IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

APPELLATE DIVISION

EDGEWATER HOUSE
CONDOMINIUM ASSOC., INC.

Petitioner,

vs.

CITY OF FORT LAUDERDALE,
FLORIDA, a Florida Municipality,
by and through its City Commission,

Respondent.
_____/

Case No. _____

*Petition Filed Pursuant to Fla. R. App. P. 9.100(f) and 9.190(b)(3)

PETITION FOR WRIT OF CERTIORARI AS A MATTER OF RIGHT FROM A FINAL QUASI-JUDICIAL DECISION OF AN ADMINISTRATIVE BODY[1]

INTRODUCTION

Edgewater brings this certiorari petition as a matter of right. The City Commission's Resolution denying Edgewater's development application to construct a residential development in Fort Lauderdale's Downtown Regional Activity Center – City Center Zoning District ("**Downtown City Center**") must be quashed. The denial, which was by a 3-2 vote, has no basis in law or fact—it was purely the result of political pressure. The City's Development Review Committee

[1] Petitioner, Edgewater House Condominium Association, Inc., is referenced as "Edgewater". Respondent, the City of Fort Lauderdale, a Florida Municipality, is referenced as the "City," and the Fort Lauderdale City Commission is referenced as "City Commission" or "Commission."

("**DRC**") approved the application after an extensive review process, finding the application met all requirements of the governing regulations. Despite the approval, the City Commission violated its own rules and held a de novo hearing. Then, without making any findings as to what requirements were allegedly violated, it denied the application. It did so even though the DRC repeatedly confirmed during a series of hearings that the application met all plan and code requirements and should be approved. The Commission's denial departed from the essential requirements of law, violated due process, and is not supported by competent substantial evidence. Because the project complies with all governing regulations, the Commission cannot refuse to approve the application simply because it dislikes it.

First, as a matter of law, the City Commission's decision to hold a de novo hearing and second-guess the DRC's preliminary approval was invalid. To reopen and review an application the DRC has already approved, the City Commission must make a factual finding—within 30 days of the DRC's approval—that the DRC misapplied or failed to apply one or more requirements of the Unified Land Development Regulations ("**ULDR**") or the City's Comprehensive Plan in approving the application. The City Commission failed to make the required findings and failed to follow its own rules. As a result, the DRC's preliminary approval became final on April 5, 2018.

Second, Edgewater established that its application met all ULDR requirements and comprehensive plan standards, and not one shred of evidence—much less competent, substantial evidence—was presented by or to the Commission to the contrary. Once Edgewater established it met the requirements, the burden shifted to the City Commission to establish Edgewater did not meet the requirements. The Commission not only failed to meet that burden but also acted arbitrarily and capriciously in denying Edgewater's application. By placing additional, non-codified and arbitrary restrictions on the development as a condition of approval, the Commission improperly legislated and denied Edgewater due process.

Third, the City Commission violated section 166.033(2), Florida Statutes, which requires the Commission to set forth exactly what law, rule, ordinance or other legal provision Edgewater failed to meet. It did not do so, and its Resolution is erroneous as a matter of law.

BASIS FOR JURISDICTION

This Court, sitting in its appellate capacity, has jurisdiction under Florida Constitution, article V, section 5(b); Florida Rules of Appellate Procedure 9.100(c)(2) and 9.190(b)(3); and Fort Lauderdale ULDR article VI, sections 47-26.A.2.D and 47-26.B.1.A.5. Edgewater brings this certiorari petition as a matter of right. *Dusseau v. Metropolitan Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d

1270, 1273-74 (Fla. 2001). Edgewater has standing to bring this Petition on behalf of the 30 individual condominium unit owners under Florida Rule of Civil Procedure 1.221.

STATEMENT OF THE CASE AND FACTS

Edgewater submitted an application seeking approval to build a new residential development, the Alexan Tarpon River development (the "**Alexan**"), in the Downtown City Center District. The application was submitted to the City of Fort Lauderdale's Design Review Team (the "**DRT**"), and its DRC in 2017. [A[2] 1-80] Both the DRT and the DRC initially found the Alexan largely met the Downtown Master Plan Guidelines, and the City's ULDR, but it requested a few adjustments and required more information on certain design aspects. [A 22, 86]

For example, the DRT wanted the application to update the proposed design to camouflage the parking levels with "creative screening" and provide green elements on the rooftop to add "visual interest" and a "compelling street presence," which Edgewater agreed to do. [A 22-24] The DRC also provided extensive comments based on each individual Master Plan Guideline. [A 86, 99] The applicant addressed each comment in turn, and it agreed to make any and all necessary adjustments to address the DRC's concerns. [A 204, 554]

Because the Alexan's location is proximate to certain historic landmarks (the

[2] References to the appendix are to the page number preceded by the letter "A."

Stranahan House and Smoker Park), Edgewater also submitted an application to the Fort Lauderdale Historic Preservation Board. [A 649[3]] The Preservation Board determined that the Alexan would not adversely affect the Stranahan House. [A 780] The Preservation Board also found the Alexan would not adversely affect Smoker Park, favorably noting that the first two floors of the Alexan nearest the Park are raised, "creating open space that leads directly into the park … which creates interaction between the structure and the park." [A 782] Although not a requirement of approval, at the Preservation Board's suggestion, the developer agreed to (1) contract with an archeologist, (2) not adversely affect the Park during demolition of the existing structure, and (3) relocate two specific trees. [A 1929]

The developer also contacted the City of Fort Lauderdale's Public Works Department regarding water and sewer demand. The Department initially concluded that the water main "has enough capacity to provide water service for the proposed demand." [A 255] Upon further review, the Department determined the 6-inch water main would need to be increased to 8 inches, which the applicant agreed to do. [A 427]

In addition, the Florida Department of Transportation approved the Alexan's proposed driveways for ingress and egress. [A 258, 425] Florida Power and Light also confirmed it had sufficient capacity to service the Alexan. [A 426]

[3] Page 1 of the Historic Preservation Board's Report begins on page 649 in the Appendix and is continued at page 769.

Although a traffic study was not required because the Alexan would generate less than 1,000 daily trips and only "approximately 3 additional vehicles per hour during the peak hour" in the 15 or so surrounding streets, "in order to be a good neighbor" the developer also commissioned a traffic analysis to address neighboring communities' concerns. [A 439-41] The analysis concluded the Alexan would not have any significant impact. [*Id*.]

Following more than a dozen meetings, numerous site plan modifications, and significant downsizing [*e.g*., A 1994, 2007, 2009, 2050], on March 6, 2018, the DRC approved the application for the Alexan. It found all comments had been addressed and the development as proposed fully satisfied all requirements and local development plans. [A 554]

Importantly, the DRC found that the Alexan as proposed was well below the maximum allowable height (no code provision limits height but the FAA limits height to 499 feet), and, as proposed, the Alexan was significantly farther away from the river's edge than the guidelines require, creating additional public space and positively "contribut[ing] to the public realm." [A 554-58]

In addition, the DRC believed the Alexan was a welcome addition to Downtown City Center, commenting positively on, among other things, the "open and welcoming gateway to Riverwalk," the "exceptional public realm space" (Edgewater agreed to set aside a large public park area to connect adjacent Smoker

Park and the Riverwalk corridor), the "large, covered plaza," the building's orientation facing "both the street and the park, in stark contrast to the existing building … which turns its back to it," the "slender tower [allowing] sufficient light and air," the abundance of glass "providing a touch of skyline drama," the parking garage screened "to convincingly appear as habitable space," and the landscaped roof and pool amenities. [*Id*.]

Under the ULDR, the DRC's preliminary approval automatically became final in 30 days, on April 5, 2018, unless, before the 30-day expiration, the City Commission voted to review the application. [*See id*; *see also* A 659 (ULDR § 14-13.20.N.2. (regulating Downtown Regional Activity Center projects, including the Alexan))] But the City Commission could not arbitrarily call up any approved project for review. Under ULDR Section 47-13.20.N.2, the Commission could only review the application if it first found that the DRC "misapplied or failed to apply one (1) or more requirements of the ULDR or the city's Comprehensive Plan in approving the application." It did not make that finding here.

The April 3, 2018 Hearing

The City Commission first considered the Alexan development application on April 3, 2018. [A 874] Mayor Trantalis asked the Commission to set a de novo hearing "to hear the testimony regarding the—the compliance of [the Alexan] to the ULDR at a later meeting." [A 875]

Commissioner Moraitis questioned whether a de novo hearing was necessary if the Commission, after hearing testimony, determined the developer had met the development standards, "done their due diligence, the standards that we pass in our own New River Master Plan." [A 875-76] The City Attorney confirmed that to justify a future de novo hearing the City Commission would have to conclude the DRC either misapplied or failed to apply one or more of the ULDR's requirements. [A 876-77]

The City Attorney acknowledged that, in the past, a hearing had been granted when the City Commission merely "had a concern that potentially the criteria have not been met." [A 878] However, the City Attorney explained that past procedure did not comply with ULDR section 47-13.20, which requires the City Commission to "make some sort of determination that something has not been followed with regards to the ULDR" in order to set a future de novo hearing. [*Id.*]

Commissioner Glassman asked whether he could amend his motion to express his specific concerns with the ULDR. [A 880] With the Mayor's permission, Commissioner Glassman stated he had "several" concerns. [*Id*.] Without describing any specific way the DRC misapplied or failed to apply the ULDR, Commissioner Glassman stated "the ULDR talks about integrity and character of adjacent neighborhoods. It talks about the neighborhood master plan. There are elements of the downtown master plan. There are ULDR issues,

comprehensive plan issues I mean, do you want me to list all of them or just what I have concerns?" [A 880-81]

Mayor Trantalis, in an apparent attempt to pinpoint some particular way Commissioner Glassman believed the DRC had misapplied or failed to apply the ULDR, asked: "Do you feel that, perhaps the transitional zoning is applicable here?" [A 881] Commissioner Glassman did not agree that he believed the DRC misapplied or failed to apply the transitional zoning requirements; instead, he replied "I would like to flush that out in a hearing, yes. I mean, I just don't think that I've heard enough that, you know, I'm willing to say—." [*Id*.]

Despite the plain and unequivocal mandates in the City's own code applicable to the Downtown Regional Activity Center, the City Attorney advised that based on "past practices" Commissioner Glassman's stated concerns were "enough of a justification … to proceed forward" with voting on whether to conduct a de novo hearing. [*Id*.]

Counsel for Edgewater objected to the process because the Commission had not pointed to any specific way the DRC had allegedly misapplied or failed to apply the ULDR. Specifically, at the April 3 meeting counsel stated:

> COURTNEY CRUSH: … We'd just like to state for the record that we object to the process…
>
> BILL SPENCER: … I'd like to reaffirm Ms. Crush's comments, and she's incorporated your entire record, but we've done so tonight without prejudice or waiver to the entire process that y'all

> are following and the lack of ability to present proper testimony and proper notice. So whatever happens tonight, and any comments that have been made by the lay public, could not and should not be considered evidence if, in fact, it would wasn't intended to be, (sic) because they're not expert or qualified to render an opinion on the master plan. Thank you.
>
> CECELIA WARD: … I am opposed to the motion. I'd like to just confirm and confer with Ms. Crush and Mr. Spencer's comments, and also just to refer again to the staff's findings and recommendation of the proposed project.

[A 884-85]

The Mayor nonetheless opened the floor for comments on whether to schedule a de novo hearing. [A 883] The ensuing comments did not show (or even focus on) how the DRC may have misapplied or failed to apply the ULDR. Comments instead consisted mainly of neighborhood concern over the building's proposed height. [*See, e.g.*, A 883-86] No one pointed to any guideline or regulation the DRC misapplied or failed to apply.

After the public hearing closed, Commissioner Moraitis asked whether the proposed building exceeded the height requirements for the master plan. [A 889] Anthony Fajardo, the Director of Sustainable Development for the City, answered that it did not. While the plan encourages transition heights in some areas (*e.g.*, in Transition Zone I), transition heights do not apply to the Alexan's location. He further explained that due to "the wide right-of-way from federal highway and the tunnel" the transition heights do not apply here. [A 890]

Given the confusion and the failure to allow the presentation of any actual testimony and evidence as to whether the DRC had misapplied or failed to apply one or more of the requirements of the ULDR or comprehensive plan, Commissioner McKinzie lamented: "This whole process is a lack of due process." [A 891] The Commission nevertheless, and without making any finding as to how the DRC misapplied or failed to apply the ULDR, voted 4 to 1 to conduct a de novo hearing on May 15, 2018. [A 893]

The May 15, 2018 Hearing

In preparing for the May 15 hearing, the City Manager transmitted his official Commission Agenda Memorandum (memorializing the DRC's determinations) to the City Commission recommending it "adopt a resolution approving the issuance of a Site Plan Level II Development Permit for 'Alexan-Tarpon River.'" [A 916] The City Manager included detailed information on why the proposed Alexan development complies with the ULDR and the Master Plan Guidelines. Specifically, the memorandum noted:

- 1,088 residential units were available in the Downtown City Center, so if 151 residential units were allocated to the Alexan, 937 units will remain;
- The maximum building height is 499 feet[4], and the proposed Alexan development is only 216 feet, 8 inches;
- The minimum setback from the river is 45 feet, and the proposed Alexan development is set back 135 feet;

[4] The 499-foot height restriction is set by the FAA. The ULDR does not contain any height restrictions for Downtown City Center.

- Surrounding building heights ranged from 9 to 45 stories, and the proposed Alexan development would have just 21 stories.

[A 916-17]

In addition, the City Manager noted both the DRC and the Historic Preservation Board had already approved the Alexan. The Preservation Board especially appreciated "the 20 foot raising of the north wing, which allows for a covered open space that flows seamlessly into the park … floor to ceiling windows open onto the park space, allowing interaction between the structure and the park." [A 917] The City Manager further noted that capacity studies for public service availability were conducted and addressed. As was a traffic impact study, which was not required but was completed to address concerns of the Rio Vista neighborhood, and, in general, in the interest of being a good neighbor. [A 918]

The City Manager also explained the Alexan is consistent with the New River Master Plan's intent because it includes, among other desirable features:

- a spacious and welcoming gateway to Riverwalk;
- generously-wide paved areas inviting in pedestrians, as well as tree-canopied lawn areas, effectively expanding Smoker Park, which was currently a paved asphalt parking lot;
- 3800 square feet of private land dedicated to public open space;
- the Riverwalk entrance plaza is unenclosed allowing a proper edge to Smoker Park;
- exceptional public space at the river's edge including the building's height of only 6 stories, where the preferred maximum is 9 stories;
- historic markers provided by the developer;

- a pleasingly slender tower allowing light and air to reach the ground;
- a glass upper wing providing "a touch of skyline drama, and representing a high level of architecture."

[A 119-21]

Counsel for Edgewater opened the May 15 meeting by renewing her objection to the de novo review process. [A 1995] She noted the Alexan is code-compliant, as the DRC previously found. [*Id.*] She also noted that, in addition to merely complying with the DMP and the ULDR, the developers had gone above and beyond by agreeing to dedicate 135 feet of private land to create a large public park between the Alexan and the seawall. [A 1995-96] Finally, as an alternative, counsel stated that Edgewater would agree to a building modification reducing the tower's 21 stories to just 14 if that would alleviate neighborhood height concerns and guarantee site plan approval. [A 1997]

Cecelia Ward, President of J.C. Consulting, who had been retained on behalf of Edgewater to render an expert analysis on the Alexan, next addressed the Commission. Ms. Ward explained that the City's Comprehensive Plan is the foundation for all development within the City. [A 1998] From that document, the city adopted land development regulations, the ULDR (Chapter 47), which provides the implementation tools for how development should occur. [*Id.*] The Regional Activity Center City Center, the zoning district where the proposed Alexan would be located, is the "most intense and dense future land use category

permitted within the city." [A 1999] The Activity Center requirements set specific goals, objectives, and policies with which new developments must strive to comply. Ms. Ward reviewed each goal, objective, and policy and established that the Alexan, both as originally proposed and as alternatively proposed with just 14 stories, is in compliance. [*Id*.]

Vice Mayor Sorensen asked Ms. Ward to talk about the transitional zones within the Activity Center. [A 2000] Ms. Ward explained—as DRC staff had previously explained at the April 3 meeting—that the subject property is not contiguous to any residential property, so neighborhood compatibility does not apply. Further, the property is not located in any transitional mixed use zoning district. [A 2001] Also, to trigger any neighborhood compatibility requirements, the development must either (1) be within 100 feet of residential property outside of the Activity Center, which the proposed Alexan is not; or (2) deviate from the New River design standards, which it does not. [*Id.*] Neighborhood compatibility, including any transition zone restrictions, do not apply. [*Id*.]

Importantly, Ms. Ward noted the Master Plan was intended to stimulate downtown residential development. She found that, in her expert opinion, the Alexan complies with all of its provisions and the Comprehensive Plan. [*Id.*] Finally, in her report, Ms. Ward set out each goal and policy under the Activity Center guidelines, the Comprehensive Plan, the ULDR and Master Plan provisions,

intents, and purposes, the list of permitted and conditional uses, the review process and the special regulations, and in a checklist format, showed that the Alexan, as originally proposed or as modified, complies with each and every design provision. [A 1611-1777; 2001-02] In conclusion, Ms. Ward stated:

> [I]t complies with the comprehensive plan and the ULDRs. Nothing's been changed that would warrant it to be noncompliant. The site plan does not materially alter the use, the density or intensity of the subject property in any manner that is inconsistent with the City's adopted comprehensive plan. And lastly, that the request is consistent with the City's adopted comprehensive plan in compliance with the unified development regulations and thus, in my professional opinion, the city should issue the development permit for the site plan both as originally submitted and if desired, I believe that same statement could be made with respect to the modified design. Thank you.

[A 2002]

Seemingly determined to uncover some way the DRC misapplied the Master Plan, some Commissioners questioned the expert reports. Commissioner Glassman asked the City Attorney if he agreed with Ms. Ward that the neighborhood transitional height restrictions are inapplicable, and the attorney confirmed that was correct due to the Alexan's location in the Downtown City Center. [A 2002] Anthony Fajardo confirmed the statements of Ms. Ward. [A 2007]

The Commissioners then raised various topics such as the number of residential units in the modified development plan, the dedicated public park, traffic concerns, whether some recommendations carry more weight than other recommendations, how the project guidelines would differ if this was a

commercial development [*see* A 2005-09]—notably none of which is applicable to (1) whether the DRC misapplied or failed to apply the ULDR in approving the application, or (2) whether the project in fact complies with the Master Plan and the ULDR. The Commissioners also inquired about parking, water and wastewater, public works, and fire protection [*see* A 2009-13], all of which had previously been addressed and approved by the appropriate public service providers.

Commissioner McKinzie expressed his frustration with the process given that the project clearly met the criteria for a Site Plan Level II project. [*See* A 2016-17 (stating "I am just not comfortable with us not following the procedures that have been put before us to try to redesign a building")].

Commissioner Glassman conceded that his misgivings in approving the Alexan stemmed from his receiving political pushback from his constituents. He revealed he had been receiving "a ton of emails … from people in opposition" to the project stating "don't forget why we voted for you, we voted for you … to slow down development, this project violates the master plan, this project is a strain on the infrastructure, this project is a strain on the traffic, we don't like the ingress and the egress, the master plan guidelines are not being met, too much development downtown." [A 2017]

After communications began to break down and it became clear the Commission was unprepared to make a decision, it voted to continue the hearing

until a future City Commission meeting on June 19, 2018. [A 2014-22]

The June 19, 2018 Hearing

In preparing for the June 19, 2018 hearing, counsel for the applicant again submitted two document binders containing the following relevant information supporting the proposed Alexan's compliance with the downtown master plan:

1. The City Commission agenda with the site plans and previous approvals from various boards attached;
2. The Staff Report and Vote Summary from the May 15, 2018 meeting;
3. The transcript from the May 15, 2018 meeting;
4. The alternate site plan with the DRT checklist;
5. An updated signed affidavit of the June 19 meeting;
6. An updated wastewater capacity letter stating the capacity is sufficient;
7. An email from Kevin Markow stating the Concerned Citizens for the Preservation of our Neighborhood and the Watergarden Board do not oppose the proposed amended site plan, nor does Las Olas Grand;
8. A letter from Jeffrey Shir with Becker and Poiliakoff to Courtney Crush stating it agrees with the modified plan as discussed;
9. A traffic Calming improvement plan which was not required by FDOT or by the ULDR but which was commissioned solely to address any Commissioner's traffic concerns;
10. A memorandum detailing the developer's continuing objection to the de novo hearing because the Commission did not specify what provision of the ULDR the DRC either misapplied or failed to apply in approving the Alexan site plan; and
11. An Expert Opinion prepared by Cecelia Ward, President of J.C. Consulting Enterprises Inc., describing in express detail with attached documentation, how the Alexan, as proposed, is consistent with the (1) Comprehensive Plan including the city future land use element; (2) Unified Land Development Regulations; (3) intent of the Downtown Master Plan; and (4) chapter 163, Florida Statutes.

[A 1289-1777]

Anthony Fajardo, the Director of Fort Lauderdale's Department of Sustainable Development, made the first presentation supporting approval. [A 2045] Mr. Fajardo previously worked as the Zoning Administrator for Fort Lauderdale and was also a City Planner at levels I, II, and III. [A 2047] He explained that the planners in the Department all have Bachelor degrees, some have Master's degrees, and most have advanced certifications and have been practicing for many, many years. [*Id*.]

Mr. Fajardo stated he and his staff had been working with the applicant for over a year and that the project had been approved by "the Department of Sustainable Development, Transportation and Mobility, Parks and Recreation, Public Works, police and fire, among others." [A 2045] Mr. Fajardo explained that the Master Plan is a "qualitative intent-driven document [that] uses established design guidelines [while] maintaining flexibility to allow for creative design solutions." [*Id*.] The guidelines provide a roadmap to achieve the intent of the Master Plan. [A 2046] And the Alexan, as originally proposed, meets those guidelines in all areas including street design, building design, and architecture. [*Id*.] He explained that, while a modified 14-story structure would also meet the guideline's intent, the Department had determined that "the original proposal met that intent better than the modified plan." [A 2046-47]

Commissioner McKinzie asked whether Mr. Fajardo and his staff had

misapplied or failed to apply any Master Plan or ULDR provisions in approving the development, to which Mr. Fajardo replied they had not. [A 2047-48] The Commissioner then further clarified that, in order to deny the Alexan proposal, the Commission would have to find that it does not meet one of the criteria. [A 2048] He explained that the Master Plan is written in such a way that, if an applicant meets all the design criteria, it should be approved. [A 2050]

The City Attorney also explained (again) that the project had already been approved under the code for Site Plan Level II development, so for the project to be subsequently denied, the Commission would "have to find that there was a misapplication or an error." [A 2051]

More than ever determined to find a way to disapprove the Alexan development, the Mayor posed various scenarios asking whether the Commission could find that the staff improperly afforded more weight to certain criteria and not others. [A 2051-52] The City Attorney explained that would be impossible to determine given the flexibility of the Plan and the fact that people have differing opinions. For the Commission to hold the DRC's approval was erroneous, it would have to find misapplication—for example, it would have to find that the DRC completely ignored a plan provision, not that it considered it along with all other provisions and nonetheless approved the project, as it properly did here. [A 2052]

The Mayor then inquired whether the applicant or staff had considered

reducing the number of residential units within the proposed development. [A 2054] Mr. Fajardo acknowledged density reduction could be a possibility, but it reminded the Mayor that the applicant had agreed to dedicate a significant plot of public space between the building and the river's edge, balancing "what they can do and what [is] feasible." [*Id*.] The Mayor countered that the modified version did not seem to be any compromise given it had the same number of units as the original and thus the same impact on traffic. [*Id*.] The Director reiterated that the purpose of the modified version was to address height concerns, not traffic. Moreover, the original building plan was too small to even require a traffic study under the ULDR—although the Applicant did, in fact, commission a traffic study, which found that the building, including 180 units, would have no negative impact on traffic. [A 2054-55]

The Mayor then argued that "a lot of talk has occurred lately … people are feeling we're overbuilding. … so I'm just wondering why Staff continuing [sic] to be on this path of build, build, build, when the people are saying stop, stop, stop, stop." [A 2055] Commissioner Glassman again chimed in regarding the transition zones, wondering why that would not affect the project density. [A 2056] And the Director again reiterated that—under the City's own guidelines—the proposed, uncodified, Type II transition zones do not apply to the Alexan. [*Id*.]

The Mayor then opened the meeting for public comment. Importantly, no

expert witness spoke in favor of not approving the application, and no witness, expert or otherwise, showed how the DRC misapplied or failed to apply the Master Plan or the ULDR in approving the Alexan development. Instead, citizens raised, for example, their personal opinions regarding traffic concerns (despite the expert analysis that had shown no adverse impact would occur); fire safety issues (despite that the fire department had already approved the project); and height and density concerns (despite that the Alexan, at 216 feet, 8 inches, at its highest point is well under the 499-foot FAA maximum and at 181 units is well within the 1088 units available). [A 2056-69]

Commissioner McKenzie opined that, if the City Commission does not want development, then it needs to change its code. He aptly noted that the project meets the plan guidelines but "[w]e're trying to tear it down." [A 2064]

After public comment closed, counsel for Edgewater again renewed her objection to the de novo hearing. [A 2069] She reiterated that staff had approved the project and reminded the Commission that the Activity Center is the urban core in which the Master Plan "intend[ed] for high density, high intensity unlimited height." [A 2070] The project was reviewed and approved for adequacy of public services, and the development actually will improve those services. [*Id*.]

Discussion then ensued as to whether to approve the original or the modified 14-story version. [A 2073] The City Manager repeated that the DRC approves

either proposal but prefers the initial proposal. [A 2073-74]

Determined to reduce the number of units/density, the Mayor stated he made a promise to the neighborhoods not to permit overdevelopment, and he was "gonna keep that promise." [A 2075] Commissioner McKenzie pointed out that no density problem could exist because the project had been approved through the Commission's process under its guidelines. [A 2076]

Clearly frustrated, the Mayor called for a 10-minute break so he could speak privately with the developer—flatly ignoring the City Attorney's warning against such ex parte communications. [A 2077-78] Following the break, the Mayor announced that the developer had tentatively agreed to reduce the density from 181 units to 120 provided (1) he can cancel the deal if the numbers don't "work out", and (2) the unit reduction passes architectural review. [A 2078]

Collectively, the Commissioners expressed outrage at this unusual process and the Mayor's behavior. [*See, e.g.*, A 2078-80 (C. Glassman: "I just vehemently oppose this process and this way of doing business"); (C. McKenzie: "I'm at a loss for words. … We have just micromanaged this thing to almost not being manageable."); A 2082 ("This is nuts."); A 2085 (C. Glassman: "You're the one (Mayor) that called for a break and let's go negotiate behind closed doors and we'll talk to each other. No, that's not the way we do business. We do business in the sunshine. … That's the way we've always done business. This is a drastic change.

… I have a right to speak my opinion about a process I think is screwed up.")]

Commissioner McKenzie further expressed his frustration, correctly noting that the Commission itself had developed the rules and the criteria for new development, and, if the staff found that the developer met that criteria, the project should be deemed approved as originally proposed. [A 2084-85]

The Commission then voted to deny the project, but it was unclear exactly what it denied and on what basis. [A 2086-87; 2088-89; 2093] In fact, after the Commission voted, the Mayor asked the City Attorney whether they needed to state a factual basis for the resolution, which they had not done. [*See* A 2088 ("We have to indicate the basis for the denial, do we not? Do we need a factual basis?")] The City Attorney replied that "the record speaks for itself." [A 2090] He explained that the resolution denying the application, in order to be valid, must be based on competent, substantial evidence and the essential requirements of law. Competent, substantial evidence would have to be evident from the record that was created at the two hearings (May 15 and June 19). But since the Commission had already voted, he advised "[t]here is nothing that can be said now to add to the resolution that would somehow make it stronger." [A 2088]

After Edgewater questioned the result following the motion, the Commission, after further discussion, agreed to again continue the hearing. [A 2089-93] The Commission determined that what it had previously voted upon—the

alternative resolution to approve a 120-unit 14-story structure—had not been approved. Technically, it rationalized that differed from an outright denial, and it thus scheduled a continuance until August 21, 2018. [A 2093]

The August 21, 2018 Hearing

At the August 21 hearing, the Commission apparently expected to see a prospectively revised site plan with reduced height and density. [A 2124-25] However, counsel for Edgewater explained that the developer—as he stated he would do in response to the Mayor's demand of reduced units—had internally considered the lower 120-unit density proposal but rejected it after it became apparent it was not economically feasible. [A 2027] Edgewater determined the initial proposal, which had been fully vetted and approved by the DRC, remained best for the company, the community, the Riverwalk, and the Park. [*Id*.]

The Mayor advocated for denying the application because Edgewater did not present a modified project with reduced density, as he had wanted. He was also annoyed that City Staff continued to recommend the original project—the 181-unit, 21-story structure that it previously vetted and approved—even though "there was no factual basis for [Staff] to change the recommendation." [A 2125]

Commissioner Glassman then also advocated for denying the application stating: "I do not believe that it conforms with the Downtown Master Plan and I do not believe that it conforms with the New River Master Plan. I have issues with

adequacy and capacity. I have issues with the parking and circulation. I have issues with the master plan consistency. I have issues with traffic. I have issues with EMS coming around the corner. I have issues with the archeological survey. … I would object to Staff's conclusions with regard to all of that." [A 2128]

The City Attorney reminded the Commissioners that a de novo denial "requires a finding that the applicant did not meet, to some extent, the published criteria. And your decision needs to be based on competent substantial evidence that you've received through this evidentiary process, as well as following the essential requirements of law which is essential to your code." [*Id*.] In addition, he explained that the competent, substantial evidence must have been received through the various City Commission hearings, and it must be based on "something that is reliable. Typically it has to be fact based so opinions don't count as competent substantial evidence unless they're expert opinions that are fact based through some sort of verifiable method." [A 2129][5]

Although the Commission had received no expert opinions throughout the various hearings that supported denying the application, and although it received no competent, substantial evidence (or any evidence at all) that the DRC misapplied or failed to apply or consider any aspect of the ULDR or the DMP in

[5] This had also been communicated to the City Commission in the City Attorney's May 15, 2018 Memorandum, which provided guidance on the required quasi-judicial process and the City's burden of proof. [A 916]

approving the application, it nonetheless proceeded to deny the application by a vote of 3 to 2.

NATURE OF RELIEF SOUGHT

This petition seeks a Writ of Certiorari quashing the Resolution denying Edgewater's Site Plan Application. Specifically, this petition asks this Court to: (1) find the DRC's approval became final on April 5, 2018, and the Commission's subsequent resolution denying the application is invalid as a matter of law; (2) find Edgewater established it met all requirements and standards set by the ULDR and not one shred of evidence—much less competent, substantial evidence—was presented by or to the Commission to the contrary, so the Commission's resolution denying the application is invalid as a matter of law; (3) find the Commission violated Florida law in denying the application, and (4) grant such other relief this Court deems necessary and just.

STANDARD OF REVIEW

Where, as here, a party is entitled as a matter of right to seek review of the Commission's resolution, this Court must determine: (1) whether procedural due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the Commission's findings and judgment are supported by competent, substantial evidence. *City of Deefield Bch. v. Vaillant*, 419 So. 2d 624 (Fla. 1982). This "first-tier certiorari review is not discretionary but rather a

matter of right and is akin in many respects to a plenary appeal." *Fla. Pwr. & Light Co. v. City of Dania,* 761 So. 2d 1089 (Fla. 2000).

In addition, this Court must strictly scrutinize the evidence to determine whether that evidence was competent and substantial to support a denial. *Bd. of County Com'rs of Brevard Cty. v. Snyder,* 627 So. 2d 469 (Fla. 1993). Once Edgewater established its application met the applicable requirements, the burden shifted to the Commission to demonstrate that its denial is not arbitrary, discriminatory, or unreasonable—and it can only do so if competent, substantial evidence of non-compliance is in the record to support its decision. *Id.* at 476.

ARGUMENT

I. THE CITY COMMISSION'S DETERMINATION TO HOLD A DE NOVO HEARING WAS INVALID BECAUSE THE DRC'S APPROVAL OF EDGEWATER'S APPLICATION BECAME FINAL ON APRIL 5, 2018.

The Commission violated its own regulations in holding a de novo hearing and rejecting the DRC's approval of Edgewater's application. Under the City's own regulations, approval of Edgewater's application became final April 5, 2018.

After an extensive review, the DRC approved Edgewater's application on March 6, 2018. Under ULDR Section 47-13.20, a development application that is preliminarily approved by the DRC becomes final 30 days after that approval unless the City Commission adopts a motion to review the application under the

process set forth in Section 47-26.A.2. *See* § 47-13.20.N.2.[6] Further, adopting a motion to review is valid only if the City first finds that the DRC misapplied or failed to apply one or more requirements of the ULDR or the City's Comprehensive Plan in approving the application. *Id.*

As a result, the City Commission could only adopt a motion to review the DRC's approval of Edgewater's project if, within 30 days of the DRC's approval, the City Commission expressly made a factual finding that the DRC misapplied or failed to apply one or more requirements of the ULDR or the City's Comprehensive Plan. If it made such a factual finding, then the Commission could subsequently conduct a de novo hearing and reach its own conclusions as to whether the project should or should not be approved. Otherwise, the DRC's approval of the project became final within 30 days of the DRC's approval.

In this case, the City Commission did not make any factual finding within 30 days of the DRC's approval of Edgewater's project that the DRC misapplied or

[6] Section 47-13.20.N.2. provides:

> Approval of all other Site Plan Level II developments within the RAC shall not be final until thirty (30) days after preliminary DRC approval and then only if no motion is adopted by the city commission seeking to review the application pursuant to the process provided in Section 47-26.A.2 of the ULDR. A motion seeking to review an application pursuant to this subsection 2, shall only be approved if it is found by the city commission that DRC has misapplied or failed to apply one (1) or more requirements of the ULDR or the city's Comprehensive Plan in approving the application. (Emphasis added.)

failed to apply one or more requirements of the ULDR or the City's Comprehensive Plan. The DRC approved Edgewater's application on March 6, 2018. The City Commission held a meeting on April 3, 2018.

Under the City's own rules, the April 3rd hearing should have been limited to how the DRC misapplied or failed to apply plan guidelines in order to justify a de novo hearing. Indeed, the City Attorney advised the Commission that it would have to comply with Section 47-13.20—and "the Commission essentially would have to come to a conclusion that somehow the DRC either misapplied or failed to apply one or more of the requirements of the ULDR." [A 876-77].

After this discussion, significant confusion ensued. In the end, a divided Commission voted to hold a de novo hearing without making any express finding of misapplication or failure to meet one or more requirements of the ULDR or the City's Comprehensive Plan requirements. Despite the plain language of its own ULDR requirements, the City Commission determined by a 4 to 1 vote that it would go with "past practices" instead of the specific directives under the ULDR provisions – and make the factual findings at a subsequent de novo hearing. Importantly, the Commission also failed to determine what provision the DRC failed to apply or misapplied at the de novo hearing.

As a matter of law, the DRC's approval of Applicant's project is now final. As shown above, Section 47-13.20.N.2 expressly states that Edgewater's project

becomes final within 30 days of DRC approval if no motion to review is adopted by the City Commission meeting the requirements of that Section. Here, the City Commission failed to make any of the required findings at either the April 3, 2018 hearing or the de novo hearing.

Florida courts have repeatedly held that quasi-judicial boards cannot ignore their own rules and that the failure to act appropriately within a set time renders any untimely action invalid.[7] Accordingly, this Court should quash the Commission's Resolution disapproving Edgewater's application and hold that the DRC's approval of Edgewater's project became final on April 5, 2018.

[7] *See Johnson v. Bd. of Architecture & Interior Design*, 634 So. 2d 666 (Fla. 2d DCA 1994) (application for licensure as an interior designer was deemed approved where the Board did not deny it within 90 days pursuant to governing statutes; although a committee of the Board had purported to deny the application within 90 days, the statutes did not authorize a committee to deny applications—only the full board could do so); *Krakow v. Dep't of Prof'l Reg., Bd. of Chiropractic*, 586 So. 2d 1271 (Fla. 1st DCA 1991) (Board of Chiropractic's failure to timely act on applications precluded it from exercising its discretion to determine the applicant's qualifications for licensure; the applications were automatically deemed approved without conditions); *Skaggs v. City of Key West*, 312 So. 2d 549, 551 (Fla. 3d DCA 1975) (striking down city ordinance because it was passed in violation of the city's procedures for passing ordinances; it was not read twice as required by the city's charter); *Sea Place III Homeowners Ass'n v. Deigert*, No. CA01—100, 2005 WL 6963557 (Fla. 7th Cir. Ct. 2005) (homeowners' application to build a shower enclosure on their property was automatically approved pursuant to the HOA's Declarations stating such applications will automatically be approved if they are not denied within 60 days; the HOA's stop work notices were insufficient to constitute denials of the application, and, since 60 days had passed since the application was submitted, it was deemed approved).

II. BECAUSE THE DENIAL WAS NOT BASED ON COMPETENT, SUBSTANTIAL EVIDENCE, THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW AND DENIED EDGEWATER DUE PROCESS.

In addition to the de novo hearing(s) being erroneous as a matter of law, no competent substantial evidence supports denying Edgewater's application. All the evidence—including expert opinions, the DRC's thorough analysis, and the plain requirements of the code—supports approval. The application should have been granted as a matter of course, and the Commission's Resolution denying the application must be quashed.

The administrative procedure for site plan approval is quasi-judicial, conducted solely to determine if a proposed site plan conforms to the code and administrative regulations. *See Park of Commerce Assoc. v. City of Delray Beach*, 606 So. 2d 633, 635 (Fla. 4th DCA 1992). This is because property owners are entitled to know the conditions they must meet to improve their property within existing zoning and other code requirements. *Id*. When these conditions are set out in municipal regulations, "[c]ompliance … should be capable of objective determination in an administrative proceeding." *Id*.

Once a property owner has met the initial burden to show a proposed development comports with the reasonable procedural requirements of the ordinance and the use is consistent with the comprehensive plan, the property owner is then "presumptively entitled to use his property in the manner he seeks."

Bd. of Cnty Comm'rs of Brevard Cnty v. Snyder, 627 So. 2d 469 (Fla. 1993). The burden then shifts to the appropriate administrative agency to "assert[] and prove[] by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive use." *Id.*; *see also D.R. Horton, Inc.—Jacksonville v. Peyton*, 959 So. 2d 390, 399 (Fla. 1st DCA 2007) (approving *Snyder* and explaining that when the council approved an application that did not comply with the comprehensive plan and required changes to the plan, it improperly legislated).

City ordinances and comprehensive plans must be given their plain meaning, and any doubts must be construed in favor of the property owner. *See Colonial Apartments, L.P. v. City of Deland*, 577 So. 2d 593, 598 (Fla. 5th DCA 1991). To impose additional requirements, such as restricting the number of dwelling units, is not fair to the property owners, and violates procedural due process. *Id.*

In *Park of Commerce*, Florida Power and Light ("**FPL**") submitted its proposed site plan to the planning and zoning board, and the board initially rejected the plan "subject to FPL's making a number of technical changes." 606 So. 2d at 634. After FPL made the requested changes and resubmitted its plan, the council "denied the plan for no apparent reason other than neighborhood opposition." *Id.* This Court held that a writ of certiorari was the proper remedy given the site plan review was "quasi-judicial in nature and conducted to factually determine if a proposed site plan submitted by the property owner conforms to the

specific requirements set out in the administrative regulations governing the erection of improvements on the property." *Id*. at 635. This Court explained that the conditions property owners must meet should be set out in clearly stated regulations. Once the property owner has demonstrated compliance, "no legislative discretion is involved in resolving the issue of compliance." *Id*. Indeed, "a city cannot unreasonably withhold approval once the legislatively adopted legal requirements have been met." *Id*. at 634.

Similarly, in *Colonial Apartments*, 577 So. 2d 593, the City of Deland had conditionally approved a site plan upon the developers committing to a density less than that provided in the city ordinance. The City argued that, even though the proposed density complied with the code, the lower density was needed to satisfy the "aesthetic and compatible" purpose stated in the ordinance. 577 So. 2d at 596. The Fifth District quashed the density condition holding the city could not arbitrarily impose a condition different than that contained in the ordinance. *Id*. Importantly, it held that "[t]he opinions of neighbors by themselves are insufficient to support a denial of a proposed development." *Id*. It further admonished that property owners "are entitled to fair play; the lands which may represent their life fortunes should not be subjected to ad hoc legislation." *Id*. at 577.

In *Effie, Inc. v. City of Ocala*, 438 So. 2d 506, 507 (Fla. 5th DCA 1983), the City had denied Effie's location permit for the sale and consumption of alcoholic

beverages even though the applicable zoning district permitted businesses that engage in the sale and consumption of alcohol. Further, the City's Planning Director had submitted a report stating that the Building, Engineering and Fire Departments had "no comment" on the application, and the Police Department had reported "no problem" with the permit request. *Id*. The report stated that no churches, schools, public recreation areas, public buildings, or areas of public assembly were within any prohibited distances, and, in sum, the code requirements had all been met. *Id*. The City's only basis for denying the permit was objection from local residents.

The Fifth District reversed, stating "[o]nce the requirements are met the governing body may not refuse the application." *Id*. at 508. This was not a situation where the applicant sought rezoning. "Here, the city has already determined that the land is suitable for the use requested by zoning it in a manner which permits that use. If additional requirements are to be imposed [the property owner] has a right to know what the requirements are that he must comply with in order to implement the permitted use. … [O]nce the requirements are met, the governing body may not refuse the application." *Id*. at 509; *see also Drexel v. City of Miami Beach*, 64 So. 2d 317 (Fla. 1953) (holding city council discriminates and deprives a person of his property by arbitrary declining a permit when the applicant has complied with all applicable regulations). In sum, objection from local residents is

insufficient to deny a permit once the legal requirements have been meet. To hold otherwise denies due process of law.

The entirety of the evidence here shows that the Alexan development plan fully satisfies the Comprehensive Plan and the ULDR's requirements and intents. City Staff vetted the development plan for over a year, considering each and every plan requirement before granting approval. In addition, the development plan was approved by the Historic Preservation Board, the Public Works Department, and the Fire Department. A traffic study, which was not required but which the developer commissioned, showed no adverse impact on the surrounding area. The only evidence or information presented to the City Commission confirmed Edgewater's project met all ULDR requirements. The only competent evidence presented at the de novo hearing(s) as to whether Edgewater's project was compliant consisted of the staff's (Anthony Fajardo) statements that the application was ULDR compliant, Cecelia Ward's statements that the application was ULDR compliant, and the DRC record incorporated by Edgewater's counsel.

The truth is, the City Commission's denying the Alexan's development plan was not based on competent, substantial evidence but on political pressure from constituents in the form of neighborhood opinion. That surrounding neighborhoods may think the proposed building is too high or too dense is not evidence that the DRC misapplied or failed to apply the Comprehensive Plan or the ULDR. *See*

Colonial Apts., 577 So. 2d at 593; *Park of Commerce*, 606 So. 2d at 635.

Accordingly, the Commission's decision imposes conditions of approval, not included in the ULDR or the Comprehensive Plan, which denied the applicant due process of the law, and it must be quashed.

III. THE COMMISSION'S RESOLUTION DENYING EDGEWATER'S APPLICATION IS INVALID AS A MATTER OF LAW BECAUSE IT VIOLATES SECTION 166.033(2).

The Commission's resolution is also invalid as a matter of law because it does not comply with section 166.033(2), Florida Statutes, which provides:

> When a municipality denies an application for a development permit, the municipality shall give written notice to the applicant. The notice must include a citation to the applicable portions of an ordinance, rule, statute, or other legal authority for the denial of the permit.

The Fourth DCA recognizes that municipalities must comply with this provision. *Wal-Mart Stores East L.P. v. Town of Davie*, 977 So. 2d 636 (Fla. 4th DCA 2008) ("written notice from a denial of a development permit is now required under Florida Statutes section 166.03, which took effect on October 1, 2006").

The resolution very broadly states that Edgewater's application does not meet the standards and requirements of the Unified Land Development Regulations. This does not comply with section 166.033(2). The statute requires citation to the "applicable portions" of an ordinance, rule, statute, or other legal authorities basing the denial. Clearly, citing to the regulations in general is not citation to "applicable portions."

The language of the resolution also does not comport with the legislative intent of the statute, which is for the municipality to state with "particularity the grounds or basis….on which the [city] will issue or deny the license." Governmental Oversight and Productivity Committee, Senate Staff Analysis and Economic Impact Statement, CS/CS/SB 1112, March 22, 2006, p. 3 *available at* https://archive.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=1112&Year=2006&Chamber=Senate#Analysis (last visited Sept. 19, 2018). Such detail—not required prior to enactment of this statute—promotes streamlined permitting because it permits applicants to correct compliance issues. *Id.* at 4.

While the remedy for violating section 166.033(2) may not be clear in all circumstances, in this case the violation requires approving Edgewater's application. As explained in argument II above, the only evidence or information presented to the Commission confirmed that Edgewater's project met all ULDR requirements—nothing supports any basis for denying the application. As a matter of law, the Commission cannot get a second bite of the apple to conjure up violations of the ULDR or Comprehensive Plan where none exist or attempt to introduce new evidence regarding the application. *See Dep't of Hwy. Safety & Motor Veh. v. Azbell,* 154 So. 3d 461 (Fla. 5th DCA 2015) (where an administrative body fails to present sufficient evidence to support its position, it

may not be given "another bite at the apple" to present its proof; otherwise, the approval process "could result in an endless series of hearings until it finally presents sufficient evidence to support [its position]"); *see also Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Const. Industries, Inc.*, 978 So. 2d 873 (Fla. 4th DCA 2008) ("Given the lack of any other evidence, there was insufficient evidence to support a damage award. The judgment as to damages must therefore be reversed. Furthermore, CCI is not entitled to a new trial on damages, as this would constitute a 'second bite at the apple at proving damages.'"). Thus, the Commission's resolution must be quashed and Edgewater's application must be approved.

CONCLUSION

For the reasons expressed above, this Court should quash the Commission's Resolution denying Edgewater's application and order that Edgewater's application must be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2018 a true and correct copy of the foregoing has been electronically uploaded to the 17th Judicial Circuit Court, Broward County's ePortal and a true and correct copy was furnished by Federal Express and E-Mail to all parties listed below via Alain Boileau, the City Attorney, who has agreed to accept service on behalf of the Mayor and the City.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.100(l).

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