

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO:
DIVISION:

JONATHAN LIVINGSTON,
LAKSHMI GOPAL and RIGHT
SIZE SAN MARCO, INC., a Florida
non-profit corporation,

Plaintiffs/Petitioners,

v.

CITY OF JACKSONVILLE,
FLORIDA,

Defendant/Respondent.

PETITION FOR WRIT OF CERTIORARI

Pursuant to Florida Rule of Appellate Procedure 9.100(f), Plaintiffs/Petitioners, Jonathan Livingston, Lakshmi Gopal and Right Size San Marco, Inc., a Florida non-profit corporation, file this Petition for Writ of Certiorari to review a decision of the City Council, City of Jacksonville, Florida, rendered on February 25, 2020.

PREFACE

For purpose of this petition, citations to the appendix are denoted "A. ____." Citations to the City Planning Commission hearing dated January 23,

2020, the Land Use and Zoning Committee hearing dated February 19, 2020 and the City Council hearing dated February 25, 2020 are denoted “PC Tr. _____,” “LUZ Tr. _____,” and “CC Tr. _____,” respectively. Citations to the City Land Development Code, also referred to as the Zoning Code, are denoted “§_____, LDC.”

PETITIONERS

Petitioner Livingston lives at 1507 North Alexandria Place, one block south of the project that is the subject of this petition. (PC Tr. 108, LUZ Tr. 123-126, 164-167). Petitioner Gopal lives at 1535 North Alexandria Place. (LUZ TR. 98). Right Size San Marco, Inc., is a non-profit corporation organized to oppose the height and other aspects of the project. (PC Tr. 108).

PROCEDURAL AND FACTUAL BACKGROUND

On February 25, 2020, the Jacksonville City Council enacted Ordinance 2019-751-E, which rezoned 2.87 acres near the heart of San Marco to a mixed-use Planned Unit Development (PUD). (A. 001). At the same hearing, the Council enacted Ordinance 2019-750-E (the “Plan Amendment”)¹, which approved a proposed small-scale amendment to the

¹ Petitioner is also filing a petition with the Department of Administrative Hearing contesting the validity of the Plan Amendment.

City's future land use map to facilitate the PUD.² (A. 024). The applications for the PUD and Plan Amendment were submitted by the PUD Parcel owner, South Jacksonville Presbyterian Church, to facilitate the proposed project of the developer, Harbert Realty Services and Corner Lot Development. (A. 008).

The PUD would allow a mixed-use project consisting of 133 multi-family units, a three-story parking garage and the existing South Jacksonville Presbyterian Church. The proposed multi-family structure would be four stories, measuring 49.5 feet in height from grade to the top of the roof. (A. 086, 114). The residential density of the project would be 46.34 units per acre (DUA) spread across the entire 2.87 acres of the site. (A. 110). It would be 156.52 DUA based on the .92 acres of the site devoted to residential development. (A. 015).

The Site

The site consists of two parcels, which are further subdivided into 22 lots (A. 006), and which are aggregated for purpose of the PUD. As described in the Planning and Development staff report:

The 2.87 acre subject site consists of two parcels and comprises the majority of the block between

² The amendment is not final until the administrative challenge is final. § 163.3187(5)(c), Fla. Stat.

Alford Place to the north and Mitchell Avenue to the south, and Hendricks Avenue to the west and Mango Place to the east.

* * *

Thacker Avenue is a closed north-south road that separates the two parcels.

* * *

The western-most parcel of the subject site is home to the South Jacksonville Presbyterian Church building. The eastern-most parcel is under the same ownership but contains a parking lot, vacant land, and a smaller church office facility.

(A. 127).

Under the PUD, the northern portion of the site is designated for the multi-family development and the southeast corner for the parking garage. The church occupies the southwest corner at the intersection of Hendricks and Mitchell. (A. 019). The PUD reserves the church parcel for uses permitted by right and by exception under CRO zoning. (A. 009).

The subject property is located within the San Marco Overlay District (A. 067), the Southeast Planning District and is within the boundaries of the Southeast Vision Plan. (A. 126).

Zoning and Land Use Designations

Prior to the passage of the Plan Amendment and the PUD, under the Future Land Use Element of the 2030 Comprehensive Plan, the property was

within an Urban Development Area (UA), with the northern portion of the property designated for Community/General Commercial (CGC) land use and the southern portion Residential-Professional-Institutional (RPI). (A. 127). The northern portion of the site was zoned Commercial Community/General-1 (CCG-1) and the southern portion Commercial Residential Office (CRO). (Id.). Under the Comprehensive Plan, the maximum residential density allowed in UA is 40 DUA (A. 139) and under the CRO zoning category, the maximum is 20. (A. 045A). Accordingly, prior to enactment of the PUD and the Plan Amendment, residential development on the northern portion of the site was limited to 40 DUA by the UA designation and on the southern portion, density was capped at 20 DUA by the CRO zoning.

The Plan Amendment would reclassify the entire property from UA to Urban Priority Area (UPA) and the southern portion from RPI to CGC land use, so that the entire property would be designated UPA and CGC. On the northern portion, the UPA designation would increase the maximum residential density to the 60 DUA³ allowed by UPA from the 40 allowed by UA, and on the southern portion to 60 DUA from the 20 allowed by CRO zoning. (A. 031, 110).

³ Petitioner's Plan Amendment challenge contests the increase in density to 60 DUA, because as extended, the UPA would abut a low density residential neighborhood.

The Plan Amendment would extend the boundary of the San Marco UPA south from Alford Place to Mitchell Avenue (A. 089), eliminating the medium density development area (UA) and zoning (CRO) designations that served as a transition from the high density residential development allowed in the UPA development area north of the property to the adjacent low density single family neighborhoods south of Mitchell and east of Mango. (A. 031, 127). The neighborhood across Mitchell from the property is zoned for single family development not to exceed 7 DUA, barely a 10th of what UPA allows. (A. 205).

**Ordinance 2016-367-E and the Limitations on PUDs
in the San Marco Overlay District**

The subject property is located within the San Marco Overlay District Zone. The zoning and land development regulations for the Overlay District are codified in Sections 656.399.1 – 656.399.8 of the Zoning Code. (A. 064-83). The Code states:

Sec. 656.399.1 – Legislative findings.

The Council hereby finds and determines as follows:

* * *

(c) In the past ten years, the Zone has experienced increased development pressure and many recent developments have digressed from the Zone's historical design,

massing and platted building restriction lines and have deviated from the general zoning requirements in order to maximize short-term gain. Such a trend, if left unchecked and continuing unabated, would lead to a loss of vitality, character, aesthetic appeal, historical integrity and overall charm and eventually might contribute to the decline of the Zone in terms of desirability;

(d) In order to preserve the economic vitality, character, aesthetic appeal, historical integrity and overall charm of the Zone, it is recommended that the following provisions of this Subpart M be adopted which provide special zoning restrictions, standards and processes which facilitate the historical design and platted patterns of development, especially those related to height, bulk and setbacks.

(A. 063) (emphasis added).

Consistent with the legislative objectives of the Overlay District, in 2016, the City enacted Ordinance 2016-372-E to amend its PUD and Overlay District regulations for the express purpose of preventing the use of PUDs to waive or relax San Marco Overlay District development regulations. The title of the ordinance states:

ORDINANCE 2016-372-E

AN ORDINANCE AMENDING CHAPTER 656 (ZONING CODE), PART 3 (SCHEDULE OF DISTRICT REGULATIONS), SUBPART F (PLANNED UNIT DEVELOPMENT), SECTIONS 656.340 (PLANNED UNIT DEVELOPMENT-

PUD) AND 656.341 (PROCEDURES), ORDINANCE CODE, AND SUBPART M (SAN MARCO OVERLAY ZONE), SECTIONS 656.399.4, 656.399.6, AND 656.399.7 TO CLARIFY THAT, EXCEPT IN CERTAIN COMMERCIAL LOCATIONS AS SPECIFICALLY ALLOWED IN THE SUBPART, ANY PROPOSED OR AMENDED EXISTING PLANNED UNIT DEVELOPMENT WITHIN THE SAN MARCO OVERLAY ZONE IS PROHIBITED FROM WAIVING OR ALTERING ANY STANDARD OR REQUIREMENTS SET OUT IN THE SAN MARCO OVERLAY ZONE SUBPART; AUTHORIZATION FOR OFFICE OF GENERAL COUNSEL TO INSERT EFFECTIVE DATE; PROVIDING AN EFFECTIVE DATE.

(A. 035) (emphasis added). The exception to the Overlay District's limitations on the use of PUDs "in certain commercial locations" referred to in the title is set forth in Section 656.399.7. It applies to commercial property located on Atlantic Boulevard and on Hendricks several blocks north of Atlantic as defined by Sections 656.399.7(e)(3)(a) and (b). (A. 078-79). The exception is not relevant here because the subject property is not located in one of those areas (A. 007) and is not commercial. (A. 001, 009).

In keeping with the Overlay District policy of maintaining uniform development standards, Ordinance 2016-367-E amended Section 656.340 (PUDs), 656.341 (PUD procedures), and Sections 656.399.4 (Application), 656.399.6 (Lot aggregation and subdivision) and 656.399.7 (Overlay

development standards) to expressly limit the City's authority to enact PUDs in the Overlay District.

Section 656.340 was amended to state:

Sec. 656.340. – Planned Unit Development – PUD.

It is not the intent to utilize the Planned Unit Development district solely to diminish the usual application of the provisions of the Zoning Code. Further, a Planned Unit Development, or any amendment of an existing or future Planned Unit Development, shall not be allowed to authorize the relaxation of any standards set out in the San Marco Overlay Zone Subpart unless such relaxation is specifically allowed in the San Marco Overlay Zone Subpart of the Zoning Code.

(A. 036) (emphasis added).

Section 656.399.4 also was amended to reinforce the admonition against the use of PUDs to circumvent Overlay District requirements:

Sec. 656.399.4. – Application.

No new Planned Unit Development zoning district ("PUD") or existing PUD administrative modification, minor modification, or major modification through rezoning shall be allowed that do[es] not conform to the requirements of 656.399.6 (Lot aggregation and subdivision), the requirements of 656.399.7 (Overlay development standards), or the historic plats within the San Marco Overlay Zone.

(A. 039-40, 065) (emphasis added).

Likewise, Section 656.399.6 was amended to limit the City's authority to approve a PUD on aggregated lots in the Overlay District:

Sec. 656.39.6. – Lot aggregation and subdivision.

The aggregation of lots lying within the Zone is allowed if the aggregation is proposed as a Planned Unit Development (PUD) pursuant to Subpart F of Part 3 of the Zoning code and meets the requirements thereof. Unless the property is commercially zoned and located in a Transportation Corridor, such a PUD shall be limited to the issues of aggregation and shall not be utilized for a change in use or to waive or alter any other development standard established in the Overlay or the historic plats within the San Marco Overlay Zone. If the property is located in a Transportation Corridor and is commercially zoned, an increase in height may also be addressed pursuant to Section 656.399.7.

(A. 040, 065-66) (emphasis added).

Ordinance 2016-367-E added mandatory language to Section 656.399.7 that further drives the point home. Section 656.399.7 now states, in pertinent part:

Sec. 656.399.7. – Overlay development standards.

Except as otherwise provided in this Subpart M, the design, siting and building standards, criteria and limitations set forth expressly in this Subpart M with reference to lots with building restriction lines, setback and height, specific locations, specific development types and/or specific types of structures and equipment, shall supersede and prevail over any other inconsistent

provisions of the Zoning Code including any PUD adopted subsequent to the effective date of this ordinance. Subsequent to the effective date of this ordinance any request for administrative deviation, variance, conventional rezoning, PUD rezoning, PUD administrative modification, PUD minor modification, or PUD major modification shall be limited by these Overlay development standards as well as Section 656.399.6, of this Overlay. For standards not expressly set forth in this Overlay, the standards relative to an underlying zoning district and other applicable, general provisions of the Zoning Code shall govern.

(A. 041-42, 067) (emphasis added).

The overarching Overlay District policy of strictly limiting the use of PUDs in order to maintain uniform development standards in the District is augmented by Section 656.399.5:

Sec. 656399.5. – Construction and intent.

All applicable provisions of the Zoning Code not expressly modified and superseded by this Subpart M remain in full force and effect. In the event a court of competent jurisdiction finally determines there is an irreconcilable conflict or inconsistency between the Zoning Code and this Subpart, the more restrictive condition or term most closely associated with the remedial purpose of this Subpart shall be construed do apply where lawfully possible.

(A. 065).

The Maximum Height Requirement

Section 656.399.7 prescribes development standards for the Overlay District. It sets standards for multi-family projects, including an express limitation on maximum height. Section 656.399.7(d)(1) succinctly states:

Maximum building height: 35 feet

(A. 076-77) (emphasis added).

Section 656.399.7(h) of the Overlay District regulations provides that the height of a building shall be measured “from the lower of either the undisturbed existing grade at the perimeter of the building pad, or one foot above the elevation of the property line at the road right-of-way.” (A. 080). The Overlay regulations do not specify the exact point at the top of the building to which maximum height should be measured, whether to the roofline or some other feature at the top of the building. However, when the Overlay District regulations are silent, Section 656.399.7 requires that the “general provisions of the Zoning Code shall govern.” (A. 068).

The general definition of height contained in Part 16 of the Zoning Code thus is incorporated into the Overlay District regulations for purpose of determining the top of a building when measuring height. The definition requires height to be measured to the peak of the roof:

“Height of building” or “building height” means the vertical distance from the required finished floor to the peak of the roof or parapet.

(A. 084) (emphasis added).

Measured to the peak of the roof, the multi-family building allowed by the PUD would be 49.5 feet high. (A. 011, 086). Measured to the rooftop mechanical equipment and architectural features, the building would be closer to 55 feet. (A. 011). Either way, the building would be well in excess of the 35-foot maximum.

The Overlay District regulations only allow height in excess of the 35-foot maximum under limited circumstances in two limited areas. Section 656.399.7(e)(3)(a) provides that on Atlantic Boulevard, the height limit for commercial buildings is 50 feet. (A. 078). Under Subsection (e)(3)(a)(i), greater height may be achieved through the use of a PUD by increasing the setback from an adjacent residential use by one foot for every one-foot increase in height. (Id.). Under Subsection (e)(3)(a)(ii), when the PUD is across the street from a residential use, height may be increased by increasing the setback one foot for every two feet of additional height. (Id.). Both subsections spell out additional criteria to qualify for an increase. (Id.). Under Subsection (e)(3)(b), property located on Hendricks Avenue at its intersection with Atlantic and several blocks north, a PUD may be approved allowing

height in excess of 35 feet if certain criteria are met. (A. 079). However, these options were not available to the Applicant, because the subject building is not commercial and because the City did not see fit to include the property in the limited areas where a developer would be eligible to seek an increase in height.

Since the stand-alone apartment building would substantially exceed the 35-foot maximum height requirement, the Applicant persuaded the City to change the height requirement to suit the project. The PUD changes the requirement from a maximum height of 35 feet to a weighted average height of 35 feet. (A. 010). The Applicant's narrative description stated:

The maximum height for new buildings as established by the San Marco Overlay is 35 feet. Building height shall be determined as a calculated weighted average across the length of the development from Alford Place to Mitchell Avenue along Mango Place as follows:

A sum of the height to the predominant roof line (ridge or parapet wall) of that portion of a building multiplied by the length of that portion of a building divided by the overall length of permissible building within the minimum setback. The minimum setback for the purpose of this calculation shall be established by the San Marco Overlay.

A graphical depiction and calculation for the Multi-Family Building and Garage Building is provided on the Conceptual Building Section drawing.

(A. 010-11) (emphasis added). However, the description did not explain why the weighted average heights of the other three sides of the apartment building were not also considered. (Id.). According to the unrebutted analysis of land planner Tom Atkins, consideration of the other sides of the building would increase the weighted average height to close to 40 feet – still over the 35-foot limit. (A. 191).

Section 656.341(c)(2)(ii)(B) requires that a “description of specifically how the proposed planned unit development differs from the usual application of the Zoning Code” must be included in the written description of the PUD, together with “an explanation given as to why each deviation or waiver is necessary.” (A. 050). The Applicant’s written description stated that the PUD would use the weighted average standard to measure height, but did not acknowledge that it was deviating from the maximum height norm, nor did it explain why the change was necessary. (A. 010-11). However, adding the fourth floor added 34 units to the building.

The PUD staff report likewise ignored the conflict between the proposed new height criteria in addressing whether “the proposed rezoning conflict[s] with any portion of the City’s land use Regulations.” Instead, the report said in conclusory terms that “the written description in the site plan of the intended plan of development, meets the intent of the City’s Land Use

Regulations by providing specific development standards,” notwithstanding the fact the height standard provided by the plan conflicts with the Overlay District’s strict height limitation. (A. 112). Under the “any other factor deemed relevant” section, the report did disclose that the Applicant was proposing to use “the average height of the multi-family building and the garage to meet the 35-foot maximum height allowed in the Overlay,” and added that “staff approves of this method.” (A. 114). The report did not acknowledge, let alone reconcile the conflict.

At the Planning Commission hearing, Planning Director William Killingsworth admitted that the weighted average approach of measuring height used in the application was not “the textbook way to do it,” but rather “that’s how the Applicant chose to do it.” (PC Tr. 114). Mr. Killingsworth elaborated:

My review of it was that seeking an average was a permissible approach. The Overlay defines where to start. The Overlay does not define where to end. In the Zoning Code it defines where the top is. Because the top isn’t in the Overlay, then that’s subject to being modified by a PUD.

(PC Tr. 114-115; LUZ Tr. 16). Mr. Killingsworth seemingly forgot Section 656.399.7 of the Overlay District regulations, which incorporates the underlying Zoning Code’s requirement for measuring height to the peak of

the roof. He did not seem to realize that weighted average height is a completely different standard from maximum height, referring to the weighted average standard simply as a different methodology for measuring height. (LUZ Tr. 215).

At the Land Use and Zoning hearing, Mr. Killingsworth again shared his view that it is permissible and appropriate to use the PUD to change the height standard from maximum height to weighted average height. (LUZ Tr. 15-16). He did admit that this was “the first time a weighted average has been used in a PUD like this in the neighborhood.” (LUZ Tr. 21-22). Folks Huxford, who is the City’s Chief of Community Planning, reportedly allowed that the weighted average standard had never previously been used in Jacksonville to measure the height of a structure. (PC Tr. 93). There is no precedent for it in any of the Code’s residential regulations.

At the hearing, Mr. Killingsworth and the Applicant’s representatives glossed over the prohibition on the use of PUDs to change Overlay District standards and requirements. To the contrary, the Applicant’s attorney suggested that it was routine to use PUDs to change the rules:

The methodology approved by the Planning Director, and its not a work-around, it’s not a new concept, it’s a concept that’s allowed in PUDs. A lot of times, you have PUDs which set their own

standards, and this is one of the standards we're setting.

(LUZ Tr. 119-120) (emphasis added) (see also, LUZ Tr. 32-34). Although the PUD would change the express Overlay District height standard from a maximum of 35 feet to an average of 35 feet, Mr. Killingsworth insisted that it would not change an Overlay standard, but just the underlying zoning code:

The section says you cannot change the standards in the overlay. But everything else in the zoning code is in place and in play.

So the questions was, what else could you change? You can change any standard in 656 that is not defined in the San Marco Overlay.

(LUZ Tr. 195). (See also, LUZ Tr. 31). Mr. Killingsworth was more succinct before the full Council:

What I'm saying is it takes ten votes to enact a law and the overlay is just the law.

(CC Tr. 38). Again, Mr. Killingsworth seemed to forget that the Overlay District regulations ("the law") require (1) the application of the express Overlay maximum height standard, and (2) if that standard were unclear (which it is not), the "general provisions of the Zoning Code shall govern" to resolve the only possible question – to what point should height be measured at the top of the building? He did not seem to fathom that the City was violating those express requirements of the Overlay District regulations.

STANDARD OF REVIEW

Quasi-judicial decisions are subject to a certiorari standard of review. In a certiorari review of a quasi-judicial decision, a circuit court must determine (1) whether procedural due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the decision is supported by competent substantial evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982); Broward County v. G.B.V. Intern. Ltd., 787 So.2d 838, 843 (Fla. 2001); Saadeh v. City of Jacksonville, 969 So.2d 1079, 1082 (Fla. 1st DCA 2007).

ARGUMENT

The City failed to meet its burden under Board of County Comm'rs of Brevard County v. Snyder, 627 So.2d 469, 476 (Fla. 1993) and departed from the essential requirements of law when it approved the PUD in material violation of the procedural and substantive San Marco Overlay District requirements of its Code. In particular, the PUD (a) violates the Overlay District's 35-foot maximum height standard; (b) changes the Overlay District's 35-foot maximum height standard to a weighted average standard that allows a building nearly or even exceeding 50 feet in height; (c) violates the Overlay District's requirement to apply the general provisions of the Zoning Code where standards are not expressly addressed in the Overlay

District regulations, (d) addresses height and other issues beyond the scope of an aggregated PUD, contrary to Section 656.399.6, and (e) repudiates the Overlay District policy and regulations that categorically prohibit the use of PUDs to circumvent District standards.

A zoning authority fails to observe the essential requirements of law when it fails to adhere to the requirements of its zoning regulations. See Surf Works L.L.C. v. City of Jacksonville Beach, 230 So.3d 925, 929 (Fla. 1st DCA 2017) (city departed from essential requirements of law where it failed to follow applicable provisions of its code in denying rezoning application); Shamrock – Shamrock, Inc. v. City of Daytona Beach, 169 So.3d 1253 (Fla. 5th DCA 2015) (city departed from essential requirements of law when it failed to follow its code’s definition of multi-family development); ABG Real Estate Development Co. of Florida v. St. Johns County, 608 So.2d 59 (Fla. 5th DCA 1992) (PUD must be reviewed based on the PUD code criteria). See generally, Alvey v. City of North Miami Beach, 206 So.3d 67 (Fla. 3d DCA 2016) (local government must apply its own express zoning code PUD criteria concerning compatibility and scale); City of Naples v. Central Plaza of Naples, 303 So.2d 423 (Fla. 2d DCA) (city limited to criteria of its ordinance in review of zoning applications); Thompson v. Planning Comm., 464 So.2d 1231 (Fla. 1st DCA 1985) (property owners across the street would

be irreparably harmed by failure to follow variance code criteria). See also Auerbach v. City of Miami, 929 So.2d 693, 694-95 (Fla. 3d DCA 2006) (where the city failed to follow the law in granting a variance, the court declared that “[t]he law ... will not and cannot approve a zoning regulation or any government action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will”). In this regard, it is the City’s burden to prove that the PUD “complies with all procedural requirements of the zoning ordinance.” Snyder, 627 So.2d at 476.

A. The PUD Violates the Overlay’s Multi-Family Maximum Height Requirement

Section 656.399.7(d) establishes the Overlay District standards and criteria for multi-family development. Section 656.399.7(d)(1) states:

Maximum building height: 35 feet

(A. 076-77). The 133 apartments approved by the PUD violate the 35-foot maximum height requirement. Measured from grade to the peak of the roof, the maximum height of the building is 49.5 feet. (A. 011). It is even higher when measured to the mechanical equipment on the roof.

There is nothing unclear or ambiguous about the Overlay District height limit. The cardinal rule of construction is that the words of a zoning ordinance

“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.” Rinker Materials Corp. v. City of North Miami, 288 So.2d 552, 553 (Fla. 1973); Surf Works, 230 So.3d at 930-931; Stroemel v. Columbia County, 930 So.2d 742, 744 (Fla. 1st DCA 2006). The Miriam-Webster online dictionary defines “height” as “the distance from the bottom to the top of ... something standing upright.” (A. 270). “Maximum” is defined by Miriam-Webster as “an upper limit allowed (as by legal authority).” (A. 271). There is no way the plain and obvious meaning of “Maximum building height: 35 feet” would allow a building that measures 49.5 feet from grade to the peak of the roof, and some 55 feet to the rooftop mechanical and architectural appurtenances. Regardless of what point height is measured to at the top, the building would exceed the 35-foot maximum.

The 35-foot height standard is expressly set forth in the Overlay District regulations. Those same Overlay District regulations expressly prohibit the use of a PUD to change such a standard. As stated in its title, Ordinance 2016-367-E amended Sections 656.340 and 656.341 governing PUDs, and Sections 656.399.4, 656.399.6 and 656.399.7 of the Overlay regulations to limit the use and scope of PUDs in the Overlay District. (A. 035). Those regulations categorically prohibit the use of PUDs to “diminish,” “waive,” “alter,”

“relax,” or “change” the standards and requirements of the Overlay District regulations in order to promote uniformity in land use and zoning decisions in the Overlay District. Section 656.399.7 expressly requires that a PUD in the District shall be “limited by these Overlay District development standards.” (A. 041-42). It could not be said any more forcefully that the City is prohibited from using a PUD to change the Overlay District’s 35-foot maximum height standard.

The Overlay District regulations implement the City’s clear, unequivocal legislative policy and mandate that require PUDs to meet Overlay development standards. Nevertheless, rather than designing the project to fit the standards, the Applicant and the City have impermissibly changed the standards to fit the project. The PUD changes the maximum height standard to a more lenient weighted average standard.

Contrary to the Applicant and City’s spin, the new weighted average standard allowed by the PUD is not just another way of measuring maximum height. It is a fundamental, substantive change in the Overlay District height standard and the underlying policy against the use of PUDs to change District standards. Maximum height means the upper limit of allowable height. Weighted average height does not set an upper limit on allowable height, but rather takes into account the height of totally separate lower buildings to offset

one taller than 35 feet. The maximum height standard does not allow any buildings that are higher than 35 feet – period. The weighted average height standard does. That is why the Applicant proposed it.

At the public hearings, City officials and the Applicant’s attorney sought to justify the weighted average standard on the ground that the Overlay District regulations do not expressly address what part of the top of the building should be used to measure height. (PC. Tr. 114-115; LUZ Tr. 16, 32-24, 119-120). This argument ignores the fact that the 35-foot maximum standard is not open to such creative interpretation because even standing alone, its plain and ordinary meaning is clear. There is no need to know whether height should be measured to the peak of the roof or something else at the top of the building in order to determine that the proposed building would substantially violate the 35-foot height maximum. Accordingly, any ambiguity on that score is not material here, and is no excuse for rewriting the standard in the guise of “interpretation.” See Rinker Materials, 286 So.2d at 553-54 (courts “may not insert words or phrases in municipal ordinances in order to express intentions which do not appear ... and must give a statute (or ordinance) the plain or ordinary meaning of the words employed by the legislative body”); Stroemel, 930 So.2d at 745 (circuit court erred where it “ignored the plain and ordinary meaning of the words used in the code”); Surf

Works, 230 So.3d at 931 (if the language of an ordinance is unambiguous, the court “should not resort to further construction or interpretation”).

In fact, contrary to Mr. Killingsworth’s selective reading, the Overlay District regulations do make it clear how top of the building should be measured. Section 656.399.7 of the Overlay District regulations sets forth the requirement that “the other applicable general provisions of the Zoning Code shall govern” as to any standard they do not expressly address. (A. 068). Under that requirement, the definition of height contained in Part 16 of the Zoning Code applies to require that height must be measured to the “peak of the roof.” The Overlay District regulations thus spell out the maximum height standard of 35 feet – measured to the peak of the roof.

We reiterate and emphasize the core issue. The weighted average allows a height that exceeds 35 feet, whether measured to the peak of the roof or something on top of the roof. Moreover, the applicable standard, to the top of the roof without regard to rooftop equipment, is the more restrictive standard, consistent with the remedial purpose of the Overlay District as required by Section 656.399.5. The weighted average is not a clarification. No, it is a convenient result in search of rationale.

It is important to note that, contrary to the Overlay District’s categorical prohibition against using PUDs to circumvent District rules, the PUD changes

two requirements expressly set forth in the District regulations. First, it changes the maximum height standard to a weighted average standard. Secondly, the PUD changes the requirement of Section 656.399.7, which dictates the application of the general provisions of the Zoning Code, and replaces it with a special, site-specific and completely different requirement. That is the antithesis of applying the “general provisions of the Zoning Code.”

Mr. Killingsworth and the Applicant sought to justify of these changes as an administrative interpretation of the Code. Again, there was no need or justification for any interpretation of the clear and unambiguous terms of the height standard itself or the language of Section 656.399.7, which incorporates the Zoning Code definition of height into the Overlay District regulations. The weighted average analysis is not an interpretation of where the Overlay District requires height to be measured at the top of the building, as Mr. Killingsworth suggested, but rather is a completely different standard, disingenuously concocted to give the Applicant what it wants. Even if an interpretation of the Overlay District height requirement were needed or justified, the express legislative intent of maintaining uniform height regulations throughout the Overlay District as expressly stated in Section

656.399.7⁴, as restated throughout its regulations, and as reflected in the Zoning Code's generally applicable definition of height would leave no room for an "interpretation" that allows a 50-foot building.

Nor can the City's ad hoc change of the height standard be rationalized by Mr. Killingsworth's theory that it was not the Overlay District regulations that were being changed, but rather the underlying provisions of the Zoning Code. This argument is smoke and mirrors. What Mr. Killingsworth is saying is that the City is free to do indirectly what the Overlay District regulations repeatedly prohibit it from doing directly. Such an interpretation would completely defeat the purpose of the strong Overlay District policy against using PUDs to circumvent development standards. Finally, it is clear that the City did not, in fact, amend "the general provisions of the Zoning Code." The City simply rewrote the 35-foot maximum height requirement and replaced it with a completely different, one-of-a-kind, site-specific standard. The fact is that the general provisions of underlying Zoning Code have not been amended. The definition remains on the books. What the City did is

⁴ "[T]he design, siting and development standards expressly set forth [in the Overlay District regulations] with reference to ... height ... shall supersede and prevail over any other inconsistent provisions of ... any PUD adopted subsequent to the date of this ordinance."

deliberately misinterpret the requirements of its own code to accommodate a favored project.

The PUD turns the overarching policy of holding Overlay District PUDs to Overlay District standards on its head. It is exactly the type of ad hoc, piecemeal zoning action the Overlay District regulations are intended to prevent.

This is not the first time the City has used a PUD as a way to circumvent the requirements of its zoning code. See Saadeh, 969 So.2d at 1084-85. See generally, Dixon v. City of Jacksonville, 774 So.2d 763 (Fla. 1st DCA 2000) (where the First District Court of Appeal afforded the City no deference in interpretation of unambiguous comprehensive plan language, in rejecting Mr. Killingsworth’s predecessor Planning and Development Director’s “reading” an unlisted use into a comprehensive plan category).

B. Section 656.399.6 Limitations on Aggregated Lot PUDs Within the Overlay District

Section 656.399.6 further demonstrates that the City exceeded its authority in granting the PUD. It provides:

Section 656.399.6 – Lot aggregation and subdivision.

The aggregation of lots lying within the Zone is allowed if the aggregation is proposed as a Planned Unit Development (PUD) pursuant to

Subpart F of Part 3 of the Zoning code and meets the requirements thereof. Unless the property is commercially zoned and located in a Transportation Corridor, such a PUD shall be limited to the issues of aggregation and shall not be utilized for a change in use or to waive or alter any other development standard established in the Overlay or the historic plats within the San Marco Overlay Zone. If the property is located in a Transportation Corridor and is commercially zoned, an increase in height may also be addressed by the PUD pursuant to Section 656.399.7.

* * *

For purposes of this Subpart M, the term “aggregation” means the zoning doctrine of merging separate and adjoining lots for purposes of determining and applying zoning requirements and/or building parameters.

(A. 065-66) (emphasis added). The Applicant’s PUD incorporates two separate parcels, which in turn are comprised of 22 lots (A. 006). The Applicant utilized the aggregated lots to increase the overall acreage of the PUD and thereby increase the number of multi-family units by calculating density based on 2.87 acres instead of the .92 acres actually occupied by those units. (A. 015). The aggregation also allowed the Applicant to dispense with the interior lot boundary setback requirements.

Importantly, the Overlay District aggregation rule does not allow a PUD to address anything other than aggregation. More particularly, it does

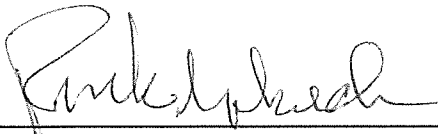
not allow an aggregated PUD to seek an increase in maximum height unless the property is commercial and is within one of the Transportation Corridor Areas designated by Sections 656.399.7(e)(3)(a) and (b), which the subject property is not.

The PUD is fatally defective and ultra vires because it violates the Overlay District requirements for aggregated PUDs.

CONCLUSION

The Court is respectfully requested to issue its writ of certiorari quashing the City's decision to approve the PUD and remanding the case to the City for further proceedings consistent with the Court's decision.

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