MAR 4, 2014
PROVIDED BY
JOHN WEAVER

R-2

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY FLORIDA

CASE NO.

RESIDENTS FOR RESPONSIBLE GROWTH, LLC, a Florida Limited Liability Company, and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-For-Profit Corporation,

Petitioners,

v.

CITY OF FORT LAUDERDALE, FLORIDA, by and through its City Commission, a Florida municipality, and GRAND BIRCH, LLC, a Florida limited liability company,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners, Residents for Responsible Growth, LLC ("RRG"), and Central Beach Alliance of Fort Lauderdale, Inc. (the "CBA"), by and through their undersigned counsel, respectfully request the issuance of a Writ of Certiorari quashing Resolution No. 13-65 (the "Resolution), adopted by the City of Fort Lauderdale (the "City") on April 16, 2013 following a quasi-judicial hearing, approving a site plan submitted by Grand Birch, LLC (the "Developer") for a 129.2 foot tall (nearly 13-story), 22 unit residential condominium building located at 321 North Birch Road in the Central Beach Area of the City of Fort Lauderdale.

As explained below, the underlying quasi-judicial hearing was riddled with numerous procedural infirmities, including the City's refusal to grant RRG the status of an "intervenor," despite its active involvement in the earlier Planning and Zoning Board meeting regarding the same site plan. This prevented RRG from having equal time to present its opposition, and, at the lower level, prevented RRG from being able to cross-examine the Developer's witnesses and experts, as well as the City's staff. Additionally, the City's approval of the site plan was tainted by improper ex parte communications that the City Commissioners failed to disclose as required, prior to the initiation of the proceeding. The City Commissioners did not disclose the substance of their ex parte communications nor any of the

circumstances surrounding them, and after paying very short shrift to the mandated disclosures, immediately proceeded to vote on approving the project.

Further, the City departed from the essential requirements of law in approving a site plan that did not meet the minimum criteria for approval set out in the City's Unified Land Development Regulations (the "ULDR's"). As explained below, the site plan violates at least three separate ULDR requirements, including those relating to minimum rear yard setbacks (ULDR § 47-12.5.D.1.d.ii), building separation and spacing (ULDR § 47-25.3.A.3.e.iv.e), and "neighborhood compatibility" (ULDR § 47-25.3). The most glaring deficiency is that the site plan depicts a swimming pool located only seven feet, ten inches from the rear yard property line, in violation of the 20-foot rear yard minimum setback mandated by ULDR § 47-12.5.D.1.d.ii. Had the swimming pool been placed in the proper location, the building's size and scale would have been dramatically different to meet the requirements of the Code. Lastly, the record does not contain competent and substantial evidence that the site plan satisfied these ULDR requirements or that this massive project was compatible with the established pattern of development in the surrounding neighborhood, which consists of mostly low-rise buildings. For each of these reasons, any one of which standing alone is sufficient, the Resolution approving the site plan for the Project must be quashed as a matter of law.

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THE PARTIES

Petitioner RRG is a limited liability company organized and existing under the laws of the States of Florida, with its principal offices in Broward County, Florida. RRG represents the interests of hundreds of residents and local businesses located in the Central Beach Area that will be directly and adversely impacted by the Project.[1] Each of these residents and businesses own property or transact business within close proximity (less than 1000 feet) of the site of the proposed development, and several of its members, including the Birch Pointe Condominium Association and the Cormona Apartments (a historic landmark in the City of Fort Lauderdale) are located directly adjacent to the project site.

RRG's primary purpose is to preserve the unique character and architectural design of the Central Beach Area. In furtherance of this objective, RRG has met with local government officials (including members of the City Commission) and real estate developers (including Grand Birch, LLC) in an effort to ensure that future land development is compatible with the existing buildings and architecture in the Central Beach Area. RRG's substantial interest in preserving the unique

[1] The list of RRG's constituent members at the time of the quasi-judicial hearings below included, among others, (i) Birch Pointe Condominium Association, (ii) Cormona Apartments, (iii) Alhambra Place Condominium Association, (iv) Lauderdale Surf Club Apartments, (v) The Seasons of Fort Lauderdale Condominium Association, (vi) Granada Inn Luxury Bed & Breakfast, (vii) 3000 Granada Inn, (viii) La Costa Del Mar, (ix) Coconut Cove Guest House, and (x) Versailles Cooperative Association. (Petitioner's Appx., Tab "3," at p. 2)

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character and architecture of the Central Beach Area is also evidenced by its participation in the underlying quasi-judicial proceedings at which the site plan for the Grand Birch Condominium Project was approved. At both the Planning & Zoning Board Meeting and the City Commission Meeting, RRG presented substantial evidence, including expert testimony, in opposition to the site plan.

Petitioner CBA is a Florida not-for-profit corporation organized and existing under the laws of the States of Florida, with its principal offices in Broward County, Florida. The CBA was formed in 1999, and represents the interests of residents, businesses, property owners, and condominium associations located throughout the Central Beach Area. It currently has approximately 400 individual members and associations. These associations, in turn, represent approximately 3,000 unit owners. The specific objectives and purposes of the CBA are to represent its member associations and individual residents, whether or not they belong to condominium or cooperative associations, to protect their interests, to aid and advance responsible development within and around the Central Beach Area, and to promote a better neighborhood and community through group action.

Petitioners and their members will suffer numerous negative adverse effects from the proposed development, including, *inter alia*, (1) a decrease in property values (due to the extreme closeness, unsightly nature, and grand scale of the proposed development); (2) the loss and/or significant impairment of water views

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and breezes from the Intracoastal Waterway; (3) increased traffic hazards and congestion; (4) decreased availability of parking; (5) increased traffic, noise, odors, shadow, scale, visual nuisances and pollution; (6) extreme limitations upon the delivery of emergency and essential services; (7) a decrease in the availability of emergency evacuation routes; and (8) a manifest reduction in physical safety.

Respondent City is a municipality located in Broward County, Florida, and chartered under the statutory laws of the State of Florida. The City is empowered to act through its governing bodies, including the City Commission. The City Commission is designated as the "land planning agency" for the City.

Respondent Grand Birch, LLC (hereinafter referred to as the "Developer" or the "Applicant") is a Florida limited liability company. It is the developer of the project that was approved by the City Commission on April 16, 2013.

BASIS FOR INVOKING JURISDICTION OF THE COURT

Petitioners invoke the jurisdiction of this Court pursuant to Article V, Section 5(b) of the Florida Constitution, and Rules 9.030(c), 9.100 and 9.190(b)(3) of the Florida Rules of Appellate Procedure, which collectively repose jurisdiction in the circuit courts for actions in which a petitioner seeks judicial review of the "quasi-judicial" decisions of local government. *See Park Commerce Associates, Inc. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994); *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 479 (Fla. 1993)

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It is firmly established that decisions granting or denying site plan approval are quasi-judicial in nature, and thus subject to certiorari review by the circuit court. In *Broward County v. G.B.V. Int'l, Ltd.*, 787 So.2d 838 (Fla. 2001), the Florida Supreme Court held that "appellate review of decisions of local governments on building permits, site plans, and other development orders . . . are quasi-judicial in nature and are subject to certiorari review by the courts." *Id.* at 842 (emphasis added) (quoting *Park of Commerce Assoc. v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994)). *See also Webb v. Town Council of Town of Hilliard*, 766 So.2d 1241, 1242 (Fla. 1st DCA 2000) ("local government decisions pertaining to building permits, site plans, special zoning exceptions, and other development orders generally are deemed quasi-judicial in nature, thus subject to certiorari review.") (emphasis added)

NATURE OF THE RELIEF SOUGHT

Preliminarily, Petitioners seek an Order to Show Cause directed to the Respondents pursuant to Fla. R. App. P. 9.100(h) as to why this Court should not issue a Writ of Certiorari quashing the City's quasi-judicial decision (reflected by Resolution No. 13-65) approving the site plan submitted by the Applicant, Grand Birch. Following the issuance of the Order to Show Cause, the Court should issue a Writ of Certiorari quashing Resolution No. 13-65 on the grounds asserted herein.

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FACTS ON WHICH THE PETITIONERS RELY

A. The Proposed Development

On July 6, 2012, the Developer submitted a site plan application to the City requesting site plan approval for a 129.2 foot (nearly 13-story), 22-unit condominium building located at 321 North Birch Road in the Central Beach Area of the City of Fort Lauderdale (the "Project").[2] The Project site is only slightly more than a half-acre (0.63 acre), totaling approximately 25,000 square feet, and the Developer is proposing to place 163,740 square feet of concrete on this site.[3]

Although the site plan states that the building height is 115 feet (five feet less than the maximum allowable for the zoning district), the actual height of the proposed building is 129.2 feet (inclusive of utility towers and elevator equipment located on the top of the structure),[4] and includes two levels of parking on the second and third floors and residential units on the remaining floors above.[5] The site plan depicts a total of 48 parking spaces, most of which are only 8.8 feet wide, and includes only three parking spaces for guests and one for building employees.[6]

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[2] Appx., Tab "1," at p. 1; Tab "11"

[3] *Id.*, Tab "2," at p. 59:18-59:24; Tab "3," at p. 8; Tab "8," at p. 54:16-54:20; Tab "10," at p. 7. A two-story multi-family residential building was previously located on the site of the proposed development. *Id.*, Tab "10," at p. 15

[4] Appx., Tab "2," at pp. 59:25-60:4; Tab "8," at pp. 55:5-55:9 & 59:7-59:10

[5] *Id.*, Tab "5," at p. 1; Tab "7," at p. 1

[6] *Id.*, Tab "2," at p. 59:21-59:24; Tab "3," at pp. 8 & 12-14; Tab "8," at

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In its application, the Developer requested that the Project be approved as a "Development of Significant Impact" and that its application be reviewed as a "Site Plan Level IV" pursuant to Sections 47-12.5(D)(1)(d)(i)(iii) and 47-12.6 of the Unified Land Development Regulations ("ULDR"), which is the City's zoning code.[7] The Developer is requesting 30-foot side yard setbacks and a 20-foot rear yard setback as part of the request for the Development of Significant Impact.[8]

Despite requesting a 20-foot rear yard setback, the site plan depicts a structure that is located squarely within the 20-foot buffer zone. Specifically, the site plan depicts an in-ground swimming pool (and deck) that is located only 7 feet, 10 inches from the property line in the rear of the property.[9] As will be explained in Section C. of the "ARGUMENT" section below, the location of this swimming pool and deck, so close to the property line, constitutes a flagrant violation of the 20-foot minimum rear yard setback mandated by ULDR § 47-12.5.D.1.d.ii. Had the swimming pool been placed in the proper location, the development would have been a dramatically different size and scale in order to accommodate a pool.

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[7] Appx., Tab "5," at p. 1; Tab "6," at p. 1; Tab "7," at p. 1

[8] *Id.*, Tab "5," at p. 1; Tab "7," at p. 1

[9] *Id.*, Tab "3," at pp. 7, 18 & 20; Tab "4," at pp. 7-8; Tab "8," at p. 70:15-70:19; Tab "10," at p. 31; Tab "12," at p. 3

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B. The Character of the Surrounding Neighborhood

The Project is located in the Central Beach Area of Fort Lauderdale.[10] The Central Beach Area, in turn, is divided into six zoning districts. ULDR § 47-12.1. The Project is located in the "Intracoastal Overlook Area (IOA)" zoning district.[11] The IOA district was established for the purpose of "encouraging the preservation, maintenance and revitalization of existing structures and uses that front on the eastern Intracoastal Waterway." ULDR § 47-12.1.A.4. "Existing residential uses and transient accommodations represent a substantial element of the central beach housing stock to be **protected, preserved and enhanced.**" *Id.* (emphasis added).

The IOA district is comprised primarily of low to mid-rise buildings.[12] For example, the Cormona Apartments, a historic building located adjacent to the Project, is only two stories tall.[13] Similarly, the Little Paris Hotel and Apartments, located across the street, is only two stories tall.[14] In addition, directly to the north of the Project is a two-story multi-family building.[15] Each of these buildings

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[10] Appx., Tab "6," at p. 1. The Central Beach Area, also referred to as the "CBA," is defined as "the area lying south of Sunrise Boulevard, west of the Atlantic Ocean, east of the Intracoastal Waterway and north of the south boundary of the plat of Bahia Mar lying west of State Road A-1-A." ULDR § 47-12.3.
[11] Appx., Tab "6," at p. 1; Tab "7," at p. 1; Tab "12," at p. 1;
[12] *Id.*, Tab "3," at p. 25; Tab "8," at p. 50:5-50:6; Tab "10," at p. 15
[13] *Id.*, Tab "2," at pp. 90:1-90:2; Tab "8," at 68:17-68:23; Tab "10," at p. 26
[14] *Id.*, Tab "10," at p. 26
[15] *Id.*, Tab "5," at p. 3; Tab "8," at p. 50:5-50:6

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enjoys unobstructed views of the Intracoastal Waterway, and these views will be obstructed and completely dwarfed if the proposed development is constructed.[16]

The proposed structure will be built next door to the Birch Pointe Condominium (which is to its immediate south) and the Cormona Apartments (to its immediate north).[17] However, there is only 60 feet of separation between the proposed structure and the Birch Pointe Condominium, and even less separation -- 38 feet -- between the proposed structure and the Cormona Apartments.[18] By contrast, there is a separation of 150 feet between the Birch Pointe Condominium and the building to its immediate south (the Versailles Cooperative Association).[19]

C. Applicable Legal Requirements

For the IOA zoning district, the standards for site plan approval are set forth in ULDR § 47-12.5.D. Section 47-12.5.D delineates four principal site development standards, including those pertaining to minimum setbacks, maximum building height, density and permitted uses. Pursuant to ULDR § 47-12.5.D, proposed structures in the IOA district must have a minimum front yard setback of twenty (20) feet, a minimum side yard setback of one-half (1/2) the height of the building, and a minimum rear yard setback of one-half (1/2) the

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[16] Appx., Tab "8," at pp. 56:5-56:8 & 68:10 -69:11; Tab "10," at pp. 8, 10 & 17
[17] *Id.*, Tab "2," at pp. 70:22-23; Tab "3," at p. 9; Tab "8," at p. 12
[18] *Id.*, Tab "2," at 60:4-60:10; Tab "3," at p. 9; Tab "6," at p. 2; Tab "8," at p. 8
[19] *Id.*, Tab "2," at p. 60:15-60:19; Tab "3," at p. 10

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height of the building. However, if approval is sought as a "development of significant impact," **the minimum rear yard setback is reduced from one-half (1/2) of the height of the building to twenty (20) feet,** and the minimum side yard setback is reduced from one-half (1/2) the height of the building to forty (40) feet for structures greater than seventy-five (75) feet in height. ULDR § 47-12.5.D.1.d

Because the proposed development is also part of the Central Beach Area, the site plan must also satisfy the development criteria applicable to that area. Section 47-12.6.B of the ULDR sets forth the development and design criteria for the Central Beach Area. Among other things, the proposed development must be "compatible with the character of the overall plan of development contemplated by the revitalization plan of the central beach area." ULDR § 47-12.6.B.1.

In addition to meeting the requirements of the district in which it is located, the proposed development must satisfy the general "Development Review Criteria" contained in ULDR Section 47-25.[20] "Neighborhood Compatibility" is one of the development review criteria contained in Section 47-25. This criterion requires all developments to be "**compatible with, and preserve the character and integrity of adjacent neighborhoods,** . . . and include improvements or modifications either on-site or within the public rights of way to mitigate adverse impacts, such as

[20] *See* ULDR § 47-24.1.D ("In addition to meeting the requirements of the district in which a proposed development is located . . . [,] all development permits shall be subject to Section 47-25, Development Review Criteria, as specified therein").

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traffic, noise, odors, shadow, scale, visual nuisances, or other similar adverse effects to adjacent neighborhoods." ULDR § 47-25.3.A.3.e.i.a (emphasis added).

The burden of proof of satisfying these criteria remains on the applicant. ULDR § 47-24.1 ("The applicant shall have the burden of showing that all standards, requirements, and criteria of the ULDR have been met."). The applicant must prove by competent and substantial evidence that its site plan application is in conformity with the relevant plans and laws of the State of Florida, Broward County and City of Fort Lauderdale. *See Premier Developers III. Assocs. v. City of Fort Lauderdale*, 920 So.2d 852, 854 (Fla. 4th DCA 2006) (stating that it is the applicant, rather than the city commission, that has "the initial burden of showing that his application met the statutory criteria for granting such [applications].").

C. The Proceedings Below

On July 24, 2012, the City's Development Review Committee ("DRC") reviewed the site plan and recommended its approval.[21] The DRC then forwarded its recommendations to the Planning and Zoning Board ("P&Z Board") for consideration. On November 12, 2012, the P&Z Board conducted a hearing to consider the site plan application and to hear public comment on the application.[22] RRG participated in this hearing through counsel, and presented argument and

[21] Appx. Tab "8," at pp. 46:2-74:25; Tab "9," at pp. 7-9
[22] *Id.*, Tab "8"

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evidence in opposition to the Project.[23] (A transcript of the P&Z Board Meeting is attached to the accompanying Appendix as Tab "8"). Despite this opposition, the P&Z Board recommended approval of the subject site plan by a 7-2 vote.[24]

Following the P&Z Board's recommendation of approval, the site plan application and related materials were sent to the City Commission for review.[25] On April 16, 2013, the City Commission held a public hearing on the site plan application.[26] The proceeding was quasi-judicial in nature, and both the Applicant and RRG (which objected to the proposed development) were represented by counsel and made presentations to the City Commission.[27] (A transcript of the City Commission meeting is attached to the accompanying Appendix as Tab "2"). At the outset of the hearing, however, the Petitioners' legal counsel requested that RRG be accorded the status of an "intervenor," especially in light of its prior participation in the earlier P&Z Board Meeting regarding the same site plan.[28] This request was denied by the City Attorney, who did not provide any explanation for his decision other than to state "Mayor, we do not have a party intervenor status

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[23] Appx., Tab "5," at p. 1
[24] *Id.*, Tab "5," at p. 1
[25] *Id.*, Tab "2" and Tab "5"
[26] *Id.*, Tab "2" and Tab "5"
[27] *Id.*, Tab "2," at pp. 55:18-70:8
[28] *Id.* at p. 6:14-6:17

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on this."[29] As a consequence, Petitioner RRG was limited to a twenty (20) minute presentation (as compared to the forty-five (45) minutes afforded the Developer), and was denied all rights that a party would have been afforded in this matter.

At the very end of the meeting, after all testimony and public comment had been closed, and immediately before the vote on the site plan was taken, Mayor Seiler (who presided over the meeting) asked the City Commissioners to disclose any ex parte communications which any of them may have had with the developer or other interested parties.[30] Five of the City Commissioners, including Mayor Seiler, admitted to having ex parte communications with the developer and its representatives.[31] However, none of the City Commissioners disclosed the subject matter of these ex parte communications, only that they had occurred.[32]

Following the incomplete disclosure of these communications, and without affording Petitioners or any other opponents of the Project any opportunity to make further inquiry into the substance of these communications, the City Commission voted to approve the site plan application. The site plan was approved by a 4-1 vote, with only Commissioner Dean J. Trantalis voting against the Project.[33]

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[29] Appx., Tab "2," at p. 7:2-7:5
[30] *Id.*, Tab "2," at pp. 191:12-193:21
[31] *Id.*, Tab "2," at pp. 191:21-193:19
[32] *Id.*, Tab "2," at p. 219:3
[33] *Id.*, Tab "2," at pp. 218:17-219:10

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The City Commission's approval of the site plan application is memorialized in Resolution No. 13-65.[34] The Resolution states that "the development plan for a multi-family residential development and parking garage located at 321 North Birch Road, Fort Lauderdale, Florida, located in an IOA zoning district is hereby approved, subject to the conditions imposed by the Development Review Committee, Planning and Zoning Board and City Commission."[35]

The Resolution was signed by the City's Mayor on April 16, 2013.[36] This Petition is timely because it was filed with the Circuit Court within 30 days of the City's rendition of the Resolution, in accordance with Fla. R. App. 9.100(c).

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[34] Appx., Tab "1"
[35] *Id.*, Tab "1," at p. 2
[36] *Id.*, Tab "1," at p. 3

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ARGUMENT IN SUPPORT OF THE PETITION

A. Standard of Review

The instant Petition seeks "first-tier" certiorari review of the City's adoption of Resolution No. 13-65, approving the issuance of a "Site Plan Level IV" development permit for the development of the Grand Birch Condominium Project. "First-tier certiorari review [before the Circuit Court] is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal." *Broward County v. G.B.V. International, Ltd.*, 787 So.2d 838, 843 (Fla. 2001) (citing *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982)). "First-tier" certiorari review is the proper method to challenge local land decisions where the governing body acts in a "quasi-judicial" capacity. *See Park of Commerce Associates v. City of Delray Beach*, 636 So.2d 12, 15 (Fla. 1994).

On "first-tier" certiorari review, this Court must determine: (1) whether the City afforded the Petitioner procedural due process in its consideration of the site plan; (2) whether the City observed the essential requirements of the law in approving the site plan; and (3) whether the City's administrative findings and judgment in approving the Resolution are supported by "competent and substantial evidence." *See G.B.V.*, 787 So.2d at 843 (citing *Vaillant*, 419 So.2d at 626); *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So.2d

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1270, 1274 (Fla. 2001). If any of the three areas of inquiries are found deficient, then a writ of certiorari must be issued quashing the quasi-judicial decision.

In its review of these factors, the Circuit Court must apply "strict scrutiny" to the City's actions undertaken in a quasi-judicial capacity. *See Board of County Com'rs of Brevard County v. Snyder*, 627 So.2d 469, 475 (Fla. 1993) (stating that the "review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions."); *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla. 3d DCA 1987), *rev. denied*, 529 So.2d 694 (Fla. 1988) (observing that review of development orders is subject to strict scrutiny). "Strict scrutiny" in this context has been described as follows:

> [s]trict scrutiny implies rigid exactness or precision. A thing scrutinized has been subjected to minute investigation. Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to a standard or norm. It is the antithesis of a deferential review.

Machado, 519 So.2d at 632 (internal citations omitted)

B. The City Failed to Afford Procedural Due Process in its Consideration of the Site Plan by Refusing to Recognize Petitioner RRG's Status as an Intervenor and by Failing to Properly Disclose Ex Parte Communications, as Required by the ULDR § 47-1.13 and Florida Law

The April 13, 2013 City Commission hearing was riddled with numerous procedural infirmities, beginning with the City's refusal to recognize Petitioner

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RRG as an intervenor in the proceeding.[37] At the beginning of the public hearing, RRG's legal counsel requested that RRG be accorded the status of an "intervenor," especially in light of its prior participation in the earlier P&Z Board Meeting.[38] This request was denied by the City Attorney, who did not provide any explanation for his decision other than to state "Mayor, we do not have a party intervenor status on this."[39] As a consequence, Petitioner RRG was limited to a twenty (20) minute presentation (as compared to the forty-five (45) minutes afforded the Developer), and was denied all rights that a party would have been afforded in this matter.

Although quasi-judicial proceedings are not controlled by strict rules of evidence and procedure, "certain standards of basic fairness must be adhered to in order to afford due process." *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991) (citing *Hadley v. Department of Admin.*, 411 So.2d 184 (Fla. 1982)). Due process does not just simply mean "notice and an opportunity to be heard." In the context of quasi-judicial zoning proceedings, due process also includes the right to present evidence and **cross-examine witnesses**. *Id.* (citing *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648, 652 (Fla. 3d DCA 1982)) (emphasis added). By refusing to recognize RRG as an intervenor, after RRG had fully participated in the earlier P&Z Board Meeting, the City ensured

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[37] Appx., Tab "2," at pp. 6:14-7:5
[38] *Id.* at p. 6:14-6:17
[39] *Id.* at p. 7:2-7:5

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that RRG would not have the same rights afforded to it as if it were a party to the proceeding. This is clearly a violation of the Petitioner's procedural due process rights as an interested and adversely affected party. *See, e.g., Sorrento Ranches Homeowners Ass'n, Inc. v. City of Venice*, 15 Fla. L. Weekly Supp. 877 (Fla. 12th Cir. Ct. 2008) (holding that "neighboring landowners" were denied their due process right to cross-examine witnesses in a quasi-judicial proceeding)

The City's approval of the site plan was also tainted by improper ex parte communications between the Developer and members of the City Commission, which also effectively denied Petitioners (and all citizens) due process. It is a fundamental principle of due process that parties are prohibited from engaging in ex parte communications with a neutral decision-maker. In *Jennings*, the Third District Court of Appeal held that "[e]x parte communications are **inherently improper and are anathema to quasi-judicial proceedings.**" 589 So.2d at 1341 (emphasis added). Upon an aggrieved party's proof that a quasi-judicial officer received an ex parte communication, "its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence." *Id.* at 1341. The person or persons adversely affected by the decision, therefore, is entitled to a new and complete hearing, unless the party defending against a new hearing can show that the ex parte communication was not, in fact, prejudicial. *Id.* at 1339

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In 1995, the Florida Legislature enacted Section 286.0115, Florida Statutes, to address the issues raised in the *Jennings* case. Section 286.0115 still "requires public officials to disclose ex parte communications in order to assure an adverse party the opportunity to confront, respond, and rebut any such disclosures so as to prevent an appearance of impropriety." *City of Hollywood v. Hakanson*, 866 So.2d 106 (Fla. 4th DCA 2004). However, unlike *Jennings*, which created a rebuttable presumption of prejudice arising from an ex parte communication with a quasi-judicial officer, Section 286.0115 removes the prejudicial effect of such communication, but only "**if the subject of the communication** and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record." Fla. Stat. § 286.0115(c)(1) (emphasis added)

The City's own municipal regulations provide further protection and safeguards against improper ex parte communications. Specifically, Section 47-1.13 of the ULDR ["Access to Public Officials"] provides that an "[a]n ex parte communication shall not be presumed to be prejudicial to the action taken by a public official, board or commission if the communication is disclosed as follows:

> 1. The public official in receipt of a verbal communication discloses the identity of the person, group or entity with whom the communication took place and makes such information part of the record of the quasi-judicial matter prior to final action being taken on the matter.

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> 2. The public official in receipt of a written communication makes the written communication part of the record of the quasi-judicial matter prior to final action being taken on the matter. . . .
>
> * * *
>
> 4. Disclosure made pursuant to this section shall be made before or during the public meeting at which a vote is taken on such matter so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to rebut or respond to the communication.

Thus, to avoid the "prejudicial" effect of an ex parte communication, the City's own rules require complete disclosure on the record, and, further, at a point in time when opponents have an opportunity to rebut or respond to the communication.

Here, the City has failed to make the specific curative disclosures mandated by *Jennings*, § 286.0115, and by its own rules, in order to avoid the prejudicial effect of its city commission's ex parte communications with the developer's representatives. At pages 191 through 193 of the hearing transcript, which contains the "disclosure" of all ex parte communications, the Commissioners made only vague references to the fact that they had ex parte communications with the developer and its representatives.[40] However, none of the Commissioners disclosed the **subject matter** of these ex parte communications, only that they had

[40] Five of the City Commissioners admitted to having ex parte communications with the developer and its representatives. (Appx., Tab "2," at pp. 191:12-193:21).

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1. Violation of Setback Requirements

ULDR § 47.19.BB.2 states that that "a **swimming pool**, hot tub or spa, **when accessory** to a hotel or **multifamily dwelling**, shall be subject to the **minimum yard requirements** of the zoning district in which it is located." (emphasis added). The minimum required "rear yard setback" for structures located within the IOA zoning district is **20 feet**. ULDR § 47-12.5.D.1.d.ii. Therefore, in order to comply with the setback requirements of the IOA zoning district, a swimming pool that is part of a multifamily dwelling must be located at least 20 feet from the property line. Here, the proposed development depicted in the site plan violates this ULDR requirement because the swimming pool (which includes a pool deck) is located only 7 feet, 10 inches from the property line.[42]

The City's purported justification for excluding the swimming pool from the setback calculation is patently absurd. In fact the City's position was clearly concocted during the actual proceeding to save face from its apparent misreading of its own Code. Just hours before the hearing, the City sent correspondence to the Petitioner advising that the swimming pool would be permitted in its proposed location pursuant to ULDR § 47-23.8.B, which the City later confirmed was inapplicable to the IOA zoning district. (Appx., Tab "14). Then, at the hearing,

[42] Appx., Tab "3," at pp. 18 & 20; Tab "4," at pp. 7-8; Tab "8," at p. 70:15-70:19; Tab "10," at p. 31; Tab "12," at p. 3

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when the City was backed into a corner, it quickly took the position that the in-ground swimming pool is not a "structure," pointing to the definition of "Setback" in the ULDR. *See* ULDR § 47-2.2.B.O ("A setback is the minimum horizontal difference between a **structure** and a property line of a lot or plot.") (emphasis added); ULDR § 47-12.3.A.23 ("Setbacks are the distance between the boundary line of a lot and **structure** measured **above ground level.**") (emphasis added). Citing these two ULDR definitions, the Developer argued (and the City apparently agreed) that the swimming pool should not be taken into consideration because it is not a "structure," and, in any event, is being built "below ground level."[43]

Such an argument strains all credulity, and is based upon a plain misreading of the ULDR. The term "structure" is defined in the City's ULDR as follows:

> **Anything built or constructed or erected, the use of which requires more or less permanent location on the land**, or attached to something having a permanent location on the land, or any composition, artificially built up or composed of parts joined together in some definite manner or any rooflike structure or storage apparatus whether movable or nonmovable which may or may not be self-supporting or may or may not be affixed to a "structure," as defined herein, or to a building.

ULDR § 47-35.1 (emphasis added). Under this broad definition, a swimming pool built into the ground is clearly a "structure" within the meaning of ULDR § 47-

[43] Appx., Tab "2," at pp. 14:21-14:24, 145:13-145:17; 157:18-158:19 &160:3-160:5

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35.1 since it will be "built or constructed or erected" on land, and its use will require "more or less [a] permanent location on the land." *See also Scott v. Board of Appeal of Wellesley*, 356 Mass. 159, 162, 248 N.E. 281, 283 (1969) (holding that below-ground swimming pool was a "structure" for purposes of town zoning by-law's setback requirements); *Greenberg v. Koslow*, 475 S.W.2d 434, 437 (Mo. App. 1971) (stating that "beyond doubt," the swimming pool is a "structure").[44]

While the City's interpretation of its own zoning code is ordinarily entitled to deference, the law is clear that **no deference** need be given to an agency interpretation that is **unreasonable**, implausible or clearly erroneous. *See Office of Fire Code Official v. Fla. Dep't of Fin. Servs.*, 869 So.2d 1233, 1237 (Fla. 2d DCA 2004) (deference to agency decisions "does not require that we defer to an implausible and unreasonable statutory interpretation adopted by an administrative agency."); *City of Coral Gables v. Coral Gables Walter F. Stathers Memorial Lodge 7, Frat. Order of Police*, 976 So.2d 57, 63 (Fla. 3d DCA 2008) ("No deference is due an error of law.") (citing *Office of Fire Code Official*, 869 So.2d at 1237); *Osorio v. Board of Prof. Surveyors & Mappers*, 898 So.2d 188, 190 (Fla. 5th DCA 2005) ("if the agency's interpretation

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[44] *See also Corter v. Zoning Bd. of Appeals for Village of* Fredonia, 46 A.D.2d 184, 186, 361 N.Y.S.2d 444, 447 (N.Y. App. Div. 1974) ("the broad definitions of the words 'structure' or 'yard', as used in the ordinance, support the conclusion that the pool is a 'structure'")

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conflicts with the plain and ordinary meaning of the statute, deference is not required.") (citing *Verizon Fla., Inc. v. Jacobs,* 810 So.2d 906, 908 (Fla. 2002)).

The City's determination that the swimming pool was not a "structure" constitutes an unreasonable, absurd and clearly erroneous interpretation of ULDR § 47-35.1, which makes clear that anything "built, constructed or erected" on land squarely fits within the definition of "structure," so long as it requires "more or less a permanent location on land." The absurdity of the City's position is reflected in the testimony of Anthony Fajardo, the City's zoning official, who conceded that an *elevated* swimming pool would qualify as a "structure," but that an in-ground swimming pool (made of the same material) does not.[45] This is an illogical distinction because, regardless of whether it is built above or below the surface, the swimming pool at issue here is a **permanent installation** on the land. *See, e.g.*, *Scott*, 248 N.E. at 283 ("We think that the pool is to be deemed a structure for purposes of the yard or setback provisions of the Wellesley by-law. It is a large permanent installation constructed of wood, steel, stone and earth, with a plastic liner. Although mostly below ground level, there is, because of it, a material occupation of a substantial area above ground."). The "structure" inquiry does not turn on the arbitrary dividing line urged by the City (i.e., above-grade vs. below-grade), but, rather, depends on whether the claimed structure is "built or

[45] Appx., Tab "2," at p. 158:5-158:10

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constructed or erected" and "requires a permanent location on land." There can be no question that an in-ground swimming pool fits within this broad definition.

There is likewise no merit to the City's exclusion of the swimming pool based upon it being "*below ground level.*" ULDR § 47.19.BB.2 plainly states that that a "swimming pool," when accessory to a multifamily dwelling, "shall be subject to the **minimum yard requirements** of the zoning district in which it is located." (emphasis added). The term "yard" is defined in § 47-12.3.A.23 as "the distance between the boundary line of a lot and structure **measured at ground level**." (emphasis added). As applied here, the distance between the property line and the swimming pool – measured at ground level – is 7 feet 10 inches, which is well within the 20-foot rear yard setback mandated by ULDR § 47-12.5.D.1.d.ii.

Although the definition of "setback" in ULDR § 47-12.3.A.23 speaks of "the distance" between the property line and a structure "**measured *above* ground level**," it is not remotely plausible to read this provision to mean that you can completely ignore the presence of all structures that are flush with or below the surface. ULDR § 47-12.3.A.23 simply means what it says -- that "the distance" between the property line and the structure shall be measured "at ground level."

Finally, there is no merit to the Developer's contention (made during the P&Z Board meeting) that the setback requirements were waived by virtue of

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ULDR § 47-23.8.B.[46] By its express terms, Section § 47-23.8.B **does not apply** to the zoning districts within the Central Beach Area. ULDR § 47-23.8.B ("This Section shall not apply to development within the downtown RAC, except for development . . . , and shall not apply to the central beach area districts."). Therefore, there would have been no basis for the City to excuse the Developer from the setback requirements based upon a wholly inapplicable provision.

2. Violation of Building Separation and Spacing Requirements

The proposed development also violates ULDR § 47-25.3.A.3.e.iv.e, which is entitled "Building Separation." This provision states as follows:

> Buildings should allow adequate space between structural masses for the passage of natural breezes. **New building masses should be sited to the extent feasible so they maintain reasonable views to the ocean and Intracoastal Waterway from existing structures.**

ULDR § 47-25.3.A.3.e.iv.e (emphasis added). The intent of this provision is to ensure that existing residents do not lose their ocean views and breezes as a result of new structures being built "too close" to existing residential structures.

The proposed development is located directly adjacent to the Birch Pointe Condominium (on the immediate south) and the two-story Cormona Apartments

[46] The Developer apparently abandoned this argument during the City Commission Meeting. (Appx., Tab "2," pp. 14:24-15:1; 58:8-59:3)

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(on the immediate north).[47] However, there is only **60 feet** of separation between the proposed structure and Birch Pointe, and even less separation -- **38 feet** -- between the proposed structure and the Cormona Apartments.[48] The proposed structure is basically "jammed in" right next to these two adjacent buildings.[49] By contrast, there is a separation of **150 feet** between the Birch Pointe Condominium and the building to its immediate south (the Versailles Cooperative).[50] At a height of 129.2 feet, the proposed nearly 13-story building (which sits literally inches from the Cormona Apartments) will negatively affect the panoramic views of the Birch Pointe Condominium and will **completely block** the inter-coastal views of the historic Cormona Apartments.[51] As such, the proposed development plainly violates ULDR § 47-25.3.A.3.e.iv.e.

3. Violation of "Neighborhood Compatibility" Requirements

The requirement of "neighborhood compatibility" is a staple of Florida zoning law, *see Premier Developers III. Assocs. v. City of Fort Lauderdale*, 920 So.2d 852, 854 (Fla. 4th DCA 2006), and is incorporated in Section 47-25.3 of the ULDR. All applications for development permits filed with the City,

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[47] Appx., Tab "10," at pp. 8 & 12
[48] *Id.*, Tab "2," at pp. 21:12-21:14; 36:23-36:25; 40:20-40:23; 60:4-60:10; Tab "3," at p. 9; Tab "10," at p. 8
[49] *Id.*, Tab "2," at p. 87:23-89:9
[50] *Id.*, Tab "2," at p. 60:15-60:17; Tab "3," at p. 10
[51] *Id.*, Tab "8," at p. 56:5-56:8; Tab "10," at p. 29

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including site plan applications, must satisfy the "neighborhood compatibility" requirements. ULDR § 47-24.1.D ("In addition to meeting the requirements of the district in which a proposed development is located . . . , all development permits shall be subject to Section 47-25, Development Review Criteria . . .").

The specific "neighborhood compatibility" provision which is violated by the site plan is ULDR § 47-25.3.A.3.e.i.a, which provides in pertinent part:

> i. All developments subject to this section 47-25.3 shall comply with the following:
>
> a) **Development will be compatible with, and preserve the character and integrity of adjacent neighborhoods**, the development shall include improvements or modifications either on-site or within the public rights of way to **mitigate adverse impacts, such as traffic, noise, odors, shadow, scale, visual nuisances, or other similar adverse affects to adjacent neighborhoods**. These improvements or modifications may include, but shall not be limited to, the placement or orientation of buildings and entryways, parking areas, buffer yards, alteration of building mass, and the addition of landscaping, walls, or both to ameliorate such impacts. Roadway adjustments, traffic control devices or mechanisms, and access restrictions may be required to control traffic flow or divert traffic as needed to reduce or eliminate development generated traffic on neighborhood streets.

ULDR § 47-25.3.A.3.e.i.a (emphasis added)

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"Neighborhood compatibility" requires a consideration of several factors, including the scale, mass, location and height of the proposed project. *See Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So.2d 308 (Fla. 4th DCA 1999). Consideration of each of these factors can lead only to one conclusion: the proposed development is incompatible with the surrounding neighborhood, and subverts (rather than preserves) the character and integrity of adjacent neighborhoods. The proposed building height of 129.2 feet is **completely out of scale** with other properties in the surrounding neighborhood. The adjacent properties are of a much lower mass and scale than the proposed development, and consist primarily of low-rise buildings.[52] For example, the Cormona Apartments, a historic building located adjacent to the proposed development, is **only two stories tall**.[53] Similarly, the Little Paris Hotel and Apartments, located across the street, is only **two stories tall**.[54] The proposed development (which is **13 stories tall**) represents an abrupt change in the development pattern of the surrounding neighborhood, and will cast a giant shadow over adjacent

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[52] Appx., Tab "3," at p. 25; Tab "8," at p. 59:15-59:19. The only high-rise structure in this entire area is Birch Pointe Condominium, which was intended to be the bookend and the transition point for the tallest building in this area.
[53] *Id.*, Tab "2," at pp. 90:1-90:2; Tab "8," at 68:17-68:23; Tab "10," at p. 26
[54] *Id.*, Tab "10," at p. 26

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properties,[55] leading to the loss of water views and causing other significant adverse impacts such as increased traffic and noise. *See* Planning and Urban Design Standards, American Planning Association, published by John Wiley & Sons (Feb. 2006) (recognizing that an "abrupt change in building scale creates an *inharmonious* environment that maximizes the *negative effects* of tall buildings on adjacent uses, such as loss of sunlight . . .") (emphasis added)[56]

The lack of compatibility between the proposed development and the surrounding properties is also evidenced by the City's Massing Study, which depicts **a much smaller property** (only two stories tall) on the project site.[57] The fact that the City's own massing study shows a two-story building (and not a 129-foot tall structure) on the same lot tells us all we need to know about the compatibility issue. Indeed, the City previously rejected other development plans for the same location due to concerns about height. For example, in 2006, the developer of the Birch Pointe Condominium had an option contract to the purchase the subject property for $11 million. He submitted development plans to the City's Development Review Committee, which advised him that the proposed structure was too tall, had insufficient setbacks (only 30 feet) and did

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[55] Appx., Tab "8," at p. 56:5-56:8 & 69:2-69:21; Tab "10," at pp. 8, 12 & 27-29
[56] *Id.*, Tab "8," at p. 68:4-68:23; Tab "10," at p. 26
[57] *Id.*, Tab "2," at p. 65:21-66:1; Tab "3," at p. 26; Tab "8," at 59:11-59:14 & 60:11-60:16; Tab "10," at p. 13

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not have enough parking.[58] Ironically, the approved site plan calls for a structure that is even bigger than the project that the City had earlier rejected.

The proposed development is also inconsistent with the goals of the Central Beach Alliance ("CBA"), a local civic association consisting of affected property owners in the Central Beach Area. The CBA's goals, as recommended to the City in 2008, state that "[a]ll future construction on remaining undeveloped property in the IOA (Intracoastal) district **shall not exceed 70 feet** at its highest point."[59] The proposed development approved by the City exceeds the maximum height restriction recommended by the CBA by **nearly double**.

A look at other recent development projects approved by the City underscores this project's incomprehensibly large size. The proposed 11-story structure, which sits on a parcel of only 0.61 acres, has a floor-area-ratio ("FAR") of 5.9.[60] This is the highest floor-area-ratio on Fort Lauderdale Beach, and exceeds the FAR of some of the largest development projects ever approved by the City, including, among others, Beach Place (4.14), Fortune House Resort Hotel (4.4), MLK Development (3.7), Las Olas Beach Club (5.61), Orion Resort

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[58] Appx., Tab "2," at p. 56:13-56:17; Tab "3," at p. 4; Tab "8," at p. 50:14-50:21; Tab "10," at p. 4

[59] *Id.*, Tab "8," at p. 58:15-58:26; Tab "10," at p. 11

[60] *Id.*, Tab "10," at p. 6. Floor-area-ratio is "the gross floor area of all buildings or structures on a plot divided by the total plot areas." ULDR § 47-2.2.E

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(4.4), Stay Social Hotel (4.6), Ocean Wave (4.8), Yankee Trader – North Bldg. (2.38) and Yankee Trader – South Bldg. (2.84).[61] This shows that the developer of the project is trying to mass too much structure into a small half-acre lot.

D. The City Commission's Decision Was Not Supported by Competent Substantial Evidence

While the Court may not substitute its judgment for that of the City Commission as to the weight of the evidence, it must still determine whether the decision on review is supported by "competent and substantial evidence," that is, relevant evidence that is sufficiently material "such that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957); *State Dep't of Agriculture and Consumer Servs. v. Strickland*, 262 So.2d 893, 894 (Fla. 1st DCA 1972).

Although courts typically uphold agency decisions that are supported by competent substantial evidence, "**the same standards of review do not apply to an erroneous application of the law to the facts.**" *City of Coral Gables*, 976 So.2d at 63 (emphasis added). The Court need not accord any deference to "erroneous applications of law to the facts by a quasi-judicial body such as the Commission." *Id.* at 66. Similarly, if the agency's decision is based upon an "implausible or unreasonable interpretation" of its own code, then its decision is

[61] Appx., Tab "8," at pp. 60:20-61:7; Tab "10," at p. 16

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not accorded any deference. *Id.* at 63 (citing *Office of Fire Code Officials*, 869 So.2d at 1237). Likewise, the deference normally afforded agency determinations "does not extend to findings of fact that are **not expressly supported by competent, substantial evidence.**" *Id.* (emphasis added).

Here, the City's approval of the site plan was based upon an unreasonable interpretation of its own zoning code. As explained in Section C. above, the City improperly excluded the swimming pool from the setback calculation based upon its off-the-cuff determination that an in-ground swimming pool was not a "structure." Such an interpretation flies in the face of ULDR § 47-35.1, which defines a "structure" as "[a]nything built or constructed or erected, the use of which requires more or less permanent location on the land." An in-ground swimming pool easily fits within this definition, as numerous courts have held. The consequence of the swimming pool being a "structure" is that its location only 7 feet, 10 inches from the property line violates the 20-foot minimum rear yard setback mandated by ULDR § 47-12.5.D.1.d.ii, and, thus, required the denial of the applicant's site plan as not being in compliance with the setback requirement.[62]

Similarly, as also explained in Section C. above, the City misapplied the "neighborhood compatibility" requirement contained in ULDR § 47-25.3.A.3,

[62] Neither the City nor the Developer disputed the location of the swimming pool, or provided any evidence that it was located beyond the 20-foot setback area.

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by ignoring the fact that the surrounding neighborhood was comprised primarily of low-rise and low-density buildings, such as the **two-story** historic Cormona Apartments (located adjacent to the proposed development) and the **two-story** Little Paris Hotel and Apartments (located across the street from the proposed development).[63] The evidence adduced by RRG at the quasi-judicial hearings showed that the proposed building height of 129 feet was completely out of scale with anything in the surrounding neighborhood, and overshadowed the more modest low-rise structures surrounding the proposed development.[64]

There is no evidence that the City Commission considered the impact of the proposed development upon the numerous low-rise structures in the surrounding neighborhood. While the Developer acknowledged that there were "one and two-story buildings" abutting the proposed development, it blatantly misrepresented the height of those buildings to the City Commission, falsely claiming that they were "between 100 and 166 feet" in height.[65] As the quasi-judicial record makes clear, the proposed development (which is 129.2 feet in height) **towers over** the adjacent two-story buildings, dispelling any notion that these low-rise buildings are anywhere near the height claimed by the Developer.

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[63] Appx., Tab "8," at 68:17-68:23; Tab "10," at p. 26
[64] *Id.*, Tab "8," at p. 56:5-56:8 & 69:2-69:21; Tab "10," at pp. 8, 12 & 27-29
[65] *Id.*, Tab "2," pp. 38:24-39:5

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CONCLUSION

Based on the foregoing, the Petitioners have demonstrated a preliminary basis for relief, and respectfully request that this Court issue an Order to the Respondent City to show cause why a Writ of Certiorari should not be issued quashing Resolution No. 13-65, and, following the issuance of such Order, to issue a Writ of Certiorari quashing Resolution No. 13-65 in its entirety, and remand the matter to Respondent for further proceedings consistent with the Court's writ.

Respectfully submitted,

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By _____
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Keith M. Poliakoff
Florida Bar No. 0477656

CERTIFICATE OF FONT COMPLIANCE

WE HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.100(l), this Petition for Writ of Certiorari has been printed in Times New Roman with 14-point font.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing document has been furnished by Electronic Mail this 16th day of May, 2013, in accordance with Florida Rule of Judicial Administration 2.516 to: Harry Stewart, Esq., City Attorney for the City of Fort Lauderdale, 100 North Andrews Avenue, 7th Floor, Fort Lauderdale, Florida 33301 (hstewart@fortlauderdale.gov); and Heidi Davis Knapik, Esq., Gunster, Yoakley & Stewart, P.A. Attorneys for Grand Birch, LLC 450 E. Las Olas Boulevard, Suite 1400, Fort Lauderdale, Florida 33301-4206 (hdavis@gunster.com).

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Keith M. Poliakoff
Florida Bar No. 0477656

ACTIVE: 4726697_1

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

RESIDENTS FOR RESPONSIBLE GROWTH, LLC, a Florida Limited Liability Company, and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-for-Profit Corporation,

Plaintiffs,

vs.

CITY OF FORT LAUDERDALE, FLORIDA, by and through its City Commission, a Florida municipality, and GRAND BIRCH, LLC, a Florida Limited Liability Company,

Defendants.

CASE NO. 13-011238 (09)

NOTICE OF DROPPING PARTY
(AS TO CENTRAL BREACH ALLIANCE OF FORT LAUDERDALE, INC. ONLY)

Please take note that CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-for-Profit Corporation, is hereby withdrawn as Plaintiff pursuant to Rule 1.250, Fla.R.Civ.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail on this 9th day of July, 2013, to: Gunster, Yoakley & Stewart, P.A., at eservice@gunster.com, mmarcil@gunster.com, josborne@gunster.com;

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By Michelle L. Klymko
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11049993.1

Appeal

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 062013CA011308AXXXCE

RESIDENTS FOR RESPONSIBLE GROWTH, LLC, a Florida Limited Liability Company, and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-for-Profit Corporation,

Plaintiff,

vs.

CITY OF FORT LAUDERDALE, FLORIDA, by and through its City Commission, a Florida municipality,

Defendant.

STIPULATION OF VOLUNTARY DISMISSAL

The undersigned counsel, pursuant to Rule 1.420(a)(1)(B), Fla.R.Civ.P., hereby stipulate and agree to the dismissal of the Plaintiff, CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC.

DATED this ____ day of June, 2013.

CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC.

By_____
John Weaver, President

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By_____
Jonathan K. Osborne
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 13-011238 (09)

RESIDENTS FOR RESPONSIBLE GROWTH, LLC, a Florida Limited Liability Company, and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-for-Profit Corporation,

Plaintiff,

vs.

CITY OF FORT LAUDERDALE, FLORIDA, by and through its City Commission, a Florida municipality, and GRANT BIRCH, LLC, a Florida Limited Liability Company,

Respondents.

STIPULATION OF VOLUNTARY DISMISSAL

The undersigned counsel, pursuant to Rule 1.420(a)(1)(B), Fla.R.Civ.P., hereby stipulate and agree to the dismissal of the Plaintiff, CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC.

DATED this ____ day of June, 2013.

CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC.

By_____
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

RESIDENTS FOR RESPONSIBLE GROWTH, LLC, a Florida Limited Liability Company, and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., a Florida Not-For-Profit Corporation,

Plaintiffs,

v.

CITY OF FORT LAUDERDALE, FLORIDA, by and through its City Commission, a Florida municipality,

Defendant,

and

GRAND BIRCH, LLC, a Florida Limited Liability Company,

Intervenor/Defendant.
_____/

CASE NO.: 062013CA011308AXXXCE

GRAND BIRCH, LLC'S MOTION FOR SANCTIONS AGAINST PLAINTIFF, CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC., PURSUANT TO FLORIDA STATUTES SECTION 163.3215(6)

Defendant-Intervenor, Grand Birch, LLC ("Grand Birch"), by and through its undersigned counsel hereby moves this Court to enter an Order pursuant to Florida Statutes Section 163.3215(6), sanctioning Plaintiff, Central Beach Alliance of Fort Lauderdale, Inc. ("CBA"), and its attorneys, and granting Grand Birch an award of expenses, including attorney's fees and costs, incurred by Grand Birch from the inception of this case until CBA's voluntary dismissal of its Complaint for Declaratory and Injunctive Relief on July 8, 2013. Grand Birch states the following in support of this Motion:

BACKGROUND

On May 16, 2013, CBA filed its Complaint for Declaratory and Injunctive Relief against the City of Fort Lauderdale, Florida (the "City") pursuant to Florida Statutes Section 163.3215(3) ("CBA's Complaint"), alleging that CBA is entitled to declaratory relief and an injunction, preventing Grand Birch from moving forward with the development (the "Project") approved by City of Fort Lauderdale Resolution No. 13-65.[1] *See* Ex. A, Resolution No. 13-65. CBA also filed a Petition for Writ of Certiorari. *See* CBA's Complaint; Petition for Writ of Certiorari. The signatories on the Complaint included Daniel Wallach, an attorney at Becker of Poliakoff, P.A., and Keith Poliakoff, currently an attorney at Arnstein & Lehr, LLP.

On May 17, 2013, the CBA's membership voted overwhelmingly against the filing of any lawsuit relating to the Project. *See* Ex. B, Don Crinklaw, *Lawsuit Could Delay Waterfront Condo Project*, Sun-Sentinel, May 23, 2013 ("Just as the suit was filed, the Central Beach Alliance membership voted 120 to 50 not to be part of it."). The CBA's former president, Steve Glassman explained the lopsided vote: "We don't have enough facts. . . . We don't have all the options in front of us, we don't know what the chances are of prevailing." *Id.*

Nevertheless, despite insufficient facts and the questions posed by CBA's membership, Keith Poliakoff, CBA's counsel, predicted that "the litigation can go anywhere from two to five years" and that, "[i]n the meantime, [Grand Birch] can't start construction. We've experienced in history that because of these sorts of litigations the bank will not finance the development because there's a chance the court will rule in the plaintiff's favor." *Id.* Thereafter, CBA remained in the case.

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[1] This Motion seeks sanctions and costs and attorney's fees incurred litigating this case against CBA pursuant to Section 163.3215(6). Separately, Grand Birch will also seek fees against Residents for Responsible Growth, LLC, and its counsel, pursuant to both Section 163.3215(6) and Section 57.105.

Accordingly, Grand Birch answered CBA's Complaint and served Requests for Production, Admissions, and Interrogatories on CBA, seeking documents, information and communications related to the allegations of CBA's Complaint. After learning of CBA's vote, Grand Birch also sent letters to CBA's counsel, advising that CBA's claims were frivolous: "despite the vote of the CBA against joining the litigation . . . you proceeded to bring a lawsuit on behalf of the CBA anyway." *See* Ex. C, Letter from M. Marcil, Gunster, Yoakley & Stewart P.A. to D. Wallach, Becker & Poliakoff, P.A., K. Poliakoff, Arnstein & Lehr, P.A., and M. Klymko, Arnstein & Lehr, P.A. (June 24, 2013) (without enclosures).

On June 25, 2013, Michelle Klymko of Arnstein & Lehr contacted Grand Birch's counsel via email, notifying Grand Birch that "[she] would be filing a notice of voluntary dismissal . . . for the CBA." *See* Ex. D, Email from M. Klymko, Arnstein & Lehr, PA, to J. Osborne, Gunster Yoakley & Stewart, PA (June 25, 2013 1:53 PM). Although the Complaint had been pending for over forty days in the face of a published vote against the lawsuit, CBA's counsel claimed that "[she] was finally able to speak with John Weaver (CBA's President) yesterday and he confirmed that although the Board (of CBA) wished to be part of this matter, that the membership (of CBA) decided otherwise after the appeal/dec action was filed" against the City and Grand Birch, in CBA's name. *Id.*

But instead of dismissing CBA's claims immediately, Plaintiffs' counsel sent Grand Birch a proposed stipulation of dismissal, and pled with Grand Birch not to seek attorney's fees and costs against CBA for their initiation of this suit without the approval of CBA's members. *See* Ex. E, CBA's Proposed Stipulation; Ex. F, Email from M. Klymko, Arnstein & Lehr, to J. Osborne, Gunster, Yoakley & Stewart, P.A. (July 3, 2013 4:45 PM) (requesting confirmation in writing that Grand Birch would not seek an award of fees and costs against CBA). In doing so,

CBA's counsel changed its story about CBA's participation in this lawsuit. Where, previously, CBA's counsel claimed that CBA filed the lawsuit with its board's approval, as of June 28, 2013, CBA's position was that CBA was actually "inadvertently added as a party to this matter." *See* Ex. G, Email from M. Klymko, Arnstein & Lehr, P.A., to G. Wald, City of Fort Lauderdale, J. Osborne, Gunster, Yoakley & Stewart, P.A. and M. Wallach, Becker & Poliakoff, P.A. (June 28, 2013 3:54 PM). This new claim of "inadvertence" was rejected by Grand Birch. *See* Ex. H, Email from J. Osborne, Gunster, Yoakley & Stewart, P.A. to M. Klymko, Arnstein & Lehr, P.A. (July 7, 2013 6:29 PM) (Grand Birch "reject[s] [CBA's] contention . . . that CBA was "inadvertently" added as a Plaintiff in this case.").

ANALYSIS

Section 163.3215(6) authorizes this Court to sanction CBA and grant costs, including attorney's fees to Grand Birch because CBA's Complaint was "interposed" to "harass [and] to cause unnecessary delay for economic advantage, competitive reasons[,] [] frivolous purposes[,] [and] needless increase[s] in the cost of litigation." *See* Fla. Stat. § 163.3215(6) (explaining that, where these elements are present, the Court "*shall impose* . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses (including a reasonable attorney's fee) incurred because of the filing of [the] pleading, motion or other paper"); *see also Morton v. Heathcock*, 913 So.2d 662, 668 (Fla. 4th DCA 2005) ("It has long been recognized that use of the word 'shall' in [an attorney's fees statute], 'evidences the legislative intention to impose a mandatory penalty in the form of a reasonable attorney's fee once the determination has been made that there was a complete absence of a justiciable issue raised by the losing party.'"). CBA's Complaint violates every standard espoused by §

163.3215(6) because it was filed for expressly improper purposes: (1) delay and to (2) harass and gain a competitive advantage over Grand Birch.

CBA, through counsel, filed the Complaint before it had permission from CBA's membership, and then held a meeting only after the Complaint was filed. There was discussion at the CBA meeting of delaying and hindering projects within the Central Beach area so that no projects would be developed, and the City would have to change its zoning requirements to cap building heights at 70-feet. Nevertheless, CBA's membership immediately and overwhelmingly voted against CBA's participation in this lawsuit, with one prominent member noting, "We don't have enough facts."

Thereafter, CBA participated in the lawsuit for two more months. Why? The apparent explanation is set forth in the same article that reported that CBA voted against the lawsuit. In that article, CBA's counsel threatened that "banks will not finance the development" during the litigation, "which can go anywhere from two to five years." *See* Ex. B. Emails from CBA's counsel to Grand Birch's land use counsel during the approval process repeat this threat. *See* Ex. I, E-mail from Keith Poliakoff, Becker Poliakoff, to Heidi Davis Knapik, Gunster, Yoakley & Stewart, P.A. (November 29, 2012 10:32 AM); Ex. J, E-mail from Keith Poliakoff, Becker Poliakoff, to Heidi Davis Knapik, Gunster, Yoakley & Stewart, P.A. (February 06, 2013 01:30 PM); and Ex. K, E-mail from Keith Poliakoff, Becker Poliakoff, to Heidi Davis Knapik, Gunster, Yoakley & Stewart, P.A. (April 15, 2013 04:06 PM). CBA's Complaint and CBA's delay in withdrawing from the case brought the threat to fruition. Section 163.3215(6) protects Defendants against such actions.

Moreover, as demonstrated by way of examples in the following chart, CBA's Complaint relies on blatant factual and legal inaccuracies that further establish: (a) CBA's intent to use

litigation to delay the Project and force Grand Birch's and the City's hands and (b) Grand Birch's entitlement to sanctions and an award of costs and fees against CBA and its counsel. *See Davis v. Bill Williams Air Conditioning and Heating, Inc.*, 765 So.2d 114, 115 (Fla. 1st DCA 2000) ("filing a lawsuit with no factual basis is a classic situation in which fees should be assessed . . . .") (quoting *Sykes v. St. Andrews School*, 625 So.2d 1317, 1318 (Fla. 4th DCA 1993)).

Fiction v. Fact Chart

MISREPRESENTATION FROM CBA'S COMPLAINT		DEMONSTRABLE FACTS
The Project is "129.2 feet (inclusive of utility towers and elevator equipment to be located on top of the structure)." Complaint, ¶ 39.		The Project's structure is 115-feet tall, *see* Ex. M, City Commission Hearing Tr., p. 35, ll. 5-7; p. 161-62, ll. 24-25; 1-6, and both utility towers and elevator equipment are expressly excluded from the height measurements of a building or structure under Section 47-2.I. of the ULDR. *See* Section 47-2.I.
The Project's "on-site parking is woefully inadequate" and the Project "does not provide for safe and efficient on-site traffic circulation and parking," because the parking spaces are "too narrow (only 8.0 feet wide)." Complaint, ¶¶ 13, 40.		The 48 parking spaces provided by the Project satisfy the required parking for the Project pursuant to Section 47-20.2 of the ULDR and the standard parking space width in the City is 8 feet, 8 inches pursuant to Section 47-20.11 of the ULDR (and all of the Project's parking spaces satisfy this requirement). *See* Ex. L, City Commission Hearing Tr., p. 175, ll. 6-12.
Resolution No. 13-65 "fails to protect historical properties," because the Project is located next to "the Cormona Apartments, a historical building." Complaint, ¶¶ 17; 44.		Cormona Apartments was not designated a "historical property" when the Project was approved by the City Commission on April 16, 2013. *See* 47-35 ("*Historic Building*"); Ex. L, City Commission Hearing Tr., p. 113, ll. 4-8; Ex. M, Historic Preservation Bd., City of Fort Lauderdale, May 6, 2013 Meeting Minutes (approving application of Cormona Apartments for historic designation).

Plaintiffs were "depriv[ed] . . . [of] an opportunity to rebut or respond to [the City Commissioners' disclosures of ex parte communications]" during the April 16, 2013 City Commission Hearing. Complaint, ¶ 64.		Before closing the Hearing, Mayor Seiler asked if anyone had any more questions of staff, the applicant, and anyone else involved. *See* Ex. L, City Commission Hearing Tr., p. 190, ll. 15-23. CBA and RRG were silent. *See id.*

Because of these demonstrably false representations, which are material to CBA's claims, Grand Birch is entitled to sanctions and an award of costs and attorney's fees against CBA and its counsel, compensating Grand Birch for the expenses incurred before CBA finally withdrew. *See* § 163.3215(6) (the sanction must be imposed upon "the person who signed [the pleading], a represented party, or both."); *Hustad v. Architectural Studio, Inc.*, 958 So.2d 569, 571 (Fla. 4th DCA 2007) ("Even when the lawsuit is dismissed in its early stages," the movant for fees under Florida Statutes Section 57.105, a mandatory fees statute—like Section 163.3215(6)—"is entitled to present evidence and establish a record for the purposes of demonstrating entitlement to attorney's fees"; holding that the trial court's failure to consider a motion for award of attorney fees based on frivolous litigation merely because the lawsuit had been voluntarily dismissed was an abuse of discretion).

With respect to CBA, Grand Birch has incurred 26.3 hours litigating the CBA's claims. *See* Ex. N, Affidavit of Jonathan K. Osborne. The rates charged by Gunster, Yoakley & Stewart, P.A. were $400.00 per hour for lead counsel, Michael Marcil, who is the Co-Chair of the Business Litigation Practice Group of Gunster Yoakley with 19 years of experience, and $245.00 for Jonathan Osborne, who is an associate at Gunster, are reasonable under Florida law. The total fees and costs incurred to date in defending CBA's claims are $7,063.50.

Prior to setting this Motion for hearing, Grand Birch's counsel will consult with CBA's counsel about whether they will contest the reasonableness of Gunster's attorney's fees,

including the reasonableness of rates charged. If further litigation is necessary to adjudicate these issues, then Grand Birch requests Gunster's attorney's fees and costs expended on litigating the reasonableness of Gunster's fees, including any expert witness costs. *See Bennett v. Berges*, 50 So. 3d 1154, 1161 (Fla. 4th DCA 2010) (affirming award of attorney's fees "incurred in determining the amount of fees to be awarded, where the award of attorney's fees was a sanction.").

WHEREFORE, Grand Birch respectfully requests that this Court enter an order: (a) awarding costs and attorney's fees, jointly and severally, against CBA, Becker & Poliakoff, P.A., and Arnstein & Lehr, P.A., in the amount of $7,063.50 (and to include further fees spent litigating the entitlement, amount and reasonableness of the fee); and (c) awarding such other and further relief as the Court may deem just and appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email and U.S. Mail to: Daniel L. Wallach, Esquire, Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312 (dwallach@becker-poliakoff.com); Keith Poliakoff, Esquire (kpoliakoff@arnstein.com) and Michelle L. Klymko, Esquire (mklymko@arnstein.com), Arnstein & Lehr, P.A., 200 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, Florida 33301; Ginger Wald, Esquire, City of Fort Lauderdale, 100 North Andrews Avenue, 7th Floor, Fort Lauderdale, Florida 33301 (gwald@fortlauderdale.gov), this 30th day of July, 2013.

By: Michael W. Marcil
MICHAEL W. MARCIL