

App. 1

**IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT IN AND
FOR MANATEE COUNTY, FLORIDA**

**THE CITY OF HOLMES
BEACH, a Municipal
Corporation of the
State of Florida,

Plaintiff,**

v.

**PETITIONERS' COMMITTEE,
RICHARD HAZEN and
HUONG L. TRAN in her
individual capacity and
as the designated
representative of the
PETITIONERS' COMMITTEE,

Defendants.**

**CASE NO.
2013-CA-5990**

/

The parties hereto stipulate to the following facts:

1. The affected property is located at 103 29th Street, Holmes Beach, Florida, and is within the city limits of the City of Holmes Beach.
2. The property is owned by Huong L. Tran and Richard Hazen.
3. The property contains a rental property called Angelino's Sea Lodge with four rental units. The property also contains the Defendants' home in an adjacent structure. The property adjoins the public beach along the Gulf of Mexico. A large Australian pine tree is located

App. 2

between the personal home and the Gulf of Mexico approximately twenty feet west of the home and thirty feet east of the boundary line between the Defendants Hazen and Tran's property and the erosion control line marking the boundary of the public beach.

4. In 2011, Hazen and Tran discussed with each other building a tree house in the Australian pine tree in their yard facing the Gulf of Mexico. In April or May 2011, Hazen made contact with Bob Schaffer [sic], who at the time was a building inspector for the City. Hazen asked Mr. Schaffer if the City regulated tree houses. Mr. Schaffer reviewed his code book and spoke to Joe Duennes, the City's building official at the time. They concluded that tree houses were not named in the City's regulations and told Hazen that permits were not needed.
5. In May 2011, Hazen and Tran then began designing the tree house they envisioned. Tran was the primary designer and the design evolved as they worked on it. They hired a pair of carpenters to build it.
6. As constructed, the tree house consists of two levels, with each level containing approximately 200-250 square feet. The lowest level is approximately ten feet above the ground. It is faced with windows and has a broad view towards the Gulf. It is constructed on the tree and also rests on four (4) wooden piles which are driven into the ground. It is furnished with rudimentary furniture such as chairs, tables, and a hammock. It is not used for

App. 3

overnight accommodations and is not wired for electricity or plumbed for water and sewer. Defendants Hazen and Tran use it as a getaway and for relaxation. Defendant Tran has entertained family members in it on occasion. It is not available to Defendants' rental tenants.

7. On or about November 11, 2011, the City received an anonymous complaint about construction of the tree house and began to investigate it.
8. During the investigation, the City determined that the tree house had been constructed without required City permits and began code enforcement proceedings. The proceedings resulted in a hearing before the City's code enforcement board on July 30, 2013. The code enforcement board found Hazen and Tran in violation of 11 provisions of the City's codes. The order of the CEB gave Hazen and Tran 30 days to begin the [sic] to come into compliance with the City's codes or to remove the tree house.
9. The code sections that were found to have been violated are as follows:
 - a) CHB Code, Part III, Art. III, Div.1, Section 3.2
 - b) CHB Code, Part III, Art. III, Div.1, Section 3.3
 - c) CHB Code, Part III, Art. III, Div.1, Section 3.4

App. 4

- d) CHB Code, Part III, Art. III, Div.1, Section 3.5(A)
 - e) CHB Code, Part III, Art. III, Div.1, Section 3.6(A)(1)
 - f) CHB Code, Part III, Art. III, Div.1, Section 3.7(A)(2)
 - g) CHB Code, Part III, Art. III, Div.1, Section 3.8(B)
 - h) CHB Code, Part III, Art. VI, Div.2, Section 6.6(E)(2)(b)(9)
 - i) CHB Code, Part III, Art. IX, Section 9.8
 - j) CHB Code, Part III, Art. IX, Section 9.13(A) and (B)
10. Hazen and Tran timely appealed the CEB order to the circuit court sitting in its appellate capacity. The parties briefed numerous issues to the court and on September 16, 2014, Judge Dunnigan issued a 28 page order upholding the CEB's order.
11. Hazen and Tran then sought discretionary review of Judge Dunnigan's order at the Second District Court of Appeal. They sought review first by petition for a writ of certiorari. On June 12, 2015, the Court of Appeal denied the petition for the writ, per curium [sic]. Defendants Hazen and Tran then filed a motion for certification and issuance of a written opinion. The Second District Court of Appeal denied their motions on July 22, 2015. They moved for a rehearing en banc, which the appeal court struck as unauthorized on October 28, 2015.

12. This last action by the Court of Appeal essentially ends the Defendants' appeals of the City's Code Enforcement Board's order finding their property in violation of several City ordinances and regulations. An order imposing a fine on the property was issued by a special magistrate on May 23, 2016,. Defendants Hazen and Tran filed a notice of appeal of that order on May 25, 2016. The proceedings on the appeal of the order are in an early stage and will not affect this declaratory judgment action.
13. On June 3, 2013, prior to the July 30, 2013 Code Enforcement Board Hearing, Defendants began an initiative process. The initiative process authorizes citizens to present to their local governing body (in this case, the Holmes Beach City Commission) a proposed ordinance for consideration. The Defendants followed the required procedures and on August 28, 2013, the City Clerk of the City of Holmes Beach certified that their initiative petition was sufficient and the proposed ordinance could be presented to the City Commission. On October 8, 2013, the City Commission took up the Defendants' proposed ordinance, Ordinance 13-17, for first reading. One commissioner moved that the ordinance be approved on first reading. The motion was not seconded and the ordinance therefore failed to progress. In accordance with the statutes controlling initiative petitions, an initiative ordinance not approved by the local government is to be presented to the voters for a popular

App. 6

vote. If the voters approved the initiative ordinance, it becomes law of the jurisdiction.

14. The proposed ordinance will cure the violations found by the CEB. The operative language of the ordinance is found in Section 2 of the proposed ordinance. It states: **Section 2. Approval of “Tree house” at 103 29th Street, Holmes Beach, Florida.**
 - A. Notwithstanding any provision contained within the City of Holmes Beach Code of Ordinances to the contrary, the City Commission does hereby authorize the construction and maintenance of the so-called “tree house” upon 103 29th Street, Holmes Beach, Florida.
 - B. The tree house shall not be used by customers of “Angelinos Sea Lodge.”
 - C. The Owners shall be required to record in the Public Records of Manatee County, Florida a full release or similar document, indemnifying and holding the City of Holmes Beach harmless from any and all claims for injury and/or property damages resulting from the construction and use of the subject tree house. Failure to record such a release or similar document within 60 days of the effective date of this Ordinance shall cause the automatic repeal of this Ordinance.
15. The City filed the immediate declaratory judgment action on September 23, 2013, between the time the Defendants’ petition was

App. 7

certified and the time the City Commission refused to move their ordinance forward. The question the City presents in the declaratory judgment action relates to Section 163.3167(8), Fla. Stat. This section states:

(8)(a) An initiative or referendum process in regard to any development order is prohibited.

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or

App. 8

completed thereafter is deemed null and void and of no legal force and effect.

16. The Defendants' property is located in the R-4 zoning district. The R-4 zoning district is a medium density residential zoning district. The Defendants' personal house and the 4 unit lodge are allowed uses in the R-4 zoning district. A tree house is not a specifically defined use in the Holmes Beach code. Instead, it is classified under Section 6.6E. 2, CHB Land Development Code as an accessory use "customarily incidental to a permitted use not involving the conduct of business". The City building official testified during the July 30, 2013, CEB hearing, that it can also be classified as a recreational facility for the use and convenience of residential owners or tenants and their guests. The Defendants do not agree with this characterization
17. For the tree house to be constructed where it is located, it would be subject to several Holmes Beach permitting processes. The processes are related but look at different components of the construction process. These processes include a building permit issued under the authority of the Florida Building Code, as administered by the Holmes Beach Building Official. The FBC contains the regulations regarding the structural components including foundation, carpentry, glazing, and roofing. An engineering review is required as part of the Building Code review.

App. 9

18. The City has its own building regulations relating to land use and location of the structure. The tree house, if it was to undergo development review and permitting, would be subject to site planning review, which would involve location in relations to property lines, adjacent structures, set back lines, and an overall review of whether the structure is compatible with the surrounding uses and structures. The City would review the structure for compliance with flood zone and wind load compliance. Engineering is required
19. The CHB code sections in the City's Land Development Code involved in review of a structure include:
 - a) Section 3.2, Permits Required
 - b) Section 3.5, Site plan review;
 - c) Section 3.6, Consistency and concurrency
 - d) Section 3.8, Permitted uses;
 - e) Section 7.2, Coastal building and development activities contiguous to the Gulf of Mexico;
 - f) Article VI, zoning, Section 6.6 E, R-4 zoning regulations;
 - g) Division 6., Sections 8.21-8.24, Storm-water management;
 - h) Article IX, Floodplain management, particularly Section 9.23, Permits required

App. 10

- i) Part III, LDC, Article 1, Section 1.4 Selected definitions
- 20. Not all uses allowed on a particular piece of property can be permitted and built.

Development of land may be constrained by the physical size of the property and regulations such as setbacks and height limitations. The location of the tree house is within a City setback which prohibits construction within fifty feet of the erosion control line except for minor structures related to access to the beach or control of erosion. The erosion control line is a state created property line separating the privately owned upland from the publicly owned beach area.

Respectfully submitted this
14th day of July, 2016,

s/ James D. Dye, Esq.

Dye, Deitrich, Petruff &
St. Paul, P.L.

1111 3rd Avenue West,
Ste. 300

Bradenton, Fl 34205

941-748-4411

Email: jdye@dyefirm.com

Florida Bar No. 699179

Attorneys for Plaintiff

App. 11

s/ David M. Levin

Florida Bar No. 296384

Icard Merrill, Cullis, Timm

Furen & Ginsburg, P.A.

110 Sullivan Street, Ste. 112

Punta Gorda, FL 33950

941-833-9244

Email: dlevin@icardmerrill.com

Attorneys for the Defendants

App. 12

**IN THE CIRCUIT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT**

**PETITIONERS' COMMITTEE,
RICHARD HAZEN and
HUONG L. TRAN in her
Individual capacity and
as the designated
Representative of the
PETITIONERS' COMMITTEE,**

Appellants,

v.

**THE CITY OF HOLMES
BEACH, a Municipal
Corporation of the
State of Florida,**

Appellee.

**DCA #: 2D16-4158
Appealed Case:
2013-CA-05990AX**

/

INITIAL BRIEF

(Filed Nov. 30, 2016)

David M. Levin
Florida Bar #296384
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
2033 Main Street, Suite 600
Sarasota, FL 34237
Email: dlevin@icardmerrill.com
(941) 366-8100
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS.....	i
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	9
ARGUMENT.....	12
POINT ONE THE CIRCUIT COURT VIOLATED APPELLANTS' DUE PROCESS RIGHTS BY "RUBBER STAMPING" APPELLEE'S PROPOSED FINAL ORDER WITHOUT ANY EVIDENCE IN THE RECORD TO DEMONSTRATE THAT THE COURT EXERCISED THOUGHTFUL AND INDEPENDENT ANALYSIS OF THE FACTS, ISSUES, AND THE LAW	12
POINT TWO THERE IS NO LEGAL BASIS FOR THE CONCLUSION OF LAW IN THE CIRCUIT COURT'S FINAL ORDER THAT APPELLANTS' USE OF THEIR LAND FOR THE ERECTION OF A "TREE HOUSE" IS "DEVELOPMENT" AS DEFINED BY SECTION 380.04, FLORIDA STATUTES, THEREFORE APPELLANTS' PROPOSED INITIATIVE ORDINANCE IS NOT A "DEVELOPMENT ORDER", PROHIBITED BY SECTION 163.3167(8), FLORIDA STATUTES, NOR IS THERE ANY OTHER LEGAL BASIS JUSTIFYING APPELLEE'S FAILURE	

App. 14

TO SUBMIT APPELLANTS' INITIATIVE ORDINANCE TO A VOTE OF THE ELECTORS.....	18
CONCLUSION	29
CERTIFICATE OF SERVICE.....	30
CERTIFICATE OF COMPLIANCE	31

[i] **TABLE OF CITATIONS**

CASES

<i>Barnes v. City of Miami</i> , 47 So.2d 3, 4 (Fla. 1950).....	20
<i>Browning v. Florida Hometown Democracy, Inc.</i> , 29 So.3d 1053, 1063-1065 (Fla. 2010).....	20
<i>Canney v. Board of Public Instruction of Alachua County</i> , 278 So.2d 260 (Fla. 1973).....	13
<i>Chudasama v. Mazda Motor Corporation</i> , 123 F.3d 1353 (11th Cir. 1997).....	17
<i>City of Hollywood v. Mulligan</i> , 934 So.2d 1238 (Ha. 2006)	27
<i>Corporate Management Advisors, Inc. v. Boghos</i> , 756 So.2d 246, 248 (Fla. 5th DCA 2000)	17
<i>Donato v. AT&T</i> , 767 So.2d 1146, 1150 (Fla. 2000).....	23
<i>Florida State Racing Commission v. McLaughlin</i> , 102 So.2d 574, 575 (Fla. 1958).....	22
<i>Gay v. City of Coral Gables</i> , 47 So.2d 529 (Fla. 1950).....	25

App. 15

<i>Gerali v. State</i> , 50 So.3d 727 (Fla. 5th DCA 2010)	13
<i>Green v. State</i> , 604 So.2d 471, 473 (Fla. 1992)	23
<i>In re T.D v. Department of Children and Family Services</i> , 924 So.2d 827, 830 (Fla. 2nd DCA 2005)	17
[ii] <i>Lucas v. South Carolina Coastal Council</i> , 112 S.Ct. 2886, 2901 (1992)	23
<i>M.D. v. Department of Children & Family Services</i> , 924 So.2d 827, 831 (Fla. 2nd DCA 2005)	15
<i>Offutt v. U.S.</i> , 75 S.Ct. 11 (1954)	13
<i>Perlow v. Berg-Perlow</i> , 875 So.2d 383, 389-390 (Fla. 2004)	14
<i>Preserve Palm Beach Political Action Committee v. Town of Palm Beach</i> , 50 So.3d 1176, 1179 (Fla. 4th DCA 2010)	20
<i>Rinker Materials Corporation v. North Miami</i> , 286 So.2d 552, 554 (Fla. 1973)	25
<i>Rinker Materials Corp. v. City of North Miami</i> , 286 So.2d 552, 554 (Fla. 1973)	28
<i>Scott v. City of Orlando</i> , 173 So.2d 501, 503 (Fla. 2' [sic] DCA 1965)	19
<i>State v. Byars</i> , 804 So.2d 336, 338 (Fla. 4th DCA 2001)	22
<i>Stratton v. Sarasota County</i> , 983 So.2d 51, 56 (Fla. 2nd DCA 2008)	23

App. 16

<i>Verizon Business Network Services, Inc. v.</i> <i>Department of Corrections,</i> 988 So.2d 1148, 1151 (Fla. 1st DCA 2008)	14
<i>Walker v. Walker,</i> 873 So.2d 565, 566 (Fla. 2nd DCA 2004)	16,18

[iii] **CONSTITUTIONS, STATUTES,
RULES & ORDINANCES**

Article I, Section 1, Florida Constitution.....	19
Chapter 380, Florida Statutes	22,24,25
Section 163.3167(8), Florida Statutes.....	10,19,20,26
Section 163.3167(8)(a), Florida Statutes	5,11,21,27
Section 163.3164(15), Florida Statutes.....	5,21
Section 166.021(1), Florida Statutes.....	26
Section 166.021(4), Florida Statutes.....	26
Section 380.04, Florida Statutes	10,11,18,21-26
Section 380.04(1), Florida Statutes	21
Section 380.04(3)(d), Florida Statutes	11,21-25
Rule 9.210(a)(2), Fla.R.App.Pro.	31
Article III, Section 3.11, Charter of the City of Holmes Beach.....	4,27
Part I, Article III, Section 3.11(1)(a), City of Holmes Beach Charter.....	3,4,5,19
Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach.....	7,29,30
Part III, Article III, Division 1, Section 3.2(B), City of Holmes Beach Code	3,28

Part III, Article VII, Division 2, Section 7.2(A),
City of Holmes Beach Code 2,3

[1] STATEMENT OF THE CASE AND FACTS

This is an appeal of a Final Order of the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida.^{1 2} The matter before the lower tribunal was a declaratory judgment action filed by the City of Holmes Beach (City) on September 23, 2013.³ This Court has jurisdiction to hear this appeal pursuant to the provisions of Rules 9.030(b)(1)(A), Fla.R.App.Pro.

Appellants, Richard Hazen and Huong L. Tran, husband and wife, own property located at 103 29th Street, Holmes Beach, Florida, and is within the city limits of the City of Holmes Beach.⁴ Said property is adjacent to the public beach along the Gulf of Mexico. The property contains the Appellants' residence. Within the Appellants' property boundaries, and between the Appellants' residence and the Gulf side property line is located a large Australian pine tree.

¹ References to documents in the Record shall be referred to as "R:___"; References to documents in the Appendix shall be referred to as "App.Tab___". Note, there is no Transcript of the proceedings below.

² R:329-348; App.Tab1.

³ R:4-33; App. Tab2

⁴ All of the facts included in this Statement of the Case and Facts and are taken from the parties' Stipulation of Facts filed on July 18, 2016. R:290-328; App.Tab3

App. 18

The Appellants' Gulf side property line and the State of Florida Erosion Control Line are coincident.

The large Australian pine tree is located approximately thirty (30) feet landward of the Erosion Control Line.

In 2011, the Appellants decided to construct a non-habitable structure for their personal use. The non-habitable structure, referred to as a "tree house", is [2] furnished with rudimentary furniture such as chairs, tables, and a hammock. It is not used for overnight accommodations and is not wired for electricity or plumbed for water and sewer. Appellants use it as a getaway and for relaxation.

In April or May, 2011, before using the large Australian pine tree for the construction of the so-called "tree house", Richard Hazen met with Bob Schaffer [sic], who at the time was a building inspector for the City. Richard Hazen asked Mr. Shaffer if the City regulated tree houses. Mr. Shaffer reviewed his code book and spoke to Joe Duennes, the City's building official at the time. They concluded that tree houses were not named in the City's regulations and told Richard Hazen that permits were not needed.

In May 2011, Appellants commenced the construction and use of the large Australian pine tree as a tree house. On or about November 11, 2011, the Appellee received an anonymous complaint about construction of the tree house and began to investigate. During the investigation, the Appellee determined that the tree

house had been constructed without required City permits and began code enforcement proceedings.

Part III, Article VII, Division 2, Section 7.2(A), City of Holmes Beach Code provides, “*Setback from the erosion control line.* Anything to the contrary contained in this ordinance notwithstanding, no person, firm, partnership, corporation or public agency shall construct any structure or building, including [3] any dwelling, hotel, motel, apartment building or other multifamily dwelling, nor construct any structures or facilities appurtenant to existing structures or buildings, including patios, garages, sheds, swimming pools or spas within 50 feet of the *erosion* control line as established by the State of Florida. 1. *Variances.* The board of adjustment shall have no authority to grant any variance from the provisions of this paragraph that would permit any excavation or construction as hereinabove specified within 50 feet of the *erosion* control line as established by the State of Florida.”

In light of the provisions of Part III, Article VII, Division 2, Section 7.2(A), City of Holmes Beach Code, and the fact that the Appellants’ large Australian pine tree was located within 50 feet of the erosion control line as established by the State of Florida, the Appellants sought to get around the absolute prohibition of Section 7.2(A), City of Holmes Beach Code by implementing the Initiative Proceedings of Part I, Article III, Section 3.11(1)(a), City of Holmes Beach Charter,⁵ to require the City Commission to adopt an ordinance

⁵ R: 75-271; TAB 4 at Page174

authorizing the construction and maintenance of the so-called “tree house” at 103 29th Street, Holmes Beach, Florida. Such an ordinance would be consistent with the authority of the City Commission implied in Part III, Article III, Division 1, Section 3.2(B), [4] City of Holmes Beach Code,⁶ which provides, “No building or structure shall be erected and no existing building or structure shall be moved, altered or enlarged until a permit therefore has been issued by the building official. ***Except upon a written order of the city commission***, no such permit shall be issued for any building or structure where said construction, addition, alteration or use thereof would be in violation of any of the provisions of this ordinance.” (Emphasis Added).

On June 3, 2013, prior to the Appellee’s commencement of its July 30, 2013 Code Enforcement Board Hearing, the Appellants filed with the City Clerk of the City of Holmes Beach an “Affidavit To Commence Initiative Proceedings” pursuant to Article III, Section

⁶ R:271; TAB 4 at Page 197

3.11(1)(a), Charter of the City of Holmes Beach, Florida⁷.⁸ Said Charter provision states,

⁷ Appellee's Complaint includes as Exhibit No. 4 the text of Part 1, Article III, Section 3.11, Charter of the City of Holmes Beach in effect at the time of the City's consideration of Appellants' Initiative Petition. That language should be the language considered by the Court in this proceeding. It is noted, however, particularly in view of the fact that Appellee furnished to the Court below a more recent version of Part 1, Article III, Section 3.11, Charter of the City of Holmes Beach, that by Ordinance No. 14-17, adopted by the City Commission of the City of Holmes Beach on July 22, 2014, and subsequently approved by the electors of the City of Holmes Beach, the language of Part 1, Article III, Section 3.11(1)(a), Charter of the City of Holmes Beach, pertaining to Initiatives, was changed. The change included language to exclude from the Power of Initiative any ordinance relating to comprehensive plans and development orders. Curiously, Section 3.11(1)(b) relating to the power of referendum, was not similarly amended. The ballot question pertaining to the proposed amendment of Article III, Section 3.11(1)(a), Charter of the City of Holmes Beach as presented in Ordinance No. 14-17, reads, "Adoption of amendments that provide for ***non-substantive changes*** in Article III – Shall the City of Holmes Beach amend Article III, Sections . . . 3.11 . . . of its Charter to fix grammatical errors; eliminate ineffective language; update terminology to be consistent with general law, state and county statutes; provide clarity to statements within the article; and provide consistency within the Charter between sections?" (Emphasis Added). While the validity of the 2014 amendment is not at issue in this proceeding since that amendment was not in effect at the time of the filing of Appellee's Complaint, it is incumbent upon this Court to observe that the ballot question appears to be unconstitutional as misleading. For example, it appears to be misleading to suggest that the amendment to Section 3.11(1)(a), Charter of the City of Holmes Beach was a "non-substantive change". It is clearly a substantive change to Section 3.11(1)(a), Charter of the City of Holmes Beach to exclude from the Initiative process provided in the City's Charter Initiatives relating to "comprehensive plans" and "development orders". To argue that said change was necessary to

“update terminology to be consistent with general law”, would also be misleading. Section 163.3167(8)(a), Florida Statutes, which provides, “An initiative or referendum process in regard to any development order is prohibited”, necessarily includes the language of Section 163.3164(15), Florida Statutes, which defines the term “development order”. The amendment to Section 3.11(1)(a), Charter of the City of Holmes Beach does not include any definition of the term “development order” as stated in said amendment. Therefore, there are no assurances that the term “development order” as used in the City’s proposed Charter amendment will be interpreted in the same manner as that term is defined in Section 163.3164(15), Florida Statutes. It is conceivable that the term “development order” as used in the Charter amendment will be interpreted more expansively than the term as defined in Section 163.3164(15), Florida Statutes. That would clearly result in a substantive change to the pre-existing Charter provision. Additionally, if it was truly the intent of the City Commission to amend the City Charter to “update terminology to be consistent with general law”, then the City Commission would have also included a proposed amendment of Section 3.11(1)(b), Charter of the City Holmes Beach, relating to the power of referendum, to include the statutory limitations relating to the referendum process. As written, the ballot question pertaining to the proposed amendment of Article III, Section 3.11(1)(a), Charter of the City of Holmes Beach as presented in Ordinance No. 14-17, could be found to be in violation of Section 101.161(1), Florida Statutes. See, *Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers*, 705 So.2d 563 (Fla. 1998) (“Section 101.161(1) provides in pertinent part: Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot. . . . This requirement is intended ‘to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot’.”).

⁸ APP.TAB 5

[5] Sec. 3.11 – Initiative and referendum.

(1) *Power.*

(a) *Initiative.* The qualified voters of the city shall have the power to propose ordinances to the commission and, if the commission fails to adopt an ordinance so proposed without any change in substance, to adopt or reject it at a city election, provided that such power shall not extend to the budget or capital program or any ordinance relating to appropriation of money, levy of taxes or salaries of city officers or employees.

The initiative process authorizes citizens to present to their local governing body (in this case, the Holmes Beach City Commission) a proposed ordinance for consideration. The Appellants followed the required procedures and on August 28, 2013, the City Clerk of the City of Holmes Beach certified that their initiative petition was sufficient and the proposed ordinance could be presented to the City Commission.

The operative language of the ordinance proposed in Appellants' Initiative Petition is found in Section 2 of the proposed ordinance, which reads:

[6] Section 2. Approval of "Tree house" at 103 29th Street, Holmes Beach, Florida.

A. Notwithstanding any provision contained within the City of Holmes Beach Code of Ordinances to the contrary, the City Commission does hereby authorize the construction and maintenance of the

so-called “tree house” upon 103 29th Street, Holmes Beach, Florida.

- B. The tree house shall not be used by customers of “Angelinos Sea Lodge.”
- C. The Owners shall be required to record in the Public Records of Manatee County, Florida a full release or similar document, indemnifying and holding the City of Holmes Beach harmless from any and all claims for injury and/or property damages resulting from the construction and use of the subject tree house. Failure to record such a release or similar document within 60 days of the effective date of this Ordinance shall cause the automatic repeal of this Ordinance.

The Appellee filed its Complaint in this action on September 23, 2013. On October 8, 2013, the City Commission took up the Appellants’ proposed ordinance, Ordinance 13-17, for first reading. One Commissioner moved that the ordinance be approved on first reading. The motion was not seconded and the ordinance therefore failed to progress. In accordance with the statutes controlling initiative petitions, an initiative ordinance not approved by the local government is to be presented to the voters for a popular vote. If the voters approved the initiative ordinance, it becomes law of the jurisdiction.

[7] Rather than follow the Initiative Procedures contained in Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach, concerning action to be

taken by the City Commission upon a failure of the Commission to approve the ordinance submitted pursuant to an Initiative Petition, the Appellee took no further action until Appellants' filed their Motion for Summary Judgment on February 4, 2016.

On or about February 29, 2016, Appellee filed a motion to strike Appellants' Motion for Summary Judgment. On June 6, 2016, the parties appeared in a hearing before Senior Judge Dubensky. During the hearing the Court suggested and the parties agreed that the appropriate course of action would be to hold a final judgment hearing rather than a summary judgment hearing. In preparation for the final judgment hearing, the parties prepared a set of stipulated facts and filed the same.

The final judgment hearing was held before the lower tribunal on July 15, 2016. At the final judgment hearing, counsel for the parties presented their legal arguments before the Court. At the conclusion of the hearing, without stating any findings of fact and conclusions of law on the record, and without rendering any verbal rulings to be subsequently memorialized in a written order, the Court requested the parties' legal counsel to submit proposed Final Orders by the end of the month (July 29, 2016).

[8] Appellants' proposed Final Order was emailed to the Circuit Court Judge's Judicial Assistant, with a copy to Appellee's legal counsel, by email on July 29,

2016.⁹ Appellee’s proposed Final Order was emailed to the Circuit Court Judge’s Judicial Assistant on August 1, 2016 and sent to Appellants’ legal counsel by U.S. Mail, postmarked August 3, 2016, but addressed incorrectly.¹⁰ Appellee’s proposed Final Order was received by Appellants’ legal counsel on August 10, 2016.

On August 15, 2016, the Circuit Court Judge entered his Final Order in this cause.¹¹ Upon a review of the Court’s August 15, 2016 [sic], it became apparent that the Court signed Appellee’s proposed Final Order, verbatim without a single modification or edit. In fact, the Court’s Final Order contains the same incorrect date for the final judgment hearing that was stated in the first line of Appellee’s proposed Final Order (“June 15, 2016” instead of the correct hearing date, July 15, 2016).

The Court’s Final Order also contains the exact same typographical error that appears on Page 5 of Appellee’s proposed Final Order. In Paragraph F, Page 5 of both the Court’s Final Order and Appellee’s proposed Final Order, the last sentence reads, “To determine the question presented to the Court then requires a determination of whether the proposed initiative ordinance concerns a development [9] order *of* whether it concerns the use of any structure or land devoted to

⁹ APP.TAB 6

¹⁰ APP.TAB 7

¹¹ APP.TAB 1

dwelling uses”. (Emphasis Added). The highlighted word should correctly be “or”.

The Court’s Final Order also contains the same inconsistent spacing between the lettered paragraphs in the “Conclusions of Law” on Pages 4 through 8, as contained on the Appellee’s proposed Final Order. It will be noted that in the Appellee’s proposed Final Order on Page 4, there is a double space between Paragraphs A and B, and Paragraphs B and C. There is no space, however, between Paragraphs C and D. The exact same anomaly occurs on Page 4 of the Court’s Final Order.

It will be noted that on Page 5 of Appellee’s proposed Final Order, there is again double spacing between the lettered paragraphs. The same spacing is evident on Page 5 of the Court’s Final Order. On Page 6 of Appellee’s proposed Final Order, there is no space between Paragraphs H and I. Similarly, on Page 6 of the Court’s Final Order, there is no space between Paragraphs H and I.

The identical irregular spacing sequence on Pages 7 and 8 of Appellee’s proposed Final Order is reflected on Pages 7 and 8 of the Court’s Final Order.

Clearly, the Court below merely “rubber stamped” the Appellee’s proposed Final Order.

SUMMARY OF THE ARGUMENT

Appellants raise two points on Appeal: (1) That the Circuit Court violated [10] Appellants’ due process rights by “Rubber Stamping” Appellee’s proposed Final

Order without any evidence in the record to demonstrate that the Court exercised thoughtful and independent analysis of the facts, issues, and the law; and (2) There is no legal basis for the conclusion of law in the Circuit Court's Final Order that Appellants' use of their land for the erection of a "tree house" is "development" as defined by Section 380.04, Florida Statutes, and therefore Appellants' proposed initiative ordinance is not a "development order", prohibited by Section 163.3167(8), Florida Statutes.

Due process requires that judicial decisions be reached by a means that preserves both the appearance and reality of fairness. When a trial judge adopts a proposed final order verbatim, without any additions, changes, or deletions, and without the trial judge having indicated any findings of fact or conclusions of law, an appearance is created that the trial judge did not independently make factual findings and legal conclusions, hence an appearance of impropriety.

In the case at bar, where there is nothing in the record to suggest that the trial judge independently made factual findings and legal conclusions before signing verbatim Appellee's proposed Final Order, the subject Final Order should be reversed and remanded. Alternatively, since the primary issue before this Court is a matter of law, i.e., an interpretation of statutes, this Court may decide the question of law de novo, and to disregard the usual presumption that the trial [11] court's decision is correct.

The power of initiative is a venerable institution in our democratic society and should not easily be restrained. When the power has been approved by the electors of a municipality to be included in their city's Charter, it is a reservation of the right of the electors to exercise their inherent or political power over the city's governing body on matters of local concern. Once such power of initiative is granted, such a power should be liberally construed by the courts to the ends of permitting, rather than restricting the power, and to attain rather than prevent its object.

A plain reading of the definition of the term "development" contained in Section 380.04, Florida Statutes, as limited by a plain reading of Section 380.04(3)(d), Florida Statutes, leads to the conclusion that the provisions of Section 163.3167(8)(a), Florida Statutes prohibiting the use of local initiative processes in regard to any development order, does not apply to prohibit Appellants' proposed initiative ordinance, since said ordinance does not concern a "development order" as that term is defined by the Legislature.

Arguments by Appellee to restrict the interpretation of Section 380.04(3)(d), Florida Statutes, as adopted by the lower Court in its Final Order, are contrary to the plain meaning of said statute and such deviation from the plain meaning has not been shown to be necessary to effectuate the intent of the Legislature.

[12] **ARGUMENT**

POINT ONE

THE CIRCUIT COURT VIOLATED APPELLANTS' DUE PROCESS RIGHTS BY "RUBBER STAMPING" APPELLEE'S PROPOSED FINAL ORDER WITHOUT ANY EVIDENCE IN THE RECORD TO DEMONSTRATE THAT THE COURT EXERCISED THOUGHTFUL AND INDEPENDENT ANALYSIS OF THE FACTS, ISSUES, AND THE LAW.

A final judgment hearing on Appellee's Complaint for Declaratory Judgment was held before the lower tribunal on July 15, 2016. At the final judgment hearing, counsel for the parties presented their legal arguments before the Court. At the conclusion of the hearing, without stating any findings of fact and conclusions of law on the record, and without rendering any verbal rulings to be subsequently memorialized in a written order, the Court requested the parties' legal counsel to submit proposed Final Orders by the end of the month (July 29, 2016).

Appellants' proposed Final Order was emailed to the Circuit Court Judge's Judicial Assistant, with a copy to Appellee's legal counsel, by email on July 29, 2016. Appellee's proposed Final Order was emailed to the Circuit Court Judge's Judicial Assistant on August 1, 2016 and sent to Appellants' legal counsel by U.S. Mail, postmarked August 3, 2016, but addressed incorrectly. Appellee's proposed Final Order was received by Appellants' legal counsel on August 10, 2016.

In view of the fact that the parties had stipulated to the facts to be presented [13] to the Court, upon Appellants' review of Appellee's proposed Final Order, the only matters within said document that Appellants disagreed with were Appellee's legal arguments and conclusions of law. Since Appellants could not anticipate that the Circuit Court Judge would sign Appellee's proposed final order verbatim, without any additions, changes, or deletions, and without having indicated any findings of fact or conclusions of law on the record at the conclusion of the final hearing, Appellants did not file any objection to the Circuit Court's procedure of requesting proposed final orders from the parties' legal counsel.

On August 15, 2016, the Circuit Court Judge entered his Final Order in this cause. Upon a review of the Court's August 15, 2016 Final Order, it became apparent that the Judge signed Appellee's proposed Final Order, verbatim without a single modification or edit.

In *Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260 (Fla. 1973), the Florida Supreme Court stated, "Where the rights of an individual are concerned, due process requires that he be given an opportunity to be heard ***and*** that he be given a fair hearing by an impartial body." (Emphasis Added).

It is further well-recognized that due process requires not only an impartial decision-maker, but also a decision-maker that presents the appearance of being unbiased and impartial. *Gerali v. State*, 50 So.3d 727 (Fla. 5th DCA 2010). In *Offutt v. U.S.*, 75 S.Ct. 11

(1954), the U.S. Supreme Court stated, “justice must [14] satisfy the appearance of justice”. Similarly, in *Verizon Business Network Services, Inc. v. Department of Corrections*, 988 So.2d 1148, 1151 (Fla. 1st DCA 2008), the Court noted, “Due process demands an impartial decisionmaker regardless of whether the decision is being made by a fact-finder or a reviewing body. The constitutional guarantee of due process requires that judicial decisions be reached by a means that ‘preserves both the appearance and reality of fairness’.”

The procedure followed by the Circuit Court in this case, i.e., directing the parties’ legal counsel to prepare proposed orders without making any oral findings, or giving any instructions to the parties as to the content of the proposed order, is a procedure which has soundly been criticized as being contrary to the appearance of fairness.

In *Perlow v. Berg-Perlow*, 875 So.2d 383, 389-390 (Fla. 2004), the Florida Supreme Court noted,

“We understand and appreciate the fact that a trial judge in these often complex and multi-issue dissolution cases can benefit from proposed findings and conclusions prepared by the parties. Such proposals can serve as a starting point and reminder of the facts and issues that should be considered and weighed by the judge in his or her own evaluation. **However**, such submissions cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge. When the trial judge accepts verbatim

a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not express his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding is fair to neither the [15] parties involved in a particular case nor our judicial system." (Emphasis Added).

In *M.D. v. Department of Children & Family Services*, 924 So.2d 827, 831 (Fla. 2nd DCA 2005), relying upon the Florida Supreme Court's decision in *Berg-Perlow*, this Court declined to reverse the final order of a trial court which adopted verbatim the proposed judgment of the Department of Children & Family Services terminating the parental rights of a mother and father to their daughter. This Court found that the mere fact a court adopts one party's proposed judgment verbatim does not require reversal.

This Court distinguished the circumstances in *M.D.* from those in *Berg-Perlow*. For example, in *M.D.*, this Court made note of the fact that the Court's "orally announced findings and the written judgment were **basically** taken word-for-word from the Department's proposed judgment, **with some** minor grammatical **alterations** but no substantive changes". (Emphasis Added). This Court in *M.D.* also noted that the judgment in that case, unlike the judgment in *Berg-Perlow*, was not "so one-sided in its findings and conclusions

that it could only reflect the views of the party that drafted and proposed it”.

The circumstances cited by this Court for declining to reverse the judgment in *M.D.* are absent in the case at bar. The mere fact that the final judgment in *M.D.* included some “alterations” from the Department’s proposed final order is evidence that the Judge in that case at least read the proposed final order before [16] signing it. It may be reasonable to assume, based upon that fact alone, that the Judge in *M.D.* exercised his independent judgment in the case.

In the case at bar, however, as noted in the Statement of Facts above, Appellee’s proposed Final Order was signed by the Judge in this case ***without*** correcting the inaccurate date of the hearing, without correcting the noted grammatical error, and without correcting the inconsistent formatting of paragraphs. Such circumstances, when compared to those in *M.D.*, would lead to the conclusion that the Judge in the case at bar ***did not*** exercise his independent judgment. Furthermore, unlike the circumstances in *M.D.*, in the present case, the conclusions in the Final Order were clearly one-sided in favor of Appellee and against the Appellants.

In *Walker v. Walker*, 873 So.2d 565, 566 (Fla. 2nd DCA 2004), a case decided after *Berg-Perlow*, this Court reversed the lower court’s final judgment upon a finding that it was based verbatim upon the proposed final judgment of one of the parties. This Court found

that as such, “the trial court delegated its decision-making authority to the Husband’s counsel”.

In *Walker* this Court noted that the Florida Supreme Court in *Berg-Perlow* stated, “prior to requesting proposed final judgments, the trial judge should, when possible, indicate on the record the court’s findings of fact and conclusions of law”. This Court went on to state, “We can conceive of no scenario when it would [17] not be possible for the trial court to indicate its findings of fact and conclusions of law”. *Walker* at 566.

Following this Court’s statements in *Walker*, in order to avoid the appearance that a judgment does not reflect the trial judge’s independent decision-making, either the judge presents his or her findings of fact and conclusions of law on the record before the preparation of proposed orders by the parties, or the trial judge refrain from adopting a proposed order verbatim.

In *In re T.D v. Department of Children and Family Services*, 924 So.2d 827, 830 (Fla. 2nd DCA 2005), this Court stated, “The rule in this district, as elsewhere in Florida, is that we will reverse any judgment entered under circumstances that create an appearance that the judgment does not reflect the judge’s independent decision-making.”

In *Corporate Management Advisors, Inc. v. Boghos*, 756 So.2d 246, 248 (Fla. 5th DCA 2000), the Court commented on the Eleventh Circuit’s decision in *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353 (11th Cir. 1997) stating, “The Eleventh Circuit made it clear that a judge’s practice of delegating the task of drafting

sensitive, dispositive orders to counsel, and then uncritically adopting the orders nearly verbatim would belie the appearance of justice and creates the potential for overreaching and exaggeration on the part of the attorney preparing findings of fact. . . . The court referred to a quote of Judge J. Skelly Wright, who [18] characterized opinions drafted by lawyers as ‘not worth the paper they are written on’ as far as assisting the appellate court in determining why the judge decided the case.”

In similar fashion, this Court in *Walker v. Walker*, 873 So.2d 565, 566 (Fla. 2nd DCA 2004) noted that where the Final Judgment is taken verbatim from one party’s proposed final judgment, and the trial court fails to provide its findings or conclusions in the record, meaningful appellate review of the final judgment is impossible.

Accordingly, with respect to the case at bar, it may be found that the lower court’s action, or more to the point, inaction, which deprives the Appellants meaningful appellate review, fails to satisfy the appearance of justice, resulting in a denial of Appellants’ rights to due process, and is a miscarriage of justice.

Therefore, the Final Judgment entered in this cause should be reversed and the case remanded to the Circuit Court to be reassigned to a different judge to consider the merits of this case. Alternatively, this Court should reverse the Final Judgment of the lower court and disregard the conclusions of law therein, and

consider the merits of the parties' legal arguments de novo.

POINT TWO

THERE IS NO LEGAL BASIS FOR THE CONCLUSION OF LAW IN THE CIRCUIT COURT'S FINAL ORDER THAT APPELLANTS' USE OF THEIR LAND FOR THE ERECTION OF A "TREE HOUSE" IS "DEVELOPMENT" AS DEFINED BY SECTION 380.04, FLORIDA [19] STATUTES, THEREFORE APPELLANTS' PROPOSED INITIATIVE ORDINANCE IS NOT A "DEVELOPMENT ORDER", PROHIBITED BY SECTION 163.3167(8), FLORIDA STATUTES, NOR IS THERE ANY OTHER LEGAL BASIS JUSTIFYING APPELLEE'S FAILURE TO SUBMIT APPELLANTS' INITIATIVE ORDINANCE TO A VOTE OF THE ELECTORS.

At the time Appellants' "Affidavit To Commence Initiative Proceedings" was filed with the City Clerk of the City of Holmes Beach, Part I, Article III, Section 3.11(1)(a), City of Holmes Beach Charter, provided for Initiatives and stated, "The qualified voters of the city shall have the power to propose ordinances to the commission and, if the commission fails to adopt an ordinance so proposed without any change in substance, to adopt or reject it at a city election, provided that such power shall not extend to the budget or capital program or any ordinance relating to appropriation of

money, levy of taxes or salaries of city officers or employees.”¹²

Article I, Section 1, Florida Constitution provides, “All political power is inherent in the people”. Consistent with this historic reservation of powers, many municipal charters include the power of initiative. Initiative has been described generally as the power reserved to the inhabitants of a municipality to propose (“initiate”) ordinances which may be enacted or rejected by all the electors. In *Scott v. City of Orlando*, 173 So.2d 501, 503 (Fla. 2d DCA 1965), the Court [20] noted that initiative “is the right of the people of the municipality to exercise their inherent or political power over the city council on matters of local concern”.

The power of initiative is a venerable institution in our democratic society and should not be easily restrained. See, *Preserve Palm Beach Political Action Committee v. Town of Palm Beach*, 50 So.3d 1176, 1179 (Fla. 4th DCA 2010) (“The right of the people to vote on issues they are entitled to vote on is one of utmost importance in our democratic system of government”). It has long been held, “Statutes giving the power of initiative to the electors of a municipality are to be liberally construed by the courts to the ends of permitting rather than restricting the power and to attaining rather than preventing its object”. *Barnes v. City of Miami*, 47 So.2d 3, 4 (Fla. 1950).

¹² APP.TAB 8

In *Browning v. Florida Hometown Democracy, Inc.*, 29 So.3d 1053, 1063-1065 (Fla. 2010), the Florida Supreme Court noted, “Given its constitutional underpinnings, the right to petition is inherent and absolute”. The Court further stated, “any rule or statute which regulates this initiative process *must not unduly burden the petitioners’ initiative access.*” (Emphasis in original).

The City of Holmes Beach seeks to limit the rights of the Appellants and those qualified voters signing Appellants’ Initiative Petition, contending the [21] provisions of Section 163.3167(8), Florida Statutes¹³ prohibit Appellants’ proposed initiative ordinance.

Section 163.3167(8)(a), Florida Statutes provides, “An initiative or referendum process in regard to any **development order** is prohibited.” (Emphasis Added).

The term “development order” is defined by Section 163.3164(15), Florida Statutes¹⁴ to mean, “any order granting, denying, or granting with conditions an application for a **development permit**”. (Emphasis Added).

Section 163.3167(14), Florida Statutes¹⁵ states that the term **development** “has the same meaning as in s. 380.04”.

¹³ APP.TAB 9

¹⁴ APP.TAB 10

¹⁵ APP.TAB 11

In its Complaint, the Appellee cited the definition of the term “development” as provided in Section 380.04(1), Florida Statutes¹⁶ to support its contention that Appellants’ Initiative Petition is prohibited by Section 163.3167(8)(a), Florida Statutes. Section 380.04(1), Florida Statutes provides, “The term ‘development’ means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels”.

[22] In drafting its Complaint, however, the Appellee overlooked the provisions of Section 380.04(3)(d), Florida Statutes¹⁷. Section 380.04(3)(d), Florida Statutes expressly excludes from the definition of the term “development” for the purposes of Chapter 380, Florida Statutes, “The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling”.

It is the Appellee’s argument, as adopted in the lower court’s Final Order, that the phrase in Section 380.04(3)(d), Florida Statutes which reads, “The use of any . . . land . . . for any purpose customarily incidental to enjoyment of the dwelling”, does not include construction on the land. The question that was before the lower tribunal was whether the Appellee’s interpretation of Section 380.04(3)(d), Florida Statutes is consistent with the intent of the Florida Legislature.

¹⁶ APP.TAB 12

¹⁷ APP.TAB 13

It is axiomatic that when interpreting the provisions of a statute, Courts must construe the statute according to the plain meaning of the words employed by the Legislature. This is so because the Legislature is presumed to know the plain meaning of the words it uses. *Florida State Racing Commission v. McLaughlin*, 102 So.2d 574, 575 (Fla. 1958) (“the Legislature is conclusively presumed to have a working knowledge of the English language and when a statute has been drafted in such a manner as to clearly convey a specific meaning the only proper function [23] of the Court is to effectuate this legislative intent”). In construing a statute, courts must follow what the Legislature has written and “neither add, subtract, nor distort the words written”. *State v. Byars*, 804 So.2d 336, 338 (Fla. 4th DCA 2001). To do otherwise “would be an abrogation of legislative power”. *Donato v. AT&T*, 767 So.2d 1146, 1150 (Fla. 2000).

So what then is the plain meaning of Section 380.04(3)(d), Florida Statutes? It may be helpful to break the subject sentence into its component parts, the first of which reads, in pertinent part, “The *use* of any . . . land . . . for *any purpose*. . . .”

When interpreting statutes, it is generally accepted that a “word is known by the company it keeps”. *Stratton v. Sarasota County*, 983 So.2d 51, 56 (Fla. 2nd DCA 2008). Thus, the word “use” is modified by the phrase “for any purpose”. This would signify that the Legislature intended the word “use” would include any imaginable activity.

The purposes for which land may be used are almost limitless. Among the historic uses of land is the erection of habitable or productive improvements thereon. In fact, the construction of improvements upon privately owned lands has been called an “essential **use**” of the land. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992).

The second part of Section 380.04(3)(d), Florida Statutes reads, “. . . customarily **incidental** to enjoyment of the dwelling”. When ascertaining the [24] plain meaning of words, Courts may resort to a dictionary. *Green v. State*, 604 So.2d 471, 473 (Fla. 1992). *The Macmillan Dictionary* defines the word “incidental” to mean, “related to something but considered less important”. This is similar to the definition of the word “accessory” which is defined by the *Merriam-Webster* dictionary to mean, “a thing of secondary or subordinate importance”. The word “incidental” as used in 380.04(3)(d), Florida Statutes relates to the word “dwelling”.

Therefore, putting together the two parts of Section 380.04(3)(d), Florida Statutes, we find that the Legislature intended to exclude from the definition of the term “development” for the purposes of Chapter 380, Florida Statutes, any use of land, including the construction of typical improvements accessory to the main residence on a property.

It is known from common experience that patios and decks, open or enclosed, elevated or at grade, are improvements that are customarily incidental to the

enjoyment of the principal residential structure on private property. The parties stipulated that the Appellants' "tree house" was accessory to the Appellants' residence on the subject property.

Thus, the use of land for the erection of such improvements would be excluded from the definition of the term "development" pursuant to the provisions of Section 380.04(3)(d), Florida Statutes.

[25] Accordingly, Appellants' use of their land for the erection of an elevated, enclosed deck, or "tree house", incidental to their residence, is not "development" as that term is defined by Section 380.04, Florida Statutes.

Without any legal justification, the Appellee seeks to restrict, subtract from, or otherwise distort the plain meaning of the words used by the Legislature in Section 380.04(3)(d), Florida Statutes by arguing that the phrase "the use of any . . . land . . . for any purpose" does not include the erection of improvements upon the land. Neither the Appellee's "Proposed Final Order", nor the Court's Final Order, which was taken verbatim from the Appellee's draft, explain why it is necessary to deviate from the plain meaning of the words used in Section 380.04(3)(d), Florida Statutes.

In *Rinker Materials Corp. v. North Miami*, 286 So.2d 552, 554 (Fla. 1973), the Florida Supreme Court quoted from its decision in *Gay v. City of Coral Gables*, 47 So.2d 529 (Fla. 1950) stating, "When the legislative intent is clear from words used in the enactment, courts **are bound** thereby and **may not** seek a meaning

different from ordinary or common usage connotation of such words ***unless***, upon a consideration of the act as a whole and the subject matter to which it relates, the court ***is necessarily lead*** to a determination that the legislature intended a different meaning to be ascribed to the language adopted by it.” (Emphasis Added).

[26] The Appellee’s “Proposed Final Order” and the Court’s Final Order exclude the “construction or development” of the subject tree house from the provisions of Section 380.04(3)(d), Florida Statutes. This was done, however, without providing any demonstration how consideration of Chapter 380, Florida Statutes, as a whole, and the subject matter to which it relates, made it necessary to deviate from the words’ plain meaning. Furthermore, there was no showing that the Legislature intended a different meaning to be ascribed to the language adopted than the plain meaning.

Therefore, since Appellants’ use of their land for the erection of an elevated, enclosed deck, or “tree house”, incidental to their residence, is not “development” as that term is defined by Section 380.04, Florida Statutes, and therefore, by definition, is not a “development order”, the Appellants’ proposed initiative ordinance is ***not*** prohibited by Section 163.3167(8), Florida Statutes.

Section 166.021(1), Florida Statutes provides, “municipalities shall have the general, corporate, and proprietary powers to enable them to conduct municipal

government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.”

Section 166.021(4), Florida Statutes provides, “The provisions of this section shall be so construed as to secure for municipalities the broad exercise of [27] home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those expressly prohibited”.

Other than the provisions of Section 163.3167(8)(a), Florida Statutes, which as demonstrated above, is not applicable to the Appellants’ Initiative Petition relating to the tree house, the Appellee has cited no provision of the Florida Constitution, general or special law, or county charter which expressly prohibit Appellee from complying with the provisions of Article III, Section 3.11, Charter of the City of Holmes Beach, Florida with respect to Appellants’ Initiative Petition.

In the absence of any provision of the Florida Constitution, general or special law, or county charter which expressly prohibit the Appellee from complying with the provisions of Article III, Section 3.11, Charter of the City of Holmes Beach, Florida with respect to

Appellants' Initiative Petition, then the Appellee has the full power and authority to act upon said Petition. *City of Hollywood v. Mulligan*, 934 So.2d 1238 (Fla. 2006).

The Appellee has cited no provision of the Florida Constitution, general or special law, or county charter which expressly prohibit the City from complying [28] with the provisions of Article III, Section 3.11, Charter of the City of Holmes Beach, Florida and adopting Appellants' proposed initiative ordinance even if the Appellants' tree house is not in full compliance with the City's Land Development Code.

Part III, Article III, Division 1, Section 3.2(B), City of Holmes Beach Land Development Code¹⁸ provides, "No building or structure shall be erected and no existing building or structure shall be moved, altered or enlarged until a permit therefore has been issued by the building official. **Except upon written order of the city commission**, no such permit shall be issued for any building or structure where said construction, addition, alteration or use thereof would be in violation of any of the provisions of this ordinance". (Emphasis Added).

As noted above, Courts will give a municipal ordinance the plain and ordinary meaning of the words employed by the City Commission. *Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552, 554 (Fla. 1973). Employing this rule of statutory construction to

¹⁸ APP.TAB 14

the phrase, “Except upon written order of the city commission”, the plain meaning of Part III, Article III, Division 1, Section 3.2(B), City of Holmes Beach Land Development Code requires the conclusion that notwithstanding the fact that a structure may be in violation of any provision of the City’s Land Development Code, the City Commission has the [29] lawful authority to issue an order directing the issuance of a permit for such a structure. This is true even if the subject tree house is located within the City’s setback from the Erosion Control Line, said setback being a provision of the City’s Land Development Code.

Thus, there is no legal basis prohibiting the Appellee from approving the ordinance proposed by Appellants pursuant to the City’s Charter Initiative Process.

Should Appellee fail to adopt the ordinance proposed by Appellants, the Appellee is required to submit the proposed ordinance to the voters pursuant to the provisions of Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach. It is only when this is done will “the right of the people of the municipality to exercise their inherent or political power over the city council on matters of local concern” be respected.

Accordingly, the Final Order of the lower tribunal should be reversed, and the case remanded to the lower tribunal for further proceedings consistent with the finding that Appellee is not prohibited from acting upon Appellants proposed Initiative Ordinance consistent with the requirements of Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach.

CONCLUSION

The lower court's adoption of Appellee's proposed final order verbatim, without any additions, changes, or deletions, and without having indicated any [30] findings of fact or conclusions of law on the record at the conclusion of the final hearing, deprives the Appellants of a meaningful appellate review, and fails to satisfy the appearance of justice, resulting in a denial of their rights to due process and a miscarriage of justice.

Therefore, the Final Judgment entered in this cause should be reversed and the case remanded to the Circuit Court to be reassigned to a different judge to consider the merits of this case. Alternatively, this Court should reverse the Final Judgment of the lower court and disregard the conclusions of law therein, and consider the merits of the parties' legal arguments de novo.

Furthermore, the Final Order of the lower tribunal should be reversed, and the case remanded to the lower tribunal for further proceedings consistent with the finding that Appellee is not prohibited from acting upon Appellants proposed Initiative Ordinance consistent with the requirements of Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach.

[Certificate Of Service Omitted]

[Certificate Of Compliance Omitted]

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT**

**PETITIONERS' COMMIT-
TEE, RICHARD HAZEN and
HUONG L. TRAN in her
Individual capacity and as
the designated Representa-
tive of the PETITIONERS'
COMMITTEE,**

DCA#: 2D16-4158

Appellants,

**Appealed Case:
2013-CA-05990AX**

v.

**THE CITY OF HOLMES
BEACH, A municipal
Corporation of the State
of Florida,**

Appellee.

/

REPLY BRIEF

(Filed Feb. 2, 2017)

David M. Levin
Florida Bar #296384
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
2033 Main Street, Suite 600
Sarasota, FL 34237
Email: dlevin@icardmerrill.com
(941) 366-8100
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS	i
ARGUMENT	1
POINT ONE – THE CIRCUIT COURT VIOLATED APPELLANTS’ DUE PROCESS RIGHTS BY “RUBBER STAMPING” APPELLEE’S PROPOSED FINAL ORDER WITHOUT ANY EVIDENCE IN THE RECORD TO DEMONSTRATE THAT THE COURT EXERCISED THOUGHTFUL AND INDEPENDENT ANALYSIS OF THE FACTS, ISSUES, AND THE LAW	1
POINT TWO – THERE IS NO LEGAL BASIS FOR THE CONCLUSION OF LAW IN THE CIRCUIT COURT’S FINAL ORDER THAT APPELLANTS’ USE OF THEIR LAND FOR THE ERECTION OF A “TREE HOUSE” IS “DEVELOPMENT” AS DEFINED BY SECTION 380.04, FLORIDA STATUTES, THEREFORE APPELLANTS’ PROPOSED INITIATIVE ORDINANCE IS NOT A “DEVELOPMENT ORDER”, PROHIBITED BY SECTION 163.3167(8), FLORIDA STATUTES, NOR IS THERE ANY OTHER LEGAL BASIS JUSTIFYING APPELLEE’S FAILURE TO SUBMIT APPELLANTS’ INITIATIVE ORDINANCE TO A VOTE OF THE ELECTORS.....	4
CONCLUSION.....	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE.....	10

[i] **TABLE OF CITATIONS**

CASES

<i>Brindise v. U.S. Bank National Association</i> , 183 So.3d 1215, 1217 (Fla. 2nd DCA 2016).....	5
<i>Cowart v. West Palm Beach</i> , 255 So.2d 673 (Fla. 1971).....	8
<i>Lucas v. South Carolina Coastal Council</i> , 112 S.Ct. 2886, 2901 (1992)	5
<i>M.D. v. Department of Children and Family Ser- vices</i> , 924 So.2d 827 (Fla. 2nd DCA 2005).....	2
<i>M.D v. Department of Children and Family Ser- vices</i> , 924 So.2d 827, 830 (Fla. 2nd DCA 2005).....	3
<i>Offutt v. U.S.</i> , 75 S.Ct. 11 (1954)	4
<i>Vatalaro v. Florida Department of Environmen- tal Regulation</i> , 601 So.2d 1223,1228-1229 (Fla. 5th DCA 1992), ...	6
<i>Villas of Lake Jackson, Ltd. v. Leon County</i> , 906 F.Supp. 1509, 1516 (D.C.N.D.Fla. 1995)	5

STATUTES, CHARTERS

Section 163.3164(15), Florida Statutes.....	7,9
Section 163.3167(8), Florida Statutes.....	4
Section 163.3167(8)(a), Florida Statutes	7-9
[ii] Section 163.3167(14), Florida Statutes	7,9
Section 380.04, Florida Statutes	4

Section 380.04(1), Florida Statutes	5,7
Section 380.04(3)(d), Florida Statutes	5-8,9
Section 533.79, Florida Statutes	8
Part 1, Article III, Section 3.11(6), Charter of the City of Holmes Beach.....	9

[1] **ARGUMENT**

POINT ONE

THE CIRCUIT COURT VIOLATED APPELLANTS' DUE PROCESS RIGHTS BY "RUBBER STAMPING" APPELLEE'S PROPOSED FINAL ORDER WITHOUT ANY EVIDENCE IN THE RECORD TO DEMONSTRATE THAT THE COURT EXERCISED THOUGHTFUL AND INDEPENDENT ANALYSIS OF THE FACTS, ISSUES, AND THE LAW.

Appellee, City of Holmes Beach, concedes in its Answer Brief that the trial court merely signed the draft proposed order provided by Appellee, including "the formatting and errors in dates". This is uncontroverted evidence that the trial court did not even take the time to have Appellee's draft proposed order proof-read and retyped before adopting Appellee's order as that of the trial court. Appellee further concedes that due process extends to the final order.

The ultimate questions remaining to be resolved by this Court are whether the final order is the result of the lower tribunal's independent judgment, and did the action of the lower tribunal, appearing to merely "rubber stamp" Appellee's draft proposed order, preserve both the appearance and reality of fairness?

Neither Appellants nor Appellee were able to cite to this Court an appellate decision based upon facts as egregious as in the case at bar, i.e., where the lower tribunal made no in-court statements regarding findings of fact and conclusions of law, but signed the exact document provided by one of the parties.

[2] In its argument in support of the lower tribunal's final order, Appellee relies heavily on this Court's decision in *M.D. v. Department of Children and Family Services*, 924 So.2d 827 (Fla. 2nd DCA 2005)¹ wherein this Court declined to reverse a lower tribunal's final order which was "basically taken word-for-word" from the proposed order drafted by one of the parties.

The circumstances in *M.D.* are significantly distinguishable from the circumstances in the case at bar. In *M.D.*, the lower tribunal's written judgment was "basically" taken "word for word", meaning that the written judgment was not the identical document provided as a proposed order by one of the parties. Furthermore, this Court noted that the lower tribunal's

¹ Appellee incorrectly cited this case in its Answer Brief as *In re: T.D. v. Dep't of Children and Family Services*, 924 So.2d 827 (Fla. 2nd DCA 2005). It seems that Appellants also mistakenly used this reference once in their Initial Brief.

written judgment contained “some minor grammatical alterations”. *M.D.*, at 828. Such circumstances, while preventing this Court from concluding that the lower tribunal did in fact exercise its independent judgment, allowed this Court to conclude that the challengers of the final order “failed to demonstrate that circumstances surrounding the entry of the judgment create an appearance that the judge did not exercise his independent judgment”. *M.D.*, at 828.

In the case at bar, however, there is no dispute that the lower tribunal signed the exact document provided by Appellee without changing a single word, and without correcting the formatting errors and errors in dates contained in Appellee’s [3] document. In light of the fact that the lower tribunal did not make any in-court statements regarding its findings of fact and conclusions of law, and in view of the fact that the final order was entirely one-sided in favor of Appellee, there is absolutely no circumstances in the case at bar that suggest the lower tribunal exercised its independent judgment before signing the draft proposed order provided by Appellee.

Of course, Appellants cannot prove that the lower tribunal in fact failed to exercise its independent judgment before signing the document prepared by Appellee, but such is not the standard of proof in this case.

Instead, the standard is that announced in *M.D v. Department of Children and Family Services*, 924 So.2d 827, 830 (Fla. 2nd DCA 2005), wherein this Court stated, “The rule in this district, as elsewhere in Florida, is that we ***will reverse any judgment*** entered under circumstances that ***create an appearance*** that the judgment does not reflect the judge’s independent decision-making.” (Emphasis Added).

Under the circumstances of this case, there is no basis for the Court to recede from its standard. The circumstances of this case, without a doubt, create an ***appearance*** that the judgment does not reflect the judge’s independent decision-making, and the Appellee has failed to provide any facts or circumstances [4] permitting this Court to find otherwise. As stated by the U.S. Supreme Court in *Offutt v. U.S.*, 75 S.Ct. 11 (1954), “justice must satisfy the appearance of justice”.

Accordingly, this Court should reverse the final order of the lower tribunal.

POINT TWO

THERE IS NO LEGAL BASIS FOR THE CONCLUSION OF LAW IN THE CIRCUIT COURT'S FINAL ORDER THAT APPELLANTS' USE OF THEIR LAND FOR THE ERECTION OF A "TREE HOUSE" IS "DEVELOPMENT" AS DEFINED BY SECTION 1380.04, FLORIDA STATUTES, THEREFORE APPELLANTS' PROPOSED INITIATIVE ORDINANCE IS NOT A "DEVELOPMENT ORDER"; PROHIBITED BY SECTION 163.3167(8), FLORIDA STATUTES, NOR; IS THERE ANY OTHER LEGAL BASIS JUSTIFYING APPELLEE'S FAILURE TO SUBMIT APPELLANTS' INITIATIVE ORDINANCE TO A VOTE OF THE ELECTORS²

Appellee argues in its Answer Brief, "The portion of the judgment in which the trial court determined the initiative ordinance was in fact a development order is based on an evidentiary showing and it is reviewed on whether the court's conclusions are supported by competent substantial evidence".

² Appellee rewrote Appellants' Point Two and included a non-fundamental issue neither raised nor argued before the lower tribunal, nor addressed in the Final Order. Said issue concerned whether Section 553.79, Florida Statutes provided another legal basis for Appellee's failure to consider Appellants' Initiative Petition. It was not proper for Appellee to introduce that issue for the first time in its Answer Brief and should not be considered by this Court at this stage of the case. *Lightsee v. First National Bank of Melbourne*, 132 So.2d 776, 778 (Fla. 2nd DCA 1961).

The issue before this Court is not whether the lower tribunal's findings regarding Appellants' proposed Initiative are supported by competent, substantial evidence. This case involves an interpretation of a State statute, and whether or not the lower tribunal correctly interpreted said statute. As such, this Court's [5] standard of review is *de novo*. *Brindise v. U.S. Bank National Association*, 183 So.3d 1215, 1217 (Fla. 2nd DCA 2016).

Specifically at issue before the lower tribunal, and now this Court, is whether Appellants' use of their land to construct an accessory structure to enhance their enjoyment of their residence on the same land, is exempt from the definition of the term "development" by virtue of the provisions of Section 380.04(3)(d), Florida Statutes. Section 380.04(3)(d), Florida Statutes, excludes from the definition of the term "development" as otherwise defined in Section 380.04(1), Florida Statutes, "the *use* of any . . . land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling". (Emphasis Added).

It is Appellants' contention that in the phrase, "the use of any . . . land", the word "use" includes construction upon the land. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992), the U.S. Supreme Court noted that under the common law, the erection of productive improvements upon one's land was an essential "use" of land.

Similarly, in *Villas of Lake Jackson, Ltd. v. Leon County*, 906 F.Supp. 1509, 1516 (D.C.N.D.Fla. 1995),

the Court noted that the right to “use” land includes the right to develop the land. Here the Court was using the generic form of the word “develop”, a concept typically involving making physical changes upon the land.

[6] In *Vatalaro v. Florida Department of Environmental Regulation*, 601 So.2d 1223,1228-1229 (Fla. 5th DCA 1992), the Court discussed the “bundle of rights” that an owner of real property has as a consequence of such ownership. In that discussion, the Court included the construction of a home and other structures as a “use of the property”.

Therefore, interpreting the phrase “the use of any . . . land” in accordance with its plain meaning would require this Court to find that the word “use” embodies such activities as the construction and maintenance of structures upon the land.

The Appellee’s argument, as adopted verbatim by the lower tribunal, is that Appellants’ Initiative Petition concerned the “construction and maintenance” of Appellants’ “tree house”, but “not the use of the structure or the land”. Therefore, according to Appellee and the lower tribunal, since the Initiative Petition did not specifically state that approval would authorize “the use of the land”, the exclusion provisions of Section 380.04(3)(d), Florida Statutes were not applicable.

To sustain the Appellee’s argument, as adopted verbatim by the lower tribunal, this Court would have to ignore the plain meaning of the phrase “use of any . . . land” as discussed above. As a matter of law,

because a plain meaning of the phrase “use of any . . . land” includes the construction and maintenance of structures upon the land, the construction and maintenance of a “tree house” would be included within the scope of Section 380.04(3)(d), Florida Statutes.

[7] The parties stipulated that the Appellants’ “tree house” constructed on the land in question was an accessory use customarily incidental to the enjoyment of the permitted use of the property, i.e., a residential dwelling. Therefore, there was no dispute between the parties that the “tree house” was “devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling”.

Accordingly, since the construction and maintenance, of Appellants’ “tree house” constitutes “the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling”, pursuant to Section 380.04(3)(d), Florida Statutes, the construction and maintenance of Appellants’ “tree house” shall not be taken for the purpose of Chapter 380, Florida Statutes to involve “development” as that term is defined in Section 380.04(1), Florida Statutes.

Since, pursuant to Section 380.04(3)(d), Florida Statutes, the construction and maintenance of Appellants’ “tree house”, by definition, is **not** “development”, then pursuant to Sections 163.3164(15) and 163.3167(14) Florida Statutes, Appellants’ Initiative Petition is neither a “development permit” nor “development order”.

In view of the fact that Section 163.3167(8)(a), Florida Statutes prohibits only an initiative process in regard to “development orders”, Appellants’ Initiative [8] Petition, as a matter of law, is not prohibited by Section 163.3167(8)(a), Florida Statutes.

In an apparent effort to “hedge its bets”, for the first time in this appeal the Appellee introduces a new issue and argument to thwart Appellants’ lawful use of the City of Holmes Beach Charter provisions concerning Initiative Proceedings. On Pages 17-19, Appellee argues that Section 533.79, Florida Statutes “prohibits the use of initiative for after the fact approval of the tree house”.

In the Conclusion of its Answer Brief, Appellee suggests that the lower tribunal found that Appellants’ use of its Initiative Petition was prohibited by Section 163.3167(8)(a), Florida Statutes **and** Section 533.79, Florida Statutes.

Even a cursory review of the lower tribunal’s Final Order in this case will reveal that there is no mention of Section 533.79, Florida Statutes, that statute was never an issue before the lower tribunal, and the lower tribunal never made any finding with respect to said statute.

It is well-established that, with certain exceptions not applicable here, a theory of the case not presented and argued in the lower tribunal, may not be raised for the first time on appeal. *Cowart v. West Palm Beach*, 255 So.2d 673 (Fla. 1971).

Therefore, since the construction and maintenance of Appellants' "tree house" squarely fits within the exception provided in Section, 380.04(3)(d), Florida [9] Statutes, the Appellants' Initiative Petition does not constitute a "development order", and therefore is not prohibited by Section 163.3167(8)(a), Florida Statutes.

CONCLUSION

The lower court's adoption of Appellee's proposed final order verbatim, without any additions, changes, or deletions, and without having indicated any findings of fact or conclusions of law on the record at the conclusion of the final hearing, deprives the Appellants of a meaningful appellate review, and fails to satisfy the appearance of justice, resulting in a denial of their rights to due process and a miscarriage of justice.

Furthermore, upon a *de novo* review of the provisions of Section 163.3167(8)(a), Florida Statutes, including consideration of Sections 163.3164(15) and 163.3167(14), Florida Statutes, and especially Section 380.04(3)(d), Florida Statutes in light of the stipulated facts, the Appellants' Initiative Petition does not constitute a "development orders", and therefore is not prohibited by Section 163.3167(8)(a), Florida Statutes.

Accordingly, the Final Order entered in this cause should be reversed, and the case remanded to the lower tribunal for further proceedings consistent with the finding that Appellee is not prohibited from acting upon Appellants' proposed Initiative Ordinance

App. 62

consistent with the requirements of Part 1, Article III,
Section 3.11(6), Charter of the City of Holmes Beach.

[Certificate of Service Omitted]

[Certificate of Compliance Omitted]

**IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, SECOND DISTRICT**

**PETITIONERS' COMMIT-
TEE, RICHARD HAZEN
and HUONG L. TRAN in
her individual capacity
and as the designated
Representative of the
PETITIONERS'
COMMITTEE,**

Appellants,

Case No. 2D16-4158

v.

**CITY OF HOLMES
BEACH, FLORIDA
A municipal corporation
of the State of Florida.**

Appellee.

/

**MOTION FOR REHEARING EN BANC
AND FOR
ISSUANCE OF A WRITTEN OPINION**

COMES NOW, APPELLANTS, PETITIONERS' COMMITTEE, RICHARD HAZEN and HUONG L. TRAN, by and through their undersigned legal counsel, and pursuant to Rule 9.331(d), Fla.R.App.Pro. and Rule 9.330(a), Fla.R.App.Pro. who move for a rehearing en banc of this Court's Order dated May 3, 2017, and for the issuance of a written opinion in this cause, and certification.

I. MOTION FOR REHEARING EN BANC

On May 3, 2017, this Court affirmed, without a written opinion, the order of the trial court in a declaratory judgment action filed by the City of Holmes Beach, ruling adversely to Appellants. The City of Holmes Beach was contesting the right of Appellants to seek consideration of an ordinance by the City Commission under a provision in the City's Charter concerning Initiatives. It was the City's position that Section 163.3167(8), Florida Statutes prohibited use of the City Charter's Initiative provisions for consideration of the ordinance proposed by Appellants.

Whether or not Section 163.3167(8), Florida Statutes prohibited Appellants' Initiative Petition from being presented to the voters turned on the interpretation of the term "development order" as that term was used in Section 163.3167(8), Florida Statutes. Whether or not Appellants' Initiative was a "development order", depended upon an interpretation of the term "development permit" as that term was defined in Section 163.3164(15), Florida Statutes. Whether or not Appellants' Initiative was a "development permit", depended upon an interpretation of the term "development" as that term is defined in Section 380.04, Florida Statutes. Finally, whether or not Appellants' Initiative was "development" depended upon an interpretation of the provisions of Section 380.04(3)(d), Florida Statutes, which included express exclusions from the definition of the term "development", and whether Appellants' Initiative related to one of the express exclusions.

On July 15, 2016, a hearing was conducted before the lower tribunal at which time counsel for Appellants and the City presented their arguments. At the conclusion of the hearing, without stating any findings of fact and conclusions of law on the record, and without rendering any verbal rulings to be subsequently memorialized in a written order, the lower tribunal requested the parties' legal counsel to submit proposed Final Orders by the end of the month (July 29, 2016).

Following the submission of their individual proposed Final Orders to the lower tribunal, on August 15, 2016 the lower tribunal entered its Final Order. Attached as Exhibit "A" to this Motion is a copy of the lower tribunal's Final Order, found at Tab 1 to the Appendix to Appellants' Initial Brief.

Attached as Exhibit "B" to this Motion is a copy of the Appellee's proposed Final Order which it submitted to the lower tribunal on August 1, 2016. The Appellee's proposed Final Order may be found at Tab 7 to the Appendix to Appellants' Initial Brief.

All one needs to do is to put the Appellee's proposed Final Order on top of the Final Order entered by the lower tribunal, hold them both to the light, and it instantly becomes obvious that the two documents are absolutely, 100% identical.

Upon a review of the lower tribunal's August 15, 2016 Final Order, it will become apparent that the lower tribunal merely signed Appellee's proposed Final Order, verbatim without a single modification or edit. In fact, the lower tribunal's Final Order contains the

same incorrect date for the final judgment hearing that was stated in the first line of Appellee's proposed Final Order ("June 15, 2016" instead of the correct hearing date, July 15, 2016).

The lower tribunal's Final Order also contains the exact same typographical error that appears on Page 5 of Appellee's proposed Final Order. In Paragraph F, Page 5 of both the lower tribunal's Final Order and Appellee's proposed Final Order, the last sentence reads, "To determine the question presented to the Court then requires a determination of whether the proposed initiative ordinance concerns a development order ***of*** whether it concerns the use of any structure or land devoted to dwelling uses". (Emphasis Added). The highlighted word should correctly be "or".

The lower tribunal's Final Order also contains the same inconsistent spacing between the lettered paragraphs in the "Conclusions of Law" on Pages 4 through 8, as contained on the Appellee's proposed Final Order. It will be noted that in the Appellee's proposed Final Order on Page 4, there is a double space between Paragraphs A and B, and Paragraphs B and C. There is no space, however, between Paragraphs C and D. The exact same anomaly occurs on Page 4 of the lower tribunal's Final Order.

It will be noted that on Page 5 of Appellee's proposed Final Order, there is again double spacing between the lettered paragraphs. The same spacing is evident on Page 5 of the lower tribunal's Final Order. On Page 6 of Appellee's proposed Final Order, there is

no space between Paragraphs H and I. Similarly, on Page 6 of the lower tribunal's Final Order, there is no space between Paragraphs H and I.

The identical irregular spacing sequence on Pages 7 and 8 of Appellee's proposed Final Order is reflected on Pages 7 and 8 of the lower tribunal's Final Order.

Clearly, the lower tribunal below merely "rubber stamped" the Appellee's proposed Final Order. In fact, in its Answer Brief on Page 2, Appellee admitted as much.

There is absolutely nothing within the "four corners" of the lower tribunal's Final Order, nor within the record of the proceedings below to indicate that the Final Order reflects a thoughtful and independent analysis of the facts, issues, and law by the lower tribunal.

Walker v. Walker, 873 So.2d 565 (Fla. 2nd DCA 2004), involved operative facts identical to the case at bar where the lower court solicited proposed orders from both parties, the lower tribunal made no findings of fact on the record, and the lower tribunal signed one of the party's proposed order verbatim without a single change. Under such circumstances, following the decision of the Florida Supreme Court in *Perlow v. Berg-Perlow*, 875 So.2d 383 (Fla. 2004), this Court found it was "compelled" to reverse the decision of the lower tribunal.

This Court stated that, "The Florida Supreme Court noted that this procedure creates an appearance that the trial court did not independently make factual

findings and legal conclusions. . . . The court held that prior to requesting proposed judgments, the trial court should, when possible, indicate on the record the court's findings of facts and conclusions of law". This Court further noted, "We can conceive of no scenario when it would not be possible for the trial court to indicate its findings of fact and conclusions of law". *Walker v. Walker*, at page 566.

Similarly, in *Pedersen v. Pedersen*, 892 So.2d 1125 (Fla. 2nd DCA 2004), this Court reversed the decision of the lower tribunal upon a finding that "the record does not reflect that the trial court made its own findings of fact and conclusions of law". Just as in the case at bar, the lower tribunal in *Pedersen v. Pedersen*, did not give any indication of its findings of fact or conclusions of law. As this Court noted in its decision, "Instead, the trial court directed counsel for the parties to each prepare and submit to the court a proposed order". This Court further found that the lower tribunal entered the final order prepared by one of the parties without making any changes, without making its own findings of fact and conclusions of law, and entering an order which contained various errors. *Pedersen v. Pedersen*, at page 1126.

Finding that the procedure used by the lower tribunal in entering its final judgment raised a substantial question as to whether the final judgment "reflects the trial court's independent determination of the issues that were presented", the Court determined that "reversal is required". *Pedersen v. Pedersen*, at page 1126.

In *Bishop v. Bishop*, 47 So.3d 326 (Fla. 2nd DCA 2010), this Court, once again was “compelled to reverse” the lower tribunal’s verbatim adoption of a proposed final judgment. This Court found that the lower tribunal allowed the parties to submit proposed orders; the lower tribunal made no oral rulings and provided no direction to the parties regarding the findings and conclusions to be included in the proposed orders; and the lower tribunal adopted one of the party’s proposed orders verbatim.

This Court stated, “We recognize that the law in Florida does not prohibit the verbatim adoption of a judgment that has been proposed by a party. . . . However, the adopted judgment ‘cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge’. . . . We will reverse any judgment entered under circumstances that create an appearance that the judgment does not reflect the judge’s independent decision-making.” (Citations omitted). *Bishop v. Bishop*, at page 328.

This Court concluded, “Regardless of the contents of the parties’ proposed final judgments, the trial court is obligated to make rulings on all issues raised based on its own thoughtful and independent analysis of the facts. . . . Because the instant record does not establish this independent analysis, we are compelled to reverse.” *Bishop v. Bishop*, at page 329.

The verbatim entry of Appellee’s proposed Final Order without any change whatsoever; with its inclusion of the numerous errors contained in Appellee’s

proposed Final Order, including the incorrect date of the hearing; and without making any findings of fact or conclusions of law on the record, presents circumstances identical to those cases where this Court determined it was compelled to reverse the order of the lower tribunal because there was no evidence that the order was the result of the lower tribunal's independent analysis.

Nevertheless, in the case at bar, without a written decision, this Court affirmed the lower tribunal's Final Order. This Court's action is inconsistent with its well-established precedent on this matter.

Accordingly, pursuant to the provisions of Rule 9.331(d)(1), Fla.R.App.Pro., Appellants respectfully request a rehearing en banc because such consideration is necessary to maintain uniformity in the Court's decisions.

II. MOTION FOR ISSUANCE OF A WRITTEN OPINION

As demonstrated above, affirming the lower tribunal's verbatim entry of Appellee's proposed Final Order without any change whatsoever; with its inclusion of the numerous errors contained in Appellee's proposed Final Order, including the incorrect date of the hearing; and without making any findings of fact or conclusions of law on the record, would appear to be in conflict with the decision of the Florida Supreme Court in *Perlow v. Berg-Perlow*, 875 So.2d 383 (Fla. 2004).

In that case, the Florida Supreme Court found that proposed findings and conclusions prepared by parties may serve as a starting point for a judge's preparation of an order. However, the Court found, "such submissions cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge". *Perlow v. Berg-Perlow*, at page 390. The Court further found that where the judge accepts verbatim a proposed final order from one party, and where the judge has made no findings or conclusions on the record that would form the basis for the party's proposed order, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. Under such circumstances, the Court found, "this type of proceeding is fair to neither the parties involved in a particular case nor our judicial system". *Perlow v. Berg-Perlow*, at page 390.

A written decision by the Court in this case explaining its basis for affirming the lower tribunal under the circumstances presented, would provide a legitimate basis for supreme court review if this Court's decision conflicted with that of the Florida Supreme Court in *Perlow v. Berg-Perlow*.

WHEREFORE, Appellants respectfully move the Court for a rehearing en banc and a written decision. In view of the fact that the issue before the lower tribunal involved an interpretation of Florida Statutes, this Court may review the legal issues *de novo*. For the sake of judicial economy and fairness to the Appellants, it is also respectfully requested that this Court

consider the merits of the case presented before lower tribunal instead of remanding this matter.

STATEMENT OF COUNSEL

A. Pursuant to the requirements of Rule 9.331(d)(2), Fla.R.App.Pro., I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions of this Court: *Walker v. Walker*, 873 So.2d 565 (Fla. 2nd DCA 2004); *Pedersen v. Pedersen*, 892 So.2d 1125 (Fla. 2nd DCA 2004); and *Bishop v. Bishop*, 47 So.3d 326 (Fla. 2nd DCA 2010).

B. Pursuant to the requirements of Rule 9.330(a), Fla.R.App.Pro., I express a belief, based on a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because if this Court affirms the lower tribunal's verbatim entry of Appellee's proposed Final Order without any change whatsoever; with its inclusion of the numerous errors contained in Appellee's proposed Final Order, including the incorrect date of the hearing; and without making any findings of fact or conclusions of law on the record, the Supreme Court would likely grant review of such action by this Court

App. 73

as a conflict with the Supreme Court's decision in *Perlow v. Berg-Perlow*, 875 So.2d 383 (Fla. 2004).

/s/David M. Levin
Florida Bar #296384
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
Postal Drawer 4195
Sarasota, FL 34237
(941) 366-8100
Email: dlevin@icardmerrill.com
Attorney for Appellants

[Certificate Of Service Omitted]

EXHIBIT A

**IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT IN AND FOR
MANATEE COUNTY, FLORIDA**

**THE CITY OF HOLMES
BEACH, a Municipal
Corporation of the
State of Florida,**

Plaintiff,

v.

**CASE NO.
2013-CA-5990 AX**

**PETITIONERS' COMMIT-
TEE, RICHARD HAZEN
and HUONG L. TRAN in her
individual capacity and as
the designated representa-
tive of the PETITIONERS'
COMMITTEE,**

Defendants.

/

FINAL ORDER

(Filed Aug. 17, 2016)

On June 15, 2016, a hearing was held in this matter. The matter is a declaratory judgment action filed by the City of Holmes Beach (City) on September 23, 2013. The City's complaint states that it is in doubt as to whether an initiative ordinance proposed by the Defendants to be placed before the voters of the City of Holmes Beach can go forward. The City's doubt is based on Section 163.3167(8), Florida Statutes which

statute prohibits initiation ordinances on development orders.

The Defendants are the owners of property within the City of Holmes Beach and also a Petitioners' Committee formed to process a proposed initiative ordinance pursuant to the City's charter. The Defendants timely answered the City's complaint.

The proceedings have been somewhat on the back burner because of other related administrative and judicial litigation between the same parties. That other litigation has been wound down and the parties have now turned their attention to this matter.

On or about February 4, 2016, the Defendants filed a motion for summary judgment. On or about February 29, 2016, the City filed a motion to strike the motion for summary judgment. Several filings followed thereafter and on June 6, 2016, the parties appeared in a hearing with Senior Judge Dubensky. During the course of that hearing the Court suggested and the parties agreed that the appropriate response would be to hold a final judgment hearing rather than a summary judgment hearing. In preparation for a final judgment hearing, the parties prepared a set of stipulated facts. The stipulated facts were filed with the Court on June 14, 2016, in preparation for the final hearing on July 15, 2016.

At the July 15, 2016, hearing, the parties argued the issues to the Court. Following review of the record, the acceptance of the stipulated facts, the argument of

the parties, and being otherwise fully advised of the premises, the Court finds as follows:

Findings of Fact

1. The Court accepts the stipulated facts filed by the parties in this matter. This order is based on said factual stipulation.
2. The stipulated facts frame the issues between the parties. The litigation is based upon a large treehouse constructed by the Defendants in the rear of their property located on the Gulf of Mexico in the City of Holmes Beach. The treehouse is approximately 400 to 500 square feet in size and is constructed on two levels. It is built in and around a large Australian pine tree within the Defendants' property. It relies on both the tree and four piles driven into the ground for support.
3. The treehouse was constructed without permitting by the City of Holmes Beach. The issues relating to the construction and the lack of permitting have been previously litigated before the City's Code Enforcement Board. The hearing before the Code Enforcement Board went against the Defendants. The issues raised in the Code Enforcement Board hearing were fully appealed to both the Circuit Court and the Second District Court of Appeal. The reviewing courts upheld the decision of the City's Code Enforcement Board. The legitimacy or legality of the Code Enforcement Board order is not raised in this proceeding.

4. The Defendants organized an initiative campaign as one way to address the violations on their property. They drafted a proposed ordinance for consideration. The proposed ordinance was intended to address the treehouse and to cure all local ordinance violations thereby allowing the treehouse to remain in place. An ordinance by initiative is a process authorized in Section 3.11 of the City's charter. The City concedes that the Defendants followed the proper procedures set out by the charter resulting in an initiative ordinance that, in accordance with the City's procedures, was presented to the City of Holmes Beach commission on October 8, 2013. At that City Commission meeting, the ordinance did not progress because the City Commission did not approve it on its first reading. In that case, the charter's procedures authorize presenting the ordinance to the voters of the City of Holmes Beach asking the voters whether they approve the ordinance. If so, it becomes law of the City and by its terms would allow the treehouse to remain in place on the Defendants' property.
5. The City, however, filed the declaratory judgment action asking the Court to rule whether Section 163.3167(8), Florida Statutes, would prohibit the City from placing the initiative ordinance before the voters. Section 163.3167(8), Florida Statutes, states:
 - (8)(a) An initiative or referendum process in regard to any development order is prohibited.

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) It is the intent of the legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and apply as retroactively to any initiative or referendum process commenced after June 1, 2011, in any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force in effect.

6. The City essentially asks if Section 163.3167(8)(a) prohibits the Defendant's ordinance from being presented to the voters, and if so, to issue an order stopping the process.

Conclusions of Law

- A. The parties are properly before the Court and the Court has jurisdiction over this matter.
- B. The question of whether the ordinance proposed by the Defendants may be presented to the voters depends heavily on statutory construction. Section 163.3167(8), quoted above, states that an initiative or referendum process in regard to any “development order” is prohibited. Section 163.3167 does not define the term “development order”. Section 163.3164, Florida Statutes, is from the same chapter of the statutes and related to growth policy. Section 163.3164 sets forth the definitions for part two of Chapter 163, which includes Section 163.3167. Accordingly, the definitions found in this statute apply to Section 163.3167.
- C. Section 163.3164(15), defines “development order”. A development order means “any order granting, denying, or granting with conditions an application for a development permit.” “Development permit” is further defined in subsection (16) of the same statute. A development permit “includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.” Development, which is the action being permitted by either a development order or development permit, is defined in Section 163.3164(14). There it states that

development “has the same meaning as in Section 380.04.” Accordingly, in order to determine development that is being permitted either by a development order or development permit, the Court is required to incorporate the definition of development from Section 380.04, Florida Statutes. That statute defines development as “the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or dividing of land into three or more parcels.”

- D. Section 380.04(3)(d) creates an exception to development. This statute states that:

(3) The following operations or uses shall not be taken for the purpose of this chapter to involve “development” as defined in this section:

(d) The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

- E. The legislature has therefore created a scheme heavily dependent upon statutory definitions. The legislature has stated that development is essentially carrying out building activities, mining operations, the making of material change in the use or appearance of any structure or land, or subdividing land into three or more parcels. The legislature has carved out of the definition of development “the use of any structure or land devoted to

dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.” If an activity is development as defined in Section 380.04, and that development requires a development order or development permit as those terms are defined in Section 163.3164, then the City is correct in that Section 163.3167(8)(a), would prohibit an initiative process in regard to that development order.

- F. The Defendants rely upon the exclusion from the term development set out in Section 380.04(3)(d). The legislature has removed the definition of development “the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.” To determine the question presented to the Court then requires a determination of whether the proposed initiative ordinance concerns a development order of whether it concerns the use of any structure or land devoted to dwelling uses.
- G. The parties stipulated that if the tree house were to be constructed in its current location today, it would be reviewed under numerous Holmes Beach permitting processes. The stipulation names building permits, roofing, foundations, and glazing processes. The stipulation calls out site planning, zoning, storm water management, floodplain management permits and associated engineering as several of the permitting components controlling construction and location of the tree house.

- H. The process of permitting and building the tree house is development as defined in section 380.04, because permitting and building the tree house is indeed “the carrying out of any building activity . . . , the making of any material change in the use or appearance of any structure or land, or dividing of land into three or more parcels.” The tree house is described as two levels elevated approximately ten feet off the ground. It contains approximately 450-500 square feet, has windows facing the Gulf of Mexico, and has been furnished with chairs, tables, and a hammock. It is built on piles and is partially supported by an Australian pine tree. Under normal circumstances, it would be subject to City permitting and review processes, including several of the specific process [sic] named in the definition of development permit in Section 163.3164(16). These include a building permit and zoning permit. The City’s regulations require under normal circumstances that the tree house could not be sited and built in its current location unless the City granted a development order, including a development permit, and all of the associated review. Additionally, the tree house is located in a City set back from the Gulf of Mexico which prohibits a structure such as the tree house.
- I. The Defendants’ position is that their ordinance may be presented to the voters because the ordinance does not concern development as defined by Section 380.04. Instead, they rely on Section 380.04(3)(d), which states

(3) The following operations or uses shall not be taken for the purpose of this chapter to involve “development” as defined in this section:

(d) The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

- J. The stipulated facts indicate that the tree house is defined under Holmes Beach regulations as an accessory use “customarily incidental to a permitted use not involving the conduct of business.” The City building official testified at the Code Enforcement Board hearing that it can also be classified as a recreational facility for the use and convenience of residential owners or tenants and their guests. The Defendants do not agree with the Building Official’s characterization. See paragraph 16 of the Stipulated Facts.
- K. The City countered at the final hearing that this exception does not apply because the tree house is an allowed use under the Holmes Beach regulations. The City argues that it does not matter whether the tree house is an accessory use or a recreational facility because under either definition, it is allowed on the Defendants’ property. Instead, the question is not whether the use is allowed but whether the use can be built or constructed at that location and in that configuration. The only way to answer that question is through

the development process and the issuance of a development order.

- L. The key wording of the proposed ordinance states:

Section 2. Approval of “Tree house” at 103 29th Street, Holmes Beach, Florida.

- A. Notwithstanding any provision contained within the City of Holmes Beach Code of Ordinances to the contrary, the City Commission does hereby authorize the construction and maintenance of the so-called “tree house” upon 103 29th Street, Holmes Beach, Florida.
- B. The tree house shall not be used by customers of “Angelinos Sea Lodge.”
- C. The Owners shall be required to record in the Public Records of Manatee County, Florida a full release or similar document, indemnifying and holding the City of Holmes Beach harmless from any and all claims for injury and/or property damages resulting from the construction and use of the subject tree house. Failure to record such a release or similar document within 60 days of the effective date of this Ordinance shall cause the automatic repeal of this Ordinance.

See, Section 2., proposed ordinance, Exhibit 5 of Plaintiff’s complaint.

- M. Based on the proposed language in the ordinance, it is clear that the ordinance is focused on construction of the tree house. It authorizes its continued construction and maintenance, not the use of the structure or the land. It authorizes a building activity and the making of a material change in the use or appearance of the structure called the tree house and Defendants' land. These are items of the permitting and construction process, not whether a tree house is an allowed use on the property. Moreover, the proposed ordinance contains conditions related to its construction and maintenance, namely the restrictions on who may use the tree house and the recording of a release in the public records. The ordinance, in other words, grants or grants with conditions the development of the tree house, albeit after the fact.
- N. The exception to the term development found in Section 380.04(3)(d) relates to the use of the structure, as argued by the City, and the City states that tree houses, as either an accessory structure or as a recreational facility, are allowed. But there is a difference between being allowed as a use and being permitted as a building or structure. The proposed ordinance only addresses the latter, the construction or development of the tree house, not its use. Accordingly, the Court finds that the proposed ordinance addresses a development order as defined in Section 163.3167(8)(a), Florida Statutes.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. The proposed initiative ordinance grants building rights the Defendants would not otherwise have under the City's regulations and therefore acts as a Development Order as that term is defined in Section 163.3164(15), Florida Statutes.
2. Section 163.3167(8)(a), Florida Statutes prohibits the use of the initiative process in regard to any development order. Any initiative vote on the Defendants' proposed ordinance would be in violation of said statute.
3. The City of Holmes Beach is accordingly permanently prohibited from submitting the proposed ordinance to the voters of the City under the initiative provisions of its charter.
4. The Court shall retain jurisdiction to award costs and to enter such further orders as necessary to enforce this Order.

Signed this 15 day of August, 2016, in Manatee County, Florida.

/s/ Don T. Hall
Don T. Hall, Circuit Judge

CC: Counsel of record.

App. 87

EXHIBIT B

DYE, DEITRICH, PETRUFF & ST. PAUL, P.L.
Attorneys at Law
The Riverview Center, Suite 300
1111 Third Avenue West
Bradenton, FL 34205
www.dyefirm.com

Stephen R. Dye	Telephone: (941) 798-4411
Patricia A. Petruff ^{1†}	Facsimile: (941) 798-1573
Alexandra St. Paul ^{2*}	
James D. Dye [†]	Email: jdye@dyefirm.com
David K. Deitrich [†]	cmangum@dyefirm.com

*Certified Circuit Civil Mediator
'Of Counsel

Also Admitted In:

¹ California

² Louisiana

[LOGO]

[†]Board Certified: City, County And Local Government Law

August 1, 2016

Via electronic mail to acollins@jud12.flcourts.org

The Honorable Don T. Hall
Manatee County Circuit Court, Division D
1051 Manatee Ave W
Bradenton FL 34206

Dear Judge Hall:

Per your request at the June 15, 2016 hearing, enclosed is the proposed Final Order for Case #2013-CA-5990 AX for your review. I apologize that it wasn't presented to you this past Friday but when I

App. 88

suggest [sic] at hearing on Friday, July 29th, I had forgotten I was going to be out of town that day for a wedding.

Very Truly Yours,

/s/ James D. Dye
James D. Dye

JDD/clm

ENC

cc: Atty. David Levin

**IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT IN AND FOR
MANATEE COUNTY, FLORIDA**

**THE CITY OF HOLMES
BEACH, a Municipal
Corporation of the
State of Florida,**

Plaintiff,

v.

**CASE NO.
2013-CA-5990 AX**

**PETITIONERS' COMMIT-
TEE, RICHARD HAZEN
and HUONG L. TRAN in her
individual capacity and as
the designated representa-
tive of the PETITIONERS'
COMMITTEE,**

Defendants.

FINAL ORDER

On June 15, 2016, a hearing was held in this matter. The matter is a declaratory judgment action filed by the City of Holmes Beach (City) on September 23, 2013. The City's complaint states that it is in doubt as to whether an initiative ordinance proposed by the Defendants to be placed before the voters of the City of Holmes Beach can go forward. The City's doubt is based on Section 163.3167(8), Florida Statutes which statute prohibits initiation ordinances on development orders.

The Defendants are the owners of property within the City of Holmes Beach and also a Petitioners' Committee formed to process a proposed initiative ordinance pursuant to the City's charter. The Defendants timely answered the City's complaint.

The proceedings have been somewhat on the back burner because of other related administrative and judicial litigation between the same parties. That other litigation has been wound down and the parties have now turned their attention to this matter.

On or about February 4, 2016, the Defendants filed a motion for summary judgment. On or about February 29, 2016, the City filed a motion to strike the motion for summary judgment. Several filings followed thereafter and on June 6, 2016, the parties appeared in a hearing with Senior Judge Dubensky. During the course of that hearing the Court suggested and the parties agreed that the appropriate response would be

to hold a final judgment hearing rather than a summary judgment hearing. In preparation for a final judgment hearing, the parties prepared a set of stipulated facts. The stipulated facts were filed with the Court on June 14, 2016, in preparation for the final hearing on July 15, 2016.

At the July 15, 2016, hearing, the parties argued the issues to the Court. Following review of the record, the acceptance of the stipulated facts, the argument of the parties, and being otherwise fully advised of the premises, the Court finds as follows:

Findings of Fact

1. The Court accepts the stipulated facts filed by the parties in this matter. This order is based on said factual stipulation.
2. The stipulated facts frame the issues between the parties. The litigation is based upon a large treehouse constructed by the Defendants in the rear of their property located on the Gulf of Mexico in the City of Holmes Beach. The treehouse is approximately 400 to 500 square feet in size and is constructed on two levels. It is built in and around a large Australian pine tree within the Defendants' property. It relies on both the tree and four piles driven into the ground for support.
3. The treehouse was constructed without permitting by the City of Holmes Beach. The issues relating to the construction and the lack of permitting have been previously litigated

before the City's Code Enforcement Board. The hearing before the Code Enforcement Board went against the Defendants. The issues raised in the Code Enforcement Board hearing were fully appealed to both the Circuit Court and the Second District Court of Appeal. The reviewing courts upheld the decision of the City's Code Enforcement Board. The legitimacy or legality of the Code Enforcement Board order is not raised in this proceeding.

4. The Defendants organized an initiative campaign as one way to address the violations on their property. They drafted a proposed ordinance for consideration. The proposed ordinance was intended to address the treehouse and to cure all local ordinance violations thereby allowing the treehouse to remain in place. An ordinance by initiative is a process authorized in Section 3.11 of the City's charter. The City concedes that the Defendants followed the proper procedures set out by the charter resulting in an initiative ordinance that, in accordance with the City's procedures, was presented to the City of Holmes Beach commission on October 8, 2013. At that City Commission meeting, the ordinance did not progress because the City Commission did not approve it on its first reading. In that case, the charter's procedures authorize presenting the ordinance to the voters of the City of Holmes Beach asking the voters whether they approve the ordinance. If so, it becomes law of the City and by its terms would allow the

treehouse to remain in place on the Defendants' property.

5. The City, however, filed the declaratory judgment action asking the Court to rule whether Section 163.3167(8), Florida Statutes, would prohibit the City from placing the initiative ordinance before the voters. Section 163.3167(8), Florida Statutes, states:

(8)(a) An initiative or referendum process in regard to any development order is prohibited.

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) It is the intent of the legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and apply as retroactively to any initiative or referendum process commenced after June 1, 2011, in any

such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force in effect.

6. The City essentially asks if Section 163.3167(8)(a) prohibits the Defendant's ordinance from being presented to the voters, and if so, to issue an order stopping the process.

Conclusions of Law

- A. The parties are properly before the Court and the Court has jurisdiction over this matter.
- B. The question of whether the ordinance proposed by the Defendants may be presented to the voters depends heavily on statutory construction. Section 163.3167(8), quoted above, states that an initiative or referendum process in regard to any "development order" is prohibited. Section 163.3167 does not define the term "development order". Section 163.3164, Florida Statutes, is from the same chapter of the statutes and related to growth policy. Section 163.3164 sets forth the definitions for part two of Chapter 163, which concludes Section 163.3164. Accordingly, the definitions found in this statute apply to Section 163.3167.
- C. Section 163.3164(15), defines "development order". A development order means "any order granting, denying, or granting with conditions an application for a development permit." "Development permit" is further defined in subsection (16) of the same statute. A

development permit “includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.” Development, which is the action being permitted by either a development order or development permit, is defined in Section 163.3164(14). There it states that development “has the same meaning as in Section 380.04.” Accordingly, in order to determine development that is being permitted either by a development order or development permit, the Court is required to incorporate the definition of development from Section 380.04, Florida Statutes. That statute defines development as “the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or dividing of land into three or more parcels.”

- D. Section 380.04(3)(d) creates an exception to development. This statute states that:

(3) The following operations or uses shall not be taken for the purpose of this Chapter to involve “development” as defined in this section:

(d) The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

- E. The legislature has therefore created a scheme heavily dependent upon statutory

definitions. The legislature has stated that development is essentially carrying out building activities, mining operations, the making of material change in the use or appearance of any structure or land, or subdividing land into three or more parcels. The legislature has carved out of the definition of development “the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.” If an activity is development as defined in Section 380.04, and that development requires a development order or development permit as those terms are defined in Section 163.3164, then the City is correct in that Section 163.3167(8)(a), would prohibit an initiative process in regard to that development order.

- F. The Defendants rely upon the exclusion from the term development set out in Section 380.04(3)(d). The legislature has removed the definition of development “the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.” To determine the question presented to the Court then requires a determination of whether the proposed initiative ordinance concerns a development order of whether it concerns the use of any structure or land devoted to dwelling uses.
- G. The parties stipulated that if the tree house were to be constructed in its current location today, it would be reviewed under numerous Holmes Beach permitting processes. The stipulation names building permits, roofing,

foundations, and glazing processes. The stipulation calls out site planning, zoning, storm water management, floodplain management permits and associated engineering as several of the permitting components controlling construction and location of the tree house.

- H. The process of permitting and building the tree house is development as defined in section 380.04, because permitting and building the tree house is indeed “the carrying out of any building activity . . . , the making of any material change in the use or appearance of any structure or land, or dividing of land into three or more parcels.” The tree house is described as two levels elevated approximately ten feet off the ground. It contains approximately 450-500 square feet, has windows facing the Gulf of Mexico, and has been furnished with chairs, tables, and a hammock. It is built on piles and is partially supported by an Australian pine tree. Under normal circumstances, it would be subject to City permitting and review processes, including several of the specific process [sic] named in the definition of development permit in Section 163.3164(16). These include a building permit and zoning permit. The City’s regulations require under normal circumstances that the tree house could not be sited and built in its current location unless the City granted a development order, including a development permit, and all of the associated review. Additionally, the tree house is located in a City set back from the Gulf of Mexico which prohibits a structure such as the tree house.

- I. The Defendants' position is that their ordinance may be presented to the voters because the ordinance does not concern development as defined by Section 380.04. Instead, they rely on Section 380.04(3)(d), which states

(3) The following operations or uses shall not be taken for the purpose of this chapter to involve "development" as defined in this section:

(d) The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

- J. The stipulated facts indicate that the tree house is defined under Holmes Beach regulations as an accessory use "customarily incidental to a permitted use not involving the conduct of business." The City building official testified at the Code Enforcement Board hearing that it can also be classified as a recreational facility for the use and convenience of residential owners or tenants and their guests. The Defendants do not agree with the Building Official's characterization. See paragraph 16 of the Stipulated Facts.
- K. The City countered at the final hearing that this exception does not apply because the tree house is an allowed use under the Holmes Beach regulations. The City argues that it does not matter whether the tree house is an accessory use or a recreational facility because under either definition, it is allowed on

the Defendants' property. Instead, the question is not whether the use is allowed but whether the use can be built or constructed at that location and in that configuration. The only way to answer that question is through the development process and the issuance of a development order.

- L. The key wording of the proposed ordinance states:

Section 2. Approval of "Tree house" at 103 29th Street, Holmes Beach, Florida.

- A. Notwithstanding any provision contained within the City of Holmes Beach Code of Ordinances to the contrary, the City Commission does hereby authorize the construction and maintenance of the so-called "tree house" upon 103 29th Street, Holmes Beach, Florida.
- B. The tree house shall not be used by customers of "Angelinos Sea Lodge."
- C. The Owners shall be required to record in the Public Records of Manatee County, Florida a full release or similar document, indemnifying and holding the City of Holmes Beach harmless from any and all claims for injury and/or property damages resulting from the construction and use of the subject tree house. Failure to record such a release or similar document within 60 days of the effective date of this Ordinance shall cause the automatic repeal of this Ordinance.

See, Section 2., proposed ordinance, Exhibit 5 of Plaintiff's complaint.

- M. Based on the proposed language in the ordinance, it is clear that the ordinance is focused on construction of the tree house. It authorizes its continued construction and maintenance, not the use of the structure or the land. It authorizes a building activity and the making of a material change in the use or appearance of the structure called the tree house and Defendants' land. These are items of the permitting and construction process, not whether a tree house is an allowed use on the property. Moreover, the proposed ordinance contains conditions related to its construction and maintenance, namely the restrictions on who may use the tree house and the recording of a release in the public records. The ordinance, in other words, grants or grants with conditions the development of the tree house, albeit after the fact.
- N. The exception to the term development found in Section 380.04(3)(d) relates to the use of the structure, as argued by the City, and the City states that tree houses, as either an accessory structure or as a recreational facility, are allowed. But there is a difference between being allowed as a use and being permitted as a building or structure. The proposed ordinance only addresses the latter, the construction or development of the tree house, not its use. Accordingly, the Court finds that the proposed ordinance addresses a development order as

defined in Section 163.3167(8)(a), Florida Statutes.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. The proposed initiative ordinance grants building rights the Defendants would not otherwise have under the City's regulations and therefore acts as a Development Order as that term is defined in Section 163.3164(15), Florida Statutes.
2. Section 163.3167(8)(a), Florida Statutes prohibits the use of the initiative process in regard to any development order. Any initiative vote on the Defendants' proposed ordinance would be in violation of said statute.
3. The City of Holmes Beach is accordingly permanently prohibited from submitting the proposed ordinance to the voters of the City under the initiative provisions of its charter.
4. The Court shall retain jurisdiction to award costs and to enter such further orders as necessary to enforce this Order.

Signed this ____ day of ____, 2016, in Manatee County, Florida.

Don T. Hall, Circuit Judge

CC: Counsel of record.
