IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 4D22-0432
Lower Tribunal Case No. 2021-CA-000599

MICHAEL DAVID TESTA,
INDIVIDUALLY AND AS TRUSTEE OF THE M. DAVID TESTA REVOCABLE LIVING TRUST, DATED OCTOBER 25, 2017

Appellant,

v.

TOWN OF JUPITER ISLAND

Appellee.

ON APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT FROM THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Jesse Panuccio
Fla. Bar No. 31401
Stuart H. Singer
Fla. Bar No. 377325
James Grippando
Fla. Bar No. 383015
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
jpanuccio@bsfllp.com
ssinger@bsfllp.com
jgrippando@bsfllp.com

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I. INTRODUCTION

This case presents the question of whether a town commission must strictly follow the public notice requirements established by section 166.041(3), Florida Statutes. The trial court, departing from *every* DCA case to have considered the question, said no. The ruling paves the way for municipalities to ignore their sunshine law obligations and erode the public-access rights that are enshrined in Florida law and that have long been celebrated as a defining feature of Florida government. The trial court erred and should be reversed.

The underlying controversy involves the Town of Jupiter Island's enactment of Ordinance 376, a zoning ordinance that permitted development on pristine beachfront. Prior to enacting such an ordinance, the Town was obligated to comply with section 166.041(3), which has two separate requirements. First, *any* proposed ordinance, "shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation," and this "notice of proposed enactment shall state the date, time, and place of the meeting." § 166.041(3)(a), Fla. Stat. The Town enacted Ordinance 376 on May 7, 2019, but the notice of proposed enactment contained a *different* date, April 15, 2019. Because strict compliance with

section 166.041(3)(a) is required, Ordinance 376 is null and void. *See City of Ft. Pierce v. Davis*, 400 So. 2d 1242, 1244-45 (Fla. 4th DCA 1981); *Healthsouth Doctors' Hosp. v. Hartnett*, 622 So. 2d 146, 147-48 (Fla. 3d DCA 1993).

Second, section 166.041(3)(c) requires heightened notice and processes for ordinances that "change the actual list of permitted, conditional, or prohibited uses within a zoning category, or … that change the actual zoning map designation of a parcel or parcels of land." The Town admits that Ordinance 376 is a zoning ordinance, and further admits that it did not comply with the statute's heightened requirements, but contends that the ordinance did not change the actual zoning map or the actual list of prohibited or permitted uses. Each of those contentions is wrong. For example, Ordinance 376 itself says that it amends the "maps" in the Town ordinances that depict the setback line (i.e., the *zoning* line). Because strict compliance with section 166.041(3)(c) was required—and because there was no compliance at all—Ordinance 376 is null and void.

II. STATEMENT OF FACTS

A. THE TOWN OF JUPITER ISLAND'S LAND DEVELOPMENT REGULATIONS HISTORICALLY PROHIBITED DEVELOPMENT ON THE BEACHFRONT OF THE 300 BLOCK OF SOUTH BEACH ROAD.

The Town of Jupiter Island ("Town"), situated at the southern tip of Martin County, is a barrier island community of approximately 900 residents. Much of the slender island is bisected by Beach Road, with its North and South sections. The Town has long eschewed the large-scale development found in neighboring communities; its Comprehensive Plan instead emphasizes "tranquility" and "seclusion" and states that the community is one where "the beauty of nature will always dominate the presence of man." R.2076 ("Town Vision").[1] *See also* Jupiter Island Comprehensive Plan, Town Profile (describing Town as a "low-density residential community that seeks to preserve natural resources to the maximum extent possible.").[2] Indeed, the Comprehensive Plan even states that the Town "is virtually developed, and the only areas for potential development are

[1] The Record on Appeal is cited as "R."

[2] The Town's Comprehensive Plan and its Land Development Regulations are part of its Code of Ordinances, available at https://library.municode.com/fl/jupiter_island/codes/code_of_ordinances?nodeId=12535.

located on 'in-fill' parcels." *Id.* The Town's land-use ordinances reflect these community values. For example, while neighboring communities allow condos on the beach, Jupiter Island permits only single-family dwellings in residential areas. *See* Jupiter Island Land Development Regulations ("LDR") Art. III.

One way the Town has preserved tranquility, cabined overdevelopment, and promoted the beauty of nature is through adoption of waterfront setback lines ("WFSBL"). The setback lines establish a buffer between the water and any structures, both on the Intracoastal and Atlantic Ocean sides of the island. LDR Art. IV, Div. III, § 3.02. As the Town's Land Planning Director has explained, the WFSBL "keeps homes from encroaching too far out" and prevents "irresponsible development in the coastal area." R.2135.

The Town adopted the WFSBL in 2000, through Ordinance 252. R.2137-38. The Town considers the WFSBL a zoning ordinance. R.2033 ¶16. The 2000 WFSBL prohibited any development on the ocean side of the 300 block of South Beach Road, protecting one of the last stretches of pristine beachfront on the island. R.4841, R.4846-57. Thus, under the 2000 WFSBL, many of the lots on the

300 block of South Beach Road—"split parcels," which are single lots that stretch across the road and have both an Intracoastal and ocean side—could have structures only on their western portion. R.2087; LDR Art. III, Div. I, § 1.00; LDR Ex. B; LDR Art. IV, Div. III, § 3.02.

Appellant, David Testa, purchased his home on the 300 block in 2004, while Ordinance 252 was in effect and its WFSBL prohibited development on the beachfront. R.1796 ¶2. This is how things stood for fifteen years.

B. In 2019, the Town Altered the Setback Line to Help a Former Commissioner and Unwittingly Opened the 300 Block's Beachfront to Substantial Development.

In 2019, the Town Commission sought to help one of its own—former Commissioner Jane Doggett—whose oceanfront house had been grandfathered under Ordinance 252 and thus did not conform with the 2000 WFSBL. R.744 ¶14, R.2137, R.2139. This nonconforming status meant that any new "building could only be constructed within [the existing] small building envelope," which had a "negative[] impact [on] the property's value." R.2139, R.2147. Doggett asked the Commission to adjust the WFSBL on her parcel. *Id.* In response, Town staff advised the Commission to address all

nonconforming structures, rather than just two that had filed recent requests. R.2139. But Town staff also warned the Commission not to take any action that would create, on properties without existing beachfront structures, "the ability to develop beachfront property that today could not be developed." *Id.* The Commission followed the recommendation to address all nonconforming structures by adjusting the entire WFSBL through what would eventually become Ordinance 376. R.2096-2131.

As the Commission was considering the new WFSBL, and consistent with the staff recommendation to adjust the line solely to address existing structures, the Town represented that the purpose and effect of Ordinance 376 was as follows:

> The reason for reviewing and updating the setback line is that the line had been jagged and, as a result, created non-conforming properties. The new WFSBL is much straighter and does not create any non-conforming properties. Instead it converted some of the current non-conforming properties to conforming properties.

R.1758.[3]

[3] Both the Town and Intervenors contend that the article in which this paragraph appeared was critically important in conveying information to the public about Ordinance 376. *See* R.1518, R.2580,

C. THE TOWN FAILED TO PUBLISH NOTICE OF THE ACTUAL DATE OF ENACTMENT OF ORDINANCE 376 AND FAILED TO FOLLOW HEIGHTENED PROCEDURES REQUIRED FOR ZONING ORDINANCES.

The Town Commission conducted the first reading of Ordinance 376 at a meeting on March 18, 2019. Prior to that meeting, the Town did not publish a notice of proposed enactment of Ordinance 376. R.769 ¶16, R.970 ¶16. The official minutes from that meeting reflect that only a single resident made public comment, and he "questioned if the residents had been involved with this item." R.2194.

On April 5, 2019, the Town published, in a newspaper of general circulation in Martin County, a notice of proposed enactment of Ordinance 376. The notice stated:

> The Town of Jupiter Island proposes to adopt Ordinance 376, amending the Land Development Regulations … TO MODIFY THE WATERFRONT SETBACK LINE.… The Town of Jupiter Island Commission will hold a public hearing on the proposed adoption of the ordinance.… The public hearing will be held on **April 15, 2019** at 9:00 a.m., or as soon thereafter as the matter may be heard, at Town Hall, 2 Bridge Road, Hobe Sound, Florida, 33455.

R.1117, R.2916. Other contemporaneous documents likewise focused solely on Ordinance 376's effect on existing structures and made no mention of potential new development on vacant lots. For example, the April 12, 2019 Town Newsletter reported: "Beach Director Duchock reported that the setback line does not move significantly and that no properties moved from conforming to non-conforming as a result of the revised mapping." R.1225.

R.2026, R.2028, R.1605 (emphasis added).

At the April 15 meeting, however, the Town Commission did ***not*** hear or enact Ordinance 376. Instead, according to the Town's official minutes of the meeting, Commissioner Collins moved "to postpone the 2nd Reading of Ordinance 376 until the May 7th Town Commission meeting." R.2202. Commissioner Townsend seconded, and the motion carried unanimously. *Id.*

After the April 15 meeting, the Town did ***not*** publish a notice stating that Ordinance 376 was proposed to be enacted at the May 7, 2019 Commission meeting. R.971 ¶19, R.955 ¶19. Yet, at the May 7 meeting, the Town Attorney "read Ordinance 376 by title only," Commissioner Conze moved to adopt the ordinance, Commissioner Townsend seconded, and the motion carried unanimously. R.2214. The Town's official minutes of the meeting do not reflect any public comment relating to Ordinance 376. R.2212-20.

D. To the Surprise of Many Town Residents, in 2021, Two LLCs Applied to Build Large "Accessory Use" Beach Houses as Extra Dwelling Units on their 300 Block Holdings.

As noted above, in 2019, as the Town Commission was studying and enacting Ordinance 376, it never discussed or disclosed that the

new WFSBL would open previously pristine beachfront to applications for new development. To the contrary, the Town failed to conduct *any* analysis of the effect on the buildable envelope along the beach. It was only two years later—in 2021, after the WFSBL became the subject of controversy—that the Town secretly hired a surveyor to perform the analysis. That analysis was revealed only through a public-records request, and it showed that, far from merely fixing existing, nonconforming structures, Ordinance 376 ushered in a wave of potential beachfront development, creating 39,630 square feet of buildable envelope. R.1770-71, R.2024.

Commissioner Townsend, who in 2019 had seconded the motion to enact Ordinance 376, admitted in 2021 that the Commission had not known, and thus had not informed residents, about the drastic consequences of Ordinance 376:

> [A]t the time [Ordinance 376 was adopted], the commission had no information and no thoughts that whatever was happening was going to be a development change in effect. Staff was asked if there were going to be any negative impact or significant consequence for this action and the answer was no.

R.2045 (Tr. of Oct. 21, 2021 Comm'n Mtg. at 19:18-19:23).

> Yes, we talked about it. Yes, it was in newsletters. But [that] didn't address the information that we didn't have. And that is a concern for me. And as my responsibility [is] to make sure that all of the residents' rights are protected, in my opinion, they never had the right to come and talk to us because they didn't know.... So I have serious concerns that that right was denied to our residents.
> ...
>
> I've read every single minute, I've read every single public newsletter, Island News, and the verbiage was something to the effect of some non-conforming properties will become conforming. The line is being straightened a little and there is no significant change.

R.4145-4146 (Tr. of Nov. 16, 2021 Comm'n Mtg. at 145:5-145:14, 145:21-146:1). Thus, for eighteen months, the very commissioners who enacted Ordinance 376 were under the impression that the WFSBL had been "straightened a little" with "no significant change."

Some real-estate consultants, however, discovered the Town's blunder and began seeking approvals to build beach homes on behalf of clients. R.1262 ¶8, R.1266 ¶4. In January 2021, the Testas and many other residents first learned of Ordinance 376's sweeping effects when the Town sent letters notifying the Testas that a neighboring property owner at 310 South Beach Road, Jupiter Island Compound, LLC, had applied to build a main house and "wellness pavilion" on the west side of its estate, but also a 2,858 square-foot

accessory-use house on the beach. R.1798 ¶8. As the Town's legal counsel later explained: "As a result of the recent applications for development of structures on the oceanside portion of two of the Split Parcels in the 300 Block, a number of nearby residents have expressed objections to allowing such development." R.2087; *see also* R.2046-48 at Tr. 23-32. In response to the concerns raised, the Town adopted a "Zoning In Progress" on March 17, 2021, halting any further development applications while the Commission studied the issue. R.770 ¶21, R.971 ¶21, R.2087.[4]

Unlike Commissioner Townsend—who has repeatedly expressed contrition about the Town's nonfeasance surrounding Ordinance 376—the Town's mayor, Whit Pidot, waged a campaign of denial and delay. When Mrs. Testa began to inquire as to whether the Commission had followed the law in enacting the ordinance,

[4] While the Zoning In Progress was in place, the LLCs that had applied to develop large "accessory homes" on the 300 block beachfront repeatedly threatened to sue the Town if it took any action to correct its 2019 errors. *See, e.g.*, R.2251 (Tr. of Comm'n Mtg. at 138:1-6) ("If we don't get a deal, we're going to sue you. Point blank, I'm going to be very blunt with you. We are going to sue you. It is going to be a lot of money. The damages have the potential to be catastrophic.").

Mayor Pidot insisted that the ordinance was unassailable and could not be challenged. R.1798 ¶9, R.3421-22, R.4927. Indeed, on March 1, 2021, the Town even issued a "public notice" stating that any questioning of the propriety of the Town's "communications with residents about" Ordinance 376 constituted "misinformation." R.2231-32.

III. STATEMENT OF THE CASE

A. MR. TESTA SUES THE TOWN FOR VIOLATIONS OF § 166.041(3), FLORIDA STATUTES.

After retaining legal counsel to further investigate the matter, the Testas learned that the Town had not complied with the notice requirements of section 166.041(3), and Mr. Testa filed the instant lawsuit on June 2, 2021. R.1798 ¶10, R.3486-89, R.766-817. On October 27, Mr. Testa filed the operative First Amended Complaint (FAC). The FAC alleged that Ordinance 376 was invalid because the Town failed to comply with the requirements of sections 166.041(3)(a) and (3)(c), Florida Statutes. Subsection (3)(a) states:

> [A] proposed ordinance may be read by title, or in full, on at least 2 separate days and shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The notice of proposed

> enactment shall state the date, time, and place of the meeting.

Subsection (3)(c) states that ordinances "that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or … that change the actual zoning map designation of a parcel or parcels of land must be enacted pursuant to the following procedure:"

- "Two advertised public hearings" with "at least one … after 5 p.m. on a weekday."
- The "advertisements shall be no less than 2 columns wide by 10 inches long" and "the headline in the advertisement shall be in a type no smaller than 18 point."
- "The advertisement shall not be placed … where legal notices and classified advertisements appear."
- "The advertisement shall be placed in a newspaper in the municipality … of general interest and readership … that is published at least weekly unless the only newspaper in the municipality is published less than weekly."[5]

Mr. Testa sought an order declaring Ordinance 376 void and an injunction barring the Town "from permitting any construction under

[5] The statute also provides: "Except for amendments which change the actual list of permitted, conditional, or prohibited uses within a zoning category, the advertisement shall contain a geographic location map which clearly indicates the area covered by the proposed ordinance." § 166.041(3)(c), Fla. Stat.

existing development permits or issuing new development permits that rely upon the Revised Setback Line." R.770-76.

On August 26, 2021, the LLCs that had applied for permits to develop on the 300 block beachfront moved to intervene on the basis of their interest in "economically beneficial use of their properties." R.281. Over Mr. Testa's objection, the Court granted intervention on September 15, 2021. R.289-92, R.424-25.[6]

The Town filed its Answer to the FAC on November 1, 2021. The Town admitted that, after it published the newspaper notice of

[6] The court also permitted Intervenors to take significant discovery, well beyond discovery sought by the main parties. R.821-22. Indeed, the only limit the court placed on Intervenors' discovery was to deny an attempt to subpoena Mr. Testa's doctors in Maryland. R.2457-62, R.4318-19. The Intervenors have used that discovery to try to turn this case into a trial over loose language in a few emails among residents seeking to find a way to ameliorate the Town's seismic blunder in enacting Ordinance 376 without first performing an impact analysis. For example, one objecting Town resident called the proposed development "COVID ON THE BEACH!" and stated, in the hopes that efforts to stop development would prevail, "I think we are almost there—say a prayer! I haven't ordered the caviar yet!" R.3111-16. And Mrs. Testa, in one email, said "the more headaches the better" in reference to efforts to oppose the destruction of the beachfront. R.3103-06. If past is prologue, Intervenors' answer brief will mainly include exclamations about these emails and breeze past the legal questions at issue. But not one of those emails can change the law applicable to this case.

proposed enactment on April 15, 2019, "there was not a further newspaper publication of the adoption of Ordinance 376" on May 7, 2019. R.971 ¶19. The Town also admitted (1) that "Ordinance 376 is a zoning ordinance" and (2) that the published notice for the second reading of Ordinance 376 "did not provide a map of the affected area," "was published in the classifieds section of the *Stuart News*," "used font smaller than 18-point font for the headline," and "was smaller than two (2) columns wide by ten (10) inches long." R.745-46. Indeed, the Town flatly admitted that "the published notice provided by the Town for Ordinance 376 … did not meet the notice standards of Section 166.041(3)(c)(2)." R.747 ¶27.

B. THE TRIAL COURT DENIES MR. TESTA'S SUMMARY JUDGMENT MOTION AND GRANTS THE TOWN AND INTERVENORS' SUMMARY JUDGMENT MOTIONS.

The parties filed cross motions for summary judgment. R.1759, R.1511, R.1103, R.3862, R.2554, R.2915. Mr. Testa argued that controlling caselaw requires the notice provisions of section 166.041(3) to be strictly followed and, because the Town had not done so, Ordinance 376 is void. R.1759-92, R.3862-90. The Town and Intervenors argued that strict compliance with subsection 3(a)

was not necessary, and it was sufficient for the Town to notice the April meeting and then simply postpone adoption to a future meeting without publishing further notice. R.1525-30, R.1122-25. As for subsection (3)(c), the Town and Intervenors argued that Ordinance 376 did not qualify as an ordinance triggering the heightened processes specified therein. R.1531-35, R.1127-31. The Town and Intervenors also argued that even if the Town had violated the law, Mr. Testa was not entitled to relief under either a waiver theory or a laches theory. R.2578-2583, R.2945-2949. Mr. Testa responded to these points by noting both defenses failed as a matter of law and as a matter of undisputed record. R.1787-91, R.3880-87, R.4889-4910, R.4923-27.

On January 14, 2022, the trial court held a four-hour hearing on the motions, at which each party extensively argued its position, including through the use of demonstrative exhibits. *See* R.4839-4927. After argument concluded, the court took a five-minute recess and then ruled from the bench. The court ruled:

> What I'm going to do, and I'm going to need some help, because I don't recall all of the details, but I'm granting the summary judgment for the Intervenors and the Town. I don't think the ordinance changed what it needed to

> change for heightened notice to be required. I think the notice that was given is sufficient.

R.5626-5627. The court also ruled that it would not grant summary judgment as to waiver and laches because they were "very fact intensive." R.5627. The Court asked for submission of "an appropriate order." *Id.*

On January 21, 2022, Intervenors and the Town submitted a proposed order. R. 5033-45. On January 31, the court adopted the proposed order nearly verbatim. R.5123-35 ("SJ Order"). In the SJ Order, the court held that section 166.041(3)(a) did not require the Town to "separately publish notice" of the "May 7, 2019 meeting at which Ordinance 376 was adopted," because the statute "merely requires that that a proposed ordinance be noticed once, 'at least 10 days ***prior to adoption***." R.5128 (emphasis in original). The court held that the statute "does not … require 10-day notice of the hearing ***at which the ordinance is adopted***." R.5128-29 (emphasis in original). The trial court further (and perhaps alternatively) held that it was sufficient for the Town to notice the April 15, 2019 meeting and then orally announce "on the record" that the Ordinance 376

agenda item was being "continue[d]" or "deferred" until May 7, 2019. R.5126, R.5129-30.

The trial court further held that the "Town was not required to comply with … section 166.041(3)(c)(2)(a) … because Ordinance 376 did not change 'the actual list of permitted, conditional, or prohibited uses within a zoning category' nor did it change 'the actual zoning map designation of a parcel or parcels of land.'" R.5130. Rather than analyze the text of the Town's LDRs, the court provided only a single rationale for this legal conclusion—namely, reliance on the testimony of "the Town's Planning, Zoning and Building Director Ruben Cruz." R.5130-31 ¶17, R.5132-33 ¶20. The court also held that this Court's opinion in *3299 North Federal Highway, Inc. v. Board of County Commissioners of Broward County*, 646 So. 2d 215, 222 (Fla. 4th DCA 1994), is "inapposite given the intervening 1995 amendment" to the statute and a legislative staff report that "verifies … the intent of such amendment." R.5132.

As for the affirmative defenses, the court held that "summary judgment … would be improper for either party because issues of fact remain." R.5133. The court did not identify which material issues

of fact remained or where in the record these issues of fact were disputed.

IV. SUMMARY OF ARGUMENT

1. As to Count I, concerning failure to comply with section 166.041(3)(a), Mr. Testa was entitled to summary judgment because it is undisputed that the Town failed to publish a "notice of proposed enactment" that included the actual date of enactment, May 7, 2019. The plain text of the statute precludes the trial court's conclusions that the Town could comply with the statute by noticing some other meeting at which Ordinance 376 was read or by providing oral notice at a commission meeting. Likewise, this conclusion is foreclosed by precedent. *See Healthsouth*, 622 So. 2d at 148 (ordinance "null and void" under section 166.041(3)(a) because "there was no newspaper publication of notice of the City Commission meeting at which adoption of the ordinance took place").

2. As to Count II, concerning failure to comply with section 166.041(3)(c), Mr. Testa was entitled to summary judgment because the Town admits it did not comply with the statute. R.2035 ¶27. The trial court relied on lay witness opinion to answer the *legal* question

of whether Ordinance 376 met section 166.041(3)(c)'s triggers, but that was error. Ordinance 376 triggered section 166.041(3)(c) three times over because: (1) it changed the actual zoning map in the LDRs (the map depicting the WFSBL, an admitted zoning ordinance); (2) it changed the actual list of prohibited uses in the LDRs (by changing the incorporated content of last item on the list, "any other use not specifically permitted in these regulations"); and (3) it changed the actual list of permitted uses (by increasing the number of structures permissible on the ocean side of 300 block parcels from zero to two).

3. As to the Town's affirmative defenses, Mr. Testa was entitled to summary judgment both as a matter of law and as a matter of undisputed record evidence. Waiver of a section 166.041(3) claim can occur only "if [the contesting] landowner appeared at the hearing and was able to fully and adequately present any objection to the ordinance." *Schumacher v. Town of Jupiter*, 643 So. 2d 8, 9 (Fla. 4th DCA 1999). It is undisputed that Mr. Testa did not appear at the May 7, 2019 meeting. As for laches, that equitable defense requires more than a showing of delay; it requires unexplained delay. Here, the delay in filing suit is explained by the Town's own ignorance

of the devastating effects of the ordinance it enacted. Moreover, once Town residents learned of these effects, the Town's mayor delayed legal action by misrepresenting to residents that there were no defects in the Town's enactment process.

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews de novo a trial court order granting summary judgment. *Restoration Constr., LLC v. SafePoint Ins. Co.*, 308 So. 3d 649, 651 (Fla. 4th DCA 2020). Where an order granting summary judgment also denied a cross motion for summary judgment, the Court reviews the denial of summary judgment de novo and can instruct the trial court to enter summary judgment in the cross-movant's favor. *See World Fin. Grp., LLC v. Progressive Select Ins. Co.*, 300 So. 3d 1220, 1223 n.6 (Fla. 3d DCA 2020) ("We may remand for entry of summary judgment when there were cross motions for summary judgment filed below."); *Indep. Mortg. and Fin., Inc. v. Deater*, 814 So. 2d 1224, 1226 (Fla. 3d DCA 2002).

Under Florida Rule of Civil Procedure 1.510(c), summary judgment is proper if "there is no genuine dispute as to any material

fact and [] the moving party is entitled to a judgment as a matter of law." The test for determining whether there is a "genuine" issue as to any material fact is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see also In re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 193-94 (Fla. 2020) (adopting *Anderson* test). The Florida Supreme Court has expressly rejected any requirement that the moving party conclusively "disprove the nonmovant's theory of the case in order to eliminate any issue of fact," and the Court also rejected the rule that "the slightest doubt" would preclude summary judgment. *Id.* at 193.

B. ORDINANCE 376 IS VOID AB INITIO BECAUSE THE TOWN FAILED TO PUBLISH NOTICE OF THE DATE OF PROPOSED ENACTMENT PURSUANT TO SECTION 166.041(3)(a).

State law establishes the basic notice process a Florida municipality must follow in enacting any ordinance:

> Except as provided in paragraph (c), **a proposed ordinance** may be read by title, or in full, on at least 2 separate days and **shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The notice of proposed enactment shall state the date, time, and**

> **place of the meeting**; the title or titles of proposed ordinances; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The notice shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance.

§ 166.041(3)(a), Fla. Stat. (emphasis added).

This notice requirement is "mandatory and jurisdictional," *City of Ft. Pierce v. Davis*, 400 So. 2d 1242, 1244 (Fla. 4th DCA 1981)—hence the use of the word "shall"—and must be "strictly" followed. *Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001) ("The courts have consistently held that ordinances which fall within the ambit of section 166.041(3) … must be strictly enacted pursuant to the statute's notice provisions ...."). *See also David v. City of Dunedin*, 473 So. 2d 304, 306 (Fla. 2d DCA 1985) (ordinance must be "strictly enacted pursuant to the requirements of section 166.041"); Office of the Attorney General of Florida, 43 Government-In-The-Sunshine Manual 45 (2021) (A "public agency may be subject to additional notice requirements," beyond those in § 286.011, "imposed by other statutes, charters or codes. In such cases, the requirements of that statute, charter, or code must be strictly observed.").

An ordinance that is not "strictly enacted pursuant to [section 166.041(3)]'s notice provisions [is] null and void." *Coleman*, 807 So. 2d at 85. *See also Ellison v. City of Fort Lauderdale*, 183 So. 2d 193, 195 (Fla. 1966) ("Since the City Commission did not comply with the notice and public hearing provisions, the ordinance … was invalid."); *Healthsouth Doctors' Hosp., Inc. v. Hartnett*, 622 So. 2d 146, 148 (Fla. 3d DCA 1993) ("the ordinance is null and void because the City failed to follow the mandatory notice requirements of Section 166.041(3)(a)"); *David*, 473 So. 2d at 306 (same); *Fountain v. City of Jacksonville*, 447 So. 2d 353, 356 (Fla. 1st DCA 1984) (the "ordinance must be deemed null and void because of the City's failure to comply with the procedural requirements of Section 166.041"); *City of St. Petersburg v. Austin*, 355 So. 2d 486, 488 (Fla. 2d DCA 1978) (ordinance not enacted in strict conformity with § 166.041(3)(a) is "fatally defective" and "invalid").

It is undisputed that the Town adopted Ordinance 376 on May 7, 2019, and that it failed to publish "a notice of proposed enactment" that "state[d] the date, time, and place" of that meeting. R. 971 ¶19, R.955 ¶19. Accordingly, the Town failed to comply with a "mandatory

and jurisdictional" requirement, *Davis*, 400 So. 2d at 1244, and the resulting enactment, Ordinance 376, is null and void, *Healthsouth*, 622 So. 2d at 148. That should be the end of this straightforward case.

The trial court, however, came to a different conclusion, relying on two erroneous readings of the statute.

1. The Trial Court's Interpretation Ignores Key Terms in the Statute and Violates the Plain-Meaning Rule.

The trial court held that section 166.041(3)(a) "merely requires that a proposed ordinance be noticed once, 'at least 10 days prior to adoption'" and does "not … require 10-day notice of the hearing at which the ordinance is adopted." R.5128-29. This interpretation is flawed because it ignores key words within the statute. *See Recovery Racing, LLC v. Dept. of Hwy. Safety & Motor Vehicles*, 192 So. 3d 665, 669 (Fla. 4th DCA 2016) (courts "are required to give effect to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word and every provision is to be

given effect. None should be ignored.... [I]t is no more the court's function to revise by subtraction than by addition.").

The "notice of proposed enactment" is not just a general notice that a proposed ordinance is being considered; instead, it must "***state the date, time, and place of the meeting***." § 166.041(3)(a), Fla. Stat. (emphasis added). The trial court's interpretation gives no effect to these critical statutory terms. "The meeting" has no reasonable or logical referent in the statute except "adoption," and the SJ Order offers no other possibility. *See* Scalia & Garner, *Reading Law* 152 (a "postpositive modifier normally applies only to the nearest reasonable referent"). In other words, "the meeting" that must be noticed with a precise date and time is the one where "adoption" will occur, not some other meeting that does not result in adoption. That is why it is a "notice of proposed enactment," not a notice of a reading, hearing, consideration, or debate.

This interpretation is compelled by the full context of section 166.041(3)(a), which has three separate requirements. First, the statute requires that a proposed ordinance be read "on at least 2 separate days" and "may be read by title, or in full." *See Bay Cty. v.*

Town of Cedar Grove, 992 So. 2d 164, 167-68 (Fla. 2008) (holding that § 166.041(3)(a)'s reading requirement is *separate* from its public-notice requirement).[7] Second, the municipality must, "at least 10 days prior to adoption," publish "notice of proposed enactment," advising the public of "the date, time, and place of the meeting." Third, the municipality must permit interested parties to "appear at the meeting and be heard with respect to the proposed ordinance." As a matter of basic grammar, the two references to "**the** meeting" (singular) can refer only to the single meeting referenced in the subsection—i.e., the adoption/enactment meeting. The required readings must occur during at least *two* meetings, so "the meeting" (singular) cannot possibly refer to those.

This plain-meaning interpretation of section 166.041(3)(a) is confirmed by the only DCA case to expressly address the issue—a case which, until the trial court ruled below, was unquestioned for nearly thirty years. In *Healthsouth*, the Third DCA addressed a

[7] *See also Austin*, 355 So. 2d at 488 ("It is quite obvious that the Legislature intended to allow the City the option of reading proposed ordinances either by title or in full, but it is also equally obvious that the legislature mandated that this reading be done on no less than two occasions prior to its passage.").

situation quite similar to the one at bar. There, the City of Coral Gables enacted an ordinance permitting certain development projects. 622 So. 2d at 147. The "owners of residences[] in close proximity" to the proposed development contended that the notice was inadequate and brought an "action for declaratory and injunctive relief seeking to have the Court declare [the] [o]rdinance … invalid, and to enjoin Healthsouth from proceeding with the construction." *Id.* The trial court granted declaratory and injunctive relief. *Id.* The Third DCA affirmed, holding the ordinance "null and void" under section 166.041(3)(a) because "there was no newspaper publication of notice of the City Commission meeting ***at which adoption of the ordinance took place***." *Id.* at 148 (emphasis added). In other words, the Third DCA squarely held that the "clearly mandatory" notice required by section 166.041(3)(a) is of the enactment meeting, not of some other meeting or of general consideration of an ordinance. *Id.*

Entirely ignoring this DCA precedent, the trial court instead cited an unpublished circuit court decision, *Tierra Verde Community Association, Inc. v. City of St. Petersburg*, No. 08-000050-AP-88B (Fla.

6th Cir. App. Ct. April 7, 2011) (reproduced at R.4343-54). But reliance on *Tierra Verde* was misplaced for three reasons.

First, as the trial court acknowledged, *Tierra Verde* has no precedential value, R.5129 n.2,[8] whereas *Healthsouth* was binding on the trial court. *See Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) ("The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision.").

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[8] Below, Intervenors misrepresented that *Tierra Verde* had been "upheld" by the Second DCA. R.4341. After Mr. Testa pointed out that the Second DCA had merely issued a one-word order denying a certiorari petition, R.4879, *Tierra Verde Community Ass'n v. City of St. Petersburg*, 75 So. 3d 1263 (Fla. 2d DCA 2011), Intervenors shifted course and, in their proposed order, claimed that the Second District denial was "persuasive" because the court had "reviewed" the lower court decision "to determine if the Sixth Circuit provided due process and applied the correct law." R.5039 n.2. The trial court adopted this formulation verbatim, R. 5129 n.2, but it is still erroneous. A one-word denial of a certiorari petition does not establish that *any* substantive review occurred or that the DCA agrees with the trial court on the merits. *See Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004) ("unelaborated orders denying relief in connection with all extraordinary writ petitions issued by Florida courts shall *not* be deemed to be decisions on the merits"); *Pub. Emps. Relations Comm'n v. Dist. Sch. Bd. of DeSoto Cty.*, 374 So. 2d 1005, 1010 (Fla. 2d DCA 1979). And an unreasoned, one-word denial cannot be "persuasive."

Second, *Tierra Verde* involved an annexation ordinance, the enactment process for which is governed by the Municipal Annexation or Contraction Act ("MAC Act"), § 171.0413, Fla. Stat., which incorporates the "procedure for the adoption of a nonemergency ordinance established by s. 166.041," but also more specifically provides that adoption of such an ordinance must be preceded by "at least two advertised public hearings." § 171.0413(1), Fla. Stat. In enacting the annexation ordinance at issue, the city advertised and held the two required public hearings, and then "generally noticed" the November 21, 2008 meeting at which enactment occurred. R.4350. The agenda for the enactment meeting "included the Tierra Verde annexation … but no public hearing on the annexation was listed." R.4346. The plaintiff complained that the notice was deficient. R.4350. The city responded that the MAC Act "does not require a third public hearing," and the court agreed that the city had not erred "by failing to advertise the November 21, 2008, meeting as a third public hearing." R.4350-51. The court did *not* state that the city failed to notice the date, time, and place of enactment (as noted, there is some indication that "annexation was

listed"), which is the issue in this case. It is possible the court concluded that the MAC Act's more specific instructions regarding public hearings controlled over section 166.041(3)(a)'s requirement that the enactment meeting for non-emergency ordinances "advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance." § 166.041(3)(a), Fla. Stat. *Cf. Bay Cty.*, 992 So. 2d at 167-68 (concluding that statute incorporated public-notice requirement of § 166.041 but had its own hearing requirement). Accordingly, *Tierra Verde* did not clearly hold that a municipality may ignore the specific notice-of-enactment requirement of section 166.041(3)(a).

Third, if *Tierra Verde* is read to come to the same conclusion as the trial court here, then it is equally flawed because, like the trial court here, the decision cannot reconcile the plain text of section 166.041(3)(a). Indeed, *Tierra Verde* provides no textual analysis of section 166.041(3)(a) at all, so it can hardly be "persuasive" when it is a Florida court's duty to "adhere to the 'supremacy-of-text principle,'" treating "[t]he words of a governing text" as the "paramount concern." *Advisory Op. to the Governor re*

Implementation of Amendment 4, 288 So. 3d 1070, 1078 (Fla. 2020). This Court need not embrace judicial error simply because it has been twice made by trial courts.

2. The Trial Court Erred in Fashioning a Judicially-Created Exception to the Plain Terms of Section 166.041(3)(a).

In an apparent alternative holding, the trial court concluded that the "law require[d] nothing further" than the Town publishing notice of the April 15, 2019 meeting and then orally announcing, at that meeting, "that the second reading of Ordinance 376 would be deferred to the May 7 Town Commission meeting." R.5129-30.[9] This was error.

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[9] The SJ Order states that at "the Town Commission meeting held on April 15, 2019, the Town Commission voted unanimously to continue the second reading of Ordinance 376 to the next regularly scheduled Town Commission meeting." R.5126 ¶8. But the citation in support of this conclusion is to paragraph 4 of Mayor Pidot's declaration, which states that the Commission voted to "***defer*** consideration," not continue. R.1603-04 (emphasis added). More importantly, the official minutes of the April 15, 2019 meeting, passed by the Town Commission, state: "Collins/Townsend made motion to ***postpone*** the 2nd Reading of Ordinance No. 376 until the May 7th Town Commission meeting." R.2202 (emphasis added). Thus, to the extent a "continuance" could be deemed to make a difference under section 166.041(3)(a)—and there is no textual support for that proposition—the trial court had no basis in the undisputed record to conclude that a "continuance" occurred.

First, the trial court again offered no textual analysis of the statute, which does not contain an exception permitting notice of an enactment meeting through oral announcement at a public meeting. The statute states "a proposed ordinance, at least 10 days prior to adoption, shall be noticed once ***in a newspaper*** of general circulation in the municipality" and that "notice of proposed enactment shall state the date, time, and place of the meeting." § 166.041(3)(a), Fla. Stat. The statute does not contain any provision regarding oral notices, exceptions for continuances, or any other alternative path. To the contrary, the statute states that the "notice procedures required by this section are established as minimum notice procedures," "a municipality shall not have the power or authority to lessen or reduce the requirements of this section," and municipalities must "strictly adhere to [its] provisions." §§ 166.041(6)-(8), Fla. Stat. The trial court simply chose to ignore the plain text of the statute.

Second—and unsurprisingly given the clear statutory text—the trial court's judicially created exception for "continuances" is flatly contradicted by binding precedent. The district courts of appeal have

uniformly and repeatedly held that the requirements of section 166.041 must be "strictly" followed, and these decisions make no mention of an exception for any alternative procedure. *See Coleman*, 807 So. 2d at 85 (rejecting even an "excellent reason" for postponing a meeting as a justification for failing to publish notice of the new meeting date); *Healthsouth*, 622 So. 2d at 148 (notice requirement is "clearly mandatory, and constitutes a jurisdictional prerequisite"); *David*, 473 So. 2d at 306 (ordinance is "null and void if not strictly enacted pursuant to the requirements of section 166.041").

Indeed, this Court has squarely held that section 166.041 is "mandatory and jurisdictional" and must be strictly followed, such that forms of notice that fall short of the statute—even actual notice to a party—do not suffice. *See Davis,* 400 So. 2d at 1244. *Davis* held a zoning ordinance invalid because the city, in enacting the measure, had failed to comply strictly with the 1979 version of section 166.041(3), which required the city to "'notify by mail each real party owner whose land the municipality will rezone'" with the "'time and place for one or more public hearings on such ordinance,'" and to do so "'at least 30 days prior to the date set for the public hearing.'" *Id.*

(quoting § 166.041(3)(c)(1), Fla. Stat. (1979)). On March 9, 1979, the city published a notice that a hearing on the ordinance would be held on March 19, 1979. The city then rescheduled the hearing for April 2, 1979, advised the affected landowner of that hearing by letter dated March 25, 1979, and published public notice on March 26, 1979. Despite the letter sent directly to the landowner's attorney, and despite the new notice stating that the reading would occur on a new hearing date, this Court held that the town failed to comply with the notice requirements by failing to timely provide published notice. 400 So. 2d at 1244. Apparently, the trial court's position is that this Court would have decided *Davis* differently, and found that Fort Pierce *had* complied with section 166.041, if the town commissioners had simply arrived at city hall on March 19, 1979, and voted to postpone the reading of the proposed ordinance to a hearing on April 2, 1979. This result is untenable under *Davis* because the specific requirements of section 166.041 are "mandatory and jurisdictional." 400 So. 2d at 1244.

Third, the trial court's judicially created exception is inconsistent with how Florida's sunshine laws work generally. As the

Attorney General has explained, "[i]f a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed." Office of the Attorney General of Florida, 43 Government-In-The-Sunshine Manual 44 (2021).[10] In opinion 90-56, the Attorney General flatly rejected the argument that a commission subject to the notice requirements of the Sunshine Law could "adjourn a properly noticed meeting and, without further publication of notice, reconvene within seven days in order to complete business from the agenda of the adjourned meeting." Op. Att'y Gen. Fla. 90-56 (1990). As the Attorney General explained:

> To allow a meeting noticed for a specific date, time and location to be continued to a future date, time and location without further proper notice, would effectively open the future meeting only to those individuals who attended the initial meeting. This leaves to chance that interested members of the public who happened not to be in attendance at the properly noticed meeting would receive notice of the future meeting.

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[10] This Court has relied on the Sunshine Manual as an authoritative source. *See, e.g.*, *Transparency for Fla. v. City of Port St. Lucie*, 240 So. 3d 780, 787 (Fla. 4th DCA 2018); *State Attorney's Off. of Seventeenth Jud. Cir. v. Cable News Network, Inc.*, 251 So. 3d 205, 212 (Fla. 4th DCA 2018); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 897 (Fla. 4th DCA 1998).

Id. If that is the rule for the general notice requirements of section 286.011, then surely a lesser standard cannot apply to the *heightened* notice requirements for enactment of ordinances under section 166.041.

Fourth, aside from citing *Tierra Verde*—discussed above—the only caselaw the trial court could muster in support of its judicially created exception to a Florida statute are cases from Arizona and Oregon. *See* R.5130 (citing *Hart v. Bayless Inv. & Trading Co.*, 346 P.2d 1101, 1106 (Ariz. 1959); *Apalategui v. Wash. Cty.*, 723 P.2d 1021, 1025 (Or. App. 1986)). These cases, of course, did not interpret Florida's famously robust sunshine laws and thus shed no light on the meaning of a Florida statute. But even on their own terms, the cases are not supportive of the trial court's conclusions here.

The Arizona case cuts precisely the opposite way, holding that "where a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective." *Hart*, 346 P.2d at 1108. Indeed, the Arizona court went even further, holding "[n]or may the requirement be relaxed merely because of a showing that certain complaining parties did have actual notice of

the proceeding." *Id.* As for the portion of the opinion quoted by the trial court, the Arizona law at issue had a "requirement … for a public hearing, to be held after due notice, but … [did] not state that … the Commission … must act immediately upon the matters presented at the hearing." *Id.* at 1108. Florida law is the opposite: section 166.041(3)(a) specifically requires the "notice of proposed enactment" be for the meeting where "adoption" of the ordinance occurs.

As for the trial court's invocation of Oregon law, it is not helpful because, unlike Florida, Oregon notice statutes do not require strict compliance. Indeed, Oregon's notice statutes explicitly disclaim any strict form or content requirement for such notices, and Oregon's courts have similarly interpreted these laws to be forgiving. *See* Or. Rev. Stat. § 215.060 ("The notice provisions of this section shall not restrict the giving of notice by other means…."); *Fifth Ave Corp. v. Washington Cty., By & Through Bd. of Cty. Comm'rs*, 581 P.2d 50, 59 (Or. 1978) (notice is to be judged based on whether it "reasonably apprise[d] those interested that the contemplated action is pending"). Thus, whereas under Oregon's permissive notice regime a town commission can continue hearings without notice after "long and

complicated" testimony, *Apalategui v. Washington Cty.*, 723 P.2d 1021, 1025 (Or. App. 1986), in Florida, the notice law is to be "strictly" followed for each and every meeting, and even an "excellent reason to cancel a hearing … is not valid reason for noncompliance with the notice requirements," *Coleman*, 807 So. 2d at 85.

Fifth, even if section 166.041(3)(a) could be satisfied by an oral announcement at a commission meeting, the oral notice here was not of "proposed enactment." It was, according to the official minutes, an oral announcement of a "2nd Reading." R.2202. The requirement for a proposed ordinance to "be read … on at least 2 separate days" is *separate* from the requirement to notice the "proposed enactment." § 166.041(3)(a), Fla. Stat. *See Bay Cty.*, 992 So. 2d at 167-68. Thus, the trial court's judicially created exception would write not only the publication requirement out of the statute, but the notice of enactment altogether.

* * *

Because the trial court's interpretation ignores, and cannot be reconciled with, the statutory terms of section 166.041(3)(a), it was

in error and must be reversed. This Court should order the trial court to grant Mr. Testa summary judgment on Count I.

C. ORDINANCE 376, A ZONING ORDINANCE, IS VOID BECAUSE THE TOWN FAILED TO COMPLY WITH THE REQUIREMENTS OF SECTION 166.041(3)(c).

The Town conceded below that Ordinance 376 was a zoning ordinance that regulated ten contiguous acres or more of land. R.2033-34 ¶¶16-17, 25. The Town also conceded that it failed to follow the heightened notice and hearing requirements that apply to zoning ordinances under section 166.041(3)(c), Florida Statutes. R.2035 ¶27. Nonetheless, the Town argued—and the trial court held—that this noncompliance was permissible because Ordinance 376 did not "change the actual list of permitted, conditional, or prohibited uses within a zoning category," and did not "change the actual zoning map designation of a parcel or parcels of land." R.5130-33. These conclusions were errors of law.

1. Ordinance 376 Changed the Actual Zoning Map Designation of Parcels of Land.

The trial court concluded that "the actual zoning map for the Town has not changed since 2016." R.5131. As its sole support for this conclusion, the trial court cited the declaration of the Town's

director of planning, who opined that Ordinance 376 did not alter the "Town's Official Zoning Map." *Id.* (citing R.1540-41 ¶¶10-15). But what constitutes the "actual zoning map"—and whether it was changed—are questions of law, and "a witness may not settle [a] question of law by merely giving his opinion." *Mach v. Mayo*, 86 So. 222, 222 (Fla. 1920); *see also Therrien v. State*, 914 So. 2d 942, 945 (Fla. 2005) ("Statutory construction is a question of law."); *HSBC Bank USA, Nat'l Ass'n v. Buset*, 241 So. 3d 882, 886 (Fla. 3d DCA 2018) ("[O]pinion that amounts to a conclusion of law cannot be properly received in evidence since the determination of such questions is exclusively within the province of the court."). Looking beyond the impermissible opinion testimony, there is no support for the trial court's legal conclusion.

The Town's LDRs contain *two* maps:

> (1) **Exhibit B**, which is titled "Official Zoning Map" and depicts the zoning district for each parcel. *See* LDR Art. III, Div. I, § 1.00.B; LDR Ex. B (reproduced at R.1601); and
>
> (2) **Exhibit C**, which is titled "Waterfront Setback Line" and depicts the designated setback zoning for each parcel. *See* LDR Art. IV, Div. III, § 3.02; LDR Ex. C (reproduced at R.1548-81, R.1989-2022).

The legal question is whether the second map—Exhibit C—is also an "actual zoning map" under section 166.041(3)(a). The Town's own admissions and documents show that it is. The Town flatly admitted that (1) "an ordinance modifying or moving a setback line is a zoning ordinance," (2) that "Ordinance 376 is a zoning ordinance," and (3) that Ordinance 376 regulated more than ten contiguous acres of land. R.745-46 at ¶¶16-17, 25. *See also* R.2086 (memo from Town attorney stating that the WFSBL is "zoning"). And Ordinance 376—an admitted zoning ordinance—states that it "amend[s] Exhibit 'C' of the Land Development Regulations" and that "maps depicting the location of the setback line shall be amended in the manner and form described." R.1546. If "an ordinance modifying or moving a setback line is a zoning ordinance" that regulates parcels (all admitted by the Town), and it "amended" the "maps depicting the location of the setback line" in the LDRs (as the ordinance itself states), then Ordinance 376 necessarily "change[d] the actual zoning map designation of a parcel or parcels of land," which is the trigger for section 166.041(3)(c)'s heightened notice and hearing requirements.

To validate this conclusion, it is helpful to examine how the dictionary definition of each term of the phrase "change to the actual zoning map designation of a parcel or parcels of land" was satisfied[11]:

- "**Change**": "To alter, modify, or transform (a thing); to make or render different." Ordinance 376, of course, modified the WFSBL, describing its own effect as "amending" the LDRs and associated "maps." R.1546.[12]

- "**Actual**": "Existing in fact, real." The WFSBL map exists in fact as a physical exhibit to the Town's LDRs. *See* LDR Art. IV, Div. III, § 3.02 ("The original of this document is on file in Town Hall.").

- "**Zoning**": "The regulation of land use by particular planning restrictions in designated areas." As noted, the Town admits that Ordinance 376 and the WFSBL constitute zoning. R.2033 ¶¶16, 17.

- "**Map**": "A drawing or other representation of the earth's surface or a part of it made on a flat surface, showing the distribution of physical or geographical features (and often also including socio-economic, political, agricultural, meteorological, etc., information)." Ordinance 376 itself states that the relevant maps are "depicting the location [of] the setback line." R.1546.

- "**Designation**": "The action or process of designating a place for a special purpose or conferring upon it a special status." According to the LDRs, the WFSBL confers upon land the special status of where development can, and cannot, occur. LDR Art. IV, Div. III, § 3.02.

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[11] All definitions are taken from the Oxford English Dictionary Online, available at www.oed.com.

[12] The definition of "amend" is to "to make **changes** to (a text)."

- "**Parcel**": "A portion or piece of land, frequently one in separate occupation or ownership from those that surround it." The WFSBL covers all parcels of land on the ocean side of Jupiter Island, and the Town admitted Ordinance 376 regulates more than ten contiguous acres of property in the town. R.2034 ¶25.

Thus, because the trial court completely ignored the *second* "actual zoning map" included in the LDRs, its conclusion that Ordinance 376 did not "change the actual zoning map designation of a parcel or parcels" was erroneous. Because the Town did not comply with section 166.041(3)(c), Mr. Testa is entitled to summary judgment on Count II and the trial court must be reversed.

2. Ordinance 376 Changed the Actual List of Prohibited Uses.

Ordinance 376 also changed the actual list of prohibited uses in the Town's LDRs. The list of prohibited uses is found in the LDR section dealing with each zoning district. One listed item is: "Any other use not specifically permitted in these regulations." For example, in the zoning district along the ocean on South Beach Road (B-40), the list of prohibited uses is:

> A. The rental of any portion of a lot or building which does not include the use and occupancy of the single family dwelling which is the principal building on the lot.

B. Storage of manure or odor- or dust-producing substances or uses within fifty (50) feet of any lot line.

C. Reverse Osmosis plants, except if the Reverse Osmosis plant is approved by the Board of Adjustment as an accessory use pursuant to the provisions of Article X, Section 3.13 of the Land Development Regulations….

D. Executive/employee/group vacation/retreats are prohibited in this zoning district….

E. Any other use not specifically permitted in these regulations.

LDR Art. III, Div. III, Sec. 3.01. This last item on the list (item E) incorporates the rest of "these regulations"—that is, the LDRs—to provide its content. One of "these regulations" is the Waterfront Setback Line, found in LDR Article IV ("Supplemental Regulations"), which prohibits "[o]n oceanfront lots, new buildings" that are not "set back at least to the 'Waterfront Setback Line.'" LDR Art. IV, Div. III, § 3.02.B. Thus, in changing the WFSBL, Ordinance 376 changed what was "specifically permitted in these regulations," which in turn changed the "actual list … of prohibited uses" and triggered subsection 3(c)'s heightened requirements.

Stated differently, by using an incorporation clause in the actual list of prohibited uses, the Town made the incorporated

provisions part of the actual list, and a change to the incorporated language ***is*** a change to the actual list. *See Jaramillo v. City of Homestead*, 322 So. 2d 496, 498 (Fla. 1975) (when a municipal ordinance incorporates state law by "general reference," subsequent amendments to state law "apply to the municipal ordinance"); *State ex rel. Springer v. Smith*, 189 So. 2d 846, 846-48 (Fla. 4th DCA 1966) ("Florida follows the general rule" that when an ordinance "'refers to the law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of the adopting act, but also all subsequent laws on the particular subject referred to.'") (quoting *Hecht v. Shaw*, 151 So. 333, 333 (Fla. 1933)).

When considered from the perspective of a Jupiter Island property owner, the change to the actual list of prohibited uses is obvious. If such a resident wants to know which uses are prohibited on his property, he would turn to the "List of Prohibited Uses" for the property's zoning designation. He would then encounter Item E, directing him to consult the rest of the LDRs to determine "any other use not specifically permitted." If the Town changes the "specifically

permitted" uses in the LDRs, it changes what this resident must consult to determine the full list of prohibited uses on his property.

The SJ Order provides no textual analysis of this issue at all. Instead, the trial court relied solely on the declaration of the Town's planning director "who averred that a Land Development Regulation does not establish or change actual zoning 'uses.'" R.5133. But the interaction between section 166.041(3)(c), Ordinance 376, and the other LDRs is a pure question of law. As already explained, the opinion of a witness is immaterial to resolution of a question of law, and reliance upon it was error. *See supra* p. 41.

Because Ordinance 376 changed the actual list of prohibited uses, the Town was required to comply with section 166.041(3)(c). Because the Town did not comply, Mr. Testa is entitled to summary judgment on Count II and the trial court must be reversed.

3. Ordinance 376 Changed the Actual List of Permitted Uses.

Ordinance 376 also changed the actual list of permitted uses in the Town's LDRs. The "permitted uses" for oceanfront lots on the 300 block of South Beach Road include "[n]o more than two (2) accessory buildings for living quarters." LDR Art. III, Div. III, Sec.

3.00.B. But "all development"—including this permitted use—is "subject to the supplemental regulation set forth in" Article IV of the LDRs. LDR Art. IV, Div. I, Sec. 1.00. One such supplemental regulation states that "[o]n oceanfront lots, new buildings … shall be set back at least to the" Waterfront Setback Line. LDR Art. IV, Div. 1, Sec. 3.02.B. Thus, prior to Ordinance 376, the total number of living quarters as a permitted use on oceanfront lots on the 300 block was zero. After Ordinance 376, it was two. Two being a change from zero, Ordinance 376 effectuated a change to the list of permitted uses.

The trial court again failed to address this analysis head on, opting instead to defer to the legal opinion of the Town's planning director. R.5131 ¶17, R.5133 ¶21. But, as noted above, the interpretation of Ordinance 376's effect on the LDRs is a pure question of law, not a question for a lay witness. The court's sole reliance on such testimony as the basis for its legal view was error.

Because Ordinance 376 changed the actual list of permitted uses, the Town was required to comply with section 166.041(3)(c).

Because the Town did not comply, Mr. Testa is entitled to summary judgment on Count II and the trial court must be reversed.

4. Ordinance 376 Substantially Affects Land Use and Thus Triggered Heightened Notice.

As explained, Ordinance 376 triggered section 166.041(3)(c)'s requirements for three independently sufficient reasons: it changed the actual zoning map, the actual list of prohibited uses, and the actual list of permitted uses. But to the extent there is any ambiguity on these questions, the Court may also look to the general test that controls whether subsection (3)(c) applies. In *3299 North Federal Highway, Inc. v. Board of County Commissioners of Broward County*, 646 So. 2d 215 (Fla. 4th DCA 1994), this Court held that "[i]f an ordinance substantially affects land use, it must be enacted under" section 166.041(3)(c). *Id.* at 223. This Court explained that "[e]xamples of ordinances that substantially affect land use" include "changing setback … restrictions." *Id.* at 224. Given that Ordinance 376 changed the Town's setback restriction, it falls within the ambit of this Court's substantial-effects test.

The trial court concluded that *3299* is no longer good law because section 166.041(3)(c) was amended in 1995. But this Court

has never overruled *3299* and other courts—subsequent to the 1995 amendment—still apply the substantial-effects test. For example, in 2003, the Fifth DCA held that the above-quoted language from *3299* is "controlling precedent." *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 166 (Fla. 5th DCA 2003). And the Second DCA, in 2000, held that "[u]nder Florida law, ordinances which substantially affect the use of land must strictly comply with … § 166.041(3)(c)." *Webb v. Town of Hilliard*, 766 So. 2d 1241, 1244 (Fla. 2d DCA 2000). These cases were binding authority that the trial court simply ignored.

Rather than address the binding post-1995 cases that continue to apply the substantial-effects test, the trial court resorted to legislative history to "verif[y] that the intent of [the] amendment was to expressly eliminate the uncertainty created by the overly generalized 'substantially affecting land use' espoused [*sic*] by Plaintiff." R.5132. Resort to a legislative staff report is a dubious means of determining statutory purpose or effect, *see Dep't of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304, 307 (Fla. 5th DCA 2008); *Davidson v. MacKinnon*, 656 So. 2d 223, 225 (Fla.

5th DCA 1995) (noting the "questionable validity of relying on staff reports as proof of legislative intent"), but even on its terms, the staff report does not support the trial court's holding.

The crucial backdrop for the 1995 amendment to section 166.041 is the 1990 Amendment to Fla. Stat. § 125.66, which changed the rezoning procedures for counties. Instead of adding "substantially change permitted use categories" to the existing rezoning trigger—as had been done for municipalities in 1983—the Legislature established a separate procedure for county ordinances that "do not actually change the zoning designation applicable to a piece of property but *do affect the use of land*." § 125.66(6), Fla. Stat. (1990) (emphasis added). Accordingly, the final bill analysis for the 1995 amendment stated it was "designed to alleviate these problems:" "A series of court cases and statutory amendments have expanded the applicability of the rezoning ordinance enactment procedures to nearly all ordinances that somehow ***affect the use of land***." R.2244 (House of Representatives Committee on Community Affairs Final Bill Analysis & Economic Impact Statement (May 16, 1995) (emphasis added)). As publications enclosed with the Final Bill

Analysis noted, the types of cases intended to be addressed by the 1995 Amendment were ordinances that in some tangential or vague way "affect the use of land," such as "ordinances that restrict the location of alcoholic beverage establishments and adult entertainment establishments" and "sign ordinances." R.2248 (HB 2044, Rep. Trovillion, Public Notice, Florida Association of Counties). Put simply, the legislative history of the 1995 Amendment shows there was a concern over judicial decisions applying the language governing *county* ordinances, not over the substantial-effects test for *municipal* ordinances. There was no legislative intent to eliminate the "substantial effects" doctrinal test, especially in circumstances where, as here, the municipality admits that Ordinance 376 is a zoning ordinance.

D. THE TRIAL COURT ERRED IN DENYING MR. TESTA'S MOTION FOR SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSES.

The trial court denied Mr. Testa's motion for summary judgment on the affirmative defenses of wavier and laches on the ground that "issue [*sic*] of fact remain." R.5133. This was error because both defenses fail as a matter of law and as a matter of uncontested record evidence.

1. The Waiver Defense Fails.

The Town and Intervenors argued below that Mr. Testa waived any claims under section 166.041(3)(a) because he had "actual notice" of the May 7, 2019 enactment meeting. Specifically, they contended that Mr. Testa received two blast emails from the Town stating that the "second reading" of Ordinance 376 would occur on May 7, 2019. R.1519-20 ¶¶26-27, R.1530-31, R.1126-27. The Town and Intervenors also argued that "actual notice" of other meetings at which Ordinance 376 was discussed was sufficient to waive claims under section 166.041(3). R.1530-31, R.1126-27.

This defense fails as a matter of law. And even if it did not fail as a matter of law, it would fail on the undisputed record evidence. Accordingly, the trial court erred in not granting Mr. Testa's summary judgment motion on the waiver defense.

a. The "Actual Notice" Defense Fails as a Matter of Law.

As discussed further below, undisputed record evidence shows that Mr. Testa did not read the "actual notice" that forms the basis of the Town's wavier defense. But even if he had, the defense would fail as a matter of law. While section 166.041 preserves "the common

law doctrine[] of … waiver" as a defense to an "action challenging the validity of an ordinance" under section 166.041, the elements of waiver are not met simply by sending a blast email to Town residents. If that were the case, then a municipality could simply dispense with publishing newspaper notice altogether and instead opt for email notice. This result would contravene the plain text of that statute, which states: "a municipality shall not have the power or authority to lessen or reduce the requirements of this section," and the "notice procedures required by this section are established as minimum notice procedures." §§ 166.041 (6), (8), Fla. Stat.

Moreover, a judicially created exception along the lines the Town suggests would violate the expressio unius, or negative-implication, canon. *See* Scalia & Garner, *Reading Law* 107 ("[t]he expression of one thing implies the exclusion of others"). The Legislature knew how to include an actual-notice exception to the published-notice requirements of section 166.041, and did so for subsection 3(c). *See* § 166.041(3)(c)2.c, Fla. Stat.[13] The complete

[13] Tellingly, the Town and Intervenors asserted "actual notice" waiver as a defense only to Count I (subsection 3(a) notice) and not

absence of a similar provision in subsection 3(a) thus must be interpreted to mean such an exception is unavailable for that subsection. *See Yount v. Varnes*, 691 So. 2d 1129, 1130 (Fla. 4th DCA 1997) ("the fact that there are express exceptions gives rise to a strong inference that no other exceptions were intended"); *Biddle v. State Beverage Dep't*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966) ("express exceptions made in a statute give rise to a strong inference that no other exceptions were intended").

Far from endorsing the judicially created exception to public notice that the Town requests, *no* Florida case has held that mere "actual notice" to a party constitutes waiver of a claim under section 166.041(3)(a). To the contrary, this Court has held:

> The general rule is that, while strict compliance with statutory notice requirements is mandatory and jurisdictional, a contesting landowner may waive the right,

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as to Count II (subsection 3(c) notice). *See* R.1530-1531, R.2578, R.1126, R.2936. They could not assert an "actual notice" defense to Count II because the statute requires, "[i]n lieu of publishing the advertisement," the "mail[ing] [of] a notice to each person owning real property within the area covered by the ordinance," and such "notice shall clearly explain the proposed ordinance and shall notify the person of the time place, and location of any public hearing on the proposed ordinance." § 166.041(3)(c)2.c, Fla. Stat. Neither the Town nor Intervenors contend that any such mail notice was ever provided to any Town resident.

> or be estopped, to assert a defect in the notice ***if*** that landowner appeared at the hearing and was able to fully and adequately present any objections to the ordinance.

Schumacher v. Town of Jupiter, 643 So. 2d 8, 9 (Fla. 4th DCA 1994) (emphasis added). This has long been the law in Florida, and is "the general rule" cited in national treatises. *See Malley v. Clay County Zoning Comm'n*, 225 So. 2d 555, 557 (Fla. 1st DCA 1969) ("'Where adequate notice is a jurisdictional, and not merely a procedural, matter, persons who appear at the hearing and fail to object are not estopped to object later….' Conversely, it would seem to follow that a person who appears at the hearing and fully registers his objection may be estopped to later object on the ground of defective notice of hearing.") (quoting 101 Corpus Juris Secundum, Zoning § 302, p. 1084).[14]

Thus, under *Schumacher* and *Malley*, there are three required elements to a knowing, intentional, and voluntary waiver under §166.041(7): (1) actual notice of the hearing; (2) appearance at the

[14] Even the Town and Intervenors' favored non-Florida authorities do not support their actual notice theory. *See Hart*, 346 P.2d at 1108 ("Nor may the requirement be relaxed merely because of a showing that certain complaining parties did have actual notice of the proceeding.").

hearing; and (3) fully and adequately objecting at the hearing. It is undisputed that Mr. Testa did not appear at the May 7, 2019 Town Commission meeting. R.2564 ¶7. Thus, the waiver defense fails as a matter of law and the trial court erred in not granting Mr. Testa summary judgment on this affirmative defense.

b. The "Actual Notice" Waiver Defense Fails as a Matter of Undisputed Record Evidence.

Even if waiver of a section 166.041(3)(a) claim could occur simply through "actual notice" by email, the undisputed record below demonstrated that Mr. Testa did not have such actual notice of the May 7, 2019 meeting.

First, most of the emails and newsletters the Town claims provided "actual notice" make no mention of the May 7 enactment meeting; they instead discuss *previous* meetings at which Ordinance 376 was discussed. *See* R.1517-22 ¶20 (email about March 18, 2019 meeting), ¶¶21, 23-24 (newsletter and emails about April 2019 meeting), ¶23 (email about April 2019 meeting), ¶28 (email about September 2018 meeting), ¶29 (email about October 2018 meeting), ¶30 (email about November 2018 meeting), ¶¶31-32 (emails about January 2019 meeting), ¶33 (email about meetings prior to May

2019). Section 166.041(3)(a) requires notice of the "date, time, and place of *the* meeting" of enactment, not of other meetings that merely discuss the ordinance at issue.

Second, the Town relies on two emails it sent residents on May 3, 2019, but those emails (through embedded web links that had to be clicked to access the information upon which the Town relies, R.4899-4902) only advised that Ordinance 376 would receive its "second reading" on May 7. R.1519-20 ¶¶26-27. As explained above, section 166.041 has a *separate* requirement for two readings, *supra* pp. 26-27, and these emails only advise that the Town was set to fulfill *that* requirement. The emails did not advise that "proposed enactment" would occur at the May 7, 2019 meeting. Moreover, these emails failed to include the other items required by section 166.041(3)(a): they did not state the title of the proposed ordinance, did not state "the place or places within the municipality where such proposed ordinance[] may be inspected by the public," did not "advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance," and were sent less than ten days prior to the meetings.

Third, the Town and Intervenors represented to the trial court that Mr. Testa had—according to the unauthorized electronic surveillance software that the Town secretly uses to track its residents—"opened" and "viewed" the two May 3, 2019 emails. R.1519-20 ¶¶26-27, R.1619-20 ¶¶15-16, R.1119. What the Town and Intervenors hid from the court, however, was that additional secret tracking records maintained by the Town showed that Mr. Testa *never* clicked on the links that led to the documents that contain the "actual notice" upon which the Town relies. R.4892-4896, R.4090-96, R.4098-4103.[15] Thus, there is *no* evidence that Mr. Testa "opened" or "viewed" the so-called "actual notice" that is the sole support for the waiver defense. Accordingly, for this additional reason, the trial court should have granted summary judgment to Mr. Testa as to the waiver defense.

[15] Notably, the Town and Intervenors also hid from the court that the Town's secret tracking software counts an email as "opened" and "viewed" when an Apple user (like Mr. Testa) merely scrolls past an email without opening it. R.3921-22 ¶13. That is why the tracking software discloses to customers (like the Town) that its "Open" reports contain false positives. *Id.* ¶9. These omissions by the Town were stunning given that a Town official swore, under penalty of perjury, that the Town's secret tracking software provided conclusive "proof of opening the email[s]" at issue. R.1619-20 ¶¶15-16.

2. The Laches Defense Fails.

As a last-ditch effort to save the invalid Ordinance 376, the Town and Intervenors briefly argued in their summary-judgment papers that Mr. Testa's claim is barred by common law laches. R.2583, R.2945-46. The Town and Intervenors base this argument on the theory that Mr. Testa had "actual notice of the Town's enactment of Ordinance 376 in real time during 2019." R.1133, R.2583. As just explained, this false assertion is based on the misleading electronic surveillance reports that the Town submitted to the court. In light of the undisputed *complete* records of the Town's secret surveillance, a laches defense fails as a matter of record.

But even if it were true that Mr. Testa knew that the Town was considering Ordinance 376, that would not be sufficient for a laches defense as a matter of law. As this Court has held, the "law is clear that lapse of time alone is insufficient to support a finding of laches." *Smith v. Town of Bithlo*, 344 So. 2d 1288, 1288-89 (Fla. 4th DCA 1977). The delay must be "unreasonable and unexplained." *Ticktin v. Kearin*, 807 So. 2d 659, 663 (Fla. 3d DCA 2001). Here, the reason no resident objected to Ordinance 376 until 2021 (when many

objected) was explained in the fall of 2021 by Commissioner Townsend—the very same Commissioner Townsend who seconded the motion to pass Ordinance 376:

> [A]t the time [Ordinance 376 was adopted], the commission had no information and no thoughts that whatever was happening was going to be a development change in effect. Staff was asked if there were going to be any negative impact or significant consequence for this action and the answer was no.
>
> …
> Yes, we talked about it. Yes, it was in newsletters. But [that] didn't address the information that we didn't have. And that is a concern for me. And as my responsibility [is] to make sure that all of the residents' rights are protected, in my opinion, they never had the right to come and talk to us because they didn't know.… So I have serious concerns that that right was denied to our residents.
>
> …
>
> I've read every single minute, I've read every single public newsletter, Island News, and the verbiage was something to the effect of some non-conforming properties will become conforming. The line is being straightened a little and there is no significant change.

R.2045, R.4145-46.

Moreover, "[d]elay caused by the acts of the defendant does not constitute laches nor does delay that was contributed to … by the defendant." 48 Fla. Jur. 2d Specific Performance § 57. Once

Ordinance 376's unwitting but devastating consequences were revealed, Mayor Pidot did all he could to stamp out objections and forestall litigation against the Town, going so far as to provide his legal opinion to the Testas that Ordinance 376 was unassailable. R.1798 ¶ 9 ("Based on my conversations with the Town Mayor, I was led to believe … that there was no legal basis to challenge Ordinance 376."), R.3421-22 at Tr. 104-05 ("Q. And did the mayor indicate that he believed he complied with all of the legal requirements in connection with the passage of Ordinance 376? A. He did, yes."). With the Town mayor doing all he could to forestall legal action by misrepresenting the law and potential remedies, the Town can hardly rely on delay as an equitable defense.

Section 166.041(7) creates a five-year statute of limitations for bringing claims under section 166.041(3). "Laches may be applied before the statute of limitations expires *only* where *strong* equities appear." *Appalachian, Inc. v. Olson*, 468 So. 2d 266, 269 (Fla. 2d DCA 1985) (emphasis added). Far from strong equities favoring the Town, and far from "unreasonable and unexplained" delay, the undisputed record shows the delay was due to (i) the Town's

negligence or nonfeasance in failing to understand and convey the seismic effects of the ordinance it was considering, and (ii) Mayor Pidot's subsequent attempts to sugarcoat that negligence and discourage litigation to correct it. Accordingly, the trial court erred in not granting Mr. Testa summary judgment as to the laches defense.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the SJ Order and order the trial court to grant summary judgment in Appellant's favor.

April 21, 2022

/s/ *Jesse Panuccio*
Jesse Panuccio
Fla. Bar No. 31401
Stuart H. Singer
Fla. Bar No. 377325
James Grippando
Fla. Bar No. 383015
Pirzada Ahmad
Fla. Bar No. 1032122
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd.
Suite 1200
Fort Lauderdale, FL 33301
Tel: (954) 356-0011
jpanuccio@bsfllp.com
ssinger@bsfllp.com

jgrippando@bsfllp.com
pahmad@bsfllp.com

Counsel for Appellant

AMENDED CERTIFICATE OF SERVICE

I certify that the foregoing document was furnished to

Counsel for Appellee Town of Jupiter Island:
Joanne O'Connor
James Gavigan
John Randolph
505 S. Flagler Dr., Suite 1100
West Palm Beach, FL 33401
joconnor@jonesfoster.com
jgavigan@jonesfoster.com
jrandolph@jonesfoster.com

Counsel for Intervenor-Appellees Jupiter Island Compound LLC and Dolphin Suite, LLC:
Ethan Loeb
Bartlett Loeb Hinds & Thompson, LLC
100 N. Tampa St Suite 2050
Tampa, FL 33602
EthanL@BLHTLaw.com

Counsel for Movant/Amicus Curie First Amendment Foundation:
Pamela Marsh
Virginia Hamrick
317 E. Park Ave
Tallahassee, FL 32301
pmarsh@floridafaf.org
vhamrick@floridafaf.org

Cynthia Angelos
The Law Office of Cynthia Angelos
PO Box 9163
Port Saint Lucie, FL 34985
cynthia@jangeloslaw.com

by email generated through the Florida Courts E-Filing Portal on April 21, 2022.[1]

[1] On April 21, 2022, a copy of the foregoing Initial Brief was filed and served, via email automatically generated through the Florida Courts E-Filing Portal, on all counsel of record, as identified in this Amended Certificate of Service. *See* Fla. R. Jud. Admin. 2.516(b)(1). The Certificate of Service stated that it was so served "to all counsel of record." On April 22, 2022, the Court issued an order striking the foregoing Initial Brief because "the certificate of service d[id] not comply in substance with the requirements of Florida Rule

s/ *Jesse Panuccio*
Jesse Panuccio

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of General Practice and Judicial Administration 2.516(f)." This Amended Certificate of Service and re-filed Initial Brief (without other amendments), filed on April 22, 2022, therefore includes the name, addresses used for service, and mailing address of counsel for the parties.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fla. R. App. P. 9.045(b) and 9.210(a)(2) that the font used herein is Bookman Old Style, 14 point, and that this Initial Brief contains 12,917 words and complies with the word count limitations contained in the Rule.

/s/ *Jesse Panuccio*
Jesse Panuccio