's application was consistent with each element of the CP.
- Ms. Vincent testified that City staff reviewed the Project for public facilities capacity, including for potable water, sanitary sewer, solid waste, public schools, hurricane sheltering, libraries, law enforcement, and fire protection, and that Morgan would provide extensive onsite recreation facilities, storm water drainage, and sanitary sewer at its own expense. [T1.23:21-24:18].
- Ms. Vincent testified that the Project's design layout separates the buildings and activities as far away as possible from the eagle's nest located on site. [T1.20:14-18]. Ms. Vincent testified that the Project has extensive buffering from the wetlands on site and approximately 96% of the wetlands would be preserved, sets aside just under 14 acres of significant upland habitat, and only 18% of the total site (less than 12 of the total 64 acres) was being occupied by buildings and parking. [T1.20:18-22:21]. Ms. Vincent testified that the Project exceeds CP compliance and the City's tree removal and mitigation requirements and that Morgan would plant over 6,000 trees to reforest the wetlands. [T1.21:22-22:8]. Ms. Vincent testified the State of Florida has opined that, although there are some identified archeological sites on the site, those are of no concern based on the evidence that already exists, but in an abundance of caution, the City recommended that a level one assessment be conducted prior to any ground disturbing activities, as well as a systematic review of the entire site. [T1.25:3-15].
- Ms. Vincent testified that the site's permitted residential density, based on the CP and future land use ("FLU") designations, is 485 units but the Project will build only 404 units; in other words, the maximum density allowed on site was 15 units per acre but because the Project developed only 6.3 units per acre, it was a reduction in allowable density. [T1.22:12-23:3; T1.41:3-19]. Ms. Vincent testified that the required open space of significant upland habitat was 25% but the Project has 49%. [T1.22:12-23:3].
- Ms. Vincent testified that the general area around the site was occupied by residential, office, business, and light industrial uses, had buffering between the nearby mobile home parks and residential development, and fronted U.S. Highway 19 with all access points off U.S. Highway 19 so no traffic will travel through the adjoining neighborhoods. [T1.25:18-26:3]. Ms. Vincent testified that Morgan requested a waiver for the building height limit of 45 feet up to 53 feet to allow the Project to build vertically instead of horizontally, thereby allowing the Project to set aside additional land for recreation open space preservation. [T1.26:4-14].
- Ms. Vincent testified that City staff recommended approval of the conditional residential use in the CG district (Resolution 2021-52) and rezoning the site to RPD and the PDP (Ordinance 2021-15. [T1.28:14-23]. Ms. Vincent further testified that with respect to Morgan's FLU map amendment for rezoning to RPD, City staff found that, pursuant to § 207.03(C) of the Code, the amendment met the standards of Chapter 163, Florida Statutes. [T1.29-10-14].
- Ms. Vincent testified that Morgan requested two changes to the language of Ordinance 2021-15; specifically to conditions 3 and 6 of the PDP. [T3.36:11-38:2]. Ms. Vincent testified that City staff objected to Morgan's requested edits to the

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conservation easement in condition 3 by deleting the easement's specific details because the easement was for the benefit of the City and staff explicitly drafted that language and included those details in the PDP and FDP. [T3.36:13-37:22]. Ms. Vincent testified that City staff had no objection to Morgan's requested edits to condition 6 by deleting "finished floor elevation" because it was a clarification to accurately reflect the parties' intent. [T3.37:23-38:2].

- Ms. Vincent testified that Morgan's FDP (Resolution 2021-60) was the next step in the planned development process and that the City's review was to ensure the FDP carried out the intent of PDP, and she entered into evidence all previous testimony and written reports of City staff with regard to consistency with CP. [T3.179:24-180:14]. Ms. Vincent testified again that City staff conducted a thorough review of the Project for consistency with the CP and that the Project was consistent, reiterated that staff reviewed the Project and its specific details for (1) consistency with the CP; (2) public facilities availability; (3) environmental and historical resources; and (4) appropriateness and compatibility of use. [T3.184:6-188:7]. Ms. Vincent testified that Resolution 2021-60 included (1) FDP, signed and sealed; (2) U.S. Highway 19 Roadway Improvement Plan; (3) Wetland Enhancement Plan; (4) Architectural Elevations; (5) Draft Conservation Easement (which needed to be finalized and accepted by the City); (6) Environmental Assessment Report; and (7) Hurricane Response Plan. [T3.188:7-16]. Ms. Vincent testified that Resolution 2021-60 contained three general categories of conditions: (1) general advisory (conditions 1-6); (2) items requiring verification prior to permits being issued for construction or building (conditions 7-16); and (3) items requiring verification prior to a certificate of occupancy being issued (conditions 17-27). [T3.188:20-189:3]. Ms. Vincent testified that staff reviewed as part of the FDP the following: site utility plans, lift station design memo, analysis of storm water operations, geotechnical exploration and addendum, ground water monitor report addendum, and drainage report. [T3.189:4-11].
- Ms. Vincent testified that staff recommended the City approve Resolution 2021-60 (FDP) with attachments and conditions. [T3.189:11-14]. Ms. Vincent testified that one such condition of approval required Morgan to receive all extra judicial and agency permits in hand before beginning any work on the site, such as approvals from FDOT and the Southwest Florida Water Management District. [T3.194:12-195:14].

Ms. Linda Hess and Mr. Jeffrey Novotny, traffic experts, licensed professional engineers

- Ms. Hess and Mr. Novotny testified that they conducted an updated traffic study, including intensity/density reduction, access management strategies, demand management commuter assistance, bicycle pedestrian improvements, livable community site design features, AM and PM peak hour trips, traffic volumes, parking provided on site, gap analysis on U.S. Highway 19, and median openings along U.S. Highway 19 in consultation with FDOT. [T1.91:13-93:13]. Ms. Hess testified that the Project "is a safer design than what could be approved [by the City]" and she could not suggest a design safer. [T1.97:22-98:8].

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Mr. Todd Crosby, FDOT access management engineer, licensed professional engineer

- Mr. Crosby testified that the proposed plan with two entrances and exits off U.S. Highway 19 "is the safest [design] for this type of development." [T1.117:17-18; T1.125:9-14].
- FDOT's pre-application review for access permit report was entered into evidence, finding that FDOT approved of the Project as presented with certain conditions/considerations. [A1.457-458].

Mr. Ray Page, water and sewer expert

- Mr. Page testified that the City had enough water capacity to provide service for the Project and, with respect to sanitary sewer overflow into the Anclote River, the Project had been approved by Florida Department of Environmental Protection ("DEP") and met the requirements to ensure overflow would not go into the river. [T1.140:20-22; T1.142:2-6; T1.144:9-14]. Mr. Page testified that Morgan must meet both the City's standards and DEP's rules for reclaimed water. [T3.230:9-24].

Mr. Rick Aguiar, storm water drainage consultant

- Mr. Aguiar testified that storm water would be treated before it drained into the Anclote River, thereby ensuring that no pollution would drain into the river and that the Project met all of the City's storm water requirements. [T1.146:21-147:16]. Mr. Aguiar testified that the Project was safe based on the Federal Emergency Management Agency's ("FEMA") 100-year flood elevation model, even taking into account storm surge and sea level rise. [T1.149:3-150:6].

Mr. Kevin Powell, City Building Development Director and Floodplain Manager

- Mr. Powell testified that the Project met or exceeded FEMA's base flood regulations, the Florida Building Code, and the City's Code. [T1.153:10-12; T1.154:10-156:7].

Morgan's Witnesses and Evidence

Mr. Dave Healy, community planning, land use, and development expert

- Mr. Healy testified that he had practiced land planning for 52 years, the last 44 years in Pinellas County, working primarily for and with local governments. [T1.164:1-14]. Mr. Healy discussed in his experience how to understand and identify the respective roles of the CP and the Code, opining that the CP was akin to a policy document whereas the Code was a regulatory document, stating that the "[C]ode is designed to administer and implement the [CP]." [T1.165:3-11]. Mr. Healy quoted language from the Florida Community Planning Act, Chapter 163, Florida Statutes, and explained that the goals, objectives, and policies of the CP were "not intended or designed to be applied singularly or as an individual absolute, but rather again, as guidelines requiring a holistic and balanced approach to their consideration." [T1.166:18-167:1].

Ms. Cyndi Tarapani, land use/urban planning expert

- Ms. Tarapani testified that she had over 40 years' experience as an urban planner, in both the public and private sectors. [T1.183:13-15; T1.185:3-5]. Ms. Tarapani

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testified that the Project "meets all of the dimensional requirements contained in the Land Development Code with one exception … we are asking for a waiver to increase the five residential buildings from 45 feet to 53 feet … allow[ing] us to have few buildings, minimize the number of building and cluster them in the center of the site to provide for greater open space, the separation from the eagle's nest and from the river." [T1.190:3-13].

- Ms. Tarapani testified that the CP required the site preserve a minimum of 30% (nine acres) of significant upland habitat but that the Project would preserve almost 14 acres. [T1.192:3-10].
- Ms. Tarapani testified that, although the City's Code would allow buildings to be within 50 feet of the river without a variance or waiver, the Project would not have any buildings or parking adjacent to the river, with the closest building being 175 feet away and the remaining buildings at least 350 to 450 feet from the river. [T1.192:19-193:4]. Ms. Tarapani testified that Morgan had obtained a federal eagle permit and that no buildings would be within 660 feet of the eagle's nest. [T1.193:5-16].
- Ms. Tarapani testified that only 12 acres on the site would be developed, the remaining 52 acres would be maintained as open space, recreation, landscaping, eagle protection, and storm water management. [T1.195:13-21].
- Ms. Tarapani testified that the Project was consistent with the CP/FLU and the City's Code and included public art, a pedestrian circulation system, significant upland habitat preservation, recreation open space, buffering setbacks for the eagle's nest, significant wetlands preservation, a walkable community design, a bike share program, extensive tree replacement, solar panels, sewer and reclaimed water at Morgan's expense, and a hurricane shelter study that met the City's requirements. [T2.215:22-225:23].
- Ms. Tarapani testified that City staff listed several conditions Morgan must abide by to build the Project, including contributing $444,000 to the Land Preservation Fund, expanding the recreation open space, providing a conservation easement, providing a post-development eagle management plan, providing more detail regarding removal of invasive and exotic species, elevating the building height, submitting a transportation management plan, evaluating sea level rise on the site, and providing an archeological field survey of the site. [T2.226:18-230:22]. Ms. Tarapani testified that Morgan would pay the City $2.9 million in impact fees and it was estimated that the Project would generate $1.4 million annually in ad valorem taxes. [T2.231-8-15].
- Ms. Tarapani testified that Morgan was requesting two changes to the language of Ordinance 2021-15; specifically to conditions 3 and 6 of the PDP. [T3.5:13-13; T3.25:18-28:16; A.2810-2813]. Ms. Tarapani testified that Morgan was requesting the specific details of the conservation easement in condition 3 be deleted because this was only the preliminary plan (PDP) and the City may ultimately approve of a conservation easement with different specifics when it decides on the final plan (FDP). [T3.25:3-26:19]. Ms. Tarapani testified that Morgan was requesting the wording "finished floor elevation" be deleted from condition 6 because it may be misinterpreted to mean that Morgan must elevate the buildings to 4 feet above the flood zone, when only 2 feet of elevation was required. [T3.26:23-28:13].

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- Ms. Tarapani testified and detailed how the FDP met all the requirements of a multifamily use within the RPD pursuant to § 78.01 of the Code, as well as all the review criteria of a FDP pursuant to § 82.00 of the Code. [T3.243:12-248:10]. Ms. Tarapani testified further about the FDP conditions of approval and the timing of each permit for construction and occupancy. [T3.248:10-268:25].
- Ms. Tarapani's report was entered into evidence. [A1.23-80].

Mr. Christopher Hatton, traffic expert, licensed professional engineer

- Mr. Hatton testified that he had been conducting traffic impact studies in the Tampa Bay area for 30 years. Mr. Hatton testified that he performed a transportation management plan and the Project incorporated all eight of the management strategies listed in the City Code [§ 122.11.03(A)] [the remaining four strategies were inapplicable], including reducing vehicular traffic through carpooling, intensity and density reduction, and co-working space on site. [T2.260:13-21; T2.262:23-263:11; A1.393]. Mr. Hatton testified that he also conducted a gap study and the Project's traffic design with two entrances off U.S. Highway 19 was the safest approach. [T2.278:12-16; T2.300:11-15].
- Mr. Hatton's report was entered into evidence. [A1.392-399].

Mr. John Miklos, environmental expert

- Mr. Miklos testified that he had been a professional environmental consultant for 29 years. [T2.314:25-10]. Mr. Miklos testified that he conducted a variety of field studies on the site, including wildlife surveys with an emphasis on tortoises and eagles and standard environmental assessments with a focus on vegetative analysis and wetland function analysis. [T2.314:10-15]. Mr. Miklos testified that, pursuant to the Florida Fish and Wildlife Conservation Commission's ("FWC") requirement, they would survey the site prior to development and relocate any protected gopher tortoises. [T2.317:9-21].
- Mr. Miklos testified that, in evaluating the site for two years, they had not observed eagles on the site and, in consulting with FWC and Audubon's Eagle Watch, they had confirmed that the two eagle nests were inactive. [T2.318:14-319:1]. Mr. Miklos testified that they obtained a permit from the U.S. Fish and Wildlife Service to conduct work within the nest zones, which required them to monitor the nests during nesting season to ensure none of the activities on the site were disturbing the eagles, if they were in fact there nesting. [T2.319:13-320:1]. Mr. Miklos testified that they had implemented a five-year post-construction bald eagle management plan that included educational information to all residents and some use restrictions, such as prohibiting fireworks and any loud noises that could deter eagles from using the nests. [T2.320:16-23].
- Mr. Miklos testified that the wetlands and buffers on site were in a greatly degraded state and their wetlands enhancement plan called for removal of all noxious, nuisance vegetation, replanting of native species plants, and subjecting those native plants to a long-term monitoring and maintenance plan. [T2.321:13-23].
- Mr. Miklos testified that "the development of the site will actually create additional habitat for Sandhill cranes, by creating the large storm water pond … by fixing these wetlands that have been trashed for decades, you will actually create a

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situation where wildlife will have true habitat to utilize that they currently don't." [T2.348:12-22].

- Mr. Miklos testified that the trees would be planted in the wetlands because they were precluded from planting trees and shrubby vegetation within the power line easements because of the maintenance, safety, and fall requirements of the various utilities. [T3.275:22-277:11].
- Mr. Miklos's reports were entered into evidence. [A1.313-371].

Mr. Weston Rogers, landscape architect

- Mr. Rogers testified that the Project would omit high water use material, prioritize the use of native vegetation and drought tolerant materials, and be served by reclaimed water for irrigation in lieu of potable water. [T2.351:2-12].

Mr. Matt Brosman, floodplain management expert, licensed professional engineer

- Mr. Brosman testified one benchmark to help understand how a site may experience coastal flooding in existing conditions was the Coastal High Hazard Area ("CHHA") by using a model developed by the National Oceanic and Atmospheric Administration. [T2.354:3-355:3]. Mr. Brosman testified that development was not prohibited in the CHHA and, in fact, the Project site and approximately 60% of the City of Tarpon Springs were located in the CHHA. [T2.355:4-8]. Mr. Brosman testified that another benchmark to help understand a site's flood risk was FEMA's 100-year flood elevation model, which was recently recalculated with sea level rise for the Tampa Bay region in 2017 and was known as the special flood hazard area. [T2.355:11-25]. Mr. Brosman testified that development within the FEMA floodplain was likewise not prohibited. [T2.355:20-22]. Mr. Brosman testified that site vulnerabilities, such as the CHHA, the FEMA floodplain, and the potential for storm surge and sea level rise were not uncommon in Florida. [T2.356:14-20].
- Mr. Brosman testified that the Project would elevate the buildings and major infrastructure above both the CHHA and the FEMA special flood hazard area, which was triple the Florida Building Code requirement. [T2.358:6-9; T2.361:7-11].
- Mr. Brosman's report was entered into evidence. [A1.403-406].

Ms. Kelsey Riley, air quality expert and civil engineer

- Ms. Riley testified that the site was located within Pinellas County, which was within the air quality threshold deemed safe from a health and welfare standpoint. [T2.378:4-8; T2.386:7-17].

Mr. Nathan Lee, drainage expert, licensed professional engineer

- Mr. Lee testified that he had been practicing for approximately 15 years. Mr. Lee testified that, to prevent pollution running into the Anclote River, the storm water would be filtered through multiple ponds before it was discharged south of the site, not into the river. [T3.270:3-272:21].

Mr. John Seals, traffic expert and licensed professional engineer

- Mr. Seals testified that he had been practicing for 35 years. Mr. Seals testified that the FDOT permit Morgan was required to have will be in three separate permits,

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specifically for construction, driveway connection, and drainage, and that once FDOT issued a notice of intent, Morgan would be required to notify any affected residents of the construction. [T3.279:24-284:11].

Petitioner's Witnesses and Evidence

Mr. Richard Gehring, land use planning expert

- Mr. Gehring testified to his extensive experience, which included 46 years of land use planning and development in Florida. [T2.397:1-400:20; A1.777]. Mr. Gehring testified that he was appearing to address Morgan's request for a conditional residential use in the CG district and one of his principal complaints with the Project was that it was located in the CHHA. [T2.397:3-6; T2.455:1-4]. Mr. Gehring testified that the site's current allowable residential density was zero, unless and until the City conducted a compatibility analysis of Morgan's conditional use request and approved it; thus, until that occurred, any density on the site was considered an increase in density in the CHHA pursuant to the City's CP. [T2.401:17-402:7]. Mr. Gehring testified that, in every aspect, the conditional residential use was not consistent with the City's CP. [T2.405:8-14]. Mr. Gehring testified that, based on Pinellas County's Comprehensive Plan and the County's version of a commercial general district, secondary residential use was not allowed in the CHHA; therefore, because the site here was in the CHHA, the City could not conduct a compatibility analysis for residential use in the CG. [T2.406:1-10; T2.463:12:18; A2.2454].
- Mr. Gehring's reports were entered into evidence. [A1.777-822; A2.2452-2568; A2.3248-3252].

Mr. Carl Wagenfohr, traffic consultant, automotive racing enthusiast

- Mr. Wagenfohr testified that he was an "automotive racing enthusiast" and had extensive experience racing and driving cars as well as driving boats. [T2.473:1-3; T2.476:19-477:7]. Mr. Wagenfohr opined that Morgan's transportation management plan had only one quantifiable component that would reduce single-applicant vehicle travel to and from the Project; that component being a reduction in density/units on the site, which Morgan claimed would result in approximately 440 fewer trips onto U.S. Highway 19. [T2.480:7-15]. Mr. Wagenfohr testified that the Project was projected to produce more than 2,000 daily trips on U.S. Highway 19. [T2.480:15-18]. Mr. Wagenfohr testified about the bicycle, pedestrian, and bus traffic, as well as gaps in timing between vehicles on U.S. Highway 19 near the southern entrance/exit of the Project. [T2.482:14-487:4]. Mr. Wagenfohr testified that he did not perform his own gap study for this Project, nor had he ever performed a gap study. [T2.507:19-24]. Mr. Wagenfohr testified that, based on his personal experience, although Morgan's plan with two entrances/exits and an offset, left U-turn configuration was safe, the safest traffic solution here would be to build an overpass from the Project, thereby eliminating all conflict points on U.S. Highway 19. [T2.494:16-24; T2.502:5-14].
- Mr. Wagenfohr testified at length about FDOT's Guidebook in evaluating the quality/level of service of alternative means of transportation, such as bicycle, pedestrian, and bus, and opined that those modes of transportation along U.S. Highway 19 were deficient in every respect. [T3.287:7-291:5]. Mr. Wagenfohr

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testified again about the specific aspects of Morgan's transportation management plan, such as the gap analysis, and why he believed it was unsafe. [T3.291:5-302:8].

- The FDOT Guidebooks were entered into evidence. [A2.2970-3226].
- Mr. Wagenfohr's report was entered into evidence. [A1.823-838].

Mr. Peter Dalacos, president of Concerned Citizens of Tarpon Springs, Inc.

- Mr. Dalacos testified about his extensive experience over the years trying to save and protect this site from any development for all the residents of Tarpon Springs to use as a park. [T2.510:7-515:17]. Mr. Dalacos testified that he lived adjacent to the site "through the connection of water . . . I swim there, I fish there, I've grown up there. Where I live now, I can walk a block and take my kayak and go kayaking . . . [a]nd that's what we're fighting for this land to become a public park for all of our citizens to enjoy for them to be able to swim, fish or kayak on the river, to walk through wooded trails and enjoy the nature around them, to be able to bring their families to a place of serenity, to learn more about the natural world around them, and a place to reflect and refresh themselves from the hectic world around them." [T2.515:1-9; T2.516:6-14].
- Mr. Dalacos testified at length about the historical and archaeological resources on the site. [T2.518:9-532:14].
- Mr. Dalacos testified that although he was a City Commissioner from 2004 to 2010, during that time he did not ask for the topic of the City acquiring this site to turn it into a public park to be placed on the Commission agenda for discussion. [T2.551:9-552:7].
- Mr. Dalacos testified that the Project was not consistent with the City's CP for numerous reasons, including that it did not satisfy the following policies: (1) Policy 1.1.11 because it was not a mixed-use development; (2) Policy 1.1.1 because the wetlands on site were not for the public's benefit; (3) Policy 2.2.1 because it was not a low-density development along the Anclote River; (4) Policy 3.4.2 because it increased density in the CHHA; (5) Policy 1.6.3 because it did not conserve and preserve endangered and threatened species; (6) Policy 1.6.4 because the overall habitat was not being preserved; (7) Policy 1.5.2 because it was not mitigating archeological sites; (8) Policies 1.10.1 and 1.10.2 because it was neither workforce nor affordable housing; (9) Policy 1.5.1 because the recreational facilities were not for the public; (10) Policy 1.2.1 because it did not limit development in the CHHA; (11) Policy 1.3.1 because the City had not coordinated and mitigated development and service impacts with Pasco and Pinellas Counties; and (12) Policy 3.1.4 because it was in the CHHA and created a hurricane shelter deficit. [T3.303:14-316:12].
- Mr. Dalacos's report was entered into evidence. [A1.839-864].

Mr. Drew Roark, traffic expert, licensed professional engineer

- Mr. Roark did not appear in person to testify, however, his report was entered into evidence. [T3.17:14-16; T3.23:9-18; T3:176:6-15; A2.3227-3247].

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B. Consistency With the City's Comprehensive Plan and *Baker*

As a threshold matter, the majority of Petitioner's arguments that the City departed from the essential requirements of law in adopting the Approvals center on Petitioner's contention that the Approvals are inconsistent with the City's CP/FLU. To that end, Petitioner cites extensively to *Baker v. Metro. Dade Cty.*, 774 So. 2d 14 (Fla. 3rd DCA 2000), stating that *Baker* is "directly on point and controls." Petitioner, however, is mistaken as *Baker* is distinguishable for several reasons.

In *Baker*, the petitioners objected to the county's approval of a development application and sought certiorari review of the circuit court's decision upholding the county's approval. 774 So. 2d at 16. The subject property consisted of four adjacent lots; lot one was zoned commercial, lots two and three were zoned residential, and lot four was zoned residential but was protected from development because it was on the fringe of the river and mangroves. *Id.* The property owners applied to the county (1) to build a self-storage facility on lot one (commercial), (2) for a "special exception" to increase the size of the storage facility beyond what could be built on lot one, and (3) for an "unusual use" permit to use lots two and three (residential) for storage facility parking (commercial parking) and landscaping. *Id.* at 16-17. Despite county staff concluding that the proposed commercial parking within a residential zone (lots two and three) would be inconsistent with the comprehensive plan, staff recommended approval and the county approved it because it would be "fundamentally unfair to deny this application due to the fact that a portion of the RU [residential] zoned portion of the site [lot 4] is a part of the environmentally sensitive Oleta River and mangroves." *Id.* at 16-18. On appeal, the property owners argued that the petitioners were precluded from challenging the development order as inconsistent with the county's comprehensive plan by certiorari review because the sole method for bringing such a challenge was through § 163.3215, Florida Statutes. *Id.* at 17. The county argued that, based on

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fundamental fairness (which was a judicial question), the county's code empowered quasi-judicial boards with inherent powers of a court and therefore the board could invalidate zoning plan designations and replace them with whatever designation the board saw fit. *Id.* at 19.

The Third District Court of Appeal held that (1) the petitioners need not challenge the development order as being inconsistent with the comprehensive plan through § 163.3215, Florida Statutes, because the county admitted the application was inconsistent; (2) the board was required to deny the application because the unusual use applied for was to allow commercial parking in a residential zone, where the code did not allow such use (only noncommercial parking parking); (3) the board was required to deny the application because it was inconsistent with the comprehensive plan and the county admitted it; and (4) the circuit court failed to apply the correct law when it concluded that the county's quasi-judicial board had the authority to reject a zoning plan designation on the property and determine which designation applied. *Id.* at 18-20.

Here, the record reflects that City did not approve land development orders that were inconsistent with the CP/FLU or pick and choose whatever CP/FLU provision or zoning designation it wanted to. In fact, the opposite is true. City staff/consultants applied the required CP/FLU provisions, policies, and designations in its review; found that the Approvals were consistent with the CP/FLU; and stated the Approvals were consistent with the CP/FLU explicitly and repeatedly. Also, because the City found the Approvals were consistent with the CP/FLU, unlike the petitioners in *Baker*, Petitioner is precluded from challenging the Approvals as being inconsistent with the CP/FLU in a certiorari petition. As we stated in our March 25, 2022 Order and as Morgan correctly notes, Petitioner is required to bring such a challenge, as the sole method, as an "aggrieved or adversely affected party" pursuant to § 163.3215, Florida Statutes. However, as with the issue of standing, in the interest of judicial efficiency and to move this matter along,

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the Court will address the merits of Petitioner's arguments that the Approvals are inconsistent with the CP.

C. "Primary" Residential Conditional Use Permit

Petitioner argues that Resolution 2021-52 is void because "[t]he City applied the wrong procedure and law by approving the conditional use of a primary residential use in the Commercial General (CG) district where only a secondary (supporting) residential use could be approved." Citing to Policy 2.4.3 of the City's CP/FLU, Petitioner contends that "[w]hile a residential use may be allowed as a secondary or *supporting* role through a **conditional use** approval, no similar procedural vehicle allows the approval of residential use as the primary use in CG." (Emphasis in original). Petitioner argues therefore that Morgan "would need to apply for a future land use map amendment pursuant to Section 207.03(C), Code[.]" As the Court interprets it, Petitioner in essence alleges that Policy 2.4.3 of the CP/FLU provides for a blanket prohibition against any secondary use on a CG site. In other words, Petitioner argues that a primary use is the *only* use allowed on a CG site and a secondary use is strictly prohibited, *unless* it supports a primary use on the same site. Thus, Petitioner asserts that the *only* way to allow a secondary use on a CG site alone (without a corresponding primary use) is to amend the site's zoning designation in the CP/FLU. Morgan counters that both the Code and the CP/FLU allow for a secondary residential use alone in the CG. We agree.

In pertinent part, Policy 2.4.3 establishes primary and secondary uses, as well as density standards for CG districts. Primary uses "shall include Office, Personal Service/Office Support, Retail Commercial, Commercial/Business Service, Transient Accommodation, Wholesale/District, Storage/Warehouse." CP/FLU Policy 2.4.3(d). Secondary uses "shall include Commercial Recreation, *Residential (requires conditional use review for compatibility)* … [and] Residential Use shall not exceed 15 units per acre [in density][.]" CP/FLU Policy 2.4.3(e) and (f)

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(emphasis added). Primary uses are defined as "[t]he predominate land use … [t]he main use of land or structures, as distinguishable from a secondary use." CP/FLU § VI.(9); Code § 241.00(163). Secondary uses are defined as uses that "typically serve support functions to the primary land uses and are of secondary importance in terms of the area having zoning approval." CP/FLU § VI.(11).

Contrary to Petitioner's assertion, these provisions do not prohibit a secondary use alone on a CG site, nor do they require an amendment to the CP/FLU to change the site's designation to allow that secondary use. In fact, based on this Court's review, no provision in the CP/FLU or Code prohibits a secondary use alone on a CG site or mandates that the site's zoning designation be amended to allow for a secondary use alone. As stated above, secondary uses *typically support* primary uses on a CG site. But that does not mean that secondary uses *must only support* primary uses. Simply put, neither the CP/FLU nor the Code prohibit a residential secondary use alone on a CG site. And, contrary to Petitioner's assertion, the CP/FLU and Code do indeed provide a procedural vehicle in which the City may approve a residential secondary use alone on a CG site. That procedure (discussed in detail below) is a conditional use review for compatibility through the established approval procedures, provided that the density does not exceed 15 units per acre. CP/FLU Policy 2.4.3(e) and (f); Code § 209.01. Therefore, the site's zoning designation need not be amended in the FLU map to allow for a residential secondary use. Petitioner's argument is without merit.

Here, Morgan submitted an application to the City for a conditional use permit to develop a 404-unit multifamily residential project on the vacant site which was designated as CG pursuant to the CP/FLU. [A1.10-13]. Section 209.00(A) of the Code states that "[c]onditional uses shall be established by the use restrictions of the various zoning districts in this Code and shall be subject to the approval procedures of this section." Conditional uses are defined as "[u]ses which are not

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permitted by right in a specified zoning district but which when subjected to a review according to established standards may be approved subject to certain restrictions and safeguards." Code § 241.00(36). One type of conditional use permitted in the CG district is "Multifamily Dwellings to a maximum density of 15 units per acre." Code § 25.11(C)(11). In reviewing and approving a conditional use request, such as the one Morgan submitted, the City must apply the established standards enumerated in the Code. The Code states that "[n]o conditional use ... shall be recommended for approval or receive a final action of approval unless a positive finding, based upon substantial competent evidence presented at a public hearing held by the [City] is made on each of the following standards:

> (A) Conformance with the requirements of this Code.
> (B) The use to which the property may be put is appropriate to the property in question and is compatible with existing and planned uses in the area.
> (C) The conditional use is consistent with the goals, objectives, and policies of all Elements of the City Comprehensive Plan.
> (D) The conditional use will not result in significant adverse impacts to the environment or historical resources.
> (E) The conditional use will not adversely affect adjoining property values.
> (F) The conditional use will not adversely impact nor exceed the capacity or the fiscal availability of the City to provide available public facilities, including transportation, water and sewer, solid waste, drainage, recreation, education, fire protection and emergency services, police protection, library service, and other similar public facilities. Compliance with the adopted Levels of Service standards can be demonstrated if necessary.
> (G) The conditional use shall provide for efficient and orderly development considering the impact upon growth patterns and the cost to the City to provide public facilities.

Code § 209.01. "Competent substantial evidence is evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred .... [S]uch relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Maroone Chevrolet, LLC v. Alvarado*, 344 So. 3d 459, 463 (Fla. 4th DCA 2022).

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As detailed above, the record reflects that City staff conducted a conditional use review of Morgan's residential conditional use request as required during the October 26-27, 2021 and October 27-28, 2021 public hearings. The City was required to make a positive finding, based on competent substantial evidence, that Morgan's conditional residential use request met the seven compatibility standards outlined in § 209.01, provided that the density did not exceed 15 units per acre. The City received extensive testimony and written evidence from City staff/consultants and Morgan's witnesses demonstrating that the conditional residential use permit met or exceeded those compatibility standards and, although the maximum density allowed on site was 15 units per acre, the Project actually reduced the allowable density because it would only develop 6.3 units per acre. The City also received opposing testimony and written evidence from Petitioner's witnesses.

Given the record evidence from City staff/consultants and Morgan's witnesses, the City could reasonably accept such evidence as adequate to conclude that a conditional residential use permit met the compatibility standards in § 209.01. *Maroone Chevrolet, LLC*, 344 So. 3d at 463. Therefore, the City applied the correct law in approving Morgan's multifamily residential conditional use request in adopting Resolution 2021-52. *Heggs*, 658 So. 2d 530. Petitioner has failed to establish that the City committed any error, let alone an error constituting a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs*, 436 So. 2d at 95-96.

With respect to Petitioner's argument that Resolution 2021-52 is void because Morgan was required to apply for a FLU map amendment pursuant to § 207.03(C) of the Code, Petitioner again is mistaken. Section 207.03(C) applies to "Comprehensive Plan Amendments" and mandates that the "amendment meets the standards of F.S. Ch. 163, Part II[.]" An amendment is defined as "[a] change to the designations or boundaries of the Official Zoning Atlas or The Future Land Use Map

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Series, or a change to the text of this Code or the Comprehensive Plan." Code § 241.00(7). Morgan applied for a conditional residential use permit in the CG district. A conditional use request reviewed for compatibility is not a request to amend the CP. As discussed above, a conditional use request is simply a request for approval for a use that is "not permitted by right in a specified zoning district" – here, a residential use in the CG district. Code § 241.00(36).

D. "On Balance" Comprehensive Plan Consistency Standard

Petitioner argues that the Approvals are void because the "City applied an erroneous 'on balance' Comprehensive Plan consistency standard to allow admitted inconsistencies which was both a departure from the essential requirements of law and invalid as an unconstitutional delegation of legislative power." Specifically, Petitioner argues that "City staff admitted throughout the 'Staff-Report Tarpon Springs Comprehensive Plan Consistency' and during the October 26, 2021 hearing that the assessment of consistency was based on an 'on balance' approach, identifying specific policies 'as policies of concern with staff analysis provided for in italics.'" Petitioner contends that "[t]his method also directly conflicts with the [Code], which states, "[i]nconsistency exists when a development order is in conflict with the goals, objectives, and policies of the Comprehensive Plan." Morgan counters that "[a]lthough there was discussion at the hearings concerning 'balancing,' the record establishes that the [City] found that the Project was consistent with **all** applicable Goals, Objectives, and Policies of the Comprehensive Plan, based upon the competent substantial evidence supplied[.]" (Emphasis in original). We agree.

Section 4.00 of the Code states, in pertinent part, "[a]ll requests for development order approval must comply with the [Code], must further the adopted Comprehensive Plan, and shall be reviewed for consistency with the goals, objectives, and policies contained within the following elements of the adopted Comprehensive Plan:

(A) Future Land Use Map Series.

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(B) Future Land Use Element.
(C) Historic Resources Element.
(D) Utilities Element and all Sub-Elements.
(E) Coastal Management and Conservation Element.
(F) Traffic Circulation Element.
(G) Capital Improvements Element.
(H) Housing Element.
(I) Recreation and Open Space Element.
(J) Intergovernmental Coordination Element.
(K) Plan Administration Element.

"Consistency" is defined as "to further the intent of the Comprehensive Plan." Code § 121.00(B).

As demonstrated in all of the City staff reports, the record reflects that staff conducted an extensive review of the Project for compliance with the Code and for consistency with the goals, objectives, and policies of the CP elements outlined in § 4.00. [A2.2014-2068; A2.2080-2101]. The City staff's CP consistency report provides an overview of the relationship between CP goals, objectives, and polices as follows:

> Goals are not designed to be implemented or enforced on a daily basis. Instead, goals are intended as the long-range end toward which the City desires to be directed. Objectives serve as a benchmark or interim measure with which progress toward the goals can be identified. The objectives tend to be specific, and are often measurable by a completion or implementation date. Policies represent the actual programs, activities, or means which are conducted to achieve a desired end.

[A2.2020]. The report states, "[f]or each element staff has made an overall finding of the project's consistency with that element and discussion is provided for any *'policies of concern' where full consistency is not obvious or the policy merits additional discussion for clarity of staff's findings*." *Id.* (Emphasis added). Then, the report lists every CP element analyzed, the corresponding CP policy, and a discussion of any policies of concern – in other words, where full consistency is not obvious or merits additional discussion for clarity of staff's findings. [A2.2019-2029]. For each CP element, staff concluded that the Project was "on balance" consistent with that element. *Id.*

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Ms. Vincent, City Planning and Zoning Director, explained the terms "on balance" and "policies of concern" as follows:

> [I]n applying the [CP], we have to look at every element, which we have done. We've looked at all the goals, objectives and policies. There are going to be competing – I can't imagine a project that wouldn't have competing policies in the [CP] whereby you may not be able to 100 [%] meet the litmus of the literal interpretation of a policy. So, what I think my job is to do is to bring balance to that review. And I have called that out in the policy review that we did. I've identified those policies that I think are of concern and where I think those stand. But on balance, after reviewing all the information, I think that this project is consistent with our [CP] and our [Code].

[T1.64:15-65:4].

The City staff's full CP consistency report reflects that staff conducted a thorough review of Morgan's Project for consistency with the CP and concluded that it was indeed consistent. In the interest of brevity, however, the Court will only provide a few examples of staff's CP evaluation demonstrating the analysis, necessity for balancing policies, and "policies of concern" listed in italics.

> FUTURE LAND USE ELEMENT
>
> On balance, staff finds the [Project] consistent with the Goals, Objectives and Policies of the Future Land Element. The following policies are identified as polices of concern with staff analysis provided for in *italics*:
>
> Policy 1.1.11 Require large scale development / redevelopment (40 acres or more) to adhere to mixed use and livable community objectives and policies set out in Goal 4 (now Goal 5) of this element.
> • *The intent of this policy was to push large scale development projects to include uses that address daily needs of living and employment in order to reduce reliance on vehicle trips.*
> • *While not a mixed-use project, the project does incorporate amenities and services that seek to reduce external trips and promotes livable communities' objectives. Developer should provide for services/amenities to compensate for singularity of use and reduce required external trips via automobile. Van circulator, ride sharing services, bike share are examples.*

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• *Direct application of this policy, at this location, must be balanced with competing policies of the Coastal Element which seek to preserve wetland and upland habitat resources. Requiring a true "mixed use" center at this location may require additional land occupation and reduced preservation of wetlands and upland habitat. As currently proposed 96% of wetlands and nearly 14 acres of significant upland habitat are being preserved.*

COASTAL ZONE (COASTAL MANAGEMENT) ELEMENT

On balance, staff finds the [Project] consistent with the Goals, Objectives, and Policies of the Coastal Management portion of the Coastal Zone Element. The following policies are identified as polices of concern with staff analysis provided in italics:

Policy 1.1.1 Evaluate all wetland areas for potential preservation designation with a goal of "no net loss of wetlands". Development projects which may affect wetland areas must meet the following criteria and must also be consistent with Policies 1.6.6 and 1.6.7 of the Conservation Goals Objectives and Policies:

1. An overall public benefit is provided by the development and the mitigation plan provides an overall improvement to water quality within the applicable watershed.
2. Proposed mitigation shall be in the following order of priority.

a. Mitigation on the same site of the development. b. Mitigation within the Planning Area Boundary. c. Mitigation within the applicable watershed as identified by Southwest Water Management District.

3. Mitigation plans which rely on 2.c. above shall also be required to perform some mitigation either on site, adjacent to the development, or within the Planning Area that improves water quality and/or wildlife habitat.

• *The entire site contains 22.08 acres of wetlands. The proposed project will impact less than 1 acre of isolated interior wetlands and will enhance the remaining wetlands with removal of exotic species and replanting. An initial UMAM (Unified Mitigation Assessment Methodology) evaluation has been conducted indicating a functional loss of .39 acres and a functional gain of 1.77 acres with the onsite wetland enhancement plan. The wetland and wetland buffer enhancement plan includes planting of over 6,000 trees.*

Policy 3.4.2 Implement a policy of "no net increase" in residential density within the Coastal High Hazard Area, taking into account the cumulative effects of all previous land use amendments affecting residential density within the CHHA, as most currently defined. A tracking mechanism to implement this policy shall be implemented within the Future Land Use Element.

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• The proposed project is not proposing to increase allowable density, and is building well below the established density allowed by the Future Land Use map designations.
• The intent of this policy was to recognize the total allowable number of residential units throughout the City in the CHHA, based upon the future land use map designations in place. This would essentially create a "density pool" in the CHHA that could theoretically be shifted around as long there was no net increase based upon future land use map designations. This would allow one property to be increased in density, as long as another property was similarly decreased in density and the units balanced out.
• It is staff's opinion that this policy does not apply in this situation.

COASTAL ZONE (COASTAL CONSERVATION) ELEMENT

On balance, staff finds the [Project] consistent with the Goals, Objectives, and Policies of the Coastal Conservation portion of the Coastal Zone Element. The following policies are identified as polices of concern with staff analysis provided in italics:

Policy 1.6.6 Preserve / conserve wetlands and areas of significant upland habitat as defined in Future Land Use Policy 1.1.12 in accordance with specific regulations related to wetlands protection, preservation of open space, planned development performance zoning, transfer of density/intensity rights, buffers and setbacks, tree protection, clustering of units within the least environmentally-sensitive areas, and other techniques adopted in the Land Development Code.
• The project is clustered within the least environmentally sensitive portions of the site utilizing disturbed areas to the fullest extent possible before encroaching into natural upland habitat and wetland habitat.
• The project will preserve significant upland habitat at a greater rate than is required by Policy 1.1.12 of the Future Land Use Element (project is preserving 46% of significant upland habitat).
• There will also be improvements in the overall habitat through wetland restoration, removal of invasives and replacement tree plantings.
• The applicant has committed to placing 6.46 acres into Recreation Open Space. Staff has recommended that the entire area identified as significant upland habitat (nearly 14 acres) be placed in the Recreation Open Space future land use map category.
• Staff is further recommending a conservation easement over the ROS designated lands and all preserved significant upland habitat and limit activities which can take place to passive walking trails and other recreation elements specifically identified on the Preliminary and Final Planned Development Plans.

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Policy 1.6.7 Wetlands that are not designated as "Preservation" or "Recreation Open Space" on the Future Land Use Map shall require a future land use amendment to either of these two designations prior to issuance of any construction permits for adjacent upland development.

• *Existing wetlands are already designated as Preservation. The applicant will [provide] verified wetland survey data and Preservation boundary will be updated to reflect the current location of the wetlands.*

RECREATION OPEN SPACE ELEMENT

On balance, staff finds the [Project] consistent with the Goals, Objectives, and Policies of the Recreation Open Space Element. The following policies are identified as polices of concern with staff analysis provided in italics:

Policy 1.1.2 Provide additional facilities to meet the Level of Service standards adopted herein for existing residents and visitors.

• *Currently the City is only deficient in mini-park facilities. The applicant is providing onsite pool, picnic, playground, passive recreational trails and dog park facilities to meet the needs of its residents. In addition, water access sites for canoe/kayak launching are also provided. Applicant has committed to a donation of $444,000 to the City's Land Preservation Fund in addition to paying all required Recreation Impact Fees (estimated at $393,492).*

Policy 1.5.1 The City shall promote preservation of environmentally sensitive and scenic areas for passive recreational uses.

• *The total project site consists of 64 acres (22 acres of wetlands and 42 acres of uplands) The project proposes to preserve 13.89 acres of significant upland habitat and over 21 acres (96%) of wetlands on the site. Additionally, the overall plan incorporates drainage and [storm water] features into the overall aesthetic design of the site and provides for passive recreational trails and other low impact recreation uses. Only 11.77 acres of the total 64 acres (approximately 18.5%) will be occupied by buildings, parking, or other impervious surfaces.*

Policy 1.5.2 Land designated as Recreation/Open Space by the Future Land Use Map shall be protected from the establishment or expansion of incompatible uses.

• *The applicant proposes to designate 6.5 acres of developable upland habitat to the Recreation Open Space land use category. Staff has requested that the entire 13.89 acres of upland habitat designated to be preserved be officially designated with the Recreation Open Space land use map category. Further, staff is*

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> *recommending Conservation easements are requested to further limit recreation uses in these areas to passive trails and similar uses.*
>
> Policy 1.5.3 Preserve environmentally sensitive open spaces in perpetuity through conservation easements.
> • *The applicant proposes to designate 6.5 acres of developable upland habitat to the Recreation Open Space land use category. Staff has requested that the entire 13.89 acres of upland habitat designated to be preserved be officially designated with the Recreation Open Space land use map category. Further, staff is recommending Conservation easements [] to further limit recreation uses in these areas to passive trails and similar uses.*

[A2.2020-2029].

The record reflects that the City conducted an extensive review of Morgan's Project and concluded that it was consistent with all elements of the CP. City staff, experts in land development and zoning, used the term "on balance" to indicate that all development projects, like this one, have competing CP policies that must be harmonized. However, simply because those competing policies were harmonized does not mean that the Project was inconsistent with the CP. Indeed, City staff repeatedly found that the Project was consistent with the CP as furthering the intent of the CP. *See* Code § 121.00(B) ("Consistency" means "to further the intent of the Comprehensive Plan). And City staff discussed "policies of concern" merely to explain the harmonizing of competing policies "where full consistency is not obvious or the policy merits additional discussion for clarity of staff's findings."

Given the record evidence from City staff, as well as supporting evidence from Morgan, the City could reasonably accept such evidence as adequate to conclude that the Project is consistent with all elements of the CP outlined in § 4.00. *Maroone Chevrolet, LLC*, 344 So. 3d at 463. Therefore, the City applied the correct law in granting the Approvals for Morgan's Project. *Heggs*, 658 So. 2d 530. Petitioner has failed to establish that the City committed any error, let

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alone an error constituting a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs*, 436 So. 2d at 95-96.

E. Compliance With Future Land Use and Density Restrictions

Petitioner argues that Ordinance 2021-15 (PDP and rezone to RPD) and Resolution 2021-60 (FDP) are void because the City's "approval of a primary residential use within the CG district on the Property ignores [Code] requirements to comply with future land use district and density restrictions." Specifically, Petitioner asserts that the City "impermissibly allowed a primary residential use where only secondary was permitted and granted conditional use where it should have reviewed it via a future land use amendment. Therefore a future land use amendment would also be required before the [City] could approve Ordinance 2021-15 for this residential planned development." Petitioner also argues that Morgan "ascribes 400 residential units to the CG land use (26.65 acres with a density of 15 units per acre) … [h]owever, as explained above, a primary residential use in CG is not permitted, so the true allowable residential density within the CG on the property would be nil unless and until a primary residential use is approved via a future land use amendment."

Petitioner's argument here is simply a repeat of the argument that Resolution 2021-52 (conditional residential use) is void because the only way to allow a secondary use on a CG site alone (without a corresponding primary use) is to amend the site's zoning designation in the CP/FLU. For the same reasons above, Petitioner's argument is without merit.

F. Illegal Contract Zoning

Petitioner argues that Ordinance 2021-15 (PDP and rezone to RPD) is void because it "conditioned approval on collateral agreements between the City and [Morgan], amounting to illegal contract zoning[.]" Ordinance 2021-15 contains nine conditions, however, Petitioner only challenges conditions 3 and 9. Specifically, Petitioner argues that the City's "inclusion of

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Condition #3 … regarding the terms of the Conversation Easement amounted to illegal contract zoning since the Ordinance is contingent on certain conditions in return for the government's rezoning or enforceable promise to rezone." Petitioner further contends that the "City's agreement to include Condition #9 amounts to contract zoning because it obligates the decisionmaking authority to approve the FLUM [Future Land Use Map] amendment." Petitioner states that the FLUM amendment referenced in condition 9 the City is obligated to approve is for another application (#21-103) Morgan submitted "to amend the future land use of a 6.459-acre Upland Preserve from Residential/Office General Plan Category to Recreation/Open Space Plan Category." Petitioner concedes that, as of the filing of its Amended Petition (April 25, 2022), "[Morgan's application #21-103] has not been adopted." Morgan counters, *inter alia*, that because neither condition requires the City to approve anything, illegal contract zoning did not occur. We agree.

"Contract zoning refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government's rezoning or enforceable promise to rezone." *Chung v. Sarasota Cty.*, 686 So.2d 1358, 1359 (Fla. 2d DCA 1996) (internal quotations and citation omitted). A local government lacks authority to enter into an agreement, "which effectively contracts away the exercise of its police powers." *Id.* (citation omitted). "One of the reasons contract zoning is generally rejected is because [t]he legislative power to enact and amend zoning regulations *requires due process, notice, and hearings*." *Id.* at 1359 (internal quotations and citation omitted) (emphasis added). To be clear, a local government's "obligation to follow applicable zoning laws, including requirements for public hearings, is an obligation that must be exercised *prior to the decision-making, not afterwards*." *Id.* at 1360 (emphasis added).

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Petitioner cites to *Chung* and *Morgran Co. Inc. v. Orange Cty.*, 818 So. 2d 640 (Fla. 5th DCA 2002), as support for its argument that the City obligated itself to approve Morgan's rezoning applications when it adopted Ordinance 2021-15 with conditions 3 and 9. Petitioner, however, misconstrues the law. The Court's own research of cases where illegal contract zoning has been found, including in *Chung* and *Morgran*, reveal that those agreements were private contracts between the government and property owner not subject to the strict requirements of due process, notice, and hearings *before* the government made its decision. *See also Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956) (holding that city had no authority to enter into private contract with property owner to rezone). That is not what occurred here.

In *Chung*, property owner Chung applied to the county for rezoning. 686 So.2d at 1359. When the county denied Chung's application, Chung filed suit in circuit court. *Id.* Thereafter, Chung and the county entered into a settlement agreement to resolve the law suit, which obligated the county to rezone Chung's property subject to several conditions. *Id.* The trial court vacated the parties' settlement agreement and Chung appealed. *Id.* The Second District Court of Appeal affirmed, finding that the settlement agreement was improper contract zoning because (1) although the county approved the settlement agreement during its regular meetings, "it bypassed the more stringent notice and hearing requirements for a rezoning"; and (2) the county contracted away the exercise of its police powers when it entered the settlement agreement obligating the county to rezone Chung's property. *Id.* at 1360. The Court also rejected Chung's argument that the county must still follow the formal requirements of zoning amendments, such as notice and hearing, "because the hearings that follow would be a pro forma exercise since the County has already obligated itself to a decision." *Id.*

In *Morgran*, developer Morgran applied to the county for, among other things, an amendment to the county's comprehensive plan and for rezoning property. 818 So. 2d at 641.

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After the county adopted the amendment to the comprehensive plan, the county and Morgran entered into a "Developer's Agreement," which required the county to "support and expeditiously process" Morgran's rezoning application in exchange for Morgran's donation of 50 acres to the county for a park. *Id.* The Development Agreement was a private contract entered into between Morgran and the county, as executed by the county Chairman. *Id.* at 643. When the county ultimately denied Morgran's rezoning application, Morgran filed suit in circuit court. *Id.* at 641-42. The trial court dismissed Morgran's complaint with prejudice and Morgran appealed. *Id.* at 644. The Fifth District Court of Appeal affirmed the trial court's decision to dismiss, albeit without prejudice, finding the county "invalidly contracted away its discretionary legislative power as the final decisionmaking authority" when it contracted to "support" Morgran's rezoning application. *Id.* at 643.

Here, Petitioner attacks conditions 3 and 9 of Ordinance 2021-15 as illegal contract zoning. To be clear, the record reflects that no portion of the subject site is or was zoned Recreation/Open Space; it was zoned CG on the western portion and Residential Office General on the eastern portion. [A2.1646]. Thus, for either condition 3 or condition 9 to take effect, the City would need to approve Morgan's separate application (#21-103). That did not happen under the record before us.

Condition 3 provides, in pertinent part:

> A conservation easement in favor of the City shall be established over the entire acreage required by the conditions herein, of *Recreation/Open Space* and Preservation Future Land Use Map (FLUM) categories. The easement shall prohibit the use or transfer of any remaining density/intensity, restrict the site to certain recreational amenities, provide for certain water access facilities, prohibit vessel launching or landing except at designated water access facilities, and provide for maintenance free of species listed as invasive in the City's [Code] in perpetuity.

[A2.3] (Emphasis added). Condition 9 provides:

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> For purposes of calculating density for the [Project], [Morgan] and the City agree that the uplands acreage and related residential density ascribed to the portion of the site that is *proposed* to be designated as R/OS, *Recreation/Open Space* on the City's [FLU] map shall be considered a part of the developable uplands of the overall site and has been used to calculate the allowable density for the [Project]. Therefore, the [Project] is consistent with the City's [CP and Code] as legally conforming residential development as to density, and the RPD has the right to develop and maintain 404 multifamily residential units on the site in reliance of the density from the [FLU] map.

[A2.4] (Emphasis added). Petitioner's contention that Ordinance 2021-15 with conditions 3 and 9 amounts to illegal contract zoning is without merit for several reasons.

First, unlike those instances where illegal contract zoning occurred, such as in *Chung* and *Morgran*, the City did not enter into a private contract with Morgan which obligated the City to grant Morgan's rezoning application. The City followed all applicable laws and requirements, including for public hearings, *before* it made its decision to adopt Ordinance 2021-15 with conditions. As detailed above, the record reflects that notice of Ordinance 2021-15 was sent to property owners within 1,000 feet and to the general public via publishing in the *Tampa Bay Times* as least twice. The City held extensive public hearings over three days on Morgan's entire application, including Ordinance 2021-15 and the conditions, before making a decision on whether to adopt Ordinance 2021-15.

The record reflects that during those public hearings, both Petitioner and Morgan were represented by counsel, had the opportunity to make opening statements, had the opportunity to present witness testimony and written evidence, had the opportunity to cross-examine witnesses, and had the opportunity to make closing arguments. Additionally, the public had the opportunity to provide comments. The City received testimony and written evidence from City staff that staff conducted an extensive review of Morgan's application as required by the CP and Code, including those Code sections required for review of Ordinance 2021-15. [See specifically City staff report

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for PDP, Code § 79.00, at A2.2030-2041; report for Rezoning to RPD, Code § 207.03, at A2.2042-2053]. City staff recommended approval of Ordinance 2021-15 given their conclusion that Ordinance 2021-15 and the conditions meet the requirements of the CP and Code. The City also received testimony and written evidence from Morgan supporting approval of Ordinance 2021-15 with conditions, as well as from Petitioner opposing it. Only *after* following the stringent requirements of due process, notice, and hearings, did the City adopt Ordinance 2021-15 with conditions.

Next, neither condition 3 nor condition 9 obligate the City to do anything, including approving Morgan's separate application (#21-103) for a *proposed* rezoning to Residential Open Space. The record reflects that City staff explained Morgan's separate rezoning request to amend the FLU is "to accommodate a natural preserve and recreational trail amenity *proposed* as part of the overall project … [and] … [t]he *proposed* Recreation/Open Space land use category recognizes and responds to the unique environmental considerations on the subject site by limiting the use of this area to passive recreation and open space for the use of the apartment community." [A2.2062-2063]. The City may or may not approve this separate application, after of course the City follows all applicable zoning laws and stringent requirements of due process, notice, and hearings. In response, Petitioner argues that, like in *Chung*, the hearings would be a pro forma exercise because the City already obligated itself to a decision. However, as discussed above, no condition in Ordinance 2021-15 obligates the City to make any decision.

Given the record before us, the City did not contract away the exercise of its police powers in adopting Ordinance 2021-15 with conditions. Therefore, the City applied the correct law and Petitioner has failed to establish that the City committed any error, let alone an error constituting a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Heggs*, 658 So. 2d 530; *Combs*, 436 So. 2d at 95-96.

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G. Onsite Transfers of Density

Petitioner argues that Ordinance 2021-15 condition 9 and Resolution 2021-60 condition 1 (the same condition) "ignore Section 78.01(D)(3) [Code] which does not allow onsite transfers of density that increase density over what is permitted for the site as a whole." Specifically, Petitioner contends that condition 9 "contracts away the 'nil' residential density from [Recreation/Open Space] by agreeing to consider it as developable uplands of the overall site to calculate the allowable density for the [Project] … [it] increases the density over what would be permitted in the site as designed and contemplated with the FLUM amendment[.]" Morgan counters, *inter alia*, that since the site's zoning designations allow for a maximum density of 15 units per acre, the Project does not increase density. We agree.

Petitioner's argument fails for several reasons. First, as discussed above, in adopting Ordinance 2021-15 with condition 9 (condition 1 in Resolution 2021-60), the City did not "contract away" anything. The City did not enter into a private contract with Morgan which obligated the City to grant Morgan's separate application (#21-103) for this proposed rezoning.

Next, because the City has not granted this separate rezoning request, the site's zoning remains the same; it has not been rezoned to Recreation/Open Space. The record reflects that before the City adopted Ordinance 2021-15 (rezoning CG to RPD), the site was zoned CG on the western portion and Residential Office General on the eastern portion. [A2.1646]. As discussed above, the maximum allowable density in the CG district is 15 units per acre. Likewise, the maximum allowable density in the Residential Office General category is 15 units per acre. CP/FLU Policy 2.3.1(c); Code § 25.08(B)(5). Because Morgan's Project will develop only 6.3 units per acre, less than the density allowed, neither Ordinance 2021-15 condition 9 nor Resolution 2021-60 condition 1 increase density. Petitioner's argument is without merit.

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Therefore, the City applied the correct law in adopting Ordinance 2021-15 and Resolution 2021-60 with conditions. *Heggs*, 658 So. 2d 530. Petitioner has failed to establish that the City committed any error, let alone an error constituting a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs*, 436 So. 2d at 95-96.

III. Due Process

"Due process is a flexible concept and requires only that the proceeding be essentially fair." *Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) (internal quotations omitted). "In order to determine what process is constitutionally required, the Court must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) (internal quotations omitted) (citing *Cafeteria Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). "Accordingly, the amount of process due varies based on the particular factual context surrounding an administrative proceeding." *Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla. 2d DCA 2009) (citation omitted). "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Bush v. City of Mexico Beach*, 71 So. 3d 147, 150 (Fla. 1st DCA 2011). "[T]he opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive." *Hofer*, 5 So. 3d at 771 (citation omitted).

Petitioner argues that the City denied both it and "members of the public" due process in adopting the Approvals, thereby constituting fundamental error and rendering the Approvals void.

As a threshold matter and as Morgan correctly notes, Petitioner lacks standing to assert due process violations allegedly suffered by third parties. *State v. Hunter*, 586 So. 2d 319, 322 (Fla. 1991) (citing *U.S. v. Valdovinos-Valdovinos*, 743 F.2d 1436, 1437 (9th Cir. 1984). Therefore, this

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Court will not address arguments asserted by Petitioner regarding due process violations allegedly suffered by unidentified members of the public attending the City's extensive public hearings. Having said that, the record reflects that more than 60 members of the public commented during the hearings in question. [T2.555:7-626:4; T3.46:5-121:12; T3.321:3-331:5]. The Court finds that the City unquestionably afforded members of the public due process in adopting the Approvals.

Turning now to Petitioner's arguments regarding the due process violations it alone allegedly suffered, Petitioner claims that "[n]umerous facts relating to the timing, sequence, and restrictions on the scope of the hearings cumulatively demonstrate that [Petitioner] was deprived of a meaningful, full, and fair opportunity to be heard regarding the Approvals[.]" Petitioner enumerates twenty-nine such facts. The Court has organized Petitioner's list into cohesive categories and will discuss each in turn.

First, the Court addresses Petitioner's citation to the United Supreme Court case *Mathews v. Eldridge*, 424 U.S. 319 (1976), stating that *Mathews* "sets forth three factors to consider in deciding what procedural due process requires." Petitioner then analyzes the *Mathews* factors, apparently arguing that this Court must consider these three factors to determine if the City accorded due process to Petitioner during the hearings in question. Petitioner, however, misconstrues *Mathews* and its holding of when a court must consider the factors.

In *Mathews*, respondent Eldridge challenged the government's initial termination of his worker's compensation benefits. 424 U.S. at 323-24. Instead of requesting reconsideration of the decision as instructed through the administrative procedures already in place as established by the government, Eldridge filed suit, arguing that the administrative procedures were unconstitutional and that due process required a hearing before the government could terminate his benefits. *Id.* at 324-25. The issue in *Mathews* "center[ed] upon *what process is due prior* to the initial termination of benefits[.]" *Id.* at 333 (emphasis added). The Court emphasized that a review of its prior

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decisions "underscore[s] the truism that (d)ue process … is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334 (internal quotations omitted). Indeed, the Court concluded that to identify what procedures due process demands in a particular situation requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35. *Mathews*, as this Court interprets it, holds that a court must analyze the three factors to determine whether the procedures already in place in a particular situation are constitutionally sufficient to accord due process. Meaning, the factors are used to determine what process is due before a governmental entity takes official action in a particular situation.

Here, it is undisputed that Petitioner was permitted to participate in every hearing as an "affected" party. Petitioner argued that it was an "affected" party because

> The members of Concerned Citizens have a larger interest than the regular people at large in the community. They have been dedicated to this mission of protecting the Anclote River. Over a period of 15 years, they've spent time advocating for it. They like to recreate on the river. They own property that's connected to the waters of Anclote River through the bayou and the surrounding area. They enjoy bird watching. They enjoy stargazing upon the river. And so based on these and based on our reading of Renard, we believe that the Concerned Citizens of Tarpon Springs does have standing as an affected party.

[T1.15:16-16:13]. Morgan objected, arguing that Petitioner fails to meet the *Renard* factors, specifically because Petitioner "owns no property, they're not part of the neighborhood that is in question here, and as such, they're not entitled to notice. So they simply do not meet the standard."

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[T1.16:21-17:12]. Over Morgan's objection, the City Mayor stated, "I believe [Petitioner] to be treated and to [be] allow[ed] to be up here as an affected party." [T1.17:22-24].[5]

Therefore, because Petitioner was permitted to participate as an "affected" party in every hearing, it was afforded the same due process rights as the applicant, Morgan. Petitioner, like Morgan, was represented by counsel, had the opportunity to make an opening statement, had the opportunity to present testimony and written evidence, had the opportunity to cross-examine witnesses, and had the opportunity to make a closing argument. The City's procedures in place during the public hearings to afford the parties due process before the City took action in granting or denying Morgan's application were constitutionally sufficient. Indeed, the record reflects that Petitioner was undoubtedly afforded due process.

October 26-27, 2021 Public Hearing

- City Attorney Mr. Thomas Trask gave the first reading of Ordinance 2021-15 and advised that the second reading would take place on November 9, 2021. [T1.3:14-4:8].
- City Attorney Trask explained the City's quasi-judicial process, including the procedures and order of appearance. [T1.4:9-6:9].
- Petitioner argued that it was an "affected" party and the City Mayor stated, "I believe [Petitioner] to be treated and to [be] allow[ed] to be up here as an affected party." [T1.15:16-17:24].
- Petitioner had opportunity to cross-examine the following City staff/consultants: (1) Ms. Renea Vincent, City Planning and Zoning Director, [T1.81:10-89:20]; (2) Ms. Linda Hess and Mr. Jeffrey Novotny, traffic experts and licensed professional engineers, [T1.112:15-117:10]; (3) Mr. Todd Crosby, FDOT access management engineer and licensed professional engineer, [T1.134:24-137:23]; (4) Mr. Ray Page, sewer and water expert, [T1.145:10-146:10]; and (5) Mr. Kevin Powell, City Building Development Director and Floodplain Manager, [T1.154:9-156:8].

October 27-28, 2021 Public Hearing (cont. Oct. 26-27 hearing)

- Petitioner had opportunity to cross-examine the following Morgan witnesses: (1) Ms. Cyndi Tarapani, land use/urban planning expert, [T2.254:3-260:7]; (2) Mr. Christopher Hatton, traffic expert and licensed professional engineer, [T2.305:5-312:2]; (3) Mr. John Miklos, environmental expert, [T2.345:17-350:17]; (4) Mr. Weston Rogers, landscape architect, [T2.353:19-21]; (5) Mr. Matt Brosman,

[5] As this Court noted in our March 25, 2022 Order, City Attorney Mr. Thomas Trask opined that "[a]s for affected party status, it is still my opinion, based on the Renard case, that the Concerned Citizens group is not an affected party BUT in an abundance of caution will be treated as one, unless the Mayor decides otherwise at the hearing." [A2.2781].

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floodplain management expert and licensed professional engineer, [T2.373:14-377:16]; and (6) Ms. Kelsey Riley, air quality expert and civil engineer [T2.392:2-4].

- Petitioner had the opportunity to present its opening statement. [T2.392:24-395:24].
- Petitioner had the opportunity to present the testimony of the following witnesses, as well as to have those witnesses answer questions directly from the City Commissioners: (1) Mr. Richard Gehring, land use planning expert, [T2.396:25-452:24]; (2) Mr. Carl Wagenfohr, traffic consultant and automotive racing enthusiast, [T2.473:1-503:19]; and (3) Mr. Peter Dalacos, president of Concerned Citizens of Tarpon Springs, Inc., [T2.510:7-549:15].
- The public had the opportunity to comment. [T2.555:7-626:4].
- Petitioner had the opportunity to present its closing argument. [T2.629:11-635:20].
- City Attorney Trask read Resolution 2021-52. [T2:649:2-12].
- Following extensive open discussion, the City adopted Resolution 2021-52 (conditional residential use permit) by a vote of 3-1. [T2.640:19-647:11].

November 9-10, 2021 Public Hearing

- City Attorney Trask gave the second reading of Ordinance 2021-15. [T3.3:10-24].
- City Attorney Trask advised that the quasi-judicial hearing on Ordinance 2021-15 was conducted on October 26-27 and October 27-28 and had been concluded. Mr. Trask also advised that because there had been no change to Morgan's application, the City would not take additional testimony or evidence during this hearing, however, because Morgan had proposed two changes to the language of the Ordinance itself, the City would take testimony and evidence as to those two changes only. [T3.3:24-6:18].
- City Attorney Trask advised that no witnesses would be permitted to testify via remote methods and that he had previously advised the attorneys for Petitioner and Morgan of that on numerous occasions. [T3.6:20-7:9].
- Petitioner made several motions, including moving for approval to have Petitioner's witnesses testify remotely. [T3.15:21-16:4]. The City Mayor denied Petitioner's motion regarding remote testimony stating, "[i]n regards to the Zoom remote testifying, this is decided it will be treated like any other item. There will be no exceptions to that. A person must be present to testify in order to be examined." [T3.21:14-22:1].
- Petitioner had opportunity to cross-examine the following witnesses for the City and Morgan who testified as to the two proposed changes to Ordinance 2021-15: (1) Ms. Vincent and (2) Ms. Tarapani. [T3.41:20-24].
- The public had the opportunity to comment. [T3.46:5-121:12].
- Following extensive open discussion, the City adopted Ordinance 2021-15 by a vote of 3-1. [T3.145:8-170:7].
- City Attorney Trask read Resolution 2021-60. [T3.170:13-23].
- Petitioner had opportunity to cross-examine the following City staff/consultants: (1) Ms. Vincent, [T3.214:21-229:3]; and (2) Ms. Hess, [T3.236:23-239:8].
- Petitioner had opportunity to cross-examine the following Morgan witnesses: (1) Ms. Tarapani, [T3.269:21-23]; (2) Mr. Nathan Lee, drainage expert and licensed

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professional engineer, [T3.273:5-6]; (3) Mr. Hatton, [T3.275:10-12]; (4) Mr. Miklos, [T3.275:10-12]; and (5) Mr. John Seals, traffic expert and licensed professional engineer, [T3.284:9-10].

- Petitioner had the opportunity to present its opening statement. [T3.286:3-287:3].
- Petitioner had the opportunity to present the testimony of the following witnesses, as well as to have those witnesses answer questions directly from the City Commissioners: (1) Mr. Wagenfohr, [T3.287:4-302:8]; and (2) Mr. Dalacos, [T3.303:8-316:21].
- The public had the opportunity to comment. [T3.321:3-331:5].
- Petitioner had the opportunity to present its closing argument. [T3.332:2-340:13].
- Following extensive open discussion, the City adopted Resolution 2021-60 by a vote of 3-1. [T3.359:14-364:5].

Given that Petitioner was permitted to participate as an "affected" party (same as Morgan) before the City took action on Morgan's application, the City's procedures were constitutionally sufficient to accord Petitioner due process. Thus, the *Mathews* factors are inapplicable here. We now address Petitioner's specific arguments that the City denied it due process.

A. Lateness of Public Hearings

Petitioner argues that because each of the public hearings ran into the early morning hours (1) Petitioner's "opportunity to be meaningfully heard was severely hindered by being relegated to speak at unreasonably late (and early) hours of the morning[,]" (2) Petitioner's "witnesses' and counsel's energy waned, as well as the [City] Commission's ability to listen[,]" and (3) "[t]he proceedings were unfairly biased against [Petitioner] since the City and [Morgan] both presented and concluded their cases during earlier hours between 6:30 pm and midnight."

As Morgan correctly notes, Petitioner fails to cite any authority holding that public hearings continuing into the early morning hours violate due process. Likewise, Petitioner fails to cite any authority holding that because the City and the applicant (Morgan) presented their cases first, as was the City's standard procedure, the hearings were unfairly biased against Petitioner. And the Court's own research fails to reveal any such authority supporting Petitioner's allegations.

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Here, the City's own rules control the procedures during public meetings. Specifically, Resolution 2021-22 sets forth the City's Rules of Procedure of the Board of Commissions ("City's Rules of Procedure").[6] The City's Rule of Procedure, Art. III, § 1(b), states, "[m]eetings shall begin promptly at 6:30 p.m. … [and] shall end no later than 11:00 p.m., unless a simple majority votes to continue past such time."

The record reflects that during the October 26-27, 2021 hearing, the City extended the hearing past 11:00 p.m. twice, each time by a majority vote. [T1.138:2-23; T1.182:20-183:7]. During that hearing, the Vice Mayor was called away for an emergency at approximately 12:00 a.m. and the Mayor concluded the hearing shortly thereafter, continuing it until the next day. [A2.3533, link #1; T1.209:12-15]. During the October 27-28, 2021 hearing, the City extended the hearing past 11:00 p.m. five times, each time by a majority vote. [T2.408:20-409:10; T2.495:13-496:3; T2.549:22-550:23; T2.554:18-555-5; T2.626:10-627:1]. The hearing concluded at 4:51 a.m. [T2.650:2-10]. During the November 9-10, 2021 hearing, the City extended the hearing past 11:00 p.m. four times, each time by a majority vote. [T3.121:13-122:13; T3.239:24-240:17; T3.331:13-332:1; T3.358:15-359:14]. The hearing concluded at 3:31 a.m. [T3.364:12-14].

As for the order of appearance, the City's Rule of Procedure, Art. II, § 2(a), lists the procedure and order of appearance during quasi-judicial hearings as follows:

> 1. Introduction of item; explanation of quasi-judicial procedures; inquiry as to ex-parte contacts and conflicts of interest; swearing of witnesses.
> 2. If appropriate, the Ordinance/item will be read by the City Attorney, by title only.
> 3. Motion/Second to place the item on the table. The Mayor has flexibility to call for a motion after the public hearing.
> 4. **[City] Staff presentation**.
> 5. Commission questions of staff.
> 6. Cross examination of staff by applicant and affected parties.

[6] Resolution 2021-22 was in effect at the time of the public hearings in question. Although Resolution 2021-22 was subsequently repealed on May 10, 2022 through Resolution 2022-18, the relevant Rules of Procedure of the City's Board of Commissions cited herein remain the same.

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7. **Applicant's presentation**.
8. Commission questions of applicant.
9. Cross examination by staff or affected parties.
10. **Affected parties' presentation**.
11. Commission questions of affected parties.
12. Cross examination by staff or applicant.
13. Open public hearing for comments by proponents and then opponents.
14. Close the public hearing.
15. Applicant's rebuttal
16. Staff response and summary.
17. Commission discussion.
18. Roll call vote.

(Emphasis added). Additionally, during the October and November 2021 public hearings, City Attorney Mr. Thomas Trask explained the City's Rules of Procedure for a quasi-judicial process, including the procedure and order of appearance referenced above. [T1.4:9-6:9; T2.214:4-13; T3.3:10-5:5; T3.170:13-171:22].

As stated above, because Petitioner was permitted to participate in these hearings as an "affected" party, it was accorded the same due process rights as Morgan, the applicant. The City had the discretion to extend the public hearings beyond 11:00 p.m. by a majority vote and clearly did so in each instance. Moreover, the City's procedures and order of appearance in quasi-judicial hearings are the City's standard practice in every such hearing. Following this sequence of presentations (where the City presents first, then the applicant, and then any "affected" parties such as Petitioner) does not violate due process, nor did it violate Petitioner's due process rights in this case. Further, the City's Rules of Procedure are public record and were read at the beginning of the hearings. Petitioner therefore was on notice that the City would follow this procedure and order of appearance for all quasi-judicial hearings, including in the hearings in question.

Given the record before us, Petitioner was afforded due process and a meaningful, full, and fair opportunity to be heard. *Hofer*, 5 So. 3d at 771. Petitioner's arguments that it was denied due

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process because the hearings extended into the morning hours and the City and Morgan presented their cases first are meritless.

B. Scope of the November 9-10, 2021 Public Hearing

Petitioner argues that "the scope of the [November 9-10, 2021] hearing was narrowed on the day of the hearing to Ordinance [2021-15] and condition changes with no reasonable warning." Thus, Petitioner claims it was "de facto cut out of the second hearing and deprived of the opportunity to cross examine witnesses and present evidence or testimony." In essence, Petitioner is arguing that it was deprived of due process because the City did not hold a second quasi-judicial hearing on Ordinance 2021-15 (PDP and rezoning to RPD). Morgan counters, *inter alia*, that the City was only required to hold one quasi-judicial hearing, not two. We agree.

Again, Petitioner fails to cite any authority holding that (1) the City was required to hold a second quasi-judicial hearing on an Ordinance 2021-15 and (2) failing to do so violates due process. And yet again the Court's own research fails to reveal any such authority supporting Petitioner's allegations.

In fact, Petitioner apparently misinterprets the controlling law. Pursuant to § 166.041(3)(a), Florida Statutes, "a proposed ordinance may be read by title, or in full, on at least 2 separate days." Put simply, Florida law only requires that a municipality have a second *reading* of an ordinance, not a second *hearing*. Likewise, the City's Rule of Procedure, Art. IV., § 2, only requires a second reading of an ordinance, not a second hearing.

The record reflects, that City Attorney Trask gave the first reading of Ordinance 2021-15 on October 26, 2021, advising that the second reading would occur on November 9, 2021. And the second reading did occur on November 9, 2021. During the only quasi-judicial hearing required by law on Ordinance 2021-15 (beginning on October 26-27 and concluding on October 27-28), Petitioner presented its opening statement, presented witness testimony and written

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evidence, cross-examined witnesses on behalf of the City and Morgan, and presented its closing argument.

The record further reflects that on November 9, 2021 at 11:10 a.m., City Attorney Trask emailed attorneys for Petitioner and Morgan. Mr. Trask advised that the meeting tonight is "the second reading of Ordinance 2021-15[.]" Mr. Trask continued as follows:

> Please remember that the [City] conducted and completed the quasi-judicial hearing over two nights on October 26-27. Both of your clients had the opportunity to present testimony and evidence as well as the opportunity to cross examine the other's witnesses. At the completion of that hearing you both had the opportunity and did in fact present closing arguments. It is my opinion that the quasi-judicial hearing will NOT be reopened to take additional testimony or evidence nor will the [City] entertain hearing another closing argument or a power point closing argument. The only reason to reopen the quasi-judicial hearing would be if [] there were changes in the applications being considered by the [City]. There have been no changes to the applications. There have been some changes to the Ordinance proposed by the Morgan Group. If either of you wish to present testimony or evidence related to those changes I think that is absolutely appropriate to present testimony or evidence limited to those issues … the public will be allowed to provide their comments and concerns.

[A2.2801-2802].

As stated above, because Petitioner was permitted to participate in these hearings as an "affected" party, it was accorded the same due process rights as Morgan, the applicant. The City complied with law; it read Ordinance 2021-15 twice and held an extensive quasi-judicial public hearing over two days. Petitioner presented its opening statement, presented witness testimony and written evidence, cross-examined witnesses on behalf of the City and Morgan, and presented its closing argument.

Given the record before us, Petitioner was afforded due process and a meaningful, full, and fair opportunity to be heard. *Hofer*, 5 So. 3d at 771. Petitioner's argument that it was denied due process because the City did not hold a second quasi-judicial hearing is meritless.

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C. Remote Testimony

Petitioner argues that it was denied due process because its traffic engineer, Mr. Drew Roark, and its land use planning expert, Mr. Richard Gehring, were not permitted to testify remotely, and because its traffic consultant, Mr. Carl Wagenfohr, was not allowed to testify as to Mr. Roark's findings. Morgan counters, *inter alia*, that it was the City's standard procedure to require witnesses to testify in person and the City correctly prevented Mr. Wagenfohr from explaining Mr. Roark's opinions. We agree.

The record reflects the following:

- On September 13, 2021, Petitioner's attorney submitted a letter to the City Attorney Trask, stating that Petitioner "should be granted the reasonable accommodation to present by Zoom as needed due to the continuing Covid pandemic." [A2.2767-2769].
- On September 15, 2021, Morgan's attorney responded to Mr. Trask, objecting to Petitioner's request that its witnesses be allowed to appear remotely. Morgan stated that it "has made preparations to ensure that all of its witnesses are able to attend the hearings in person … [and] believes that its ability to properly cross-examine all witnesses and have a fair hearing will be negatively affected by a hybrid meeting, where some witnesses are allowed to attend by Zoom." [A2.2779-2780].
- On September 22, 2021, Mr. Trask replied via email to both attorneys, advising that "the Governor's Executive Order allowing for the [City Commission] to meet by Zoom expired, the [City Commission] discussed the issue of attendance by Zoom … and came to the conclusion that it was no longer necessary. Since that [City Commission] discussion occurred the [City Commission] [has] not allowed any deviation. It is my opinion, based on the [City Commission] discussion, that the [City Commission] will not be allowing witnesses to appear/testify by Zoom at the upcoming Anclote Harbor hearings. Please be prepared to have all of your witnesses appear in person at the hearings." [A2.2781].
- On October 19, 2021, Petitioner's attorney sent another letter to Mr. Trask, urging him "to reconsider your recommendation to deny virtual witness participation during these hearings." [A2.2783].
- The same day, Mr. Trask replied, advising that "[n]othing has changed since your last letter. Therefore my thoughts, as set forth in my email, remain the same." [A2.2784].
- On October 22, 2022, Petitioner's attorney sent its third request to Mr. Trask, asking him to reconsider his recommendation to the City that witnesses not be allowed to testify remotely and providing additional information that one of Petitioner's witnesses, Mr. Roark, "is based in Tallahassee and is unable to attend the hearing in person." [A2.2787].

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- The same day, Mr. Trask replied by email, advising that he had "not made a recommendation to the [City] Commission on that issue [virtual attendance of witnesses]. I have merely offered my opinion to you based on what the [City] Commission has discussed in the recent past. Nothing has changed since my emails to you on October 19, 2021 at 2:47 p.m. and September 22, 2021 at 11:52 a.m. Therefore my thoughts remain the same." [A2.2789].
- At the October 27-28, 2021 hearing, Mr. Richard Gehring testified in person and his reports were submitted into evidence. [T2.396:25-452:24; A2.2452-2568].
- At October 27-28 hearing, Mr. Carl Wagenfohr attempted to read from Mr. Drew Roark's report because Mr. Roark was unable to attend in person and was not permitted to testify remotely. [T2.473:12-474:22]. Morgan's attorney objected, arguing that since Mr. Roark was not present, he was not subject to cross-examination. Following response from Petitioner's attorney, the Mayor sustained Morgan's objection, stating that "we treat this item like any other item … [e]verybody else is here." [T2.474:23-476:12].
- On November 8, 2021, Petitioner's attorney sent a letter to the City Mayor comprising of motions for the upcoming November 9, 2021 hearing. Petitioner's letter included request number four, seeking permission for its witnesses, Mr. Roark and Mr. Gehring, to be allowed to appear remotely. [A2.2791-2794].
- On November 9, 2021, Mr. Trask replied via email to attorneys for Petitioner and Morgan. Mr. Trask stated, "As for [Petitioner's] request to allow Mr. Roark and Mr. Gehring to appear by audio or video communication because of the 'cost and inconvenience' my opinion has not changed. I made my opinion known in the emails to [Petitioner's attorney] on September 22, 2021 at 11:52 a.m., October 19, 2021 at 2:47 p.m. and again on October 22, 2021 at 1:40 p.m. That opinion was that the [City] would not allow witnesses to appear/testify by audio or Zoom. My opinion was confirmed by the Mayor at the October hearing." [A2.2801-2802].
- At the November 9, 2021 hearing, Petitioner renewed its previous motions, including the motion for Petitioner's witnesses, specifically Mr. Roark, to testify remotely. [T3.15:21-16:4]. The City Mayor denied Petitioner's motion regarding remote testimony stating, "[i]n regards to the Zoom remote testifying, this is decided it will be treated like any other item. There will be no exceptions to that. A person must be present to testify in order to be examined." [T3.21:14-22:1].
- Although Mr. Roark did not testify in person, three of his written reports/assessments/rebuttals were submitted into evidence. This includes Mr. Roark's "written testimony" for the November 9, 2021 hearing, which he prepared in advance in lieu of testifying in person. [A2.3228-3247; T3.23:9-18].

As stated above, because Petitioner was permitted to participate in these hearings as an "affected" party, it was accorded the same due process rights as Morgan, the applicant. The record reflects that it was the City's standard procedure to require that all witnesses appear in person for proper cross-examination. The City applied this requirement equally to everyone participating in the hearings – the City required its own witnesses to testify in person, required Petitioner's

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witnesses to testify in person, and required Morgan's witnesses to testify in person. Petitioner knew as of September 22, 2021 (almost five weeks before the October 26 hearing and almost seven weeks before the November 9 hearing) that no witnesses would be allowed to testify remotely and no exception would be given. The record further reflects that Mr. Gehring in fact testified in person at the October 27-28 hearing and his reports were submitted into evidence. Moreover, although Mr. Roark did not testify in person, three of his written reports/assessments/rebuttals were submitted into evidence, including his "testimony" for the November 9 hearing he prepared in advance.

As for Petitioner's argument that it was denied due process because the City did not allow Mr. Wagenfohr to testify as to Mr. Roark's findings, the City correctly denied Petitioner's request because it would have been "improper bolstering." "Improper bolstering occurs when an expert testifies on direct examination that some other authority not subject to cross-examination, such as another expert whom the witness consulted or a secondary treatise, agrees with the testifying expert's opinions." *Gutierrez v. Vargas*, 239 So. 3d 615, 627 (Fla. 2018) (citing *Linn v. Fossum*, 946 So. 2d 1032, 1039 (Fla. 2006) ("[A]n expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion."). Allowing Mr. Wagenfohr to testify as to Mr. Roark's findings and opinions would have been improper because Morgan would have been denied its due process right to cross-examine Mr. Roark and the City would be unable to assess whether Mr. Roark was a qualified expert.

Given the record before us, Petitioner was afforded due process and a meaningful, full, and fair opportunity to be heard. *Hofer*, 5 So. 3d at 771. Petitioner's arguments that it was denied due process because its witnesses were not allowed to testify remotely and Mr. Wagenfohr was not permitted to testify as to Mr. Roark's findings are meritless.

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CONCLUSION

In conclusion, given the record before us, the Court finds that the City observed the essential requirements of the law and accorded Petitioner, the public, and Morgan due process in adopting the Approvals.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Amended Petition for Writ of Certiorari filed April 25, 2022 is hereby **DENIED. THE CITY'S APPROVALS, RESOLUTION 2021-52, ORDINANCE 2021-15, AND RESOLUTION 2021-60, ARE HEREBY AFFIRMED.**

DONE AND ORDERED in Chambers, in St. Petersburg, Pinellas County, Florida, this 23rd day of November, 2022. A true and correct copy of the foregoing has been furnished to the parties listed below.

Original Order entered on November 23, 2022 by Circuit Judges Thomas M. Ramsberger, Pamela A.M. Campbell, and Steve D. Berlin.

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