

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT  
IN AND FOR LEE COUNTY, FLORIDA

CASE NO. 25-CA-004846

Appellate Division

Captiva Civic Association, Inc., et. al.,

Petitioners

v.

Lee County (FL) and  
WS SSIR Owner, LLC,

Respondents

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**ON APPEAL UNDER FRAP 9.100(f) FROM THE  
RESOLUTION OF THE LEE COUNTY BOARD OF  
COUNTY COMMISSIONERS**

**PETITIONERS' REPLY TO RESPONDENTS' RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI AND MOTION TO STRIKE**

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## **I. SUMMARY OF ARGUMENT**

Resolution Z-25-005 carved a new Planned Development out of an existing Planned Unit Development, violating Petitioners' rights under Resolution Z-73-202, Administrative Interpretation 2002-00098 ("ADD"), and the Land Development Code's PUD and PD amendment procedures.

Resolution Z-25-005 violated nine additional LDC provisions, including long-established Captiva-specific density and intensity limits, by allowing (i) an unlawful expansion of a master development plan, (ii) the prohibited use of unidentified easements and property the applicant does not own, and (iii) an increase in density without proof of adequate sewer and fire services.

The rezoning of 120 acres of the 304-acre South Seas Resort comes at the expense of 640 property owners on the remaining 184 acres of the fully integrated Resort, whose properties and shared roadways, easements, open space and clustered densities in a common plan of development suffer detrimental impact.

That developers built the Resort as a single PUD with a Master Development Plan, and all official County actions over 50 years treated it as a PUD, refutes Respondents' claim South Seas held

conventional zoning and qualified for exemption from the LDC's PUD amendment rules the ADD references. The Resort could not have been constructed under any conventional zoning district. Its development was conditioned upon the 912-unit (3 per acre) density limitation for both residential and hotel units with specific construction, building height, open space, infrastructure, landscape, parking, buffering and setback standards to ensure compatibility of uses among the purchasers of Resort properties. Allowing SSIR to extract and rezone 120 acres of the 304-acre Resort for increased density and building heights violates this binding, common plan of development. Petitioners' property rights are fully integrated into a single, interrelated development limiting "current and future development" within South Seas. The rezoning destroys the common plan of development and makes the Petitioners' remaining development clusters nonconforming by exceeding the LDC's limit of three units per acre.

The County also violated the due process rights of Petitioners, whose interests are categorically greater than those of typical abutting landowners. Due process required either their consent to

SSIR's rezoning application or full party status during the quasi-judicial proceeding.

Respondents claim Petitioners "view life through a 50-year-old prism." Petitioner's prism, however, is Code Section 34-413(1), which requires the County to "limit development to that which is in keeping with the historic development pattern on Captiva," "enforce development standards that maintain the historic low-density residential development pattern of Captiva," and "continue existing land use patterns." These provisions prevent the very expansion of the Resort's density and intensity approved here, not enable SSIR's vision of "increased or shifting population" on Captiva, or South Seas as "an area of growth."

The rezoning increased the number of SSIR's units from 272 (2.26 units per acre) to 628 (5.23 units per acre) and increased its building heights from 35 to 60 feet above grade.

## II. ARGUMENT

### 1. South Seas Resort was and is a Planned Unit Development; Resolution Z-25-005 Violates the LDC's PUD and PD Amendment Provisions.

The 1973 Zoning Resolution “established a **unique zoning district** . . . the South Seas Resort District . . . using a PUD Concept as a guide with a special limitation of three units per acre (912 total units).” (PA. 004154). A 2000 Zoning Staff memorandum explained:

Having reviewed the development status of the SSPD through all ... evidence in the field, I have determined ...:

Z-73-202 established a [PUD] zoning district ... limited to ... a maximum of 912 units and 5 acres of commercial development, all within 304 acres of Captiva Island.

(PA. 004212).

South Seas mirrors Section 34-1033's definition of a PUD:

Planned Unit Development means ... land that is **developed as a unit under unified control and is planned and developed in a single operation** ... by a series of scheduled development phases according to an officially approved final PUD development plan that **does not necessarily correspond to the ... regulations of the conventional zoning districts but permits flexibility** in building siting and mixtures of housing types and land uses, and encouraged the utilization of usable open space and the maintenance of significant natural features.

No conventional zoning category produced South Seas' fully-integrated, clustered, mixed use development of single family

residences, condominiums, hotels and restaurants built without conventional buffers and setbacks. The ADD confirmed this:

“[I]n light of the PUD definition ... converting the SSRD to, or treating the SSRD as an RM-2 zoning district does not further the mutual intention of the [BoCC] and the developers ... evident in Resolution Z-73-202 for the project to be developed as a PUD; and

[. . .] the developers ... have developed the subject property similarly to a PUD, in reliance on Resolution Z-73-202;” (PA. 004420).

The ADD’s accompanying Staff memorandum explained that applying the RM-2 or TFC-2 conventional zoning standards to South Seas would be “problematic to both the developer and the county” because those requirements were inconsistent with the Master Concept Plan under which the Resort had developed. (PA. 004198).

SSIR’s application for this rezoning also confirmed that “[o]ver the years **the Resort has been treated as a PUD,**”<sup>1</sup> based on ... **the [1973] zoning,**” and “what had been constructed ... was **inconsistent with the conventional zoning.**” (PA. 001598) (emphasis added).

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<sup>1</sup> The HEX found the ADD “treats the Resort similar to a PUD.” PA. 001405.

**A. Resolution Z-25-005 Violates LDC Section 34-1039.**

Resolution Z-25-005 violates LDC Section 34-1039, which governs “built Planned Unit Developments” by failing to recognize South Seas as a built PUD and ignoring the PUD amendment rules. The County authorized PUD amendments to South Seas in 2002, 2003, 2004, 2006, 2008 and 2015, affirming “[t]he terms and conditions of the original zoning resolutions, as confirmed in ADD2002-00098 remain in full force and effect.” (PA. 001599, 002023, 002462, 004250).

Respondents’ claim the ADD was invalid and could not be further amended under Section 34-1039 belies reality. First, the Resort remained subject to the ADD “unless the County approved further zoning action.” Second, “[t]he ADD referenced LDC Sec. 34-1038, a PUD amendment procedure, as the process for reviewing changes to the Resort’s development parameters.” PA. 004428. Third, after Z-25-005 was approved for SSIR’s 120 acres, the ADD still governs Petitioners’ remaining 184 acres.

Failing to recognize South Seas as a PUD converted the amendment process from the longstanding parameters of an existing single, integrated, built-out development—with all affected parties

either joining or equally participating—to a rezoning process untethered from the 1973 Zoning Resolution and ADD.

**B. Resolution Z-25-005 Violates Section 34-373(c).**

Respondents claim PUD amendment rules do not apply because Planned Developments have replaced PUDs, and Z-25-005 rezoned the Resort from conventional zoning to a PD “for the first time.” However, South Seas was always a PUD or PD, not conventionally zoned. If the PUD amendment provisions no longer apply (which they do), the LDC provisions governing “Amendments to built Plan Developments” must apply. In either case, Resolution Z-25-005 violated the Code.

Section 34-373(c), which governs amendments to built PDs (the successor to PUDs according to the County), provides:

Any part or all of a planned development that is built may be the subject of an application for a variance or other approval covered by this chapter wherein the **subject property is the only part of the original planned development that will be affected by the requested approval.**

One property owner cannot amend a fully-built PD when the amendment will affect other properties—as is the case here. The deviations and increased development impact shared roadways and

easements. (PA. 798-807, 1500, 1514, 1518 1524-1530, 1558,1570-1571,1573-1578; 1624, and 1629). SSIR's request to waive the requirement to identify all property easements cited the "complexity and history of the property" as the "reason" for its request—which the County granted. (PA. 001697). SSIR justified its request for reduced buffers between its rezoned property and an adjacent home because, under the ADD, the entire Resort constituted the same property and stood "in that zoning together." (PA. 3276-3277).

Moreover, with the extraction and rezoning of the 120 acres from the 304-acre development, Petitioners' 640 units on the remaining 184 acres become nonconforming and, should they sustain substantial damaged or destruction, could not rebuild within the three units per acre Code limitation, which permits only 552 units. (PA. 000852 - 000855; 001964 - 001965).

The map below illustrates the unique intertwined relationship of the applicant's 120 acres to the remaining 184 owned by Petitioners' members. The HEX found "The Master Concept Plan (MCP) depicts development mainly concentrated in two locations at opposite ends of the property." (PA. 001404). However, the units the



same features that have existed for over 50 years and SSIR's 120-acre parcel is part of the larger 304-acre Resort, which "has functioned as a cohesive master planned resort since its inception" (PA.001618, 002481, 004004) and "has included hotel, residential and commercial uses." (PA. 001409, 001423). What Respondents claim is a newly minted PD is the same as what has existed—only substantially and impermissibly larger.

Section 34-612 also shows that South Seas is NOT a conventionally zoned district:

Conventional zoning districts are districts ... within which land use is controlled through the regulation of the height and bulk of buildings and structures, the minimum area and dimensions of lots, the percentage of lot coverage, minimum open space and yard areas, through the use of setback requirements, the density of population, and the type and intensity of use of the land and buildings.

This is not South Seas.

Code Section 34-612(2)'s definition of Planned Development Districts, however, perfectly describes South Seas:

"The purpose and intent of . . . [PDD]s is to further implement the . . . Lee Plan while providing . . . flexibility in planning and designing developments by:

a. Facilitating state of the art site planning ... to improve the quality of the built environment and to ensure

the most economical use of land and public resources; . .  
.

c. Encouraging ... mixed-use development ... the provision of several uses in combination such as residential and neighborhood commercial, . . . and other analogous combinations;

d. Promoting improved and unifying design techniques that reduce dependence on vehicular movement within the development, encourage the use of joint parking and loading facilities, provide for joint access . . .

e. Encouraging patterns of land use that support more economical provision of infrastructure;

f. Providing a mechanism by which the preservation or conservation of historic or natural resources and environmental amenities, including open space, may be ensured . . .

h. Providing a process and record on which developers, public officials, ... and the consumers of development may rely....”

South Seas indisputably had “the elements” of a PD—the 1973 Zoning Resolution, the BOCC-approved South Seas Resort Master Development Plan, which detailed existing and future development within the unique zoning district approved for the South Seas Resort

District.<sup>2</sup> Failing to apply either the PD or PUD amendment restrictions to South Seas was unlawful.

**C. Z-25-005 Violates Section 34-612(h).**

Section 34-612(2)(h) describes the PD Districts as:

“Providing a process and record on which developers, public officials, ...the general public and the **consumers of development may rely ....**”

The County violated Section 34-612(h) when it disowned South Seas as a PD and ignored the “process and record” of the 1973 Zoning Resolution and the ADD upon which “developers, public officials, the general public and the consumers of development may rely” for more than 50 years—and approved a major expansion of the Resort as if the other owners were simply abutting property owners. The ADD was clear:

“Contemporaneous to the adoption of Resolution Z-73-202, the developers made ... **representations** to [the County] and the Public, which representations **constitute enforceable conditions of the SSRD:**

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<sup>2</sup> *Biscayne Cove Condo. Assn. v. Biscayne Cove Southeastern, Inc.*, 582 So. 2d 806, 807 (Fla. 3d DCA 1991), which ruled that a fire safety ordinance adopted after a permit application was filed did not apply to the application, does not support Respondents’ claim that the Resort’s consistent, historic treatment cannot subject it to the code provisions governing amendments to PDs.

a. Development ... will evolve over a number of years in line with ... very low density development utilizing a number of small scale clusters; carefully planned and tightly controlled development; ... [and]; Emphasis on pedestrian traffic, not automobiles.

b. The project will be limited to 912 residential units (304 acres at three units per acre) and five (5) acres of commercial development.” (PA. 004423).

South Seas property owners whom Petitioners represent relied upon the 1973 Rezoning Resolution, the ADD, and the amendments to the Resort’s Master Development Plan as the Resort developed under a unified plan with a 912 unit density cap, height limits and other restrictions—and many so testified. (PA. 001214 - 001215, 001262, 002263, 002280, 002331–002332, 002433-002457, 002968–002972, 002988,003084, 003105, 003136, 003146). SSIR’s rezoning application repeatedly asserted it had vested rights under the ADD and 1973 Zoning to 272 units allocated to its 120 acres . (PA. 001602–001605, 001613, 001615). They justified deviations from Code requirements because they “will allow for continuation of vested design standards set forth in ADD2002-00098.” (PA. 002478)

Yet the special treatment the County gave SSIR’s portion of the 304-acre Master Development Plan fails to protect the vested rights of most South Seas property owners under the enforceable common

plan of development. The record includes substantial objections to allowing the applicant to carve out its acreage from the built PUD for a windfall density and height benefit incompatible with the adjacent owners' interests. (PA. 001675, 001685, 001720, 001752–53, 001771; 001995–001998, 002849; 000800, 000815–000817, 000848–000849, 000870, 000945, 000958, 001654, 001675, 001683, 001713, 001955–001958, 001964–001965, 002836, 002845, 002852, and 002929).

Petitioners have property rights emanating from the common plan of development's mutual burdens and benefits. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302 (Fla. 1966). Citing *Hagan*, in *Preserve Grove Isle, et. al. v. Grove Isle Yacht & Tennis Club, et. al.*, 11<sup>th</sup> Circ. Case No. 15-009106 CA 04 (Final Order Aug. 13, 2015), Judge Bronwyn Miller ruled condominium unit owners could enforce a “common development plan” upon which they relied—based on representations by the original developer—in purchasing their units and which a demolition permit's approval would destroy.

**2. Petitioners are enforcing Code Section 34-413(1), which adopts the “range of density or the uses permitted or encouraged under the Lee Plan as its governing density and intensity standard.**

**A. This Petition enforces the Land Development Code.**

This is not a Section 163.3215, Fla. Stat. action to enforce a comprehensive plan. It is a certiorari action to enforce Code Section 34-413(1), which requires:

Density or intensity of use permitted in any planned development shall be determined on a case-by-case basis in accordance with:

- (1) The range of density or the uses **permitted or encouraged under the Lee Plan at that location**; [...]
- (4) The nature of and the density and intensity of existing development surrounding the project. (emphasis added).

LDC Section 34-413(1) adopts the relevant Comprehensive Plan provisions. The Court has the same jurisdiction over this claim as any other Code-violation claim.

**B. Resolution Z-25-005 violates Section 34-413(1) by allowing a density and intensity of use that is not within the range of density permitted or encouraged under the Lee Plan at that location, and with the nature of and the density and intensity of existing development surrounding the project.**

The 1973 Zoning Resolution limited the “range of density or the uses permitted or encouraged under the Lee Plan at that location” and the “nature of and the density and intensity of existing

development surrounding the project” to three units per acre—a total of 912 units—including hotel and residential units.

**Goal 23** of the Plan is to “**maintain** the historic low-density residential development pattern of Captiva.” (PA. 001609). **Objective 23.2** is to “**continue** the long-term protection and enhancement of ... **existing land use patterns, unique neighborhood-style commercial activities** ... and historically significant features on Captiva.” (PA. 1758). Policy **23.2.4** is to:

**“Limit development to that which is in keeping with the historic development pattern on Captiva ..... The historic development pattern on Captiva is comprised of low density residential dwelling units ... minor commercial development and South Seas Island Resort.”**

(PA. 000073) (emphasis added).

Respondents’ claim that the Plan does not limit development on South Seas to a historical development pattern ignores Policy 23.2.4’s plain language. Their claim that “there is no historical development pattern for the Resort based on the ADD” and that the reference to “South Seas Island Resort” concerns solely uses and not density and intensity ignores the specific reference to “density,” the enactment of the Captiva Plan amendments sixteen years after ADD2002-00098 and forty-five years after the 1973 Zoning

Resolution establishing the Resort District, and the Support Document adopted with those amendments, which identified South Seas as “a blend of hotel, commercial and residential uses **delineated in a separate 2002 Administrative Interpretation ....**” (PA. 004579). The ADD limited development to 912 combined residential and guest units,<sup>3</sup> and restricted building heights to the lesser of 35’ above the grade or 42’ above mean sea level. (PA. 003815).

Respondents’ reference to a County planner’s opinion that the Resort is a distinct area and the Plan’s lack of an explicit reference to the ADD misses the point. The Plan requires limiting density to the historical development pattern, and the 1973 Zoning action and ADD undisputedly delineate that pattern.

The Plan’s Support Document for Captiva explained the Plan “protects the existing neighborhood form and densities,”<sup>4</sup> described as “a pattern of land use and low-impact development ... that should be maintained and supported into the future.” (PA. 004561). It

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<sup>3</sup> Respondents’ insistence that hotel units at South Seas are not subject to residential density limits because hotels in PDs are generally exempt from density calculations is irrelevant. The rules on Captiva have always been stricter.

<sup>4</sup> PA. 004556.

explains “density on Captiva is three units an acre,” that hurricane evacuation times, infrastructural capacity and other factors, “warrant[] ... steps to **control the density and intensity ... to that which currently exists**”<sup>5</sup> and “**limiting rezoning approvals to those which do not increase density ....**” (PA. 004572) (emphasis added). It explained “[b]uilding height limits have a long historic precedent on the island” and the policy “maintains this historical limit ... to continue the island's history of low-rise and low-density development.” (PA. 004574).

The Resort is **not behind a gate and separated from the residential part of Captiva**, as Respondents claim. The South Seas shops, its Farmers Market and its conference center sit outside the gate. (PA 001201, 001933, 002945, 003813, 003852). South Seas abuts Captiva’s residential Village, and South Seas residents and visitors continually visit the Village by foot, golf cart and auto. PA. 001199–0012020; 002030. Forty-nine CCA members and 640 Petitioner Association members own 640 residential units/lots within the Resort. (PA. 001569)

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<sup>5</sup> PA. 004576 (emphasis added).

A greatly expanded Resort is not within the range of *density* the Lee Plan permits or encourages because the Resort is still a resort. The Code requires both use and **density** to remain consistent with the Comprehensive Plan which prohibits the massive expansion of an existing use, as happened here. Resolution Z-25-005 increased development on SSIR's 120 acres from 272 units to 628 units, from one 107-room hotel to 2 hotels with 435 rooms, and from 2.27 to 5.21 units per acre.

No structure SSIR owned violated the ADD's building height limits. (PA. 003811)<sup>6</sup> But the rezoning allows SSIR three habitable stories above parking (RA PA. 001603) up to 60' above grade. (PA. 003817). Under the guise of a regulatory "squeeze," the approval provides SSIR more habitable stories than the buildings they purchased and demolished, at almost double the prior building heights, and 15' taller than any existing structure on South Seas.

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<sup>6</sup> Staff Report ("previous property owners have developed in accordance with the guidance provided in ADD2002-00098"). The ADD limited heights to the lesser of 35' above the grade surrounding the building foundation or 42' above mean sea level. (PA.004162)

Respondents' reference to five hotels that exceed 3 units per acre "surrounding the Resort" (RA.63, 86; RA.2386) points to four old motels built between 1925 and 1976, pre-dating the Comprehensive Plan and the Code, and comprising only 13.26 acres combined (Captiva is 740 acres). Three of the four have County historic designations. (PA. 000082 - 000086; 001636; 001683). They are the "historically significant features" Goal 23 of the Lee Plan allows to "continue." The fifth building cited by the Respondents—Sunset Captiva Condominium—is not a hotel. (P.A. 002499).

**Resolution Z-25-005 erroneously applied Code provisions intended to limit development at South Seas to its historic pattern to instead allow a major expansion of that historic development pattern.**

In addition to the historic development pattern Plan Chapter 23 mandates, Plan Policy 1.1.6 establishes the "range of density . . . permitted or encouraged under the Lee Plan" on Captiva as "from one dwelling unit per acre ... to three dwelling units per acre ...." Resolution Z-25-005 violates Policy 1.1.6. It allows a density of 5.21 per gross acre on SSIR's 120 acres. (PA. 001500, 000917 - 000918.).

Respondents cite a 2023 Code amendment<sup>7</sup> exempting hotels at South Seas (but not the rest of Captiva) from the Captiva Code limiting hotels to 3 units per acre. But specific to South Seas and the rest of Captiva, the 1973 Zoning Resolution, the actual development, and the ADD have historically limited both hotel and residential units to 3 units per acre. The Resort held exemption from LDC Chapter 33 only if it complied with the ADD. (PA. 001350).

LDC Section 34-413 precludes the increased hotel room densities Resolution Z-25-005 allows. If the Plan and the Code conflict, LDC Section 34-491(a) states:

All development orders (including rezonings) ... shall be consistent with the ... Lee Plan. **Where there are apparent conflicts between the Lee Plan and any regulations ... the Lee Plan will prevail.**

(emphasis added).

The density and intensity Resolution Z-25-005 allows for SSIR substantially exceeds the “range of density or the uses permitted or encouraged under the Lee Plan at that location” and is not in keeping

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<sup>7</sup> The adoption of that Code change remains subject to appeal before the Sixth District. *CCA. v. Lee County, et. al.*, Case No. 6D2025-0271.

with the “nature of and the density and intensity of existing development surrounding the project.”

**C. Collateral Estoppel does not render an administrative agency’s interpretation of the Lee County Plan preclusive in this proceeding.**

A ruling by an administrative law judge, which is on appeal<sup>8</sup>, does not collaterally estop Petitioners from asserting their interpretations of the Lee Plan’s Captiva density standards. Respondents’ cases do not apply collateral estoppel to judgments subject to appeal. Collateral estoppel does not apply when the trial court judgment remains on appeal. *Ridard v. Massa Inv. Group*, 337 So. 3d 862, 865 (Fla. 3d DCA 2022).

Collateral estoppel also cannot apply because the parties in the two proceedings are not identical. *Zakhary v. Raymond Thompson PSM, Inc.*, 93 So. 3d 1148, 1151 (Fla. 2d DCA 2012). Nineteen of the twenty Petitioners in this case were not a party to that administrative proceeding.

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<sup>8</sup> *CCA v. Lee County, et. al.* (Fla. 6 DCA Case No. 6D2025-0271).

### **3. Violation of Procedural Due Process.**

#### **A. What Process is due is circumstance-specific.**

The overarching holding in *Carillon Community Res. v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010) provides:

The **extent of procedural due process protection varies with the character of the interest and nature of the proceeding** involved. There is, therefore, **no single unchanging test** .... Courts instead **consider the facts of the particular case.**” *Id.* at 9. (emphasis added).

*See also Walker v. Bailey*, 89 So.3d 297, 299 (Fla. 5d DCA 2012) (“Due process ... is a **flexible concept that calls for procedural protections specific to each circumstance.**”)

The nature of the Resort’s 304-acre planned master development, within which many Petitioners’ members own homes, and the rezoning’s impact on their property interests, required that they be afforded full quasi-judicial party status. In *Harris v. Goff*, 151 So. 2d 642 (Fla. 1st DCA 1963), a County moved to dismiss a lawsuit by third-party objectors to a rezoning on the theory their sole remedy lay in a certiorari action. *Id.* at 643. The Court upheld the denial of that motion to dismiss, explaining certiorari was available only when the parties below received the necessary quasi-judicial procedures. *Id.* at 645. The Court held a “fair opportunity to be heard must afford

the affected party the opportunity ... to ... **cross-examine adverse witnesses ...**” *Id.* at 644. (emphasis added).

In *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648, 652 (Fla. 3d DCA 1982), the Court observed the “procedural due process which is afforded to the interested parties in a hearing on an application for rezoning” includes “the right to cross-examine adverse witnesses....”

**B. Given the unique nature of the South Seas Master Planned Development, Petitioners should have been granted full quasi - judicial party status.**

Petitioners’ status in the Resort categorically exceeds that of typical abutting property owners. The rezoning affected property they own. Regardless of the zoning category applying to the South Seas development district, the unique nature of this integrated resort—with a common plan of development, interwoven property interests, shared infrastructure, and vested rights the 1973 Zoning Resolution created and the County continuously re-affirmed—required that the Petitioners be granted full quasi-judicial party status. *See supra*, pp. 10 - 12.

*Metro-Dade County v. Sokolowski*, 439 So.2d 932 (Fla. 3d DCA 1983); rev. denied, 450 So. 2d 488 (Fla.1984) explains that

Petitioners possess a property interest sufficient to preclude approval of the zoning change without their consent and to require full quasi-judicial hearing party status:

[a] **property interest may be created by statute, ordinance or contract** [internal citation omitted] **as well as by policies and practices of an institution which support claims of entitlement.** [internal citations omitted]; *Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir.1975), cert. denied, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976) (**viable understanding** that, although *Soni* ineligible for tenure his employment would be permanent, gave rise to entitlement); *Hermes v. Hein*, 511 F.Supp. 123 (N.D.Ill.1980) (**unwavering custom** of promoting in exact order of rank on promotion roster gave rise to entitlement); *Garnel v. Bunzel*, 68 Cal.App.3d 999, 137 Cal.Rptr. 627 (1977) (tenured professors had property interest in right of consultation with respect to departmental personnel and policy activities under written regulations, and **policies and practices of university**).

*Id.* at 934.<sup>9</sup> (emphasis added)

In *Moser v. Barron Chase Securities, Inc.*, 783 So.2d 231 (Fla. 2001), Florida's Supreme Court held:

“The notion of a property interest encompasses a **variety of valuable interests that go well beyond the traditional view of property.** [internal citations omitted]. However, these interests do not make up some exclusive list; rather, they are **defined in light of existing rules or understanding.**”

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<sup>9</sup> Accord, *Key West Harbour Development Corp. v. Key West*, 987 F.2d 723, 727 (11th Cir. 1993).

*Id.* at 237, n.5 (emphasis added).

Given the unique nature of the Resort District the County created in 1973 (including the special limitation of 912 units) and the spatial relationships of the intertwined nature of the fee simple and easement ownership interests, Petitioners have reliance-based vested rights to prevent the unilateral density increase the County granted to SSIR and to participate on equal terms as a party to the quasi-judicial hearing. *Citrus County v. Halls River Development*, 8 So. 3d 413, 421–422 (Fla. 5th DCA 2009) (recognizing estoppel/vested rights based on substantial change in position in good-faith reliance on an act of government such that destroying those rights would be highly inequitable and unjust). This is especially true given the detailed “enforceable representations” in the 1973 Zoning Resolution and the ADD. *Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571, 573 (Fla. 2d DCA 1975) (“a citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations.”).

Here, the reliance language in LDC Section 34-612(2)(h) and the objections by organizations representing hundreds of people who bought units within the master planned development require the Court to quash Resolution Z-25-005.

**C. The County Code restrictions on non-applicant status cannot excuse a Constitutional violation.**

While Respondents claim Petitioners had due process since the County Code prohibits non-applicants to be a party to a quasi-judicial hearing, the Constitution supersedes local ordinances. *Florida Ass'n of Realtors v. Orange County*, 350 So. 3d 115, 119 (Fla. 5th DCA 2022).

*Manatee Cty. v. Mandarin Dev., Inc.*, 301 So. 3d 372 (Fla. 2d DCA 2020), which involved a facial constitutional challenge, does not support Respondents' claim that the statute of limitations bars Petitioners' due process claim. In an as-applied challenge, the statute runs from the ordinance's application. *Shands v. City of Marathon*, 999 So. 2d 718, 726–27 (Fla. 3d DCA 2008).

**D. Petitioners Were Not Afforded Procedural Due Process.**

Three factors overwhelmed the time Petitioners had to present: (1) SSIR's counsel's ability to interject objections to testimony and

exhibits and cross examine opposing presenters in real time, (2) Petitioners' counsel's inability to do the same; and 3) SSIR's ability to present a two-day rebuttal case free from objections or cross examination by Petitioners' counsel. (PA. 003254 - 003768).

Respondents **falsely claim Petitioners were allowed to make “rebuttal presentations on all pertinent issues.”<sup>10</sup> That did not happen.** Respondents' record citations (PA. 1930, 2059, and 2813) have nothing to do with Petitioner rebuttal testimony. Only SSIR had that opportunity, after having 18 days after the public presentations ended to prepare a rebuttal case. (PA. 003079 - 003220, 003254). Petitioners could not cross-examine SSIR's rebuttal witnesses.

Respondents speculate allowing the Petitioners to cross-examine witnesses and present rebuttal testimony would have turned a nine-day hearing into nine weeks and become “a procedural nightmare....” A more realistic projection of one-to-two additional days would have respected the Petitioners' interests and the enormous impact of the decision.

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<sup>10</sup> Response pp. 23, 42.

**4. The Rezoning Departed from the Essential Elements of Law Because It Violates the LDC.**

**A. The Improper Use of Easements and Deviations, and Property Interests of Non-Applicants.**

**i. The alleged waiver of the requirements to depict all easements**

LDC Section 34-373(a)(4)(a) requires an application for a PD to include “a boundary survey . . . [that] must identify and depict all easements affecting the subject property . . . .” SSIR’s application did not.

Separately, Section 34-373(a)(6)(a) requires the MCP to identify the location and explanation of all existing easements. SSIR did not comply with this requirement either.

Respondents claim the County’s waiver from Section 34-373(a)(4)(a) also relived SSIR from identifying easements on the MCP as Section 34-373(a)(6)(a) requires. But these are independent requirements. **The explicit authorization for waivers in Section 34-373(a)(4)(a) (boundary survey) does not exist in LDC Section 34-373(a)(6)(a) (Code Master Concept Plan).**

Respondents omit the first part of the sentence in Section 34-373(a)(4)(a) – which **limits waiver requests to:** “applications seeking

to **amend an approved planned development ....**” (emphasis added).

**The contradiction from Respondents, who adamantly claim they were not amending a PD, is stunning.** Either Respondents concede they amended a PD (to obtain their easement-requirement waiver) or they violated the Code by not identifying the easements. Failing to depict all easements on the MCP omitted areas where the proposed development conflicts with or ignores the property interests and rights vested in any unidentified easement’s beneficiaries and owners—*i.e.*, many Petitioners’ members. (PA. 002555)

**ii. The improper use of property not owned by SSIR.**

SSIR does not own the entire Access Road affected by the rezoning. Deviations 2 and 14 either apply to the entire Access Road or only to portions of the Access Road owned by SSIR, which make them invalid. SSIR and Petitioners share roadways and easements (PA. 1573–1584), including a single two-lane Access Road and the only hurricane evacuation route on the Resort—which SSIR acknowledges is already constrained. (PA. 798–807; 1573–1578; 1624). Dismantling the existing development and increasing density on the portion SSIR owns, with adverse impacts to the Access Road

largely owned by several Petitioners, violates PUD and PD amendment procedures and Petitioners' due process rights. The approved increase in density and building heights will impact adjacent and interconnected owners at a level far exceeding what has been historically approved. (PA. 1570-1571).

Deviation 2 allows SSIR to preserve vegetation along the east side of the Access Road instead of complying with the LDC requirement for a 15-foot-wide right-of-way buffer throughout the project, and allows no buffer along the west side. Deviation 14 exempts SSIR from the safety specifications for the Access Road—a privately maintained local roadway with open drainage. It requires SSIR only to submit a development order application depicting “Bicycle May Use Full Lane” signs and pavement markings, along with an engineering report for bicycle signage and pavement markings detailing the roadway’s condition. (PA. 001514 and 1518). SSIR claims, citing RA.1989 and 2174 and PA. 1449, this Deviation simply continues an existing deviation on “*its* roadway, with limited improvements.”

While SSIR purports Deviations 2 and 14 apply only to the sections of the Access Road subject to the 120 acres it owns, the

approved MCP shows both Deviations apply to the entire Access Road, including the segments outside the property subject to the rezoning. (PA. 1500; 1524-1530).<sup>11</sup>

Respondents claim SSIR did not seek to rezone any roads on Petitioners' property or impose covenants and restrictions on Petitioners' property, and Deviations 2 and 14 simply allow SSIR to "*leave the road as is*" (RA.2174). However, the MCP identifies the entire Access Road as subject to Deviations 2 and 14 and necessary for access to SSIR's proposed development. Nor does SSIR own the existing vegetation along both sides of the Access Road portions others own. Without the consent and joinder of Petitioners - who own the balance of the Access Road -SSIR cannot maintain the entire road or the immediately adjacent existing buffer in its existing condition

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<sup>11</sup> LDC Section 34-202(A) required SSIR to submit a signed sworn statement that it is the owner or authorized representative of the owner of the rezoning application and has full authority to secure approval and impose covenants and restrictions on that property. SSIR is not the owner of the full extent of the road to which the Master Concept Plan applies Deviations 2 and 14 and is not the authorized agent for any of the 12 association petitioners or other impacted owners. PA. 803-805. Z-25-005 requires that development comply with the attached MCP. PA. 1500.

along its full extent pursuant to the approved rezoning. (PA. 803-807, 1575, 1558, and 1629).

Notwithstanding this internal inconsistency, if Deviations 2 and 14 applied only to SSIR's portion of the Access Road, they would have no practicable effect. Right-of-way buffering and street design and construction standards exist to sufficiently mitigate adverse impacts to adjacent uses and properties from the rezoning. However, Deviations 2 and 14, if applied only to a small portion of the Access Road subject to the rezoning, fail to mitigate the adverse impacts to the Access Road segments others own, maintained at the expense of others, and which must serve the additional density and intensity from the rezoning. For example, approval of Deviation 14 was conditioned upon bicycle lane signs and pavement markings, a report identifying areas of pavement failure, evidence of site-specific crash patterns, and identifying existing right-of-way widths or access easement widths to provide sufficient road access to support the proposed development intensity and enhance the planned development and preserve public safety. (PA. 1519-1520. These conditions cannot practically apply to only the portion SSIR owns

when the entire Access Road serves the development subject to the rezoning. PA. 1518; 1555–1159.

Deviation 14 relieves SSIR from the safety specifications for privately maintained local roadways. PA. 1518; 1555–1159. To justify Deviation 14, SSIR utilized a cross-section of an Access Road portion it does not own and which is outside the property to be rezoned.<sup>12</sup> SSIR cannot utilize road conditions existing outside its property to support a deviation it alleges is applied to only its property.

**iii. The Deviations Were Improperly Granted.**

Respondents seek to “memorialize” existing entitlements under a PUD whose existence they deny while intensifying development on the Resort without companion improvements to adequately serve that development.

Existing constraints already prevent widening the Access Road to serve already developed properties. The approved deviations and the corresponding intensification from the rezoning will compound this constraint—to the detriment of the majority owners of the Access

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<sup>12</sup> The cross section used by SSIR is from a portion of the Access Road within Beach Cottages Condominium Association, Inc. property. PA. 1575, 1558, and 1629.

Road, who were not a party to the proceedings and did not consent to the rezoning.

Respondents want it both ways. They say the ADD is invalid (PA. 1599) but consistently relied on it to claim SSIR had vested development rights and sought to expand its application to serve the project at a greater intensity the ADD did not contemplate. The deviations result from the applicant's actions, a reasonable use of the land exists without them, and they harm the public interest. They violate Code Sections 34-373(9) and 33-1615(b).

**B. Adequate Sewer Capacity Does Not Exist for the Increased Development Approved by Resolution Z-25-005.**

Code 34-202(a)(10) requires verification of the appropriate utility provider's ability to serve the proposed development. No competent substantial evidence shows SSIR satisfied its burden. Rather, the evidence proves the proposed development has a sewer demand of 187,457 Gallons Per Day (PA. 004333) and the FGUA wastewater treatment facility has availability for only 117,880 GPD of the proposed new development. (PA. 000191).

**County Staff provided the only sewer demand analysis** for the proposed development. It included wastewater treatment

demands for 196 multi-family units, 435 hotel rooms, 6 restaurants, 78 boat dock slips and a water park for a total demand of **187,457 GPD**. (PA. 004333, 004766). This was uncontroverted.

**SOUTH SEAS  
WATER & SEWER DEMAND ANALYSIS**

**A. POTABLE WATER**

Existing Resort per ADD2022-00098

165 multi-family units @ 200 GPD/unit	= 33,000 GPD
107 hotel rooms @ 200 GPD/room	= 21,400 GPD
6 restaurants @ 49,980 GPD	= 49,980 GPD
78 boat dock slips @ 25 GPD/slip	= 1,950 GPD
Marina @ 750 GPD	= 750 GPD
<b>TOTAL EXISTING DEMAND:</b>	<b>107,080 GPD</b>

Proposed Mixed Use Development per DCI2023-00052

196 multi-family units @ 200 GPD	= 39,200 GPD
435 hotel rooms @ 200 GPD	= 87,000 GPD
6 restaurants @ 49,980 GPD	= 49,980 GPD
78 boat dock slips @ 25 GPD/slip	= 1,950 GPD
Marina @ 750 GPD	= 750 GPD
Water Park @ 13,991 GPD	= 13,991 GPD
<b>TOTAL PROPOSED DEMAND:</b>	<b>192,871 GPD</b>

The proposed South Seas Island Resort MPD results in an estimated increase in potable water demand of 85,791 GPD. The Subject Property is located in the Island Water Association (IWA) potable water service area.

**B. SANITARY SEWER**

Existing Resort per ADD2022-00098

165 multi-family units @ 200 GPD/unit	= 33,000 GPD
107 hotel rooms @ 200 GPD/room	= 21,400 GPD
6 restaurants @ 49,980 GPD	= 49,980 GPD
78 boat dock slips @ 4 GPD/slip	= 312 GPD
<b>TOTAL EXISTING DEMAND:</b>	<b>104,692 GPD</b>

Proposed Mixed Use Development per DCI2023-00052

196 multi-family units @ 200 GPD	= 39,200 GPD
435 hotel rooms @ 200 GPD	= 87,000 GPD
6 restaurants @ 49,980 GPD	= 49,980 GPD
78 boat dock slips @ 4 GPD	= 312 GPD
Water Park @ 10,965 GPD	= 10,965 GPD
<b>TOTAL PROPOSED DEMAND:</b>	<b>187,457 GPD</b>

The proposed South Seas Island Resort MPD results in an estimated increase in sanitary sewer demand of 82,765 GPD. The Subject Property is located in the sanitary sewer service area of Florida Gulf Utilities Authority (FGUA).

SSIR failed to disclose the proposed development's full wastewater demand to FGUA. Its initial request to FGUA stated the proposed development consisted of only 425 hotel rooms requiring a treatment demand of 85,000 GPD. (PA. 000191). SSIR's revised request stated the proposed development consisted of 193 multi-family units and 435 hotel rooms requiring a treatment demand of 117,880. (PA. 000191; 004519). However, both requests left out the restaurants, the boat dock slips and the water park, so FGUA did not include those wastewater demands in its response. (PA. 004521, 004765). Furthermore, FGUA also services 640 multi-family units on South Seas outside of SSIR's proposed development. Using either the applicant's minimum number of 160 GPD per multi-family unit or the County Staff's more realistic number of 200 GPD, the 640 units generate 102,400 GPD or 128,000 GPD. Adding either figure to the proposed development's demand of 187,457 GPD would require FGUA to treat between 289,857 GPD and 315,457 GPD. (PA. 000191; 004333). The FGUA plant's design capacity is only 264,000 GPD, and its current operating treatment capacity is only 180,000 GPD. (PA. 001107, 001132, 001136, 004765). Nothing in the record supports Respondents' claim that the County Staff's estimate of

187,457 GPD was “the required sewage capacity for the entire resort.” No competent substantial evidence shows FGUA can serve the approved development.<sup>13</sup>

Respondents’ perceived need to argue the FGUA plant has more than one method of effluent disposal making it “more likely that the new development could be supported” is irrelevant and telling. The Code contains no “more likely” standard. “Evidence that is . . . nonexistent is not competent, substantial evidence.” *A&S Entm’t, LLC v. Fla. Dep’t of Revenue*, 282, So.3d 905, 909 (Fla. 3d DCA 2019).

Respondents then claim adequate sewer capacity is not a zoning issue, and obtaining a letter from the utility “is all that the LDC required,” even if it does not “verify their ability” to service the proposed development. Claiming the County need not ensure actual

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<sup>13</sup> The only FGUA Capacity Analysis in evidence limits the plant’s current treatment capacity to 180,000 GPD and estimates that new two-bedroom multi-family units will generate 240 GPD – significantly higher than the applicant’s or the County Staff’s demand estimate. Respondents claim incorrectly that Petitioners rely on the 2015 Capacity Analysis Report of wastewater demand. Petitioners rely upon the County Staff Report and the applicant’s own numbers to prove insufficient sewer availability.

projected demand is accurate and corresponds to actual availability is absurd.

Respondents claim the FGUA letter suffices at the rezoning stage because the County’s “concurrency” system requires adequate sewer service exist when development orders are approved. But these are independent, complementary requirements. Section 34-202(a)(10) requires a **rezoning** to verify “availability” and “ability” to provide sewer service to avoid approving a project whose wastewater demands cannot be met when future construction permits are sought. The development “concurrency” requirement subsequently applies to confirm no other developments consumed the capacity available at the rezoning stage in the interim and each permitted unit has sewer service. Section 163.3180 (2), Fla. Stat. The County’s concurrency requirement does not preempt the zoning requirement.

Respondents claim the Hearing Examiner’s had no obligation to make findings about the sanitary demand the proposed development would generated.<sup>14</sup> However, the Code precisely requires the HEX to

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<sup>14</sup> Respondents' reliance on Plan Objective 4.1, which allows the HEX to merely **consider** sewer capacity, is meritless. The stricter County Code requirement governs in this certiorari proceeding.

find facts relevant to the application’s compliance with Code Section 34-202(a)(10) (“*Proof of ... sanitary sewer availability*”). See AC-2-6, Section 3.3(B) (“[T]he Hearing Examiner's ... recommendation must include ... Findings of fact and conclusions of law based on the evidence and testimony, including citations to relevant LDC and Lee Plan provisions to support the ... the recommendation.”). (PA. 002782).

Respondents’ argument—even if their consultant’s testimony was wrong, the County Commission heard all competing testimony and voted to approve the Resolution<sup>15</sup>—is revealing. In other words, SSIR won the vote so competent substantial evidence of Code compliance must exist. However, no competent substantial evidence establishes sewer availability for the 640 existing units on the Resort plus the proposed additional development. Nothing proved FGUA provide sewer service to the proposed development, which violates Section 34-202(a)(10).

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<sup>15</sup> Response p. 74.

**C. There was No Competent Substantial Evidence of Adequate Fire Service.**

Code Section 34-413(2) requires the “density and intensity of use permitted in a planned development” to be based on the availability of adequate fire (public safety) services. The Captiva Island Fire Control District’s Chief’s letter and testimony were not just about impact fees. Florida’s impact fee law is irrelevant. Respondents’ claim it was “premature” to apply the requirement of adequate fire services to the rezoning decision cannot withstand the plain language of Section 34-413(2), which makes public safety a condition of rezoning approval. No such showing was made.

The Fire Chief testified the proposed development’s increased density and building heights would put buildings at risk and “lives may also be lost” because the district lacked the ladders and fire flows to contain fires on the upper floors of taller buildings. (PA. 004593, 001273–001278). The County did not adopt his recommended zoning conditions to ensure the District's ability to meet the increased demands. (PA. 001275). While he “did not oppose the rezoning,” that is not his role. His unrebutted testimony proved a violation of Code Section 34-413(2).

### **III. CONCLUSION**

The Court should issue a Writ of Certiorari quashing Resolution Z-25-005, which (1) resulted from a violation of Petitioners' procedural due process rights, and (2) departed from the essential elements of law (the County's Land Development Code) by:

- a) violating the amendment processes for built PDs or PUDs to rezone one property owner's portion of the fully integrated common plan of development without the consent or joinder of the other affected property owners, and detached from the longstanding parameters and conditions that govern and bind all property owners;
- b) approving development density and intensity that exceeds the historic low density and intensity development pattern to which development on Captiva is limited.
- c) granting deviations from Code requirements without proper authority over affected easements and properties of Petitioners' members; and
- d) up-rezoning land without competent substantial evidence demonstrating that sufficient sewer capacity and fire service are available to serve the authorized development.

Respectfully submitted June 5, 2026.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-mail on this 5th day of June, 2026, to counsel as indicated below:

/s/Richard Grosso  
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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.100(l), this Petition for Writ of Certiorari has been printed in Bookman Old Style with 14-point font, and contains 7500 words, in compliance with this Court's Order of May 27, 2026 granting the Petitioner's Motion for Enlargement of Word Count.

/s/Richard Grosso  
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