



**Departmental Report for:  
Reporting Period  
April 2016**

**CASE OF:  
BETTE APRIL BURCH  
VS.  
VILLAGE OF PALMETTO BAY**

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

PETITION FOR CERTIORARI

RULE 9.100(f) Florida Rules of Appellate Procedure

CASE NO.:

BETTE APRIL BURCH

Petitioner,

v.

VILLAGE OF PALMETTO BAY, FL,  
a Florida municipal corporation, and  
17777 OLD CUTLER RD LLC, a foreign  
limited liability company

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

Bette April Burch (hereinafter “Petitioner”), by and through undersigned counsel, hereby files her Petition for Writ of Certiorari, pursuant to Fla. R. App. P. 9.100, seeking to overturn a quasi-judicial action by the Village of Palmetto Bay, Florida (hereinafter “Village”) where the Village Council approved a zoning application submitted by 17777 Old Cutler Rd LLC (hereinafter “Applicant”) wherein a resolution was passed granting the transfer of development rights between

two parcels of land owned by Applicant and two companion ordinances were adopted that changed the Village's Comprehensive Use Plan (hereinafter "Comprehensive Plan") and Land Development Code to allow a less restrictive definition of permissible residential housing, and as grounds for this Petition states:

**I. JURISDICTION**

Petitioner invokes the original appellate jurisdiction of the Circuit Court of Miami-Dade County, Florida in accordance with Rule 9.030(c)(3) and 9.100(c)(2), Florida Rules of Appellate Procedure.

**II. STANDARD OF REVIEW**

A party may seek certiorari review of a quasi-judicial hearing, as a matter of right and it is akin to a plenary appeal. *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982). Upon an appeal by first tier certiorari review of final agency action the scope of the circuit court's review of that government action is to determine: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the factual findings and judgment are supported by competent substantial evidence. *Dusseau v. Metro Dade County Board of County Commissioners*, 794 So. 2d 1270, 1273-75 (Fla. 2001); *Broward County v. G.B.B. International, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001).

**III. FACTS**

**A. PROCEDURAL HISTORY**

On January 11, 2016 17777 Old Cutler Rd LLC (hereinafter “Applicant”) initiated the process to apply for a transfer of development rights from portions of a property located at 17901 Old Cutler Rd to portions of properties located at 17901 Old Cutler Rd and 17777 Old Cutler Rd, Palmetto Bay, FL (hereinafter “subject properties”) by requesting a formal determination of the development rights on a 22 acre portion of the property located at 17901 Old Cutler Rd (hereinafter “Sender Site”). (App. at 249). In Response, Village staff prepared a “building rights” determination letter for the Sender Site<sup>1</sup>. (App. at 247) At the time of Applicant’s request, the Sender Site was zoned exclusively “Interim (I)” under the Village Land Development Code and designated “Parks and Recreation (PR)” under the Village Comprehensive Plan and Future Land Use Map (FLUM). *Id.* Staff conceded that a property designated PR would not be permitted any residential or commercial development rights and that the PR designation would have to change before any private development could occur, yet still concluded residential development rights could be determined through a “trend of development” analysis. (App. at 247-248). Although there were no neighboring properties with either existing residential

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<sup>1</sup> Confusingly, although the Sender Site is situated entirely within 17901 Old Cutler Rd, staff conducted the “building rights determination” on the “front 22 acres of 17777 & 18001 Old Cutler Rd” *Id.*

development or approved residential development, staff determined the Sender Site to have residential development right of 85 units. *Id.*

On February 13, 2016 Applicant submitted a zoning application to transfer the determined building rights of 85 residential units from the Sender Site to adjacent parcels of land consisting of approximately 15 acres on 17901 Old Cutler Rd and 25.01 acres on 17777 Old Cutler Rd zoned exclusively “Village Mixed Use” (collectively “Receiver Site”) (App. at 242-244). In addition to the request to transfer the 85 residential units from the Sender Site to the Receiver Site, the Applicant proposed two ordinances to amend the Village Comprehensive Plan and Land Development Code, respectively. (App. at 243).

Village staff analyzed the Applicant’s zoning application and recommended that the zoning application be granted with the additional conditions that subsequent to the transfer of development rights the Sender Site and 18 additional acres of environmentally sensitive lands located entirely within 17901 Old Cutler Rd be deeded to the Village. (App. at 34-46). Staff also drafted a proposed resolution and two “companion ordinances” which would be presented together before the Village Council for approval. *Id.* Without valid justification, Village staff waived the requirement that Applicant provide an approved site plan pursuant to Village Code § 30-30.5. (App. at 45). Village staff additionally drafted two companion ordinances and recommended Village Council approval of the same. The resultant

proposed resolution and companion ordinances were placed on the Village Council Meeting Agenda for initial consideration on March 7, 2016. (App. at 333-351)

**B. SUBJECT PROPERTIES HISTORY**

Petitioner or Petitioner's family has owned, resided upon, and utilized for agricultural purposes real property adjacent to the subject properties located at 17601 Old Cutler Rd Palmetto Bay, FL since 1945. Petitioner's property is the only remaining property within the Village located east of Old Cutler Rd still remaining in open agricultural use. Petitioner has had front row seats to decades of conflict between residents and developers to eliminate, minimize or concentrate residential development on the subject properties away from Old Cutler Rd.

In 1969 a zoning change for the subject properties which proposed a change from E-2 (Single family 5 acre estates) to RU-4 (Apartment House and Hotel) was denied because the requested change would be incompatible with the surrounding neighborhood. (App. at 55). However, the developer of the subject properties appealed this denial and in 1970 the previous denial was reversed and a zoning change of the subject properties to RU-4 with development rights of 1,857 units was granted. (App. at 60-61).

Public opposition to this approved zoning change and increased development on the subject properties was so influential that, subsequent to initial development on the properties, the Dade County Board of Commissioners issued a building

moratorium on the subject properties and an effort to down-zone the subject properties began (App. at 64-66). As a result, the developer of the subject properties agreed to lower the residential development rights on the subject properties to 1,325 residential units. (App. at 81-86). Development on the subject properties was further limited in that the developer purchased an additional 10 acres of property to serve as an undeveloped buffer along the southern border of the subject properties and agreed to maintain a 300 foot undeveloped buffer adjacent to Old Cutler Road to be incorporated into all site plans for future development. *Id.* This 300 foot buffer encompasses nearly the entirety of the present day Sender Site.

Residential development never materialized as continued community opposition, litigation and financial constraints caused all development to stagnate. In 1985, again on the heels of community opposition to residential development on the subject properties, Burger King Corp. purchased the subject properties subject to Restrictive Covenants which were negotiated between Dade County, Burger King, and the previous owners of the subject properties. (App. at 356-377). The zoning of the subject properties was also changed to General Use (GU) on the property located at 17901 Old Cutler Rd and Office Park Development (OPD) on the property located at 17777 Old Cutler Rd. (App. at 95). As a result of the transfer of the subject properties to Burger King's ownership there were no longer any residential development rights on the subject properties. Further, the Restrictive Covenants

required all future development of the subject properties to be tied to site plans which specifically left the entirety of the Sender Site devoid of either residential or commercial development. (App. at 356-377).

In 2005 the Village of Palmetto Bay adopted their own Comprehensive Plan and designated the Sender Site as “Parks and Recreation,” upon which no future residential development could occur. (App. at 247). In 2008 the Village created a new zoning district, “Village Mixed Use,” which was applied to what now encompasses the Receiver Site; the Sender Site was specifically excluded from this new designation. (App. at 201) Although residential development rights of 400 restricted units were granted to the new VMU district, these residential development rights were again specifically concentrated away from the Sender Site and Old Cutler Rd. *Id.*

In short, there has never, in the history of the subject properties while held under common ownership, been any realized, approved, or affirmatively determined rights to residential development on the Sender Site until the adoption of the presently challenged decisions.

**C. DECISION CHALLENGED**

On March 7, 2016 the proposed resolution and companion ordinances were presented to the Village Council for first reading and initial consideration. (App. at 333-351). The Applicant did not provide any type of notice to the public regarding

either the proposed resolution or companion ordinances. Evidence in support was presented by Village staff and a handful of participants commented upon the same. *Id.* The proposed resolution was deferred on advice of staff and both companion ordinances passed first reading by a Village Council vote of 4-0. *Id.*

The Village Council meeting on May 2, 2016, when the proposed resolution and companion ordinances were brought for second reading and consideration, was radically different in both character and process. Again, the Applicant did not provide any type of notice to the public regarding the proposed resolution or companion ordinances. The same evidence in support was presented by Village staff. (App. at 332; App. at 4, Darby DeSalle, 00:45:25). However, additional testimony was provided from the Applicant, an alleged traffic expert<sup>2</sup>, and over 30 additional participants. (App. at 387-388). The vast majority of participants expressed their extreme opposition to the proposed resolution and companion ordinances because of detrimental effects to traffic, Village aesthetics, and the historical character of the local community. *Id.* The quasi-judicial hearing and meeting would last nearly 5 hours before being adjourned at midnight<sup>3</sup>. By a vote

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<sup>2</sup> No notice of the alleged expert's testimony was ever provided, nor were any disclosures regarding the content thereof.

<sup>3</sup> App. at p. 4, Eugene Flinn, 04:53:50).

of 3-2 the Village Council approved the proposed resolution and companion ordinances. (App. at 392-393).

#### **IV. NATURE OF RELIEF SOUGHT**

Petitioner, requests that this Court grant this petition and issue a summons in certiorari requiring the Respondents to show cause why the challenged decisions should not be quashed and remanded for rehearing. Petitioner further requests that this Court find that Petitioner's due process rights were violated by not being provided strict statutory notice and that the challenged decisions are not supported by competent substantial evidence and represent a departure from the essential requirements of law.

#### **V. LEGAL ARGUMENT**

##### **A. Approval of Applicant's Zoning Application Violated Petitioner's Procedural Due Process Rights**

Although quasi-judicial proceedings are not controlled by strict rules of evidence and procedure<sup>4</sup>, certain standards of basic fairness must be adhered to in order to afford due process. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Minimum procedural due process requires that the parties are provided notice of the hearing and an opportunity to be heard in which the parties may present evidence, cross-examine witnesses, and be informed of all the facts

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<sup>4</sup> See *Astore v. Florida Real Estate Comm'n*, 374 So. 2d 40 (3d DCA 1979)

upon which the commission acts. *Id.* Petitioners to a quasi-judicial proceeding also must be afforded the same minimal due process as parties with the exception of a right to cross-examine witnesses. *Carillon Community Residential v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010).

- i. Petitioner's procedural due process rights were violated, because the Applicant did not provide the statutory notice requirements of Village Land Development Code §. 30-30.11

In a quasi-judicial proceeding affected parties need to be notified and strict compliance with all statutory notice procedures must be followed. *Webb v. Town of Hilliard*, 766 So. 2d 1241 (Fla. 1st DCA 2000). Further, if the statutory notice provisions are not followed, an action is void *ultra vires*. *Id.* The Village Land Development Code § 30-30.11 governs the mandatory statutory notice requirements for a quasi-judicial hearing. A zoning applicant is required to provide, "two copies of a list, with the names and addresses of all property owners of land located within the required radius from the exterior boundary of the subject property." Village Land Development Code §. 30-30.11. Here, because the subject properties are both greater than five (5) acres in size, notice must be mailed to all residents by the applicant within a 2,500 foot radius 30 days before the public hearing. § 30-30.11(k)(2). Notice must additionally be published by the applicant 30 days prior to the public hearing. *Id.* In the present case, there was not a list with the names and addresses of all property owners located within 2,500 feet of the perimeter of the

subject properties provided with the transfer of development rights application. (App. at 241). Petitioner, despite owning real property within 2,500 feet of the subject properties, did not receive any mailed notice 30 days prior to the public hearing held on either March 7, 2016 or May 2, 2016 nor was any such mailed or published notice part of the compiled record made available by Village Staff for inspection by Petitioner's counsel on May 24, 2016. Thus, Petitioner was not afforded mandatory statutory notice and was denied procedural due process required under the law.

- ii. Petitioner's procedural due process rights were violated, because the Village did not provide statutory notice requirements for expert testimony required by Village Land Development Code § 30-30.12

In a quasi-judicial proceeding, strict compliance with the relevant statutory notice procedure must be followed to satisfy the minimum requirements of procedural due process. *See Supra.* § 30-30.12 of the Village Land Development Code mandates specific disclosures and notice to be provided for expert witnesses,

“No document prepared or relied upon by an expert shall be admitted into evidence at a public hearing unless such document shall have been filed with the director of planning and zoning at least 15 days prior to the public hearing. No Expert opinion testimony shall be admitted into evidence at a public hearing unless a written summary of the testimony setting out the substance and basis of such testimony shall have been filed with the director at least 15 days prior to the public hearing. The village **shall** provide written notice of any retained experts a minimum of ten days prior to the public hearing . . .” § 30-30.12(a).

During the May 2, 2016 Village Council meeting and quasi-judicial hearing, expert testimony was elicited from Joseph Corradino, AICP, a traffic expert retained by the Village. (App. at 4, Joseph Corradino, 00:53:00; App. at 352-355). However, questioning from the Village Council and record evidence reveals that the documents and data upon which the expert relied were produced and finalized less than a week prior to the hearing (App. at 4, Karen Cunningham, 00:55:19; App. at 352-355). The evidence presented by the expert did not exist 15 days prior to the hearing and thus could not have been provided the required minimum of 15 days before the hearing. As such, the Village did not provide the required notice of a retained expert before the public hearing and none of the additional required expert opinion disclosures were provided. Thus, strict compliance with the required statutory notice procedures was again not followed in violation of Petitioner's procedural due process rights. Therefore, Petitioner was not afforded the required statutory notice of expert testimony to be presented and was denied due process under the law.

- iii. Resolution 2016-28 violates Petitioner's procedural due process rights because the factual findings are mere general conclusions stated in the language of Sec. 30-30.15 of the Village Land Development Code

In order to meet due process requirements, the agency or government must set out detailed facts found from the record evidence so that a court authorized to review the matter on certiorari can determine whether or not the facts found by the agency

constitute lawful grounds for its action and, then determine whether the evidence supports the finding. *Dusseau v. Metro-Dade County*, 794 So. 2d 1270,1277 (Fla. 2001) (Pariante, concurring). It is not sufficient that the cited findings merely be general conclusions in the language of the statute or ordinance because such conclusions provide no way for the court to know on judicial review whether the conclusions have sufficient foundation in findings of fact. *Id.*; *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA).

The factual findings contained in Resolution 2016-28 upon which the Village Council is alleged to have made their decisions evidence mere general conclusions derived from the legal requirements of Sec. 30-30.15 of the Village Land Development Code, and more alarmingly a recitation of foregone factual conclusions. The May 2, 2016 quasi-judicial hearing at which Resolution 2016-28 was adopted began at approximately 7:00 p.m. (App. at 23). Throughout the course of the quasi-judicial hearing testimony was provided by both fact and lay witnesses, concerned residents, village staff, and an alleged traffic expert in addition to Village Council deliberation and decision and Village staff presentations totaling five (5) hours and extending into the next morning. (App. at 4, 04:55:56). Upon first reading on March 7, 2016 the findings of fact allegedly supporting the Council's decision to support the proposed TDR Resolution upon first reading is identical to the findings of fact as contained in Resolution 2016-28 passed on May 2, 2016. (App at 5-13;

App. at 231-240) Despite the voluminous new fact witness testimony from residents as well as the presentation of additional expert testimony, the findings of fact in Resolution 2016-28 remained exactly the same as upon first reading on March 7, 2016. Clearly, no additional analysis into specifically what facts were relied upon by the Council was performed or memorialized, only the pre-determined and unchanged findings of fact from first presentation on March 7, 2013 Council meeting were adopted. *Id.* Thus, Resolution 2016-28 does not contain specific findings of fact sufficient to allow judicial review of whether the conclusions reached have a sufficient foundation in the stated findings of fact. Therefore, Petitioner was denied procedural due process.

**B. The Village's Approval of Applicant's Zoning Application was a Departure from the Essential Requirements of Law**

A failure to observe the essential requirements of law means a failure to afford due process of law or the commission of an error so fundamental in character as to fatally infect the judgment and render it void. *Haines City Community Development v. Higgs*, 658 So. 2d 523, 528 (Fla. 1995). An appellate court should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. *Id.* When, however, there has been a violation of a clearly established principle of law resulting in a miscarriage of justice, courts have found a departure from the essential requirements of law. *Id.*; *see also Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). Further, clearly established law can

derive from a variety of legal sources, including recent controlling case law, rules of court, statutes and constitutional law, an interpretation or application of a statute, procedural rule, or a constitutional provision may be the basis for granting certiorari review. *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d at 890. Thus, where there has been a violation of either a municipal ordinance or the interpretation of a municipal ordinance, there has been a departure from the essential requirements of law.

- i. Village staff's determination that development rights of 85 residential units existed on the Sender Site is a departure from the essential requirements of law because it is a clearly erroneous and unreasonable interpretation of the Village Code contrary to the plain wording of the Ordinance

Generally a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. *Las Olas Tower Company v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). However, judicial deference and adherence to an agency interpretation is not demanded when the interpretation is an unreasonable interpretation, is clearly erroneous, or is contrary to the plain wording of the ordinance. *Id.*; *See also Sullivan v. F.D.E.P.*, 890 So. 2d 417, 420-21 (Fla. 1st DCA 2004). A construction inconsistent with clear language must be rejected, notwithstanding how laudable the goals of the department. *Fla. Department of Children and Family Services v. McKim*, 869 So. 2d 760, 762 (Fla. 1st DCA 2004); *See also, Werner v. State*

*Department of Insurance and Treasurer*, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997). Further, courts and other governmental bodies are prohibited from inserting words or phrases into municipal ordinances to express intentions that do not appear. *Mandelstam v. City of South Miami*, 539 So. 2d 1139, 1139 (Fla. 3d DCA 1988).

Here, Village staff determined the existence of development rights totaling 85 residential units on the Sender Site. (App. at 48-50) Specifically, a trend of development analysis was applied pursuant to Village Code Sec. 30-50.22, because the Sender Site was zoned exclusively “Interim.” (App. at 49). Palmetto Bay, FL Municipal Code §. 30-50.22(1) requires,

All properties in the interim district which are inside the village limits, as shown on the zoning map, and ***which not been previously trended or otherwise approved through the public hearing process for a specific use***, shall be subject to the following trend determination process:

For the purposes of this section, “trend of development” shall mean the use or uses which predominate in ***adjoining properties*** within the Interim district which because of their geographic proximity to the subject parcel make for a compatible use. The director shall be guided in determining what constitutes a neighborhood by limiting the evaluation to separate geographic areas, which may be designated by natural boundaries (rivers canals, etc.) and/or manmade boundaries (roads, full and half-section lines, etc. . . . If no trend of development has been established in the Interim neighborhood, minimum standards of the E-2 district shall be applied. (emphasis added)

The determination as to what constitutes a “neighborhood” as part of a zoning application is a factual determination to be made by the reviewing agency. *Town of*

*Juno Beach v. McLeod*, 832 So. 2d 864, 867 (Fla. 4th DCA 2002). However, when conducting a trend of development analysis, the trend should be based on the actual development or the actually approved development of surrounding properties. *Metro. Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1996).

Staff analysis of the “trend of development” supporting the determination of development rights totaling 85 residential units on the Sender Site is unreasonable, contrary to the plain wording of Village Land Development Code §30-50.22 and results in a nonsensical situation wherein a property is allowed to establish a trend of development based on itself. It is important to note that the transfer of development rights proposed in this situation is complicated by the fact that development rights are not being strictly transferred from one property to another. Rather, the designated Sender Site consists of approximately 22 acres of land located within a larger property located at 17901 Old Cutler Rd and is zoned exclusively “Interim” (App. at 12-13; App. at 251) and the Receiver Site consists of 40 acres of land which, although zoned exclusively as “Village Mixed Use,” actually consists of 25 acres of property located at 17777 Old Cutler Rd and 15 acres of property located at 17901 Old Cutler Rd. *Id.* Despite this crucial distinction, Village staff analyzed Resolution 2016-28 as though the Applicant was requesting to transfer development rights to, “*the property zoned VMU;*” there is no single property depicted in the zoning application to receive a transfer of development rights that is

zoned VMU (App. at 34). This crucial distinction renders Village staff analysis regarding the “trend of development” of the Sender Site unreasonable and contrary to the plain reading of Sec. 30-50.22(1). Village Staff’s determination of the development rights upon the Sender Site further analyzed the “*lands*” to the north and east of the Sender Site to be zoned as VMU, not the properties as required. (App. at 247-249) However, because the “*lands*” north and east of the Sender Site zoned VMU exist within the same property (17901 Old Cutler Rd) as the Sender site such analysis contradicts the clear language of the ordinance requiring neighboring *properties* to be considered in a trend of development analysis. Because the Sender Site is located within the property located at 17901 Old Cutler Rd, the *properties* located to the north and east of the Sender Site include Biscayne National Park and a property located at 17641 Old currently occupied by the Village of Palmetto Bay Library and a public park; residential development is not allowed on either property. (App. at 251). Further, there are not presently any approved or actually developed residential units in any properties adjacent to the Sender Site. Thus, Village staff’s “trend of development” analysis results in the unreasonable and illogical situation where a property (17901 Old Cutler Rd) is actually being used to establish a trend of development based on itself and where potential development rights are impermissibly treated as actually built or actually approved residential developments. Such a result is both unreasonable and inconsistent with the clear

language of the Village Land Development Code §30-50.22. Therefore, the “trend of development” analysis provided by Village Staff to determine the residential rights on the Sender Site violates the essential requirements of Law.

Additionally, Staff analysis of the trend of development on the Sender Site is inconsistent with and legally unnecessary according to the plain wording of Village Code Sec. 30-30.50.22, because the Sender Site was previously trended and otherwise approved through a public hearing process for a particular use. On February 7, 1985 the Miami Dade County Commission approved Resolution Z-30-85 which approved a district boundary request by the owner of the subject properties to change the district boundary of 17901 Old Cutler Rd to exclusively General Use (GU). (App. at 37). Pursuant to Resolution Z-30-85 17901 Old Cutler Rd was also granted the ability to develop private recreational facilities and one 10 unit apartment building on 17901 Old Cutler Rd; the 10 unit apartment building was designated as housing for visitors of Burger King Corp. and a permissible ancillary use of the permitted commercial office park development. (*Id.*; App. at 140). Concurrently, the 22 acre Sender Site within 17901 Old Cutler Rd was specifically depicted as containing no proposed commercial or residential development. Further, in 2005, the Village adopted a Comprehensive Plan wherein the 22 Sender Site within 17901 Old Cutler Rd was designated as “Parks and Recreation (PR)” pursuant to properly noticed public hearings. (App. at 247). Under the Village’s Comprehensive Plan, a

property designated PR cannot be developed for residential purposes and any commercial development must be consistent with, “certain commercial activities ancillary to recreational uses and related to resources of the park, such as boat supply stores, fuel docks, or tennis and golf clubhouses are also permitted and may be considered for approval in the PR category.” Policy 1.1.1 Village Comprehensive Plan; (App. at 48). In both 1985 and 2005 the Sender Site was trended for only commercial purposes through the public hearing process and specifically only for limited ancillary commercial purposes consistent with the aforementioned PR designation in the Village Comprehensive Plan. Thus, the Sender Site was previously trended and approved exclusively for limited commercial development and Village Staff’s “trend of development analysis” violates the plain wording of Sec. 30-50.22(1). Therefore, the determination by Village staff that the Sender Site possessed any residential development rights is a departure from the essential requirements of law.

- ii. Resolution 2016-28 is a departure from the essential requirements of law because it violates Restrictive Covenants currently running with the Sender and Receiver Site.

Since January 31, 1985 the subject properties have been subject to a Declaration of Restrictive Covenants (hereinafter “Restrictive Covenants”) executed between the previous owners of the subject properties and Dade County that run with the land. (App. at 356-377) The Restrictive Covenants were amended on April 5,

1989 to reflect a change in the approved site plans for development. (App. at 378-

381) Of specific relevance, the Restrictive Covenants provided,

1. That the Development will be built in substantial compliance with the plans entitled 'Burger King World Headquarters,' as prepared by Hellmuth, Obata & Kassabaum, P.A., Planners and Architects dated January 7, 1985, on sheets 1, 3, 4, 5, 7, 7a, 7b, 8, 9, 10, 11 and 13-16, dated revised January 10, 1985, on cover sheet; sheets 2 and 6 replaced by a sheet 1 entitled 'Site Dimensions & Statistics Computations' last dated Feb. 26, 1986; sheets 7a & 7b replaced by sheets 2 through 5 entitled 'Parking Layout/Tech Center/Training Center/Office' and dated Feb. 14, 1986, Sheet 17 dated Feb. 27, 1986; and additional sheets CL-1, CL-2, CL-3 and 2C.6-1, dated 8-18-88, a complete set of which is on file with the Dade County Building and Zoning Department.
  
3. That the portion described as Tracts II and B (which will be designated GU and RU-4) shall only be developed in substantial compliance with the plans described in Paragraph 1.
  - A. No Application for rezoning for Tracts II and B for the express purpose of construction of addition residential units or the construction of additional square footage for commercial or office buildings shall be filed with Dade County unless and until written approval is obtained from the owners of more than seventy-five (75) percent of all individual properties within five hundred (500) feet from the perimeter of the subject property. This subsection may be released upon written authorization from the owners of more than seventy-five (75) percent of all individual properties within five hundred (500) feet from the perimeter of the subject property.

(App. at 356-381). Tracts II and B referenced in the Restrictive Covenants encompass the entirety of property presently located at 17901 Old Cutler Rd. (App. at 140) The Restrictive Covenants, thus, require that any future development on 17901 Old Cutler Rd remain tied to site plans submitted by Burger King Corp. in 1985 and modified in 1986 and 1989 and that should an application for rezoning any portion of 17901 Old Cutler Rd for the express purpose of construction of additional residential units the approval of 75% of property owners within 500 feet from the perimeter of 17901 Old Cutler Rd must be obtained.

The Village's approval of Applicant's zoning application through the passage of Resolution 2016-28 and Ordinances 2016-13 and 2016-14, violates Restrictive Covenants 1, 3 and 3A. Resolution 2016-28 established that the Sender Site (located entirely within Tracts II and B) had development rights of 85 residential Units which could be transferred to a Receiver Site (also containing a portion of Tracts II and B) (App. at 5-13). However, none of the aforementioned site plans submitted by Burger King Corp., which development on the Sender Site must adhere to pursuant to paragraphs 1 and 3 of the Restrictive Covenants, depict any residential development on the Sender Site. Thus, a determination that residential development rights exist on the Sender Site is a violation of the Restrictive Covenants. Further, as part of Applicant's zoning application two companion ordinances were presented to and approved by the Village Council which had the effect of lessening restrictions on

and increasing intensity of residential development abilities on the Receiver Site, a portion of which was located on Tracts II and B (as depicted in the Restrictive Covenants). (App. at 14-22) The Applicant's zoning application was effectively to re-zone a portion of Tract II and B with the express purpose of additional residential construction thereon. However, no approval from any property owners within 500 feet of the perimeter of 17901 Old Cutler Rd was sought or provided by the Applicant. Therefore, the Village's approval of Applicant's zoning application violates paragraph 3A of the Restrictive Covenants. The Village's approval of Applicant's zoning application is a departure from the essential requirements of law, because it is itself a violation of the Restrictive Covenants.

- iii. Resolution 2016-28 is a departure from the essential requirements of law, because Applicant's Application does not conform with the requirements of Sec. 30-30.15 of the Village's Land Development Code

Section 30-30.15 of the Village's Land Development Code provides that an applicant for a transfer of development rights **shall** provide a complete site plan application of the receiver site which must be submitted and reviewed pursuant to Village Code Section 30-30.5<sup>5</sup>. Village staff reports analyzing the proposed TDR resolution, specifically find that the Applicant did not submit any particular development or a site plan pursuant to 30-30.5 for the receiver site. (App. at 34-47).

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<sup>5</sup> Village Code §30-30.5 governs the mandatory Site Plan approval process.

Without any legal justification, staff ignored this mandatory requirement of any application submitted for a transfer of development rights, because, “the application as offered by the applicant provides the Village the unique opportunity to expand its park system . . .” (App. at 45) Such a finding is clearly inconsistent with the express language of Section 30-30.15 mandating that an applicant SHALL provide a complete site plan application of the receiver site which must be submitted and reviewed pursuant to Section 30-30.5. Staff’s justification for exempting the applicant from submission of a complete site plan application represent a clearly erroneous interpretation of the relevant ordinance that is contrary to the plain wording of the ordinance and improperly expresses an intention that does not appear anywhere in Sec. 30-30.15 of the Village’s Land Development Code. Therefore, Resolution 2016-28 cannot conform to the express requirements of Sec. 30-30.15 of the Village’s land development code and is a departure from the essential requirements of law.

iv. Ordinance 2016-13 and 2016-14 are a departure from the essential requirements because they constitute illegal spot zoning

Spot zoning is a departure from the essential requirements of law resulting in the miscarriage of justice. *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. 3d DCA 2010); *Bird-Kendall Homeowners Ass’n v. Metro Dade County*, 695 So. 2d 908, 908 (Fla. 3d DCA 1997). The singling out of one property alone for disparate treatment represents wholly impermissible spot zoning.

*Debes v. City of Key West*, 690 So. 2d 200 (Fla. 3d DCA 1997). More specifically, spot zoning is the name given to piecemeal rezoning of small parcels of land to a greater density, leading to disharmony with the surrounding area. *Bird-Kendall Homeowners Ass'n v. Metro Dade County*, 695 So. 2d at 908. Proper analysis of a spot zoning challenge should examine: (1) the size of the spot; (2) the compatibility with the surrounding area; (3) the benefit to the owner; and (4) the detriment to the immediate neighborhood. *Id.*

Here the ordinances only effect one property owner. Further, although spanning two separate properties the VMU zoning district was treated as a single property by Village staff in their analysis of the challenged decisions and the VMU district was disparately treated from all surrounding properties by approving less restrictive residential development rights than all other surrounding properties. The challenged ordinances eliminated the previous restriction on a VMU property that residential development must consist of at least 300 of the total 400 residential units be dedicated to housing for elder persons, and instead all permissible residential development in the VMU district could be multi-family. (App. at 14-22). The VMU district additionally gained the ability to develop Apartment Housing in addition to the previously approved townhouse/rowhouse units. *Id.* The entire area surrounding the VMU district consists of either environmentally protected lands, low-rise residential housing, or a commercial office park. Nowhere in the surrounding area

are there any apartment buildings or other similar high-rise residential developments. Further, repeated citizen testimony presented at the May 2, 2016 Village Council Meeting established that a vast majority of residents also felt the newly gained residential development abilities within the VMU district would be aesthetically displeasing and not in harmony with the surrounding area. (App. at 4, Public Comment, 1:23:20 – 2:39:29). Fact based citizen-testimony further repeatedly addressed the damaging effects the proposed ordinances would have on the surrounding area and their immediate neighborhood due to the effects of cut-through traffic, increased overall density, quality of life and a loss of the established character of their community. *Id.* Here, the challenged ordinances work solely to rezone a single parcel of land to a greater residential density leading to disharmony with the surrounding area. Therefore, the challenged ordinances constitute illegal spot zoning and are a departure from the essential requirements of law.

- v. Resolution 2016-28 is a departure from the essential requirements of Law because it is not consistent with the Village Comprehensive Use Plan

Where a zoning decision violates the consistency provision of the Local Government Comprehensive Planning and Land Development Regulation Act, a local government has invalidly exercised their discretionary land use authority. Fla. Stat. §163.3161 requires that once a municipality has adopted a comprehensive plan in conformity with the guidelines set out in the act, all future development

undertaken by responsible governing bodies is required to be consistent with the comprehensive plan. See Fla. Stat. §163.3194(1); *Southwest Ranches Homeowners Ass'n, Inc. v. County of Broward*, 502 So. 2d 931, 935 (Fla. 4th DCA 1987). When scrutinized by a circuit court on certiorari review, zoning decisions must strictly comply with the applicable comprehensive plan. *Dev. Of N. Fla., Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001). When considering whether a decision is consistent with the comprehensive plan, courts should consider: (1) the reasonableness of the comprehensive plan, or element or elements thereof relating to the issue justiciable raised or; (2) the appropriateness and completeness the element or elements thereof in relation to the governmental action or developmental regulation under consideration; and (3) the relationship of the comprehensive plan, or element or elements thereof to the governmental action or the development regulation involved in litigation, among others. *Southwest Ranches Homeowners Ass'n, Inc. v. County of Broward*, 502 So. 2d 931, 937 (Fla. 4th DCA 1987).

The future land use classification of the Sender Site according to the Comprehensive Plan is Parks and Recreation (PR) which does not permit any residential development under the Comprehensive Plan. Palmetto Bay Plan Policy 1.1.1 provides that properties with a PR designation,

The Future Land Use Map (FLUM) specifically illustrates larger park and recreation areas, as well as, golf courses. Compatible parks are encouraged in all residential land use categories. The siting and use of

future parks and recreation areas shall be guided by the Recreation and Open Space Element and the Capital Improvements Element of this plan, and by other applicable goals, objectives, and policies of the Comprehensive Plan. Certain commercial activities ancillary to recreational uses and related to resources of the park, such as boat supply stores, fuel docks, or tennis and golf clubhouses are also permitted and may be considered for approval in the PR category. Other commercial recreation, entertainment or cultural uses may also be considered for approval in the PR category if they would enhance the quality, utility, or enjoyment of the site and its natural historical or archaeological resources and facilities.

Resolution 2016-28 transfers the development rights of 85 residential units from the Sender Site and is thus inconsistent with the duly adopted Comprehensive plan, because the Sender Site lies entirely within an area designated PR and an area designated PR under the Comprehensive plan cannot have residential development rights. (App. at 48)

The future land use designation of the Receiver Site is Village Mixed Use (VMU) which grants a maximum residential density of 10 units/gross acre. Specifically, Policy 1.1.1 of the Comprehensive plan provides that properties with a VMU designation, "Each parcel must also adhere to a unified "Development Plan" established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types, and design features and controls. Residential density shall range from a minimum of 5.0 to a maximum of 10.0 dwelling units per gross acre, subject to the approved Development Plan." Resolution 2016-28 transfers the development rights of 85 residential units to the

Receiver Site and is inconsistent with the duly adopted Comprehensive plan, because the Receiver site now has total residential development rights of 485 units on approximately 40 acres of land. The resultant residential development density on the Receiver site is 12.125 units per gross acre, in clear excess of the maximum 10.0 units per gross acre allowable in a VMU designated property required for consistency with the comprehensive plan.

Policy 1.1.1 of the Comprehensive Plan requires that Each parcel within a Village Mixed Use district, “adhere to a unified ‘Development Plan’ established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types and design features and controls.” In 2004, a unified development plan was established through a public charrette process in which the entirety of the Sender Site was specifically proposed to be dedicated to recreational/park use with park facilities open to the public; no proposed residential development on the Sender Site was proposed or considered. (App. at 4, Scott Silver (Applicant), 1:13:57; App. at 48) Resolution 2016-28 transfers the development rights of 85 residential units to the Receiver Site and is inconsistent with the duly adopted Comprehensive plan, because there was no “development plan” established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types, and design features and controls for a parcel partially zoned

VMU and containing the Sender Site specifying any residential uses or development within the Sender Site.

The subject properties are located within the coastal high hazard area (CHHA) as defined in the Coastal Management Element of the Comprehensive Plan and Fla. Stat. §163.3178(2)(h). The subject properties are also located within the Hurricane Vulnerability Area (HVA) as measured using the methodology assumed in the South Florida Regional Council “Hurricane Evacuation Study.” Comprehensive Plan Policy 5.4.3 provides,

The Village will reduce or maintain a maximum hurricane evacuation clearance time of 10.0 hours for the Hurricane Vulnerability Area (HVA) measured using the methodology assumed in the South Florida Regional Planning Council “Hurricane Evacuation Study.” To this end, no comprehensive plan amendments or development applications should be approved that increase densities or intensities beyond those depicted on the Future Land Use Map for lands within the HVA without property analysis to determine compliance with this policy for hurricane evacuation clearance time. A 12-hour evacuation time to shelter is maintained for a category 5 storm event as measured on the Saffir-Simpson scale and shelter space reasonably expected to accommodate is available.

Resolution 2016-28 granting the transfer of development rights between subject properties is inconsistent with the duly adopted Comprehensive plan, because there was no property analysis performed in compliance with policy 5.4.3 of the Comprehensive Plan to determine whether maximum hurricane evacuation clearance times would be maintained.

Comprehensive Plan Policy 5.4.4 provides,

All proposed large-scale amendments to this Comprehensive Plan and/or applications for development review shall be evaluated for significant impacts to evacuation routes and times for significant impacts to current available off-site sheltering capacities. Roadway improvements and shelter improvements shall be required, if deemed necessary, to mitigate negative impacts and phased with new residential development. Appropriate mitigation shall include, without limitations, payment of money, contribution of land, and construction of hurricane shelters and transportation facilities. Required mitigation may not exceed the amount required for a developer to accommodate impacts reasonably attributable to development. A local government and a developer shall enter into a binding agreement to memorialize the mitigation plan.

Resolution 2016-28 granting the transfer of development rights between the subject properties is inconsistent with the duly adopted Comprehensive plan, because there was no evaluation for significant impacts to evacuation routes and times or for significant impacts to current available off-site sheltering capacities.

Resolution 2016-28 is thus inconsistent with a strict interpretation and review of the Village Comprehensive Plan. Therefore, Resolution 2016-28 represents a departure from the essential requirements of law.

**C. The Village's Approval of Applicant's Zoning Application is not supported by competent substantial evidence**

Competent and Substantial Evidence relied upon to sustain an ultimate finding or decision should be sufficiently relevant and material so 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). Florida Courts have further refined the definition of competent evidence to be, "evidence that provides a factual basis from which a fact