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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

Appellate Division

Florida Audubon Society,

Petitioner

v.

Town of Fort Myers Beach (FL) CASE NO.: 23- XXXX

and

Squeeze Me Inn, LLC, and
Texas Hold'Em, LLC,

Respondents

____________________________________/

PETITION FOR WRIT OF CERTIORARI[1]

Pursuant to Florida Rule of Appellate Procedure 9.100(f), Petitioner, Florida Audubon Society, hereby petition this Honorable Court for issuance of a Writ of Certiorari to quash the action of the Town of Fort Myers Beach approving Resolution 23-22, granting Special Exception SEZ20220103 and Variance VAR20220104 to allow the construction of a boardwalk / dune crossover for property

[1] An appendix has been filed simultaneously herewith in accordance with Fla. R. App. P. 9.220

on Ft. Myers Beach. Resolution 23-22 was filed with the Town Clerk, and thus rendered,[2] on March 8, 2023. Pursuant to Fla. R. App. P. 9.100(c), a petition for writ of certiorari must be filed within 30 days of rendition of the Town's Order. The 30-day deadline from March 8, 2023 is April 7, 2023, pursuant to Fla. R. Jud Admin. 2.514.

I. INTRODUCTION AND BASIS FOR INVOKING JURISDICTION

This Petition for Certiorari is brought pursuant to Article V, Section 5(b) of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(c)(3) and 9.100.

Under Florida law, certiorari is the appropriate mechanism in circuit court to review quasi-judicial decisions of a local government that approve development orders. Rule 9.100(c)(1)(2); Fla. R. App. P.; *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Hirt v. Polk County Board of County Commissioners*, 576 So. 2d 415 (Fla. 2nd DCA 1991); *Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995).

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[2] Rendition occurs when a "signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(i)

A party is entitled to certiorari review of a lower tribunal's quasi-judicial action, i.e., one in which notice of a hearing, an opportunity to be heard and other basic requirements of due process are required. *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1960); *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1958); *County of Volusia v. City of Daytona Beach*, 420 So.2d 606 (Fla. 5th DCA 1982). A quasi-judicial proceedings is one in which a decision is taken based on the application of existing policy to a single or limited number of properties at a public hearing after notice and with other basic due process afforded. *Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993); *Bloomfield v. Mayo*, 119 So.2d 417 (Fla. 1960); *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1958).

The proper procedure for an appeal from a local government's zoning decision is by writ of (first – tier) certiorari to Circuit Court. *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001); *City of St. Petersburg v. Cardinal Industries Development Corp.*, 493 So.2d 535 (Fla. 2d DCA 1986). First-tier certiorari to circuit court from a local government quasi-judicial ruling is a "matter of right and is akin in many respects to a plenary appeal". *Broward County v. G.B.V. Int'l* , 787 So. 2d 838 (Fla. 2001).

II. NATURE OF THE RELIEF SOUGHT

Upon this Court's determination that this Petition states a prima facie basis for relief, this Court should issue an order to show cause directing the Town of Ft. Myers Beach to demonstrate why a Writ of Certiorari should not be issued to quash Resolution 23-22. *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County*, 810 So. 2d 526, 530 (Fla. 2d DCA 2002). Petitioner requests that the Court issue an order to show cause to the Respondent, Ft. Myers Beach, and ultimately quash Resolution 23-22.

III. STATEMENT OF FACTS RELIED UPON BY PETITIONER[3]

A. The Development Approval

1. On March 6, 2023, the Town Council for the Town of Fort Myers Beach conducted a quasi-judicial hearing and then voted 3-2 to approve Resolution 23-22, granting Special Exception

[3] The facts below are taken from the Record of the Town's quasi-judicial process for this matter, consisting, per a response to a request for the entire record, of the documents identified in Appendix A, the transcript of the quasi-judicial hearing, and additional exhibits placed into the record at the quasi-judicial hearing, identified as such throughout this Petition. Citations to the Appendix will be demarcated as "App." followed by the page number(s).

SEZ20220103 and Variance VAR20220104 to allow the construction of a private boardwalk / dune crossover to serve two adjoining properties and homes on the south side of Estero Boulevard. (App. 8 - 10). Resolution 23-22 was filed with the Town Clerk, and thus rendered, on March 8, 2023. (App. 11.)

2. The Town's professional staff had recommended the denial of the applications. (App. 19: Staff Report, p.7).
3. The Subject Property is located on the south side of Estero Boulevard, adjacent to state lands and the Little Estero Island Critical Wildlife Area. (LEICWA). (App. 14: Staff Report, p. 2; App. 23: Applicant's Supp. Information)
4. The Property lies within the Town's "Environmentally Critical" zoning district. (App. 8: Res. 23-22, p. 1)
5. The purpose of the Environmentally Critical zoning district "is to designate beaches and significant wetlands whose preservation is deemed critical to the Town of Fort Myers Beach through its comprehensive plan, including... Beaches that have been designated in the "Recreation" category on the future land use map". Land Development Code Sec. 34-652 (a) (1) (App. 40).

6. The “application of the EC district is intended to prevent public harm by precluding the use of land for purposes for which it is unsuited in its natural state and which injures the rights of others or otherwise adversely affects a defined public interest.” Code Sec. 34-652 (b). (App. 40).[4]

7. The “uses and structures” “permitted by right” in the EC district include:

   (1) Boating, with no motors … except electric trolling motors.
   (2) Fishing.
   (3) Removal of intrusive, exotic species or diseased or dead trees, and pest control.
   (4) Outdoor education, in keeping with the intent of the district.
   (5) Passive recreation activities on public property [which] may require temporary structures but no alteration of the natural landscape. [….]
   (6) Outdoor accessory uses, including the rental of beach furniture….
   (7) Wildlife management, as wildlife preserves.
   (8)Expansion of area designated for the consumption and service of alcoholic beverages….
   (9)Temporary, movable structures on private property that do not alter the natural environment, landscape or obstruct pedestrian traffic.[….]
   (10) Temporary, movable structures that are part of a permitted special event ….
   (11) Licensed beach vendor rental equipment or a temporary movable structure ….
   (12) On-grade, pathways through a dune, not to exceed 40 inches ….” Sec. 34-652 (d)

[4] See discussion at *Rood v. Town of Ft. Myers Beach*, 2:20-cv-981-SPC-KCD, 19 (M.D. Fla. Aug. 18, 2022)

(App. 40 - 41).

8. Sec. 34-652 (e) (6) authorizes the approval of a "special exception", if they meet the standards in § 34-88 of the LDC and all other applicable regulations, for:

> **"Perpendicular dune walkovers … when required to protect indigenous plant** communities and when elevation change exists, in accordance with … subsection (f), below." (emphasis added)

(f) *Additional regulations. […]*
(2) Any dune walkover must be state approved and constructed consistent with the following requirements:
a. Walkovers must be placed perpendicular to the dune or no more than 30 degrees from perpendicular. New walkovers cannot be placed closer than 150 feet to the nearest walkover.
b. Walkovers must be supported on posts embedded to a sufficient depth to provide structural stability. These posts may not be encased in concrete.
c. Walkovers cannot exceed four feet in width when serving single-family homes or six feet in width otherwise. Alternate widths require a variance.
d. Walkovers must be elevated at least two feet, and no more than three feet, above the highest point of the dune and dune vegetation and must extend to the seaward toe of any existing dune and dune vegetation.
e. Walkovers must be constructed in a manner that minimizes short-term disturbance of the dune system. Any dune vegetation destroyed during construction must be replaced with similar native vegetation that is suitable for beach and dune stabilization and increases either plant density or area of plantings.
f. Walkovers may not be constructed during the sea turtle nesting season (May 1 through October 31).
g. Walkovers may not be attached to any other structures.
(App. 41 - 42).

9. Resolution 23-22 granted an application by Texas Hold'em LLC and Squeeze Me Inn LLC for a "special exception" for the use of a dune walkover and boardwalk in the "Environmentally Critical" zoning district. (App. 9-10: Res. 23-22, pp. 1 - 2)[5]

10. The proposed dune walkover consists of an approximately 298-foot long wooden structure, supported by wooden pilings. (App. 23: Applicants' Supp. Information)

11. As described by the County development staff, "It's certainly a much larger size than we typically see for a dune walkover." (App. 1636 Tr., Propst, p. 122, lines 11-12)

12. The residences on the properties are separated from the waters of the Gulf of Mexico by a system of low-lying dunes covered with native vegetation, and two shallow lagoon which are state lands. (App. 23: Applicants' Supp. Information)

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[5] At the time of the quasi-judicial hearing, the applicant had at least one lawsuit and one pre-suit claim pending against the Town over its prior denial of this same project. (App. 202, 208, 209, 211: Tr., p. 158, lines 9 – 18; Tr., Rood, p. 164, lines 5-18; p. 165, lines 11 – 13, 24-25; p. 167, lines 3-17)

13. This structure would cross over a dynamic dune system that is subject to opening and closing to the Gulf pf Mexico. (App. 169: Tr., p. 125, lines 2-4)

14. The structure would be located between two properties, extend across two state-owned lagoons, and deposit beachgoers at the edge of Little Estero Island Critical Wildlife Area. (App. 84-85: Tr., Propst, p. 40, lines 1-4, p. 40, line 23 -p. 41, line 5; App. 217: Applicant's PPt.)

15. Town Code Sec. 34-2 defines a "Special Exception" as:

> "**Uses that may not be appropriate generally or without restrictions** throughout a zoning district but which when controlled as to number, area, location, or relation to neighborhood would promote the public health, safety, welfare, order, comfort, convenience, appearance, or prosperity and may be permitted."

(App. 14: Staff Report, pp. 2-3)(emphasis added)

16. Resolution 23-22 also granted a variance from the four – foot width limit in Sec. 34-652 (f)(2)c, to allow the structure to be five feet wide. (App. 9 – 10: Res. 23-22, pp. 1 – 2)

17. There are no other dune access structures in the vicinity of the project. (App. 229: Applicant PPt.)

18. An application for a Special Exception by the applicants for this project had been denied by the Town Council in 2019. (App. 252: Agenda Summary, p. 1)

19. The record does not include evidence of changed or changing conditions since that time.

20. Resolution 23-22 includes a condition, as follows:

> "Supplement documentation that was discussed with the LPA [the local planning agency advisory board], including … plans for the boardwalk; **items presented for criteria compliance that were addressed verbally to be submitted in writing to supplement the record."**
>
> (App. 10: Res. 23-22, Section 4.D., p.3)

B. <u>Florida Audubon Society</u>

21. Florida Audubon Society appeared as a party to the quasi - judicial proceeding and objected to the proposed project. Brad Cornell, the Southwest Florida policy associate for Audubon, testified at the quasi-judicial hearing that Audubon has for over 12 years been collaborating with the town, the Florida Fish and Wildlife Conservation Commission, and local Audubon chapters on protecting, researching, and monitoring imperiled coastal birds. (App. 94 – 95: Tr. p. 50, line 13 – p. 51, line 8)

22. This work is done through a decade – long partnership with the town of Ft. Myers Beach to protect, research, and monitor the shorebirds and sea birds that nest and overwinter in the critical wildlife area and the nearby areas. (Id; Also, App. 134 – 135: Tr., Cornell, p. 90, line 25 – p. 91, line 8.)

23. Mr. Cornell explained that Audubon has devoted the work of sixty – seven trained volunteers and three staff members to this work, all working at and near the site of the proposed structure. (App. 94 - 95: Tr., Cornell, p. 50, lines 16 – 25, p. 51, lines 5-8; p. 97, lines 15 - 20)

24. He testified that this work was currently ongoing and is done "adjacent to and within a few feet of this proposed dune walkover structure as well as within and near the Little Estero Island critical wildlife area. (App. 94-95: Tr., Cornell, p. 50, line 22-p. - 51, line 1)

25. Cornell testified that Audubon has over 112 current members residing in the town of Fort Myers Beach. (App. 95: Tr., Cornell, p. 51, lines 2-3)

26. Audubon and its partners have invested more than $100,000 and organizational resources in this Lee Shorebird Stewardship

Program, and the construction of the proposed structure would compromise its research and conservation efforts and investment in protecting these imperiled wildlife species and their habitats. (App. 95: Tr., Cornell, p. 51, lines 11-24)

27. Audubon's full-time biologist who has managed this science program at this location on Ft. Myers Beach for over two years, Rochelle Streker, testified at the quasi-judicial hearing. (App. 96, 141 – 150: Tr., p. 52, lines 16-24, p. 97, line 21- p. 106, line 1).
28. Streker has a master's degree and a bachelor's degree in wildlife biology, and as 10 years of experience in shorebird and seabird conservation (App. 142 – 143: Tr., p. 98, line 24- p. 99, line 2)
29. She is a partner in Florida's Shorebird Alliance (FSA) with the Florida Fish and Wildlife Conservation Commission and other conservation organizations, and is the co-lead of the Collier, Lee, and Charlotte FSA partnership. (App. 143: Tr., Streker, p. 99, lines 17-21)
30. After explaining its substantial interests, Audubon was granted status to participate as a full party to the quasi – judicial proceeding. (App. 113 – 114, 129 – 130: Tr., p. 69, line 24 – p. 70, line 6; p. 85, lines 12 -21; p. 86, lines 12-18)

C. Land Development Code Requirements for Special Exceptions

31. LDC Sec. 34-88 (b) establishes the following criteria for the approval of a special exception:

> 1) Whether there exist changed or changing conditions which make approval of the request appropriate.
> (2) The testimony of any applicant.
> (3) The recommendation of staff and of the local planning agency.
> (4) The testimony of the public.
> (5) Whether the request is consistent with the goals, objectives, policies and intent of the Fort Myers Beach Comprehensive Plan.
> (6) Whether the request meets or exceeds all performance and locational standards set forth for the proposed use.
> (7) Whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.
> 8) Whether the request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.
> (9) Whether a requested use will be in compliance with applicable general zoning provisions and supplemental regulations pertaining to the use set forth in this chapter.

(App. 14 – 18: Staff report, pp. 2-6; App. 263-264: Town Code Section 34-88).

Additional facts relevant to compliance with the criteria relevant to this Petition follow.

***"Whether there exist changed or changing condition which make approval of the request appropriate ."* Sec. 34-88 (b) 1.**

32. The Applicants' counsel asserted as a "changed or changing condition" that one of the principals of one of the owner companies:

> “**has continued to have some increasing mobility issues**. [….] Having a boardwalk-type structure for this dune walkover enables him to access the beach …. So **that's a change condition for him that leads to part of the reason** why they're asking for this and the opportunity so that Eddie can continue to enjoy this beautiful beachfront.” (App. 72: Tr., p. 28, lines 12-24)

33. Town staff recommended denial of the request because it was supported by no changed or changing conditions. (App. 84: Tr., Propst, p. 40, lines 5-16; App. 16 – 17: Staff Report, pp. 4-5)

34. The evidence submitted by the applicants on this point was a ruling by a state administrative law judge after a 2018 hearing that the site has experienced net accretion (meaning the sandy beach has been expanding) over the past 50 years, and a comparative set of aerial photographs from 2003 and 2017. (App. 24: Applicants' Supp. Information, p. 2; App. 228: Applicants' PPt.)[6]

35. The applicants also asserted, as a changed condition supporting a special exception, that “practical access” to the beach and Gulf was previously granted by a neighbor, who chose in 2015 to cease allowing them to use his property to access the beach. (App. 229 –

[6] It is not clear from the record how the expanse of the width of the beach system changed / increased, as asserted by the applicant, the justification for the structure.

230: Applicants' PPt.; App. 63-64: Tr. Rood, p. 19, line 23 – p. 20, line 4)

36.The applicants had not possessed any legal entitlement to that prior access way. (Id; App. 50: Tr., p. 6, lines 4-11)

37. The applicants' attorney explained that the structure was needed to replace the direct beach access the applicants had previously enjoyed by their neighbor's grace, because:

> "**There's a big difference between a home with a view of the beach and a beachfront home**, and t**he prices on either side of that road** will – **will bear that fact out**. So they looked at it and said, you know, "What -- what's the solution here? Is there an answer to this?" (App. 47: Tr., p. 6, lines 15-20) (emphasis added)

38. The lack of direct access to the beach is a condition that has historically existed on the property, prior to when it was purchased in 2012. (App. 50: Tr., p. 6, lines 4-11)

39. As shown above, the record does not include evidence of changed or changing conditions since that time.

40. County staff testified that:

> "While the beach and shore conditions are dynamic and constantly changing, this would likely be a reason to not allow a structure to be located where accretion and erosion are common." (App. 84: Tr., Propst, p. 40, lines 10-13)

41. The Staff Report explained that:

> "The applicant's narrative attempts to identify two justifications, (1) the proposed dune walkover as a necessary use due to the accretion along the shoreline; and (2) the [code] allows dune walkovers so they should be permitted to have one. Both assumptions are incorrect. The first assumption, based on accretion, is why the Special Exception process exists. The intent is to evaluate location, type of construction, environmental and community features that may support or not support the location of a use and structure(s). **The simple occurrence of accretion doesn't support the approval of a Special Exception. If anything, the amount, nature, and type of accretion are important factors in deciding placement of a dune walkover or any other structure. Substantial accretion may very well be the reason not to locate a structure in a certain location.** The applicant **has not provided sufficient documentation of recent changes to the shoreline and subject properties since 2017 and post Ian.** Secondly, the assumption that the LDC (and Comprehensive Plan) speak to encouraging dune walkovers is removed from context. The LDC and Comprehensive Plan identify dune walkovers to protect dune systems. The applicant states "homeowners currently traverse this dune system on foot with some difficulty." However, **since the proposed structure(s) is for private use between two property owners, the difficult conditions to traverse will remain in place for adjacent property owners. This proposal does not address or resolve that issue;** therefore, and does not set forth a comprehensive strategy to address potential dune and vegetation impacts."
>
> (App. 16: Staff Report p. 4 of 8).

42. The applicants introduced no testimony to the contrary.

43. Lagoons such as these open up to the Gulf after storms for months at a time, and then close up again, as these coastal barrier island environments are very dynamic. (App. 161: Tr., Cornell, p. 117, lines 10-17)

***"Whether the request meets or exceeds all performance and locational standards for the proposed use."* Sec. 34-88 (b) 6.**

44. Ms. Propst testified that Town staff recommended denial of the request because it did not meet the Code criteria for a special exception. (App. 84-86: Tr., Propst, p. 40, line 5- p. 42, line 17; App. 19: Staff Report, p. 7)

45. A month before the Council's approval of the applications, Town Staff sent a "Sufficiency and Review" letter to the applicants, explaining that:

> "The site plan document that was submitted is dated with a **data collection date of 2014**. It also does **not provide any additional information about the structure, materials, or profile of the structure.** It also appears that the **proposed design of the structure will be based on data, elevations, and conditions that were collected in 2014**."
>
> (App. 255: Sufficiency and Review" letter, Feb. 3, 2023, p. 1 [item 2])

46. The Staff's "Sufficiency and Review" letter reported that:

> "The survey document that was submitted is dated with a data collection date of 2017. **Due to the nature of the changing conditions of the beach, dunes, and surrounding lands, especially in a post-Ian environment, the survey should be updated with more recently collected data**. This includes, but not limited to, elevations, locations of dune and vegetation, wetlands, water bodies, etc."
>
> (App. 255: Sufficiency and Review" letter, Feb. 3, 2023, p. 1 item 63) (emphasis added)

47. That letter also reported that:

> "A comparison of data from the two different plans, the 2017 survey and the site plan with data collected in 2014, shows a change in elevations, shoreline locations, edge of pond and mangrove locations. **None of the data provided shows the proposed structure in reference to current conditions and changes that have occurred since 2017, post Ian storm event."**
>
> (App. 255: Sufficiency and Review" letter, Feb. 3, 2023, p. 1 item 4]) (emphasis added)

48.The staff letter explained that, "[p]ursuant to Sec. 34-202d(2), the Town's [code] requires sufficient site plan detailing the proposed structure(s) in order for it to be reviewed for compliance with the [code] and "[m]**ore accurate measurements and dimensions" will help clarify intent and more accurate landing area of the**

proposed structure.” (App. 255: Sufficiency and Review” letter, Feb. 3, 2023, p. 1 items 5 and 6])

49. Finally, the letter concluded:

> “The application references the need to provide protection of the dune and vegetation system. **Despite this claim the application and site plan proposes the terminus of the proposed structure to be short of the area desired to be protected from foot traffic** or facilitate access by device for someone with a disability. Please **provide documentation, narrative, and evidence of how the landing area will protect the dune and vegetation despite appearing to land in an area desired to be protected.”**
>
> (App. 255-256: Sufficiency and Review” letter, Feb. 3, 2023, pp. 1-2 [item 8]) (emphasis added)

50. Town Staff reported that the application had **not** been shown to meet the requirements in Code Sec. 34-652 f.2. a-g, because:

> “the applicant has provided no documentation showing compliance of any of items a-e, or g. Furthermore, **they claim to be compliant with side setbacks of the EC zoning district** (25 feet, Table 34-3), **yet clearly show a proposed structure on a shared property line with a portion of the proposed structure on each property.”**
>
> (App. 17-18: Staff Report, pp. 5-6)[7] (emphasis added)

[7] Community Development staff person Sara Propst testified at the quasi-judicial hearing, and presented and corroborated the findings in the staff report. (App. 136: Tr., Propst, p. 92, lines 9 – 18)

51.“The staff opinion is that the applicants **have failed to provide sufficient information to determine if they are in compliance** with the technical standards of the [Code]. Staff has also provided a review of the application materials relevant to the criteria outlined in LDC Sec. 34-88 - Special Exceptions …. In summary, the request is not consistent with the [Code] ….” (App. 255: Agenda Summary, p. 1)

***“Whether the request will protect, conserve, or preserve environmentally critical areas and natural resources.”* Sec. 34-88 (b) 7.**

52. The supplemental information document submitted by the applicants in support of the application was a 185 – page document, 174 of which consisted of a Florida Department of Environmental Protection order and legal argument following a 2018 administrative proceeding concerning the state permit. The other 11 pages consisted of basic information about the project site, a narrative argument of the relevant code criteria bearing no identification of authorship, but no scientific or technical analysis. (App. 21 - 38: Applicant’s Supplemental Information [excerpts])

53.The applicants’ attorney claimed that the absence of a specific delineated terminus is a result of a state environmental permitting

requirement that the applicant meet on site with agency permitting staff to identify the exact location to minimize environmental impact and not interfering with the public right of way. (App. 69: Tr., p. 25, lines 18-22).

54. Sara Propst, of the Town community development division testified that, since this had not yet occurred:

> **“[s]taff can't ascertain if that will preserve, conserve, and protect the environmentally critical area**.” (App. 140: Tr., p. 96, lines 22 – 24) (emphasis added)

55. Ms. Propst explained that a survey submitted to the Town just prior to the hearing showed the existence of seagrass and dunes located between the structure’s ending spot and the beach shore (App. 85: Tr., Propst, p. 41, lines 6-8)

56. Ms. Propst testified that it is:

> “**unlikely that the request will be compatible with the existing uses, which is a critical wildlife habitat for shorebirds**. Humans often cause adverse impacts on natural ecosystems and provide -- and **providing a direct pathway from the residences to an area known to be a prolific shorebird nesting and foraging area may have a negative impact on wildlife**.”
>
> (App. 85: Tr., Propst, p. 41, lines 9-16) (emphasis added)

57. The Staff Report found that:

> "The applicant claims to have provided sufficient evidence and documentation to show proof that the proposed structure will protect, conserve, or preserve environmentally critical areas and natural resources; yet **no plans, documents, or other evidence has been provided other than a narrative** that demonstrate the project will protect, conserve, or preserve environmentally critical areas and natural resources."
>
> (App. 18: Staff Report, p.6)

58. A July 20, 2016 Florida Fish and Wildlife Conservation Commission, letter commenting on the impacts of the proposed structure on wildlife in and near the Little Estero Island Critical Wildlife Area, characterized the area as uniquely important for 68 species of over-wintering, nesting, and foraging coastal birds. The Commission (FWC), which is the state's wildlife agency and the manager for the Little Estero Island Critical Wildlife Area, also described the impacts of the proposed bridge structure as eliminating habitat within the structure footprint and causing harm to many meters on either side. The agency found that pedestrian traffic from the structure will reduce listed species nesting in the future, and that such structures are incompatible with a Critical Wildlife Area. (App.

143-144, 159: Tr., p. 99, line 25 – p. 100, line 6; p. 100, lines 11 – 25., p. 115, lines 18 – 20; App 260-261: FWC letter, pp. 1-2)

59.The Commission also expressed concern that permitting this structure may lead to more such bridges and walkovers into the CWA, resulting in possible elimination of the LEICWA altogether. (App. 145: Tr., 101, lines 1-5; App. 261: FWC letter, p. 2)

60.The Commissions' findings were corroborated by Audubon's seabird and shorebird expert, Rochelle Streker, during the quasi-judicial hearing. (App. 145: Tr., Streker, p. 101, lines 9 – 17).

61.Ms. Streker testified that the Little Estero Critical Wildlife Area and the private land surrounding it is important habitat for the breeding birds and for wintering birds, and that several state-protected and federally-protected species utilize the area within the CWA and right next to the CWA where this crossover would be built. (App. 145: Tr., Streker , p. 101, lines 9 – 17).

62.The nesting colonies here for Least Terns, Black Skimmers, Snowy Plovers, and Wilson's Plovers, all state or federally - protected species, are among the most important in Florida. (App. 95, 146-148: Tr., Cornell, p. 51, lines 9-11; Streker, p. 102, line 17 – p. 104, line 12)

63. The affected area around the construction is critical brood-rearing habitat for flightless chicks, which, because they cannot fly and relocate to other locations, are especially susceptible to increased human disturbance. (App. 149-150: Tr., Streker, p. 103, line 12 - p. 104, line 12)

64. This type of core foraging and nesting habitat type is uncommon in southwest Florida. (App. 149 -150: Tr., Streker, p. 105, line 7 - p. 106, line 1)

65. The foraging habitat of the lagoons near the proposed construction is important to wintering birds and migratory birds. (App. 148: Tr., Streker, p. 104, lines 13 – 25)

66. The site provides habitat and core needs like foraging and resting for the federally protected migratory American Oystercatchers and Piping Plovers. (App. 148-149: Tr., Streker, p. 104, line 13 – p. 105, line 6)

67. Streker testified that the structure will cause harm to listed species, especially due to increased foot traffic where nesting occurs. (App. 153: Tr., Streker, p. 109, lines 14-19 ("people bring increased disturbance, which brings down the survival rate of the chicks.….”)

68.The applicants provided no contrary or other testimony by a relevant expert. Its counsel relied upon the state DEP determination from a 2018 hearing that the project would comply with that agency's criteria as evidence. (App. 76: Tr., p. 32, lines 8-10 ("Moving on to page 21, "Requires protection of natural resources." And here's where I will refer back to the FDEP findings …."); See also, App. 77: Tr., p. 33, lines 8-10; See also, App. 227, 235 -239: Applicants' PPt.)

"Whether the request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property." **Sec. 34-88 (b)8**

69. The Staff Report found that:

> "The applicant claims to have provided sufficient evidence and documentation to show proof that the proposed structure will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property; yet **no plans, documents, or other evidence has been provided other than a narrative that demonstrate the project is compatible, and will not cause nuisance or harm to the surrounding natural environment**."
>
> (App. 18: Staff Report, p. 6) (emphasis added)

70. In response, the applicants' attorney again relied on the state agency order from the 2018 administrative hearing that the dune walkover could reduce pedestrian foot traffic over the dune. (App. 76: Tr., p. 32, lines 8-10)

71. The applicants' attorney also argued that this criteria is met because the structure is made to be fungible [sic] and "wash away" away during a storm, acknowledging that such an event would create debris. (App. 77: Tr., p. 33, lines 19-23)[8]

***"Whether a requested use will be in compliance with the applicable general zoning provisions and supplemental regulations set forth in Chapter 34 of the Town's Land Development Code."* Sec. 34-88 (b)9.**

72. Regarding Criteria #9, the Town Staff reported that:

> "The only analysis provided by the applicant indicates previous rulings within the FDEP Consolidated Final Order that found that the proposed structure will not adversely impact public health, safety or welfare. **However, those findings are not based on the Town's Special Exception criteria and evaluation process."**
>
> (App. 18: Staff Report, p. 6).

[8] Mr. Cornell, of Florida Audubon Society had testified that the impacts of Hurricane Ian revealed the risk of building an uncemented bridge/dune walkover structure that will be subject to storm surge and hurricane-force winds, which can then pose a danger to neighboring properties and residents. (App. 158: Tr., p. 114, lines 16-21). Prior to the vote, the Council discussed conditioning the approval on a requirement that if the beach erodes, the applicant would be required to dismantle the boardwalk. The motion to approve the Resolution however, was adopted without adding that condition. (App. 203-204: Tr. p. 159, line 12 – p. 161, line 11).

73. Town Staff noted that “the DEP Consolidated Final Order specifically states that the proposed dune walkover is **subject to compliance with all local government regulations.”** (App. 18: Staff Report, p. 6)

74. As explained by the County planner during the hearing, “the **town has specific criteria that we evaluate, and those aren't the same criteria the DEP evaluates**.” (App. 141: Tr., Propst, p. 97, lines 6-12) (emphasis added).

75. Town Staff found that “the applicant **hasn’t provided any relevant data or analysis, studies, or expert findings** related to the proposed location of the structure and **how the current conditions may or not be impacted.”** (App. 18: Staff Report, p. 6)

76. Town Staff reported that the applicants’ “analysis for Item 9 also fails to provide sufficient evidence that the proposed structure is compliant with Chapter 34 of the Town’s Land Development Code.” (App. 18: Staff Report, p. 6)

77. The Staff Report states, and Town Staff confirmed at the quasi-judicial hearing, that "the applicant has not provided sufficient or relevant documentation to address the town's criteria. The application **fails to provide details, specifics, or recent data that**

helps understand what is proposed and how it may or may not have an impact to the public and community." (App. 136: Tr., Propst, p. 93, lines 8 – 18; App. 15-16: Staff Report, p. 3-4)(emphasis added)

78. The staff report also stated that:

> "The proposed length is not clear, and dimensions of the proposed structure weren't provided on the applicants' submitted site plan. The end of the dune walkover ends prior to the area labeled on the applicants' plan as dune and sand (it shows the dune walkover ending in an area of buttonwood mangroves)"

(App. 14: Staff Report, p. 2)

79. The Town's planning advisory board's prior vote to recommend approval of the applications was **subject to the submittal in writing of supplement documentation, including "plans for the boardwalk" and other "items presented for criteria compliance** that were addressed verbally". (App. 20: Staff Report, p. 8)

80.At the quasi-judicial hearing before the Town Council, responding to questions from Audubon's representative Mr. Cornell, Ms. Propst, of the Town's Community Development Division, explained that compliance with the Code's performance and locational standards had not been demonstrated because the applicants had submitted

the required information only on the Thursday afternoon and Friday morning prior to the Monday morning hearing, and that information had not yet been reviewed by the staff. (App. 84-87, 136-139: Tr., Propst, p. 40, line 18 – p. 43, line 8, p. 92, line 19 – p. 95, line 7)

81. The newly – submitted information included “a structural plan showing the design” and “surveys”. (App. 139: Tr., Propst, p. 95, lines 18 -22)

82. That information was submitted “after the packet [for the Board’s consideration during the quasi-judicial hearing] was created”, and it would take staff about one week to review it for compliance with the Code requirements. (App. 87: Tr., Propst p. 43, lines 18-25)

83. Responding to questions from Audubon’s representative Mr. Cornell, Ms. Propst reported that **as of the time of the quasi-judicial hearing was being conducted, the applicant’s newly – submitted documents had not been made available to the public.** (App. 138-140: Tr., Propst, p. 94, line 19 – p. 95, line 7; p. 96, lines 4-8)

84. The Town attorney raised to the Council the issue of whether it might defer action on the item to allow a review of the newly –

provided information. (App. 109: Tr., p. 65, lines 6-12). The Council however, voted 3-2 to approve the applications.

IV. ARGUMENT

A. Summary of Argument

The Town's approval of Resolution 23-22 was not based upon competent substantial evidence, and was the result of a denial of Audubon's procedural due process rights because the documentation required to demonstrate compliance with the Town's Code requirements governing the approved dune boardwalk, having been filed with the Town only over one business day before the quasi-judicial hearing, were not available to Audubon, had not been reviewed by Town staff, and were not submitted as part of the quasi-judicial record. Resolution 23-20 is also not supported by competent substantial evidence and is a departure from the essential elements of law because the only evidence submitted by the applicants to meet its burden of proof to demonstrate compliance with the Town Code was a hearsay document – an order of a state environmental agency resulting from a 2018 hearing, based on the state's permit criteria and not the Town Code – uncorroborated by a competent expert as

relevant or currently valid, and inadequate to represent current conditions and plans. The Court should quash Resolution 23-22.

B. Petitioner Has Standing

Petitioner Florida Audubon Society established standing on the record below and was granted full party status to the quasi-judicial hearing by the Town. Moreover, because of its unique and long-standing role in researching shore and sea bird habitat at this site in partnership with the Town of Ft. Myers Beach, and managing the Lee Shorebird Stewardship Program in this specific location, it will suffer damages "*differing in kind" from that* "suffered by the community as a whole", and thus has standing under *Renard v. Dade County*, 261 So. 2d 832, 835 (Fla. 1972) See also, City *of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008). The use of this area by its staff and volunteers for its seabird and shorebird research and protection work provides associational standing. *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011)

C. **Standard of Review**

In a certiorari proceeding, the circuit court must determine [1] whether procedural due process is accorded, [2] whether the essential requirements of law have been observed, and [3] whether the findings below are supported by competent, substantial evidence. *Wiggins v. Fla. Dep't of High. Saf. & Motor Vehs.*, 209 So. 3d 1165, 1170 (Fla. 2017); *Bencivenga v. Osceola Cty.*, 140 So. 3d 1035, 1036 (Fla. 5th DCA 2014); *Dept. of Highway Safety and Motor Vehicles v. Stenmark*, 941 So. 2d 1247, 1249 (Fla. 2nd DCA 2006); *Broward County v. G. B. V. International, Ltd.*, 787 So.2d 838 (Fla. 2001); *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982).

D. **Burden of Proof below**

The burden of demonstrating that a project meets a local government's regulatory criteria is on the applicant. *Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993); *Conetta v. City of* Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981).[9] The record demonstrates that the

[9] This is in contrast to Section 120.569(2)(p), Fla. Stat., which governs challenges to environmental permits issued by the state, and which places the ultimate burden of persuasion on the opponent of the permit.

Town Council voted to approve the Special Exception even though the documentation required to prove compliance with the governing criteria had only been submitted just over one work day prior to the quasi-judicial hearing, Town Staff had not yet been able to review it, and it was neither introduced into the record of the hearing nor available to the public as of that time. Thus, the applicants did not meet their burden of proof below. The Town's apparent determination otherwise is not supported by competent substantial evidence.

E. The Approval of the Special Exception Departed From the Essential Elements of Law

On certiorari, the court must determine whether the local government "followed its … regulations…."*Osborn v. Bd of Cty. Comm'rs*, 937 So.2d. 1119,1120 (Fla.3d DCA 2006). Here, the Resolution approved development that violates the Town's Code requirements for the approval of a special exception, and thus departed from the essential elements of law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003).

The Town Council did not meet the substantive requirements in Town of Fort Myers Beach Code Section 34-88 for the granting of a Special Exception, including:

Sec. 34-88. - Special exceptions. […]
(b) Considerations. In reaching its decision, the town council shall consider the following, whenever applicable:
(1) Whether there exist **changed or changing conditions which make approval** of the request **appropriate.** […]
(3) The recommendation of staff and of the local planning agency.
(4) The testimony of the public. […]
(6) Whether the request **meets or exceeds all performance and locational standards** set forth for the proposed use.
(7) Whether the request **will protect, conserve, or preserve environmentally critical areas and natural resources.**
(8) Whether the request **will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property**.
(9) Whether a requested use **will be in compliance with applicable general zoning provisions and supplemental regulations** pertaining to the use set forth in this chapter.
(c) Findings. Before granting any special exceptions, the town council **must find that the applicant has demonstrated that the requested special exception complies with the standards in this section and with**:
(1) The Fort Myers Beach Comprehensive Plan;
(2) This chapter; and
(3) Any other applicable town ordinances or codes.
(d) Authority.
(1) The town council shall grant the special exception unless it finds that granting the special exception is contrary to the public interest and the health, safety, comfort, convenience, and welfare of the citizens of the town, or that the request is in conflict with the criteria in this section." (emphasis added)

Resolution 23-22 departs from the essential elements of law because it approved the Special Exception, contrary to the "recommendation of staff", without demonstrating "changed or changing conditions which make approval of the request

appropriate", that it "meets or exceeds all performance and locational standards", "will protect, conserve, or preserve environmentally critical areas and natural resources", "will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property", "will be in compliance with applicable general zoning provisions and supplemental regulations" and will not be "contrary to the public interest and the health, safety, comfort, convenience, and welfare of the citizens of the town…."

The only competent substantial evidence adduced at the quasi-judicial hearing demonstrated that there were no changed conditions since either the purchase of the property or since the Town's prior denial of the project, to justify the Special Exception. The applicant's desire to increase the market value of the homes is not a cognizable changed condition. Neither the lack of direct shoreline access, or the expansion of the beach things that have changed since the 2019 denial of the project or the 2012 purchase of the property.

As for the applicants' assertions that mobility challenges of one of the applicants constitutes a changed condition supporting the approval of the Special Exception, last year, a federal judge rejected

an *American's with Disabilities Act* lawsuit brought by Mr. Rood against the Town for the prior denial of approval for this walkway. In *Rood v. Town of Fort Myers Beach*, 2:20-cv-981-SPC-KCD (M.D. Fla. Aug. 18, 2022) the Court ruled that:

> "Arguing the Exemption was a fundamental alteration, the Town hits the nail on the head. On its face, building the Dune Walkover through an EC zone would change the complexion of the area by encroaching on land protected from development. Put another way, the Dune Walkover was "incompatible with surrounding land uses" of the "zoning scheme."
>
> This is not conjecture. The Town never granted a single dune walkover exemption to a homeowner. Stated different, Rood would be the only person in Town with one of these structures on EC land. Nor is there evidence of the Town ever allowing an exemption for any other landowner development within this zone. Of course, allowing a private person to develop environmental conservation land for the first time would change that protected area."

Rood v. Town of Ft. Myers Beach, 2:20-cv-981-SPC-KCD, 19-20 (M.D. Fla. Aug. 18, 2022) (citations omitted)

The Court found that:

> "[t]he Dune Walkover would place Rood in a far better position than nondisabled people. Again, no private person has a walkover in the EC zone. So Rood seeks favored land use, not an equal opportunity to access the beach." *Rood v. Town of Ft. Myers Beach*, 2:20-cv-981-SPC-KCD, 25 (M.D. Fla. Aug. 18, 2022).

The Court found that “Rood seeks privileged treatment because he prefers that over the other beach access options open to him and the public.” *Rood v. Town of Ft. Myers Beach*, 2:20-cv-981-SPC-KCD, 26 (M.D. Fla. Aug. 18, 2022)

To the extent that the applicants here suggested that they may be willing to allow other neighbors to use this structure, the federal court had found:

> “Even if it services Rood's whole neighborhood, the structure is still behind the Property and allows a private citizen preferential beach access.
>
> What's more, there is no indication whether these walkovers are similar. The Dune Walkover is unique. It does not just traverse a sand dune behind the Property. Instead, it creates a walkway over two lagoons. As one Town councilmember said, “This is actually a lagoon walkover.” Nothing suggests the public walkovers-or anything else in Town-provide a permanent walkway over a coastal lagoon (much less in an EC zone).
>
> In short, allowing Rood to build the Dune Walkover would fundamentally alter the area.”

Rood v. Town of Ft. Myers Beach, 2:20-cv-981-SPC-KCD, 20 (M.D. Fla. Aug. 18, 2022)[10]

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[10] This judicial decision was discussed at the quasi-judicial hearing below. App. 156: Tr., p. 115, lines 2-17.

The only competent substantial evidence adduced at the quasi-judicial hearing demonstrated that the project would not protect the sea and shorebird habitat in the immediate vicinity of the project. The only competent substantial evidence adduced at the quasi-judicial hearing demonstrated that the documentation required to demonstrate compliance with the Town's performance, locational and other standards had been submitted one business day prior to the hearing, had not been reviewed by staff, was unavailable to Audubon and the public and was not introduced at the hearing.

In addition, Section 34-652 (e)6 of the Code allows a special exception for "**Perpendicular dune walkovers" only**:

> **"when required to protect indigenous plant** communities and when elevation change exists, in accordance with ... subsection (f), below." (App. 41-42.) (emphasis added)

Resolution 23-22 **violates this limitation because it was approved even though the Town made no finding that the walkover is "required to protect indigenous plant communities"**.

The Court should quash Resolution 23-22 because it violates the Town Code and is thus a departure from the essential elements

of law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003); *Osborn v. Bd of Cty. Comm'rs*, 937 So.2d. 1119,1120 (Fla.3d DCA 2006)

F. The Town Council's findings concerning the Special Exception are not supported by Competent, Substantial Evidence

Competent, substantial evidence is that which is admissible under the governing rules of evidence and which is real, material, pertinent, and **relevant and which tends to prove an essential element of the governing legal standard**. *Scholastic Book Fairs, Inc. Great Am. Div. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996)

The reports and recommendations of a city's professional staff, which one court described as "strong evidence" supporting a decision, is competent, substantial evidence in a quasi – judicial hearing. *ABC Real Estate Development, Inc. v. St. Johns County*, 608 So.2d 59, 62 (Fla. 5th DCA 1992). The written and oral recommendation and testimony of the city's professional staff, who are generally recognized as experts in their field, constitute competent substantial evidence. See e.g. *Payne v. City of Miami*, 52

So. 3d 707, 761 & n.13 (Fla. 3d DCA 2010); *Palm Beach Cnty. v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989); *Battaglia Fruit Co. v. City of Maitland*, 530 So.2d 940 (Fla. 5th DCA 1988)

Here, Resolution 23-22 states that "[i]n approving the Special Exception, the Town Council makes the following findings and conclusions in accordance with the requirements of Section 34-88 of the Code:

> A. Changed or changing conditions which make approval of the request appropriate.
>
> B. The request is consistent with the goals, objectives, policies, and intent of the Fort Myers Beach Comprehensive Plan.
>
> C. The request meets or exceeds all performance and locational standards for the proposed use.
>
> D. The request will protect, conserve, or preserve environmentally critical areas and natural resources.
>
> E. The request will be compatible with existing or planned uses and not cause damage, hazard, nuisance, or other detriment to persons or property.
>
> F. The requested use will be in compliance with the applicable general zoning provisions and supplemental regulations set forth in Chapter 34 of the Land Development Code." (App. 9: Res. 23-22, p. 2)

These findings, however, are not supported by competent substantial evidence. The only competent substantial evidence

introduced at the quasi-judicial hearing **support only the following factual conclusions:**

1. There were no relevant changed conditions justifying the Special Exception; and
2. The structure will not protect, conserve, or preserve environmentally critical areas and natural resources; and
3. The information submitted by the applicants demonstrated a failure to comply with the governing performance and locational standards, applicable general zoning provisions and supplemental regulations, and to demonstrate that the structure would not cause damage, hazard, nuisance, or other detriment to persons or property; or
4. The applicants had not supplied enough information to demonstrate compliance with the governing performance and locational standards, applicable general zoning provisions and supplemental regulations, and to demonstrate that the structure would not cause damage, hazard, nuisance, or other detriment to persons or property.

The evidence presented at the quasi-judicial hearing by the applicants consisted of the state DEP order from the 2018 hearing on compliance with state rules and the argument of its counsel.

An attorney's arguments about the evidence or about why the city should vote for or against a development request is not competent evidence to support a quasi-judicial decision. *Nat'l Advert. Co. v. Broward Cnty.*, 491 So. 2d 1262, 1263 (Fla. 4th DCA 1986). Here, the only person who appeared before the Town Council's quasi-judicial hearing (other than the co-applicants, who spoke briefly but who did not offer expert opinion testimony) was the applicants' attorney. To the extent that the applicants might rely on the statement by their attorney that he was also a land use planner, the attorney claimed no expertise on shore or seabirds or other environmental impacts and any planning opinion he may have expressed had no evidentiary support given the lack of supporting plans for the project.

Expert opinion must be supported by factual evidence. As the Florida Supreme Court has stated:

> "It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value. It is equally well settled that the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion."

Akin Construction Co. v. Simpkins, 99 So.2d 557 (Fla. 1957).

1. **The State Agency Order is Not Competent Substantial Evidence**

The only "evidence" introduced by the applicants in the quasi-judicial hearing below to demonstrate compliance with the current Town of Ft. Myers Beach special exception standards was the state administrative order entered after a 2018 state permit proceeding. They produced no testimony of qualified experts to support the findings made by the Town Council relative to the Town's criteria for special exceptions.

a. The State Agency Order is Hearsay

Hearsay can only support a quasi-judicial decision if it is corroborated by other competent substantial evidence. *Pasco County School Board v. Florida Public Employees Relations Commission,* 353 So.2d 108 (Fla. 1st DCA 1977); *Jones v. City of*

Hialeah, 294 So. 2d 686, 688 (Fla. 3d DCA 1974); *Spicer v. Metro. Dade Cnty.*, 458 So. 2d 792, 794 (Fla. 3d DCA 1984); *De Groot v. Sheffield,* 95 So.2d 912 (Fla. 1957). Hearsay evidence alone is not sufficient to support a finding unless it would be admissible over objection in civil actions. *Byer v. Florida Real Estate Commission,* 380 So.2d 511 (Fla. 3d DCA 1980); *McDonald v. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977).

This is the law even in administrative tribunals where technical rules of evidence do not apply to the same extent as they do in courts. *Jones v. City of Hialeah*, 294 So. 2d 686, 688 (Fla. 3d DCA 1974). An agency action that is based upon only hearsay evidence, uncorroborated by any other substantial evidence, constitutes a departure from the essential requirements of the law. *Spicer v. Metropolitan Dade County*, 458 So. 2d 792, 795 (Fla. 3d DCA 1984)

The potential for unreliability that results from the absence of cross-examination is "probably the most persuasive" reason for excluding hearsay. *Walden v. State*, 17 So. 3d 795, 798 n.2 (Fla. 1st DCA 2009) (citing Charles W. Ehrhardt, § 801.1, at 766 (2009 ed.) ("the lack of an opportunity to cross-examine the person who

made the out-of-court statement to test the person's perception, memory, sincerity, and accuracy of the description of the event raises serious questions concerning the reliability of the statement" and is the most persuasive reason for the hearsay rule.)

In this case, the Town's reliance on a state order resulting from a 2019 hearing – uncorroborated by any witness who could testify that those rulings represented current conditions on the ground as they related to the Town's Land Development Code requirements - and be subjected to cross – examination on such testimony – impermissibly relied upon hearsay evidence.

b. The State Agency Order Is Not Relevant to the Town Code

The state order relied on by the applicants (on its face, and as explained on the record by Town Staff) expressly did not address compliance with the Town's zoning standards, and expressly prohibited construction unless and until local zoning approval was secured.[11]

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[11] The state agency found the Town lacked standing because "issues of compliance with or confusion about the Town's zoning or land use procedures are not within the zone of interests protected by this type of proceeding. (App. 36: Applicants' Supp. Information, Rec. Order, p. 78, ¶199 -200 (citing *Council of Lower Keys v. Charley Toppino &*

"A decision granting or denying a [quasi-judicial] application <u>is governed by local regulations</u>" *Miami-Dade v. Omnipoint*, 863 So. 2d 375, 376 (Fla. 3d DCA. 2003)(emphasis in original) (citing *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) and *Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982). "Neither a quasi-judicial body nor a reviewing circuit court is permitted to add to or detract from these criteria (the local regulations) when making its assigned determination" Id. In *Omnipoint*, the court held that the lower tribunal erred in considering factors from the Federal Telecommunications Act in determining whether to grant or not to grant approval under the Dade County Zoning Regulations. The considerations had to be limited to those issues or standards recited in the ordinance. 863 So.2d at 377.

Sons, Inc., 429 So. 2d 67, 68 (Fla. 3d DCA 1983); *Taylor v. Cedar Key Special Water and Sewerage Dist.*, 590 So. 2d 481 (Fla. 1st DCA 1991). During the quasi-judicial hearing, the Town Attorney advised the Council of that ruling, and "therefore it says the town was never a party to those proceedings under the law. In the eyes of the court, in the eyes of this body, the fact that the town participated in that prior DOAH proceeding has no legal effect whatsoever. (App. 100: Tr., p. 56, lines 9-18).

Material irrelevant to a local zoning code is entitled to no consideration in arriving at a conclusion as to whether the substantial competent evidence test has been met. *Machado v. Musgrove*, 519 So.2d 629 (Fla. 3d DCA 1987), *rev. denied*, 529 So.2d 693 and *rev. denied*, 529 So.2d 694 (Fla. 1988).

As a matter of both evidence law and legal relevance, the Town of Ft. Myers Beach departed from the essential elements of law and based its findings of compliance with its code on irrelevant and incompetent substantial evidence.

G. Violation of Procedural Due Process

The Court should quash Resolution 23 – 22 because it resulted from a violation of Audubon's procedural due process rights. Parties to a quasi – judicial hearing must be accorded procedural due process. *Tameu v. Palm Beach County*, 430 So.2d 601, 602 (Fla. 4th DCA 1983); *Cherokee Crushed Stone Inc. v. City of Miramar*, 421 So.2d 684, 689 (Fla. 4th DCA 1983); *De Groot v. Sheffield*, 95 So. 2d 912, 914–16 (Fla. 1957).

A person granted party status in a quasi-judicial hearing is entitled to procedural due process. *Carrillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 10 (Fla. 5th DCA 2010). Basic procedural due process for a quasi-judicial hearing requires allowing the party to be able to present evidence, cross-examine witnesses, and **be informed of all facts upon which the ruling governmental body acts.** *Id.*; *DSA Marine Sales & Service v. Manatee*, 661 So.2d 907 (Fla. 2d DCA 1995); *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1000-1002 (Fla. 2d DCA 1993); *Conetta v. City of Sarasota*, 400 So.2d 1051 (Fla. 2d DCA 1981); *Walgreen Co. v. Polk Cnty.*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988).

The Second District has explained the fundamental protections of due process in a quasi-judicial hearing:

> "certain standards of basic fairness must be adhered to in order to afford due process. . . . A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial zoning proceedings, the **parties must be able to** present evidence, cross-examine witnesses, and **be informed of all the facts upon which the commission acts**."

Lee County v. Sunbelt Equities, 619 So.2d 996, 1002 (Fla. 2d DCA 1993)(citing *Jennings v. Dade County*, 589 So.2d 1337, 1343 (Fla. 3d DCA 1991), rev. denied, 598 So.2d 75 (Fla. 1992)). (emphasis added)

As the Court explained in *Deel Motors v. Dep't of Commerce*, 252 So. 2d 389, 394 (Fla.1st DCA 1971):

> "Such /quasi-judicial] proceeding contemplates that the party to be affected by the outcome of the proceeding will be given reasonable notice of the hearing and an opportunity to appear in person or by attorney and to be heard on the issues presented for determination. It is contemplated that the order to be entered will be based on competent and substantial evidence adduced by the parties consisting of sworn testimony of witnesses and properly authenticated documents bearing the required indicia of credibility. The parties must be accorded the right to confront and cross-examine the witnesses against them, and be reasonably heard on the contentions urged by them with respect to the action to be taken by the agency."

Here, the Town Council **deprived Audubon due process by not making all of the materials upon which it based its decision available to the public before the vote was taken.** At the time of the hearing, town staff testified repeatedly that the applicants submitted missing elements of the application on the Thursday

afternoon and Friday morning prior to the Monday morning hearing at which the application was approved, well after the meeting was publicly noticed, and at the time of the council meeting on March 6, staff had not had adequate time to review the materials and they had not been provided to the public.

Audubon was not, as due process requires, "**informed of all the facts upon which the commission acts**." *Lee County v. Sunbelt Equities*, 619 So.2d 996, 1002 (Fla. 2d DCA 1993).(emphasis added)

Indeed, this violation – that the documentation required to demonstrate compliance with the Special Exception requirements had not been submitted – is apparent on the face of Resolution 23-22, which includes a condition that the:

> "Supplement documentation that was discussed with the LPA [the local planning agency advisory board], including … plans for the boardwalk; **items presented for criteria compliance that were addressed verbally to be submitted in writing to supplement the record."** (App. 7: Res. 23-22, Section 4.D., p.3)

The Town approved the Special Exception without thee evidence before it necessary to demonstrate the applicants' compliance with the criteria governing such an approval. That same information was

unavailable to Audubon. The Town's action deprived Audubon of procedural due process for the same reason it is not supported by competent, substantial evidence demonstrating that the project meets the Code requirements governing Special Exceptions.

IV. Conclusion

The Town Council voted to approve a project for which the only competent substantial evidence demonstrated a failure to comply with the governing criteria, during a quasi-judicial hearing at which the applicants presented only the argument of counsel and a hearsay administrative order from a state agency that expressly did not address the adopted criteria governing the Town's decision. It approved a development when its staff had not yet had the ability to review for compliance with the Code's structural and locational requirements. The applicants, for their part, presented only the excuse that a specific location for the structure had not yet been settled upon with the state. The result is that any factual finding by the Council that the structure and location will comply with the Code is not based upon competent substantial evidence. While the Town's Resolution of approval included the lone, conclusory statement that

“[t]he request will protect, conserve, or preserve environmentally critical areas and natural resources”, there was no competent substantial evidence introduced at the quasi-judicial hearing to support that statement.

The applicants presented no expert testimony at the hearing, and no expert written analysis, relying instead on a ruling by the Fla. Dep’t of Environmental Protection based on a hearing conducted 5 years ago that the (apparently conceptual) plan for the structure met the state’s requirements. That order is both hearsay and irrelevant to compliance with the Town Code.

The only expert testimony on the subject at the hearing was that of Audubon’s expert in shorebird biology, and town staff, whose opinions corroborated the findings of the Florida Fish and Wildlife Conservation Commission, the state's wildlife agency and the manager for the Little Estero Island Critical Wildlife Area, that the proposed bridge/dune walkover will significantly harm imperiled listed species of migratory and nesting shore and seabirds, and their habitats, which are adjacent and near to this proposed structure. Unlike the state agency order, the Fish and Wildlife letter was

corroborated during the quasi-judicial hearing by a relevant expert. They all recommend denial based on their expert opinions.

The constantly changing nature of the beach and dune system supports keeping the dune free of fixed structures. While the applicants' counsel stressed "the unique" nature of this dune, that unique nature makes the project inappropriate. That very accretional change is an important reason why the construction of a fixed boardwalk structure is environmentally harmful.

The lack of direct access to the Gulf is not a changed or changing circumstance since the applicants purchased the property – but only the voluntary allowance by a neighboring owner for these applicants to access the Gulf from its property that has changed. The same is true of the accretion of the beach, as the evidence does not demonstrate that this is a changed condition subsequent to either the applicant's purchase of the property in 2012 or the Town's prior denial of the application in 2019.

Florida courts have recognized the special circumstances involved in applications to build on dynamic, ever – changing beach and dune systems. In *Town of Indialantic v McNulty*, 400 So. 2d 1227 (Fla. 5d DCA 1981), the court noted that the "harm to be prevented

[by beachfront construction] is substantial....” 400 So.2d at 1233. In discussing the harm to be prevented, the court noted that:

> “Through sad experience Florida has learned the importance of the barrier sand dunes which face its "high energy" beaches. The 'high energy beach' is a shore fronting the open ocean and dominated by sand and dunal features." Maloney and O'Donnell, Drawing the Line at the Oceanfront, 30 Fla. L. Rev. 383, 385 n.19 (1978). Sand beaches and dunes comprise a very small and unstable part of Florida's coastal zone. Forming a narrow band along the shores of the Atlantic Ocean and the Gulf of Mexico, they offer some of the state's most attractive and most hazardous locations for real estate development. Without adequate controls on construction and excavation, oceanfront development could destroy not only man-made structures but also beaches and dunes.” Id at 1231. (citations omitted)

As shown above, the record does not support the Town’s approval of the “Special Exception” – a “[u]se[] that may not be appropriate generally or without restrictions”[12] either factually or legally. The Town Council’s determination otherwise is not supported by competent, substantial evidence and is inconsistent with the standards in its Code governing such uses.

In addition, because only members of the Town Council and staff were provided material information about the proposal (and at

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[12] Town Code Sec. 34-2.

that, because it was submitted only one business day prior to the quasi-judicial hearing, precluding the ability of staff to review and explain it) and such material was not made available to the public prior to – or during – the quasi-judicial hearing, the approval of the Special Exception violated Audubon's rights of procedural due process while also causing a failure of the approval to enjoy support in any competent substantial evidence.

The Court should issue an order to show cause to the Respondents and ultimately quash Resolution 23-22.

Respectfully submitted this 7th day of April 2023.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing document was served this 7th day of April 2023 by e-mail sent via the Florida Courts E-Filing Portal on the recipients shown in the attached Service List.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certified that he has complied with the font requirements in Fla. R. App. P. 9.045 and word count limits in Fla. R. App. P. 9.100(g).

/s/ Richard Grosso
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