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

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

Petitioners,

vs.

CITY OF ST. PETE BEACH, FLORIDA, a Political Subdivision of the State of Florida, CP ST. PETE, LLC, a Foreign limited liability company,

Respondents.

Case No.:

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

PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Code Sections

PETITION FOR WRIT OF CERTIORARI

Petitioner, Seamark, Inc., ("Seamark") a Florida Not for Profit Corporation, a Condominium ("Seamark"), Protect St. Pete Beach Advocacy Group, a Florida Not For Profit Corporation ("PSPB"), and Ken Barnes, an individual ("Barnes") (collectively "Petitioners"), respectfully file this petition for writ of certiorari ("Petition"), by and through their undersigned attorneys, and petition the Court to issue a Writ of Certiorari quashing a quasi-judicial decision ("Granting a Conditional Use Permit") of the City Commission of the CITY OF ST. PETE BEACH (the "City"), Resolution 2023-21, ("Resolution"), rendered on March 5, 2024, approving a conditional use permit: to allow construction of a 290 temporary lodging unit with rooftop features; a 130 unit temporary lodging unit hotel with rooftop features, along with ancillary and accessory structures, and permit a rooftop and dining and drinking amenity that includes the playing of outdoor music, in connection with an Application for a Conditional Use Permit #23053 for the redevelopment of the Sirata, St. Pete Beach ("Redevelopment Project"). The City Commission ("Commission") failed to afford procedural due process, departed from the essential requirements of law, and failed to support its decision with competent substantial evidence.

As required under rule 9.100(g), this petition contains: (1) the basis for

invoking the jurisdiction of this Court; (2) the facts upon which Petitioners rely; (3) the nature of the relief sought; and (4) argument in support of the petition with appropriate citations of authority. For these reasons, the Court should issue a writ of certiorari quashing Resolution 2023-21.

THE PARTIES

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

2. The Common Elements of the Seamark are defined within its Adopted Amended and Restated Declaration of Condominium Ownership of Seamark, Inc., a Condominium. A.00057-129.

3. Petitioner, Seamark, through its President Tim Yarnell, filed a letter of objection to the proposed redevelopment project, and notice of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant. A.00017.

4. Seamark membership consists of any record owner of a unit in Seamark, Inc. A.00057-129.

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

Mr. Barnes appeared on behalf of Seamark, and objected during the Commission hearing on February 21, 2024, and appeared at the Commission hearing on February 27, 2024. T. 00290 at line 19– T.00307 at line 9.

6. Petitioner PSPB is a Florida not-for profit corporation composed of residents who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.00150.

7. PSPB was formed by St. Pete Beach residents who are concerned about overdevelopment and the negative impacts of increasing development density above sustainable levels. PSPB's purpose is based on the responsibility to ensure the St. Pete Beach community prioritizes environmental stewardship, preserves history and family friendly atmosphere. A.000149.

8. Eligibility of membership is open to open to residents of St Pete Beach who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.000150.

9. PSPB's director JoLynn Lawson addressed the City Commission on February 21, 2024, and provided petitions in objection. T. 00403 at

lines14-25, T. 00404 at lines 1-2. A.-02487 to A.-02535. PSPB also provided oral legal arguments and testimony in objection at the Planning Commission Hearing on November 13, 2023 and the City Commission hearing on February 21, 2024 (T. 00324 at lines 18-25 – T.00348 at lines 1-11) and submitted extensive written objections submitted into the record, including their attorney's legal analysis of the Application's flaws, a report by land use planner Charles Gauthier, and a report by traffic engineer Charles Andrew Roark, PE reviewing the Applicant's traffic study. A.02432-2486; A[redacted]-00301.

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

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

12. Respondent, CP St. Pete, LLC is a foreign limited liability company with its principal place of business in Kentucky.

JURISDICTION AND VENUE

13. This is an action seeking certiorari review of the City of St. Pete Beach's Resolution No. 2023-21 ("Resolution"), rendered on March 5, 2024,

which approved a conditional use permit, to allow construction of a 290 temporary lodging unit, ten story tall hotel, with rooftop dining and drinking amenity that includes the playing of outdoor music ("Redevelopment Project") by CP St. Pete, LLC.

14. Petitioners seek issuance of a writ of certiorari quashing, setting aside, reversing or otherwise invalidating the Resolution.

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

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

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

TIMELINESS

A party must file a petition for a writ of certiorari within thirty days of rendition of the order on review. Fla. R. App. P. 9.100(c)(1). An order is

rendered when a signed, written order is filed with the clerk of the lower tribunal. Fla. R. App. P. 9.020(h). Resolution 2023-21 was stamped as filed with the Clerk on March 5, 2024. Therefore, the petition in this action is timely filed on April 3, 2024. Fla. R. App. P. 9.420(e).

FACTUAL BACKGROUND

A. Conditional Use Application

The Developer, CP ST. Pete, LLC, on June 16, 2023, filed an application for a Conditional Use Permit #23053 seeking review of the proposed redevelopment project. The subject property currently consists of a 382-unit Resort known as the Sirata. A.00308. The subject property consists of 15.45 acres, 8.62 landward of the Coastal Construction Control Line, located at 5300, 5350, 5380, & 5390 Gulf Blvd in the Large Resort district in the Community Redevelopment District. A.00307.

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

a conditional use permit pursuant to Division 4 of this Code. Section 39.6 (p), LDC.

Section 4.4(a) provides,

> When considering an application for approval of a conditional use, the city commission review shall consider the following standards:
>
> (1) Whether the conditional use is consistent with the goals, objectives, and policies of the Comprehensive Plan, any adopted special area plan and these regulations;
>
> (2) Whether the proposed use will be **compatible with the character of the existing area,** including existing structures and structures under construction, existing public facilities and public facilities under construction, and residential, commercial and/or service facilities available within the existing area. More specifically:
>
> a. **Whether the overall appearance and function of the area will be significantly affected consideration shall be given to the existence of other uses in the area**, based on the number, size, and location of the uses and the intensity and scale of the proposed and existing uses in the area;
>
> b. Whether the application will preserve any city, state or federally designated historic, scenic, archaeological, or cultural resources;
>
> c. Whether the application will be compatible with adjacent development, if any, based on characteristics such as size, building style and scale; or whether such incompatibilities are mitigated through such means as screening,

landscaping, setbacks, and other design features; and

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

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

(4) Whether the minimum off-street parking area required and the amount of space needed for the loading and unloading of trucks, if applicable, will be provided and will function properly and safely;

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

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

(7) Whether the proposed use complies with all additional standards imposed on it by the particular provision of these regulations authorizing such use

> and by all other applicable requirements of the regulations of the City of St. Pete Beach.

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

> It is the intent of the city that the aesthetic and functional characteristics of new development shall be regulated to insure consistency with the stated objectives of city redevelopment policy and that all new development is undertaken in a manner consistent with the best interests of the community. **In instances of development projects which are of significant density or intensity, the complexity of the construction and operation of such projects require a higher than usual level of public scrutiny and technical review prior to permitting, and necessitate the articulation of specific requirements on the part of both the developer and the city to ensure that such developments are in harmony with community character and consistent with the policies of the community redevelopment plan. The provisions of this section are intended to supplement the stated requirements of this division and other divisions of the Land Development Code and provide for the incorporation of provisions into conditional use approvals which address issues of public concern**.

STANDARD OF REVIEW

On certiorari review, the circuit court must determine whether procedural due process was afforded, whether the essential requirements of law were observed, and whether the decision under review was supported by competent substantial evidence. *See, Broward Cty. v. G.B.V. Int'l, Ltd*.,

787 So. 2d 838, 843 (Fla. 2001); *Mann v. Bd. of Cty. Com'rs*, 830 So. 2d 144 (Fla. 5th DCA 2002). Review of a decision by certiorari at the circuit court level is a matter of right, *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198 (Fla. 2003), and the circuit court must review the decision with strict scrutiny. *Bd. of Cty. Com'rs of Brevard Cty. v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Hernando Cty. Bd. of Cty. Com'rs v. S.A. Williams Corp.*, 630 So. 2d 1155 (Fla. 5th DCA 1994); *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 530 (Fla. 1995).

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

Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding 'if the parties are provided notice of the hearing and an opportunity to be heard.'" *A & S Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019). (citations omitted).

"The proceeding must be 'essentially fair.'" *Id*. However, "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved." *Carillon v. Seminole County*, 45 So. 3d 7, 9-10 (Fla. 5th DCA 2010). "In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

While courts have recognized that strict rules of evidence and procedure do not control quasi-judicial proceedings, this does not mean that these proceedings are informal, and a commission may allow anything goes or where results can be politically motivated, rather than based on the rule of law and established criteria. See, e.g., *Seminole Entertainment, Inc. v. City of Castleberry, Florida*, 813 So. 2d 186 (Fla. 5th DCA 2002). Courts have soundly rejected this idea. See, e.g., *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996 (Fla. 2d DCA 1993) (quasi-judicial decisions should be "isolated as far as is possible from the more politicized activities of local government"); *City of Apopka v. Orange County*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (quasi-judicial decisions must be based on applying published legal criteria to admitted evidence, rather than subjective "polling" of nearby residents). When a local-government decision is quasi-

judicial, minimum levels of procedural due process still apply. *Miami-Dade County v. Reyes*, 772 So. 2d 24 (Fla. 3d DCA 2000).

Departure From the Essential Requirements of Law

A "departure from the essential requirements of the law" for purposes of first-tier certiorari review can be "no more than the same level of error that would require reversal on a direct appeal - a substantive or procedural error that was not harmless error." *Patel v. Gadsden Cnty*., 20 Fla. L. Weekly Supp. 124 (Fla. 2d Cir. Ct. Sept. 14, 2012). A "departure from the essential requirements of law" occurs when a lower tribunal fails to apply or adhere to the plain language of a statute or ordinance. *See Justice Admin. Comm'n v. Peterson*, 989 So. 2d 663, 665 (Fla. 2d DCA 2008).

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

DCA 2019). Failure to apply binding case law constitutes a classic example of a departure from clearly established law. *Dept. of Highway Safety & Motor Vehicles v. Chakrin*, 304 So. 3d 822 (Fla. 2d DCA 2020).

Competent Substantial Evidence

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). It is well established, however, that conclusory testimony, including from an expert witness, does not constitute competent substantial evidence. *See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So. 2d 202, 204 (Fla. 3d DCA 2003) ("Generalized statements ... even those from an expert, should be disregarded").

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

STANDING

Petitioners Seamark and Ken Barnes are the direct neighboring Condominium and property owner to the proposed Redevelopment Project by CP St. Pete, LLC ("Developer/Applicant"). PSPB is a non-profit

organization composed of residents who live in close vicinity to Gulf Boulevard between 60th and 52nd Avenues directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. At the subject hearings, Petitioners separately appeared and objected to the granting of the Conditional Use to preserve the arguments contained herein. In fact, Petitioner's Seamark and PSPB submitted separate notices of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant. A.00017; A.00130-144.

The record is replete with testimony from City Staff, City Commissioners, as well as experts recognizing the impact of the proposed Conditional Use on the Seamark. Specifically, the following excerpts from the February 21, 2024, hearing: *Most significant impact to Seamark Shading*. T. 00030 at lines 18-24; *Shade Study Seamark is affected*. T. 00118 at lines 9-10.; *Seamark has the unreasonable adverse impact, with a litany of problems.* T. 00331 at lines 13-25; T. 00332 at lines 1-5.

Additionally, from the February 27, 2024, hearing: *I think you need to take into consideration the Seamark itself*. T. 00531 at lines 2-3; *I am trying to reduce the impact on the northern property, Seamark.* T. 00636 at lines 2-3; *Seamark view*. T. 00667 at lines 8-11; *explain to residents of the Seamark,*

kill your view, kill your property value. T. 00671 at lines 24-25; T. 00672 at lines 1-3; *put the shorter building next to the Seamark*. T. 00683 at lines 10-19; *Maximizing impact to Seamark.* T. 00687 at lines 6-15; *undisputed impact to Seamark.* T. 00713 at lines 24-25.

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

Second *Renard* Test

Petitioners Seamark, Barnes, and PSPB assert that the City failed to require the Developer to present competent substantial evidence in support of the Application, which is a decision based on the unreasonable exercise of legislative power. "An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question." *Renard,*

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

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

Here, Petitioners, Seamark and Ken Barnes meet the second test of *Renard* as an association and organization dedicated to protecting the interests of its members who live in close proximity to the proposed

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

PSPB is a group dedicated to ensuring that planning and development occur in a way that preserves the local environment and community in the community, substantially composed of members who individually have standing." A.130-134. PSPB's land use planner Charles Gauthier provided written testimony as to the special impact of the Sirata development on the overall appearance and function of the area, and block customary scenic

views, interfere with natural air movements, cast shadows, worsen peak season congestion, reduce safety, and result in beach crowding. A.00171; A.00179.

Third *Renard* Test

Petitioners Seamark, Barnes, and PSPB also assert that the Resolution is void as improperly enacted based on departures from the essential requirements of law and failure to afford the Petitioners procedural due process. The third test in *Renard* provides, "any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an [void] ordinance." *Id.*; *See also Parsons v. City of Jacksonville*, 295 So. 3d 892, 895 (Fla. 1st DCA 2020). No special injury is required for a party who attacks a void ordinance. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); *see also Rhodes v. City of Homestead*, 248 So. 2d 674, 674–675 (Fla. 3d DCA 1971).

Florida courts recognize standing for citizen groups to challenge void ordinances under this test. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); (granting standing to a nonprofit citizens association composed of local Upper Keys residents who alleged a zoning variance was illegally enacted, and holding that no special damages needed to be alleged); s*ee also Save Brickell Ave., Inc. v. City of Miami*, 395

So. 2d 246, 247 (Fla. 3d DCA 1981) (Corporation devoted to safeguarding zoning of area was "an affected citizen" which had standing to attack zoning resolution on the ground it was void). Courts apply the third Renard test to "any asserted basis for the conclusion that the enactment in question is 'void.'" *City of Miami v. Save Brickell Ave., Inc.,* 426 So. 2d 1100, 1103 (Fla. 3d DCA 1983). Like *Upper Key's Citizens Ass'n* and *Save Brickell Ave*., PSPB is a nonprofit citizens group composed of members who live within a few blocks of the proposed development who are directly impacted by the potential transformation of the beauty, hotelscape and infrastructure on Gulf Boulevard. A.00149-150. PSPB's purpose is to ensure the community "prioritizes environmental stewardship, preserves our history, and family friendly atmosphere," Consequently, all Petitioners have standing under the third *Renard* test.

ARGUMENT

The substantive errors that occurred regarding the City Commission's February 27, 2024, approval of Resolution 2023-21, are not harmless.

A. Failed to afford procedural due process by: (1) Failing to consider and vote on Seamark and PSPB's Notice and Request for Intervenor/Affected Party status; (2) Each Commissioner's failure to comply with 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach

Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991, by failing to adequately disclose the subject of the communications, and the identity of the person, group or entity with whom the communication took place; (3) Each Commissioner's failure to comply with 286.0115 (C) (4), *Florida Statutes* by failing to make the disclosure's before or during the public portion of the Quasi-Judicial hearing at which the vote is taken; (4) Commission's failure to allow public participation at the February 27, 2024, hearing, when the hearing went beyond the mere deliberations and vote of the Commission; (5) Following the closing of the public hearing on February 21, 2024, Commissioner Marriott met with the Developer's Counsel, prior to the February 27, 2024, hearing and failed to disclose the substance of those discussions;

B. Departed from the essential requirements of law by: (1) City failing to comply with Section 4.2(e); which requires revised conditional use applications with new data and information to be subject to the same stages of review as the initial application; (2) City failed to comply with Section 3.16(C)(1), St. Pete Beach Code of Ordinances, which mandates that the City Manager "Shall, when a violation has been determined to exist: (1) refrain from issuing any subsequent development approvals for the developer until the violation has been corrected, here it is uncontroverted,

and the record reflects that the Development Project site is in violation of the Turtle lighting requirements; (3) An unelected City Commission voted on the Application, in violation of Fla. Const. art. VIII, § 2 and Section 4.7, LDC; (4) City Commission ignored and declared unenforceable legislated criteria under Section 4.4 and instead relied on information irrelevant to published criteria; (5) Developer's Counsel artificially modified and restricted the standard to assess impacts to surrounding views under Section 4.12 and Section 4.4.

C. Is not supported by competent substantial evidence where the record establishes, as to Petitioners Seamark and Ken Barnes, that: (1) The Commission failed to support its decision with evidentiary support for each criteria required by the City's published code for the approval of a conditional use; (2) The Commission's approval based upon the Developer's attorney's threat of utilizing the Live Local Act as Plan B if the conditional use is not approved; (3) The record is completely devoid of any evidence to support the reduction of the 30-foot minimum buffer as required in Section 35.13 of the City's Land Development Code; (4) Developer's traffic study is legally flawed as the trip generation is inaccurate and the miscalculation impacts the entire traffic analysis; and (5) City and Developer failed to provide any evidentiary support for Section 35.1 Large Resort District requirement for full-

service integrated resorts.

Consequently, this Court should issue a writ of certiorari quashing Resolution 2023-21.

I. THE COMMISSION FAILED TO AFFORD PETITIONERS PROCEDURAL DUE PROCESS

As to the first prong of the three-part test, under the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution, the requirements of procedural due process are reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson*, 464 So.2d 158, 164 (Fla. 2d DCA 1985). As such, "quasi-judicial hearings require a hearing upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process." *Walgreen Co. v. Polk County*, 524 So.2d 1119, 1120 (Fla. 2d DCA 1988).

A. Intervenor/Affected Party Status

The Commission failed to afford procedural due process by failing to consider and vote on Seamark and PSPB's Notice and Request for Intervenor/Affected Party status. On February 20, 2024, Seamark hand delivered to the City's Clerk, as well as emailed to the Mayor and City Commissioner's it's notice of filing as a party intervenor/adversely affected party requesting the same rights and privileges afforded the applicant. A.-

00017.Additionally, on February 16, 2024, PSPB, submitted to the Mayor and City Commission a request for Party Intervenor status. A.-00130 – A.-00144..

As discussed under the Standing section above, the record is replete with testimony from City Staff, City Commissioners, as well as experts recognizing the impact of the proposed Conditional Use on the Seamark. The fact that Seamark was denied Intervenor/Affected party status belies logic*. See transcript citations for the February 21, 2024, and February 27, 2024, hearings cited above*.

At the February 21, 2024, hearing, the City Attorney stated that "the city code itself does not have any criteria for which to designate somebody as an intervenor party or an affected party or an interested party. So therefore I recommend that you not try to make up any kind of procedure or criteria for doing that." T. 00008 at lines 10-14. The City Attorney reiterated throughout the hearing that he wanted to remind the Commission that Seamark and PSPB are not party intervenors. T. 00076 at lines 6-13; T. 00321 at lines 6-13; T. 00348 at lines 22-23; T. 00349 at lines 16-18.

Despite the City Attorney's remarks, Section 2-66(b) of the City's Code of Ordinances, clearly contemplates the ability to afford an affected party, party intervenor status. Furthermore, during the public portion of the hearing,

the City Attorney warned the Developer's attorney (Jessica Icerman) that if she sought to cross examine PSPB's expert, she would do so at her peril, as it might afford them intervenor status. T. 00350 at lines 1-25; T. 00351 at lines 1-25. Ms. Icerman cited to both the *Jennings* case and the *Carrillon* case. T. 00350 at lines 21-25.

The *Carrillion* case, in footnote 1, cites to the *Hirt v. Polk County Bd. Of County Comm'rs*, 578 So.2d 415 (Fla. 2d DCA 1991), indicating that in *Hirt,* the court "noted that local ordinances expressly afforded "interested parties" the right to cross-examine witnesses in a quasi-judicial hearing. No such ordinance exists in this case." *Carillon Cmty. Residential v. Seminole Cty*., 45 So. 3d 7 (Fla. 5thDCA 2010). Unlike Seminole County in Carrillion, here, the City does have an ordinance that contemplates a party intervenor.

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

B. <u>Failure to Disclose Ex Parte Communications</u>

As discussed above, the Commission failed to afford procedural due

process by each Commissioner's failure to comply with 286.0115 (C) (1) – (3), *Florida Statutes*, Section 2-66, St. Pete Beach Code of Ordinances, and *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), by failing to adequately disclose the subject of the communications, and the identity of the person, group or entity with whom the communication took place.

Commissioner Rzewnicki

While Commissioner Rzewnicki provided the most detailed response on who she spoke with, she still failed to disclose the specific subject of the communications, which would afford persons that have opinions contrary to those expressed in the ex parte communications, a reasonable opportunity to refute or respond to the communications. Furthermore, Commissioner Rzewnicki disclosed that she researched Senate Bill 102, the Live Local Act, which was not a criteria of approval. T. 00037 at lines 6-25; T.00038 at line 1.

Mayor Petrila

Mayor Petrila additionally failed to disclose the subject of the communications, the identities of the persons of whom he met and discussed with at the Mayor's office, as well as disclosing the subject and identity of the texts, emails, voicemails and staff that he met with. T. 00038 at lines 2-8.

Commissioner Filtz

Commissioner Filtz additionally failed to disclose the subject of the communications, the identities of the persons of whom he spoke with, as well as disclosing the subject and identity of the texts, emails, voicemails and staff that he met with. T. 00038 at lines 10-15.

Commissioner Marriott

Commissioner Marriott additionally failed to disclose the subject of the communications, the identities of the residents and business owners of whom she spoke with, as well as disclosing the subject and identity of the staff and which Developer's counsel that she met with. T. 00038 at lines 16-19.

Vice Mayor Lorenzen

Vice Mayor Lorenzen additionally failed to disclose the subject of the communications, the identities of the persons of whom he spoke with on the sidewalks, as well as disclosing the subject and identity of emails. T. 00037 at lines 1-3.

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

C. Failure to Disclose Ex Parte Communications – Public Portion

As discussed above, the Commission failed to afford procedural due process by each Commissioner's failure to comply with Section 286.0115 (C)(4), *Florida Statutes*, Section 2-66(a)(4), St. Pete Beach Code of Ordinances, by failing to make the disclosure's before or during the public portion of the Quasi-Judicial hearing at which the vote is taken.

As discussed, the February 21, 2024, hearing consisted of the public hearing portion of the quasi-judicial hearing, and the hearing was continued to February 27, 2024. At the conclusion of the hearing, the City Attorney advised the Commission that the public portion of the meeting is concluded, and all that remained to be conducted at the February 27, 2024, hearing was deliberate and vote. T. 00037 at lines 1-25; T. 00038 at lines 1-19.

Section 286.0115 (C)(4), *Florida Statutes*, states: "Disclosure made pursuant to subparagraphs 1., 2., and 3. must be ***made before or during the public meeting at which a vote is taken on such matters***, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This subsection does not subject local public officials to part III of chapter 112 for not complying with this paragraph." (*emphasis added*).

Here, it is uncontroverted that the Commissioners, at the February 27, 2024, hearing failed to make their disclosures before or during the public meeting at which the vote was taken on such matters.

D. Failure to Allow Public Participation - February 27, 2024 Hearing

As discussed above, the Commission failed to afford procedural due process by the Commission's failure to allow public participation at the February 27, 2024, hearing, when the hearing went beyond the mere deliberations and vote of the Commission.

At the conclusion of the public hearing portion of the meeting on February 21, 2024, the City Attorney advised the Commission that this is the point in the proceedings in which you deliberate amongst yourselves. T. 00438 at lines 2-7. While the Commissioners briefly deliberated, they adjourned the meeting without a vote, and continued the meeting to February 27, 2024, at 6:00pm.

On February 27, 2024, the newly appointed commission reconvened the hearing on the Developer's conditional use application. City Attorney Dickman once again reminded the commission that all that was left to do was to deliberate and vote. T. 00490 at lines 17-25; T. 00518 at lines 19-24; T. 00519 at lines 1-5.

However, despite the City Attorney's directive, the Commission

commenced a shockingly brief deliberation, and moved straight to discussing conditions prior to agreeing on approving the conditional use application. T. 00522 at lines 39-42.

In fact, Mayor Petrila attempted to steer the commission in the proper quasi judicial process as directed by the City Attorney, stating that "I think that implies we want to move forward. And so I think maybe the first step we do is, is it a yes or no? And then if yes, then we can look at the conditions, if no, then we don't need to look at the conditions." T. 00523 at lines 14-18. However, instead of deliberating and applying the City's own published criteria to admitted evidence as required by *City of Apopka*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (quasi-judicial decisions must be based on applying published legal criteria to admitted evidence, rather than subjective "polling" of nearby residents), the Commission moved directly to discussing the conditions to the approval. T. 00525 – T. 00678.

Despite the fact that the public portion of the meeting was closed at the February 21, 2024, hearing, the Commission permitted the Developer, the Developer's experts, Mr. Gilner and Mr. Stapleton, as well as the Developer's land use attorney, Elise Batsel, to testify and address several aspects of the Developer's conditional use application during the February 27, 2024, hearing. T. 00526; T.00535; T.00540 at lines 2-25; T. 00541 at lines 1-13;

T. 00552 at lines 20-25; T. 00553 at lines 1-22; T. 00554 at lines 2-24; T. 00563 at lines 19-25; T. 00564 at lines 1-17; T. 00565 at lines 23-25; T. 00566 at lines 1-6; T. 00571 at lines 7-25; T. 00572 at lines 2-10; T. 00585 at lines 9-12; T. 00586 at lines 1-2; T. 00610 at lines 22-25; T. 00611 at lines 1-10, 12-25; T. 00612 at lines 1-14; T. 00613 at lines 23-25; T. 00614 at lines 1-21; T. 00621 at lines 2-25;T. 00622 at lines 1-18; T. 00627 at lines 15-24; T. 00628 at lines 6-16; T. 00632 at lines 19-25; T. 00645 at lines 2-18, 23-25; T. 00646 at lines 1-8, 16-25; T. 00647 at lines 1-9; T. 00648 – T.00653; T. 00660 at lines 21-25.

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

E. <u>Marriot - Failure to Disclose Ex Parte Communications</u>

As discussed above, Commissioner Marriott Commission failed to afford procedural due process by, after the closing of the public hearing on February 21, 2024, meeting with one of the Developer's attorneys, prior to the February 27, 2024, hearing and failing to disclose the substance of those discussions. T. 00521 at lines 16-19.

As result, the City failed to afford Seamark, Ken Barnes, and PSPB procedural due process.

II. THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY APPROVING RESOLUTION 2023-21.

It is well established that "[a] decision granting or denying a [quasi-judicial] application is governed by local regulations, which must be uniformly administered." *See Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 376 (Fla. 3d DCA 2003). A ruling constitutes a departure from the essential requirements of law when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice. *Clay County v. Kendale Land Development, Inc.*, 969 So. 2d 1177 (Fla. 1st DCA 2007) (citing Combs v. State, 436 So.2d 93, 96 (Fla. 1983)). Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1256 (Fla. 5th DCA 2015). However, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand." *Id*., citing *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So.2d 308, 312 (Fla. 4th DCA 1999). In *Heggs*, supra., the Florida Supreme Court concluded that "applied the correct law" is synonymous with "observing the essential requirements of law." 658 So.2d at 530. Municipal zoning ordinances are subject to the same rules of construction as are state

statutes. *Shamrock*, 169 So.3d. at 1256.

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

A. <u>The City failed to comply with Section 4.2(e), LDC, which requires revised application with new data and information to be subject to the same stages of review as the initial application.</u>

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

Section 4.2(e), LDC requires for conditional use applications (bolding added),

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

Conditional use applications are reviewed by the City Commission, at a public hearing. Section 4.7, LDC. Additionally, the Planning Board holds a public hearing to make a recommendation to the City Commission for conditional use applications within the Community Redevelopment District. Section 4.7, LDC. The City's Technical Review Committee reviews conditional uses for compliance with the LDC. Section 22-147(c), LDC.

Here, the determination of completeness was made on June 20, 2023. The Technical Review Committee ("TRC") met on July 5, 2023. The Developer then added a rooftop dining and drinking amenity that provides for outdoor music on August 28, 2023. The TRC met on November 1, 2023 to address the rooftop and drinking amenity. In addition, Developer submitted a Traffic Impact Analysis in November 2023 which included new data and information provided after the determination of completeness.

After that, the Developer submitted new data and information in the January 10, 2024 agenda, including:

(1) Updated architectural renderings, dated 12/28/23, received 1/2/24; A.0479-490.

(2) A Wind Consultation Letter from CPP Wind Engineering Consultants, 12/19/23; A.00491-493.

(3) Bank Credit Letter from Huntington National Bank, dated January 2, 2024; A.00494; and

(4) Developer's response to Recommended staff criteria. A.00495-501.

At the January 10, 2024, meeting where the City Commission voted on a continuance, PSPB attorney objected to new materials without following requirement of 4.2(e). A. 00297.

At the February 21, 2024, City Commission hearing, the Developer provided additional new data and information which had not been previously submitted to or vetted by the TRC, Planning Commission, or public, including:

(1) Parking Garage Narrative, by Elise Batsel, dated February 18, 2024; A.-02571 – A.-02577.

(2) Kimley Horn Response to Peer Review of Traffic Impact Analysis, dated February 21, 2024, including new data relating to the distribution of the project traffic and its impact on the outcome of the

roadway capacity analysis, new tables comparing peak hour of adjacent roadways and generator, and new data relating to the service volume of Pasadena Avenue . A.02536-2547. Traffic Rebuttal slides;

(3) Live Local Act Slide (comparing proposal to planned Live Local Act project) and testimony by Developer Attorney Elise Batsel. A.02548-2548. (T. 00427 at line 15 – T. 00431 at line 14)

(4) Live Local Buildout Rendering

At the February 27, 2024 continued hearing, which was supposed to have been a closed public hearing, the City Attorney advised,

> 19 So where you are right now was that you had
> 20 decided that all questions had been asked of the
> 21 Applicant's experts. And I don't think she has –
> 22 they don't have their entire expert team here. So
> 23 that's why they don't have them here, because you
> 24 had already asked questions of everybody.
> 25 Staff is here if you have questions of them.
> 1 But where you are in the process really, is just a
> 2 time for you to wrap it up and decide amongst
> 3 yourselves, and to vote amongst yourselves, on a
> 4 conditional use. Your choices are to deny it, to
> 5 approve it, or approve it with– conditions.

(T. 00518 at line 19 to T. 00519 at line 5); A.02548.

Despite this guidance from the City Attorney, the Developer provided the following new data and information during the "deliberations", including:

1. Four Sirata Hotel Garage Renderings . A.02550-2553. and T. 00552

at line 20 – T. 00553 at line 22; T. 00554, including “one that was created by our architect and [former] Commissioner Frislowski, T. 00554 at lines 15-16; T.00559 at lines 10-18: T. 00565 at line 23: Developer’s counsel even admitted the significant changes:

> 23 My concern is, we’re starting to
> 24 redesign the whole project and I have grave concerns
> 25 about -- at this stage trying to redesign the
> 1 project from the dais.

2. Drafted Proposed Conditions to address buildings style and flow between 3 hotels; A.02554.
3. Extended discussion between Developer and Commission on specific terms of redlined conditions, including the deletion of a condition to conduct a wind study (T. 00536 at lines 2-17), testimony for Developer Architect James Stapleton, T. 00540 at line 2 – T. 00541 at line 13), Testimony from Scott Gilner, civil engineer- on pavers(T. 00127 at line 22 – T. 00129 at line 14.)
4. Undergrounding utility lines: Batsel (T. 00621 at line 2 – T. 00622 at line 18).
5. Median improvements in front of 49th- T. 00646 at line 9, T. 00646 at line 16, T. 00647 at line 9.

Between the City’s determination of completeness in June 2023 and

the eventual vote on February 27, 2024, the amount of new data and information provided by the Developer to the City was extensive. The plain language of Section 4.2(e) required the revised application to undergo the same review process as the original application from eight months prior. *See Town of Longboat Key v. Islandside Property Owner's Coalition, LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) ("As the wording of its laws binds a legislature, the Town is bound by the wording of its Code. This mounts a bulwark against the Town's unfettered exercise of power."); *see also Canal Ins. Co. v. Giesenschlag*, 454 So. 2d 88, 89 (Fla. 2d DCA 1984) (A basic rule in constructing city ordinances is that words are to be given their plain meaning). PSPB objected to the additional information without review under 4.2(e) on December 5, 2023, (A.00299-00301); January 10, 2024, (A.00296-298), February 21, 2024 (A.02473-2486) and attempted to object on February 27, 2024 to the additional new information but Mayor demanded PSPB's counsel take a seat or he would ask for the sheriff). (T. 00558 at lines 21-25).

Failure to follow procedural requirements of a local government code constitutes a departure from the essential requirements of the law. *O'Connor v. Dade County*, 410 So. 2d 605, 605–6 (Fla. 3d DCA 1982) (Commission improperly adopted a zoning plan with respect to the petitioners' property

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

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

The City also failed to comply with Section 3.16(C)(1), St. Pete Beach Code of Ordinances, which mandates that the City Manager "Shall, when a violation has been determined to exist: (1) refrain from issuing any subsequent development approvals for the developer until the violation has been corrected, here it is uncontroverted, and the record reflects that the Development Project site is in violation of the Turtle lighting requirements.

T. 00051 at lines 12-25; T. 00161 at lines 1-2; T. 00377 at lines 12-17.

"Municipal ordinances are subject to the same rules of construction as are state statutes." *Angelo's Aggregate Materials, Ltd. v. Pasco County*, 118 So. 3d 971, 975 (Fla. 2d DCA 2013) (quoting *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553-54 (Fla. 1973)).

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

Section 3.16-Violations, penalties and remedies generally, is located within Division 3, Administration of the Land Development Code. Section 3.2 – City Commission Approval, states: "*Except as otherwise specifically*

provided under this Code, the city commission shall make the final determination on all decisions required by this Code regarding amendments to the comprehensive plan, amendments to this Code or the official zoning map, and the issuance of conditional use permits."

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

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

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

improvement in nesting habitat degraded by light pollution, and increase successful nesting activity and production of hatchlings."

Accordingly, pursuant to Section 3.16, once the City Manager knew the property was in violation of the City's Code, the City Manager was mandated to refrain from allowing Resolution 2023-21, from being approved, until the violation has been corrected.

In sum, by failing to apply and adhere to the City's own code of ordinances, as discussed above, the Commission departed from the essential requirements of law. See *Justice Admin. Comm'n*, 989 So. 2d at 665 (holding failure to apply plain and unambiguous language of relevant statute constitutes a departure from the essential requirements of law). Accordingly, on this basis alone, the Court must quash the Commission's February 27, 2024, Decision, approving Resolution 2023-21.

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

The City Commission is the municipal legislative body authorized to grant an application for conditional use. Section 4.7, LDC. Fla. Const. art. VIII, § 2 requires that ("[e]ach municipal legislative body shall be elective."). As alleged in Protect St. Pete Beach's complaint in pending litigation in Pinellas County Circuit Court, *Protect St. Pete Beach Advocacy Group, et al*

v. City of St, Pete Beach (6th Jud. Cir.), 24-000041-CI, the current Commission does not have authority to meet and or vote on the conditional use application because its composition violates Fla. Const. art. VIII, § 2 as four out of five of the members are appointed. ("[e]ach municipal legislative body shall be elective."). A departure from the essential requirements of law occurs when there is a violation of a clearly established principle of law, which can derive from constitutional provisions. *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 890 (Fla. 2003). Additionally, a municipality engages in a void ultra vires act when it lacks the authority to take the action under statute or its own governing laws. *Neapolitan Enterprises, LLC v. City of Naples*, 185 So. 3d 585, 593 (Fla. 2d DCA 2016).

D. City Commission ignored and declared unenforceable legislated criteria under Section 4.4 and instead relied on information irrelevant to published criteria.

A City Commission departs from the essential requirements of law when it makes a decision that is not based on published criteria or factors. *Alvey v. City of N. Miami Beach*, 206 So. 3d 67, 73–74 (Fla. 3d DCA 2016) (granting rezoning based on perceived economic benefit to city, which was not published criteria). Quasi-judicial boards do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations. *Miami–Dade County v. Omnipoint*

Holdings, Inc., 863 So. 2d 375, 377 (Fla. 3d DCA 2003).

A conditional use in the Community Redevelopment District is subject to the criteria of Section 4.4(a), LDC and Section 4.12, LDC.

Like *Alvey*, the 3-2 decision in favor of the Application was based on issues beyond the published criteria or factors, including impacts to small businesses, "cost benefit to the city as a whole", and the live local act. During the February 27 deliberations, Commissioner Lorenzen stated,

> I've met with some people that own small businesses. Some people that are for this. They think it's time the City moved on to a different phase, away from the 50's and 60's, stuff we have going on along the beach. But they're kind of quiet, I found.
>
> (T. 00694 at line 21 – T.00695 at line 1)

> So there is also the issue of residents versus business owners. I'm all for the residents, but we also have to respect the rights of business owners in town and those that want to build businesses. So it's -- to me, it's not just a one group. It's both groups. We're not elected just to take care of residents. We're elected to take care of everybody, business owners and residents.
>
> (T. 00696 at line 24 – T. 00697 at line 6)

Commissioner Marriott stated during deliberations,

> And if you start looking at, you know, what is the cost to -- what is the cost and benefit to one specific person or a small group of people next door? Although to them the cost may be significantly

> 14 worse than the benefits. But our job isn't to look
> 15 at what is the cost and benefits to a subset of
> 16 people in the city. It's to look at what is the cost
> 17 and benefits to the city as a whole.

The rights of business owners and the "cost and benefits to the city as a whole" are not legislated criteria for approval of a conditional use.

Additionally, Developer's Attorney raised potential impacts from an alternative Live Local Act project, which was also outside the criteria for review. Any consideration of such information was improper, despite the comments from Developer attorney that such information must be considered because if the Application is not approved, development under the Live Local Act would be Plan B. (T. 00427 at lines 14-22)

In *Alvey*, the Third District found a departure from the essential requirements of law when the City failed to consider whether a zoning amendment would be consistent with and in scale with the established neighborhood land use pattern, and instead considered economic benefits to the City. *Id*. at 70-74. Here, City Commissioners ignored criteria and also looked to economic benefits to the City. For example, Section 4.4(a)(3) requires consideration of "Whether the transportation system is capable of adequately supporting the proposed use in addition to the existing uses in the area." Section 4.12(a)(2) requires consideration of transportation infrastructure. However, the Commissioner Lorenzen dismissed the

application of this criteria, stating during the deliberations,

> 17 As far as traffic, you know, I think it's game
> 18 over already for traffic. I mean, St. Pete is
> 19 exploding. Everywhere we look, there's apartment
> 20 buildings going up all along Tyrone, down 19. And
> 21 where are they all going to go to the beach?
> 22 They're all coming here. And in my mind, there is
> 23 one way they're all getting here, and it's on the
> 24 Bayway. And I think it's just going to continue to
> 25 get worse.
>
> T. 00695 at lines 17-25.

E. . Developer Counsel Artificially Modified And Restricted The Standard To Assess Impacts To Surrounding Views Under Section 4.12 And Section 4.4

Adding, modifying, or limiting a statute beyond its unambiguous terms or their reasonable implication constitutes a departure from clearly established law. *Elso v. State*, 260 So. 3d 489, 493 (Fla. 3d DCA 2018); *see also City of Homestead v. McDonough*, 232 So. 3d 1069, 1072 (Fla. 3d DCA 2017) ("Florida courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."). The failure to apply the plain and unambiguous language of a statute or ordinance constitutes a departure from clearly established law. *Mt. Plymouth Land Owners' League*, 279 So. 3d at 1284.

Section 4.11, LDC states that the conditional use criteria for

commercial redevelopment districts within Section 4.12 are “intended to **supplement** the stated requirements of this division and other divisions of the land development code...”, including Section 4.4. However, Developer’s counsel repeatedly stated that specific controls over general, and that the standard for evaluating impacts to views was exclusively limited to “whether there is a disproportionately negative impact or unreasonable negative impact on those surrounding uses from 4.12.

This artificial limitation conflicts with the plain language of the LDC. Section 4.4 (a)(1) requires conditional uses to be consistent with the goals, objectives, and policies of the Comprehensive Plan, and FLU, Policy 2.11.3 (“The City shall continue to administer the land development regulations in a manner aimed at preserving the access to and view of the beach and other recreational facilities for all residents of and visitors to this community.”) Section 4.4(a)(2)(a) requires proposed uses to be compatible with the character of the existing area, and 4.4(a)(2)(b) requires preservation of scenic resources. Section 4.12(a)(4) requires the provision and maintenance of Gulf and Bay views and vistas on nearby and adjacent properties.

Developer Counsel’s instruction limited Section 4.12 beyond its unambiguous terms or their reasonable implication, which constituted a departure from clearly established law. *Elso v. State*, 260 So. 3d 489, 493

(Fla. 3d DCA 2018).

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

To be upheld, the Commission's February 27, 2024, Decision, approving Resolution 2023-21, must also be supported by competent substantial evidence in the record that granting the conditional use and approving a 50% reduction in the buffer along the northern property line shared with Seamark complies with the City's Code Criteria. *See Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993).

Competent substantial evidence is "evidence a reasonable mind would accept as adequate to support a conclusion." *Sunbelt Equities*, 619 So. 2d at 1002. "Evidence that is confirmed untruthful or nonexistent is not competent substantial evidence. Competent substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017). A review of the record in the instant case, however, establishes that the Commission's February 27, 2024, Decision, approving Resolution 2023-21, is not supported by competent substantial evidence. Accordingly, on this additional basis, the Court must quash the Commission's Resolution 2023-21.

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

The Commission failed to support its decision with evidentiary support for each criteria required by the City's published code for the approval of a conditional use.

During her presentation, Ms. Batsel, correctly stated, "You're a quasi judicial body and your role here is to say, lets look at this criteria and determine if the Developer has provided competent substantial evidence that they met that criteria. That's it. That's the whole world and the whole box and your decision tonight." T. 00100 at lines 2-7.

The City Manager additionally reminded the commission was to make their decision solely on the criteria and the code, "not something that may happen in the future." T. 00466 at lines 3-7.

However, despite the reminders regarding the Commission's decision, the February 27, 2024, meeting at which the Commissioners were required to deliberate and vote, is completely devoid of any deliberations by the Commission that the Developer met each criteria or factor required by the City's published code for approval of a conditional use permit. Instead, the Commission spent the majority of the meeting discussing and reviewing the proposed conditions for approval. Essentially putting the cart before the horse, worse yet, before even purchasing the horse. T. 00665 – T. 00719.

The one exception to any consideration of whether the Developer met

each criteria or factor required by the City's published code for approval of a conditional use permit, was by Mayor Petrila, indicating that the developer did not meet the criteria. T. 00688 at lines 13-21.

B. Ms. Batsel's Threat Of Plan B - Live Local Is Not Competent Substantial Evidence.

As discussed above, the Commission's approval is not supported by competent substantial evidence where the record establishes, as to Petitioners Seamark and Ken Barnes, that the Commission's approval was based upon the Developer's attorney's threat of utilizing the Live Local Act as Plan B if the conditional use is not approved.

Florida case law is clear, a lawyer's statements and arguments about why the local government should vote for or against a matter, has been found not to constitute competent substantial evidence in order to support a quasi-judicial decision. *See National Advertising Co. v. Broward County*, 491 So. 2d 1262 (Fla. 4th DCA 1986) (finding only evidence supporting variance grant was argument of counsel, which is not evidence);

Throughout her presentation on February 21, 2024, Ms. Batsel made several representations that, "if this CUP does not go forward, the Plan B is to develop under the Live Local Act." T. 00427 at lines 14-16. Ms. Batsel further stated, "that is not what they want to do, but it's important to for you to understand the effect of your vote on what will go there if this isn't

approved." T. 00427 at lines 19-22. Next, Ms. Batsel proceeded to thoroughly describe the details and impacts of the Live Local Act to the Commission. T. 00427-432.

Finally, after the City attorney opined that the Live Local Act is not part of the criteria for the consideration of the conditional use permit, just that she is providing a list of one horrible scenario, Ms. Batsel left the Commission with this thought, "Well, it does affect the decision because when you're talking about whether to approve this or not, not having this information that directly affects the decisions that you're making. I think its important information to have before you." T. 00427 – T. 00432.

Essentially, Ms. Batsel, advised the Commission to disregard the City Attorney's instructions, and consider the Live Local Act as part of their decision whether to approve the Conditional Use.

As a result of the Developer's threat of a "Plan B" under the Live Local Act, we know that at least one Commissioner considered the threat in their decision, despite the City Attorney's mandate not to. T. 00520 – T.00521 at line 1.

Specifically, Commissioner Rzewinicki disclosed that she did some research on Senate Bill 102, the Live Local Act. T. 00520 – T.00521 at line 1. Furthermore, Commissioner Marriott stated, "if we don't approve the

application for the conditional use, we lose the ability to negotiate on a lot of these things, depending on what they decide to do. Because we can't compel them to come back with another plan for a different conditional use. We can't compel them to do the project that we wish they might do. They have a right to do with their property what is allowed." T. 00712 at lines 4-11.

This is a very important point because the final vote was 3-2, with Commissioner Rzewinicki and Commissioner Marriott voting to approve, and Commissioner Marriott the maker of the Motion. T. 00718 – T. 00719 lines 1-16.

C. Failure to Provide any Evidentiary Support for Buffer Reduction

As discussed above, the Commission's approval Is not supported by competent substantial evidence where the record establishes, as to Petitioners Seamark and Ken Barnes, that the record is completely devoid of any evidence to support the reduction of the 30-foot minimum buffer as required in Section 35.13 of the City's Land Development Code.

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

Here, a thorough search of the record indicates there is not one scintilla

of evidence to support the support the reduction of the 30-foot minimum buffer as required in Section 35.13 of the City's Land Development Code. Neither Staff nor the Developer provided evidence in support of the buffer reduction.

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

As discussed above, the Commission's approval Is not supported by competent substantial evidence where the record establishes, as to Petitioners Seamark and Ken Barnes, that the Developer's traffic study is legally flawed as the trip generation is inaccurate and the miscalculation impacts the entire traffic analysis. Florida Courts have regularly held that evidence that is legally flawed is not competent substantial evidence. *See First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114 (Fla. 3d DCA 2000) (finding traffic study was legally flawed and thus not probative because it accounted for less than 100% of additional students expected for expanded grades).

At the February 21, 2024, hearing, Drew Roark, a Florida licensed engineer and traffic study expert for PSPB, testified that the Developer's traffic study was flawed. T. 00334 – T. 00343. While his analysis and testimony was highly technical, in essence, the Developer's traffic study is flawed in several areas, including: failed to analyze the peak hours, which is

the industry standard for traffic analysis (T. 00338 at lines 9-25); the trip generations were flawed, and most critical, the project driveway volumes that were used were incorrect. T. 00339 at lines 1-9. *See First Baptist Church of Perrine v. Miami- Dade Cty*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000) (zoning board properly denied zoning application where recommendation for approval was based on flawed traffic impact study which did not constitute competent substantial evidence); *see also Beach Leg. Properties, Inc. v. City of Miami Beach,* 2022-18 AP 01, 2023 WL 3743107, at *4 (Fla. 11th Cir. May 25, 2023) (Having concluded that the City failed to follow the essential requirements of law in applying an incorrect analysis, "flawed" and "erroneous" staff recommendations are "invalid" and "d[o] not constitute competent evidence").

When questioned by Commissioner Marriot as to the conclusions drawn from the traffic study, Mr. Roark testified that the study that they proposed and the conclusions that they're drawing from are based upon an inaccurate analysis. T. 00343 at lines 15-25.

While the Developer's expert had the opportunity to rebut Mr. Roark, Seamark was not provided the ability to rebut, or cross exam the Developer's expert. Additionally, Developer provided a traffic rebuttal dated February 21, 2024 which had not been previously submitted to, or reviewed by, either the

City staff or Drew Roark. A.02536-2547.

Accordingly, the record is devoid of any competent substantial evidence to support Resolution 2023-21. Rather, the record evidence establishes, on its face, that the Commission's approval does not comply with the mandatory requirements prescribed by City's code for approval of a Conditional Use Permit.

E. Failure to provide any evidentiary support for Section 35.1 Large Resort District requirement for full-service integrated resorts

Section 35.1, LDC provides that the Large Resort District is "intended to primarily support and encourage full-service integrated resort redevelopment projects." However, as stated by PSPB's land use planner Charles Gauthier, "instead of a single, integrated large resort the Sirata proposal is better characterized as three hotels on a single property. A.02435. *See also* Ken Barnes observations that evidence shows the three separate hotels are neither full service or integrated. A.2374. The City staff report contains a conclusory finding that the development meets the overall purpose and intent of the Large Resort district) without analyzing the three separate buildings, entities, quality, and service. A.00449 A generalized statement, even from an expert, is not competent substantial evidence. *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.,* 857 So. 2d 202,

204 (Fla. 3d DCA 2003). Competent evidence must be credible and based on facts, and cannot be bare allegations, speculation, or conjecture. *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1086-87 (Fla. 1st DCA 2002).

CONCLUSION

For the reasons set forth above, the Commission's February, 27, 2024, Decision, approving Resolution 2023-21, granting a Conditional Use: (1) failed to afford Petitioners procedural due process; and (2) departed from the essential requirements of law; and (3) is not supported by competent substantial evidence. Simply put, the Commission is not allowed to disregard the City's Code and approve the Conditional Use, 2023-21, as in the instant case, which violates the plain and unambiguous requirements therein. As aptly stated in *Auerbach v. City of Miami*, 929 So. 2d 693 (Fla. 3d DCA 2006):

> The law … will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will.

Id. at 695 (quashing city commission's approval of variance which violated code criteria). Accordingly, this Court must quash the Commission's February 27, 2024, Decision, approving Resolution 2023-21. See *Maturo v. City of Coral Gables*, 619 So. 2d 455, 457 (Fla. 3d DCA 1993) ("[A court]

cannot, and should not, turn a blind eye to an incorrect application of the law.").

NATURE OF RELIEF SOUGHT

WHEREFORE, Petitioners respectfully request that this Honorable Court:

a. Assert jurisdiction over the parties to the subject matter of this proceeding;
b. Declare that the Commission failed to afford the Petitioners procedural due process.
c. Declare that the Commission's approval of Resolution 2023-21 constituted a departure from the essential requirements of law;
d. Declare that the Commission erred in the approval of Resolution 2023-21 in that the decision was unsupported by competent substantial evidence; and
e. Issue a Writ of Certiorari quashing the Commission's decision to approve Resolution 2023-21.

Dated this 3rd day of April, 2024. Respectfully submitted,

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CERTIFICATE OF SERVICE

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

City of St. Pete Beach
c/o Mayor Adrian Petrila
155 Corey Avenue
St. Pete Beach, FL 33706

CP St. Pete, LLC
c/o Registered Agent, Corporation Service Company
1201 Hays Street
Tallahassee, FL 32301-2525

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font and word

count requirements of Fla. R. App. P. 9.045 and Fla. R. App. P. 9.100.

By: */s/ Richard J. DeWitt, III*
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