SECOND DISTRICT COURT OF APPEAL

STATE OF FLORIDA

SARASOTA EAST-ENDERS FOR RESPONSIBLE DEVELOPMENT, INC., BRENDA STOCKS, and STEVEN HIGGINS

Petitioners,

vs.

SARASOTA COUNTY; and THE CLASSICAL ACADEMY OF SARASOTA, INC.

Respondents.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA
LOWER TRIBUNAL NO. 2023 CA 6382

PETITION FOR SECOND-TIER WRIT OF CERTIORARI

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PETITION FOR SECOND-TIER WRIT OF CERTIORARI

Petitioners, Sarasota East-enders for Responsible Development, Inc., ("SEERD") a Florida not-for-profit corporation, and Brenda Stocks and Steven Higgins, individuals, (collectively "Petitioners") respectfully petition for second-tier writ of certiorari ("Petition"), to quash a circuit court appellate opinion affirming Sarasota County's approval of The Classical Academy of Sarasota, Inc.'s ("TCA") special exception granted under Resolution No. 2023-156 ("Resolution"), which approved Special Exception Petition No. 1874 to permit an elementary, middle, and high school with 1310 students and athletic fields at the property located at 8000 Bee Ridge Road, Sarasota County, Florida ("Property").

INTRODUCTION

In July 2023, Sarasota County approved TCA's special exception to allow 1310 students and athletic fields on Bee Ridge Road, a quiet area surrounded by single-family homes and churches. Petitioners challenged the approval by first-tier petition for writ of certiorari in Sarasota County Circuit Court. The Circuit Court denied the petition on various grounds in its July 16, 2024 Order on Petition

for Writ of Certiorari ("Order") and denied Petitioners' Motion for Rehearing in its August 29, 2024 Order ("Rehearing Order").

A district court grants second-tier certiorari relief "when there has been a violation of a clearly established principle of law resulting in the miscarriage of justice." *Wekiva Springs Reserve Homeowners v. Binns,* 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011). A circuit court fails to apply the correct law by ignoring legislated criteria. *Coral Gables Code Enf't Bd. v. Tien,* 967 So. 2d 963, 965–66 (Fla. 3d DCA 2007).

Here, the Circuit Court failed to apply the correct law by refusing to apply the criteria under Section 124-43(c)(3), UDC, which requires Special Exception applications to include a statement of consequences, resulting in the miscarriage of justice. In practical terms, one cannot decide *how* to adequately buffer a noise until they have assessed *what* the consequences are from that noise, or rather, how loud it is, how long will it last, what times will the loud sounds occur, and what tools can mitigate the noise. The Circuit Court also failed to apply the correct law by failing to require compliance with

criteria under Section 66-76(b) for a limited Cultural Assessment Survey for the Property site as noted in the Pre-Application.

The Order also departed from the correct law by finding the cultural assessment issue was unpreserved, even though preservation would have been futile. Failure to apply a controlling legal decision is a classic departure from the essential requirements of the law. *Dep't of Highway Safety & Motor Vehicles v. Chakrin*, 304 So. 3d 822, 826 (Fla. 2d DCA 2020). Here, the Court erroneously found, in conflict with binding case law, that the County's failure to require compliance with the cultural assessment survey was not fundamental error. The Order failed to apply the correct law by refusing to apply binding precedent from *First Baptist Church of Perrine v. Miami-Dade Cnty.*, 768 So. 2d 1114, 1115 (Fla. 3d DCA 2000) which would have recognized that the Applicant's flawed traffic study was not competent substantial evidence.

JURISDICTION

The Circuit Court, acting in its appellate capacity, had jurisdiction to review the County's quasi-judicial decision under Rule 9.190(b)(3), Florida Rules of Appellate Procedure. The district court

of appeal has jurisdiction to review the opinion by the circuit court, acting in its appellate capacity, under Rule 9.030(b)(2)(B), Florida Rules of Appellate Procedure.

STANDING

Petitioner, SEERD, is a Florida not-for profit corporation composed of members who are residents who live across from and close to 8000 Bee Ridge Road, Sarasota, Florida, 34231. A.26. SEERD is a grassroots group dedicated to preserving and protecting the East-End community and ensuring that planning and development occur in a way that preserves the local environment and community. A.26. SEERD was established as a not-for-profit corporation interested in transparent and responsible accountability between residents and governmental agencies involved in development and growth management in northeastern Sarasota County. SEERD's president Roger Zacks and several members objected at the Sarasota County Planning Commission hearing on June 15, 2023, and Sarasota County Commission hearing on July 12, 2023. A.26. SEERD also submitted extensive written objections into the record, including their attorney's legal analysis of the

Application's flaws, and a report by traffic engineer Alex Roark Engineering.

Petitioner Brenda Stocks owns and lives at the property located at 4576 Legacy Court, Sarasota, FL, 34241 in Heritage Oaks Golf and Country Club located less than 750 feet away from the proposed TCA site on at 8000 Bee Ridge Road. A.27-28. Ms. Stocks received notice by mail of the Application. A.28. Ms. Stocks objected during the Sarasota County Planning Commission hearing on June 15, 2023, and at the Sarasota County Commission hearing on July 12, 2023. A.28. She also submitted written objections which were entered into the record. A.28.

Petitioner Steven Higgins owns and lives at the property located at 4449 Samoset Drive, Sarasota, FL, 34241 in Heritage Oaks Golf and Country Club, which is roughly 2000 feet away from the Grace Church Property. A.28. Higgins objected during the Sarasota County Planning Commission hearing on June 15, 2023, A.28. He also submitted written objections which were entered into the record. A.28.

In the first-tier certiorari petition, Petitioners argued the Resolution was void as improperly enacted based on a departure from the essential requirements of law. A.42. The third test in *Renard* provides, "any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an [void] ordinance." *Id.*; *See also Parsons v. City of Jacksonville*, 295 So. 3d 892, 895 (Fla. 1st DCA 2020). No special injury is required for a party who attacks a void ordinance. *Upper Keys Citizens Ass'n, Inc. v. Wedel*, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); *see also Rhodes v. City of Homestead*, 248 So. 2d 674, 674–675 (Fla. 3d DCA 1971).

Petitioners Brenda Stocks and Steven Higgins are clearly affected residents and property owners within Sarasota County who own property in Heritage Oaks, in close vicinity to the Property. They are affected based on their stated concerns of compatibility, significant changes to the character of the locale, visual impacts, traffic, noise and light impacts, and enjoyment of quiet and peaceful evenings. A.42.

Florida courts recognize standing for citizen groups to challenge void ordinances under this test. *Upper Keys Citizens Ass'n, Inc. v.*

Wedel, 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977); *See also Save Brickell Ave., Inc. v. City of Miami*, 395 So. 2d 246, 247 (Fla. 3d DCA 1981) (Corporation devoted to safeguarding zoning of area was "an affected citizen" which had standing to attack zoning resolution on the ground it was void). Consequently, SEERD has standing under the third *Renard* test.

Neither Respondent contested Petitioners' standing in the briefs below, and accordingly, the Court found any standing defense was waived. The Order addressed the merits of Petitioners' claims. A.4.

TIMELINESS

A party must file a petition for a writ of certiorari within thirty days of rendition of the order on review. Fla. R. App. P. 9.100(c)(1). The Circuit Court issued its opinion on July 16, 2024. Fla. R. App. P. 9.020(h) ("An order is rendered when a signed, written order is filed with the clerk of the lower tribunal"). Petitioners' timely and properly filed motion for rehearing tolled rendition on the opinion. Fla. R. App. P. 9.020(i). A.148. On August 29, 2024, the "Order Denying Motion for Rehearing" was rendered. A.22. Therefore, the petition in this action is timely filed on September 30, 2024. Fla. R. App. P. 9.420(e);

Fla. R. Gen Prac. & Jud. Admin. 2.514(a)(1)(C) (extending a deadline that falls on a Saturday, Sunday, or legal holiday until the end of the next day that is not a Saturday, Sunday, or legal holiday).

FACTS

On March 15, 2023, TCA submitted a Petition for Special Exception ("Application") for the Property, a parcel located in unincorporated Sarasota County, 2.3 miles east of Interstate 75 along the south side of Bee Ridge Road, identified as Sarasota County Property Appraiser Record Parcel No. 0257020001 ("Property"). A.2.

The Sarasota County Unified Development Code ("UDC") provides that a special exception is a use that would not be appropriate generally or without restriction throughout a zoning district but which, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or the general welfare. Section 124-43(b), UDC. Such use may be permissible in a zoning district as a Special Exception if specifically provided in the UDC. However, such uses are not deemed to be appropriate within a zoning district without demonstration by

the applicant that the Special Exception use complies with the procedures and criteria of Section 124-43, UDC.

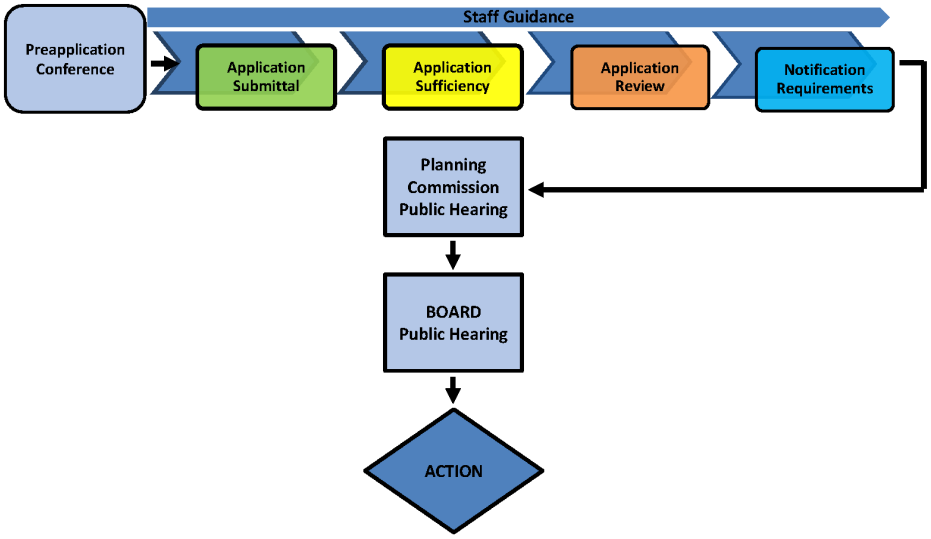
I. Property and Surrounding Area

The Property, approximately 41.22 acres located at 8000 Bee Ridge Road, is currently zoned OUE-1 (Open Use Estate, 1 unit/5 acres). A.2. The Property included the Grace Community Church place of worship, an active place of worship since 1985, and a pre-school in operation since 2000. A.2. To the east of the Property is Bayside Community Church of Sarasota. A.2.An RSF-1 (Residential Single-Family, 2.5 units/acre) zone district known as the Heritage Oaks Golf and Country Club is located to the south, a multi-development consisting of a golf course and single-family homes. A.2. To the west is St. Patrick's Catholic Church. A.2. To the northwest is a RE-2/PUD (Residential Estate, 1 unit/acre/Planned Unit Development) zone district known as the Laurel Oaks Estates which consists of a golf course and single-family homes. A.2. To the north, across from Bee Ridge Road, is an RSF-1 subdivision known as the Hammocks which consists of single-family homes. A.2.

II. Sarasota County Special Exception Code

Sec. 124-43, UDC provides:

(a) ***Review Procedure Established.*** Each Component Part depicted within the flow chart below is required in accordance with Section 124-36 together with this Section 124-43.



(b) ***Applicability.*** A Special Exception is a use that would not be appropriate generally or without restriction throughout a zoning district but which, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or the general welfare. Such use may be permissible in a zoning district as a Special Exception if specifically provided in this UDC. However, such uses are not deemed to be appropriate within a zoning district without demonstration by the applicant that the Special Exception use complies with this section.

(c) ***Component Parts of Review Procedure.***

(1) ***Preapplication Conference.*** A Preapplication Conference on all Special Exception applications is required.

(2) ***Application Submittal.*** No application shall be accepted for a Special Exception that does not meet the minimum district requirements of Article 6 and any applicable use standards in Articles 7 and 8.

a. *Written Application.* A written application for Special Exception shall be submitted indicating the Section of this UDC under which the Special Exception is sought and stating the grounds on which it is requested. Specific reference shall be made to the types of findings which the Board must make under subsection (4) below. The application shall include information necessary to demonstrate that the grant of Special Exception will promote the public health, safety and welfare, be in harmony with the general intent and purpose of this UDC, will not be injurious to the neighborhood or to adjoining properties, or otherwise detrimental to the public welfare. The application shall disclose full ownership as required under the County Charter.

* * *

(3) ***Application Sufficiency.*** Applications for a Special Exception shall be accompanied by a clear statement and accounting that presents the applicant's purpose for the requested Special Exception. The statement shall include those facts that clarify the need for the Special Exception, the Special Exception application's context, **and the consequences of the Special Exception.** The application shall address how

the Special Exception preserves the UDC's consistency with the Comprehensive Plan, and each of the findings within subsection (4) below.

* * *

(d) ***Other Applicable Provisions.***

(1) ***Board of County Commissioners Findings of Fact.*** Before any Special Exception shall be approved, the Board shall determine that the granting of the Special Exception will promote the public interest, health, safety, and general welfare; that the specific requirements in Article 6 regarding Special Exception uses, if any, have been met by the applicant; that the Planning Commission action on the findings of fact have been considered; and that the following standards, where applicable, have been met:

a. The proposed use must be consistent with the intent, goals, objectives, policies, guiding principles, and programs of the Comprehensive Plan;

b. The proposed use must be compatible with the existing land use pattern and designated future uses;

c. There must be adequate public facilities available consistent with the level of service standards adopted in the Comprehensive Plan, and as defined and implemented through the Sarasota County Concurrency Management System Regulations, Chapter 94, Article VII, Exhibit A of the County Code;

d. The proposed use, singularly or in combination with other Special Exceptions, must not be detrimental to the health, safety, morals, order, comfort, convenience, or appearance of the neighborhood or other

> adjacent uses by reason of any one or more of the following: the number, area, location, height, orientation, intensity or relation to the neighborhood or other adjacent uses;
>
> e. The proposed use must be adequately buffered to effectively separate traffic, visual impact and noise from existing or intended nearby uses;
>
> f. The subject parcel must be adequate in shape and size to accommodate the proposed use;
>
> g. The ingress and egress to the subject parcel and internal circulation must not adversely affect traffic flow, safety or control; and
>
> h. The subject parcel is adequate to accommodate the height and mass of any proposed structure(s).
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> * * *

III. Hearings and First Tier Certiorari

On June 15, 2023, the Sarasota County Planning Commission conducted a public hearing on TCA's application and unanimously recommended approval. A.3. On July 12, 2023, the Board conducted a public hearing on TCA's application. A.3. At the hearing, SEERD president Roger Zacks testified in opposition to the application, as did Petitioner Stocks. A.3. Petitioner Higgins submitted written comments in opposition to the application. A.3. The Board

unanimously approved the application. Petitioners' timely petition followed. On July 16, 2024, the Circuit Court denied the Petition ("Order"), (A.21), and thereafter denied Petitioners' motion for rehearing on August 29, 2024 ("Rehearing Motion"). A.22.

NATURE OF RELIEF

Petitioners ask this Court to quash the Circuit Court Order and remand this case for further review and application of the correct law.

STANDARD OF REVIEW

On second-tier certiorari, a district court must determine whether the circuit court "(1) afforded procedural due process and (2) applied the correct law." *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1255–56 (Fla. 5th DCA 2015); *Miami–Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003). A district court grants second-tier certiorari relief "when there has been a violation of a clearly established principle of law resulting in the miscarriage of justice." *Wekiva Springs Reserve Homeowners,* 61 So. 3d at 1191. Clearly established law can be derived not only from case law dealing with the same issue of law, but also from "an interpretation or application of a statute, a procedural rule, or a

constitutional provision…" *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 890 (Fla. 2003). A circuit court fails to apply the correct law by ignoring legislated criteria. *Kaklamanos,* 843 So. 2d at 890; *Coral Gables Code Enf't Bd. v. Tien*, 967 So. 2d 963, 965–66 (Fla. 3d DCA 2007) (expressly extending the list of legal sources to municipal ordinances); see also *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 316 (Fla. 3d DCA 2017) ("Where the issue before the circuit court involves statutory construction, a writ of certiorari may be appropriate where the circuit court does not apply the plain and unambiguous language of the relevant statute, resulting in an egregious error.". "[A] district court is authorized to find clearly established law on the face of a statute even when another district court has interpreted the statute to require a different outcome in a published opinion. Moreover, a district court is then authorized to grant certiorari relief and quash a circuit court decision that obeyed the controlling precedent and disobeyed the plain language of the statute." *Dept. of Hwy. Safety and Motor Vehicles v. Nader,* 4 So. 3d 705, 711 (Fla. 2d DCA 2009), *approved sub nom. Nader v. Fla. Dept. of Hwy. Safety and Motor Vehicles*, 87 So. 3d 712 (Fla. 2012).

Although second-tier certiorari's standards of review are stringent, the district courts of appeal are not "legal potted palms," who are unable correct "manifest errors of law and policy" when they arise. *Auerbach v. City of Miami*, 929 So. 2d 693, 695 n.3 (Fla. 3d DCA 2006).

ARGUMENT

I. The Circuit Court failed to apply the correct law by declining to apply the criteria under Section 124-43(c)(3), UDC, which requires Special Exception applications to include the consequences of the Special Exception, resulting in the miscarriage of justice.

A circuit court fails to apply the correct law by ignoring legislated criteria. *Kaklamanos*, 843 So. 2d at 890; *Coral Gables Code Enf't Bd. v. Tien*, 967 So. 2d at 965–66 (expressly extending the list of legal sources to municipal ordinances).

Here, the County's special exception process requires applicants, pursuant to Section 124-43(c)(3), UDC (bolding added):

> ***Application Sufficiency.*** Applications for a Special Exception shall be accompanied by a **clear statement and accounting that presents the applicant's purpose for the requested Special Exception**. The statement **shall** include those facts that clarify the need for the Special Exception, the Special Exception

> application's context, **and the consequences of the Special Exception.**

However, the Application contained no discussion of the consequences of the Special Exception relating to noise impacts on the neighborhood as required by Section 124-43(c)(3). A.48.

The Order failed to apply the correct law by holding, (A.8-9):

> The determination of this claim turns on whether the Board applied the correct law in evaluating TCA's request for a special exception. In this instance, the correct law is the procedure set forth in UDC § 124-43. The record shows TCA used the application format described in § 124-43 and directed the narrative of its application to the specific findings listed in § 124-43(d)(1) that must be met as required by § 124-43(2)(a).
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> * * *
>
> Petitioners ascribe undue significance to the term "consequences" within UDC § 124-43(c)(3). Applying the common definition of the term, the overall application required by the UDC is, in a manner of speaking, a statement of "consequences" in that the potential effects of a proposed special exception use are considered from multiple perspectives (*e.g.*, noise, traffic, utilities, stormwater, and fire safety). In the present case, concerns over potential noise and traffic consequences appear most prominent. Construing UDC § 124-43 as requiring a specific "consequences statement" exalts form

> over substance. The Board applied the correct law. The Court finds this claim is without merit.

The Order fails to apply the correct law by stating that TCA appropriately addressed subsections 124-43(c)(3) of the Sarasota County Unified Development Code ("UDC") by addressing the criteria under subsection 124-43(d)(1), UDC. A.8-9. The Order stated that such a requirement for a consequences statement "exalts form over substance." A.9.

Courts have not permitted Counties to exercise authority under one code provision yet ignore obligatory requirements of the same ordinance pertaining to the method and procedure for making those changes. *Fla. Tallow Corp. v. Bryan*, 237 So. 2d 308, 310 (Fla. 4th DCA 1970) (town cannot grant a zoning change under one provision of an ordinance while ignoring the obligatory requirements of the same ordinance). "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of New York,* 840 So. 2d 993, 996 (Fla. 2003). "[A] court interpreting local ordinances must first look to the plain and

ordinary meaning of the words in the ordinance." *Town of Longboat Key v. Islandside Property Owners Coalition, LLC*, 95 So. 3d 1037, 1041 (Fla. 2d DCA 2012). "The word 'shall' when used in a statute or ordinance has, according to its normal usage, a mandatory connotation." *Florida Tallow Corp.*, 237 So. 2d at 309.

Failure to follow procedural requirements of a local government code constitutes a departure from the essential requirements of the law. *O'Connor v. Dade County*, 410 So. 2d 605, 605–606 (Fla. 3d DCA 1982) (Commission improperly adopted a zoning plan with respect to the petitioners' property without first seeking the recommendation of the county's developmental impact committee as required by the Dade County Code).

The Order relies on the fact that residential development to the south is separated by a drainage right-of-way and dense vegetation, and that TCA proffered stipulations to address noise impacts. A.9. However, a special exception approved with stipulations cannot be interpreted to allow applicants to circumvent the requirement to include the consequences in the first place. *See Ocean's Edge Dev. Corp. v. Town of Juno Beach*, 430 So. 2d 472, 474-75 (Fla. 4th DCA

1983) (holding that courts cannot amend local ordinances as the town would have liked it to read by ignoring the language of the code "in favor of after-the-fact expert testimony as to legislative intent"). The burden of proving the entitlement to a special exception is on the applicant. Failure to satisfy the criteria set forth in the requirements for a special exception does not justify the issuance of a special exception. *Board of County Com'rs of Dade County v. First Free Will Baptist Church*, 374 So. 2d 1055 (Fla. 3d DCA 1979). As the Florida Supreme Court recently held in *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla. 2020):

> "[i]n interpreting the statute, we follow the "supremacy-of-text principle"—namely, the principle that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." We also adhere to Justice Joseph Story's view that "every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69).

In practical terms, one cannot decide *how* to adequately buffer a noise until they have assessed *what* the consequences are from that noise, or rather, how loud it is, how long will it last, what times will the loud sounds occur, and what tools can mitigate the noise. *See* Section 54-118, UDC. Foam ear plugs might be appropriate to muffle a newborn baby's cries but fail to protect ear drums from the grind of a chainsaw. Without knowing how loud the impacts from the Special Exception will be (the consequences), the Commission was deprived of any reasonable possibility to determine adequate mitigation for those impacts.

A "miscarriage of justice" arises when an erroneous circuit appellate opinion will have adverse precedential effect on subsequent cases. Also, a miscarriage of justice arises when a circuit appellate opinion is profoundly wrong about the interpretation of a statute. *Progressive Am. Ins. Co. v. SHL Enterprises, LLC*, 264 So. 3d 1013, 1017-18 (Fla. 2d DCA 2018); *Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 772 (Fla. 2d. DCA 2009); *see also Maple Manor, Inc. v. City of Sarasota,* 813 So.2d 204, 207 (Fla. 2d DCA 2002) (finding miscarriage of justice where circuit court's error

which incorrectly determined petitioner had procedural due process could be applied to future administrative nuisance abatement proceedings); *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 813 So. 2d 141, 145 (Fla. 2d DCA 2002)*; State Farm Fla. Ins. Co. v. Lorenzo,* 969 So. 2d 393, 398 (Fla. 5th DCA 2007).

In this case, a miscarriage of justice arose because the circuit court ignored the plain language and intent of Section 124-43(c)(3), UDC to provide a consequences statement for a special exception application. By failing to include a statement of consequences, the Commission was deprived of any reasonable possibility to determine adequate mitigation for those consequences. Even though a circuit court opinion is not binding on other local government decisions, the circuit court serves as the only appellate court that reviews first-tier petitioners for writs of certiorari for decisions by local government boards. Opinions by the circuit court in the Twelfth Judicial Circuit of Florida are strongly persuasive on decisionmakers and staff in local governments.

II. The Court failed to apply the correct law by failing to require compliance with criteria under Section 66-76(b)

> **for a limited Cultural Assessment Survey for the Property site as noted in the Pre-Application.**

Again, a circuit court fails to apply the correct law by ignoring legislated criteria. *Kaklamanos,* 843 So. 2d at 890; *Coral Gables Code Enf't Bd.,* 967 So. 2d at 965–66 (expressly extending the list of legal sources to municipal ordinances).

The County's Pre-Application Form for the Application stated, (A.50):

> A Cultural Resource Assessment Review and site visit has been completed for this parcel under Chapter 66, Sec. 66-73. Based on this review, it has been determined that a recorded archaeological site lies adjacent to this parcel to the east which may extend on this parcel. Based on this information, the parcel is considered to have a high probability for containing a component of this site, or another site, however, its presence and potential significance is indeterminate. **Therefore, a limited Cultural Assessment Survey is required with areas of the potential effect under Chapter 66, Sec. 66- 76(b).** A letter detailing this requirement will follow within five business days.

Section 66-76, Sarasota County Code of Ordinances, requires:

> (b) The Director shall require that the owner or applicant provide a site assessment survey or follow the procedure for the protection of significant resources as outlined in subsection (c)(2) of this Article when it has been determined

> that Significant or Potentially Significant Historic Resources are likely to be present on a development site per the criteria and procedures in Section 66-74 of this Code.
>
> * * *
>
> (c) When significant Historic Resources have been identified, the Director shall make a written determination of either: (i) no adverse effect, (ii) conditional no adverse effect or (iii) adverse effect on significant Historic Resources. **Where the final action is to be taken by the Board of County Commissioners, the Director's determination and approval of applications under this Section shall constitute a recommendation to that Board**.

No such recommendation appears in the record. A.51. Instead, the July 12, 2023 Staff Report states, "staff has reviewed and has no comment." A.13. The County never disputed that the cultural assessment survey issue was not completed.

A. The Order failed to apply correct law by finding the cultural assessment issue was unpreserved, even though preservation would have been futile.

The Order found that the cultural assessment survey issue was not raised during the Board hearing and was thus unpreserved, (A.13), stating,

> The "rule of preservation" prohibits a reviewing court from considering new arguments for the

> first time on certiorari that were not raised and considered before the lower tribunal (in this case, the Board). The rule applies to both the arguments of applicants and their opponents.

Petitioners do not contest that this issue was not raised during the Board hearing. However, the failure of the County to complete the Cultural Resources survey was not readily apparent from the face of the record. It was a latent defect with the application that only came to light after a subsequent public records request. The County and TCA only provided case law where applicants failed to raise issues before the lower tribunal, not objectors. A.90; A.111-113. However, the Order cites two opinions where an objector fails to preserve an argument but the opinions are distinguishable, inapplicable, and not binding to this case. A.13. First, in *First City Savings Corporation of Texas v. S & B Partners*, 548 So. 2d 1156, 1157-58 (Fla. 5th DCA 1989), the court found that objectors to a rezoning waived their argument that the applicant failed to provide written authorization for a bank to act as its agent. The Court held that if the issue had been raised at the county commission level, "the owners perhaps would have been able to correct this technical oversight and include in the record a written authorization." *Id.* at 1158. Here, the failure

to complete the cultural resources assessment was not a mere technical oversight but a required analysis which the County did not review or complete. Additionally, it was not apparent from the record at the lower tribunal level that it had never been completed, so objectors were in no position to object. In *First City Savings*, the Court also found that the objectors waived their argument that the application was inconsistent with the county's growth management policy. *Id.* Again, this substantive argument is inapplicable to a latent defect and omission of the cultural resources survey. Likewise, in *Miromar Development Corporation, et al. v. Lee County*, 2016 WL 4464076 (Fla. 20th Cir. Ct., June 30, 2016), the argument that the code did not provide a process to allow a deviation to the lot type would have been readily apparent from the record.

In contrast, here, there was no mechanism, except via first-tier certiorari review, for an objecting party to challenge such a departure of law. Petitioners were not afforded adequate notice that the County disregarded its own requirement for a cultural resources survey because, as TCA correctly cites, the County staff report stated under Historical Resources: "Staff has reviewed and has no comment."

A.13. County procedure provided no opportunity for Petitioners to cross-examine witnesses or verify whether the Applicant completed a cultural survey which had been reviewed by County staff. A party must obtain a ruling from the trial court to preserve an issue for appellate review. *High Definition Mobile MRI, Inc. v. State Farm Mut. Automobile Ins. Co.,* 321 So. 3d 818, 824 (Fla. 4th DCA 2021). County procedure provided no mechanism for Petitioners to obtain a ruling to preserve the issue for appeal. The County was on notice that the cultural resources survey was required to be reviewed by the Director of Historic Resources or a designee, Section 66-76(b), UDC and nevertheless failed to address this requirement at the hearing or staff report. A more specific objection on this point would have been futile and the law does not require futile acts. *State v. Roberts*, 963 So. 2d 747, 748-49 (Fla. 3d DCA 2007).

A district court grants second-tier certiorari relief "when there has been a violation of a clearly established principle of law resulting in the miscarriage of justice." *Wekiva Springs Reserve Homeowners,* 61 So. 3d at 1191. Here, the Order focused on case law with distinguishable facts where objections could have been made and

potentially addressed during the lower tribunal. The Order failed to address the distinguishing facts and ignored the vein of case law that explains why preservation would have been futile where the issue was latent.

B. The Order failed to apply the correct law by finding the omission of cultural assessment was not a fundamental error.

The Order then reviewed the unpreserved issue for fundamental error, and found:

> The Board's approval of TCA's application in the purported absence of the cultural assessment survey does not constitute fundamental error reviewable by this Court. No egregious deprivation of a constitutional right has occurred nor does the claimed error go to the heart of the judicial process before the Board. The record shows that County Historical Resources staff noted the need for a cultural assessment survey in the pre-application checklist form prepared for the pre-application meeting of December 17, 2020 (App. 158 & 161). The pre-application checklist was included as part of TCA's application submitted March 15, 2023 (App.47-169). Later, when the staff report for the July 12, 2023, board hearing was prepared, Historical Resources commented that, "Staff has reviewed and has no comment" (App. 42). Thus, the record before the Board showed no continuing concern relating to historical resources. Under these circumstances, the Board committed no error

> relating to the cultural assessment survey, let alone a fundamental one. Because the issue was not preserved for review, the Court cannot address the merits of the cultural assessment survey issue.
>
> A.14-15.

Appellate courts have the inherent power to correct fundamental errors. *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) ("Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action.") Error that goes to the foundation of a case or cause of action occurs when the court permits a party to bring a cause of action that does not exist or is not available to the party. Valeria Hendricks, *Pop Quiz: Why Is Fundamental Error Like Pornography?,* 76 Fla. B.J. 77, 78 (November 2002). Courts use the doctrine of fundamental error to correct mistakes or omissions at trial where an objection would not have been possible. *Sec. Bank, N.A. v. BellSouth Advert. & Pub. Corp.,* 679 So. 2d 795, 800 (Fla. 3d DCA 1996), *approved*, 698 So. 2d 254 (Fla. 1997) (The setting of unliquidated damages without the required notice and without proof is regarded as a fundamental error).

Here, Section 124-4(c)(2)(c), UDC required: "Where the UDC places additional requirements on specific Special Exceptions, the application shall demonstrate that such requirements are met." The Pre-Application form required the Applicant to conduct a "limited Cultural Assessment Survey" which would be reviewed by County staff due to the adjacent archaeological site found in the initial cultural resource assessment review, pursuant to the requirements of Section 66-76(b), UDC. Nothing in the record showed that this survey was conducted or reviewed by County staff prior to the Special Exception hearing, and therefore the Special Exception Application was not sufficient or ripe for review upon its July 12, 2023, County Commission vote.

However, the Order relies on distinguishable and inapplicable case law, *Fleischer v. Fleischer*, 586 So. 2d 1253, 1254 (Fla 4th DCA 1991), for the proposition that "fundamental error refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law or rule to apply, or as to the application of such a rule of law to the facts in the case." In *Fleischer*, the trial judge ordered the husband in a dissolution of marriage action to give

his approval for the wife's application for a "get," a document in Jewish tradition which severs a marriage. *Fleischer*, 586 So. 2d at 1254. At the trial level, the husband did not oppose this provision and instead stated he would agree to the get if he "got what he wanted in the property division." *Id.* On appeal to the Fourth District, the husband then took an inconsistent position and raised the new argument that the "get" violated his First Amendment rights. The Fourth District noted that constitutional issues are waived unless first presented in the trial. The one exception, "fundamental" error goes to the heart of the process. The Fourth District held, "[b]ecause he failed to oppose this provision on any basis other than that he would agree to it if he got the property he wanted, we find that he has failed to show any error in the trial judge's decision." *Id.*

Unlike *Fleischer*, Petitioners in this case did not take an inconsistent position at the quasi-judicial hearing and First Tier Certiorari. As noted in Footnote 2 of the Order, Petitioners did not know that the County staff did not receive or review the Cultural Assessment Survey until after the hearing, and the Cultural Assessment Survey was not in the record. A.15. The statement in the

staff report that "staff has reviewed and has no comment" does not cure the fact that no Cultural Assessment Survey was supplied or reviewed, as required by County's procedures. The omission of required information in the Application relates to the very heart of the judicial process, a due process issue whereby Petitioners were denied the opportunity to be on notice as to whether the completion of the review process by staff had occurred prior to approval by the County Commission. Petitioners cannot be penalized for failing to object to an omission where nothing in the record suggested such an omission existed, and discovery of such omission only occurred after the quasi-judicial hearing was complete. The Order also relies on *Interest of K.B.,* 371 So. 3d 975, 983 (Fla. 2d DCA 2023), where Plaintiffs were on notice of the facts upon which an objection could have been made during the lower tribunal. A.14. The Court found no fundamental error where Heart of Adoptions failed to preserve the timeliness issue at the lower court despite being clearly put on notice during a hearing. *Id.* Again, the facts are distinguishable from this case because the *K.B.* Plaintiffs were on notice as to the facts.

In contrast, *I.A. v. H.H.,* 710 So. 2d 162, 165 (Fla. 2d DCA 1998) is binding and relevant relating to fundamental error because neither party perceived or argued, latent issues either in the circuit court or on appeal, that circumstances precluded the putative father's paternity suit. When it came to light that the mother's new husband was the biological father instead of the putative father bringing suit, the Second District *sua sponte* found a fundamental error which had not been identified by the parties because the paternity case had been brought under the wrong statute. *Id.* Like *I.A*, Petitioners in this case were not aware of the critical fact, that the cultural assessment survey had not been reviewed, at the time of the lower tribunal hearing. Failure to apply a controlling legal decision is a classic departure from the essential requirements of the law. *Dep't of Highway Safety & Motor Vehicles*, 304 So. 3d at 826.

The Order's failure to apply the correct law on fundamental errors resulted in a miscarriage of justice because it deprived consideration of Petitioners' valid issue relating to the heart of the special exception process- whether the Applicant had complied with requirements to protect cultural resources.

III. The order failed to apply the correct law by declining to apply binding precedent from *First Baptist Church of Perrine v. Miami-Dade Cnty.*, 768 So. 2d 1114, 1115 (Fla. 3d DCA 2000) which would have recognized that the Applicant's flawed traffic study was not competent substantial evidence.

Failure to apply a controlling legal decision is a classic departure from the essential requirements of the law. *Dep't of Highway Safety & Motor Vehicles*, 304 So. 3d at 826. The Order erroneously narrows the holding of *First Baptist Church of Perrine,* 768 So. 2d at 1115 and fails to apply it to this case. A.19.

In *Perrine*, the Third District stated:

> The neighboring residents opposed the planned expansion based on the potential for increased traffic and crime in the neighborhood should middle school grades be allowed at the school. In fact-based testimony before the Zoning Board, representatives of the neighborhood pointed out, and we agree, that the Church's traffic study was invalid and thus not probative of the zoning code's traffic impact and neighborhood quality protection standards because its projections of future neighborhood traffic congestion were flawed. Those projections were based on figures which took into account less than 100% of the number of additional students permitted at the school under the application. The residents also presented fact-based testimony calling into question the validity of the traffic study and the County's zoning and planning department's recommendation based on that study because it

> showed that the most frequently used ingress and egress from the school was by way of a non-arterial, neighborhood street, SW 170 Street, rather than the County arterial street, SW 168 Street, which bounded the Church/school property. Thus, the applicant failed to meet the criteria which require consideration of the neighborhood traffic impact arising from a requested special exception.

The Order distinguishes *Perrine* by stating that in this case, the Applicant's traffic engineer Stantec submitted its proposed methodology to County Transportation staff for approval, whereas there was no indication in *Perrine* whether the methodology of the Church's traffic study was approved in advance by the County. A.19. However, the County's approval of the methodology is irrelevant because if a study is flawed, it is flawed whether County staff has approved it or not. The Order also notes that unlike the traffic study in *Perrine*, Stantec did take into account the effect of 100% of the maximum number of students permitted in the school. A.19.

Here, the Alex Roark Report ("Roark"), submitted by Petitioners, pointed out a variety of other flaws in the Stantec report. A.146. Roark stated that background traffic growth rate was flawed. Similarly, in *Perrine*, the traffic study was invalid because it was "not

probative of the zoning code's traffic impact and neighborhood quality protection standards because projections of future neighborhood traffic congestions were flawed." *Perrine*, 768 So. 2d at 1115. Like *Perrine*, Roark also found flaws with the analysis of ingress and egress. *Compare* A.1403 with *Perrine* at 1115.

Other courts have relied on *Perrine* for the broader notion that flawed staff recommendations are not competent substantial evidence. In *Beach Leg. Properties, Inc. v. City of Miami Beach*, No. 2022-18 AP 01, 2023 WL 3743107, at *4 (Fla. 20th Cir. May 25, 2023), the Circuit Court held:

> The City failed to apply the pole sign provisions of the City Code to the application for demolition of the Pylon. This was error…. Having concluded that the City failed to follow the essential requirements of law in applying an incorrect analysis, "flawed" and "erroneous" staff recommendations are "invalid" and "d[o] not constitute competent evidence." *See First Baptist Church v. Miami-Dade Cty.*, 768 So. 2d 1114, 1116 (Fla. 3d DCA 2000). Accordingly, the Resolution is also not supported by competent substantial evidence.

Here, based on the errors pointed out in the Roark Report, it is clear that Perrine was binding and should have been applied to the facts of the case.

CONCLUSION

This Court should grant the petition and issue a writ of certiorari quashing the Circuit Court's Order and remanding it for further proceedings to apply the correct law.

Dated this 30th day of September, 2024.

Respectfully submitted,

/s/Jane Graham
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document – *PETITION FOR SECOND-TIER WRIT OF CERTIORARI*– has been delivered to Joshua B. Moye, County Attorney for Sarasota County, 1660 Ringling Blvd., Sarasota, FL 34236 by e-mail on September 30, 2024 at jmoye@scgov.net, and to Stephen Rees, Jr., attorney for The Classical Academy of Sarasota, Inc., at Icard Merrill Cullis Timm Furen Ginsburg, at 8470 Enterprise Cir Ste 201 Lakewood Ranch, FL 34202-4105 by e-mail on September 30, 2024 at srees@icardmerrill.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition was prepared in Bookman Old Style 14-point font and complies with the font and word count requirements of Fla. R. App. P. 9.045 and Fla. R. App. P. 9.100.

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