

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

**CORRECTED PROPOSED ORDER GRANTING PETITION FOR
WRIT OF CERTIORARI**

THIS CAUSE comes before the Court upon the timely filing of a Petition for Writ of *Certiorari* pursuant to Art. V, § 5(b), Fla. Const. and Fla. R. App. P. 9.030(c)2 and 9.100 (c)2), invoking the Court’s “first tier *certiorari*” jurisdiction to review Resolution Z-25-005 – approved by the Lee County Board of County Commissioners - granting a Rezoning and companion Master Plan Development to South Seas Island Resort, DCI2023-00051, rendered on August 6, 2025. Having considered the Petition, the Response, Reply, all Appendices and governing authority, and heard oral argument on August 4, 2026, and being otherwise duly advised, the Petition for Writ of *Certiorari* is hereby GRANTED and Resolution Z-25-005 is QUASHED.

Three independent bases exist for this Court to quash the County's action. *Broward Co. v. G. B. V. International, Ltd.*, 787 So.2d 838 (Fla. 2001); *Dept. of Highway Safety and Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2nd DCA 2006). Resolution Z-25-005 violates 11 provisions of the Lee County Land Development Code ("LDC" or "Code"), is based upon two dispositive findings not supported by competent substantial evidence and violates Petitioners' rights under the procedural due process and common plan of development doctrines.

(1) Resolution Z-25-005 fails to comply with the essential requirements of the law.

The County violated Code Sections 34-1039, 34-373(c) and 34-612(2)(h) when it failed to treat South Seas Island Resort ("South Seas" or "Resort") as a Planned Unit Development ("PUD") or Planned Development ("PD") and failed to process the rezoning application as an amendment to either a built PUD or PD. There was no basis in law or fact for the County to circumvent the PUD amendment procedures that it had consistently applied to South Seas, as memorialized in ADD2002-00098 ("ADD"), ADD2008-00082, ADD2014-00203 and four other amendments to the South Seas PUD. Failing to recognize South Seas as a PUD or PD unlawfully

bypassed the prescribed limits on amending the established parameters of an existing single, integrated, built-out development – with the rights of all affected owners fully protected – resulting in a rezoning process untethered from the 1973 Zoning Resolution that created the Resort and the ADD which governed development on the Resort from 2002 to the present.

The County violated Code Section 34-413(1) by exceeding the range of density and intensity permitted on Captiva and South Seas under the incorporated by reference provisions of the Lee Plan that require the County to limit development to Captiva’s historic development pattern, to maintain its low-density residential development pattern, and to continue its existing land use patterns. Section 34-413(1) does not allow for increased density and intensity on WS SSIR Owner’s (“SSIR” or “Applicant”) property from 272 units to 628 units and for increased building heights from 35 feet to 60 feet above grade.

The County violated Code Sections 34-373(a)(4)(a), 34-373(a)(6)(a) and 34-202(b)(2) by waiving the requirement for SSIR to identify all easements affecting the property. Because waiver is only possible on applications amending an approved PD, Resolution Z-

25-005 violated either the Code's easement identification requirements or the limit on amending PDs.

The County violated Code Sections 34-202(a)(3) and 34-202(a)(4) by permitting SSIR to impose deviations and conditions upon the Resort's entire shared access road of which it was not the sole owner.

(2) There was no competent substantial evidence supporting the findings of adequate public facilities and services necessary for approval of Resolution Z-25-005.

The County violated Code Section 34-202(a)(10) because there was no competent substantial evidence that the sewer utility has the capacity to provide service to the approved development. County Staff's report showing that the approved development's sewer demand was substantially greater than the utility's availability was the only competent record evidence.

The County violated Code Section 34-413(2) because there was no competent substantial evidence that the Captiva Island Fire District has adequate fire equipment to support the increased density and building heights in the approved development. The Captiva Island Fire Chief's un rebutted letter and testimony confirmed that the Fire District does not have the ground ladders or

fire flows to respond to the upper floors of the approved development, that the intensity of hotel space creates a life safety and property risk, and that due to the inability to suppress fire on upper floors, lives may be lost.

(3) The County violated Petitioners' procedural due process rights by repudiating the Resort's uniquely planned and constructed common plan of development, treating them as mere abutting property owners and denying them the same quasi-judicial hearing procedural rights granted to SSIR, even though their ownership rights integral to the PUD were directly impacted by the County's action.

I. Standing

The Petition includes numerous citations to the record where Petitioners opposed the proposed rezoning and established standing to bring this *certiorari* action. The Hearing Examiner (HEX) found that as residents and property owners within South Seas, Petitioners will be impacted by the rezoning. (PA. 793 - 794). Petitioners have associational standing because: (1) a substantial number of their members are adversely affected by Resolution Z-25-005; (2) the subject matter is within the association's scope of interest and activity; and (3) the relief requested is appropriate for the association

to receive on behalf of its members. *Fla. Homebuilders Assoc. v. Dept. of Labor*, 412 So. 2d 351, 353 - 354 (Fla. 1982). The unique, interconnected relationship of the rezoned land with that of a substantial number of Petitioners' members means they will suffer damages "differing in kind" from that "suffered by the community as a whole". *Renard v. Dade Co.*, 261 So. 2d 832, 834-837 (Fla. 1972); *Chapman v. Town of Redington Beach*, 282 So. 3d 979, 984-985 (Fla. 2d DCA 2019). Respondents did not challenge standing.

II. Resolution Z-25-005

Resolution Z-25-005 rezoned SSIR's 120.5 acres within the 304 – acre Resort to a Mixed Use Planned Development (MPD), approving 193 multi-family or timeshare units and 435 hotel units for a total of 628 units – exceeding by 356 units the 272 - unit cap to which the property was historically limited. (PA. 344, 1405, 1500). The net density increases from 2.27 units to 5.21 units per acre on SSIR's 120 acres. (PA. 1500, 917 - 918). Resolution Z-25-005 allows SSIR to construct buildings as high as 60 feet above grade, 25 feet taller than the ADD-compliant buildings SSIR purchased, and up to 15 feet taller than the tallest buildings on South Seas. (PA. 267-268, 1372, 1373, 1334, 1335 and 1336, 3817).

III. The Rezoning Departs From the Essential Elements of Law

Local regulations are among the essential elements of law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). A local government must deny a rezoning that violates its Code. *Realty Assocs. Fund v. Town of Cutler Bay*, 208 So.3d 735 (Fla. 3d DCA 2016). An applicant bears the burden of demonstrating compliance with a local government code. *Conetta v. City of Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981).

The rezoning decision on review was a quasi-judicial decision in which the County was required to apply and conform to its existing policies in the Code and was not free to make new policy. *City of Tampa v. Liberty Hosp. Mgmt., LLC*, 431 So. 3d 552, 556 - 559 (Fla. 2d DCA 2026)¹ (citing *Bd. of Cnty. Commr's v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993)).

Code Section 34-145(d)(4)(b) requires that a rezoning meet the Code regulations. Resolution Z-25-005 violates multiple Code provisions and thus departs from the essential elements of law.

A. Violation of the Rules for Amending Built PUDs.

Much of the briefing and argument of counsel to the Court focused on whether the existing South Seas development should be

¹ Erroneously cited for the opposite proposition in Respondent's September 3, 2026 Notice of Supplemental Authority.

considered only as a conventional or as a planned unit (or planned) development. As a matter of law, the County violated Code Sections 34-373(c), 34-612(h) and 34-1039 when it failed to recognize South Seas as a PUD or PD after having treated it as such from its inception and for over 50 years - circumventing the Code's rules governing amendments to built-out PUDs or PDs.

i. South Seas is a Built PUD

The HEX found that the 1973 Zoning Resolution and the ADD treat South Seas as a PUD. (PA. 1405, 598, 4151 - 4153). PUDs did not exist in the County in 1973 when Resolution Z-73-202 created South Seas and “established a unique zoning district ... using a PUD Concept.” It became the template for future PD districts. (PA. 306, 834-835, 3811, 4197, 4200, 4414).

The “enforceable conditions” of the 1973 Zoning approval were:

- “limit the overall density in line with our desire to create a very low density, high quality resort community;”
- with an “overall limitation ... to have the flexibility to develop pockets of higher density, while leaving other areas completely untouched;”
- with a “maximum limitation” of 912 combined dwelling units and hotel units. (PA. 4417 - 4434).

The ADD confirmed actual development complied with these conditions and “clarif[ied] what additional development may be

permitted...,” referring to the construction of the 35 unbuilt units at the time as the “final phases of the development.” (PA. 1405, 4164). It re-authorized the Resort, with conditions that “[c]urrent and future development ... [b]e limited to a development density of 912 units utilizing a number of small-scale clusters, be “carefully planned and tightly controlled,” [e]mphasize pedestrian movement [...], and “maintain a balance of dwelling units, amenities, and service facilities” (PA. 4164).

The ADD provided that “[p]roposed revisions ... will be reviewed as changes to a PUD master development plan in accordance with LDC Section 34-1038.” (PA. 3811, 4159, 4165, 4428). The County approved several amendments to the ADD between 2003 and 2014 under Section 34-1038, none of which changed the ADD’s density or intensity limits. (PA. 670 – 1405).

SSIR’s rezoning application conceded that its 120 - acre parcel is part of the 304-acre Resort that “has functioned as a cohesive master planned resort since its inception” (PA. 1618, 2481, 4004), “included hotel, residential and commercial uses” (PA. 1409, 1423, 1597), and that “property immediately surrounding the subject property is within the 304 acres that comprise South Seas Island Resort and is subject to Resolution Z-73-202 and ADD2002-00098.”

(PA. 3812).² It acknowledged that “[o]ver the years the Resort has been treated as a PUD,” “is a “unique property where integrated resort uses traverse property lines under separate ownership” and includes “internal residential uses that are not subject to this ... zoning request.” (PA. 1602, 1606, 1608,1625).

SSIR claims vested rights to 272 units within the PUD pursuant to the ADD. (PA. 1598). Six hundred forty (640) of the Resort’s 912 units are not owned by SSIR and are represented by Petitioners. Their properties are intertwined with SSIR’s and are both in-between and adjacent to the approved MPD. (PA. 17 - 69, 667, 791-820, 1569, 1580-1584, 1975-1983, 4437-4441).

SSIR and Petitioner Associations share ownership and easement rights over the single dedicated ingress-egress access road that is physically constrained against future expansion, over which construction vehicles, and then the occupants of future hotel and residential units must travel. (PA. 737-738, 791-820, 855, 947, 1500, 1514, 1518, 1524, 1530, 1558, 1570-1584, 1624, 1629, 1975-1983, 2265, 2433 – 2457, 3456-3463, 3810, 3836 -3851, 4192, 4214, 4414, 4434-4450). The entire length of the access road

² County Code Sec. 33-1614 also defines South Seas Island Resort to include the entire 304-acres.

is subject to buffer and safety deviations and conditions of approval on those deviations granted by Resolution Z-25-005. (PA. 1500, 1514, 1518, 1524-1530, 1574-1576, 1581, 1883-1908).

At the south end of the Resort, segments of the access road are within the Condominium Property of several of the Petitioner Associations which did not consent to or join in on the Rezoning. (PA. 1574-1576, 1580-1584, 1883-1908, 4442-4446). With the extraction and rezoning of the 120 acres from the original 304-acre PUD, Petitioners' 640 units on the remaining 184 acres become nonconforming. Under the three units per acre limit of the Code and the ADD, Petitioners' remaining 184 acres are entitled to only 552 units, not the existing 640. (PA. 852 - 855; 1964 - 1965).

SSIR's rezoning application demonstrates that all properties within the 304-acre Resort must be treated as a unified whole. Its request to waive the requirement to identify all property easements cited the "complexity and history of the property" as its "reason" for the request. (PA. 1697). SSIR justified its request for reduced buffers between its rezoned property and an adjacent home because the entire Resort was "in that zoning together." (PA. 3276-3277). SSIR acknowledged that "what had been constructed ... was inconsistent with the conventional zoning". (PA. 1598). Code Section 34-612

defines a “conventionally zoned district” as one that is inconsistent with South Seas:

“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.”

The ADD also confirmed that the South Seas’ Resort could not have been built under the conventional zoning categories:

“[I]n light of the PUD definition ... 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 ... similarly to a PUD, in reliance on Resolution Z-73-202....” (PA. 4420).

The Staff memorandum accompanying the ADD explained that applying 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. 4198).

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

“land that is developed as a unit under unified control and is planned and developed in a single operation or within a proposed period of time 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.”

What used to be known and developed as PUDs are currently called and developed as Planned Developments. Code Section 34-612(2)’s definition of PD Districts likewise describes South Seas:

“The purpose and intent of . . . [PDD]s is to ... provid[e] . . . flexibility³ 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 ... economical provision of infrastructure;

f. Providing a mechanism by which the preservation or conservation of historic or natural resources and

³ As explained by SSIR’s current rezoning application, the 1973 approval “provide[d] flexibility of development by allowing cluster concepts” (PA. 2460)

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....”

Any underlying or preexisting conventional zoning designations neither contradict nor negate the County’s controlling PUD overlay on those designations. As SSIR’s land use planner explained, the 1973 zoning approval creating South Seas was based on “a PUD concept as a guide to accompany [its] conventional zoning district.” (PA. 306, 4414). The County’s initial approval of South Seas bypassed the restrictions of the underlying conventional zoning to allow construction of the Resort and it continuously treated and amended the Resort as a PUD, now called PDs.

ii. Resolution Z-25-005 Violates the Code’s Rules for Amending Built PUDs or PDs

On *certiorari* review, a court gives no deference to a local government’s “self-serving”, “unreasonable or erroneous” interpretations of its code. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So.3d 1037, 1042 (Fla. 2d DCA 2012). The County’s position that the provisions for amending built PUDs or PDs do not apply to South Seas is erroneous and unreasonable. As a matter of law, Resolution Z-25-005 violates the Code.

**a. Resolution Z-25-005 Violates Section 34-1039
Governing Built PUDs and Section 34-373(c)
Governing Built PDs**

LDC Section 34-1039 governs “Amendments to built Planned Unit Developments” and states:

“Any part or all of a PUD ... which is built may be the subject of an application for a variance, special exception or other approval covered by this chapter wherein the subject property is the only part of the original PUD for which the approval is sought.”

LDC Section 34-373(c) governs “Amendments to built Plan Developments” and states:

“Any part or all of a planned development that is built may be the subject of an application for ... 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.”

Whether South Seas is a “built” PUD or a “built” PD, the full 304-acre development is governed, as in the past, by these provisions and their applicable restrictions. SSIR’s application was wrongly processed as if it were a new development on a conventionally zoned property – disregarding the Code provisions governing amendments to built PUDs or PDs.

Sections 34-1039 and 34-373(c) do not permit a major amendment to a built PUD or PD by one property owner when it

affects other property owners and the development as a whole without their consent. SSIR's property is not the only property subject to Z-25-005 or the only part of the original development affected by the rezoning. Extracting SSIR's 120 acres from the existing PUD and increasing the number of units on those 120 acres from 272 to 628 on a shared roadway with shared easements and deviations that apply Resort-wide, impacts all property owners within South Seas. Sections 34-1039 and 34-373(c) permit "notice" to substitute for "consent" only when the subject property is the only part of the original PUD or PD for which the approval is sought or that will be affected.

After having consistently and correctly used the PUD amendment provisions to allow re-arrangement of approved units within the Resort, the County improperly claimed that the Resort was not a PUD (or the currently used designation - PD) to approve the current application for a major increase in development.

b. Resolution Z-25-005 Violates Section 34-612(2)(h)

Section 34-612(2)(h) describes PDs 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(2)(h) when it refused to recognize South Seas as a PUD or 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” relied for more than 50 years – and approved a major expansion of the Resort as if the other owners were unaffected.

The ADD specified:

“Contemporaneous to the adoption of Resolution Z-73-202, the developers made ... representations ... which ... constitute enforceable conditions of the SSRD:

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)” (PA. 4423)

South Seas is built out. The land and buildings SSIR purchased in 2021 represent the realization of development rights and site planning flexibility granted by the 1973 Zoning Approval. Resolution Z-25-005 grants SSIR substantially greater development rights than the carefully limited, arranged, and built development allowances approved by the integrated MPD with a 912-unit density cap, specific height limits, and designated open space. The unique and specified

development standards and limits of the 1973 approval and the ADD in effect for more than 50 years apply and continue to apply to hundreds of homeowners interspersed among SSIR's holdings. (PA. 1214 - 1215, 1262, 2263, 2280, 2331 - 2332, 2433-2457, 2968 - 2972, 2988, 3084, 3105, 3136, 3146).

SSIR's rezoning application asserted repeatedly that it had vested rights under the 2002 ADD and 1973 Zoning Resolution to 272 units and prior Code deviations on its 120 acres. (PA. 1602 - 1605, 1613, 1615, 2478). The vested rights of the other owners on South Seas under the shared and enforceable common plan of development require equal protection. The heights, densities, intensities of use, buffering, setbacks, and open space cannot be changed unilaterally by one owner. Petitioners have a reliance interest in the common scheme of development which created cluster communities within the Resort based upon the overall land area for determining units per acre. A "citizen is entitled to rely on the assurances or commitments of a zoning authority [which] is bound by its representations...." *City of Miami Beach v. Cleveland Ocean, L.P.*, 338 So. 3d 16, 22 (Fla. 3d DCA 2022) ("[a]ll residents of the community have a personal interest in maintaining the character of an area as established by comprehensive zoning plans and

preventing one property from being damaged or diminished in value by the use of an adjacent property”).

Resolution Z-25-005 also deprives Petitioners members of their rights integral to the common plan or scheme of development. In *Hagen v. Sabal Palms, Inc.*, 186 So.2d 302, 307 (Fla. 2d DCA 1966), the Second District observed:

Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created; and this doctrine is not dependent on whether the covenant is to be construed as running with the land. 26 C.J.S. Deeds s 167(2), p. 1143 et seq.”

Petitioners have property rights from the common plan of development’s mutual burdens and benefits. *Hagan*. In *Preserve Grove Isle, et. al. v. Grove Isle Yacht & Tennis Club, et. al.*, 11th Circ. Case No. 15-009106 CA 04 (Final Order Aug. 13, 2015), Judge Bronwyn Miller ruled that condominium unit owners could rely upon and enforce a “common development plan” based upon representations by the original developer when purchasing their units. (pp. 1-2,5,10-11,20,22-29) (citing testimony and cases

regarding enforcing a developer's representations and unrecorded plans given actual and constructive notice).

B. Resolution Z-25-005 Violates Code Section 34-413(1).

Code Section 34-413(1) 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.”

The “range of density or the uses permitted or encouraged under the Lee Plan on Captiva and the “nature of and the density and intensity of existing development surrounding the project” has been limited since 1973 at South Seas to three units per acre - a total of 912 hotel and residential units, and since 1982 to all of Captiva. Resolution Z-25-005 violates the Code by allowing increases in hotel units and building heights that greatly exceed these limits.

Goal 23 of the Plan's Captiva Chapter is:

“to protect the coastal barrier island community's natural resources ... and history. This goal will be achieved through ... land use regulations that ... enforce development standards that maintain the historic low-density residential development pattern of Captiva.” (PA. 909, 1609).

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. 73, 1651).

These mandates were added to the Lee Plan 16 years after the ADD and 45 years after the 1973 Zoning Resolution creating the Resort, by Ordinance 18-04, which also adopted a Support Document stating that the Plan “protects the existing neighborhood form and densities”⁴ described as “a pattern of land use and low-impact development ... that should be maintained and supported into the future.” (PA. 4561). The Support Document states that density on Captiva is limited to three units an acre owing to the barrier island’s coastal hazards which “warrant more stringent regulations” in order to “control the density and intensity ... to that

⁴ PA. 4556.

which currently exists”⁵ and to “[limit] rezoning approvals to those which do not increase density” (PA. 4550, 4556, 4572).

i. The Historical Development Pattern of South Seas

Resolution Z-73-202 created the Resort in 1973 “with a special limitation of three units per acre (912 total units)” - 120 hotel rooms and 792 residential units” (PA. 58, 305-306; 4212, 4215, 4341-4359, 4154, 1597, 4414).⁶ At no time since then has South Seas ever been approved for more than 912 hotel and residential units. (PA. 58, 305-306, 684, 1405, 1597, 4164, 4212, 4215, 4341-4359, 4414, 4417 – 4434). This limit, memorialized in the ADD, was enshrined in the Code until a 2023 Code change exempting South Seas from the hotel density and building height limits that remained applicable to the rest of Captiva. (PA. 1350).

The Staff Report states that “previous property owners have developed in accordance with the guidance provided in” the ADD which limits building heights to the lesser of 35 feet above grade or 42 feet above mean sea level. (PA. 3811, 4162). SSIR’s rezoning

⁵ PA. 4576.

⁶ SSIR purchased its 120 acres in 2021 having been advised by the County that the entire Resort was “vested for a maximum of 912 dwelling units,” and SSIR was entitled to 272 of them. (PA.1599, 4404-4413).

application reveals that the tallest pre-ADD buildings at South Seas - Bayside Villas - are less than 45 feet above grade. (PA. 267-268); and outside of South Seas, no buildings on Captiva are taller than 45 feet above grade. (PA 686). Resolution Z-25-005 allows SSIR three habitable stories above parking (RA PA. 1603) and up to 60' above grade. (PA. 3817).

The Captiva Community Plan Staff Report states that, under Objective 23.2 (“continue the long-term protection and enhancement of ... existing land use patterns.”), “[h]eights are also limited in keeping with Captiva's low rise buildings”, “[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. 4556, 4574). The HEX nonetheless ruled that the “Plan’s description of historic development patterns does not address building height,” (PA. 1414) and then incorrectly approved increased building heights because “height variations ... within a single development is commonplace throughout the County.” (PA. 1415). The proper interpretation of the Code must focus with precision on its specific words. *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So.3d 1037, 1040 (Fla. 2d DCA 2012). In *Alvey v. City of N. Miami Beach*, 206

So. 3d 67 (Fla. 3d DCA 2016), the Court quashed a rezoning because the Code mandated that rezonings “be consistent with and in scale with the established neighborhood land use pattern”, but approval was wrongly granted on the basis that it “would be ‘compatible’ with the general area.” Id at 69-70, 72.

Resolution Z-25-005 applied Code provisions intended to limit development at South Seas to its historic pattern to instead allow a major expansion. “Maintain” means to “keep in an existing state,”⁷ “limit” means “something that bounds, restrains, or confines” or “a prescribed maximum or minimum amount, quantity, or number.”⁸ To “continue” is to “to remain in existence.”⁹ The plain language of Policy 23.2.4 limits development on South Seas to its historic density as explicitly identified in the ADD. The HEX failed to address the language in the Lee Plan that “[l]imits development to that which is in keeping with the historic development pattern Captiva,” and repeatedly misstated the express mandates of the Plan as simply to “encourage” compliance. (PA. 1408). It is unreasonable to interpret

⁷ Merriam-Webster, <https://www.merriam-webster.com/dictionary/maintain> (last visited Sept. 2, 2026).

⁸ Merriam-Webster, <https://www.merriam-webster.com/dictionary/limit> (last visited Sept. 2, 2026)

⁹ Merriam-Webster, <https://www.merriam-webster.com/dictionary/continue> (last visited Sept. 2, 2026)

Policy 23.2.4 as not limiting density and intensity or that the Resort has no historical development pattern.¹⁰

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 units per acre to 5.21 units per acre). This exceeds the "range of density or the uses permitted or encouraged under the Lee Plan at that location" and is not in keeping with and fails to maintain and continue the "nature of and the density and intensity of existing development surrounding the project." Resolution Z-25-005 violates Code Section 34-413(1), which prohibits the major expansion of an existing use on Captiva Island.

¹⁰ A contrary interpretation by a state administrative law judge, which is on appeal, does not collaterally estop the Court from properly interpreting the Lee Plan's Captiva density standards. The parties in the two proceedings are not identical. *Zakhary v. Raymond Thompson PSM, Inc.*, 93 So. 3d 1148, 1151 (Fla. 2d DCA 2012). Cases holding that a PCA can be considered a decision on the merits for *res judicata* and law of the case purposes still require that the parties to the cases be identical and do not support collateral estoppel here. *State Comm'n on Ethics v. Sullivan*, 430 So. 2d 928, 932 (Fla. 1st DCA 1983); *Hospital Corp. v. McCrea*, 118 So.2d 25 (Fla.1960); *Tyson v. Sch. Bd. of Levy Cty.*, No. 1:17cv255-MW/GRJ, 2018 BL 538929, at *5 (N.D. Fla. Oct. 24, 2018). Also, collateral estoppel does not apply to a PCA that remains on appeal with post-decision motions pending. *Ridard v. Massa Inv. Group*, 337 So. 3d 862, 865 (Fla. 3d DCA 2022).

C. Resolution Z-25-005 Violates the Property Interests of Non-Applicants.

i. The County Violated Code Sections 34-373(a)(4)(a), 34-373(a)(6)(a) and 34-202(b)(2) by Waiving the Requirement for the Applicant to Identify and Depict All Easements Affecting the Subject Property

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 that the associated Master Concept Plan (“MCP”) identify the location and explanation of all existing easements. That requirement was also not met. (PA. 1573-1576, 1695-1700).

Even if the County could waive compliance with §34-373(a)(4)(a), SSIR was still required to identify easements on the MCP pursuant to §34-373(a)(6)(a). These are independent requirements. The express authorization for waivers in §34-373(a)(4)(a)(boundary survey) does not exist in §34-373(a)(6)(a) (MCP). Also, a waiver from §34-373(a)(6)(a) is available only for “applications seeking to amend an approved planned development” The granting of this waiver either shows that the County violated the Code’s easement identification requirements or confirms that

Resolution Z-25-005 amended an existing PD and violated the applicable PD amendment limits. Section 34-202(b)(2) does not remedy the violation. It required SSIR to provide the “information required by 34-373” under which the waiver was granted. (PA. 4340).

ii. The County Violated Sections 34-202(a)(3) and 34-202(a)(4) by Imposing Deviations on Properties Not Owned by Applicant.

SSIR and the County violated Code Sections 34-202(a)(3) and (4) when SSIR verified that it owned and had full authority to secure the approval of deviations on property owned by Petitioners, and when the County approved deviations on Petitioners’ properties without their consent. Deviation 2 allows SSIR to preserve vegetation along the east side of the Access Road instead of complying with the Code requirement for a 15-foot-wide right-of-way buffer throughout its length and allows no buffer along the west side. Deviation 14 exempts SSIR from the safety specifications for the Access Road, requiring only that SSIR submit a subsequent application depicting “Bicycle May Use Full Lane” signs and pavement markings along with engineering reports for signage and pavement markings that detail the roadway’s condition. (PA. 1514, 1518, 1555-1159). To justify Deviation 14, SSIR used a cross-section of a portion of the

Access Road it does not own but which is instead within the property of Petitioner Beach Cottages Condominium Association, Inc. (PA. 1575, 1558, and 1629).

The approved Master Concept Plan applies Deviations 2 and 14, and their related conditions of approval, to the entire Access Road through the Resort, including segments not owned by SSIR and without the consent of all property owners. (PA. 1500, 1514, 1518, 1524-1530,¹¹ 1574-1576, 1581, 1883-1908¹²).

¹¹ Deviations 2 and 4 as approved under Resolution Z-25-005 (Section C.2 and C.14), detailed on PA 1514 and 1518, are depicted on the approved Master Concept Plan (MCP) enclosed as Exhibit C to the Resolution, at P.A. 1524-1530. Section B.1 of the Resolution at PA 1500 requires the approved "[d]evelopment [to] substantially comply with the...MCP...attached hereto as Exhibit C." In particular, Sheets 2, 3, 5, and 6 of the MCP at PA 1525-1526 and 1528-1529 depict Deviations 2 and 14 in triangles applying along the entire South Seas Plantation Road even where owned by five (5) of the Petitioners and outside the MPD boundary (shown in a bolded dotted line). Accordingly, on its face, the approved Resolution requires that all development comply with the MCP that denotes Deviations 2 and 14, the latter with conditions of approval that include signs and markings as site improvements, on the entire South Seas Plantation Road even where outside the approved MPD boundary and owned by others.

¹² PA. 1574-1576, 1581 and 1883-1908 show that the "internal" roadway of South Seas Plantation Road is not entirely owned or controlled by SSIR, and a portion is outside the approved MPD boundary, particularly at the south end of the Resort. This segment is owned by Petitioners, Beach Cottages Condominium Association,

This violates Code sections 34-202(a)(3) and 34-202(a)(4).

IV. Resolution Z-25-005 is Not Supported by Competent, Substantial Evidence.

A. There is No Competent Substantial Evidence of Available Sewer Service for the Approved Development thereby Violating Code Section 34-202(a)(10).

No competent substantial evidence supports a finding that the application complies with Code Section 34-202(a)(10), (“Proof of ... and sanitary sewer availability”), which requires a letter from the appropriate utility provider “verifying their ability to provide service to the proposed development.” The rezoning violates Section 34-202(a)(10).

The only record evidence proves that the proposed development (193 multi-family units, 435 hotel rooms, 6 restaurants, 78 boat dock slips and a water park) has a sewer demand of 187,457 Gallons Per Day (“GPD”) and the Florida Government Utilities Authority (“FGUA”) wastewater treatment facility has available capacity for

Inc., Beach Villas III Condominium, Inc., Gulf Beach Villas Condominium Association, Inc., South Seas Plantation Beach Home Condominium Association, Inc., and Sunset Beach Villas Condominium Association, Inc.

only 117,880 GPD. (PA. 191, 4333, 4766). SSIRs' consultant's unsupported claim that the Staff's estimate of 187,457 GPD was "the required sewage capacity for the entire resort" is supported by no actual evidence in the record, which clearly demonstrates otherwise. The "opinion of the expert cannot constitute proof of the existence of the facts necessary to support the opinion." *Akin Construction Co. v. Simpkins*, 99 So.2d 557 (Fla. 1957). "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). That the County Commissioners heard competing testimony and approved the Resolution does not establish proof. Winning a vote does not constitute competent substantial evidence.

The letter from FGUA stating that it could serve the development responded to SSIR's inquiry that failed to identify the full extent of the proposed development. It omitted the restaurants, boat dock slips and the water park. (PA. 191, 4519, 4521, 4765).

There are 640 multi-family units on South Seas in addition to SSIR's approved development that are also serviced by the FGUA facility. Using the number reflected in the record that is most favorable to SSIR (160 GPD per multi-family unit), those 640 units generate 102,400 GPD – which, when added to the proposed

development's demand of 187,457 GPD, would require FGUA to treat at least 289,857 GPD, exceeding the treatment facility's design capacity of 264,000 GPD. (PA. 191, 1107, 1132, 1136, 4333, 4765).

Arguments excusing the lack of evidence of adequate sewer capacity are without merit. First, that the FGUA plant may have more than one method of effluent disposal that makes it "more likely that the new development could be supported" does not cure the violation. There is no "more likely" standard in the Code. Second, the claim that 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" belies the "§34-202(a)(10)'s plain language requiring a rezoning applicant to verify "availability" and "ability" to provide sewer service. And the independent, complementary, statutory "concurrency" requirement applies to building permits at a later stage in the process and does not abate the Code violation. Section 163.3180, Fla. Stat.

B. There is No Competent Substantial Evidence of Adequate Fire Service thereby violating Code Section 34-413(2).

No competent substantial evidence demonstrates compliance with Code Section 34-413(2), which requires the "density and intensity of use permitted in a planned development" to be based on

the availability of adequate capacity fire (public safety) facilities and services. The only record evidence was the testimony of the Chief of the Captiva Island Fire Control District, and the District's February 26, 2025, comment letter, explaining that:

- a. "if the rezoning is approved, the Fire District will be adversely impacted due to the proposed changes to building heights."
- b. "The District will not have the ground ladders or fire flows to provide a sufficient response to the upper floors of a building within the resort";
- c. "an increase in units due to the ... rezoning may also result in the need for the Fire District to increase staffing."
- d. "the intensity of hotel space and timeshares creates a larger life safety and property risk for the visitors to the resort",
- e. "[i]n addition to the building being lost if a fire occurs due to the inability to suppress fire on upper floors, lives may also be lost." (PA. 1273 – 1278, 4593).

His unrebutted testimony proved a violation of §34-413(2).

V. Approval of Resolution Z-25-005 Violated Petitioners' Procedural Due Process Rights

The failure to acknowledge Petitioners' status within the unique and intertwined ownership patterns of South Seas - treating

them as mere abutting owners and denying them full quasi-judicial party status - deprived them of procedural due process.

A. The Quasi – Judicial Proceeding

Pursuant to the procedural rules applicable to applicants, 48 hours prior to the proceeding, Petitioners each submitted letters requesting full party status, with documents supporting the factual basis for the request, cited authority supporting party status, and identified witnesses and exhibits (including resumes and copies of exhibits) they were prepared to present. (PA. 1567 - 1594; 2433 - 2457, 4471-4502; 4595, 4752-4757). The HEX denied each request, stating that:

“Nonparty participants may not put on a case, That means they may not have a representative make opening and closing arguments, call witnesses, and the like.” (PA. 286; also, 792-797, 941-943, 2260 - 2261)

The HEX ruled that the procedural rights attendant to party status were “privileges ... reserved to the parties.” (PA. 640). She cited Administrative Code AC 2-6, which identifies a rezoning applicant and County staff as the only parties to a quasi-judicial proceeding and “does not grant the [HEX] the authority to expand the scope of who may be a Party.” (PA. 1422, 2773; also, 3278-3279). The HEX stated that the Applicant’s property rights, but not those of other owners within South Seas, were at risk in the proceeding:

“[t]here's no risk of loss of property rights. So the risk of deprivation in any way, in terms of elevating their status beyond -- anything beyond an adjacent property owner is not something I'm going to entertain.” (PA. 794; see also, PA. 1423).

At the hearing, over 100 exhibits, many with multiple subparts, were introduced. (PA. 1487-1494). The Applicant presented the testimony of 17 expert witnesses and the County presented four expert witnesses. (PA. 1495). Fifty-five non-party witnesses testified, including expert and fact witnesses representing or aligned with the Petitioners. (PA.1496-1498).

Throughout the hearing, SSIR's counsel was able to engage in direct examination of, including substantial leading questions to, SSIR's consultants and to interject her own testimony and commentary during these presentations. (PA. 389, 397, 414-415, 423, 426, 438, 440, 444, 447, 461, 469, 474, 478, 485, 546, 557, 572, 577, 3270-3271, 3275, 3277, 3279, 3281, 3284-3285, 3287, 3289, 3294-3295, 3297, 3300, 3309, 3312, 3321, 3323, 3329 - 3330, 3336, 3341, 3343-3346, 3349-3351, 3372, 3376, 3386, 3390, 3395, 3398, 3434, 3443-3444, 3452-3453, 3471-3472, 3489, 3497, 3506-3507, 3574, 3589, 3591). SSIR's counsel was also able to direct questions to County Staff, whose position was aligned with that of SSIR, in real time. (PA. 633-637, 3743-3745, 3753-3758).

Petitioners' lawyers were not allowed to engage in direct examination. (PA. 2778).

Persons who presented on behalf of Petitioners and other public participants were interrupted with objections by SSIR's counsel, who was allowed to interrupt the presentation of, and argue with, a CCA representative at the hearing before the Board of County Commissioners. (PA. 645 - 647, 650 - 652, 658, 660, 664, 669, 681, 740 - 745, 810, 825, 832, 1156, 2018 -2019, 2182, 2260-2261, 2279, 2352, 2962, 3079-3082, 3100, 3126). Counsel for Petitioners were unable to do the same to SSIR's witnesses.

Petitioners' witnesses were subject to real time cross examination, including follow-up questions. (PA. 712 - 720, 742-745, 856-879, 895-897, 927 - 938, 959-961, 1070-1077, 1090-1093, 1134-1144, 1176-1190, 1228-1232, 1263-1273, 2275-2278, 2284-2287, 2308-2315, 2321-2322, 2332, 2353-2357, 2369-2374, 2380-2385, 2951-2954, 2964-2966, 2988-2998, 3007-3010, 3106-3114, 3118-3120, 3124, 3130-3131, 3141, 3164, 3171-3172, 3191-3192). Petitioners' counsel were unable to cross-examine opposing witnesses. (PA. 2923-2924). County Administrative Code AC-2-6 precludes non-parties from cross-examining witnesses. (PA. 2778).

When the public presentations concluded, the HEX scheduled SSIR's rebuttal presentation over Petitioner CCA's objections that it was unavailable on the chosen date. (PA. 3212 - 3219). SSIR then put on a one and one-half day rebuttal presentation, with direct examination and leading questions from its counsel, without its witnesses subject to cross examination. (PA. 3254-3809).

In a case involving a wide range of disputed evidence and expert opinions about historic development pattern, permitted density and building heights, land use compatibility, traffic, evacuation, environmental impacts, and the rights of the other owners under the original development approval, the uneven playing field skewed the outcome, denying Petitioners' meaningful opportunity to be heard.

After the HEX issued her Recommendation, two days prior to the County Commission hearing, Petitioners submitted renewed requests for party status, raising their procedural due process claim, and asserting points of error in the HEX Recommendation. (PA. 1917 – 1920, 1979-1981, 1560, 1916, 2010, 4547, 1560 - 1561, 4742, 4749-4757). The County Attorney's Office refused to transmit the requests to the Board. (PA. 1560).

B. Procedural Due Process Analysis.

Parties to a quasi-judicial hearing must be accorded procedural due process. *De Groot v. Sheffield*, 95 So. 2d 912, 914–16 (Fla. 1957). Parties to a quasi-judicial zoning hearing must be able to cross-examine witnesses. *Lee County v. Sunbelt Equities*, 619 So.2d 996, 1002 (Fla. 2d DCA 1993); *DSA Marine Sales & Service v. Manatee*, 661 So.2d 907 (Fla. 2d DCA 1995); *Conetta v. City of Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981); *Walgreen Co. v. Polk Co.*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988).

In *Carillon Community Residential Ass’n v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010), the court held that:

“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.”). Petitioners are like the objectors to a rezoning in *Harris v. Goff*, 151 So.2d 642, 644 (Fla. 1st DCA 1963), where the Court ruled petitioners were entitled to bring an original suit in equity because the hearing at which the rezoning was approved did not afford them, as an “affected party the opportunity ... to cross examine adverse witnesses”

C. The Nature of the Master Planned Development Required that Petitioners be Granted Quasi - Judicial Party Status.

South Seas originated from a single common source of title and grantor and a singular 1973 zoning action, creating an interwoven array of ownership, shared infrastructure, and amenities tied to a unified master planned development and confirmed multiple times over 50 years by formal county actions. The unique nature of the fully built Resort, within which many of Petitioners' members own homes, and the rezoning's impact on their property interests, required that they be deemed parties and afforded quasi - judicial party status. Petitioners' status categorically exceeded that of typical abutting property owners.

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

“[a] property interest may be created by statute, ordinance or contract ... as well as by policies and practices of an institution which support claims of entitlement. [internal citations omitted]

Id. at 934.¹³ *Moser v. Barron Chase Securities, Inc.*, 783 So.2d 231 (Fla. 2001) holds that “[t]he notion of a property interest:

¹³ Accord, *Key West Harbour Development Corp. v. Key West*, 987 F.2d 723, 727 (11th Cir. 1993).

“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.” *Id.* at 237, n.5.

Petitioners have a reliance-based property interest. *Citrus County v. Halls River Development*, 8 So. 3d 413, 421-422 (Fla. 5th DCA 2009). This is especially true given the detailed “enforceable representations” of the 1973 Zoning Resolution. *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 body, which “is bound by its representations.”).

Applying the *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) factors, the County violated the Petitioners’ procedural due process rights. First, the Petitioners’ private interests affected by the action are substantial, including property rights and investment-backed expectations created by the development density and building height limits of the Resort established in 1973. Their rights within the PUD and under the common plan of development were adversely affected by extracting 120 acres within their shared development for a substantial upzoning.

Second, the procedures below created an erroneous deprivation of those private interests. Over the course of a nine - day hearing involving vast and voluminous exhibits, over two dozen expert witnesses, many more fact witnesses, and a wide range of disputed evidence and expert opinions, the disparity in the right to direct, cross examine and to interrupt witnesses with objections created an uneven and unfair playing field.

Third, the value of additional procedural rights was substantial. Party status would have ensured Petitioners' ability to meaningfully question and test the Applicant's case.

Finally, granting Petitioners party status would not have burdened the County relative to the benefit of protecting their rights. Given the length of the hearing, the additional time necessary to grant Petitioners who were represented by counsel the procedural rights of a party would have been negligible. Procedural rights afforded the applicant and other owners within the master planned development must be fair to all parties.

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

The Code's prohibition of non-applicant quasi-judicial hearing party status does not mitigate the violation. The Constitution

supersedes local ordinances. *Florida Ass'n of Realtors v. Orange Co.*, 350 So. 3d 115, 119 (Fla. 5th DCA 2022). To comply with the Constitution, “[i]t is necessary to fill the procedural gaps in [the code] by the common-sense application of basic principles of due process.” *Massey v. Charlotte Co.*, 842 So. 2d 142, 145–46 (Fla. 2d DCA 2003). Because the application of the Code’s limitations to these Petitioners on these facts represents an “as applied”, not a facial, constitutional violation, the procedural due process claim is not time – barred. *Shands v. City of Marathon*, 999 So. 2d 718, 726–27 (Fla. 3d DCA 2008).

Conclusion

Resolution Z-25-005 violated (i) Petitioners’ due process rights, (ii) the amendment processes for built PUDs and PDs, (iii) the limitation on density and intensity, (iv) the requirement to identify all easements, (v) Petitioners’ property rights by imposing deviations without authority or consent, and (vi) the requirement for proof of sufficient sewer capacity and fire service.

The Court hereby issues this Writ of Certiorari and quashes Resolution Z-25-005.

DONE AND ORDERED in chambers at Ft. Myers, Lee County,
Fla.

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