IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

VIRGINIA SPLIT, individually, CALOOSAHATCHEE RIVER CITIZENS ASSOCIATION, INC., a Florida not for profit corporation, and RESPONSIBLE GROWTH MANAGEMENT COALITION, INC., a Florida not for profit corporation, Plaintiff/Petitioner, v. CITY OF FORT MYERS, a Florida municipal corporation, and THROGMARTIN RIVERFRONT CORPORATION, a Florida corporation, Defendants/Respondents. _____//	CASE NO. _____ Lower Tribunal: Ordinance Nos. 3225, 3330, 3366, and 3374.

PETITION FOR WRIT OF CERTIORARI AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO §163.3215, F.S.

COMES NOW, Mrs. Virginia Split, Caloosahatchee River Citizens Association, Inc. (the "CRCA"), and Responsible Growth Management Coalition, Inc. (the "RGMC"), (collectively the "Petitioners" and/or "Plaintiffs") by and through undersigned counsel, and petition this Court for the issuance of a writ of certiorari and declaratory and injunctive relief directed to the City of Fort Myers (the "City") and Throgmartin Riverfront Corporation ("Throgmartin") to quash

Ordinance Nos. 3225, 3330, 3366, and 3374 (A:1-47) rendered and/or amended on January 11, 2007.[1] [2]

The subject property is located at approximately the northwest and southwest corners of First Street and Carson Street, downtown Fort Myers, Florida (the "Property") (A:96-97). The Property consists of five parcels totaling 3 acres, more or less: Parcel A, Parcel B, Parcel C, the Abbott Parcel, and the Offsite Parcel. (A:98-100). Throgmartin is the owner of the Property except Parcel B, which the City now owns. The City transferred Parcel A to Trogmartin in exchange for Parcel B in order to give Trogmartin a wider development space with riverfront access. (A:89-95) The subject ordinances authorize the development of two planned unit developments ("P.U.D."), the foot print of which depends on whether the developer selects "alternative A" or "alternative B". Both P.U.D.s permit the development of a 27-story luxury condominium project, called "The Vue" consisting of a private 32-slip marina, ground floor commercial use, multiple levels of parking, and the remaining levels up to 27-stories for multifamily

[1] References to the appendix will be indicated by "A" followed by the appropriate page number and references to the transcript will be indicated by "T" followed by the appropriate page number.

[2] Petitioner is still compiling the record and transcripts kept at the City. In an abundance of caution, Petitioners have filed this petition to preserve their appellate rights. Petitioners therefore reserve the right to request the court's approval to amend their petition and accompanying record in a timely manner.

residential. The Vue also includes a 5-story commercial building and a surface parking lot on the adjacent parcels. (A:101-107).

THE PARTIES.

1. Virginia Split. Petitioner Virginia Split is an aggrieved citizen and tax payer in the City. Mrs. Split attended several public hearings pertaining to the subject P.U.D. and voiced her opposition to the City Council. Shortly after Mrs. Split's late husband, Mr. Robert F. Split, died only July 5, 1992, a memorial oak tree was planted by co-workers at the County. Mr. Split was the Chief Hearing Examiner for Lee County pertaining to land use and zoning matters. In his capacity as hearing examiner and privately, Mr. Split was a well known advocate for parks, green spaces, and environmental preservation. In honor of his service, Lee County employees requested and received approval from the County and City to plant an oak tree in the western section of Centennial Park on property which is now directly impacted by Throgmartin's development. (A:103). Mrs. Split attended the memorial tree planting ceremony on or about July 1992 and has visited the site numerous times since then. One month after its planting, the memorial oak tree survived Hurricane Andrew, albeit slightly bent, and has thrived ever since. Throgmartin and the City plan to execute a risky relocation of the memorial oak tree in order to make way for the new development. Mrs. Split has conveyed her opposition to this plan and the development because relocating a

mature oak with a significant root system is particularly risky and damaging to the tree. If the tree is successfully relocated, severing it from the original memorial site would have profound and permanent emotional impact on Petitioner Split. The development would cast a shadow over the oak tree and radically change the current environment in which it has survived since 1992. (A:104-106). The oak tree would forever become exclusively a mere amenity to the development and the back yard for future residents at the development. The oak tree was deliberately planted in Centennial Park in anticipation that the Park would remain protected by the City and County by their respective comprehensive plans and zoning code.

Petitioner is an aggrieved or adversely affected person having a legally recognizable interest which is or will be affected by the action of the City. Petitioner has a definite interest exceeding the general interest in community good shared in common with all citizens. Petitioner lives and owns property in the City and her late husband's memorial oak tree is within less than one hundred feet of the subject property within the notice-radius required under the City code, and the character of Petitioner's oak and surrounding park lands is impacted by the City's actions. Petitioner has standing to bring this action to court, pursuant to the City Code Section 98-1 defining an "[a]ggrieved person" as "any person attending a public hearing and officially voicing an objection to the proposed subject."

Petitioner Virginia Split also has standing to seek certiorari review of the development order because as described above she has a legally recognizable interest which is or will be affected by the action of the City in question, and her interest is a definite interest exceeding the general interest in community good shared in common with all citizens. Renard v. Dade County 261 So.2d 832.

Petitioner Split also has standing to challenge the P.U.D., which is a development order, under the liberalized standing requirement of pursuant to §§163.3164(7) and 163.3215(3), Fla. Stat. Mrs. Split is an "aggrieved or adversely affected party" because she has A) a personal interests protected or furthered by the local government comprehensive plan, B) her interests are greater than the general interest in the community's well being, and C) her interests are or will be adversely affected by the challenged decision. Florida Rock Properties v Keyser, 709 So.2d at 177; Putnam County Environmental Council, Inc. v. Board of County Commissioners of Putnam County, 757 So.2s 590; Herbert Payne et al. v. City of Miami et al., 30 Fla. L. Weekly D2601 (Fla 3d DCA, November 16, 2005); Southwest Ranches Homeowners Ass'n, Inc. v. County of Broward, 502 So.2d 931, 935 (Fla. 4th DCA), rev. denied, 511 So.2d 999 (Fla.1987); see also Education Dev. Ctr., Inc. v. Palm Beach County, 751 So.2d 621 (Fla. 4th DCA 1999) (noting that section 163.3215 is a remedial statute and as such is to be liberally construed

to ensure standing to any party with a protected interest under the comprehensive plan. See also Edgewater v. Walton County, 833 So.2d 215 (Fla. 1st DCA 2002).

2. Caloosahatchee River Citizens Association, Inc. Petitioner CRCA "Riverwatch" is a non-profit organization dedicated to the protection of the Caloosahatchee River and its watershed, through education and promotion of responsible use and enjoyment by all people. CRCA's principle address is 16970 Carolyn Lane, Fort Myers, FL 33917, and numerous CRCA members live and work in the City. The Goals and Objectives of CRCA Riverwatch are directed towards improving the River from its source to its mouth, including its impacts on riparian and estuarine systems, wildlife habitat, and marine life; promoting public education concerning the historical significance, present condition, and future of the River and its watershed; increasing public awareness of the importance of the River to our quality of life; studying the effect of domestic, commercial, and agricultural uses of the River's resources; improving the River's water quality, quantity, and flow characteristics; and participating in the activities of public bodies responsible for the management of the River and its watershed. Because the subject property and the proposed Vue development, including a marina, is located on the Caloosahatchee River and directly impacts the Centennial Park open space, CRCA officially opposed the project and authorized its officers, directors,

and members to testify at the public hearings in opposition. CRCA has standing in accordance with City Code, Renard, and §§163.3164(7) and 163.3215(3), Fla. Stat.

3. Responsible Growth Management Coalition, Inc. Petitioner RGMC is a non-profit organization dedicated to practices that help to ensure Southwest Florida remains a desirable place to live for all citizens. RGMC advocates for sustainable development practices that link growth to appropriate infrastructure, minimize environmental impacts, permanently preserve public space, and provide a safe and accessible lifestyle. RGMC's principle address is P.O. Box 1826, Fort Myers, FL 33902 and has numerous members who live and work in the City. RGMC is actively engage in the City's public process for development approvals and comprehensive planning, including its opposition to the subject development at Centennial Park. Several officers, directors and members of RGMC testified against the development at the public hearings below. RGMC supported the adoption of the "Duany Plan" for the Park in 2003, which recommended acquiring the subject property and expanding the Park to its natural western boundary. RGMC also took a position against the proposed Vue development as its "size and mass" would detrimentally impact the abutting Park and riverfront. CRCA has standing in accordance with City Code, Renard, and §§163.3164(7) and 163.3215(3), Fla. Stat.

4. City. Respondent City is a Florida municipal corporation.

5. Throgmartin. Respondent Throgmartin is a Florida for profit corporation.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to Article V, Section 5, Florida Constitution and Rule 9.030(c)(1)(C), Florida Rules of Appellate Procedure. See Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995); Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993). The real property at issue is located within an incorporated area of City of Fort Myers, Florida.

NATURE OF THE RELIEF SOUGHT

Petitioner requests that the court issue a writ of certiorari, and declaratory and injunctive relief, reversing and quashing the City's development orders because the City failed to follow the essential requirements of law, failed to afford Petitioners procedural due process and equal protection, and because the Vue development orders are inconsistent with the City's state mandated comprehensive plan.

STATEMENT OF THE CASE AND FACTS

Statement of the Case.

This Petition and Complaint arises from a decision and vote by the City Council approving an application to authorize the construction of The Vue alternative A and B. (A:1-3,28-47). In its 4-2 vote on January 11, 2007, the Council denied Petitioners an adequate quasi Judicial proceeding, failed to strictly comply with proscriptive City Codes and Comprehensive Plan, predicated on an illegal transaction of real property between the City and developer, and the blatant breach of an agreement between the City and State of Florida pertaining to preservation of Centennial Park.

Facts of the Case.

On or about November 30, 1984, the City and State of Florida entered into a binding contract which resulted in the City acquiring $381,096.00 from the federal Land and Water Conservation Fund program ("LWCF"). (A:48-59) According to the contract, the funds were half the total cost for an improvement project at Centennial Park. The LWCF funds are managed by the Department of Interior, National Park Service ("NPS"), and the Florida Department of Environmental Protection ("Florida DEP") is the state "pass through" entity. A key provision of the contract at paragraph 18 is the dedication of the land to which the funds are attached "to the public in perpetuity as a recreation area available to the general

public for recreational purposes only." (A:54). Also, at paragraph 20, the City agreed to "not for any reason convert all or any portion of the property…to other than recreational purposes, without prior approval…" of Florida DEP and the NPS. (A:55)

On or about 2003, the City contracted a study and plan for the redevelopment of the Riverfront including Centennial Park, i.e., the "Duany Plan." Thereafter, the City decided to sell City-owned land on the Riverfront to implement the Duany Plan. Throgmartin was selected to purchase parcel C, which is the location of the Edison Sailing School, in large part because he already owned parcel B and the Abbot parcel, and because he agreed to redevelop parcel C and allow the sailing school to remain. (A:98-100).

With ownership control over three contiguous parcels (Abbot, parcel B and parcel C), Throgmartin proposed The Vue alternative Plan A, which included construction on the City's parcel A in Centennial Park. Parcel A effectively widens the Abbot parcel by 50 feet from First Street to the riverfront. (A:98-99). The City filed its "conversion application" with Florida DEP and NPS on or about March 9, 2004. (A:60-78). The application is complex and requires the preparation and submittal of an environmental assessment pursuant the National Environmental Policy Act ("NEPA"). The Vue alternative Plan A P.U.D. was approved in Ordinance 3225 on or about September 24, 2004. (A:4-16).

Subsequently, and without NPS approval, according to public records, on or about May 12, 2005, the City transferred parcel A to Throgmartin with a Quit Claim Deed for the sum of $568,300.00, and at the same time the Developer transferred parcel B to the City with a Special Warranty Deed for the sum of $1,226,900.00. (collectively "the land swap"). (A:89-95).

Ordinance 3225 was subsequently amended with Ordinance 3330 on or about June 19, 2006, because the City had not yet received NPS approval for the land swap, which had already taken place. (A:17-27). Ordinance 3330 extended the timeframes for construction of the Vue to allow Throgmartin and the City more time to secure NPS approval of the request to convert Centennial Park property to non-public use.

On or about August 2006, NPS rejected the City's third submittal of its conversation application as deficient. (A:60-78). Subsequently, Throgmartin brought forward his "alternative B" plan for the VUE P.U.D., which moved the building's footprint off parcel A – the subject parcel of the conversion application. The prior P.U.D. would become known as "alternative A." Thus, on or about January 11, 2007, the Vue P.U.D. was again amended to give Throgmartin until December 31, 2007 to obtain NPS approval of the conversion application. According to Ordinance 3366, if NPS approval is not obtained by said date, alternative A would expire. If NPS approval is obtain by said date, the developer

could choose either alternative A or B, causing the non-selected alternative to expire. (A:28-47).

SUMMARY OF THE ARGUMENT

The City granted the Vue development order that is blatantly inconsistent with the City's state mandated comprehensive plan, City land development codes, the LWCF agreement, and NEPA.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction over this matter pursuant to Article V, Section 5, Florida Constitution and Rule 9.190, Fla.R.App.P., which authorize circuit courts to issue writs of common law certiorari. *See also,* Florida Power and Light Co. v. City of Dania, 761 So.2d. 1089, 1092 (Fla. 2000), and Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995). Petitioner has a due process right to processes provided by law. Matthews v. Eldridge, 96 S. Ct 893 (1976), Van Morfit v. USF, 794 So. 2d 655 (Fla. 2d DCA 2001). Pursuant to Florida Rules of Appellate Procedure 9.100(c)(2), 9.190(b)(3), and 9.030 (c)(2) and (3), certiorari review is appropriate to review quasi-judicial action of agencies, boards, and commissions of local government, not otherwise directly appealable, but which may be subject to review by certiorari. Sub-sections (f) and (h) of Rule 9.100 further provide for review of lower tribunal proceedings in the circuit court

sitting in its appellate capacity, and for the issuance of an order to show cause where Petitioner can demonstrate a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy on plenary review.

In this case, the City Council approved an ordinance on or about January 11, 2007 to amend the Vue P.U.D.. Findings of fact and conclusions of law were incorporated in the ordinance. It is that ordinance which is the subject of this appeal. This decision is subject to review by writ of certiorari because such approval is quasi-judicial. Park of Commerce Associates v. Delray Beach, 636 So.2d 12, 15 (Fla. 1994). That decision is also subject to review because said ordinance is a development order. See §§163.3164(7) and 163.3215(3), Fla. Stat.

STANDARD OF REVIEW

When a circuit court reviews the decisions of an administrative agency, there are three discrete components of its review. The circuit court must determine (1) whether procedural due process was accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent, substantial evidence. Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So.2d 1270 (Fla. 2001); Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000).

The circuit court's review is commonly referred to as "first-tier" certiorari review. Although it is frequently termed certiorari review, review at the appellate level of the circuit court is not discretionary but rather a matter of right and is akin to a plenary appeal. Dusseau v. Metropolitan Dade County Board of County Commissioners, 794 So. 2d 1270, 1273 (Fla. 2001); Florida Power & Light Co. v. City of Dania, 761 So.2d 10089, 1092 (Fla. 2000). In non-rezoning cases, the applicant has the burden of demonstrating compliance with statutory requirement for granting a special permit. Irvine v. Duval County Planning Commission 495 So.2d 167 (Fla. 1986).

In addition, Sections 163.3164(7) and 163.3215(3), Fla. Stat., establish a "de novo" review of the City's decision as to whether the development order is inconsistent with the provisions of the City's Comprehensive Plan.

ARGUMENT ONE:
THE P.U.D. IS BASED UPON AN ILLEGAL CONVERSION OF PARK LAND WITHOUT NPS APPROVAL.

NEPA is a federal law designed to force federal agencies to evaluate the environmental consequences of their actions before implementing a proposal or recommendation. 42 U.S.C. 4332. The City accepted federal funding through the LWCF Act for Centennial Park, including Parcel A. LWCF mandates that a conversion request must also comply with NEPA. 36 CFR Part 59.3 and LWCF

Manual Chapter 650.2. (A:48-59). Thus, as a matter of law the LWCF Act and NEPA are a condition precedent for the City to "swap" parcels with the Developer. The Vue development order, both alternative A and B, involve property under the jurisdiction of NEPA and LWCF. Until NPS grants the conversion application, any zoning action pertaining to Park property is invalid as a matter of law.

Alternative A clearly and directly converts Park property as part of the Vue's footprint. Alternative B utilizes Park property for a service entrance and landscape buffer, to which the developer was granted an easement in perpetuity. (A:101-107). Thus, ordinance 3235 is clearly illegal and void because it prematurely converts Park lands without prior authorization from NPS. Ordinance 3330 is illegal and void for the same reason, and merely exasperates the illegality by enlarging the developer's timeframe to initiate and complete construction of the Vue. Finally, ordinance 3366 is illegal and void in that it also converts Park lands without prior NPS approval, and because it is nothing more than an amendment to the two prior illegal and void ordinances involving the same lands.

The original "alternative A" Vue P.U.D. rezoned property conditioned on the illegal exchange of property. The contract between the City and Throgmartin to execute the property exchange was predicated on the City granting the Vue zoning approvals. The contracted zoning denied citizens due process and equal

protection afforded under Florida's constitution. For these reasons alone, the ordinances must be quashed and declared void.

ARGUMENT TWO:
THE P.U.D. WAS ERRONEOUSLY REVIEWED UNDER THE CITY'S PREVIOUS ZONING CODE.

The City declared that the Vue alternative B stands on its own as a new P.U.D.; however, the City also went to great effort to declare the Vue "vested" under the prior zoning code. (A:79-80). Ordinance 3366 is an amendment to the prior ordinance 3330, which amended ordinance 3225, and thus both Vue alternative A and B are decisions properly appealed to this Court. Ordinance 3366, on its own, is a substantial modification of the Vue alternative A, and as such must not be vested and must be evaluated under the new zoning guidelines. Essentially ordinances 3225, 3330, and 3366 award two P.U.D. development orders simultaneously on the same or substantially the same property. Ordinance 3366 amends the prior P.U.D. and at the same time grants a new P.U.D., both of which must track the new zoning code. Anything else is a departure from the essential requirement of law.

ARGUMENT THREE:
THE P.U.D. WAS IMPROPERLY ENLARGED WITH WARRANTS, BONUSES, AND MISCALCULATIONS OF DENSITY.

The City granted variances (aka "Warrants") without the legal hardship, as defined by the City zoning code. (A:1-47). Florida courts have held that a legal

hardship will be found to exist only in those cases where the property is virtually unusable or incapable of yielding a reasonable return when used pursuant to the applicable zoning regulations. Herrera v. City of Miami, 600 So.2d at 562; Bernard v. Town Council of Palm Beach, 569 So.2d 853 (Fla. 4th DCA 1990); see also Miami-Dade County v. Brennan, 802 So.2d 1154, 1155 n. 2 (Fla. 3d DCA 2001) (Fletcher, J., concurring). As in numerous prior cases, therefore, including many, like this one, on "second-tier" review of a circuit court decision, quashal of the variance will be required. See City of Jacksonville v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1998), review denied, 732 So.2d 328 (Fla.1999); Maqueira v. Montessori Children's Sch. of Key West, Inc., 622 So.2d 597 (Fla. 3d DCA 1993); Maturo v. City of Coral Gables, 619 So.2d at 455; Herrera, 600 So.2d at 561; Metro. Dade County v. Betancourt, 559 So.2d 1237 (Fla. 3d DCA 1990); Hemisphere Equity Realty Co. v. Key Biscayne Property Taxpayers Ass'n, 369 So.2d at 996; cf. Chisholm Props. S. Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. C689 (Fla. 11th Cir.Ct.App.Div. Aug. 9, 2001), cert. denied, 830 So.2d 842 (Fla. 3d DCA 2002)(Schwartz, C.J., specially concurring in denial of rehearing en banc). Failing to grant certiorari and quash the City's decision in this case would create both a direct conflict with these decisions, and an unjustified approval of the obvious failure of the City to apply the correct law, see Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 195, 199 (Fla.2003);

Morningside Civic Ass'n, Inc. v. City of Miami Comm'n, 917 So.2d 293 (Fla. 3d DCA 2005), and resulting in the correction of a "miscarriage of justice" which occurred below. See Dep't of Highway Safety & Motor Vehicles v. Rosenthal, 908 So.2d 602, 607 (Fla. 2d DCA 2005). On the other hand, by invalidating the warrants, the Court will reaffirm what the Third District Court of Appeal described as its "solemn promise" that "[t]he 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." Allapattah Cmty. Ass'n, Inc. of Fla. v. City of Miami, 379 So.2d 387, 394 (Fla. 3d DCA 1980), cert. denied, 386 So.2d 635 (Fla.1980). Auerbach v. City of Miami et al, 929 So.2d 693, 31 Fla. L. Weekly D1432.

The current land use designation and zoning district within which the subject property is located allows up to 18 stories, which is not an entitlement but a maximum ceiling for development. Desiring much greater return on his investment, Throgmartin agreed to pay the City $56,700 to the downtown coastal high hazard zone hurricane shelter fund, $360,000 to the downtown redevelopment area moderate income housing trust fund, and $9,665 annual contribution to the downtown para transit fund in exchange for additional height and density. Such exactions failed to inform the public what current zoning standards apply. (A:33-35). If a developer can purchase more height and density than is allowed by the

zoning, there is no meaningful way for the public to predict what development will occur in the future or whether it implements the comprehensive plan. Essentially, the maximum zoning can be doubled if an applicant has the financial means to pay for it, a private situation wholly unknown by the public.

Alternative A and B use Centennial Park Parcel A to calculate the allowable density for the Vue, yet Alternative B purports to remove Parcel A from its site plan. This issue was presented to the City at the hearing below by a citizen testifying in opposition to the Vue. The City acknowledged that the calculation does in fact use Parcel A but chose to discount its importance.

The Vue alternative A and B illegally use warrants, density bonuses, and miscalculation of acreage to enlarge the size and mass of the project to almost double what the zoning standards allow.

ARGUMENT FOUR:
PETITIONERS WERE NOT AFFORDED AN IMPARTIAL DECISION MAKER AND WERE PRECLUDED FROM EXAMINING ALL THE EVIDENCE AT THE HEARING BELOW.

Prior to the quasi judicial hearing, City Councilman Flanders made clear his decision in advance regarding the Vue application in a letter to a member of the public. (A:84-85). The Councilman very firmly espouses his support for the project and rebuts all objections the citizen raised in the letter. He is therefore a biased decision maker where Petitioners are entitled to an impartial one. Also at

the hearing below when the ordinance was adopted on January 11, 2007, the City declared the public hearing closed and would not allow any further testimony. The Petitioners were not allowed to examine new plans submitted by the Developer between the time of the public hearing and council deliberation, which occurred on two separate council meetings roughly one month apart. Even Councilman Flanders acknowledged that it was the first time he had seen the new plans. Petitioners are entitled to examine all evidence in a quasi judicial tribunal. Preventing such an examination violates Petitioners' rights to due process.

ARGUMENT FIVE:
THE CITY FAILED TO REQUIRE THE REMOVAL OF A NOTICE OF LIS PENDENS ON THE SUBJECT PROPERTY BEFORE GRANTING THE P.U.D.

Throgmartin and the Vue's architect are in a contractual dispute. The architect filed a notice of lis pendens on the subject property, including parcels A and B. (A:81-83). Parcel A is Centennial Park land technically, but not legally, owned by Throgmartin. Parcel B is the Vue's so called urban plaza, or entrance, technically, but not legally, owned by the City. The ownership of both parcels is significantly in question for numerous reasons including the lack of NPS authorization for the property exchange. The notice of lis pendens further clouds the title to the property, which would be fully evident by a proper opinion of title as is required for submittal of a P.U.D. application. The City deliberately ignored

or minimalized the importance of this title question and the pending litigation on the very same property it approved the Vue alternative B. Such an action is a departure from the essential requirement of law.

ARGUMENT SIX:
THE CITY IMPROPERLY GRANTED SUBSTANTIAL CHANGES TO THE P.U.D. AT THE HEARING BELOW WITHOUT ADEQUATE NOTICE TO THE PUBLIC.

At the public hearing below, the City Council conditioned its approval of the Vue alternative plan B with Throgmartin's acquiescence to numerous changes to the application as submitted. (A:1-3). The public is entitled to know what is and is not proposed in order to have full notice and an opportunity to be heard. Only de minimis changes, for example, pertaining to paint color or tile patterns, do not impact this right. The City conditioned its granting of the ordinance on the substantial change of use of the ground floor for commercial use, use of the parking garage and out parcel, and the demolition, reconstruction and maintenance of Park property. None of these conditions were advertised or available for public comment, and as a result denied Petitioners due process.

ARGUMENT SEVEN:
THE P.U.D. IS INCONSISTENT WITH THE ADOPTED COMPREHENSIVE PLAN.

Petitioners hereby adopt and re-allege, as if fully set forth herein, all of the allegations above.

The City's state-mandated Comprehensive Plan contains specific goals, objectives and policies that protect the public's access to the riverfront, preserving the Park as important natural recourse and open space, and directing residential development out of the coastal high hazard zone where such use would be vulnerable to flooding and hurricanes.

Petitioners seek a declaration voiding the action of the City rendered on January 11, 2007, approving the Vue, and injunctive relief preventing any development to proceed based on said action because it is unclear how the City's actions is consistent with the comprehensive plan. It is necessary to resolve the numerous ambiguities contained in the Vue as approved by the City. Petitioners seek a declaratory judgment concerning the specific type, nature, and extent of development that has been authorized by the Vue approval. A real controversy exists and merits relief. For the reasons set forth above, a real controversy has arisen between Petitioners and Respondents regarding their respective rights and duties under the Vue, which subject Petitioners to the risk of irreparable injury unless the relief sought herein is granted; and for which Petitioners have no adequate legal remedy. If Respondents and persons acting under them proceed during the pendency of this action, irreparable injury to Petitioners will result in that:

(a) Critical riverfront lands will be converted to private non water related or water dependent use;

(b) The character, quality, aesthetic appeal, safety, and environmental integrity of the Park will forever be degraded; and

(c) Numerous new residents will be vulnerable to flooding and hurricane destruction.

A reviewing court should therefore intercede while it remains equitable and just to do so, before Petitioners' rights to contest the approval have been irreparably injured. Petitioners have a clear legal right to seek review as alleged in this action on whether, now or in the future, a power, privilege or right exists; no adequate remedy at law exists; irreparable harm may result if no injunction is issued. Therefore, Petitioners request that the Court:

- Enjoin Respondents and all persons acting under it from using said property or making improvements thereon, for development of it in any manner except as permitted under the applicable zoning provisions and Comprehensive Plan;
- Declare that the Vue null and void because approval of the ordinance and all prior Vue ordinances violated due process and notice requirements, and violates adopted city regulations and the comprehensive plan;
- Reverse, set aside and vacate the Vue approvals;

- In the alternative, declare the Vue *void ab initio* because a proper quasi-judicial hearing was required and remand the matter to the City Council;
- Award costs of this action to Petitioners; and,
- Grant Petitioners such other and further relief as it may deem just, proper, and necessary.

CONCLUSION

Petitioners have has a due process right to notice of the hearing, full and fair examination of evidence and witnesses, and an opportunity to be heard by the decision-makers. Deel Motors v. Dep't of Commerce, 252 So. 2d 389 (Fla. 1st DCA 1971. The case law in Florida is well settled that the application of policy as opposed to setting policy is a quasi-judicial proceeding as opposed to a legislative one. Board of County Commissioners of Brevard county v. Snyder, 627 so.2d 469 (Fla. 1993); Section 28 Partnership, ltd. v. Martin county, 642 so.2d 609 (Fla. App 4 dist. 1994). The Council's consideration of the application is a quasi-judicial proceeding. Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993).

The City departed from the essential requirements of law. In City of Miami v. Save Brickell Avenue, Inc., 426 So.2d 1100 (Fla. 3d DCA 1983), the District Court expressed its distaste for local governments which wield their enormous power arbitrarily when it invalidated an ordinance allowing the city commission to

totally disregard the list of criteria and instead to base a decision upon criteria that are not listed or no criteria at all. Id. at 1105. see, also, Florida Mining and Materials v. Port Orange, 518 so.2d 311 (Fla. 5th DCA 1987) (holding that the city erred in denying the applicant's request for a special exception where the application met all the applicable criteria of the relevant zoning ordinance; Odem v. Petersen, 398 So.2d 875 (Fla. 5th DCA 1981). Zoning laws are in derogation of the common law and therefore are to be strictly construed, and the Respondent City has an affirmative duty to strictly follow all of the code provisions cited above. City of Miami Beach v. 100 Lincoln Road, Inc., 214 So. 2d 39 (Fla 3rd DCA 1968); Mandelstam v. City of South Miami, 539 So. 2d 1139 (Fla. 3rd DCA 1988). A local government's failure to comply with its own ordinances.

"Significance and effect must be given to every word…and words in a statute should not be construed as mere surplusage" Hechtman v. Nationals Title Ins. of New York, 840 So.2d 993, 996 (Fla. 2003). For example, an ordinance that requires written findings must be strictly complied with. See Rosa Hotel Devs., Inc. v. City of Delray Beach, 10 Fla. L. Weekly Supp. 600b (Fla 15th Cir. Ct. June 12, 2003) and Reyes v. City of Miami, 2 Fla L. Weekly Supp. 511a (Fla. 11th Cir. Ct. October 21, 1994) stand for the proposition that the local government departs from the essential requirement of law by failing to make the written findings their ordinances required. See Rosa Hotel, ("While the City was not required to impose

on its Commission the obligation to make findings of fact when sitting as an appellate body, it chose to do so. Having created this important procedural safeguard, it may not unilaterally decide to deny a citizen its protection. A decision to do so departs from the essential requirements of the law").

The City granted the Vue development order P.U.D. inconsistent with the goals, objectives and policies of the comprehensive plan pertaining to preservation of the riverfront, protecting the Park, and avoiding harm to human life and damage to personal property by directing residential development out of the coastal high hazard zone.

Petitioners reside and/or conduct business in the City, attended the public hearing, and testified about their opposition to the Vue. The City code grants Petitioners standing to ask this court to review the decision below. In addition, Petitioners have an interest protected and furthered by the City's comprehensive plan. That interest is jeopardized by the Vue development. The impact on their interest is greater than that of the community at large. Therefore Petitioners have standing under Renard and §163.3215, Fla. Stat.

WHEREFORE, Petitioners/Plaintiffs respectfully request that the Court quash and reverse the City's decision below and declare the Vue development

order as a departure of the essential requirement of law, denial of due process, and inconsistent with the Comprehensive Plan.

Respectfully submitted this 9th day of February 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on February 9, 2007 to:

The Honorable Jim Humphrey
Mayor's Office
CITY OF FORT MYERS
P.O. Drawer 2217
Fort Myers, FL 33902

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the foregoing amended petition is typed in Times New Roman 14-point font pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure.

By: 

Andrew W.J. Dickman