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City of Jacksonville
Orientation Program

LAND USE & QUASI-JUDICIAL PROCEEDINGS

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INTRODUCTION

Local land use decisions are at the heart of the local government process. In Jacksonville, land use decisions often comprise up to 60 percent of the City Council's agenda for any given meeting. In addition, the Jacksonville Planning Commission conducts public hearings on several hundred applications for zoning exceptions, variances and waivers each year.

For local government to be effective in the land use arena, there must be a balance between the increasing formality of the process and community participation in the system. The significance of labeling the process as quasi-judicial or legislative is often confusing to the general public and equally unclear to the public officials who render these decisions. It is essential, however, that both the elected and appointed decision makers understand the rules that govern these types of proceedings. Similarly, both the applicants and the general public must be provided with a reasonable opportunity to be heard in a public hearing system that is predictable, consistent and provides due process to all participants.

The standard of review to sustain the land use decisions rendered by local governments has undergone a dramatic transformation since the Legislature's adoption of the Growth Management Act in 1985, as such Act was once again amended by the Legislature in 2011 and superseded via enactment of the "Community Planning Act," F.S. §§ 163.3161 - 163.3248. *See Laws of Florida*, Chapter 2011-139. The laws of the State of Florida are well-settled that the local hearing procedures used to debate and decide quasi-judicial land use decisions must honor the expectations of both property owners and the general public. Accordingly the following procedural requirements are mandated to be achieved:

- Fundamental fairness to all participants;
- Objective application of the law to the facts presented; and
- A reasonable opportunity to be heard on the issue at hand.

I. LEGISLATIVE ACTIONS: "FAIRLY DEBATABLE" STANDARD OF REVIEW

In Florida, prior to 1985, both land use and zoning decisions were considered legislative in nature and were therefore subject to the "fairly debatable" standard of judicial review. *See Florida Land Co. v. City of Winter Springs*, 427 So.2d 170 (Fla. 1983). Such decisions are presumed to be valid, as long as they are "reasonably based" upon the evidence presented *(i.e.,* reasonable people could differ as to the result) and will not be overturned unless proven to be clearly arbitrary and unreasonable. The "fairly debatable" standard of review prevents a court from substituting its judgment for that of the decision-making body and is thus very deferential to the decision rendered by the local government.

In 1985, however, things changed significantly. That is the year in which the State Legislature passed the Growth Management Act, which was further amended by the Legislature in 2011 and

superseded through enactment of the "Community Planning Act" found at Chapter 163, Part II, of the Florida Statutes, thereby requiring all "development orders" to be consistent with the local government's comprehensive plan for future development.

Initially, the standard of review applied by the courts was varied and inconsistent. Accordingly, the stage was set for the Florida Supreme Court to reconcile this conflict and resolve the following issues:

(1) Whether decisions on rezoning applications are legislative or quasi-judicial determinations; and

(2) What is the appropriate legal standard of review for quasi-judicial actions?

II. "QUASI-JUDICIAL" DEFINED

The Supreme Court's answer to these questions is found in the landmark case of *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993). In *Snyder*, the Court concluded that a local government's actions are "quasi-judicial" where the decision is one that:

- Has an identifiable impact on a limited number of persons or property interests;

- Is contingent on facts arrived at from distinct alternatives presented at the local government hearing; and

- Can be viewed as policy *application*, rather than policy setting. In the words of the Florida Supreme Court:

> **Legislative action results in the *formulation* of a general rule of policy, whereas, judicial action results in the *application* of a general rule or policy.**

Thus, according to the Supreme Court, it is the *character* of the hearing that determines whether the actions of local governments are legislative (policy making) or quasi-judicial (policy application). Applying this analysis, the courts have universally held that the following decisions are quasi-judicial and therefore subject to the "strict scrutiny" standard of review:

- Site-specific Rezonings
- Zoning Exceptions
- Zoning Variances
- Zoning Waivers

Certain procedural safeguards must be adhered to when conducting quasi-judicial hearings. Of paramount importance is that the hearing procedures afford all parties constitutional due process. *See Jennings v. Dade County*, 589 So.2d. 1337, *review denied*, 598 So.2d 75 (Fla. 1992).

Procedural due process requires that all interested parties be provided reasonable notice of the hearing and an opportunity to be heard on the matter. It also requires that the parties be able to present evidence, cross- examine witnesses, and be informed of all facts presented to the quasi-judicial body. *Compare Carillon Community Residential v. Seminole County*, 45 So.3d 7 (Fla. 5th DCA 2010) (while *parties* to quasi-judicial proceedings are allowed to cross-examine witnesses, *participants* in the quasi-judicial proceedings are not necessarily entitled to cross-examine witnesses). Both the City Council and the Planning Commission have promulgated special procedural rules for quasi-judicial hearings which are designed to ensure that all participants are fully accorded due process in these proceedings.

III. QUASI-JUDICIAL ACTIONS: "STRICT SCRUTINY" STANDARD OF REVIEW

When considering an appeal of a quasi-judicial decision of a local government, the courts are limited to reviewing the record made during the proceedings below. This "strict scrutiny" standard of judicial review was set forth by the Florida Supreme Court in *Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995). According to the Florida Supreme Court, three questions are asked when a circuit court reviews a quasi-judicial decision of a local government:

(1) Whether procedural due process was afforded;

(2) Whether the administrative body applied the correct law; and

(3) Whether its findings are supported by competent substantial evidence.

Educational Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989).

A. PROCEDURAL DUE PROCESS

Due process requires that there must be a hearing where evidence and testimony are taken and considered. The hearing must be conducted so that the applicant and public are given a reasonable opportunity to present the request and rebut information presented by persons appearing at the hearing. The Florida Supreme Court has not provided a detailed analysis of the procedural due process requirements in quasi- judicial proceedings, although it has clarified that such hearings do *not* have to meet the formal rules of evidence.

1. *Ex Parte* Communications

Ex parte communications are contacts made by one party to a proceeding with the decision-maker outside of the presence of the other parties. Because such communications are made off the record and intended to influence the decision maker, they undermine the concept of an impartial, neutral decision-maker. In the past, it was accepted that these types of communications with public officials were not prohibited.

The decision in *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991), *rev. denied*, 598 So.2d 75 (Fla. 1992), however, dramatically altered the legal effect of such communications. The *Jennings* decision established that *ex parte* communications with the decision maker prior to a quasi-judicial hearing render the final decision on that matter presumptively prejudicial to those who were not parties to the prior communication. In many communities, including Jacksonville, it is common for constituents to freely discuss with board members and elected officials their position on issues of concern, including land use issues. The average constituent is not aware of the difference between a legislative matter, where they may freely communicate their concerns to decision makers, and a quasi-judicial zoning matter in their neighborhood, where *ex parte* communications are discouraged, if not prohibited.

In response to *Jennings*, many communities in Florida adopted procedures to deal with the issue of *ex parte* communications. Some local governments established a total prohibition on *ex parte* communications. In 1995, however, the Legislature adopted Chapter 95-352, Laws of Florida (codified at Section 286.0115, Fla. Stat.) which provides a procedure that may be adopted by municipalities to permit site visits and *ex parte* contacts between board members and constituents of the community in which the land use decision is to be made. This amendment authorized access by the public to local public officials, including *ex parte* communications in a quasi-judicial proceeding, subject to the adoption of local procedures pursuant to the statute.

Pursuant to both the statute and local ordinances, *ex parte* discussions are not presumed to be prejudicial to actions taken by the board or commission as long as the proper disclosure is made prior to or at the hearing. A further amendment was adopted in the 1996 legislative session, which provided that members of the public do *not* need to be sworn as witnesses and are *not* required to be subject to cross-examination. Parties are only subject to being sworn as witnesses and cross-examination upon the request of another party.

To enjoy the benefits of this statute, a municipality must adopt the procedures by resolution or ordinance. Jacksonville established such procedures in 1997 when it adopted Part 2, Chapter 50, Ordinance Code ("Procedures Governing Conduct of Public Officials with Respect to *Ex Parte* Communications"). It is important to recognize, however, that the adoption and utilization of such procedures may not always be sufficient to avoid problems. The prohibition against *ex parte* communications is based on constitutional requirements of a fair hearing. Therefore, it is questionable whether a statute can waive something that is constitutionally-based. By erasing the presumption of prejudice, however, Section 286.0115 forces proof of prejudice as a result of the *ex parte* communication. If the nature of the *ex parte* communication is disclosed and adverse parties are provided the right to express contrary views, it becomes difficult to argue that prejudice has been suffered.

One of the problems that has developed since the Legislature acted to waive the *Jennings* Rule is that local government officials are meeting with constituents, *taking a position on the quasi-judicial issues*, and then disclosing the constituent meeting at a public hearing, as required by Section 286.0115, Florida Statutes. If the issue was functionally legislative, there would be no problem with the official taking a position prior to the public hearing. *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3d DCA 1984). However, due process and the right to a fair hearing still apply in quasi-judicial matters. ***Thus, by publicly taking a position either for or against a quasi-***

judicial matter prior to the actual hearing date, a quasi- judicial officer subjects himself to being disqualified from taking any official action on the matter. *See State Board of Funeral Directors and Embalmers v. Cooksey*, 4 So.2d 253 (Fla. 1941); *Board of Public Instruction of Broward County v. State ex rel. Allen*, 219 So.2d 430 (Fla. 1969). Moreover, if the board member refuses to recuse himself, the entire decision is subject to reversal on appeal.

In *Huntley's Jiffy Stores, Inc. v. Brevard County*, Case No. 90-12261-AP (Fla. 18th Cir. 1991), Huntley's Jiffy Stores sought a rezoning of property for a retail commercial use. Residents in the area opposed the rezoning, and the County denied the application. On appeal, the circuit court overturned the County's denial of the rezoning. In doing so, the court was highly critical of one County Commissioner who had apparently advised residents that he would oppose the rezoning. The Court stated:

> Disquieting in our search was the revelation that a Commissioner telegraphed his decision before considering the information upon which the decision was to be made. We think that was a questionable departure from the fundamental fairness which should prevail when any governing body considers a citizen's request.

In *ABC Ventures, Inc. v. Board of County Commissioners of Brevard County*, Case No. 95-8041-AP (Fla. 18th Cir., January, 1996), ABC Ventures sought a rezoning. Residents from the area had made their position in opposition known prior to the Commission's public hearing. At the hearing, prior to listening to any comment from the applicant or the public on the application, the district County Commissioner moved to deny the rezoning. In overturning the County's decision, the Court noted that the proceedings were quasi- judicial, requiring impartial proceedings, and stated:

> [a]t the Board hearing before any evidence was received, [the district] County Commissioner . . . moved for denial of the Petitioner's rezoning request which would give some cause to question the Commissioner's impartiality on the issue before the Board.

The message in the *ABC Ventures* and *Huntley's Jiffy Stores* cases is that individuals participating in quasi-judicial proceedings have a right to expect impartial decisions to be made on the basis of the evidence presented. Decision makers are well advised not to take a position on a quasi-judicial land development application until each side has made its presentation at the public hearing. Taking a position on a land development issue prior to hearing both sides of the issue at the public hearing deprives one side or the other of its constitutionally protected right to a fair hearing.

B. APPLICATION OF THE CORRECT LAW

Application of the correct law means that the City Council, Planning Commission or other administrative body conducting the hearing must apply the law applicable to the land use decision. This is usually the Zoning Code or the Comprehensive Plan. More simply stated, the City Council or Planning Commission must apply the law as it exists, rather than how a member or members might

like it to be. The requirement that the hearing body limit itself to considering the facts and applying the law to the matter properly before it is the principal limitation on the quasi-judicial power. This requirement applies equally to judicial review of zoning appeals. See *City of Jacksonville v. Taylor*, 721 So.2d 1212 (Fla. 1st DCA 1999).

In *Snyder*, the Supreme Court established that the appropriate standard of review for quasi-judicial actions is the "strict scrutiny" standard. Significantly, the court also adopted the analysis employed in *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987) *rev. den.*, 529 So.2d 694 (Fla. 1988). *Machado* adopted a strict scrutiny standard of review and "did not distinguish between rezonings based on whether they allow more or less intensive uses than those contemplated by the local plan." Noting that "strict scrutiny" is a term arising from the "necessity of strict compliance with comprehensive plan," the court cited both *Machado* and the lower court's *Snyder* decision as examples of the type of strict scrutiny review applicable in the judicial review of land use decisions. Thus, at least with regard to quasi-judicial rezonings, the court adopted a strict standard of judicial review that facilitates the effective enforcement of the consistency requirement.

1. Burdens of Proof

(a) Rezonings

A rezoning is a change in the zoning district and, consequently, the permitted uses and structures allowed on a particular piece of property. In *Snyder*, the Florida Supreme court held that a property owner who is seeking rezoning of his property bears the initial burden of establishing that the proposed rezoning is consistent with the Comprehensive Plan and complies with all applicable zoning regulations. At this point, the burden shifts to the administrative board to demonstrate that maintaining the existing zoning for the subject parcel accomplishes a "legitimate public purpose." In other words, the decision to deny the requested rezoning cannot be arbitrary, discriminatory or unreasonable. Section 656.125 of the Zoning Code establishes criteria for rezonings and guidelines for establishing a legitimate public purpose sufficient to deny a rezoning.

(b) Zoning Exceptions

A zoning exception is defined in the Zoning Code as:

> A use that would not be appropriate generally or without restriction throughout the zoning district but which -- if controlled as to number, area, location or relation to the neighborhood -- could promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or general welfare.

Such uses may be permissible in the zoning district if specific provision for the exception is made in the Zoning Code and the uses are found to be in conformity with the applicable standards and criteria of Section 656.131(c) of the Zoning Code. Namely, the applicant must establish that the proposed use:

> (1) Will be consistent with the Comprehensive Plan, including any subsequent plan adopted by the Council pursuant thereto;

(2) Will be compatible with the existing contiguous uses or zoning and compatible with the general character of the area, considering population density, design, scale and orientation of structures to the area, property values, and existing similar uses or zoning;

(3) Will not have an environmental impact inconsistent with the health, safety and welfare of the community;

(4) Will not have a detrimental effect on vehicular or pedestrian traffic, or parking conditions, and will not result in the generation or creation of traffic inconsistent with the health, safety and welfare of the community;

(5) Will not have a detrimental effect on the future development of contiguous properties or the general area, according to the Comprehensive Plan, including any subsequent amendment to the plan adopted by the Council;

(6) Will not result in the creation of objectionable or excessive noise, lights, vibrations, fumes, odors, dust or physical activities, taking into account existing uses or zoning in the vicinity;

(7) Will not overburden existing public services and facilities;

(8) Will be sufficiently accessible to permit entry onto the property by fire, police, rescue and other services; and

(9) Will be consistent with the definition of a zoning exception, and will meet the standards and criteria of the zoning classification in which such use is proposed to be located, and all other requirements for such particular use set forth elsewhere in the Zoning Code, or otherwise adopted by the Planning Commission.

A use that is permissible by exception is a use to which the applicant is entitled, unless the zoning authority determines that - based on the standards and criteria set forth above - the proposed use would adversely affect the public interest. Therefore, the applicant has the initial burden before the Planning Commission of showing that his application meets the requirements of the statutory criteria for granting such exceptions. Once the petitioner demonstrates that his application meets these standards and criteria, the burden shifts to the Planning Commission to demonstrate, by competent, substantial evidence presented at the hearing and made a part of the record, that the exception requested by the applicant does not meet one or more standards and is therefore adverse to the public interest. *Irvine v. Duval County Planning Commission*, 504 So.2d 1265 (Fla. 1st DCA

1986). *See also Broward County v. G.B.V. International, Ltd.*, 787 So.2d 838 (Fla. 2001).

(c) Zoning Variances

A zoning variance is defined in the Zoning Code as:

> A relaxation of the terms of Zoning Code which will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the Zoning Code would result in unnecessary and undue hardship.

In order to obtain a variance, the applicant must meet *all* of the standards and criteria set forth in Section 656.132(c) of the Zoning Code. Specifically, the applicant must show, by a preponderance of the evidence, that:

(1) The property has unique and peculiar circumstances which create an unnecessary and undue hardship;

(2) The variance is the minimum necessary to alleviate the hardship;

(3) The need for the variance is not the result of the actions of the property owner;

(4) The grant of variance would not create a detriment to adjacent and nearby properties or the public in general;

(5) The variance will not substantially diminish property values or alter the general character of the area; and

(6) The effect of the variance is in harmony with the intent of the relevant area of the Zoning Code.

The burden of proof is on the applicant for a variance to show an "undue hardship" that is related to the property, **not** a personal hardship on the applicant. In other words, it must be shown that the existing zoning regulations make the property virtually unusable or incapable of yielding a reasonable return unless the variance is granted. This is a heavy burden to meet since it is unlikely that the facts will demonstrate the existence of all of these factors in any given case. In most cases, it is very difficult to substantiate the grant of a variance with competent substantial evidence.

(d) Zoning Waivers

Waivers for minimum distance requirements and minimum street frontage are similar to variances, but have different criteria for approval. Waivers are authorized pursuant to the criteria set forth in Section 656.133 of the Zoning Code:

(a) The waiver for minimum distance requirements from a church or school for a liquor license location may be granted if there exist one or more circumstances which negate the necessity for compliance with the distance requirements, including, but not limited to the following:

(1) The commercial activity associated with the alcoholic beverage use is of a lesser intensity than the commercial activity associated with the alcoholic beverage use which previously existed; *e.g.*, there has been a reduction in the number of seats or square footage or the type license;

(2) The alcoholic beverage use is designed to be an integral part of a mixed planned unit development;

(3) The alcoholic beverage use is located within a shopping center with an aggregate gross leasable area of fifty thousand (50,000) square feet or more, inclusive of all outparcels and meets the definition of a "bona fide restaurant", as defined in s.656.805(c);

(4) The alcoholic beverage use is not directly visible along the line of measurement defined in s.656.806 and is physically separated from the church or school, thereby negating the distance requirement as a result of the extra travel time; or

(5) There are other existing liquor license locations of a similar nature in the immediate vicinity of the proposed location; provided, however, that no waiver shall be granted pursuant to this criterion if the proposed liquor license location is closer to the church or school than other existing locations.

(b) The waiver for minimum required street frontage may be granted if the Commission makes a positive finding based on substantial, competent evidence that the application meets all of the following criteria:

(1) There are practical or economic difficulties in carrying out the strict letter of the regulation;

(2) The request is not based exclusively upon the desire to reduce the cost of developing the site or to circumvent the requirements of Chapter 654 (Code of

Subdivision Regulations);

(3) The proposed waiver will not substantially diminish the property values in, nor alter the essential character of, the area surrounding the site and will not substantially interfere with or injure the rights of others whose property would be affected by the waiver;

(4) There is a valid and effective easement for adequate vehicular access connected to a public street which is maintained by the City or an approved private street; and

(5) The proposed waiver will not be detrimental to the public health, safety or welfare, result in additional expense, the creation of nuisances or conflict with any other applicable law.

With respect to a waiver of the distance limitations for alcoholic beverage locations, the burden of proof is on the applicant to show that *one* or more circumstances exist which eliminate the need for the standard separation between the two uses. With respect to a waiver for street frontage, the applicant must show that *all five* of the criteria have been met. Both of these burdens of proof must be established by competent substantial evidence.

C. COMPETENT SUBSTANTIAL EVIDENCE

In order to sustain a local government's quasi-judicial decision, it must be shown that there was competent substantial evidence presented to the board to support its rulings. *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993). Although simply stated, this requirement of "competent substantial evidence" is -- in the words of one court – "susceptible to misunderstanding." *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So 2d. 996 (Fla. 2d DCA 1993). According to the Second District Court of Appeal, the issue of competent substantial evidence "involves a purely legal question;" that is:

> [W]hether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and *reweigh* that evidence (*e.g.*, where there may be conflicts in the evidence), or to substitute *its* judgment about what *should* be done for that of the administrative agency.

Id. at 1003.

The seminal case defining competent substantial evidence is *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957). In that case, the Florida Supreme Court defined competent substantial evidence as

"evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred ... such relevant evidence as a reasonable mind would accept as adequate to support a conclusion" A further elaboration of this definition was presented by the Fifth District Court of Appeal in *Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996):

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged . . . [C]ircumstantial evidence is sufficient. Direct evidence is not required.

In sum, quasi-judicial decisions must be supported, in the record, by evidence that is both legally competent and quantifiably substantial. Examples of what does and does not constitute competent substantial evidence sufficient to support a local government's zoning decisions are set forth below.

1. Findings of Fact

Unfortunately, *Snyder* gives very limited guidance on the precise *procedural* requirements of a quasi- judicial hearing. Nevertheless, the Supreme Court did state that the local government "will *not* be required to make findings of fact" to support its decision on an application for rezoning. *Snyder*, 627 So.2d at 476. All that is required is that the record (*i.e.*, the testimonial and documentary evidence presented at the hearing) contain competent substantial evidence. *Id.*

2. Expert Testimony

Expert testimony is considered to be competent substantial evidence as long as the expert gives testimony that is within his area of expertise and is based either facts known to the expert, a hypothetical situation or facts disclosed at the hearing. It is important that expert witnesses state their qualifications on the record or submit their resume to the quasi-judicial body record.

The reports and recommendations of a local government's professional planning staff have long been recognized as the type of expert testimony sufficient to sustain a quasi-judicial zoning decision where the statements in the report are supported by the facts and are not merely conclusory in nature. *ABG Real Estate Development Co. of Florida, Inc. v. St. Johns County*, 608 So.2d 59 (Fla. 5th DCA 1992); *Battaglia Fruit Co. v. City of Maitland*, 530 So.2d 940 (Fla. 5th DCA 1988). In *Florida Mining & Materials v. City of Port Orange*, 518 So.2d 311 (Fla. 3d DCA 1987), however, the court reversed the city's denial of a zoning exception for a cement batch plant. Although, the

City found that the proposed use would create potential traffic problems, the Court held that there was no competent substantial evidence to support the staff recommendation of denial where there was no factual basis to distinguish how the applicant's cement trucks would adversely affect a residential neighborhood any more than other large trucks which traveled through the neighborhood. *Id.* at 313.

In addition to professional planning staff recommendations, the courts have also held decisions of a local government's Planning Commission may also constitute competent substantial evidence upon which to grant or deny a zoning request. *Hillsborough County Board of County Commissioners v. Longo*, 505 So.2d 470 (Fla. 2d DCA 1987); *Conetta v. City of Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981).

In contrast, the "testimony" of attorneys does not constitute competent substantial evidence. *National Advertising Co. v. Broward County*, 491 So.2d 1262 (Fla. 4th DCA 1986). Attorneys generally appear on *behalf of* a party; they are advocates -- not witnesses. As such, absent stipulation by the opposing party, they cannot testify. Although mere conclusory assertions of law may sound persuasive, they fall far short of satisfying the requisite foundational element of "competent" evidence. As aptly stated by one court:

> [T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts [or quasi-judicial bodies] may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations, and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony *through witnesses other than himself* or a stipulation to which his opponent agrees.

Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1016-1017 (Fla. 4th DCA 1982)(emphasis added)(internal citations omitted).

3. Citizen Testimony

Florida courts have long acknowledged the legitimate interest of neighboring property owners in preserving the character of their neighborhood. As recognized by the Fourth District Court of Appeal:

> The role of the governmental entity is to arrive at sound decisions affecting the use of property within its domain. *This includes receiving citizen input regarding the effect of the proposed use on the neighborhood,* especially where the input is fact-based.

City of Dania v. Florida Power & Light, 718 So.2d 813, 816 (Fla. 4th DCA, 1998), *app'd in part, quashed in part, Florida. Power & Light Co. v. City of Dania*, 761 So.2d 1089 (Fla. 2000) (emphasis added).

In short, although citizen testimony may be considered, it can only be used to support a quasi-judicial zoning decision when it is based on something more than mere opinions. Popularity polls of neighborhood residents do not constitute competent substantial evidence. *See City of Apopka v. Orange County*, 299 So.2d 657 (Fla. 4th DCA 1974).

This issue regarding the weight and legal sufficiency to be accorded public "concerns" was revisited by the Third District Court of Appeal in the case of *Metropolitan Dade County v. Section 11 Property Corp.*, 719 So.2d 1204 (Fla. 3d DCA 1998). In that case, the court expressly considered whether the opposition of neighboring property owners could be considered as "competent substantial evidence" sufficient to withstand judicial review of the local government's decision to deny the zoning request. According to the developer (as well as the circuit court), the citizen testimony was "merely opinion" and therefore insufficient grounds for denying the proposed development. The Third District Court of Appeal, however, saw things differently:

> In the instant case, when the Commission examined the issue of compatibility, it properly considered aesthetics, as well as use. The Commission received the testimony of several neighbors who characterized the project as "industrial" and who stated that the project would be incompatible with the surrounding residential neighborhood. Specifically, one neighbor stated that the self-storage facility would be "an eyesore." He commented that any proposed landscaping to try to enhance the appearance of the self-storage facility would not be effective and stated, "it's almost like trying to put an elephant in a Volkswagen, you know the elephant is still there." *This fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception.*

Id. (citations omitted) (emphasis added).

(a) Examples of Unacceptable Citizen Testimony

The comments of witnesses must be probative or competent as to whether the standards in the Zoning Code have been satisfied. The courts have universally held that objections of neighborhood residents, without more, are not a sound basis for denying a zoning application.

Examples of citizen testimony that does not constitute competent substantial evidence include: *Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1990) (special exception for an ACLF; neighbors testified as to traffic, light and noise problems that would occur if permit approved); *Flowers Baking Co. v. City of Melbourne*, 537 So.2d 1040 (Fla. 5th DCA 1989) (gas station will cause tremendous traffic problem adjacent to condominium inhabited by retirees); *City of St. Petersburg v. Cardinal Industries Development Corp.*, 493 So.2d 535 (Fla. 2d DCA 1986) (lay testimony insufficient to sustain denial; concerns that construction would be done by labor force

from outside the area, wooden homes would be a fire hazard); *BML Investments v. City of Casselberry*, 476 So.2d 713 (Fla. 5th DCA 1985), *rev. denied*, 486 So.2d 595 (Fla. 1986) (development plan approval denied; testimony of residents regarding relationship of project to surrounding neighborhood insufficient to deny plan approval); *City of Apopka v. Orange County*, 299 So.2d 657 (Fla. 4th DCA 1974) (special exception for airplane landing strip; noise and cost of future home construction cited by interested residents); *Conetta v. Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981) (special exception for guest house; residents stated it would not conform to neighborhood); *Miami Mental Health Center v. City of Miami*, 3 Fla. L. Weekly Supp. 91 (Fla. 11th Cir. Ct. 1995) (two residents testified as to declining property values if mental health facility was approved; testimony disapproved as ambiguous); *Robinson v. City of Miami Beach*, 3 Fla. L. Weekly Supp. 320 (Fla. 11th Cir. 1995) (testimony by resident that helicopters are dangerous was unacceptable as contrary to a city code which allowed the permitting of helicopter pads); *Demarinis v. Town of Palm Beach*, 3 Fla. L. Weekly Supp. 150 (Fla. 15th Cir. Ct. 1995) (Applicant sought a permit to expand an outdoor dining area; homeowner's association president testified that residents objected; next door resident objected to the 4 L's: "liquor, later, longer, and louder;" none of this testimony was competent); *Jesus Fellowship, Inc. v. Miami-Dade County,* 752 So.2d 708 (Fla. 3d DCA 2000) (testimony by non-expert citizens insufficient to rebut expert testimony presented on behalf of landowner).

Similarly, expressions of mass opinions from neighborhood residents do not constitute competent substantial evidence. It has long been common practice at a hearing for someone to get up and ask the question: "How many people here oppose this project?" A large number of the citizens present stand or raise their hands. This expression by the audience simply does not constitute evidence.

The fact that there may be a large number of objectors to the approval of a permit or other quasi- judicial decision is not a sound basis for denial, no matter how strenuous the objections. The function of a quasi-judicial board must be exercised on the basis of facts adduced at the hearing and upon appropriate zoning principles and objectives as set forth in the zoning ordinance and shall *not* be based on a mere poll of the neighbors. The merits of the application, rather than the number of opponents, must control the consideration. Local governing bodies and boards acting in a quasi-judicial-capacity must base their decisions on fact and *not* indulge in "government by applause meter." *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988).

(b) Examples of Acceptable Citizen Testimony

One case that fully supports the testimony of neighborhood residents is *Board of County Commissioners of Pinellas County v. City of Clearwater*, 440 So.2d 497 (Fla. 2d DCA 1983). This case concerned an application for a public pier 200 feet in length with a 100 foot long T-end. The application was denied after residents appeared in opposition stating that the proposed dock would have a material and adverse effect upon the beauty and recreation advantages of the area. The circuit court reversed, citing a lack of expert testimony, and that the opinions of citizens did not constitute competent substantial evidence. The appellate court reversed, finding local lay individuals with first-hand knowledge of the vicinity qualified as expert witnesses as to the issue of natural beauty and recreational advantages of the area.

Statements of neighbors regarding the effect of a development on their quality of life are also admissible. *City of St. Petersburg v. Cardinal Industries Development Corp.*, 493 So.2d 535, 538 (Fla. 2d DCA 1986); *Graham Companies v. Dade County*, Case No. 93-163AP, 2 Fla. L. Weekly Supp. 241, 242 (Fla. 11th Cir. Ct. Apr. 22, 1994). Lay citizens have the ability to testify how conditions in a neighborhood have changed over time, if they have witnessed those changes.

Other cases in which the testimony of residents has been found to be acceptable include: *Metro Dade County v. Blumenthal*, 675 So.2d 598 (Fla. 3d DCA 1995), *reversed en banc*, 675 So.2d 610 (Fla. 3d DCA 1996) (resident Morgan Levy testified as to location and density of nearby developments; original opinion determined that Levy was not competent to testify to "zoning trends" (Judge Cope dissenting); *en banc* the court adopted Judge Cope's dissent, in which he noted that no one had ever used the word "zoning trends" except a Commissioner and that what Levy had done was simply to present information on nearby developments from which the County Commission could draw its own conclusions; Levy was competent to testify to that information); *Robinson v. City of Miami Beach*, 3 Fla. L. Weekly Supp. 320 (Fla. 11th Cir. Ct. 1995) (testimony by residents that existing unpermitted helicopter pad should not be permitted because helicopters made too much noise, blew covers off boats, caused houses to rattle, and windows to vibrate was expert testimony because the witnesses had observed these occurrences); and *Citivest Construction Corp. v. City of Tampa*, 3 Fla. L. Weekly Supp. 212 (Fla. 13th Cir. 1995) (permit was for single-family homes on sub- standard lots; resident testimony related to permitting standards; a resident who was an architect presented a picture board comparing home sizes of proposed and existing homes; a resident took pictures of all homes in the neighborhood and compared existing lot intensiveness with proposed lot intensiveness; testimony found to be "expert" testimony); *Marion County v. Priest*, 26 Fla. L. Weekly Supp. 1098 (Fla. 5th DCA 2001) (Marion County's denial of special use permit to withdraw 100,000 gallons of water to be sold outside county based on testimony of three homeowners in opposition to special use permit regarding impact on existing roads, existing water usage restrictions and salt water intrusion in wells in Levy County upheld as supported by competent substantial evidence).

IV. JUDICIAL REVIEW BY DISTRICT COURTS OF APPEAL

When the jurisdiction of a district court of appeal is invoked to review a circuit court's ruling on the decision of a quasi-judicial body, the scope of the court's review is quite narrow. Namely, the district courts of appeal are limited to considering two issues:

(1) Whether the circuit court afforded procedural due process; and

(2) Whether the circuit court departed from the essential requirements of law.

Fla. Power and Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000).

Thus, while the circuit courts examine the record of the quasi-judicial proceedings to determine whether competent substantial evidence exists to support the zoning decision, the district courts of appeal look primarily at the issue of whether the circuit court applied the correct law in rendering its decision.

The most common reason cited for reversal of a circuit court's order quashing the decision

of the quasi-judicial body is where they seek to reweigh the evidence presented during the quasi-judicial proceeding. This constitutes a "departure from the essential requirements of law," as the circuit courts are strictly prohibited from reweighing the record evidence presented below. Rather, the courts are restricted to *reviewing* the record of the proceedings below -- they are not permitted to substitute their judgment for that of the local government. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

In sum, a circuit court acting in its appellate capacity is charged with simply ascertaining whether the challenged administrative action is *supported* by competent substantial evidence. In the words of the Florida Supreme Court:

> The question is not whether upon review of the evidence in the record there exists substantial competent evidence to support a position *contrary* to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial competent evidence to *support* the agency's conclusion.

Education Dev. Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So.2d 106, 107-08 (Fla. 1989)(emphasis added); *see also, C City of Dania v. Florida Power & Light*, 718 So.2d 813, 816 (Fla. 4th DCA, 1998), *app'd in part, quashed in part, Florida. Power & Light Co. v. City of Dania*, 761 So.2d 1089 (Fla. 2000) ("The test is not whether the circuit court *would* have reached the same conclusion based on the evidence, but 'whether there was *any* substantial competent evidence upon which to base the [local government's] decision.'")(emphasis added).

A "departure from the essential requirements of law" can also occur where the circuit court misstates the criteria of a local zoning ordinance. One such case was presented in *City of Jacksonville v. Taylor*, 721 So.2d 1212 (Fla. 1st DCA 1998). In *Taylor*, the circuit court had reversed the City's decision to deny the landowner his request for a zoning variance to reduce the required road frontage, concluding that there was no competent substantial evidence to support the denial. According to the circuit court, the City Council had misapplied the governing zoning code criteria; Mr. Taylor, the court reasoned, was entitled to the variance because surrounding properties had already received identical zoning variances.

The First District Court of Appeal reversed the circuit court's decision, concluding that it was the circuit court -- not the City Council -- that failed to apply the correct law, stating:

> The fact that certain other property owners have received a variance is not a consideration under the City of Jacksonville ordinance code, the law applicable here . . . . Obviously, the lower court's statement of the law is not consistent with the local zoning ordinance.

Taylor, 721 So.2d at 1214.

Once a case makes its way to the district court of appeal, the scope of review is generally limited to ascertaining whether the lower court applied the correct law. The appellate courts do not

revisit the competent substantial evidence issue. That issue is determined at the circuit court level. However, if a circuit court exceeds its own scope of review and substitutes its judgment for that of the quasi-judicial body, the appellate courts will not hesitate to find reversible error. In *St. Johns County v. Smith*, 766 So.2d 1097, 1100 (Fla. 5th DCA 2000), the Fifth District Court of Appeal reversed circuit court's decision denying an application for a PUD amendment to allow a solid waste transfer facility, holding that the lower court had reweighed and rejected the testimony given by the two expert witnesses. In *Florida Power & Light v. Dania*, 761 So.2d 1089 (Fla. 2000), the Florida Supreme Court held that the Fourth District Court of Appeal was precluded from assessing the record evidence. ("Once the district court determined from the face of the circuit court order that the circuit court had applied the wrong law, the job of the district court was ended. In proceeding to apply the right first-tier law, i.e., in evaluating the record for competent substantial evidence to support the Commission's decision, the district court usurped the jurisdiction of the circuit court.").

V. COMPREHENSIVE PLAN AMENDMENTS

In 1997 the Florida Supreme Court decided *Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997), which clarified the standard of review to be applied by courts when reviewing the local government's decision on an amendment to the local comprehensive plan. The court held that the local government's decision on a plan amendment is legislative in nature rather than quasi-judicial and, therefore, the deferential "fairly debatable" standard of review applies. However, the court suggested in a footnote that its holding may not apply in cases involving small-scale plan amendments.

In 2001, the Florida Supreme Court answered the unresolved question of whether small-scale comprehensive plan amendments are legislative or quasi-judicial in nature. In *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*, 788 So.2d 204 (Fla. 2001), the court held that small-scale comprehensive plan amendments are also legislative decisions. The Florida Supreme Court held that the same reasoning it used in *Yusem* also applies to small-scale amendments because: (1) the original adoption of a comprehensive plan is a legislative act, the proposed modification of that plan is likewise a legislative act; (2) the integrated comprehensive plan amendment review process by several levels of government indicates that action on a plan amendment is a policy decision; (3) Section 163.3184, *Florida Statutes*, requires that the fairly debatable standard of review applies in an administrative hearing to determine consistency; and (4) characterizing all comprehensive plan amendments as legislative will remove uncertainty and promote uniformity in the land use law context. The Court rejected the contention that small-scale plan amendments are distinguishable from other plan amendments because they involve changes to the future land use map that do not alter the plan's textual goals, objectives and policies, finding that the future land use map is part of the comprehensive plan and represents a fundamental policy decision of the local government and therefore any proposed change to that established policy likewise is a policy decision. Finally, the Court held that local legislative decisions on small-scale plan amendments may be challenged in an original *de novo* action in circuit court, subject to the fairly debatable standard of review.

VI. INTERPRETATION OF LOCAL COMPREHENSIVE PLANS

Dixon v. City of Jacksonville, 774 So.2d 763 (Fla. 1st DCA 2000), *rev. dismissed*, 831 So.2d 161 (Fla. 2002), involved an action for injunctive relief by neighbors challenging the consistency of the City's development order, which permitted the construction of a hotel, with its comprehensive plan, based on the argument that the hotel was not a permitted use within the applicable RPI (Residential, Professional, Institutional) future land use classification. The Court rejected the City's argument that deference should be given to the City's interpretation of its comprehensive plan.

The First District Court of Appeal determined that the strict scrutiny standard previously established in *Machado v. Musgrove* applies in determining the consistency of the development order with the comprehensive plan and that the construction of statutes and ordinances is a question of law that is reviewable *de novo*, unless their meaning is ambiguous. Even if a statute or ordinance is complicated, that does not necessarily render it "ambiguous." Although the RPI future land use classification did not mention, either specifically or by implication, hotels, another future land use classification expressly permitted hotels. Accordingly, based upon its "strict scrutiny" of the provisions of the City's comprehensive plan, the Court concluded that hotels were not a permitted use in the RPI classification.

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Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?, Bonnie Twardosky Polk & Mark P. Barneby, March 1995.

Parker Creates Confusion in Land Use Appeals, John E. Fennelly, February 1995.

Planning vs. Zoning: Snyder Decision Changes Rezoning Standards, John W. Howell & David J. Russ, May 1994.

The Death of Zoning As We Know It, Paul R. Gougelman III, March 1993.

Quasi-Judicial Review of Rezoning Decisions and Local Government Home Rule Power: Can They Be Reconciled? Morgan R. Bentley, January 1993.

II. Law Review Articles

Quasi-Judicial Rezonings: A Commentary on the Snyder Decision and the Consistency Requirement, Thomas G. Pelham, JOURNAL OF LAND USE AND ENVIRONMENTAL LAW, Vol. 9, No. 2, Spring 1994.

Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil", Charles L. Siemon & Julie P. Kendig, NOVA LAW REVIEW, Vol. 20, No. 2, Winter 1996.

III. Internet Resources

Florida Department of Economic Opportunity	http://www.floridajobs.org
Florida Planning & Zoning Association	http://www.fpza.org
Planners Web: Citizen Planner Resources	http://www.plannersweb.com
Urban Land Institute	http://uli.org

Office of General Counsel
117 W. Duval Street, Suite 480
Jacksonville, FL 32202
(904) 255-5100

MEMORANDUM

TO: LUZ Committee Members

FROM: Mary Staffopoulos, Deputy General Counsel

DATE: September 30, 2022

RE: **Resolution 2022-446** – Appeal of Final Order of the Jacksonville Planning Commission on Waiver of Minimum Distance Requirements for Liquor License Location Application WLD-22-13

On October 4, 2022, the Land Use & Zoning (LUZ) Committee will be considering Resolution 2022-446 which concerns an appeal of a decision of the Jacksonville Planning Commission ("PC") granting an application filed by Paul Harden, Esq., on behalf of Anwar's Properties, Inc. (the "Applicant"), requesting approval of a waiver of minimum distance requirements for a liquor license location (Application WLD-22-13) on the property located at 5522 Soutel Drive. Specifically, the Applicant sought a waiver of the minimum distance requirements between the subject liquor license location and a church from 500 feet to 401 feet. The appeal was filed by Jessica Cappock, Esq., on behalf of Yahya Shabazz (the "Appellant").

While the record that was submitted before the PC for this appeal is part of the record you will have before you for review, you will be considering this request *de novo*, which means that a presentation of all the evidence starts over again, and the Appellant and other presenters may provide you with additional evidence to assist with your decision.

Procedure for Appeal

Sections 656.140 - 656.142, *Ordinance Code*, provide the procedure for appeal of a decision by the PC on applications for waiver of minimum distance requirements for liquor license locations from a church or school. The LUZ Committee, as the committee of reference to the City Council on such appeals, will hold a hearing and provide a recommendation to the City Council.

Pursuant to Council Rule 6.201 and Sections 656.140 – 656.142, *Ordinance Code.*

1. This is an informal quasi-judicial hearing. No formal hearing was requested by the Appellant.
2. The order of presentation is as follows:
    a. Disclosure of *ex parte* communications by LUZ Committee members.
    b. Open the public hearing.
    c. Swearing of witnesses, if requested:
        i. Witnesses are not required to be sworn unless the Appellant, the Applicant, or a Committee member asks, and then the swearing in would be done *en masse* (as a group).
        ii. Cross examination of witnesses is not permitted, but Committee members may ask questions, and the Appellant and Applicant may reserve the right to ask questions of a witness at the beginning of their respective presentations.
    d. Presentation by Planning & Development Dept. staff to state how the appeal came to LUZ and presentation of Staff Report (up to 10 minutes).
    e. Appellant presentation (up to 20 min.).
    f. Applicant presentation (up to 20 min).
    g. Public hearing (up to 3 min. each).
    h. Rebuttal by Applicant, if requested (up to 5 min.).
    i. Rebuttal by Appellant, if requested (up to 5 min.).
    j. Close the public hearing.
    k. Deliberation and voice vote on Waiver of Minimum Distance Requirements for Liquor License Location Application WLD-22-13.
        - See **Exhibit A,** attached hereto, for Waiver criteria.
    l. Motion and voice vote to amend Resolution 2022-446 to grant or deny the appeal.
    m. Move the bill as amended, discussion, open the ballot and vote using the buttons.

Decision must be based upon "competent, substantial evidence"

Competent, substantial evidence may consist of:

1. Expert testimony (staff, other experts or citizens with personal knowledge of material facts); and
2. Staff and expert reports, documents, maps, photographs, etc.

Argument of an attorney, expressions of general support or opposition, and statements involving speculation or conjecture are not competent, substantial evidence.

During discussion/deliberation, or in crafting your motion, it is helpful to refer to the evidence that was presented by witnesses or in the Planning & Development Department Staff Report to support your decision/recommendation to the City Council.

Potential Motions/Recommendations by the LUZ Committee

The LUZ Committee will provide a recommendation to the City Council regarding the appeal. Pursuant to Section 656.15, *Ordinance Code*, the City Council may take any of the following actions regarding the appeal:

1. Affirm the PC decision (in this case, deny the appeal), with or without conditions;
2. Reverse the PC decision (in this case, grant the appeal);
3. Modify the PC decision; or
4. Refer the matter back to the PC, with specific instructions for further action, by adopting a written order.

Criteria for Decision/Recommendation to City Council

When the City Council acts on a contested decision by affirming, reversing, or modifying the action of the PC, the Council action is the final action of the City and shall be subjected to no further review under the *Code*. The criteria for waiver of minimum distance requirements for liquor license locations are listed in **Exhibit A**, attached hereto. The LUZ Committee may require the Appellant and Applicant to submit such additional information as the Committee deems necessary to be used in making its determination.

** Testimony from the PC hearings held on April 7, 2022 and April 21, 2022 during which it considered WLD-22-13 can be found in the transcripts included in the LUZ Book. The LUZ Book contains only that portion of the April 7, 2022 transcript pertaining to WLD-22-13; testimony on WLD-22-13 presented during the April 21, 2022 PC meeting begins on page 177 and continues to page 252 (of 343) of that transcript.*

EXHIBIT A

Criteria for Consideration of Waiver of Minimum Distance Requirements for Liquor License Location Application (WLD-22-13)

Pursuant to Section 656.133(a), *Ordinance Code*, a waiver for minimum distance requirements from a church or school for a liquor license location may be granted if there exist one or more circumstances which negate the necessity for compliance with the distance requirements, including but not limited to the following:

1. The commercial activity associated with the alcoholic beverage use is of a lesser intensity than the commercial activity associated with the alcoholic beverage use which previously existed; e.g., there has been a reduction in the number of seats or square footage or the type of license;

2. The alcoholic beverage use is designed to be an integral part of a mixed planned unit development;

3. The alcoholic beverage use is located within a shopping center with an aggregate gross leasable area of 50,000 square feet or more, inclusive of all outparcels and meets the definition of a "bona fide restaurant", as defined in Section 656.805(c), *Ordinance Code*;

4. The alcoholic beverage use is not directly visible along the line of measurement defined in Section 656.806, *Ordinance Code*, and is physically separated from the church or school, thereby negating the distance requirement as a result of the extra travel time; or

5. There are other existing liquor license locations of a similar nature in the immediate vicinity of the proposed location; provided, however, that no waiver shall be granted pursuant to this criterion if the proposed liquor license location is closer to the church or school than other existing locations.

Introduced by the Land Use and Zoning Committee:

RESOLUTION 2022-446

A RESOLUTION CONCERNING THE APPEAL FILED BY YAHYA SHABAZZ OF THE FINAL ORDER APPROVING, SUBJECT TO ONE CONDITION, APPLICATION FOR ZONING WAIVER OF MINIMUM DISTANCE REQUIREMENTS FOR LIQUOR LICENSE LOCATION WLD-22-13 REQUESTING TO REDUCE THE REQUIRED MINIMUM DISTANCE BETWEEN A LIQUOR LICENSE LOCATION AND A CHURCH OR SCHOOL FROM 500 FEET TO 401 FEET ON PROPERTY LOCATED IN COMMERCIAL COMMUNITY/GENERAL-2 (CCG-2) ZONING DISTRICT AT 5522 SOUTEL DRIVE (R.E. NO. 042013-0000), PURSUANT TO SECTION 656.141, *ORDINANCE CODE*; ADOPTING RECOMMENDED FINDINGS AND CONCLUSIONS OF THE LAND USE AND ZONING COMMITTEE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Anwar's Properties Inc., the owner of property at 5522 Soutel Drive (R.E. No. 042013-0000), applied to the Planning Commission for a Zoning Waiver of Minimum Distance Requirements for a Liquor License Location (Application WLD-22-13) to reduce the required minimum distance between a liquor license location and a church or school from 500 feet to 401 feet, on property located at 5522 Soutel Drive, in the Commercial Community/General-2 (CCG-2) Zoning District; and

WHEREAS, the Planning Commission approved Application WLD-22-13, subject to one condition, by Final Order dated April 21, 2022; and

WHEREAS, pursuant to Section 656.141, *Ordinance Code*, Yahya

Shabazz filed a notice of appeal; and

WHEREAS, such appeal was timely filed, and the appellant has standing to appeal; now, therefore

BE IT RESOLVED by the Council of the City of Jacksonville:

Section 1. Adoption of recommended findings and conclusions. The Council has reviewed the record of proceedings regarding Zoning Waiver of Minimum Distance Requirements for a Liquor License Location Application WLD-22-13, **On File** in the Office of Legislative Services and the Planning and Development Department, and has considered the recommended findings and conclusions of the Land Use and Zoning Committee. The recommended findings and conclusions of the Land Use and Zoning Committee are hereby adopted. This Resolution is the final action of the Council.

Section 2. Effective Date. The adoption of this Resolution shall be deemed to constitute a quasi-judicial action of the City Council and shall become effective upon signature by the Council President and Council Secretary.

Form Approved:

/s/ Mary E. Staffopoulos

Office of General Counsel

Legislation Prepared by: Mary E. Staffopoulos

GC-#1500760-v3-2022-446_(WLD-22-13_Appeal)

Introduced and amended by the Land Use and Zoning Committee:

RESOLUTION 2022-446-A

A RESOLUTION GRANTING THE APPEAL FILED BY YAHYA SHABAZZ OF THE FINAL ORDER APPROVING, SUBJECT TO ONE CONDITION, APPLICATION FOR ZONING WAIVER OF MINIMUM DISTANCE REQUIREMENTS FOR LIQUOR LICENSE LOCATION WLD-22-13 REQUESTING TO REDUCE THE REQUIRED MINIMUM DISTANCE BETWEEN A LIQUOR LICENSE LOCATION AND A CHURCH OR SCHOOL FROM 500 FEET TO 401 FEET ON PROPERTY LOCATED IN COMMERCIAL COMMUNITY/GENERAL-2 (CCG-2) ZONING DISTRICT AT 5522 SOUTEL DRIVE (R.E. NO. 042013-0000), PURSUANT TO SECTION 656.141, *ORDINANCE CODE*; ADOPTING RECOMMENDED FINDINGS AND CONCLUSIONS OF THE LAND USE AND ZONING COMMITTEE; PROVIDING FOR NOTICE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Anwar's Properties Inc., the owner of property at 5522 Soutel Drive (R.E. No. 042013-0000), applied to the Planning Commission for a Zoning Waiver of Minimum Distance Requirements for a Liquor License Location (Application WLD-22-13) to reduce the required minimum distance between a liquor license location and a church or school from 500 feet to 401 feet, on property located at 5522 Soutel Drive, in the Commercial Community/General-2 (CCG-2) Zoning District; and

WHEREAS, the Planning Commission approved Application WLD-22-13, subject to one condition, by Final Order dated April 21, 2022; and

WHEREAS, pursuant to Section 656.141, *Ordinance Code*, Yahya Shabazz filed a notice of appeal; and

WHEREAS, such appeal was timely filed, and the appellant has standing to appeal; now, therefore

BE IT RESOLVED by the Council of the City of Jacksonville:

Section 1. Adoption of recommended findings and conclusions. The Council has reviewed the record of proceedings regarding Zoning Waiver of Minimum Distance Requirements for a Liquor License Location Application WLD-22-13, **On File** in the Office of Legislative Services and the Planning and Development Department, and has considered the recommended findings and conclusions of the Land Use and Zoning Committee. The recommended findings and conclusions of the Land Use and Zoning Committee are hereby adopted. Based on the competent, substantial evidence in the record of proceedings, the appeal is granted. The Planning Commission Final Order Approving with Condition Application for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13 is overturned, and Application for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13 is denied. Pursuant to Section 166.033(2), *Florida Statutes*, the Council hereby finds:

(1) This Resolution shall serve as written notice to the appellant, Yahya Shabazz, and the applicant for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13, Anwar's Properties Inc.

(2) Based on the competent, substantial evidence in the record of proceedings, the City Council has determined that Application for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13 fails to meet the requirements set forth in Section 656.133, *Ordinance Code*, in that there are not circumstances that exist that negate the necessity for compliance with the distance requirements of Chapter 656, *Ordinance Code*. Specifically, consideration was

given to proximity of the proposed liquor license location to the Friendship Missionary Baptist Church located at 7141 New Kings Road, where competent, substantial evidence on the record reflects that church services and other church-related activities are conducted within an area less than 500 feet from the proposed liquor license location. In addition, testimony received from both residents of the area and officials from Duval County Public Schools regarding the proximity of the proposed liquor license location to a bus stop and the path of pedestrian travel for students attending the nearby S.A. Hull Elementary School, and the negative impact the proposed business would have on the students and residents in the immediate surrounding area, was compelling. Based on the above and the additional reasons stated on the record during the Land Use and Zoning Committee's public hearing on this matter, Application for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13 is hereby denied.

Section 2. Notice. Legislative Services is hereby directed to mail a copy of this Resolution, as adopted, to the applicant for Waiver of Minimum Distance Requirements for Liquor License Location WLD-22-13, Anwar's Properties Inc., and the appellant, Yahya Shabazz, and any other parties who testified before the Land Use and Zoning Committee, or who otherwise filed a qualifying written statement as defined in Section 656.140(c), *Ordinance Code*.

Section 3. Effective Date. The adoption of this Resolution shall be deemed to constitute a quasi-judicial action of the City Council and shall become effective upon signature by the Council President and Council Secretary.

Form Approved:

/s/ Mary E. Staffopoulos

Office of General Counsel

Legislation Prepared by: Mary E. Staffopoulos

GC-#1530369-v1-2022-446-A.docx

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MEMORANDUM

TO: **Land Use & Zoning Committee Members**

FROM: **Mary E. Staffopoulos, Deputy General Counsel**

DATE: **March 5, 2023**

RE: **Resolution 2023-14 – Appeal of a Final Order of the Jacksonville Historic Preservation Commission on Application for Certificate of Appropriateness (COA) 22-28217**

On March 7, 2023, the Land Use & Zoning (LUZ) Committee will be considering Resolution 2023-14 which concerns an appeal of a final order of the Jacksonville Historic Preservation Commission (JHPC) denying Application for Certificate of Appropriateness (COA) 22-28217 filed by Kimberly Baker, requesting to replace an existing grey 3-tab shingle roof with a standing seam silver metal roof (reroof) on a contributing (residential) structure located at 1968 Morningside Street (R.E. No. 092736-0000) in the Riverside/Avondale Historic District. Pursuant to Chapter 307, *Ordinance Code*, the proposed project involves an "alteration" to a contributing structure in the Historic District because it entails removal and replacement of a shingle roof with a metal roof. This appeal was filed by Ian Baker on behalf of the property owner, Kimberly Baker (the "Appellant").

While the record that was submitted before the JHPC for this appeal is part of the record you will have before you for review, you will be considering this request *de novo*, which means that a presentation of all the evidence starts over again, and the Appellant and other presenters may provide you with additional evidence.

Procedure for Appeal

Chapter 307, Part 2, *Ordinance Code*, provides the procedure for appeal of a decision by the JHPC on applications for certificates of appropriateness. The LUZ Committee, as the committee of reference to the City Council on such appeals, will hold a hearing and provide a recommendation to the City Council.

Pursuant to Council Rule 6.201 and Section 307.204, *Ordinance Code*.

1. This is an informal quasi-judicial hearing. No formal hearing was requested by the Appellant.
2. The order of presentation is just as in a typical rezoning:
    a. Disclosure of *ex parte* communications by LUZ Committee members.
    b. Open the public hearing.
    c. Swearing of witnesses, if requested:
        i. Witnesses are not required to be sworn unless the Appellant or a LUZ Committee member asks, and then the swearing in would be done *en masse* (as a group).
        ii. Cross examination of witnesses is not permitted, but LUZ Committee members may ask questions, and the Appellant may reserve the right to ask questions of a witness at the beginning of his/her presentation.
    d. OGC presentation by Carla Lopera to state how the appeal came to the LUZ Committee.
    e. Appellant (Kimberly Baker) presentation (up to 10 min., to include rebuttal, if any).
    f. Appellee (City) presentation by Arimus Wells, Historic Preservation Section (time remaining after OGC presentation up to a total of 10 min., to include rebuttal, if any).
    g. Public hearing (up to 3 min. each).
    h. Rebuttal by Appellee (City/OGC), if requested (time retained, if any).
    i. Rebuttal by Appellant, if requested (time retained, if any).
    j. Close the public hearing.
    k. Deliberation and vote.

Decision must be based upon "competent, substantial evidence"

Competent, substantial evidence may consist of:

1. Expert testimony (staff, other experts or citizens with personal knowledge of material facts); and
2. Staff and expert reports, documents, maps, photographs, etc.

Argument of an attorney, expressions of general support or opposition, and statements involving speculation or conjecture are not competent, substantial evidence.

During discussion/deliberation it is helpful to refer to the evidence that was presented by witnesses or in the Planning & Development Department Staff Report to support your decision/recommendation to the City Council.

Potential Motions/Recommendations by the LUZ Committee

The LUZ Committee will provide a recommendation to the City Council regarding the appeal. Pursuant to Section 307.205, *Ordinance Code*, the City Council may take any of the following actions regarding the appeal:

1. Affirm the JHPC decision (in this case, deny the appeal);
2. Reverse the JHPC decision (in this case, grant the appeal, with or without conditions);
3. Modify the JHPC decision; or
4. Refer the matter back to the JHPC, with specific instructions for further action, by adopting a written order.

Criteria for Decision/Recommendation to City Council

When the City Council acts on a contested decision by affirming, reversing, or modifying the action of the JHPC, the Council action is the final action of the City and shall be subjected to no further review under the Code.

Pursuant to Sections 307.106(k) and (l), *Ordinance Code*, in reviewing an application for a certificate of appropriateness for alterations to a contributing structure within an historic district, the JHPC shall be guided by the criteria outlined below. These same criteria shall also guide the recommendation of the LUZ Committee to the City Council and the City Council's final action on this appeal.

1. The Historic Preservation Guidelines for the Riverside/Avondale Historic District (a copy of the applicable Guidelines for Roofs and Roof Surfaces can be found in the LUZ Book materials for this item); and

2. The following general criteria:

    a. The effect of the proposed work on the landmark, landmark site or property within an historic district upon which such work is to be done;
    b. The relationship between such work and other structures on the landmark site or other property in the historic district;
    c. The extent to which the historic, architectural, or archaeological significance, architectural style, design, arrangement, texture and materials of the landmark or the property will be affected; and
    d. Whether the plans may be carried out by the applicant within a reasonable period of time.

3. The following additional criteria are applicable when considering a request for alteration which are based on the United States Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings:
    a. Every reasonable effort shall be made to use a property for its originally intended purpose, or to provide a compatible use for a property that requires minimal alteration of the building structure, or site.
    b. The distinguishing original qualities or character of a building, structure, or site shall not be destroyed. The removal or alteration of any historic material or distinctive architectural features shall be avoided when possible.
    c. Each building, structure, and site shall be recognized as a product of its own time. An alteration which has no historical basis and which seeks to create an earlier appearance shall be discouraged.
    d. Changes which may have taken place in the course of time are evidence of the history and development of a building, structure, or site. These changes may have acquired significance in their own right, and this significance shall be recognized and respected.
    e. Distinctive stylistic features or examples of skilled craftsmanship which characterize a building, structure, or site, shall be treated with sensitivity.
    f. Deteriorated architectural features shall be repaired rather than replaced, wherever possible. In the event replacement is necessary, the new material shall match the material being replaced in composition, design, color, texture, and other visual qualities. However, technologically advanced materials shall be considered and used as replacement alternatives. Repair or replacement of missing architectural features shall be based on accurate duplications of features, substantiated by historical, physical, or pictorial evidence rather than on conjectural designs or the availability of different architectural elements from other buildings or structures.
    g. The surface cleaning of structures shall be undertaken with the gentlest means possible. Sandblasting and other cleaning methods that will damage the historic building materials shall be not undertaken.
    h. Every reasonable effort shall be made to protect and preserve archaeological resources affected by, or adjacent to, any acquisition, protection, stabilization, preservation, rehabilitation, restoration, or reconstruction project.

The LUZ Committee may require the Appellant to submit such additional information as the LUZ Committee deems necessary to be used in making its determination. Testimony from the JHPC meeting held on October 26, 2022, during which it considered COA-22-28217, can be found in the transcript included in the LUZ Book on pages 48 through 51 of the **On File** document to Resolution 2023-14.

Introduced by the Land Use and Zoning Committee:

RESOLUTION 2023-14

A RESOLUTION CONCERNING THE APPEAL OF A FINAL ORDER OF THE JACKSONVILLE HISTORIC PRESERVATION COMMISSION DENYING APPLICATION FOR CERTIFICATE OF APPROPRIATENESS COA-22-28217, AS REQUESTED BY KIMBERLY SIMON BAKER, SEEKING APPROVAL TO REPLACE AN EXISTING SHINGLE ROOF WITH A SILVER METAL ROOF (REROOF) ON A CONTRIBUTING STRUCTURE IN THE RIVERSIDE/AVONDALE HISTORIC DISTRICT AT 1968 MORNINGSIDE STREET (R.E. NO. 092736-0000) IN COUNCIL DISTRICT 14, PURSUANT TO CHAPTER 307 (HISTORIC PRESERVATION AND PROTECTION), PART 2 (APPELLATE PROCEDURE), *ORDINANCE CODE*; ADOPTING RECOMMENDED FINDINGS AND CONCLUSIONS OF THE LAND USE AND ZONING COMMITTEE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Kimberly Simon Baker, owner of property located at 1968 Morningside Street in the Riverside/Avondale Historic District in Council District 14 (the "Subject Property"), submitted Application for Certificate of Appropriateness COA-22-28217 requesting to replace an existing shingle roof with a silver metal roof (reroof) on a contributing structure located on the Subject Property; and

WHEREAS, by Final Order dated November 15, 2022, the Jacksonville Historic Preservation Commission denied Application for Certificate of Appropriateness COA-22-28217, requesting to replace an existing shingle roof with a silver metal roof (reroof) on a contributing structure; and

WHEREAS, on December 5, 2022, pursuant to Section 307.201, *Ordinance Code*, Ian Baker, on behalf of Kimberly Simon Baker, filed a Notice of Appeal appealing the Jacksonville Historic Preservation Commission's Final Order denying Application for Certificate of Appropriateness COA-22-28217; and

WHEREAS, the Notice of Appeal was timely filed and the appellant has standing to appeal; now, therefore

BE IT RESOLVED by the Council of the City of Jacksonville:

Section 1. Adoption of recommended findings and conclusions. The Council has reviewed the record of proceedings for the Appeal of the Final Order denying Application for Certificate of Appropriateness COA-22-28217. The record of proceedings is **On File** in the City Council Legislative Services Division and the Planning and Development Department. After reviewing the record of proceedings, the recommended findings and conclusions of the Land Use and Zoning Committee are hereby adopted by the Council. This Resolution is the final action of the Council.

Section 2. Effective Date. The adoption of this Resolution shall be deemed to constitute a quasi-judicial action of the City Council and shall become effective upon the signature by the Council President and Council Secretary.

Form Approved:

/s/ Mary E. Staffopoulos

Office of General Counsel

Legislation Prepared by: Mary E. Staffopoulos

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Introduced and amended by the Land Use and Zoning Committee:

RESOLUTION 2023-14-A

A RESOLUTION GRANTING THE APPEAL OF A FINAL ORDER OF THE JACKSONVILLE HISTORIC PRESERVATION COMMISSION DENYING APPLICATION FOR CERTIFICATE OF APPROPRIATENESS COA-22-28217, AS REQUESTED BY KIMBERLY SIMON BAKER, SEEKING APPROVAL TO REPLACE AN EXISTING SHINGLE ROOF WITH A SILVER METAL ROOF (REROOF) ON A CONTRIBUTING STRUCTURE IN THE RIVERSIDE/AVONDALE HISTORIC DISTRICT AT 1968 MORNINGSIDE STREET (R.E. NO. 092736-0000) IN COUNCIL DISTRICT 14, PURSUANT TO CHAPTER 307 (HISTORIC PRESERVATION AND PROTECTION), PART 2 (APPELLATE PROCEDURE), *ORDINANCE CODE*; ADOPTING RECOMMENDED FINDINGS AND CONCLUSIONS OF THE LAND USE AND ZONING COMMITTEE; PROVIDING FOR NOTICE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Kimberly Simon Baker, owner of property located at 1968 Morningside Street in the Riverside/Avondale Historic District in Council District 14 (the "Subject Property"), submitted Application for Certificate of Appropriateness COA-22-28217 requesting to replace an existing shingle roof with a silver metal roof (reroof) on a contributing structure located on the Subject Property; and

WHEREAS, by Final Order dated November 15, 2022, the Jacksonville Historic Preservation Commission denied Application for Certificate of Appropriateness COA-22-28217, requesting to replace an existing shingle roof with a silver metal roof (reroof) on a contributing structure; and

WHEREAS, on December 5, 2022, pursuant to Section 307.201, *Ordinance Code*, Ian Baker, on behalf of Kimberly Simon Baker, filed a Notice of Appeal appealing the Jacksonville Historic Preservation Commission's Final Order denying Application for Certificate of Appropriateness COA-22-28217; and

WHEREAS, the Notice of Appeal was timely filed and the appellant has standing to appeal; now, therefore

BE IT RESOLVED by the Council of the City of Jacksonville:

Section 1. Adoption of recommended findings and conclusions. The Council has reviewed the record of proceedings for the Appeal of the Final Order denying Application for Certificate of Appropriateness COA-22-28217. The record of proceedings is **On File** in the City Council Legislative Services Division and the Planning and Development Department. After reviewing the record of proceedings, the recommended findings and conclusions of the Land Use and Zoning Committee are hereby adopted by the Council. Based on the competent, substantial evidence in the record of proceedings, the appeal is granted, the Historic Preservation Commission Final Order denying Application for Certificate of Appropriateness COA-22-28217 is overturned, and Application for Certificate of Appropriateness COA-22-28217 is approved. Pursuant to Section 166.033, *Florida Statutes*, the Council hereby finds:

(1) This Resolution shall serve as written notice of the Council's action to grant the appeal and approve COA-22-28217 to the appellant, Ian Baker, and the applicant for Certificate of Appropriateness COA-22-28217, Kimberly Simon Baker.

(2) Based on a review and application of the criteria listed in Section 307.106, *Ordinance Code*, pertaining to requests for alterations to a contributing structure within a historic district, and the competent, substantial evidence in the record of proceedings, Application for Certificate of Appropriateness COA-22-28217

sufficiently demonstrates a basis for granting the request for alterations to the subject contributing structure located in the Riverside/Avondale Historic District. This Resolution is the final action of the Council.

Section 2. Notice. Legislative Services is hereby directed to mail a copy of this Resolution, as adopted, to the appellant, applicant for Certificate of Appropriateness COA-22-28217, and any other parties who testified before the Land Use and Zoning Committee, or who otherwise filed a qualifying written statement as defined in Section 307.202(c), *Ordinance Code*.

Section 3. Effective Date. The adoption of this Resolution shall be deemed to constitute a quasi-judicial action of the City Council and shall become effective upon the signature by the Council President and Council Secretary.

Form Approved:

/s/ Mary E. Staffopoulos

Office of General Counsel

Legislation Prepared by: Mary E. Staffopoulos

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