IN THE CIRCUIT COURT FOR THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

EAST GAINESVILLE
DEVELOPMENT PARTNERS
LLC, a Florida limited liability
company,

Petitioner,

vs.

CITY OF GAINESVILLE, a
Florida municipal corporation,

Respondent.
_____/

Circuit Case No. 01-09-CA 4848 W

Lower Tribunal Legistar
No. 090182, Petition No. PZ-09-19

EAST GAINESVILLE DEVELOPMENT PARTNERS LLC'S PETITION FOR WRIT OF CERTIORARI PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.100(f)

Petitioner East Gainesville Development Partners LLC ("EGDP") petitions this Court to issue a Writ of Certiorari directed to the Gainesville City Commission ("City" or "Commission") quashing the City's quasi-judicial order denying EGDP's Petition No. PZ-09-19 ("Order") and directing the City to approve it.

I. PRELIMINARY STATEMENT

On August 6 and 17, 2009, the Commission conducted a quasi-judicial hearing on EGDP's application for design plat approval of an environmental cluster

subdivision on its property pursuant to Sections 30-183 and 30-190 of the City's Land Development Code (the "Application"). EGDP presented substantial competent evidence – including factual testimony, expert testimony and volumes of data – supporting its application and demonstrating compliance with each and every applicable ordinance.

By contrast, the City's staff members ("Staff") did not provide the Commission with substantial competent evidence in opposition to the Application. Rather, Staff submitted erroneous and unsupported conclusions that failed to counter EGDP's substantial competent evidence.

In reaction to Staff's erroneous and unsupported conclusions on the airport, wetland and set-aside issues and in an effort to build a record for denial, one of the Commissioners assumed the role of Staff instead of impartial decision maker. Similarly, the City Attorney improperly assumed the role of advocate, in addition to advisor to the Commission, by, among other things, cross examining EGDP's environmental expert, arguing against his opinions, commenting on and summarizing the evidence and providing legal memoranda and testimony that cherry-picked only portions of the adopted ordinances and set forth what the City Attorney deemed relevant as outside sources to define compatibility.

Several years ago, the City made an unsuccessful offer to purchase the subject property from the prior owners. The subject property is west of the

Gainesville Regional Airport and adjacent to Ironwood Golf Course, the City's only municipal golf course, and the City did not, and does not, want residential development on the site. Rather than negotiating to purchase the property from EGDP, the City accomplished the same result – no residential development on the property – by denying EGDP's Application. The Commission's decision was a departure from the essential requirements of the law, deprived EGDP of procedural due process, and was not supported by competent substantial evidence.

II. JURISDICTION

This Court has jurisdiction over this matter pursuant to Article V, Section 5, Florida Constitution, Florida Rules of Appellate Procedure 9.030(c) and 9.100(f), and Florida Rule of Civil Procedure 1.630, which authorize circuit courts to review by certiorari final quasi-judicial action of administrative agencies. See generally Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000); Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).

III. NATURE OF RELIEF SOUGHT

Petitioner EGDP requests that this Court grant certiorari, quash the City's Order denying EGDP's petition, and direct the Commission to approve EGDP's Application, Petition No. PZ-09-19.

IV. PROCEDURAL AND FACTUAL BACKGROUND[1]

A. EGDP's Application

On February 11, 2009, EGDP submitted its Application for an environmental cluster subdivision in the City of Gainesville, Florida. App. 66. The Application was submitted in accordance with Section 30-183 of the Land Development Code of City of Gainesville, Florida ("Code"). The Application addressed the requirements of the Code, including, but not limited to, Section 30-190 regarding environmental cluster subdivisions, wetlands, set-asides, and Appendix F regarding Airport Hazard Zoning Regulations.

B. The Property

The property at issue in this case comprises approximately 428 surveyed acres surrounding the majority of Ironwood Golf Course in the City of Gainesville, Florida, west of Waldo Road between NE 53rd Avenue and NE 39th Avenue ("Parcel"). App. 73. The City annexed an area, including the Parcel, from Alachua County effective March 21, 2001. App. 1363-1369. Following annexation, the City changed the land use for the approximately 298 acres of the Parcel, that EGDP now proposes to develop, from Office, Low Density Residential, Commercial and Recreational, to Single Family Residential up to 8

[1] Pursuant to Fla. R. App. P. 9.220, a consecutively paginated Appendix is being filed with this Petition. References to the Appendix will cite to the page number.

units/acre. App. 666:12-667:22; App. 597-606. This 298-acre portion proposed for Residential development within the Parcel is referred to as the "Site" herein. In 2003, the City changed the zoning for the Site from Administrative/Professional and Single Family, low density (1 to 4 dwelling units/acre), to Single Family Residential District (RSF-1, 3.5 units/acre and RSF-4, 8.0 units/acre). Id.

On July 17, 2006, an affiliate of EGDP acquired the Parcel and shortly thereafter transferred title to the Parcel to EGDP. EGDP also owns more than 70 acres immediately adjacent to the eastern border of the Parcel, which is contiguous land surrounding the majority of Ironwood Golf Course.

When EGDP acquired the Site, the land use and zoning were both Residential, allowing over 1,100 single-family detached homes according to the actual surveyed acreage (but only approximately 1,071 according to the Alachua County tax assessor's records). App. 662:4-22. Except for proposed set-aside and wetland creation areas (which are in the Parcel but are not zoned Residential), EGDP's Application covers only the 298 acres that are designated in the City's Comprehensive Land Use Plan as Residential and that are zoned Residential. App. 664:12-665:24; App. 597-606; App. 1037-1130. The Application does not seek permission to develop any of the acreage owned by EGDP with a current land use and zoning of Industrial. Id.

C. Gainesville Regional Airport

The Parcel is west of Waldo Road, which in turn is west of Gainesville Regional Airport. The Gainesville-Alachua County Regional Airport Authority ("GACRAA") conducted a voluntary study to qualify for Federal Aviation Administration ("FAA") funding to assist in noise abatement programs for pre-existing houses within the 65 decibel noise level ("DNL") or higher noise contour area. In March 1986, GACRAA published its study called the FAR Part 150 Study (the "1986 Study"). 14 C.F.R. A150; App. 372.

In 1999, the City enacted Appendix F, Airport Hazard Zoning Regulations, as part of its Land Development Code. Appendix F incorporates a 20-year noise contour planning map (Attachment 3 of Appendix F), which noise map was never submitted to nor accepted by the FAA. See City Code, Appendix F at II(C)(2)(e); App. 371-451; App. 800:18-25; App. 1036. The majority of the Parcel falls in the 65 DNL area according to the noise planning map in Attachment 3 to Appendix F.

In 2005 the City approved the North Point at Ironwood residential project, which is adjacent to EGDP's Parcel. Like EGDP's Parcel, the North Point at Ironwood project is in what was then the 65 DNL noise contour based on the Noise Exposure Map ("NEM") in Attachment 3 of Appendix F. App. 667:23-668:10, 669:6-14, 671:3-6, 672:8-17.

On June 22, 2006, GACRAA adopted its Airport Master Plan Update, which acknowledged that Residential development is permitted in the 65 DNL noise contour. App. 901:9-21; App. 1169-1177. Also on June 22, 2006, GACRAA adopted and transmitted to the City of Gainesville a resolution for the City to accept the Airport Master Plan Update which contained new NEM approved by GACRAA. App. 1151-1177E; App. 1361-1362. The noise contour zones in the 2006 Airport Master Plan Update were much smaller than the noise zones in the planning map attached as Attachment 3 of Appendix F. App. 1036A; App. 1151-1177E. Indeed, only a small portion of EGDP's Site was within the noise contour zones of the 2006 GACRAA-approved NEM. App. 1151-1177E.

Years later, on April 20, 2009, the FAA accepted the current conditions 2007 NEM and projected 2012 NEM for the Gainesville Regional Airport. App. 173. These NEMs are binding on the City, GACRAA, the Gainesville Regional Airport and the FAA. No portion of EGDP's Site is within the 65, 70 or 75 DNL noise contours in either the current 2007 or 2012 NEM. This was not surprising, since only a small portion of the Site had been within the 65 DNL noise contour of GACRAA's 2006-approved NEM and noise contours at Gainesville Regional Airport have been getting smaller over time. App. 287-370; App. 1151-1177E.

The 65, 70 and 75 DNL noise contours are the only areas to which the City applies the noise regulations of Appendix F. App. 1027-1036. Although the City

should have automatically replaced the NEM in Attachment 3 of Appendix F with the FAA-approved projected 2012 NEM to which it is bound, it did not, and refused to do so. Id.

D. The City's Consideration of the Application

On or about February 11, 2009, EGDP, filed its Application with the City of Gainesville. App. 66-150; App. 209-256. Staff prepared a Staff Report in which City reviewing departments provided comments and recommendations regarding the Application. App. 05-52. Ultimately, solely because of concerns regarding the airport noise regulations of Appendix F, Staff recommended the Application be denied. Id.

On May 14 and June 11, 2009, the Gainesville Development Review Board ("DRB") heard EGDP's Application. App. 1195-1360. According to the DRB's draft minutes, the DRB recommended denial. App. 270.

The quasi-judicial hearing on EGDP's Application was conducted on August 6 and 17, 2009. Members of the Commission present at the hearing were Mayor Pegeen Hanrahan, Thomas Hawkins, Scherwin Henry, Craig Lowe, Jeanna Mastrodicasa, Lauren Poe and Jack Donovan.

Staff and representatives of EGDP made presentations regarding the Application at the August 6, 2009 portion of the hearing. EGDP presented expert testimony to support the Application, which itself contains the supporting data and

analyses that the Code requires. The Commission closed the evidentiary presentation portion of the hearing, and continued the matter to a special hearing date of August 17, 2009.

At the August 17, 2009, portion of the hearing, different members of Staff, as well as the City's expert Mr. Baldwin, made new presentations at the Commission's invitation, following which the Commission concluded the hearing. The members of the Commission made individual comments, but without any post-hearing discussion or debate, the Commissioners voted 6-1 to deny EGDP's Application. The City issued a one-sentence denial order dated August 19, 2009. App. 641.

V. SUMMARY OF ARGUMENT

The noise regulation portion of Gainesville's Airport Hazard Zoning Regulations in Appendix F of the City's Code, the primary grounds for the Commission's denial of the Application, does not even apply to EGDP's Site. The Commission refused to apply the current binding Noise Exposure Map for the Gainesville Regional Airport, and instead applied an outdated planning map derived from the 1980s, in an improper attempt to restrict EGDP's development of the Site.

Even if the noise regulation component of Appendix F was applicable to the Site when the Commission heard the Application (it was not), the Commission

misused Appendix F to remove the objective conditions for permitting Residential development within the Airport Noise Zone. Although the City had consistently and repeatedly determined that Residential development was an appropriate use for property like EGDP's Site, the City disregarded its Code's objective conditions for permitting Residential use, in favor of an undefined "compatibility" test, which enabled the City to deny EGDP's Application in its unfettered discretion.

Further, none of wetlands avoidance, set-aside, connectivity, grid pattern (block size) and lot size issues provides a cognizable basis for the denial of EGDP's Application.

The City's denial of the Application, on any one or more of the foregoing grounds, was (or would have been) unsupported by substantial competent evidence, and a departure from the essential requirements of law.

Finally, EGDP was denied procedural due process.

VI. ARGUMENT

A. Standard of Review

This Court's standard of review for certiorari requires a determination of whether the City: (i) observed the essential requirements of the law; (ii) supported its decision with substantial competent evidence; and (iii) accorded the Petitioner procedural due process. See Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003); Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523

(Fla. 1995); Bd. Of County Commr's of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).

EGDP's certiorari petition is in the nature of a direct, as-of-right, constitutionally guaranteed appeal. See Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000) ("[T]he scope of review is actually more like a plenary appeal."). Certiorari review at this level is not discretionary. Thus, in ruling on a petition for writ of certiorari, a circuit court's review should be limited to the administrative record and those items attached to the petition. Evergreen v. Charlotte County, 810 So. 2d 526, 530 (Fla. 2d DCA 2002).

B. Essential Requirements of the Law

"[D]eparture from the essential requirements of law necessary for the issuance of a writ of certiorari is something more than a simple legal error." Fassy v. Crowley, 884 So. 2d 359, 363-64 (Fla. 2d DCA 2004)(citation omitted). "There must be a violation of a clearly established principle of law resulting in a miscarriage of justice." Id. A court's inquiry should not be as concerned "with the mere existence of legal error as much as with the seriousness of the error." Id.

The phrase "departure from the essential requirements of the law" should not, however, be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. See Combs v. State, 436 So. 2d 93, 95 (Fla. 1983) (citations omitted). The Florida

Supreme Court has held that "clearly established law can derive from a variety of legal sources" and, thus, "in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." Allstate Insurance Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

1. Airport Issues

The City adopted the Airport Hazard Zoning Regulations in Appendix F of the Code in 1999. Appendix F established the Airport Noise Zone around the Gainesville Regional Airport, within which land use restrictions and special construction standards apply to minimize impacts of airport-generated noise. App. 1027 (City Code, Appendix F at II(C)(1)).

a. Commission Used the Incorrect Noise Exposure Map to Deny Application

The City departed from the essential requirements of law by applying an outdated, more restrictive, noise planning map to the Site, instead of the current, applicable FAA-accepted Noise Exposure Map associated with the current official Part 150 Study. The Airport Hazard Zoning Regulations in Appendix F of the Land Development Code established Airport Noise Subzones (A-75 DNL, B-70 DNL and C-65 DNL) surrounding the Gainesville Regional Airport to regulate land uses sensitive to sound levels generated by operation of the airport. App.

1027 at II(C)(1). Appendix F requires the City to attach an Airport Exposure Map setting forth the boundaries of the Airport Noise Subzones (Attachment 3 of Appendix F). Id. Appendix F expressly provides that the boundaries of the Airport Noise Subzones on the Noise Exposure Map "shall be amended as necessary to reflect any changes in the documentation of day/night average sound levels on which said zone is based." Id.

The City's land use regulations permit, restrict or prohibit certain uses within the designated Airport Noise Subzones. App. 1027 at II(C)(2). These airport noise zone land use regulations do not apply to land outside of the boundaries of the Airport Noise Subzones. Id.

The Noise Exposure Map the City refused to replace is derived from a 20-year planning map produced some time in the mid-1980s. App. 1036A. This noise map was never submitted to the FAA for approval, nor could it ever be approved by the FAA because the planning period was too long and thus the results too speculative. App. 372; App. 800:18-25; App. 1036A. At the time of adoption of Appendix F, portions of EGDP's Site were included within the boundaries of Airport Noise Subzones B (70 DNL) and C (65 DNL) according to Attachment 3 of Appendix F. Id.

The Code requires the City to replace the NEM found at Attachment 3 of Appendix F as the Part 150 Study is amended:

> The boundary of any Airport Noise Zone shall be amended as necessary to reflect any changes in the documentation of forecast day/night average sound levels on which said zone is based. Notwithstanding other provisions of this section, should the Gainesville Regional Airport amend its official 14 CFR Part 150 study, the boundaries of the Airport Noise Zones shall be modified to comply with the amended official noise study.

App. 1027 at II(C)(1); App. 546-548; App. 1131-1150.

By June 2006, the City was aware from GACRAA's Airport Master Plan Update that only a small portion of EGDP's Site was within the noise contours of the 2006 GACRAA-approved NEM. App. 901:9-21; App. 1151-1177E. In 2007 and 2008, GACRAA prepared three new NEMs, one for 2007, one projected for 2012, and one projected for 2027. App. 303-305. GACRAA submitted its revised NEMs to the FAA for its acceptance. App. 459, 1135-1136. On April 20, 2009, the FAA accepted two of the NEMs, the 2007 and projected 2012, for the Gainesville Regional Airport. App. 173. The FAA did not accept GACRAA's projected 2027 Noise Exposure Map. App. 173; App. 459-462. The projected 2012 Noise Exposure Map is binding on the FAA, GACRAA, Gainesville Regional Airport and the City of Gainesville. The FAA's acceptance of the new NEMs modified the boundaries of the Airport Noise Zones in Attachment 3 of Appendix F.

Replacing the old map with the new NEM at Attachment 3 is a ministerial function without need for Commission approval or action, and is required by the

plain language of Appendix F. "A duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." RHS Corp. v. City of Boynton Beach, 736 So.2d 1211, 1213 (Fla. DCA 1999)(internal citation omitted). The Land Development Code's direction that "the boundaries of the Airport Noise Zones shall be modified to comply with the amended official noise study" requires the City to act and leaves no room for discretion, making the replacement of Attachment 3 a ministerial function. See Stranahan House, Inc. v. City of Fort Lauderdale, 927 So.2d 1068, 1069-70 (Fla. 4th DCA 2006).

The NEMs that the FAA accepted are the NEMs that must be attached to Appendix F. App. 459-462. The FAA advised the City that in updating the noise contour maps in its local code, the City should adopt NEMs that had been reviewed for compliance by the FAA, as these are the only officially recognized maps for noise contour regulation purposes. Furthermore, the outdated planning map the City insists on relying on for this Application was never submitted to the FAA for approval nor accepted by the FAA. See App. 372; App. 546-548; App. 1036A.

When Appendix F was adopted, the City included the future condition map as Attachment 3 of Appendix F. App. 1036A. The appropriate replacement map unquestionably is the projected 2012 NEM (there is only one future Noise Exposure Map accepted by the FAA for the Airport). As a result, the 2012 NEM is

controlling, not the 1980s 20-year planning map applied by the City in this matter. The Commission was required to apply the 2012 NEM to EGDP's Application. It's failure to have done so was a departure from the essential requirements of the law.[2]

Under the current official 2012 NEM, none of the Site sought to be developed in this matter is within Airport Noise Subzone A, B or C. App. 548; App. 679:23-689:14; App. 1136. All of the Site which is the subject of EGDP's Application lies outside of the noise-related land use restrictions of Appendix F. As such, this portion of Appendix F is irrelevant to the Application and cannot constitute a basis for denial.

The Commission cannot cast a blind eye to the truth, the current official 2012 Noise Exposure Map submitted by GACRAA and approved and accepted by both GACRAA and the FAA, and rely on an outdated 1980s planning map. The City's own Code, Section II(C)(1) of Appendix F provides that the "boundaries of the Airport Noise Zones shall be modified to comply with the amended official noise study." App. 1031. The Commission must apply the official 2012 Noise Exposure Map to the Application, which contains the best available data regarding airport noise. The Commission cannot rely on the 1980s planning map, which

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[2] It was also a perverse refusal to change stale information. The City's own airport noise expert, Ted Baldwin, testified that the NEM attached as Attachment 3 is "out of date and they overstate the exposure around the airport today." App. 800:18-25.

previously restricted the land use on the Site, solely to prevent EGDP from developing the Site.

The Commission's refusal to apply the correct Noise Exposure Map in this matter constitutes a departure from the essential requirements of law. Therefore, the noise-related land use restrictions contained in Appendix F, Airport Hazard Zoning Regulations, do not provide a basis for denying EGDP's Application.

b. Commission Misinterpreted Appendix F of Land Development Code to Make Residential a Prohibited Use

Even if, *in arguendo*, Appendix F did apply to EDGP's Site when the City considered EGDP's Application, the plain language of Appendix F does not prohibit Residential development on the Site. The Commission departed from the essential requirements of law by interpreting Appendix F to prohibit, rather than merely conditionally restrict, Residential use on the Site – the only use allowed according to the City-designated land use and zoning of Residential.

Pursuant to the City's Land Development Code, Appendix F, Residential development is permissible on approximately 298 acres of the Site. Even if a portion of EGDP's Site is deemed to be governed by the noise-related regulations of Appendix F, Residential development can occur as long as, at the developer's option, one of two conditions is met – constructing to better building standards or providing an avigation easement. See Appendix F, Section II(C)(2)(e)(i):

> The following uses shall be permitted within the noise overlay zone, . . . only if the proposed development complies with the applicable criteria described below and is compatible with the Official 14 CFR Part 150 Study:
>
> > Developers of proposed . . . residential uses (other than mobile homes) shall verify to the city in writing that proposed buildings are designed to achieve an out door to indoor noise level reduction (NLR) of at least 25 decibels.
> >
> > * * *
> >
> > In lieu of providing written verification that a proposed building is designed for an NLR of 25 decibels . . ., a developer may execute and record an avigation easement as provided in subsection [h] below.
> >
> > * * *
> >
> > h. Avigation Easement. An avigation easement is a legal document that grants to the owner/operator of a nearby airport a right to continue to operate the airport in a manner similar to current operations, despite potential nuisance effects upon uses that are being established in close proximity to the airport. Applicants *choosing* to provide an avigation easement shall execute said easement to the Gainesville-Alachua County Regional Airport Authority.

App. 1032 at II(C)(2)(e)(i) and (h) (emphasis added).

EGDP's Application satisfied the codified noise level reduction condition. App. 731:25-732:5. Although EGDP satisfied the Appendix F conditions and, hence, should have been permitted to use the Site for Residential development even if the superseded planning map had applied, the Commission improperly interpreted Section II(C)(2)(e) to read these conditions out of the Code.

The Staff Report and the Commission ignored Section II(C)(2)(e) of Appendix F. App. 05-52. Indeed, rather than framing the relevant issue before the Commission in a manner consistent with the legislative mandate expressed in Section II(C)(2)(e), the Staff Report and Staff testimony pay it no heed. Staff's and the Commission's failure to acknowledge Section II(C)(2)(e)'s express objective criteria for Residential use in the Airport Noise Zone is indefensible given the fact that all of the following occurred after the writing and adoption of Appendix F: (i) the City's annexation of the Site, the North Point at Ironwood property, and the Ironwood Golf Course Village property; (ii) the City's creation of Residential land use and zoning for the Site, the North Point at Ironwood property, and the Ironwood Golf Course Village property; (iii) the building of residences at Ironwood Golf Course Village in 2001 and 2002; (iv) the approval and building of the North Point at Ironwood residential development in 2005 through today; and (v) there is no rational reason to have Residential as a "restricted use" in Appendix F if one were to accept the City's position.

Where a local government misapplies or misinterprets local ordinances in denying a permit application, it departs from the essential requirements of law and must be reversed. City of Tampa v. City National Bank, 974 So. 2d 408 (Fla. 2d

DCA 2007).[3] The City's analysis and decision were wrong, in numerous respects, as a matter of law.

To begin with, "[z]oning laws are in derogation of the common law and, as a general rule, are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property." Mandelstam v. City Commission of the City of South Miami, 539 So. 2d 1139, 1140 (Fla. 3d DCA 1988) (citations omitted)(granting certiorari where the "circuit court departed from the essential requirements of the law when it inserted additional terms" into an ordinance and defined a term "in derogation of its ordinary dictionary meaning"). Moreover, a court is not required to defer to an agency's construction or application of a law or

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[3] The grant of a certiorari petition is also appropriate where a lower tribunal violates the express terms of an ordinance. See, e.g., Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 891 (Fla. 2003) (concluding that certiorari review was proper where lower tribunal failed to apply the dictates of the personal injury protection statute and thus violated clearly established law); In re Asbestos Litig., 933 So. 2d 613, 616-17 (Fla. 3d DCA 2006) (granting certiorari and stating that "[c]ertiorari review is proper when it is alleged that the circuit court's interpretation of a statute violates clearly established law or when it fails to follow the dictates of a statute"); State v. Farino, 915 So. 2d 685, 687 (Fla. 2d DCA 2005)(granting certiorari and concluding that circuit court departed from essential requirements of law by failing to apply a statutory definition); Fassy v. Crowley, 884 So. 2d 359 (Fla. 2d DCA 2004) (granting certiorari where circuit court departed from the essential requirements of law by relying on a statute that did not apply); State v. Possati, 866 So. 2d 737, 741 (Fla. 3d DCA 2004) ("we conclude that the circuit court departed from the essential requirements of law by not following the clearly established dictates of the statute"). Cf. Ortega v. United Automobile Ins. Co., 847 So. 2d 994, 997 (Fla. 3d DCA 2003)(granting certiorari where circuit court departed from essential requirements of law by granting a directed verdict "premised upon non-compliance with a non-existent statutory requirement").

ordinance where the court is equally capable of reading the ordinance. City of Coral Gables Code Enforcement Bd v. Tien, 967 So. 2d 963, 966 (Fla. 3d DCA 2007).

Appendix F does not prohibit Residential use in the Airport Noise Zone. On the contrary, Section II(C)(2)(e) allows Residential use if the applicant met either, at its election, one of two objective conditions: (i) a 25 decibel indoor-to-outdoor noise level reduction in its building standards, or, (ii) an avigation easement. App. 1032. Conditions are a common method for local governments to mitigate noise and achieve compatibility with a local airport. App. 549; App. 681:13-22.

Nonetheless, Staff and the Commission denied EGDP's Application by ignoring Section II(C)(2)(e)'s objective conditions in favor of a touchy-feely subjective decision whether the proposed Residential development is or is not "compatible with the Official 14 CFR Part 150 Study." Indeed, the City's own Code provides, "No change shall be made in the use of land . . . in any airport zone of influence created by these regulations except in conformance with the requirements of this section." Appendix F at Section VI. Thus, when the City changed the Site's land use designation to Residential in 2003, such change to Residential use was by definition "in conformance" with Appendix F. The City cannot have it both ways. If Residential use was "in conformance" with Appendix F in 2003, it is still "in conformance" today.

Moreover, the rules of statutory construction do not allow the City Commission to ignore the words in the Code to achieve its desired outcome. According to the Florida Supreme Court:

a) [S]tatutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words.

b) Statutes or ordinances should be given that interpretation which renders the ordinance valid and constitutional.

c) Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner.

d) Municipal ordinances are subject to the same rules of construction as are state statutes.

Stroemel v. Columbia County, 930 So. 2d 742, 745 (Fla. lst DCA 2006) (citing Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552, 553-54 (Fla. 1973) (citations and footnotes omitted). Further, "It is also a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006)(citations omitted).

The Commission ignored these fundamental rules of construction. It's denial of the Application renders meaningless Appendix F's express conditions for

Residential use, and applied a land use ordinance against the landowner. City Code, Section II(C)(2)(f).

Land use and zoning regulations are in derogation of private rights of ownership, and words used in such ordinances should be interpreted in favor of the property owner. Stroemel, 930 So. 2d at 745. If the City had wanted to determine compatibility or incompatibility of a proposed Residential use on an ad hoc basis using undefined, subjective criteria, it should have passed that ordinance, rather than Section II(C)(2)(e). Because the Commission ignored the objective standards in denying the Application, it departed from the essential requirements of law.

c. Commission Improperly Revisited Incompatibility of Residential Use

Before denying the Application, the City has previously, repeatedly and consistently determined that Residential use is compatible in the Airport Noise Zone. Accordingly, in considering the Application, the Commission's only charge was to determine whether EGDP had met either of the conditions in Section II(C)(2)(e), i.e., adequate noise level reduction or an avigation easement.

The Part 150 Study was published in March 1986. App. 372-551. The City enacted Appendix F, including the "compatible with the Official 14 CFR Part 150 Study" language, in 1999. App. 1036. At that time, the Parcel was not yet within the City limits, and was in an area that Alachua County had designated for

Commercial, Office, Low Density Residential and Recreational land use. App. 829:21-830:14.

The City annexed the Parcel and surrounding land in 2001. App. 597; App. 602. Thereafter, with the 1986 Study and the "compatible" language in Section II(C)(2)(e) and Section VI of Appendix F already on the books, the City changed the zoning for all of the Site to single-family Residential and changed the land use to Residential. App. 597; App. 602; App. 666:16-667:22. *Sub silentio,* the City had determined that Residential development "is compatible with the Official CFR Part 150 Study." City Code, Appendix F at Sections II(C)(2)(e) and VI. Consistent with that determination, the City subsequently permitted Residential development of North Point at Ironwood, adjacent to the Site and the Parcel and within Airport Noise Zone. App. 824:15-825:4; App. 829:17-830:2.

Having determined that Residential use is compatible with the Airport when it zoned the Site Residential and made a like change to its land use designation, and when it permitted the neighboring North Point at Ironwood for Residential development in 2005, the City's denial of the Application on the ground of incompatibility was arbitrary and capricious and an obvious pretext to justify the unjustifiable denial of EGDP's Application. It also constitutes a departure from the essential requirements of law.

d. "Compatibility" Has No Objective Standard

The City's Code has no specific criteria upon which to determine whether a use is "compatible with the Part 150 Study." EGDP's Application was for a permitted use. An application for a permitted use does not allow for legislative discretion in determining whether the applicant complied with the regulations set out in the City's Code. As the First District Court of Appeal has previously admonished:

> The applicant has a right to know what the requirements are that he must comply with in order to implement the permitted use; these requirements must be of uniform applications, once the requirements are met, the governing body may not refuse the application. Otherwise councilmen can act upon whim and caprice or in response to pressures which do not permit ascertainment or correction.

Alachua County v. Eagles Nest Farms, Inc., 473 So. 2d 257, 259-60 (Fla. 1st DCA 1985). The Commission's duty was to determine whether EGDP met the requirements set forth in its Code, not to make an ad hoc determination, as to what it subjectively believed was or was not compatible, especially given the plain language of Section II(C)(2)(e) and Section VI of Appendix F. See Inlet Beach Capital Corporation v. Walton County Board of County Commissioners, First Judicial Circuit Court for Walton County, Florida, Case No. 01-CA-000351 (Commission's denial of an application based upon its own ad hoc subjective interpretation of the definition of compatibility and its failure to give property

owners notice of the conditions which they must meet in order to improve their property constitutes a departure from the essential requirements of law).

Here, the City disregarded the conditions for Residential use set forth in Section II(C)(2)(e) of Appendix F, with which EGDP complied, and, ignoring Section VI, created a new "compatibility" rule which gave the Commission unfettered discretion to deny EGDP's Application. The City has not referred to any established criteria which define compatibility with the 1986 Study or otherwise limit the Commission's discretion regarding this ordinance. The Code fails to articulate any standards to be applied in determining whether Residential use is "compatible" with the Part 150 Study, other than, according to Section VI of Appendix F, the creation of Residential land use in an airport zone of influence is an admission of "compatibility with the 14 CFR Part 150 Study". Absent actual criteria to determine whether Residential use is compatible with the Part 150 Study, the Commission's denial of the Application on compatibility grounds departed from the essential requirements of law.

2. Wetlands Avoidance

To the extent the Commission denied the Application due to the alleged deficiencies in wetlands avoidance, it was error. Section 30-302.1(d) of the City's Code states that "[a]voidance through practicable design modifications is not required when the ecological value of the function provided by the area of wetland

is low and the proposed mitigation will provide greater long term ecological value than the area of wetland to be affected." App. 82.

EGDP demonstrated through substantial competent evidence by means of reports (App. 182-208) and testimony (App. 696-709; 892-896) that the wetlands that were not avoided had a low ecological value and that the proposed mitigation will provide greater long term ecological value than the area to be affected; that is, EGDP met the criteria of Section 30-302.1(d).

The City presented no substantial competent evidence that EGDP failed to meet these criteria. To the contrary, the City's environmental coordinator, Mark Garland, admitted that the wetlands at issue were degraded wetlands. App. 846. As to whether the wetlands at issue were of low ecological value, Mr. Garland testified, "I'm not going to stand here and defend how I rated the quality of the wetlands, because it was a seat-of-the-pants rating." App. 845-846.

Mr. Garland's further testimony revealed that his opinion on whether the Application was in compliance with the wetland rules in the Code was unreliable. "I have argued that because this has been identified as an ecologically significant area within the City of Gainesville, even though these are degraded wetlands, you should avoid and minimize. That's what my argument boils down to." App. 845 (emphasis added). Mr. Garland did not cite any land development code regulation to support his position. Indeed, Mr. Garland admitted the City's Code "doesn't

define low ecological value," and "it's difficult to apply these codes in the manner in which they are written." App. 857. In the absence of a definition, and in the presence of difficulty in application, Mr. Garland created his own interpretation of how low the ecological value of wetlands must be before an applicant does not have to demonstrate avoidance. "My interpretation is that this is in a significant ecological area and these wetlands will have to be an extremely, extremely degraded condition so that they don't even meet the state's definition." He even remarked, "certainly you don't have to avoid and minimize impacts to those," referring to wetlands that are not wetlands anymore. App. 857-858.

Despite the clear language and plain meaning in the Code that wetlands of low ecological value are not required to be avoided, Staff made up a rule that the only wetlands within the significant ecological communities district that do not need to be avoided are wetlands that "weren't even wetlands any more." App. 720. The Commission departed from the essential requirements of law when it used this made-up rule as an apparent basis to deny the EGDP's Application. The Fourth District Court of Appeal held as follows in Park of Commerce v. City of Delray Beach:

> property owners are entitled to notice of the conditions they must meet in order to improve their property in accord with the existing zoning and other development regulations of the government. Those conditions should be set out in clearly stated regulations. Compliance with those regulations should be capable of objective determination in an administrative proceeding. While the burden may be on the

> property owner to demonstrate compliance, no legislative discretion is involved in resolving the issue of compliance.

606 So. 2d 633, 635 (Fla. 4th DCA 1992).

The City's use of discretion in the denial of the Application, instead of determining whether EGDP complied with the conditions in clearly stated regulations is best demonstrated by the statements of Mayor Pegeen Hanrahan that "[w]e are interpreting the best that we can. We are interpreting overlapping regulations. And we're trying to come up with what is the best fit for the community within the regulations that we have." App. 904 (emphasis added). The Mayor further characterized the design plat approval process in the City of Gainesville as a "negotiation process." App. 903. Proving the Mayor's point, Commissioner Mastrodicasa voted to deny the Application not because she felt that EGDP did not meet the criteria for development, but because she did "not think that the petitioner has done a reasonable job with attempting to work with the wetlands." App. 878.

However, "all persons similarly situated should be able to obtain plat approval upon meeting uniform standards." Broward County v. Narco Realty, Inc., 359 So.2d 509, 510 (Fla. 4th DCA 1978). In City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. 4th DCA 1983), the Fourth District held that the same legal requirements announced in Narco apply to the site plan approval process. The Corn court held that "where all the legal requirements for platting land use had

been met, there is no residual discretion to refuse plat approval" and that "the same reasoning applies to approval of site plans." Id. at 242. In both Narco and City of Lauderdale Lakes, the court held that once an applicant meets all of the requirements for plat approval or site plan approval, no "element of discretion remains." See City of Lauderdale Lakes, 427 So. 2d at 242; Narco, 359 So. 2d at 511.

The only substantial competent evidence in the record is EGDP's evidence that it met the requirements of Section 30-302.19(d). The City's evidence as to whether the wetlands were of low ecological value was insubstantial and incompetent. Therefore, there was no substantial competent evidence upon which the Commission could base its denial on the failure to avoid the wetlands at issue. Further, the City departed from the essential requirements of law when it used legislative discretion and interpreted the Code to require that the wetlands on site with low ecological value had to be avoided.

3. Set-Aside

The City failed to determine that a set-aside is required under the criteria in Section 30-309(e) of the City's Code and also failed to determine, if required, the exact amount and location based on the listed objective criteria. Section 30-309(e) of the Code regarding Significant Ecological Communities District provides the following:

> A set-aside of no more than ten percent of the total parcel area may be required to enable the clustering of development on the parcel away from significant ecological features on the parcel. The exact amount and location of property to be set-aside shall be determined by the appropriate reviewing board, city manager or designee on a site specific basis and shall be based on objective criteria. . . The reviewing board, city manager or designee shall apply the following criteria to determine if the aforesaid set-aside is necessary . . ..

App. 994.

Despite the requirement in the Code that puts the burden on the City to apply the listed criteria to determine if the set-aside is necessary and, if necessary, puts the burden on the City to determine, based on listed objective criteria, the exact amount and location, the Staff report states that Staff did not make a determination of whether a set-aside is required or if so, where. App. 030. The City's expert, Mr. Garland, in his testimony before the Commission, poses the following question: "Should a set-aside be required?" App. 847. However, Mr. Garland never answers that question and never testifies that a set-aside is required. In response to a Commissioner's question, Mr. Garland, instead of providing any testimony applying the criteria in the Code to this specific site, merely states, "it could be required, if you decided it should be required." App. 861.

To the contrary, the record contains a report from EGDP's expert, Peter Wallace, which states "within the site of the cluster subdivision, there is no basis for prioritization of upland communities. In this area, the uplands are neither rare,

exemplary or unique." App. 185. This un-refuted report is substantial competent evidence that a set-aside within the area of the cluster subdivision is not required.

Despite the fact that the City did not determine, based upon the stated objective criteria, that a set-aside is required within the area of the cluster subdivision pursuant to Code Section 30-309(e) and EGDP expert's un-refuted report that a set-aside is not required within the area of the cluster subdivision, the Application included a set-aside of 27.93 acres within the area of the cluster subdivision (12.06 percent of the area of the cluster subdivision within the overlay district). The Application also included an additional set aside of 26.67 acres within the Parcel within which the cluster subdivision is located for a total of 54.6 acres or 14.06 percent of the total parcel area within the overlay district. App. 543-544; App. 709-712. Mr. Garland, the City's expert, testified that EGDP is "actually proposing a larger set-aside than is required by our code." App. 847. The Staff report reconfirms, "the applicant has provided figures showing that over 10% of the parcel in the Significant Ecological Communities overlay district is set-aside under the current plan." App. 031 (emphasis added). This meets the requirements of Section 30-309." App. 031. Although the Code provides that it is the City's burden to determine the need for and the location of a set-aside, if required, based on the listed objective criteria, the City never, in response to EGDP's proposed set-asides or otherwise, determined a different location. Rather,

Mr. Garland, as set forth in the Staff report, only made a suggestion as to a different location, but the suggested location would have required a "set-aside of more than 10% of the property in the Significant Ecological Communities overlay district," and Mr. Garland stated that "it cannot be required." App. 030. Mr. Garland did not testify as to any location(s) that would have been within the 10% maximum and would have met the listed objective criteria.

Because the City failed to determine, based on the stated objective criteria, that a set-aside is required, and if required, failed to determine, based on the stated objective criteria, the amount and location, any denial of the Application based upon the voluntary set-asides included in the Application departed from the essential requirements of law and is not supported by substantial competent evidence.

4. Connectivity and Grid Pattern (Block Size)

To the extent the Commission denied the Application due to alleged deficiencies related to connectivity and grid pattern (block size), the Order should be quashed since there is no substantial competent evidence in the record that the Application is not in compliance with the Code requirements or Comprehensive Plan policies. Further, the City departed from the essential requirements of law and failed to afford EGDP procedural due process by allowing Commissioner

Hawkins to provide the testimony regarding these matters, which testimony then became a stated basis for a majority of the Commissioners to deny the Application.

The record before the Commission contains a seventy-eight page Design Plat Application Consistency Report dated February 11, 2009, prepared by EGDP's expert who demonstrated compliance with the City's Code and Comprehensive Plan. App. 067-149. The Staff report does not state, and there was no competent substantial testimony, that the Application is not in compliance with any Code requirements or Comprehensive Plan policies relating to connectivity or grid pattern (block size). As to connectivity and grid pattern (block size), the Staff report states, "despite the Comprehensive Plan support for increased street connectivity, the City's Code does not have any standards for connectivity, maximum block size or a maximum distance between intersections." App. 012. As to connectivity, the Staff report states only that there are "multiple opportunities to improve the street connectivity," but "it is difficult to determine the feasibility and practicality of some potential roadway connections, since they may need to cross existing creeks or drainage ditches or impact wetlands on site." App. 012. Mr. Wright's testimony at the City Commissioner hearing likewise fell short of stating that the Application was not in compliance, and again refers to "some opportunities for some additional connections." App. 659. Further, Mr. Wright made clear that "as you see in the Staff report, this [the airport noise zone] is staff's

-- basically staff's reason for recommending denial on this petition." App. 651-652.

The connectivity opportunity statements by Staff were, therefore, at most, recommended considerations for the Commission and not bases for denial. EGDP's attorney, Ron Carpenter, stated on the record at the Commission hearing that EGDP, with the exception of the environmental recommendations that were not even considered "conditions," was accepting all of the recommended conditions in the Staff report. App. 730-731.

As to grid pattern (block size), two of the City's planners testified at the hearings on this subject. Mr. Wright testified that there are no street grid standards in the City's Code (App. 659) and Mr. Calderon (App. 843) testified that there are a lot of wetlands on this site; there is a need to cluster; and there is very limited area to form a true grid pattern. The record contains a comprehensive Design Plat Application Consistency Report dated February 11, 2009, prepared by EGDP's expert who demonstrated compliance with the City's Code and Comprehensive Plan. App. 067-149. The record contains no substantial competent evidence that the Application failed to comply with any requirements for grid pattern (block size).

Despite EGDP'S agreement on the record to the observation by Staff that there was an opportunity for two additional connections, the lack of any testimony

or evidence from Staff that the Application failed to comply with any requirements or policies relating to connectivity or grid pattern (block size), and the fact that neither connectivity nor grid pattern (block size) was a reason for Staff's recommendation of denial, Commissioner Hawkins, a land use attorney, spent a considerable amount of time at both of the City hearings testifying regarding connectivity and grid pattern (block size). App. 757-771; App. 837-841; App. 854-857. At the August 6, 2009, hearing, Commissioner Hawkins testified that in his opinion, "I don't think it's designed to address the fundamental block size and connectivity of the plan." When asked to respond to Commissioner Hawkins' testimony, Staff stated, "The staff has no comment." App. 765.

It is a fundamental violation of due process for a decision maker to also provide testimony (evidence) in the matter decided. Verizon Business Network Services v. Department of Corrections, 988 So. 2d 1148 (Fla. 1st DCA 2008). Even more egregious is the fact that Commissioner Hawkins' testimony then became a stated basis for a majority of the Commissioners to deny the Application. Commissioner Lowe stated connectivity as a basis for denial in his motion for denial and characterized the issue as "brought to life by Commissioner Hawkins." App. 877. Commissioner Mastrodicasa, in supporting the motion for denial, states, "I think Commissioner Hawkins' point about connectivity is important." App. 879. Similarly, Commissioner Poe states, in also supporting the motion for denial, that

"equally, I think that there are some challenging, yet not unresolvable issues . . . that Mr. Hawkins brought up . . ." App. 880. Additionally, Commissioner Donovan concurs with Commissioner Poe and stated that the issue of connectivity is "still very important and up in the air". App. 882. The Commission clearly departed from the essential requirement of law and failed to afford EGDP procedural due process; and therefore, the Order should be quashed.

C. Procedural Due Process

As is frequently the case in these types of proceedings, it is difficult, if not impossible, to compartmentalize an error as either a denial of procedural due process or a departure from the essential requirements of law. Typically, a departure from the essential requirements of the law results in a denial of procedural due process. See Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003) (equating departure from the essential requirements of the law to a failure to afford procedural due process and failure to apply the correct law). Such is the case here.

Consequently, for all the reasons discussed above, EGDP suffered a devastating denial of due process with respect to its Application. And, when viewed through the lens of this Court's first-tier certiorari review standard, the City's denial of EGDP's Application constitutes both a denial of procedural due process and departure from the essential requirements of law.

1. Order Is Unsupported by Findings of Fact

The mere fact that the Commission failed to make written findings of fact in support of its order of denial, alone constitutes a departure from the essential requirements of law and denial of procedural due process. The Commission's Notice of Denial of Development Permit dated August 19, 2009, consists of one sentence denying EGDP's Application, and contains no findings of fact. App. 641. [4] Under Florida law, regardless of which party bears the burden of proof, a local government's failure to make adequate findings of fact in its order constitutes a departure from the essential requirements of law. Irvine v. Duval County Planning Commission, 466 So. 2d 357, 365-66 (Fla. 1st DCA 1985)(dissent), as adopted in Irvine v. Duval County Planning Commission, 504 So. 2d 1265, 1267 (Fla. 1st DCA 1986).

Following quasi-judicial proceedings, all administrative orders must contain findings of fact that are legally sufficient to support the decision ordered:

> An agency should establish and announce findings of fact which will provide a basis for rationally inferring the conclusion which the statute [or ordinance] requires.

* * *

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[4] Moreover the lack of any sort of meaningful debate by the Commission with respect to EGDP's Application is further proof of the lack of procedural due process. The Commission's summary denial of EGDP's Application reflects less than meaningful due process.

> To meet due process requirements, it is necessary that the agency set out detailed facts found from the evidence so that a court authorized to review the matter on certiorari can first determine whether or not the facts found by the agency constitute lawful grounds for its action and, then, determine whether the evidence supports the finding – 'Without detailed findings, the reviewing court would be compelled to grope in the dark and to resort to guess-work as to what facts the Board had found to be true and what facts alleged were not found to be true. . . . It is not sufficient that the cited findings merely be general conclusions in the language of the statute or ordinance because such conclusions provide no way for the court to know on judicial review whether the conclusions have sufficient foundation in findings of fact.

Id. (internal citations omitted). Because the Commission failed to provide findings of fact in support of its order denying EGDP's Application, the denial should be quashed.

2. Commission Was Not Impartial

The City's denial of EGDP's Application should be quashed because the City did not meet the basic constituent of due process: impartiality. Procedural due process requires an impartial decision maker. Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322, 323 (Fla. 1990).

EGDP's Application was a politically charged issue in the City of Gainesville because the Gainesville-Alachua County Regional Airport Authority wanted to (over) protect itself from the typical complaints airports might receive from their neighbors. See, e.g., App. 732:25-736:2; App. 742:2-743:10. At first, the City of Gainesville considered purchasing the Site. App. 832:13-16. However, the City "made an offer and the offer was too low for that owner's purposes, so [the

City] never acquired the property." App. 832:2-833:4. Rather than paying for the Site, the City invented rules which denied EGDP the right to build the Residential development on the Site for which it is zoned and designated land use in the City's Comprehensive Plan. An impartial Commission either should have purchased the Site or applied the Code as written.

Here, at least three of the seven-member Commission, Commissioners Craig Lowe, Jeanna Mastrodicasa and Lauren Poe, admitted to have had ex parte communications with Kinnon Thomas, the current Chairman of the Gainesville-Alachua County Regional Airport Authority. App. 646:11-647:4. Another member, Commissioner Thomas Hawkins, evidently conducted his own personal ex parte investigation and then purported to offer fact testimony during the Commission hearings. App. 757-771; App. 837-841; App. 854-857. Commissioner Hawkins' statements in the quasi-judicial hearing concerned the very issues over which he was the final arbiter. This violated EGDP's procedural due process rights. See Ridgewood Properties, 562 So. 2d at 323.

The City Attorney improperly took on the role of advocate, in addition to advisor to the Commission, in violation of EGDP's procedural due process rights. A legal advisor to the Commission cannot also act as an advocate at the same quasi-judicial hearing. See Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995) (a decision-maker must not allow one side in the dispute to have a

special advantage in influencing the decision). The City Attorney, on his own and not upon the request of the Commission, (1) interrupted and cross-examined EGDP's environmental expert and argued with his opinions regarding the plat versus the parcel only minutes before the vote to deny the Application (App 899-900); (2) commented on and summarized the evidence several times during the hearing (App 803-807; 835); (3) argued with EGDP's testimony regarding whether the property was undevelopable based on the City's interpretations of the Code (App 836); and (4) advocated the airport issue by providing memoranda and testimony to the Commission that cherry picked only portions of the Code and Part 150 Study to summarize to the Commission and set forth what the City Attorney, as opposed to an expert, deemed relevant as outside sources to define compatibility. App 559-589; App. 805. In cherry picking only portions of the Code, the City Attorney egregiously left out the portion of Appendix F at Section VI that provides, "No change shall be made in the use of land . . . in any airport zone of influence created by these regulations except in conformance with the requirements of this section." The City Attorney, whose advice is clearly relied upon and influences the Commission, in the face of a City retained expert who refused to give opinions on certain issues and a Staff who admitted they had were not technically adept on the issue, improperly assumed the role of advocate, which resulted in EGDP not being afforded the procedural due process required by law.

Further, Commissioner Scherwin Henry noted, that despite the Commission's supposedly unbiased role in ruling on EGDP's Application in a quasi-judicial proceeding, "from the beginning there's been the drive to end it" by the City. App. 885:2-5. Staff recommended denial of EGDP's Application, upon which the City relied heavily. Commissioner Henry took umbrage with the Staff for letting EGDP's Application take on a "personal tenor" when they were being "paid to be professional." App. 884:4-11.

The City was not an impartial arbiter in this matter. In pursuing the City's interest of keeping vacant property surrounding Ironwood Golf Course and appeasing aggressive GACRAA Board members and Airport staff (see GACRAA Board member and CEO public comment and correspondence), the City disregarded the actual provisions of its own Land Development Code. EGDP was denied the minimum protections of procedural due process. This warrants quashing the City's order of denial.

3. Commission Deprived EGDP of Opportunity to Respond

After the hearing on EGDP's Application was continued to August 17, 2009, the Commission did not permit EGDP a realistic opportunity to respond to the testimony given by the City's witnesses that were solicited by the City, in violation of EGDP's due process rights. Despite EGDP's protestations, the Commission cut off EGDP's opportunity for a meaningful response to the new evidence presented

to the City on August 17, 2009. See, e.g., App. 892:4-893:16; App. 899:5-10. Because the Commission deprived EGDP a reasonable opportunity to be heard, the denial order should be quashed.

D. Substantial Competent Evidence

A quasi-judicial action cannot withstand judicial scrutiny unless it is supported by substantial competent evidence. See Dusseau v. Metro Dade County Bd. Of County Commissioners, 794 So. 2d 1270, 1274 (Fla. 2001) ("The Court must review the record and determine inter alia whether the agency decision is supported by competent substantial evidence. Competent substantial evidence is tantamount to legally sufficient evidence."). Substantial competent evidence must be directly relevant to the published criteria in the application regulation - irrelevant evidence cannot be substantial or competent. See DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) ("[E]vidence relied upon to sustain the ultimate findings should be sufficiently relevant and material").

As recounted above, EGDP presented overwhelming competent substantial evidence supporting the approval of its Application. The City, however, failed to present any such evidence, and based its decision on an erroneous interpretation of the Code and improper testimony of Commissioner Hawkins.

1. EGDP's Use Is Compatible with Part 150 Study

Even if, *arguendo*, "compatibility" is a super-condition that overrides the actual Residential use conditions of Section II(C)(2)(e) of Appendix F, there is no substantial competent evidence in the record to support denial of the Application on the ground that EGDP's proposed use of the Site is incompatible with the Part 150 Study. Even if there is an overriding condition regarding compatibility, EGDP's project is compatible with the Part 150 Study.

Because Staff by its own admission did not have the requisite background, it retained an expert in airport noise compatibility planning, Ted Baldwin, to testify in this matter. App. 820:17-20; App. 853:17-21. Although Staff touted Mr. Baldwin as an expert who would opine that EGDP's Application was incompatible with the 1986 Part 150 Study, and Staff relied on this supposed conclusion from Mr. Baldwin for its own recommendation of denial of the Application, and in turn the Commission relied on Mr. Baldwin for such, Mr. Baldwin did no such thing. App. 655:16-23; App. 789:8-9. The City's own expert, despite given numerous opportunities, did not testify regarding compatibility with the 1986 Part 150 Study, and indeed, refused to offer an opinion that the Application was incompatible with the 1986 Part 150 Study.

Instead, Mr. Baldwin testified, consistent with the Section II(C)(2)(e) of Appendix F that Residential use within the 65 DNL would be considered

incompatible "without either an avigation easement or sound attenuation." App. 801:1-5. However, it is undisputed that EGDP's Application called for sound attenuation, thereby satisfying the conditions of Section II(C)(2)(e). Mr. Baldwin refused to testify that the Residential use proposed by EGDP was incompatible with the 1986 Part 150 Study:

> MAYOR: But what we're really trying to get a sense of is . . . what the current noise zones are what the current regulations are; is that correct?
>
> MR. BALDWIN: . . . And, again, I'm not aware. I'm not a lawyer and I guess I shouldn't address the issue of the status of the existing noise zones.

App. 800:9-14, 801:8-10. Mr. Baldwin's testimony, the only testimony on compatibility proffered by the City, constitutes an admission that Residential development in the 65 DNL Airport Noise Subzone is permissible under Appendix F, with, at the developer's option, either sound insulation or an avigation easement. In any event, Mr. Baldwin did not provide any basis upon which the City could deny EGDP's Application.

In grasping for arguments that Residential use is not compatible with the 1986 Part 150 Study, the City relied on portions of the 80-page study that were unrelated to compatibility. For example, the tables in the 1986 Study are not evidence that Residential use is incompatible above 65 DNL. On the other hand, the 1986 Part 150 Study specifically provides, "Residential development shall be

generally permitted in the 65-75 Ldn area." App. 427. Further, Alachua County specifically confirmed in the 1986 Part 150 Study:

> the potential residential development near the Ironwood Golf Club will be influenced by the existence of large flood prone areas. This does not mean residential development is prohibited . . ..

App. 447 (emphasis added).

EGDP, however, provided undisputed evidence that its proposed Residential use was compatible with the Part 150 Study. The City annexed the Property and surrounding land in 2001. App. 597; App. 602. With the 1986 Part 150 Study and the "compatible" language in Section II(C)(2)(e) in effect, the City affirmatively changed the Comprehensive Plan designation and zoning for the Site to Single-Family Residential and to Residential, obviously concluding that Residential development "is compatible with the Official CFR Part 150 Study" also in accordance with Section VI discussed above. App. 597; App. 602; App. 666:16-667:22. The City subsequently permitted Residential development in the neighboring North Point at Ironwood within Airport Noise Subzone B (70 DNL) and C (65 DNL). App. 824:15-825:4; App. 829:17-830:2; App. 1036A; App. 1136.

The City made the zoning and land use for EGDP's Property Residential. The City affirmatively found that Residential development was a compatible use for EGDP's Site when the City changed the zoning and land use to residential in

2003. Appendix F at Section VI ("No change shall be made in the use of land . . . in any airport zone of influence created by these regulations except in conformance with the requirements of this section."). The City again found Residential use compatible with the Part 150 Study when it permitted the neighboring Residential development North Point at Ironwood.

In short, EGDP presented substantial competent evidence to the City that its Residential development is compatible with the 1986 Part 150 Study. The City, however, has merely claimed it is not compatible. The City, either through its expert, the City Attorney or the FAA, failed to introduce substantial competent evidence regarding incompatibility between Residential use and the 1986 Part 150 Study. It is essential to also remember that one never even reaches the issue of "compatibility" if the Court concludes, as it should, that the Part 150-approved new 2012 Noise Exposure Map, which is binding on the FAA, GACRAA, the airport, and the City, is the appropriate map – in which case the noise related potion of Appendix F does not cover any portion of the Site and the question of compatibility is moot. As such, the denial should be quashed, and EGDP's Application approved.

2. Wetlands Avoidance, Set-Aside and Connectivity

As discussed in Part VI(B)(2), (3) and (4), supra, there is no substantial competent evidence in the record that EGDP failed to comply with the Code

regarding wetlands avoidance, set-asides, connectivity or grid pattern (block size). The City presented no evidence at the hearings that EGDP did not comply with the Code, and therefore, any denial based upon those factors should be quashed.

3. Lot Size

To the extent the City denied the Application due to reduced lot sizes, the denial is not supported by substantial competent evidence. The Staff report states that the Application met all of the specific criteria set forth in City Code Section 30-190(i) for cluster subdivisions which authorize reduced lot sizes. App. 010-012. There is no evidence in the record that the lot sizes did not comply with the City Code. There were no Staff recommendations in the Staff report relating to lot size. In fact, the purpose of an Environmental Cluster Subdivision is to have small lot sizes, which will allow the same density on a parcel of land and result in more open space than would otherwise be the case. See Section 30-190(a); App. 945) The only testimony at the Commission hearings relating to concerns about lot sizes was by Commissioner Hawkins. However, Commissioner Hawkins' testimony is not and cannot be substantial competent evidence. Further, as more fully set forth above, the Commission clearly departed from the essential requirements of law and failed to afford EGDP procedural due process relating to Commissioner Hawkins' actions.

VII. CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, this Court should grant certiorari, quash the City's Order denying EGDP's Application, and direct the Commission to approve EGDP's Petition No. PZ-09-19, and any other further relief the Court deems just and proper.

CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to Fla. R. App. P. 9.210, I hereby certify that the typeface used in this brief is no smaller than 14 point, Times New Roman.

Dated: September 16, 2009

Respectfully submitted,

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