IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

LONGBOAT COVE CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Petitioner,

vs.

Case No. 95-2246-CA-01
Judge Titus

PLANNING & ZONING BOARD, TOWN OF LONGBOAT KEY,

Respondent.

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

(1) Introductory statement. Quite simply, this is a case where the Town commission has decided to construct a commercialized, 10-court, 50-parking space tennis complex with offices, restrooms, showers, and observation deck on residentially-zoned, residentially-designated, and residentially-surrounded property within the Town of Longboat Key notwithstanding that the tennis complex flaunts the Town's comprehensive plans, the Town's open space ordinances, and the Town's zoning code. Put bluntly, the Town commission, thus far, has been able to implement its will, only because the Town employs the staff personnel who have recommended that the special exception be approved for the tennis complex and because the Town commissioners appoint the Planning and Zoning Board which has granted the special exception for the tennis complex.

Longboat Cove Condominium Association, Inc., the petitioner, will be referred to as "Longboat Cove." Planning and Zoning Board, Town of Longboat Key, the respondent, will be referred to as "Planning and Zoning Board," "P and Z Board," or "PZB." Town of Longboat Key, the applicant for the special exception, will be referred to as "the Town." References to the transcript of the hearing of March 21, 1995, will be to "transcript at ----." References to Longboat Cove's exhibits at the hearing on March 21, 1995, will be to "Cove exhibit ---." References to the Town's zoning code and comprehensive plan will be "Zoning Code ----" and "Comprehensive Plan ---------." A copy of the transcript is included in volume 1 of Longboat Cove's appendix; copies of Longboat Cove's exhibits are included in volumes 2 and 3 of Longboat Cove's

appendix; and copies of the Town's zoning code and of the Town's comprehensive plan are included in volume 4 of Longboat Cove's appendix.

(2) Basis for invoking the jurisdiction of this Court. This Court has original jurisdiction pursuant to Florida Rule of Civil Procedure 9.030(c)(3). See also Florida Rules of Civil Procedure 1.630 and 9.100. The grounds upon which Longboat Cove is requesting this Court to quash the special exception is that the P and Z Board (1) failed to accord procedural due process, (2) departed from the essential requirements of law, and (3) failed to base its decision on competent substantial evidence. See, e.g., Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989); City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982).

(3) Summary of argument. In 1978, the Town adopted a comprehensive plan that listed the south Ansel tract as "among [six] remaining ecosystems. . . which deserve special review and consideration prior to any development activities" and as "[t]he most active and productive site for wildlife [with] excellent potential for a passive park and nature preserve.". The comprehensive plan in 1978 also favored passive recreation over active recreation, with active recreation limited to the Town's recreation center. The comprehensive plan then recommended that the Town "develop techniques of preserving vital areas in their natural state," "preserve as much native vegetation as possible to reflect the island character of the Town," and "develop passive parks for relaxation and nature study."

To implement the comprehensive plan, the Town beginning in 1979 passed open space ordinances to require developers to pay fees to be used "to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks and open space. . .to exclusively serve the residents of the Town. . . ."

In 1990, the Town spent $1.6 million in open space monies to acquire the south Ansel tract.

Prior to 1992, Arvida, the developer of the two large planned unit developments in the Town, had donated $200,000 and certain real property known as the civic grove to the Town for Town recreational purposes.

The Town determined, however, that the civic grove was inappropriate for a Town tennis complex because the tennis complex supposedly needed at least eight courts to be self-supporting, because the soil conditions at the civic grove were unsuitable for har-tru tennis courts, and because constructing eight courts at the civic grove would require that certain oak trees be cut.

Therefore, the Town decided to construct a 10-court, 50-parking space tennis complex with restrooms, showers, offices, and observation deck, on the south Ansel tract. The tennis complex would be open 14 hours per day (from 8 am to 10 pm), seven days a week. The Town would lease the tennis complex to a lessee-operator who would guarantee at least $63,000 in yearly rents. The minimum rents would retire the Town's costs of constructing the tennis complex. In addition to selling memberships in the tennis complex, the lessee-operator would sell tennis lessons and

tennis accessories. The Town would share in revenues should the tennis center exceed certain revenues. Thus, the lessee-operator and the Town would profit with increased use of the tennis complex.

Because the south Ansel tract was zoned residential, the Town needed a special exception for "parks and recreation areas."

The Town staff, which reports to the Town manager and the Town commission, recommended that the special exception be approved, and the P and Z Board, whose members are appointed by the Town commission, voted to approve the special exception even though the only evidence supporting the application was Town staff's conclusory statements. Those conclusory statements conflicted with the Town's comprehensive plans and do not constitute competent substantial evidence.

The special exception should be quashed because Longboat Cove was denied procedural due process. Procedural due process requires an impartial decisionmaker. Here, the Town commission, the proponent of the highly visible tennis complex, appointed the P and Z Board, which was to grant or deny the Town's application for special exception. Procedural due process also requires impartial advisors to the impartial decisionmaker. Here, the Town's planning, zoning, and building director, the primary advisor to the P and Z Board, worked for the Town manager and the Town commission, the primary proponents of the tennis complex; here, the Town attorney, the other advisor to the P and Z Board, also worked for the Town commission. Finally, one of the nine members of the P and Z Board also had chaired the five-member tennis advisory committee for the Town and a second member of the P and

Z Board had served on the Town's tennis committee; though those two members were rightfully advised that they should not vote on the application for the special exception, their seven colleagues on the P and Z Board were aware of their involvement with the tennis committee. For all of those reasons, denying Longboat Cove's request for an impartial decisionmaker deprived Longboat Cove of procedural due process.

The special exception also should be quashed because granting it, on the record here, departs from the essential requirements of law, and because there was no competent substantial evidence that the proposed tennis complex would not adversely affect the public interest, that it would comply with "all elements" of the comprehensive plan, that it would be a permitted use within the R-3MX zoning district, that it would be compatible with established land use patterns, that it would be not adversely affect property values, and that it would not be out of scale with the neighborhood's and Town's needs. Rather, there was overwhelming (and generally unrebutted) evidence that the proposed tennis complex would violate the comprehensive plan, would not be a permitted use in a residential district, would be incompatible with established land use patterns, would adversely affect property values, and would be out of scale with the neighborhood's and Town's needs.

(4) Facts on which the petitioner relies.

(a) Town's application for special exception. On February 24, 1995, the Town filed an application for a special exception to construct a 10-tennis court, 50-parking space tennis complex with a 576 square foot tennis pavilion including

restrooms and showers and a 564 square foot observation deck on the south Ansel tract; the south Ansel tract is a 13.8-acre tract zoned R-3MX, "low-medium-density mixed residential district," and designated in the Town's comprehensive land use plan as RM-3, "low to medium residential, single-family and mixed-structure type," at 5450 Gulf of Mexico Drive within the Town (Cove exhibit 42; transcript at 6-7, 15). The 13.8 acres are bordered with residential zoning and residential uses to the south and to the north, with Sarasota Bay to the east, and with a low-intensity commercial strip to the west along Gulf of Mexico Drive; Longboat Cove, a 26-unit residential condominium, is located directly across Gulf of Mexico Drive from the south Ansel tract at 5461-5481 Gulf of Mexico Drive. Thus, with the exception of the low-intensity commercial strip, the surrounding zoning and land uses are residential.

(b) Town staff's recommendation on Town's application for special exception. On March 14, 1995, the Town's staff recommended that the P and Z Board approve the Town's application for special exception. As will be pointed out below, Mr. Gaffney, the Town's planning, zoning and building director, did not purport to function as an independent reviewer, but rather as the proponent of the Town's application for special exception. For example, it was Mr. Gaffney who would cross-examine Longboat Cove's expert at the public hearing on March 21, 1995 (transcript at 185-194); indeed, the Town attorney, in asking follow-up questions, indicated that Mr. Gaffney had been "[t]he tough guy" in cross-examining Longboat Cove's expert (transcript at 195).

(c) P and Z Board's action on Town's application for special exception. On March 21, 1995, the P and Z Board voted 7 to 0 to grant the special exception (transcript at 217; Cove exhibit 42). One member of the P and Z Board candidly noted that "all that I've heard all morning about the technicalities of the Comprehensive Plan and this and that may have value. But times have changed. . . . I would base my vote on the present reality and hope for the best" (transcript at 216). Because two tennis committee members (including the committee's chairman) sat on the P and Z Board and because the Town was the applicant, Longboat Cove requested the Town to disqualify the P and Z Board. The Town refused to do so (Cove exhibit 36).

Apart from Mr. Gaffney's conclusory statements, the Town submitted no evidence at the public hearing. Longboat Cove submitted 46 exhibits and testimony from Mr. Hemke and Mr. Smith. Mr. Smith, a super-credentialed planner with teaching, governmental and private experience; was formerly director of the Chatham County-Savannah Metropolitan Planning Commission and of the Hillsborough County Planning Commission. Since 1985, Mr. Smith also has served as hearing master on more than 1,100 zoning petitions and applications. Mr. Smith's curriculum vita is Cove exhibit 46.

(d) Town's plans for tennis complex. With that overview, one can better understand the facts leading up to the approval from the P and Z Board.

Originally, the Town planned to construct a tennis complex on 2.43 acres of real property known as the civic grove near Town hall within the Bay Isles planned unit development; Arvida, the developer of two large planned unit developments

within the Town including Bay Isles, had donated the civic grove and $200,000 to the Town for Town recreation purposes (Cove exhibit 31, page 1; Cove exhibit 32, page 2; transcript at 28, 214-215). Because the Town claimed it needed eight courts for the tennis complex to be self-supporting, because the Town claimed that soil conditions at the civic grove were unsuitable for har-tru surfaces for the tennis courts, and because the Town claimed that there was not enough room for eight courts at the civic grove without cutting down certain oak trees, the Town changed the planned location for the tennis complex from the civic grove to the south Ansel tract across from Longboat Cove (Cove exhibit 31, page 1; transcript at 28). The Town had acquired the south Ansel tract with approximately $1.6 million in "open space" monies (transcript at 118).

As of October 26, 1992, the Town's tennis committee estimated that the tennis courts could be built for the $200,000 (Cove exhibit 25). By August 1993, however, it was estimated that the tennis complex would cost $700,000 to $900,000 to construct (Cove exhibit 24). Originally, the plans called for no lights (Cove exhibit 25), but later lights were added (Cove exhibit 32; transcript at 67). Tennis would begin at 8 am and continue through 10 pm, seven days per week. Memberships would cost $450 yearly for family memberships and $300 yearly for single memberships, up from the $360 and $240 originally planned (Cove exhibits 24, 27). The tennis center would be "predominantly" for Longboat Key residents (Cove exhibits 31, 32), but would be "open to the general public" (Cove exhibit 37). Originally, the Town tennis committee projected rents at $21,000 yearly (Cove exhibit 25). With construction

costs increasing from $200,000 to $900,000 (Cove exhibits 30, 32), rents (which would retire construction debt) were required to be increased from $21,000 yearly at least $63,000 yearly (Cove exhibit 30).

Once the decision was made to change the location from the civic grove to the south Ansel tract, the Town in April 1994 requested proposals to design, construct and/or lease/operate a 10-court tennis complex to be constructed on the south Ansel tract (Cove exhibit 27). The RFP provided that the lessee-operator would commercially operate the tennis center for profit, providing, Inter alia, tennis lessons, vending machines and retail sales of related merchandise. The RFP provided that the tennis center would be "primarily" for Longboat Key residents (notwithstanding that the Town's open space ordinances have provided that properties purchased with open space monies, such as the south Ansel tract here, are "intended to exclusively serve the residents of the town"). The RFP provided that the tennis center would be open 8 am-10 pm, seven days a week (Cove exhibit 27). Only members and persons paying a daily fee could play on the eight fast-dry courts, but no fees would be charged for the two low maintenance courts (Cove exhibit 27). The RFP provided that the lessee-operator would be required to have a manager or assistant manager on-site 14 hours daily, seven days a week (Cove exhibit 27). The RFP projected that the minimum monthly rental would be $3,000 to $5,500 monthly in order to service the construction debt (Cove exhibit 27). In addition to the minimum monthly rental, the RFP provided for percentage rentals of 30 percent of revenues between $150,000 and $175,000, 25 percent of revenues between $175,000 and $200,000, 20 percent of

revenues between $200,000 and $225,000, declining to 5 percent of revenues over $300,000 (Cove exhibit 27). Thus, the lessee-operator and the Town would each have an incentive to maximize revenue from the tennis center; the lessee-operator and the Town could both generate profits, the Town's profit to be the excess of rent over amortizing construction costs.

World Class Tennis Management (WCTM), with over ten years' experience "in the tennis business" operating tennis resorts such as the Stouffer Vinoy, submitted a proposal (Cove exhibit 28), which the Town accepted to negotiate. WCTM's proposal projected revenues increasing from $339,700 in the first year of operations to $603,500 in the fifth year of operations, with the rent to the Town increasing from $80,270 in the first year of operations to $136,050 in the fifth year of operations and with WCTM's business profit increasing from $92,747 in the first year of operations to $254,920 in the fifth year of operations.

Prior to breaking off negotiations, the Town and WCTM had negotiated a draft four-year lease that provided for a pro shop, eight fast-dry courts, and two asphalt courts for free play with all courts to be lighted (Cove exhibit 29). The draft lease provided that the tennis center would be "primarily" for Town residents (notwithstanding that the Town's open space ordinances limited the use of open space monies, as were involved in purchasing the south Ansel tract here, "to exclusively serve the residents of the town"), that WCTM could install vending machines and sell related merchandise, that the tennis center would operate from 8 am to 10 pm seven days a week, that annual user fees would be $360 for a family

and $230 for a single, that the minimum guaranteed rent would be $5,250 monthly, with additional monthly rentals of $5,000 if gross receipts exceeded $300,000, of $7,500 if gross receipts exceeded $400,000, and of $10,000 if gross receipts exceeded $500,000, and a percentage rental of 10 percent on gross receipts in excess of $150,000. Thus, with projected revenues at $600,000, the projected annual rental for year five and thereafter would be $118,000 ($63,000 plus $10,000 plus $45,000).

Once negotiations were broken off with WCTM, the Town solicited 27 other lease-operators, ultimately receiving only two proposals (Cove exhibit 39). The Town decided to negotiate a draft lease with EEM, III, Inc., later to be known as the Longboat Key Tennis Center, Inc. (Cove exhibits 39, 40, 44, 45). EEM was comfortable with a $4,800 to $5,000 minimum monthly rent (Cove exhibit 40). EEM planned to use the tennis complex

> "to make Longboat Key the place to be in the summer. We will attract tennis groups from the U.S., Canada and Europe to come to Longboat Key for a week of beach walking, great restaurants and shops, and tennis. The package will consist of discounted hotel rates, discounts at restaurants and shops, and a week-long tennis event" (Cove exhibit 40).

EEM suggested that revenue from lessons may be as much as one-third of its revenue (Cove exhibit 40). EEM touted its track record in increasing memberships dramatically at other tennis clubs, for example, from 150 to 1,100 members, from 297 to 2,500 members, and from 500 to 1,800 members (Cove exhibit 40).

The draft lease between the Town and LBKTC (Cove exhibit 45) provides, inter alia, that the tennis center would be "primarily" for Town residents, that the tennis courts would be available 14 hours per day, seven days per week, that LBKTC would guarantee $4,850 in monthly rents, and that LBKTC would pay the Town 5 percent of gross revenues in excess of $235,000, 10 percent of gross revenues in excess of $285,000, and 15 percent of gross revenues in excess of $335,000.

(e) Neighbors' objections to tennis complex. In addition to Longboat Cove, Victor Levine, who owns the property immediately south of the proposed tennis complex, objected, in part because "before [he] bought the land [Town officials told him] that the Ansel land would remain Open Space (and . . .was led to believe that this meant remaining totally as natural vegetation)" (Cove exhibit 28). Indeed, Mr. Levine testified at the public hearing that three Town employees had told him that, because the south Ansel tract was bought with open space monies, it could be used only for passive recreation, rather than "for tennis courts and things like that" (transcript at 69, 90-91, 93-94). Mr. Levine went on:

> "I asked them could that ever be changed -- could the Town change their mind on that? I was told that there was only one way it could be changed, which was, if they purchased another parcel of wooded property of an equal size with other funds, they could substitute that one into open space and take this one out. . . .And I said, what activities could take place on open space land? And I was told it would remain a wooded tree lot" (transcript at 69).

Mr. Klinger, the president of a nine-homesite single family development just south of Mr. Levine's property, also objected (transcript at 101-103).

(f) The south Ansel tract. For at least 16 years, until it "needed" the south Ansel tract for the tennis center, the Town had treated the south Ansel tract as environmentally sensitive. In 1978, the Town's comprehensive plan listed the south Ansel tract as "among [six] remaining ecosystems. . . which deserve special review and consideration prior to any development activities" (Cove exhibit 1, page 4). The comprehensive plan described the south Ansel tract as "[t]he most active and productive site for wildlife [with] significant stands of southern red cedar and laced with tidal swamps and marshes [and with] excellent potential for a passive park and nature preserve" (Cove exhibit 1, page 4). Since 1980, the south Ansel tract has been listed on the Town's open space master plan (Cove exhibits 14, 19).

In its comprehensive plan in 1989, the Town listed the south Ansel tract on the open space master plan inventory as "nature study/conservation" (comprehensive plan, recreation and open space plan at 11). Moreover, the plan indicated that the Town's island character depends upon protection and appropriate use of its natural resources (transcript at 116).

Prior to purchasing the south Ansel tract with $1.6 million in open space monies in 1990 (and prior to the Town considering a tennis complex, much less one for the south Ansel tract), the Town mayor suggested that acquiring the south Ansel tract would be a "tremendous asset" for the Town as a nature preserve (transcript at 117).

When the Town purchased the south Ansel tract with open space monies in 1990, the Town attorney opined that "[i]f the land was purchased with open space

money, it was subject to all of the restrictions currently in the Code, and it could only be used for parks and open space purposes" (Cove exhibit 19).

(g) The Town's comprehensive plan has favored passive over active recreation. The Town's plans traditionally have favored passive recreation over open active recreation, with active recreation limited to the Town recreation center. For example, the open space and recreation plan of the Town's comprehensive plan in 1978 provided that

> "[t]he primary orientation of the plan is to achieve an open space pattern and system which preserves critical nature resources [and] maintains the island character of the Key. . . . Open space areas not only provide opportunities for outdoor recreation, they also serve to protect important natural resources and to provide for aesthetic experiences. This is reinforced by the fact that Longboat Key is a wildlife sanctuary, and the need to provide habitats is crucial to future populations. Open space for this plan is defined as that portion of the Town's environment which is characterized by natural scenic beauty or openness which is dedicated to being left open to enhance the Town. . . ." (Cove exhibit 1, page 1).

The open space objectives in the 1978 plan were to "develop techniques of preserving vital areas in their natural state," "preserve as much native vegetation as possible to reflect the island character of the Town," and "develop passive parks for relaxation and nature study" (Cove exhibit 1, pages 10-11).

(h) The Town's comprehensive plans have relied on private interests, rather than the Town, to provide active recreation, and have focused active recreation at the Town recreation center, rather than environmentally sensitive lands such as the south Ansel tract. For at least 17 years, the Town's policy has been to rely on private

interests to supply recreational needs. For example, the Town's comprehensive plan in 1978 provided that "recreation needs are satisfied through condominium associations, private clubs and individual facilities" and that "no recreation or park facilities are owned, maintained or staffed by the Town, except the bike path. . . ." (Cove exhibit I, page 3). The comprehensive plan in 1978 further provided that the Longboat Key Youth Center had a tennis court available to the general public (Cove exhibit 1, pages 6-7). The first objective of the recreation policy of the comprehensive plan in 1978 was to "consider the Longboat Key youth center as the primary recreation/activity focus for general recreation" and to "expand the center's facilities commensurated with Town growth" (Cove exhibit 1, page 11). Even in deciding to construct the tennis center on the south Ansel tract, the Town commission recognized that the comprehensive plan "called for" locating the courts at the recreation center (Cove exhibit 32, page 3).

(l) The Town's implementation of the open space/recreation element of its comprehensive plan and the Town's "open space" ordinances to preserve lands "in their natural state" for parks and recreation areas "exclusively" for Town residents. Shortly after the adoption of the Town's comprehensive plan in 1978, the Town began to implement the open space/recreation element. By memorandum of January 26, 1979, the Town manager reflected that "[t]here are several references to the need for conserving open space and the functions related to these needs in . . . the Comprehensive Plan" (Cove exhibit 2). Given ongoing development within the Town, the Town manager was "very concerned regarding the rapid disappearance of the

remaining ecosystems on the Island" (Cove exhibit 2, page 1). The Town manager suggested, however, that "[t]hrough the adoption of proper policy decisions regarding these areas," the Town "can still achieve many" of the objectives in the comprehensive plan (Cove exhibit 2, page 1). The Town manager recommended that the open space element of the 1978 plan should be emphasized with "an explanation of the applicable areas of land remaining of vital concern as ecosystems, why they are ecosystems and what amenities are provided by these areas which require that they be preserved as open space. . . ." (Cove exhibit 2, page 3). The Town manager recommended that the Town explore a policy to acquire lands for open space (Cove exhibit 2, page 3).

Thereafter, the Town passed Ordinance 79-7 and Ordinance 80-1 to implement the open space policies in the 1978 comprehensive plan (Cove exhibits 4 and 5). In April 1980, the Town listed the south Ansel tract for acquisition on its open space master plan (Cove exhibit 14, page 2). In January 1981, the Town passed Ordinance 80-9, amending Ordinance 79-7, to specifically provide that the "purpose" of the land acquisition ordinance was "to ensure that future land development within the Town of Longboat Key preserves or provides land its natural state for parks, open space and land for specified Town purposes required by the Longboat Key 1978 Comprehensive Plan. . . ." (Cove exhibit 6). Ordinance 80-9 went on to provide that the developer would be required to pay fees "for acquisition of land for parks, open space and specified town purposes which is intended to exclusively serve the residents of the Town of Longboat Key" (Cove exhibit 6, page 3) (later, the Town would plan the

tennis center to "primarily" or "predominantly" serve Town residents). The language concerning the purpose of the open space acquisition ordinance being to "preserve or provide land in its natural state for parks and open space as required by the Longboat Key 1978 Comprehensive Plan" and to acquire land, parks, and open space "which is intended to exclusively serve the residents of the Town of Longboat Key" was readopted as part of Ordinance 81-27 on September 16, 1981 (Cove exhibit 7), as part of Ordinance 85-19 on November 18, 1985 (Cove exhibit 13), and as part of Ordinance 87-34 on February 18, 1988 (Cove exhibit 15), and was codified as part of Town Code 158.017 in 1982 (Cove exhibit 8) and again in 1994 (Cove exhibit 26).

As further evidence that the open space fund was designed to preserve lands in their natural states for parks and open space, the Town has consistently so indicated in defending the open space ordinances in court. In Town of Longboat Key v. Lands End, Ltd., Case No. 82-1595 (Fla. 2d DCA), the Town's attorneys represented that "[t]he purpose of Ordinance 80-9. . . is to ensure that future land development within the Town preserves or provides land in its natural state for parks [and] open space . . . required by the Comprehensive Plan and the Open Space Master Plan" (Cove exhibit 9, pages 1-2; see also Cove exhibit 9, page 20 noting that, insofaras parks and open space were concerned, Ordinance 80-9 was "to insure the preservation of land its natural state"). In arguing that the ordinance was sufficiently certain, the Town's attorneys argued that the ordinance should be construed in light of "the purpose clause of the Ordinance, which restricts the use of funds to purposes established in the Comprehensive Plan, and in particular the Open Space Master Plan"

(Cove exhibit 9, page 6). In continuing its argument, the Town attorneys pointed out that "[I]n construing legislation, the declaration of purposes is persuasive" (Cove exhibit 9, page 9). Further, the Town attorneys admitted that the open space acquisition ordinance was "specifically. . . .enacted to implement the [1978] Comprehensive Plan" (Cove exhibit 9, page 12), the 1978 plan being concerned with conserving the south Ansel property and passive recreation, rather than active recreation which was limited to the recreation center. In its reply brief in Lands End, the Town again pointed out that Ordinance 80-9 was "to preserve or provide land in its natural state for parks [and] open space. . . ." (Cove exhibit 10, page 1). In its reply, the Town further pointed out its trial testimony that monies were restricted to purchasing lands designated on the open space master plan, that those lands were designated because they "had ecological value and passive recreation value," and that those lands were designated "with regard to the preservation of valuable and environmentally sensitive land and to the preservation of land which could and was appropriate for passive recreation. . . ." (Cove exhibit 10, pages 2-3).

In 1984, Vroom Development, the developer of Longboat Cove, challenged the land acquisition ordinance as invalid. Vroom had paid $61,962.35 in connection with obtaining permits for Longboat Cove. Vroom challenged the ordinances as violating due process, as lacking any rational nexus and any reasonable relationship with the public health, safety, and welfare, and as being unconstitutionally vague (Cove exhibit 11). In defending the land acquisition ordinances against Vroom in court, the Town defended that the ordinances were not vague because "[t]he Open Space Master

Plan . . . and the 1978 Comprehensive Plan Open Space Recreation Element provides further guidance to the use of the land and fees" (Cove exhibit 12, page 4). The Town's expert witness in Vroom, Ms. Satterthwaite, testified that the open space monies were "for people who are not interested in pursuing tennis, swimming and high facility activities. . . ." (Cove exhibit 16, page 142). Because 75% of Longboat Key's residents "live in multi-family units, many of which have active recreation facilities, like tennis courts and swimming pools, so that the need as expressed by the community itself is for open space. . .and so the planning for recreation and land and open space on Longboat Key is very much oriented to what we call passive recreation or open space" (Cove exhibit 16, page 141). The Town's expert was further asked:

> "Q. So, what we're talking about under the ordinance for the acquisition of parks and open space is the acquisition of these environmentally sensitive lands for passive parks or viewing and perhaps some extremely limited pathway or walkway development?
>
> "A. I would say that's correct. . . ." (Cove exhibit 16, page 145).

Certainly, having prevailed upon espousing one position in the Land's End and Vroom litigation, the Town cannot now change its mind concerning the restrictions on open space monies. See, e.g., Bregman v. Alderman, 955 F.2d 660, 664 n.3 (11th Cir. 1992) ("Judicial estoppel is a doctrine whereby a party is estopped from asserting a proposition in the present proceeding 'merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath' an allegation to the contrary. The doctrine is applicable despite the fact that the party asserting it was not involved in the earlier proceeding"); Columbia Gas Co. v. Thomas, 20 F. Supp. 251, 252 (N.D. Fla. 1937) (a party "cannot play fast and loose. As the pleadings are a part

of the record, there is such a thing as estoppel by pleading. . . ."); Crosby v. Burleson, 142 Fla. 443, 195 So. 202 (Fla. 1940); Smith v. Urquhart, 129 Fla. 742, 176 So. 787 (1937); Federated Mutual Implement and Hardware Ins. Co. v. Griffin, 237 So.2d 38, 42 (Fla. 1st DCA 1970) (judicial estoppel "is founded upon legal and equitable concepts of justice under the law, or perhaps on such popular expressions as 'you can't blow hot and cold at the same time' or 'you can't have your cake and eat it, too'").

As further evidence that use of open space funds has been limited to preserving properties in the natural state, the Town commission so recognized at its special workshop on May 10, 1989, where Vice-Mayor Dreyfus noted that lots listed for acquisition should only be lots in their natural state, where Commissioner Fernald noted that open space monies could not be used for playgrounds, and where Town Manager Cox agreed with Commissioner Fernald unless the commission made certain changes to the ordinances (Cove exhibit 17).

The Town, however, ignores the language "in its natural state" because, as codified, section 158.017 provides that open space monies may be used for parks and recreation areas and because parks and recreation areas are defined, generally, as including active recreation (see transcript at 153-154). Whatever may be the general definition of parks and recreation areas within the Town's zoning code, the preamble to the open space ordinances consistently have indicated that the open space monies are to preserve land "in its natural state" for parks and recreation areas. It is well-established that the specific prevails over the general, see, e.g., Gratz v. Florida

Unemployment Appeals Comm'n, 572 So.2d 1384 (Fla. 1991), Shelle v. Jack Eckerd Corp., 560 So.2d 361 (Fla. 2d DCA 1990), State v. Billie, 497 So.2d 881 (Fla. 2d DCA 1986), cert. denied, 506 So.2d 1040 (Fla. 1987), Floyd v. Bentley, 496 So.2d 962 (Fla. 2d DCA 1986), cert. denied, 504 So.2d 767 (Fla. 1987), Dubin v. Dow Corning Corp., 478 So.2d 71 (Fla. 2d DCA 1985), that preambles are to be considered in construing an ordinance or statute, see, e.g., State ex rel. Ervin v. Cotney, 104 So.2d 346, 349 (Fla. 1958), and that meaning must be given to every word of an ordinance or statute, see, e.g., Terrinoni v. Westward Hol, 418 So.2d 1143, 1146 (Fla. 1st DCA 1982), Pinellas County v. Woolley, 189 So.2d 217, 219 (Fla. 2d DCA 1966).

(5) Nature of the relief sought. This Court should quash the P and Z Board's grant of the special exception.

(6) Argument in support of the petition and appropriate citations of authority. Granting special exceptions is a quasi-judicial action and courts review quasi-judicial acts with non-deferential judicial standards. See, e.g., Jennings v. Dade County, 589 So.2d 1337, 1343 (Fla. 3rd DCA 1991). See also Amerifirst Development Corp. v. Pinellas County Board of Adjustment, Case No. 86-13534-21 (Judge Swanson, order filed December 5, 1986), where Judge Swanson noted that the Florida public policy in favor of ACLF's "can not be utilized to overcome deficiencies in Petitioner's burden of proving all eight of the standards for a special exception." Similarly in Levine v. Pinellas County Board of Adjustment, Appeal No. 88-12246 (Judge William L. Walker, order filed June 13, 1989), Judge Walker noted that "the burden of proof in special

exception cases is on the applicants. Applicants must show that they have met the statutory criteria for granting exceptions." Most recently, in Lawton v. Pinellas County Board of Adjustment, Case No. 93-413 CI-88B (Judge Stoutamire, order and opinion filed May 13, 1993), Judge Stoutamire similarly noted that "before [the applicant] could obtain the special exception she had to show that the granting of special exception would not create a parking or traffic problem. . . ."

(a) No impartial decision maker. At the public hearing, Longboat Cove again raised the issue concerning the impartiality of the P and Z Board determining the Town's application for special exception and of the Town attorney both advising the P and Z Board and being the legal advisor to the Town as the applicant (transcript at 114). The Town's planning and building director also also gave the staff report to the P and Z Board (transcript at 20-27), even though he had been involved in connection with expediting construction the south Ansel tract (see, e.g., Cove exhibit 41), and even though he would cross-examine Longboat Cove's expert at the public hearing. Moreover, two of the nine members on the P and Z Board sat on the five-member Town tennis committee (Cove exhibit 25). One member of the P and Z Board chaired the Town tennis committee (Cove exhibit 25). The Town's tennis committee had submitted "a rather comprehensive study [with] recommendations to the Town commission as to membership fees, estimated number of members, projected revenues, and the desired number of courts for this facility to be self-supporting" (Cove exhibit 31, page 1). Of course, Mr. Redgrave's and Mr. Rothenberg's involvement with the Town's tennis committee was known to other members of the

P and Z Board (see Cove exhibit 35). The project had been high-profile within the Town, with two years' preparation involving the Town manager (transcript at 28-30). "[T]he Town Manager and staff considered other Town properties for a suitable site, resulting in a recommendation for the eastern portion of the south Ansel tract. . . .The Town Commission approved [the south Ansel] site and staff proceeded to pursue design and development of the [south Ansel] site" (Cove exhibit 31, page 2). A former mayor testified at the hearing that the Town commission had supported the tennis complex (transcript at 100). Given all of these circumstances, Longboat Key did not receive procedural due process. Procedural due process, in a quasi-judicial proceeding such as was involved here, requires, at a minimum, an impartial decisionmaker and impartial advisors to the decisionmaker.

(b) Departure from essential requirements of law and no competent substantial evidence. The Town's zoning code provides that special exceptions may be granted only where the P and Z Board finds the proposed use complies with section 158.126. The zoning code further provides that,

> "[b]efore any special exception shall be granted, the Planning and Zoning Board . . . shall make a written finding that the granting of the special exception will not adversely affect the public interest and certifying that the specific requirements. . .and that, further, satisfactory provision and arrangement has been made concerning the following matters, where applicable. . ,
>
> "(1) Compliance with all elements of the Comprehensive Plan.
>
> "(2) That the use is a permitted use as set forth in the Schedule of Use Regulations. . . .
>
> "(11) Considerations relating to general compatibility with adjacent properties and other property in the district, including but not limited to:

> "(a) Whether the proposed use would be contrary to the land use plan and would have an adverse effect on the Comprehensive Plan.
>
> "(b) Whether the proposed use would be compatible with the established land use pattern. . . .
>
> "(i) Whether the proposed use would adversely affect property values in the adjacent area.
>
> "(k) Whether the proposed use would be out of scale with the needs of the neighborhood or the town."

The only "evidence" that the Town submitted in favor of its application was the self-serving conclusions of Mr. Gaffney, the Town's planning, building, and zoning director. Those conclusions are far, far short of being competent, substantial evidence, and the grant of the special exception, on the subject record, departs from the essential requirements of law.

Mr. Gaffney's conclusory statements, in Cove exhibit 42 and in the transcript at 20-27, do not constitute competent substantial evidence underlying the P and Z Board's grant of the special exception. Mr. Gaffney's "conclusions" had no underlying analysis, but were one-sentence recitations of the underlying determinations necessary for a special exception (see transcript at 140). For example, Mr. Gaffney summarily concluded that the application "does in fact comply with all of the elements of the Town's Comprehensive Plan" (transcript at 21), that "the proposed use is not contrary to the land use plan and does not have an adverse effect on the comprehensive plan" (transcript at 23-24), that "the proposed use is compatible with the established land use pattern" (transcript at 24), that "the proposed use does not adversely affect

property values in the adjacent area" (transcript at 25-26), and that "the proposed use is not out of scale with the needs of the neighborhood or the needs of the Town" (transcript at 26).

Mr. Gaffney, however, was unaware of the Town's defense of its open space ordinances (transcript at 48). Mr. Gaffney was unaware that the south Ansel tract had been recommended for preservation in the 1978 comprehensive plan (transcript at 47). Mr. Gaffney further claimed that the 1989 comprehensive plan was not site-specific (transcript at 48), even though it actually listed the south Ansel tract as "nature study/preservation" on the Town's open space master plan inventory (recreation and open space plan at 11). Mr. Gaffney also was unfamiliar with the proposed lease, which provided for operating hours from 8 am to 10 pm, seven days a week (transcript at 46).

Most incredulously, Mr. Gaffney claimed that the 1989 comprehensive plan projected a need for five additional private tennis courts (transcript at 49-50) even though the open space and recreation element adopts a need standard as one privately supplied tennis court per 5,000 persons (recreation and open space plan at 15), even though there are 140 privately supplied tennis courts in the Town (open space and recreation plan at 8, 9, 16), even though the seasonal high population of the Town is projected to be approximately 23,600 in 1998 (future land use plan at 23), thereby equating into an overall need for five privately-supplied tennis in 1998 (recreation and open space plan at 16), thus producing a surplus of 135 privately supplied tennis courts. What Mr. Gaffney's testimony shows is his enthusiasm in attempting to

support, somehow, his employer's application for the special exception, even to the extent of disregarding the clear language in the comprehensive plan that projects a "demand" for five, but no need in light of the 140 existing courts (open space and recreation element at 16). When confronted with the plan itself, Mr. Gaffney dismissed the clear language as an "interpretation," which "wouldn't be [his] interpretation" (transcript at 52).

In preparing his recommendations, Mr. Gaffney was unaware that the south Ansel tract had been purchased with open space monies (transcript at 42). Mr. Gaffney also was unaware that the use of open space monies was restricted to preserving "in their natural state" parks and recreation areas (transcript at 42). Rather, Mr. Gaffney opined that, even if the Town acquired property with open space monies, the Town could use the land in accordance with "the underlying zoning" (transcript at 42). Thus, if the Town acquired vacant and treed land, but zoned commercial, with open space monies, the Town could use the land for commercial purposes notwithstanding the restriction in the open space ordinances to preserving lands "in their natural states." Notwithstanding his total unfamiliarity with the open space ordinances, Land's End, and Vroom, however, Mr. Gaffney was willing to attempt to further his employer's interest in answering Chairman Karsch's leading question concerning whether the special exception complied with the open space ordinances (see transcript at 149).

Mr. Gaffney's conclusions were hardly surprising given that Town manager, Mr. Gaffney's immediate boss; and Town staff had previously recommended the south

Ansel tract as a suitable site for the tennis complex, given that the Town Commission, Mr. Gaffney's ultimate boss, had approved the south Ansel tract for the tennis complex, and given that Town staff had proceeded to pursue design and development of the tennis complex at the south Ansel tract (Cove exhibit 31, page 2). Mr. Gaffney, as the Town's planning, zoning and building director, of course, was involved in the Town studies leading up to the application for the special exception (see, e.g., Cove exhibit 31, page 11).

Even if the underlying open space ordinances and comprehensive plans did not undermine Mr. Gaffney's conclusions and even if Mr. Gaffney were "impartial," Mr. Gaffney's conclusions would not constitute competent, substantial evidence. See transcript at 140. In Duval Utility Co. v. Florida Public Service Comm'n, 380 So.2d 1028, 1031 (Fla. 1980), for example, the Supreme Court of Florida held that a county commissioner's and an accountant's "conclusory statements. . . . do not provide sufficient support for the findings necessary to underpin the commission's action. . . ." The Supreme Court went on to quash the underlying order because it "lack[ed] competent substantial evidence to support [it]," noting that competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion."

A "mere opinion . . . is not a valid substitute for evidence." In overturning an administrative order in North Florida Water Co. v. City of Marianna, 235 So.2d 487, 489 (Fla. 1970), the Supreme Court of Florida noted that "[g]overnmental

bodies. . .must base their decisions upon evidence and not upon some undisclosed factor or factors. A reviewing body's mere opinion . . . is not a valid substitute for evidence." See, e.g., Colonial Apartments, L.P. v. City of DeLand, 577 So.2d 593 (Fla. 5th DCA 1991); Pollard v. Palm Beach County, 560 So.2d 1358 (Fla. 5th DCA 1990); BML Investments v. City of Casselberry, 476 So.2d 713, 715 (Fla. 5th DCA 1985), review denied, 486 So.2d 595 (Fla. 1986); Conetta v. City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981); City of Apopka v. Orange County, 299 So.2d 657, 659-660 (Fla. 4th DCA 1974).

In Florida Rate Conference v. Florida Railroad & Public Utilities Comm'n, 108 So.2d 601, 607-608 (Fla. 1959), the Supreme Court of Florida, in quashing an order for lacking competent substantial evidence, noted that "evidence to be substantial must possess something of substantial and relevant consequence and must not consist of vague, uncertain, or irrelevant matter not carrying the quality of proof or having fitness to induce conviction. . . ."

As further pointed out below, there is no substantial competent evidence that the proposed tennis complex would not adversely affect the public interest, that the proposed tennis complex would comply with the comprehensive plan, that the proposed tennis complex would be a permitted use within the R-3MX zoning district, that the proposed tennis complex would be compatible with established land use patterns, that the proposed tennis complex would not adversely affect property values, and that the proposed tennis complex would not be out of scale with the needs of the neighborhood or the Town.

Courts have often quashed quasi-judicial or quasi-administrative orders, including special exceptions, for lacking competent substantial evidence or for departing from the essential requirements of law. See, e.g., Florida Power Corp. v. Public Service Comm'n, 487 So.2d 1061 (Fla. 1986); Dr. Phillips Utilities, Inc. v. Bevis, 289 So.2d 697 (Fla. 1974); Blocker's Transfer & Storage Co. v. Yarborough, 277 So.2d 9 (Fla. 1973); Florida East Coast Rv. v. King, 108 So.2d 523 (Fla. 1963); Florida Rate Conference v. Florida Railroad and Public Utilities Comm'n, 108 So.2d 601 (Fla. 1959); Laney v. Board of Public Instruction, 15 So.2d 748 (Fla. 1943); Marco Island Utilities v. Public Service Comm'n, 566 So.2d 1325 (Fla. 1st DCA 1990).

(1) Adverse affect on the public interest. Certainly, converting one of the only remaining ecosystems within the Town to a commercialized 10-court, 50-parking space tennis complex with restrooms, showers, offices, pavilion and observation deck adversely affects the public interest where the underlying property has native habitat, has been singled out in the Town's comprehensive plans for acquisition for passive open space, and was acquired with open space monies to preserve land "in its natural state" for parks and recreation areas (see transcript at 139-140). Indeed, the comprehensive plan reflects that preserving natural spaces as open space enhances the Town's island character that residents and visitors find so attractive (transcript at 142).

(2) Compliance with all elements of the comprehensive plan. The Town's planning director admitted that native vegetation covered the area where the 10 tennis

courts and 50 parking spaces would be constructed (transcript at 44). The comprehensive plan provides that open spaces provided by natural resources within the Town add significantly to the island character that residents and visitors find so attractive (transcript at 142).

The comprehensive plan provides that the LBK recreation center, rather than the south Ansel tract, would be "the primary recreation focus for public recreation" (open space and recreation policy 1.18; transcript at 51, 143, 172).

The comprehensive plan provides that the private sector, rather than the Town, is to supply recreation in the Town (comprehensive plan, recreation and open space element at 13; see transcript at 140, 171).

The comprehensive plan provides that the R-3MX designation is for residential use, not for a commercially-operated tennis complex (transcript at 142). As Mr. Smith, Longboat Cove's expert, testified, "parks" are listed within the open space designation in the comprehensive plan, rather than within the residential designation (transcript at 169). Mr. Smith conceded that "perhaps a small passive open park area with limited use -- landscaping or something -- could be considered appropriate. But the type of use we're talking about here, and has been expressed as a very intensive active recreation area that certainly has some commercial aspects to it, in my mind, is not compatible with that land use classification" (transcript at 169). When Ordinance 93-13 was passed, the Town made no amendment to the comprehensive plan (transcript at 43).

The comprehensive plan indicates that one tennis court, at $24,000, would be sufficient to maintain the level of service standards through 1995, and that two courts would be sufficient through 1998 (comprehensive plan, capital improvements element at 4; comprehensive plan, recreation and open space element at 16; see transcript at 141, 172, 173).

The comprehensive plan lists the south Ansel tract as "nature study/conservation" on the open space master plan inventory (comprehensive plan, recreation and open space element at 11; see transcript at 140, 172-173).

The proposed tennis complex would violate policy 1.3.2 in the comprehensive plan to minimize impacts upon the natural environment, as Mr. Smith, Longboat Cove's expert, testified. Mr. Smith explained that the south Ansel tract

> "is very sensitive from an environmental point of view. It's rich in natural resources. As has been pointed out, the project utilizes about 20 percent of the site for impervious coverage. But it utilizes virtually all of the nonwetland area. Just a few little pockets here and there between the courts that are not utilized. So it's a very intensive application of a land use upon this sensitive property" (transcript at 170-171).

The south Ansel tract was acquired with open space monies (see transcript at 144). Those open space monies were acquired pursuant to open space ordinances implementing comprehensive plans as early as the 1979. The ordinances have consistently indicated that they are to preserve land "in its natural state" for parks and recreation areas. Constructing a 10-court, 50-parking space tennis complex with pavilion, restrooms, showers, office, and observation deck in the midst of undisturbed native habitat does not preserve the land "in its natural state," especially where the Town has described the south Ansel tract as "[t]he most active and productive site

for wildlife [in the Town with] excellent potential for a passive park and nature preserve" (Cove exhibit 1, page 4). Mr. Smith, Longboat Cove's expert, testified that the south Ansel tract was "environmentally sensitive" and that the tennis complex would destroy the "central portion" of the south Ansel tract (transcript at 185).

(3) Permitted use in the schedule of uses. The Town's zoning code provides that the "purpose" of the R-3MX zoning district is "to delineate those areas suitable for mixed residential development of a low-medium-density character together with associated accessory uses." Single-family dwellings and multi-family dwellings with less than 10 dwelling units are listed as permitted uses in the R-3MX zoning district. On June 24, 1993, the Town commission added "parks and recreation areas" as a special exception use in all residential districts, including the R-3MX zoning district (Cove exhibit 23). Previously, "public parks and recreation areas" were permitted uses in the INS, Community Facility Institutional District, and "[p]ublic parks and recreation areas" were permitted uses in the OI, Office-Institutional District (see transcript at 43, 128-133). The zoning code provides that the purpose of the INS zoning district is "to delineate those areas suitable for public and semi-public facilities." The purpose of the OI zoning district is "to delineate those areas which, by their location, are suitable to accommodate offices and institutional uses. . . ." "Parks and recreation areas" must mean something different than "public parks and recreation areas." See, e.g., State v. Robertson, 614 So.2d 1155, 1156 (Fla. 4th DCA 1993) (Farmer, J., concurring) ("the legislative use of different terms in different statutes on the same subject is strong evidence that different meanings were intended"); Department of Professional

Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515, 518 (Fla. 1st DCA 1984) ("[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended"); Ocasio v. Bureau of Crimes Compensation Division of Workers' Compensation, 408 So.2d 751, 753 (Fla. 3rd DCA 1982) (legislature's "deliberate use of a quite different term. . .is strong evidence indeed that it intended a quite different meaning").

As Mr. Smith, Longboat Cove's expert, testified, because the proposed tennis complex would be high-intensity commercial, it would not fall within the special exception for "parks and recreation areas" in residential zones. "Parks and recreation areas that have been put into the ordinance in '93 certainly doesn't intend it to be a commercial enterprise or one that generates profit" (transcript at 174).

Moreover, the Town would permit tennis lessons and sales of tennis-related necessities, such as stringing racquets, selling racquets, and selling tennis balls "in a very limited supply" (transcript at 75). The lessee-operator would have every incentive to maximize tennis lessons, 14 hours a day, seven days a week, because revenue from tennis lessons would not be subject to the percentage lease with the Town (Cove exhibit 27, page 2-17); WCTM projected $18,000 in annual revenue from tennis lessons (Cove exhibit 28). Such accessory commercial activities, however, are not permitted in the R-3MX zoning district. Section 158.006 of the Town's zoning code defines "commercial use" as "[a]n activity involving the purchase and sale or exchange of goods, commodities or services carried out primarily for the purpose of gaining a profit." Section 158.127 of the Town's zoning code clearly provides that

"[n]o commercial accessory use will be permitted in an R District. . . ." Section 158.127 does not sanction commercial accessory uses "in a very limited supply."

(4) Compatibility with the established land use pattern. As pointed out above, residential uses and zones border the 13.8 acres to the north and south (see transcript at 175-176). North of the bordering residential street is Durante Park, a "passive" park (transcript at 15). Sarasota Bay lies to the east of the 13.8 acres. Coco's Boutique, a low-intensity commercial use on Gulf of Mexico Drive, and a planned fire station lie to the west of the 13.8 acres. Across Gulf of Mexico Drive from Coco's are the Longboat Cove condominiums. Mr. Levine, the owner of 3.5 residentially-zoned acres just south of the proposed tennis complex, testified concerning adverse impacts on his property (see transcript at 68-74, 142; Cove exhibits 25, 38). The president of a nine-homesite single-family development just south of the Mr. Levine's property testified that the noise and lights would adversely affect his neighborhood (transcript at 102). Mr. Smith, Longboat Cove's expert, testified that the proposed tennis center "is of a community-wide character and should. . .be located in a high activity area. The proposed location would negatively impact the residential areas both to the north and to the south" (transcript at 169). Mr. Smith further testified that the proposed tennis complex would generate noise, glare and otherwise adversely affect

> "adjoining properties and properties generally in the district. Certainly this is going to produce noise. With ten courts going, you're going to have a lot of noise generated by this that it not there now. I lived for years about 1,400 feet from two courts, and I could hear the voices of people at times and the clicking of tennis balls. That's two small courts. So you're going to have a lot of noise from this. You're going to have

> some ill effects of light, regardless of how carefully it's designed. . . .This is going to be a detriment to the surrounding areas because now there is nothing here. Twenty feet from these residential areas there is going to be 50 cars parked that are not here now. And 20 feet from the residen[oes] to the south you're going to have eight tennis courts. That's quite a difference. And it's going to have a negative effect on the adjoining property" (transcript at 174-175; see transcript at 176).

Mr. Smith went on,

> "I don't find the use to be in keeping with the intent of the 3MX classification. Should perhaps be located in the INS classification, which provides for public uses and public parks as a separate district. I don't think this type of use was intended to be placed in a district that's primarily residential. . . .This proposal is injecting a major activity use right into the residential pattern of residences to the north and the south. I don't find it to be compatible with that pattern" (transcript at 178).

Mr. Smith concluded that the proposed tennis center "[i]s not just a park. It's not just a recreation area. It's an active sport facility for tennis with commercial application. . . .[It is] inappropriate for this site" (transcript at 181).

Board of County Commissioners v. Lowas, 348 So.2d 13, 18 (Fla. 3rd DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978), is controlling. There, Dade County had granted an unusual use permit, Dade County's equivalent to a special exception, for a 160-family tennis club in a residential zone. The club would consist of a swimming pool and eight tennis courts. The Third District quashed the grant even though the proposal there would have no lights. The Third District held: "It is apparent what the applicant attempted to do, with all candor, was to organize a tennis club for profit. . . .Regardless of its nomenclature, the impact of such a request, if granted, would have been totally out of character with the neighborhood, and in effect amounted to a rezoning of the property. . . .The club expected to have 160 family

professionals, sales at a pro shop and, by its very nature, would have generated traffic, noise and activity, which are not compatible to an exclusive one-acre residential area. . . ." Certainly, the competent substantial evidence at the public hearing indicates that Lowas applies here, and the special exception should be quashed.

(5) Adverse impact upon property values in the adjacent area. Mr. Levine, the owner of the 3.5 residentially-zoned acres to the immediate south of the south Ansel tract, testified that "[I]f you've got ten tennis courts a few yards away from your house, flood lit, people playing 14 hours a day running around, that's something different from an open woodland area, and certainly would affect the property values. . ." (transcript at 71). Mr. Klinger, the president of a nine-homesite residential development just south of the 13.8 acres, similarly testified that the tennis complex would diminish his property values (transcript at 102). Mr. Smith, Longboat Cove's expert, testified that the proposed tennis center "certainly will affect property values" and "will make [nearby] lots much less desirable to build a single-family residence" (transcript at 179-180). Mr. Smith further testified that the proposed tennis center "would be damaging to [Longboat Cove] because of the noise, the light, the traffic and the change in use that's there. I think that definitely would be a damage to them" (transcript at 182).

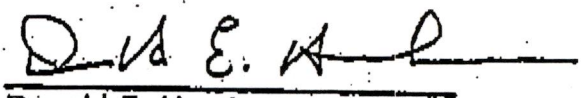
(6) Out of scale with the needs of the neighborhood and Town.

The Town's comprehensive plan projects a demand for three publicly-supplied tennis courts through 1998 (open space and recreation element at 16). The demand

is based upon the Town's projected seasonal-high population of approximately 23,600 (future land use plan at 23) and the Town's standard of one publicly supplied tennis court per 8,000 persons (open space and recreation element at 15). Given that the Town already had one or two publicly supplied tennis courts, the deficit through 1998 would, at most, be one or two tennis courts town-wide (see transcript at 143, 172). A ten-court complex is out of scale with the Town's needs, and certainly out of scale with the neighborhood's needs. As Mr. Smith, the expert, put it, "ten tennis courts are simply not needed. . ., certainly not from a neighborhood standpoint. . . .There is no neighborhood need demonstrated to put an active intense commercial center with commercial implications in this area. And I think it's been pointed out with regard to the expressed needs of the Town in your adopted Comprehensive Plan, it doesn't warrant the project there either" (transcript at 179-180).

WHEREFORE, this Court should quash the P and Z Board's grant of the special exception. The P and Z Board has denied Longboat Cove procedural due process, the grant of the special exception departs from the essential requirements of law, and no competent substantial evidence supports the grant of the special exception.

Respectfully submitted,



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April 25, 1995

Mr. Griff H. Roberts, Town Manager
Town of Longboat Key
501 Bay Isles Road
Longboat Key, Florida 34228

Re: Longboat Cove Condominium Association, Inc. v. Town of Longboat Key Planning & Zoning Board

Dear Griff:

Enclosed is a copy of the Response to Verified Complaint which was filed in the above-referenced matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

David P. Persson

DPP:awg128
Enclosures

DPP

BEFORE THE TOWN OF LONGBOAT KEY, FLORIDA
PLANNING AND ZONING BOARD
FOR THE TOWN OF LONGBOAT KEY, FLORIDA

LONGBOAT COVE CONDOMINIUM
ASSOCIATION, INC.

Plaintiff/Petitioner,

vs.

TOWN OF LONGBOAT KEY, FLORIDA and
PLANNING AND ZONING BOARD,
TOWN OF LONGBOAT KEY,

Defendants/Respondents.
_____/

RESPONSE TO VERIFIED COMPLAINT

Defendants, the TOWN OF LONGBOAT KEY, FLORIDA and PLANNING AND ZONING BOARD, TOWN OF LONGBOAT KEY, by and through their undersigned counsel, respond to the Verified Complaint filed with the TOWN on April 20, 1995 as follows:

1. Defendants initially respond by stating that the verification of the Verified Complaint is inadequate and legally insufficient because it is not made by the "complaining party", as required by §163.3215, and further because the verification is qualified in that it only provides that the facts set forth in the Verified Complaint are true "..to the best of [the signatory's] knowledge and belief", which qualification and equivocation renders the verification legally insufficient and the Verified Complaint improper and inadequate.

2. However, in the event it is subsequently determined that the Verified Complaint was properly verified, Defendants respond by stating that they have reviewed the Complaint, the Comprehensive

Plan, and the record of the proceedings in this matter and have determined that the Verified Complaint is without merit and that the special exception is consistent with the TOWN's Comprehensive Plan.

BARRY R. LEWIS, JR.
Florida Bar No. 0785784
Davis, Persson, Smith & Darnell
2033 Main Street
Suite 406
Sarasota, Florida 34237
(813) 365-4950

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via fax and U.S. Mail to Donald Hemke, P.O. Box 3239, Tampa, Florida 33601 this 21st day of April, 1995.

Barry R. Lewis, Jr.

BEFORE THE TOWN OF LONGBOAT KEY, FLORIDA
PLANNING AND ZONING BOARD
FOR THE TOWN OF LONGBOAT KEY, FLORIDA

LONGBOAT COVE CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Plaintiff/Petitioner,

vs. CASE NO.

TOWN OF LONGBOAT KEY, FLORIDA, a municipal corporation, and PLANNING AND ZONING BOARD, TOWN OF LONGBOAT KEY,

Defendants/Respondents.
_____/

VERIFIED COMPLAINT

Plaintiff/petitioner, Longboat Cove Condominium Association, Inc. ("Longboat Cove"), by its undersigned attorneys, files this verified complaint against defendants/respondents, Town of Longboat Key, Florida ("the Town"), and Planning and Zoning Board ("P and Z Board"), Town of Longboat Key, and says:

1. This is a verified complaint pursuant to Florida Statutes 163.3215 to prevent the P and Z Board and Town from taking any action on a development order which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the Town's comprehensive plan adopted under Florida Statutes, Chapter 163, Part II.

2. Longboat Cove is an aggrieved or adversely affected party within Florida Statutes 163.3215 and applicable Florida common law. Longboat Cove is a 26-unit residential condominium across Gulf of Mexico Drive from 13.8 undeveloped acres

that the Town proposes to convert into a commercially-operated, tennis center consisting of 10 tennis courts, 50 parking spaces, restrooms and showers, offices, and a tennis observation deck that will operate 14 hours a day, seven days a week. Further, Longboat Cove actively opposed the Town's application for the special exception and presented substantial competent evidence to the P and Z Board in opposition to the Town's application for the special exception. Finally, Longboat Cove is uniquely located within the community in relation to the proposed tennis center in that Longboat Cove is located within 500 feet of the proposed tennis center and a significant portion of the daily traffic, noise, lights and adverse impact will occur within its neighborhood. Therefore, Longboat Cove will suffer special damages unique from the balance of the community and will be adversely affected if the tennis center were constructed and operated.

3. The Town has delegated final quasi-judicial decisionmaking authority on special exceptions, such as is involved here, to the P and Z Board.

4. On February 24, 1995, the Town applied for a special exception to construct the tennis center on approximately 14 acres designated as RM-3MX, "Medium Density/Mixed Residential," in the Town's comprehensive plan and zoned R-3MX, "Low-Medium-Density Mixed Residential District."

5. On March 14, 1995, the Town's planning, zoning and building director opined, in a one-sentence conclusion, that the application complies "will all elements of the Town Comprehensive Plan." The director's recommendation failed to address many of the applicable policies and standards in the comprehensive plan, including,

but not limited to, those policies and standards noted in paragraphs 9 through 12 below.

6. On March 21, 1995, the P and Z Board held a public hearing on the Town's application for special exception. The Town's planning, zoning and building director spoke, but again only concluded that the application complied with the comprehensive plan. Among those speaking in opposition to the application were Longboat Cove representatives Judson Pearl, Donald E. Hemke and Martin Smith. The P and Z Board also received into evidence 46 exhibits from Longboat Cove. Longboat Cove presented competent, substantial and unrebutted evidence that the tennis center would violate and was inconsistent with the Town's comprehensive plan. Despite the overwhelming evidence that the tennis center would not be consistent with the Town's comprehensive plan but with one commissioner noting that "he hoped for the best," the P and Z Board approved 7-0 a special exception for the tennis center.

7. The special exception is a development order, as defined in Florida Statutes 163.3164. Section 163.3164(6) defines "development order" as "any order granting. . .an application for a development permit," and section 163.3164(7), in turn, defines "development permit" as including any special exception.

8. On June 5, 1989, the Town Commission adopted the Town's comprehensive plan ("comprehensive plan"). The comprehensive plan consists of nine elements, including a future land use plan, a conservation and coastal management plan, a recreation and open space plan, and a capital improvements plan.

9. The future land use element provides that it must be "definitive enough to plan and program facilities to meet the needs of the particular community." The comprehensive plan defines "open space" land use as including lands "for recreational and open space purposes, including. . .public recreation facilities." The comprehensive plan defines the "residential multifamily" land use as "land used for residential purposes." The comprehensive plan defines "commercial" land use as "land used for retail; trade, offices, . . .service outlets, . . . and specialty shops," including zoning code classifications OI, office institutional. The comprehensive plan defines "public" land use as including "public buildings and grounds." The future land use map designates the 13.8 acres as RM-3MX, "Residential Medium Density/Mixed Residential, 3 dwelling units per acre." The future land use element provides that "[p]ublic facilities for current and future populations are deemed adequate and no additional acreage is required." The future land use element indicates that "passive recreation areas" are the most appropriate use for lands designated as "open space," that low to medium density residential is most appropriate for lands designated as RM-3, that offices and institutional uses are most appropriate for lands designated as OI, and that public and semi-public facilities are most appropriate for lands designated as INS. The future land use element further provides that public facilities "will be located to best. . .minimize impacts on the natural environment."

10. The recreation and open space element of the comprehensive plan provides "[t]he active recreation facilities on the key are exclusively provided through private means" and that "[t]ennis courts are in abundant supply. . . ." The recreation

and open space element goes on to provide that "[p]ublic provision of recreation/open space facilities on Longboat Key is entirely resource-based," such as providing sites and facilities for picnicking, hiking, hunting, water sports, fishing or simple enjoyment of nature. The recreation and open space element goes on to provide that "activity-based recreation sites and facilities on Longboat Key are provided by the private sector in the form of [tennis]." The recreation and open space plan further noted that tennis was available at the LBK recreation center. Table 3, the existing open space master plan inventory, listed the 13.8 acres (which are part of the 5450-5490 Blocks GMD) as "nature study/conservation." The recreation and open space element establishes a recreation standard of one privately supplied court per 5,000 persons and one publicly supplied tennis court per 8,000 persons. Thus, the recreation and open space plan reflects no need for more privately supplied tennis courts given that the Town has 140 privately supplied courts but only needs five courts through 1998, and reflects no need for publicly supplied courts given that the Town will have three publicly supplied courts and needs only three publicly supplied courts through 1998. Recreation policy 1.1.8 provides that the Longboat Key recreation center would be considered "as the primary recreation/activity focus for public recreation."

11. The capital improvements element of the comprehensive plan lists one tennis court at an estimated cost of $24,000 as necessary through 1995. The capital improvements element also lists the level of service as one public tennis court per 8,000 persons and one private tennis court per 5,000 residents. The five-year schedule of improvements lists one tennis court, at an estimated cost of $24,000.

12. The conservation and coastal management element of the comprehensive plan notes that the Town "is considered an urban setting with limited natural ecosystems remaining." Conservation and coastal management policy 1.1.1 provides that "[n]o development activity shall be allowed in a wetland area unless competent evidence indicates that 1) dominant vegetation is no longer comprised of wetland types; and 2) the water regime has been permanently altered naturally or artificially in a manner to preclude its associated watershed areas from functioning as wetlands."

13. The special exception is inconsistent with, and violates, the comprehensive plan in that, inter alia:

(a) The comprehensive plan lists the 13.8 acres as "nature study/conservation" on the open space master plan inventory.

(b) The comprehensive plan indicates that the Town's island character depends upon protection and appropriate use of its natural resources, such as the 13.8 acres.

(c) The comprehensive plan indicates that the Town needs, at most, two additional publicly-supplied tennis courts through 1998.

(d) The comprehensive plan indicates that any additional tennis courts should be constructed at the Town youth center, "the primary focus for public recreation"in the Town, rather than on the 13.8 acres.

(e) The comprehensive plan indicates that private interests, rather than the Town, are to supply recreation in the Town.

(f) The comprehensive plan indicates that Town facilities should be located to minimize impacts upon the natural environment.

(g) The comprehensive plan indicates that R3-MX lands are "for residential purposes," rather than high-intensity commercialized recreation; the comprehensive plan indicates that high intensity public parks are appropriate for lands designated as institutional or commercial.

(h) The comprehensive plan indicates that no development should be permitted which would adversely affect wetlands.

14. All conditions precedent to the relief herein demanded have occurred or have been performed.

Wherefore, Longboat Cove prays that the Board and the Town declare that the special exception is inconsistent with and violates the comprehensive plan.

Respectfully submitted,

Donald E. Hemke
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Tampa, Florida 33601
(813) 223-7000
Attorneys for Plaintiff/Petitioner

VERIFICATION

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared Donald E. Hemke, who after being duly sworn, deposes and says that he is the authorized representative of Longboat Cove, the plaintiff/petitioner in the above styled cause, and that the facts set forth therein are true to the best of his knowledge and belief.

Witness my hand and official seal in the county and state last aforesaid, this 20th day of April, 1995.

Tammy L Stanton

Tammy L. Stanton
Notary Public, State of Florida

(NOTARIAL SEAL)

(Commission Expiration Date)

TAMMY L. STANTON
MY COMMISSION # CC 427006
EXPIRES: January 9, 1999
Bonded Thru Notary Public Underwriters