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

KLC SURF LLC and TEH4, Inc.,

Appellants,

vs.

TOWN OF FORT MYERS BEACH,
a Florida Municipal Corporation,

Appellee.

CASE NO. 25-CA-930

APPELLANTS' REPLY BRIEF

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I. PREFACE

Citations to the record are notated as follows:

- Appellants' Appendix: "App. p. __."
- Town Answer Brief: "TAB p. __."
- Town Supplemental Appendix: "Supp. P. __."

II. CORRECTION OF MISSTATED FACTS

The Town argues that the photographs it presented at the Hearing were taken in the aftermath of Hurricane Milton. TAB p. 4, 23. Hurricane Milton made landfall on October 9, 2024. App. p. 319. The record contains an affidavit from a Town employee, Mr. Jason Hauge, dated January 7, 2025 (the "**Affidavit**"), that attests that the photographs were taken at 3:11 am on September 27, 2024. Supp. p. 43. The Affidavit directly contradicts the Town's statements that the photographs were taken in the aftermath of Hurricane Milton.

The Town asserts that it provided testimony on the record that the anchoring and materials requirements were not met. TAB p. 23. The Town also asserts, as a fact, that the Development is "not anchored, not anchored to remain in place during a flood event." TAB p. 24. Appellants submit that Mr. Thomas speculated that the Development was not anchored properly; however, the record is clear

that this statement was unsupported by other evidence on the record. Appellants clarify that the Town proffered *no underlying factual evidence* to substantiate this position. App. p. 23. However, the Town's assertions that it discussed whether the Development was constructed of flood-resistant materials is patently false, as evidenced in the transcript.

The Town states that "Appellants' failure to object to this evidence [regarding anchoring requirements] further illustrates that Appellants were aware of the Town's position before the hearing." TAB p. 33-34. The anchoring and materials requirements are factual inquiries. Appellants explicitly prepared a *legal* argument based on the NOV and discussions with the Town that the alleged violations were related to BFE, as discussed at the Hearing:

> *ATTORNEY THIBAUT: My only question for Officer Yozzo at this time would be to confirm that you are finding this to be in violation due to failure to meet base flood or design flood?*
>
> *OFFICER YOZZO: That is correct.*

App. p. 281-82.

> *SPECIAL MAGISTRATE: …It's a legal argument more than a factual one. Would that be fair to say?*
>
> *ATTORNEY THIBAUT: That is correct, Your Honor.*

App. p. 308.

The Town's statement that the Development "in fact jeopardized the Town's standing in the NFIP" impliedly blames Appellants for the Town's failures to meet FEMA standards. TAB p. 50. FEMA placed the Town on NFIP probation for multiple reasons, one of which was failure to enforce its floodplain ordinance. App. p. 4-9. Related to that issue, the Development was one of many cited by FEMA for alleged violations. Thus, the record proves that the Town's characterization of Appellants' blame for the Town's probation is, at best, exaggerated.

The Town mischaracterizes FEMA's letter dated November 12, 2024, when it stated that FEMA determined "that this Development presented a hazard because it did not comply with NFIP minimum standards." TAB p. 51. That letter does not contemplate the compliance of the Development specifically but addresses the impacts from the *totality* of the alleged noncompliant structures. App. p. 14-15.

III. STANDARD OF REVIEW

The standard of review in a plenary statutory appeal is not the same as the three-prong first-tier certiorari standard set forth in *City*

of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). The Town cites cases in support of their argument that the *Vaillant* standard applies, none of which raised or considered the question of the standard of review for a F.S. 162.11 appeal. TAB p. 9-11. Conversely, *Central Fla. Investments, Inc. v. Orange County*, 295 So.3d 292 (Fla. 5th DCA 2019) raises and considers the question of the proper standard of review for F.S. 162.11 appeal and thus controls. See *Benson v. Norwegian Cruise Line, Ltd.*, 859 So.2d 1213, 1218 (Fla. 3d DCA 2003), *cause dismissed*, 885 So.2d 388 (Fla. 2004) ("No decision is authority on any question not raised and considered, although it may be involved in the facts of the case"). Because this is a plenary statutory appeal, not something like an appeal, applying the three-prong certiorari standard would be a departure from the essential requirements of the law. See *Central Fla.*, 295 So.3d at 295.

For this case, the primary distinction between the two standards is whether the threshold is reversible error or a departure from the essential requirements of the law. Error is reversible if it is reasonably probable that a more favorable result to an appellant would have been reached had the error not been committed. See *Damico v. Lundber*, 379 So.2d 964, 965 (Fla. 2d DCA 1979). A

departure from the essential requirements of the law is more than mere legal error; it is a violation of a clearly established principle of law resulting in a miscarriage of justice. See *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 889 (Fla. 2003). Even if the standard was a departure from the essential requirements of the law, the Order must still be reversed for violating clearly established principles of law resulting in a miscarriage of justice.

IV. COMPETENT SUBSTANTIAL EVIDENCE

Appellants do not dispute Mr. Thomas's qualifications as an expert. Appellants disagree with the Town's assertion that his opinion testimony is default competent substantial evidence solely based on his status as an expert. There was no supporting evidence on the record related to the Development to support his opinion testimony that the Development was at the same risk of displacement as the dislodged shipping container other than its failure to meet BFE.

A. Mr. Thomas's Testimony Not Supported by Factually Based Chain of Reasoning

The Town argues that the Order is supported by competent substantial evidence because Mr. Yozzo and Mr. Thomas were qualified as experts. Expert testimony is not *per se* competent

substantial evidence. An expert opinion that is conclusory and lacks a factually based chain of reasoning is not competent substantial evidence. See *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). In *De Groot*, the Florida Supreme Court emphasized the necessity of grounding expert opinions in factual evidence. See *Id*. The Court held that, "…the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id*. at 916. "Substantial evidence is *evidence that provides a factual basis from which a fact at issue can be reasonably inferred*." *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So.2d 202, 204 (Fla. 3d DCA 2003) (finding expert testimony to be competent substantial evidence when supported by not only professional experience, but also personal observations, zoning application, site plan and traffic study).

To be clear, the Order includes one finding of fact that Mr. Yozzo "found that the structures did not comply with the elevation, anchoring, or flood-resistance requirements" of the LDC and ASCE 24-14. App. p. 263. While the distinction is minor, Mr. Yozzo's testimony regarding inspection of the Property did not address

anchoring or materials. Mr. Thomas's testimony addressed anchoring but was not sufficient to be competent substantial evidence. Neither testified to the now alleged insufficiency of materials.

Mr. Thomas briefly alleged issues related to anchoring after presentation of Appellants' case, though it was already determined that he was unfamiliar with the Development's basic components - the Trailers – despite reference thereto in the Permit and their physical location on the Property during his inspection. It naturally follows that he could not be adequately familiar with the Development's anchoring mechanisms to determine that they are insufficient. Further, by his own account, he could not speak to the general conditions of the dislodged shipping container or why it became dislodged. App. p. 285. There is no other evidence on the record to fill the gaps and thus support his opinion. Therefore, the Town did not establish a sufficient factual basis such that a reasonable mind could accept his opinion as adequate to support his opinion that the Development was at the same risk of displacement.

"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." *Arkin Const. Co. v. Simpkins*, 99 So.2d 557, 561 (Fla. 1957). Expert testimony proffered during administrative hearings is not competent substantial evidence if it is "…totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." *Div. of Admin., State Dept. of Transportation v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981). "Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent, substantial evidence must be reasonable and logical." *A & S Ent., LLC v. Fla. Dep't of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) (quoting *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017)). "Evidence that is unreliable is not competent, substantial evidence." *Id*. at 1170. Similarly, speculation is not competent substantial evidence. See *McNorton v. McNorton*, 135 So.3d 482 (Fla. 2d DCA 2014) (expert conclusion unsupported by basic facts on the record is speculation and therefore not competent substantial evidence).

Mr. Thomas's opinion testimony failed to meet the standard set forth in *De Groot*. Mr. Thomas failed to accurately testify as to the description of the Development, including its anchoring, when the

Town noted that it was unaware that the Containers were affixed to the Trailers. He admitted he was unfamiliar with the conditions of the unrelated shipping container depicted in photographs yet still opined that such risk was likely with the subject Development. Such failure to familiarize himself with even the basic characteristics of the Development directly contradicts *De Groot* because it was speculation and therefore a reasonable mind could not accept it as adequate to reach the conclusion that the Development violated LDC 6-525. Just as in *De Groot*, here, an expert opinion that is conclusory and lacks a factually based chain of reasoning is not competent substantial evidence.

B. Not Reweighing Evidence

When a court is asked to reweigh evidence, it is being asked to reassess the credibility, weight or persuasiveness of the evidence presented. See *Bd. of Cty. Comm'rs v. Clearwater*, 440 So. 2d 497, 499 (Fla. 2d DCA 1983). The proper inquiry is whether the evidence to support the Order is sufficient to meet the competent substantial evidence standard. See *Wiggins*, 209 So.2d at 1173.

Appellant has not requested the Court to reassess the credibility, weight or persuasiveness of the evidence presented.

Instead, Appellant has demonstrated that the Magistrate's Final Order is based on conclusory and speculative statements not supported by underlying facts on the record. Therefore, the Order is not supported by competent substantial evidence.

C. Affidavit

The Affidavit further demonstrates the insufficiency of Mr. Thomas's lack of knowledge regarding pertinent issues to which he testified and opined. Namely, he cited that the dislodged shipping container was displaced during Hurricane Milton, not Hurricane Helene. App. p. 287. Failure to correctly identify the dates and thus specific storm characteristics related to the dislodged shipping container further evidences that his testimony was not supported by the facts on the record. Mr. Houghton to confirmed he removed the Development for Hurricane Milton, later clarifying the dates on redirect. App. p. 318-19. There is no evidence that the Development incurred or caused damage during Hurricane Helene. The record demonstrates that Mr. Thomas's testimony was entirely speculative and conclusory. Thus, his opinion testimony is not competent substantial evidence to support finding a violation of 6-525(1) or (2).

D. Town's Memorandum of Law Not Evidence

As stated above, the Town did not proffer evidence related to materials despite Town argument to the contrary. The Town Attorney argued in her Memorandum that "the Record does not contain any evidence that the [Development] is 'constructed of flood damage-resistant materials.'" App. p. 172. The Town bears the burden of proving a violation by competent substantial evidence. See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177 (2009) (burden of persuasion falls upon party seeking relief). There is no documentary evidence or testimony to support a conclusion that the Development's materials are not flood-damage resistant. Therefore, there is no competent substantial evidence to support the conclusion that the Development violates LDC 6-525(3).

V. DEPARTURE FROM ESSENTIAL REQUIREMENTS OF THE LAW

The Order departed from the essential requirements of the law because it interpreted LDC 6-525(1) to include a requirement to meet BFE, which required inserting language into the ordinance without any evidence of intent for such requirement. The Town acknowledges that the requirements to meet BFE application to development not governed by LDC 6-525 are codified, demonstrating that the intent

was not to impose a BFE requirement in LDC 6-525. The Town's analysis of LDC 6-525(1) further demonstrates that such interpretation is a departure from the essential requirements of the law because it would result in an unconstitutional outcome.

A. Erroneous Interpretation of LDC 6-525 Violated Clearly Established Law

The Town incorrectly argues that an erroneous interpretation of the correct law is not a departure from the essential requirements of the law. TAB p. 39. A departure of the essential requirements of the law "can come from the court's 'interpretation or application of controlling case law, statutes, procedural rules, or constitutional provisions." *Dept. of Highway Safety and Motor Vehicles v. Chakrin*, 304 So.3d 822, 826 (Fla. 2d DCA 2020), *rev. denied*, 2021 WL 1234847 (Fla. 2021) (quoting *State v. Jones*, 283 So.3d 1259, 1268 (Fla. 2d DCA 2019)).

The Order found a violation of LDC 6-525(1) <u>*because*</u> the Development failed to meet BFE. Therefore, the effect of the Order is to improperly insert the BFE elevation requirement into the language of LDC 6-525(1) despite no apparent intention to require same. See *Rinker Materials Corp. v. City of N. Miami*, 286 So.2d 552, 553-54 (Fla.

1973). For this reason, the plain and ordinary words of LDC 6-525(1) must be applied to this case. The Order failed to comply with this requirement, which is "correct law" because it has direct and relevant application to this issue. See *State, Dept. of Highway Control and Motor Vehicles v. Wiggins*, 151 So.3d 457, 470 (Fla. 1st DCA 2014), affirmed, 209 So.3d 1165 (Fla. 2017). Therefore, the insertion of a requirement to meet BFE into the language of LDC 6-525(1) departs from the essential requirements of the law.

In the same vein, the Town asserts that prohibiting consideration of BFE undermines the purpose of minimizing flood damage because it would not provide similar flood mitigation strategies as similar development, making comparison with permanent structures. TAB p. 42-43. Appellants agree with the Town's position, but only to the extent that LDC 6-525(1) is intended to minimize flood damage and should be construed to require "flood mitigation strategies comparable to other similar developments in the same area." TAB p. 42. The Town makes comparison with permanent structures, but the Development is more akin to a food truck or RV given that all three are mobile and similarly sized. To this point, they are all vehicles. See F.S. 320.01(1). Vehicles are not required to meet

BFE under FEMA regulations. See 44 C.F.R. 59.1 (exempting vehicles from definition of "structure") and 44 C.F.R. 60.3(e)(4) (requiring structures to meet BFE in VE zones).

The Town's floodplain management ordinance does not explicitly regulate food trucks. Regardless, there is a food truck on the Property which is undisputedly compliant. App. p. 317.

RVs are regulated and need not meet BFE but must be highway ready ("on wheels or jacking system"), attached by quick-disconnect utilities and security devices, and structurally independent of permanent attachments such as decks or stairs. See LDC 6-519(2). The Development meets said requirements for both food trucks *and* RVs, thus employing comparable floodplain mitigation strategies to like development.

The Town's reference to 6-403(8) and its argument that Mr. Thomas's authority to render interpretations of the Town's floodplain regulations are equally unconvincing. LDC 6-403(8) incorporates 44 C.F.R. 59.22, which does not address substantive or technical requirements for *development* but codifies requirements that *the Town* must meet to participate in the NFIP. Further, Mr. Thomas's

authority to interpret floodplain regulations does not authorize him to *rewrite* the ordinance.

The Town also asserts that LDC 6-525(1) must be construed liberally. TAB p. 52. Even if the LDC superseded common law, a liberal construction of LDC 6-525(1) would not require meeting BFE. Liberal construction does not support a conclusion that has no basis in the ordinance or common sense. See *Turnberry Isle Resort and Club v. Fernandez*, 666 So.2d 245, 256 (Fla. 3d DCA 1996). As discussed above, the Town's interpretation of LDC 6-525 is neither has basis in the ordinance nor common sense, as further demonstrated by the Town's conflation of the Development with permanent structures versus other mobile uses.

To support its proposed case-by-case application of BFE under LDC 6-525, the Town cites distinct standards for above-ground and below-ground storage tanks. This argument better supports Appellants' position because it references distinct *codified* standards for each that put the public and staff on notice of relevant requirements. There is no codified standard putting the public or staff on notice that the Development must meet BFE, as evidenced by issuance of the Permit.

The Town's argument that LDC 6-525(4) "also requires evaluation of whether at least a portion of the Development is at or above [BFE]" is false. TAB p. 46-49. ASCE 24-14 permits these facilities below BFE under certain conditions, which is also expressly contemplated in LDC 6-525(4). App. p. 217-18.

B. Town Advances Unconstitutional Interpretation of LDC 6-525

The Town's analysis of LDC 6-525(1) requires imposing BFE on a case-by-case basis, further demonstrating that its interpretation is flawed the void-for-vagueness and nondelegation doctrines. Ordinances are presumed to be constitutional and therefore must be construed whenever possible to affect a constitutional outcome. See *Brinkmann v. Francois*, 184 So.3d 504, 507-08 (Fla. 2016).

1. Vagueness

Appellants' interpretation of LDC 6-525(1) comports with constitutional requirements: development governed thereunder must be located and constructed to minimize flood damage, which can be accomplished in development-specific, and sometimes multiple, ways. While meeting BFE might satisfy LDC 6-525(1) in some cases, the Town expands the plain language to mean that some, but not all

development, ***must*** meet BFE to satisfy this criterion. This interpretation fails to give persons of ordinary intelligence fair notice of what constitutes required or forbidden conduct under LDC 6-525(1). See *State v. Carrier*, 240 So.3d 852, 859-60 (Fla. 2d DCA 2018). As evidenced by Mr. Houghton's testimony that staff required the Trailers to obtain the Permit, neither staff nor Appellants were on notice that meeting BFE is required to comply with LDC 6-525. App. p. 312.

The Town's analysis proves that case-by-case staff decisions to meet BFE under LDC 6-525(1) would result in arbitrary and discriminatory enforcement. See *Southeastern Fisheries Ass'n v. Dept. of Natural Resources*, 453 So.2d 1351, 1353 (Fla. 1984) ("A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement."). The Town compares the Development to permanent structures instead of other mobile uses, demonstrating that arbitrary and discriminatory enforcement of an uncodified BFE standard is likely. TAB p. 43. Therefore, the Town's interpretation would render the ordinance unconstitutionally vague.

Appellants reiterate agreement with the Town's point that compliance with LDC 6-525 would require enacting comparable flood mitigation strategies as similar development. TAB p. 42. As discussed above, the Development employs comparable flood mitigation strategies as food trucks and RVs. Therefore, Appellants' interpretation of LDC 6-525(1) provides a constitutional construction that should be applied.

2. Nondelegation Doctrine

The Town's analysis would also vest staff with unbridled discretion to determine when BFE applies under LDC 6-525(1), in violation of the nondelegation doctrine. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." *Askew v. Cross Key Waterways*, 372 So.2d 913, 918–19 (Fla. 1978). The Town's interpretation would impermissibly empower staff, without guidelines or standards, to create, not administer, the law applying BFE to LDC 6-525(1). Town Council has provided no standards for determining if/when LDC 6-525(1) requires compliance with BFE.

The correct reading of LDC 6-525(1) allows staff to weigh relevant and often complex technical factors (e.g. location relative to other improvements, weight/mass, nature of use, mobility), and potentially multiple solutions, to determine whether a development is located and constructed to minimize flood damage. This interpretation is correct because it avoids conflict with the nondelegation doctrine. See *Id.* at 921.

VI. DUE PROCESS

The Town argues that Appellants' claim for lack of due process is "demonstrably untrue," citing the undersigned's appearance at the Hearing as evidence. TAB p. 26. Appellants have not argued that the Town provided *no* notice. Rather, the notice was deficient for failure to apprise Appellants that the Town alleged violations for reasons other than failure to meet BFE. It is clear from the record that Appellants prepared a legal argument demonstrating why BFE does not apply to the Development. The Town expanded the scope of the charges against Appellants at the Hearing to include factual issues *other than BFE*. Appellants were prejudiced as a result, as adequate notice would have informed Appellants of the additional factual issues – LDC 6-525(2) and (3) – and thus the need to file appropriate

exhibits and engage expert witnesses. Therefore, Appellants have been prejudiced by the Town's expansion of the charges at Hearing and the Order's finding of violation for issues unrelated to BFE.

The record supports Appellants' position: the NOV cites failure to meet BFE as the reason for bringing the violation: "For the keeping and/or maintaining of non-compliant structure(s) and/or shipping containers on property, which are *not built to current flood design codes* in the Special Hazard Areas as defined in Section 6-494 of the FMB Code of Ordinances (***VE Zone for this property requires 14 feet***)." App. p. 20. The photographs provided to Appellants prior to January 7, 2025, the date of the Hearing, only evidence failure to meet BFE. App. 34-35, 39.

Mr. Yozzo, the Town's code officer, initiated enforcement proceedings and requested a hearing. See F.S. 162.06(1) and 162.07(1). He testified that "photographs show that the shipping container is not elevated to 13 feet above sea level." App. p. 279. When asked, Mr. Yozzo confirmed that *failure to meet BFE was the reason for alleging a violation*. App. p. 281-82. Therefore, the NOV and photographs provided to Appellants prior to the date of Hearing

were consistent with the code officer's stated reason for bringing the enforcement action: failure to meet BFE.

Due process requires that notice must be sufficiently specific and clear to apprise the accused to the extent that they may have a fair opportunity meet and disprove or explain the act complained of. See *State ex re. Hawkins v. McCall*, 29 So.2d 739, 742 (Fla. 1947). "Simple justice requires that there be at least enough specificity as to fairly apprise the accused [person] of the alleged acts against which he must defend himself." *Crowder v. State ex rel. Baker*, 285 So.2d 33, 35 (Fla. 4th DCA 1973), *cert. denied*, 291 So.2d 9 (Fla. 1974). In the administrative context, "the charges should be specific, informing the accused with reasonable certainty of the nature and cause of the accusation so as to be given a reasonable opportunity to defend against those charges." *Robins v. Fla. Real Estate Commission*, 162 So.2d 535, 537 (Fla. 3d DCA 1964) (citing accused for alleged course of conduct without stating with any degree of exactness in what specific manner he violated statute was failure to accord due process).

To further illustrate the flaws in the Town's argument, the NOV also cited Appellants for violations of ASCE 24-14, and LDC 6-501,

which incorporates by reference the requirements of ASCE 24-14. App. p. 20. The Town did not cite a particular provision of ASCE 24-14 that they alleged had been violated. ASCE 24-14 is 75 pages and imposes a plethora of technical design standards, *including BFE*. App. p. 209. If the alleged violation of ASCE 24-14 had been for issues unrelated to BFE, the notice would have been too broad and thus vague to apprise Appellants of the nature of those charges. This violates due process. See *Crowder*, 285 So.2d at 35 (vague and indefinite factual allegations fail even less demanding test for due process in non-criminal proceedings).

The Town may not provide notice related to one alleged violation and proceed to argue additional issues at a quasi-judicial hearing. "[T]he granting of relief which expands the scope of the hearing and decides matters not noticed for hearing violates due process." *Miami-Dade County Bd. of Cnt. Commissioners v. An Accountable Miami-Dade*, 208 So.3d 724, 734 (Fla. 3d DCA 2016) (quoting *Celebrity Cruises, Inc. v. Fernandes*, 149 So.3d 744, 750 (Fla. 3d DCA 2014)). The date of the Affidavit, the same as the Hearing, further indicates that the Town expanded the scope of the charges after issuing notice. Sup.

Contrary to the Town's argument, Appellants' discussion of all four criteria in LDC 6-525 nor is not fatal. While anchoring and materials requirements are separate from BFE, they overlap with the requirement to be located and constructed to minimize flood damage. The record is clear that Appellants prepared a lengthy legal analysis demonstrating that BFE did not apply, but only quickly addressed the entirety of LDC 6-525. App. p. 301. The context demonstrates that such brief discussion was not in defense against additional charges, but to emphasize what Appellants believed to be undisputed facts, thus proving that the failure to meet BFE does not equate to a violation of LDC 6-525.

The Town argues that Appellants are barred from asserting a violation of due process without objection at the Hearing. App. p. 26. The failure to provide due process is fundamental error which may be argued for the first time on appeal. See *Georges v. Dept. of Health*, 75 So.3d 759, 762 (Fla. 2d DCA 2011). The Town likewise argues that Appellants have waived their right to assert a due process violation; however, "only an express waiver will suffice to estop the aggrieved party from challenging the adjudication on appeal." *Reins v. Johnson*, 604 So.2d 911, 911 (Fla. 2d DCA 1992). Appellants did not expressly

waive this right but agreed to provide a memorandum[1] in response to the Magistrate's acknowledgement that "it's really not so much a fact dispute here as a legal one." App. p. 328. That statement indicated the Magistrate's understanding that the issue at bar was failure to meet BFE, which fact was undisputed, and whether BFE applied to the Development. Agreement to restate the arguments in writing was not a waiver, as Appellants agreed to waive a second hearing on the ***legal*** argument presented.

The NOV clearly alleged violation of LDC 6-501, ASCE 24-14, and LDC 6-525 on the basis that the Development failed to meet BFE, as confirmed by Mr. Yozzo, who initiated the case. The NOV is issued for the purposes of informing Appellants of the charges against them. BFE is separate from the issues of anchoring or materials. Expanding their prosecution of Appellants to include matters not noticed for hearing is violative of due process and prejudiced Appellants. Therefore, the Order should be reversed.

[1] Appellants filed, or at least attempted, in good faith to file, their memorandum of law on January 17, 2025. Whether or not the memorandum is stricken from the record, this demonstrates that Appellants did not intend to waive any rights.

VII. EQUITABLE ESTOPPEL

The Town asserts that Appellants improperly reargue the issue of equitable estoppel. To be clear, the Order found that equitable estoppel did not apply *because* it had already found a violation of LDC 6-525 and therefore deemed the issuance of the Permit invalid. TAB p. 35. The Order's basis for finding the violation of LDC 6-525 was a departure from the essential requirements of the law, which in turn resulted in a flawed analysis of the issue of equitable estoppel that has prejudiced Appellants. Simply, the Order's finding that equitable estoppel did not apply was predicated on a departure from the essential requirements of the law and therefore should be reversed.

VIII. CONCLUSION

Based on the foregoing, Appellants request this Honorable Court to reverse the Order.

Respectfully submitted this 20th day of June, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on Gretchen R.H. Vose, Esq. (bvose@voselaw.com), Nancy Stuparich, Esq. (nstuparich@voselaw.com), and Chloe Berryman, Esq. (cberryman@voselaw.com) Vose Law Firm, 324 Morse Boulevard, Winter Park, Florida 32789-4294 (counsel for Respondent) this 20th day of June 2025.

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CERTIFICATE OF COMPLIANCE WITH COMPUTER GENERATED BRIEF

I HEREBY CERTIFY that this brief was prepared using Bookman Old Style 14-point font and that it complies with the word count requirements in the Florida Rules of Appellate Procedure.

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