

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
INC., and KEN HOFER,

Petitioners,

vs.

CASE NO. 5D09-3789
L.T. Case No. 09-19AP

SEMINOLE COUNTY, FLORIDA,
AHG GROUP, LLC, and
UNIVERSITY OF CENTRAL
FLORIDA FOUNDATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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PREFACE

Petitioners Carillon Community Residential Association, Inc., and Ken Hofer will be collectively referenced as the “Petitioners.” Petitioners Carillon Community Residential Association, Inc., and Ken Hofer will be individually referenced as the “Association” and “Mr. Hofer,” respectively.

Respondent Seminole County, Florida, will be referenced as the “County.”

Respondents AHG Group, LLC, and University of Central Florida Foundation, Inc., will be collectively referenced as the “Developers.”

References to the Appendix submitted by the Petitioners in support of this Petition for Writ of Certiorari will be to the Exhibit and, where appropriate, the page number. For example, a reference to Page 7 of Exhibit 1 of the Appendix will be denoted as follows: “App., Ex. 1 at 7.”

I.

INTRODUCTION

The primary issue in this case is whether neighbors, such as the Petitioners, who own property and/or reside adjacent to a proposed development have a due process right to cross-examine adverse witnesses during a quasi-judicial hearing at which a local government is deciding whether to approve the proposed development. This issue arises from a decision by the Seminole County Board of County Commissioners (“BOCC”) to approve a major amendment to the Carillon Planned Unit Development (“Carillon PUD”), which includes the Petitioners’ single-family neighborhood, to allow a four (4) story, 600-bed University of Central Florida (“UCF”) student housing complex to be built on Parcels 201/401 and Parcel 202, Lot 2 therein (“Carillon Major PUD Amendment”).

In their Amended Petition for Writ of Certiorari filed in Circuit Court, the Petitioners asserted, *inter alia*, that the BOCC violated the Petitioners’ right to due process by denying the Petitioners’ request to cross-examine adverse witnesses during the quasi-judicial hearing on the Carillon Major PUD Amendment. (App., Ex. 11 at 21-27). In addition, the Petitioners asserted that the BOCC’s approval of the Carillon Major PUD Amendment violated several minimum requirements of the County’s

Land Development Code (“LDC”). (*Id.* at 27-39). The Circuit Court denied the Petitioners’ Amended Petition for Writ of Certiorari.

The Petitioners respectfully submit that, in upholding the BOCC’s decision, the Circuit Court departed from the essential requirements of law because:

- A. The Circuit Court failed to apply the correct law in concluding that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC’s quasi-judicial hearing on the Carillon Major PUD Amendment; and
- B. The Circuit Court failed to apply the correct law in concluding that the Carillon Major PUD Amendment complied with the County’s LDC.

Accordingly, the Petitioners request that this Court quash the Circuit Court’s Order dated September 25, 2009.

II.

BASIS FOR INVOKING JURISDICTION

Jurisdiction to review this action is based upon Florida Rule of Appellate Procedure 9.030(b)(2)(B) and Article V, Section 4(b) of the Florida Constitution.

III.

FACTUAL BACKGROUND

A. Parties

Petitioner Carillon Community Residential Association, Inc., is a Florida not-for-profit corporation comprised of the owners of 833 single-family homes within the Carillon subdivision in Seminole County, Florida. (App., Ex. 2 at 93-96). The Carillon subdivision makes up the vast majority of the Carillon PUD, which also includes the property subject to the Carillon Major PUD Amendment. (App., Ex. 7). The Association and its members will be substantially affected by the adverse impacts associated with the Carillon Major PUD Amendment, including, but not limited to, the noise, lighting, litter, traffic, crime, and other activities associated with the constant influx of 600 college students and their guests within the Petitioners' neighborhood. (App., Ex. 2 at 93-99, 127; Ex. 8).

Petitioner Ken Hofer is the President of the Association, and owns property at 3383 Foxcroft Circle in the Carillon PUD, which is adjacent to the proposed student housing complex. (App., Ex. 2 at 130-32; Ex. 6 at 743). Mr. Hofer will be substantially affected by the adverse impacts associated with the Carillon Major PUD Amendment, including, but not limited to, the noise, lighting, litter, traffic, crime, and

other activities associated with the constant influx of 600 college students and their guests within the Petitioners' neighborhood. (App., Ex. 2 at 93-99, 127; Ex. 8).

Respondent AHG Group, LLC, is the owner of Parcel 202, Lot 2 in the Carillon PUD, which is currently developed with a vacant Winn Dixie grocery store. (App., Ex. 5).

Respondent University of Central Florida Foundation, Inc., is the owner of Parcels 201 and 401 in the Carillon PUD, which are currently vacant. (*See id.*).

Respondent Seminole County, Florida, is a political subdivision of the State of Florida, with its principal place of business located at 1101 East First Street, Sanford, Florida. (App., Ex. 2 at 1).

B. The Developers' Application For The Carillon Major PUD Amendment

On or about April 13, 2007, the Developers submitted an application with the County for the Carillon Major PUD Amendment. (App., Ex. 5). As previously mentioned, the Carillon Major PUD Amendment seeks to amend the Final Master Plan for the Carillon PUD to allow, among other things, a 600-bed UCF student housing complex to be developed on Parcels 201/401 and Parcel 202, Lot 2 of the Carillon PUD. (App., Ex. 3 at A1).

Pursuant to the Revised Final Master Plan submitted as part of the Carillon Major PUD Amendment, the vacant Winn Dixie store on Parcel 202, Lot 2 would be demolished and replaced with a four (4) story, 182,435 square foot student housing building, featuring 112 units with 428 beds. (*Id.*) In addition, a two (2) story, 45,652 square foot religious community center and UCF student center would be developed on Parcel 202, Lot 2. (*Id.*) A four (4) story parking garage with roof parking, totaling approximately 209,000 square feet, would also be developed on Parcel 202, Lot 2 as part of the Carillon Major PUD Amendment. (*Id.*)

As proposed by the Carillon Major PUD Amendment, Parcels 201/401 of the Carillon PUD would be developed with two (2), three (3) story student housing buildings. (*Id.*) The student housing buildings on Parcels 201/401 would feature 44 units with 172 student beds, totaling 63,934 square feet. (*Id.*) The first floor of such buildings would be used for retail/commercial uses, totaling 35,877 square feet. (*Id.*) An additional 18,100 square feet of retail/commercial space would be developed in two (2) separate buildings on Parcels 201/401. (*Id.*) A parking garage with roof parking, totaling approximately 78,000 square feet, would also be developed on Parcels 201/401 as part of the Carillon Major PUD Amendment. (*Id.*)

C. The BOCC's Hearing On The Carillon Major PUD Amendment

On January 27, 2009, the BOCC held a quasi-judicial hearing on the Carillon Major PUD Amendment. (App., Ex. 2). The Petitioners appeared at the quasi-judicial hearing in opposition to the Carillon Major PUD Amendment. (*Id.* at 15, 24, 91-128, 130-32).

Prior to the commencement of the quasi-judicial hearing, the Petitioners' counsel asked the County Attorney whether the BOCC would be swearing witnesses and allowing cross-examination. (*Id.* at 15). The County Attorney indicated that cross-examination would not be permitted and witnesses would not be sworn. (*Id.*).

At the outset of the January 27 quasi-judicial hearing, the County's Assistant Planning Manager provided a brief overview of the Carillon Major PUD Amendment. (*Id.* at 4-14). Following the Assistant Planning Manager's introduction, the Petitioners' counsel requested confirmation on the record from the BOCC that cross-examination would not be permitted:

Before the hearing started, we had a brief discussion with the County Attorney about placing witnesses under oath and also allowing cross-examination. It was my understanding that the Board would not allow that to occur tonight. So I just wanted to raise that, get that on the record, and have a – with the permission of the Chairman and also the County Attorney – a continuing objection on that ground and reconfirm that there will be no cross-examination [of] testimony at all.

(*Id.* at 15). In response, the BOCC's Chairman and the County Attorney confirmed that the BOCC would not allow any cross-examination during the quasi-judicial hearing, nor would the BOCC swear the witnesses:

[BOCC CHAIRMAN]: The Board of County Commissioners and, I believe, Mr. McMillan can confirm or deny, over the past number of years, and I believe the conversation we had was at least 20 times, that we have not done that yet to date, correct?

[COUNTY ATTORNEY]: That is correct.

[BOCC CHAIRMAN]: We will be following our standard format.

(*Id.*).

Thereafter, the Developers' counsel provided an overview of the Carillon Major PUD Amendment, including revisions the Developers made to the proposed Revised Final Master Plan since the Planning and Zoning Commission's meeting on January 7, 2009. (*Id.* at 16-23). In so doing, the Developers' counsel distributed an updated Revised Final Master Plan.¹ (*See id.* at 18).

¹ The Petitioners' counsel objected to the Developers' last-minute introduction of a revised site plan, requesting a continuance of the quasi-judicial hearing to allow an opportunity for the Petitioners' expert witnesses to review the revised plan. (App., Ex. 2 at 24). The BOCC, however, denied the Petitioners' request for a continuance. (*Id.* at 24-25).

The Developers presented numerous witnesses during their presentation, including the Developers' architect, land use consultant, and traffic engineer, and representatives from the UCF Foundation, the UCF police department, and the UCF Department of Student Development and Enrollment Services. (*Id.* at 25-59). The BOCC prohibited the Petitioners' counsel from cross-examining any of the Developers' witnesses. (*Id.* at 15). Consequently, the Petitioners were deprived of an opportunity to question the basis and accuracy of the statements made by such witnesses.

Following the Developers' presentation and comments from lay witnesses in support of the proposed development, the Petitioners were provided an opportunity to make a presentation to the BOCC in opposition to the Carillon Major PUD Amendment. (*Id.* at 91-128, 130-32). Matt West, AICP, the former Planning Manager for Seminole County, provided expert testimony on the Petitioners' behalf regarding the procedural and substantive deficiencies of the Carillon Major PUD Amendment. (*Id.* at 99-119).

Among other substantive deficiencies, Mr. West testified that the Revised Final Master Plan failed to comply with the minimum submittal requirements of the County's LDC, and that the traffic impact study submitted as part of the Carillon Major PUD Amendment did not utilize a two (2) mile study radius, as required by the

County's LDC for projects with more than 50,000 square feet of commercial/retail use. (App., Ex. 2 at 116; Ex. 8 at 2-3). Mr. West further testified that the Carillon Major PUD Amendment did not comply with the minimum upland buffer requirements set forth in the County's LDC for property located within the Econlockhatchee River Basin. (App., Ex. 2 at 112-13; Ex. 8 at 4).

Following the Association's presentation, Mr. Hofer introduced a petition signed by approximately 600 of the 833 property owners in the Carillon PUD voicing their opposition to the proposed four (4) story, 600-bed student housing complex. (App., Ex. 2 at 131). Numerous additional residents testified in opposition to the Carillon Major PUD Amendment during the January 27 quasi-judicial hearing, stating that the proposed 600-bed student housing complex was inherently incompatible with the adjacent single-family homes within the Carillon PUD. (*Id.* at 128-47, 149-54).

At the conclusion of the January 27 quasi-judicial hearing, the BOCC voted to approve the Carillon Major PUD Amendment. (*Id.* at 186). The BOCC's decision to approve the Carillon Major PUD Amendment is memorialized in the "Carillon Planned Unit Development Developer's Commitment Agreement Addendum #4." (App., Ex. 4).

D. The Circuit Court Proceeding

On February 26, 2009, the Petitioners timely sought certiorari review of the BOCC's approval of the Carillon Major PUD Amendment before the Circuit Court. The Petitioners subsequently filed an Amended Petition for Writ of Certiorari on April 29, 2009. (App., Ex. 11). Thereafter, the County and the Developers filed separate Responses to the Petitioners' Amended Petition for Writ of Certiorari. (App., Ex. 12; Ex. 13). On July 27, 2009, the Petitioners filed their combined Reply to the Respondents' Responses. (App., Ex. 14). The Petitioners also filed a Request for Oral Argument on July 27, 2009. (App., Ex. 15).

On September 25, 2009, without granting any oral argument, the Circuit Court issued its "Order Denying Amended Petition for Writ of Certiorari."² (App., Ex. 1). On October 26, 2009, the Petitioners timely filed this Petition for Writ of Certiorari in this Court seeking second-tier certiorari review of the Circuit Court's Order.

² Although dated September 25, 2009, the Circuit Court's Order was not filed with the Clerk of Court, and, thus, not "rendered," until September 29, 2009. (App., Ex. 1 at 1).

IV.

STANDARD OF REVIEW

The Petitioners seek review of the Circuit Court's Order denying their Amended Petition for Writ of Certiorari, and have timely filed this Petition for Writ of Certiorari pursuant to Florida Rule of Appellate Procedure 9.100(c)(1). The standard of review for this Court is limited to determining: (1) whether the Circuit Court afforded due process of law; and (2) whether the Circuit Court departed from the essential requirements of law, *i.e.*, applied the correct law. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). "This review includes determining whether the circuit court correctly applied the law to the facts of the case." *Dougherty ex rel. Eisenberg v. City of Miami*, 2009 WL 3190382, *1 (Fla. 3d DCA Oct. 7, 2009).

A circuit court's failure to properly apply the principles of due process constitutes a departure from the essential requirements of law and will result in the circuit court's decision being quashed on second-tier certiorari review. *See Kupke v. Orange County*, 838 So. 2d 598, 599 (Fla. 5th DCA 2003) (quashing decision where circuit court misapplied the law in denying petitioner's due process claim). Likewise, a circuit court's failure to enforce the plain requirements of a local zoning code constitutes a departure from the essential requirements of law and will result in the

circuit court's decision being quashed on second-tier certiorari review. *See Auerbach v. City of Miami*, 929 So. 2d 693, 695 (Fla. 3d DCA 2006) (quashing zoning approval which failed to comply with minimum requirements of city's zoning code, reiterating that "it is the unshirkable obligation of the courts, on whatever 'tier' of consideration, 'to say what the law is' and to effect that judgment").

V.

ARGUMENT

As discussed below, the Circuit Court departed from the essential requirements of law in upholding the BOCC's approval of the Carillon Major PUD Amendment because:

- A. The Circuit Court failed to apply the correct law in concluding that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC's quasi-judicial hearing on the Carillon Major PUD Amendment; and
- B. The Circuit Court failed to apply the correct law in concluding that the Carillon Major PUD Amendment complied with the County's LDC.

Accordingly, this Court must quash the Circuit Court's Order.

A.

THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN CONCLUDING THAT THE PETITIONERS DID NOT HAVE A DUE PROCESS RIGHT TO CROSS-EXAMINE ADVERSE WITNESSES DURING THE BOCC'S QUASI-JUDICIAL HEARING ON THE CARILLON MAJOR PUD AMENDMENT

In their Amended Petition for Writ of Certiorari and Reply filed below, the Petitioners asserted that the BOCC's failure to allow cross-examination during the January 27 quasi-judicial hearing on the Carillon Major PUD Amendment violated the Petitioners' right to due process. (App., Ex. 11 at 21-27; Ex. 14 at 2-14). In its Order, the Circuit Court concluded that affected parties, like the Petitioners, do not have a due process right to cross-examine adverse witnesses during a quasi-judicial zoning hearing. (App., Ex. 1 at 2-3). The Circuit Court's ruling that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC's quasi-judicial hearing on the Carillon Major PUD Amendment is directly contrary to Florida law, including existing precedent from this Court. Accordingly, this Court must quash the Circuit Court's Order.

1. **The Right Of Affected Parties To Cross-Examine Adverse Witnesses Is A Fundamental Component Of Due Process In A Quasi-Judicial Hearing Pursuant To Florida Law**

For more than forty (40) years, Florida courts have recognized that the right of “affected parties” to cross-examine adverse witnesses is a fundamental component of due process in a quasi-judicial proceeding. For example, in *Harris v. Goff*, 151 So. 2d 642 (Fla. 1st DCA 1963) – a zoning case – the First District held that the basic characteristics and safeguards of a quasi-judicial proceeding require an opportunity for affected parties to conduct cross-examination, stating that in quasi-judicial matters a local government must:

give due notice of a hearing to be held on the question to be considered, and provide a fair opportunity to be heard in a proceeding in which **the party affected is accorded the basic requirements of due process of law. Such requirements must afford the affected party the opportunity . . . to cross-examine adverse witnesses** whose testimony is offered at the hearing.

Id. at 644 (emphasis supplied).

Since *Harris*, Florida courts have repeatedly reaffirmed the right of affected parties to conduct cross-examination as a basic component of due process in local government quasi-judicial proceedings. In *Board of County Commissioners of Hillsborough County v. Casa Development Ltd., II*, 332 So. 2d 651 (Fla. 2d DCA 1976), the Second District held:

Before an administrative proceeding can be quasi-judicial in character, there must be a requirement for a hearing to be held upon notice at which **the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process, including the right to . . . cross-examine adverse witnesses.**

Id. at 654 (emphasis supplied).

Likewise, in *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 75 (Fla. 1992), the Third District reiterated:

[C]ertain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. **In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.** *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 652 (Fla. 3d DCA 1982).

Id. at 1341 (citations omitted) (emphasis supplied).³

³ Contrary to the Respondents' suggestion below and the Circuit Court's statement in its Order, the above-quoted language from *Jennings* is not dicta. To the contrary, such language formed the legal basis for the Third District's ultimate holding in the case. Moreover, the Third District's statement in *Jennings* that parties in a quasi-judicial zoning proceeding must be able to cross-examine witnesses was consistent with the court's prior holding in *Coral Reef Nurseries*, as well as the other cases discussed above. *See also Dougherty ex rel. Eisenberg v. City of Miami*, 2009 WL 3190382, *5 (Fla. 3d DCA Oct. 7, 2009) (Wells, J., specially concurring) (recognizing that, pursuant to *Jennings*, "parties

In *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993) – the leading zoning case in Florida – the Florida Supreme Court held that it is “the character of the hearing” which determines whether local governmental action is quasi-judicial. *See id.* at 474. In so holding, the Florida Supreme Court cited *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 652-53 (Fla. 3d DCA 1982), wherein the Third District held:

[I]t is the character of the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action. . . . **The procedural due process which is afforded to the interested parties in a hearing on an application for rezoning . . . contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and *the right to cross-examine adverse witnesses*; and *it is the existence of these safeguards which makes the hearing quasi-judicial***

(Emphasis supplied) (citing *Harris*).⁴

must be allowed to present evidence and cross-examine witnesses” during a quasi-judicial zoning hearing).

⁴ *See also Berkos v. Village of Wellington*, 2003 WL 21383886, *3 (S.D. Fla. Mar. 20, 2003) (“[T]he State of Florida has provided safeguards to ensure that quasi-judicial proceedings are constitutional Quasi-judicial proceedings may not receive the full due process protections of an actual judicial hearing, however ‘certain standards of basic fairness must be adhered to in order to afford due process [T]he parties must be able to . . . cross-examine witnesses.’”) (citing *Jennings*); *Lee County v. Sunbelt Equities, II, Ltd. P’ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (“In quasi-judicial zoning proceedings, the parties must be able to . . . cross-examine witnesses.”); *Hirt v. Polk County Bd.*

Consistent with *Snyder* and the above-cited precedent, this Court in *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001), recognized that quasi-judicial proceedings require a certain level of basic fairness in order to afford due process, including the right to cross-examine witnesses. *See id.* at 696 (citing *Sunbelt Equities* and *Jennings*). Similarly, in *Kupke v. Orange County*, 838 So. 2d 598 (Fla. 5th DCA 2003), this Court recognized that “in quasi-judicial proceedings, the parties must be able to . . . cross-examine witnesses.” *Id.* at 599 (quoting *Sunbelt Equities*). Although cited in the Petitioners’ Amended Petition for Writ of Certiorari and Reply, the Circuit Court ignored the foregoing precedent from this Court.⁵

of County Comm’rs, 578 So. 2d 415, 416 (Fla. 2d DCA 1991) (recognizing that “an opportunity for cross-examination was afforded” during quasi-judicial zoning hearing); *Walgreen Co. v. Polk County*, 524 So. 2d 1119, 1120 (Fla. 2d DCA 1988) (“Quasi-judicial hearings require a hearing upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process. Ordinarily this includes the right to present evidence and to cross-examine adverse witnesses.”).

⁵ In its Order, the Circuit Court also *incorrectly* stated that the Petitioners failed to cite “a single case” in which a court held that the denial of an opportunity to cross-examine witnesses in a quasi-judicial zoning hearing constituted a due process violation. (App., Ex. 1 at 3). To the contrary, in addition to the cases discussed above, the Petitioners cited the following cases in their Amended Petition for Writ of Certiorari and Reply to support their due process argument. *See Sorrento Ranches Homeowners Ass’n, Inc. v. City of Venice*, 15 Fla. L. Weekly Supp. 877 (Fla. 12th Cir. Ct. 2008) (holding “depriving [neighboring homeowners association of its] right to cross-examine was a denial

As established above, Florida courts have long recognized that the right of affected parties, like the Petitioners, to cross-examine adverse witnesses during a quasi-judicial zoning hearing is a fundamental component of due process. In concluding that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC's quasi-judicial hearing on the Carillon Major PUD Amendment, the Circuit Court failed to apply well-established law governing quasi-judicial zoning hearings, thereby departing from the essential requirements of

of due process,” reiterating that affected parties must be able to cross-examine witnesses during a quasi-judicial zoning hearing); *Advanced Remediation, LLC v. Orange County*, 13 Fla. L. Weekly Supp. 955 (Fla. 9th Cir. Ct. 2006) (holding denial of right to cross-examination in quasi-judicial proceeding violated petitioner's right to due process); *R.I.A.H. Clematis, Inc. v. City of West Palm Beach*, 10 Fla. L. Weekly Supp. 985 (Fla. 15th Cir. Ct. 2003) (holding city violated petitioner's “fundamental right to procedural due process” by precluding cross-examination during quasi-judicial hearing); *Garrison v. Miami-Dade County*, 10 Fla. L. Weekly Supp. 676 (Fla. 11th Cir. Ct. 2003) (“While procedural due process in the administrative setting does not always require application of the strict judicial model, it does require that parties be able to present evidence as well as cross-examine witnesses.”); *Walton v. Holmes County*, 8 Fla. L. Weekly Supp. 289 (Fla. 14th Cir. Ct. 2001) (holding county failed to comply with due process requirements for a quasi-judicial zoning hearing where “no cross-examination was allowed”); *Cook v. City of Lynn Haven*, 7 Fla. L. Weekly Supp. 176 (Fla. 14th Cir. Ct. 1999) (holding city failed to comply with due process requirements for a quasi-judicial zoning hearing where the city commission “failed to provide the opportunity for the cross-examination of the witnesses”); *Goldberg v. Lee County*, Case No. 94-CA-00416 (Fla. 12th Cir. Ct. June 16, 1994) (holding refusal to permit cross-examination by opponents of zoning application was a denial of due process, stating “fundamental due process requires that some form of adequate cross-examination be permitted in a quasi-judicial administrative proceeding”), *cert. denied*, Case No. 2D94-2455 (Fla. 2d DCA 1995).

law. *See Peachtree Cas. Ins. Co. v. Prof'l Massage Servs., Inc.*, 923 So. 2d 548, 550 (Fla. 1st DCA 2006) (“A ‘departure from the essential requirements of law’ occurs when a lower court fails to fulfill its constitutional duty to apply a correct principle of law to admitted facts.”).

2. The Opportunity For Affected Parties To Cross-Examine Adverse Witnesses During A Quasi-Judicial Hearing Is Essential To Meaningful Appellate Review

In addition to being a fundamental component of due process under established Florida law, the opportunity for affected parties to cross-examine adverse witnesses during a quasi-judicial zoning hearing is essential because the procedure to challenge such zoning decisions as violating the local government’s land development code is through a petition for writ of certiorari. *See Board of County Comm’rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). Certiorari review is limited to the record created before the lower tribunal. *See Dade County v. Marca, S.A.*, 326 So. 2d 183, 184 (Fla. 1976). Consequently, the ***only*** opportunity that affected parties, like the Petitioners, have to create a record is during the quasi-judicial proceeding before the local government.

It is axiomatic that cross-examination is the principal means by which the believability of a witness and the truth of the witness’s testimony are tested:

[C]ross-examination under oath [is] essential to due process because it is the approved method to test the probity of the evidence and discredit or eliminate that which is spurious or of doubtful veracity.

Petition for Revision of, or Amendment to, Integration Rule of Florida Bar, 103 So. 2d 873, 876 (Fla. 1956); *see also Burns v. Freund*, 49 So. 2d 592, 595 (Fla. 1950). Cross-examination can also “lead the fact finder to conclude the expert’s opinion is neither well-founded, nor persuasive because the expert failed to consider the many issues raised in cross-examination.” *AT & T Wireless Servs., Inc. v. Castro*, 896 So. 2d 828, 833 (Fla. 1st DCA 2005).

The decision in *McBryde v. City of Center Hill*, 13 Fla. L. Weekly Supp. 1035 (Fla. 5th Cir. Ct. 2006), *affirmed*, 952 So. 2d 599 (Fla. 5th DCA 2007), exemplifies the critical importance of cross-examination during a quasi-judicial zoning hearing. In *McBryde*, the petitioners asserted, in part, that an approved annexation was invalid because it resulted in an impermissible “pocket” of unincorporated territory in violation of Chapter 171, *Florida Statutes*. During the quasi-judicial hearing before the city council, the respondent’s expert witness initially testified that the annexation complied with the requirements of Chapter 171, *Florida Statutes*. On cross-examination, however, the respondent’s expert witness admitted that he did not know what a “pocket” was for purposes of Chapter 171, *Florida Statutes*.

In quashing the annexation on first-tier certiorari, the circuit court in *McBryde* held, in pertinent part, that “the Respondent’s argument that the annexation does not create a pocket is not supported by competent substantial evidence because the Respondent’s own expert did not know what a pocket was for the purposes of annexation.” *McBryde*, 13 Fla. L. Weekly Supp. at 1035.⁶ Absent the opportunity to cross-examine the respondent’s expert witness during the quasi-judicial hearing, the petitioners in *McBryde* would have had no way of establishing on certiorari review that the testimony offered by the respondent’s expert witness was incompetent.

Simply put, the opportunity for affected parties to conduct reasonable cross-examination of adverse witnesses during a quasi-judicial zoning hearing is absolutely essential to meaningful appellate review of such decisions. In the absence of cross-examination, affected parties, like the Petitioners, have no opportunity to demonstrate the incompleteness, the untruth, the partiality, or any other weakness or defect in the testimony offered. Further, as a practical matter, if cross-examination is not allowed in a quasi-judicial zoning hearing, all testimony would be unrefuted and must

⁶ This Court affirmed the circuit court’s decision in *McBryde* on appeal. *See City of Center Hill v. McBryde*, 952 So. 2d 599 (Fla. 5th DCA 2007).

constitute competent substantial evidence – thereby rendering the “competent substantial evidence” prong on first-tier certiorari a complete nullity.

3. The Petitioners Did Not Waive Their Right To Cross-Examine Adverse Witnesses During The BOCC’s Quasi-Judicial Hearing On The Carillon Major PUD Amendment

Lastly, the Circuit Court’s attempt to dismiss the significance of the BOCC’s denial of the Petitioners’ due process right to cross-examine adverse witnesses by suggesting that the Petitioners were permitted to direct questions to the BOCC is not well taken. As previously discussed, at the outset of the BOCC’s quasi-judicial hearing, the Petitioners’ counsel specifically requested confirmation that the BOCC would not permit any cross-examination. (App., Ex. 2 at 15). Contrary to the Circuit Court’s suggestion, the BOCC Chairman did ***not*** advise the Petitioners’ counsel that the Petitioners could pose questions concerning the Developers’ presentation to the BOCC and that the BOCC would require the questions to be answered. (*See id.*)

Moreover, even if the BOCC Chairman had instructed the Petitioners’ counsel to that effect at the beginning of the quasi-judicial hearing, which he did not, such a procedure would ***not*** be a substitute for the right of cross-examination afforded affected parties pursuant to Florida law. In fact, courts have held that such a requirement constitutes an unjustifiable restriction upon a parties’ right to cross-examine witnesses during a quasi-judicial zoning hearing. *See, e.g., People ex rel.*

Klaeren v. Village of Lisle, 737 N.E.2d 1099, 1113 (Ill. Ct. App. 2000) (“[A] requirement that questions be filtered through the body conducting the hearing is an unjustified restriction on the right of cross-examination, and such a restriction is more onerous when the responses are delayed until after the hearing.”), *aff’d*, 781 N.E.2d 223 (Ill. 2002); *Wadell v. Board of Zoning Appeals of City of New Haven*, 68 A.2d 152, 156 (Conn. 1949) (“A requirement of the board that attorneys desiring to cross-examine witnesses should ask questions through it would place an unjustifiable restriction upon their rights.”).

In addition, the Circuit Court’s suggestion that granting affected parties, like the Petitioners, an opportunity to cross-examine adverse witnesses during a quasi-judicial zoning hearing would be “impractical” and result in undue administrative burdens is unfounded. Local governments, large and small, throughout Florida comply with the dictates of *Snyder* and *Jennings* without incident. Indeed, the vast majority of quasi-judicial proceedings are not controversial and result in no additional administrative burdens.⁷

⁷ In this regard, it bears noting that the County candidly acknowledged in its Response that requests to cross-examine witnesses during quasi-judicial zoning hearings are “rare.” (App., Ex. 13 at 16). Indeed, the Petitioners were the only affected parties to request an opportunity to cross-examine witnesses during the BOCC’s quasi-judicial hearing on the Carillon Major PUD Amendment. Thus, the Circuit Court’s concern that every person who appeared during the BOCC’s quasi-judicial hearing would have to be provided an opportunity to cross-examine

Moreover, to the extent any issues were to arise regarding cross-examination during a quasi-judicial hearing, the remedy lies in the BOCC exercising proper control over the proceedings before it, not in the outright denial of a right to which affected parties are entitled. *See Wadell*, 68 A.2d at 156; *Sorrento Ranches Homeowners Ass'n, Inc. v. City of Venice*, 15 Fla. L. Weekly Supp. 877 (Fla. 12th Cir. Ct. 2008) (quashing zoning approval where neighboring homeowners' association was denied opportunity to cross-examine witnesses, stating "[e]fficiency oftentimes competes with due process, but due process must always prevail"). For example, a local government could, within reasonable limits, require those wishing to exercise the right to cross-examine witnesses to file a notice of appearance in advance of the quasi-judicial hearing.⁸ Those wishing to exercise the right to cross-examine witnesses could also be required to allege some special interest beyond that of the general public. In addition, a local government could request large groups of interested persons to designate a party-representative for purposes of the quasi-judicial hearing. The presiding officer at the quasi-judicial hearing could also limit the scope of cross-examination, as necessary, to ensure that questions remain relevant

witnesses is not supported by the record.

⁸ *See, e.g.*, § 14.00.06.C.2, Lake County Land Development Code (available at www.municode.com).

to the matter at issue. *See generally People ex rel. Klaeren v. Village of Lisle*, 781 N.E.2d 223, 235-36 (Ill. 2002) (discussing examples of procedures a local government could use to ease any administrative burdens of affording interested parties their due process right to cross-examine adverse witnesses during quasi-judicial zoning hearings).

In sum, for the reasons set forth above, the Circuit Court departed from the essential requirements of law in concluding that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC's quasi-judicial hearing on the Carillon Major PUD Amendment. Accordingly, this Court must quash the Circuit Court's Order.

B.

**THE CIRCUIT COURT DEPARTED FROM THE
ESSENTIAL REQUIREMENTS OF LAW IN
CONCLUDING THAT THE CARILLON MAJOR
PUD AMENDMENT COMPLIED WITH THE
COUNTY'S LAND DEVELOPMENT CODE**

The record further establishes that the Circuit Court departed from the essential requirements of law in concluding that the Carillon Major PUD Amendment complied with the County's LDC. Accordingly, on this additional basis, this Court must quash the Circuit Court's Order.

1. The Carillon Major PUD Amendment Failed To Comply With The Mandatory Submittal Requirements Of The County's LDC

In their Amended Petition for Writ of Certiorari filed below, the Petitioners asserted, in pertinent part, that the Carillon Major PUD Amendment failed to comply with the mandatory submittal requirements of the County's LDC. In particular, the Petitioners asserted that the Revised Final Master Plan for the Carillon Major PUD Amendment failed to include an earthmoving concept plan and a fire protection plan as required by the County's LDC, and that the traffic impact study for the Carillon Major PUD Amendment failed to evaluate a two (2) mile radius as required by the County's LDC. (App., Ex. 11 at 28-30; Ex. 14 at 16-20). In its Order, the Circuit Court refused to consider the merits of the Petitioners' argument, summarily concluding that the issue of whether the Carillon Major PUD Amendment complied with the County's LDC was a "factual determination" outside the purview of the court's review. (App., Ex. 1 at 5). The Circuit Court's ruling departs from the essential requirements of law.

Contrary to the Circuit Court's ruling, the issue of whether a local government has adhered to its adopted regulations is a *legal* determination, not a "factual determination" outside the purview of a court's certiorari review. Indeed, Florida courts have consistently held that a local government's failure to adhere to its adopted

regulations constitutes a departure from the essential requirements of law, requiring the zoning approval at issue to be quashed. *See, e.g., Gulf & Eastern Dev. Corp. v. City of Ft. Lauderdale*, 354 So. 2d 57, 61 (Fla. 1978) (reiterating that a local governing body is bound by the procedural requirements imposed by its code and cannot renege on its promise to its citizens to uphold such code requirements); *Auerbach v. City of Miami*, 929 So. 2d 693, 695 n.3 (Fla. 3d DCA 2006) (quashing zoning approval which failed to comply with minimum requirements of city’s zoning code, reiterating that “it is the unshirkable obligation of the courts, on whatever ‘tier’ of consideration, ‘to say what the law is’ and to effect that judgment”); *O’Connor v. Dade County*, 410 So. 2d 605, 605-06 (Fla. 3d DCA 1982) (quashing circuit court’s affirmance of zoning approval where county failed to comply with code requirements).

Turning to the instant case, Section 30.446 of the County’s LDC mandates that a “Final Master Plan ***shall*** include the following exhibits . . . (c) A Site Development Plan including: (1) An earthmoving concept plan . . . [and] . . . (f) A fire protection plan.”⁹ (App., Ex. 10 at § 30.446) (emphasis supplied). It is indisputable, however, that the Revised Final Master Plan approved as part of the Carillon Major PUD

⁹ The term “shall” is mandatory for purposes of the County’s LDC. (App., Ex. 10 at § 1.11(a)).

Amendment does *not* include an earthmoving concept plan and/or a fire protection plan, as expressly required by Section 30.446 of the County’s LDC.¹⁰ (App., Ex. 3).

The record further establishes that the required traffic impact study submitted as part of the Carillon Major PUD Amendment was legally deficient. Pursuant to Section 10.3(a)(2) of the County’s LDC, the traffic impact study area required for a project with more than 50,000 square feet of retail use *shall* be two (2) miles. (App., Ex. 10 at § 10.3(a)(2)). The Carillon Major PUD Amendment includes 53,977 square feet of commercial/retail use – thus, requiring a two (2) mile study radius. (App., Ex. 4 at 2). It is undisputed, however, that the traffic impact study submitted as part of the Carillon Major PUD Amendment only evaluated traffic impacts within a one (1)

¹⁰ In an *after-the-fact* attempt to overcome such legal deficiencies, the Respondents alleged in their Responses filed below that the required earthmoving concept plan would be “implemented at the time of final engineering” and that a fire protection plan was not required because some fire safety details were denoted on Sheets A1 and A6 of the Revised Final Master Plan. (App., Ex. 12 at 39-41; Ex. 13 at 32-33). As discussed above, Section 30.446(c)(1) of the County’s LDC expressly and unambiguously requires that an earthmoving concept plan be included as part of the approved final master plan, not deferred until the time of final engineering. Likewise, Sheets A1 (site plan) and A6 (utility plan) of the Revised Final Master Plan were not a substitute for the required fire protection plan. Not only did Sheets A1 and A6 fail to include all of the information required by Section 30.446(f) of the County’s LDC for a fire protection plan, but the disclaimer on Sheet A6 acknowledged that a “registered fire protection engineer will be required to submit fire protection plans” -- thus, refuting any suggestion that such utility plan constituted the fire protection plan mandated by Section 30.446(f) of the County’s LDC. (App., Ex. 3 at A6).

mile radius of the proposed project. (App., Ex. 9 at 1-2). Consequently, the traffic impact study for the Carillon Major PUD Amendment failed to analyze all potentially affected roadways and signalized intersections within a two (2) mile radius of the site location, as required by the County's LDC.¹¹

In sum, by upholding the BOCC's approval of the Carillon Major PUD Amendment which failed to comply with the *minimum* submittal requirements of the County's LDC, the Circuit Court departed from the essential requirements of law. *See Gulf & Eastern Dev. Corp.*, 354 So. 2d at 61; *Auerbach*, 929 So. 2d at 695; *O'Connor*, 410 So. 2d at 605-06. Accordingly, this Court must quash the Circuit Court's Order.

2. The Carillon Major PUD Amendment Violates The Mandatory Upland Buffer Requirements In The County's LDC For Property Located Within The Econlockhatchee River Basin

In their Amended Petition for Writ of Certiorari filed below, the Petitioners also asserted that the BOCC's approval of the Carillon Major PUD Amendment

¹¹ The record reflects that the traffic impact study for the Carillon Major PUD Amendment was based upon the project including only 46,547 square feet of retail space and, as such, assumed "a one-mile study radius . . . based on the standard Seminole County study requirements." (App., Ex. 9 at 1). The proposed project's actual amount of retail space is 53,977 square feet, which triggers the square footage threshold for a two (2) mile study radius pursuant to Section 10.3(a)(2) of the County's LDC. (App., Ex. 4 at 2). The traffic impact study, however, was never corrected to evaluate a two (2) mile study radius as required.

violated the minimum upland buffer requirements mandated by Section 30.1085(b)(6) of the County's LDC for property within the Econlockhatchee River Basin.¹² (App., Ex. 11 at 38-39; Ex. 14 at 27-30). In its Order, the Circuit Court concluded that there was no clear evidence in the record that the subject property was within the Econlockhatchee River Basin, and, in any event, the Carillon Major PUD Amendment "sought setback waivers." (App., Ex. 1 at 7). Further, to the extent the Carillon Major PUD Amendment violated the mandatory upland buffer requirements imposed by Section 30.1085(b)(6) of the County's LDC, the Circuit Court concluded such error was not a "miscarriage of justice" warranting certiorari relief. (*See id.*). The Circuit Court's ruling departs from the essential requirements of law.

First, contrary to the Circuit Court's statement, it is undisputed that Parcel 202, Lot 2 of the Carillon PUD is located within the Econlockhatchee River Basin and, as such, is subject to the minimum upland buffer requirements imposed by Section

¹² Section 30.1085(b)(6) of the County's LDC mandates that an average upland buffer of fifty (50) feet shall be provided from any designated conservation easement, such as the conservation easement that exists on the eastern portion of Parcel 202, Lot 2 of the Carillon PUD. (App., Ex. 10 at § 30.1085(b)(6)). Contrary to Section 30.1085(b)(6) of the County's LDC, the Carillon Major PUD Amendment does not require a fifty (50) foot average upland buffer from the boundary of the conservation easement area on Parcel 202, Lot 2. (App., Ex. 4 at 5). In fact, the Carillon Major PUD Amendment does not require any upland buffer from the adjacent conversation easement area on Parcel 202, Lot 2, and only imposes rear and side setbacks of ten (10) feet. (*See id.*).

30.1085(b)(6) of the County's LDC. Indeed, the Staff Report prepared for the Carillon Major PUD Amendment expressly states that "[t]he proposed development is located within the Econlockhatchee River Protection Area" – which is governed by Part 57, Chapter 30 of the County's LDC (§§ 30.1081-30.1089). (App., Ex. 6 at 740; *see also* App., Ex. 2 at 112-13; Ex. 8 at 4).

Second, contrary to the Circuit Court's statement, it is ***undisputed*** that the Developers did ***not*** request, nor did the BOCC grant, a waiver from the minimum upland buffer requirements imposed by Section 30.1085(b)(6) of the County's LDC. Rather, as conceded by the County in its Response filed below, the Developers only requested a waiver from the active/passive building setback required along the northern boundary of Parcel 202, Lot 2 by Section 30.1232 of the County's LDC -- which is ***separate and distinct*** from the minimum upland buffer mandated by Section 30.1085(b)(6) of the County's LDC from the conservation easement on the eastern portion of Parcel 202, Lot 2. (App., Ex. 2 at 8, Ex. 6 at 735-36, Ex. 13 at 34). Accordingly, the Circuit Court's conclusion that the Carillon Major PUD Amendment sought "setback waivers" from the minimum upland buffer requirements imposed by Section 30.1085(b)(6) of the County's LDC is legally and factually erroneous.¹³

¹³ As an aside, it must be emphasized that there is no language in Section 30.1085(b) of the County's LDC which authorizes the BOCC to "waive" the minimum buffer requirements prescribed therein. (App., Ex. 10 at §

Lastly, the Circuit Court’s conclusion that any failure of the Carillon Major PUD Amendment to comply with the minimum upland buffer requirements mandated by Section 30.1085(b)(6) of the County’s LDC did not constitute a “miscarriage of justice” warranting certiorari relief is an erroneous application of Florida law. The “miscarriage of justice” standard applies *only* in a “second-tier” certiorari case -- it is *not* applicable on certiorari review of a local government’s quasi-judicial decision before a circuit court, which is the first tier of judicial review in such cases.

So called “first-tier” certiorari review of a local government’s quasi-judicial decision before a circuit court is *not* discretionary – rather, such review is a matter of right and akin to a direct appeal. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *see also* Philip J. Padovano, *Florida Appellate Practice* § 18:9 (2009 ed.) (“At this level, certiorari is used in place of an appeal” and “[t]his use of certiorari is unlike any other, in that the scope of review is actually more like a plenary appeal.”).

Consequently,

a “departure from the essential requirements of the law” for the purposes of circuit court review can be no more than

30.1085(b)). To the contrary, Section 30.1085(b) of the County’s LDC expressly states that such requirements “shall apply to *all* development activities within the Econlockhatchee River Basin” – no exceptions are made. (*See id.*) (emphasis supplied).

the same level of error that would require reversal on a direct appeal -- a substantive or procedural error that was not a harmless error.

The Reserve at West Bay, LLC v. City of Panama City Beach, 15 Fla. L. Weekly Supp. 22 (Fla. 14th Cir. Ct. July 17, 2007).¹⁴

The Circuit Court's reliance upon the "miscarriage of justice" standard in a non-discretionary, first-tier certiorari proceeding alone constitutes reversible error. *See Johnson v. State*, 728 So. 2d 1204, 1206 (Fla. 3d DCA 1999) (holding circuit court's application of wrong legal standard constituted a departure from the essential requirements of law). Moreover, contrary to the Circuit Court's conclusion, the failure of the Carillon Major PUD Amendment to comply with the minimum upland buffer requirements mandated by Section 30.1085(b)(6) of the County's LDC constituted a departure from the essential requirements of law, which obligated the Circuit Court to quash the BOCC's approval of the Carillon Major PUD Amendment. *See Auerbach v. City of Miami*, 929 So. 2d 693, 695 (Fla. 3d DCA 2006); *see also Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 377 (Fla. 3d DCA

¹⁴ *See also Walton v. Holmes County*, 8 Fla. L. Weekly Supp. 289 (Fla. 14th Cir. Ct. Feb. 16, 2001) (same); *Cook v. City of Lynn Haven*, 7 Fla. L. Weekly Supp. 176 (Fla. 14th Cir. Ct. Dec. 7, 1999) (same); *Am v. Gadsden County*, 6 Fla. L. Weekly Supp. 735 (Fla. 2d Cir. Ct. Aug. 27, 1999) (same); *Elliott Point Cmty. Group, Inc. v. City of Fort Walton Beach*, 5 Fla. L. Weekly Supp. 787 (Fla. 1st Cir. Ct. June 10, 1998) (same).

2003) (“[Q]uasi-judicial boards do not have the power to ignore . . . the legislated criteria they utilize in making their quasi-judicial determinations.”). Indeed, to hold otherwise would render first-tier certiorari review of local zoning decisions meaningless, since under the Circuit Court’s reasoning a violation of the minimum requirements of the County’s LDC would never be grounds for relief.

In sum, by upholding the BOCC’s approval of the Carillon Major PUD Amendment which failed to impose the fifty (50) foot average buffer mandated by Section 30.1085(b)(6) of the County’s LDC, the Circuit Court departed from the essential requirements of the law. Simply put, the Circuit Court was not allowed to disregard the County’s LDC and uphold the BOCC’s approval of a development application that violates the minimum legal requirements therein:

The law . . . will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will.

Auerbach, 929 So. 2d at 695. Accordingly, this Court must quash the Circuit Court’s Order. *See Maturo v. City of Coral Gables*, 619 So. 2d 455, 457 (Fla. 3d DCA 1993) (“[A court] cannot, and should not, turn a blind eye to an incorrect application of the law.”).

VI.

CONCLUSION

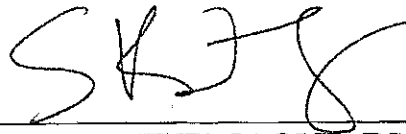
The Circuit Court departed from the essential requirements of law in upholding the BOCC's decision to approve the Carillon Major PUD Amendment. In so doing, the Circuit Court disregarded well-established case law, including decisions of this Court, in concluding that the Petitioners did not have a due process right to cross-examine adverse witnesses during the BOCC's quasi-judicial hearing on the Carillon Major PUD Amendment. In addition, the Circuit Court disregarded the plain and unambiguous requirements of the County's LDC and upheld the BOCC's decision which violated the minimum requirements prescribed therein. Accordingly, this Court must quash the Circuit Court's September 25 Order.

WHEREFORE, Petitioners CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER request that the Court:

- A. Accept jurisdiction to hear this case;
- B. Issue an Order to Show Cause pursuant to Florida Rule of Appellate Procedure 9.100(h); and

C. Quash the Circuit Court's Order Denying Amended Petition for Writ of Certiorari dated September 25, 2009, which upheld the BOCC's approval of the Carillon Major PUD Amendment.

RESPECTFULLY SUBMITTED on this 26th day of October 2009.



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CERTIFICATE OF SERVICE

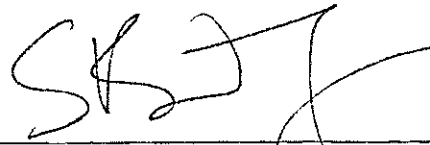
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail to:

Robert A. McMillan, Esquire
Seminole County Attorney's Office
1101 East First Street
Sanford, Florida 32771

Janet M. Courtney, Esquire
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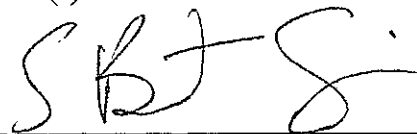
this 26th day of October 2009.



S. BRENT SPAIN, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(1).



S. BRENT SPAIN, ESQUIRE