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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA

MICHAEL DAVID TESTA, TRUSTEE OF THE M. DAVID TESTA REVOCABLE LIVING TRUST, DATED OCTOBER 25, 2017.

Petitioner,

Appellate Division
Case No. 22-AP-01

v.

TOWN OF JUPITER ISLAND, a Florida municipal corporation; the TOWN OF JUPITER ISLAND TOWN COMMISSION; the TOWN OF JUPITER ISLAND IMACT REVIEW COMMITTEE; and JUPITER ISLAND COMPOUND, LLC.

Respondents.
_____/

PETITIONER'S REPLY

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The Town Commission's Final Order, and underlying Impact Review Committee ("IRC") decision, are defective because they failed to afford procedural due process, failed to observe essential requirements of law, and failed to rely upon competent, substantial evidence. The Responses fail to rehabilitate these defects.

At the outset, it is useful to reiterate what is at issue. Respondent, Jupiter Island Compound, LLC ("JIC"), owns a split parcel located at 310 S. Beach Road:

App. 789. JIC is developing, on the parcel's western portion, a 9,747.41 square-foot residence and 2,236.92 square-foot "wellness pavilion." Unlike other 300-block owners, JIC also seeks to develop, on the parcel's beachfront portion, a 2,697.41 square-foot "accessory" house:

App. 10. This litigation concerns whether the Town lawfully approved this first-of-its-kind "accessory" house on the 300 block's otherwise pristine beachfront.

I. THE PROCESS THAT LED TO THE FINAL ORDER VIOLATED DUE PROCESS AND ESSENTIAL REQUIREMENTS OF LAW.

On August 17, 2021, the Town Commission voted 4-1 to grant Petitioner's appeal and overturn the IRC decision approving construction of the beach house. Mayor Pidot was the lone dissenter. The majority Commissioners provided substantial reasons for their decision. *See* App. 580-586 (Commissioner Heck); App. 587-89 (Commissioner Townsend).[1] Yet, for weeks after the August meeting, no final order issued. By the time of the next Commission meeting,

[1] JIC elides most of Commissioner Heck's careful reasoning and instead attempts to defame him, offering no record citations for its grossly misleading allegations. JIC Resp. 5 & n.2. JIC has waged a campaign of threats and litigation against public officials and residents who oppose its plans, and some targets, like Commissioner Heck, have likely concluded uncompensated public service is not worth the cost of combatting these scorched-earth tactics.

on September 13, 2021, Mayor Pidot still had not issued the order. Tellingly, the Town's Response leaves the Mayor's inaction unexplained. But there is an explanation: the Petition details how Mayor Pidot, the lone dissenter, was unhappy with the Commission's decision and engineered an unlawful process to reverse it. The Responses fail to demonstrate otherwise.

First, Respondents contend the delay in rendering the final order and in bringing the motion to reconsider was lawful because it complied with Robert's Rules of Order. *See* Town Resp. 37 ("any delay in rendering a written order … could never have denied Mr. Testa due process because the Town timely voted to reconsider its initial decision on the 310 appeal in accordance with Robert's Rules"); JIC Resp. 29 ("the Mayor was following its established procedures and the advice of Town Attorney, who himself cited Robert's Rules of Order on the proper procedures for a motion to reconsider"). But Robert's Rules provide that "[i]n a session of one day—such as an ordinary meeting of a club or a one-day convention—***the motion to Reconsider can only be made on the same day the vote to be reconsidered was taken***." ROBERT'S RULES OF ORDER NEWLY REVISED § 37:10(b) (12th ed. 2020) (emphasis added). Moreover, "[t]he effect

of the adoption of the motion to *Reconsider* is ***immediately*** to place before the assembly again the question on which the vote is to be reconsidered." *Id.* § 37:19 (emphasis added); *see also id.* § 37:9(5) (motion to reconsider "***opens to debate the merits of the question whose reconsideration is proposed***"). Yet, the Commission did not (1) move to reconsider on the same day the vote to be reconsidered was taken (August 17), and (2) did not immediately debate the merits of the IRC appeal once the motion carried, but instead held that debate months later, removing it even further from the same-day requirement. Thus, based on the very rules Respondents concede governed the motion to reconsider, the Town Commission failed to comply with the essential requirements of law. *See Wolfman, Inc. v. City of New Orleans*, 874 So. 2d 261, 264-65 (La.App. 4 Cir. 2004) (under Robert's Rules local government motion to reconsider invalid because not made same day as initial vote).

The reason for the same-day rule for a motion to reconsider is "[t]o provide … protection against abuse," such as by a member who lost a vote and is seeks to delay action enacted by a majority. ROBERT'S RULES § 37.8. That is *exactly* what happened here, as Mayor Pidot, for *four weeks*, delayed issuing a final order memorializing the

August vote (that he lost) so he could reach the next Commission meeting and propose a motion to *indefinitely* delay issuing that order. App. 723-24. When that gambit failed, Mayor Pidot engineered the untimely motion to reconsider. Pet. 14-15. By comparison, Mayor Pidot took only two weeks (during the Christmas holiday) to issue the final order memorializing the equally divided December vote that achieved his desired outcome. This obvious gamesmanship violated not just the essential requirements of the Commission's own procedural rules, but also due process because it denied Petitioner "basic fairness [that] must be adhered to in order to afford due process." *Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). A bedrock tenant of due process is that once a court (or quasi-judicial body) establishes rules, it must follow them. *See Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010) ("If courts are to require that others follow regular procedures, courts must do so as well."). As JIC recognizes, the Town Commission is entitled "to adopt its own rules of procedure and order of business." JIC Resp. 28-29; Jupiter Island Town Charter § 3.6(b). The Town chose Robert's

Rules. Having done so, it cannot now selectively claim the benefit of those rules.[2]

Moreover, the Town's resort to Robert's Rules to defend the motion to reconsider fails because even the basic form of the motion did not comply. Robert's Rules explains that "[t]his motion may be made in forms such as the following: … 'I move to reconsider the vote on the resolution relating to [subject]. I voted for … the resolution.'" ROBERT'S RULES § 37:36 (brackets added). The "chair immediately states the question as follows: 'It is moved and seconded to reconsider the vote on the following resolution [reading it].'" *Id.* (brackets in original). This is a far cry from what occurred at the September meeting:

> MAYOR PIDOT: So you have made a motion?
>
> VICE MAYOR COLLINS: ***Sort of.***
>
> MAYOR PIDOT: No, not sort of. The record has to show you have made a motion to reconsider the determination by this commission in its August meeting on the appeal from the IRC determination with respect to 310. Is that correct? I think I said it.

[2] A quasi-judicial body's "inherent power to reconsider its ruling," *Smull v. Town of Jupiter*, 854 So. 2d 780 (Fla. 4th DCA 2003), cannot save the Town here because the Commission adopted specific procedural rules that it must follow.

> VICE MAYOR COLLINS: All right.
>
> MAYOR PIDOT: Do I have the right property?
>
> MR. RANDOLPH: Yes.
>
> MAYOR PIDOT: And separately—and I appreciate your comment about a plea, but ***I don't want to put that into the motion*** because that's not part of the motion. But it's certainly appreciated. And I would join you in that plea. Is there a second of the motion?

App. 735 (Tr. 222:18-223:9) (emphasis added). Vice Mayor Collins, part of the August majority, never made the motion as required by Robert's Rules. As Mayor Pidot recognized, "sort of" is not a motion. And Mayor Pidot gave up the game when he explained "***I*** don't want to put that into the motion." It was not his motion to craft or make, yet that is exactly what happened.

Second, the Town claims it was permissible for the Commission to vote on the motion to reconsider without notice because the state Sunshine Law does not require every item considered at a meeting to appear on an advanced agenda. Town Resp. 38. JIC is even more general, citing to national treatises. JIC Resp. 27-28. But neither the Sunshine Law nor non-Florida treatises control the notice required here. As Respondents recognize by embracing *Smull*, the Commission was acting in its quasi-judicial capacity at all times

when addressing the IRC appeal. The Town's own Land Development Regulations ("LDR") establish the rules for its quasi-judicial review, and those rules require notice to the parties. *See* LDR Art. X, Div. VIII, § 8.03 ("The Town Commission shall, prior to hearing an appeal, provide notice to the appellant of the guidelines under which the Commission shall consider the appeal.").

Third, the Town tries to rehabilitate Mayor Pidot's actions—which call into question his impartiality and the fairness of the motion-to-reconsider procedure—by claiming the Mayor was following Robert's Rules' advice that a minority member "'should try, if there is time or opportunity, to persuade someone who voted with the prevailing side to make such a motion.'" Town Resp. 42 (quoting ROBERT'S RULES § 37.10(a)). But the Town omits the next sentence of the Rule: "he can obtain the floor ***while no business is pending*** and ***briefly state his reasons*** for hoping that a reconsideration will be moved, provided that this ***does not run into debate***." ROBERTS RULE'S § 37.10(a) (emphasis added). This is not what Mayor Pidot did. He purposely delayed issuing the order so that he could reach the next Commission meeting. He then commandeered that meeting, while other business was pending, to repeatedly and at length badger

his fellow commissioners with various proposals to avoid issuing the final order. *See* Pet. 8-11, 18-19.

JIC's attempt to rehabilitate the Mayor's actions is even weaker. As explained, the Mayor's actions do not reveal he was simply engaging in political give-and-take that characterizes "every city council … in America." JIC Resp. 29. The Mayor was not serving as a politician; as Respondents admit, he was serving as a quasi-judicial officer who had a duty to act impartially and fairly towards all parties. His purposeful delay, violation of the Town's own rules, and repeated badgering of his fellow quasi-judicial officers shows that he failed to afford Petitioner that basic right.

***

Because the motion to reconsider was unlawful, it must be vacated and the August decision restored, with instructions to the Town to enter the appropriate final order memorializing that decision.

II. THE TOWN FAILED TO FOLLOW ESSENTIAL REQUIREMENTS OF LAW.

A. The Town Offers an Abrogated Standard of Review.

The Town seeks "great deference" for its interpretation of ordinances. Town Resp. 45-47. But the case cited, *Pruitt v. Sands*,

84 So. 3d 1267 (Fla. 4th DCA 2012), relies on decisions granting deference to interpretations by state agencies. *See id.* at 1268. In 2018, Florida's electorate enacted a constitutional amendment that flatly bans such deference. *See* Art. V, § 21, Fla. Const. The Town cannot cite any case holding that *Pruitt* is still good law, and the Fourth DCA has recognized the deference cases upon which *Pruitt* relies are no longer good law. *See G.R. v. Agency for Persons with Disabilities,* 315 So. 3d 107, 108 (Fla. 4th DCA 2020) ("the previously afforded deference to the agency's interpretation of the statutes it implements has been abolished; our review is de novo.").

B. The Town Departed from Essential Requirements of Law because the IRC Concluded Ordinance 376 *Required* It to Approve Some Form of Development on the Beachfront.[3]

The record shows the IRC incorrectly concluded Ordinance 376 required it to approve some type of development on the eastern

[3] In separate litigation, in which JIC intervened, Petitioner contends Ordinance 376 is void ab initio under section 166.041(3), Fla. Stat. The trial court ruled against Petitioner and he appealed. *See Testa v. Town of Jupiter Island*, No. 2021-CA-000599 (Fla. 19th Cir. Ct.), *on appeal*, No. 4D22-0432 Fla. 4th DCA). Should the Fourth DCA void Ordinance 376, the prior Waterfront Setback Line will be restored and there will be no legal basis for the IRC's approval of the proposed development.

portion of the 310 Property. *See* Pet. 26-29. The Town admits as much. *See* Town Resp. 50 ("[T]he reluctance arose from some [IRC] members' regret that they were bound by Ordinance 376 and the revised WFSBL."). As one IRC member explained: "I feel like … that if persons have purchased properties with the idea in mind that they will be allowed to build a beach house, at this point it's not up to us to deny something like this." App. 406 (Tr. 114-15).

But the LDRs require no such thing. The IRC is required to approve an application *only* if the standards for impact review are met. *See* LDR Art. X, Div. II, § 2.02. Such a misapplication of an applicable legal standard is a departure from the essential requirements of law. Pet. 26-29.

The Town appears to contend that outright denial of an impact review application is not an option under the LDRs. Town Resp. 49-50. But the Town can point to no LDR provision saying this, nor can it point to any historical practice showing this is the Town's

longstanding interpretation.[4] To the contrary, at the August 17 meeting, one Town commissioner explained:

> Importantly, the code does not say that the applicants must be permitted to build something. These provisions were adopted years ago and apply equally to all properties in Town. The code has recognized for years that for all properties in Town, an otherwise buildable footprint can exist by setbacks on a portion of the property but still not qualify for development if it wasn't designed, located, configured, landscaped, and developed to avoid negative impacts on the neighboring properties or the Town as a whole.

App. 581 (Tr. 78:1-12). An agency interpretation invented for litigation and inconsistent with past practice is not entitled to deference. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019).

Moreover, the IRC misunderstood its legal obligation to enforce LDR Article X, Div. II, Section 2.00, which requires that "if the proposed building … cannot be designed, located, configured, landscaped and developed in a manner that satisfies" impact-review standards, then an applicant "may not be entitled to develop all of the floor area and/or building height that are otherwise permitted." Hence, in certain scenarios, it does not matter how many changes an

[4] JIC offers no response on this point and, accordingly, concedes the point.

applicant makes; if a proposed building cannot be designed in a way that will not threaten the public interest or the surrounding neighborhood character—for example, the proposed construction of a house in an undeveloped area of beachfront—then the applicant can be prohibited from developing *any* floor area not meeting those standards. That is what the governing law says, yet the IRC was under the misconception that it was legally bound to approve some development pursuant to Ordinance 376. App. 406 (Tr. 114:9-14).

Finally, even if the Town were correct that the IRC is limited to simply requiring applicants not to "develop all of the floor area" proposed in an application, Town Resp. 50, the IRC would still have erred in assuming that it could not eliminate all of the floor area on the beachfront side of the split parcel, while still allowing substantial development (12,000+ square feet) on the western portion (like every other 300-block parcel).

C. The Town Departed from Essential Requirements of Law by Improperly Constricting the Definition of Public Interest.

JIC's explanation for how it met the Impact Review standard of "not adversely affect[ing] the public interest" focused only on removal of non-native species, buffering, and reduction of 161 square feet of

from 2,858 square-foot proposal. Pet. 24. That the IRC approved the Application based on this thin explanation means the IRC interpreted the public-interest standard to be so narrowly cabined. As explained, Pet. 23-26, the public-interest standard is far broader.

Public-interest analysis includes "implementing the Jupiter Island Comprehensive Plan" and "balancing the interest of the general public in the town with that of the individual property owners." LDR Art. 1, Div. I, § 1.01. The "Town Vision" in the Comprehensive Plan is to ensure a community where "the beauty of nature will always dominate the presence of man." App. 339. The Comprehensive Plan describes the Town as a "low-density residential community that seeks to preserve natural resources ***to the maximum extent possible***." Jupiter Island Comp. Plan.[5] Critically, the Comprehensive Plan recognizes that, under this vision, the Town "is virtually developed, and ***the only areas for potential development are located on 'in-fill' parcels.***" *Id.* There is no

[5] The Comprehensive Plan is part of the Code of Ordinances, https://library.municode.com/fl/jupiter_island/codes/code_of_ordinances?nodeId=12535.

record evidence that the IRC applied these defined elements of the public interest, and Respondents point to none.

Moreover, the Comprehensive Plan includes a Coastal Management Element that seeks to "restrict development activities where such activities would damage or destroy coastal resources." *Id.* "The protection of natural resources from the impacts of development and protection of the residents from natural disaster and sea level rise" are "*primary concerns*." *Id.* A specific goal is "to restrict development which would damage or destroy the natural … resources of the coastal area," and to prohibit "removal of existing dune vegetation." *Id.* In short, environmental destruction stemming from a proposed development implicates the public interest and was a necessary subject for IRC consideration. *See Rural New Town, Inc. v. Palm Beach Cnty.*, 315 So. 2d 478, 480 (Fla. 4th DCA 1975).

Residents testified that JIC's proposed development "adversely affects the public interest" by destroying the existing dune system through the "removal of beachfront vegetation," App. 404 (Tr. 109:19-22), and the alteration of beach topography in such a way that increases the total impermeable area and thereby increases the risk of flooding for surrounding dwellings, App. 345. Although these

concerns about potential environmental impacts were raised, there is no evidence that the IRC gave them consideration as part of the public-interest standard. Accordingly, the IRC misapplied the Town's LDRs and departed from the essential requirements of law. Approval of an application that fails to satisfy the Town's legal requirements is "synonymous with a failure to apply 'the correct law.'" *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004) (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995)).

In response, the Town briefly argues that anything broader than the limited public-interest factors identified in the original JIC Application are the province of actors other than the IRC. Town Resp. 49. But the Town cannot point to anything in the LDRs that so limits the "public interest" to these random elements, and the Town fails to address its own Comprehensive Plan and LDR provisions that show the public interest standard encompasses far more.[6] As one Commissioner explained at the August 17, 2021 meeting, the public-interest standard is capacious and should not have been artificially cabined by the IRC:

[6] For its part, JIC offers *no* response to this point and thus concedes the issue.

> The opposing residents have established a basis of fact both individually and collectively, citing numerous substantive reasons, including environmental, contrary to code[,] and contrary to the comprehensive plan. The code empowers residents to voice their opinions and provide evidence, and the residents have produced competent, substantial evidence of adverse effects to the public interest and nonconformity with the neighborhood character. All such competent evidence should be considered in the evaluation of whether an applicant has met the standards, and it should be evaluated against whatever evidence the applicant has or has not produced.

App. 585 (Tr. 95:24-96:14).

III. THE TOWN'S DECISION WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.[7]

Respondents wrongly contend that Petitioner asks this Court to reweigh the evidence considered by the IRC. The question, however, is whether JIC *submitted* to the IRC competent, substantial evidence that could support a finding that the Impact Review standards were met. *Flowers Baking Co. v. City of Melbourne*, 537 So. 2d 1040, 1041 (Fla. 5th DCA 1989). It did not.

The entirety of JIC's public-interest submission is recounted at page 24 of the Petition. This meager presentation ignores much of

[7] Because the Responses include no effective rebuttal of the Petition's arguments regarding the lack of evidence supporting a finding of consistency with surrounding neighborhood character, Petitioner relies on the Petition.

what comprises the public interest, and thus the IRC decision could not have been supported by competent, substantial evidence.

First, there is nothing in the record showing that the proposed "accessory" house on the pristine beachfront of the 300 block is "in-fill," and thus the IRC had no evidence before it that the Comprehensive Plan's restriction of "potential development" to such parcels has been met. Likewise, there is no evidence of consistency with the Comprehensive Plan's requirement "to preserve natural resources ***to the maximum extent possible***." As one resident explained to the IRC: "There is no way of getting around where it is being built. It is being built on the dunes. An incredibly narrow, fragile, pristine dune.... [O]nce we start letting this happen, it will open up a Pandora's box, and the historical identity and the face of this island will be changed forever and we can't get [it] back." App. 401 (Tr. 94:5-8, 15-20). Because evaluation of consistency with the Comprehensive Plan is part of the public-interest determination, that standard could not possibly have been supported by competent, substantial evidence.

Second, JIC's evidence (and the "expert" evidence upon which the Town relies, Town Resp. 56) regarding reduction in square-

footage, removing a story, removing a curb cut, reducing driveway width, adding berms, and enhancing landscape buffers are all geared toward *other* impact-review standards, not toward the public-interest standard found in section 2.02(A). *See* LDR Art. X, Div. II., § 2.02 (C) ("The visibility of the proposed development … is minimized…."); *id.* § 2.02(I) ("The proposed development is designed and located so that all buildings are screened from view from adjacent properties and public roads…."). If these elements could satisfy the public-interest standard, then that standard would be redundant and meaningless. *See Recovery Racing, LLC v. DHSMV*, 192 So. 3d 665, 669 (Fla. 4th DCA 2016) (courts "are required to give effect to every … part of the statute if possible, and words in a statute should not be construed as mere surplusage").

Third, regarding environment and ecology, JIC presented no evidence that the modification of natural dune topography, the introduction of a large impermeable area, and the creation of a berm system will not disrupt the natural and historic storm-water patterns on, and surrounding, the property.

Fourth, regarding public safety, Applicant presented no evidence that hardscape on natural dunes will not cause flooding or washout of South Beach Road.

Fifth, regarding beach renourishment, Applicant presented no evidence regarding the soundness of permanent construction along beachfront that is continuously eroding, that is temporary in existence unless supplied by publicly funded sand renourishment, and that is now open to application for development only because of past public funding of renourishment. This lack of evidence is especially salient because JIC conceded that "[t]he beach comes and goes" based on renourishment. App. 388 (Tr. 44:8-18).

Sixth, as Commissioner Heck explained at the August 17 meeting: "[T]he applicant [did] not submit[] any competent, substantial evidence from any residents in favor of the proposal, nor any community support for the project." App. 582 (Tr. 84:11-20). While Respondents seek to ignore this as mere "public opinion," the very case cited by the Town notes that public participation in zoning decisions gives "interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance" is met. *Pollard v. Palm Beach County*, 560

So. 2d 1358, 1360 (Fla. 4th DCA 1990). *See also Marion Cnty. v. Priest*, 786 So. 2d 623, 626-27 (Fla. 5th DCA 2001) ("citizen testimony was perfectly admissible and, because it was fact based, could constitute substantial competent evidence"). Here, "the 46 strongly-stated letters in opposition," App. 582, were not just a straw poll, but rather highlighted the substantial gaps in evidence and the countervailing considerations.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ quashing the Final Order and remanding for entry of an order granting Petitioner's appeal.

Dated: May 10, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the size, font, and formatting requirements of Rule 9.045, Florida Rules of Appellate Procedure, and with the word limit in Rule 9.100(k), Florida Rules of Appellate Procedure, because it contains 3996 words, excluding the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block.

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CERTIFICATE OF SERVICE

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