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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

2600 N OCEAN, LLC, a Florida Limited Liability Company,

Petitioner,

v.

CITY OF BOCA RATON, a Florida Municipal Corporation,

Respondent.
_____/

Appellate Division AY (Civil)
Rule 9.100 Petition
Case No.: _____

PETITION FOR WRIT OF CERTIORARI

Petitioner, 2600 N Ocean, LLC a Florida limited liability company, files this petition for Writ of Certiorari against the City of Boca Raton, a Florida municipal corporation, and says:

INTRODUCTION

Petitioner, 2600 N Ocean, LLC ("Petitioner"), petitions this Court for a Writ of Certiorari to quash Resolution 22-2019 ("Resolution") of the City Council for the City of Boca Raton ("Respondent" or "City"), whereby the City denied Petitioner the single variance needed to develop the property located at 2600 North Ocean Boulevard, Boca Raton ("Property"). The City denied the variance application in derogation of Petitioner's due process rights and without competent substantial evidence that Petitioner did not qualify for the requested variance.

Long before issuing the Resolution, the City had openly expressed its desire to acquire the oceanfront Property – one of only two private undeveloped oceanfront properties remaining in the zoning district and in a City that prides itself on its public beachfront parks — either by negotiation or eminent domain, to preserve this Property for the benefit of the public. Indeed, the City even obtained an appraisal of the Property valued at $7.2 million dollars to aid in its efforts to acquire the Property. After Petitioner offered to sell the Property to the City for the City's own appraised value and while Petitioner's variance application was pending, three City Council members (a majority of the decision-making body) publicly declared that they would not vote for any variance that would allow the Property to be developed. The City sought to drive down the value of the Property by frustrating and ultimately denying Petitioner's efforts to obtain the one variance needed to develop the Property. The City's institutional bias deprived Petitioner of due process.

The City also denied Petitioner due process at the Environmental Advisory Board and City Council hearings on the variance by strictly enforcing time limitations against Petitioner. In doing so, the City prevented Petitioner from fully presenting its witnesses and cross-examining the limited witnesses made available by the City. The City's strict enforcement of wholly unreasonable time limits deprived Petitioner of a full opportunity to be heard at both hearings.

The Resolution must be quashed on substantive grounds as well. Petitioner presented substantial evidence that the development satisfied all of the City's variance criteria while the City presented no competent substantial evidence to the contrary. Instead, the City denied the variance based on completely subjective and unspecified standards.

STATEMENT OF THE CASE AND FACTS

The Property

The Property is 0.42 acres of vacant land on the oceanfront in Boca Raton. (Tab 28 at p. 0646) It is zoned Multifamily Residential (R-3-F) with a future land use designation of Residential Medium. (Id.; Tab 30 at p. 0767) The zoning permits single-family residences, duplexes, townhomes and other multiple dwelling uses. The Property is one of only two private undeveloped properties located fully seaward of the Coastal Construction Control Line ("CCCL") in the zoning district. (Tab 28 at p. 0651; Tab 30 at pp. 0772-73)

Coastal Construction Control Line and the Variance Criteria

The City expressly contemplates a variance from its restrictions on construction seaward of the CCCL. Ordinance 28-1556(3) adopts the CCCL set by the Florida Department of Environmental Protection ("FDEP") and prohibits construction of "any structure whatsoever" seaward of the CCCL even if City zoning allows the construction of residential structures. Ordinance 28-1556(4) then allows

a variance from this restriction. To obtain a variance, the following criteria set forth in Ordinance 28-127(3) must be satisfied:

(a) Special and unique conditions exist which are peculiar to the applicant's case and which are not generally applicable to the property located in the zoning district;

(b) The special and unique conditions are not directly attributable to the actions of the applicant;

(c) The literal interpretation of this chapter, as applied to the applicant, would deprive the applicant of rights commonly enjoyed by the owners of other property in the zoning district;

(d) The variance granted is the minimum variance necessary for the applicant to make reasonable use of the property;

(e) Granting the variance is not detrimental to the public welfare, or injurious to the property or improvements in zoning district or neighborhood involved; and

(f) Granting the variance is not contrary to the objectives of the comprehensive plan of the city.

The entire Property is seaward of the CCCL and thus requires a variance for any development.

Variance Application

On September 16, 2016, Petitioner applied for a variance to allow construction of a four story, 14,270 square foot duplex residence consistent with the Property's zoning and setbacks. (Tab 6 at pp. 0052-0060) The footprint of the proposed building was only 1,932 square feet with a seaward depth of only 19 feet and a cantilevered floor that extends just another 11 feet. (Tab 24 at p. 0329) The City delayed the

application, but ultimately engaged Applied Technology & Management, Inc. ("ATM") to provide a coastal engineering and environmental review of the project. (Tab 9 at pp. 0104-0109) ATM did not complete its initial report until December 12, 2017, fourteen months after the original application.

Petitioner's variance application was originally scheduled to be heard by the City's Environmental Advisory Board ("EAB") in August 2018. Following several continuances, the EAB ultimately reviewed the variance request on January 10, 2019 and voted unanimously to recommend its denial. (Tab 24 at p. 0592)

The City Council considered the variance on February 26, 2019 and voted unanimously to deny it. (Tab 29 at pp. 0662-0692) The Resolution issued the same day.

Institutional Bias of the City

In December 2015, then Mayor Susan Haynie asked the Greater Boca Raton Beach and Park District ("District") to investigate the possible acquisition of "all privately-owned vacant buildable oceanfront properties," which include the Property, for "preservation and public use." (Tab 2 at p. 0008) To further this directive, the City passed Resolution 12-2016 on January 11, 2016, which directed the District to "expeditiously evaluate and consider acquisition of oceanfront properties . . . for preservation and public use . . . ." (Tab 3 at pp. 0009-0011) Based on a dearth of willing sellers, the City Manager in August 2017 asked the District

whether it had considered the use of eminent domain to acquire the oceanfront properties. (Tab 8 at p. 0103)

The District thereafter went so far as to have the Property appraised for "potential litigation related to the condemnation and whole taking" of the Property. (Tab 10 at pp. 0110-0160) The appraisal completed in January 2018 valued the Property at $7,190,000. (Id.) The appraisers noted that their estimated market value was based, as instructed by the City, on the "Extraordinary Assumption that the necessary variances are achievable and that the Subject Property is a buildable lot." (Id.)

In the summer of 2018, shortly before the originally scheduled August EAB hearing on Petitioner's application, Mayor Scott Singer published a re-election campaign video where he stated that the "new and more difficult variance will be required to build east of A1A, and based on all the evidence we've seen, that burden won't be met. I can't support plans for a house here on the dunes behind me." (Tab 30 at p. 0723) He also wrote to voters stating that "[b]ased on the environmental evidence that already exists on potential impact on our dunes and sea life (including turtles), I will NOT support granting a variance that would be needed to allow the coastal construction for this lot and the proposed home there. My policy has been and still is to protect our beaches and green space." (Tab 17 at pp. 0220-0247)

On May 31, 2018, City Council member Monica Mayotte wrote to various constituents about the pending variance application for the Property: "I want to reassure you that I have no intention of granting any variances seaward of the Coastal Construction Control Line (CCCL) . . . ." (Tab 16 at pp. 0202-0219) In another communication on August 24, 2018, Mayotte wrote that she "will do everything in my power to preserve the legacy of previous Boca Raton city leaders who had the foresight to create our beachfront parks and ensure they are open to the public." (Id.)

On May 29, 2018, City Council member Andrea O'Rourke wrote to various constituents stating: "Now as an elected official myself, I can promise you that I will do everything within my power to prevent building on these beach front properties." (Tab 7 at pp. 0061-0102) In another communication, she stated: "I promise you I am not in favor of building on this sensitive precious land and will do all I can to prevent this from happening." (Id.)

In sum, while Petitioner's application was pending and before Petitioner's opportunity to be heard before a fair and impartial decision-making body, a majority of the City Council had already openly and repeatedly vowed to deny the requested variance.

In October 2018, when the City Council revisited the idea of attempting to purchase the property from Petitioner, the Council opined that the price sought by Petitioner had "one zero too many" and was "ridiculous." (Tab 22 at pp. 0265-0272

(Tr. pp. 3, 6)). By then, the Council Members had convinced themselves that the variance application for the Property – an issue about which they admittedly received more communication than any other – did not concern **Petitioner's** private property, but part of a legacy created by the City and "**our** [the City's] greatest natural asset." (Tab 22 at p. 0266 (Tr. p. 5)).[1] As Council Member Andrew Thomson observed:

> I was driving down A1A, and I rolled down the windows... and I enjoyed the – both the view and just the impact that we have on the eastern side of A1A. There's no development for parts of it there. And it made me think of the vision that our forefathers and forebearers had to buy portions of that area, first for Red Reef and then for Ocean Strand. And I think it operates as a legacy to these folks that they were able to do that. They had the foresight to do that and create a legacy.

(Tab 22 at p. 0266 (Tr. p. 2)).

The City Council's hearing on February 26, 2019 was a pre-determined sham designed to drive the value of the Property down to benefit the City in its efforts to acquire property the City Council members had convinced themselves was effectively public, part and parcel of the City's "legacy" of beachfront preservation.

Jurisdiction

The Circuit Court has jurisdiction to review quasi judicial action, including action on a variance petition, pursuant to Article V, Sec. 5(b), Florida Constitution, Rule 9.030(c)(3) and Rule 9.100(c)(2), Fla. Rules of Appellate Procedure. Quasi-judicial decisions by municipalities are subject to certiorari review by the courts. Fla.

[1] All emphasis is added unless otherwise indicated.

Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000); Park of Commerce Assocs. v. City of Delray Beach, 636 So. 2d 12, 15 (Fla. 1994).

The City is a political subdivision of the State of Florida. The City's Ordinances do not allow for administrative relief under the Administrative Procedures Act, Chapter 120, Florida Statutes. Petitioner has thus exhausted all administrative remedies.

Standard of Review

In its review on a petition for writ of certiorari, the Circuit Court is to determine whether (1) the petitioner was afforded procedural due process; (2) the agency below observed the essential requirements of law (i.e. applied the correct law); and (3) the decision was supported by substantial competent evidence. Miami Dade County v. Omnipoint Holdings, 863 So. 2d 195, 198-99 (Fla. 2003); Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). This scope of review protects against arbitrary fact-finding and decision making by government acting in a quasi-judicial capacity. See Seminole County Board of Commissioners v. Long, 422 So. 2d 938, 942 (Fla. 5th DCA 1982).

ARGUMENT

Point One
City's Institutional Bias Denied Petitioner Due Process

Due process includes the right to a decision by an impartial tribunal. Gtech Corp. v. Dep't of the Lottery, 737 So. 2d 615 (Fla. 1st DCA 1999) (citing Ridgewood

Props., Inc. v. Dep't of Cmty. Affairs, 562 So. 2d 322 (Fla. 1990)). "[T]he right of every litigant to appear before an impartial tribunal is a fundamental tenet of the constitutional guarantee of due process." Verizon Bus. Network Servs. ex rel. MCI Commc'ns, Inc. v. Dep't of Corr., 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008). Due process demands an impartial decision maker regardless of whether the decision is made by a fact-finder or a reviewing body. Ridgewood Props., 562 So. 2d at 323 (finding denial of due process where ultimate arbiter had a "predisposition to reject" and weighed his own evidence); Seminole Entm 't v. City of Casselberry, 811 So. 2d 693, 696-97 (Fla. 5th DCA 2001) ("The rulings... reflect a bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process."). Quasi-judicial proceedings, particularly those associated with property rights-related claims, are supposed to be "an independent forum that is isolated as far as is possible from the more politicized activities of local government, much as the judiciary is constitutionally independent of the legislative and executive branches." Lee County v. Sunbelt Equities, II Ltd. P'ship, 619 So. 2d 996, 1001-1002 (Fla. 2d DCA 1993).

Certiorari is the appropriate means to remedy the City Council's patent institutional bias toward Petitioner's application. In Florida Water Services Corp. v. Robinson, a utility sought to sell its systems to the Florida Governmental Utility Authority, which planned to sell the systems to the local counties where the systems

were located. 856 So. 2d 1025, 1036-37 (Fla. 5th DCA 2003). In the meantime, the utility applied for three new wells in Hernando County, but the county denied the application. The utility claimed the denial was the result of the county's institutional bias. Id. Rather than purchasing the utility's system through the Authority as planned, the county had decided to acquire the system through eminent domain, and the county denied the well application to depress the value of the utility's system. Id. The utility erroneously sought a writ of prohibition and the court explained that the "remedy for redress of its claim the Board is biased and motivated by self interest is to seek certiorari review. . . ." Id. at 1040.

Petitioner makes a similar claim against the City and the evidence of institutional bias is blatant and overwhelming. The City openly declared its interest in acquiring the property through negotiation or eminent domain before and throughout the pendency of Petitioner's application for a variance. To assist with negotiation or eminent domain, the City obtained an appraisal valuing the property at $7.2 million. The City, however, expressly instructed the appraisers to condition the property value on what the City deemed the "Extraordinary Assumption that the necessary variances are achievable and that the Subject Property is a buildable lot." In other words, the City had no intention of ever granting any variance for development on the property.

After issuance of the appraisal and before Petitioner presented any evidence to the EAB or City Council on its pending application, three of five council members repeatedly and unequivocally stated that they would not support a variance on the Property. Even though Petitioner made clear that it would accept the City's own $7.2 million dollar appraisal price to sell the Property to the City (Tab 24 at p. 0374 (Tr. p. 84)), the City opined that Petitioner's asking price was "ridiculous" in a transparent effort to drive down the value of the Property, by assuring that the "Extraordinary Assumption" would not be achieved. The five council members thereafter unanimously denied Petitioner's variance in reliance on vague and subjective criteria. The City's institutional bias and self-interest could not be more glaring. Petitioner did not receive due process and it will not if the same biased decision-making body reviews the application again.

Point Two
City's Failure to Provide a Fair and Full Opportunity to be Heard Denied Petitioner Due Process

Due process also requires reasonable notice and a fair and meaningful opportunity to be heard. Hous. Auth. of City of Tampa v. Robinson, 464 So. 2d 158 (Fla. 2d DCA 1985); Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991). The quality of due process required in a quasi-judicial hearing may not be the same as due process to which a party to a full judicial hearing is entitled. However, certain

standards of basic fairness must be adhered to. Jennings, 589 So. 2d at 1340 (citing Goss v. Lopez, 419 U.S. 565 (1975)).

Resolution 139-2001 provides the following time allotments in quasi-judicial proceedings before the City:

- Presentation by staff is limited to a maximum of 20 minutes.
- Presentation by an applicant is to be set by the Mayor for 20 minutes or more for up to a maximum of 1 hour depending on the complexity of the matter and the number of experts planning to testify.
- Presentation by other interested parties is limited to a maximum of 5 minutes. If an attorney is representing an interested party, the presentation is limited to 20 minutes.
- Cross-examination is limited to a maximum of 3 minutes for each witness.
- Rebuttal by the applicant is limited to a maximum of 10 minutes.
- The Mayor has the discretion to extend any of the time allotments.

The City's application of the foregoing time limitations in the context of Petitioner's application violated Petitioner's due process rights, as detailed below.

The Environmental Advisory Board Hearing

At the EAB hearing, Petitioner sought to present the testimony of six expert witnesses to address the numerous concerns about lighting, glass transmittance, glass reflectivity, building reflectivity, vegetation mitigation plans, the height and

footprint of the proposed structure, mitigation plans during construction, the Florida department of environmental Protection ("FDEP") and Florida Fish and Wildlife Conservation Commission ("FFWCC") approvals, allowable uses on the property, and the six variance criteria. Specifically, Petitioner brought an engineer, a CCCL expert, a turtle expert, a dune vegetation expert, an architect and a land use expert to testify in that order. Before the architect even started presenting his testimony, the EAB Chair warned Petitioner, "I would like you to try to wrap up." (Tab 24 at p. 0366 (Tr. p. 76)) After Petitioner's counsel explained that this was "an important project and it's going to be in litigation and we should make a complete record," the EAB Chair stated: "I'd like you to wrap up in 10 minutes." (Tab 24 at pp. 0366-0367 (Tr. pp. 76-77)) The EAB's action severely limited the architect's testimony and forced Petitioner to forego presenting its land use expert's testimony.

On cross-examination of the City's engineer Dr. Michael Jenkins, which was limited by rule to only three minutes (Tab 24 at p. 0536 (Tr. p. 165)), the Chair interrupted Petitioner's counsel during a pending question to advise: "You do need to wrap this up." (Tab 24 at p. 0543 (Tr. p. 172)) Shortly thereafter, he stated, "We're already six minutes over. Please wrap up or the next witness . . . ." (Tab 24 at p. 0544 (Tr. p. 173)) In the middle of another question during the cross-examination of the City Staff Brandon Schaad, the Chair again interrupted to warn, "Also watch your time, please." (Tab 24 at p. 0550 (Tr. p. 179)) The extreme limitations on time and

constant interrupting by the Chair made it impossible to adequately and thoroughly cross-examine the expert the City brought to the hearing on numerous complex issues.

The City Council Hearing

Prior to the City council hearing, Petitioner requested two hours to present its numerous expert witnesses and 15 minutes to cross-examine the City's witnesses. (Tab 25 at pp. 0625-0627) The City denied the request. (Tab 27 at pp. 0639-0644) At the hearing, Petitioner against requested additional time to present its seven witnesses, but Mayor Singer denied the request and granted time for the presentation up to an hour and limited cross-examination to three minutes per witness. (Tab 30 at pp. 0719-0720, 0821 (Tr. pp. 27-28, 129))

After moving to recuse the City Council for bias, Petitioner called the City's sea turtle expert Dr. Rusenko as an adverse witness and then called its own architect Juan Caycedo, and engineer William Stoddard. At that point, Petitioner had less than six minutes of remaining time to present its remaining witnesses, including a CCCL expert, a turtle expert, a dune vegetation expert, an architect and a land use expert. Even though the Mayor allowed an extra 15 minutes, Petitioner was forced to present the testimony of its land use expert Bonnie Miskel and CCCL expert Tom Tomasello in dramatically expedited fashion, and was unable to present the testimony of its turtle expert and dune vegetation expert. (Tab 30 at pp. 0765-0783

(Tr. pp. 73-91)) As the transcript reflects, the City Council nevertheless devoted almost the same time given Petitioner to hearing from some 17 members of the public, all of whom spoke in opposition. (Tab 30 at pp. 0784-0818 (Tr. pp. 92-126)).

In sum, a review of the EAB and City Council hearing transcripts reflects that the severe due process constraints imposed on Petitioner deviated from standards of basic fairness and unduly prejudiced its ability to fully present its case and to meaningfully be heard.

Point Three
The City Presented No Competent Substantial Evidence to Support Denial of the Variance

Independent of the City's institutional bias and due process violations, the City failed to support its denial of the variance with substantial competent evidence. City of Dania v. Florida Power and Light, 718 So. 2d 813 (Fla. 4th DCA 1998). To be competent, the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. City of Fort Lauderdale v. 32 Multidyne Med. Waste Mgmt., Inc., 567 So. 2d 955, 957 (Fla. 4th DCA 1990) (citing DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957)).

The zoning ordinance on which rests a quasi-judicial decision like the City Council's variance denial must also establish a sufficiently adequate and definite

guide to governance with respect to the grant of variances, exceptions, or permits. City of Homestead v. Schild, 227 So. 2d 540, 542 (Fla. 3d DCA 1969). See also City of St. Petersburg v. Schweitzer, 297 So. 2d 74, 77 (Fla. 1974) (holding invalid an ordinance which provided no standards for the granting of special exceptions). Citizens are entitled to an interpretation of the codes that will allow them to know objective, discernible standards as to what can be done with a property – both theirs and in the surrounding neighborhood. See ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146, 149 (Fla. 1st DCA 1979) (holding that any standards for approving or denying a development order which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality); Effie, Inc. v. City of Ocala, 438 So. 2d 506, 509 (Fla. 5th DCA 1983) (holding that patently vague and obscure development criteria, allowing for exercise of arbitrary discretion, renders an ordinance invalid under the Fourteenth Amendment and specifically finding invalid ordinance which allowed City Council to deny a permit for the sale of alcoholic beverages, based upon "all other pertinent factors that may arise in connection with the particular application and location being considered").

Our Supreme Court has long made it clear that having no standards and retaining absolute discretion is unconstitutional. See North Bay Village v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956), where the court stated:

> An ordinance whereby the City Council delegates to itself the arbitrary and unfettered authority to decide where and

> how a particular structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment.

As described below, Petitioner met or exceeded all objective criteria, but the City relied on subjective standards and its ever-changing discretion, without any competent substantial evidence, to deny the variance.

a. Special and unique conditions exist which are peculiar to the applicant's case and which are not generally applicable to the property located in the zoning district.

Importantly, the "special and unique conditions" criterion expressly focuses on properties located in the applicable "zoning district," not all oceanfront properties as argued by the City. Bonnie Miskel, a land use attorney representing Petitioner, testified at the City Council hearing that the applicable "zoning district" is R-3-F or multi-family housing. (Tab 30 at p. 0767 (Tr. p. 75)). Within that zoning district, there are 228 total properties, but 219 of those properties are off the beach and not affected by the CCCL. (Tab 30 at pp. 0771-0772 (Tr. pp. 79-80)). Only nine properties in this zoning district are affected by the CCCL. Of the nine properties, seven have vested uses (including two used as amenities/accessory uses to westerly condominiums, one owned by the City's park district, one developed as a four-unit condominium, and one house covering three parcels that was built in 1958, long before the imposition of any CCCL). (Tab 30 at pp. 0772-0783 (Tr. pp.

80-91); Tab 28 at p. 0652)). As a result, the Property is one of **only two** privately owned properties that remain undeveloped fully east of the CCCL in the zoning district. (Tab 30 at p. 0773 (Tr. p. 81)). The Property is special and unique in this regard in comparison to other properties in the same zoning district.

The City's only argument as to this criterion was that Petitioner could use the Property as an amenity to an existing condominium, which would limit the impacts of the project similar to other existing uses east of the CCCL. (Tab 26 at p. 0631; Tab 30 at pp. 0707-0708 (Tr. pp. 15-16)) Ms. Miskel explained that this argument fails because the accessory use of an amenity requires there be unity of ownership between a principal use and the accessory use, and there is no principal use on the Property that would allow the accessory of an amenity. (Tab 30 at pp. 0774-0775 (Tr. pp. 82-83)). The City Attorney ultimately confirmed Ms. Miskel's position at the end of the hearing. (Tab 30 at pp. 0837-0838 (Tr. pp. 145-146)). Accordingly, the City presented no substantial competent evidence to refute that special and unique conditions exist peculiar to the Property that are not generally applicable to other properties in the zoning district.

b. The special and unique conditions are not directly attributable to the actions of the applicant.

Even though Petitioner acquired its interest in the Property with knowledge of the CCCL and the need for a variance, Petitioner did not cause or create these "special and unique conditions" of the Property.

"[I]t has been held that a 'hardship' may not be found unless no reasonable use can be made of the property without the variance; or, stated otherwise, 'the hardship must be such that it renders it virtually impossible to use the land for the purpose for which it is zoned.'" Bernard v. Town Council of the Town of Palm Beach, 569 So. 2d 853, 855 (Fla. 4th DCA 1990) (quoting Town of Indialantic v. Nance, 485 So. 2d 1318 (Fla. 5th DCA 1986)); Auerbach v. City of Miami, 929 So. 2d 693, 695, n.3 (Fla. 3d DCA 2006). Also, a "self-imposed" hardship does not occur simply because a purchaser has knowledge of applicable zoning restrictions, but when an act by that owner or purchaser "brings the hardship into being." *Coral Gables v. Geary*, 383 So. 2d 1127, 1128-29 (Fla. 3d DCA 1980) (internal quotations and citation omitted). Specifically, "circumstances peculiar to the realty alone," will not be held against a purchaser. *See id.* at 1128 (affirming trial court's requirement that city grant variances and holding that fact that plaintiff purchased irregularly shaped property with knowledge of the already-imposed building restrictions did not constitute a "self-imposed" hardship).

Here, Petitioner did nothing to create the special and unique conditions under which it sought the variance. The Property was platted as a separate parcel in 1944. (Tab 30 at p. 0774 (Tr. p. 82)). Since that time, any prior owner could have conveyed the Property as a separate parcel with all attendant rights allowed by the applicable zoning. (Tab 30 at pp. 0774-0775 (Tr. pp. 82-83)) The City adopted the

CCCL in 1979 and subsequently moved it westerly in 1997, causing the entire Property to be west of the CCCL. (Tab 28 at pp. 0650, 0653) Also, the same owner owned the Property and the parcel immediately to the west until 1999, when the Property was conveyed as a separate parcel. Over time and through various decisions by the City and other parcel owners, the Property became one of only two privately owned vacant parcels completely east of the CCCL out of 228 parcels in the zoning district. Yet it remained zoned Multifamily Residential. Petitioner played no role in creating these "special and unique conditions" of the Property.

The least impactful use is residential.[2] But, by the City's own pronouncement, it is an "extraordinary assumption" that the necessary variances could be obtained even for a single family residence given the location of the Property on the oceanfront. A majority of the City Council vowed to deny the variance before hearing any evidence. The City's subjective standards and commitment to deny a variance "render it virtually impossible to use the land for the purpose for which it is zoned." Bernard, 569 So. 2d at 855. Petitioner's hardship is not self-created.

c. The literal interpretation of this chapter, as applied to the applicant, would deprive the applicant of rights commonly enjoyed by the owners of other property in the zoning district;

[2] The City contends that the Property may be used as a less impactful amenity, but as explained above, that is not an option for Petitioner because there is no principal use on the Property.

As explained above, there are nine properties subject to the CCCL in the Multifamily Residential zoning district. Six of those properties are developed with amenities for condominiums, a private residence or a condominium. One property is owned by the City's park district. Petitioner is not able to use the Property as an amenity because there is no principal use associated with the Property. Petitioner has submitted plans for multi-family residential, a right widely observed and exercised by other property owners in the zoning district. The City's literal interpretation and application of the variance criteria as a "line of prohibition" (Tab 30 at pp. 0782-0783 (Tr. pp. 90-91)) for anything other than an amenity (which Petitioner cannot do) is depriving Petitioner of rights commonly enjoyed by other property owners in the zoning district, including those east of the CCCL.

d. The variance granted is the minimum variance necessary for the applicant to make reasonable use of the property.

When analyzing the scope of the variance, "'[r]easonable use' should neither be the very best nor the very worst use." City of Ormond Beach v. State ex rel. Del Marco, 426 So. 2d 1029 n.6 (Fla. 5th DCA 1983). Ordinance 28-582 permits construction of a duplex on property that is zoned R-3-F, like the Property. The zoning ordinance also permits single-family, townhouse, and multiple dwellings, schools, helistops, community residential homes, child and adult care centers, and places of worship. On the scale of permitted uses, a residential duplex is one of the minimum uses allowed. A residential duplex like that proposed by Petitioner is the

smallest family unit in the City's code and, further, this location would actually support three units being built as opposed to the two proposed. (Tab 30 at p. 0776 (Tr. p. 84))

In response to Petitioner's application, the City engaged ATM to provide a coastal engineering and environmental review of the project. Michael Jenkins of ATM issued a letter on December 14, 2017, stating that the proposed structure is "acceptable for this area" concerning flood and wave vulnerability and the finished floor elevation was "well above the minimum elevation requirements from a vulnerability perspective." (Tab 9 at pp. 0104-0109) The City's expert also stated that the siting dimensions were within the "accepted standard practice for site development" and the cantilevered plan "reduces the number and seaward extent of structural members." (Id.) He noted, however, that the structure "must be engineered to withstand all anticipated loads, including those from storm surge, winds and waves," which he claimed Petitioner had not demonstrated. (Id.)

In response to Dr. Jenkins' comments regarding loads, William Stoddard, Ph.D., testified for Petitioner at the EAB hearing that he ran the necessary tests and the 1,932 square foot footprint with a 19 foot depth[3] was the **minimum** that would

[3] Petitioner acknowledges that the cantilevered floor provides an additional 11 feet of floor space extending seaward. Without some minimal additional depth, however, the entire building would be as deep as a regular garage, which by any standard is not reasonable for a single family or multi-family dwelling.

allow the proposed structure "to withstand the hydrostatic, hydrodynamic wind loads and live loads and dead loads." (Tab 24 at pp. 0329-0330 (Tr. pp. 39-40)). The City never countered that evidence. In addition, Juan Caycedo, Petitioner's architect, testified at the EAB hearing that the 19 foot depth of the building was the absolute minimum:

> [W]e were given a very tight footprint on this building. It was only 19 feet to work with. So within that constraint, we have a really very minimum—we're seeking a very minimum variance to make a reasonable use of the property. If you think about a ranch home with a 19 foot or 20 foot deep garage, that's basically the depth of this building as a footprint. So you couldn't close to park reasonably this building if it was any less than that.

(Tab 24 at pp. 0367-0368 (Tr. pp. 77-78))

At the City Council hearing, Dr. Stoddard again testified that the proposed 19 foot depth of the footprint was the **minimum** variance necessary for Petitioner to make reasonable use of the Property given the various loads. (Tab 30 at pp. 0763-0764 (Tr. pp. 71-72)) Mr. Caycedo explained that once you constrict the depth of the building footprint to 19 feet deep, "you only have one way to go, which is up" to have any reasonable use of the property. (Tab 30 at p. 0758 (Tr. p. 66))

The City never countered Petitioner's evidence that the proposed project was the minimum variance necessary to make reasonable use of the property. The City's conclusory response is that based on the height of the project and overall square footage, both of which actually "comply with the numerical bulk requirements of

the district," the building simply cannot be the "minimum variance necessary." (Tab 26 at p. 0632) This is not competent substantial evidence. The City unreasonably interprets this criterion as requiring the smallest building possible and suggests, without any testimony to rebut Petitioner's experts, that the building footprint could be less than 19 feet wide (Id. at p. 0633). The unrefuted evidence is that the footprint cannot be smaller to have a reasonable multi-family use.

The City's only other stated concern was that the building is "large and obtrusive," which would negatively impact turtle nesting and vegetation (Id.), but Petitioner addressed those concerns as discussed infra at 25-43.

e. Granting the variance is not detrimental to the public welfare, or injurious to the property or improvements in zoning district or neighborhood involved; and

f. Granting the variance is not contrary to the objectives of the comprehensive plan of the city.

As to both of these criteria, the primary contention by the City is that the proposed structure and variance is "inconsistent with the Comprehensive Plan and City Code based on its purported negative impacts to endangered and threatened sea turtles as well as to the dune system and vegetation." (Tab 26 at pp. 0632-0633) Specifically, the City contends that the proposed variance is inconsistent with:

- Objective CON.1.4.0: Protect species which are listed as endangered or threatened, and to protect rare, unique, or significant natural habitats within the City.

- Goal CM 1.0.0: Restrict development activities that would damage or destroy resources and protect human life and limit public expenditures in areas subject to destruction by natural disasters.

- Policy CM 1.1.11: Protect and restore altered beach and dune systems.

(Id. at p. 0633). Petitioner details below the absence of substantial competent evidence to find that the variance would detrimentally impact sea turtles or vegetation and dunes in the neighborhood involved.

No Substantial Competent Evidence of Negative Impacts to Turtles

Neither Petitioner nor the City dispute that loggerhead, green and leatherback turtles nest on the Property. The City concedes that the proposed structure "is sited landward of the active turtle nesting zone."[4] (Id. at p. 0630) Unable to assert that the physical situs of the structure will directly impact turtle nesting, the City instead complains that the "lighting and reflection of glass onto the turtle habitat from the proposed duplex is of critical concern. . ." and that the "exterior lighting plan and fixture detail do not address interior lighting visible from the beach, nor does it address reflection from the glass building, both critical issues for sea turtle nesting .

[4] Later, the City tried to backtrack from the objective data on this site and create a potential concern by generally stating that it "is common knowledge among sea turtle biologists that green sea turtles tend to nest in or near the dune." (Tab 26 at p. 0637) Petitioner's turtle expert, John Fletemeyer, opined that sea turtles rarely nest in the dunes, and if they do, they are subject to other threats including root intrusion, ants and predators that likely will destroy the nests. (Tab 24 at p. 0353 (Tr. p. 63)) In an attempt to undermine his testimony, the City falsely accused Mr. Fletemeyer of opining that sea turtles never nest in the dunes. (Tab 26 at p. 0637)

. . ." (Tab 26 at p. 0630) Petitioner extensively addressed both of these concerns and others. The City failed to rebut Petitioner's evidence with competent substantial evidence of its own.

(1) Light Transmittance.

Petitioner far exceeded the City's own objective standard regarding light transmittance to minimize the impact on nesting turtles. The City's Ordinance 23-242(2) requires on all new "construction of single-family or multifamily dwellings" that "[t]inted or filmed glass shall be used in all windows visible from the beach, regardless of exposure, and including windows within doors." The code defines "tinted or filmed glass" as material having "visible light transmittance [VLT] of 45 percent or less." Dr. Rusenko, the City's turtle expert, confirmed that this is the current standard under the Boca Raton Lighting Plan and at FDEP. (Tab 30 at pp. 0748-0749 (Tr. pp. 56-57)) He also confirmed all of the most recent projects along the Boca Raton coast satisfied only the 45% VLT threshold of the City's standard.[5] (Id. at pp. 0749-0750 (Tr. pp. 57-58))

Petitioner proposed to use tinted materials that would limit VLT of interior light to 15% or less at significant expense to it. Petitioner far surpassed the City's own objective standard.

[5] Even the windows on the City's own fire department constructed on top of an oceanfront dune has only has 45% VLT. (Tab 30 at p. 0750 (Tr. p. 58))

(2) Light Reflection.

Without any objective standards on reflectivity and unable to identify a single other building on its beaches with reflectivity as low as 8%, the City resorted to subjective, never-disclosed criteria to deny Petitioner's application. The City claimed that the lighting proposed by Petitioner did not "address reflection from the glass building," another issue that potentially causes disorientation of nesting turtles. (Tab 26 at p. 0630) To the contrary, Petitioner at the EAB hearing presented evidence that it proposed to use materials that have less than 8% reflection. (Tab 24 at pp. 0338-0339 (Tr. pp. 48-49))

Despite claiming to be concerned about the impact of reflection on nesting sea turtles, the City maintains no objective standards for reflection in its code and Dr. Rusenko has never suggested they do so. (Tab 30 at p. 0752 (Tr. p. 60)) Dr. Rusenko was unaware of any other building along the Boca Raton beaches having windows with reflectivity as low as 8%. (Id. at pp. 0753-0754 (Tr. pp. 61-62)) The City has no objective standards on reflectivity in its ordinances or Comprehensive Plan (or anywhere), but used its own subjective evaluation as a basis to deny the variance.[6]

[6] After acknowledging Petitioner far exceeded the City's minimum VLT standards and addressed reflectivity better than any other building to his knowledge, Dr. Rusenko changed his focus to the building's "proximity to the beach" which has always been the "big issue." Despite this being the "big issue," Dr. Rusenko admits that this concern was not even mentioned in the Staff Report. (Id. at pp. 0753-0754 (Tr. pp. 61-62)).

On September 18, 2017, the City met with Petitioner and expressed concern that reflection off the large flat surfaces of the proposed structure, not including the glass, were a "source for disorienting hatchling sea turtles." (Tab 26 at p. 0635) Without any objective standards (Tab 24 at p. 0542 (Tr. p. 171)), the City asked that the amount of flat surface and glass be reduced on the east, north and south sides to minimize reflection. (Tab 26 at p. 0635) To address these concerns, Petitioner resubmitted its plans in February 2018 and in doing so: reduced the square footage of glass on the east side by 22%; incorporated four-foot deep balconies on the second through fourth levels; screened the underside of the balconies; changed the building surface to dark brown to minimize refection of light; changed all glazing on the north and south sides to 15% VLT; and shielded all interior lighting and used only warm colors. (Tab 24 at p. 0336 (Tr. p. 46)). Petitioner also introduced "grillage work to screen the stair enclosures." (Id. at p. 0368 (Tr. p. 78)); (Tab 11 at p. 0168) ATM's response to these changes was that it was "unclear whether the development as proposed will result in adverse impacts." (Tab 12 at p. 0187) Petitioner did everything requested -- and more -- to address concerns about reflections from flat surfaces, but the City's response, without any objective criteria or evidence, was that it was still not enough.

Dr. John Fletemeyer, a leading authority on sea turtles, testified for Petitioner that there is no objective evidence that the proposed structure would have a negative

impact on sea turtles. (Tab 24 at p. 0352 (Tr. p. 62)) Instead, Dr. Fletemeyer pointed to 30 years of evidence that shows sea turtle nesting actually **increases** behind large oceanfront structures, more so than behind undeveloped preserved areas. (Id. at pp. 0352-0353 (Tr. pp. 62-63)) This opinion is consistent with Dr. Rusenko's (the City's turtle expert) opinion regarding the impact that large oceanfront structures have on sea turtle nesting and as publicized at the City's Gumbo Limbo Center. (Tab 30 at pp. 0755-0756 (Tr. pp. 63-64)) The assumption behind this unintuitive circumstance is that tall structures block nighttime "sky glow," another turtle-disorienting factor associated with urban development, and the darker beach safely attracts the turtles for nesting. (Tab 24 at pp. 0352-0353 (Tr. pp. 62-63)) Thus, the proposed structure would have a positive impact to the extent it blocked "sky glow."

Realizing that the unrebutted science did not support its position, the City responded -- without any evidence -- that the proposed structure was "not large enough to block sky glow." (Tab 26 at pp. 0634-0635 (Tr. pp. 7-8)) There is no evidence (objective or otherwise) of how tall a building must be to protect against "sky glow," but common sense is that protection from a four-story building is better than no protection.

(3) Petitioner's Compliance with FDEP and FFWCC Guidelines

Petitioner also sought input and pre-application approval from the FFWCC and FDEP regarding certain elements of the proposed project. Tom Tomasello

represented Petitioner in dealing with these agencies and he explained that FDEP and FFWCC work together to determine whether a project will have an unacceptable impact on turtles before issuance of a permit by FDEP. (Tab 24 at pp. 0342-0343 (Tr. pp. 52-53)) Mr. Tomasello also highlighted the complete lack of objective standards behind the City's various positions. (Id. at pp. 0343-0346 (Tr. pp. 53-56))

In response to Petitioner's pre-application approval request, on March 14, 2016, FDEP issued a letter stating that the "proposed duplex, if constructed consistent with the plans submitted, as modified by this letter, **will not cause significant adverse impact to the beach and dune system.**" (Tab 4 at p. 0012) (Emphasis added).[7] FDEP, a state agency charged with protecting natural resources, had no issues with the siting of the structure in relation to the dunes and turtle nesting areas. As Mr. Tomasello explained, there is not a single structure on thousands of properties in Florida seaward of the CCCL that does not impact the dune system, but

[7] The City contended that this letter was meaningless because by its terms it "did not constitute approval of the Department." (Tab 26 at p. 0633) Yet Petitioner could not get formal CCCL permit from FDEP without obtaining a letter of consistency from the City that the proposed development does not contravene local setback requirements or zoning codes. (Tab 30 at p 0780 (Tr. p. 88); Rule 62B-33.008(1)(c)). Even though it is undisputed that the project met all setback and zoning requirements, the City would not issue the consistency letter "until the CCCL variance is granted." (Tab 30 at pp. 0780, 0839 (Tr. pp. 88, 147)) The City thus ensured that Petitioner could not obtain the FDEP permit until after the City gives a variance.

the idea is to "minimize the impact." (Tab 24 at p. 0343 (Tr. p. 53)) According to FDEP, Petitioner's project would not have a significant adverse impact.

Petitioner submitted a pre-application review request for the project to FFWCC. On August 30, 2018, FFWCC requested that several items be addressed, including issues concerning lighting fixtures and exterior lighting, and a "site plan showing the limits of construction including excavation, fill and dune planting areas." (Tab 20) After Petitioner submitted additional materials, FFWCC wrote on September 24, 2018 that it reviewed the "proposed exterior lighting designs and **recommends approval for the proposed lighting** as indicated on the submitted drawings and cutsheets" and invited Petitioner to submit a CCCL permit application to FDEP. (Tab 21) (Emphasis added) Petitioner's lighting was approved by FFWCC.

Petitioner thereafter submitted a site plan showing the limits of construction including a topographic survey, a project cross section with detailed elevation and grade information, the location of temporary fill and excavation, and a staging and phasing plan. (Tab 30 at p. 0782 (Tr. p. 90)); (Tab 15). On November 1, 2018, FWWC confirmed that the submission addressed all of its concerns about impacts during construction. (Tab 20) The City ignored Petitioner's construction mitigation plan.

The City acknowledges that the project "includes provisions for exterior lighting **consistent with the FDEP and the FFWCC guidelines** and glass

treatments consistent with FDEP guidelines to reduce interior light source visibility." (Tab 26 at p. 0630) (Emphasis added). To get around this consistency, however, the City argued again without any evidence that the FDEP guidelines for glass tinting "are not specific to sea turtle lighting concerns." (Id.) In other words, the City argued that FDEP -- one of the agencies charged with protecting Florida's natural resources, such as turtles -- approved tinting for the project that would be adverse to turtles. The City also ignored in the same report that the 15% VLT for the tinting proposed by Petitioner far exceeded the 45% VLT of its own ordinance, which presumably is specific to sea turtle lighting concerns.

(4) The City's Remaining Arguments.

Unable to rebut the extensive efforts Petitioner undertook to minimize impacts to nesting turtles, the City resorted to other arguments that rely upon subjective "science" and are inherently inconsistent. In the staff report before the EAB, the City complained that the "light signature on the nesting beach associated with the [proposed structure] has not been quantified" by Petitioner. (Tab 23 at p. 0276) The City did not provide any methodology or objective standards for measuring the "light signature" on the beach. The City's turtle expert, Dr. Rusenko, can only measure the lighting impact on the beach after construction using his camera. (Tab 24 at pp. 0333-0334 (Tr. pp. 43-44)); (Tab 30 at pp. 0747-0748 (Tr. pp. 55-56)) The City also heavily relied upon a Technical Report issue by the Florida Fish and Wildlife

Research Institute entitled "Understanding, Assessing, and Resolving Light-Pollution Problems on Sea Turtle Beaches." Of note, the treatise acknowledges that "we have **no reliable formula** for calculating how much a light source will affect sea turtles." (Tab 26 at p. 0634)

In sum, the City has no idea how much light affects sea turtles, and even if it did, it cannot measure the "light signature" on the beach until after the construction of the building. The City lacks competent substantial evidence that the proposed structure with all of the light-minimizing measures taken by Petitioner, which measures far exceed those taken by most other structures along the Boca Raton coast, will have any negative impact on turtles.

The City relied heavily upon the EAB testimony and two reports of its engineer Michael Jenkins regarding how the proposed building would negatively impact turtles, particularly by disorienting them. His "opinions" include:

- "[A] primary concern is for the potential for impacts to turtle nesting habitat." (Tab 24 at p. 0303 (Tr. p. 13))
- "The concern is that this building will have impacts to turtles and that is not allowed within the City Code." (Id. at p. 0304 (Tr. p. 14))
- "There will be adverse impacts on the active use of the site by nesting sea turtles and this is contrary to City Code requirements regarding impacts to environmental resources and listed species." (Tab 23 at p. 0275)
- "And so the concern is given the proposed development that there will be disorientations of turtles associated with what is being proposed." (Tab 24 at p. 0306 (Tr. p. 16))

In addition to the complete absence of competent substantial evidence to support these conclusory statements as demonstrated above, Dr. Jenkins was wholly unqualified to provide such expert testimony. He had never testified regarding sea turtles, never testified regarding the effects of lighting on sea turtles, never written any articles on sea turtle preservation, and never written any articles on the effects of lighting on sea turtles. (Tab 24 at pp. 0537-0538 (Tr. pp. 165-166) Dr. Jenkins relied on the purported opinions of Dr. Rusenko, who did not submit any report or testify at the EAB hearing.[8] The "expert opinion" of Dr. Jenkins regarding impacts to turtles is not competent substantial evidence to support the City's denial of the variance.

The City had no competent substantial evidence that the proposed structure would negatively affect sea turtles. The City relied on unspecified subjective standards and constantly shifted its concerns every time Petitioner addressed an issue. When Petitioner far exceeded the City's own VLT standards, the issue became glass reflectivity even though the City had no reflectivity standards. When Petitioner

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[8] Regarding the negative impact on sea turtles, the City relied upon the "opinions" of Dr. Jenkins and Dr. Rusenko. (Tab 24 at p. 0550 (Tr. p. 179)) The City never called Dr. Rusenko to testify about his expert opinions and he never issued a report identifying what his opinions were regarding the potential impact of the building on sea turtles. (Tab 30 at p. 0747 (Tr. p. 55)) Dr. Rusenko claims he gave his opinions through meetings and emails (Id.), but failed to identify any such emails. The City never gave Petitioner a fair opportunity to examine Dr. Rusenko on his opinions because they were never provided.

then proposed the lowest reflectivity glass in Boca Raton, the issue became reflectivity of flat surfaces even though the City cannot measure such reflectivity until after construction of the building. When Petitioner proposed to paint the building dark brown and completely cover the north and south facades with dark grillage to hide the stairwells, the issue became the height and location of the building. When Petitioner explained the benefit of height in protecting from "sky glow" and pointed out that FDEP had no concerns regarding the location of the building, the City, without any science or evidence, said the building was too short to block "sky glow" and FDEP's approval was irrelevant. The City's standards were "subject to whimsical or capricious application or unbridled discretion" without any basis in science or objective criteria. ABC Liquors, Inc., 366 So. 2d at 149.

No Substantial Competent Evidence of Negative Impacts to Vegetation and Dunes

Petitioner addressed all of the City's concerns regarding the impact of the project to the vegetation and dune system. Dr. Jenkins testified at the EAB hearing that Petitioner provided no mitigation for the following concerns:

- Building will have direct impacts from converting vegetative habitat into physical structure, including removal of native and non-native vegetation and storm water runoff. (Tab 24 at pp. 0307-0308 (Tr. pp. 17-18))

- Building will have construction related impacts, including impacts to vegetation and management of excavation material. (Id.)

- Building will have secondary impacts such as shadowing of vegetation into the fore dune area. (Id.)

Despite having these concerns about vegetation, Dr. Jenkins only identified sea grapes and sea oats as being present on the site. (Tab 24 at p. 0308 (Tr. p. 18)) Dr. Jenkins assumed listed species were present because "we have had incidences of listed vegetation within the dunes within Boca Raton" (Id. at p. 0307 (Tr. p. 17)) and certain species "have been observed in the area and **may** occur on this site." (Tab 9 at pp. 0106-0107) (Emphasis added) In other words, he did not know what, if any, native species were actually present on the site other than sea grape and sea oat.

The City's Staff Reports also expressed the following additional concerns:

- The area of impacted vegetation does not include all of the vegetation to be removed during construction but not replaced afterwards. (Tab 26 at p. 0630; Tab 23 at p. 0279)

- The removal of "exotic vegetation" will leave the "already sparsely vegetated" fore dune "essentially devoid of vegetation." (Tab 26 at p. 0630; Tab 23 at pp. 0278-0279)

- The vegetation removal makes the fore dune more susceptible to wind and storm erosion during the period of construction and afterward "if not replaced." (Tab 26 at p. 0632; Tab 23 at p. 0279)

- The revised mitigation planting plan does not mitigate impacts to existing vegetation "nor does it indicate where each individual planting will be located within its designated zone." (Tab 26 at p. 0631; Tab 23 at p. 0279)

- The plantings in the mitigation plan are low in elevation and unable to act as a buffer between the building and the beach (Id.)

- "The proposed replacement vegetation does not replicate the vegetative species directly impacted by the proposed project." (Id.)

- The replacement species are not native dune vegetation.[9] (Tab 23 at p. 0279)

Petitioner's expert on dune vegetation and restoration, Robert Barron, specializes in coastal restoration. He has conducted over 1,800 restoration projects totaling 120 miles throughout Florida and the Caribbean, including numerous projects in Boca Raton. (Tab 24 at p. 0355 (Tr. p. 65)) For this project, and all of his others, he followed the procedures set by the International Society for Ecological Restoration, which provides guidelines for how restoration projects should be done. (Tab 24 at p. 0356 (Tr. p. 66))

Mr. Barron's proposed re-vegetation plan focused on removing the overly dominant sea grape plants and all invasive species and replacing them with historically accurate native species for the dune habitat. Even though the sea grape is a native plant, it historically did not dominate the dunes as it does today to the detriment of other native species. (Tab 24 at p. 0357 (Tr. p. 67)) For that reason, he has not voluntarily installed sea grapes on any projects in the last 20 years. (Id. at pp. 0357, 0362 (Tr. pp. 67, 72)) The proposed plan would replace the damaging sea grape monoculture and all "invasive plants," including Australian pine and snake

[9] The City never identified which proposed plants were not native, but Mr. Barron's unrebutted testimony was that all of the proposed replacement vegetation was native. (Id. at p. 0358 (Tr. p. 68)).

plant, with a historically correct species mix "in the dune footprint." (Id. at p. 0358; Tr. p. 68))

The City is purportedly concerned with not "replicat[ing] the vegetative species directly impacted by the proposed project" (Tab 26 at p. 0631), even if the existing native and non-native species negatively impact the growth and health of other historically native species. The City's position is completely inconsistent with its own policy of removing non-native species and restoring the dune system to a more natural state with a historically accurate species mix: "Policy CM 1.1.11: Protect and restore altered beach and dune systems."

Mr. Barron disagreed with the City's assessment that the fore dune is "sparsely vegetated" and that the mitigation plan would leave the fore dune "devoid of vegetation." (Tab 24 at p. 0357 (Tr. p. 67)) Nevertheless, he responded that the proposed mitigation would "infill other areas with native plant materials consistent with the zonation that would exist here and it should exist here in a natural system." (Id. at p. 0358 (Tr. p. 68)) The City's concern is that "exotic vegetation" would be removed leaving the fore dune "devoid of vegetation" and subject to erosion, but Petitioner presented a plan that would infill all areas with native vegetation consistent with the natural zonation all the way to the "prevailing north and south limit of the existing vegetation" on abutting properties. (Id. at pp. 0382-0383 (Tr. pp. 92-93)) The City simply ignored this.

Mr. Barron also explained that there is "no evidence to show that" shade from the building would inhibit dune and plant growth. To the contrary, Mr. Barron demonstrated actual buildings in Boca Raton that shade the same vegetative zones and "it doesn't seem to impact the vegetation." (Id. at p. 0360 (Tr. p. 70)) Vegetation that is shaded starting at noon everyday or that does not get direct sunlight until 2:00 p.m. is not adversely affected. (Id.) The concern about the cantilevered floor preventing all vegetation from growing beneath it was also debunked by Mr. Barron who presented pictures of a similar structure in Boca Raton that had vegetation growing beneath it. (Id. at p. 0361 (Tr. p. 71)) The shading concern is simply "not a viable issue," let alone based on any science. (Id.)

The City also expressed concern that the proposed vegetation would be low in elevation and unable to act as a buffer between the building and the beach. (Tab 26 at p. 0631) Mr. Barron testified that if the proposed vegetation is allowed to grow for four or five years, you will not be able to walk though it and "it replicates the natural system. So it is the exact buffer nature provided before we started messing with things." (Tab 24 at p. 0363 (Tr. p. 73)). Again, the proposed mitigation seeks to restore the dune and vegetation back to its natural state and the City presented no evidence to the contrary.

The City also complains that the mitigation plan does not "indicate where each individual planting will be located within its designated zone." (Tab 26 at p. 0631; Tab 23 at p. 0279) Mr. Barron explained that under the mitigation plan:

> Once the construction activities are complete and we go in to do the re-planting, essentially every inch of it will be vegetated consistent with the natural zonation that you would have found here historically and consistent with the plant mix of species that we would put in. And it will completely surround the building, east side, too—or west side, too.

(Tab 24 at p. 0382 (Tr. p. 92)) Even if precise locations were not identified, Petitioner provided a list identifying the species and quantity of each plant (Tab 23 at p. 0278) and ensured that "every inch" of undeveloped land would be vegetated with native species for each zone.

Realizing Petitioner's mitigation plan truly sought to restore and re-populate the dune with native species consistent with the City's own policies, the City's last response is that it just does not matter: "As noble as it may sound to revegetate the dune with plant species known to have inhabited the Boca Raton shoreline 'Prior to Development' as the Applicant's mitigation plan proposes, the shoreline of South Florida has been permanently altered by development and as a result is no longer a natural beach." (Tab 26 at p. 0636) The City's response underscores its ever-changing standards that are impossible to satisfy. Petitioner proposed a plan that would replace non-native species and harmfully dominant native species with historically native species on every square inch consistent with the Comprehensive

Plan goals and policies, but that effort is pointless to the City because it is no longer a natural beach. There is no way to satisfy the City's subjective and changing criteria.

Regarding impacts to the dune during construction, Mr. Stoddard explained that Petitioner's submissions included:

> construction methodology, staging, parking, material, storage and temporary sheet piling specifically to minimize any disturbance to the dune. . . . We're going to drive temporary sheet piling around the perimeter of the foundation. On the north and south sides, it would extend out approximately eight feet. On the east side, about four feet. This will minimize any kind of disturbance of the dune during construction.

(Tab 24 at p. 0334 (Tr. p. 44)). He also explained in a letter dated November 1, 2017, that the submitted plans "show details and phasing of construction for the foundation system. Temporary sheet piling will be used to avoid disturbance of the dune and native vegetation outside the footprint of the building. Locations for storage, parking, and handling of materials are also identified." (Tab 31 at pp. 0845-0849)) Dr. Jenkins did not address this mitigation plan. Nor did he address the fact that FFWCC had approved Petitioner's site plan that addressed the limits and impacts during construction. See supra at 32. Contrary to the City's position, Petitioner proposed a complete mitigation plan to address impacts to the dune during construction.

Lastly, the City expressed during the September 18, 2017 meeting that "[i]nsufficent information has been submitted to evaluate ancillary infrastructure and

the treatment of stormwater runoff." (Tab 31 at pp. 0845-0849) In a letter dated November 1, 2017, Petitioner responded to this concern:

> All stormwater runoff of from the building roof and driveway will be directed to an exfiltration trench to be located below the driveway. The City previously requested that all underground infrastructure be removed from the site plan as part of the EAB submittal. All infrastructure will be flood proof and designed to comply with the City of Boca Raton land development requirements and will be submitted as part of the building permit application.

(Id.). Petitioner addressed the City's concerns regarding infrastructure and stormwater runoff and the City presented no competent substantial evidence to the contrary.

CONCLUSION

The City brazenly denied Petitioner due process throughout the variance proceedings. Institutional bias pervaded the City's decision-making as the City openly expressed its desire to acquire the Property through eminent domain or negotiation as part of its "legacy" of conserving oceanfront property for the benefit of the public. Knowing that the full value of the Property was achievable only under the "extraordinary assumption" that a variance could be obtained, the City had every incentive to deny the requested variance to depress the value of the Property for its own self-interest. The City did not hide its self-interest. When Petitioner indicated its willingness to accept the City's own $7.2 million appraisal, City Council members called the price "ridiculous" and had "one zero too many." They knew the

variance would be denied. Indeed, a majority of the City Council, the body deciding the variance, publicly declared numerous times that they would not support the variance long before any hearing occurred. The City's unabashed institutional bias deprived Petitioner of any semblance of due process as the Resolution was a foregone conclusion long before February 26, 2109.

The hearings before the EAB and City Council were charades of due process that underscored the pervasive bias. Given the number of issues raised by the City staff in opposition to the requested variance, Petitioner reasonably requested additional time to present fully its numerous experts. Both bodies, however, severely limited Petitioner's time to present its case, repeatedly interrupted questioning, and forced Petitioner to forego presenting certain witnesses or their full testimony. Due process requires a full and fair opportunity to be heard, but the City ensured that Petitioner did not have that opportunity.

Even beyond the blatant denial of due process, the City had no competent substantial evidence that Petitioner did not satisfy the variance criteria. As one of only two vacant privately-owned properties east of the CCCL, the Property is unique in its zoning district through no fault of Petitioner. The City failed to refute that Petitioner proposed the minimal use available and below the allowed density. Given the proposed minimal use, the footprint was as small as possible based upon the unchallenged testimony of the Petitioner's engineer and architect. Petitioner's

substantial evidence that the proposed use and plans would not negatively affect sea turtles, vegetation and the dunes went completely unrebutted. Instead, the City relied upon subjective and ever-changing criteria and unreliable experts who had no objective "science" to support their positions. At the end of the day, the Petitioner's evidence was irrelevant to the City as the City had pre-determined that it would deny the variance regardless of the evidence presented.

WHEREFORE, based on all of the foregoing, Petitioner respectfully requests this Court issue a writ of certiorari to the City of Boca Raton quashing Resolution 22-2019, and for any further relief this Court deems equitable and just.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Petition for Writ of Certiorari has been filed with the Court via the e-filing portal and that a true and correct copy has been furnished by Email to Diana Grub Frieser, Esquire, City of Boca Raton, 201 West Palmetto Park Road, Boca Raton, Florida 33432 (dgfrieser@myboca.us) this 28th day of March, 2019.

By/s/ Roberto M. Vargas
Roberto M. Vargas, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition was typed in 14-point Times New Roman font.

By/s/ Roberto M. Vargas
Roberto M. Vargas, Esq.

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