IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY, FLORIDA

SEAMARK, INC., a Florida not for profit corporation, PROTECT ST. PETE BEACH ADVOCACY GROUP, INC., a Florida not for profit corporation, and KEN BARNES, individually,

Petitioners,

vs.

CITY OF ST. PETE BEACH, FLORIDA, a Political Subdivision of the State of Florida, 5500-5600 GULF BLVD. IG LLC, a Foreign Limited Liability Company; 5700 GULF BLVD. BR LLC, a Foreign Limited Liability Company; 5750 GULF BLVD. CR LLC, a Foreign Limited Liability Company; REEF RESORT CONDOMINIUM ASSOCIATION, INC., a Florida Not-for-Profit Corporation, and 6000 GULF BLVD. SP LLC, a Foreign Limited Liability Company,

Respondents.

Case No.:

Petition filed pursuant to Fla. R. App. P. 9.100(f)

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Seamark, Inc., ("Seamark") a Florida Not for Profit Corporation, a Condominium ("Seamark"), Protect St. Pete Beach Advocacy Group, Inc. a Florida Not For Profit Corporation ("PSPB"), and Ken Barnes, an individual ("Barnes") (collectively "Petitioners"), respectfully file this petition for writ of certiorari ("Petition"), by and through their undersigned attorneys, and petition the Court to issue a Writ of Certiorari quashing a quasi-judicial decision ("Granting a Conditional Use Permit") of the City Commission of the CITY OF ST. PETE BEACH (the "City"), Resolution 2023-27, ("Resolution"), rendered on May 9, 2024, approving a conditional use permit for the redevelopment of Tradewinds Resort, allowing the construction of a four-phase temporary lodging redevelopment that will include 1,596 total temporary lodging units, 59,895 sq. ft. of meeting space, 79,126 sq. ft. of retail and restaurant space, 31,105 sq. ft. of office space, rooftop drinking and dining amenities, parking garages in connection with an Application for a Conditional Use Permit #23033 ("Redevelopment Project"). A2.17. The City Commission ("Commission") failed to afford procedural due process, departed from the essential requirements of law, and failed to support its decision with competent substantial evidence.

As required under rule 9.100(g), this petition contains: (1) the basis for invoking the jurisdiction of this Court; (2) the facts upon which Petitioners rely; (3) the nature of the relief sought; and (4) argument in support of the petition with appropriate citations of authority. For these reasons, the Court should issue a writ of certiorari quashing Resolution 2023-27.

Copies of those portions of the record of the proceedings relied upon by Petitioners are set forth in the Appendix attached hereto. References to those portions of the Appendix will be designated by "A" for the first volume and "A2" for the second volume,[1] followed by the bates page number; for example: (A.00017-18). References to the transcript of the hearing will be designated by "T." followed by the applicable page number and line of the transcript; for example: (T.001:1-5).

THE PARTIES

1. Petitioner, Seamark, Inc. is a Florida Not for Profit Corporation, a Condominium, comprised of the individual unit owners, and common elements of the Seamark condominium, located at 5369 Gulf Boulevard, St. Pete beach, directly next to the proposed redevelopment project.

[1] The second volume is composed of the City's Agenda packet, which due to it being signature locked, could not be formatted with the rest of the Appendix.

2. The Common Elements of the Seamark are defined within its Adopted Amended and Restated Declaration of Condominium Ownership of Seamark, Inc., a Condominium.

3. Petitioner, Seamark, through its President Tim Yarnell, filed a letter of objection to the proposed redevelopment project, and notice of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant A.1059-1060; T:406:20- 409:13.

4. Seamark membership consists of any record owner of a unit in Seamark, Inc.

5. Petitioner, Ken Barnes, is the owner of record of Unit 801 at Seamark, and Chairperson of the Seamark Special Litigation Committee.

6. Petitioner PSPB is a Florida not-for profit corporation composed of residents who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.436; A.442

7. PSPB was formed by St. Pete Beach residents who are concerned about overdevelopment and the negative impacts of increasing development density above sustainable levels. PSPB's purpose is based on the responsibility to ensure the St. Pete Beach community prioritizes environmental stewardship, preserves history and family friendly

atmosphere. A.441.

8. Eligibility of membership is open to residents of St. Pete Beach who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.442.

9. PSPB's director JoLynn Lawson and Counsel Jane Graham, provided oral legal arguments and testimony in objection at the City Commission hearing on April 15, 2024. T:340:5-350:25; T:352:8-T:355:15. PSPB also submitted a letter in the record requesting intervenor status, providing evidence of existing code violations, and a letter with a report from traffic engineer expert Drew Roark. A.436-A.472; A.473-551.

10. Petitioners Seamark, Ken Barnes, and PSPB are separate entities and independent of each other.

11. Respondent, The City of St. Pete Beach, Florida ("Respondent" or "St. Pete") is a governmental entity and political subdivision of the State of Florida duly authorized by law to approve conditional uses within its boundaries.

12. Respondent, 5500-5600 Gulf Blvd. Ig LLC ("Tradewinds Island Grand"), a Delaware limited liability company. A2.207.

13. Respondent, 5700 Gulf Blvd. BR LLC, ("Tradewinds

Breckenridge") is a Delaware limited liability company. A2.207.

14. Respondent, 5750 Gulf Blvd. CR LLC is a Delaware limited liability company. A2.207.

15. Reef Resort Condominium Association, Inc., is a Florida Corporation. A2.207.

16. Respondents 5500-5600 Gulf Blvd. lg LLC, 5700 Gulf Blvd. BR LLC, 5750 Gulf Blvd. CR LLC, Reef Resort Condominium Association, Inc.,6000 Gulf Blvd. SP LLC, (collectively "Applicant") were represented throughout the Application process by agent S. Elise Batsel, Esq., of Stearns Weaver Miller. A.1.

JURISDICTION AND VENUE

17. This is an action seeking certiorari review of the City of St. Pete Beach's Resolution No. 2023-27 ("Resolution"), rendered on May 9, 2024, which approved a conditional use permit to allow construction of a four-phase temporary lodging redevelopment of the Tradewinds Resort that will include 1,596 total temporary lodging units, 59,895 sq. ft. of meeting space, 79,126 sq. ft. of retail and restaurant space, 31,105 sq. ft. of office space, rooftop drinking and dining amenities, and parking garage ("Redevelopment Project"). A2.210.

18. Petitioners seek issuance of a writ of certiorari quashing, setting

aside, reversing or otherwise invalidating the Resolution.

19. Review of quasi-judicial decisions of a commission shall be commenced by filing a petition for writ of certiorari in accordance with Florida Rule of Appellate Procedure 9.100(b) and (c) and Florida Rule of Appellate Procedure 9.190(b)(3).

20. This action is brought without limitation pursuant to Florida Rule of Appellate Procedure 9.100 and Florida Rule of Appellate Procedure 9.190(b)(3). This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, which provides that a circuit court shall have the power to issue a writ of certiorari.

21. Venue is proper in this Court pursuant to section 47.011, Florida Statutes.

TIMELINESS

A party must file a petition for a writ of certiorari within thirty days of rendition of the order on review. Fla. R. App. P. 9.100(c)(1). An order is rendered when a signed, written order is filed with the clerk of the lower tribunal. Fla. R. App. P. 9.020(h). Resolution 2023-27 was signed by Vice Mayor Lorenzen[2] and filed with the Clerk on May 9, 2024. Therefore, the

[2] PSPB is currently challenging the validity of Vice Mayor Lorenzen's appointment to the Commission in *Protect St. Pete Beach Advocacy Group,*

petition in this action is timely filed on June 10, 2024. Fla. R. App. P. 9.420(e); Fla. R. Gen. Prac. & Jud. Admin. 2.514(a)(1)(C) (extending a deadline that falls on Saturday or Sunday until the end of the next day that is not a Saturday, Sunday, or legal holiday).

FACTUAL BACKGROUND

A. Conditional Use Application

The Applicant on June 27, 2023, filed an application deemed complete for Conditional Use Permit #23033 seeking review of the Tradewinds Resort redevelopment project.

The subject zoning lot is currently comprised of five existing resorts that have been variously developed over the last seventy-five years, including: (1) Tradewinds Island Grand (5500-5600 Gulf Blvd), comprising 288-unit Jacaranda, 48-unit Alamanda, 21-unit Hibiscus (proposed for demolition under this scope), and 24-unit Poinciana buildings. A2.18-19. There is an expanse of surface parking that separates the southern side of the building from the Seamark neighbor to the south. A2.19; (2) Tradewinds

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et al v. City of St. Pete Beach (6th Jud. Cir.), 24-000041-CI. As such, Lorenzen had no authority to sign the Resolution, and thus, as ultra vires act, is void. Until a valid member of the Commission signs the Resolution, the Resolution has yet to be rendered. For preservation of jurisdiction and out of abundance of caution, Petitioners are filing this petition within time the time deadline of the signing of the Resolution.

Breckenridge (5700 Gulf Blvd), comprising the 167-unit Breckenridge building, which contains ground-floor restaurant, retail and office, as well as outdoor pool and recreation amenities and a large tent structure used for gathering and event space; (3) Coral Reef Resort (5800 Gulf Blvd), comprising the 64-unit Coral Reef resort condominiums; (4) Alden Resort (5900 Gulf Blvd), comprising the 140-unit Alden Resort, purchased in 2021; and (5) RumFish Beach Resort (6000 Gulf Blvd), comprising the 159-unit RumFish Beach Resort. A2.19.

The Property consists of 40.6 acres, 25.26 landward of the Coastal Construction Control Line, located at 5600 [Parcel # 06-32-16-00000-230-0300], 5700 [Parcel # 06-32-16-00000-230-0200], 5750 [Parcel # 01-32-15-00000-110-0600], 0 [Parcel # 01-32-15-00000-110-0610], 5800 [Parcel #s 01-32-15-18142-000-0000 & 01-32-15-18142-000-0001], 5900 [Parcel # 01-32-15-00000-110-0500], and 6000 [Parcel # 01-32-15-00000-110-0400] Gulf Blvd. A2.18. The Property's future land use designation and zoning map designation are both Large Resort District. A2.18. The application allows construction of a four-phase temporary lodging redevelopment of the Tradewinds Resort that will include 1,596 total temporary lodging units, 59,895 sq. ft. of meeting space, 79,126 sq. ft. of retail and restaurant space, 31,105 sq. ft. of office space, rooftop drinking and dining amenities, and

parking garage ("Redevelopment Project"). A2.210.

Conditional use applications are subject to procedural requirements and criteria of Division 4, Conditional Use Permits, of the City of St. Pete Beach Land Development Code ("LDC"). Certain uses are conditional rather than uses by right. Section 4.1, LDC. ("A review of these uses is necessary due to the impacts they may have on the surrounding area or neighborhood"). All new temporary lodging uses that exceed 50 feet in height or a density greater than 30 units per acre shall be required to obtain a conditional use permit pursuant to Division 4 of this Code. Section 39.6 (p), LDC.

Section 4.4(a) provides,

> When considering an application for approval of a conditional use, the city commission review shall consider the following standards:
>
> (1) Whether the conditional use is consistent with the goals, objectives, and policies of the Comprehensive Plan, any adopted special area plan and these regulations;
>
> (2) Whether the proposed use will be **compatible with the character of the existing area,** including existing structures and structures under construction, existing public facilities and public facilities under construction, and residential, commercial and/or service facilities available within the existing area. More specifically:

a. **Whether the overall appearance and function of the area will be significantly affected consideration shall be given to the existence of other uses in the area**, based on the number, size, and location of the uses and the intensity and scale of the proposed and existing uses in the area;

b. Whether the application will preserve any city, state or federally designated historic, scenic, archaeological, or cultural resources;

c. Whether the application will be compatible with adjacent development, if any, based on characteristics such as size, building style and scale; or whether such incompatibilities are mitigated through such means as screening, landscaping, setbacks, and other design features; and

d. Whether the application will have significant adverse impacts on the livability and usability of nearby land due to noise, dust, fumes, smoke, glare from lights, late-night operations, odors, vehicular traffic, truck and other delivery trips, the amount, location, and nature of any outside activities, potential for increased litter, or privacy and safety issues.

(3) Whether the transportation system is capable of adequately supporting the proposed use in addition to the existing uses in the area. Evaluation factors include street capacity and level of service, access to arterials, transit availability, on-street parking impacts, if any, site access requirements, neighborhood impacts, and pedestrian safety;

(4) Whether the minimum off-street parking area required and the amount of space needed for the

loading and unloading of trucks, if applicable, will be provided and will function properly and safely;

(5) Whether generally, the public health, safety and welfare will be preserved, and any reasonable conditions necessary for such preservation have been made;

(6) Whether the applicant has demonstrated the financial and technical capacity to complete any improvements and mitigation necessitated by the development as proposed and has made adequate legal provision to guarantee the provision such improvements and mitigation; and

(7) Whether the proposed use complies with all additional standards imposed on it by the particular provision of these regulations authorizing such use and by all other applicable requirements of the regulations of the City of St. Pete Beach.

Sec. 4.11, LDC provides for conditional uses in designated community redevelopment districts, (bolding added)

It is the intent of the city that the aesthetic and functional characteristics of new development shall be regulated to insure consistency with the stated objectives of city redevelopment policy and that all new development is undertaken in a manner consistent with the best interests of the community. **In instances of development projects which are of significant density or intensity, the complexity of the construction and operation of such projects require a higher than usual level of public scrutiny and technical review prior to permitting, and necessitate the articulation of specific requirements on the part of both the developer and the city to ensure that such developments are in harmony with community**

> **character and consistent with the policies of the community redevelopment plan. The provisions of this section are intended to supplement the stated requirements of this division and other divisions of the Land Development Code and provide for the incorporation of provisions into conditional use approvals which address issues of public concern**.

STANDARD OF REVIEW

On certiorari review, the circuit court must determine whether procedural due process was afforded, whether the essential requirements of law were observed, and whether the decision under review was supported by competent substantial evidence. *See, Broward Cty. v. G.B.V. Int'l, Ltd*., 787 So. 2d 838, 843 (Fla. 2001); *Mann v. Bd. of Cty. Com'rs*, 830 So. 2d 144 (Fla. 5th DCA 2002). Review of a decision by certiorari at the circuit court level is a matter of right, *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198 (Fla. 2003), and the circuit court must review the decision with strict scrutiny. *Bd. of Cty. Com'rs of Brevard Cty. v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Hernando Cty. Bd. of Cty. Com'rs v. S.A. Williams Corp.*, 630 So. 2d 1155 (Fla. 5th DCA 1994); *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 530 (Fla. 1995).

The circuit court on certiorari review of a City Commission's quasi-judicial zoning action is the first tier of judicial review, and the scope of

review is akin to a direct appeal. *Sarasota County v. BDR Invests., LLC*, 867 So. 2d 605, 607 (Fla. 2d DCA 2004); *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *see also Philip J. Padovano*, *Florida Appellate Practice* § 19:9 (2017 ed.) ("This use of certiorari is unlike any other, in that the scope of review is actually more like a plenary appeal").

Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding 'if the parties are provided notice of the hearing and an opportunity to be heard.'" *A & S Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019). (citations omitted). "The proceeding must be 'essentially fair.'" *Id*. However, "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved." *Carillon v. Seminole County*, 45 So. 2d 7, 9-10 (Fla. 5th DCA 2010). "In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

While courts have recognized that strict rules of evidence and procedure do not control quasi-judicial proceedings, this does not mean that these proceedings are informal, and a commission may allow anything goes

or where results can be politically motivated, rather than based on the rule of law and established criteria. See, e.g., *Seminole Entertainment, Inc. v. City of Castleberry, Florida*, 813 So. 2d 186 (Fla. 5th DCA 2002). Courts have soundly rejected this idea. See, e.g., *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996 (Fla. 2d DCA 1993) (quasi-judicial decisions should be "isolated as far as is possible from the more politicized activities of local government"); *City of Apopka v. Orange County*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (quasi-judicial decisions must be based on applying published legal criteria to admitted evidence, rather than subjective "polling" of nearby residents). When a local-government decision is quasi-judicial, minimum levels of procedural due process still apply. *Miami-Dade County v. Reyes*, 772 So. 2d 24 (Fla. 3d DCA 2000).

Departure From the Essential Requirements of Law

A "departure from the essential requirements of the law" for purposes of first-tier certiorari review can be "no more than the same level of error that would require reversal on a direct appeal - a substantive or procedural error that was not harmless error." *Patel v. Gadsden Cnty*., 20 Fla. L. Weekly Supp. 124 (Fla. 2d Cir. Ct. Sept. 14, 2012). A "departure from the essential requirements of law" occurs when a lower tribunal fails to apply or adhere to the plain language of a statute or ordinance. *See Justice Admin. Comm'n*

v. Peterson, 989 So. 2d 663, 665 (Fla. 2d DCA 2008).

The inquiry must show that the quasi-judicial decision departed from a "clearly established law." *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) The sources for "clearly established law" can arise from several sources, including constitutional law, statutes, controlling case law, and even a local government's laws. *Id*.; *City of Coral Gables Code Enforcement Board v. Tien*, 967 So. 2d 963 (Fla. 3d DCA 2007). For example, failure to apply the plain and unambiguous language of a statute or ordinance constitutes a departure from clearly established law. *Mt. Plymouth Land Owners' League v. Lake County*, 279 So. 3d 1284 (Fla. 5th DCA 2019). Failure to apply binding case law constitutes a classic example of a departure from clearly established law. *Dept. of Highway Safety & Motor Vehicles v. Chakrin*, 304 So. 3d 822 (Fla. 2d DCA 2020).

Competent Substantial Evidence

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). It is well established, however, that conclusory testimony, including from an expert witness, does not constitute competent substantial evidence. *See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So.

2d 202, 204 (Fla. 3d DCA 2003) ("Generalized statements ... even those from an expert, should be disregarded").

Moreover, each criteria or factor required by the local government's published code for a particular quasi-judicial decision must have evidentiary support. *Alvey v. City of North Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016).

STANDING

Petitioners Seamark and Ken Barnes are the direct neighboring Condominium and property owner to the proposed Redevelopment Project. PSPB is a non-profit organization composed of residents who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.442. At the subject hearings, Petitioners separately appeared and objected to the granting of the Conditional Use to preserve the arguments contained herein. In fact, Petitioner's Seamark and PSPB submitted separate notices of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant. A.1059-1060; A.436-440. PSPB submitted into the Record its bylaws and Articles of Incorporation. A.441-A.444.

The record is replete with testimony from City Staff, City

Commissioners, as well as experts recognizing the impact of the proposed Conditional Use on the Seamark. In fact, Seamark is mentioned over 80 times between the two meetings. Specifically, the following excerpts from the April 15, 2024, hearing: *Condition 8, the Applicant shall conduct a preconstruction assessment of the Seamark*. T. 00034 at lines 18-19; *Monitor the foundation of Seamark*. T. 00125 at lines 21-23.; *Proximity of the construction to Seamark;* T. 00125 at lines 24-25; T. 00126 at line 1; *Screen views from the Seamark building*. T. 00226 at lines 17-22; *Distance of restaurant to Seamark*. T.00249 at lines 18-25; *Seamark Cellphone Tower*. T.00408 at lines 23-25; T.00409 at lines 1-13. *Seamark affected views*.

PSPB president JoLynn Lawson testified at the April 15, 2024 hearing to the special injury to the members of PSPB from the Redevelopment Project: (T:352-17-T.353-22).

> Our members frequently enjoy the beaches in the Large Resort District, swimming, wildlife-watching, and enjoying our state-designated scenic views. They enjoy the view shed along Gulf Boulevard and the beach. They drive on Gulf Boulevard to get home. They use infrastructure for water and depend on the same area for emergency services. As an organization, Protect St. Pete Beach has participated in numerous public hearings and meetings, articulated objections and ideas to protect the character of properties in the Large Resort District, as well as filing a suit challenging a recent conditional

> use approval granted in the Large Resort District, the Sirata. Our primary organizational purposes and activities include the study and protection of natural resources, and preservation of St. Pete Beach's character and the advocacy of sound, land use, and growth management policies affecting the beauty and environment of our immediate community. Granting this Conditional Use Permit will adversely affect our members' enjoyment, view sheds, public access, infrastructure, and the use of the beach as a natural resource area.

"In the seminal case of *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972), the Florida Supreme Court articulated the legal standing necessary to "challenge the zoning action or inaction" of a governmental body. *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So. 2d 904, 906 (Fla. 3d DCA 1987). *Renard* provides three different tests for standing to challenge zoning decisions: 1) standing to enforce a valid zoning ordinance; 2) standing to attack a validly enacted zoning ordinance as an unreasonable exercise of legislative power; and 3) standing to attack a zoning ordinance which is void because not properly enacted. *Renard*, 261 So. 2d at 837-838.

Second *Renard* Test

Petitioners Seamark, Barnes, and PSPB assert that the City failed to require the Developer to present competent substantial evidence in support of the Application, which is a decision based on the unreasonable exercise of legislative power. "An aggrieved or adversely affected person having

standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question." *Renard,* 261 So. 2d at 837. *Renard* stated, "In determining the sufficiency of the parties' interest to give standing, factors such as the proximity of his property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations." *Id.*; *see also Rinker*, 528 So. 2d at 906." *Save Calusa, Inc., v. Miami-Dade County*, 355 So. 3d 534, 540 (Fla. 3d DCA 2023). The aggrieved party must suffer "special damages," defined as "a definite interest exceeding the general interest in community good share[d] in common with all citizens." *Id*.

Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning. See *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), *review denied*, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning). Such proximity generally establishes that the homeowners have an interest greater than "the general interest in community good share[d] in common with all citizens." *Id.*

Here, Petitioners, Seamark and Ken Barnes meet the second test of

Renard as an association and organization dedicated to protecting the interests of its members who live in close proximity to the proposed redevelopment project. Seamark and Ken Barnes own property directly adjacent to the Redevelopment Project, and were entitled to receive, and did receive notice regarding the requested Conditional Use. They are affected based on their stated concerns of compatibility, significant changes to the character of the locale, visual impacts, traffic, noise and light impacts, and enjoyment of quiet and peaceful evenings. Seamark and Ken Barnes have also suffered a separate and special injury different in kind and degree from the injuries to other citizens, residents, and taxpayers in the City of St. Pete Beach. See *Renard*, 261 So. 2d 832 (Fla. 1972) ("The fact that a person is among those entitled to receive notice under the zoning ordinance is a factor to be considered on the question of standing to challenge the proposed zoning action.") Seamark, as indicated above, is comprised of the individual unit owners, and common elements of the Seamark condominium, located directly next to the proposed redevelopment project.

PSPB is a group dedicated to ensuring that planning and development occur in a way that preserves the local environment and community in the community, substantially composed of members who individually have standing. A.441-442. PSPB's Director JoLynn Lawson provided testimony

at the April 15, 2024 hearing about PSPB's member's use of the beaches on the Large Resort District, enjoyment of state-designated scenic views, and how the CUP will adversely affect the members' enjoyment viewsheds, public access, infrastructure, and use of the beach as a natural resource area. T.352:33-353:4; T.353:19-25. She also testified to the PSPB's participation as a group advocating to protect the character of properties in the Large Resort District and filing suit to challenge a recent approval. She stated,

> Our primary organizational purposes and activities include the study and protection of natural resources, and preservation of St. Pete Beach's character and the advocacy of sound, land use, and growth management policies affecting the beauty and environment of our immediate community.
>
> T.353:12-18.

Third *Renard* Test

Petitioners Seamark, Barnes, and PSPB also assert that the Resolution is void as improperly enacted based on departures from the essential requirements of law and failure to afford the Petitioners procedural due process. The third test in *Renard* provides, "any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an [void] ordinance." *Id.*; *See also Parsons v. City of*

Jacksonville, 295 So. 3d 892, 895 (Fla. 1st DCA 2020). No special injury is required for a party who attacks a void ordinance. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); *see also Rhodes v. City of Homestead*, 248 So. 2d 674, 674–675 (Fla. 3d DCA 1971).

Florida courts recognize standing for citizen groups to challenge void ordinances under this test. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); (granting standing to a nonprofit citizens association composed of local Upper Keys residents who alleged a zoning variance was illegally enacted, and holding that no special damages needed to be alleged); s*ee also Save Brickell Ave., Inc. v. City of Miami*, 395 So. 2d 246, 247 (Fla. 3d DCA 1981) (Corporation devoted to safeguarding zoning of area was "an affected citizen" which had standing to attack zoning resolution on the ground it was void). Courts apply the third Renard test to "any asserted basis for the conclusion that the enactment in question is 'void.'" *City of Miami v. Save Brickell Ave., Inc.,* 426 So. 2d 1100, 1103 (Fla. 3d DCA 1983). Like *Upper Key's Citizens Ass'n* and *Save Brickell Ave*., PSPB is a nonprofit citizens group composed of members who live within a few blocks of the proposed development who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.00149-150. PSPB's purpose is to ensure the

community “prioritizes environmental stewardship, preserves our history, and family friendly atmosphere.” A.441. Consequently, all Petitioners have standing under the third *Renard* test.

ARGUMENT

The substantive errors that occurred regarding the City Commission’s April 23, 2024, approval of Resolution 2023-27, are not harmless.

A. Failed to afford procedural due process by: (1) Failing to consider and vote on Seamark and PSPB’s Notice and Request for Intervenor/Affected Party status; (2) Each Commissioner’s failure to comply with 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991, by failing to adequately disclose the subject of the communications, and the identity of the person, group or entity with whom the communication took place; (3) Commission’s failure to allow public participation at the April 23, 2024, hearing, when the hearing went beyond the mere deliberations and vote of the Commission;

B. Departed from the essential requirements of law by: (1) City failing to comply with Section 4.2(e); which requires revised conditional use applications with new data and information to be subject to the same stages of review as the initial application; (2) City failed to comply with Section

3.16(C)(1), St. Pete Beach Code of Ordinances, which mandates that the City Manager "Shall, when a violation has been determined to exist: (1) refrain from issuing any subsequent development approvals for the developer until the violation has been corrected, here it is uncontroverted, and the record reflects that the Development Project site is in violation of the Turtle lighting requirements; (3) An unelected City Commission voted on the Application, in violation of Fla. Const. art. VIII, § 2 and Section 4.7, LDC;

C. Is not supported by competent substantial evidence where the record establishes that: (1) The Commission failed to support its decision with evidentiary support for each criteria required by the City's published code for the approval of a conditional use to comply with the intent of Section 35.1 for an integrated resort; (2); Developer's traffic study is legally flawed as the trip generation is inaccurate by not adding up to 100% and the miscalculation impacts the entire traffic analysis.

Consequently, this Court should issue a writ of certiorari quashing Resolution 2023-27.

I. THE COMMISSION FAILED TO AFFORD PETITIONERS PROCEDURAL DUE PROCESS

As to the first prong of the three-part test, under the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution, the requirements of procedural due process are

reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson*, 464 So.2d 158, 164 (Fla. 2d DCA 1985). As such, "quasi-judicial hearings require a hearing upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process." *Walgreen Co. v. Polk County*, 524 So.2d 1119, 1120 (Fla. 2d DCA 1988).

A. <u>Intervenor/Affected Party Status</u>

The Commission failed to afford procedural due process by failing to consider and vote on Seamark and PSPB's Notice and Request for Intervenor/Affected Party status. On April 12, 2024, Seamark emailed to the City's Clerk, as well as emailed to the Mayor and City Commissioner's it's notice of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant. T.0016 at lines 15-17; T-00406 at lines 20-25; T.-00407 at lines 1-12. Additionally, on April 14, 2024, PSPB submitted to the Mayor and City Commission a request for Party Intervenor status. A.436.

As discussed under the Standing section above, the record is replete with testimony from City Staff, City Commissioners, as well as experts recognizing the impact of the proposed Conditional Use on the Seamark. The fact that Seamark was denied Intervenor/Affected party status belies

logic. *See transcript citations for the April 15, 2024, and April 23, 2024, hearings cited above*.

At the April 15, 2024, hearing, the City Attorney stated that "without criteria in the code, it is not something you can do on the fly. Therefore, we are not advising that we deem anyone a party intervener in this proceeding." T. 00017 at lines 2-4. However, the Mayor questioned the City Attorney's advice, asking "Is there something that prevents us from making a determination on the Intervener status?" The City Attorney responded that "we have no criteria to do so. I would have no way to advise you." The City Attorney then stated, "when it comes to a party intervener, if you granted them that here, there would be no standing argument in the court of law. ***And it's our position that that determination is for a competent jurisdiction without specific criteria to base it off of***." T.-00018 at lines 9-21. The City Attorney's comments appear to support the very need for this Writ, to allow this Court to determine whether Seamark and PSPB should have been granted Intervener status.

Despite the City Attorney's remarks, Section 2-66(b) of the City's Code of Ordinances, clearly contemplates the ability to afford an affected party, party intervenor status. Furthermore, Ms. Graham attempted to request an official vote of the Commission as to the parties intervenor status.

T.-00022 at lines 13-14. However, instead of a vote by the commission or acknowledgment of her request, Ms. Graham was threatened with expulsion from the chambers for any future objections or inquiries. T.-00022 at lines 19-24. These actions by the City Attorney and Mayor clearly violated Seamark and PSPB's due process rights by limiting Ms. Graham's ability to adequately represent PSPB.

In discussing the intervener request, the City Attorney opined that "you have to look at case law when interpreting this." T.-00016 at lines 21-22. Fortunately, Florida case law has addressed the issue of intervener status. *Carillon Cmty. Residential v. Seminole Cty*., 45 So. 3d 7 (Fla. 5th DCA 2010). The Carillon court stated that "[a] participant in a quasi-judicial proceeding is clearly entitled to some measure of due process ... The issue of what process is due depends on the function of the proceeding as well as the nature of the interests affected." *Water Servs. Corp. v. Robinson*, 856 So.2d 1035, 1039 (Fla. 5th DCA 2003). Here, as previously discussed, the record is replete with evidence of Seamark's affected interests, as mentioned over 80 times within both hearing transcripts.

Furthermore, the *Carrillion* case, in footnote 1, cites to *Hirt v. Polk County Bd. Of County Comm'rs*, 578 So. 2d 415 (Fla. 2d DCA 1991), indicating that in *Hirt,* the court "noted that local ordinances expressly

afforded “interested parties” the right to cross-examine witnesses in a quasi-judicial hearing. No such ordinance exists in this case.” *Carillon Cmty. Residential v. Seminole Cty*., 45 So. 3d 7 (Fla. 5thDCA 2010). Unlike Seminole County in *Carrillion*, here, the City of St. Pete Beach **does** have an ordinance that contemplates a party intervenor.

So here, the City Attorney advised the City Commission to not even address or vote on Seamark and PSPB Party Intervenor status, based upon a flawed interpretation, that the City’s code simply does not allow it, coupled with the Applicant’s Attorney afforded the right to cross examination of experts, severely impacted Seamark and PSPB’s ability to fully present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts**.**

B. Failure to Disclose Ex Parte Communications – April 15, 2024

As discussed above, the Commission failed to afford procedural due process by each Commissioner’s failure to comply with 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), by failing to adequately disclose the subject of the communications, and the identity of the person, group or entity with whom the communication took place. At the April 15, 2024, hearing, the City Attorney advised the Commission that

pursuant to Section 286.0115, *Florida Statutes*, that they should "list the person you met with or the group and the subject, right? Don't need a date or time, but just be as informative as you can with the information."

April 15, 2024, Hearing

Commissioner Marriott

Commissioner Marriott failed to heed the City Attorney's directive, and failed to disclose a single name of a person she spoke with, or the specific subject of the communications, which would afford persons that have opinions contrary to those expressed in the ex parte communications, a reasonable opportunity to refute or respond to the communications. T.00019 at lines 16-23.

Commissioner Filtz

Commissioner Filtz additionally failed to disclose the subject of the communications, the identities of the persons of whom he met and discussed with, especially the Planning Board members when those discussions occurred), as well as disclosing the subject and identity of the texts, emails, and staff that he met with. T. 00019 at line 25; T.-00020 at lines 1-9.

Commissioner Rzewnicki

Commissioner Rzewnicki additionally failed to disclose the subject of

the communications, the identities of the persons of whom she spoke with (with the exception of Thomas Hughes), as well as disclosing the subject and identity of the facebook, nextdoor and social media posts she read, emails, and staff that she met with. T. 00020 at lines 11-25; T.00021 at lines 1-5.

Vice Mayor Lorenzen

Commissioner Lorenzen additionally failed to disclose the subject of the communications, the identities of the neighbors of whom he spoke with, as well as disclosing the subject and identity of the staff that he met with, or the Social Media posts he reviewed. T. 00021 at lines 7-15.

Mayor Petrila

Vice Mayor Lorenzen additionally failed to disclose the subject of the communications, or the identities of the persons of whom he spoke with at FDOT, as well as disclosing the subject and identity of the staff members he met with. T. 00021 at lines 16-25.

Accordingly, each Commissioner failed to comply with Section 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991)

C. Failure to Disclose Ex Parte Communications – April 23, 2024

As discussed above, the Commission failed to afford procedural due process by each Commissioner's failure to comply with 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), by failing to adequately disclose the subject of the communications, and the identity of the person, group or entity with whom the communication took place. As discussed, the April 15, 2024, hearing consisted of the public hearing portion of the quasi-judicial hearing, and the hearing was continued to April 23, 2024. At the conclusion of the hearing, the Mayor stated that the public portion of the meeting is concluded. T. 00037 at lines 1-25; T. 00423 at lines 18-20.

At the April 23, 2024, hearing, the City Attorney advised the Commission that pursuant to Section 286.0115, *Florida Statutes*, that they need to disclose any type of ex parte information from the close of the April 15, 2024, hearing to the April 24, 2024, hearing, stating "any typical thing that could potentially be seen as prejudicial. The way to cure it under the statute is just to disclose the what, the who, and when right now here in public. You can get it out in the open." T. 00037 at lines 1-25.

<u>April 23, 2024, Hearing</u>

Once again, despite the City Attorney's directives, or the Applicant

attorney's request for more specific disclosures, the Commissioners still failed to comply with Section 286.0115, *Florida Statutes.*

Commissioner Marriott

Commissioner Marriott failed to heed the City Attorney's directive, and failed to disclose a single name of a person she spoke with, or the specific subject of the communications, which would afford persons that have opinions contrary to those expressed in the ex parte communications, a reasonable opportunity to refute or respond to the communications. T. 00439 at lines 24-25; T. 00440 at lines 1-3; T. 00450 at lines 10-17.

Commissioner Filtz

Commissioner Filtz additionally failed to disclose the subject of the communications, the identities of the persons of whom he met and discussed with, especially the subject of the communication with Planning Board member, Grant Izzi, and when those discussions occurred, as well as disclosing the subject and identity of the emails, and staff that he met with. T. 00440 at lines 4-10; T.-00449 at lines 14-25; T. 00450 at lines 1-7.

Commissioner Rzewnicki

Commissioner Rzewnicki additionally failed to disclose the subject of the communications, the identities of the persons of whom she spoke with, as well as disclosing the subject and identity of the emails, and staff that she

met with. T. 00440 at lines 11-24; T.- 00448 at lines 2-25; T. 00449 at lines 1-9.

Vice Mayor Lorenzen

Commissioner Lorenzen additionally failed to disclose the subject of the communications, the identities of the residents of whom he spoke with, as well as disclosing the subject and identity of the staff that he met with. T. 00440 at line 1; T. 00441 at lines 1-5; T. 00447 at lines 19-25.

Mayor Petrila

Mayor Petrila additionally failed to disclose the subject of the communications, or the identities of the persons of whom he spoke with including residents, community groups, HOAs, advocacy groups, and turtle groups. T. 00441 at lines 7-13; T. 00450 at lines 19-25; T. 00451 at lines 1-4.

Accordingly, each Commissioner failed to comply with Section 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991)

D. Failure to Allow Public Participation - April 23, 2024 Hearing

The Commission failed to afford procedural due process by the Commission's failure to allow public participation at the April 23, 2024,

hearing, when the hearing went beyond the mere deliberations and vote of the Commission.

At the conclusion of the public hearing portion of the meeting on April 15, 2024, the Mayor stated that the public portion of the meeting is concluded. T. 00037 at lines 1-25; T. 00423 at lines 18-20. Subsequently, the Commissioners adjourned the meeting without a vote, and continued the meeting to April 23, 2024, at 6:00pm.

On April 23, 2024, the commission reconvened the hearing on the Developer's conditional use application. City Attorney Dickman advised the Commission that he does not "believe that the proceedings have not been closed." The whole record for the whole hearing hasn't been closed yet. It was started on the 15th, and so it's still being transcribed. Any discussion that happens here right now is part of the transcripts that will be part of the record." T. 00443 at lines 14-20. He then proceeded to allow the Applicant's attorney to ask questions of the Commission and challenge them as to their ex-parte communications. T. 00447 through T. 00451 at lines 1-7.

The City Attorney not only permitted the Applicant's attorney to challenge the Commission as to ex parte communications, he also permitted Ms. Batsel to introduce a letter prepared, after the April 15th, 2024, hearing, by the City's transportation engineer, to be entered into the record. T. 00463

at lines 12-25. On April 23, 2024, the Applicant presented and spoke at length about videos depicting the view corridor, which the City Attorney allowed. T.482:6-487:23.

The Commission, by allowing the Developer's team to testify and introduce new evidence AFTER the public hearing was closed, failed to afford Seamark, Ken Barnes, and PSPB procedural due process.

II. THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY APPROVING RESOLUTION 2023-27.

It is well established that "[a] decision granting or denying a [quasi-judicial] application is governed by local regulations, which must be uniformly administered." *See Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 376 (Fla. 3d DCA 2003). A ruling constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice. *Clay County v. Kendale Land Development, Inc.*, 969 So. 2d 1177 (Fla. 1st DCA 2007) (citing Combs v. State, 436 So.2d 93, 96 (Fla. 1983)). Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1256 (Fla. 5th DCA 2015). However, that deference is not absolute, and when the

agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand." *Id*., citing *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So.2d 308, 312 (Fla. 4th DCA 1999). In *Heggs*, supra., the Florida Supreme Court concluded that "applied the correct law" is synonymous with "observing the essential requirements of law." 658 So.2d at 530. Municipal zoning ordinances are subject to the same rules of construction as are state statutes. *Shamrock*, 169 So.3d. at 1256.

In quasi-judicial hearings, a departure from the essential requirements of law typically involves the interpretation and application of local ordinances. *See Colonial Apartments, LP v. City of Deland,* 577 So. 2d 593, 598 (Fla. 5th DCA 1991) ("the correct law applicable in the case was to give the zoning ordinance its plain and obvious meaning"). Quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations. *Miami–Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 375, 377 (Fla. 3d DCA 2003); *Alvey v. City of N. Miami Beach*, 206 So. 3d 67, 73–74 (Fla. 3d DCA 2016). The City departed from the essential requirements of law for the following reasons:

A. <u>The City failed to comply with Section 4.2(e), LDC, which requires revised application with new data and information to</u>

be subject to the same stages of review as the initial application.

The Applicant seeking the conditional use approval has the burden to demonstrate that the application complies with the reasonable procedural requirements of the applicable ordinance. *Alvey,* 206 So. 3d at 73. Here, the City failed to comply with the requirements of Section 4.2(e), LDC, which required revised applications with new information and data to be subject to the same review as the initial application:

> If an applicant submits new data or information at any time after a determination of completeness has been made, **the revised application will be subject to the same stages of review as the initial application.**

Conditional use applications are reviewed by the City Commission, at a public hearing. Section 4.7, LDC. Additionally, the Planning Board holds a public hearing to make a recommendation to the City Commission for conditional use applications within the Community Redevelopment District. Section 4.7, LDC. The City's Technical Review Committee reviews conditional uses for compliance with the LDC. Section 22-147(c), LDC. In this case, because of the impact the Community, staff also required an initial community meeting.

In this case, there was a noticed community meeting on July 14, 2022, where there were concerns about traffic and "the integrity of the traffic

study," and dissatisfaction with the number of beach access points. A2.19. On April 25, 2023, the Applicant submitted a preliminary submittal which was deemed incomplete. A2.19. On June 27, 2023, the Applicant resubmitted the Application with scalable civil plans and a survey, which staff deemed complete for review. A.2. On August 2, 2023, staff held a Technical Review Committee ("TRC") for the Application. A.2. On September 22, 2023, the Agent responded to the TRC comments and added a new conditional use permit request for rooftop dining, drinking and music. A.2. The amended Application was not sent back to a community meeting. The TRC met on December 8, 2023 to discuss the amended request. A.2. On March 18. 2023 the Planning Board met and recommended approval of the Application. A.2.

After that, on March 28, 2023, the Applicant submitted a revised Transportation Analysis, which was not subject to the same stages of review as the initial application. A.330-538. Instead, the City's outside traffic consultant David Muntean sent a cursory one-page letter stating that "we find the study to be satisfactorily completed." A.539. The new transportation analysis was not sent back to a community meeting, TRC meeting, or even reviewed by the Planning Board. An "Integration" slide was also submitted after the Planning Board hearing. A2.7. A revised beachfront restaurant

rooftop sketch was also provided after the Planning Board hearing. A2.5. On April 23, 2024, the Applicant presented and spoke at length about videos depicting the view corridor, which had not been previously submitted or viewed by any of the prior Boards or by the Commission or public at the April 15 hearing. T.482:6-487:23.

The plain language of Section 4.2(e) required the revised application to undergo the same review process as the original application from eight months prior. *See Town of Longboat Key v. Islandside Property Owner's Coalition, LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) ("As the wording of its laws binds a legislature, the Town is bound by the wording of its Code. This mounts a bulwark against the Town's unfettered exercise of power."); *see also Canal Ins. Co. v. Giesenschlag*, 454 So. 2d 88, 89 (Fla. 2d DCA 1984) (A basic rule in constructing city ordinances is that words are to be given their plain meaning). PSPB objected to the additional information without review under 4.2(e) through a letter sent on April 14, 2024. A.439. PSPB's counsel was not afforded the opportunity to object to the new information presented during the April 23 hearing because the Mayor threatened to "have a sheriff remove" anyone who interrupted the proceedings. T.435:10-14.

Failure to follow procedural requirements of a local government code

constitutes a departure from the essential requirements of the law. *O'Connor v. Dade County*, 410 So. 2d 605, 605–6 (Fla. 3d DCA 1982) (Commission improperly adopted a zoning plan with respect to the petitioners' property without first seeking the recommendation of the county's developmental impact committee as required by the Dade County Code); *See also Fla. Tallow Corp. v. Bryan*, 237 So. 2d 308 (Fla. 4th DCA 1970) (town cannot grant a zoning change under one provision of an ordinance while ignoring the obligatory requirements of the same ordinance). The failure to apply the plain and unambiguous language of a statute or ordinance constitutes a departure from clearly established law. *Mt. Plymouth Land Owners' League*, 279 So. 3d at 1284; *see also DMB Inv. Tr. v. Islamorada, Vill. of 11 Islands*, 225 So. 3d 312, 316 (Fla. 3d DCA 2017) ("Where the issue before the circuit court involves statutory construction, a writ of certiorari may be appropriate where the circuit court does not apply the plain and unambiguous language of the relevant statute, resulting in an egregious error.")

B. City Failed to Comply with Section 3.16(C)(1) by granting a development approval where a violation has been determined to exist.

The City also failed to comply with Section 3.16(C)(1), St. Pete Beach Code of Ordinances, which mandates that the City Manager "Shall, when a

violation has been determined to exist: (1) refrain from issuing any subsequent development approvals for the developer until the violation has been corrected. Despite the existing violations of marine turtle protection standards under Chapter 44 of the Code, the City failed to follow Section 3.16 and approved the Redevelopment Project anyway. Here, the TRC stated as operational comments dated July 31, 2023 (A2.262):

> Staff have noted marine turtle lighting issues on the following areas of the project site (note: additional areas may be discussed by the code enforcement representative at TRC: 1) The south-facing portion of the Coral Reef building; 2) The parking lot area around the outdoor tent on the Tradewinds campus. Are any steps being taken, either through this project or in advance, to cure any existing marine turtle lighting deficiencies that may exist at the property

Applicant's response was "These comments do not relate to the CUP application." A2.262.

On April 13, 2024, Lisa Reich filed a complaint and requested a Code Violation be opened on the Tradewinds Resort Property located at 5550 Gulf Boulevard, 6000 Gulf Boulevard, citing Section 44.5(a)(10(2),(b)(1-5);(c)(1-4) for artificial lights and light fixtures in violations that do not meet turtle friendly guidelines, with photo proof of the violations. A.445-472. She further testified to the violations at the April 15, 2024 hearing. T.401:10-403:5.

At the April 15, 2024 hearing, Assistant City Attorney McConnell was dismissive of Ms. Reich's complaints stating "She's (Lisa Reich) not a code enforcement officer. She has no legal authority to issue a notice of violation. T.17:18-25. However, nothing in Section 3.16 requires a "notice of violation" pursuant to the procedures of Section 22 for Special Magistrate code enforcement. PSPB's counsel also noted during her testimony at the April 15, 2024 hearing that there were numerous open code violations on the Tradewinds properties. T.343:20-344:2. At the April 23, 2024 meeting, the Applicant's Agent/Attorney Batsel claimed that the open cases had been closed and therefore there were no current violations, although she did not reference Ms. Reich's complaints or specifics relating to existing beachfront lighting. See T.453:14-454-7. During deliberations, Commissioner Rzewnicki pointed out, T.498:16-21:

> I believe as of today, there has not been a survey done. So I just want to -- I want to make sure that's clarified because I don't like hearing that we're compliant when there hasn't been a survey done possibly this year. So I just want to make sure that we get that clarified.

Without a survey, there is not information to confirm that the property is in compliance.

"Municipal ordinances are subject to the same rules of construction as are state statutes." *Angelo's Aggregate Materials, Ltd. v. Pasco County*, 118

So. 3d 971, 975 (Fla. 2d DCA 2013) (quoting *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553-54 (Fla. 1973)).

"Although there is no fixed construction of the word "shall," it is normally meant to be mandatory in nature." *S.R. v. State,* 346 So.2d 1018 (Fla.1977), *citing Neal v. Bryant,* 149 So. 2d 529 (Fla.1962). The interpretation of the word "shall" depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute. *State v. Goodson,* 403 So.2d 1337, 1339 (Fla.1981); *S.R.,* 346 So.2d at 1019, *citing White v. Means,* 280 So.2d 20 (Fla. 1st DCA1973). Where a property right, rather than an "immaterial matter," or a matter of "substance" rather than a "matter of convenience" is involved, the word "shall" will be strictly construed. *Neal,* 149 So.2d at 532." *Concerned Citizens of Putnam County for Responsive Gov't, Inc. v. St. Johns River Water Mgmt. Dist.*, 622 So.2d 520, 523 (Fla. 5th DCA 1993).

Section 3.16-Violations, penalties and remedies generally, is located within Division 3, Administration of the Land Development Code. Section 3.2 – City Commission Approval, states: "*Except as otherwise specifically provided under this Code*, the city commission shall make the final determination on all decisions required by this Code regarding amendments to the comprehensive plan, amendments to this Code or the official zoning

map, and the issuance of conditional use permits."

Section 1.2(d)-Rules of Construction of the City's Land Development code states: "The words "shall," "must," and "will," are mandatory in nature, implying an obligation or duty to comply with the particular provision."

Section 1.4 – Conflicts with other ordinances, covenants or agreements, states: "Wherever higher or more restrictive standards are established by the provisions of any other applicable statute, ordinance or regulation than are established by the provisions of this ordinance, those regulations shall govern. This ordinance is not intended to interfere with, abrogate or annul any easement, covenant or other agreements between parties, except that if this ordinance imposes greater restriction, this ordinance shall control."

Section 1.1 – Title and purpose, states that one of the purposes is to protect natural and historic resources. Additionally, in Division 44 – Marine Turtle Protection, Section 44.1 Purpose and Intent, of the Land Development Code, states: "The purpose of this rule is to protect hatchling marine turtles from the adverse effects of artificial lighting, provide overall improvement in nesting habitat degraded by light pollution, and increase successful nesting activity and production of hatchlings."

Accordingly, pursuant to Section 3.16, once the City Manager knew

the property was in violation of the City's Code, the City Manager was mandated to refrain from allowing Resolution 2023-27, from being approved, until the violation has been corrected.

In sum, by failing to apply and adhere to the City's own code of ordinances, as discussed above, the Commission departed from the essential requirements of law. See *Justice Admin. Comm'n*, 989 So. 2d at 665 (holding failure to apply plain and unambiguous language of relevant statute constitutes a departure from the essential requirements of law). Accordingly, on this basis alone, the Court must quash the Commission's April 23, 2024, Decision, approving Resolution 2023-27.

C. An unelected City Commission voted on the Application, in violation of Fla. Const. art. VIII, § 2 and Section 4.7, LDC.

The City Commission is the municipal legislative body authorized to grant an application for conditional use. Section 4.7, LDC. Fla. Const. art. VIII, § 2 requires that ("[e]ach municipal legislative body shall be elective."). As alleged in Protect St. Pete Beach's complaint in pending litigation in Pinellas County Circuit Court, *Protect St. Pete Beach Advocacy Group, et al v. City of St. Pete Beach* (6th Jud. Cir.), 24-000041-CI, the current Commission does not have authority to meet and or vote on the conditional use application because its composition violates the City's Charter and Fla.

Const. art. VIII, § 2 as four out of five of the members are appointed. ("[e]ach municipal legislative body shall be elective."). A departure from the essential requirements of law occurs when there is a violation of a clearly established principle of law, which can derive from constitutional provisions. *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 890 (Fla. 2003). Additionally, a municipality engages in a void ultra vires act when it lacks the authority to take the action under statute or its own governing laws. *Neapolitan Enterprises, LLC v. City of Naples*, 185 So. 3d 585, 593 (Fla. 2d DCA 2016).

Additionally, on April 23, 2024, when the Commission voted to approve the Resolution, Commissioners Rzewnicki and Marriott were arguably validly seated on the Commission because they ran unopposed in the March 2024 election. Vice Mayor Lorenzen and Commissioner Fitz were not validly seated. The vote to approve the Resolution was 3-2, with two opposing votes Rzewnicki and the Mayor, and with Marriott, Lorenzen and Filtz voting to approve. T.697:5-17. If the votes of the illegally appointed Commissioners are disregarded, the Commission's vote is a 2-1 denial of the Resolution, not a 3-2 approval.

As such, the Court's decision in *Protect St. Pete Beach Advocacy Group, et al v. City of St. Pete Beach* (6th Jud. Cir.), 24-000041-CI could potentially moot this case. On May 13, 2024, the Court heard oral argument

on cross-motions for summary judgment as to liability only. The Court took the issue under advisement and asked the parties to submit proposed Findings of Fact and Conclusions of Law by May 30, 2024. As of this date, the parties have submitted their proposed Orders and await the Court's ruling. After filing this Petition, Petitioners will move to stay the proceedings of this case until this dispositive issue of the Commission's authority is resolved.

III. THE COMMISSION'S DECISION IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

To be upheld, the Commission's April 23, 2024, Decision, approving Resolution 2023-27, must also be supported by competent substantial evidence in the record that granting the conditional use complies with the City's Code Criteria. *See Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993).

Competent substantial evidence is "evidence a reasonable mind would accept as adequate to support a conclusion." *Sunbelt Equities*, 619 So. 2d at 1002. "Evidence that is confirmed untruthful or nonexistent is not competent substantial evidence. Competent substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017). A review of the record in the instant case, however, establishes that the Commission's April 23, 2024,

Decision, approving Resolution 2023-27, is not supported by competent substantial evidence. Accordingly, on this additional basis, the Court must quash the Commission's Resolution 2023-27.

A. Commission Failed To Support Its Decision With Evidentiary Support For Each Criteria.

The Commission failed to support its decision with evidentiary support for each criteria required by the City's published code for the approval of a conditional use. Section 4.4(a)(7) requires the showing that the proposed use complied with all additional standards imposed on it by the particular provides of these regulations authorizing such use…" Here, since the Property is within the Large Resort District, Section 35.1, LDC provides that the Large Resort District is "intended to primarily support and encourage full-service integrated resort redevelopment projects to promote economic balance and compatibility of land uses."

For support of "integration," Agent attorney Batsel testified at length, stating: (T.179:2-18),

> Yes, you've got some old buildings and yes, you have new buildings. But it is going to be a fully integrated site. I thought about this. My son is in Napa, California, in culinary school. And I went to book a hotel. It's called the Harvest Inn and it's in St. Helena. And you go in, and you book. And you can either stay in the main house; you can stay in the vineyard little houses; or you can stay in these little casitas. They all look a little different. They

> were probably all built at different times, and they all cater to different folks that are coming to stay there. It's just like this. I mean, that is how the hospitality industry grows. That's how a resort grows over time. So this is definitely an integrated resort.

Argument of counsel does not constitute competent substantial evidence. *Natl. Advert. Co. v. Broward Cnty.,* 491 So. 2d 1262, 1263 (Fla. 4th DCA 1986), citing *Hewitt, Coleman & Associates v. Lymas,* 460 So. 2d 467, 468 (Fla. 4th DCA 1984), *rev. denied,* 471 So.2d 43 (Fla.1985); *see also Leon Shaffer Golnick Advertising, Inc. v. Cedar,* 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982). Applicant did not provide competent substantial evidence of "integration" to meet the intent of Section 35.1, LDC.

B. Developer's Flawed Traffic Study is not competent substantial evidence.

The Developer's traffic study is legally flawed because the traffic distribution exiting the property north and south does not add up to 100 percent. Mayor Petrila pointed out that the traffic distribution existing the property south and north did not add up to 100 percent, with 63 north and 29 south, adding up to 92%. T.199:14-25. Developer's traffic expert Steve Henry agreed it was "63 north is what we had and 29 south," T.199:22-23. PSPB's independent traffic engineer Drew Roark also pointed out the discrepancy that "only 92% of the project traffic was distributed (and included in the analysis). Therefore over 71 project trips are unaccounted

for in the analysis." A.538. See also *Graham* testimony, citing Roark report: T:345: 8-12. Roark pointed out additional significant flaws in the Transportation Analysis, including: (1) Background traffic growth does not match Forward Pinellas Level of Service Report, which if reported correctly, found "it is likely that segments of Gulf Boulevard would exceed a v/c ratio of 0.9 and therefore be considered deficient" (A.537-538); (3) Pass-by calculations are Inappropriate (A.539); (4) Trip generation estimates use two different methods; (5) traffic volumes used from the Sirata Hotel traffic analysis were also incorrect, and volumes on Gulf Boulevard from the Tradewinds to the Pinellas Bayway Link is wrong A.538-A.550.

Florida Courts have regularly held that evidence that is legally flawed is not competent substantial evidence. *See First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114 (Fla. 3d DCA 2000) (finding traffic study was legally flawed and thus not probative because it accounted for less than 100% of additional students expected for expanded grades). *See First Baptist Church of Perrine v. Miami- Dade Cty*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000) (zoning board properly denied zoning application where recommendation for approval was based on flawed traffic impact study which did not constitute competent substantial evidence); *see also Beach Leg. Properties, Inc. v. City of Miami Beach,* 2022-18 AP 01, 2023 WL

3743107, at *4 (Fla. 11th Cir. May 25, 2023) (Having concluded that the City failed to follow the essential requirements of law in applying an incorrect analysis, “flawed” and “erroneous” staff recommendations are “invalid” and “d[o] not constitute competent evidence”).

Accordingly, the record shows there is not competent substantial evidence to support Resolution 2023-27. Rather, the record evidence establishes, on its face, that the Commission’s approval does not comply with the mandatory requirements prescribed by City’s code for approval of a Conditional Use.

CONCLUSION

For the reasons set forth above, the Commission’s May 9, 2024, Decision, approving Resolution 2023-27, granting a Conditional Use: (1) failed to afford Petitioners procedural due process; and (2) departed from the essential requirements of law; and (3) is not supported by competent substantial evidence. Simply put, the Commission is not allowed to disregard the City's Code and approve the Conditional Use, 2023-27, as in the instant case, which violates the plain and unambiguous requirements therein. As aptly stated in *Auerbach v. City of Miami*, 929 So. 2d 693 (Fla. 3d DCA 2006):

> The law … will not and cannot approve a zoning

> regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will.

Id. at 695 (quashing city commission's approval of variance which violated code criteria). Accordingly, this Court must quash the Commission's May 9, 2024, Decision, approving Resolution 2023-27. See *Maturo v. City of Coral Gables*, 619 So. 2d 455, 457 (Fla. 3d DCA 1993) ("[A court] cannot, and should not, turn a blind eye to an incorrect application of the law").

NATURE OF RELIEF SOUGHT

WHEREFORE, Petitioners respectfully request that this Honorable Court:

a. Assert jurisdiction over the parties to the subject matter of this proceeding;

b. Declare that the Commission failed to afford the Petitioners procedural due process.

c. Declare that the Commission's approval of Resolution 2023-27 constituted a departure from the essential requirements of law;

d. Declare that the Commission erred in the approval of Resolution 2023-27 in that the decision was unsupported by competent

substantial evidence; and

e. Issue a Writ of Certiorari quashing the Commission's decision to approve Resolution 2023-27.

Dated this 10th day of June, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document – *Petition for Writ of Certiorari*– has been filed with the Clerk of Court via Florida's Efiling Portal

and served via service of process on:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font and word count requirements of Fla. R. App. P. 9.045 and Fla. R. App. P. 9.100.

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