IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2017-CA-351-O

PHILLIP T. COWHERD

Petitioner,

v.

CITY OF ORLANDO, FLORIDA, and
INVICTUS DEVELOPMENT, LLC

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI SEEKING REVIEW OF ORLANDO CITY COUNCIL'S APPROVAL OF ORLANDO MUNICIPAL PLANNING BOARD'S DECISION TO GRANT INVICTUS DEVELOPMENT LLC'S ZONING APPLICATION

INVICTUS DEVELOPMENT, LLC'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE FACTS

A. BACKGROUND

Over the years, the City of Orlando has taken significant steps to improve the once-blighted Parramore neighborhood. (City App. 4). In 2002, the City established "the Parramore Village project area as a prelude to redevelopment." *Id*. A few years later, however, the City was forced to demolish Parramore Village due to neglect. *Id*. In 2009, the Parramore Village area was rezoned to a planned development to support a townhome and single-family home community, but the project was never developed. (Pet. App. 38:16-23).

Several years later, in 2014, the City began assessing whether the U.S. Department of Housing and Urban Development ("HUD") Sustainable Communities Regional Planning Grant would benefit the Parramore community. (Pet. App. 68:21-69:4). This federal grant emphasized sustainable growth in minority and low-income neighborhoods along the SunRail route. *Id*.

As a result of that assessment, the City adopted the Parramore Comprehensive Neighborhood Plan ("Parramore Plan"), which "contains [the City's] vision for the . . . Parramore community." (Pet. App. 68:14-69:19); (City App. 28-114). The Parramore Plan is "an important continuation and further refinement of the pathways for Parramore initiative that [the City has] been

working on for over a decade." (Pet. App. 69:8-11). The Parramore Plan further identifies certain "Catalyst Projects" that are "necessary to pursue redevelopment projects that will have the greatest impact on creating a healthy community and stimulating redevelopment." (City App. 80). The City incorporated the Parramore Plan into its Growth Management Plan ("GMP"). (Pet. App. 69:15-18).

In November 2015, the City issued a Request for Proposals for the redevelopment of the old Parramore Village site. Invictus responded, along with 5 other developers, and was ultimately selected. Invictus chose to adopt the City's vision as its development plan, which consists of 178 multi-family units and 33 townhomes. (City App. 4). The planned development is a mixed-income project that consists of 80% income-restricted units, and 20% market rate units. (Pet. App. 73:20-22). It also seeks to develop land designated in one of the Parramore Plan's "Catalyst Projects." (Pet. App. 70:19-71:3); (City App. 87).

B. PROCEEDINGS BEFORE THE MUNICIPAL PLANNING BOARD

On October 18, 2016, the City's planning staff issued a Staff Report to the Municipal Planning Board (the "Zoning Board") regarding Invictus's application. (City App. 1-27). The Staff Report concluded that Invictus's application was consistent with the GMP and the City's Land Development Code ("LDC") (Tit. II, Code of the City of Orlando, Fla.) (City App. 16). The Staff Report recommended

that the Zoning Board approve Invictus's application, subject to certain conditions. *Id*.

On October 18, 2016, the Zoning Board held a public hearing. The project planner for the City, Jim Burnett, introduced the project to the Zoning Board. (Pet. App. 205). He explained the conditions set out in the Staff Report, as well as the basis for the Staff Report's recommendation, and he responded to the Zoning Board's questions. *Id*. Paul Lewis, Chief Planning Manager for the City, also appeared. Mr. Lewis discussed the "City's Growth Management Plan as it related to neighborhood compatibility and consistency with the GMP." *Id*. at 206. He further noted that "the project was consistent" with "Orlando's Downtown Community Redevelopment Area Plan" and the "Parramore Comprehensive Neighborhood Plan." *Id*.

Mr. Cowherd took advantage of the opportunity to be heard during the public hearing. Prior to the hearing, Mr. Cowherd sent the Zoning Board members an email listing his concerns. (Pet. App. 205). And he appeared at the October 18 public hearing, reiterating the arguments he raised in the email. *Id*. Mr. Cowherd urged the Zoning Board to "table" the decision until his concerns could be addressed. *Id*.

Two of Invictus's principals, Richard Cavalieri and Paula Rhodes, presented argument on behalf of Invictus and answered questions from the Zoning Board. *Id*.

Ms. Rhodes "addressed the concerns presented by Mr. Cowherd." *Id*. at 206. Mr. Cavalieri explained that Invictus was on a "strict timeline" and that a decision to "table" the zoning determination, as suggested by Mr. Cowherd, would preclude Invictus from meeting the deadline for the tax credit program. *Id*.

Finally, three Parramore residents offered testimony in support of approving the application. Dr. Robert Spooney spoke of the need for affordable housing in Parramore. *Id*. at 205. Madelyn Young noted that the opponents of the application (Mr. Cowherd) "didn't live in the Parramore neighborhood." *Id*. Ms. Young explained that she does live in the neighborhood, and described the development as "a much-needed project." *Id*. Finally, Reverend James Watkins offered his support, stating that "the proposed project would help the Parramore area thrive and would serve to reduce or eliminate crime." *Id*. at 206. After this extensive presentation of evidence and testimony, the Zoning Board voted unanimously to approve the project. *Id*.

C. THE PATH TO QUASI-JUDICIAL REVIEW BEFORE THE CITY COUNCIL ON DECEMBER 12, 2016

A week after the Zoning Board public hearing, Mr. Cowherd requested a quasi-judicial hearing (Pet. App. 150), and on November 14, 2016, filed his Petition in Opposition to Invictus's application. (Pet. App. 148-56). Mr. Cowherd asserted in his Petition that he "controls the ownership of a property addressed as 800 McFall Ave.," which "is in immediately adjacent proximity to the Applicant's

subject property." *Id*. at 148. Mr. Cowherd contended that his "right to enjoyment of his property, part of the Traditional lot and block land pattern of downtown Orlando," would be "adversely affected" by (1) the aesthetic "contrast in the non-traditional multi-family layout of the development plan"; (2) an increase in "land use intensity"; and (3) additional traffic. *Id*. at 148.

Mr. Cowherd provided no explanation in his Petition regarding how these issues would "adversely affect" him personally or his property to any greater degree than any landowner in the area surrounding the project. Instead, Mr. Cowherd raised a bevy of highly-technical arguments that the Zoning Board considered and rejected at the October 18 hearing. (Pet. App. 148-56).

Finally, in his Petition, Mr. Cowherd did not request the ability to present witness testimony or cross-examine any of the witnesses from the October 18 public hearing. In fact, Mr. Cowherd did not request that the hearing officer consider any information other than the legal arguments contained in his Petition, various provisions of the Orlando City Code and the Orlando GMP, and the purported shortcomings of the Staff Report. Rather, he requested only that "the Hearing Officer, after full consideration of the findings provided herein, recommend unconditional denial" of Invictus's zoning application. *Id*. at 150. In sum, Mr. Cowherd's argument was that his Petition contained all the information necessary for a hearing officer to determine the application should be denied.

On December 2, 2016, the City published notice that on December 12, 2016, the City Council would consider whether to adopt an additional procedure for conducting quasi-judicial hearings on an expedited basis before the City Council under limited circumstances. (Petition at 13-14); (Pet. App. 159); (City App. 218). If adopted, this amendment would be codified in Section 2.206(6). (Pet. App. 159); (City App. 218). The same day, December 2, the City also notified Mr. Cowherd that it would hold a quasi-judicial hearing on December 12 to review the Zoning Board's approval of Invictus's application in light of the arguments raised in Mr. Cowherd's Petition in Opposition. (City App. 219).

Mr. Cowherd unquestionably received these December 2 notices because three days later he, along with counsel, was present at the "first reading," which took place on December 5, 2016. Mr. Cowherd took advantage of this opportunity to be heard as well. His attorney argued against the Code amendment at the first reading on December 5, 2016. (Pet. App. 11).

D. THE DECEMBER 12, 2016 PROCEEDINGS BEFORE THE CITY COUNCIL

1. Adoption of Section 2.206(6)

On December 12, 2016, the City considered argument from the City and Mr. Cowherd regarding the adoption of section 2.206(6). At the time Mr. Cowherd filed his Petition in Opposition, the quasi-judicial hearing process was governed exclusively by section 2.207, which provides for a quasi-judicial hearing before a

hearing officer no later than ninety (90) days from the date of the hearing request. Tit. 1, Ch. 2, Art. XXXII, § 2.207(1), Code of the City of Orlando, Fla. Section 2.207 affords petitioners the opportunity to present evidence, call witnesses, and cross-examine witnesses. *Id.* Upon conclusion of the hearing, the hearing officer issues a recommendation to the City Council. *Id.* If a party objects to the hearing officer's recommendation, that party can submit an exception to the City Council, which the City Council will consider. *Id.* at 2.209(1)-(2).

The proposed code provision, section 2.206(6), does not replace or otherwise impact the traditional quasi-judicial hearing process before a hearing officer. Instead, as the Mayor explained during the December 12 proceedings, section 2.206(6) allows the City to "create a path on our land use decisions when extraordinary circumstances exist to expedite the process and bring the decision directly to City Council." (Pet. App. 4). The Mayor further explained that whether the hearing process is governed by section 2.206(6) or 2.207, "[i]t's ultimately a quasi-judicial process, ends with the City Council, in any event, that usually makes a stop with a hearing officer or nonbinding recommendation from the hearing officer, but ultimately the City Council makes the final decision in every case, whether it goes to a hearing officer or whether it goes through this new procedure." *Id*. at 4-5. The Mayor concluded by noting, "[t]his is not unusual, a lot of the big

cities, Tampa, Hialeah, Jacksonville, Maitland, Oviedo, use a process that does not include a hearing officer their quasi-judicial [hearings]." *Id*. at 5.

The problem with section 2.207 is that it provides an easy mechanism for competitors and individuals with ulterior motives to delay finality in the zoning process. Under the section 2.207 regime, the simple act of filing a notice of intent to challenge a Zoning Board determination stays the approval process while the matter works its way through the quasi-judicial process before a hearing officer. (Pet. App. 20).

As Commissioner Stuart explained during the December 12 hearing, the delay guaranteed by section 2.207 has been exploited in the past: "It has been common in the last 11 years that I've been here, it's been common that people use this process to push it down the road. In which case it adversely affects or adversely causes additional investment by people in this, [even though] the outcome has not changed." *Id*. at 30. Commissioner Stuart elaborated: "I also know that in a recent issue, there was a one year delay based upon an effective appeal that has cost the builder millions of dollars in terms of getting it accomplished," notwithstanding that "the project had already been determined to a good project…" *Id*. He continued: "[T]here are projects that have also not been any different but cost hundreds of thousands of dollars in terms of legal fees to accomplish really nothing." *Id*. at 33-34.

Although Mr. Cowherd had already argued against adoption of section 2.206(6) during the December 5 first reading, the City Council afforded him another opportunity to be heard on the issue. After hearing counsel for Mr. Cowherd present his arguments for a second time (Pet. App. 11-18), the City Council ultimately voted unanimously to adopt section 2.206(6). (Pet. App. 4:3-34:17).

2. Quasi-Judicial Hearing

The December 12 quasi-judicial hearing began with testimony from City planning official Dean Grandin that addressed Mr. Cowherd's arguments. (Pet. App. 36-41). After Mr. Grandin's presentation was complete, the Mayor invited the parties to ask questions. (Pet. App. 41). Mr. Cowherd did not ask questions of Mr. Grandin. Mr. Cowherd did not attempt to cross-examine Mr. Grandin.

After the conclusion of Mr. Grandin's testimony, Mr. Cowherd was called to present his case-in-chief. (Pet. App. 41). Mr. Cowherd's attorney presented argument. At no point did he ask to call witnesses. He did not even call Mr. Cowherd to provide testimony. Instead, Mr. Cowherd opted to have his attorney repeat, almost verbatim, the arguments presented in his Petition in Opposition. This exercise accounted for approximately 8 minutes and 30 seconds of his 10 minute case-in-chief. (Pet. App. 43-51). And even though his expert witness was sworn in, Mr. Cowherd did not call him as a witness, and instead elected to submit

an affidavit into the record: "The affidavit is his statement. He is just available for cross-examination by you as acting as a hearing officer." (Pet. App. 52:19-21).

Richard Cavalieri testified as a witness for Invictus. (Pet. App. 60). He detailed: (1) the immediate need for affordable housing in the Parramore neighborhood; (2) the high quality of materials Invictus would use to construct the development; (3) the likelihood of an increase in market value of land surrounding the development; and (4) the security measures Invictus would employ to ensure a high-level of safety within the development. *Id*. at 60-63. Mr. Cowherd did not ask questions of Mr. Cavalieri or request leave to cross-examine.

Paula Rhodes also testified on behalf of Invictus. (Pet. App. 63). She addressed: (1) the density bonus issue; (2) parking; and (3) the ownership of certain roads within the proposed site and why it was not an issue. (Pet. App. 63-64). Mr. Cowherd did not ask questions of Ms. Rhodes or request leave to cross-examine.

Next, the City provided extensive testimony from City zoning official Mark Cechman, as well as the City's Chief Planning Manager, Paul Lewis, which was tailored specifically to respond to the issues raised in Mr. Cowherd's Petition in Opposition to the Zoning Board's decision. (Pet. App. 66-83). Mr. Cowherd did not request leave to cross-examine either witness.

Next, 8 witnesses unaffiliated with any of the parties to the quasi-judicial proceeding—most were long-time Parramore residents— testified in favor of the City's decision to grant Invictus's application. (Pet. App. 83-107). Mr. Cowherd asked no questions of these witnesses. He did not ask for leave to cross-examine them.

Counsel for Mr. Cowherd presented rebuttal argument and posed a specific question to Mr. Cechman. (Pet. App. 107). During Mr. Cowherd's rebuttal, Commissioner Ortiz noted the technical nature of Mr. Cowherd's objections and the overwhelming support for the development within the Parramore community. (Pet. App. 110-113). Given these considerations, Commissioner Ortiz asked what Mr. Cowherd wanted out of the proceedings, and how any of this affected Mr. Cowherd personally. *Id*. at 113-114.

Commissioner Stuart found the answers to these questions unsatisfactory and questioned Mr. Cowherd's true motive in challenging the zoning approval: "[h]ave you ever heard your client actually tell somebody else that they are going to procedurally try to stop your project and sue to make such a case that it would not go forward?" *Id*. at 120. Counsel for Mr. Cowherd asked Commissioner Stuart to be more specific. *Id*. at 121. Commissioner Stuart replied: "I'm asking you have you had your client ever talk to you about procedurally moving something forward or suing somebody in the case so that this would be killed because of the lawsuit

and the process?" *Id*. Counsel for Mr. Cowherd refused to answer the question based on attorney-client privilege. *Id*.

Mr. Cechman and Mr. Lewis presented additional testimony in response to specific questions submitted during the proceedings, only one of which was submitted on behalf of Mr. Cowherd. Mr. Cechman and Mr. Lewis also responded to many questions from the City Council members about the specific arguments raised by Mr. Cowherd. (Pet. App. 129-136).

At the conclusion of the lengthy quasi-judicial hearing, the City Council voted unanimously to approve Invictus's Application. (Pet. App. 141:9-14). As support for the decision, the City Council adopted the findings contained in the Staff Report. (Pet. App. 140). The Final Order provides that Invictus's "zoning application case #2016-00024 is consistent with the applicable provisions of the City's Growth Management Plan and Land Development Code." (Pet. App. 173).

ARGUMENT AND CITATIONS OF AUTHORITY

I. MR. COWHERD'S ARGUMENT REGARDING THE SCOPE OF THIS COURT'S REVIEW RELIES ON A MISCHARACTERIZATION OF THE LAW.

The scope of this Court's review is narrow and much more circumscribed than Mr. Cowherd represents. According to Mr. Cowherd, Florida circuit courts review quasi-judicial acts by "non-deferential standards" and should grant certiorari relief to correct "the same level of error that would require reversal on a

direct appeal—a substantive or procedural error that was not harmless error." (Petition at 10)[1].

Mr. Cowherd is incorrect. True, certiorari review of a local agency's quasi-judicial acts is "akin in many respects to a plenary appeal." *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) (citing *Florida Power & Light v. City of Dania*, 761 So. 2d 1089 (Fla. 2000)). But the Florida Supreme Court has made pellucidly clear that first-tier certiorari review is "**deliberately circumscribed out of deference to the agency's technical mastery of its field of expertise**." *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d at 843 (emphasis added).

Because of this special deference, it is well-settled in Florida that on first-tier certiorari review—unlike review on plenary appeal—a circuit court is precluded from reweighing the evidence presented to the agency tribunal and substituting its judgment for the agency's. *Marion Cty. v. Priest*, 786 So. 2d 623, 625 (Fla. 5th DCA 2001) ("Therefore, when the facts are such that a zoning authority has a choice between two alternatives, it is up to the zoning authority to make the choice, and not the circuit court.") (citing *Dania*, 761 So.2d 1089 (Fla.2000) (improper for circuit court to conduct a de novo review and substitute its judgment for city's as to

[1] As authority for these propositions, Mr. Cowherd quotes a footnote from a concurring opinion in a 1991 Third DCA case and an unpublished ruling from a Gadsden County circuit court. (Petition at 10).

relative weight of conflicting evidence) and *City of Jacksonville Beach v. Marisol Land Dev., Inc.*, 706 So.2d 354, 355 (Fla. 1st DCA 1998) (circuit court is not authorized to decide questions of zoning policy de novo)); *see also Dusseau v. Metopolitan Dade Cty. Bd. of Cty. Com'rs*, 794 So. 2d 1270, 1276 (2001) ("The circuit court has no training or experience—and is inherently unsuited—to sit as a roving 'super agency' with plenary oversight in such matters.").

As explained in more detail below, this Court's review is constrained to three considerations: (1) whether Mr. Cowherd received adequate procedural due process; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d at 843 (citing *City of Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982)). And contrary to Mr. Cowherd's characterization of the law, in applying this test, this Court must defer to the City's findings and judgment. *Id*.

II. NO DENIAL OF PROCEDURAL DUE PROCESS

A. No Deprivation of a Constitutionally Protected Property or Liberty Interest = No Denial of Due Process

As Mr. Cowherd acknowledges (Petition at 12), this Court's due process inquiry is controlled by the Fifth DCA's decision in *Carillon Cmty. Residential v. Seminole Cty.*, 45 So.3d 7 (Fla. 5th DCA 2010). In *Carillon*, the Seminole County Board of County Commissioners approved an amendment to the Carillon Planned

Unit Development. The amendment allowed a mixed-use development, including a four-story, 600 bed University of Central Florida student housing complex, to be built on two parcels of land adjacent to petitioners' subdivision. *Id*. The petitioners were the subdivision's homeowners' association and its President. *Id*. They argued to the circuit court they were not afforded procedural due process because the County Board denied their request to cross-examine witnesses at the quasi-judicial hearing in which the amendment was approved. *Id*. On first-tier certiorari review, the circuit court rejected their argument, and petitioners requested second-tier certiorari relief from the Fifth DCA. *Id*.

The Fifth DCA affirmed. According to the *Carillon* court, determining whether a party received procedural due process in a quasi-judicial proceeding is a fact-intensive, case-by-case inquiry:

> Due process is a flexible concept and requires only that the proceeding be "essentially fair." The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved. There is, therefore, no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met. Courts instead consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand.

Id. (citations omitted).

The Fifth DCA explained that before a reviewing court engages in the procedural due process inquiry, it must make a threshold determination: "When assessing whether or not a violation of due process has occurred 'the court must

first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation there can be no denial of due process.'" *Id*. at 9 (quoting *Economic Dev. Corp. of Dade County, Inc. v. Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986)).

Mr. Cowherd argues his due process rights were violated by the City's amendment to the portion of its Code regarding quasi-judicial proceedings because he was stripped of the right to present evidence, cross-examine adverse witnesses, impeach witnesses, and rebut opposition evidence. (Petition at 5, 11, 13). As explained below, these claims have no factual support in the record whatsoever. Mr. Cowherd did, in fact, present evidence during the December 12 proceedings. He also presented questions to opposition witnesses. Mr. Cowherd was never precluded from cross-examining or impeaching witnesses, or from rebutting opposition evidence—he just elected not to. But the threshold problem for Mr. Cowherd is that he has no "constitutionally protected liberty or property interest" in an automatic right under the former version of the Code to present argument to a hearing officer, as opposed to the City Council.

At most, Mr. Cowherd had an *expectation* the City would continue using section 2.207 exclusively for quasi-judicial proceedings. But an expectation a particular law will continue in force is not a vested right, and is thus not a constitutionally protected interest. The First DCA's decision in *Lakeland Regional*

Medical Center, Inc. v. Florida Agency for Health Care Administration, 917 So.2d 1024 (Fla. 1st DCA 2006) is instructive. In *Lakeland Regional*, Lakeland Regional Medical Center challenged Winter Haven Hospital's license to perform open heart surgery in 2003 and filed a petition for a formal hearing. While Lakeland Regional's petition was pending, the Legislature amended sections 408.036 and 408.0361, Florida Statutes, to create a new licensure scheme which effectively eliminated Lakeland Regional's right to challenge Winter Haven's application. Judge Polston (now Justice Polston), writing for the court, held that even though Lakeland Regional had a right under the previous statute to challenge the application, and the amendment extinguished that right, because Lakeland Regional did not have a vested constitutionally protected right, the retroactive application of the statute did not violate due process. *Id*. at 1033.

The same rationale applies here. Mr. Cowherd did not have "a vested constitutionally protected right" to continued application of section 2.207. "A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. **To be vested[,] a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.**" *DaimlerChrysler Corp. v. Hurst*, 949 So.2d 279, 285-86 (Fla. 3d DCA 2007) (emphasis added) (citations omitted) (rejecting argument that plaintiff had vested right to maintain asbestos claim, such that newly enacted legislation which

abrogated plaintiff's right to maintain claim constituted a due process violation: "Prior to the enactment of the Act, the plaintiff had, at most, a 'mere expectation' that the common law would not be altered by legislation. Thus, the plaintiff did not have a vested right in her common law asbestos claim." *Id*. at 287 (citations omitted). At most, Mr. Cowherd had an expectation the quasi-judicial process would remain the same. This expectation does not constitute a "constitutionally protected liberty or property interest." As a result, under *Carillon*, "there can be no denial of due process." *Carillon*, 45 So.3d at 9.

Even if Mr. Cowherd had a constitutionally protected interest in continued application of section 2.207, he cannot prevail under *Carillon*. The "core" of due process is the right to notice and an opportunity to be heard. *Id*. Mr. Cowherd had plenty of notice and multiple opportunities to be heard.

B. Adequate Notice

Mr. Cowherd claims in his Petition he had only "seconds" of notice that the amended quasi-judicial procedure would be adopted, and that "[n]otice measured in seconds cannot possibly be deemed 'fair notice.'" (Petition at p. 14). The "seconds" of notice characterization is belied by the record. As counsel for Mr. Cowherd himself acknowledged during the December 12, 2016 proceedings before the City Council, the amendment to the City Code was first introduced at a public "first reading" on December 5, 2016. (Tr. 10). Mr. Cowherd and his counsel

attended the December 5 proceedings and presented extensive argument against the proposed amendment to the quasi-judicial process outline in the Code. The reason Mr. Cowherd was able to retain counsel and attend the December 5 hearing: the notice published by the City on December 2. Therefore, Mr. Cowherd's argument that he had only "seconds" of notice of the likelihood the amended version of the Code would be used for the December 12, 2016 proceedings is refuted by the record.

C. Opportunit**IES** to be Heard

Mr. Cowherd also had an opportunity to be heard. In fact, he had multiple opportunities to be heard and he took advantage of all of them. Mr. Cowherd was first heard during the October 18, 2016 public hearing before the Zoning Board. He attended the hearing and presented argument opposing Invictus's application. Mr. Cowherd submitted a Petition in Opposition following the Zoning Board's decision to grant Invictus's application. That petition triggered his right to a quasi-judicial proceeding. Before the December 12 quasi-judicial proceeding took place, Mr. Cowherd took advantage of another opportunity to be heard when he argued against the adoption of section 2.206(6) on December 5. And on December 12, he was heard yet again during the quasi-judicial proceeding before the City Council. It is critical to remember that the December 12 quasi-judicial proceeding was the product of Mr. Cowherd's Petition in Opposition to the Zoning Board

determination. As a result, the City's presentation was in large part tailored to address and respond to Mr. Cowherd's specific concerns. Not only was Mr. Cowherd given an opportunity to be heard on December 12, the purpose of the entire proceeding was to address his arguments.

Mr. Cowherd ignores all this in his Petition. He conveniently omits any mention of his involvement in the October 18 proceedings before the Zoning Board. His attendance and his attorney's argument at the December 5 first reading are also not discussed in the Petition. The most striking aspect of Mr. Cowherd's Petition, however, is his portrayal of the December 12 quasi-judicial proceeding.

In support of his due process argument, Mr. Cowherd maintains that when the City "adopted and applied Section 2.206(6)," it "prevent[ed]" Mr. Cowherd from exercising the "rights granted to him" under section 2.207. (Petition at 13). By Mr. Cowherd's estimation, "the rights granted him under the 1994 [quasi-judicial procedures]" were the right "to present evidence relevant to the issues"; the right "to cross-examine opposing witnesses"; the right "to impeach any witness regardless of which party called the witness to testify"; and the right "to rebut evidence presented against it [sic]." (Petition at 13). These rights, argues Mr. Cowherd, were "taken away from [him] at the last moments" by adoption of section 2.206(6). (Petition at 13).

These arguments are based on nothing. The plain language of section 2.206(6) does not reveal any intent to "take away" the evidentiary safeguards described in section 2.207, or otherwise "prevent" a party from exercising them during a section 2.206(6) quasi-judicial hearing before the City Council. And the record of the section 2.206(6) proceedings in this case establishes that each of these evidentiary safeguards was available in the quasi-judicial hearing before the City Council. Mr. Cowherd knows this because he took advantage of some of them.

For instance, Mr. Cowherd claims he was stripped of his right "to present evidence relevant to the issues" at the December 12 hearing. Not so. First, "the issues" up for consideration at the December 12 hearing were the arguments raised by Mr. Cowherd in his Petition in Opposition. (Pet. App. 148-56). To support his arguments at the December 12 hearing, Mr. Cowherd submitted an affidavit from an expert witness, and 10 other documents in support of his position. (Pet. App. 166-72 & 175-98).

Moreover, Mr. Cowherd had 10 minutes to present his case-in-chief, 5 minutes for rebuttal, and was allotted additional time to answer questions from Council members. (Pet. App. 37:2-15); *see Stranahan House, Inc. v. City of Fort Lauderdale,* 967 So. 2d 1121, 1127 (Fla. 4th DCA 2007) (finding the circuit court

applied the correct standard of review in upholding the city's findings that were based on three minutes of oral argument from interested persons).

Mr. Cowherd had additional opportunities to present evidence, but simply elected not to take advantage of them. For instance, at the outset of the quasi-judicial hearing, the Mayor asked all interested parties to identify their witnesses so the Clerk could swear them in. (Pet. App. 36:4-7). Invictus presented testimony from two witnesses, the City presented testimony from multiple witnesses, and 8 witnesses from the Parramore neighborhood offered their testimony.

Mr. Cowherd could have called his own witnesses. He could have presented his own testimony. He could have cross-examined other witnesses. He simply did not. In fact, the record reflects Mr. Cowherd never requested leave or otherwise *attempted* to exercise the "rights" he now complains were "taken away." This constitutes waiver: "As a general rule, reviewing courts will not consider claims of error which are raised for the first time on appeal." *Hernandez v. Kissimmee Police Dept.*, 901 So. 2d 420, 421 (Fla. 5th DCA 2005).

For reasons known only to Mr. Cowherd, he chose to rely on documentary evidence only and did not attempt to present witness testimony. Instead, Mr. Cowherd opted to have his attorney repeat, almost verbatim, the arguments presented in his Petition in Opposition. This exercise accounted for approximately 8 minutes and 30 seconds of his 10 minute case-in-chief. (Tr. 43-50). And even

though his expert was sworn in, Mr. Cowherd did not call him as a witness, and instead elected to submit an affidavit into the record: "The affidavit is his statement. He is just available for cross-examination by you as acting as a hearing officer." (Pet. App. 52:19-21).

Mr. Cowherd fails to cite any case in his Petition suggesting he was entitled to process above and beyond that which he received. *Carillon* establishes that Mr. Cowherd's procedural due process rights were not violated in the proceedings below. Mr. Cowherd had notice of every proceeding. He attended each proceeding and presented argument. And during the December 12 proceedings, Mr. Cowherd had an opportunity to present additional evidence and cross-examine witnesses, but simply chose not to fully engage in the process.

The record of the December 12 proceedings, standing alone, establishes that Mr. Cowherd received adequate procedural due process. Mr. Cowherd's participation in the October 18 hearing before the Zoning Board, as well as his participation in the December 5 proceedings, makes the due process inquiry a foregone conclusion.

D. Mr. Cowherd Lacks Standing

Mr. Cowherd argues he "is entitled to great [sic] due process that [sic] other members of the general public who are not within the definition of an "adversely-affected person." (Petition at 13). Mr. Cowherd does not provide the definition of

"adversely-affected person." He also does not explain what record evidence suggests he meets the definition. That is because no such evidence exists. The absence of evidence that Mr. Cowherd is an "adversely-affected party" does not just spell defeat for his argument he is entitled to heightened due process. It also means he lacks standing to obtain relief through these certiorari proceedings.

Section 2.203(1) of the City Code defines an adversely-affected person as "a person who will suffer a negative effect to a protected interest as a result of the quasi-judicial action sought by the applicant. The alleged adversely-affected interest may be shared in common with other members of the community at large, but shall exceed in degree the general interests in community good shared by all persons."

On page 3 of his Petition, Mr. Cowherd provides the same vague and confusing explanation that confounded Commissioner Ortiz during the quasi-judicial proceeding. (Pet. App. 113-115). Mr. Cowherd claims his "right to enjoyment of his property, including without limitation, part of the traditional lot and block land pattern of downtown Orlando, will be adversely affected" for various reasons that are difficult to comprehend. (Petition at 3). The problem for Mr. Cowherd is that no evidence was introduced during the December 12 quasi-judicial hearing to establish he owns neighboring property.

This was brought to Mr. Cowherd's attention by Commissioner Stuart when he asked Mr. Cowherd's attorney to identify the property he was relying on for standing. (Pet. App. 120). After Mr. Cowherd's attorney identified the property as 800 McFall Rd., Commissioner Stuart asked whether the property was listed in an affidavit that had been submitted into evidence. *Id*. It was not. And even though his due process argument and proof of standing depended on establishing something seemingly simple, Mr. Cowherd did not offer his own testimony. Counsel for Mr. Cowherd simply stated that the address was listed in Mr. Cowherd's Petition in Opposition, which, of course, is not evidence.

Mr. Cowherd does not have standing to maintain these certiorari proceedings. *Fort Meyers v. Splitt*, 988 So. 2d 28, 37-38 (Fla. 2d DCA 2008) ("The circuit court similarly failed to apply the correct law when it determined the standing issue on the basis of the allegations of Mrs. Splitt et al. in their certiorari petition rather than on the basis of the record made in the proceedings before the City.") (citing *Dade County v. Marca, S.A.*, 326 So. 2d 183, 184 (Fla. 1976) ("[T]he well[-]established rule applicable to ... certiorari proceedings[s][is] that the reviewing court's consideration shall be confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based."). "This rule controls the determination of the factual basis establishing standing to initiate a certiorari proceeding in the circuit court." *Id*. (citing *Battaglia Fruit Co.*

v. City of Maitland, 530 So. 2d 940, 943 (Fla. 5th DCA 1988) (holding that where city as certiorari petitioner failed to establish the basis for city's standing in the record of the county zoning proceedings, "the circuit court departed from the essential requirements of law in not dismissing the City's petition for lack of standing.").

III. NO DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW.

In his Petition, Mr. Cowherd argues in conclusory fashion that: "The City's decision in granting the Application departs from the essential requirements of law in that it either misapplied or ignored the City's own Land Development Code and Growth Management Plan." (Petition at 14). Mr. Cowherd does not elaborate further, or otherwise explain how the City "misapplied" or "ignored" its Land Development Code and Growth Management Plan—he simply cites to an affidavit and exhibits presented at the December 12, 2016 hearing.

Mr. Cowherd's failure to develop this conclusory assertion into a discernible argument constitutes waiver. *See, e.g.*, *Kilgore v. State*, 55 So. 3d 487, 511 (Fla. 2010) ("Kilgore alleges that he was denied a fair trial because of improper prosecutorial comments made at trial and trial counsel's failure to object to those comments. In his initial brief to this Court for this claim, Kilgore simply asserts conclusory statements that reiterate arguments made before the postconviction court. Accordingly, these issues are waived for appellate review) (citing *Rose v.*

State, 985 So.2d 500, 509 (Fla. 2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review.")); *see also Coolen v. State*, 696 So.2d 738, 742 n. 2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); *Duest v. Dugger*, 555 So.2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); *Caldwell v. Fla. Dept. of Elder Affairs*, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) ("These perfunctory statements are insufficient to present an argument for appellate review . . . The mere fact that Caldwell further explained this argument in her Reply Brief does not revive this argument.").

Waived or not, Mr. Cowherd's "argument" is not cognizable on first-tier certiorari review. The claim that the City "misapplied" or "ignored" its Land Development Code and Growth Management Plan is tantamount to a claim that Invictus's application should not have been approved because it was inconsistent with the City's enactments. The exclusive remedy for such "consistency" arguments is section 163.3215, Florida Statutes. *See, e.g., Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 1121, 1125–26 (Fla. 4th DCA 2007) ("Although raised in the circuit court, issues of plan inconsistency are not

appropriately brought in a petition for certiorari. In its second petition to the circuit court, Stranahan House included allegations of the alternative site plan's inconsistency with the historical preservation provisions and neighborhood compatibility provisions of the comprehensive plan. Such claims must be filed as a declaratory judgment action pursuant to section 163.3215(3) and are not properly part of the petition for review.") (citing *Educ. Dev. Ctr., Inc. v. Palm Beach County*, 721 So.2d 1240 (Fla. 4th DCA 1998) and *Cook v. City of Lynn Haven*, 729 So.2d 545 (Fla. 1st DCA 1999))).

This Court should not address Mr. Cowherd's assertion that the decision to grant Invictus's application was based on a departure from the essential requirements. It is not preserved. It is also not cognizable on first-tier certiorari review. If, however, this Court does decide to reach the merits of Mr. Cowherd's unexplained argument, Invictus hereby incorporates by reference and relies on the argument presented by the City in pages 17 to 21 of its Response to Mr Cowherd's Petition.

IV. THE CITY COUNCIL'S DECISION WAS BASED ON COMPETENT SUBSTANTIAL EVIDENCE.

Mr. Cowherd's Petition omits any sort of factual description of the evidence adduced by the City at the December 12, 2016 hearing. Also absent from Mr. Cowherd's Petition is any substantive argument explaining how or why the record evidence does not meet the competent, substantial evidence test. Instead, Mr.

Cowherd argues once again in wholly conclusory terms: "A review of the record in the instant case, however, establishes that the City's decision to grant the Application is not supported by competent, substantial evidence." (Petition at 15).

This argument is also waived. Invictus argued above that Mr. Cowherd's conclusory assertion regarding a purported departure from the essential requirements of law was insufficiently developed in his Petition and therefore waived. The same rationale and legal authority applies here. This Court should consider Mr. Cowherd's competent substantial evidence "argument" waived.

The closest Mr. Cowherd comes to presenting actual argument regarding the sufficiency of the evidence in his Petition is the following statement: "The City chose (apparently, as to specific findings were [sic] made on the record or in the December 12, 2016, Order) to ignore the testimony of Petitioner's expert, Mack Cope[,] in his affidavit." (Petition at 15). This fleeting gripe is not argument. Even if this Court finds otherwise, it is unhelpful.

In fact, well-settled Florida law establishes that this Court is precluded from even considering the merits of the points raised in Mr. Cope's affidavit. As the Florida Supreme Court explained in *Dusseau*:

> We reiterate that the "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the

> agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience-and is inherently unsuited-to sit as a roving "super agency" with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-a-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. **Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence.** While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau, 794 So. 2d at 1275–76 (Fla. 2001) (emphasis added).

Contrary to Mr. Cowherd's unsubstantiated claim, the record establishes the City's decision was based on competent, substantial evidence. As explained in greater detail on pages 9-12 above, the City presented multiple witnesses who submitted documentary and testimonial evidence, as did Invictus.

Moreover, 8 witnesses unaffiliated with any of the parties to the quasi-judicial proceeding—most were long-time Parramore residents—testified in favor of the City's decision to grant Invictus's application. (Tr. at 82-106). This witness testimony also constitutes competent, substantial evidence. *See, e.g., Marion Cty. v. Priest*, 786 So. 2d 623, 626-627 (Fla. 5th DCA 2001) (holding that zoning authority's decision was supported by competent, substantial evidence even though

"main evidence" justifying authority's decision was "citizen testimony"). The City's approval of the Zoning Board's decision to grant Invictus's zoning application is supported by competent, substantial evidence.

CONCLUSION

Mr. Cowherd is not entitled to certiorari relief. The arguments raised in his Petition are meritless and border on frivolity. Despite ample opportunity during the many proceedings below to explain in basic terms how approval of Invictus's zoning application impacts him personally, Mr. Cowherd has been unable to do so. The Parramore residents, on the other hand—the people who actually live in the area—repeatedly offered unopposed testimony that this development will benefit them, and their neighbors, dramatically.

Nonetheless, for reasons known only to him, Mr. Cowherd has attempted to take advantage of every legal mechanism available in the City Code to "table" this development. He continues that effort in these proceedings, and in a display of remarkable hubris, complains to this Court that *he* has been a victim of legal maneuvering. Enough is enough. This Court should deny Mr. Cowherd's Petition.

DATED this 31st day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was electronically filed via the Florida E-Portal this 31st day of March, 2017, and has also been furnished via email to: Mark R. Lippman, Esquire at mlippman@llopa.com and filings@llopa.com; and counsel for the City, Joshua Bachman, Esq. and Jason Zimmerman, Esq. at joshua.bachman@gray-robinson.com and jason.zimmerman@gray-robinson.com.

s/Michael M. Brownlee
Michael M. Brownlee, B.C.S.

CERTIFICATE OF COMPLIANCE

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

/s/Michael M. Brownlee
Michael M. Brownlee, B.C.S.