LEGISTAR NO.

120781

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT,
IN ITS APPELLATE CAPACITY
IN AND FOR ALACHUA COUNTY, FLORIDA

SCRUBS, INC.,
a Florida corporation,

Petitioner

vs.

CITY OF GAINESVILLE
a political subdivision,

Respondent

PETITION FOR WRIT OF CERTIORARI FROM A FINAL DECISION
BY THE CITY OF GAINESVILLE PLAN BOARD

Special Use Permit Petition PB-12-07

PETITION FOR WRIT OF CERTIORARI

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Merriam-Webster.com. 2013. http://www.merriam-webster.com
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III. JURISDICTION

This Court has jurisdiction to issue a writ of certiorari under Article 5, Section 5(b) of the Florida Constitution.

IV. CITATIONS TO THE APPENDIX

Citations to the Appendix will appear throughout as (App: page number).

V. STANDARD OF REVIEW

The Florida Supreme Court has ruled that on review of an administrative action, such as the City of Gainesville Plan Board's ("City" or "Plan Board") quasi-judicial or zoning decision in the instant case, the Circuit Court must determine 1) whether procedural due process has been accorded; 2) whether the essential requirements of law have been observed; and, 3) whether the administrative findings and judgment are supported by competent, substantial evidence. *See Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). The Plan Board's approval of PB-12-07, resulting in issuance of a Special Use Permit, is subject to strict scrutiny by this Court. *See Bd. of County Comm'rs of Clay County v. Qualls*, 772 So. 2d 544, 546 (Fla. 1st DCA 2000). The applicant at all times has the burden of proving it met the standards in the applicable zoning codes. *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985). In determining whether to grant an exception, a planning commission is required to base its decision on specific standards and

criteria set forth in zoning regulations, and it is reversible error to base a decision on other grounds. *Irvine v. Duval County Planning Commission*, 504 So.2d 1265 (Fla. 1st DCA 1986); *Irvine v. Duval Planning Commission,* 495 So.2d 167 (Fla. 1986). The applicant's burden is even higher for a variance request such as a special use permit than an exception. There is no presumption that the request "bears legislative sanction." *Planning Comm'n of City of Jacksonville v. Brooks*, 579 So. 2d 270, 273 (Fla. 1st DCA 1991)("a special exception [unlike a variance or rezoning] is a part of the comprehensive zoning plan, sharing the presumption that as such it is in the interest of the general welfare and, therefore, valid..."). In short, the law of Florida requires that zoning ordinances and their exceptions be predicated on legislative standards which can be applied to all cases, rather than on the theory of granting an administrative board the power to arbitrarily decide each case on an *ad hoc* basis, "or to shift a particular parcel of property from one zoning classification to another, whether by 'variance', 'exception' or 'special use permit.'" *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985).

VI. STATEMENT OF THE CASE AND FACTS

Gators Car Wash, LLC ("Applicant") in mid-November, 2012 applied for a special use permit and development plan ("SUP") in an attempt to allow a new site plan, major building demolition and renovation, plus the substitution of new, albeit

prohibited, non-conforming uses to rescue an obsolete full-service car wash. App: 2, 17, 87. The car wash, located at 3010 Archer Road, Gainesville, Florida, is considered an existing non-conforming use. App: 84, 87, 154. After the property was voluntarily annexed in 2002 into the City of Gainesville (App: 154), it was administratively rezoned in 2003 to BUS (General Business District), which does not allow car washes by right or by special use permit, "hence establishing the legal status of the property as a nonconforming use...". App: 1, 5, 8, 15, 142-144, 154. The City classifies car washes as Industrial uses, which are not permitted uses in the General Business District. App: 26. The property owner fully accepted the BUS zoning at the time of the property's administrative rezoning. App: 26-27.

The City of Gainesville Plan Board ("Plan Board" or "City") on December 3, 2012, voted 5-1 to approve the SUP. App: 74, 84. Subsequent to the hearing, Petitioner learned that the Plan Board does not intend a written order, and to date has not issued minutes of the meeting that could function as a rendered order for purposes of judicial review. App: 76-78. (City Staff has stated the minutes would not be available until January 24, 2013 at the earliest. App: 77. In the abundance of caution and to avoid delay, Petitioner seeks relief at this juncture. In the event the City issues minutes of the meeting, Petitioner by appropriate motion will seek to add the certified minutes to the Appendix of this proceeding.) Petitioner, an expert in the car wash industry, appeared as an affected party without objection at the

Plan Board's informal quasi-judicial hearing on December 3, 2012, and presented testimony and evidence that the application did not meet the City requirements for a special use permit under the facts and circumstances, and also presented written argument of counsel that approval of the Petition would not comport with the treatment of nonconforming uses under Florida law. App: 56-63, 79-80.

The well-settled zoning policy of many states and local jurisdictions is to eliminate non-conforming uses with all the speed that justice will tolerate. *Lewis v. City of Atlantic Beach*, 467 So.2d 751 (Fla. 1st DCA 1985); *JPM Investment Group v. Brevard Cnty. BOCC,* 818 So.2d 595 (Fla. 5th DCA 2002), *quoting Salerni v. Scheuy,* 102 A.2d 528, 530 (Conn. 1954)("It is a general principle in zoning that nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit.") Gainesville is no exception. "The intent of the code is to get rid of nonconforming uses." App: 16, 48.

By definition, a nonconforming use or structure is one in which the use or structure was legally permitted prior to a change in the law, and the change in law would no longer permit the re-establishment of such structure or use. Id. *See Mark A. Rothenberg, The Status of Nonconforming Use Law in Florida, Rothenberg,* 79 Fla.B.J. 46 (Mar. 2005). A landowner generally has a vested right to continue a legal, nonconforming use in Florida. *Fortunato v. City of Coral Gables*, 47 So.2d 321 (Fla. 1940). But the right to continue is not synonymous with a right to

expand, and the spirit of the law toward nonconforming uses restricts rather than expands them.

Typically, non-conformities are eliminated by attrition (amortization), abandonment, obsolescence, and/or destruction. *Rothenberg,* at 1*; Sarasota County v. Bow Point Condominium Developers, LLC,* 974 So.2d 431 (Fla. 2d DCA 2007). The general rule is that extensions, expansions, intensifications, and enlargements of non-conforming uses or structures are illegal. Similarly, existing non-conforming uses may not be used as a launch pad for expansion of nonconforming uses.

The central issue in the instant case is that the Plan Board departed from the essential requirements of law by approving an illegal expansion, extension, intensification or enlargement of an obsolete nonconforming use at the Applicant's property. The existing non-conforming use is being used as a basis to add other Industrial structures and uses prohibited in the General Business District, thereby impermissibly perpetuating the nonconformity. The character of the existing nonconforming use also has changed due to the site's intensification, and would pose significant traffic and excessive noise impacts to the adjacent residential and office uses. App: 11, 59, 154, 157, 268. There is no relationship between demolition of the building and continuing the nonconforming use. The Applicant has yet to present a plan demonstrating that it will manage water generated on site.

App: 159. The existing operation has generated complaints regarding water flow accumulation and property damage to a neighboring owner. App: 44-45, 159. There have been little or no changes to the car wash property since its annexation. App: 158-159. The applicant intends to abandon a portion of the nonconforming use by substantial demolition of the existing building, thereby forfeiting grandfathering protection for that portion of the property, and the Plan Board has no authority to permit substitution of new nonconforming uses and structures in its place. The Plan Board departed from the essential requirements of law by erroneously interpreting and misapplying the City's zoning codes language (§30-346(d), LDC) to the SUP application. And, finally, the Plan Board's decision is not supported by competent, substantial evidence on the critical standards that must be satisfied to sustain an approval of the SUP.

VII. ARGUMENT

I. The City Plan Board departed from the essential requirements of law by incorrectly applying §30-346, Land Development Code, to the SUP application.

A. The Plan Board approved an illegal extension, expansion, intensification, or enlargement of a nonconforming use.

Section 30-346(a) (*Nonconforming lots, uses or structures*) of the City's Land Development Code ("LDC") provides in pertinent part:

> Sec.30-346 (a) *Intent.* Within the districts established by this chapter there exist lots, structures and uses of land or land and structures which were lawful before

this chapter was adopted or amended but which will be prohibited, regulated or restricted under the terms of this chapter. **It is the intent of this chapter to permit these nonconformities to continue until they are removed but not to encourage their continuation.** Except as otherwise provided, it is the further intent of this chapter that nonconformities **shall not be enlarged upon, expanded, intensified or extended nor be used as a basis for adding other structures or uses prohibited within the district.** Certain improvements to nonconforming uses which:
(1) Do not involve increases in the size of structures or changes in the character of existing uses;
(2) Are reasonably related to the continuation of those uses; and
(3) Will not have an adverse impact on the surrounding neighborhood and general public;
may be permitted subject to the requirements of this chapter...". **(emphasis added)**.

Section 30-346(d) of the LDC provides in pertinent part:

Sec. 30-346(d) *Nonconforming uses of buildings, structures and premises.* ... All nonconforming uses shall be subject to the following provisions:
(1) **No existing structure devoted to a use not permitted** by this chapter in the district in which it is located **shall be enlarged, constructed, reconstructed, remodeled, moved or structurally altered** except in changing the use of the structure to a use permitted in the district in which it is located. The city plan board may allow, by special use permit, minor decorative, functional or safety improvements to existing structures devoted to legal nonconforming uses...".

App: 106

The Plan Board approved an SUP that, in effect, sanctions removal of half of a non-conforming structure and use but then authorizes reconstruction or remodeling of the structure and substitution of a more intense nonconforming use – all in direct contravention of §30-346, LDC and the City's zoning regulation that allows non-conforming uses to continue "until they are removed but not to encourage their continuation." App: 51. The Plan Board is without authority to make such an arbitrary decision. Nonconforming uses may be continued as a matter of right but may not be enlarged by right. *Congregation Anshei Roosevelt v. Planning and Zoning Board of the Borough of Roosevent,* A-1390-09T3 (N.J. Super. App. Div. 2011)(unpublished), *citing to Grundlehner v. Dangler,* 29 N.J. 256 (1959)(holding that nonconforming uses may not be enlarged as of right except where the enlargement is so negligible or insubstantial that it does not fairly warrant judicial or administrative notice or interference). Questions or uncertainty regarding whether the proposed change is substantial are to be resolved against allowance of the enlargement or change, and the issue is a mixed question of fact and law. *Id.* In *Congregation*, the New Jersey Court denied an application to add a private *yeshiva* school to a pre-existing nonconforming synagogue use, despite existence of a nursery school on the site. *Id.* The Court found it was an impermissible intensification of a pre-existing nonconforming use, despite applicant's argument that the facilities were all religiously affiliated to the

synagogue. In the instant case, new versions of car wash services may not be permitted at this location under the City's zoning code, however related they might be to car washing.

City planners concurred in their December 3, 2012 Staff Report that Sec. 30-346 of the City's Land Development Code ("LDC") "specifically does not allow renovations, expansions, modifications or intensifications to non-conforming uses." App: 155. Despite code prohibitions, the Plan Board approved the Applicant's proposed demolition of 57% of the existing building (3,680 sf of the existing 6,540 sf building), relocation and remodeling of office and rest room space, and conversion of the removed building to 16 outdoor vacuum stations plus 9 prep stations. App: 17, 19-20, 98, 154. The applicant admitted it was remodeling its non-conforming building to reduce its size, and, to reduce and relocate the office, vending area and bathrooms. App: 4-5. The applicant admitted that parts of its current building simply "need to be updated" (read: renovated, modified) and that it is implementing a "new business" model. App: 131-132. But the applicant also admitted that non-conforming uses "cannot be renovated or expanded." App: 87. So, the applicant asked that the renovations be approved under a narrow exception, discussed *infra*. *Id*.

As a matter of law, §30-346(d)(1), LDC, does not contemplate or allow renovations or modifications to existing non-conforming uses and structures unless

the changes are a transition to a permitted use and structure in the zoning district. App: 106. The instant SUP application perpetuates and extends a nonconforming use rather than transitioning to a permitted use. *Bixler v. Pierson,* 188 So.2d 681 (Fla. 4th DCA 1966)(finding that removal of an old trailer and placing of a new trailer was prohibited as "the substitution permitted perpetuation of the non-conforming structure contrary to the clear intent of the zoning regulations construed as a whole. The regulations look forward to the eventual elimination of all non-conforming structures and uses by attrition, abandonment and acts of God as speedily as is consistent with proper safeguards for the rights of those persons affected."), *citing* to *Hanna v. Board of Adjustment,* 183 A.2d 539 (1962). The Florida 4th DCA stated in *Pierson* that the reason for such an interpretation was pointed out in the Kentucky case, *Goodrich v. Selligman*, 183 S.W.2d 625 (1944) wherein the Court stated, "[h]ere a new structure is substituted for an old one. If it is proper to do this once it will be proper to do it again and thus the life of the non-conforming structure will be indefinitely prolonged, and the whole purpose of the zoning ordinance will be defeated." *See also, Town of Redington Shores v. Innocenti,* 455 So.2d 642 (Fla. 2d DCA 1984)(zoning code prohibits extension of existing non-conforming use). *See also, Woodbury Donuts LLC v. Zoning Board of Appeals of the Town of Woodbury,* 2012 WL 6571425 (Conn. App. 12/25/12), *citing to Planning & Zoning Commission v. Craft,* 529 A.2d 1328, cert. denied,

531 A.2d 937 (1987)(proposed change of nonconforming use from seasonal to year-round was change in character of previous use and impermissible expansion); *Trudo v. Town of Kennebunkport,* 942 A.2d 689 (Me. 2008)(substituting insulated windows for porch screens constituted impermissible expansion of nonconforming use because it allowed longer seasonal use of porch located in critical shoreline area); *Dowd v. Monroe County,* 557 So.2d 63 (Fla. 3rd DCA 1990)(nonconforming motel use may not be enlarged or expanded from 5 to 30 units even though use is still motel.)

Analysis under Florida's "takings" jurisprudence further demonstrates the Plan Board's decision was simply an illegal enlargement, expansion, intensification or extension of a pre-existing nonconforming use. To prevail in an inverse condemnation proceeding on a theory of "taking" of a vested nonconforming use, the landowner in part must demonstrate that its nonconforming use likely would have qualified for an after-the-fact permit at the time intervening laws rendered the use nonconforming. *U.S. v. 320.0 Acres of Land,* 605 F.2d 762 (5th Cir. 1979). In the instant case, the evidence of record is unequivocal that the outdoor vacuuming uses and car wash facility would not have qualified for a zoning permit at the time of annexation into the City and administrative rezoning, which rendered the Applicant's pre-existing use nonconforming.

A plain reading of §30-346, LDC, prohibits Applicant's renovations, remodeling and significant modifications to its existing non-conforming use and structure. *Stroemel v. Columbia County*, 930 So. 2d 742, 745 (Fla. 1st DCA 2006)(holding that courts "may not insert words or phrases in municipal ordinances in order to express intentions which do not appear"); *Dixon v. City of Jacksonville*, 774 So.2d 763 (Fla. 1st DCA 2000)(internal citations omitted)("It is well established that construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable *de novo*, unless their meaning is ambiguous"); *Rinker Materials Corp. v. City of North Miami Beach,* 286 So.2d 552 (Fla. 1973)("Where words used in an act, when considered in their ordinary and grammatical sense, clearly express the legislative intent, other rules of construction and interpretation are unnecessary and unwarranted. ...A statute or ordinance must be given its plain and ordinary meaning." Conjecture, as the Plan Board undertook in the instant case, is not allowed. *Id.*

Staff was unconvinced by the Applicant's rationale, and found that "the proposed building modification seems to be a **significant departure from the manner in which non-conforming properties have been addressed**." **(Emphasis added)** App: 156. Notably, Staff also found that the applicant's proposed traffic circulation, parking space increase and landscaping/stormwater improvements could be made without changes to the building and expanding the

outdoor vacuum/prep stations. *Id.* ("Given the circulation and site changes proposed, it would seem that the carwash facility can function at a higher level of efficiency and economy without changes to the building." *Id.* at p. 4); *See also* App: 48 and the testimony of Petitioner at App: 59 ("The function and safety of the current wash could be implemented without having to remove half the building and expanding the current vacuum/prep zones to the proposed configuration, and the circulation would be improved on that just as well.")

Certain improvements to the premises of a nonconforming structure (not buildings or structures themselves) may be allowed under the City's code, potentially including existing vehicular use areas, landscaping, drainage, lighting, buffering and screening along property boundaries. Here, the Plan Board approved major improvements to and remodeling of the existing structure, which were unrelated to the otherwise permissible improvements to the premises. App: 156. In short, there is no basis in law or the facts of record that the premise's improvements necessitated major changes and remodeling to the building, or that they were allowable under City Code.

B. The Plan Board approval impermissibly allows an existing non-conforming use to be a launch pad for other nonconforming uses or structures that are prohibited in the General Business District.

Sec. 30-346, LDC, provides that a nonconforming use shall not be enlarged upon, expanded, intensified or extended nor used "as a basis for adding other

structures or uses prohibited in the district."

Under a plain reading of the code provision, the Plan Board was without legislative authority under the City zoning codes to approve an SUP that introduces new or expanded, outdoor, Industrial activities and excess parking in the General Business District. Sec. 30-67(g), LDC. App: 225. Outdoor activities and Industrial uses such as car washes are prohibited in the General Business District of the City of Gainesville.[1] App: 131. Excess parking is prohibited at all developments in the City. App: 92, 132.

Notwithstanding the City zoning codes, the Plan Board approved adding 16 over-sized parking spaces at the building demolition site to accommodate new outdoor cleaning and vacuuming stations at the car wash. App: 99. The site currently has 5 regulation-sized parking spaces. However, the Plan Board approved this excess parking based on the applicant's representation "as needed for the new business." App: 132. The applicant criticized existing City zoning codes because the "current parking requirements for carwashes do not apply to the 'self-service' carwash model." Id. The Plan Board exceeded its legislative authority by approving excess parking, and thereby departed from the essential requirements of law.

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[1] Sec. 30-67 – General provisions for business and mixed use districts. ... (g) Outdoor storage and sales. All principal uses in any business or mixed use district shall be contained within completely enclosed buildings, except as otherwise specifically provided as a permitted use. ...".

Outdoor activities are not permitted in the City's General Business District with limited exceptions that do not apply in this case. §30-67(g), Land Development Code; App: 131. But the Plan Board approved what City Staff described as "significantly more outdoor equipment as well as more outdoor space than the existing design." App: 132, 133.

The Applicant wants the City's ordinances to "catch up" to carwash industry preferences, but the Plan Board and this Court are without authority to rewrite the City zoning codes to accommodate this one applicant. In its application of the zoning code, this Court "may not insert words or phrases in municipal ordinances in order to express intentions which do not appear." *Stroemel v. Columbia County*, 930 So. 2d 742, 745 (Fla. 1st DCA 2006), *citing Rinker Materials Corp. v. City of N. Miami,* 286 So. 2d 552, 553-54 (Fla. 1973). The City zoning code would not permit the establishment of a new facility with these outdoor features in the General Business District, and the Plan Board's interpretation of the code may not sanction the transformation and perpetuation of this non-confirming use into further non-conformity. *U.S. v. 320.0 Acres of Land,* 605 F.2d 762 (5th Cir. 1979); *Bixler v. Pierson*, 188 So.2d 681 (Fla. 4th DCA 1966). Petitioner does not argue that the City could not have drafted the legislation so that outdoor uses attendant to express, self-serve carwashes would have been allowable, merely that the City in fact did not draft the legislation to accomplish that purpose. *Stroemel v. Columbia*

County, 930 So. 2d 742, 745 (Fla. 1st DCA 2006), *citing Rinker Materials Corp. v. City of N. Miami,* 286 So. 2d 552, 553-54 (Fla. 1973). The City cannot, therefore, utilize the current legislation to permit or fail to permit the facility as designed. Id.

The gravamen of the Applicant's plea to the Plan Board is that its existing nonconforming use, site, and building are economically obsolete. App: 131-132. "Industrial trends" demand improvements, the Applicant testified to the Plan Board, contending that it was "inherent" on the Plan Board to "right a wrong." App: 5. For instance, window-tinting and oil changing at the car wash are no longer in demand, and the current type of car wash at the property is "diminishing" use of the property, according to the Applicant. App: 35. The Applicant's agent admitted the existing nonconforming use's obsolescence in his testimony to the Plan Board: "The existing business is not operating properly, it's not economically producing what it needs to produce to be – to maintain the business going, and this new owner is introducing a new concept to the car wash in this area...". App: 30. The property owner admitted in his testimony that "We're altering its (the property's) primary function, if you will, but we're still washing cars." App: 43. The applicant complained in its correspondence to the City that the City's zoning code has not yet "caught up with some new ways to do business..." App: 131. "It is imperative that the City revise the old idea to allow carwash business only in the periphery of the City or in the industrial areas. The new express-service carwash

business is demanding more exposure and better transited areas to better serve their clientele." App: 88. In this case, Applicant simply does not agree with the City's adopted zoning and land use policies of having car wash businesses located on the periphery of the urban area in Business Automotive Zoning Districts – away from general commercial and residential areas. App: 26-27; 268. Notwithstanding Applicant's feelings, the Plan Board is without legislative authority to amend the zoning code *ad hoc* in the context of this quasi-judicial permit hearing. *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985).

The insurmountable problem for Applicant in this case is that the sought-after variance and special use permit must be predicated on circumstances that directly affect the real estate and not upon circumstances that have caused Applicant personal hardship. The criteria relate to the land, not to the Applicant. *See, Sodano v. Winthrop Board of Appeals,* 2012 WL 1345314 (Mass. Land Ct. 4/17/2012), citing to *Huntington v. Zoning Bd. of Appeals of Hadley,* 12 Mass. App. Ct. 710 (1981). Applicant's existing nonconforming use and structures are economically obsolete, and should be allowed to terminate with the passage of time. Staff testified at hearing that the City's policy would be to "eventually get rid of the property over time." App: 16, 48. The well-settled policy of nonconforming uses in Florida does not support breathing new economic life into obsolete, nonconforming uses at the expense of the City's uniform zoning regulations and

the public's expectation of fair treatment for all property owners under those regulations. App: 58.

The Applicant is within its right to locate a new car wash business in the City of Gainesville – on properly zoned land, but not on the subject property. The Applicant also is within its right to continue a legal, nonconforming use, on the subject property and conduct minor repairs and maintenance, but has no right to expand it, renovate it or otherwise perpetuate its economic existence. *Bixler v. Pierson*, 188 So.2d 681 (Fla. 4th DCA 1966). It is not incumbent on the City to arbitrarily "shoehorn" this new nonconforming use onto land that lacks proper land use and zoning designations. The instant case is strikingly similar to the facts of *Marine Attractions, Inc. v. City of St. Petersburg Beach,* 224 So.2d 337 (Fla. 2d DCA 1969) wherein the Florida Appellate Court held that a permissible extension of the original nonconforming use of the property "doesn't mean that a corporation operating an aquarium attraction can build a separate amusement park and describe it as a use accessory to the nonconforming aquarium." Likewise, it would be anomalous to allow this SUP to function as a launching pad for expansion of a nonconforming use. *See Patenaude v. Zoning Board of Appeals of Dracut,* 82 Mass. App. Ct. 914 (Nov. 28, 2012). The Plan Board failed to apply the City's codes that require eventual elimination of obsolete, non-conforming uses, thereby departing from the essential requirements of law.

The Plan Board's improper approval of this SUP results in manifest injustice by increasing the difficulty of carrying out the City's zoning codes and comprehensive plan policies related to nonconforming uses. This approval adversely affects Petitioner's and the general public's expectation and right to rely on uniform application of the City's zoning codes and comprehensive plan. The evidence of record already establishes the lack of uniformity with respect to the subject property, based on Petitioner's testimony at hearing. App: 57-58.

Petitioner's representative testified that in 2007, he conducted due diligence related to potential purchase of Applicant's property, and was instructed by City staff that new activity would be limited to repainting the building, fixing the roof -- essentially keeping the building in repair. App: 57. No modifications or renovations would be allowed. *Id.* His testimony cited to the City's recommended denial in 2004, under circumstances similar to the instant case, of PD rezoning (Petition 46PDV-04 PB) to situate a new self-service car wash at the former Putt-Putt mini golf site on 34th Street, Gainesville, Florida, where the zoning also was General Business ("Putt-Putt site"). App: 58-59. Faced with a strong staff and advisory board denial, that application was withdrawn prior to a final vote. App: 228-236. (Prior to the hearing below in the instant case, Petitioner requested a copy of the City's file on Petition 46PDV-04 PB with the intent of introducing it into evidence at the Plan Board hearing. The City produced the file from its archives on

or about December 29, 2012, which effectively precluded Petitioner from introducing it at the December 3, 2012 hearing. Accordingly, Petitioner requests that the Court allow it to supplement the record of the proceedings with the City file on Petition 46PDV-04 PB, which is found at App: 228-324.)

C. Applicant's modifications fall outside exception to general prohibition because the character of nonconforming use has changed, there is no reasonable relationship to continuing the use, and adverse impacts befall the surrounding neighborhood and general public.

The City Plan Board is required to make additional findings of fact before approving a special use permit under §30-346, LDC, for changes to nonconforming uses. Those standards in pertinent part include:

> (2) The proposed improvements are reasonable related to the continuation of a nonconforming use and associated facilities and will not result in an increase in the floor area of structures, enclosure of previously unenclosed areas, a change in the character of a use or detrimental impacts on surrounding uses and properties or the general public;"
>
> App: 108-109

The Applicant admitted at hearing that it was "completely changing the property. We're altering its primary function, if you will, but we're still washing cars." App: 42. Staff testified that "(i)t appears that it might be more intense than what is currently proposed at the site." App: 24. "Depending on the extent and the manner in which this is done that somebody may think that this classifies as a change in character...".App: 20.

Change in character may be related to the attributes that are physically placed on a facility or added to the nonconforming activity, to render its use different in type, degree or intensity, i.e. changing from a sit-down restaurant to a drive-through (App: 25, 79-80) or seeking a full liquor license at a pre-existing nonconforming use that sold only beer and wine. *See JPM Investment Group v. Brevard Cnty. BOCC*, 818 So.2d 595 (Fla. 5th DCA 2002). In this case, an express car wash differs significantly from a self-service and a full service car wash in that a long tunnel is used to automatically move cars through at a rate of one per foot of tunnel, resulting in potentially many more cars on the subject site at one time and greater offsite impacts from the increased activity, noise and water flow. App: 60.

As further evidence of the significant change in character of the use, staff testified that increased buffers along the property boundary would be required to meet criteria for a SUP and establish more compatibility with surrounding neighbors. App: 15,18, 21-22, 47-48. Applicant wanted to rely on the existing vegetation. App: 11-12. Staff testified, "...(B)ut we want to make sure that any changes to this development does not aggravate any situation...". App: 22-23.

Demolition of half of the building and significant remodeling and renovations bear no relationship to continuing the existing non-conforming use. App: 46. City planning staff testified at the Plan Board hearing below that the Applicant could improve its site circulation pattern without removing half of the

building, as proposed. App: 48. ("...that building, that facility can make an improvement to the circulation without removing of the building, so I – the reason of removing the building is something I think the applicant has to convince you about." Id, at 46-47.)

In addition, adverse offsite impacts to adjacent residential and office neighbors and the general public will be intensified, including noise from the tunnel blowers, 16 new vacuum stations and nine prep stations (currently there are three central vacuum stations, and only one central vacuum station will be removed). App: 61, 98. The applicant has yet to meet its burden of proving noise levels generated at the site will not "be a nuisance to surrounding developments." App: 158.

Traffic impacts are expected to intensify since the maximum number of vehicles per hour through the new facility is 100 to 130, per the system manufacturers' design specifications. App: 60. There is conflicting testimony from the Applicant's representatives regarding the site's current traffic intensity, with one witness testifying it is no more than 150 cars per week and another testifying that the number is not more than 40 cars on site at one time; in any event the existing site has only 5 bays and is full-service which is passé, according to the applicant. App: 43, 62, 63-64, 154. For purposes of comparison, an 8-bay car wash may be expected to average 296 trips per day (App: 252), suggesting the Applicant

underestimated the probable offsite impacts.

Similar to the instant case, staff expressed concern over the location of vacuum cleaning and detailing areas in relation to residential development located immediately adjacent to the proposed Putt-Putt car wash site. App: 241. "The playing of amplified acoustical systems are problems in carwash facilities throughout the City, but especially those located adjacent to residential dwellings." App: 241. "Staff has determined, from site visits to existing car washes throughout the City, there exists the potential for excessive noise to be generated from vehicular stereos ... utilizing the car wash facilities. There is even greater potential for the use of amplified music during the vacuum cleaning and detailing of vehicles while all doors and windows of a vehicle are open." App: 268.

The issue before the Court is that the applicant did not meet its burden of proof concerning the significant change of character, relationship of the changes to continuation of the use, and adverse offsite traffic or noise impacts, and proffered no expert testimony on either subject, and was not entitled to Plan Board approval of the SUP under an exception to the prohibition in the zoning code. *Planning Comm'n of City of Jacksonville v. Brooks*, 579 So. 2d 270, 273 (Fla. 1st DCA 1991); *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985).

D. Applicant intends to abandon its nonconforming use by partial demolition of the building, and the Plan Board is

without authority to approve a replacement nonconforming use at that demolition site.

Section 30-346(d)(2), LDC, provides that when nonconforming status applies to a structure and premises in combination, as here, "removal or destruction of the structure shall eliminate the nonconforming use." App: 105-106. Based on the code, Applicant's partial building demolition removes the grandfathering protection of nonconforming status from at least that portion of the property. Going forward, the applicant must meet current codes and undertake a permissible use in the General Business District for anything it seeks to construct in its place. The Plan Board cannot contravene the plain reading of §30-346(d)(2), LDC, and departed from the essential requirements of law in so doing. *Stroemel v. Columbia County*, 930 So. 2d 742, 745 (Fla. 1st DCA 2006)(holding that courts "may not insert words or phrases in municipal ordinances in order to express intentions which do not appear"); *Dixon v. City of Jacksonville*, 774 So.2d 763 (Fla. 1st DCA 2000)(internal citations omitted)("It is well established that construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable *de novo*, unless their meaning is ambiguous"); *Rinker Materials Corp. v. City of North Miami Beach,* 286 So.2d 552 (Fla. 1973).

It is unclear under Florida law whether the owner's intent to abandon the use must be shown. *Rothenberg,* at 3. A large number of courts outside of Florida have

held that a showing of intent is necessary, as have some Florida courts.[2] *Id.* If that rule applies to Florida, this Court may find that the Applicant in the instant case evinced its intent to abandon the nonconforming use on a significant portion of the property by stating it will demolish half the building to add pavement to accommodate expanded, albeit prohibited, outdoor uses. "Abandonment may occur momentarily, without the lapse of any stated period of time such that a clear, overt act may, in and of itself, signal one's abandonment of a nonconforming use," such as giving up a permit to operate a facility. *Gustavino Realty, LLC, et al. v. Robertson, et al.,* 20 LCR 338 (Massachusetts Trial Court, Land Court Department, July 5, 2012). Surely, physical removal of a nonconforming structure qualifies as such a clear, overt act.

The Plan Board's approval of the SUP was beyond its scope of authority because it reestablished a partially abandoned nonconforming use and structure in violation of the City's zoning codes and Florida law.

II. The Plan Board departed from the essential requirements of law by erroneously interpreting the definition of "minor decorative, functional and safety improvements" in §30-346(d), LDC.

The Plan Board justified its approval of major changes to the property's pre-existing nonconforming use and structure as "minor decorative, functional and

[2] *See, Lewis v. City of Atlantic Beach*, 467 So.2d 751 (Fla. 1st DCA 1985)(no evidence of record that owner ever intended to abandon use); *Hobbs v. DOT,* 831 So.2d 745 (Fla. 5th DCA 2002).

safety improvements" pursuant to §30-346(d), LDC, deciding, albeit erroneously, that the term "minor" only modified "decorative" and not "functional or safety improvements" in the code. Section 30-346(d)(1), LDC, provides in pertinent part:

> The city plan board may allow, by special use permit, minor decorative, functional or safety improvements to existing structures devoted to legal nonconforming uses.
>
> App: 106

Notably, the City zoning code does not define the phrase "minor decorative, functional or safety improvements." Regardless, the Plan Board was required to apply the plain and ordinary meaning of the words, instead of warping the terminology to fit a desired result. Such conjecture is impermissible and a departure from the essential requirements of law. *Stroemel v. Columbia County*, 930 So. 2d 742, 745 (Fla. 1st DCA 2006)(holding that courts "may not insert words or phrases in municipal ordinances in order to express intentions which do not appear"); *Dixon v. City of Jacksonville*, 774 So.2d 763 (Fla. 1st DCA 2000)(internal citations omitted)("It is well established that construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable *de novo*, unless their meaning is ambiguous"); *Rinker Materials Corp. v. City of North Miami Beach,* 286 So.2d 552 (Fla. 1973)("Where words used in an act, when considered in their ordinary and grammatical sense, clearly express the legislative intent, other rules of construction and interpretation are unnecessary and

unwarranted...A statute or ordinance must be given its plain and ordinary meaning."

The Florida Supreme Court has concluded that local ordinances are subject to the same rules of interpretation as are state statutes; a Court interpreting local ordinances must first look to the plain and ordinary meaning of the words in the ordinance. *Longboat Key, Florida v. Islandside Property Owners Coalition, LLC,* 95 So.3d 1037 (Fla. 2d DCA 2012), citing to *Rinker*, 286 So.2d 552 (Fla. 1973). Where, as here, the zoning code does not define or otherwise supply the plain and ordinary meaning of its terms, the reviewing Circuit Court may resort to the dictionary for definitions and then apply the plain and ordinary meaning of the words. *Id., citing to Baker Cnty. v. Medical Serv. Aetna Health Mgmt.,* 31 So.3d 842 (Fla. 1st DCA), *rev. denied,* 44 So.3d 1177 (Fla. 2010). The subject terms in the instant case are not ambiguous, and are susceptible to dictionary definition. *Dixon v. City of Jacksonville*, 774 So.2d 763 (Fla. 1st DCA 2000)(Even if the meaning of a statute is complicated, this does not necessarily render it ambiguous).

The definition of "minor" is "inferior in importance, size, or degree: comparatively unimportant", the definition of "decorative" is "serving to decorate; *especially* : purely ornamental", the definition of "functional" is "used to contribute to the development or maintenance of a larger whole"; the definition of "safety" is "the condition of being safe from undergoing or causing hurt, injury, or

loss"; and the definition of "improvements" is "the act or process of improving." *Merriam-Webster.com*. 2013. http://www.merriam-webster.com (11 January 2013).

A plain and ordinary reading of the disputed code section would prohibit all but minor changes of a decorative, functional or safety nature to a nonconforming use or structure. *See also* App: 155 ("...a legal nonconforming use may be maintained, repaired or changed to another use allowed in the zoning district."). Such a reading is consistent with the well-settled Florida law of nonconforming uses – to allow basic repairs and maintenance of an existing legal nonconforming use, but to preclude major changes of any kind without coming into compliance with current regulations. To adopt the Plan Board's erroneous interpretation would sanction major safety and functional changes (as occurred in the instant case), thereby gutting the intent of the City's adopted policies to eliminate nonconforming uses and structures. *Bixler v. Pierson*, 188 So.2d 681 (Fla. 4th DCA 1966); *Dixon v. City of Jacksonville*, 774 So.2d 763 (Fla. 1st DCA 2000) *citing to Winter v. Playa del Sol, Inc.,* 353 So.2d 598 (Fla. 4th DCA 1977)(trial court erred in construing statute in a manner that would lead to an absurd result).

"Decorative" needs no further qualifier in the zoning code provision because it already means a nonmaterial change to a nonconforming use. However, the terms "functional or safety improvements" without the diminutive modifier

"minor" are boundless and threaten to be the proverbial exception that swallows the rule. The only plausible reading of the code term is "minor...functional or safety improvements."

The Plan Board's code interpretation was based on planning staff's advice on this question of law. App: 55. However, the City's interpretation of the code section "cannot tie the Court's hands." *Longboat Key, Florida v. Islandside Property Owners Coalition, LLC,* 95 So.3d 1037 (Fla. 2d DCA 2012)("To allow such a result would countenance a shifting-sands approach to Code construction that would deny meaningful judicial review of local quasi-judicial decisions. The meaning of a code would remain in flux."), *citing to Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So.2d 469, 474 (Fla. 1993)(noting that local governments and agencies must strictly adhere to town development plans and zoning codes).

Applying a plain reading of the code provisions, the Plan Board departed from the essential requirements of law by interpreting §30-346(d), LDC, to say that "minor" modified only the word "decorative" and not "functional or safety improvements."

III. The Plan Board's decision was not supported by competent, substantial evidence of record.

The Plan Board's decision to approve the special use permit was not supported by competent, substantial evidence, as required under Florida law. *See*

Dep't of Highway & Safety Motor Vehicles v. Trimble, 821 So. 2d 1084 (Fla. 1st DCA 2002), *quoting DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957)(holding that competent, substantial evidence is that which "will establish a substantial basis of fact from which the fact at issue can reasonably be inferred...such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial' we are aware of the familiar rule that in administrative proceedings the formalities...are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached...".) An order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient. *See Fla. Conference v. Fla. R.R. and Pub. Util. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959). The "substantial evidence rule is not satisfied by evidence which merely creates a suspicion or which gives equal support to inconsistent references...." *Id.* This type of evidence "must not consist of vague, uncertain, or irrelevant matter not carrying the quality of proof or having fitness to induce conviction. Surmise, conjecture or speculation has been held not to be substantial evidence." *Id.*

A. No evidence of record demonstrated that the Applicant's substantial changes to a non-conforming use and structure were justified as "minor decorative, functional or safety

improvements."

City planners acknowledged that some nonconforming uses may exist for a long time, and that there is a need to "maintain compatibility with surrounding conforming uses; there is a need to maintain safety standards; and there is a need for such uses to remain functional within industry standards." App: 155. Nothing in the code, however, authorizes the Plan Board's approval in the instant case of wholesale reconstruction of a nonconforming use that has become obsolete. City planner Lawrence Calderon testified at hearing:

> "I can tell you that staff is in total support of the changes to the site that makes circulation more efficient. There are changes that are proposed such as removing the building, changing the sign, staff – **I have not been able to see how those actually fit the functional and safety requirement** ...". App: 46. (**emphasis added**).

The Plan Board's approval, based in part on improvements being for so-called "functional or safety" purposes pursuant to §30-346(d), LDC (*See* App: 155), was not supported by any expert planning testimony or competent testimony by the applicant. The applicant's agent, Ricardo Cavalino, is an architect, not a planner or engineer, and therefore is not qualified to testify concerning traffic and site safety matters or the analytical relationship of the City's zoning code and comprehensive plan to the Applicant's major modifications and renovations. App: 89. (In addition, the Plan Board issued no written order, and there were no findings

of fact in the oral motion that would support the Board's naked conclusion on this issue).

Even the City's experts acknowledge that the evidence upon which they relied in making their recommendations, replete with conditions, was incomplete, and problematic. *See* App: 154-155 ("Another issue of consideration is to what extent are the improvements related to the functional and safety operations of the site?"); *See also* App: 129-135 ("I do not see any information addressing the 'functional and safety' aspects of the site and the building...".)

City planners deferred to the Applicant to establish facts entitling it to an approval under the "safety or functionality" exception in the ordinance.[3] App: 7, 156. "Staff's role here is not to convince you that the special use permit is to be granted, but our role is to present to you why we think our recommendations on the property are justified based on the code. The burden of proof is on the applicant to submit basis for granting the special use permit." App: 7, 16. City Planners offered no independent expert opinion supporting a finding of compliance with this standard in their report or at hearing. Rather, City Planning Director Ralph Hilliard stated to the Board that the request was "definitely pushing the envelope" and that the Board had never been faced with "anything this major." More typical

[3] "Staff defers to the applicant in demonstrating how the specific building modification addresses the functional and safety operation of the facility." That demonstration never occurred.

improvements to non-conforming uses included ADA-related installations of ramps and bathrooms, he said.[4] Usually, "a legal non-conforming use may be maintained, repaired or changed to another use allowed in the zoning district." App: 155.

For its part, the applicant offered evidence of obsolescence of its current nonconforming use – the market demands the car wash process be changed to self-serve, and the "functional necessity" of applicant's requested changes relates only to the need to expand outdoor uses for vacuuming and prep of cars. App: 136, 156. The applicant overlooks the fact that other car wash owners must abide by the City's zoning codes, which preclude expanding nonconforming car wash uses especially where the expansion is into expressly prohibited outdoor uses in the General Business District.

The Plan Board described its choices as either recommending amendment to the City's zoning code to allow this car wash use in the General Business District or "shoe-horning" the SUP request into the "functional or safety" category of §30-346, LDC to accommodate the applicant. App: 50, 52.

The Plan Board departed from the essential requirements of law by "shoe-horning" this application into the zoning code's "functional or safety" category

[4] Other examples may be found in §30-346(d)(6), LDC, which enables the City's Development Review Board to allow improvements to the premises such as "vehicular use areas, landscaping, drainage, lighting, and the provision of buffering and screening along property boundaries."

without competent, substantial evidence of record – or an appropriate interpretation of the City zoning code -- in support of its decision. Its decision effectively shifted this particular parcel of property into another zoning category by means of a special use permit, in contravention to controlling Florida law. *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So. 2d 257 (Fla. 1st DCA 1985).

B. The Plan Board's decision, based in part on inapplicable portions of the City's Comprehensive Plan, was nonetheless not supported by competent, substantial evidence of record.

The Plan Board relied, in part, on portions of the Future Land Use Element of the City's Comprehensive Plan that govern designated redevelopment areas within the City, namely Objective 2.1 and Policy 2.1.1 of the Future Land Use Element. App: 139-140.

Objective 2.1 of the Future Land Use Element states:

> Redevelopment should be encouraged to promote compact, vibrant urbanism, improve the condition of blighted areas, discourage urban sprawl, and foster compact development patterns that promote transportation choice.

Policy 2.1.1 of the Future Land Use Element states:

> The City shall continue to develop recommendations for areas designated as redevelopment areas, neighborhood centers and residential neighborhoods in need of neighborhood enhancement and stabilization. a. The City should consider the unique function and image of the area through design standards and design review procedures as appropriate for each redevelopment area.

It is well settled that a Comprehensive Plan must be read *in pari materia* and not selectively. Where there are specific provisions included in the legislation, the Plan Board cannot simply ignore those provisions in favor of the more general language in another portion of the legislation, i.e. a redevelopment policy in the comprehensive plan, notwithstanding it is inapplicable. *Stroemel,* 930 So. 2d at 746, *quoting Parker v. Baker*, 499 So. 2d 843, 845 (Fla. 2d DCA 1986)(holding that "(w)here there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control..."). The provisions of the Non-Conforming Uses legislation must be read *in pari materia* and construed so that each of those provisions makes sense in light of the others. *See Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993 (Fla. 2003)(holding that to ascertain legislative intent, related provisions must be construed in harmony with one another); *Fla. Dept. of Educ. v. Cooper*, 858 So. 2d 394 (Fla. 1st DCA 2003)(holding that statutes relating to the same subject must be read *in pari material* and construed in such a manner as to give meaning and effect to each part).

Goal 2, which opens this section of the Future Land Use Element, but was not furnished to the Plan Board, states:

> Redevelop areas within the city, as needed, in a manner that promotes quality of life, transportation choice, a healthy economy, and discourages sprawl.
>
> App: 167

To implement that Goal, Policy 2.1.4, which was not furnished to the Plan Board, states:

> The City **shall designate an Urban Infill and Redevelopment Area** for the purpose of targeting economic development, job creation, housing, transportation, crime prevention, neighborhood revitalization and preservation, and land use incentives in the urban core. The designated Urban Infill and Redevelopment Area shall be part of and shown in the adopted, Future Land Use Map Series. (**emphasis added**).
>
> App: 168.

Construed as a whole, Goal 2 of the Future Land Use Element and the implementing policies address designated redevelopment and blighted areas of the City. There was no testimony or evidence of record to demonstrate that the subject car wash site is located within such a designated area. The evidence of record shows the subject property, upon annexation into the City, "became part of the reference area known as Butler Plaza-Archer Road." App: 4. The City assigned the General Business zoning code and a future land use designation of Commercial. Id.

There is no evidence to even suggest that the Butler Plaza-Archer Road Commercial District is suffering from lack of economic development. The evidence of record demonstrated the obsolescence of the Applicant's current

Industrial non-conforming use, the remedy for which is addressed by other provisions of the City's zoning code and Florida law, as discussed *supra*.

VIII. CONCLUSION

Wherefore, based on the foregoing facts and authority, the City of Gainesville Plan Board has departed from the essential requirements of law in its approval of the Special Use Permit, Petition PB-12-07. In addition, the Plan Board's decision was not based on competent, substantial evidence of record.

Petitioner respectfully requests that this Court quash the decision of the Plan Board and remand with instructions consistent with its zoning code, the evidence of record, and Florida law.

If the Court quashed the Plan Board order, the Applicant would retain protection of the property's status as a legal nonconforming use. *3M Nat. Advertising Co. v. City of Tampa Code Enforcement Board,* 587 So. 2d 640 (Fla. 2nd DCA 1991)("...the rule appears to be that a prohibited increase in a nonconforming use does not result in loss of the entire use, at least if the landowner can return to the *status quo ante*.").

IX. ALTERNATIVE PRAYER FOR RELIEF

Petitioner believes that the action of the City of Gainesville Plan Board was a quasi-judicial decision. The Plan Board held a quasi-judicial hearing in this matter on December 3, 2012, In an abundance of caution, however, Petitioner

requests that if this Court determines that the decision of the Plan Board was legislative in nature, this Petition should be deemed a de novo action. Petitioner believed that the Plan Board's departure from the essential requirements of law and failure to base its decision on competent, substantial evidence demonstrates the arbitrary and capricious nature of the Plan Board's decision. Under such a circumstance, Petitioners asks leave of this Court to amend its pleading to include the appropriate "fairly debatable" standard of review and appropriate prayer for relief, and to provide a legal basis for claims that the actions of the Plan Board were arbitrary and capricious.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari have been furnished to the following via electronic mail this 14th day of January 2013.

Nicolle Shalley, City Attorney
Office of the City Attorney
City of Gainesville (City Hall)
200 East University Avenue
Gainesville, Florida 32601

Patrice Bowes
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the typeface contained in this Petition is Times New Roman, 14-point font, as required by Rule 9.210, Fla.R.App.P.

Patrice Bowes
Attorney

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

SCRUBS, INC.,
A Florida Corporation,
Petitioner,

CASE NO: 01-2013-CA-000146

v.

CITY of GAINESVILLE, A Political Subdivision,
Respondent.

ORDER TO SHOW CAUSE

THIS ACTION came before the Court for review of the Petition for Writ of Certiorari filed on January 14, 2013. Petitioner seeks review of the final decision of the Gainesville City Planning Board rendered on December 3, 2012, granting a special use permit. No written order is yet available. This Court, having examined the petition and attachments, finds that a response is warranted. Fla. R. App. P. 9.100.

Accordingly, it is

ADJUDGED as follows:

1. Pursuant to Florida Rule of Appellate Procedure 9.100, Respondent shall file a responsive pleading within **30 days** of entry of this order and show cause why Petitioner is not entitled to the relief it seeks.

2. Respondent shall address the above issue(s) and any others raised in the Petition. The response shall contain the factual basis of Respondent's position, supported by legal argument with proper citations to authority.

3. Petitioner will have **20 days** from service of the Response within which to file and serve a Reply and, if desired, a supplemental appendix.

Petitioner certifies that Respondent has been furnished with a copy of the petition.

ORDERED in Alachua County, Florida on 16 January 2013.

ROBERT E. ROUNDTREE, JR., CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed on 16 January 2013 to:

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