LIT 017

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

THE TOWN of LONGBOAT KEY, FLORIDA,
a municipality of the State of Florida,

Petitioner,

v.

ISLANDSIDE PROPERTY OWNERS COALITION, LLC, a Florida limited liability company, THE SANCTUARY AT LONGBOAT KEY CLUB COMMUNITY ASSOCIATION INC., a Florida non-profit corporation, and L'AMBIANCE AT LONGBOAT KEY CLUB CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Respondents.
_____/

Case No. 2D12-_____
L.T. Case No. 2010-CA-008261-NC

PETITION FOR WRIT OF CERTIORARI BY THE TOWN OF LONGBOAT KEY, FLORIDA

Seeking Review of Final Order Entered by the
Circuit Court of the Twelfth Judicial Circuit for Sarasota County

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PRELIMINARY STATEMENT

This is a petition for certiorari review of a circuit court's grant of a writ of certiorari. Petitioner, the Town of Longboat Key, Florida, a municipality of the State of Florida ("the Town"), was a respondent below. Key Club Associates, Limited Partnership, and Islandside Development, LLC, the owners of the Longboat Key Club (collectively, "the Club"), also were respondents below. The Club has separately filed a petition joining in this request for certiorari review by this Court and moved for consolidation.

Islandside Property Owners Coalition, LLC, a Florida limited liability company with managing members who are condominium associations in the area at issue ("IPOC"), the Sanctuary at Longboat Key Club Community Association Inc., and L'Ambiance at Longboat Key Club Condominium Association, Inc. were the petitioners below and are collectively referred to in this Petition as "Respondents."

The Town's Appendix contains four volumes. The Town refers to materials included within its Appendix as "V. __, Ex. __" where "V." represents the volume number and "Ex." is the exhibit number. Specific pages and paragraphs included within the exhibits are referred to as needed. The Zoning Code (V. 1, Ex. A) is referred to as "ZC."

All emphasis in quoted material is added unless otherwise noted.

PETITION FOR WRIT OF CERTIORARI

Pursuant to Florida Rule of Appellate Procedure 9.100(c), the Town seeks a writ of certiorari to review a final order of the Circuit Court for Sarasota County issued in its review capacity. The order granted a writ of certiorari quashing Ordinance 2009-25 of the Town approving a $400 million redevelopment of Longboat Key Club.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to review this Petition for Writ of Certiorari pursuant to Florida Rule of Appellate Procedure 9.030(b)(2)(B), which provides the district courts with jurisdiction to review final orders of the circuit courts acting in their review capacity. The Town acknowledges that second-tier certiorari review is more limited than the review previously performed by the circuit court. *See, e.g., Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1092 (Fla. 2010). As will be shown, however, the circuit court's order granting the writ of certiorari below constitutes a departure from the essential requirements of the law.

FACTS UPON WHICH PETITIONER RELIES

Longboat Key is a barrier island lying entirely within the boundaries of the Town. The Gulf Planned Development ("GPD") zoning district in which it lies consists of 314.59 acres, with a permissible density of 5.05 units per acre, for a

maximum potential density of 1,588 units. (V. 4, Ex. A, pp. 9-12). Only 892 of those units have been developed to date. (V. 4, Ex. A, pp. 11-12).

The GPD zoning district is governed by multiple tiers of land use regulations. First is the Town's Comprehensive Plan, which sets forth the Town's land development goals, objectives, and policies.[1] Next is the Town's Land Development Code, which includes the Zoning Code (Chapter 158). (V. 1, Ex. A). Finally, the Zoning Code requires that an Outline Development Plan be adopted for any planned unit development. (ZC §158.067(B)(1)).

Development within the GPD was first planned and implemented in 1976 through such an Outline Development Plan. (V. 3, Ex. A). Resolution 76-07 specifically approved the initial uses within the GPD, which included hotels, motels, multi-family development, cluster villas, conference facilities, restaurants and lounges, a marina, a beach club, and recreational facilities. *Id.*

Twenty amendments to the initial Outline Development Plan resulted in the development within the GPD district as it now exists. The last amendments before the amendment at issue here were in 1995. (V. 1, Ex. C, pp. 1, 28). Amendments to the Outline Development Plan must be consistent with the Zoning Code unless departures are granted. ZC §158.067(B)(1)(o) and (D)(3)(g). Departures may be granted if they are necessary or desirable to accomplish one or more of the

[1] The most recent amendment to the Plan, which is the pertinent amendment here, is in the Appendix at (V. 1, Ex. D).

purposes set forth in section 158.065, which include encouragement of flexibility in the design and development of the land in order to promote its most appropriate use. (ZC §158.065; V. 4, Ex. F, pp. 149-152).

The Club owns 146.31 acres within the GPD district. (V. 4, Ex. A, p. 5). Its property currently includes a golf course, a tennis center, and a clubhouse with a restaurant, health and wellness center, as well as business offices. (V. 4, Ex. A, p. 9; V. 1, Ex. B, p. 8; V. 3, Ex. E, p. 1.9).

In June 2009, the Club submitted an application to the Town for amendments to the Outline Development Plan that would allow it to redevelop its property within the GPD district with a mix of uses, which include golf club condominiums, units in the hotel, villa buildings, and a mid-rise building by the hotel, as well as a meeting center, wellness center and spa, new clubhouse, practice range, and parking facilities (the "Application"). (V. 4, Ex. A, pp. 10-11; V. 3, Ex. E, p. 1.9). All of these proposed uses are consistent with previously approved and existing uses in the GPD. (*See* V. 4, Ex. A, p. 8; V. 4, Ex. F, pp. 10-11). The cost is estimated to be $400 million. (V. 4, Ex. G, pp. 17-19).

Upon finding the Application to be complete, the Town's Planning, Zoning, and Building Director referred the Application to the Planning and Zoning Board, pursuant to Section 158.067(B)(2) of the Zoning Code. (V. 1, Ex. C, pp. 1-2). Between October 21, 2009 and December 10, 2009, the Board held a series of

properly noticed, quasi-judicial public hearings on the Application. (V. 1, Ex. C, p. 2). On December 10, 2009, the Board recommended that the Application be approved by the Town Commission. (V. 3, Ex. F).

The Town Commission reviewed the Application during a number of properly noticed, quasi-judicial public hearings beginning on January 8, 2010, and concluding on June 30, 2010. (V. 1, Ex. C, p. 2). While these hearings were ongoing, the Town amended its Zoning Code, through Ordinance 2010-16, to clarify certain parts of the Code that were asserted to be inconsistent with the Club's Application. (V. 1, Ex. B). Under Exhibit B to this Ordinance, the calculations of the existing nonresidential uses in the GPD district, which totaled nearly 15 percent and included a variety of commercial uses, were set forth, thereby making clear that such uses are permitted under the Code. (V. 1, Ex. B, p. 8). In addition, the Application itself was amended several times to address concerns raised by Town staff, the Town Commission, and others, including Respondent IPOC. (V. 3, Ex. K, p. 2).

The Town's Planning Director's May 28, 2010 report to the Town Commission on the Application expressly stated that, although she could not recommend approval of the Application, it was "written in a form that would allow the Town Commission to approve the redevelopment plan as currently submitted." (V. 3, Ex. H, p. 17). In addition, the Planning Director testified that the Zoning

Code allowed the Town to grant such approval. (V. 4, Ex. B, p. 5). She did not object to the general mix of proposed land uses. (V. 3, Ex. H, p. 10; V. 4, Ex. E, p. 20). As she explained, her interpretation of the Code as allowing a mix of residential and nonresidential uses was consistent with years of the Town's prior interpretations and applications of the Code. (V. 4, Ex. B, p. 33; V. 4, Ex. F, pp. 10-11).

In a later staff report to the Town, the Planning Director reiterated that she could not recommend approval of the Application, saying the proposed redevelopment was "potentially overbuilt" and expressing concern over the "magnitude" of the land uses. (V. 3, Ex. H, p. 10). When testifying, however, she acknowledged that the proposed development was consistent with other developments previously approved in the GPD. (V. 4, Ex. F, pp. 10-11). Other professional planners specifically testified that the departures were justified under the criteria of the Zoning Code and that the Application complied with the Zoning Code in all respects. (V. 4, Ex. F, pp. 120-146; V. 4, Ex. C, pp. 3-4).

The Planning Director further testified that the Zoning Code did not limit the requested departures from the Code. (V. 4, Ex. F, pp. 27-28). The special counsel representing the planning staff flatly told the Town Commission on their behalf that approval of the Application was allowable with certain conditions, all of which were accepted by the Club. (V. 4, Ex. E, pp. 50-58). On June 30, 2010, after the

Town Attorney similarly advised the Town that it had the authority to approve the Application, the Town, in a 6-to-1 vote, adopted Ordinance No. 2009-25, which approved the Application subject to certain conditions (the "Development Order"). (V. 4, Ex. F, pp. 177-184).

The Development Order allows 351 units, which results in less than 80% of the allowable units per acre in the GPD and a density of 3.95 units per acre on the Club's property. (V. 1, Ex. C, p. 3). The Town expressly found that the proposed development "is consistent with the statement of objectives of the planned unit development and is consistent with the Town's Comprehensive Plan." (V. 1, Ex. C, pp. 2-5). The Town further found the proposed development is "an effective, unified use of the property as a mixed-use resort development while making appropriate provisions for recreational facilities, and the preservation of open space, scenic features, and amenities of the site and the surrounding areas . . . ." (V. 1, Ex. C, pp. 2-5).

The Town also set forth 16 paragraphs of findings of fact in the Development Order that addressed the approved departures from the Code, and specifically found that each departure was "consistent with the intent of the Code and in the best interest of the Town . . . ." (V. 1, Ex. C, pp. 2-5). These findings were more specific than those in orders on similar amendments to the Outline

Development Plan for this district. (*See, e.g.,* V. 3, Ex. A, Res. 76-7 and Ex. B, Res. 80-21).

Thereafter, Respondents filed a petition for a writ of certiorari in the circuit court challenging the consistency of the Development Order with the Town's Zoning Code. (V. 2, Ex. B). They also filed a declaratory action challenging the Development Order, an action that still is pending. (V. 2, Ex. E, p. 3). In addition, IPOC filed a proceeding with the Florida Department of Community Affairs, asserting that Ordinance 2010-16, which had clarified certain parts of the Code that IPOC asserted were inconsistent with the Application, was inconsistent with the Town's Comprehensive Plan. (V. 3, Ex. O, p. 1).

Following a hearing, the Department of Community Affairs issued a 34-page order, finding Ordinance 2010-16 to be a permissible amendment to the Code. (V. 3, Ex. O). In doing so, the Department acknowledged that the Code permitted the requested commercial uses. (V. 3, Ex. O, p. 15). The Department found, however, that nonresidential uses or district-wide clustering of density in the GPD zoning districts were not permissible under the Town's Comprehensive Plan. *Id.*

Subsequently, by Ordinance 2011-28, the Town amended its Comprehensive Plan to make clear and explicit the Town's intent to allow nonresidential uses, including commercial uses, and district-wide clustering of density in the GPD. (V. 1, Ex. D, p. 1). The Department reviewed the amendments, did not object to them,

and, on September 29, 2011, dismissed its objections to the Zoning Code amendments enacted by Ordinance 2010-16. (V. 3, Ex. R, p. 2). The Department specifically concluded that the Town's current land development regulations allowing commercial uses and district-wide clustering of density in the GPD zoning districts were consistent with the Town's Comprehensive Plan and Zoning Code. (*Id.*).

Thereafter, however, the circuit court ruled that the Development Order violated the Town's Zoning Code and quashed it by a writ of certiorari issued on December 30, 2011. (V. 2, Ex. A). The court ruled for the Respondents on each of the seven Code issues they raised, including their contention that the Code did not allow the proposed commercial/office uses in the GPD zoning district. (*Id.* at 7-18). The court specifically refused to consider Ordinance 2010-16 in determining what uses and density are allowed in the GPD district. (*Id.*). In setting forth the factual underpinnings of its ruling, the court focused on the Planning Director's failure to recommend approval of the Application and characterized the June 28, 2010 staff report and her testimony as indicating the Club's application and requested departures did not comply with the Code. (V. 2, Ex. A, pp. 3-4).

The court did not, however, mention the Planning Director's acknowledgment that, despite her concern about the proposed density, the Application complied with the Town's prior interpretations and application of its

Zoning Code. (V. 4, Ex. F, pp. 9-10; V. 4, Ex. B, p. 33). Nor did the court mention the disagreement of other professional planners with the Director's opinion about density or the opinions of the Town attorney and special Town counsel for the planning staff that the Town had the authority to approve the Application. (V. 4, Ex. E, pp. 50-58).

The court likewise did not mention that (1) the Department of Community Affairs interpreted the Zoning Code in the same manner as the Town with respect to the matters at issue here. (V. 3, Ex. O; V. 3, Ex. R); (2) the Town expressly amended the Comprehensive Plan by Ordinance 2011-28 and its Zoning Code by Ordinance 2010-16 to clarify its intent to allow commercial uses and clustering of density in the GPD district (V. 1, Ex. D); and (3) the Town had approved a multiplicity of similar commercial uses in the GPD over the last three decades. (V. 1, Ex. B, p. 8; V. 3, Ex. A & C; V. 4, Ex. B, p. 33; V. 4, Ex. F, pp. 10-11).

Instead, the court ruled that Respondents' interpretation of the Code was the only reasonable interpretation that could be made. (V. 2, Ex. A). The court expressly refused to defer to the Town's interpretation of its Code, saying it was "unreasonable" and the Code was "clear and unambiguous" in precluding the proposed redevelopment. (V. 2, Ex. B, pp. 7, 9, 10, 13, 18 and 15). The court did not apply the specific principles of zoning code interpretation enunciated in *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552 (Fla. 1973), which require

that local land use regulations be consistently applied in conformity with a municipality's intent and, whenever possible, be construed to favor property owners.

NATURE OF RELIEF SOUGHT

The Town seeks an order from this Court granting this petition for certiorari, quashing the circuit court's order, and remanding for further proceedings consistent with the essential requirements of the law.

ARGUMENT

I. Standard Of Review

A district court considers a "second-tier" petition for certiorari review for the limited purpose of determining whether the circuit court departed from the essential requirements of the law. *Custer*, 62 So. 3d at 1092; *Sarasota County v. BDR Investments*, 867 So. 2d 605, 607 (Fla. 2d DCA 2004). A circuit court departs from the essential requirements of the law when it fails to apply the correct law. *Custer*, 62 So. 3d at 1092. The failure to apply an established principle of law that results "in a miscarriage of justice" warrants the grant of certiorari by the district court. *(Id.)*.

In its order, the circuit court relied on the Planning Director's failure to recommend approval, and thereby violated the essential requirements of the law by reweighing the evidence. The court only was permitted to review the record for

evidence supporting the Town's Development Order approving the Application, and was not entitled to accept evidence contrary to it as a basis for granting certiorari. *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 846 n.25 (Fla. 2001). The views of the Planning Director that did not support approval were "outside the scope of the inquiry" on first-tier certiorari review of the Town's order approving the Application. *(Id.)*.

Furthermore, the circuit court failed to apply the specific principles set forth in *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552 (Fla. 1973), which assures consistency in the application of local land use regulations and deference to local agency constructions of those regulations that favor property owners' rights to use their property as they desire. The court also did not follow the Town's legislative intent as set forth in its clarifying amendments to the Code and the Comprehensive Plan, an intent *Rinker* says courts must honor. Because the circuit court applied the wrong standard of review in determining whether the Town's Zoning Code clearly and unambiguously precludes the Town's approval of the Application, the court further violated the essential requirements of the law.

II. The Circuit Court Departed From The Essential Requirements Of The Law By Conducting An Independent Review Of The Record And Accepting Evidence Contrary To The Town's Decision.

On "first tier" certiorari review of a local government decision, the circuit court must determine (1) whether procedural due process is accorded, (2) whether

the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Sarasota County*, 867 So. 2d at 607 (quashing circuit court's order that reversed local board's zoning determination).

In performing that review, the circuit court is required to accept the Town's findings so long as they are supported by competent substantial evidence. *Clay County v. Kendale Land Development*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007); *accord Premier Developers III Assocs. v. City of Fort Lauderdale*, 920 So. 2d 852, 853 (Fla. 4th DCA 2006). It is legally irrelevant whether the record also contains competent substantial evidence supporting a contrary decision. *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1275 (Fla. 2001); *Clay County*, 969 So. 2d at 1181.

Rather, the court's limited task "is to review the record for evidence that *supports* the agency's decision, not that *rebuts* it—for the court cannot reweigh the evidence." *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 846 n.25 (Fla. 2001) (emphasis in original). The court departs from the "essential requirements of the law" if it conducts an independent review of the record. *G.B.V. Int'l*, 787 So. 2d at 845. That is exactly what happened here: The circuit court reweighed the evidence in reaching its determination that the Development Order violated the essential requirements of the law.

Specifically, the court improperly gave weight to the fact that the Planning Director "issued a staff report indicating she could not recommend approval of the revised application" in May 2010. (V. 2, Ex. A, pp. 3-4). But, as the supreme court in *G.B.V. International* explained with regard to a local government agency's decision to deny a plat application, the "staff recommendation [for approval of the plat] is outside the scope of the inquiry" on first-tier certiorari review. 787 So. 2d at 846 n.25. The circuit court was required to look for evidence supporting the Town's decision on the Application, not evidence rebutting it.

The court further relied on a revised staff report, where the Planning Director again declined to recommend approval, and testimony that the court characterized as saying that the "Club's application and requested departures did not comply with the Zoning Code." (*Id.* at 4). But, on its face, that report did not broadly address all of the proposed departures and instead rested on a concern with the proposed density: "[i]n the staff's *opinion*, the utilization of departures . . . by the Applicant are not entirely consistent with the Zoning Code" because of a "*concern*" that the requested density could result in potentially "overbuilt parcels." (V. 3, Ex. K, p. 2). The revised report does not state that the Town could not approve the Application, it merely recommended against it as a planning matter.

Likewise, the court's summary characterization of the Planning Director's testimony overstates her actual testimony, which was simply that "it's Staff's

opinion that the Applicant's vision for the south parcel has always been extremely dense and extremely intense; *perhaps* too intense to be consistent with the Town's Land Development Regulations and Comprehensive Plan." (V. 4, Ex. F, p. 10). Once again, that is not a flat statement that the Application does not comply with the Code.

Moreover, in testimony the court disregarded, the Planning Director immediately went on to say, "*but having said all that, it is consistent with the development patterns of the Islandside GPD along the water.*" (V. 4, Ex. F, pp. 10-11). There is no evidence that this previously approved development is in violation of the Code. And, while the Planning Director expressed concern about the proposed density of the requested uses here, it is undisputed that the Code permits 5.05 units per acre, while the approved development is only 3.95 units per acre.

The circuit court could not simply seize on isolated testimony by the Planning Director that would support disapproval of the Application. Instead, it had to consider her testimony that supported the Town's approval of the Application. When that is done, the snippet of testimony cited by the court cannot be read to disavow the initial report acknowledging that the Application could be approved and that its "proposed mix of land uses is not objectionable." (V. 4, Ex.

E, p. 20). The court impermissibly ignored that evidence supporting the Town's approval of the Application.

Furthermore, the court made no mention of any of the other testimony and evidence that the Town received over the course of its many hearings that supported its approval of the Application, including testimony by other professional planners that the mass, intensity, density and scale of the project were appropriate and beneficial to the Town.[2] As the Town Attorney explained to the Town Commission in advising that it could approve the Application despite the Planning Director's recommendation, the Director's concerns about the density—which she admitted was consistent with previously approved use—was merely her opinion of a planning matter and entitled to no more weight than any other opinion of qualified planning professionals. (V. 4, Ex. F, pp. 112-114).

In light of the evidence supporting the Town's approval of the Application, the Planning Director's failure to recommend approval was not a proper basis for the circuit court to consider in its certiorari review of the Development Order. To consider evidence contrary to the Town's decision departs from the essential requirements of the law. The circuit court *only* should have looked at whether

[2] All of this evidence was in the circuit court record and brought to the court's attention through the Town's and Club's briefs. (V. 2, Ex. D, pp. 10-11; V. 2, Ex. C, pp. 10-12).

there was competent substantial evidence—which there was—to *support* the Town's issuance of the Development Order.

III. The Circuit Court Departed From The Essential Requirements Of The Law By Failing To Defer To The Town Commission's Interpretation Of Its Zoning Code.

In its statement of the legal standards for certiorari review, the circuit court said that it had a duty "to say what the law is," and hence it "need not defer to a construction of the Zoning Code by the Town or [its planning director] if the language of the Code is clear and unambiguous." (V. 2, Ex. A, p. 7). The circuit court further stated that it would not "defer to the Town's interpretation of the Zoning Code where the interpretation is unreasonable or clearly erroneous." (*Id.*).

The circuit court did not acknowledge or apply controlling principles of Florida law from *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552 (Fla. 1973), that local zoning regulations should be both consistently applied and construed whenever possible to favor property owners. This failure to apply the correct law fatally marred the court's determinations of all of the Code issues in favor of the Respondents.

A. Deference Is the Rule, Not the Exception.

Under Florida law, "the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous." *Miles v. Florida A&M*

University, 813 So. 2d 242, 245 (Fla. 1st DCA 2002) (quoting *Pan Am. World Airways v. Fla. Pub. Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983)); *accord Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002). A local board's interpretation of its municipal ordinance is entitled to equal deference. *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999).

The reason for this deference is two-fold. First, the agency or local commission has a greater understanding of the ordinance it regularly applies than the courts. Second, deference furthers the principle that local regulations be consistently administered. *G.B.V. Int'l*, 787 So. 2d at 842 ("A decision granting or denying a site plan or plat application is governed by local regulations, which must be uniformly administered."); *Rinker*, 286 So. 2d at 556 (noting a fundamental problem with a zoning code being "open to whatever determination the zoning director and the City of North Miami might from time to time choose to give it").

In accord with this requirement of deference, an agency's interpretation must be upheld as long as it is reasonable. *AMISUB v. Dep't of Health and Rehab. Srvcs.*, 577 So. 2d 648, 649 (Fla. 1st DCA 1991). If there is more than one reasonable way to understand an ordinance, the agency's interpretation prevails. *Las Olas*, 742 So. 2d at 312-13. Even if an ordinance appears facially unambiguous, there still may be more than one reasonable interpretation because "[a] literal interpretation need not be given the language used when to do so would

lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity." (*Id.* at 312).

In short, deference must be afforded to the agency unless the language of the ordinance is "clear and unambiguous," such that the ordinance conveys a "clear and definite meaning" through its plain language that is contrary to the agency's interpretation. *Fla. Hosp. v. Agency for Healthcare Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002). Here, the circuit court failed to defer to the Town's interpretation of language in its Zoning Code that is, at the very least, ambiguous and does not clearly and unambiguously preclude approval of the Application. The court thereby created an inconsistency in the application of the Code that disfavors the property owners' right to use their property as they desire and ignores the Town's stated intent to allow such uses. Under *Rinker*, this is a violation of the essential requirements of the law.

In *Rinker*, the Florida Supreme Court granted a writ of certiorari to a property owner seeking to build a concrete batching plant on its property. Based on the zoning director's interpretation of the pertinent zoning ordinance, the town commission, circuit court, and district court all concluded that it did not permit the requested industrial use. The supreme court rejected that conclusion as an improper interpretation of the zoning ordinance, emphasizing that the city had

previously permitted similar industrial uses under its zoning code. *Rinker*, 286 So. 2d at 554-56.

The supreme court explained that, because consistency with prior approvals is important and reflective of legislative intent, a zoning code should be interpreted in keeping with that evidence of intent. *Id.* at 556. The court laid great weight on the statements of town officials establishing the intent underlying the changes in the language of the ordinance, stating that such "clear legislative intent . . . should not be ignored." *Id.* Furthermore, because zoning ordinances impinge upon private ownership rights, they should be interpreted to favor the property owner when there is "no definition or clear intent to the contrary." *Id.* at 553.

The circuit court failed to acknowledge and apply the specific principles of zoning code interpretation set forth in *Rinker*. And, also contrary to *Rinker*, it expressly refused to consider the legislative intent reflected by the ordinances that the Town enacted to clarify its intent to allow the uses and density thereof proposed in the Application. Instead, the court only cited *Rinker* for the general (and unchallenged) proposition that the Town Commission must follow the rules of statutory construction and that, if the Zoning Code is clear and unambiguous, it must be interpreted as written. (V. 2, Ex. A, p. 6).

As we now show, however, the Zoning Code does not clearly and unambiguously preclude approval of this proposed development. In failing to

follow the controlling principles of *Rinker*, the circuit court applied the wrong standard of certiorari review, a failure that once again affected its entire order.

B. The Town's Zoning Code Did Not Clearly and Unambiguously Preclude The Town's Interpretation.

Under *Rinker,* the Zoning Code must be construed as written, with its language being accorded its common meaning. 286 So. 2d at 553. The Code's provisions should be read together, so as to give effect to all of its terms. *Las Olas*, 742 So. 2d at 313. Moreover, where there is evidence of the legislative intent regarding the language at issue, that intent "should not be ignored." *Rinker*, 286 So. 2d at 556.

When the proper standard of review is applied, there can be no doubt that the Town's interpretation of its Code must be given deference. It bears emphasis in this regard that the Town's interpretation need not be the only interpretation or even the most reasonable interpretation—it need only be a reasonable interpretation. Under *Rinker,* the circuit court erroneously substituted its reading of the Town's Code for the Town's reading of, and clear intent with respect to, its Code.

1. The Zoning Code Can Be Reasonably Interpreted As Permitting Commercial Uses in the GPD District.

The circuit court's threshold finding was that the Development Order departed from the essential requirements of the law by "permitting commercial

uses not 'designated' for the GPD zoning district." (V. 2, Ex. A, p .7). The court concluded that the Zoning Code was "clear and unambiguous" in precluding those uses and that the Town's interpretation of its Code to allow them was "clearly erroneous." (*Id.* at 7-9). To the contrary, that interpretation was reasonable, especially when all of the Code provisions—including amendments passed during the Application's review to remove any doubt on this issue—are read as a whole to give them effect. At worst, there was an ambiguity on the issue, which would have to be resolved under settled Florida law in favor of the Town's consistent interpretation and clear legislative intent.

To begin with, "residential," "tourism," and "commercial" uses are all defined terms in the Code. "Residential use" refers to the occupancy of a building, or a portion of a building, for a period of at least 30 days. (ZC § 158.006). A "tourism use" is a residential occupancy of less than a month. (*Id.*). Any "activity involving the purchase and sale or exchange of goods, commodities or services carried out primarily for the purpose of gaining a profit" is defined as a "commercial use." (*Id.*).

There is, on the other hand, no definition of "nonresidential uses," a term used throughout the Zoning Code. As the term is commonly understood, however, "nonresidential uses" encompass everything other than residential uses. The Planning Director testified that the Zoning Code intends this broad, common

understanding of the term: "It's very simple. Non-residential has been applied to tourism, commercial, office and marina . . . . If it doesn't have an 'R' in front of it, basically it is nonresidential." (Vol. 3, Ex. T-6, p. 33).

Consistent with that understanding, the Town has long approved commercial uses, such as offices, meeting spaces, and a spa, in the GPD. Although the Zoning Code is complex and has undefined terms, it cannot be said to clearly and unambiguously preclude the Town's interpretation and legislative intent to allow such uses.

In rejecting the Town's interpretation, the circuit court focused on section 158.125, which provides a "Use Table" that the court concluded does not include office, meeting rooms, spas or commercial recreational uses as allowable uses in the GPD." (V. 2, Ex. A, pp. 7-9). But section 158.125 does not itself specify all of the "permitted uses with site plan review" for the GPD district; rather, it refers to Code sections 158.065 through 158.071, which allow "mixed uses, residential and *nonresidential*." (ZC § 158.071(A)(2)). The court failed to follow the Use Table's reference to section 158.071, which specifically allows nonresidential uses up to 15% of the area in the GPD. Nothing in those sections says that "nonresidential uses" cannot include commercial uses.

In refusing to accept the Town's interpretation that the "nonresidential uses" referenced in section 158.071(A)(2) and "mix of land uses" in 158.009(L)

encompass the type of "commercial uses" proposed here, the court ruled that such uses are not "designated" in the Zoning Code, as the Code requires.[3] (V. 2, Ex. A, p. 9). Although the Town has consistently interpreted "a mix of land uses" as a sufficient designation, the court ruled that each of the particular commercial uses needed to be specifically "set apart." (*Id.*). But the commercial uses approved since 1976 in the GPD district are not specifically "set apart" in the Code either, thus resulting in an inconsistent application of the Code under the court's interpretation.

Read as a whole, the Zoning Code intends "nonresidential" development to be allowed as part of the "mix of land uses" designated for the GPD district. There is no limitation on the types of nonresidential uses permitted as part of that "mix." The Planning Director specifically stated that the mix of uses proposed in the Application was not objectionable, and nothing in the revised staff report that the circuit court relied on in quashing the Development Order suggested that the proposed commercial uses violated the Code. (V. 3, Ex. H, p. 10; V. 4, Ex. F, p. 20).The court's interpretation of the Code to exclude them defeats the legislative intent demonstrated by the historical development approved in the GPD district.

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[3] The circuit court acknowledged that section 158.009(L) provided for a "mix of land uses set forth in the regulations of this chapter," but said that the provision only made "mention of residential uses and tourism uses." (V. 2, Ex. A, p. 8). That ignored the specific mention of "other nonresidential uses" in subsection (1) of that section relating to density calculations.

In all events, the court's interpretation ignores the whole purpose of Ordinances 2011-28 and 2010-16, which were adopted precisely to make clear the Town's intent that the proposed uses and density were permissible. The Zoning Code specifically indicates that a clarification of intent through an amendment of the Comprehensive Plan—a clarification Ordinance 2011-28 expressly made—should guide interpretation of the Code. (ZC § 158.005). Moreover, the Florida Supreme Court has specifically held that an amendment adopted soon after a dispute as to a legislative act arises is considered an interpretation of the original law and not a substantive change. *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985).

The circuit court nonetheless refused to consider Ordinance 2010-16, stating that it "encompasse[d] only those lands that were in nonresidential use as of the date that Ordinance 2010-16 was adopted." (V. 2, Ex. A, pp. 9-10). The court cited *Overstreet v. Blum*, 227 So. 2d 197 (Fla. 1969), as supposedly establishing that "as amended" only meant "as amended" prior to the effective date of Ordinance 2010-16, which was May 20, 2010. (*Id.*). The court then concluded that Ordinance 2010-16 did not apply to the Development Order because "a statute that incorporates another statute (or ordinance) by specific reference takes that ordinance as it is on the date of the adoption of the statute, and does not include future amendments unless that intent is specifically stated." (*Id.* at 9-10).

The reference in Ordinance 2010-16 to "as amended" plainly can be read, however, to mean as the provision may be amended at any time. Indeed, that is the only reading that carries out the Town's intent in adopting an amendment that would confirm approval could be granted as to this Application. The court's strained reading of "as amended" contravened the drafters' clear intent, and the supreme court's *Overstreet* decision does not require the Ordinance to be read so narrowly. The statute at issue in *Overstreet* did not even contain the language "as amended."

Notably, the Department of Community Affairs specifically agreed the Ordinance permissibly amended the Town's Code to establish the appropriateness of the proposed uses and density thereof. Under *Rinker*, the court could not ignore the evidence of the Town's legislative intent and adopt a narrow construction of "as amended" that impaired the property owners' rights and contravened the plain intent of the Town. Instead, in the face of any ambiguity, the court had to defer to the Town's interpretation.

It remains only to note that, because the court improperly construed "as amended," it also erroneously concluded that the Development Order permitted more than the allowable percentage of nonresidential uses. As Exhibit B of Ordinance 2010-16 makes clear, the Ordinance clarified (and did not expand) the percentage of nonresidential uses. The Development Order is entirely consistent

with Ordinance 2010-16, and that clarification of its Code by the Town could not be disregarded by the circuit court.

2. The Town's Interpretation Of Its Code On The Other Issues Raised By Respondents Also Is Reasonable.

The court also concluded that the departure findings in the Town's Development Order are not a "clear and specific statement of how the code departures are necessary or desirable to accomplish one or more of the stated purposes of the planned unit development." (V. 2, Ex. A, pp. 11-12) (quoting ZC § 158.067(D)(3)(g))). The Code, however, does not define "clear and specific." At worst, that requirement is ambiguous as to exactly how much specificity is required, and thus deference is once again required to the Town's historical interpretation that findings such as those made here, which are similar to those in the past, are sufficient.

Moreover, the Town made sixteen findings of fact related to the departures. (V. 1, Ex. C, pp. 2-5, paragraphs A. to P.). The circuit court, however, focused only on the four findings that explicitly reference those departures. (V. 2, Ex. A, p. 11). Other findings [A, D, H, L, M and N], however, also are related to purpose and desirability of the departures. Read as a whole, the Town's findings cannot be said to not be "clear and specific" and in violation of the Code's requirements.

The court next said that the Code required the Development Order to contain findings concerning the requirements for final site plan applications and approvals.

(*Id.* at 12). As the evidence showed, however, such findings were unnecessary because the cited sections of the Code pertain to the site plan approval process and the Club's Application did not contain—and did not need to contain—a site plan. The Planning Director specifically testified that "the reasonable interpretation of the Code would allow me to recommend conditions to this Commission to adopt that would then carry forward to site plan, ensuring that all of those criteria are met *at the time of site plan*." (V. 4, Ex. E, pp. 33-34). Thus, there was again a reasonable interpretation of the Code that the court rejected.

The court's fifth finding that the approval results in inadequate parking spaces similarly misapprehends the Code's provisions. (V. 2, Ex. A, pp. 14-16). Section 158.128 of the Zoning Code specifies that a hotel must have one parking space per unit, plus "50 percent of the parking spaces required for additional uses, including restaurants and shops." In granting certiorari, the court narrowly construed "additional uses" to exclude the proposed meeting center, spa/fitness center, and offices at the hotel because they would be on a separate parcel from the hotel.[4] But the Code does not define "additional uses," much less limit it in that

[4] In saying that the parking spaces would be on a separate parcel from the hotel, the court ignored the evidence that the Application was for development of a single body of land that simply happened to have two different, but affiliated owners. One integrated development was proposed, and it was proposed by a single application, not by separate applications for separate parcels. The court once again improperly weighed the evidence in granting certiorari on this ground. *See page 12, supra.*

way. (V. 4, Ex. B, p. 36). The court thus violated the principles of *Rinker* by adopting a construction of an undefined term that is contrary to the Town's interpretation, and thereby finding that there was inadequate parking for those "additional uses."

The sixth finding—that parking garages are not permissible uses under the Code (*Id.* at 16-17)—rested on the same rationale as the court's threshold finding. The court concluded that because sections 158.009(L) and 158.025 do not explicitly name "parking garages" as a permissible use, they are not "designated" for the GPD district. As discussed above, this ignores that such a use is reasonably encompassed within the designation of "a mix of land uses" permitted in the GPD under sections 158.009(L)(1) and 158.071(A)(2).

Finally, the court ruled that the Town could not approve the Club's amended Application because nothing in the Zoning Code expressly permits amending an application after the Planning and Zoning Board recommends it to the Town Commission. (*Id.* at 17-18). Nothing in the Code, however, bars amendments after the Board's recommendation, much less when such amendments further that recommendation. The Town's process conformed to the standard from *Neumont v. State*, 967 So. 2d 822 (Fla. 2007), which requires that the enactment process must begin anew only if the ordinance's general purpose is changed. As no such fundamental change in the Ordinance's general purpose occurred during the course

of the amendments here—which were simply made to address concerns raised during the application process—review did not have to be restarted.

3. The Court's Failure To Defer To The Town's Interpretation Of Its Code Violates The Essential Requirements Of The Law.

The Zoning Code unquestionably is complex and may be subject to different readings. Under settled Florida law, however, deference must be given to the Town's interpretation and intent in every instance where there is some ambiguity, given the need for consistency in application of the Zoning Code. That deference is required even more where, as here, interpretation favors the property owners' right to develop its property in the manner it deems appropriate.

By failing to defer to the Town's interpretation of its Zoning Code, the circuit court departed from the principles set forth in *Rinker* and failed to favor the property owners and ensure consistency with the legislative intent of the Code as reflected by the Town's past approvals, its clarifying legislation, and the testimony and advice it received during the application process. This failure to apply the correct law pervaded the court's certiorari order and resulted in its quashing of the Development Order. The court's prevention of the planned development of the Club's property is a miscarriage of justice.

CONCLUSION

The circuit court departed from the essential requirements of law in quashing the Town's Development Order. This Court should grant the Town's petition for certiorari, quash the circuit court's order, and remand for further proceedings consistent with its order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this petition was furnished by U.S. mail delivery to the Honorable Charles E. Roberts, Sarasota County Judicial Center, 2002 Ringling Blvd., Sarasota, Florida 34237; Robert Lincoln, Esq., Post Office Drawer 4195, Sarasota, Florida, 34230-4195, counsel of record in the lower tribunal for IPOC, Sanctuary, and L'Ambiance; John Patterson, Esq., 46 North Washington Boulevard, Suite 1, Sarasota, Florida, 34236, and Jim D. Syprett, Esq., 1900 Ringling Boulevard, Sarasota, Florida, 34236, counsel of record in the lower tribunal for Key Club Associates Limited Partnership and Islandside Development, LLC; this 30th day of January, 2012.

Sylvia H. Walbolt

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure.

Sylvia H. Walbolt

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