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

CASE NO.: 25- XXXX

APPEAL FROM LEE COUNTY COMMISSION, FRAP 9.1000(f)

Appellate Division

Captiva Civic Association, Inc., a Florida not for profit corporation,

RLR Investments, LLC, a Florida limited liability company,

Royal Shell Vacations, Inc., a Florida profit corporation,

Harbourview Villas at South Seas Resort Condominium Association, Inc., a Florida not for profit corporation,

Plantation Beach Club Owners' Association, Inc., a Florida not for profit corporation,

Plantation Beach Club II Owners Association, Inc., a Florida not for profit corporation,

Plantation Beach Club III Owners Association, Inc., a Florida not for profit corporation,

Plantation Bay Villas Owners Association, Inc., a Florida not for profit corporation,

Plantation House Condominium Owners' Association, Inc., a Florida not for profit corporation,

South Seas Club Condominium Association, Inc., a Florida not for profit corporation,

Cottages at South Seas Plantation Condominium Association, Inc., a Florida not for profit corporation,

Bayside Villas Condominium Association, Inc., a Florida not for profit corporation,

Beach Cottages Condominium Association, Inc., a Florida not for profit corporation,

Beach Villas III Condominium Association, Inc., a Florida not for profit corporation,

Captiva Resort Villas Condominium Association, Inc., a Florida not for profit corporation (f/k/a South Seas Villas Condominium Association, Inc. and Tennis Villas Condominium Association, Inc.),

Gulf Beach Villas Condominium Association, Inc., a Florida not for profit corporation,

Land's End Village Condominium Association, Inc., a Florida not for profit corporation,

Marina Villas Condominium Association, Inc., a Florida not for profit corporation,

Sandrift Property Owners' Association, Inc., a Florida not for profit corporation,

Seabreeze at South Seas Plantation Condominium Association, Inc., a Florida not for profit corporation,

South Seas Plantation Beach Home Condominium Association, Inc., a Florida not for profit corporation,

South Seas Plantation Beach Homesites Association, Inc., a Florida not for profit corporation, and

Sunset Beach Villas Condominium Association, Inc., a Florida not for profit corporation,

Petitioners

v.

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

Respondents

_____/

PETITION FOR WRIT OF CERTIORARI[1]

I. INTRODUCTION

Captiva is a 745-acre fragile barrier island adjacent to the island of Sanibel. Residents and guests enter and leave Captiva via a 15 mile two-lane evacuation roadway through Sanibel to and from the mainland. On the northern tip of Captiva is South Seas Island Resort. Zoned as a 304-acre planned unit development in 1973, the Resort has been limited to 3 units per acre and 912 units, with building heights the lesser of 35 feet above grade or 42 feet above sea level, with the clustering of units to preserve open space, and with shared roadways, easements and amenities. This complex and integrated development, reaffirmed by multiple official Lee County (County) actions - including a formal 2002 Administrative Interpretation -

[1] An appendix has been filed simultaneously herewith in accordance with Fla. R. App. P. 9.220.

have been relied upon by purchasers of properties on South Seas and the Captiva community for over 50 years.

In 2021, Respondent WS SSIR Owner, LLC (SSIR and or the Applicant) purchased approximately 120 acres of the overall 304-acre planned unit development resort. The 120 acre portion of the Resort was allocated and vested with 272 of the total approved 912 units. Six hundred and forty (640) of the Resort's approved 912 units are individually owned by others, almost all of whom are members of the organizational petitioners in this case.

Without either the consent or full participation of these 640 property owners on the Resort, or the Captiva community immediately adjacent to the Resort, the County excised out and rezoned 120 acres of the 304-acre Resort to increase building heights and development density from 272 units to 628 units, thereby destroying the common plan of development which allotted a set and proportional share of units to the various property owners and violating the vested rights of 640 property owners to shared open space, and common easements, roadways, landscaping, utilities, gatehouses, entranceways, and amenities.

The County wrongly permitted SSIR Respondent to separate out, and rezone its portion of the fully built-out and integrated common development plan to the detriment of the majority of property owners on South Seas, and denied party status and the due process attendant to party status in the quasi-judicial rezoning hearing to that same majority of property owners who are directly affected and potentially burdened or harmed by the rezoning as well as the organizations that represent them.

County Resolution Z-25-005 violates binding requirements of the County's Land Development Code (Code) and by substantially increasing density and building heights on the Resort also violates relevant incorporated Lee Plan provisions to "limit development to that which is in keeping with the historic development pattern on Captiva . . . including South Seas" and to "enforce development standards that maintain the historic low-density residential development pattern of Captiva."

The County's findings that the approved development will be served by adequate sewer and fire service are not supported by competent substantial evidence. The sewage treatment plan does not

have enough capacity for all approved development units. Regarding fire service, the Captiva Island Fire District stated:

> "If the rezoning is approved, the Fire District will be adversely impacted due to the proposed changes to building heights. The Fire District will not have the ground ladders or fire flows to provide a sufficient response to the upper floors of a building within the resort. . . [t]he intensity of hotel space and timeshares creates a larger life safety and property risk for the visitors to the resort. In addition to the building being lost if a fire occurs due to the inability to suppress fire on upper floors, **lives may also be lost**."

The Court should quash Resolution Z-25-005.

II. BASIS FOR JURISDICTION, STANDARD OF REVIEW and NATURE OF THE RELIEF SOUGHT

Pursuant to Article V, Section 5(b) of the Florida Constitution, Fla.R.App.P. 9.030(c) and Florida Rule of Appellate Procedure 9.100(f), Petitioners, Captiva Civic Association, Inc. (**CCA**), RLR Investments, LLC (**RLR**), Royal Shell Vacations, Inc. (**Royal Shell**), Harbourview Villas at South Seas Resort Condominium Association, Inc., Plantation Beach Club Owners' Association, Inc., Plantation Beach Club II Owners Association, Inc., Plantation Beach Club III Owners Association, Inc., Plantation Bay Villas Owners Association, Inc., Plantation House Condominium Owners' Association, Inc.,

South Seas Club Condominium Association, Inc., Cottages at South Seas Plantation Condominium Association, Inc. (collectively referred to herein as **Timeshares**), Bayside Villas Condominium Association, Inc., Beach Cottages Condominium Association, Inc., Beach Villas III Condominium Association, Inc., Captiva Resort Villas Condominium Association, Inc. (f/k/a South Seas Villas Condominium Association, Inc. and Tennis Villas Condominium Association, Inc.), Gulf Beach Villas Condominium Association, Inc., Land's End Village Condominium Association, Inc., Marina Villas Condominium Association, Inc., Sandrift Property Owners' Association, Inc., Seabreeze at South Seas Plantation Condominium Association, Inc., South Seas Plantation Beach Home Condominium Association, Inc., South Seas Plantation Beach Homesites Association, Inc., and Sunset Beach Villas Condominium Association, Inc. (collectively referred to herein as the **Associations**), petition this Court to issue a Writ of Certiorari quashing the quasi-judicial decision of a lower tribunal, Lee County, that approved a Rezoning and Master Planned Development for Respondent SSIR.

County Resolution Z-25-005 was adopted by the Lee County Board of County Commissioners on August 6, 2025, approving the Rezoning and companion master concept plan, identified as SOUTH SEAS ISLAND ROAD MPD, DCl2023-00051, and filed with the County Clerk, and rendered,[2] on August 6, 2025. (App. 001500 - 001529) This Petition is timely filed. Fla. R. App. P. 9.100(c). Pursuant to Code Section 34-85(a), Rule 9.100(c)(1)(2); Fla. R. App. P., and controlling law, review is now proper.

The Petitioners are entitled to certiorari review of the lower tribunal's quasi-judicial action. *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1960); *County of Volusia v. City of Daytona Beach*, 420 So.2d 606 (Fla. 5th DCA 1982). "First-tier" certiorari to the circuit court from a local government quasi-judicial rezoning action is a "matter of right and is akin in many respects to a plenary appeal". *Broward County v. G.B.V. Int'l , 787 So. 2d 838* (Fla. 2001). In a ""first-tier" certiorari proceeding, the circuit court must quash a local government's action [1] if procedural due process was not afforded,

[2] Rendition occurs when a "signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(i).

[2] the essential requirements of law were not observed, or [3] findings of fact are not supported by competent, substantial evidence. *Broward County v. G. B. V. International, Ltd.*, 787 So.2d 838 (Fla. 2001); *Dept. of Highway Safety and Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2nd DCA 2006).

III. PROCEDURAL HISTORY

Respondent SSIR filed a rezoning application which was the subject of a quasi - judicial hearing before a Lee County Hearing Examiner (HEX) in the Spring of 2025, who issued a recommendation to the Board of County Commissioners (BOCC), which voted to approve and rendered Resolution Z-25-005, on August 6, 2025. (App. 001500, 001520). All Petitioners sought, but were denied party status, in the HEX hearing, but presented evidence and argument in opposition to the rezoning as participating members of the public, and to establish standing. (App. 000288).

IV. THE SUBJECT AREA, PROPERTY, PARTIES, and STANDING

A. The Barrier Island of Captiva

The excised and rezoned land sits at the northern tip of Captiva, a site "geographically unique … surrounded on three sides by waterways" - the Gulf of Mexico, Red Fish Pass, and Pine Island Sound. (App. 000297 [Testimony of SSIR planner Crespo]; 001405 [HEX Rec. p. 3])

The Captiva property is located in a Coastal High Hazard Area, Coastal Building Zone and is within Storm Surge/Tide area and Evacuation Zone A. (App. 001410 [HEX Rec. p. 8, fn. 49]). Both Captiva and South Seas Island Resort suffered damage from three hurricanes in two years – Hurricanes Ian, Helene and Milton. (App. 001410 [[HEX Rec. p. 8])

All ingress and egress to the South Seas property is via Captiva Drive, a constrained, two-lane county-maintained collector roadway. (App. 001596 [Application Request Statement p. 1], 001860, 001869 [Drew Roark Report], 004593 [CPA2015 Supp. Doc.]). The internal access road, South Seas Plantation Road, is likewise constrained by native vegetation and existing abutting development outside of the MPD but within the Resort. App. 000297-000298, 000364 [HEX Tr., [Crespo testimony]).

B. **<u>South Seas Island Resort</u>**

County Resolution Z-73-202, adopted in 1973 by the Lee County Commissioner, "established **a unique zoning district**, … referred to as the South Seas Resort District (SSRD)." (App. 004154 [ADD 2002-0098]) (emphasis added). Under Sec. 33-1614 of the Lee County Code, "South Seas Island Resort" is legally defined as the entire 304 - acre master-planned Resort approved by a 1973 Zoning Resolution "**using a PUD Concept** as a guide with **a special limitation of three units per acre (912 total units)"** - 120 hotel rooms and 792 residential units. (App. 001597 [App. Request Statement]; App. 000305-000306 [Crespo testimony - HEX Tr. V1, p. 26 line 17 – p. 27 line 11]; App. 004341-004359 [Lee County Ord. 23-22]; App. 000058 [SSIR PPT Slide No. 57]; App. 004215 [ADD2002-00098]; App. 004414 [Zoning Res. Z-73-202]). (emphasis added).

Land use planning experts for both the Applicant and the Petitioners explained that, when the DIstrict was created in 1973, the zoning classification of Planned Unit Development (PUD) did not exist in the County in 1973, and and the Planned Development (PD) zoning was first created in 1978, and the 1973 Zoning Resolution

that created the South Seas District became the template for **the development flexibility underlying the current PD zoning in the County.** Currently, a PUD is a specific type of PD concept, with PD being a broader category for common-interest developments. (App. 000306, 000834-000835, 004197, 004200, 004414).

The representations made by the 1973 master plan developer were **"enforceable conditions** of the SSRD" (App. 004419-004434 [ADD2002-00098]). They were:

- "to **limit the overall density** in line with our desire to create a **very low density, high quality resort community**";
- with an "**overall limitation ... to have the flexibility to develop pockets of higher density,** while **leaving other areas completely untouched**";
- with a "**maximum limitation" of 912** combined dwelling units and hotel units. (App. 004417 [Resolution Z-73-202] App. 004423 [ADD 2002-00098]).

The 120.5+/-acre excised Subject Property is part of the larger ± 304-acre SSRD, as defined by Sec. 33-1614 of the Lee County Code, which contains higher density clusters of development based upon the overall acreage of the entire parcel and which was designed to provide a mix of resort, residential, recreational, marina, and

supportive commercial amenities as a unified development. (App. 001597 [Application Request Statement]).

Six hundred forty (640) of the potential 912 units are owned by ·property owners and their associations other than the Applicant. (App. 000667). "[E]xcept for the southern development boundary, property immediately surrounding the subject property is within the 304 acres that comprise South Seas Island Resort and is subject to Resolution Z-73-202 and ADD2002-00098." (App. 003812 [Staff Report, 000017 - 000020, 000022 - 000069 [Applicant's PPT Presentation].

At the request of the County Commission, in 2002, County Staff formalized a written Administrative Interpretation (ADD 2002-00098)(ADD) which "summarized the development approvals applicable to the entire 304-acre Resort as of July 2002," "clarif[ied] all prior approvals into one comprehensive document detailing what development currently exists", and "clarif[ied] what additional development may be permitted…." (App. 001405 [HEX Rec. fn 11]).

The ADD summarized the 1973 approval for, and re-authorized the development of, South Seas Island Resort, with conditions that

"Current and future development … [b]e limited to a development density of 912 units utilizing a number of small-scale clusters, be "carefully planned and tightly controlled," "[p]rovide for a self-supported capability in terms of facilities and service needed," [e]mphasize pedestrian movement [...], and "maintain a balance of dwelling units, amenities, and service facilities for the benefit of the entire community (SSP owners and Guests, Captiva, and Lee County." (App. 004164). The ADD referred to the construction of the 35 unbuilt units (of the 912 authorized in 1973) as the "**final phases of the development.**" (App. 004164).[3]

The 1973 Zoning Resolution and the 2002 ADD treat South Seas Resort Development as a Planned Unit Development (PUD), in accordance with Article VI Division 10, Subdivision IV of the Code. (App. 001405 [HEX Rec. p. 3]; App. 001598 [SSIR Application]; App. 004151 - 0041153 [ADD]) The common plan of development allowed a maximum of five (5) acres of commercial development on the south end of the property only, which was to provide amenities to the

[3] Currently, all but 25 of the 912 units have already been built. (App. 00030 - 00031 [Applicant planner testimony, p. 31 lines 1-8])

residents and guests of the approved 912 residential units and hotel rooms. (App. 001598, 001721, 002460, 004163 [ADD]).

SSIR purchased its 120.5 acres within the PUD in 2021 having been advised in writing by the County that the Resort as a whole was "vested for a maximum of 912 dwelling units," and that of the 912 units, SSIR was entitled to 140 employee housing units, 107 hotel units and 35 unused units. (App. 001599, 004404-004413. [South Seas Plantation Due Diligence Questions]).[4] The County also advised SSIR that the County had enforced that density limit against other South Seas property owners when it eliminated the use of lock-off units.

One year later, Hurricane Ian caused "severe devastation and destruction to Lee County" [and] many of the structures, the golf course, the marina and amenities on the property were "substantially damaged." One hundred seven previously developed hotel units owned by SSIR were eventually demolished. (App. 001596, 001599 [Application Request Statement]).

[4] *Id.*

SSIR's application for the rezoning emphasized its right to its 272 units "as vested by ADD 2002-00098." (App. 001602). It also acknowledges that within the Resort there are **"internal residential uses that are not subject to this ... zoning request**" and "[t]he **adjacent lands are developed with resort residential uses."** (Emphasis added). (App. 001606, 001608).

At no time since 1973 zoning approval has South Seas Island Resort ever been approved for more than 912 combined hotel and residential units. (App. 000684).

Until a 2023 Code amendment, Code Section 33-1611 exempted "development within … South Seas Resort … from [other Captiva regulations], **so long as the development complies with … ADD2002-00098**, adopted by the Board of County Commissioners in 2002." (Emphasis added). (App. 001350 [Ord. 23-22]).

The tallest previously existing buildings within SSIR - Bayside Villas - is 47.8 feet above sea level and 44.3 from grade- which is less than 45 feet above grade.· (App. 000268 [Applicant PPT], 004399 [South Seas Coastal Building Height Issues]; Outside the gate of South Seas, no buildings are taller than 45 feet above grade on Captiva Island. (App. 000000686 [HEX Tr, V2 p. 159 lines 2-13]).

C. The Petitioners

The majority of the 304-acre Resort is owned by property owners who remain within South Seas Island Resort and subject to the 2002 ADD, but who have not consented to the rezoning application. (App. 000017 - 000020, 000022 - 000069). The Applicant's excised rezoned parcels resemble a barbell and are connected by a narrow strip that runs through properties owned by others, including Petitioners. (App. 000794 [HEX Tr. p. 7 lines 22-25], 001523 - 001530, 0001580 - 001584).

The HEX observed that "as **residents and property owners within South Seas,** [the Petitioners] will be impacted in some way by the Board's decision in this case." (App. 000793 - 000794 [p. 6 line 25 - p. 7 line 3]).

i. The Petitioner Associations

The Petitioner Associations each have standing based on their presentation through counsel and personal appearances of Association representatives. (App. 0001560 - 001975, 004435-004450 [Berkey HEX Exhibit "2"], 000791-000820, 000939-000962, 003082-003106, 002954-002966, 002941-002954, 002966-002998, 001233-001272, 000721-000745; 001491-001492, 001494 [HEX

Recommendation Exhibit C (counsel to the Petitioner Associations), Leo Farrenkopf (Land's End BOD), Marilyn Frederick (Land's End BOD), Robert Locker (Gulf Beach Villas BOD), and Ken Suarez (South Seas Villas BOD)], 004595-004757, and 001975-001983).

There are collectively 526 residential units/lots and 120 Timeshare units among the Petitioner Associations, each of which is identified in relation to (1) the Applicant's Master Concept Plan (MCP) and (2) the maps of surrounding property owners within 500-feet of the rezoned property who received direct mail notice per the Code. Each of the Petitioner Associations, and their respective members, own, operate, and control real property within the 500-foot radius for public hearing notice purposes, and are intertwined with the Applicant's property. (App. 001580-001584, 004437-004441 [Berkey Exhibit "2"], 000791-000820; and 001975-001983).

The Petitioner Associations and the Applicant share ownership of roads and easements within an interconnected long-standing comprehensive, unified planned unit development guided concept plan and corresponding development pattern. (App. 00826-00827, 000829-000832, 000834-000855 [HEX Tr. V. 3, Page 39 Line 24 -

Page 40 Line 17; Page 42 Line 25 - Page 43 Line 25), Page 44 Line 1-Page 45 Line 6), Page 47 Line 5 - Page 48 Line 25), Pages 49-67, Page 68 Lines 1-20]) App. 003810, 004414-004418, 004192-004214, 004419-004434 [Staff Report Attachments N (Resolution Z-73-202), O (Resolution Z-90-091), P (Jones-Murphy Memo), and Q (ADD2002-00098)].

The proposed development is served by a single, constrained point of access, the length of which is not entirely owned by SSIR, but is subject to deviations Resolution Z-25-005 grants the developer regarding internal right of way buffers and road standards, respectively, without the consent and joinder of the road's co-owner Petitioner Associations to the rezoning application. (App. 000018-000020, 000023-000069 [Applicant's PPT], App. 001574-1576, 001580-001581; 004437-004441 [Berkey Exhibit "2"].

The Applicant and the Petitioner Associations also share one dedicated ingress, egress and access roadway and various easements. (App. 001580-001584, 004435-004450 [Berkey Exhibit "2,"], 000791-000820, and 001975-001983). This access roadway, and through which the construction vehicles, and then the

occupants of future guest and resident units must travel, is not owned by the Applicant, but instead is partially owned by other Petitioners within the 304 acre resort and master planned development. App 000737-000738 [HEX Tr. p. 210 line 20- p. 211, line 3], App. 000947 [HEX Tr. p. 160 lines 20-25], 000802, 003836-003851 [Staff Report Attachment B: Applicant's Boundary Survey. [see also the Applicant's boundary survey at sheets 10, 11, 13, and 14 in Attachment B to the Staff Report.]; 000802 [HEX Tr. V3 p. 15 lines 2-14 [Berkey]; 003456-3463 [HEX Transcript v9, Testimony from Applicant's Surveyor].

At the south end of the Resort, the internal access road is within the Condominium Property of Petitioner Associations Beach Cottages Condominium Association, Inc., Beach Villas III Condominium Association, Inc., Gulf Beach Villas Condominium Association, Inc., South Seas Plantation Beach Home Condominium Association, Inc., and Sunset Beach Villas Condominium Association, and is outside the MPD boundary. Yet the entire length of the access road is subject to deviation numbers 2 and 14,[5] as to the internal right-of-way

[5] Deviation Nos. as originally proposed by the Applicant were Deviation No. 3 and Deviation No. 15, but per the HEX

buffers and road standards, respectively, leaving the Petitioner Associations with a legal and practical burden as a result of the rezoning. (App. 000796-000797).

The Petitioner Associations testified that the "interconnectiveness and reliance on the shared access road and easements" support their request for party status. (App. 000794) [HEX Tr. Lines 9-12]). The Petitioner Associations' introduced a map showing that the 12 associations "are fundamentally interconnected with the … South Seas Resort ·development …." (App. 000797, 004435-004450 [Berkey Exhibit "2" PPT], App. 001580-001584).

ii. <u>CCA</u>

At the HEX hearing, the testimony and evidence of CCA's President and at least ten individual members demonstrated that a substantial number of CCA's members live adjacent to, or close to the rezoned property, including forty – nine members who own property within South Seas. CCA's purpose is to preserve the quality of life, ambience, and environmental integrity of a unique barrier

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Recommendation (App. 001445 and 001449) and Lee County Resolution No. Z-25-005 (App. 001514 and 001518), the Deviations were renumbered as applicable here to Deviation Nos. 2 and 14.

island community on behalf of its members, including through advocacy to the County and litigation. (App. 000642 - 000720, 001190 - 001232, 003010 - 003033, 003082 - 003120, 003125 - 003133, 003152 - 003160 [Tr. V5, p. 130 line 22 – p. 172 line 11]; V6 p. 201 line 15 - p. 218 line 1; p. 219 line 7 - p. 224 line 5; V7, p. 4, line 25 - p. 36 line 7; p. 36 line 22 - p. 42 line 3; p. 47 line 8 - p. 53, line 9; p. 53 line 23 -p. 55 line 4; p. 74 line 9 - p. 77 line 7; p. 78 line 21 - p. 82 line 21; and, 004481 -004490 [CCA President Riordan Comp. Exhibits 1 - 3]). The CCA is party to a 2003 mediated settlement agreement with the then owner of the Resort property and Lee County which limits the issuance of building permits at the Resort to 912 units. (App. 000669 [HEX Tr. lines 6 -25]). Forty five CCA members received the "Notice to Surrounding Property Owners" for the rezoning. (App. 002785 -002807; 004485 - 004490).

CCA's counsel requested and was denied party status, and provided written and oral arguments identifying the various County requirements with which the application was inconsistent. (App. 002815 - 002929).

iii. **Petitioner RLR Investments, LLC (RLR) and Royal Shell**

Petitioners, RLR and Royal Shell, appeared as participants to the quasi-judicial proceeding and objected to the proposed project. (App. 002260, lines 3-5).

At the HEX hearing, Zachary Liebetreu, attorney for RLR and Royal Shell, and Michael Polly, President of Royal Shell and representative of RLR, testified that RLR owns two properties as investments within South Seas and Royal Shell operates the vacation rental program for dozens of properties in South Seas and within 500-feet of South Seas. (App. 002262, Lines 5-10, 002278, Lines 24-25, and 002279, lines 1-2).

RLR and Royal Shell relied on the 912-unit cap and the master plan's binding commitments regarding the maximum number of units, open space, development pattern, height, and quality of life; i.e.: the resulting character and historic development pattern. (App. 002280, Lines 19-25, 002433 - 002457). RLR and Royal Shell testified that the rezoning will have a negative impact on the

usability, value, and salability of the RLR properties. (App. 002263, Lines 6-13, 002280, Lines 23-25, 002433 - 002457).

The rezoning will increase the use of the already congested and often dangerous conditions on the internal South Seas access road and Captiva Drive, thereby reducing public safety and making it more difficult for RLR and Royal Shell visitors and employees to access their properties. (App. 002264, lines 2-11; and 002281, Lines 1-8 and 20-25). The lack of sidewalks on Captiva and the increased pedestrian, golf cart, bicycle and motor vehicle interactions will adversely affect public safety. (App. 002264, Lines 12-16). Additionally, the rezoning granted deviations which infringe on RLR's easement rights over the access road associated with residential properties that it owns within the Resort. (App. 002265, lines 16-19, 002433 - 002457).

RLR and Royal Shell testified that the rezoning would also harm the tourism and real estate industry, reducing the number of Royal Shell visitors, and accordingly reducing RLR's property values. (App. 002270, lines 23-25; 002282 Lines 3-13. The conversion to private facilities rather than public, paired with the additional density, make

South Seas less usable by RLR and Royal Shell guests and employees. (App. 002272, Lines 16-23; App. 002273, lines 3-12).

V. RESOLUTION Z-25-0051

Resolution Z-25-005 rezoned 120.5 acres of land within the 304 – acre South Seas Island Resort to the *Mixed Use Planned Development* (MPD) district, allowing 193 multi-family or timeshare units and 435 hotel units – an increase from the 272 units to which the property was limited by the 1973 master zoning resolution and ADD 2002-00098, to a total of 628 units on the 120-acre portion of the Resort. (App. 001500 [Resolution Z-25-005]; App. 001405 [HEX Rec.]). The Applicant acknowledged the rezoning would "increas[e] the units by 356, and those would be hotel room unit increases...." (App. 000344 [HEX Tr, Crespo, lines 1-4]).

Resolution Z-25-005 allows SSIR to construct buildings as high as 65 or 70 feet above grade, which is up to 20 feet taller than the tallest buildings on South Seas or the rest of Captiva. (App. 000685 - 000686 [HEX Tr. Mintz, p. 158 line 12 - p. 159 line 18]).

VI. THE QUASI – JUDICIAL PROCEEDING

The County Commission's vote followed a quasi–judicial hearing held by the County HEX conducted over nine days in February, March and April, 2025. (App. 001398, 001403 [HEX Rec.]).

Lee County Administrative Code AC 2-6 identifies a rezoning applicant and County staff as the only parties to a quasi-judicial proceeding and expressly precludes the granting of party status for any other person. (Code Section 34-2 (defining "Party to proceedings before the Hearing Examiner or Board [of County Commissioners]" to mean "…the applicant … and the County (and their representatives). The term 'party' does not include participants or their representatives.") (App. 002773) [AC 2-6]).

Forty-eight hours prior to the HEX hearing, each Petitioner submitted to County staff a letter formally requesting that they be granted full party status, with documents supporting the factual basis for each Petitioners' qualifications as a party, cited authority supporting party status, and identified witnesses and exhibits (including resumes and copies of exhibits) the Petitioners were prepared to present. (App. 001567 - 001594; 002433 - 002457, 004471 -04502; 004595, 004752-004757).

At the beginning of the hearing, the HEX announced that:

> "**Nonparty participants may not put on a case,** so to speak. That means they may not have a representative make opening and closing arguments, call witnesses, and the like. (App. App. 000286) (emphasis added).

During the HEX hearing, counsel for each Petitioner renewed their request to be considered an Aggrieved/Adversely Affected Party to the proceeding. The HEX denied each request, ruling that their participation would be limited to the public comments. (App. 000288; 000792-000793, 002260 - 002261; 000792 - 00797; 000941-000943)

The HEX ruled that the procedural rights attendant to party status were "privileges … reserved to the parties." (App. 000640). She cited, as a justification for the different rules, that the Applicant's property rights, but not those of other owners within South Seas or other neighbors, were at risk in the proceeding:

> "I **don't think there's a dispute that, as residents and property owners within South Seas, that they will be impacted** …; but their **property rights are not going to be taken away.** There's no risk of loss of property rights. So the ·risk of deprivation in any way, in terms of elevating ·their status beyond -- anything beyond an adjacent property owner is not something I'm going to entertain." (App. 000794 [Tr. V3 p. 7 lines 3-8] (emphasis added).

The HEX's subsequent Recommendation stated:

> "Some members of the public sought party status. These individuals included property owners within South Seas, but outside the confines of the 120.5 acres to be rezoned. the Code does not grant the Hearing Examine the authority to expand the scope of who may be a Party."

(App. 001422).

The HEX stated that "[m]embers of the public were not deprived of their rights in the hearing. While the enjoyment of their impacted property may arguably be impacted by the request, **they will not be deprived of the use of their property**." (App. 001423).

At the hearing, well over 100 exhibits, many composite exhibits with multiple subparts, were introduced. (App. 001487-001494). The Applicant presented the testimony of 17 expert witnesses, and the County presented four expert witnesses. (App. 001495). Fifty-five non-party witnesses testified, including expert and fact witnesses representing or aligned with the Petitioners. (App. 001496-001498).

Throughout the hearing, the **Applicant's counsel was able to engage in direct examination of, including substantial leading questions to, the Applicant's consultants, and to interject her**

own testimony and commentary during these presentations. App. 000389, 000397, 000414-000415, 000423, 000426, 000438, 000440, 0004444, 000447, 000461, 000469, 000474, 000478, 000485, [HEX Tr. V1, p. 110, line 2 – p. 118, line 8; p. 135 line 7 - p. 136 line 16; p. 144, line 6 – p. 147, line 3; p. 159 line 9 – p. 161 line 3; p. 165 line 18 - p. 168 line 23; p. 182 lines 1-19; p. 190 line 2 – p. 195 line 9; p. 199 line 19 – p. 206 line 19]; App. 000546, 000557, 000572, 000577 [HEX Tr. V2 p.19 line 6 - p. 30 line 8; p. 45 line 14 - p. 50 line 25]; App. 003270-003271, 003275, 003277, 003279-003281, 003284-003285, 003287, 003289, 003294-003295, 003297, 003300, 003309, 003312, 003321, 003323, 003329-003330, 003336, 003341, 003343-003346, 003349-003351, 003372, 003376, 003386, 003390, 003395, 003398, 003434, 003443-003444, 003452-003453, 003471-003472, 003489, 003497, 003506-00507 [HEX Tr. V8, p. p. 17 line 24 - p. 18 line 6; p. 22 line 25 - p. 24 line 15; p. 26 line 8 - p. 27 line 9; p. 31, line 25 - p. 32 line 10; p. 34 line 19 - p. 36 line 16; p. 41 lines 15-22; p. 42 line 17 - p. 44 line 20; p. 47 line 24 - p. 52 line 9; p. 56 line 17 - p. 59 line 2; p. 68 line 22 - p. 70 line 17; p. 76 line 4 - p. 77 line 6; p. 82 line 3 - p. 83 line 8; p. 88 line 25 - p. 90 line 13; p. 91 lines 2 -10;

p. 92 line 12 - p. 93 line 8; p. 96 line 18 - p. 97 line 11; 97 line 18 - p. 98 line 13; p. 119 line 22 - p. 123 line 13; p. 133 line 8 - 137 line 2; p. 142 line 25 - p. 145 line 15; p. 181 line 11; p. 190 line 10 - p. 191 line 21; p. 199 line 24 - p. 200 line 25; p. 218 line 5 - p. 219 line 15; p. 236 lines 5 - 17; p. 244 lines 6 -25; p. 253 line 24 - p. 254 line 19], and App. 003574, 003589, 003591 [HEX Tr. V9 p. 19 lines 8 - 23; p. 34 lines 19 - 25; p. 36 lines 2 - 5]).

The Applicant's counsel was also able to direct questions to County Staff, whose position was aligned with that of the Applicant, in real time. (App. 000633-000637, 003743-003745, 003753-003758 [HEX Tr. V2 p. 106 line 1 - p. P. 110 line 13; V9 p. 188 line 18 - p. 190 line 9; p. 198 line 20 - p. 203 line 13]). Pursuant to the HEX's ruling and Lee County Administrative Code AC-2-6,

Petitioner's lawyers were unable to do the same. Administrative Code AC-2-6 states that "Participants … may not engage in direct …examination of witnesses." (App.002778 [Section 2.3 (B)(6)]).

Persons who testified on behalf of the Petitioners and other neighbor objectors were **interrupted with objections** by the Applicant's counsel during their presentations (App. 000645 -

000647, 000650 - 000652, 000658, 000660, 000664, 000669, 000681, 000740 - 000745; App. 000810, 000825, 000832 [V3 p. 23 lines 15-22; p. 38 line 18; p. 45 lines 7-14; p. 156 line 20 – 22]; 002182 [V4 p. 37 lines 8-16]; 002260-002261 [V4 p. 115 line 22 – p. 116 line 4]; 002279 [V4 p. 134 lines 18 – 23]; 002352 [v4 p. 207 lines 1-14]; 001156 [V5 p. 96 lines 8-11]; 002962 [V6 p. 154 lines 14 - 19]; 003082, 003079-003080, 003100, 003126 [V7 p. 12 line 24 - p. 13 p. 4, p. 22 lines 1-4, V7 p. 48 lines 13-15]. The Applicant's counsel was again allowed to interrupt the presentation of and argue with a CCA representative at the County Commission hearing. (App. 002018 -00019 [Tr. p. 97 line 15 - p. 98 line 2]).

Counsel for the Petitioners were unable to do the same to SSIR's witnesses.

Lee County Administrative Code AC-2-6 states that "Participants [i.e. non-parties] may direct questions relevant to the application … to the Hearing Examiner [but] may not engage in … cross examination of witnesses." (App. 002778 [Section 2.3 (B)(6)]).

The Petitioners' witnesses and other neighboring resident objectors to the project were subject to real time cross examination, including follow - up questions. (App. 000712-

000720, 00742-000745, 000856-000879, 000895-000897, 000927-000938, 000959-000961, 002275-002278, 002284-002287, 002308-002315, 002321-002322, 002332, 002353-002357, 002369-002374, 002380-002385, 001070-001077, 001090-001093, 001134-001144, 001176-001190, 001228-001232, 001263-001273, 002951-002954, 002964-002966, 002988-002998, 003007-003010, 003106-003114, 003118-003120, 003124, 003130-003131, 003141, 003164, 003171-003172, and 003191-003192. [HEX Tr. V2, p. 185 line 4 - p. 193 line 11; p. 215 line 11 - p. 218 line 6; Tr V3 p. 69 line 15 - p. 92 line 1; V3 p. 108 line 12 - p. 110 line 7; p. 141 line 1 - p. 151 line 18; V3 p. 172 line 9- p. 174 line 25; V4, p. 130 line 10 – p. 133 line 4; V4 p. 139 line 7 – p. 142 line 10; V4 p. 163 line 11 – p. 170 line 20; V4 p. 176 line 15 – p. 177 line 20; p. 187 lines 11 – 20; p. 208 line 7 -p. 212 line 6; p. 224 line 7 – p. 229 line 19; p. 235 line 18 – p. 240 line 19; V5 p. 10 line 8 – p. 16 line 7; p. 30 line 4 – p. 32 line 6; p. 74 line 9 – p. 84 line 11; p. 116 line 17 – p. 130 line 9; p. 168, line 8 – p. 172 line 10; p. 203 line 11 – p. 213 line 3; V6, p. 142 line 17 - p. 14 line 3; p. 155 line 15 - p. 157 line 18; p. 179 line 5 - p. 189 line 7; p. 198 line 11 - p. 201 line 9; V7 p. 28 line 20 - p. 36 line 7; p. 40 line 24 - p. 42, line 4; p. 46 lines 14 -

19; V7 p. 52 line 25 - p. 53 line 10; p. 63 lines 1 - 19; p. 86 lines 10-20; p. 93 line 15 - p. 94 line 12; p. 113, line 3 - p. 114 line 7).

The Petitioners' and their counsel were not granted these same rights. (App. 002923-002924).

When the public presentation component of the quasi - judicial hearing ended, the HEX discussed with County staff and the Applicant the scheduling of the Applicant's rebuttal presentation. (App. 003212 - 003215). CCA's counsel asked to be heard concerning the continuance date the HEX had identified after that discussion. The HEX rejected this request because CCA was not a party to the proceeding. (App. 003215).

The HEX scheduled the remaining hearing days without the input of CCA, even after the County's planner brought to her attention that CCA representatives would not be able to attend on the continuation date that had been agreed to by the County and the Applicant. (App. 003215 - 003219).

At the reconvened hearing, the HEX re-stated that she denied party status to the Petitioners because the County's Administrative Code specifically identified only the Applicant and County staff as the parties to a quasi - judicial hearing, did not allow her to grant party

status to any other party or hear motions seeking such status (or any motions at all.) (App. 003278-003279).

Thereafter, the Applicant put on a one and one - half day rebuttal presentation, with direct examination and leading questions from the Applicant's counsel. The Applicant's witnesses were subject to no cross examination by counsel for any of the Petitioners. (App. 003254-003809).

The HEX issued her Recommendation on July 9, 2025. (App. 001403).

On August 4, 2025, two days prior to the County Commission's consideration of the rezoning, Petitioners each submitted to the clerk, with a copy to the County Attorney's Office and the Applicant, a renewed request for party status, a comment letter explaining that, due to the three minute limitation in the County's procedural rules, the Petitioners were submitting in writing their points of error in the HEX Recommendation, and a conditional motion for stay of any final decision approving the rezoning. (App. 001917 - 001920; 001979-001981, 001560-001916; 002010, 004547; 001560 - 001561, 004742, 004749-004757).

A Deputy County Attorney responded, stating that the requests would not be transmitted to the Board and that the Petitioners would have to submit them during their presentations on August 6:

> "On Mon, Aug 4, 2025 at 10:00 AM Jacob, Michael <MJacob@leegov.com> wrote:
>
> Please note that none of these emails and their attached documents will be presented to the Board prior to the Hearing. It is the public participant's responsibility to introduce or discuss the information at the time of their presentation, subject to any objections from the Parties.
>
> Michael D. Jacob
> Deputy County Attorney
> Lee County Attorney's Office"

(App. 001560).

On August 6, 2025, the County Commission heard the matter. Petitioners renewed their requests for party status, pointing out that the HEX hearing had not provided the necessary procedural due process to their clients. (App. 001990 - 001992, 001979-001981; 002010]; 001961-001962). The Board did not remand the matter back to the HEX, although it granted some participants and Petitioners' counsel additional time beyond the general 3 - minute limit to present their arguments based on the HEX's findings. (App.

001945-001950). Upon the conclusion of the public hearing, the Commission voted to approve Resolution Z-25-005. (App. 0020702-002078).

VII. ARGUMENT

A. Summary of Argument

The County's process for approval of Resolution Z-25-005 violated the Petitioner's procedural due process rights. The unique nature of the unified, built-out master development known as South Seas Island Resort created an interwoven array of land ownership, shared infrastructure and amenities tied to a singular zoning resolution and master development plan, confirmed multiple times over a 50 year period and reaffirmed in an official county Administrative Interpretation. As representatives of owners within that 304 - acre master development and adjacent to the property the Applicant sought to rezone, including many with easement rights impacted by the decision, the Petitioners should have been granted, but were denied, full party status at the quasi-judicial hearing.

The result was an uneven playing field where the Applicant's counsel was able to "put on a case," lodge real time objections to

Petitioners' witnesses' expertise and testimony, and conduct live cross examination, while Petitioners' counsel were deprived of those same rights. Given the unique geographic setting and ownership patterns, this skewed process denied the Petitioner's meaningful opportunity to be heard. In a case that presented a wide range of disputed evidence and expert opinions regarding the historic development pattern, land use compatibility, traffic, evacuation and environmental impacts, the uneven playing field skewed the outcome.

Despite the procedural limitations placed upon the Petitioners, the record makes clear that Resolution Z-25-005 was not based upon competent substantial evidence. The finding of adequate fire and sewer service was supported by no evidence that the relevant service providers in fact have the capacity to meet the demands of the amount of development and building heights approved by the resolution.

It is also clear that Resolution Z-25-005 departs from the essential elements of law because it violates County Code requirements related to the ability of the consumers of a master

planned development to rely on the restrictions connected to that approval. It also violates County Code requirements that density and intensity be consistent with the limitations set by the Comprehensive Plan. By allowing the Applicant to significantly expand its development density and intensity within South Seas , the County violates its requirement to maintain and enforce the historic land use and development pattern on Captiva.

In doing so, Resolution Z-25-005 also deprives the Association Petitioners of their members' rights integral to the common plan or scheme of development. *Hagen v. Sabal Palms, Inc.,* 186 So.2d 302 (Fla 1966).

B. <u>Petitioners Have Standing</u>

Each petitioner organization and a substantial number of their members will suffer damages "*differing in kind" from that* "suffered by the community as a whole," and have standing. *Renard v. Dade County*, 261 So. 2d 832, 835 (Fla. 1972); City *of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008).

Standing is based on "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood … and the

type of change proposed." *Renard,* 261 So.2d at 837. *Renard* holds that a person entitled to receive direct notice under a zoning ordinance most likely has standing, but *does* not limit standing to persons within a direct notice radius, holding that "[p]ersons having sufficient interest to challenge a zoning ordinance may, or may not, be entitled to receive notice of the proposed action under the zoning ordinances of the community." *Id.* Adjacent and neighboring property owners have standing to challenge rezonings that increase densities and intensities in certiorari. *Id* at 834. S*ee also, Paragon Group, Inc. v. Hoeksema,* 475 So.2d 244, 246 (Fla. 2d DCA 1985), *review denied,* 486 So.2d 597 (Fla. 1986); *City of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008); *Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc.*, 744 So. 2d 1242, 1243–44 (Fla. 5d DCA 1999); *City of St. Petersburg Board of Adjustment v. Marelli,* 728 So.2d 1197 (Fla. 2d DCA 1999); *Chapman v. Town of Redington Beach*, 282 So. 3d 979, 984-985 (Fla. 2d DCA, 2019); *Carlos Estates v. Dade Cnty.*, 426 So. 2d 1167 (Fla. 3d DCA 1983) (individual who lived within 700 feet of subject property had standing to challenge a special exception granted to the developer); *Exchange Investments, Inc. v. Alachua Cnty.*, 481 So. 2d 1223 (Fla. 1st DCA

1985) (property owners within one mile of subject property had standing to challenge parking variance); *Paragon Group, Inc. v. Hoeksema*, 475 So. 2d 244 (Fla. 2d DCA 1985) (petitioner had standing where he owned a single-family home directly across from the 77-acre parcel).

Each Petitioner Timeshare and Petitioner Association, and their respective members, are adversely affected because they own, operate, and control real property within the 500-foot radius for public hearing notice purposes, own property which is subject to the rezoning, and are legally intertwined with the Applicant's property.

Fla.R.Civ.P. 1.221 and Sections 718.111(3) and 720.303(1), Florida Statutes, provide that a condominium association and homeowners' association may institute legal actions on behalf of its members concerning matters of common interest…." *E.g., Grand Harbor Cmty. Ass'n, Inc. v. GH Vero Beach Dev., LLC, 395 So.3d 168, 176 (Fla. 4d DCA 2024)* (holding that an association had standing, under Fla.R.Civ.P. 1.221 and citing *Homeowner's Ass'n of Overlook, Inc. v. Seabrooke Homeowner's Ass'n, Inc., 62 So.3d 667, 671 (Fla. 2d DCA 2011)* (Holding that an association had standing because "[t]he

members…have a common interest in whether they must share in the expense of maintaining the roads in the … subdivisions of the Seabrooke development."); *Wingrove Estates,* 744 So.2d at 1244-45 (Fla. 5d DCA 1999) (holding that homeowners' associations, whose members bordered on or were proximate to a proposed development, had standing to intervene in the developer's action to quash a county's denial of the developer's plan).

Under Section 718.111(3), Florida Statutes, a condominium association "may contract, sue, or be sued with respect to the exercise or nonexercise of its powers" and "the association may institute, maintain, settle, or appeal actions … in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners …."

Because the rezoning directly impacts the common property, shared facilities, and the general interests of the Petitioner Timeshares and Petitioner Associations and their respective members, and each organizational association participated in the quasi-judicial proceedings below, the Petitioner Timeshares and Petitioner Associations have standing to bring this action.

CCA has standing because 49 of its members live within South Seas Island Resort and a substantial number of its members live on Captiva close to the Resort, along the shared hurricane evacuation route, and within the range of the public safety and quality of life impacts of increased development. CCA has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation.

RLR Investments, LLC (RLR) and Royal Shell have standing. *Rayan Corp., Inc. v. Bd. of Cnty. Com'rs of Dade Cnty.,* 356 So. 2d 1276, 1277 (Fla. 3d DCA 1978). RLR and Royal Shell own property and operate rental programs within South Seas, relied on the master plan since 1973, have easements and access rights over the rezoned property the safety and congestion of which will be affected, and ultimately their business operations and competitive interests will all be adversely affected by the rezone.

Finally, each Petitioner has standing under the associational standing doctrine. Each may bring a suit on behalf of its members because (1) a substantial number of their members, although not necessarily a majority, are adversely affected by Resolution Z-25-005,

(2) the subject matter of this case is within the association's general scope of interest and activity, and (3) the relief requested is appropriate for the association to receive on behalf of its members. *Florida Homebuilders Association v. Dept. of Labor*, 412 So. 2d 351, 353 - 354 (Fla. 1982).

C. Violation of Procedural Due Process

Resolution Z-25-005 resulted from a violation of the Petitioners' procedural due process rights.

Parties to a quasi – judicial hearing must be accorded procedural due process. *Tameu v. Palm Beach County*, 430 So.2d 601, 602 (Fla. 4th DCA 1983); *De Groot v. Sheffield*, 95 So. 2d 912, 914–16 (Fla. 1957). The Second District has explained that:

> "certain standards of basic fairness must be adhered to in order to afford due process. . . . A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. 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."

Lee County v. Sunbelt Equities, 619 So.2d 996, 1002 (Fla. 2d DCA 1993)(internal citations omitted).

The rights to present evidence and cross-examine adverse witnesses are minimum requirements of procedural due process. *Fla. Int'l Univ. v. Ramos*, 335 So. 3d 1221, 1225 (Fla. 3d DCA 2021); *DSA Marine Sales & Service v. Manatee*, 661 So.2d 907 (Fla. 2d DCA 1995); *Conetta v. City of Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981); *Walgreen Co. v. Polk Cnty.*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988); *Deel Motors v. Dep't of Commerce*, 252 So. 2d 389, 394 (Fla.1st DCA 1971). The Second District holds that in quasi-judicial zoning proceedings, the parties must be able to cross-examine witnesses. *Lee County v. Sunbelt Equities*, 619 So.2d at 1002.

Courts consider three factors to determine whether adequate due process was afforded by a lower tribunal' administrative or quasi - judicial proceeding 1) the private interest affected by the action; 2) the risk of an erroneous deprivation of such interest through the procedures used; and 3) the probable value, if any, of additional or substitute procedural safeguards. The government's interest, considering the specific function involved and any fiscal or administrative burdens that additional process would require, are relevant. *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893,

47 L.Ed.2d 18 (1976). Applying the *Mathews* factors, given the facts, the County violated the Petitioners' procedural due process rights.

i) The private interest that will be affected by the official action;

The unique development district construct, strict, carefully established and consistently enforced development caps, layout, and shared easements, access road ownership and facilities, and the geography of the narrow evacuation - challenged barrier island of Captiva required that the Petitioners have the same procedural rights as the Applicant, who was seeking to upend the 50 year old legal relationships that bound all parties.

A substantial number of the members of the Petitioners own land within the "unique zoning district … the South Seas Resort District (SSRD)" established by the County in 1973, and have investment-backed expectations as a result of the master development plan's development limits and development standards (re-confirmed by the ADD2002-00098).

Indeed, the Lee County **Code Sec. 34-373(c)** recognizes the rights of non-applicants. It requires that the "owners of the remainder

of the original planned development" must "be given notice of the application and other proceedings **as if they were owners** of property abutting the subject property regardless of their actual proximity to the subject property". (emphasis added). This code provision supports the Petitioners' claim to full party status, as it recognizes that such decisions can have a particularly profound effect on the property rights of the other owners within a unified planned development.

The Petitioners are akin to the objectors to a rezoning in *Harris v. Goff*, 151 So.2d 642 (Fla. 1st DCA 1963). In *Harris*, the Court ruled petitioners were entitled to bring an original suit in equity because the hearing at which the local government approved the rezoning did not afford them, as an "affected party the opportunity … to cross-examine adverse witnesses whose testimony is offered at the hearing." *Id.* at 644.

Property rights considerations did not support granting the Applicant greater procedural rights than the Petitioners. The Applicant's property rights were at no greater risk than those of the Petitioner Associations. It possessed vested rights to 272

development units. A Florida landowner has no private property right to an increase in zoning uses or density. The purchase of land is subject to existing zoning restrictions; there is no property right to change them. *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997)*; Martin County v. Section 28 Partnership Ltd.*, 772 So. 2d 616 (Fla. 4th DCA 2000); *Namon v. DER*, 558 So. 2d 505 (Fla. 3rd DCA 1990) (holding that landowners "are deemed to purchase the property with constructive knowledge of the applicable land use regulations" and have no property right to have them changed).

ii) The procedures used risk an erroneous deprivation of the private interest;

The Petitioners' common plan of development rights, easement rights, access rights including safety and congestion, business operations, competitive interests, and enjoyment of the use of their land, were all adversely affected by extracting 120 adjacent acres within their shared development district for a substantial up-zoning. In a case that presented a wide range of disputed evidence and expert opinions regarding the historic development pattern, land

use compatibility, traffic, evacuation and environmental impacts,[6] the uneven playing field skewed the outcome on each issue.

Over the course of a nine - day hearing involving vast and voluminous exhibits, over two dozen expert witnesses and perhaps twice that many fact witnesses, the consistently uneven playing field of direct and cross examination and ability to interrupt witnesses with objections tipped the scales daily in favor of the Applicant.

Given the common scheme of development ownership interests and relationships as the Petitioners have with this Applicant, it was a fundamental denial of procedural due process to deny them party status.

A quasi-judicial hearing is the exclusive opportunity to make their case - to have counsel direct questions to their witnesses, cross examine opposing witnesses in real time, make objections to testimony or evidence, and make closing arguments and provide rebuttal. If such procedural rights are not afforded at the quasi-judicial proceeding, the record to which their resulting certiorari challenge is limited will not have been produced (as was the case

[6] App. 001399 - 001425 (HEX Rec.)

here) from a level playing field, but instead will have been skewed in favor of the Applicant.[7]

iii) The probable value, if any, of additional or substitute procedural safeguards.

The Applicant was able to "put on a case" through counsel, and, in real time, to object to and cross examine witnesses representing the Petitioners. That right was denied to the Petitioners and deprived them of their opportunity to be heard.

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[7] Petitioners' inability to cross-examine inconsistent statements by the Applicant's witnesses was evident throughout the HEX hearing. A representative example was when the Applicant's traffic-engineer claimed that the Resort's airport shuttle and rideshare services would alleviate traffic. (App 000466 [HEX Tr. Vol. 1, p. 187-8 lines 13-15 and 22-2]; App. 003313 [HEX Tr. Vol. 8, p. 60 lines 1-4]). However, that statement was contradicted by the Applicant's General Manager's admission that no Applicant-operated airport shuttle exists, and rideshare services are difficult to obtain on Captiva. (App. 000556 [HEX Tr. Vol. 2, p. 29 lines 6-8]). Another manifestation of the inability of the Petitioners' to cross examine was a rebuttal statement by the Applicant's witness Carl Barroco that the wastewater capacity available from the utility was sufficient to meet the demands for all of South Seas, not just the proposed MPD. (App. 002062-002063). While Commissioner Ruane pointed out at the final hearing that the available capacity could not serve both the South Seas demand as a whole and the additional demands created by the Applicant, the HEX's findings had already been rendered at that point. (App. 002060-002063, 002072-002073, and 002077-002078.)

The granting of party status would have ensured that Petitioners would have had adequate opportunity to meaningfully direct the testimony of fact and expert witnesses representing or aligned with them. Petitioners would have been able to point out inconsistencies and deficiencies in the testimony and evidence placed into the record by the Applicant. the county's witnesses.

Granting the Petitioners full party status would not have burdened the County relative to the benefit granted by protecting the Petitioners' rights. **Given the nine day hearing and great number of exhibits and witnesses, the additional time it would have taken to grant Petitioners the right to object to and cross examine witnesses, and direct their own presentations, would have been negligible.**

The one-sided rules of engagement violated the Petitioners' procedural due process rights. While quasi-judicial processes are not required to mimic the formality of judicial evidentiary hearings, the procedural rights afforded the developer applicant and other owners within the integrated common planned development must be fair and even.

The nature of the local government quasi-judicial decisions and judicial review thereof, in conjunction with due process rights, requires a level playing field to participate fully in all proceedings when one minority owner within a built-out unified master planned development seeks to unilaterally increase its development rights over the objections of the other owners. The County's Administrative Code provision that, according to the HEX, precluded the HEX from granting these rights to the Petitioners, in this case, on these facts, deprived them of procedural due process. A county code that prohibits all non-applicants from party status cannot be the sole determining factor as to whether procedural due process was afforded. "**'It is necessary to fill the procedural gaps in [the code] by the common-sense application of basic principles of due process.'"** *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 145–46 (Fla. 2d DCA 2003) (citing *City of Tampa v. Brown*, 711 So.2d 1188 (Fla. 2d DCA 1998); see also *Michael D. Jones, P.A. v. Seminole County,* 670 So.2d 95, 96 (Fla. 5th DCA 1996).

The Court should quash Resolution Z-25-005 because the County denied Petitioners' procedural due process rights.

D. The Rezoning Departed From the Essential Elements of Law Because It Violates the County's Land Development Code.

In quasi-judicial hearings the interpretation and application of local ordinances constitute the essential elements of law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003); C*olonial Apartments, LP v. City of Deland*, 577 So. 2d 593, 598 (Fla. 5th DCA 1991. "A decision granting or denying a [quasi-judicial] application is governed by local regulations" *Miami-Dade v. Omnipoint*, 863 So. 2d 375, 376 (Fla. 3d DCA. 2003) (citing *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) and *Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982). *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012).

Resolution Z-25-005 violates the County Code requirements for the approval of a rezoning, and thus departs from the essential elements of law.

i. Violations of the County Code

A local government must deny a rezoning application that violates its Code. *Realty Assocs. Fund v. Town of Cutler Bay*, 208 So.3d 735 (Fla. 3d DCA 2016). The burden of demonstrating that a

project meets a local government's regulatory criteria is on the applicant. *Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993); *Conetta v. City of* Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981).

On certiorari review, a court need not defer to a construction of the zoning code by the local government if the language of the Code is clear and unambiguous. *Town of Longboat Key v. Islandside Prop. Owners Coal.*, LLC, 95 So.3d 1037, 1040 (Fla. 2d DCA 2012). No deference is required to a local government's "self-serving interpretation." Id at 1042. Even under the certiorari standard requiring that weight be given to a local government's construction of its code, "a court cannot afford such deference when the interpretation is unreasonable or erroneous." *Town of Longboat Key*, 95 So.3d at 1042. (citing *Vanderbilt Shores Condominium Association v. Collier County,* 891 So.2d 583, 585 (Fla. 2d DCA 2004)).

ii. <u>The Improper Use of Easements and Property Interests of Non-Applicants.</u>

a. <u>Easements not properly identified</u>.

Code Sections 34-371(a)(4) and 34-373(a)(6)(a) require applications for planned development zoning and corresponding

master concept plan to identify all easements affecting the proposed planned development property. The Applicant failed to correctly identify all material easements and incorrectly reflects all easement interests on its Master Concept Plan consistent with the Applicant's Opinion of Title (App. 001573-001576, 001695-001700 [Berkey Composite Exhibit "1" at Pages 7-10 (and FN 5 on Page 8), Exhibit "F" enclosed therein at Pages 43-48]).

b. <u>The Applicant does not own some portions of the Access Road affected by Deviations</u>.

Resolution Z-25-005 authorized Deviations 2[8] and 14, which apply to the entire access road, including the southern portions that are <u>not</u> owned by the Applicant (the "Southern Access Road"). App. 001580-001584, 000791-000820, and 001975-001983 [Berkey Composite Exhibit "1" at Composite Exhibit "A," and resubmitted into the record at BOCC with Michael Jacob reply, Berkey Exhibit "2," HEX Transcript Volume 3 at Page 4 et seq. (Berkey); BOCC Transcript at Page 53 et seq. (Berkey)]. Code Section 34-202(a) required the

[8] FN 5. *See also* Ms. Crespo's testimony as to Deviation No. 3 (later renumbered to Deviation No. 2) on February 14, 2025 (App. 000106-000109) where she stated Deviation No. 3 "can only apply to the [Applicant's] portions of their road in the MPD."

Applicant to submit a signed sworn statement that he is the owner or authorized representative of the owner of the property subject to the request and that he has full authority to secure the approval and impose covenants and restrictions on that property. The Applicant does not have the required authority to impose deviations on the entire access road.

The Southern Access Road is outside the proposed MPD boundary. The Applicant only holds an easement interest over this road, which is inside the condominium properties of Beach Cottages, Beach Villas III, Gulf Beach Villas, South Seas Plantation Beach Home, and Sunset Beach Villas (the "Owning Condominiums"). (App. 000796 [HEX Tr. V3 p. 9 line 24 - p. 10 line 24]). Therefore, Deviations 2 and 14 apply to the Southern Access Road, which is owned and controlled by individual Petitioner Associations, despite those Petitioner Associations not having consented to the application approving Resolution Z-25-005. The Applicant does not have the authority to secure deviation approval or otherwise impose covenants applicable to these areas outside of their road ownership. App. 000805. [HEX Tr. p. 18 lines 5-16].

In submittals in support of the application, SSIR complains about an action years ago where "the county created additional challenges when the county unilaterally filed, processed and approved a rezoning to Commercial Marine (CM) without the consent of the property owner." (App. 001599). Yet, here the Applicant unilaterally filed and the County processed and approved a rezoning with companion deviations applicable to the entirety of the road which is not wholly owned or controlled by SSIR and is outside the MPD boundary.

c. <u>The Applicant does not own or control the vegetation justifying Deviation</u>.

Resolution Z-25-005 authorized Deviation No. 2, which relies on existing vegetation on properties not subject to the application and which cannot be maintained by the Applicant to ensure ongoing compliance. The Applicant cannot impose deviations or other conditions applicable to these outside properties without those owners' consent and cooperation for compliance purposes, thereby making the application un-approvable. App. 000803-000805 [HEX Tr. V3 p. 16 line 12 - p. 17 line 6-16 p. 18 line 1-23].

iii. <u>Rezoning a Portion of a Fully Built Out Planned Development Violates the Code</u>

Resolution Z-25-005 violates **Code Section 34-612 (2)(h)**, which describes the purpose and intent of PD Districts as:

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

Resolution Z-25-005 did not rezone land legally untethered to surrounding lands, but instead, grants the successor in interest of a master plan developer substantially greater development rights over and above the carefully limited, arranged and built development allowances approved by an integrated master development plan that now includes hundreds of other land and homeowners interspersed among this Applicant's holdings.

Petitioners' raised to the HEX the inappropriateness of singling out for special treatment this Applicant's excised 120.5+-acres of the 304 acre master planned South Seas Development. (See e.g., App. 000800, 000815-000817, 000848-000849, 000870, 000945, 000958, 001654, 001675, 001683, 001713, 002836, 002845,

002852, and 002929 [HEX Tr V6, p. 27 line 19 - p. 28 line 16; p. 36 line 25 - p. 43, line 4; p. 120 lines 4 - 16].

The application acknowledged that its 120.5 acres was part of the larger ±304-acre SSRD, has functioned as a PUD, and "has functioned as **a cohesive master planned resort since its inception.**" (App 001618, 002481, 004004) The Applicant's land use planner explained at the HEX hearing that the 1973 zoning approval which governed the development at South Seas was based on "a PUD concept as a guide to accompany [its] conventional zoning district." (App. 000306, 004414).

This property is built out. The land and buildings this Applicant bought in 2021 represent the full benefit and realization of the rights granted and realized flexibility and allowances granted by the 1973 zoning approval.

The individual property owners within the SSRD have relied on the master plan's binding commitments regarding the 912 total unit cap, open space, and resulting character, development pattern, and quality of life for over 50 years. The heights, densities, intensities of use, buffering, setbacks, and open space cannot be changed

unilaterally by one owner or developer. The developer's successor cannot now be granted a windfall of additional development rights at the expense of those who purchased units within the SSRD, and who will lose the benefit they acquired of the low density, open space, and community character established by the master plan.

But despite treating the Resort as a single unified development for over 50 years, Resolution Z-25-005 allowed the Applicant to separate its +/-120.5 acres from the rest of the 304 acres to redevelop its portion of the Resort at greater density and intensity leaving the remains of the original SSRD orphaned, still subject to the ADD and without the ability to meet all the requirements and conditions of the ADD.

To the extent the County and SSIR might suggest that **Code Sec. 34-373(c)** might allow only a part of a built planned development to be the subject of an application for a rezoning, that subsection only applies if "the subject property is the only part of the original planned development that will be affected by the requested approval." Here, the Applicant's 120 acres is certainly not "the only part of the original planned development that will be affected by the requested approval."

A "citizen is entitled to rely on the assurances or commitments of a zoning authority and … the zoning authority is bound by its representations…." *City of Miami Beach v. Clevelander Ocean*, L.P., 338 So. 3d 16, 22 (Fla. 3d DCA 2022). *Clevelander* emphasized that the public interest in enforcing vested rights "is not strictly between the municipality and the individual litigant." Instead, "[a]ll residents of the community have a personal interest in maintaining the character of an area as established by comprehensive zoning plans and preventing one property from being damaged or diminished in value by the use of an adjacent property"). *Id.* at 22.

A common plan or scheme of development is a well recognized principle in Florida jurisprudence. In *Hagen,* 186 So.2d at 307, the Florida Supreme Court observed:

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

> also of his grantees and subsequent successors in title, the burden, as well as the benefit, of the restrictions is an incident to ownership of the lots, because in a neighborhood scheme the burden follows the benefit.

The master development (PUD Concept) known as South Seas Resort originated from a single common source of title and single grantor of the land which then resulted in an interwoven array of land ownership, shared infrastructure and amenities tied to a singular 1973 rezoning resolution and master development plan, confirmed multiple times over a 50 year period and reaffirmed in an official county administrative interpretation. App. 004414-004434. Petitioners are entitled to rely upon the common scheme of development which created cluster communities within SSIR based upon the overall land area for determining units per acre and would be entitled to full party status for the application process and the HEX and BOCC hearings.

Given the facts, Resolution Z-25-005 is improper "spot zoning" - an isolated favor to one landowner at the expense of the general community. *Bird-Kendall v. Dade County Comm'rs*, 695 So. 2d 908

(Fla. 3d DCA 1997); *Dade County v. Valdes*, 366 So. 2d 809 (Fla. 3d DCA 1979).

Resolution Z-25-005 departs from the essential elements of law, as it is contrary to County Code Sections 34-612 (2)(h), and 34-373(c), and the common plan or scheme of development and spot zoning doctrines.

iv. Code Violation – Density and Intensity Inconsistent with the range of density or the uses permitted or encouraged under the Lee Plan at that location.

Code Section 34-413 requires**:**

> **"Density or intensity** of use permitted in any planned development **shall be determined on a case-by-case basis in accordance with:**
> (1)The **range of density or the uses permitted or encouraged under the Lee Plan at that location**; […]
>
> (4) **The nature of and the density and intensity of existing development surrounding the project.**" (emphasis added).

Resolution Z-25-005 departs from the essential elements of law however, because the "range of density or the uses permitted or encouraged under the Lee Plan at that location" and the "nature of and the density and intensity of existing development surrounding the project" has been established for over 50 years as strictly limited

to three units per gross acre, inclusive of both hotel and residential units - for a total of 912 units for the entire South Seas District.

Directly relevant to Code Section 34-413's requirement to base PUD density or intensity on the "range of density or the uses permitted or encouraged under the Lee Plan at that location" and the "nature of and the density and intensity of existing development surrounding the project" is the Lee Plan Chapter devoted specially to Captiva. **Goal 23** of the Lee Plan reads:

> "The goal of the Captiva Community Plan is to protect the coastal barrier island community's natural resources … and history. This goal will be achieved through … land use regulations that … **enforce development standards that maintain the historic low-density residential development pattern of Captiva**." (App. 000909, 001609).
>
> **"OBJECTIVE 23.2:** To ***continue*** the **long-term protection and enhancement of** … **existing land use patterns**, unique neighborhood-style commercial activities, infrastructure capacity, and historically significant features on Captiva. (App. 000909, 001651) […]
>
> **"Policy 23.2.4**:
>
> "Limit development to that which is in keeping with the historic development pattern on Captiva ….. The historic development pattern on Captiva is comprised of low-density residential dwelling units … minor commercial development and South Seas Island Resort." (App. 000073, 001651)

These provisions were placed into the Lee Plan in 2018 - sixteen years after ADD2002-00098 and forty five years after the 1973 Zoning Resolution that approved the 912 - unit South Seas Resort - by plan amendment CPA2015-0009, adopted by Ordinance 18-04, which also adopted, as "'Support Documentation for the Lee Plan," "the corresponding Staff Reports and data and analysis …." (App. 004550 [p. 2]). That support document explains that the requirement to "[l]imit development to that which is in keeping with the historic development pattern on Captiva" "**protects the existing neighborhood form and densities**…." (App. 004556 [Supp. Doc. p8]) (emphasis added). It explained that:

> "This goal [of the] Captiva Community Plan serves as a **description of Captiva as it has historically developed and exists today - a pattern of land use and low-impact development** within the island's long-time context of environmental protection **that should be maintained and supported into the future**." (App.004561 [Supp. Doc. p2]) (emphasis added).

The Support Document explains that Captiva's geographic setting is a primary reason for these development limits:

> "**Captiva's land use pattern is guided by its location in a Coastal High Hazard Area.** [….] Consistent with … Policies … that limit development where hazards exist,

> **density** on Captiva **is three units an acre** ….” (App. 004556 [Supp. Doc. p8])
>
> […]
>
> “Florida Statutes … and the Lee Plan … identify the **need for additional regulation and requirements for Coastal High Hazard Areas … such as Captiva**. [I]ssues of **concern … are evacuation times** … **density increases and infrastructural capacity.** These reflect a recognition of additional risk to life and property … sufficient to **warrant more stringent regulations for safety** while protecting the property rights of owners.” (App. 004572 [Supp. Doc p13]) (emphasis added).

The Support Document explains that the coastal barrier island nature of Captiva “warrants … **steps to control the density and intensity of use for island properties to that which currently exists**.” (App. 004576 [Supp. Doc. p17]). (emphasis added). It added that “[r]**isk reduction is typically accomplished** (**particularly in the Lee Plan**) by … limiting rezoning approvals to those which **do not increase density** ….” App. 004572. (emphasis added)

Despite these clear statements of the “range of density or the uses permitted or encouraged under the Lee Plan at that location”

(Code Section 34-413), the County approved Resolution Z-25-005 on the theory that:

> "South Seas has included hotel, residential, and commercial uses since inception. The MPD request **does not introduce new land uses** to the Resort or the island." (App. Pet App. 001409) (emphasis added)
>
> and
>
> "the MPD district … is **compatible with** land uses. [….] The redevelopment of the property is **consistent with the property's historic use as a resort destination**."

(App. 001423).

The HEX did not find that the Rezoning and MDP would, as required by Objective 23.2, "*continue* the long-term protection and enhancement of community facilities [and] existing land use patterns…", as required by that Objective.

The HEX misread Objective 23.2, finding that it:

> "***Encourages*** long term protection and enhancement of … land use patterns …."

(App. 001408).

But the Policy is not a mere suggestion.

The HEX did not fully address Goal 23, observing only that:

> "The Captiva Community Plan is no impediment to the MPD. Goal 23 aspires to protect natural resources, dark skies, and histories." (App. 001407).

Her Recommendation did not address Goal 23's mandate that the County:

> **"enforce development standards that maintain the historic low-density residential development pattern of Captiva**."

The HEX does not address that, while South Seas has always been a Resort, historically, its hotel units - and all hotel units on Captiva - were indisputably treated as residential density for purposes of the three – unit per acre density limit.

Instead, ignoring Goal 23, the HEX found that "[t]he **proposed uses are appropriate at the location**", and referred to Policy **23.1.** (App. 001425).

The HEX addresses Policy 23.2.4 only to say that:

> "Policy 23.2.4 calls out the resort as a separate component of the historic development pattern of the island."

(App. 001408 [fn 35]).

The HEX ignored the Policy's requirement to **"Limit development to that which is in keeping with the historic development pattern on ... South Seas Island Resort" -** which is

a maximum of 912 combined residential and hotel units (three units per gross acre) and maximum height of 45 feet above grade.

The HEX also erroneously found that "[t]he Captiva Community Plan's description of historic development pattern **does not address building height**." (App. 001414).

This is an erroneous interpretation. **Height is a key component of Captiva's historic land use and development pattern**. The 2018 Staff Report for the Captiva Community Plan amendments to the Lee Plan states that, under Objective 23.2 (To *continue* the long-term protection and enhancement of community facilities, existing land use patterns ...."), "[h]eights are also limited in keeping with Captiva's low rise buildings." (App. 004556 [p. 8]) It explained that "[b]uilding height limits have a long historic precedent on the island" and the policy "maintains this historical limit without interruption in order to continue the island's history of low-rise and low-density development." (App. 004574 [p. 15]).

The HEX Report finds that "T[t]e height differential between existing and proposed structures does not trigger a finding of **incompatibility** because:

> "Height variations between developments and even within a single development is commonplace throughout the County." (App. 001415)

But this is not anywhere else in the county; it is Captiva, where the Plan has much more stringent requirements to maintain the historic development pattern.

Resolution Z-25-005 **departs from the essential elements of law by interpreting the Lee Plan provisions intended to limit development at South Seas to its historic pattern to instead allow a major expansion of that historic development pattern.** It fails to "enforce development standards that maintain the historic low-density residential development pattern of Captiva", as required by Goal 23, "*continue* the long-term protection and enhancement of … existing land use patterns," as required by Objective 23.2, and "*limit* development to that which is in keeping with the *historic* development pattern on … South Seas Island Resort," as Policy 23.2.4 requires.

The words "maintain," "limit," and "continue" can in no way be equated with the words "expand" or "increase." The word "maintain"

means to "to keep in an existing state,"[9] and "limit" means "something that bounds, restrains, or confines" or "a prescribed maximum or minimum amount, quantity, or number."[10] To "continue" is to "to remain in existence."[11]

The proper application of a land development code requires a reviewing court to "**focus[] with precision on the specific words in the Code.**" *Town of Longboat Key v. Islandside Prop. Owners Coal.*, LLC, 95 So.3d 1037, 1040 (Fla. 2d DCA 2012) (emphasis added). In *Alvey v. City of N. Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016) the Court quashed a city's approval of a rezoning because, although the City's Code mandated that the rezoning "be consistent with and in scale with the established neighborhood land use pattern", approval was granted on the basis that the change "would be 'compatible' with the general area." Id at 69-70, 72.

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[9] Merriam-Webster, https://www.merriam-webster.com/dictionary/maintain (last visited Sep. 5, 2025).
[10] Merriam-Webster, https://www.merriam-webster.com/dictionary/limit (last visited Sep. 5, 2025).
[11] Merriam-Webster, https://www.merriam-webster.com/dictionary/continue (last visited Sep. 5, 2025).

The specific words employed in a County's legislative document matter and must be enforced. But the County ignored these explicit requirements and allowed their opposite - a major expansion of the historic land use and development pattern at SSIR, defying a 50 year long application of the residential dwelling unit density limits to hotel units.

Beyond the Plan's Captiva Community Plan requirements, **Lee Plan Policy 1.1.6**, limits development to three dwelling units per acre in the *Outlying Suburban* land use category applicable to South Seas (App. 000916, 001673.) Lee Plan Policy 1.1.6 also establishes the "range of density or the uses permitted or encouraged under the Lee Plan" at Captiva, and the "nature of and the density and intensity of existing development surrounding the project." **Code Section 34-413.** Both hotel and residential units at this location (Captiva) have been subject to the three unit per acre cap for over 50 years. (App. 001673).

Resolution Z-25-005 is inconsistent with Plan Policy 1.1.6, as it allows a density of 5.21 per gross acre, inclusive of multi-family dwelling or timeshare units and 435 hotel/motel rooms, on the

Applicant's 120.5 acres at South Seas. (App. 001500, 000917-000918.). Resolution Z-25-005 also causes the density to violate the three unit per acre limit for the entire South Seas District, by exceeding the 912 units over 304 acres.

The County approved Resolution Z-25-005, however, on the theory that the density allowed did not violate the Plan, because Code section 34-1802(4)(d) exempts hotels approved by planned development from density requirements (App. 001409), and a newly - enacted amendment to the Code[12] exempts hotels at South Seas (but not the rest of Captiva) from the Captiva Code provision which made that exemption inapplicable on Captiva.

Code Section 34-491 (a) is unequivocal:

> **"All development orders (including rezonings)... shall be consistent with the** goals, objectives, policies and standards in the **Lee Plan.** Where there are apparent conflicts between the Lee Plan and any regulations in the Chapter, **the Lee Plan will prevail.**" (emphasis added).

[12]The adoption of that Code change remains subject to a legal challenge currently pending before the Sixth District in *Captiva Civic Association, Inc., v. Lee County, et. al.* Case No. 6D2025-0271.

Resolution Z-25-005 departs from the essential requirements of law. A prior HEX Report, in Case No. DCI2011-00048, correctly ruled that nothing in the Lee Plan supported exempting hotel units from the dwelling unit density cap in Plan Policy 1.1.6.

Resolution Z-25-005 is inconsistent with **Code Section 34-413** because the density and intensity of planned development it seeks to allow at South Seas exceeds substantially the "range of density or the uses permitted or encouraged under the Lee Plan at that location" and is not in keeping with and fails to maintain and continue the "nature of and the density and intensity of existing development surrounding the project."

5. The Requested Deviations Do Not Meet the Mandatory Requirements

The rezoning requires deviations which cannot be supported under the Code. None of the requested deviations meet all of the specific requirements in Code Sections **34-373(9)** and **33-1615(b).** (App. 001573-001578).

Section 34-373(9) reads in pertinent part as follows:

> *Deviations.* A schedule of deviations and a written justification for each deviation requested as part of the Master Concept Plan accompanied by documentation including sample detail drawings illustrating **how each**

deviation would enhance the achievement of the objectives of the planned development and will not cause a detriment to public interests.... (Emphasis added).

Section 33-1615(b) requires that:

Variances and deviations **will only be permitted if all of the findings required by Section 34-145 and all of the specific findings below are met**:

(1) The hardship cannot be corrected by other means allowed in this Code;

(2) Strict compliance of the regulations allows the property owner **no reasonable use of the property, building or structure**;

(3) The variance or **deviation will not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties located on the same street** and within the same future land use category, unless denial of the variance or deviation would allow no reasonable use of the property, building or structure;

(4) **The applicant did not cause the need for the** variance or **deviation**;

(5) The variance or **deviation to be granted is the minimum** variance or **deviation that will make possible the reasonable use of the property, building or structure**; and

(6) The variance or deviation is not specifically prohibited in this article and not otherwise contrary to the spirit of the ordinance from which this article is derived. " (Emphasis added).

Accordingly, the Code (*e.g.*, Sections 34-373(9), 33-1615(b)) does not permit approval of deviations that are the result of actions of the property owner, where there is a reasonable use of the land without the deviation approval, and where the deviations would be detrimental to public interests, which is the case here.

Deviation 2,[13] as to right of way buffers, still relies in part on existing vegetation on properties owned by members of the public, which property is outside of the MPD boundary (App. 00360-00361, 00364) and which cannot be maintained by the Applicant to mitigate the impacts of its MPD development. That landscaping on which the Applicant relies is owned and controlled by certain Petitioner Associations without their consent and joinder to the rezoning application. Further, Deviation No. 14[14] as to the road standards was applied to the entire extent of the Southern Access Road, even though not entirely owned or controlled by the Applicant and with portions being outside the MPD boundary. Code Section 34-202(a) provides all submittal requirements for all applications requiring a public

[13] FN 5.
[14] *Id.*

hearing, and includes the Applicant submit a signed statement, under oath, that he is the owner or authorized representative of the owner of the property subject to the request and that he has the full authority to secure the approval required and to impose covenants and restrictions on that property and that any agent authorized by the Applicant will be deemed to have the authority to bind the property to be rezoned with respect to conditions (*e.g.,* Code Sections 34-202(a)(3) and (4)). The Applicant cannot impose deviations or other conditions applicable to properties owned by others, which are outside the MPD boundary, without their consent. Accordingly, **these deviations are not authorized by the Code.** (App. 000803-000813, 001580-001584, 000791-000820, and 001975-001983).

The Applicant's claim that deviations in ADD2002-00098 regarding open space, parking and buffering are vested for this new application that would substantially increase building heights, density and intensity, is legally flawed. (App. 000800.) A landowner has no right to expand an existing non-conforming use. *Marine Attractions, Inc. v. City of St. Petersburg Beach*, 224 So. 2d 337, 338 (Fla. 2nd DCA 1969).

In light of the foregoing, the Deviations should have been denied in their entirety.

E. Resolution Z-25-005l is not supported by Competent, Substantial Evidence

i. Adequate Central Sewer Service has not been Demonstrated

Resolution Z-25-005 violates **Code Section 34-202(a)(10),** which reads:

> "*Proof of potable water and sanitary sewer availability.* A letter from the appropriate utility provider verifying their ability to provide service to the proposed development. If service is not available, the applicant must indicate how the potable water and sanitary sewer needs for the project will be met."

The HEX found that "the MPD will receive … sanitary sewer service from the Florida Governmental Utility Authority (FGUA)." (App. 001421). She did not identify the amount of sanitary sewer demand to be generated by the 638 units approved by the Rezoning or the capacity available at the FGUA facility.

The lack of available sewer capacity at the FGUA wastewater plant for the Rezoning and MPD was explained by Mr. James Evans, a scientist with decades of experience in the waters surrounding

Sanibel and Captiva islands accepted by the HEX as a water quality expert. (App. 001093 - 001098 [HEX Tr. p.33, line 25 -p. 38, line 12]).

The Zoning Staff Report identified the total wastewater demand of the proposed Mixed Use Development as 187,457 gallons per day (GPD). (App. 0004333; App. 001111 - 001113 [HEX Tr. V5, p. 51 line 23 - p. 53 line 8]). The January 23, 2025 FGUA availability letter verifies FGUA's ability to process only 117,880 GPD, not the 187,457 GPD to be generated by the proposed development. (App. 004519, 004521 [p. 1 and 3]). On its face, the FGUA's stated capacity for the MPD is 69,577 GPD less than the MPD requires.

Moreover, the FGUA plant has a maximum design capacity of **264,000** GPD (App. 004524 [2015 Capacity Analysis p. 1]). That is not enough capacity to meet the proposed MPD's sewer demand of 187,457 GPD plus the demand of the existing 640 units outside of the MPD. Subtracting the MPD sewer demand from the FGUA's maximum design capacity leaves only 76,543 GPD for the existing 640 units outside of the MPD – less than 120 GPD per unit – almost all of which are multi-bedroom.

When the insufficient capacity of the FGUA plant was pointed out by Commissioner Ruane, the Applicant's witness Carl Barroco stated on rebuttal that the 187,457 GPD represented the wastewater demands for all of South Seas, including the increased demand from the proposed rezoning, not just the proposed MPD. (App. 002060-002063). That is incorrect, the 187,457 GPD was just for the MPD.

Commissioner Ruane then stated that he was voting "no" because the Staff Report on page 524 showed that the MPD wastewater requirement was 187,457 GPD and the FGUA did not confirm that amount of capacity. According to Commissioner Ruane, "the math to me just doesn't add ·up". (App. 002060-002063, 002072-002073, and 002077-002078.)

"[T]he conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value. [....] The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." *Akin Construction Co. v. Simpkins*, 99 So.2d 557 (Fla. 1957).

Because the Applicant provided no evidence of how the deficiency will be met, Code Section 34-202(a)(10) required denial of the Rezoning and Master Planned Development.

ii. Adequate Fire Service Was Not Demonstrated

Code Section 34-413 (4) requires that density and intensity of use permitted in a planned development shall be determined in accordance with … '[t]he availability of adequate capacity of all public facilities and services [including] public safety ….'

The HEX found that the Captiva Island Fire Control District will provide fire protection and emergency medical services.…" (App. 001422). The HEX did not address the testimony and evidence provided by the Captiva Island Fire Control District at the HEX hearing. The Chief of the Captiva Island Fire Control District, Jeff Pawul, testified and introduced into the record the Fire Control District's February 26, 2025 comment letter on the proposed rezoning. Chief Pawul, and the District's letter explained that:

a. "if the rezoning is approved, the Fire District will be adversely impacted due to the proposed changes to building heights."

b. "The District will not have the ground ladders or fire flows to provide a sufficient response to the upper floors of a building within the resort";

c. "an increase in units due to the … rezoning may also result in the need for the Fire District to increase staffing."

d. "the intensity of hotel space and timeshares creates a larger life safety and property risk for the visitors to the resort",

e. "[i]n addition to the building being lost if a fire occurs due to the inability to suppress fire on upper floors, lives may also be lost." (App. 004593 [CIFCD 2.26.25 letter]; App. 001273 - 001278 [HEX Tr. V. p. 213 line 19 – p. 215 line 5]).

Mr. Pawul recommended conditions upon any zoning approval to ensure the District's financial and physical ability to meet the increased demands on the District. (App. 001275 [HEX Tr. V5. p. 215 line 6 – p. 218 line 6]).

During the Applicant's rebuttal, the HEX suggested conditioning the rezoning approval on the payment of an impact fee to cover the cost on new equipment needed to serve the taller buildings the rezoning would authorize, and a condition that "you

can't go higher than what the Fire Department testified they could fight without a ladder truck ….” (App. 003611 [lines 14 - 20]; App. 003609 - 003613 [p. 54 line 10 - p. 58 line 24]).

Moments later an assistant county attorney entered the room, and recommended that the HEX not include such a condition on the approval. App. 003613 [HEX Tr. V9 p. 58 line 25 - p. 59 line 22].

No such condition was recommended or included in Resolution Z-25-005.

VIII. CONCLUSION: THE COURT SHOULD QUASH RESOLUTION Z-25-0051 BECAUSE IT VIOLATES THE COUNTY'S CRITERIA FOR APPROVAL.

Resolution Z-25-005 is the product of a violation of the Petitioners' rights to procedural due process, departs from the essential elements of law, and is not supported by competent substantial evidence that it complies with the governing criteria.

Resolution Z-25-005 does not meet the conditions of approval of a rezoning set forth in Code **Sec. 34-145(d)(4)a** which requires that a rezoning:

a) Complies with the Lee Plan;

b) Meets this Code and other applicable County regulations or qualifies for deviations;

c) Is compatible with existing and planned uses in the surrounding area; [...];

d) Will provide access sufficient to support the proposed development intensity;

e) The expected impacts on transportation facilities will be addressed by existing County regulations and conditions of approval;

f) Will not adversely affect environmentally critical or sensitive areas and natural resources; and

g) Will be served by urban services, defined in the Lee Plan, if located in a Future Urban area category.

2. Planned development rezonings. The Hearing Examiner must also find:

a) The proposed use or mix of uses is appropriate at the proposed location. [...]

c) If the application includes deviations pursuant to Section 34-373(a)(9), that each requested deviation:

1) Enhances the achievement of the objectives of the planned development; and

2) Protects the public health, safety and welfare. [...]"

Resolution Z-25-005 departs from the principles of fairness, and due process in quasi-judicial decisions. By denying the

Petitioners party status the County created an inherently unfair process, depriving Petitioners of the ability to present a complete case, cross-examine witnesses, and object in real time, while granting those privileges exclusively to the Applicant. The unique, complex, interwoven property interests, shared infrastructure, and vested rights tied to a longstanding common scheme of development required that the Petitioners be granted the same procedural rights as the Applicant.

Resolution Z-25-005 flouts the essential requirements of law by contravening key provisions of the County Code; violating the Code's mandates for basing density and intensity decisions on what the Comprehensive Plan requires and encourages for Captiva - the maintenance of its historic low density and intensity development patterns - which very intentionally limited South Seas Island Resort as a whole to 912 development units on 304 acres.

Deviations from the Code requirements were granted without proper authority over affected easements and properties.

Finally, the decision lacks support from competent substantial evidence needed to demonstrate sufficient sewer capacity or fire

service, as the Captiva Island Fire Control District explicitly warned of its inability to respond to taller buildings, heightened risks to life and property. These evidentiary failures required a denial of the rezoning under Code standards requiring demonstrated urban services and public safety.

For over half a century, property owners, residents, and the Captiva community have relied on the County's consistent enforcement of South Seas' master plan to preserve open space, limit density, and safeguard this fragile island's character and safety. Resolution Z-25-005 upends that reliance, granting a windfall to one owner at the expense of many, while exacerbating evacuation challenges, environmental strains, and infrastructure burdens. This Court must intervene to restore the rule of law and protect vested rights.

The Petitioners have demonstrated a preliminary basis for relief. The Court should order the Respondents to Show Cause why a Writ of Certiorari should not be issued quashing Resolution Z-25-005. The County’s decision resulted from its failures to provide due process, departed from the essential elements of law, and is unsupported by

competent substantial evidence, the Court should ultimately issue a Writ of Certiorari quashing Resolution Z-25-005, together with such other relief as is just and proper.

Respectfully submitted this 5th day of September 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-mail on this 5th day of September, 2025, to counsel as follows:

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.100(l), this Petition for Writ of Certiorari has been printed in Bookman Old Style with 14-point font, and contains 15,335 words. A Motion for Enlargement of Word Count is being filed contemporaneously with this Petition.

By: /s/ James D. Fox

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