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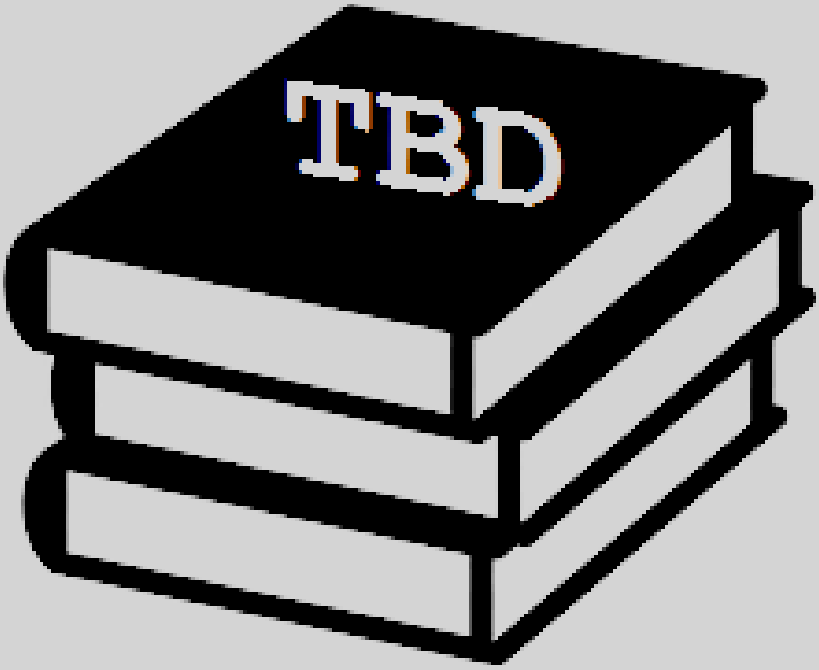

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CASE NO. 11-005619

VOF, LLC,

Appellant,

v.

MONROE COUNTY PLANNING COMMISSION, and BRIAN AND CHRIS LANCASTER,

Appellees/Intervenors.
_____/

REPLY BRIEF OF APPELLANT, VOF, LLC

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I. INTRODUCTION TO REPLY BRIEF

Pursuant to the Hearing Officer's March 28, 2012 Order, Appellant is filing one, unified Reply Brief in response to Appellee's, Monroe County, and Intervenors', Brian and Chris Lancaster, Answer Briefs.

In this Reply Brief, VOF first responds to the substantive arguments made by both Monroe County (section III, *infra*) and the Intervenors (section IV, *infra*), and then in one, unified section, VOF replies to both Appellee's and Intervenors' arguments in response to VOF's "due process argument" (section V, *infra*).

Citations to the record and supplemental record will be in the same form as those citations in VOF's Initial Brief.

II. SUMMARY OF REPLY BRIEF

Despite the approximately 66 pages of fact recitation and argument cumulatively contained in Appellees' Answer Briefs, neither Monroe County nor the Intervenors address, much less negate, the inescapable conclusion that the order on appeal (Planning Commission Resolution No. P29-11 (R. 149-153)) cannot be reconciled with Planning Commission Resolution No. P12-09. (R. 685-693).

The reason is simple: the two decisions are simply irreconcilable, the latter decision resulting in a departure from the essential requirements of law requiring the Hearing Officer's reversal.

In Resolution No. P12-09 (R. 685-693), the Monroe County Planning Commission *overturned* the Monroe County staff and specifically determined that VOF's proposed

redevelopment was allowed because it ". . . would be operated in connection with a resort hotel." (R. 692).

Approximately two years later, in the order on appeal (R. 149-153), a differently-constituted Planning Commission rejected VOF's proposed redevelopment *solely* because ". . . there is no resort hotel on the subject property." (R. 152).

The order on appeal results from VOF's appeal to the Planning Commission of a staff denial of VOF's minor conditional use application; yet the order on appeal makes no reference whatsoever to the conditional use criteria, and no part of the hearing before the Planning Commission (transcript at R. 1-137) addresses those issues.

The only issue addressed by the Planning Commission, and certainly the only issue referenced in the order on appeal, is the nexus between the proposed redevelopment and the resort hotel. Yet, this issue was conclusively determined by the Planning Commission in Resolution No. P12-09, which concluded, as a matter of law, that VOF's proposed redevelopment was allowed because the transient units to be serviced by VOF's proposed redevelopment constituted a "resort hotel."

Again, neither Monroe County, nor the Intervenors, in any way address, much less negate, VOF's central argument -- i.e. that Resolution No. P29-11 (the order on appeal) departs from the essential requirements of law because it purports to re-decide an issue which had already been conclusively determined by virtue of Resolution No. P12-09.

III. REPLY TO MONROE COUNTY'S ANSWER BRIEF

A. Introduction

The gravamen of Monroe County's argument is that Resolution No. P12-09 was erroneous and that the Planning Commission, in rendering the order on appeal (Resolution No. P29-11), simply corrected the "mistake" the prior Planning Commission made in rendering Resolution No. P12-09. (Monroe County Answer Brief, pp. 14-20).

Monroe County's argument, however, ignores both: (i) Florida's well-established "law of the case" doctrine, and (ii) Monroe County's own LDRs which specifically prevent any party from challenging a Planning Commission determination which has not been appealed.

B. Law of the Case Doctrine

1. Introduction to Doctrine.

It is well settled that an issue cannot be re-litigated once it has been determined on appeal. *Brenner Enters., Inc. v. Dep't of Revenue*, 452 So. 2d 550 (Fla. 1984); *State, Dep't of Revenue v. Bridger*, 935 So. 2d 536 (Fla. 3d DCA 2006); *Gulotty v. Estate of Wilkie*, 550 So. 2d 1170 (Fla. 3d DCA 1989).

2. The Issue Determined in Resolution No. P12-09.

In rendering Resolution No. P12-09, the Planning Commission, sitting in its *appellate* capacity, expressly determined that VOF's proposed redevelopment ". . . would be operated in connection with a resort hotel." (R. 692).

Rightly or wrongly, the Planning Commission definitively concluded that the transient units to be serviced by VOF's proposed redevelopment constituted the requisite

"resort hotel" thus authorizing the land use sought by VOF. (R. 692). In reaching this conclusion, the Planning Commission specifically cited § 9.5-243(b)(1)(j) of the LDRs.[1] (R. 692).

Since neither the County, nor the Intervenors (both of whom were parties to the proceedings resulting in Resolution No. P12-09), appealed the Planning Commission's determination in Resolution No. 12-09, the Planning Commission's holding in Resolution No. 12-09 (i.e. VOF's proposed redevelopment is part of a resort hotel), precludes a determination that VOF's proposed redevelopment is <u>not</u> part of a resort hotel.

Hence, the law of the case doctrine precludes the Planning Commission, Monroe County, the Intervenors, *or* VOF from re-litigating that issue.

Monroe County argues that the "law of the case" doctrine does not apply, asserting that the development considered by the Planning Commission during the proceedings resulting in Resolution No. P12-09 did not include the swimming pool. (Monroe County Answer Brief, pp. 16-18). While VOF disputes this assertion (and the facts of the case belie this assertion), whether or not VOF's swimming pool was considered by the Planning Commission in the proceedings resulting in Resolution No. P12-09 is *irrelevant* to the application of the law of the case doctrine in this case.

The "law of the case doctrine" prohibits re-litigation of an issue that has been resolved by virtue of an appeal.

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[1] This sub-section has since been renumbered, § 130-81(b)(10). The cited sub-section requires a resort hotel in the DR zoning district to provide at least one 200 square foot commercial retail facility plus an additional 1.3 square feet of retail facility for each guest room greater than 150 rooms.

The issue appealed by VOF -- which resulted in Resolution No. P12-09's determination -- was whether VOF's proposed redevelopment was "part of resort hotel." (R. 691).

Indeed, even a cursory review of the transcript of the appellate proceedings before the Planning Commission reveal that the *sole issue* determined by the Planning Commission in rendering Resolution No. P12-09 was whether VOF's proposed redevelopment would be considered "part of a resort hotel." (*See, e.g.*, R. 552-600).

Importantly, neither Monroe County nor the Intervenors, refute that the Planning Commission did, indeed, expressly conclude, over the arguments and objections of the Intervenors and Monroe County, that VOF's proposed redevelopment would be permitted *because it would be operated in connection with a resort hotel.* (R. 692).

Before voting to sustain VOF's appeal, and reverse County planning staff, the Planning Commissioners plainly discussed whether VOF's proposed redevelopment would be operated in connection with a resort hotel (R. 592-600); on a 4-1 vote, the Planning Commission concluded that VOF's proposed redevelopment would be operated in connection with a resort hotel, and, therefore, should be permitted pursuant to the Monroe County Code. (Vote at R. 599-600, Order at R. 692).

There can be no doubt whatsoever that the Planning Commission specifically and expressly determined that, once the "resort hotel" nexus was established, the threshold requirement under § 130-81(b) (i.e. the existence of a resort hotel) was met, thus authorizing, subject to minor conditional use approval, each of the specific minor conditional uses itemized in § 130-81(b)(1)-(10).

In fact, during the Planning Commission proceeding, the following exchange occurred between Mr. Wolfe (the attorney for the Planning Commission) and Planning Commissioner John Marston:

"Mr. Wolfe: Can I ask a question?

Chair Cameron: Go ahead.

Mr. Wolfe: Chronology following up then on that. Essentially then the applicant could ask for anything from (A) through (J). Since one hotel is already prerequisite, you could ask to do anything any of these at this commercial retail.

Commissioner Marston: Hotel is not a prerequisite. The hotel as I read it the following uses are permitted and the first one named is a hotel.

Mr. Wolfe: No, I'm saying under (B-1).

Commissioner Marston: Right.

Mr. Wolfe: If you can do (J) you can do (A), (B), (C), (D), (E).

Commissioner Marston: Right. If you do a hotel you have to have all of these things. You have to have a couple of these things.

Mr. Wolfe: I understand but I mean if you can do (J) you can do (A), (B), (C), (D), (E), (F).

Commissioner Marston: Right. Or the director could give, substitute any use he or she wishes for it according to the language.

Mr. Wolfe: I'm saying to ask for (A), (B), (C), (D), (E), or (J) you get that too.

Commissioner Marston: Or other uses that aren't mentioned."

(R. 592-593).

Similar exchanges amongst the participants continued for several pages in the transcript. (R. 594-599).

Hence, whether VOF's proposed swimming pool was, or was not, specifically included in the proposal before the Planning Commission is *wholly irrelevant* to the Planning Commission's central determination in Resolution No. P12-09: i.e. that VOF's proposed redevelopment would be operated in connection with a resort hotel and, therefore, is permitted by the LDRs.

Once the Planning Commission made this determination, as a conclusion of law, and that determination was not appealed, all parties to the Planning Commission's proceeding (i.e. Monroe County, the Intervenors, and VOF) were bound by that determination. *Gulotty*, 550 So. 2d at 1171.

C. Section 102-185(c), LDRs.

Not only does Florida's law of the case doctrine preclude the parties from re-litigating the issue (i.e. that VOF's proposed redevelopment would be operated in connection with a resort hotel and, therefore, is permitted pursuant to the LDRs), Monroe County's own LDRs governing the effect of appeals provides the same result.

Specifically, § 102-185(c) LDRs, provides that, once the Planning Commission makes a determination, the failure to file an appeal ". . . shall constitute a waiver of any rights under this chapter to appeal any interpretation or determination . . . ." Section 102-185(c), LDRs.

Hence, pursuant to the express provisions of the LDRs, Monroe County and the Intervenors have waived their rights to challenge the Planning Commission's central, indeed, critical, determination in Resolution No. P12-09, and that determination is binding on the parties and on the Planning Commission.

D. Exception to Law of the Case Doctrine

In their brief, Monroe County cites to *VLX Properties, Inc. v. Southern States Utils., Inc.*, 792 So. 2d 504, 508 (Fla. 5th DCA 2001), for the proposition that the "law of the case doctrine" can be ignored when "a mistake has been made." (Monroe County Answer Brief, pp. 18-19). In relevant part, the dicta cited by the County reads as follows: "If it appears that we have made a mistake, we should not hesitate to correct it. . . ." *Id.*

Importantly, however, nothing whatsoever in the order on appeal in any way indicates that the Planning Commission's prior decision in Resolution No. P12-09 was "a mistake," an "error" or "was a fundamentally flawed decision of the Planning Commission" as Monroe County has now characterized Resolution No. P12-09. (Monore County Answer Brief at p. 18).

To the contrary, Resolution No. P29-11 (the order on appeal) expressly recites Resolution No. P12-09 (R. 150), and nowhere in Resolution No. P29-11's findings of fact or conclusions of law is there any attempt to characterize the Planning Commission's prior ruling as a mistake or an error.[2]

E. Reliance on Finality of Land Use Determinations

With regard to the instant case, there are very practical and equitable reasons for the law of the case doctrine, and the application of § 102-185(c), LDRs, to preclude the Planning Commission from revisiting fundamental land use decisions: after appeal periods have run, applicants routinely, justifiably and understandably *rely* on the finality

[2] Obviously, had the Planning Commission truly believed that it had made a "mistake" and an "error" in rendering Resolution P12-09, the Planning Commission certainly could have, and would have, so asserted in the order on appeal.

of such determinations. Applicants purchase real property, expend thousands of dollars in professional fees for architects, attorneys, and land planners, and otherwise make critically important decisions *in reliance* upon the finality of determinations made by the Monroe County Planning Commission.

In this case, VOF expended thousands of dollars in professional fees to prepare and supplement its Minor Conditional Use Application. (S.R. 1-140). As expressed in VOF's application, VOF's application was ". . . in furtherance of . . . P12-09." (S.R. 3).

Had Monroe County or the Intervenors truly believed that Resolution No. P12-09 was a "fundamentally flawed decision," as they now argue, they could have, and should have, appealed Resolution No. P12-09's determination as provided in § 102-185(f), LDRs. It is manifestly unfair to VOF to be forced to re-litigate an issue expressly determined by a prior Planning Commission, especially after having expended substantial resources in reliance upon the determination made by the Planning Commission.

Neither Monroe County, nor the Intervenors, appealed the determination in Resolution No. P12-09 and, therefore, they are bound by the determinations reached therein.

F. Size of VOF's Proposed Swimming Pool

The final point in Monroe County's brief is that VOF failed to present evidence to show that VOF's proposed swimming pool met the requirements of § 130-81(b)(6) regarding swimming pools.[3] (Monroe County Answer Brief, p. 21).

Importantly, however, nowhere in the order on appeal (R. 149-153) does the Planning Commission make this finding or conclusion of law. Also, Monroe County does not point to anything in the record where this issue was ever raised as an impediment to VOF's swimming pool. Indeed, the sole ground for the Planning Commission denying VOF's swimming pool is the Planning Commission's determination that "there is no resort hotel on the subject property." (R. 152).

The record is devoid of any evidence which would indicate VOF's proposed swimming pool (depicted at S.R. 104, 106, 107) does not meet the requirements of the relevant LDRs. Importantly, nowhere in Development Order 02-11 (R. 655-663) (VOF's appeal of which resulted in the Planning Commission's rendering of Resolution No. P29-11, the order on appeal) does County staff ever conclude that VOF's proposed swimming pool does not meet the requisites of Monroe County Code § 130-81(b)(6). There is no substantial, competent evidence, indeed no evidence *whatsoever*, that VOF's proposed swimming pool did not meet the requisites of the applicable LDRs.

---

[3] Section 130-81(b)(6), LDRs, formerly § 9.5-243(b)(1)(f), requires resort hotels in the DR zoning district to have a swimming pool of 7 square feet of water surface for each hotel room.

G. Conclusion

Monroe County essentially argues that Resolution No. P12-09 was erroneous, despite the fact that Monroe County did not appeal same. Monroe County, however, fails to cite any authority supporting their argument that the Hearing Officer can simply declare Resolution No. P12-09 invalid, which the Hearing Officer would need to do in order to affirm the order on appeal. Absent the Hearing Officer taking such an extraordinary step, the Hearing Officer is compelled to reverse the order on appeal as it is inconsistent with Resolution No. P12-09 and constitutes a departure from the essential requirements of law.

IV. REPLY TO THE INTERVENORS' ANSWER BRIEF

A. Introduction

The Intervenors advance three theories supporting their arguments that the order on appeal should be upheld: (i) administrative *res judicata* operates to affirm the Planning Commission's decision (Intervenors' Answer Brief, pp. 27-30), (ii) the decision in the order on appeal should be affirmed for the grounds stated in the order (Intervenors' Answer Brief, pp. 31-39), and (iii) the Hearing Officer should apply the "Tipsy Coachman" doctrine to affirm the Planning Commission's decision on grounds other than those articulated in the order on appeal (Intervenors' Answer Brief, pp. 34-38).

B. Administrative *Res Judicata*

With regard to the Intervenors' "administrative *res judicata*" argument, the Intervenors argue that the doctrine precludes the County from consideration of VOF's

application for a swimming pool because the swimming pool was allegedly denied by the County by virtue of Resolution No. P11-09. (Intervenors' Answer Brief, p. 28).

The Intervenors' argument fails because it both (i) ignores the County's codification of the administrative *res judicata* doctrine, and (ii) misperceives the nature of the proceedings before the Planning Commission resulting in Resolution No. P11-09 and Resolution No. P12-09.

1. Monroe County's Codification of Administrative Res Judicata.

Monroe County's administrative *res judicata* provisions are codified in the LDRs. Specifically, § 110-8, LDRs, reads, in its entirety, as follows:

> **"Successive applications.**
>
> Whenever any application for development approval is denied *for failure to meet the substantive requirements of these regulations*, an application for development approval for all or a part of the same property shall not be considered for a period of two years after the date of denial unless the subsequent application involves a development proposal that is materially different from the prior proposal or unless four members of the planning commission determine that the prior denial was based on the material mistake of fact. For the purposes of this provision, a development proposal shall be considered materially different if it involves a change in intensity of use of more than 25 percent or the application expressly satisfies the deficiencies that were identified in the prior denial. *The body charged with conducting the initial public hearing under such successive applications shall resolve any question concerning the similarity of a second application or other questions that may develop under this section.*" (Emphasis added).

As a matter of practice, when Monroe County determines that a particular application for development approval is subject to § 110-8 (i.e. the application has been denied for failure to meet the substantive requirements of the County's LDRs), the County memorializes such denial in the actual order denying the application.

By way of example, the Development Order appealed by VOF in the instant case -- resulting in the Planning Commission's rendition of the order on appeal – expressly contained the "§ 110-8 prohibition" language. (R. 662-663).

No such language appears in either Resolution No. P11-09 or Resolution No. P12-09, and, the Intervenors have cited to no order or resolution by Monroe County in which the County has determined that VOF's application including the proposed swimming pool was "denied for failure to meet the substantive requirements of" the County's LDRs, thereby implicating the doctrine of administrative *res judicata*.

Had the Planning Commission or Monroe County staff determined that VOF's proposed swimming pool had been "denied for failure to meet the substantive requirements" of the LDRs, then, consistent with § 110-8, LDRs, and the County's practice, such language would have appeared in Resolution No. P11-09. No such language appears in Resolution No. P11-09.

More fundamentally, had the County been of the belief that VOF's application for its proposed swimming pool was precluded by the doctrine of administrative *res judicata*, the County never would have processed VOF's minor conditional use application (S.R. 1-140) which included the swimming pool, and would have required VOF to have that issue resolved by "(t)he body charged with conducting the initial public hearing" as expressly outlined in § 110-8. The County did not employ § 110-8.

As a final point regarding administrative *res judicata*, it is well settled that (i) the doctrine should be applied "with great caution" and (ii) whether the doctrine should be applied ". . . lies primarily within the discretion of the zoning authority itself." *Miller v.*

Booth, 702 So. 2d 290, 291 (Fla. 3d DCA 1997) (citation omitted). The County, as the zoning authority, certainly has not applied the doctrine at any step in this proceeding, nor has the County raised this issue in its Answer Brief. This fact should be determinative that the doctrine of administrative *res judicata* certainly has not been implicated in this case.

2. *Proceedings Before the Planning Commission Did Not Prohibit VOF's Proposed Swimming Pool.*

The reason that administrative *res judicata* language (i.e., the "§ 110-8 prohibition" language) does not appear in Resolution No. P11-09 is, of course, because, in rendering Resolution No. P11-09, the Planning Commission merely upheld the staff's determination that VOF's proposed redevelopment could not be permitted as an accessory use because of lack of contiguity. (R. 683). Resolution No. P11-09 did not determine that VOF's proposed swimming pool was disallowed for any other reason.

For administrative *res judicata* to apply, the Intervenors would need to cite to a specific adjudication by the Planning Commission that VOF's proposed swimming pool had been considered by, and expressly denied by, the Planning Commission because the pool did not meet the substantive requirements of the LDRs. Then, and only then, would the doctrine of administrative *res judicata* apply to prevent consideration of VOF's proposed swimming pool. The Planning Commission did no such thing.

Immediately after rendering its decision in Resolution No. P11-09, the Planning Commission went on to render its decision in Resolution No. P12-09, specifically incorporating the Planning Commission record used to render Resolution No. P11-09.

At no point did VOF remove the subject swimming pool from its application, its site plan, or its proposed redevelopment. Neither the County, nor the Intervenors can cite to a single instance where VOF removed the swimming pool from consideration.

The Intervenors seem to rely on one quote from the County's Mr. Haberman who, when presenting the issue to the Planning Commission, erroneously misquoted VOF. (Initial Brief, p. 11). In relevant part, Mr. Haberman stated as follows:

> "This appeal came to light after it was scheduled the first time. The applicant asked for a continuance to an undetermined date in order to have some additional conversations with staff about possibly, what you were talking about before, finding another way to do this. I mean, originally staff said that you could do it, it's just that site didn't allow us to permit (sic) on there. So we had subsequent conversations and that's when it came to light. *They said if they remove the pool and just called it*, I have the exact language, of a rental management company which would again be a commercial retail site/office on its principal use, could it permitted on this site. And we looked into that and looked, we determined that it could not be permitted and it was Townsley (sic) also came to the decision, but he wasn't in the office and the letter needed to go out, so Andrew Trevett, the director of Growth Management, signed on the letter. That (sic) why they are not – –normally it would be Townsley's interpretation as it relates to the Code but he was not there on that given day and we wanted to make sure they got their letter." (Emphasis added).

(R. 540-541).

In this passage, Mr. Haberman was explaining to the Planning Commission the origin of why Andrew Trevett (the Director of Growth Management), rather than Townsley Schwab (the Senior Director of Planning and Environmental Resources) executed the November 24, 2008 Letter of Understanding (R. 676-677).

Neither Monroe County nor the Intervenors cite any precedent supporting the proposition that a staff member's erroneous recitation of how a particular letter of

understanding came to be signed, can, in any way, modify, change, alter, or revise an applicant's proposed redevelopment or a previously submitted site plan.

As VOF has consistently argued, at no time did VOF remove the swimming pool from its proposed redevelopment.

3. Even if VOF's Proposed Swimming Pool Was Not Part of the Planning Commission's Record When Rendering Resolution No. P 12-09, Such Fact Is Irrelevant To The Actual Holding of Resolution No. P12-09.

However, for the reason stated in section III(B)(2), *supra*, even if the Planning Commission -- in deliberating over, and ultimately rendering, Resolution No. P12-09 -- believed VOF had removed the swimming pool from its proposed redevelopment (which VOF did not), such a fact in no way affects the legal determination rendered in Resolution No. P12-09. The conclusive – – indeed, preclusive – – determination in Resolution No. P12-09 is that the transient units serviced by VOF's proposed redevelopment constitute the necessary "resort hotel" to authorize the minor conditional uses specifically delineated in the County's LDRs. Whether or not VOF's proposed swimming pool was part of VOF's proposed redevelopment when the Planning Commission rendered Resolution No. P12-09 has nothing whatsoever to do with this critical holding.

4. Summary of Reply to Intervenors' Administrative Res Judicata Argument.

As outlined above, administrative *res judicata* is a doctrine that should be applied "with great caution." *Gunn v. Board of County Commr's, Dade County*, 481 S. 2d 95, 96 (Fla. 3d DCA 1986); *Miller*, 702 So. 2d at 291. In this case, the doctrine is simply

inapplicable because the issue of VOF's proposed swimming pool was never conclusively adjudicated in Resolution No. P11-09 so as to implicate the doctrine.

C. <u>Grounds Stated Within Order on Appeal (Resolution No. P 29-11).</u>

Next, the Intervenors seem to argue that, notwithstanding the Planning Commission's determination in Resolution No. P12-09, the Hearing Officer should affirm Resolution No. P29-11 based on the grounds stated in Resolution No. P29-11. (Intervenors' Answer Brief, pp. 31-34).

1. Grounds Stated in Resolution No. P29-11 Are Inconsistent With Resolution No. P12-09.

As mentioned earlier, the only "ground" stated in Resolution No. P29-11 for denial of VOF's appeal is that VOF's swimming pool was not allowed because VOF's proposed redevelopment was not "part of a resort hotel." (R. 152). Again, this holding is both inconsistent and irreconcilable with the specific holding in Resolution No. P12-09.

The holding in Resolution No. P12-09 (i.e. that the transient units would be operated in connection with a resort hotel) is a conclusion of law that is independent of VOF's proposed redevelopment. Put another way, the specific legal determination reached in Resolution No. P12-09 is in no way dependent upon the specifics of VOF's application. The transient units to be serviced by VOF's proposed redevelopment either are, or are not, part of a resort hotel, irrespective of whether VOF's proposed redevelopment contains a swimming pool.

In Resolution No. P12-09, the Planning Commission expressly determined that the transient units to be serviced by VOF's proposed redevelopment were and are part of a

resort hotel. That legal determination simply precludes a reconstituted Planning Commission from determining otherwise.

The Planning Commission's determination in the order on appeal that the swimming pool is not allowed because "there is no resort hotel on the property" cannot be reconciled with Resolution P12-09's determination that VOF's proposed redevelopment is "part of a resort hotel" and, therefore, authorized pursuant to the LDRs. Hence, the order on appeal constitutes a departure from the essential requirements of law and warrants reversal.

2. VOF's Pool Not On The "Same Property" As A Resort Hotel.

The Intervenors argue that, just because the Planning Commission "relaxed" the requirements in the DR zoning district by virtue of Resolution No. P12-09, the Planning Commission need not "further relax" the DR zoning district's requirements to accommodate VOF's proposed swimming pool. (Intervenors' Answer Brief, pp. 31-32). This argument fundamentally misperceives the legal conclusion reached in Resolution No. P12-09, as well as the process resulting in the Planning Commission's rendering of Resolution No. P12-09.

Obviously, VOF's proposed redevelopment, sitting on approximately 10,500 square feet of property (R. 636), was not, nor ever would be, "on the same property as a resort hotel." None of the minor conditional uses enumerated in § 130-81(b)(1)-(10), LDRs, if developed on the subject property, would ever be "on the same property as a resort hotel."

This fact is manifestly obvious. Yet, notwithstanding this fact, in rendering Resolution No. P12-09, the Planning Commission specifically allowed VOF's proposed use and redevelopment of the property.[4] The practical effect of Resolution No. P12-09 was that the minor conditional uses enumerated in § 130-81(b)(1)-(10),[5] were not required to be operated upon the same property as the resort hotel in order to be permitted pursuant to § 130-81(b). The fact that VOF's proposed use on VOF's subject property would serve a resort hotel – i.e. the transient units on Hawk's Cay not owned or operated by the Hawk's Cay Resort – satisfied the requisites of § 130-81(b).

The Planning Commission's determination in Resolution No. P12-09 is even better understood and appreciated in light of the process leading up to the Planning Commission meeting resulting in Resolution No. P12-09. Earlier the same day as those proceedings (i.e. February 25, 2009), the Planning Commission, in adopting Resolution No. P11-09, affirmed the determination that VOF's proposed redevelopment could not be an *accessory use* because the subject property was not *contiguous* to the lots which made up the resort hotel to be served by VOF's proposed redevelopment. (R. 679-683, Resolution No. P11-09).

Hence, after the Planning Commission concluded that VOF's proposed redevelopment could not be permitted as an *accessory use* because of lack of contiguity, the Planning Commission then, after agreeing to incorporate all of the testimony from

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[4] For the purposes of this argument, it makes no difference whether VOF's proposed use included, or did not include, VOF's proposed swimming pool.

[5] Previously numbered § 9.5-243(b)(1)(a)-(j), LDRs.

that hearing, proceeded to adjudicate VOF's alternative appeal: seeking approval of VOF's proposed redevelopment *as of right*, i.e. as a minor conditional use. (R. 673).

Because the Planning Commission *reversed* the County's November 24, 2008 Letter of Understanding (R. 676) by virtue of Resolution No. P12-09, the contiguity issues addressed in Resolution No. P11-09 became moot.

Hence, the Planning Commission did not "relax" the DR zoning requirements in Resolution No. P12-09; it *interpreted* the DR zoning requirements, determining that VOF's proposed use was authorized *as of right*.

The order on appeal simply ignores the conclusive legal determination in Resolution No. P12-09 and, therefore, constitutes a departure from the essential requirements of law warranting reversal.

3. Structure of § 130-81(b) Warrants Reversal.

The Intervenors next argue that the Planning Commission "properly construed" § 130-81(b) in rendering the order on appeal, and that the construction of § 130-81(b) reached by the Planning Commission in rendering Resolution No. P12-09 is "nonsensical." (Initial Brief, pp. 32-34).

Section 130-81(b)(1)-(10) plainly identifies ten minor conditional uses which are authorized in conjunction with a resort hotel in the DR zoning district. The preamble to § 130-81(b) reads, in relevant part, as follows:

> "The following *uses are* permitted as minor conditional *uses* in the destination resort district, subject to the standards and procedures set forth in Chapter 110, Article III:" (Emphasis added).

After the words "one or more resort hotels, provided that:" § 130-81(b)(1)-(10) itemizes ten distinct conditional uses.

Included in § 130-81(b)(6) are swimming pools.

The Intervenors argue that § 130-81(b)'s ten itemized "minor conditional uses" are not actually "minor conditional uses" but, rather, are "mandatory features of (r)esort hotels" and only "resort hotels" are permitted as minor conditional uses. (Intervenors' Answer Brief, pp. 32-33).

The Intervenors further argue that allowing minor conditional use review of VOF's proposed swimming pool would result in a "nonsensical interpretation of MCC § 130-81(b)" (Intervenors' Answer Brief, p. 32) and "does violence to the plain language of MCC § 130-81(b)." (Intervenors' Answer Brief, p. 33).

The Intervenors' argument, however, is belied by the express provisions of Resolution No. P12-09, which, in its fifth conclusion of law, states as follows:

> "5. As required in § 9.5-243(b),[6] the proposed change of use and redevelopment to a commercial retail use of the property shall require *a minor conditional use permit, subject to the standards and procedures set forth in the Monroe County Code. . . .*" (Emphasis added).

(R. 692).

Hence, if the only minor conditional use authorized in the DR zoning district is "resort hotels," and if the ten enumerated "minor conditional uses" were merely "features of a resort hotel," and not themselves "minor conditional uses" as Intervenors argue, the fifth conclusion of law in Resolution No. P12-09 (a Planning Commission Resolution not

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[6] Renumbered as § 130-81(b), LDRs.

appealed by either Monroe County or the Intervenors) would be totally unnecessary and inexplicable.

The Intervenors' argument also is belied by the plain and unambiguous text of § 130-81(b) which refers to the plural: "(t)he following uses are permitted as minor conditional uses." If the only permitted minor conditional use in the DR zoning district was "one or more resort hotels" as the Intervenors argue, the language contained in § 130-81(b) would be *singular*, and not *plural*.

Hence, the Intervenors' argument that a swimming pool is not a "minor conditional use" in the DR zoning district is soundly belied by both: (i) the express precedent found in Resolution No. P12-09; and (ii) the plain and unambiguous language of the precise LDR at issue.

4. Summary/Conclusion.

Once the Planning Commission made its determination in Resolution No. P12-09, VOF's minor conditional use application should have been evaluated pursuant to Monroe County's conditional use standards (i.e. those nine standards articulated in § 110-67, LDRs). It was not. Rather, Monroe County chose to *revisit* the Planning Commission's ruling in Resolution No. P12-09 to the detriment of VOF. The result was the order on appeal which constitutes a departure from the essential requirements of law requiring reversal.

D. Tipsy Coachman Doctrine

1. Introduction.

The Intervenors next argue that the Hearing Officer should affirm Resolution No. P29-11 because it "reaches the correct result for other reasons." (Intervenors' Answer Brief, pp. 34-38). Essentially, the Intervenors are arguing that the Hearing Officer should employ the "tipsy coachman doctrine"[7] and uphold the order on appeal for reasons other than the sole reason relied upon by the Planning Commission in rendering Resolution No. P29-11.

The Intervenors then suggest some "other reasons;" *to-wit:* that VOF's proposed swimming pool: (i) was "not consistent with the community character of the immediate vicinity" (Intervenors' Answer Brief, p. 35); (ii) did not meet the requirements of § 130-81(b)(6) of the Code (Intervenors' Answer Brief, pp. 35-36); and (iii) did not meet the requirements for an accessory use (Intervenors' Answer Brief, pp. 36-38).

Even if the Hearing Officer's scope of review includes crafting "new" conclusions of law and findings of fact, the fundamental problems with all three of the Intervenors' proposed "other reasons" is that none of them are recited in the order on appeal, nor are they supported by the record.

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[7] The tipsy coachman doctrine allows an appellate court to affirm an order on a theory other than one advanced by the lower tribunal. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).

2. *Scope of Hearing Officer's Review.*

Essentially, the Intervenors seem to be requesting the Hearing Officer to create findings of fact and conclusions of law not contained in the order on appeal or in the record.

Section 102-218(b), however, governs the scope of the hearing officer's review of orders rendered by the Planning Commission.[8] Nowhere is it contemplated that the hearing officer may make findings of fact or conclusions of law not contained in the Planning Commission's order, or which are not "necessarily implicit" in the Planning Commission's order. This is true, especially since neither Monroe County nor the Intervenors have cross-appealed the order on appeal.

As mentioned before, the Planning Commission's order provides one and only one reason for denial of the swimming pool: "there is no resort hotel on the subject property." (R. 152). No other finding of fact or conclusion of law is "necessarily implicit" in the

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[8] In relevant part, § 102-218(b), LDRs, reads:

> ". . .(t)he hearing officer shall render an order that may affirm, reverse or modify the order of the Planning Commission. The hearing officer's order may reject or modify any conclusion of law or interpretation of the County land development regulations or comprehensive plan in the Planning Commission's order, whether stated in the order *or necessarily implicit in the Planning Commission's determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record, and states with particularity in his order, that the findings of fact were not based upon competent substantial evidence or that the proceeding before the Planning Commission on which the findings were based did not comply with the essential requirements of law.*" (Emphasis added.)

Planning Commission's order. Certainly, none of the Intervenors' proposed new findings of fact/conclusions of law are "necessarily implicit" in the order on appeal.

Additionally, without a significant amount of judicial contortionism, the Hearing Officer cannot craft the findings of fact and/or conclusions of law suggested by the Intervenors. This is especially true in light of Resolution No. P29-11's fifth "Whereas" clause (R. 150) which incorporates Resolution No. P12-09 into the record before the Planning Commission. Under the guise of being "necessarily implicit," the Hearing Officer certainly cannot craft its own findings of fact and conclusions of law which are, in any way, inconsistent with those findings of fact and conclusions of law reached in Resolution No. P12-09.

However, even if the Hearing Officer was authorized to craft its own findings of fact and conclusions of law, the Hearing Officer could certainly not find the facts or reach the conclusions suggested by the Intervenors.

3. Swimming Pool Consistent With "Community Character."

At the outset, the idea that a swimming pool in Monroe County's destination resort district is "not consistent with the community character" is nonsensical. As VOF argued in its Initial Brief (Initial Brief at pp. 33-35), swimming pools are a permitted, indeed required, use in conjunction with a resort hotel.

Also, as mentioned earlier, swimming pools are one of ten expressly enumerated minor conditional uses authorized in the DR zoning district. *See*, § 130-81(b)(6), LDRs. Therefore, a swimming pool cannot, as a matter of law and practice, constitute an

"inconsistent use" in the DR zoning district, nor can a swimming pool be characterized as inconsistent with the "community character" of the DR zoning district.

Additionally, the express purpose of the conditional use process is to impose reasonable conditions on an applicant to assuage neighbors' reasonable concerns about a particular conditional use (i.e. the County can "condition" the use so as to minimize impacts).[9] The record is devoid of any attempt by Monroe County or the Intervenors to suggest any type of conditions to lessen any impact -- real or perceived -- of VOF's proposed swimming pool on neighboring vicinities. In fact, the Planning Commission did not even attempt to evaluate VOF's swimming pool using the nine conditional use standards outlined in § 110-67 of the LDRs.

4. Swimming Pool Meets Requirements of § 130-81(b)(6).

Next, the Intervenors argue that VOF's proposed swimming pool did not meet the requirements of § 130-81(b)(6) (i.e. the provisions of the DR resort) because VOF did not establish the proposed swimming pool was large enough to serve the transient units constituting the resort hotel to be served. (Intervenors' Answer Brief, pp. 35-36).

As referenced earlier in this brief (section III(F), *supra*), however, the only evidence in the record is that VOF's swimming pool is adequate to serve the transiently operated units consisting of the resort hotel contemplated in Resolution No. P12-09. There is no mention whatsoever in either the County's Development Order (R. 655-664), or the order on appeal (R. 149-153), which would suggest, in any way, that VOF's proposed swimming pool did not meet the size requisites of the LDRs. Certainly, both

[9] *See*, § 110-67, LDRs, outlining the conditional use factors.

the Development Order and the order on appeal are devoid of any findings of fact or conclusions of law which suggest the swimming pool's inadequacy; therefore, such a conclusion/finding certainly cannot be "necessarily implicit" in Resolution No. P29-11.

5. Swimming Pool As An Accessory Use.

Finally, the Intervenors argue that VOF's proposed swimming pool did not meet the requirements of an *accessory use*. (Intervenors' Answer Brief, pp. 36-38).

However, VOF's application was for a *minor conditional use* (i.e. *as of right*),[10] and was not for an *accessory use*. Hence, no finding or conclusion regarding an accessory use application can be "necessarily implicit" in the order on appeal. Given the plain text of § 130-81(b)(6), VOF's proposed swimming pool is clearly a "minor conditional use" and VOF's application was, therefore, entitled to minor conditional use review as expressly provided in § 130-81(b)(6) and § 110-60. The County did not allow such review to occur, resulting in a departure from the essential requirements of law warranting reversal.

V. REPLY TO APPELLEES' RESPONSES TO VOF'S DUE PROCESS ARGUMENTS

In response to VOF's arguments that the Planning Commission denied VOF due process by failing to follow its own appellate procedures (Initial Brief, pp. 35-38), Monroe County and the Intervenors have somewhat different arguments.

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[10] The County's Development Order plainly states in its very first "Whereas" clause, that VOF's application -- which forms the substance of this appeal -- was the minor conditional use permit application filed pursuant to § 110-69 and § 130-81. (R. 655).

Importantly, though, neither Monroe County nor the Intervenors dispute that the Planning Commission failed to follow the requisites of § 102-185(e), LDRs, by allowing the Intervenors' expert witness to present evidence at the Planning Commission meeting in direct and express violation of § 102-185(e).

Section 102-185(e)[11] permits only "a party appealing" to "present evidence and create a record before the planning commission." Notwithstanding this clear and unambiguous rule, over the objections of VOF, the Planning Commission allowed the Intervenors' expert to present to the Planning Commission evidence in the form of testimony (R. 113-121) and in the form of a memorandum (R. 732-735). The memorandum and testimony was reviewed and considered by the Planning Commission in rendering the order on appeal. (R. 151.)

In its Answer Brief, Monroe County simply argues that VOF otherwise received due process, and that the Planning Commission did not consider the evidence of the Intervenors' expert. (Monroe County Answer Brief, pp. 22-23).

The Intervenors' argument is slightly more multi-layered, arguing (i) that the Hearing Officer lacks jurisdiction to consider VOF's argument (Intervenors' Answer

[11] Section 102-185(e), LDRs, reads, in its entirety, as follows:

"e) **Action of the commission**.

The planning commission shall consider the appeal at a duly called public hearing following receipt of all records concerning the subject matter of the appeal. Any person entitled to initiate an appeal may have an opportunity to address the commission at that meeting; *and argument shall be restricted to the record below except that a party appealing an administrative decision, determination or interpretation shall be entitled to present evidence and create a record before the planning commission*; any appeals before the hearing officer shall be based upon and restricted to the record." (Emphasis added).

Brief, p. 39), and (ii) that § 102-185(e) simply prohibits the introduction of "new" evidence, notwithstanding its express terms. (Intervenors' Answer Brief, p. 40).

With regard to the Intervenors' argument that "an administrative tribunal has no jurisdiction to resolve constitutional issues" (Intervenors' Answer Brief, p. 38) (citation omitted), VOF is not suggesting that the Hearing Officer determine that the Planning Commission acted unconstitutionally. Rather, VOF is arguing that the Planning Commission departed from the essential requirements of law by failing to adhere to their own procedural rules.

Specifically, § 102-185(e) plainly and simply does not permit any party other than the appellant to produce evidence during a Planning Commission appeal. The rule makes no distinction between "new evidence" or "old evidence;" the rule makes no distinction as to whether the Planning Commission considers the evidence or does not consider the evidence; the rule allows the introduction of evidence only by the appealing party.

Despite this clear and unequivocal rule, the Planning Commission allowed the Intervenors' expert to testify and to present evidence in the form of a memorandum. The order on appeal specifically and expressly recites that this evidence was reviewed and considered by the Planning Commission in rendering the order on appeal. (R. 151).

Plainly, the Planning Commission departed from the essential requirements of law by not following its own express procedural guidelines regarding appeals. The Planning Commission's departure from the essential requirements of law requires reversal by the Hearing Officer.

VI. CONCLUSION/PRAYER FOR RELIEF

VOF respectfully requests the Hearing Officer to reverse Resolution No. P29-11 – the order on appeal -- and to enter an order granting VOF's Minor Conditional Use Permit Application.

Alternatively, the Hearing Officer should reverse the findings of fact (No. 6) and conclusions of law (No. 3) in Resolution No. P29-11 (i.e. that the proposed swimming pool does not comply with the requirements of the Monroe County Code), and enter an order (i) modifying those conclusions of law and the related findings of fact, (ii) determining that the swimming pool is a permitted use on the subject property, and (iii) remanding the matter to the Planning Commission for consideration in light of such determinations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail upon:

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James E. White, Esquire, AICP
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this 17th day of April, 2012.

EDWIN A. SCALES, III

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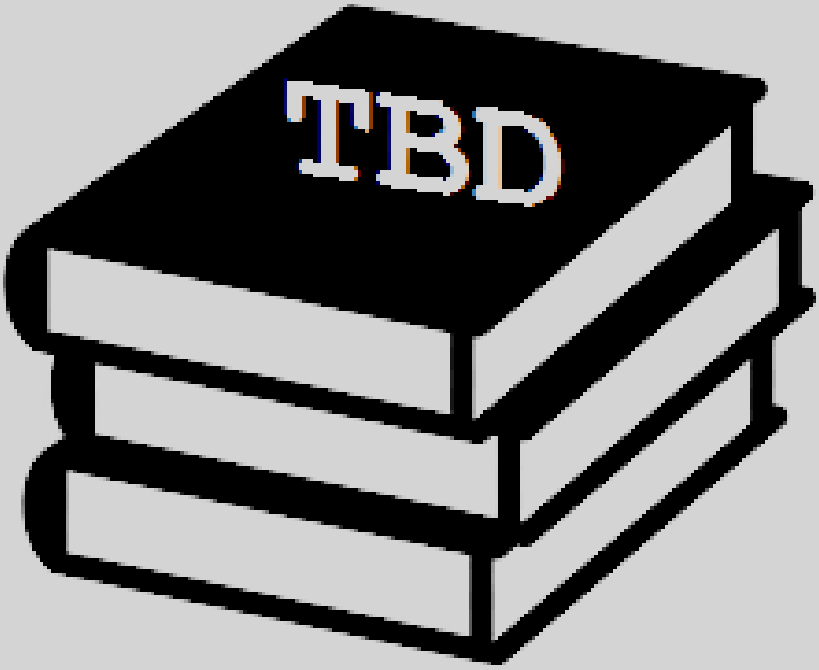

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