IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR SARASOTA COUNTY, FLORIDA

NORTH VENICE NEIGHBORHOOD
ALLIANCE INC,
GARY SCOTT,
KENNETH BARON,
SETH THOMPSON,
Plaintiff,

v.

CASE NO. 2023 CA 006165 SC
DIVISION H CIRCUIT

CITY OF VENICE,
BORDER AND JACARANDA
HOLDINGS LLC,
Defendant.

ORDER DENYING PETITIONERS'
AMENDED PETITION FOR WRIT OF CERTIORARI

THIS CAUSE came before the Court without oral argument on Petitioners' Amended Petition for Writ of Certiorari (DIN 14), Respondent City of Venice's Response to Amended Petition for Writ of Certiorari (DIN 19), Respondent Border and Jacaranda Holding's Response to Amended Petition for Writ of Certiorari (DIN 22), and Petitioners' Reply (DIN 26). The Court has reviewed the Court's file, including all Appendices and Exhibits, and is otherwise fully advised in the premises, and hereby ORDERS and ADJUDGES as follows:

Requested Relief

In their Amended Petition, Petitioners "seek judicial review of a quasi-judicial rezoning." DIN 14. More specifically, Petitioners request this Court to quash Ordinance No. 2023-11, the City of Venice Ordinance which approved Respondent, Border and Jacaranda Holdings' ("BJH"), application for a zoning map amendment of the Milano Planned Unit Development ("Milano PUD") in the City of Venice. *See* DIN 14.

Jurisdiction

The Court has jurisdiction to review quasi-judicial municipal rezoning approvals. Art. V, §5(b), Fla. Const.; *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993); Fla. R. App. P. 9.030(c)(3). In this "first tier" certiorari review, the Court is limited to determining: (1) whether the City afforded procedural due process to the parties; (2) whether the City observed the essential requirements of the law; and (3) whether the City's decision is supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Martin County v. City of Stuart*, 736 So. 2d 1264, 1266 (Fla. 4th DCA

1999). The Court's review of the City of Venice's quasi-judicial rezoning decision is limited to these considerations; it is not a plenary appeal.

Given the Court's limited review, Petitioners' requests in their Petition for this Court to do anything but to quash the City of Venice's quasi-judicial rezoning decision and adoption of Ordinance No. 2023-11 is legally improper. *See Miami-Dade County v. Snapp Industries, Inc.*, 319 So. 3d 739, 741 (Fla. 3d DCA 2021) (on a petition for certiorari, "[t]he remedy available to the circuit court was limited to quashing the hearing officer's order, and nothing more"). On a petition for certiorari, the Court "has no authority to take any action resulting in the entry of a judgment or order on the merits or to direct that any particular judgment or order be entered." *Snyder v. Douglas*, 647 So. 2d 275, 279 (Fla. 2d DCA 1994) (citation omitted). Further, the Court has no authority to direct the municipality to take any particular action. *See Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 844 n. 18 (Fla. 2001).

Procedural Due Process

The Petitioners do not argue in their Amended Petition or in their Reply that the City did not afford procedural due process. Therefore, the Court does not address procedural due process further in this Order and finds that this prong has been satisfied by the City.

Essential Requirements of the Law

Petitioners argue that the City did not observe the essential requirements of the law in approving BJH's application for a zoning map amendment of the Milano PUD and, thereafter, adopting Ordinance No.: 2023-11, using several arguments.

Application of the Old Land Development Code

Petitioners first argue that the City should have reviewed BJH's application under Ordinance No. 2022-15, the City's new Land Development Code, which was adopted on 12 July 2022. The Court disagrees and rejects this argument. Rather, the City's review of BJH's application was properly subject to Section 86-130 of the old Land Development Code (the Land Development Code in effect prior to the adoption of Ordinance No. 2022-15).

Ordinance No. 2022-15 (the new Land Development Code) specifically states "[a]pplications for land development accepted by the City prior to the effective date of this ordinance shall be processed under the requirements of the land development ordinance in effect at the time of application." Ordinance No. 2022-15 goes on to state, "[h]owever, applicants shall be given the option to have applications processed under the requirements of this Ordinance No. 2022-15."

Petitioners state in their Petition that "BJH should have elected to have its petitions processed under the city's new Land Development Regulations…that were adopted by the City Council on July 12, 2022, but chose not to." DIN 14. There is no question that BJH's application for rezoning was submitted on 14 June 2022, prior to the adoption of Ordinance No. 2022-15. There is also no question, and Petitioners' Amended Petition admits, that BJH "chose not to" have their application processed under the new Land Development Code.

Therefore, the City properly processed BJH's application for a zoning map amendment under the proper version of the LDC. Based on this, the Court does not address Respondents' estoppel arguments based on Petitioners failure to preserve this issue and takes no position on same herein.

Section 86-130(j)

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-130(j) of the old Land Development Code. Section 86-130(j) states:

> (j) *Land use intensity; open space; dedication of land for municipal uses.*
>
> (1) In a PUD a maximum density of 4.5 dwelling units per gross acre shall be allowed, provided that such maximum density may be varied by city council, after recommendation by the planning commission, where a showing is made that such maximum density is inappropriate based upon the intensity and type of land use in the immediate vicinity and the intent of the comprehensive plan for the area requested. A minimum of 50 percent of the PUD shall be open spaces.
>
> (2) A maximum of eight percent of the gross project site may be required for dedication to municipal uses for all projects in excess of 25 acres in area, after a determination by the city council that a demonstrated public need exists for municipal facilities such as parks, fire stations or other public uses.
>
> (3) Land in a PUD designated as open space will be restricted by appropriate legal instrument satisfactory to the city attorney as open space perpetually, or for a period of not less than 99 years. Such instrument shall be binding upon the developer, his successor and assigns and shall constitute a covenant running with the land, and be in recordable form.

Petitioners argue that "[t]he legal instruments required by [Section] 86-130(j)[(3)] should have been executed and submitted to the city for approval and recording no later than September 14, 2021, thereby protecting the open space within the Milano, Cielo and Aria subdivisions from redevelopment for 99 years." DIN 14. This argument is based on Petitioners' interpretation of Section 86-130(j)(3). Under Petitioners' interpretation, open space land dedications, restricting the land as open space, should be recorded by legal instrument following the final approval of a final plat for each subdivision within a PUD.

Both Respondents argue that Section 86-130(j)(3) was historically interpreted by the City to require dedication of land in a PUD designated as open space upon the final platting of the last phase of the entire PUD, regardless of when subdivisions within said PUD obtained final approval for their final plats. Argues Respondents, since there is still a development area of

residential lots for the Milano PUD that has not been memorialized through preliminary or final plats, the recording of legal instruments restricting open space is premature.

In *Haines City Community Development v. Heggs*, the Florida Supreme Court, in considering whether the essential requirements of the law were observed, held that observing the essential requirements of law is synonymous with applying the correct law. 658 So. 2d 523, 530 (Fla. 1995). Overlooking sources of established law or applying an incorrect analysis of the law results in a departure from the essential requirements of law. *See City of Tampa v. City Nat'l Bank of Fla.*, 974 So. 2d 408, 411 (Fla. 2d DCA 2007).

The Court believes that the City's interpretation of Section 86-130(j)(3) is sound based on the text. First, the Court notes that Section 86-130(j)(3) does not give a timeline for the restrictive dedication of open space in a PUD. Rather, Section 86-130(j)(3) states "will be restricted", indicating an undetermined time in the future. Second, Section 86-130(j)(3) begins with "Land in a PUD". It does not state "Land in a subdivision within a PUD". This indicates that Section 86-130(j)(3) requires the dedication of open space in a PUD, completed in its entirety. The text does not suggest the piecemeal approach that Petitioners posit. Lastly, Section 86.130(j)(3) uses the singular version of the word "instrument." Section 86-130(j)(3) does not utilize the plural form: "instruments." This gives further credibility to the City's interpretation that the restrictive dedication of open space within a PUD would occur, using one legal instrument, after *all* the lands within the PUD had been finally platted. Regarding the City's interpretation of Section 86.130(j)(3), the Court finds that the City did not depart from the essential requirements of the law.

Section 86-231

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-231(c)(2)(n) of the old Land Development Code. Petitioners argue that BJH's application violated Section 86-231(c)(2)(n) "because the proposed commercial use would violate dedicated open space that was to be required on the final plat of the Cielo subdivision plat to include the dedication to public use of all open spaces." DIN 14.

Section 86-231 is titled "Plat requirements". This section applies to plat approvals. BJH's application was *not* at plat approval. Rather, BJH's application was for a zoning map amendment of the Milano PUD. The decision made by the City to approve BJH's application and adopt Ordinance No. 2023-11 was not a decision to accept or reject a plat. Therefore, Section 86-231 does not apply and the City did not depart from the essential requirements of the law by not considering it.

To the extent that Petitioners are attempting to collaterally attack the City's approval of the Cielo subdivision plat (which occurred in 2019), their arguments are untimely. Petitioners made no challenge to the approval of the Cielo subdivision plat at the time it was approved by the City. They cannot now, five years later, attack the City's decision to accept the Cielo plat by shoehorning it into this action.

Section 86-130(b)(8)

Petitioners also argue that the City did not observe the essential requirements of Section 86-130(b)(8) of the old Land Development Code. Section 86-130(b)(8) states:

> Permitted principal uses and structures in PUD districts are:
>
> …
>
> (8) Neighborhood commercial uses which are determined at the time of approval for the PUD to be compatible with the existing and future development of adjacent and nearby lands outside the PUD.
>
> …

Petitioners argue that, since there was no determination of compatibility made at the time of the Milano PUD approval, that BJH's application for zoning map amendment should have been denied. Petitioners' argument fails as Petitioners' narrow reading of Section 86-130(b)(8) fails to recognize Section 86-130(b)(9)—the next permitted principal use in the list.

Section 86-130(b)(9) states:

> Permitted principal uses and structures in PUD districts are:
>
> …
>
> (9) Other uses of a nature similar to those listed, after determination and recommendation by the planning commission, and determination by the city council **at the time of rezoning** that such uses are appropriate to the PUD development.
>
> …

(emphasis added).

Section 86-130(b)(9) clearly shows that Petitioners' arguments based on Section 86-130(b)(8) fail. Section 86-130(v) allows for changes in plans for a PUD and Section 86-130(b)(9) allows for "uses of a nature similar", after certain determinations, at the time of the application for a zoning map amendment. This shows that zoning map amendments were anticipated and that the compatibility determination for "neighborhood commercial uses" was not locked in at the time of the initial PUD approval.

Section 86-130(r)

Petitioners further argue that the City did not observe the essential requirements of Section 86-130(r) of the old Land Development Code. Section 86-130(r) states:

> *Commercial uses.* Commercial uses located in a PUD are intended to serve the needs of the PUD and not the general needs of the

> surrounding area. Areas designated for commercial activities normally shall not front on exterior or perimeter streets, but shall be centrally located within the project to serve the residents of the PUD.

Section 86-130(r) does not restrict the commercial use to solely serving the residents of the PUD. Further, Section 86-130(r) does not prohibit the commercial use from being built on exterior or perimeter streets. While Section 86-130(r) could certainly provide the City a basis for denying a developer's PUD application or zoning map amendment, Section 86-130(r) does not impose any prohibitions on the City from approving an application wherein the proposed commercial uses have an intent to serve the needs of residents of the PUD.

Section 86-570

Next, Petitioners argue that the City did not observe the essential requirements of Section 86-570 of the old Land Development Code. Petitioners argue that "[t]he open space which BJH is attempting to utilize for this commercial use is not controlled solely by BJH." DIN 14. Petitioners' argument is completely without merit.

Petitioners' theory completely ignores age-old legal requirements for the transfer and dedication of real property—something that can only be accomplished through a legal instrument of conveyance. Petitioners' reliance on a definition in a Land Development Code has no basis in Florida's real property jurisprudence.

Denial by Planning Commission

Petitioners argue that the City did not observe the essential requirements of the law because the City of Venice Planning Commission recommended to the City Council that BJH's application should have been denied.

Section 86-47(h) of the old Land Development Code, however, states: "The report and recommendations of the planning commission regarding rezoning or amendment of this code shall be advisory only and shall not be binding upon city council."

Contrary to the arguments made by Petitioners, a recommendation of the Venice Planning Commission is solely that—a recommendation—that may be adopted or rejected by the City Council. The City Council did not fail to observe the essential requirements of the law because it chose not to adopt the recommendation of the Planning Commission.

Failure to Apply Correct Law under Brevard County v. Snyder

Petitioners also argue that the City did not observe the essential requirements of the law because they should have been instructed to apply the rezoning test established by the Florida Supreme Court in *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). Petitioners' reliance on *Snyder* is misplaced. *Snyder* relates to a municipality's *denial* of a landowner's permitting application. *See* 627 So. 2d 469.

Further, while there is no legal requirement that the City Council be instructed on applicable law, the record makes it clear that the City Council was advised by the City attorney on the record of the correct legal standard for review.

Milano PUD Residents' Reliance

Petitioners argue that residents of the Milano PUD relied on the belief that the "open space" depicted in the original approval would remain "open space". This argument lacks legal basis, and the Court rejects it without further comment.

Breach of Agreement with the City and Breach of Cielo Declaration of Restrictive Covenants

Petitioners next argue that the City did not observe the essential requirements of the law because BJH, as successor to Neal Communities of Southwest Florida, LLC, allegedly breached the Open Space Agreement with the City that, under Petitioners' interpretation, required the recording of a restriction preserving open space within the Milano PUD. The Court rejects this argument.

The Open Space Agreement is exclusively between the property owner and the City. The Open Space Agreement specifically states that "[n]o right or cause of action shall accrue upon or by reason hereof, to or for the benefit of any third party."

While this Court takes no stance as to the allegation of breach, the only entities that have rights that may be enforced under the Open Space Agreement are the parties that entered it. In this case, neither appear to have sought any enforcement of their rights under the Open Space Agreement. If there was a breach of the Open Space Agreement, the City's choice not to enforce against same does not equate to a failure to observe the essential requirements of the law as it relates to its decision to approve BJH's application.

Similarly, Petitioners argue that the City did not observe the essential requirements of the law because the approval of BJH's application causes a violation of the Cielo Declaration of Covenants, Conditions and Restrictions. The Court also rejects this argument.

While this Court takes no position as to the allegations of a violation of the Declarations, the Cielo Declaration of Covenants, Conditions and Restrictions does not apply to the City's decision-making authority to approve BJH's application. A municipality may approve a rezoning application whilst observing all essential requirements of the law, despite the Declarations. If certain usages are prohibited by the Declarations, then a Writ of Certiorari is not the appropriate avenue for relief.

Competent, Substantial Evidence

To determine whether Petitioners are entitled to have their Petition for Writ of Certiorari granted and the decision to approve BJH's application quashed, "[t]he court must review the record and determine *inter alia* whether the agency decision is supported by competent substantial evidence." *Dusseau v. Metropolitan Dade County Bd. Of County Com'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). "Competent substantial evidence is tantamount to legally sufficient evidence." *Id.* It is not this Court's role to usurp the fact-finding authority of the City. *Id*. at 1275. This

Court is not permitted to reweigh the evidence or to determine whether the City's decision was opposed by competent substantial evidence. *See Id*.

The Florida Supreme Court made the court's role in analyzing the "competent substantial evidence" prong of certiorari review very clear in *Dusseau*. The Florida Supreme Court stated as follows:

> [T]he "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-à-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Id. at 1275-76.

This Court has done exactly what the Florida Supreme Court mandated in *Dusseau*. It has reviewed the record to assess the evidentiary support for the City's decision to approve BJH's application for zoning map amendment and adopt Ordinance No. 2013-11. It has set aside evidence contrary to the City's decision as said evidence is outside the scope of inquiry. This Court has abstained from reweighing the "pros and cons" of conflicting evidence. And, in performing its review, this Court finds that the record contains competent substantial evidence to support the City's decision.

Other Issues Raised

To the extent there are any other issues raised by the Parties, the Court has considered said arguments and rejects them without further comment.

NOW, THEREFORE, based on the foregoing, this Court finds as follows:

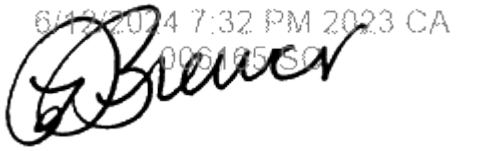
The City afforded procedural due process to the parties in deciding to approve BJH's application for a zoning map amendment and adopting Ordinance No. 2013-11.

The City observed the essential requirements of the law in deciding to approve BJH's application for a zoning map amendment and adopting Ordinance No. 2013-11.

The record contains competent substantial evidence to support the City's decision to approve BJH's application for a zoning map amendment and adopt Ordinance No. 2013-11.

FURTHERMORE, based on the foregoing, Petitioners' Amended Petition for Writ of Certiorari (DIN 14) is hereby **DENIED.**

DONE AND ORDERED in Sarasota, Sarasota County, Florida, on June 12, 2024.



e-Signed 6/12/2024 7:32 PM 2023 CA 006165 SC

DANIELLE BREWER
Circuit Judge

SERVICE CERTIFICATE

On June 12, 2024, the Court caused the foregoing document to be served via the Clerk of Court's case management system, which served the following individuals via email (where indicated). On the same date, the Court also served a copy of the foregoing document via First Class U.S. Mail on the individuals who do not have an email address on file with the Clerk of Court.

RALF GUNARS BROOKES
1217 CAPE CORAL PARKWAY
107
CAPE CORAL, FL 33904

RALF GUNARS BROOKES
1217 CAPE CORAL PARKWAY
107
CAPE CORAL, FL 33904

RALF GUNARS BROOKES
1217 CAPE CORAL PARKWAY
107
CAPE CORAL, FL 33904

RALF GUNARS BROOKES
1217 CAPE CORAL PARKWAY
107
CAPE CORAL, FL 33904

SCOTT A MCLAREN
101 E KENNEDY BLVD
SUITE 3700
TAMPA, FL 33602

JEFFERY A BOONE
BOONE BOONE & BOONE
1001 AVENIDA DEL CIRCO
VENICE, FL 34284

KELLY FERNANDEZ
236 PEDRO ST
VENICE, FL 34285

KELLY FERNANDEZ
236 PEDRO ST
VENICE, FL 34285

SHANE T COSTELLO
101 EAST KENNEDY BLVD.
SUITE 3700
TAMPA, FL 33602

ANNETTE M BOONE
240 NOKOMIS AVENUE SOUTH
SUITE 200
VENICE, FL 34285

LAUREN S. AYERS
101 EAST KENNEDY BOULEVARD
BANK OF AMERICA PLAZA, SUITE 3700
TAMPA, FL 33602

CITY OF VENICE
401 WEST VENICE AVENUE

VENICE, FL 34285

BORDER AND JACARANDA HOLDINGS LLC
No address on file
NORTH VENICE NEIGHBORHOOD ALLIANCE INC
302 LAUREL RD EAST #104
LAUREL, FL 34272

GARY SCOTT

KENNETH BARON

SETH THOMPSON
No address on file

BOONE, JEFFERY A	ANNETTE.BOONE@BOONE-LAW.COM
MCLAREN, SCOTT A	JAIME.SCHILL@HWHLAW.COM
BOONE, JEFFERY A	jboone@boone-law.com
FERNANDEZ, KELLY	kfernandez@flgovlaw.com
FERNANDEZ, KELLY	KFERNANDEZ@SWFLGOVLAW.COM
AYERS, LAUREN S.	LAUREN.AYERS@HWHLAW.COM
BOONE, JEFFERY A	LFOSCO@BOONE-LAW.COM
BROOKES, RALF GUNARS	RALF@RALFBROOKESATTORNEY.COM
BROOKES, RALF GUNARS	ralfbrookes@gmail.com
MCLAREN, SCOTT A	RELIT.SAMCLA@HWHLAW.COM
COSTELLO, SHANE T	RELIT.STC@HWHLAW.COM
MCLAREN, SCOTT A	SCOTT.MCLAREN@HWHLAW.COM
COSTELLO, SHANE T	SHANE.COSTELLO@HWHLAW.COM
COSTELLO, SHANE T	sheri.williams@hwhlaw.com
Kelly Martinson Fernandez	mmooney@flgovlaw.com
Maggie D. Mooney	mmooney@swflgovlaw.com
Maggie D. Mooney	agilmore@swflgovlaw.com