IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO. 19-CA-004116 XXXXMB (AY)

2600 N OCEAN, LLC, a Florida Limited Liability Company,

Petitioner,

v.

CITY OF BOCA RATON, a Florida Municipal Corporation,

Respondent.

CITY OF BOCA RATON'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition asks the Court to shut its eyes to the Coastal Construction Control Line ("CCCL"), established pursuant to the Beach and Shore Preservation Act to protect and preserve beaches throughout the State from "imprudent construction," §161.053(1)(a), Fla. Stat., and the City of Boca Raton's ("City") prohibition: "Seaward of the [CCCL] no person shall … construct any structure whatsoever." City Code §28-1556(3)(a) (emphasis added). To be sure, the City Code provides a variance procedure, according to which the City Council is authorized to relax the strict prohibition against construction seaward of the CCCL, but only if an applicant meets its considerable burden to establish that all six variance criteria are met. *See* City Code §§ 28-1556(4); 28-127(3).

At issue is a narrow parcel of oceanfront property which lies entirely seaward of the CCCL ("Property"). Petitioner, 2600 N. Ocean, LLC ("Petitioner"), unsuccessfully sought a variance from the City Council in order to construct a four-story, 49-foot tall, 14,270 square foot duplex with an eastern facade made nearly entirely of glass, situated on the beach dune. In the professional opinions of the City consultant, the City marine conservationist, and the professional staff of the City's Department of Development Services ("Department"), the proposed duplex as designed by the Petitioner would cause substantial negative environmental impacts, primarily to threatened and endangered nesting sea turtles by causing disorientation,

but also to the dune ecosystem and native vegetation. As a result, and for additional reasons reflected in the record, competent substantial evidence supports the City Council's determination that Petitioner did not meet its burden to satisfy all six variance criteria.

Petitioner now incorrectly asks the Court to reweigh the evidence. It asks the Court to find that Petitioner's own witnesses were correct in their countering view, considered and squarely rejected by the City Council, that the Petitioner satisfied the variance criteria and the proposed duplex would not, in fact, cause the adverse environmental impacts reported by the City's professional consultant, marine conservationist and professional staff members of the Department ("Staff"). Not only is the Petitioner's position extreme, in light of the environmental sensitivity of the Property, but it is contrary to well-established law: it is beyond the scope of the Court's certiorari review to reweigh the evidence. The only relevant evidence here is the abundant competent substantial evidence in support of the City Council's decision.

Perhaps for this reason, Petitioner resorts to a troubling attack on the integrity of three City Council Members, charging them with bias in their votes against the variance request, as if Petitioner's extreme variance request to construct a 14,270 square foot duplex would otherwise have been granted. But as the record reflects, the City's coastal construction and environmental consultant, its marine

conservationist, its senior environmental officer and its director of the Department, as well as the entire Environmental Advisory Board ("EAB") itself, unanimously recommended denial. Moreover, Florida law is clear: elected officials have every right to express their opinions and, absent a special gain or loss to them personally, are not subject to disqualification from voting, as Petitioner imagines.

Lastly, contrary to Petitioner's contention, the record reflects that the City Council afforded Petitioner a full, fair and generous opportunity to be heard. Petitioner had two complete bites at the apple, at the EAB hearing and at the hearing before the City Council; it was afforded more than the codified time allotment to present its case at each of the two hearings. All told, Petitioner presented a total of six witnesses (some twice) and vigorously cross-examined City witnesses, as well as members of the public. The record reflects no procedural due process violation here.

For these reasons, as argued more fully herein, the Court should not hesitate to deny the Petition.

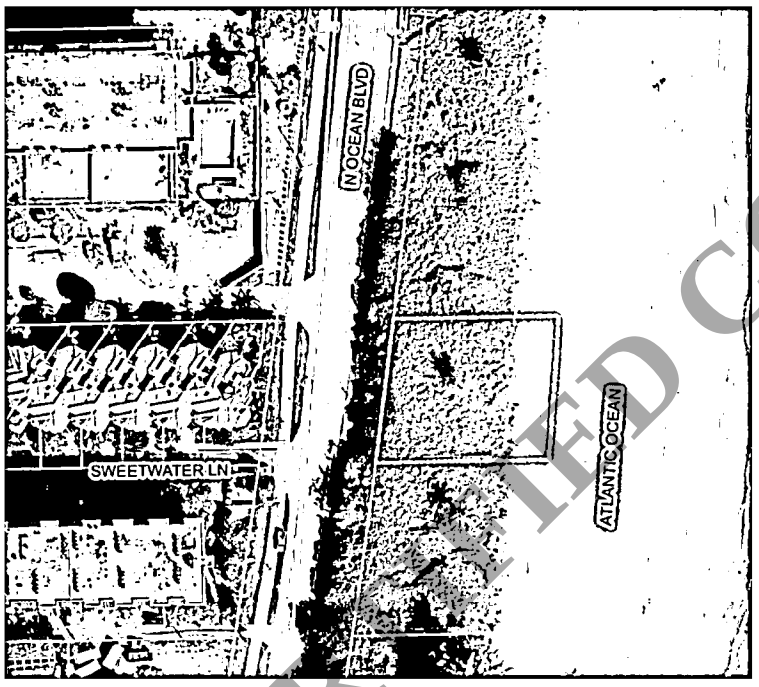
STATEMENT OF FACTS

I. BACKGROUND

A. The Property.

The Property, located at 2600 North Ocean Boulevard, is a 0.42 acre strip of beachfront property, bounded to the west by AIA and on the east by the Atlantic Ocean. A. 273-74; 628-29. The Property in its entirety lies seaward of the CCCL,

is completely undeveloped and includes a native beach dune system with an active sea turtle nesting zone. *Id.* The following aerial photograph of record depicts the location of the Property, the CCCL in relation to it, and the adjacent properties:



SA. 9; *see also* SA 10. [1]

B. The CCCL and The City's Setback Prohibition.

The City's CCCL is a product of the Beach and Shore Preservation Act. Section 161.053(1)(a), Florida Statutes, provides:

> The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest

[1] The orange line running north-south is the CCCL; the Property is identified by the broken yellow line.

> to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to the upland structures, endanger adjacent properties, or interfere with public beach access. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida.

(Emphasis added).

The City first established its coastal construction regulations in 1973. A. 274.[2]

The City Code at Section 28-1556 (3) ("Coastal Construction Setback") provides:

> The city hereby adopts the county coastal construction control line as established by the department of environmental protection, as specified under F.S. § 161.053, and recorded in the public records of the county in plat book 80, pages 137 through 155. Seaward of the established coastal construction control line no person shall:
>
> (a) Construct any structure whatsoever;
> (b) Make any excavation;
> (c) Remove any beach materials or otherwise alter existing ground elevations;

[2] In 1981, the City Council by ordinance incorporated the Palm Beach County CCCL, as established by the FDEP, into the City Code. In 2007, the City Council by ordinance revised the CCCL to make it consistent with the County's 1997 CCCL, resulting in a westward shift of the CCCL (with the Property being wholly seaward of the CCCL both before and after the westward shift). In 2012, the City Council made a corrective amendment to the CCCL provisions, to ensure that any future amendments by the County would not automatically change the City's CCCL. A. 274-75. The Fourth District Court of Appeal has expressly upheld the City's coastal construction regulations. *See GLA and Associates, Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003) (City ordinance requiring permits for activities seaward of the CCCL and establishing CCCL setback was not preempted by State law, and did not lack variance criteria).

> (d) Drive any motor vehicle on or over or cross any sand dune, or damage or cause to be damaged such sand dune or the vegetation growing thereon.

(Emphasis added).

C. City Code Variance Criteria.

The City Code provides a procedure for variances from this strict setback prohibition against any construction seaward of the CCCL. In this regard, the City Code at Section 28-1556(5) provides:

> In the consideration of whether to grant a variance, the city council shall determine whether the application meets the criteria and standards set forth in section 28-127(3) and, in making the determination, shall consider the following:
>
> (a) The recommendation of the city manager.
> (b) The comments of interested parties in the general public.
> (c) The engineering data submitted by the applicant.
> (d) All other relevant data.

Section 28-127(3) sets forth the six mandatory variance criteria, as follows:

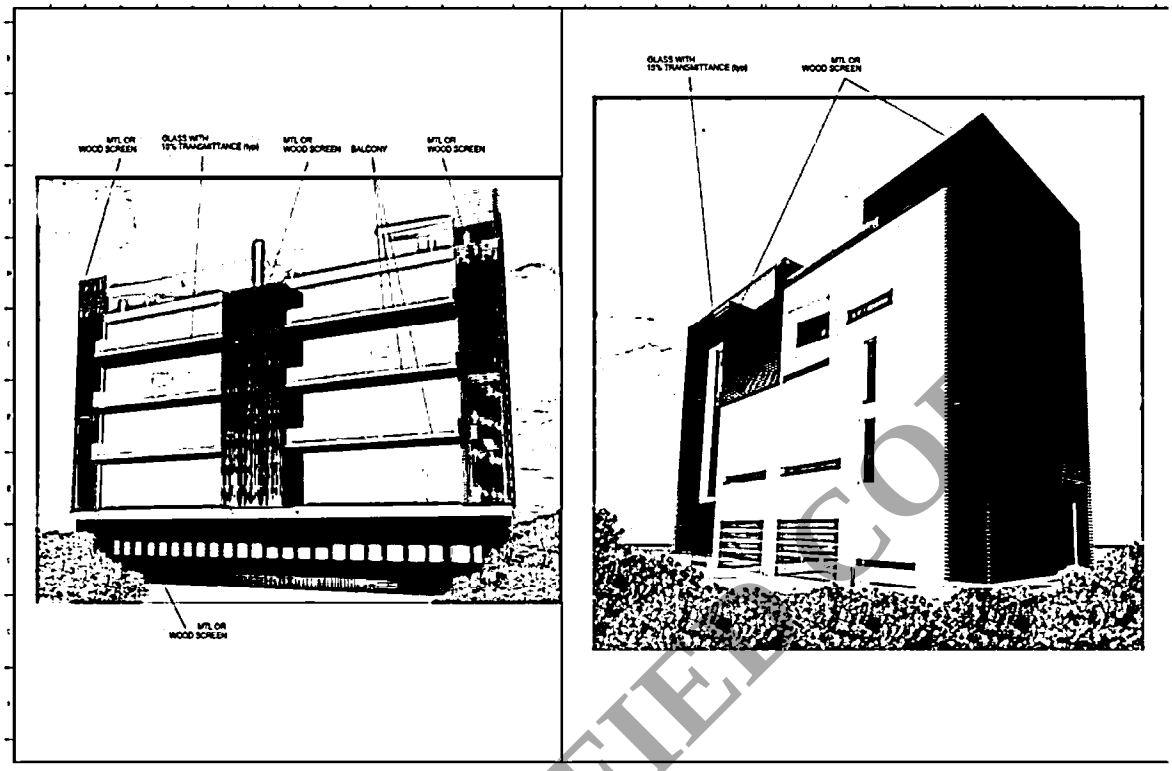
> In order to grant a variance from the requirements of this chapter for any of the requirements identified in subsection (1) above, the board must specifically find that ***all*** of the following criteria are satisfied:
>
> (a) Special and unique conditions exist which are peculiar to the applicant's case and which are not generally applicable to the property located in the zoning district;
> (b) The special and unique conditions are not directly attributable to the actions of the applicant;
> (c) The literal interpretation of this chapter, as applied to the applicant, would deprive the applicant of rights commonly enjoyed by the owners of other property in the zoning district;

(d) The variance granted is the minimum variance necessary for the applicant to make reasonable use of the property;
(e) Granting the variance is not detrimental to the public welfare, or injurious to the property or improvements in 127zoning district or neighborhood involved; and
(f) Granting the variance is not contrary to the objectives of the comprehensive plan of the city.

(Emphasis added).

D. Petitioner's Variance Request.

Petitioner sought a variance from the CCCL setback (prohibiting construction of "any structure whatsoever" on the Property) in order to construct an approximately 49 feet tall, four-story 14,270 square foot duplex, 128 feet seaward of the CCCL. A. 273; 628. The proposed duplex is 19 feet wide, but it features cantilevered floors extending 11 feet seaward further than its pile foundations, resulting in a 30 foot encroachment of the structure itself into the CCCL. A. 633. Notably, the eastern facade of the proposed duplex would be made nearly entirely of glass, depicted in the record as follows:



SA. 13.

II. PROFESSIONAL REVIEW; RECOMMENDATIONS OF DENIAL.

A. Applied Technology Management, Inc. ("ATM") Analysis and Recommendation of Denial.

Once Petitioner's application for the variance was sufficiently complete, the City engaged the professional services of ATM to provide a coastal engineering and environmental analysis of the proposed project.[3] After extensive analysis and review

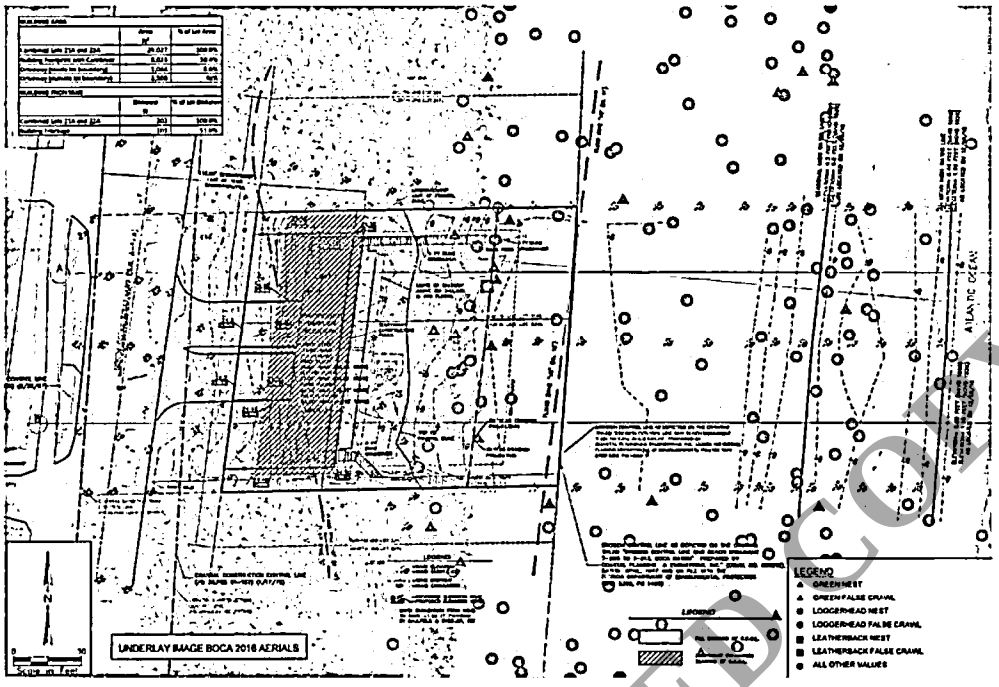
[3] Contrary to Petitioner's contention, Pet. 4, the City did not delay its processing of the variance application. Petitioner's submission on September 16, 2016, was a *pre-application* submission. SA. 178. There followed numerous and incomplete submittals by Petitioner, as well as meetings with Staff requested by Petitioner, as memorialized in City correspondence to Petitioner, dated December 15, 2017. SA. 175; 178.

of Petitioner's multiple submissions and amendments, ATM, through Michael G. Jenkins, Ph.D., P.E., provided its final report on August 9, 2018. SA.68-77. On October 25, 2018, ATM issued a supplemental report in which it responded to additional submissions by the Petitioner. SA.78-79. In preparing the reports, Dr. Jenkins worked in close association with Kirt W. Rusenko, Ph.D., the City's Marine Conservationist. A. 544.[4]

The report (and supplemental report) concluded that the development, as proposed, should not be approved. SA. 68; 73-74; 78; 80. In support of this conclusion, ATM made several findings, among them:

1. The proposed four-story 14,270 square foot duplex would cause direct and secondary adverse impacts to the active nesting site of three sea turtle species: loggerhead turtles, which are listed as a threatened species, and green and leatherback turtles, which are listed as endangered. SA. 71; 76. The following depicts the sea turtle nesting activity data for the Property:

[4] A copy of the resumes of Dr. Jenkins and Dr. Rusenko were made part of the record at the EAB hearing (A. 298) and at the City Council meeting (A. 700). Dr. Jenkins' doctoral degree is in ocean engineering and he has directed, designed and permitted multiple beach nourishment and coastal construction projects identified on his resume. *See* SA. 45-51. Dr. Rusenko's doctoral degree is in marine zoology and biochemistry and he has served in the City's employment as Marine Conservationist since 1995. *See* SA. 52-65. Among other credentials, Dr. Rusenko is an expert on sea turtle lighting and "dark sky" initiatives throughout the State of Florida and elsewhere. *Id.*



SA. 21. Thus, as the ATM report found, the area of active nesting on the Property extends landward from the beach into the foredune, with a concentration of nesting located at the vegetated dune line. SA. 71.

Further, as the ATM report found, the extensive use of glass siding on the seaward side of the proposed duplex would create an ecological disturbance to the nesting areas caused by light pollution. *Id.* As is extensively documented, including in the Florida Fish and Wildlife Research Institute's ("FFWRI") technical report, entered into the record before the City Council and entitled, "Understanding, Assessing and Resolving Light-Pollution Problems on Sea Turtle Nesting Beaches," light pollution is detrimental to sea turtles because it alters critical nocturnal behaviors – namely, the choice of nesting sites, their return to the sea after nesting, and how hatchlings find the sea after emerging. *See* SA. 89; 93-107.

As ATM reported, although the proposed exterior lighting and glass tinting treatment to reduce interior light visibility adhered to FDEP guidelines, those guidelines are not specific to sea turtle lighting concerns and also presume that interior lights will not be visible from the beach. SA. 71. In this case, the extensive use of glass siding on the eastern facade, as well as the use of partially screened glass on the northern and southern sides of the building, would mean that interior lighting for each of the four floors of the proposed duplex would be visible from the beach. *Id.*

2. The proposed duplex would result in unavoidable temporary and permanent disruption of the vegetation that secures the dune system, yet no specific mitigation plan for impacts to native dune vegetation was proposed. SA. 70-72. Two State-listed species ("beach star" and "sand dune sponge") that commonly occur in the area would be impacted by the proposed development. SA. 72.

3. As Dr. Jenkins also observed, the dune system on the Property (upon which Petitioner relies) is not a natural feature of the land, but a result of historic and current City efforts towards dune renourishment of the beach. SA. 69-70. The proposed development relies entirely on the City continuing to permit, fund and

complete renourishment projects indefinitely into the future, which is not guaranteed. *Id.*[5]

B. Staff Analysis and Recommendation of Denial.

The Director of the Department, Brandon Schaad, AICP, in conjunction with Dr. Jenkins, Dr. Rusenko and the City's Senior Environmental Officer, Nora Fosman, undertook an in-depth analysis of Petitioner's CCCL variance request, the results of which were presented to the EAB in the Staff report, dated January 10, 2019. A. 273-90.[6] The Staff report concluded with a recommendation of denial. A. 289-90.

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[5] In this regard, the ATM report stated: "[T]he Property is within the North Boca Raton Nourishment Project footprint and as such has been radically altered through repeated beach nourishments. The current property seaward boundary is defined by the Erosion Control Line (ECL)… At present, this boundary is greater than 50 feet landward of the current [Mean High Water] shoreline position. The approximate 50 [foot] seaward advance in the shoreline is directly attributable to the nourishment of the beach by the City and is not due to natural processes…. The foredune system fronting the proposed structure is not a natural feature and is dependent on the nourishment program to be maintained in its current configuration and position. The development as proposed is based on the current configuration of the dune which has been artificially advanced seaward." *Id.*

[6] Copies of the resumes of Mr. Schaad and Ms. Fosman were made part of the record at the EAB meeting (A. 298) and at the City Council meeting (A.700). Mr. Schaad has been a planner since 2003; having served as the City's Director since 2016, he was previously the director and senior planner at the Town of Miami Lakes, beginning in 2003. SA. 60. Ms. Fosman has served as an Environmental Officer for the City since 2001. SA. 61.

The Staff report relies in part on the findings made by Dr. Jenkins in the ATM reports. A. 273. In addition, the Staff report made findings regarding light pollution that would emanate and reflect from the proposed 4-story glass facade, based upon Dr. Rusenko's findings.[7] Staff also made findings regarding dune vegetation and Petitioner's revised mitigation planting plan: it found (among other things) that the revised plan did not address impacts to dune vegetation and dune stability; proposed low elevation plantings that would limit buffering between the proposed duplex and the beach; and did not replicate the vegetative species directly impacted by the proposed project. A. 279.

The Staff report concluded by recommending that the EAB recommend to the City Council denial of the variance request:

[7] The Staff report states: "[T]he proposed tinting of 15 percent of transmittance will not reduce reflections. Further, Dr. Rusenko advises that while the Property only covers approximately 130 linear feet of beach, the extensive, reflective glass surface would impact a larger area of beach both north and south of the Property. In short, the proposed 4-story, 14,270 square foot duplex with an east (ocean) facing elevation consisting almost entirely of glass will result in lighting impacts that will damage sea turtle nesting and is exacerbated by the size, extent, and architectural design (predominantly glass) of the proposed building. Dr. Rusenko also noted: '… there are a significant number of nests and false crawls in the dune at the proposed project site demonstrating that the dune is a valuable site for nesting sea turtles. The proposed structure will be extremely close to these crawl sites, in some cases the structure may be over the crawl sites. Proximity of a large, reflective surface will not be an attractive site for a nesting sea turtle. From 2001 to 2007 there have only been 3 nest disorientations involving sea turtle hatchlings largely since the dune has been quite healthy and growing during that time. Replacement of the dune vegetation with a large, reflective structure with interior lighting has a high potential to disorient hatchlings emerging from their nest in that area.'" A. 277.

> The Applicant has failed to justify the request or demonstrate compliance with the criteria for granting a variance set forth in Section 28-127(3), Code of Ordinances. Specifically, in addition to the analysis discussed in this staff report, there are other reasonable uses for the Property short of a four-story tall, more than 14,000 square foot building with a largely east-facing building elevation that will have substantial negative environmental impacts, primarily to endangered nesting sea turtles by causing disorientation, but also to the dune ecosystem and native vegetation. As such, the request is not the minimum variance necessary for the Applicant to make reasonable use of its Property, is inconsistent with the Comprehensive Plan and City Code, and would be detrimental to the public welfare and injurious to the surrounding area.

A. 289-90 (emphasis added).

C. The EAB Hearing and Recommendation of Denial.

The EAB considered Petitioner's variance request at its regularly scheduled meeting on January 10, 2019, which hearing lasted from 5.30 to 10:20 p.m. A. 291. Petitioner was afforded more time to present the variance application than the City's quasi-judicial procedures provide; and the record reflects no adverse evidentiary or procedural rulings against Petitioner, but a full opportunity to present its case and witnesses, and to conduct cross-examination.[8] At the conclusion of the hearing, the EAB voted unanimously to recommend denial. A. 591-592.

[8] The City's quasi-judicial procedures impose a time limit of a maximum of 20 minutes on the Staff presentation, but allow for the extension of the applicant's same time allotment of 20 minutes, up to a maximum of one hour. *See* A. 5-7 (Resolution No. 139-2001). Following counsel for Petitioner's opening statement, A. 319-325, Petitioner's first witness, Dr. Stoddard, testified at length to the history of the application. A.326-332. When the Chair advised that 20 minutes of the presentation had lapsed, and counsel for Petitioner stated that he needed more time, the Chair

D. Staff Analysis and City Manager Recommendation of Denial.

In the detailed Staff report to the City Council, dated February 19, 2019, Staff again recommended denial of the variance request. A. 628-640.[9] Staff reiterated the negative environmental impacts to sea turtle nesting and dune vegetation, A. 630-631, and furnished the City Council with its opinion that the proposed four-story 14,270 square foot duplex did not meet the variance criteria. A. 631-633.

In addition, Staff analyzed various points that Petitioner raised at the EAB hearing, summarized here as follows:

1. Although Petitioner contended that the proposed project had been approved by the FDEP and the Florida Fish and Wildlife

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advised that he would consider an extension. A. 332-33. Dr. Stoddard continued. A. 334-340. When a second witness, Mr. Tomasello, concluded his testimony, the Chair advised that 40 minutes had lapsed, asked whether Petitioner needed more time, and then granted an additional 20 minutes. A. 347. The third witness, Dr. Fletemeyer and the fourth witness, Mr. Barron, then testified. A. 348-363. At that point, the Chair asked whether the Petitioner was close to "wrapping up," A. 363, and agreed to extend the time by an additional 10 minutes when Mr. Barron finished. A. 366. A fifth witness, Mr. Caycedo, testified. A. 367-77. Following extensive public comment and a break, counsel for Petitioner was afforded the opportunity to cross-examine the City's witnesses and members of the public, (including cross-examination for more time than the City's quasi-judicial procedures provide). A. 536-568. As the record reflects, he did so vigorously. *Id.* Counsel for Petitioner made a rebuttal argument as well. R. 576-585.

[9] The recommendation stated: "Based on the recommendation of the Environmental Advisory Board, the Development Services Department, and the analysis and findings of the coastal engineering and environmental review conducted by the City's consultant, Applied Technology & Management, Inc. ("ATM"), I recommend denial of the request for a CCCL variance…." A. 628.

Conservation Commission ("FWCC"), documents on which Petitioner relied do not evidence any such approvals. A. 633.[10]

2. Petitioner contended that the proposed duplex, at 19 feet wide, represented the absolute minimum encroachment into the CCCL, because, as it further contended, the 19 foot width is the minimum width required to support the proposed height of the duplex from a structural standpoint. However, taking into account the cantilevered portion of the proposed duplex, the encroachment into the CCCL of the building is actually 30 feet. Moreover, a smaller building would result not only in fewer adverse environmental effects, but a smaller encroachment. *Id.*

3. Petitioner did not meet the lighting requirements of the City Code at Section 23-232(2)(i), which prohibits direct and indirect illumination of the beach or any lighting source visible from the beach. The height of the proposed duplex atop of the dune will render the lighting visible from both the north and south, not just the east. In assessing sea turtle nesting, both artificial light and reflected light from the surface of buildings are relevant concerns. A. 634.

4. Contrary to Petitioner's statement, Staff did not request 15% visible light transmissions, but instead (as early as September 2017) advised Petitioner that even a flat stucco wall (such as at Whitehall Condominium, 2000 South Ocean Boulevard) caused sea turtle hatchling disorientation. A. 635.

5. Petitioner disingenuously disparaged Dr. Rusenko's use of photographs to demonstrate which visible lighting is problematic for sea turtle nesting (calling it "junk science"), contending that only a certified digital incident light meter should be used. However, light

[10] On March 14, 2016, the FDEP issued a consultation letter, which furnished a preliminary assessment only and expressly stated that the consultation: "does not constitute the approval of the Department." A. 12-14. A September 24, 2018 letter from FWCC advised that, on a preapplication basis, Petitioner's exterior lighting designs were recommended for approval. A. 264. Further, as Staff noted, the Petitioner had not actually supplied FWCC with an architectural rendering of the proposed duplex; and FWCC's review addressed only the exterior lighting fixtures. A. 633.

meters are not an effective tool because they do not measure the amount of light reaching the beach, the light wavelength characteristics, brightness or direction. The [FFWRI technical report] [SA. 81-174] states that there is no one acceptable methodology, but that visual assessments are required to assess which lights are most likely to harm sea turtles. A. 635-36.

6. Petitioner's vegetation mitigation plan did not address impacts to dune vegetation and dune stability; proposed low elevation plantings that would reduce buffering between the proposed duplex and the beach; and did not replicate the vegetative species directly impacted by the proposed project. A. 636.

7. Contrary to the Petitioner's contention that sea turtles do not nest in the dune, data collected from 2013, 2016 and 2017 showed that 13.9% of nests were located in the dune; 48.1% were located within 10 feet of the dune; and 71.1% were located within 20 feet of the dune or in the dune. Further, nests located within the dune are most likely to survive hurricane and tropical storm activity, which coincides with the nesting time of green sea turtles. A. 637.

8. Petitioner mischaracterized the enforcement efforts of Dr. Rusenko. In the case of buildings constructed prior to December 10, 2002, which were not required to replace their windows and light fixtures, he asked residents to turn off lights or draw curtains during sea turtle nesting season. *Id.* Dr. Rusenko's experience is not limited to "after-the-fact" evaluation, but he has provided lighting assessments for several new constructions projects, as well as renovations. *Id.*

9. Contrary to Petitioner's disparagement of Dr. Rusenko and his methodology, Dr. Rusenko's expertise, affiliation with FAU, and collaboration with other scientists in academic and government settings demonstrates his expertise. A. 638. *See also* SA. 52-65.

III. CITY COUNCIL HEARING AND DENIAL OF VARIANCE.

The City Council heard Petitioner's variance application at its regularly scheduled meeting on February 26, 2019, which lasted from 6:40 p.m. to 9:27 p.m.

A. 693.[11] Again, Petitioner was granted more time to make its presentation than the City's quasi-judicial procedures afford to applicants. Again, the record reflects no adverse evidentiary or procedural rulings against Petitioner, but a full opportunity to present its case, its witnesses and to conduct cross-examination.[12]

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[11] The agenda item included the Staff report and its attachments, including the ATM reports. The City also introduced the resumes of Dr. Rusenko, Dr. Jenkins, Ms. Fosman, and Mr. Schaad. A. 700-701. Among other additional documents made part of the record was the Staff report to the EAB and the full transcript of the EAB hearing on January 10, 2019, as well as the FFWRI technical report. *Id.*

[12] Mr. Schaad presented Staff's report and recommendation to the City Council within the twenty minutes allotted under the City's quasi-judicial procedures. A. 700-719. At the outset of Petitioner's presentation, counsel requested more than the maximum one hour time; the Mayor explained that the procedures allow up to one hour maximum, and granted the extension. A.719-720. Counsel for Petitioner commenced by making a motion that three Council Members recuse themselves, described below. A. 720-730. Counsel for Petitioner then presented Petitioner's case, presenting an opening statement (A. 732-742) preliminary statement and a total of five witnesses, including Dr. Rusenko, Mr. Caycedo, and Mr. Stoddard (the latter two of which had previously testified at the EAB hearing, the transcript of which was already in the record). At that juncture, when the Mayor reminded counsel for Petitioner that time was passing, he asked how much time remained and was told he had five more minutes. A. 764-765. Petitioner next presented legal analysis of Ms. Miskel, a land use and zoning attorney, when the (already extended) time remaining lapsed. A. 769. Petitioner was asked how much more time it needed, and was afforded an additional ten minutes. A. 771. Ms. Miskel continued, then Mr. Tomasello, another attorney who had already presented legal analysis at the EAB hearing, addressed the City Council. A. 778.-784. More time was afforded for his presentation. A. 781-782 ("That would be … one hour and fifteen minutes' total, when the rules provide a minimum of twenty.") After public comment, counsel for Petitioner extended the presentation by vigorously cross-examining members of the public who had made comments, A. 821-830, but chose to waive any rebuttal. A. 831.

At the outset of the hearing, counsel for Petitioner argued that three of the five Council Members (including the Mayor) should recuse themselves, not because of any voting conflict of interest (based on a special private gain or loss, financial or otherwise, that they would experience as a result of the variance decision), but because they had previously shared their opinion regarding the CCCL setback and this request for a variance from it.[13] In this regard, counsel argued that Mayor Singer should recuse himself because he had advised constituents that, "based on the environmental evidence that exists concerning our dunes and impact to sea life," he did not favor construction seaward of the CCCL, consistent with City Code §28-1556(3)(a). A. 724-725; *see* A. 224.

In fact, the Mayor said more than that: he (accurately) explained the "very high burden in order to obtain a coastal construction variance, which considers impact on dunes," stating that, based on evidence he had "seen to date, it seems unlikely that the [Petitioner] could meet that burden in order to have [its] plans approved." A. 220. Furthermore, the Mayor strongly reminded his constituents that

[13] As grounds for recusal of the three Council Members, counsel for Petitioner first complained that the former Mayor, in 2015, had suggested to the Greater Boca Raton Beach and Park District that it consider acquisition of privately owned beach front property for park and recreation purposes. A. 720. He also complained that the City Manager had reminded the Beach and Park District of the indisputable fact that it possesses eminent domain authority. A.720-722.

no final decision could be made until all of the evidence was considered in the quasi-judicial setting:

> The City Council is required by law NOT to render a final decision until we hear all of the evidence and testimony at a quasi-judicial hearing. That means no matter how strongly I may feel about an issue – such as preserving the integrity of the dune system, turtles or the beaches in general – the law makes us wait until the evidence is complete to make a decision.

Id. In denying the motion to recuse himself at the hearing, Mayor Singer reiterated this point: his prior comments were based on the evidence existing at the time he made them and that he would make his decision based upon the evidence presented in the record.

> None of those [comments] were prejudicial to hearing more evidence. The record has been more fully developed. I have considered it and I am, certainly, prepared to consider all of the evidence that will be put forth today.

A. 730-731.

Counsel for the Petitioner likewise accused Council Member O'Rourke and Council Member Mayotte of bias, again on the basis of their communications with constituents regarding the prohibition against construction seaward of the CCCL. A. 725-727. These Council Members also declined to recuse themselves, each separately stating that they were committed to basing their decision on the variance request and on the evidence in the record: "I will make decisions based on testimony and criteria." A. 731. "I, too, was sworn into this office to uphold the laws of this

city. Yes, I do have a passion; but, my first priority is to uphold the laws of the city and that is what I plan to do here tonight." *Id.*

At the conclusion of the hearing, the Mayor advised that, having listened to the evidence and examined the record, he found that the variance criteria were not satisfied, and he made a motion to deny the variance request. A. 831. The motion was seconded by Council Member Rodgers. A. 832. Both Council Member O'Rourke and Council Member Mayotte advised that they would vote to deny the variance on the basis of the evidence presented. A. 841-842. Upon roll-call, all five Council Members voted to deny the variance. A. 842-43.

STANDARD OF REVIEW

In conducting first-tier certiorari review, the Court evaluates: (1) whether the City Council accorded procedural due process; (2) whether it observed the essential requirements of law; and (3) whether the City Council's decision is supported by competent substantial evidence. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003); *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).[14]

[14] The Petition argues the first and third prongs only.

When reviewing whether the City Council's decision is supported by competent substantial evidence, the Court may not reweigh or re-evaluate the evidence or substitute its judgment for that of the City Council. *See, e.g., Miami-Dade County v. Reyes,* 772 So. 2d 24, 28 (Fla. 3d DCA 2000) (holding that "circuit court [on certiorari review] is not free to reweigh or re-evaluate the evidence presented at the administrative hearing or substitute its judgment for that of the agency" on certiorari review). Instead, "[o]n first-tier certiorari review, the circuit court's task is to review the record for evidence that supports the agency's decision, not that rebuts it – for the court cannot reweigh the evidence." *GBV Int'l*, 787 So. 2d at 846, n. 25 (emphasis in original). To this end, a circuit court "should review the record to determine simply whether the Commission's decision is supported by competent substantial evidence." *G.B.V. Int'l,* 787 So. 2d at 843 (emphasis in original). "While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision." *Dusseau*, 794 So. 2d at 1275 (emphasis added).

ARGUMENT

I. THE DECISION OF THE CITY COUNCIL TO DENY THE VARIANCE REQUEST IS SUPPORTED BY COMPETENT SUBSTANIAL EVIDENCE.

A. The Petition Asks The Court To Stray Beyond The Standard And Scope Of Certiorari Review.

The Petition states that "the City failed to support its denial of the variance with competent substantial evidence," Pet. 17, but its argument strays well beyond the standard and scope of certiorari review, as argued more fully below.

To reiterate, the only relevant evidence is that which supports the decision; evidence to the contrary is irrelevant. *See, e.g., G.B.V. Int'l,* 787 So. 2d at 843; *Dusseau*, 794 So. 2d at 1275. Thus, it is irrelevant that Petitioner's witnesses disagreed with ATM, Dr. Rusenko, Mr. Schaad, or other Staff, whose reports, opinions and testimony support the City Council's denial. *See* Pet. 18-19; 23-25; 29-30; 37-40. Moreover, the Court does not reweigh evidence. *See, e.g., GBV Int'l*, 787 So. 2d at 846, n. 25; *Reyes,* 772 So. 2d at 28. It is therefore of no moment that Petitioner attempts to discredit the findings or conclusions of the City's professional consultant and Staff (Dr. Rusenko in particular), since the City Council alone is charged with deciding the weight of evidence presented to it.

In this regard, Petitioner would have the Court ignore the professional credentials of Dr. Jenkins, Dr. Rusenko, Mr. Schaad and Ms. Forman and overlook settled law. The professional reports of ATM and the Staff, as well as their

professional recommendations, constitute competent substantial evidence supporting the City Council's decision. *See, e.g., Village of Palmetto Bay v. Palmer Trinity Private School, Inc.,* 128 So. 3d 19, 26 (Fla. 3d DCA 2012) (recommendation of professional staff based upon its detailed review of all applicable criteria constitutes competent substantial evidence); *Payne v. City of Miami,* 52 So. 3d 707, 762 fn. 13 (professional opinion of assistant planning director is competent substantial evidence); *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 205 (Fla. 3d DCA 2003) (testimony of professional staff, when based on professional experiences and personal observations, as well as information contained in an application, site plan and studies, constitutes competent substantial evidence); *Palm Beach County v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989) (professional staff reports analyzing zoning issue constitute competent substantial evidence).

Finally, Petitioner would have the Court lose sight of the nature of the application that the City Council denied. Unlike an applicant seeking to develop its property "as of right," an applicant seeking a variance bears the burden to establish grounds for the government to deviate from legislated policies that would otherwise apply.[15] Thus, while it is an incorrect statement of the record to assert that the

[15] *See, e.g., Gomez v. City of St. Petersberg*, 550 So. 2d 7, 8 (Fla. 2d DCA 1989) (the burden rests with the applicant to establish the requirements for a variance, which burden "is more extensive than the burden upon a party seeking a permissible

decision of the City Council is unsupported by competent substantial evidence, the statement also incorrectly overlooks that it was Petitioner's own burden to establish grounds for deviation from the established rule: seaward of the CCCL, "no person shall construct any structure whatsoever." City Code §28-1556(3)(a). *See Goersch,* 217 So. 3d at 1145-46.[16]

B. The Decision To Deny The Variance Is Supported By Competent Substantial Evidence.

The Court should readily conclude that the City Council's decision to deny the variance is supported by competent substantial evidence. Although Petitioner walks the Court through each of the six variance criteria, Pet. 18-42, nowhere does it recognize the salient point: the City Council is authorized to grant a variance only if the Council determines that all six variance criteria are met. *See* City Code § 28-

use by special exception") (citing *Irvine v. Duval County Planning Comm'n*, 466 So. 2d 357, 364 (Fla. 1st DCA 1985) (Zehmer, J., dissenting), *quashed*, 495 So. 2d 167 (Fla.), *dissent adopted*, 504 So. 2d 1265 (Fla. 1st DCA 1989)); *see also, e.g., City of Satellite Beach v. Goersch,* 217 So. 3d 1143, 1145-46 (Fla. 5th DCA 2017) (holding that circuit court failed to apply the correct law by shifting the burden to the city to show that the variance denial was supported by competent substantial evidence, where the record supports the conclusion that the applicant did not meet its burden).

[16] The Court should reject Petitioner's abstract discourse on pages 16-18 of the Petition, where Petitioner cites to case law standing for the proposition that zoning ordinances must provide standards. Petitioner contends that the City relied on "subjective standards" and "ever-changing discretion, Pet. 18, but is not candid with the Court. In *GLA and Associates*, 855 So. 2d at 283, the Fourth District rejected the argument that the City's CCCL regulations lack "ascertainable standards or criteria to be followed" because, pursuant to Section 28-1554 (quoted above), the City's variance criteria control.

127(3) ("In order to grant a variance… the [City Council] must specifically find that ***all*** of the following criteria are met.") (emphasis added). Thus, to prevail here, Petitioner would need to demonstrate not only that it met its burden as to each of the six variance criteria, but that there exists a complete absence of any competent substantial evidence in support of the City Council's decision that each and every one of the six variance criteria were not met. Conversely, the City need only demonstrate that Petitioner failed to meet its burden as to a single criterion or that competent substantial evidence otherwise supports the City Council's denial as to that single criterion. On this basis, the Court must deny the Petition.

The six variance criteria considered by the City Council, and the associated arguments, follow.

1. "Special and unique conditions exist which are peculiar to the applicant's case and which are not generally applicable to the property located in the zoning district." City Code § 28-127(3)(a) (emphasis added).

Petitioner's argument veers off course at the outset. Petitioner contends that there exist "special and unique conditions" peculiar to Petitioner's case because, unlike other properties in the zoning district, the Property is subject to the CCCL setback prohibition. Pet. 18-19. The contention is entirely circular. "Special and unique conditions" warranting a variance from a regulation concern the condition of

the land, not the existence of regulation itself.[17] Otherwise, all variance requests seeking relief from application of a regulation would present "special and unique conditions." And, of course, while there are other properties in the zoning district that are not seaward of the CCCL (oceanfront properties), all such seaward properties in the zoning district are subject to the CCCL regulations. Furthermore, as Staff reported to the City Council, the Property itself is not "special and unique" oceanfront property: the primary reason that some other oceanfront properties feature structures (including condominiums) is because these properties were developed prior to the CCCL regulations. A. 284-85; 631.

Thus, because the Property features no "special or unique conditions," except that it is subject to the CCCL setback, Petitioner did not establish that its variance request satisfied the first criterion and, therefore, competent substantial evidence supports the City Council's decision to deny the variance as to this first criterion.

2. "The special and unique conditions are not directly attributable to the actions of the applicant." City Code § 28-127(3)(b) (emphasis added).

Petitioner's argument as to this second criterion suffers from the same circularity. Petitioner contends that it did not create the "special and unique conditions" because it was the City that adopted the CCCL regulations, thereby

[17] It is an "irregular shape or other peculiar physical characteristic of the real property" that make a hardship to the property owner "unique." *City of Coral Gables v. Geary*, 383 So. 2d 1127, 1128 (Fla. 3d DCA 1980).

(purportedly) creating the "special and unique conditions." Pet. 20-21. Again, inasmuch as the CCCL setback is the regulation itself, not a "special and unique condition," the argument fails. Further, as noted above, the CCCL setback was first established in 1973, decades before Petitioner acquired the Property. "A self-imposed or self-acquired hardship (such as purchasing property under existing zoning and then applying for a variance) is not the kind of hardship for which variances should be granted." *Elwyn v. City of Miami*, 113 So. 2d 849, 852 (Fla. 3d DCA 1959).[18]

Finally, as Staff reported to the City Council (A. 632) and as Petitioner concedes (Pet. 21), the condition of the Property was altered in 1999 (decades after the CCCL regulation was established), when a previous owner severed the Property from the land to west, across N. Ocean Boulevard (AIA), thereby precluding use of the Property in connection with, or as an accessory amenity to, improvements constructed across the street.[19] Although Petitioner argues that the act of severing

[18] *See also, e.g., Allstate Mortgage Corp. of Fla. v. City of Miami Beach*, 308 So.2d 629 (Fla. 3d DCA 1975), *Crossroads Lounge, Inc. v. City of Miami*, 195 So.2d 232 (Fla. 3d DCA 1967); *Friedland v. City of Hollywood*, 130 So.2d 306 (Fla. 2nd DCA 1961).

[19] As Staff reported (A. 284-285) and as Petitioner concedes (Pet. 22), the majority of privately-owned, oceanfront properties in the zoning district (which were developed after the CCCL setback was established), are utilized for the benefit of the non-oceanfront portion of the properties. A. 284-285. As noted below, nothing prevents the Property from being used as an accessory amenity to the property across the street, provided only that title is again unified. Likewise, nothing

the Property is not "attributable to its actions," but is the act of a previous owner, Pet. 21, Florida law disagrees that this distinction satisfies the variance criterion. It is only when "neither the owner of the lot at the time of the zoning ordinance… nor a subsequent owner, did anything to create the condition … for which the variance is sought" that "a right to relief possessed by the original owner passes to the successor in title." *City of Coral Gables v. Geary*, 282 So. 2d 1127, 1128-29 (Fla. 3d DCA 1980).[20]

Thus, Petitioner did not establish that its variance request satisfied the second criterion and, therefore, competent substantial evidence supports the City Council's decision to deny the variance for this additional reason.

3. "The literal interpretation of this chapter, as applied to the applicant, would deprive the applicant of rights commonly enjoyed by the owners of other property in the zoning district." City Code § 28-127(3)(c) (emphasis added).

The Court should also conclude that competent substantial evidence supports the City Council's decision to deny the variance as to the third criterion. Petitioner argues that it is wholly unable to use the Property because, unlike other oceanfront

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prevents the Petitioner from requesting a variance for a less-impactful structure that satisfies the applicable criteria.

[20] Petitioner ignores this key point in *Geary*, misreading it to stand for a broad proposition that purchasing property subject to regulation is never considered a self-imposed or self-acquired hardship. Pet. 20. Here, however, the previous owner created the condition for which the variance is sought by severing the Property from the western tract in 1999, long after the CCCL regulations were adopted by the City.

properties in the zoning district, it cannot use the Property as an accessory amenity (since the Property was severed from the parent tract of land to the west of A1A and the CCCL in 1999). Pet. 22. Apart from the fact that the severed condition of the Property is not a condition of the land, but a condition self-imposed by the previous owner, Petitioner does not show that it is deprived of rights commonly enjoyed by owners of other similarly situated properties. To the contrary, as Staff reported and as Petitioner concedes, similarly situated property (privately-owned, oceanfront properties in the zoning district, which were developed after the CCCL setback was established) are often utilized for accessory amenity purposes. *See* A. 284-85; Pet. 21-22. As Staff therefore concluded, all owners of oceanfront properties adhered to the regulations. A. 284. If developed, the owners adhered to the regulations previously in effect at the time of development; if undeveloped, they adhered to the CCCL setback regulation or obtained variances for minimally intrusive accessory amenity purposes.[21]

Because competent substantial evidence supports the conclusion that Petitioner did not establish that its variance request satisfied this criterion, the Court

[21] As Staff reported: "Of the CCCL variances that have been granted by the City, the vast majority authorized very limited development with little or no impact, such as dune crossovers or modifications to already-existing improvements." R. 631.

should conclude that the City Council's decision was proper for this additional reason.

4. "The variance granted is the minimum variance necessary for the applicant to make reasonable use of the property." City Code § 28-127(3)(d) (emphasis added).

Competent substantial evidence also supports the City Council's decision to deny the variance request as to this fourth criterion. As Staff determined, the variance request to construct a 47 foot tall, four-story, 14,270 square foot duplex with an eastern facade made nearly entirely of glass, was for numerous reasons not the "minimum variance necessary" for Petitioner to make reasonable use of the Property.[22] For example, as Petitioner concedes, the zoning district (R-3-F) authorizes single family residences, as opposed to the duplex Petitioner proposed. A. 285-286; Pet. 22. Petitioner might have sought development of a single-family residence or, even, as described above, made reasonable use of the Property as an accessory amenity, as other property owners have done. Furthermore, as Staff determined, a variance might have been sought to develop a smaller duplex or one

[22] "It has been held that a 'hardship' may not be found unless no reasonable use can be made of the property without the variance' or, stated otherwise, 'the hardship must be such that it renders virtually impossible to use the land for which it is zoned.'" *Bernard v. Town Council of Town of Palm Beach*, 569 So. 2d 853, 855 (Fla. 4th DCA 1990).

with a different design (minimizing rather than maximizing the height and the use of glass) or both.[23]

Petitioner does not now overcome the Staff's analysis by pointing to the testimony of its own witnesses, that the variance request represented the "minimum" encroachment into the CCCL to structurally support the height of the 4-story duplex structure it proposed. Pet. 23-24. The testimony begged the question. A smaller structure may obviously have "minimized" the structural need and, therefore, the necessary encroachment into the CCCL; and a smaller structure (with a different design) may, likewise, have "minimized" the adverse environmental impacts.[24] The

[23] Staff reported on this point as follows: "[T]he [Petitioner's] implication that the proposed four-story, approximately 49 feet tall, 14,2170 square foot duplex, with an east (ocean) facing elevation consisting almost entirely of glass, on an environmentally sensitive beach dune that provides critical habitat including an active sea turtle nesting zone, is the 'minimum variance necessary' is not supported. Moreover, the [Petitioner] has not submitted supporting information or analysis to demonstrate why the gratuitous negative sea turtle impacts is the minimum 'reasonable use' or why the proposed building must be so large and obtrusive in order to be 'economically beneficial.' The [Petitioner] can derive a reasonable use of the Property by proposing a structure that has fewer impacts to nesting sea turtles associated with development lighting and fewer impacts to dune vegetation." A. 286.

[24] Staff reported on this point as follows: "[T]he Applicant's proposed building width of a minimum of 19 feet is needed to support the proposed four-story building. Hence, a smaller building with fewer impacts to sea turtles associated with the development lighting and fewer impacts to dune vegetation could result in a smaller, less wide encroachment into the CCCL. While the duplex building foundation is 19 feet wide, the [Petitioner] failed to mention the 11 foot-wide cantilevered portion of the duplex resulting in a 30 foot-wide encroachment into the CCCL." A. 633.

variance criterion requires that only the "minimum necessary" be granted to make "reasonable use of the property."

Again, therefore, competent substantial evidence supports the City Council's decision to deny the variance requested by Petitioner as to this additional criterion.

5. "Granting the variance is not detrimental to the public welfare, or injurious to the property or improvements in zoning district or neighborhood involved." City Code § 28-127(3)(e) (emphasis added); and

6. "Granting the variance is not contrary to the objectives of the comprehensive plan of the city." City Code § 28-127(3)(f) (emphasis added).

Petitioner's argument that it met the fifth and six variance criteria is lengthy, but simple. Pet. 24-42. Petitioner does not suggest that any of the Comprehensive Plan provisions at issue do not control.[25] Nor does it suggest that granting the

[25] As the record reflects, A. 286-89; 633, the Staff recommended denial to the City Council based upon its conclusion that the proposed variance would be inconsistent with the following provisions of the Comprehensive Plan:

> Conservation Element, Objective 1.4.0: "… protect species which are listed as endangered or threatened, and to protect rare, unique or significant natural habitats within the City."
>
> Coastal Management Element, Goal 1.0.0: "Restrict development activities that would damage or destroy resources and protect human life and limit public expenditures in an area subject to destruction by natural disasters."
>
> Coastal Management Element, Objective 1.10: "Protect coastal barriers and resources, wetlands, estuary, living marine resources, and wildlife habitats. Protect, conserve, and enhance the natural resources of Boca Raton by … regulating the impacts of development on wildlife habitats.

variance would not be detrimental to the public welfare, if the proposed duplex were found to create adverse environmental impacts. Petitioner solely argues that, contrary to the findings and opinions of the City's professional consultants and professional members of Staff, there would be no adverse environmental impacts, or, if any, they would be sufficiently mitigated by Petitioner's plans. Because the Court does not reweigh the evidence, and because the Petitioner's countervailing evidence is "irrelevant" on certiorari review, the Court should squarely reject Petitioner's arguments. *See, e.g., G.B.V. Int'l,* 787 So. 2d at 843; *Dusseau*, 794 So. 2d at 1275.

The record reflects abundant competent substantial evidence in support of the City Council's conclusion that the variance request, if granted, would create substantial adverse impacts to the environmentally sensitive Property, as follows.

Adverse Impacts: Sea Turtles

Petitioner argues that its plans sufficiently mitigated the adverse effects of light pollution on the threatened and endangered sea turtle population. Pet. 27-30.[26]

> Coastal Management Element, Policy 1.1.11: "Protect and restore beach and dune systems…. It shall be the policy of the City to not issue development orders for structures eastward of the Coastal Control Construction Line which involve excavation, alteration, or in some other manner compromise the integrity of the existing dune."

[26] Without belaboring the point, Petitioner inaccurately argues that the City was solely concerned with the lighting and reflection of light impacting sea turtles, and

Staff, the City's consultant, the EAB and the City Council disagreed. As ATM reported, although the tinting of the large glass facade was consistent with FDEP guidelines, these guidelines are not specific to sea turtles. SA. 71. Moreover, as Staff also reported, the beach lighting prohibition at Section 23-242(2)(i) of the City Code provides: "Any lighting which directly or indirectly illuminates the beach … shall be prohibited." A. 276-77. Yet, given that the eastern facade would be made nearly entirely of glass and that there is only partial screening of windows on the northern and southern sides of the building, as well as the height of the structure on the top of the dune, lighting from the proposed structure would directly or indirectly illuminate the beach to the east, north and south. A. 633-35.

In addition, Petitioner inaccurately argues that the City's concerns were somehow random because they purportedly changed over time. As the record reflects, however, Staff had advised Petitioner as early as September 2017 and November 2017 that hatchling disorientation occurs as a result of reflected light,

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had no concern that the "physical situs" of the proposed duplex was problematic. Pet. 26. Dr. Rusenko pointed out that the proposed structure would be "extremely close" to crawl sites, in some cases, directly over them. A. 277. Concern was also expressed that the cantilevered portion of the proposed structure would create a hazard, trapping sea turtles. SA. 71. Petitioner's suggestion that the "physical situs" of the proposed structure was of no concern is not only inaccurate but, apparently, borne of its unsupportable view that sea turtles do not nest in dunes anyway. A. 637. To the contrary, data collected from 2013, 2016 and 2017 showed that sea turtle nests are, in fact, located in the dune or in close proximity to it. SA. 21. In fact, Petitioner's witness, Dr. Fletemeyer, corrected his testimony by conceding (at least) that green sea turtles nest in sea dunes. R. 389

even where the building facade is not glass, but reflective of natural light merely because it is smooth and flat. A. 635. In response to this concern, which the City deemed paramount, Petitioner modified the design, but the changes were insufficient to cure the problem: it added only shallow balconies which themselves had smooth glass railings; and decorative, but flat louvers. A. 635.

Petitioner goes on to invoke the testimony of its witness, Dr. Fletemeyer, Pet. 29-30, who testified that tall oceanfront structures have been known to have a beneficial effect on sea turtle nesting because they limit "sky glow." In this regard, Petitioner points out that Dr. Rusenko had agreed with this premise in his own extensive writings on the subject. *Id.* Yet, while crediting Dr. Rusenko's expertise to this extent because it serves its purpose, Petitioner asks the Court to discredit Dr. Rusenko's particular conclusion in the record before the City Council. It was not merely that the proposed structure is not sufficiently tall, as Petitioner suggests, but that it was also physically isolated at the top of the dune and, therefore, not clustered together with other tall structures so as to limit "sky glow." A. 635. Again, the Court's role is not to reweigh evidence or discredit testimony, but to review the record for competent substantial evidence in support of the City Council's decision. *See, e.g., G.B.V. Int'l,* 787 So. 2d at 843; *Dusseau*, 794 So. 2d at 1275. Obviously,

the City Council was free to accept Dr. Rusenko's expertise on the subject of "sky glow" and his conclusion concerning it.[27]

Thus, the record is replete with competent substantial evidence in support of the City Council's conclusion that the proposed variance, if granted, would cause substantial adverse impact to nesting sea turtles.

Adverse Impacts: Dune Integrity

Petitioner's argument with respect to dune integrity and vegetation likewise fails to demonstrate an absence of competent substantial evidence in support of the City Council's decision with respect to the fifth and sixth criteria. Pet. 36-43. The Petition itself actually identifies competent substantial evidence in the form of testimony of Dr. Jenkins at the EAB hearing and the Staff reports, pinpointing how

[27] Petitioner also contends incorrectly that positive preapplication input it received from the FWCC and FDEP should have convinced the City Council to approve the variance. Pet. 30-33. But, as Staff pointed out, the City Council is not constrained in its own review of the application pursuant to the City's own ordinance by reason of State approval, nor did the actual documentation bear out Petitioner's optimistic view. A. 633. Remarkably, given Dr. Rusenko's credentials and expertise as a marine conservationist (with particular expertise in sea turtle habitats) Petitioner continues to insist that the City's science is "subjective," Pet. 33, toning down, but not abandoning its pejorative labelling of Dr. Rusenko as a proponent of "junk science." *See, e.g.*, A. 322; 324; 549-55-; 558-559; 561. *See also* SA. 81-174 (FFWRI technical report regarding impacts of light pollution on sea turtle habitats). Finally, there is nothing wrong with Dr. Jenkins' reliance on Dr. Rusenko's expertise, as Petitioner intimates. That Dr. Rusenko did not testify at the EAB hearing is irrelevant and, as the record reflects, Dr. Rusenko testified at the City Council hearing and was vigorously questioned by counsel for Petitioner. A. 745-757.

the proposed four-story 14,270 square foot duplex would adversely impact the dune ecosystem and what was required, but not proposed by Petitioner, to mitigate the harm. Pet. 36-37. Petitioner embarks on a long discourse as to why the opinion of its witness, Mr. Barron, was (in Petitioner's view) a better reasoned one. But Mr. Barron's countervailing viewpoint is "irrelevant." *See, e.g., G.B.V. Int'l,* 787 So. 2d at 843; *Dusseau*, 794 So. 2d at 1275. The Court does not, on certiorari review, second-guess the City Council's decision.

In sum, because the record reflects competent substantial evidence in support of the City Council's conclusion that the proposed duplex (and its glass facade and sides) would create substantial negative impacts to the habitat of threatened and endangered sea turtles and that Petitioner's plans did not mitigate adverse effects to the integrity of the beach dune, the Court should conclude that Petitioner did not meet its burden to satisfy the fifth and sixth variance criteria. Accordingly, as to these criteria, the Court should conclude that competent substantial evidence supports the City Council's decision to deny the variance request.

II. THE COURT SHOULD REJECT PETITIONER'S CONTENTION THAT THE CITY COUNCIL FAILED TO ACCORD PROCEDURAL DUE PROCESS.

The Court should reject out of hand Petitioner's contention that it was not accorded procedural due process on the two grounds asserted: that the City did not afford Petitioner sufficient time to present its case, and that the vote by City Council

against the variance request was, purportedly, the product of bias. *See* Pet. 9-12; 12-16.

A. Petitioner Was Afforded A Full and Fair Opportunity To Present Its Case.

"Procedural due process requires both fair notice and a real opportunity to be heard." *Keys Citizen for Responsible Gov't, Inc. v. Florida Keys Aqueduct A*uth., 795 So. 2d 940, 948 (Fla. 2001). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* In the context of a quasi-judicial zoning hearing, the applicant "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Carillon Community Residential v. Seminole County*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010). Here, as Petitioner concedes, it was afforded the opportunity to present evidence and witnesses at each of the two quasi-judicial hearings, before the EAB and before the City Council. Pet. 13-16. In fact, as the record reflects, Petitioner presented a total of six witnesses, some of them twice.[28] Petitioner presented its documentary evidence without objection; nor were there any adverse procedural or

[28] In most cases, Petitioner's witnesses testified in lengthy narrative format. For example, at the EAB hearing, Petitioner's first witness, Mr. Stoddard, spoke at length of his credentials, when introduction of his resume would have sufficed; he dwelled on background, expounding on the lengthy history of the variance application rather than the salient point: why, in his view, the application for the four-story 14,270 square foot duplex met the variance criteria. *See* A. 326-340.

evidentiary rulings. And, as noted above, the record reflects vigorous cross-examination by counsel for Petitioner of City witnesses, as well as members of the public, at each of the two hearings.[29]

The Court should readily dispense with Petitioner's sole contention, that Petitioner believed itself rushed in presenting its case to the EAB and to the City Council. Pet.12-16. Nothing prevented Petitioner from tendering evidence to the EAB and to the City in advance of each hearing. Moreover, Petitioner concedes that the City's quasi-judicial procedures provide for twenty-minute presentations by Staff and by the applicant, but vest the Chair of the EAB and the Mayor with the discretion to extend the applicant's time up to a one hour presentation. Pet. 13-15; *see also* Resolution 139-2001 (A 5-7). Petitioner reluctantly concedes that the Mayor extended the time for its presentation at the City Council hearing (though it ignores the like extension granted by the Chair of the EAB). Pet.15. As a result, Petitioner relies now on nothing more than the selective quotation of inoffensive (indeed rather

[29] As argued below, Petitioner can point to nothing in the record demonstrating the bias of which they complain, much less a pattern of bias impacting the proceedings, as required to establish a procedural due process violation on that basis. *See Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) (where petitioner "established more than mere political bias or an unfriendly political atmosphere, [but] [i]n effect was denied the right to challenge, through cross-examination, the testimony of the principal witness against it," "[t]he evidentiary rulings … were not merely erroneous but rather reflect bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process.") (emphasis added).

polite) reminders by the Chair that time was passing beyond the allotment established in the City's quasi-judicial procedures. Pet. 13-14

Not surprisingly, Petitioner fails to cite to any case law supporting its attenuated theory that the City failed to accord it procedural due process on the grounds that the Chair and Mayor made such comments noting the passage of time under the City's quasi-judicial public hearing procedures. On the basis of the record, the Court should conclude that Petitioner was accorded more than a full and fair opportunity to be heard.

B. The Court Should Reject Petitioner's Accusation of Bias.

The Court should also reject Petitioner's contention that the City Council's vote was the product of bias, given that Petitioner was accorded a full and fair opportunity to present its case and can point to nothing in the record demonstrating the bias of which it complains, much less a pattern of biased rulings against it that impacted the proceedings. And, given the detailed report of professional Staff in connection with the Petitioner's proposed four-story, 14,270 square foot duplex, Staff's recommendation to the City Council to deny the request, and the like recommendation of the EAB, the accusation of bias appears nothing more than a last-ditch attempt to undermine the validity of the City Council's unanimous decision (5-0) to deny the CCCL variance request.

Petitioner's recusal request, directed to the Mayor and two other Council Members, was illogical. Had these three Council Members agreed to recuse themselves from voting on Petitioner's variance application, the variance application would have failed then and there, before Petitioner even presented its witnesses: there would have been no quorum sufficient to allow the hearing or the vote to proceed.[30] For such reasons, Florida law imposes on elected officials an affirmative duty to vote on all matters before them.[31] Disqualification is required only if an elected official is called upon to vote on a matter that would inure to his or her private financial gain or loss.[32] The record is devoid of any such evidence and Petitioner claims no such voting conflict of interest here.

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30 *See* City Charter §3.01 ("There shall be a city council, consisting of five (5) members…"); §3.09 ("A majority of the council shall constitute a quorum…. Passage of an ordinance or resolution shall require an affirmative vote of not less than the majority of the council members").

31 *See* §286.012, Fla. Stat. ("A member of a… municipal governmental board… who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under [Chapter 112, Florida Statutes] or additional or more stringent standards of conduct (emphasis added); §112.3143(3)(a), Fla. Stat. ("No county, municipal, or other local public officer shall vote in his official capacity up on any measure which would inure to his special private gain or loss….")

32 *See, e.g., George v. City of Cocoa, Fl.,* 78 F. 3d 494, 496 (11th Cir. 1996) ("A 'special private gain' described by the voting conflicts statute almost always

Instead, Petitioner complains of bias on the grounds that three elected officials had expressed their views regarding the CCCL setback regulation and this variance request. Pet. 12. Under Florida law, this is not grounds for disqualification. As stated in *Izaak Walton League of America v. Monroe County,* 448 So.2d 1170 (Fla. 3d DCA 1984):

> It is fundamental to our system that the members of a county commission or any governing body of a political subdivision who act in that capacity do not do so as judges—subject to judicial canons and standards—but rather, using the term in its Aristotelian sense, as politicians.

Id. at 1171. The Council Members, as political officeholders, are not prevented from performing the duties they were elected to perform because "they previously expressed, publicly or otherwise, an opinion on the subject matter of their vote." *Id.*

And, as case law reflects, more than "political bias or an adverse political philosophy" is required to invalidate a quasi-judicial proceeding or to demonstrate grounds for disqualification; such additional factors exist, for example, where the elected official charged with bias denies the right to cross-examine witnesses, makes evidentiary rulings that uniformly disfavor the applicant, and allows irrelevant, prejudicial evidence to taint the proceedings. *City of Casselberry*, 811 So. 2d at 696. Here, however, Petitioner has no such complaint. To the contrary, as the record

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(if not always) refers to the financial interest of the public official that is directly enhanced by the vote in question.")

reflects, the very Mayor whom Petitioner asked to recuse himself had granted Petitioner additional time to present its case.[33]

Petitioner ups the ante by complaining that the City Council exhibited an "institutional bias" on the basis of an ordinary, legitimate and constitutionally appropriate governmental function by a completely different government entity, the Greater Boca Raton Beach and Park District ("District"). Pet. 5-6; A. 111.[34] That the District obtained an appraisal of the Property in order to assess its value and consider potential acquisition, through eminent domain or otherwise, does not render illegitimate the City Council's vote. There is no evidence whatsoever that the City Council conspired with the District to diminish the value of the Property, as Petitioner boldly suggests. Pet. 11.[35] Petitioner harps on the fact that, at the request

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[33] *See supra*, fn. 12. Indeed, the Mayor clearly explained that he was required by law to hear all of the evidence, and would do so, before making his decision on Petitioner's CCCL variance request. A. 220; 730-31. Each of the Council Members stated their like intention, to vote on the basis of the evidence presented to them. A. 731. Under Florida law, elected officials "may abstain from voting … if the abstention is to assure a fair proceeding free from potential bias." § 286.012, Fla. Stat. (emphasis added). Thus, while the Council Members might have recused themselves (and thereby deprived Petitioner of a quorum necessary to conduct the hearing), they were not required to do so.

[34] That Petitioner grasps at straws is evident in its need to mischaracterize the actions of the District as those of the City itself. *See* Pet. 6; 43.

[35] Worse, the contention is based on a different Mayor in late 2015 and early 2016 suggesting to a different governmental entity, the District, that it study the acquisition of beachfront property generally (noting: this request has no impact on the development potential, or lack thereof, of any property). A. 8; 9-11.

of the District, the appraisal was predicated on the "extraordinary assumption" that the variance would be approved and the Property would be developed. Pet. 6; 11; 12; 43.[36] But the assumption only increased the appraised value of the Property, a counterproductive request on the part of the District, were it intent on conspiring with the City Council to diminish the value of the Property.[37]

In sum, the Court should reject Petitioner's contention that the City Council failed to accord Petitioner procedural due process. The record reflects that Petitioner was afforded ample opportunity to be fully and fairly heard and, given this, the Court should reject Petitioner's contrived contention of bias.

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[36] The term "extraordinary assumption" is a term defined in the Uniform Standards of Professional Appraisal Practice ("USPAP"), as "an assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions." What Should A Lawyer Look For When Reviewing An Appraisal In Eminent Domain, Supplemental Material, ST031 ALI-ABA 323, 364 (Jan. 2012). It is therefore not a value-laden term invented by the District to connote its view that "the City had no intention of ever granting any variance on the property," as Petitioner intimates.

[37] Petitioner's reliance on *Florida Water Services Corp. v. Robinson*, 856 So. 2d 1035 (Fla. 5th DCA 2003) is misplaced. There, the court did not reach the merits of the public utility's contention that the county commissioners were required to recuse themselves from deciding the utility's application for new wells on grounds of bias, merely deciding that a writ of prohibition was not the correct avenue for the challenge.

CONCLUSION

On the basis of the record, as well as the foregoing argument and authority, the Court should deny the Petition. The City Council properly denied Petitioner's request for permission to deviate from the City's prohibition: "Seaward of the CCCL no person shall construct any structure." City Code §28-1556(3)(a). As the record reflects, the City Council's decision was based upon competent substantial evidence; Petitioner did not meet its considerable burden to demonstrate that each of the six variance criteria were met; and without such proof, the City Council could not lawfully grant a variance approving construction seaward of the CCCL for the proposed four-story, 14,270 square foot duplex with an eastern facade made nearly entirely of glass, situated on a beach dune.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by E-Mail via State Court E-Portal on this 4th day of October, 2019, to counsel listed on the attached Service List.

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