IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA, FOURTH DISTRICT

CASE NO. 4D22-0432

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 the Circuit Court of the Nineteenth Judicial Circuit
In and For Martin County, Florida
Case No. 2021-CA-000599

ANSWER BRIEF OF APPELLEES / INTERVENORS JUPITER ISLAND COMPOUND, LLC & DOLPHIN SUITE, LLC

ETHAN J. LOEB | FBN. 0668338
STEVEN GIESELER | FBN. 0880981
CYNTHIA G. ANGELOS | FBN. 539058
NICHOLAS M. GIESELER | FBN. 0043979
ELLIOT P. HANEY | FBN. 1018829
BARTLETT, LOEB, HINDS & THOMPSON, PLLC
100 North Tampa Street, Suite 2050
Tampa, Florida 33602
Telephone: (813) 223-3888

TABLE OF CONTENTS

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND OF THE FACTS 2

A. Nature of the Case 2

B. Factual Background and Procedural History Necessary to Resolve the Questions of Law 4

1. The Town's Planning Administrator, Manager, and Outside Consultants Recommend a Change to the Waterfront Setback Line After Nearly Twenty Years 4

2. The Town Reads, Notices, and Adopts Ordinance 376 in Accordance with the Florida Statutes 6

3. Mr. Testa Sues the Town, Claiming Lack of Notice 8

4. The Circuit Court Rejects Mr. Testa's Claims 11

C. Factual and Procedural Background Relevant to Intervenors' Affirmative Defenses 12

1. The Town Commission Publicly Debates Ordinance 376 at Nine Meetings Over More than a Year 13

2. Intervenors' Affirmative Defenses (Laches & Waiver) 20

SUMMARY OF ARGUMENT 21

ARGUMENT 24

I. THE TOWN COMPLIED WITH THE NOTICE REQUIREMENTS OF FLA. STAT. §166.041(3)(A) 24

A. Standard of Review 25

B. The Plain Text of Section 166.041(3)(a) Requires Newspaper Notice at Least Ten Days Prior to Adoption of an Ordinance .. 25

C. The Authorities Cited by Mr. Testa Involve Meetings that Were Cancelled and Never Held, or Never Noticed at All, and are Inapposite to this Case 36

II. ORDINANCE 376 DID NOT CHANGE THE TOWN'S ACTUAL ZONING MAP OR PERMITTED USES; SECTION 166.041(3)(C) DOES NOT APPLY TO THIS CASE..... 41

A. Standard of Review 42

B. Ordinance 376 Did Not Change The Town's "Actual Zoning Map" or its "Actual List" of Permitted, Conditional, or Prohibited Uses Within Any Zoning Category 42

C. Appellant's Preferred "Substantially Affects" Test for Heightened Notice Relies on Statutory Language that has Not Existed Since 1995 46

III. THE TRIAL COURT PROPERLY DENIED MR. TESTA'S MOTION FOR SUMMARY JUDGMENT ON INTERVENORS' AFFIRMATIVE DEFENSES 50

A. Standard of Review 51

B. The Facts of the Case Do Not Support Summary Judgment in Favor of Mr. Testa on Intervenors' Affirmative Defenses 51

C. Intervenors' Affirmative Defenses are Valid as a Matter of Law.....55

1. Laches 55

2. Waiver 57

CONCLUSION 59

CERTIFICATE OF SERVICE..... 61

CERTIFICATE OF COMPLIANCE 62

TABLE OF CITATIONS

Page(s)

Cases

In re Amendments to Fla. R. Civ. P. 1.510,
209 So. 3d 192 (Fla. 2020) 26, 44, 53

Hart v. Bayless Inv. & Trading Co,
346 P.2d 1101 (Ariz. 1959) 33, 35

1000 Friends of Fla., Inc. v. Palm Beach Cnty.,
69 So. 3d 1123 (Fla. 4th DCA 2011) 47

3299 N. Federal Highway, Inc. v. Bd. of Cnty. Com'rs of Broward Cnty., 646 So. 2d 215 (Fla. 4th DCA 1994) 50

Apalategui v. Washington Cnty.,
80 Or. App. 508, 723 P.2d 1021 (1986) 32

City of Ft. Pierce v. Davis,
400 So. 2d 1242 (Fla. 4th DCA 1981) 39

Coleman v. City of Key West,
807 So. 2d 84 (Fla. 3d DCA 2001) 38, 39

Corya v. Sanders,
155 So. 3d 1279 (Fla. 4th DCA 2015) 59

Craven v. TRG-Boynton Beach, Ltd.,
925 So. 2d 476 (Fla. 4th DCA 2006) 26, 43, 53

Finova Capital Corp. v. Regel,
195 S.W. 3d 656 (Tenn. App. 2005) 58

Florida Convalescent Centers v. Somberg,
840 So. 2d 998 (Fla. 2003) 46

Galaxy Fireworks, Inc. v. City of Orlando,
842 So. 2d 160 (Fla. 5th DCA 2003) 51

Grieco v. Daiho Sangyo, Inc.,
2022 WL 2136932 (Fla. 4th DCA June 15, 2022) 26, 43, 53

Healthsouth Doctors' Hospital v. Hartnett,
622 So. 2d 146 (Fla. 3d DCA 1993) 40, 41, 42

Hickerson v. Vessels,
316 P.3d 620 (Colo. 2014) 58

Kathleen G. Kozinski, P.A. v. Phillips,
126 So. 3d 1264 (Fla. 4th DCA 2013) 60

Kerrigan v. Kerrigan,
642 A. 2d 1324 (D.C. 1994) 58

Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,
654 So. 2d 911 (Fla. 1995) 28

Malley v. Clay Cnty. Zoning Com'n,
225 So. 2d 555 (Fla. 1st DCA 1989) 60

Maples v. Martin,
858 F. 2d 1546 (11th Cir. 1988) 61

Martin v. Wilson,
115 So. 2d 573 (Fla. 1st DCA 1959) 58

Monroe Cnty. v. New Port Largo, Inc.,
467 So. 2d 757 58

Oeth v. Felty,
421 S.W. 2d 860 (Kent. App. 1967) 61

Osorio v. Bd. of Professional Surveyors and Mappers,
898 So. 2d 188 (Fla. 5th DCA 2005) 28

Pinnacle Advertising and Marketing Group, Inc. v. Pinnacle Advertising and Marketing Group, LLC, 2019 WL 7376779 (S.D. Fla. Sept. 19, 2019) 56

Recovery Racing, LLC v. State Dept. of Hwy. Safety and Motor Vehicles, 192 So. 3d 665 (Fla. 4th DCA 2016) 47

Schumacher v. Town of Jupiter, 643 So. 2d 8 (Fla. 4th DCA 1994)..... 60

Shepard v. State, 259 So. 3d 701 (Fla. 2018) 47

State v. Peraza, 259 So. 3d 728 (Fla. 2018) 51

Tierra Verde Community Association, Inc. v. City of St. Petersburg, 75 So. 3d 1263 (Fla. 2d DCA 2011) 36

L.P., 760 So. 2d 126 (Fla. 2000) 26, 44, 53

Statutes

Fla. Stat. §166.041(3)(a) ..... passim

Fla. Stat. §166.041(3)(c) ..... passim

Fla. Stat. §166.041(7) 21, 23, 31, 52, 57, 59

Fla. Stat. §286.011 ..... 30, 42

Rules

Fla. R. Civ. P. 1.510 ..... 26, 44, 53

Other Authorities

Florida Attorney General Opinion 90-56 (1990) 39

43 *Gov't-in-the Sunshine Manual* 45 (Fla. Att'y Gen. 2021) 40

H.R. Rep. No. 95-310 ..... 50, 57

PRELIMINARY STATEMENT

Appellant Michael David Testa will be referred to as "Appellant" or "Mr. Testa". Where appropriate, Mr. Testa and his wife, Adena Testa ("Mrs. Testa"), will be referred to together as "the Testas".

Jupiter Island Compound, LLC ("JIC") and Dolphin Suite, LLC ("Dolphin Suite") were Intervenors in the circuit court, and along with the Town of Jupiter Island (the "Town"), are Appellees in this appeal. For the sake of clarity, JIC and Dolphin Suite will be referred to together as "Intervenors".

The record on appeal will be cited as (R.**).

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case

The Testas own a house fronting the Indian River in the Town of Jupiter Island. R.1764. They filed an action in the circuit court with the aim of preventing the Town from allowing Intervenors to build a house on Intervenors' respective beachfront properties. R.655; R.1182-1198. The circuit court entered a final summary judgment in favor of the Town and Intervenors. R.5123.

This case centers on whether the Town legally adjusted its Waterfront Setback Line via Ordinance 376, adopted in 2019. The Testas presented three major arguments to the circuit court. The circuit court rejected two of those arguments as matters of law, and determined the third issue was moot in light of the first two rulings and, in any event, would involve disputed issues of fact.

The Testas first contended that under Section 166.041(3)(a) of the Florida Statutes, Ordinance 376 is void ab initio because final adoption of the Ordinance had been carried over from the prior month's public meeting, even though (a) the Town gave public notice of the proposed adoption of the Ordinance more than thirty days prior

to its actual adoption, when the statute only requires ten days' notice, and (b) the Town duly noticed the public meeting at which the Ordinance was adopted. The circuit court held there was no statutory requirement to re-notice the proposed adoption of an ordinance continued, on the record at a duly-noticed public meeting, in this common municipal context.

The Testas next claimed that under Section 166.041(3)(c) of the Florida Statutes, "heightened notice" was required because Ordinance 376 changed the Town's "actual zoning map." But the Town's Waterfront Setback Line is not, as a matter of record fact, part of its "actual zoning map." The objective, record fact was that no change to the "actual zoning map" or "actual list" of permitted uses attendant to any property occurred as a result of Ordinance 376. These official, published records were the same after the adoption of the Ordinance as they were before it. Thus, the circuit court held subsection (3)(c) of the statute did not apply in this context.

Finally, the Testas claimed they were entitled to summary judgment on the Town's and Intervenors' affirmative defenses of waiver and laches. The circuit court found it did not need to reach

this issue because of its first two rulings, but further held neither party would be entitled to summary judgment on these defenses because they were fact-intensive, and the facts were disputed.

In this appeal, Intervenors maintain that the circuit court was correct in all three rulings.

B. Factual Background and Procedural History Necessary to Resolve the Questions of Law

The facts necessary to resolve the first two issues, both questions of law, are undisputed and quite limited. This brief will present those facts first. The disputed facts concerning the Town's affirmative defenses are more complex. This Court likely will not need to consider those facts, presented separately in subsection C below, because the circuit court correctly resolved the first two issues as matters of law.

1. The Town's Planning Administrator, Manager, and Outside Consultants Recommend a Change to the Waterfront Setback Line After Nearly Twenty Years

Ordinance 376 moved the location the Town's Waterfront Setback Line, which dictates how far back a new residence or accessory structure must be built from the ocean or a riverfront.

R.1135. By 2018, the Town's Waterfront Setback Line had been unchanged for nearly 20 years, having been established in 2000. R.2137.

In the intervening years, there had been considerable technological advancement in LiDAR survey data, allowing for more accurate depiction and analysis of environmental conditions. R.2096-2097. Based on these advances, and because "[c]onditions along the ocean/beach have changed significantly, with increases in beach and dune areas in some areas which have enabled the setback line to shift slightly seaward," the Town decided to study a revision of the Waterfront Setback Line. R.2097.

Based on the data collected as part of the study, and at the recommendation of the Town's Planning, Zoning and Building Administrator Ruben Cruz, the Town Beach Manager John Duchock, the Town's Local Planning Agency, and several outside consultants retained specially to ensure the new line's compliance with the Town's land development regulations ("LDRs") and comprehensive plan, it was determined that the Waterfront Setback Line along the ocean side of the Town should be straightened and shifted seaward.

R.2086-2094; R.2404. Ordinance 376 was drafted solely to codify such a shift. R.3028; R.3035-3070.

Notably, Ordinance 376—as proposed and eventually as adopted—did not change or affect the zoning designation of a single property on Jupiter Island; nor did it change or affect the zoning designation of a single parcel shown on the Town's official zoning map, comprising Exhibit B to the Town's LDRs. R.3028; R.3029; LDR Art. XIII, Ex. B & Ex. C. Furthermore, Ordinance 376 did not add to, subtract from, or modify any of the enumerated permitted or prohibited uses of any zoning category on Jupiter Island. R.3029. Ordinance 376 merely shifted and straightened the setback throughout the Town as it is depicted on Exhibit C of the LDRs. R.3035-70.

2. The Town Reads, Notices, and Adopts Ordinance 376 in Accordance with the Florida Statutes

The Town Commission's March 2019 meeting was duly noticed. R.1338. The published agenda for the March meeting expressly stated the first reading of Ordinance 376 would take place on March

18, 2019. R.1340. The first reading took place as scheduled on March 18. R.1340.

On April 5, 2019, the Town published an ad in the Stuart News, a newspaper of general circulation, giving notice of the proposed adoption of Ordinance 376. R.1231. The Town placed this paid notice in compliance with the notice requirements of Section 161.041(3)(a) of the Florida Statutes, which mandates that a proposed ordinance shall, "at least ten days prior to adoption, be noticed once in a newspaper of general circulation in the municipality."

The published agenda for the duly-noticed April 15, 2019, meeting stated expressly that the second reading of Ordinance 376 would take place on April 15, 2019. R.1346; R.1348. The April 15 meeting was held as scheduled. R.1351. On the record, the Commission continued the second reading of Ordinance 376 to its next regularly-scheduled monthly meeting, to be held May 7, 2019. R.1351.

The May 7 meeting was duly noticed. R.1368-69. The published agenda for the Town's May meeting expressly stated that Ordinance 376 would come up for second reading on May 7. R.1370. At the May

7 Town Commission meeting, Ordinance 376 was read by title, on its second reading, and adopted. R.1378.

3. Mr. Testa Sues the Town, Claiming Lack of Notice

Against this routine and very public municipal setting for adoption of Ordinance 376, the Initial Brief somehow weaves a fantastical story of governmental intrigue. Mr. Testa alternatively contends that (a) the Town violated the amorphous principles of "seclusion" and "tranquility" by enacting the Ordinance, Initial Brief at 3; (b) the Town only enacted Ordinance 376 to surreptitiously benefit a former commissioner, Initial Brief at 5; and (c) the Town didn't really know what it was doing in adopting Ordinance 376, "unwittingly opening the [ ] beachfront to substantial development," Initial Brief at 5, and accidentally "blundered" by opening "previously pristine beachfront to applications for new development," Initial Brief at 9-10. These facially implausible, post hoc conspiracy theories do not withstand the most cursory comparison with the actual record of the case.

These claims also are entirely irrelevant to the questions of law that are central to this appeal, just as they were in the trial court.

Intervenors' foregoing facts, which are all that are needed to resolve Mr. Testa's first two claims, are undisputed matters of record. Appellant's failure to bring any claim against the Town alleging a lack of rational basis for the Ordinance, or any other similar substantive challenge to the Ordinance's provisions, illustrates this absence of cogency.

Instead, Mr. Testa settled on a lawsuit claiming Ordinance 376 was not properly noticed prior to adoption. R.030. In his first iteration of a complaint, filed more than two years after the Ordinance's enactment, Mr. Testa alleged that because Ordinance 376 "affected" Town properties and the Town's LDRs, the Town was required to comply with the heightened notice requirements set forth in Fla. Stat. §166.041(3)(c). R.034.

When it became clear that this claim had no basis and was, incredibly, based on statutory language rendered moot by a **1995** change to the actual language of Section 166.041(3)(c), Mr. Testa—now represented by new counsel, R.583—amended his complaint. R.655. Mr. Testa retained the "heightened notice" claim, but joined it with a new Count I asserting that the Town's April 5, 2019,

advertisement in the Stuart News—placed more than thirty days prior to adoption of the Ordinance—somehow violated the Florida Statute's requirement that such notice be placed at least ten days prior to adoption. R.667. Mr. Testa also sought injunctive relief based on his two substantive counts. R.671.

Prior to the filing of the amended complaint, JIC and Dolphin Suite moved to intervene in Mr. Testa's lawsuit against the Town.[1] R.280. In 2020, JIC had purchased its property, located at 310 South Beach Road, in explicit reliance on the 2019 shift in the Waterfront Setback Line and the Town staff's assurance that the 310 South Beach Road property did not contravene the Town's setback requirements. R.1261-1264. JIC had spent hundreds of thousands of dollars on consultants to pursue the Town approvals needed to build a family house on its property. R. 1262. JIC had also received

[1] The Initial Brief attempts to score a rhetorical point by consistently referring to JIC and Dolphin Suite as "LLCs." *See* Initial Brief at 8. There is nothing in the record of this case, or anywhere else, suggesting that Intervenors' proposed uses of their properties are anything other than residential in nature. Both Intervenors seek only to build family structures. R.1262-1268. The nature of the properties' ownership is of no more moment, and is no more nefarious, than is the fact the Testas' property is owned by a trust, R.031.

a permit for the house from Florida Department of Environmental Protection, and approval from the Town's Impact Review Committee ("IRC"), both over the Testas' objections. R.1262-63.

Likewise, Dolphin Suite had pursued approval to build a home on its property, located at 322 South Beach Road, in explicit reliance on the 2019 Waterfront Setback Line, and spent considerable money to obtain IRC approval from the Town as well, again over the Testas' objection. R.1266-1268. The amended complaint's demanded relief—a declaration that Ordinance 376 was void ab initio, R.671—would have obviated the efforts undertaken by JIC and Dolphin Suite in reliance on the 2019 Waterfront Setback Line. Over Mr. Testa's objection, the trial court granted the joint motion to intervene on September 15, 2021. R.424.

4. The Circuit Court Rejects Mr. Testa's Claims

In November of 2021, the parties filed cross motions for summary judgment on each of Mr. Testa's three counts (and on Intervenors' affirmative defenses of waiver and laches, see below). R.1103; R.1511; R.1792. The parties' summary judgment evidence, in total, exceeded one thousand pages. R.1103-2256.

On January 14, 2022, the circuit court held a four-hour hearing on the parties' competing summary judgment motions. R.4823. The parties presented their respective cases, including through use of demonstrative exhibits, and submitted their proposed findings of undisputed material facts. After the hearing, the court issued an oral ruling that it was entering summary judgment in favor of the Town and Intervenors, and against Mr. Testa, on all three counts pleaded in the amended complaint, finding that the Town complied with all statutory notice requirements in adopting Ordinance 376. R.5626-5627. On January 31, 2022, the court entered its written order, R.5123, and its final judgment, R.5136. This appeal follows.

C. Factual and Procedural Background Relevant to Intervenors' Affirmative Defenses

Intervenors' affirmative defenses of common law waiver and laches both were predicated on the Testas' actual notice of the adoption of Ordinance 376. R.964-965. The following are the record facts relevant to Intervenors' assertion of the Testas' actual notice.

1. The Town Commission Publicly Debates Ordinance 376 at Nine Meetings Over More than a Year

The Town's enactment of Ordinance 376 was not a clandestine event. As the Town's Mayor summarized at a September 2021 Commission hearing, when responding to the Testas' contention that Ordinance 376 was adopted without notice to Town residents: "If you go back to 2019, we had ***nine*** meetings, ***nine*** public meetings on the matter … So, the idea that this commission, as someone put it, we acted in the depths of the night or clandestinely adopted the 2019 [ordinance], or that we're not acting in public interest right now and openly is not correct." R.845-846 (emphasis added). The Mayor's comments were not hyperbole.

There was public discussion regarding Ordinance 376 at each of the following Town Commission meetings: September 12, 2018, R.1626; October 24, 2018, R.1638; November 15, 2018, R.1647; December 10, 2018, R.1656; January 18, 2019, R. 1668; February 20, 2019, R.1685; March 18, 2019, R.1704; April 15, 2019, R.1716; and May 7, 2019. R.1733. Significantly, notice of every one of these meetings was emailed to each Town resident prior to each respective

meeting. R.1623; R.1634; R.1645; R.1662; R.1666; R.1692; R.1701; R.1713. Utilizing software technology affirmed as accurate by the Town's Director of Information Technology, it is indisputable that either Mr. Testa, Mrs. Testa, or both, opened emails providing notice of *each* such meeting prior to the meeting taking place, sometimes several times. R.1615-1620.

The Town also sends a monthly newsletter to each Town resident, apprising the residents of pending municipal legislation. R.1606. Mr. Testa and Mrs. Testa each had an email on file to receive these newsletters. R. 1606. The following are summaries of the newsletters' public updates on Ordinance 376:

(1) October 12, 2018, newsletter (describing September 12, 2018, Town Meeting). On October 15, 2018, the Town emailed the Testas the monthly Town newsletter, R.1275, which contained the following language:

> Waterfront Setback Lines … . [T]he Town Commission recommended that since the Town's waterfront setback line had not been reviewed or updated since its creation 20 years ago, staff engage outside consultants to review survey data related to the current waterfront setback lines to determine if the current criteria still hold and, if not, to recommend revisions to

the line based on shoreline and building changes over the past 20 years.

(2) November 13, 2018 newsletter (describing October 24, 2018, Town Meeting). The November 13, 2018, newsletter was likewise sent to the Testas. R.1287-1288. This newsletter expressly stated the Town was in the process of hiring a consultant to remap the Waterfront Setback Line. Mrs. Testa opened this newsletter on three separate days immediately thereafter: November 13, 15, and 17, 2018. R.1292.

(3) December 6, 2018, newsletter (describing November 15, 2018, Town Meeting). In the December 6, 2018, newsletter emailed to the Testas, the Town announced the Commission had approved the consultant's retention, and that an update on the progress of formulating the revised Waterfront Setback Line would be provided at the December 10, 2018, Town Commission meeting. R.1296. Mrs. Testa opened this email twice on December 6, 2018, while Mr. Testa opened it on December 7, 2018. R.1302-1303.

(4) January 11, 2019, newsletter (describing Town Meeting of December 10, 2018). The Testas were then told in the January 11,

2019, newsletter that the consultant would present a draft of the revised Waterfront Setback Line at the January 18, 2019, meeting. R.1305. Both Mr. and Mrs. Testa opened this email on January 11, 2019. R.1312-1313.

(5) February 13, 2019, newsletter (describing Town Meeting of January 18, 2019). The Testas were provided another update on the development of the revised Waterfront Setback Line on February 13, 2019, and were told the issue would be discussed again at the February 20, 2019, meeting of the Town Commission. R.1317. Mrs. Testa opened this email the same day, while Mr. Testa opened it on February 16, 2019. R.1324-1325.

(6) March 15, 2019, newsletter (describing Town Meeting of February 20, 2019). The March 15, 2019, newsletter informed the Testas that the consultant's work was nearing an end, and that the consultant was merely doing field verifications of the survey data to finalize the revised Waterfront Setback Line. R.1328. Mrs. Testa opened this newsletter the same day, while Mr. Testa opened it on March 31, 2019. R1336-1337.

On March 14, 2019, the Town sent its residents a link to the agenda for the March 18, 2019, meeting of the Town Commission. R.1338. The agenda stated that the first reading of Ordinance 376 would take place on March 18, 2019. R.1340. Mr. Testa opened this email on March 15, 2019, while Mrs. Testa opened the email on March 14, 2019. R.1342-1343.

Then, in March 2019, Mr. Testa was sent the following article in the Island News, a local publication:

Island News, March 2019 Edition

WATERFRONT SETBACK LINE UPDATED

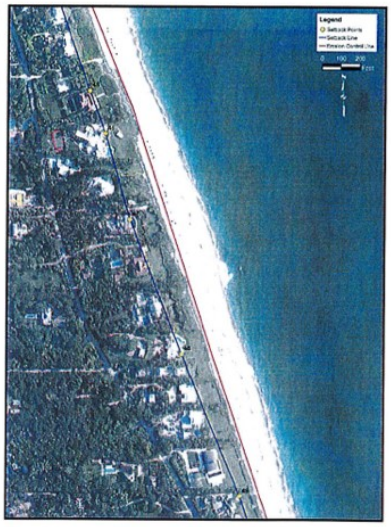
Over the past several Town meetings, Commissioners have reviewed the work being done on the Town's Waterfront Setback Line (WFSBL). At the March 18 meeting Ruben Cruz, the Town's Director of Planning, Zoning and Building, presented to Commissioners a First Reading of Ordinance 376 that would codify the newly proposed WFSBL.

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 additional non-conforming properties. Instead it converted some of the current non-conforming properties to conforming properties.

At the February Town meeting, Commissioners requested that Mr. Cruz present the information on the setback proposal to the Local Planning Agency (LPA). The LPA heard the item and recommended the proposal move forward for approval by the Town Commission.

Town Beach Manager John Duchock suggested to Commissioners that, because the beach is ever changing due to sea conditions, the Town might consider reviewing the WFSBL every five years. Commissioners agreed that would be appropriate.

Commissioners voted unanimously to approve Ordinance 376 on First Reading. It will come before Commissioners for final approval at the April Town meeting.



In this small sample area of the visual representation of the new Waterfront Setback Line, the blue line indicates the new WFSBL, and the red line indicates the Erosion Control Line.

R.1236. Among other information about Ordinance 376, this article stated that the Town Commission had voted to approve Ordinance 376 on first reading, and that Ordinance 376 would come up before the Town Commission at the April meeting for final approval. At his deposition, Mr. Testa admitted "[i]t's likely, yes," when asked directly whether he read this article around the time of its publication. R.1178. Mr. Testa further admitted at the deposition that in response to this article, he could have reached out to the Town at that time to obtain additional information about Ordinance 376, but did not avail himself of that opportunity. R.1178.

The Testas, and the general public, were separately informed about the first reading of Ordinance 376 through yet another source. The Town's April 12, 2019, town newsletter, emailed to the Testas, gave background information about Ordinance 376, and stated that the first reading of Ordinance 376 had taken place on March 18, 2019. R.1225. Mrs. Testa opened this email promptly on April 12, 2019, while Mr. Testa opened it on April 30, 2019. R.1342-43.

On April 5, 2019, the Town published its notice of proposed adoption of Ordinance 376 in the Stuart News. R.1231. On April 8,

2019, the Town sent its residents a link to the agenda for the April 15, 2019, meeting of the Town Commission. R.1348. The agenda stated explicitly that the second reading of Ordinance 376 would take place on April 15, 2019. R.1348. Mr. Testa opened this email on April 8, 2019. R.1350.

Neither Mr. Testa nor his wife appeared at the April 15, 2019, meeting, which was held as scheduled. If they had attended, they would have had the opportunity to address the Commission on Ordinance 376 at that time, and they would have been personally informed that the second reading of Ordinance 376 had been continued to the May 7, 2019, meeting. R.1351. Regardless, the Testas had actual notice through other sources that the second reading of Ordinance 376 had been continued to May 7, 2019. On May 3, 2019, the Town sent its monthly newsletter to the Testas, which contained the following information about Ordinance 376: "Ordinance No. 376, Waterfront Setback Lines (WFSBL) – The Town Commission deferred second reading of this ordinance to the May 7 meeting …." R.1361-1362. On May 3, Mr. and Mrs. Testa each opened the email. R.1366-1367.

On the very same day (May 3, 2019), the Town sent the Testas a separate email, containing a link to the agenda for the May 7, 2019, meeting. R.1370. Though both Mr. Testa and his wife opened this email as well, on May 3, neither attended the May 7 meeting. R.1372-1373.

2. Intervenors' Affirmative Defenses (Laches & Waiver)

During discovery, Intervenors obtained the aforementioned deposition testimony of Mr. Testa, who conceded that he knew about the Town's efforts to change the Waterfront Setback Line no later than March of 2019. R.1179-1180. This had significant implications for the lawsuit, since Section 166.041(7) of the Florida Statutes explicitly states that the common law doctrines of waiver and laches are defenses to any claim under Section 166.041, "[w]ithout limitation." Intervenors, in their answer and affirmative defenses to Mr. Testa's amended complaint, pleaded these common law affirmative defenses. R.964-965.

The parties' respective dispositive motions, discussed in subsection B above, also sought summary judgment on Intervenors' affirmative defenses. In a brazen attempt to undo the damage of Mr.

Testa's deposition testimony, Appellant submitted, as summary judgment evidence, a declaration of Mrs. Testa, the practical purpose of which was to assert under oath that Mr. Testa didn't know what he was talking about. R.1793-R.1977. Intervenors filed a motion to strike this declaration, joined by the Town, asserting to the court that this was a blatantly improper use of a bad faith affidavit. R.2616. The lower court eventually agreed, ordering that portions of the declaration be stricken. R.5121.

While entering summary judgment in favor of Intervenors and the Town on Mr. Testa's claims, the lower court declined to enter summary judgment favor of any party on Town's or Intervenors' affirmative defenses of waiver and laches, deeming them reliant on disputed facts and not ready for summary judgment adjudication. R.5627. Mr. Testa now appeals this denial of his motion.

SUMMARY OF ARGUMENT

In relevant part, Section 166.041(3)(a) of the Florida Statutes requires a municipality to publish notice of the proposed adoption of an ordinance at least ten days prior to its adoption. With respect to Ordinance 376, the Town published this notice on April 5, 2019.

R.1231. Ordinance 376 was adopted on May 7, 2019, more than thirty days after publication. R.1378. As such, the Town complied with the statute. Against these plain facts, Mr. Testa cannot point to a single authority, congruent with the facts of this case, which would compel a different conclusion.

Mr. Testa also contends the Town was required to comply with the heightened notice standards required by Section 166.041(3)(c) of the Florida Statutes. This heightened notice applies only where a proposed ordinance changes a municipality's "actual zoning map" or the "actual list" of permitted or prohibited uses in particular zoning categories. Because as an objective, factual matter, Ordinance 376 did neither of these things, the Town was not required to comply with Section 166.041(3)(c) of the Florida Statutes. In arguing to the contrary, Mr. Testa expressly relies on statutory language that was deleted from Section 166.041(3)(c) in 1995, and has not been the law in Florida for nearly 30 years.

Finally, the circuit court declined to enter summary judgment in any party's favor with regard to the affirmative defenses of laches and waiver, asserted by Intervenors pursuant to Section 166.041(7)

of the Florida Statutes. Because the trial court correctly found these defenses relied on matters of disputed fact, R.5134, if this Court deems it necessary to address the issue of Intervenors' affirmative defenses, it should affirm the denial of Mr. Testa's motion for summary judgment.

ARGUMENT

I. THE TOWN COMPLIED WITH THE NOTICE REQUIREMENTS OF FLA. STAT. §166.041(3)(A)

The Town complied with the notice requirements set forth in Section 166.041(3)(a) of the Florida Statutes, having provided more than thirty days' notice of the adoption of Ordinance 376, via the April 5, 2019, advertisement in the Stuart News. The Statute only requires ten days' notice prior to adoption, and Mr. Testa's argument to the contrary relies on an implausibly contorted reading of the Statute's plain language. To that end, Mr. Testa cannot point to a single opinion, of this Court or any other, requiring a "second" notice in a continued-meeting setting like that of the instant case. The cases he putatively cites as controlling are facially inapposite, dealing with instances where a public meeting was cancelled, or never noticed at all—not, as here, where an item being heard at a duly-noticed and conducted public meeting was continued on the record to another duly-noticed public meeting. The circuit court correctly rejected Mr. Testa's argument, and this Court should affirm.

A. Standard of Review

On appeal, "[t]he standard of review of the entry of summary judgment is *de novo*." *Grieco v. Daiho Sangyo, Inc.*, 2022 WL 2136932 at *3 (Fla. 4th DCA June 15, 2022) (quoting *Craven v. TRG-Boynton Beach, Ltd.*, 925 So. 2d 476, 479 (Fla. 4th DCA 2006)). "Summary judgment is proper if there are no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.* (quoting *Volusia County v. Aberdeen at Ormond Beach. L.P.*, 760 So. 2d 126, 130 (Fla. 2000)); *see In re Amendments to Fla. R. Civ. P. 1.510*, 209 So. 3d 192 (Fla. 2020).

B. The Plain Text of Section 166.041(3)(a) Requires Newspaper Notice at Least Ten Days Prior to Adoption of an Ordinance

Mr. Testa asserts the Town violated Section 166.041(3)(a) of the Florida Statutes because the hearing on the second reading was continued from the April 15 meeting to the May 7 meeting, and because the Town did not publish another proposed adoption advertisement for the May 7 meeting. Initial Brief at 22. But this was not required by law. The statute contains three sentences, which state as follows:

> 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.

Fla. Stat. §166.041(3)(a).

The plain language of the statute only requires published notice of at least ten days prior to *adoption*. It is a published notice of the "proposed ordinance." The statute plainly does not require notice of the date upon which the proposed ordinance may be adopted into law. It is notice of the places where the proposed ordinance may be inspected, and where the member of the public may appear to be heard. This statute is aimed squarely at shining the Sun on the proposed ordinance, and giving the public notice of an opportunity to be heard. It is not a requirement or a guaranty that the

municipality will vote to approve or reject the proposal on a specific date.

The statute also requires only one published notice. This reading is confirmed by comparison with Section 166.041(3)(c) of the Florida Statutes, which requires two notices for ordinances subject to that subsection. *Cf.* Fla. Stat. §166.041(3)(a) ("a proposed ordinance … shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality") and Fla. Stat. §166.041(3)(c) ("The local governing body shall hold two advertised public hearings on the proposed ordinance."). Where the Legislature has included specific language in one section of a statute, but has omitted that language from another, Florida courts consider such omitted language deliberately excluded. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995); *see also Osorio v. Bd. of Professional Surveyors and Mappers*, 898 So. 2d 188, 191 (Fla. 5th DCA 2005) ("Inclusion of the … requirement in subsection (b) shows that the legislature knew how to draft such a limitation but chose not to include it in subsection (a).").

As set forth in the Statement of Facts, it is undisputed that Ordinance 376 was read by title twice prior to adoption: at both the March 18, 2019, Town Commission meeting, and the May 7, 2019, Town Commission meeting. R.5125-5126. Furthermore, the Town published notice of the proposed adoption of Ordinance 376 in the Stuart News on April 5, 2019—10 days before the April 15, 2019, meeting, and far more than ten days before the May 7, 2019, meeting. The Town was not required to do anything else to comply with subsection (3)(a).

Mr. Testa relies on a textual sleight-of-hand, trying to contort the statute into reading as he wants it to, and not as it truly does. In a convoluted linguistic exegesis, he claims the statute requires the published notice to include the "date, time and place" of the meeting **"at which the proposed ordinance is enacted."** (emphasis added). Initial Brief at 26. Simply put, that is not what the statute says; it is the text Mr. Testa wishes the Legislature had used. On its face, the statute does not even connect the required notice to the two readings also required by subsection (3)(a). As Jupiter Island summarized in the trial court, "nothing in the statute would have precluded the

Town from giving notice of proposed enactment and advising residents of their opportunity to appear and to be heard at first reading of the ordinance or any other public meeting." R.2568.

There is no requirement under Florida law that a government entity must publish a new proposed adoption advertisement if a public hearing is continued on the record to a later date. This rule, advocated for by Mr. Testa, runs afoul not only of the statute's plain language—which ties the published notice to adoption—but of common sense. The trial court, in its summary judgment order, summarized the repercussions of Mr. Testa's tortured reading as follows:

> Indeed, adopting Plaintiff's argument would require a municipal board, like the Town Commission, to stop its work and republish newspaper notice rather than defer [a] hearing by 24 hours or as otherwise permitted by section 286.011 of the Florida Statutes if unable to reach a proposed ordinance on a busy agenda.

R.5129. These repercussions are not only forward-looking. Were Mr. Testa's reading to prevail, there are likely hundreds of ordinances, enacted at duly-noticed and continued meetings in municipalities across Florida—an entirely common legislative practice—which

would be in immediate danger of being retroactively voided. The five-year statute of limitations found in Section 166.041(7) of the Florida Statutes would only somewhat cabin the resulting chaos, which on Mr. Testa's terms would see the revocation of countless private enterprises and actions undertaken in reliance on these ordinances.

As further noted by the trial court, Mr. Testa's attempt to rewrite the text and purpose of the statute—there, as here in his Initial Brief—relies exclusively on cases "in which there was either no statutorily compliant notice whatsoever, or where the duly noticed hearing was cancelled entirely." R.5129; *see also* Part C below. But the April 15, 2019, Town Commission meeting was not cancelled. It took place where, on the record, the Town Commission merely continued the second reading of Ordinance 376 to its meeting scheduled for May 7, 2019.

Although there is no need to construe this unambiguous statute, the text of the statute reveals that the purpose of subsection (3)(a) is, fundamentally, one of notice. It is not a "gotcha" a plaintiff can invoke years later to declare an ordinance void ab initio to the detriment of his or her neighbor. While—with one exception,

addressed below—there is no apparent case law in Florida dealing with this fact setting, other jurisdictions that have encountered similar situations have sensibly concluded that continuances announced on the record do not require renewed publication. For example, in *Apalategui v. Washington Cnty.*, 80 Or. App. 508, 513–14, 723 P.2d 1021, 1025 (1986), the court stated:

> In their second assignment, petitioners assert that LUBA erred in affirming the ordinances because the county failed to follow statutory procedural requirements and because, as a result of that failure, the ordinances have no legal effect. ORS 215.060 and ORS 215.223 require ten days public notice before each board hearing on a comprehensive plan or a zoning ordinance. The county published two notices which together listed most of the 14 dates on which the Board held hearings on these ordinances. However, the Board held hearings on dates that were not listed in the notices, including the date on which it adopted them. The date of each hearing held without published notice was announced at a hearing held pursuant to a published notice or at a hearing which was itself announced at a hearing held pursuant to public notice. We agree with the county's argument that the hearings for which no published notice was given were continuations of the hearings held pursuant to published notice and that the resulting ordinances are not therefore invalid.
>
> ***
>
> There is no rule which requires a hearing to proceed continuously without interruption until consideration of the subject for which it was called is finished, simply

> because the local government has not been able to give ten days published notice of a resumption of the hearing at a later time. The announcement of the continuance at the meeting is sufficient compliance with the statutes.

Similarly, in *Hart v. Bayless Inv. & Trading Co.*, the Supreme Court of Arizona was tasked with interpreting a municipal enabling statute very similar to Section 166.041(3)(a) of the Florida Statutes, requiring municipalities to "hold at least one public hearing thereon, after giving at least fifteen days notice thereof by publication[.]" 346 P.2d 1101, 1106 (Ariz. 1959). Rejecting the plaintiff's position that the municipality violated statutory notice provisions by "holding unnoticed hearings subsequent to the hearings for which notice was published and prior to the adoption of the zoning ordinance," the *Hart* court held:

> It is not necessary, in order to provide due process, that interested parties be present at all stages of the legislative deliberations. Such a requirement is properly applicable only to adversary proceedings. The purpose of the various notice and hearing provisions in the Zoning Act is to allow interested parties an opportunity to be heard. If this opportunity is given as [r]equired by law – either on the date for which notice has been given, or, if necessary, on such later date as is duly set for the continued hearing – then it is of no moment that the Commission or the Board might indulge in further deliberations for a reasonable

> time before proceeding to the formal adoption of an ordinance.

Id. at 1108-09.

The trial court cited *Apelategui* and *Hart* in its summary judgment order. R. 5130. Even though the cases are cited only as persuasive authority, the Initial Brief takes considerable umbrage with their inclusion in the order, asserting that "[t]hese cases, of course, did not interpret Florida's famously robust sunshine laws and thus shed no light on the meaning of a Florida statute." Initial Brief at 37. Mr. Testa then attempts to argue, circularly, that *Hart* actually supports *his* case, because it holds that "where a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective." Initial Brief at 37 (quoting *Hart*, 346 P.2d at 1108). This, of course, presumes what is at issue, and merely begs the question the circuit court answered in favor of Intervenors and the Town. Mr. Testa's attempt to waive away *Apalategui* is even less availing; he makes no effort whatsoever to address it, even as persuasive authority, on its own terms. Initial Brief at 38. Instead, echoing the prior "no robust Sunshine Law"

claim, the analysis of *Apalategui* is limited to an argument that Oregon does not take public notice as serious as Florida does. Initial Brief at 38-39.

These statements are part of a lengthy, puzzling discourse where Mr. Testa argues the trial court's holding that "[t]he law requires nothing further"—in addition to the April 5 published notice and the on-the-record continuance at the April 15 meeting—constitutes "a judicially-created exception to the plain terms of Section 166.041(3)(a)." Initial Brief at 32. It is somewhat difficult to ascertain precisely what Mr. Testa is getting at with this "judicially-created exception" framing, other than as a rhetorical flourish. The circuit court decidedly did not hold, nor even suggest, it had identified an "exception" to the statute. To the contrary, the order reflects the court's opinion that Mr. Testa's reading of the statute, in total, was simply untenable, and that the Town had complied with all of the statute's requirements.

As referenced above, the trial court did deem one Florida judicial decision relevant to its analysis, with regard to the matter of adoption at a continued public meeting. The court found that

"Section 166.041(3)(a) merely requires that a proposed ordinance be noticed once, 'at least 10 days ***prior to adoption'***; it does not—as Plaintiff argues—require 10-day notice of the hearing ***at which the ordinance is adopted***." R.5129 (emphasis in original). Following this passage, the trial court's order includes this citation: *"See Tierra Verde Community Association, Inc. v. City of St. Petersburg,* No 08-000050-AP-88B (Fla. 6th Cir. App. Ct. April 7, 2011), *cert. denied* 75 So. 3d 1263 (Fla. 2d DCA 2011) (affirming compliance with Section 166.041 of the Florida Statutes, despite the fact that the annexation ordinance was actually adopted at a third hearing for which renewed published notice was not provided)." R. 5129.

As with the order's citations to the Oregon and Arizona cases, the Initial Brief evidences great displeasure with the trial court's reference to *Tierra Verde*. This vehemence is entirely out of proportion to the trial court's incidental employ of the case. As even the Initial Brief concedes, the trial court expressly wrote that *Tierra Verde* "is not traditional precedent," but merely provides "persuasive support for this Court's decision." R. 5129. In the absence of any controlling authority, including that mistakenly identified by Mr. Testa as such

(*see* R.5129 and Part C below), the circuit court merely turned to cases from other jurisdictions to further elucidate its reading of the controlling statutory text. In fact, Mr. Testa's consternation appears to be more about the court's (proper) rejection of his own wrongly-asserted precedent, Initial Brief at 29.

C. The Authorities Cited by Mr. Testa Involve Meetings that Were Cancelled and Never Held, or Never Noticed at All, and are Inapposite to this Case

As in the trial court, Mr. Testa's Initial Brief argues that several appellate opinions are on point and support his position, or even compel a result in his favor. But these authorities uniformly, and unanimously, involve situations where (a) the municipality failed to notice a meeting at all, or (b) the meeting was noticed, but cancelled and never held. These cases have not even tangential value to the analysis at hand, where the April 15 meeting was duly-noticed, held, and continued on the public record.[2]

---

[2] Mr. Testa cites a second group of authorities for the anodyne proposition that the provisions of Section 166.041 of the Florida Statutes are mandatory, and all municipal ordinances must be enacted in compliance with the statute. Initial Brief at 23-24. These principles, though, say nothing about whether the Town followed Cont.

For example, Mr. Testa cites *Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001) several times, including for the proposition that there is no "justification for failing to publish notice of the new meeting." Initial Brief at 34. First, *Coleman*, was a heightened notice case under Section 166.041(3)(c), rather than one under Section 166.041(3)(a). *Id.* But even more to the point, *Coleman* involved a situation where the duly-noticed public hearing was ***canceled***. *Id.* Specifically, in *Coleman* the city, in advance of a public meeting, published notice of the consideration of a proposed ordinance. *Id.* Due to a tropical storm, the meeting was cancelled in its entirety—"there was no [ ] city commission meeting at all." *Id.* Therefore, unlike the April 15 meeting in this case, there was no meeting where a resident could be heard, or could himself hear of the continuance of the ordinance's consideration. In *Coleman*, the city attempted to re-advertise a new meeting on two days' notice, an effort the court rejected as violating Section 166.041 of the Florida

---

these statutory requirements in the instant case, and Mr. Testa's leap to answer "no" by mere citation to these cases is an exercise in base-stealing.

Statutes. *Id.* at 86. On its face, then, *Coleman* lacks any congruence with the instant case.

Similarly, Mr. Testa relies on *City of Ft. Pierce v. Davis*, 400 So. 2d 1242 (Fla. 4th DCA 1981). Initial Brief at 34-35. As with *Coleman*, *Davis* was decided under the language of Section 166.041(3)(c). Moreover, and despite the Initial Brief's contention that *Davis* has any bearing here, this Court's opinion makes clear that the dispositive issue in *Davis* was that the city failed to give ***any*** timely notice as required by the statute. *Id.* at 1243. In *Davis*, the controlling statutory language required 30 days' notice of consideration of a proposed ordinance. *Id.* Despite the next public meeting being scheduled for March 19, the city waited until March 9 to publish the required notice. *Id.* When the meeting was re-scheduled for April 2, the city re-published the notice on March 26. *Id.*

A property owner, who objected at the April 2 hearing to the lack of notice, sued, and this Court ultimately held in his favor. *Id.* Again, though, the dates themselves are dispositive in *Davis*—the property owner won because even the city's first notice (March 9) did not satisfy the requirement of publication at least thirty days prior to the

re-scheduled meeting (April 2). Nothing approaching those facts are present here, where there is no question the April 5 notice was published more than ten days prior to the May 7 meeting.

Mr. Testa also cites *Healthsouth Doctors' Hospital v. Hartnett*, 622 So. 2d 146, 148 (Fla. 3d DCA 1993), arguing without any context that it holds an "ordinance is '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." Initial Brief at 19. But that missing context makes all the difference. In *Healthsouth*, the "notice" at issue wasn't notice of the adoption of an ordinance—it was notice of the public meeting itself. *Id.* at 148 ("In the instant case, there was no newspaper publication of *notice of the City Commission meeting* at which adoption of the ordinance took place.") (emphasis added). It is an undisputed fact that the May 7 Town Commission meeting in the instant case was duly-noticed, R.1368-1369, rendering *Healthsouth* entirely irrelevant.

Along these same *Healthsouth* lines fall Mr. Testa's brief references to Florida Attorney General Opinion 90-56 (1990), and to

the 2021 edition of the Attorney General's *Government in the Sunshine Manual*. Initial Brief at 36. In the 1990 advisory opinion, the Attorney General was asked, on behalf of the Florida Bail Bond Regulatory Board, whether the Board could legally "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." As can readily be discerned from this question, the concern in this advisory opinion, like in *Healthsouth*, was that a public meeting would be held without the public receiving any notice whatsoever; that is, that a public meeting might be conducted in private. The opinion, with its focus on the general meeting requirements of Fla. Stat. §286.011, has nothing to do with Section 166.041, and nothing to do with the facts of the instant case.

The same holds for the Initial Brief's reference to the *Sunshine Manual*, which (a) cites only to the 1990 AG opinion and (b) reads, in its entire relevant part: "If 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."

(emphasis added). In this case the May 7 meeting was noticed, satisfying the advice of the Attorney General via the advisory opinion and the *Sunshine Manual*.

The Initial Brief contains no reference to any authority holding that the Town's April 5 notice was insufficient for purposes of Section 166.041(3)(a). There is a simple reason for this: there is none. The trial court correctly rejected Mr. Testa's argument that the notice was improper, and this Court should affirm.

II. ORDINANCE 376 DID NOT CHANGE THE TOWN'S ACTUAL ZONING MAP OR PERMITTED USES; SECTION 166.041(3)(C) DOES NOT APPLY TO THIS CASE

Mr. Testa contends, in the alternative, that the Town was required to comply with the heightened notice standards required by Section 166.041(3)(c) of the Florida Statutes. Initial Brief at 40. This heightened notice applies only where a proposed ordinance changes a municipality's "actual zoning map" or the "actual list" of permitted or prohibited uses in particular zoning categories. Because as an objective, factual matter, Ordinance 376 did neither of these things, the Town was not required to comply with Section 166.041(3)(c) of the Florida Statutes.

A. Standard of Review

On appeal, "[t]he standard of review of the entry of summary judgment is *de novo*." *Grieco*, 2022 WL 2136932 at *3 (quoting *Craven*, 925 So. 2d at 479). "Summary judgment is proper if there are no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.* (quoting *Volusia County*, 760 So. 2d at 130); *see In re Amendments to Fla. R. Civ. P. 1.510*, 209 So. 3d 192.

B. Ordinance 376 Did Not Change The Town's "Actual Zoning Map" or its "Actual List" of Permitted, Conditional, or Prohibited Uses Within Any Zoning Category

The heightened notice requirements of Section 166.041(3)(c) of the Florida Statutes apply, by the statute's plain text, only to "[o]rdinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land."

To get right to the point, this is not a complicated issue. There is a published, "actual list" of "permitted uses" and "prohibited uses"

for each of the Town's ten zoning categories. R.1400. Ordinance 376 did not change the "actual list" of permitted or prohibited uses in any of these zoning designations—they were the same both before and after the Ordinance was adopted. For example, the properties at 310 South Beach Road and 322 South Beach Road, owned by Intervenors, are located in the Town's 2-Acre Estate Residential District "A-80" and the Town's 1-Acre Estate Residential District "B-40". As a pure matter of record fact, confirmed by the Town's Planning Administrator, Intervenors' properties were in these very same zoning categories both before and after Ordinance 376, and the list of published "permitted" and "prohibited" uses for these categories did not change. R.1419.[3] Nothing changed. The owners of Intervenors' properties, located in the

[3] Mr. Testa claims the Planning Administrator, Ruben Cruz, made improper legal conclusions in his Declaration supporting the Town's motion for summary judgment, specifically pertaining to the Ordinance's lack of any change to the Town's "actual zoning map" and the "actual list" of permitted and prohibited uses. Initial Brief at 41. This is yet another example of Mr. Testa's question-begging. Mr. Cruz declared, as matters of objective fact, that (a) the Town maintains and publishes an official "actual zoning map" setting forth the Town's zoning designations and an "actual list" of permitted and prohibited uses in each of these designations; and (b) Ordinance 376 did not change either of these documents. R.1419-1420. His opinion was not given, nor was it necessary.

A-80 and B-40 zoning designations, have always been permitted to develop their properties by constructing (i) single-family dwellings, or (ii) accessory uses such as beach houses. R.1419. These permitted uses existed both before and after Ordinance 376, for Intervenors' parcels, as well as all other parcels potentially impacted by Ordinance 376.

Nor is it hard—the Initial Brief's remarkably discursive attempt to the contrary—to figure out whether Ordinance 376 changed the Town's "actual zoning map." It could not have, because the Ordinance was adopted in 2019, and the Town's zoning map has not changed since the Town's last revision on December 27, 2016. R.1420; R.1474. This "official zoning map," which visually organizes each parcel within the Town into one of ten distinct zoning categories, is appended to the LDRs as Exhibit B. LDR Art. XIII, Ex. B. But the Town's setback requirements, including the Waterfront Setback Line, are found in Article IV, Div. III, Sec. 3.02 of the LDRs, set out separately from the zoning regulations and the zoning map. The setback lines are visually set forth in Exhibit C to the LDRs, separate

and apart from the zoning map appended thereto as Exhibit B. LDR Art. XIII, Ex. C.

The first step in any statutory analysis under Florida law is to look to the statute's plain language. *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998, 1000 (Fla. 2003). Where the court is tasked with construing a statute, its "first (and often only) step … is to ask what the Legislature ***actually said*** in the statute, based upon the common meaning of the words used." *Shepard v. State*, 259 So. 3d 701, 705 (Fla. 2018) (emphasis added). When reading the plain language of a statute, 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." *Recovery Racing, LLC v. State Dept. of Hwy. Safety and Motor Vehicles*, 192 So. 3d 665, 669 (Fla. 4th DCA 2016); *1000 Friends of Fla., Inc. v. Palm Beach Cnty.*, 69 So. 3d 1123, 1127 (Fla. 4th DCA 2011) (refusing to interpret a statutory list broadly, where inclusion of the word "only" signaled an intent for the list to be exclusive).

Intervenors' reading of the LDRs, shared by the Town, is the only one that gives meaning to the terms "actual list" and "actual

zoning map" found in Section 166.041(3)(c). The definition of "actual" is "existing in fact; real". *Actual*, Black's Law Dictionary (8th ed. 2004). The Town's "actual list" of uses, and its "actual zoning map," exist in fact and are quite easy to identify, with particularity, by anyone making a good-faith effort. The trial court had no problem making this identification, R.5130, and this Court should not either.

C. Appellant's Preferred "Substantially Affects" Test for Heightened Notice Relies on Statutory Language that has Not Existed Since 1995

Mr. Testa further argues the Town was required to comply with the heightened notice requirements of Section 166.041(3)(c) of the Florida Statutes because Ordinance 376 "substantially affects" land use in the Town. Initial Brief at 49. This claim relies on statutory language that was removed from Section 166.041(3)(c) by the Florida Legislature in 1995, and been inoperative under Florida law for nearly three decades.

Until 1995, Section 166.041 of the Florida Statutes contained an exception to the general public notice procedures for municipal legislation, requiring municipalities to comply with heightened notice requirements before enacting ordinances that "rezone specific parcels

of private real property or which ***substantially change permitted use categories*** in zoning districts." Fla. Stat. §166.041(3)(c) (1983) (emphasis added); R.1385-1399. Courts at the time were forced to engage in subjective "glosses" on this language, including ones which transformed the already subjective "substantial change" standard to one requiring heightened notice when a proposed ordinance would "substantially affect" other properties. These glosses made it unclear whether municipalities were required, in particular circumstances, to engage in heightened notice before enacting an ordinance. The 1995 amendment of the statute, resulting in its current form, removed this subjective test and replaced it with the objective requirements which now govern.

The language of the amended statute is plain and unambiguous. Still, it is worth noting that the legislative history of the 1995 amendment resoundingly confirms that the intent of the amendment was to eliminate the uncertainty created by the subjective "substantially affects" standard—the same test Mr. Testa now claims should govern. In fact, the aim of the amendment was to eliminate lawsuits such as Mr. Testa's. For example, the Florida House of

Representatives Committee on Community Affairs *Final Bill Analysis & Economic Impact Statement*, published on May 16, 1995, states that the primary goal and objective of the amendment to Section 166.041 was to ensure that "all ordinances will be adopted by the ***same general notice procedures*** except for ordinances that change the ***actual zoning designation*** of a parcel of property or ***change the actual list of permitted or conditional or prohibited uses*** within a zoning category." *See* Fla. H.R. Rep. No. 95-310, at 11 (1995) (emphasis added).

The legislative history confirms that the amendments were deemed necessary as a result of "[a] series of court cases and statutory amendments [that] have expanded the applicability of the rezoning ordinance enactment procedures to nearly all ordinances that somehow affect the use of land … This bill is designed to alleviate these problems." *Id.* at 10-11.

Nevertheless, Mr. Testa still argues this Court should follow its pre-amendment opinion in *3299 N. Federal Highway, Inc. v. Board of County Com'rs of Broward County*, 646 So. 2d 215 (Fla. 4th DCA 1994), applying the now-obsolete "substantially affects" test, because

"this Court has never overruled *3299*." Initial Brief at 49. It must first be noted that this Court has not cited *3299* for purposes of applying the "substantially affects" test since the statute was amended in 1995. Moreover, to the extent the Court has not had the opportunity to formally overrule *3299*, this is almost surely because—in light of the 1995 amendment to the statute—nobody else in this district has tried to argue the test still applies. In the end, of course, all this Court is bound to do is apply the law as it has been written for nearly 30 years. *State v. Peraza*, 259 So. 3d 728, 730 (Fla. 2018) (courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.").[4]

---

[4] Mr. Testa cites *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 166 (Fla. 5th DCA 2003), as a post-1995 opinion which putatively recognizing *3299* as applying the "substantially affects" test despite the amended statute's plain language. Initial Brief at 50. *Galaxy Fireworks* is a case about whether a city's fire code is a land development regulation that must be reviewed by a local planning agency prior to adoption. 842 So. 2d at 164. Its citation to *3299* draws a parallel to that question and *3299*'s similar issue pertaining to a local "adult entertainment code." At best, then, the Fifth DCA's quotation of *3299*'s pre-1995 invocation of the "substantially affects" test is dicta. Even if it weren't, it would have no bearing on this Cont.

III. THE TRIAL COURT PROPERLY DENIED MR. TESTA'S MOTION FOR SUMMARY JUDGMENT ON INTERVENORS' AFFIRMATIVE DEFENSES

This Court will not need to reach this issue if it agrees that the circuit court reached the correct rulings on the first two issues. In the event this Court does address these issues, it should affirm the circuit court's denial of Mr. Testa's motion for summary judgment because factual issues remain on the affirmative defenses.

Section 166.041(7) of the Florida Statutes states: "Without limitation, the common law doctrines of laches and waiver are valid defenses to any action challenging the validity of an ordinance or resolution based on failure to strictly adhere to the provisions contained in this section." Pursuant to this provision, Intervenors asserted the affirmative defenses of laches and waiver in the court below. R.964-965. While the parties moved for summary judgment on these defenses, the trial court declined to enter judgment in any party's favor, finding that the affirmative defenses involved issues of disputed fact. R.5133-5134. This Court should affirm.

Court's duty to apply Section 166.041(3)(c) as the statute is currently, and plainly, written.

A. Standard of Review

On appeal, "[t]he standard of review of the entry of summary judgment is *de novo*." *Grieco*, 2022 WL 2136932 at *3 (quoting *Craven*, 925 So. 2d at 479). "Summary judgment is proper if there are no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.* (quoting *Volusia County*, 760 So. 2d at 130); *see In re Amendments to Fla. R. Civ. P. 1.510*, 209 So. 3d 192.

B. The Facts of the Case Do Not Support Summary Judgment in Favor of Mr. Testa on Intervenors' Affirmative Defenses

As Mr. Testa concedes, Intervenors' affirmative defenses of waiver and laches rely on Mr. Testa's actual notice of the enactment of Ordinance 376. In the subsection C of the Statement of Facts above, Intervenors demonstrate, at a minimum, there is a question of fact as to whether Mr. Testa had such actual notice. And those facts are not the only evidence of actual notice.

During discovery in the circuit court, several of the Testas' emails uncovered by Intervenors make the Initial Brief's claim of "no actual notice" highly implausible—at the very least, sufficient to

warrant denial of summary judgment on Intervenors' affirmative defenses. In one of these emails, which attached Town's April 12, 2019, newsletter describing the first reading of Ordinance 376 on March 18, 2019, Mrs. Testa wrote plainly: "This is how we were notified." R.3117. This email is significant, as it reflects an admission by Mrs. Testa that she was receiving the newsletters leading up to the adoption of Ordinance 376. Mr. Testa, in the course of discovery, produced similar emails evidencing receipt of the newsletters. R.3139-3155.

In yet another email obtained during discovery, Mrs. Testa similarly wrote:

> As for the substance of the Notice they say they emailed to us, the Notice only says that there would be a hearing on the WFSL [waterfront setback line] without saying anything about the effect of a change would be. **Legally, they probably weren't required to say anything about the substance, but this is Jupiter Island and more needs to be communicated.**

R.3156 (emphasis added). This email is likewise significant, because it reflects an awareness by Mrs. Testa that the Town was not legally required to provide a more substantive disclosure in 2019 about how precisely a change to the Waterfront Setback Line might impact each

and every property in the Town of Jupiter Island. More than once in the Initial Brief, Mr. Testa asserts this as a fallback position: even if he may have known there was an ordinance being considered, he didn't comprehend its "unwitting but devastating consequences," and so cannot be deemed to have had true, actual notice. *See* Initial Brief at 62.

That the Testas now feel like the Town should have provided them alone, in 2019, with a parcel-by-parcel analysis of Ordinance 376, is simply not germane to a lawsuit that is fundamentally based on supposedly not having been provided notice of the date and time of Town Commission meetings on Ordinance 376. Moreover, it is also an evasion. If the Testas were truly unsure of the exact consequences of the change in the Waterfront Setback Line in 2019, they should have reached out to the Town to learn more, or attended one of the nine separate public meetings on Ordinance 376. Indeed, Mr. Testa admitted at deposition that in response to information he admittedly received from the Town about Ordinance 376 in early 2019, he could have contacted the Town at that time to obtain additional information

about Ordinance 376, but did not avail himself of that opportunity. R.1178-1180.

Finally, in another discovered email, Mrs. Testa (again) overtly admitted: "[T]here was a public hearing on the WFSBL change, but who checks notices in the Stuart Times or whatever Treasure Coast newspaper it was published in." R.3157. At an absolute minimum, these emails—part of the record evidence on which the circuit court made its summary judgment decision—are themselves sufficient to raise issues of disputed fact on the question of actual notice, and the affirmative defenses reliant thereupon. This is true even under Florida's new summary judgment standard. *See, e.g., Pinnacle Advertising and Marketing Group, Inc. v. Pinnacle Advertising and Marketing Group, LLC*, 2019 WL 7376779, at *4 (S.D. Fla. Sept. 19, 2019) (applying *Celotex* standard on summary judgment, and holding that "[b]ecause the record demonstrates a genuine dispute of material facts as it relates to at least the laches defense … I deny Plaintiff's Motion to the extent it seeks summary judgment[.]").

C. Intervenors' Affirmative Defenses are Valid as a Matter of Law

Mr. Testa further argues the affirmative defenses fail as a matter of law. He is wrong. To begin, the legislative history from the 1995 amendment to Section 166.041(7), adding the language regarding affirmative defenses, notes that courts should give particular consideration to "public reliance and expectations that are based on adopted ordinances" when analyzing waiver and common law laches defenses in this context. Fla. H.R. Rep. No. 95-310, at 6 (1995). What is more, the common law doctrines of laches and waiver are entirely applicable to the instant case.

1. Laches

Courts in Florida and nationwide have held it appropriate to apply common law laches to bar claims where the plaintiff's unreasonable delay in bringing its claim results in prejudice to an opposing party—even where the claim was brought within the statutory limitations period. *See e.g.*, *Monroe Cnty. v. New Port Largo, Inc.*, 467 So. 2d 757, n. 2 (Fla. 3d DCA 1985) (citing *Martin v. Wilson*, 115 So. 2d 573 (Fla. 1st DCA 1959), for the proposition that "laches

[is] automatically applicable when action brought beyond statute of limitations but may be barred even when it is brought within it"); *Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014) (recognizing "that laches is available as a defense in some circumstances to shorten the period for filing a claim, even though the claim has been timely filed within the legislatively prescribed statute of limitations period."); *Finova Capital Corp. v. Regel*, 195 S.W. 3d 656, 660 (Tenn. App. 2005) (affirming summary judgment based on common law laches despite claim being raised within statutory limitations period, where unreasonable delay in bringing claim resulted in prejudice to defendant).

The factor courts consider when determining whether laches is applicable is whether an opposing party "may have changed his position in a manner that would not have occurred but for plaintiff's delay." *Kerrigan v. Kerrigan*, 642 A. 2d 1324, 1326 (D.C. 1994). The record evidence in this case leaves no doubt that Intervenors' actions satisfy this criterion. R.1261-1268. Despite having actual notice of the Town's enactment of Ordinance 376 in real time during 2019, Mr. Testa waited until after Intervenors' reliance damages had been

incurred to bring his lawsuit. This is classic "common law laches," *see Corya v. Sanders*, 155 So. 3d 1279, 1285 (Fla. 4th DCA 2015), recognized by Section 166.041(7) as a valid defense to Mr. Testa's notice lawsuit.

2. Waiver

Mr. Testa argues that "mere actual notice" is insufficient to apply common law waiver, which instead requires a finding that a plaintiff appeared at the hearing in question. Initial Brief at 55. Whatever force this rule may have had, it is no longer accurate in the instant context, given the Florida Legislature's adoption in 1995 of the "common law waiver" defense to an action under Section 166.041.

Before the 1995 amendment, courts would apply waiver to bar claims premised on lack of notice where the party actively participated in the subject proceedings without objection. But Florida courts—including those issuing the opinions cited in the Initial Brief—did not hold that this is the *only* circumstance under which waiver is applicable. *Schumacher v. Town of Jupiter*, 643 So. 2d 8, 9 (Fla. 4th DCA 1994); *Malley v. Clay Cnty. Zoning Com'n*, 225 So. 2d 555, 557 (Fla. 1st DCA 1989).

Indeed, adopting Mr. Testa's position that waiver only precludes claims premised on lack of notice when the plaintiff actually attends the noticed hearing, and addresses the government body, defies logic; such a rule would encourage would-be plaintiffs to sit on their hands when provided actual notice of municipal action, rather than voice his or her objections. *See Kathleen G. Kozinski, P.A. v. Phillips*, 126 So. 3d 1264 (Fla. 4th DCA 2013). This Court dealt with a similar issue in *Phillips*, in which the Court held that the appellee waived claims of defective service of court documents where she was served "with numerous, albeit defective, documents [.]" *Id.* at 1268. In so holding, the Court reasoned that failing to apply waiver principles in such situations would incentivize parties to "simply ignore the process [and] sit idly." *Id.*

Likewise, to the extent Mr. Testa's argument arises from principles akin to due process, courts have consistently rejected such claims where the plaintiff has failed to raise such concerns after notice of his ability to do so. *See e.g.*, *Maples v. Martin*, 858 F. 2d 1546, 1551 (11th Cir. 1988) (denying plaintiff's contention that it was denied due process where "the opportunity to be heard that would have met the

requirements of due process was lost to the [plaintiffs] by their own inaction."). In such contexts, courts in other jurisdictions have held that a party's silence after actual notice of proposed action bars subsequent legal challenges—even where objections are not raised at interim hearings. *See, e.g., Oeth v. Felty*, 421 S.W. 2d 860, 861-62 (Kent. App. 1967) (plaintiff barred from asserting claim for failure to comply with statutory notice requirements, where Plaintiff admitted to actual notice of the proposed changes, yet failed to attend public hearing to voice objections).

This Court need not reach the questions of Intervenors' affirmative defenses if, as it should, the Court affirms the circuit court's judgment on the questions of statutory notice. In the event it does address these issues, it should affirm the circuit court's denial of Mr. Testa's motion for summary judgment.

CONCLUSION

In adopting Ordinance 376, the Town complied with all applicable notice requirements set forth in Fla. Stat. §166.041. For that reason, and those foregoing, this Court should affirm the judgment of the circuit court.

DATED: June 22, 2022.

/s/ Ethan J. Loeb
ETHAN J. LOEB
Florida Bar No. 0668338
EthanL@BLHTLaw.com
STEVEN GIESELER
Florida Bar No. 0880981
StevenG@BLHTLaw.com
CYNTHIA G. ANGELOS
Florida Bar No. 539058
cynthiagangelos@gmail.com
NICHOLAS M. GIESELER
Florida Bar No. 0043979
NicholasG@BLHTLaw.com
ELLIOT P. HANEY
Florida Bar No. 1018829
ElliotH@BLHTLaw.com
BARTLETT, LOEB,
HINDS & THOMPSON, PLLC
100 North Tampa Street, Suite 2050
Tampa, Florida 33602
Telephone: (813) 223-3888
Facsimile: (813) 228-6422
Attorneys for Appellees / Intervenors Jupiter Island Compound, LLC and Dolphin Suite, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 22, 2022, a true and correct copy of the foregoing was filed via the Florida E-Portal and electronically served pursuant to Fla. R. Jud. Admin. 2.516(b) to: Joanne M. O'Connor, Esq., James C. Gavigan, Jr., Esq. and John C. Randolph, Esq., Jones Foster, P.A, 505 S. Flagler Drive, Suite 1100, West Palm Beach, FL 33401 (joconnor@jonesfoster.com, jgavigan@jonesfoster.com, jrandolph@jonesfoster.com, mbest@jonesfoster.com, mmacfarlane@jonesfoster.com), *Counsel for Town of Jupiter*; Kevin S. Hennessy, Esq., Seth C. Behn, Esq., Lewis Longman & Walker, P.A., 100 Second Avenue South, Suite 501-S, St. Petersburg, FL 33701 (khennessy@llw-law.com, sbehn@llw-law.com, jbissette@llw-law.com, jdavy@llw-law.com), *Counsel for Appellant*; and Stuart H. Singer, Esq., James Grippando, Esq., Jesse Panuccio, Esq. and Pirzada Ahmad, Esq., Boies Schiller Flexner LLP, 401 E. Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301 (jgrippando@bsfllp.com, ssinger@bsfllp.com, jpanuccio@bsfllp.com, pahmad@bsfllp.com, wsmith@bsfllp.com, aanderson@bsfllp.com, ftleserve@bsfllp.com), *Co-Counsel for Appellant;* Pamela C. Marsh, Esq., Virginia M. Hamrick, Esq., 1700 N. Monroe St., Suite 11-140, Tallahassee, Florida 32300 (pmarsh@floridafaf.org, vhamrick@floridafaf.org), *Counsel for Intervenor-Appellee The First Amendment Foundation*

/s/ Ethan J. Loeb
ETHAN J. LOEB
Florida Bar No. 0668338

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(e), **I HEREBY CERTIFY** that the foregoing document complies with (a) the font requirements set forth in Florida Rule of Civil Procedure 9.045(b), having been prepared in Bookman Old Style 14-point font, and (b) the word count requirements set forth in Florida Rule of Civil Procedure 9.210(a)(2), as it consists of 11093 words.

/s/ Ethan J. Loeb
ETHAN J. LOEB
Florida Bar No. 0668338