

**IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
APPELLATE DIVISION**

PINCHERS CRAB SHACK OF DOWNTOWN FT MYERS, INC., Petitioner, vs. CITY OF FORT MYERS, BOARD OF ADJUSTMENTS and WHITE ROSE HOLDINGS LLC. Respondents.	CASE NO.:
---	-----------

PETITION FOR WRIT OF CERTIORARI

(Filed pursuant to Fla. R. App. P. 9.100(f))

Petitioner, PINCHERS CRAB SHACK OF DOWNTOWN FT MYERS, INC., by and through undersigned counsel, respectfully petitions this Honorable Court for a Writ of Certiorari to review and set aside an Order dated January 31, 2023, but rendered February 23, 2023, by the City of Fort Myers Board of Adjustments (hereinafter referred to as “BOA”).

As grounds in support thereof petitioner states:

JURISDICTION

This Court has jurisdiction to issue a Writ of Certiorari pursuant to Fla. Stat. § 163.3215(4), Fla. R. App. P. 9.100(f) and Fla. R. App. P. 9.030(c)(1)(C) & (2) and Fla. R. App. P. 9.190(b)(3). As will

be fully argued below, Petitioner contends that the order sought to be reviewed constitutes a departure from the essential requirements of law, that there was a failure to provide procedural due process, and that the findings are not supported by competent substantial evidence.

STATEMENT OF THE CASE AND OF THE FACTS

OVERVIEW

This Petition concerns the adverse impact to the Petitioner and members of the City of Fort Myers arising from an Order by the City of Fort Myers Board of Adjustments in derogation of the City's Code of Ordinances (hereinafter referred to as "the Code"), the express limitations of the Board's authority and the City's Comprehensive Plan.¹

Petitioner is a business located at the Marina at Edison Ford, 2360 West First Street, Fort Myers, FL 33901, which sits approximately five hundred feet away from 2300, 2310 and 2320 McGregor Blvd., Fort Myers, FL. The closest public parking garage to the Applicant's parcels is located at the Centennial Parking Lot, 1400

¹ The City of Fort Myers Comprehensive Plan can be found at <https://www.cityftmyers.com/1539/Comprehensive-Plan-LDC>.

Heitman Street, Fort Myers, FL 33901, appx. 3,346 feet away, over half-a-mile from the proposed location of the food truck park.²

Respondent White Rose Holdings, LLC, (hereinafter the “Applicant”) is a business located at lots 2300, 2310 and 2320 McGregor Blvd., Fort Myers, FL, that applied for a Conditional Use to build a food truck park on its properties. (A. 29, 33)

Petitioner’s lease for its location includes rights for its patrons to park at its location, as well as a parking lot located at 2301 West First Street. (A.188:19-189:19)

All locations at issue herein are located within the Downtown Redevelopment Area, governed by CH. 118, Art. 8 of the City of Fort Myers Code of Ordinances.

On January 25, 2023, the City of Fort Myers’ Board of Adjustments (hereinafter referred to as “BOA”) held a public quasi-judicial hearing³ on an application by the Applicant for Conditional

² Appellate courts may take judicial notice of landmarks and distances. See *Yellow Cab Co. of Boca Raton, Inc. v. Broward Cnty.*, 282 So. 2d 1 (Fla. 4th DCA 1973) (“In suit to enjoin cab company from picking up passengers at airport, District Court of Appeal took judicial notice of fact that hotel was within 25-mile radius of airport.”)

³ A transcript of the hearing is included in the Appendix, which shall be referred to using the abbreviation “A.” followed by the appendix page number.

Use to construct a food truck park with seven (7) truck pads on lots 2300, 2310 and 2320 McGregor Blvd. (A.10, A.32)

THE CITY’S SMART CODE

The City’s Land Development Code (“LDC”), set forth in Ch. 98 of the City’s Code of Ordinances, contain the rules, regulations, and requirements to guide the future growth, development, and redevelopment of the city in accordance with the city comprehensive plan. See § 98.1.3.A, Code of Ordinances, City of Fort Myers.

To compliment the LDC, the City’s “Smart Code” was passed as “an instrument for the implementation of the comprehensive plan and smart growth principles in the areas of the City within the Downtown and Midtown Future Land Use designations.” See § 118.8.1.A, Code of Ordinances, City of Fort Myers.

In the event provisions of the Smart Code conflict with other provisions of the LDC, the Smart Code takes precedence, except that those listed in section 118.8.4⁴ shall remain in effect. § 118.8.2.A.2, Code of Ordinances, City of Fort Myers.

⁴

118.8.4 - Superseding Regulations.

The provisions of the following regulations take precedence over the provisions of this article:

A. Adult entertainment regulations.

RELEVANT PARKING REQUIREMENTS IN DOWNTOWN

City Ordinance § 118.8.6.D sets forth the “[m]inimum parking standards” in the Smart Code. (A.298-9) Section 118.8.6.D.1 requires every building or structure instituted or erected in the downtown district “shall be provided with off-street parking facilities in accordance with the provisions of this section for the use of occupants, employees, visitors and patrons.” *Id.* Further, the section makes it unlawful for a building owner to cause a reduction of the required amount of parking without establishing alternative off-street parking facilities. *Id.*

Such off-street parking facilities shall be maintained and continued as a required accessory use as long as the building or structure is continued. It shall be unlawful for any owner or operator of such building or structure affected by this article to discontinue, change or dispense with, or cause the discontinuance or reduction of, the required parking facilities apart from the discontinuance of such building or

B. Noise regulations.

C. Flood hazard regulations.

D. Historic preservation regulations.

E. Accessibility (Americans with Disabilities Act) standards.

F. Florida Building Code.

G. Florida Fire Prevention Codes.

(Ord. No. 3422, § 4, 1-14-2008; Ord. No. 3858, § 1(Exh. A), 2-4-2019)

structure, without establishing alternative off-street parking facilities which meet the requirements of this article. Whenever any existing building or structure is enlarged, parking facilities shall be provided in accordance with this section for the enlarged area...

§ 118.8.6.D.1, Code of Ordinances, City of Fort Myers (2023). (A.298-9)

The preface to Section 118.8.6.D.1 renders exempt from its purview “those properties exempted in section 118.8.6.D.2”. *Id.* § 118.8.6.D.2 sets forth “[p]roperties located in the downtown and midtown core pedestrian sheds (see Diagram 7 in section 118.8.1.B.) are exempt from the parking requirements contained herein.” (A.299)

Figure 1. Diagram 7, Sec. 118.8.1.B. See (A.292)



The properties at issue in this case are in the West pedestrian shed. Thus, the exemption set forth in § 118.8.6.D.1 does not apply to the West pedestrian shed as its outside the downtown core and midtown core sheds.

Section 118.8.6.D. requires properties with office and retail use are required to have “1 parking space per 500 sq. ft. of gross floor area”, whereas properties applying for Conditional Use require the approving entity to make a determination of the required parking “during the conditional approval process.” § 118.8.6.D, Code of Ordinances, City of Fort Myers (2023). (A.299)

The Code places additional burdens on applicants, including for conditional use, to prove the shared parking facilities “can accommodate the parking needs of all proposed uses and that peak parking demands for each of the uses sharing the parking facility clearly occur at different times.” § 118.8.6.D.5, Code of Ordinances, City of Fort Myers (2023). (A.299) The shared parking agreements “must be recorded by a recordable covenant, lease, or other agreement and approved by the community development director.” *Id.*

Finally, section 134.3.1, governing traffic circulation and parking, sets forth: “[u]nless otherwise permitted by this chapter, **all off-street parking and circulation areas shall be located on the same lot or parcel of land as the building, use, or structure to which they are accessory.**” § 134.3.1.A, Code of Ordinances, City of Fort Myers (2023) (emphasis added).

THE RECENTLY PASSED FOOD TRUCK ORDINANCE

On May 16, 2022, the City of Fort Myers passed Ordinance 2929, amending § 118.8.5 by creating § 118.8.5.F.7 (hereinafter referred to by its chapter number or as “the Food Truck Ordinance” or “FTO”). (A.10) The provisions of the Food Truck Ordinance relevant to the issues at bar are contained in § 118.8.5.F.7. For properties located downtown, an applicant must demonstrate that sufficient public parking and on-street parking is available within a quarter mile walking distance to the food truck park.

A minimum of three (3) parking spaces per food truck is required unless located in Downtown or Midtown where it can be demonstrated that enough public parking and on-street parking is available within a quarter mile walking distance to the food truck park. A shared parking agreement may also be entered with nearby uses subject to approval by the Community Development Director. The Director is

authorized to approve an alternative number of parking spaces based upon a parking demand study submitted by the Applicant.

§ 118.8.5.F.7.B.8, City of Fort Myers Code of Ordinances (2023) (emphases added). (A.10-17)

As argued below, in the absence of a downtown location's demonstration of sufficient parking, the minimum parking space requirement per food truck is required. § 118.8.5.F.7.B.8, City of Fort Myers Code of Ordinances (2023). (A.12-13)

According to the FTO, the Community Development Director is the only enumerated official authorized to approve an alternate number of parking spaces, but only if the Applicant has submitted a parking demand study.

THE APPLICATION FOR CONDITIONAL USE

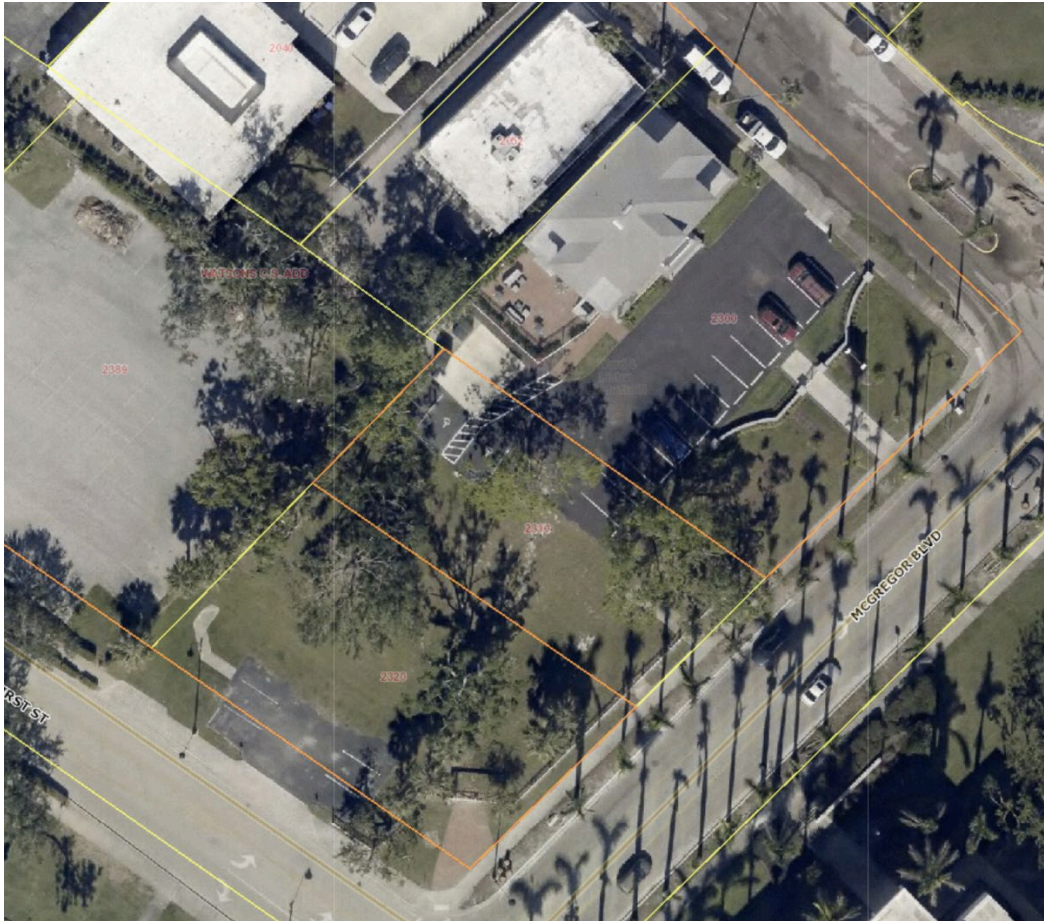
The Application for Conditional Use sought the development of three (3) contiguous parcels, one of which already has an office building, for the construction of seven (7) food truck pads, an open outdoor bar and restroom building.

The proposed development for the Project Site includes the continuing office use for the existing building together with development of seven 250 sq. ft. food truck sites, an open outdoor bar and restroom

building, a 10' by 10' entertainment area, walkways, and two dry retention areas as shown by the site plan submitted concurrently with this request.

(A.30)

The Applicant claimed there were 22 parking spots in existence at the parcels at the time of the application. (A.37) The plans submitted as part of the application identified a total of twenty (20) parking spaces and two (2) designated handicap parking spaces that would service the seven (7) food trucks, the outdoor bar and the pre-existing office building. (A.32-41) Notwithstanding, the submitted plans show that use of at least two of the proposed parking spots would block the ingress and egress of the food trucks. (A.62) The existing office building is 3,642 square feet. (A.36) The proposed outdoor seating and entertainment edifice is identified as being 1,933 square feet. (A.36)



[Retrieved from the Lee County Property Appraiser's Website, <https://gissvr.leepa.org/GeoView2/> on March 24, 2023.]

However, the City's Smart Code requires 1 parking spot per 500 square feet of gross floor area for commercial centers, including office buildings. See § 118.8.6.D, Code of Ordinance, City of Fort Myers (Office, retail, financial services, personal care services require 1 parking space per 500 sq. ft. of gross floor area).⁵ Thus, to comply

⁵ The properties at issue are in the West pedestrian sheds of Diagram 7, Sec. 118.8.1.B. See (A.292).

with the Code, a minimum seven (7) parking spots is required for the office building *alone and independent* of the planned bar, the restroom building and the planned food trucks.

The application was also accompanied by an unsigned, unfiled proposed Declaration of Shared Parking and Dumpster Easement Agreement (hereinafter referred to as the “Parking Declaration”, specifying only that the three (3) parcels of the Applicant would share parking spaces and dumpster access. (A.118) Further, the Parking Declaration, while entitled with the word “Agreement” is merely a statement of a single party, the Applicant/owner of the parcels seeking conditional use. (A.122)

THE HEARING

The rules for a quasi-judicial hearing on an application for conditional use are set forth by § 98.3.13 of the City Code and requires a decision by the BOA to be supported by competent substantial evidence.

There was no evidence submitted at the hearing that the unsigned proposed Parking Declaration was approved by the Community Development Director.

Mr. Jason White, a civil engineer with Exceptional Engineering, testified on behalf of the Applicant, (A.157), there will be a total of “22 parking spaces on this property for the seven food trucks and also for the middle building”.⁶ (A.157:21-23)

Mr. Calcedonio Bruno, the President/owner of the Applicant business, testified the proposed food truck park will have eight full-time employees and six part-time employees. (A.160:5-161:5) The adjacent office building houses several ongoing businesses that will be competing to use the same 22 parking spaces at the same time the employees and public would be using the proposed facilities. (A.160:20-162:10) Ms. Kate English, counsel for the Applicant, argued that some of the office space are occupied by tenants who frequently function virtually. (A.151:20, 175:5-10)

MR. GARGANO: The full-time and part-time employees, those are for the food truck park, or that is in the food trucks? In other words, are the food truck people working the food trucks in addition to that or -

MR. BRUNO: They would be combined, yes, that is correct.

MR. GARGANO: So 14 total?

MR. BRUNO: Operating the -- our operation, that would be including the two food trucks we operate, the pavilion, and then food trucks, as well.

⁶ That number includes two handicap parking spaces. (A.158:23-4)

MR. GARGANO:· Okay.· All right.

CHAIRPERSON FITZGERALD:· So you're using the shared parking agreement with the adjacent building for --

MR. WHITE:· Correct.

CHAIRPERSON FITZGERALD:· -- meeting the parking requirements. Do they operate -- do the businesses in that existing building operate at the same time that the food trucks are operating? Are they --

MR. WHITE:· Some of them

CHAIRPERSON FITZGERALD:· -- competing --

MR. WHITE:· -- would --

CHAIRPERSON FITZGERALD:· -- for the same parking spaces?

MR. WHITE:· Some of the office spaces are kind of virtual.· They're not there.· And they do have office space so some would be operating at the same time.

MR. GARGANO:· Just so I'm clear, the 22 spaces are on-site or include --

MR. WHITE:· On-site.

MR. GARGANO:· -- next-door?

MR. WHITE:· No -- well, including the existing white building.

MR. GARGANO:· Okay.

MR. WHITE:· Yes.

MR. GARGANO:· So there's six here --

MR. WHITE:· There's six there --

MR. GARGANO:· -- and there's 16 next-door?

MR. WHITE:· That is correct.

(A.160:20-162:10)

The proposed bar/restaurant area would have between 30-40 seats for patrons, who would presumably also be competing for the same parking spots. (A.160:17-19; 177:7-18)

Ms. Nicole DeV Vaughn, the City's Planning Manager agreed that the proposed food truck park parcels would be required to have on-site (off-street parking) for the food trucks, in addition to the requirement for the pre-existing building to have a minimum ratio of parking spaces to square feet of 1 parking space per 500 square feet off-street parking. (A.173:9-23)

Ms. Amy Thibaut, counsel for the Applicant testified that in Policy 1.9, of the Transportation section of the City's Comprehensive Plan, (A.320), "actually eliminates the off-site parking requirements for the downtown redevelopment area, but it also states that it encourages shared parking agreements between uses that have different peak -- peak times, peak trips -- well, different peak hours." (A.171:13-9) However, Policy 1.9 is not a mandate for specific action; rather it encourages the City to identify approaches to avoid requiring more parking spaces than necessary. Policy 1.9 refers to a single action taken in furtherance of its stated goals, Action 3.7.4. Yet, Action 3.7.4 does not eliminate the requirement for off-site parking. (A.320, 331) In contrast, Policies 4.1, 4.2 and Actions 4.1.1, 4.2.1 indicate the City's overarching concern for adequate parking in the Downtown Redevelopment Area. (A.333)

In the course of the hearing, it became clear that the City Planners had not included available parking as a factor in their evaluation of adverse impacts from the proposed project.

CHAIRPERSON FITZGERALD: And when you've got the potential for as many people to come to something like this if it's successful, and there being people's private parking lots immediately adjacent to the property, and off-street parking is a longer walk than just going to someone else's parking lot, does item four address that, or is that one of the items that are included in these five items? **Like where does that get addressed when you're looking at the adverse impacts?**

MS. DeVAUGHN: **Well, we don't as parking is considered -- you know, that's just a regulated component of the site development.**

CHAIRPERSON FITZGERALD: Okay.

MS. DeVAUGHN: We've done numerous, you know, variances over the past year so -- for reduction in parking citywide, and those have all been granted. I know none of that sets precedent, but I think it sets the tone that it's been recognized that maybe we need to reassess our parking.

As far as using adjacent lots, I mean, those are problems whenever you have big events downtown.
(A.184:5-25) (emphasis added).

Notwithstanding, the Chair of BOA acknowledged parking would be an issue impacting the neighborhood of the proposed site of the food truck park.

CHAIRPERSON FITZGERALD: I mean, I've been to some of these food parks, and the successful ones

do get a lot of people, and they do linger longer than just getting their food --

MS. DeVAUGHN: Uh-huh.

CHAIRPERSON FITZGERALD: -- and leaving. So I think it's a legitimate concern on some of the people that are --

MS. DeVAUGHN: I agree.

CHAIRPERSON FITZGERALD: -- adjacent to the property.

(A.186:6-16)

There were numerous witnesses who testified during the public comments phase of the hearing. (A.187:21-214:9) Mr. Grant Phelan, the owner of Pinchers, the Petitioner, testified that other similar food truck parks, including one in the City of Naples, are busy from morning to night and attract from 500 to 1,000 people a day. (A.188:2-16) He expressed how the insufficiency to plan for and require adequate parking would require him to bear additional effort and costs to police his own parking facility, as well as cause additional liability because the proposed food truck park patrons would be parking in Pincher's lots.

[M]y number one concern is where are all these people going to park? And when you have 22 spaces -- every food truck is going to have two employees, okay? And so that's 14 of those spaces. And then I looked at the renderings, I believe there's a bar there. So let's say they have two bartenders so that's two more parking spaces. So that right there, just employees running it, is 16 spaces of the 22 provided.

So now it's going to put the emphasis on me to police my parking in order for liability, and it's going to be a very -- a big-time challenge.

And so if you were to drive to Pinchers tonight in that area, you're going to see that all of those lots are full with customers that have come in. In fact, I had to buy those adjacent lots next-door to accommodate the parking requirements that are part of the restaurants -- in order to have the restaurant and the number of seats that we have in the Marina at Edison Ford. And so -- I also had to pay a \$10,000 impact fee so that I could cross -- so that those pedestrians could cross, and we could stripe the road and make it safe for those pedestrians to park across the street and then walk over.

So my major concern with this hearing is what -- or where are all these folks going to park?

(A.188:19-189:19)

Additional witnesses, including Mr. Smith, counsel for Petitioner, argued that the FTO did in fact require three (3) parking spots per food truck and that the exemption under § Section 118.8.6.D.2 did not apply as the proposed location of the food truck park was in the West section of Diagram 7, as noted above.

(A.190:14-192:15)

In rebuttal, on behalf of the Applicant, MS. English addressed the BOA.

CHAIRPERSON FITZGERALD: My question came back. So you heard Mr. Smith's testimony or his public comment earlier where he was -- there's been two different answers, it seems to me, that -- one

about off-street parking and not being required and being required. Do you agree with Mr. Smith?

MS. ENGLISH: No, sir, I don't.

CHAIRPERSON FITZGERALD: **You do not believe that there's off-street parking required on this property?**

MS. ENGLISH: I don't believe his calculations, and I don't agree with his interpretation of the Code; and, frankly, I don't believe your Staff does either. But I will leave that to your Staff to respond to that question, if you want to ask them that.

CHAIRPERSON FITZGERALD: Okay.

MS. DeVAUGHN: Maybe -- Nicole DeVaughn, for the record. **There is parking required. It is limited. When we talked about the areas that are not that are in the core, that is where we are today, sitting, not where this is proposed.** So they do have parking required at one space per 500 square feet.

CHAIRPERSON FITZGERALD: That's the requirement for where that property is located currently?

MS. DeVAUGHN: Correct.

(A.224:22-225:21) (emphasis added).

Ultimately, the BOA was led to believe that the Applicant was satisfying any parking requirements set by the Code through off-street (on-site) parking with 21 parking spaces. (A.228:7-16)

The BOA voted to accept the finding of facts contained in the "staff findings" of Agenda Item #3. (A.258-9; A.18; A.220:15-17)

BOA'S DECISION/ORDER

At the end of the hearing, the BOA voted to approve a request for Conditional Use of properties located at 2300, 2310 and 2320 McGregor Blvd., Fort Myers, subject to five (5) conditions. (A.4)

The Board voted to approve the Conditional Use with the following conditions:

1. Provide increased landscaping to the maximum enhanced allowable without being inconsistent with traffic and engineering limitations.

2. The master concept plan prepared by Exceptional Engineering, Inc. dated September 28, 2021, are approved in concept only. Compliance with the Land Development Code will be determined during the review of site work and building permits.

3. The site shall be landscaped as shown on the landscape plans prepared by Joseph H. Kelley, dated March 26, 2022, subject to the first condition.

4. The new building shall be as shown on the elevations prepared by Liberating Vision Design, LLC dated March 14, 2022.

5. Construction for the food truck park shall commence within two (2) years of the date of approval.

(A.4)

BOA memorialized its decision in a "Letter of Decision" dated January 31, 2023. The Letter of Decision was not transmitted to the City Clerk until February 23, 2023. (A.5-7) Rule 9.020(h), Fla. R. App. P., defines the term "rendition of an order" as only occurring "when a signed, written order is filed with the clerk of the lower tribunal."

In the City of Fort Myers, the City Clerk is obligated to keep and maintain records of official actions of the BOA, “all of which shall be filed in the city clerk's office and shall be a public record.” § 98.2.3, Code of Ordinances, City of Fort Myers (2023).

The city clerk shall keep minutes of the proceedings of the board of adjustments, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be filed in the city clerk's office and shall be a public record.

Id.

Thus, BOA’s Letter of Decision was not rendered when it was signed, it was only rendered when the City Clerk filed it on February 23, 2023.⁷ *See 5220 Biscayne Blvd., LLC v. Stebbins*, 937 So. 2d 1189, 1190 (Fla. 3d DCA 2006) (“Section 163.3215(3) provides that the *de novo* action ‘must be filed no later than 30 days following rendition of a development order.’ We conclude, in this case of first impression, that the triggering event for “rendition” is when the City

⁷ In the City of Fort Myers, the City Clerk is obligated by § 98.2.3, Code of Ordinances, to “keep minutes of the proceedings of the board of adjustments, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be filed in the city clerk's office and shall be a public record.” § 98.2.3, Code of Ordinances, City of Fort Myers (2023).

Clerk entered the development order, not when the mayor signed the order.”)⁸

City of Fort Myers Ordinance § 98.3.8.D required BOA to consider the following enumerated adverse impact elements.

98.3.8 - Conditional Uses.

D. Consideration of adverse impact elements. In considering an application for a conditional use, the board of adjustments shall review the following and may require mitigation of adverse impact as a condition of approval:

- 1.** Impacts on the local economy, employment, and property values.
- 2.** Impacts on the natural environment, including air, water, and noise pollution, vegetation and wildlife, open space, noxious and desirable vegetation, and flood hazards.
- 3.** Impacts on historic, scenic, and cultural resources, including views and vistas, and loss or degradation of cultural and historic resources.
- 4.** Impacts on public services, including water, sewer, surface water management, police, fire, parks and recreation, streets, public transportation, marinas and waterways, and bicycle and pedestrian facilities.

⁸ See *Smull v. Town of Jupiter*, 854 So. 2d 780, 783 (Fla. 4th DCA 2003) (“Rule 9.100(c) provides that a petition to review quasi-judicial agency action shall be filed within thirty days of rendition of the order. “An order is rendered when a signed, written order is filed with the clerk of the lower tribunal.” Fla. R.App. P. 9.020(h). In this case, there was no writing filed with the Town clerk. Therefore, the time for invoking the review jurisdiction of the circuit court had not started to run when the Town decided to reconsider its ruling.”

5. Impacts on housing and social conditions, including the variety of housing unit types and prices, and neighborhood quality.

§ 98.3.8.D, City of Fort Myers Code of Ordinances (2023).

NATURE OF THE RELIEF SOUGHT

Petitioner seeks the issuance of a writ of certiorari vacating the Order/Letter of Decision of the Board of Adjustments.

ARGUMENT IN SUPPORT OF THE PETITION

I. BOA Failed To Abide By The Rules Of The City's Code, Resulting In A Failure To Observe The Essential Requirements Of The Law

Standard of Review

Florida courts are authorized to use the common law writ of certiorari to review the actions of local government agencies not reviewable under Florida's Administrative Procedure Act. *City of Satellite Beach v. Goersch*, 217 So. 3d 1143, 1145 (Fla. 5th DCA 2017).

This Court's first-tier certiorari review of an administrative decision is limited to determining (1) whether procedural due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment

were supported by competent, substantial evidence. *Id.* (citing *Broward Cty. v. G.B.V. Int'l., Ltd.*, 787 So.2d 838, 843 (Fla. 2001)).

However, as the Florida Supreme Court noted in *Wiggins*, unlike common-law certiorari review, “first-tier certiorari review is not a discretionary writ, but a matter of right more similar to a plenary appeal.” *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1171 n.2. (Fla. 2017)

“A departure from the essential requirements of law, alternatively referred to as a violation of clearly established law, can be shown by a misapplication of the plain language in a statute.” *Gonzalez v. State*, 15 So. 3d 37, 39 (Fla. 2d DCA 2009) (emphasis added). *See Webb v. Town Council of Town of Hilliard*, 766 So. 2d 1241, 1243 (Fla. 1st DCA 2000) (““Local government decisions pertaining to building permits, site plans, special zoning exceptions, and other development orders generally are deemed quasi-judicial in nature, thus subject to certiorari review.”)

Petitioner Has Standing

Petitioner has standing to bring the instant action, as its business will be adversely impacted by BOA’s decision. Thus, Petitioner qualifies as an aggrieved or adversely affected party,

pursuant to Fla. Stat. § 163.3215(2)⁹ and § 93.3.7.D, Code of Ordinances.¹⁰ *See Save Calusa, Inc. v. Miami-Dade Cnty.*, No. 3D22-1296, 2023 WL 1430979, at *5 (Fla. 3d DCA Feb. 1, 2023), *reh'g denied* (Feb. 12, 2023) (“Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning.”) Generally, a person in close proximity to a location subject to a zoning change will be deemed to have standing to contest the order at issue. “Such proximity generally establishes that the homeowners have an interest greater than ‘the general interest in community good share[d] in common with all citizens.’” *Id.* (quoting

⁹ “As a remedial statute, section 163.3215 should be liberally construed to advance the intended remedy, i.e., to ensure standing for any party with a protected interest under the comprehensive plan who will be adversely affected by the governmental entity's actions. *Parker v. Leon County*, 627 So.2d 476, 479 (Fla.1993)” *Dunlap v. Orange Cnty.*, 971 So. 2d 171, 174 (Fla. 5th DCA 2007) (quoting *Education Development Center, Inc. v. Palm Beach County*, 751 So.2d 621, 623 (Fla. 4th DCA 1999)).

¹⁰ “Appeal from the board of adjustments. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustments, any taxpayer, or any officer, department, board or bureau of the city, may, in accordance with the rules of the court, seek review by certiorari of such decision by a court. Any person interested in appealing the decision of the board must ensure that a verbatim record of the proceeding is made.”

Renard v. Dade Cnty., 261 So. 2d 832, 837 (Fla. 1972)).¹¹

BOA Ignored The Code And Its Own Rules & Limitations Set By The Code

First, the City Code, § 98.3.8.F states the BOA “shall make a finding that the granting of the conditional use will meet the criteria of this section and will not adversely affect the public interest.” (A.286) Yet, BOA’s Order approved the application for conditional use, set a two-year deadline for construction to commence, but stated its approval was “in concept only”. (A.4, ¶2) Further, the Order states

¹¹ See *Hartnett v. Austin*, 93 So. 2d 86, 90 (Fla. 1956) (“We encounter no difficulty in concluding that the appellees were entitled to bring the suit. They occupied their homes immediately across the street from the proposed parking area. They relied on the existing zoning conditions when they bought their homes. They had a right to a continuation of those conditions in the absence of a showing that the change requisite to an amendment had taken place. They allege that the contemplated change would damage them and that it was contrary to the general welfare and totally unjustified by existing conditions. This gave them a status as parties entitled to come into court to seek relief. True their rights were subject to the power of the city to amend the ordinance on the basis of a proper showing. Nonetheless, they have a right to insist that the showing be made.”); *Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning); *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959).

“[c]ompliance with the Land Development Code will be determined during the review of site work and building permits.” *Id.*

Section 98.3.8.E sets forth the Basis for action by the BOA and requires the BOA, “[i]n granting any conditional use, the board of adjustments shall prescribe appropriate conditions and safeguards **in conformity with this land development code.**” (A.285) (emphasis added) Further, section 98.2.3.E.2, Code of Ordinances, City of Fort Myers, setting forth the limitations to BOA’s powers and duties states unequivocally “[a] **conditional use shall not be granted** by the board of adjustments **unless and until** an application is filed and **the requirements of the land development code have been met.**” § 98.2.3.E.2, Code of Ordinances, City of Fort Myers (2023). *See Tallow Corp. v. Bryan*, 237 So. 2d 308, 309 (Fla. 4th DCA 1970) (“The word ‘shall’ when used in a statute or ordinance has, according to its normal usage, a mandatory connotation.”)

BOA’s Order granting conditional use failed to ensure the requirements of the LDC, including the Smart Code, were met. Thus, the essential requirements of law were not adhered to and writ of certiorari should issue.

Attempts of local government to grant land use (zoning) changes “without compliance with procedural requirements have been deemed invalid and void.” *Webb v. Town Council of Town of Hilliard*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000).

Second, BOA operated under the false assumption that the only limitation parking requirement was that there must be 1 parking spot per 500 square feet. However, for properties located in Downtown the FTO does require a minimum of three (3) parking spaces per food truck *if it cannot be demonstrated* that enough public parking and on-street parking is available within a quarter mile walking distance to the food truck park.

A minimum of three (3) parking spaces per food truck is required unless located in Downtown...where it can be demonstrated that enough public parking and on-street parking is available within a quarter mile walking distance to the food truck park. A shared parking agreement may also be entered with nearby uses subject to approval by the Community Development Director. The Director is authorized to approve an alternative number of parking spaces based upon a parking demand study submitted by the Applicant.

§ 118.8.5.F.7.B.8, City of Fort Myers Code of Ordinances (2023) (emphases added). (A.10-17)

The phraseology of the § 118.8.5.F.7.B.8, stating the minimum number of parking spaces applies “unless located in Downtown” is conditioned by the provision “where it can be demonstrated that enough public parking and on-street parking is available within a quarter mile walking distance to the food truck park.” *Id.* However, the obverse must also hold true; where it *cannot be demonstrated* that enough public parking and on-street parking is available within a quarter mile walking distance, there is a minimum of three (3) parking spaces per food truck that is required.

Yet, BOA failed to actually make an assessment as to whether sufficient public and on-street parking existed, believing instead such did not apply. During the hearing itself, the Planning Manager, Ms. DeVaughn, admitted the Staff did not factor parking issues into its evaluation or findings. (A.184:5-25) Much like the City’s staff, the Applicant’s civil and traffic engineers did not factor parking into their analysis either, stated they were uncertain of how much parking the potential patrons of the proposed food truck park would actually need.

The Applicant’s Civil Engineer, Mr. White, testified he counted a little over 40 parking spots within 1,000 feet of the proposed food

truck park, including parking spots at a nearby Publix, but never assessed how many parking spots would actually need based on potential patrons. (A.176:22-177:18; 179:8-12)

The Applicant's Traffic Engineer, Ted Treesh, (A.166:11-3), testified he didn't address parking in his analysis. (A.167:13-6)

CHAIRPERSON FITZGERALD: It's more regarding about parking. So can you answer any questions regarding --

MR. TREESH: I really didn't address parking in our analysis. It was more just the trip generation. (A.167:13-6) See also (A.167:21-168:8)

Applying the minimum number of parking spots per truck set by the FTO, the Applicant must provide twenty-one (21) off-street (on-site) parking spots, *in addition to* the seven (7) parking spots required by the office building to confirm to the general requirements of the Smart Code and the FTO. Thus, **the Applicant's proposed food truck park would have to have twenty-eight (28) off-street (on-site) parking spots.**

Third, BOA failed to require that the shared parking agreement, Applicant's Parking Declaration, be approved by the Community Development Director before considering it as part of the conditional use process. The Parking Declaration was unsigned, unfiled and

there was no evidence it had been approved by the Community Development Director, all of which is in violation of the plain language of the FTO.

Further, the Parking Declaration is not a true shared parking agreement as it is not entered into with an entity nearby; rather, the instrument is by, among and between the same entity and same parcels seeking conditional use approval. In addition to FTO's requirements for approval of a shared parking agreement, Section 118.8.6.D.5, Code of Ordinances, sets forth:

Shared parking agreements may be used to meet the required off-street parking standards *if the developer/applicant demonstrates that the shared parking facility can accommodate the parking needs of all proposed uses and that peak parking demands for each of the uses sharing the parking facility clearly occur at different times.* Shared parking agreements must be recorded by a recordable covenant, lease, or other agreement and approved by the community development director.

Id. (emphasis added). (A.299)

The testimony and evidence presented at the hearing failed to adduce competent substantial evidence that sufficient off-street (on-site) public parking and on-street parking is available. In fact, applying the above-discussed minimum parking requirements of the

FTO, the Applicant's plans are numerically deficient, and the approval by the BOA of such plans violated the City's Code.

During the hearing, the City's Planning Manager tried justifying the paucity of off-street parking by stating the BOA had previously issued variances in other circumstances. BOA's voting under *that guidance* also violated the City Code and Petitioner's due process rights.

Even if the FTO's minimum number of parking spaces did not apply, BOA's Order disregarded its requirement to set the required number of off-street (on-site) parking spaces. (A.4) Section § 118.8.6.D.2 requires that minimum required parking "shall be determined during conditional use approval process." (A.299) BOA did not conform to the City Code.

Fourth, the Order of the BOA, in contravention of the LDC and FTO constitutes a de facto variance. While under certain circumstances the BOA has authority to grant a variance¹², its

¹² The Code defines the term "variance" as "a modification of the zoning regulations when such variance will not be contrary to the public interest and when, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the land use regulations would result in unnecessary

authority is strictly limited by City Code section 98.3.5, governing variances.¹³ Section 98.3.5, requires a written application for a variance, a public hearing with notice to the public on the application for the variance and a demonstration that:

hardship(s)¹⁴, as defined in this land development code, and circumstances exist which are peculiar to the land, structure, or community development involved and which are not applicable to other lands, structures, or buildings in the same district.

§ 98.3.5.B.1, Code of Ordinances, City of Fort Myers (2023). See also

§ 98.3.5.C, Code of Ordinances, City of Fort Myers (“Under no circumstances shall the board of adjustments grant a variance to allow a use not permissible under the terms of this land development

and undue hardship.” § 142, Art. 2, Code of Ordinances, City of Fort Myers (2023).

¹³ See § 98.2.3.E.3 (“The board of adjustments shall have the following powers and duties...3. To authorize in specific cases and pursuant to section 98.3.5, a variance from the terms of this land development code.”)

¹⁴ A “*Hardship* means a restriction on property so unreasonable that it results in an arbitrary and capricious interference with basic property rights. Hardship relates to the physical characteristics of the property, not the personal circumstances or the owner or uses. Such physical characteristics may include, but are not limited to: exceptional shape of the lot, exceptional topographic conditions, or other exceptional physical conditions of a parcel of land. A hardship shall not include personal or financial hardship, or any other hardship that is self-imposed.” § 142, Art. 2, Code of Ordinances, City of Fort Myers (2023).

code in the district involved, or any use expressly or by implication prohibited by the terms of this land development code in such district.”)

In this case, there was no application for a hardship, no notice to the public, no analysis by the City for a variance, only the deliberation by the BOA based on advice by the City Planning Manager that the BOA had issued them before under similar circumstances.

The BOA’s Order disregarding the LDC and Smart Code constitutes a de facto variance, with did not conform with the basic tenets of due process (*i.e.* notice and opportunity to be heard). Thus the Order on review should be quashed. *See Ellison v. City of Fort Lauderdale*, 183 So.2d 193, 195 (Fla. 1966) (Since City Commission did not comply with notice and public hearing provisions, ordinance was invalid); *Healthsouth Doctors' Hospital, Inc. v. Hartnett*, 622 So.2d 146, 148 (Fla. 3d DCA 1993); *City of Miami Beach v. State ex rel. Consolo*, 279 So.2d 76, 78–79 (Fla. 3d DCA 1973), *cert. denied*, 292 So.2d 24 (Fla. 1974)(City's attempt to change classification of property was a nullity, because the proposed change was not effected in accordance with the procedural requirements of

the zoning ordinance, i.e., the city failed to hold a public hearing after due notice); *City of Coral Gables v. Deschamps*, 242 So.2d 210, 212 (Fla. 3d DCA 1970) (ordinance deemed invalid and void, because the notice as to the proposed zoning change was inadequate to inform regarding the proposed changes).

CONCLUSION

The Board of Adjustments failed to abide by the mandates of the City Code of Ordinances, including failing to abide by the terms of the Food Truck Ordinance, the limitations to its own authority and the requirement to act in conformity with the Land Development Code. The requirements for certiorari review have been met. Based on all of the foregoing, Petitioner requests a writ of certiorari quashing the Order/Decision of the Board of Adjustments, City of Fort Myers. (A.4)

Respectfully submitted,

Leonard Feuer, P.A.
500 S. Australian Avenue, Suite 500
West Palm Beach, FL 33401
Telephone: (561) 659-1360

By: /s/ Leonard Feuer
LEONARD FEUER, ESQUIRE
Florida Bar No.: 501751

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service this 24th day of March, 2023, to counsel for the City of Fort Myers, Mr. Grant W. Alley, City of Fort Myers, 2200 Second Street, Fort Myers, Florida 33901, via galley@cityftmyers.com, and counsel for White Rose Holdings, LLC, Ms. Katherine English, Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901, via katherineenglish@paveselaw.com.

By: /s/ Leonard Feuer
LEONARD FEUER, ESQUIRE
Florida Bar No.: 501751

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the foregoing has been generated in Bookman Old Style 14-point font and complies with the requirements of Fla. R. App. P. 9.045(b) and (e).

By: /s/ Leonard Feuer
LEONARD FEUER, ESQUIRE
Florida Bar No.: 501751