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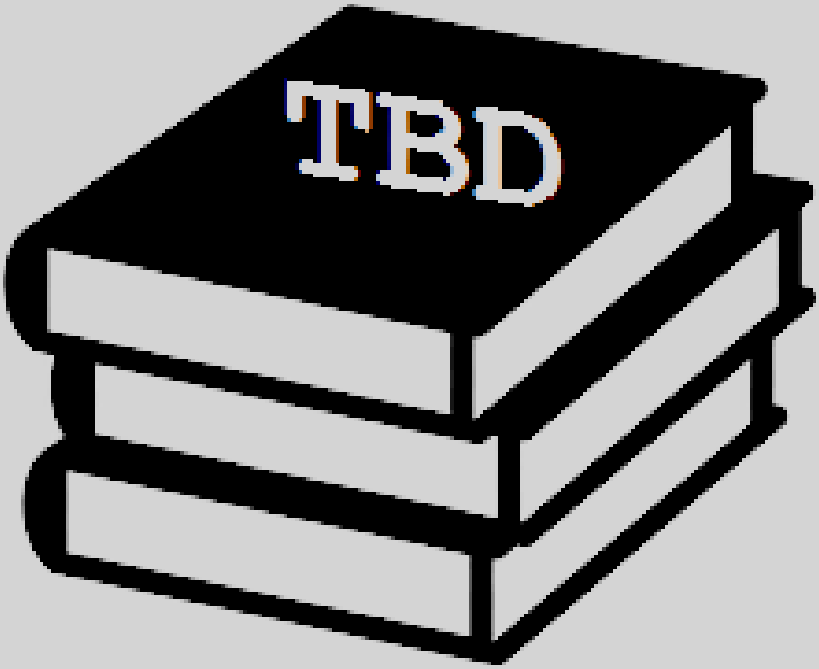

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING

LOWER DENSITY FOR LOWER SUGARLOAF, LLC, SUGARLOAF SHORES PROPERTY OWNERS ASSOCIATION, INC., SOUTH POINT HOMEOWNERS, LLC; STUART SCHAFFER; JACK MARCHANT; JOHN COLEY AND WILLIAM L. WALDROP FAMILY TRUST (12/13/11), *Appellants*, vs. MONROE COUNTY PLANNING COMMISSION and LOWER KEYS COMMUNITY CENTER CORPORATION, *Appellees.*	Case No. 21-0494

APPELLANTS' MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO SUPPLEMENT THE BRIEF

Appellants LOWER DENSITY FOR LOWER SUGARLOAF, LLC, SUGARLOAF SHORES PROPERTY OWNERS ASSOCIATION, INC., et al., by and through undersigned counsel, move to strike certain arguments made by counsel for the applicant during oral argument that were not included in the Answer Brief; or in the alternative for leave to supplement their brief as more fully set forth herein. In support, Appellants state the following:

In *Powell v. State*, 120 So. 3d 577, 591-92 (Fla. 4th DCA 2013) the Court explained:

> Basic principles of due process suggest that courts should not consider issues raised for the first time at oral argument. Doing so deprives appellants of the opportunity to have responded to the arguments in their reply briefs, and unfairly limits their ability to do so in the fleeting minutes of their reply arguments.
>
> . . .
>
> We fully recognize our obligation to ensure that justice is served by careful review of each case that comes before us; but this obligation does not relieve the State, or any other litigant, from the orderly administration of justice that disfavors raising new issues at oral argument.

The Fourth District noted that one possible remedy is to allow supplemental briefing. See, Fn. 7. Appellants agree and hereby proffer the following supplemental brief.

Grounds for Supplemental Brief

During oral arguments, counsel for the applicant cited Policy 101.5.25 of the Comprehensive Plan as further authority for its position that the housing in the project may be "Affordable" Housing that is not "Employee" Housing. The applicant did not cite

Policy 101.5.25 in its Answer Brief as support for that position. Because the applicant's argument based on Policy 101.5.25 was raised for the first time during oral arguments and not in its brief, Appellants should have the right to address this new argument.

Argument

The first sentence of Policy 101.5.25 states that the chart which follows contains "density and intensity standards for the future land use categories." It does not purport to override the permitted uses in the zoning districts as set forth in the Land Development Code.

The chart in Policy 101.5.25 specifies the allocated densities and the maximum net densities for residential development in the various land-use categories and zoning districts, including the Suburban Commercial (SC) zoning district in which the subject parcels are located. Nowhere does Policy 101.5.25 state that Affordable Housing that is not Employee Housing or Commercial Apartments (note that Commercial Apartments are not applicable here) can be built in the SC zoning district.

According to footnote (b) to the chart in Policy 101.5.25, maximum net residential density is the density allowable with the use of transferrable development rights (TDRs) (note that TDRs are

not applicable here) or for "qualifying affordable housing development." Footnote (b) does not contemplate or allow any Affordable Housing development; it refers to qualifying Affordable Housing development. Under Section 130-93 of the Land Development Code, as discussed in the Reply Brief, Affordable Housing that is not Employee Housing or Commercial Apartments is not a permitted use in the SC district.

Footnote (b) further states that "[d]eed restricted affordable dwelling units may be built up to the maximum net density without the use of TDRs." This statement does not authorize Affordable Housing that is not Employee Housing in every zoning district that allows residential development. It is referring to Affordable Housing that is a permitted use in the relevant zoning district. For the SC district, that means Affordable Housing that also qualifies as either Employee Housing or Commercial Apartments.

Also instructive is footnote (k) to the density and intensity chart in Policy 101.5.25, which applies to residential development in the SC, Mixed Use (MU) and Urban Residential (UR) zoning districts. Footnote (k) states that the maximum net density is 25 dwelling units per buildable acre for the UR district and is 18

dwelling units per buildable acre for the SC and MU zoning districts "where all units are deed restricted affordable dwelling units." Again, this does not say that Affordable Housing which is not Employee Housing or Commercial Apartments can be built in the SC district. Employee Housing is deed-restricted Affordable Housing with a further requirement that at least 70% of the income of the residents be from employment in Monroe County. Land Development Code Sec. 101-1.

For the foregoing reasons, Policy 101.5.25 does not in any way support the applicant's argument, an argument with which both Appellants and Appellee Monroe County Planning Commission disagree, that the housing in the project is permitted to be Affordable Housing that is not Employee Housing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day July 2021, the foregoing was served on counsel of record via DOAH's e-Filing Portal.

s/ Andrew M. Tobin, Esq.
Andrew M. Tobin, Esq.

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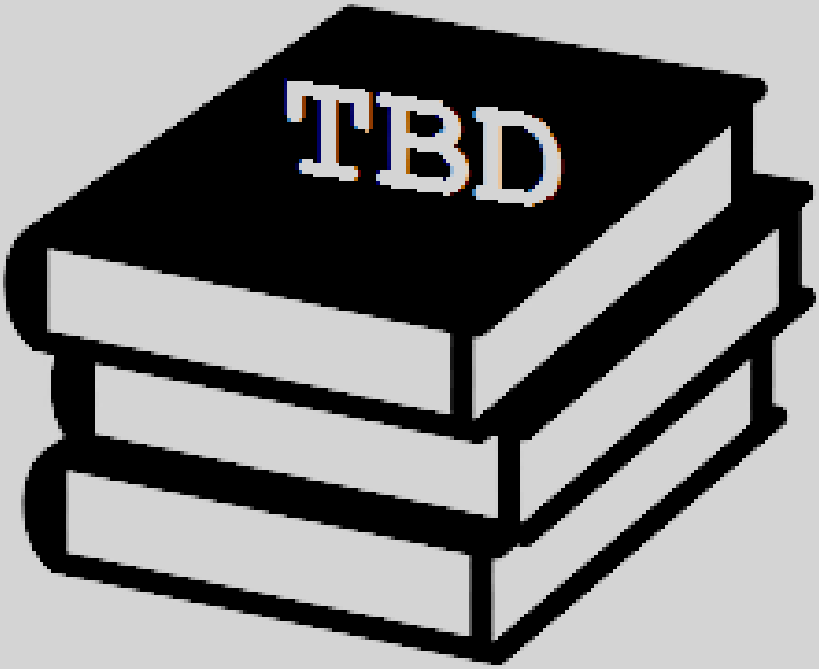

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