IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

Case No.: 14-005608CI-15
UCN: 522014CA005608XXCICI

THE RICHMAN GROUP OF FLORIDA, INC., a Florida corporation,
Plaintiff,

v.

PINELLAS COUNTY, FLORIDA, an independent and chartered Florida County,
Defendant.
______________________________________/

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KEN BURKE
CLERK OF CIRCUIT COURT

# FINAL JUDGMENT

**THIS CAUSE** having come before this Court on April 20-22, 2016 for a non-jury trial, and the Court, having considered the testimony, documentary evidence, argument of counsel, and applicable law, finds as follows:

## Statement of Case

This case arises out of an application for a Countywide Land Use Plan ("LUP") Map amendment (the "Countywide Amendment" or "Amendment") to develop a 34.55 acre parcel of land located at the intersection of McMullen-Booth Road and 10th Street within the city limits of Safety Harbor, Florida (the "Property").

On August 29, 2012, Plaintiff, Richman Group of Florida, Inc. ("Richman"), filed its initial application to the City of Safety Harbor to amend the City of Safety Harbor Comprehensive Plan. A revised application was filed on December 3, 2012. Richman sought to amend the LUP Map Amendment from Industrial Limited ("IL") 15.8 acres, Residential/Office Limited ("ROL") 5.1 acres, Residential Low ("RL") 6.0 acres, and Preservation ("P") 2.7 acres, to Residential Medium ("RM") 21.5 acres, ROL 2.8 acres and P. 10.3 acres.

The City of Safety Harbor approved the proposed amendment, subject to the Countywide Plan amendment process. The City on behalf of Richman submitted an

application to the Pinellas Planning Council who recommended approval of the Amendment. On May 7, 2013, the Countywide Planning Authority ("CPA") denied the application.

The unique regulatory structure applicable to LUP amendments within Pinellas County municipalities is governed by the legislative Act in Chapter 2012-245, Laws of Florida ("2012 Act").[1] The 2012 Act provides that if a Countywide LUP Map amendment such as that proposed by Richman is denied by Pinellas County through the CPA, the aggrieved applicant may appeal the denial to a hearing officer or administrative law judge ("ALJ"). After a hearing, the ALJ issues binding findings of fact in a recommended order. The 2012 Act mandates that the ALJ's recommended order be sent back to the CPA, who must make a "final decision" on the LUP amendment, the "basis" of which is "limited to the findings of fact of the [ALJ]." 2012 Act, section 10(3)(d).

Richman appealed the CPA's denial to Administrative Judge Bram D. E. Canter, who, after an evidentiary hearing, issued Findings of Fact in a November 18, 2013, Recommended Order. In his Findings, Administrative Judge Canter found that the parties' dispute focuses on the 15.8-acre parcel that is now designated Industrial Limited (IL), which would change to Residential Medium (RM).

Administrative Judge Canter found that CPA's stated reason of "preservation of industrial lands" was not a legitimate reason or rational basis for CPA's May 7, 2013, denial. The issue of preservation of industrial lands is not part of the criteria in the Countywide Rules that applied to the Amendment at the time of the denial, May 7, 2013. The November 18, 2013, ruling was forwarded to the CPA.

After receipt and consideration of Administrative Judge Canter's Findings, the CPA again denied the Amendment on January 14, 2014, once more stating that the reason for the denial was "to preserve industrial lands."

Richman filed this lawsuit pursuant to 42 U.S.C. section 1983 *et. seq.* contending that the CPA's January 14, 2014, final decision denying the Countywide Amendment

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[1] In their arguments, both parties reference the "Special Act" of the Florida Legislature in Chapter 88-464, Laws of Florida. However, Chapters 73-594, 74-584, 74-585, 76-473, 88-464, and 90-396, Laws of Florida governing the Pinellas County Planning Council (CPA), were amended, codified, reenacted, and repealed by Chapter 2012-245, section 2, Laws of Florida. References to the applicable law herein are to the "2012 Act" that became effective on April 27, 2012.

violated Richman's constitutional guarantee of equal protection and due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution.

**Statement Of Facts**

Richman is in the business of developing and managing apartment communities throughout Florida. Richman has successfully developed over fifty apartment communities in this State, many of which are "market rental rate" communities in the Tampa Bay region. (Pl. Ex. 113). Accordingly, Richman has a history and track record of successfully developing apartment communities in this geographic area. Richman has standing to bring this action.

Richman executed a contract to purchase the Property on June 11, 2012. Under the terms of the contract, Richman was to pursue government approvals necessary for Richman to develop the Project, including amendments to the Comprehensive LUP Map of the City of Safety Harbor, the Countywide Future LUP Map of the County, and the zoning designation for the Property under the City's Zoning Atlas. The contract included a deadline for Richman to obtain these government approvals. After a series of twelve amendments, this "Government Approval Deadline" was extended through and including March 31, 2014. (Pl. Ex. 152).

In the revised application submitted to the City, Richman intended to develop 246 apartment units and 25,000 square feet of single-story office space. (Pl. Exs. 121; 115). The City and Richman also negotiated a Development Agreement containing a negotiated site plan ("Site Plan") depicting the location and details of each structure and parking lot, and further restricting the appearance, setbacks, minimum rents, ingress-egress, amenities, and other aspects of the mixed use development (the "Development Agreement"). (Pl. Ex. 121).

Having received the support of the City's planning staff, including its Development Director, Matt McLachlan, AICP, Richman scheduled its City Applications and the Development Agreement for consideration by the Safety Harbor City Commission. At the February 18, 2013, hearing, and in the face of significant neighborhood opposition, the Commissioners voted 3-2 to approve (on first reading) the City Applications and to approve (final approval) the Development Agreement and Site Plan. Mayor Ayoub,

Commissioner Bandoni and Commissioner Blake voted in favor of these three agenda items, while Commissioners Besore and Merz voted against them. (Pl. Ex. 127).

The approved Development Agreement was then recorded on March 14, 2013, in Pinellas County Public Records. Concerning the City Applications (the LUP Map Amendment and rezoning), the February 18, 2013, City approval was only on first reading. Under City of Safety Harbor procedures, these City Applications required another approval at second reading. However, prior to the City Commission considering these applications on second reading, Richman was required to obtain a separate Countywide LUP Map amendment from the County. (Pl. Exs. 115; 121; 127, pp. 11 – 12).

During the relevant time period,[2] section 5.5.3 of the Countywide Rules provided only six criteria were to be considered in determining whether a proposed Countywide LUP Map amendment should be approved. Those six criteria are as follows:

| SEC. 5.5.3 | REVIEW CRITERIA. |
|---|---|
| 5.5.3.1 | Relevant Countywide Considerations. In the consideration of a regular Countywide Plan Map amendment, it is the objective of these Countywide Rules to evaluate the amendment so as to make a balanced legislative determination based on the following six (6) Relevant Countywide Considerations, as they pertain to the overall purpose and integrity of the Countywide Plan. |
| 5.5.3.1.1 | Consistency with the Countywide Rules. The manner in, and extent to, which the amendment is consistent with Article 4, Plan Criteria and Standards of these Countywide Rules and with the Countywide Plan as implemented through the Countywide Rules. |
| 5.5.3.1.2 | Adopted Roadway Level of Service (LOS) Standard. The manner in, and extent to, which the amendment significantly impacts a roadway segment where the existing Level of Service (LOS) is below LOS "D" or where projected traffic resulting from the amendment would cause the existing LOS to fall below LOS "D". |
| 5.5.3.1.3 | Scenic/Noncommercial Corridors. If located within a Scenic/Noncommercial Corridor, the manner in, and extent to, which the amendment conforms to the criteria and standards |

[2] Pinellas County Ordinance No. 07-13, amended the "Rules Concerning the Administration of the Countywide Future Land Use Plan." Ordinance No. 07-13, Article 5 "Countywide Plan Map Amendments" was in effect during the relevant time periods involved in this case.

contained in Section 4.2.7.1, and Section 4.2.7.1.4 of these Countywide Rules.

5.5.3.1.4 Coastal High Hazard Areas (CHHA). If located within a Coastal High Hazard Area, the manner in, and extent to, which the amendment conforms to the terms set forth in Section 4.2.7.4.

5.5.3.1.5 Designated Development/Redevelopment Areas. If the amendment involves the creation, expansion, or contraction of a Residential Very High (RVH), Activity Center (AC), Community Redevelopment District (CRD), Central Business District (CBD) category, or the Planned Redevelopment categories, the manner in, and extent to, which the amendment conforms to the purpose and requirements of the applicable category and Section 4.2.7.5.

5.5.3.1.6 Impact on a Public Educational Facility or an Adjoining Jurisdiction. The manner in, and extent to, which the amendment significantly impacts a public educational facility or an adjoining jurisdiction.

To initiate a Countywide LUP Map amendment, the Countywide Rules required that the City forward the Amendment application to the Pinellas Planning Council ("PPC"), and provide an analysis of whether the Countywide Amendment met the aforementioned six section 5.5.3 criteria. On March 8, 2013, the City (through Matt McLachlan, AICP, its Development Director) submitted the Amendment application to the PPC for consideration. Along with the application was the City/McLachlan's planning analysis explaining that the Amendment was consistent with all of the section 5.5.3 criteria. (Pl. Exs. 51, p. 5 – 12; 115, pp. 13 – 20).

In terms of LUP Map categories the chart below explains the proposed changes:

| Countywide Future Land Use | Current Acreage | Proposed Acreage |
|---|---|---|
| Industrial Limited (IL) | 15.8 | - |
| Residential/Office Limited (R/OL) | 5.1 | 2.8 |
| Residential Low (RL) | 5.0 | - |
| Residential Urban (RU) | 6.0 | - |
| Preservation (P) | 2.7 | 10.3 |
| Residential Medium (RM) | - | 21.5 |
| TOTAL | 34.6 | 34.6 |

(Pl. Ex. 124).

After submission to the PPC, the Countywide Amendment was to be reviewed by various staffs and committees analyzing whether the Amendment was consistent with

the six section 5.5.3 criteria. The PPC professional staff, the Pinellas Planners Advisory Committee, the PPC itself, and the County/CPA's own planning staff all separately reviewed the Amendment. Based on that analysis, each of the aforementioned staffs/committees/councils recommended approval. With respect to the County/CPA's own staff analysis (Pl. Ex. 119), the County's Planning Director testified that he and the County's trial representative/Economic Development Director "collaborated" on the preparation of this analysis, which recommended approval. (Pl. Exs. 116; 117; 118; 119; 164).

The Countywide Amendment was considered by the CPA at the May 7, 2013, hearing. During the hearing, three hundred and eight residents in the area surrounding the Property expressed opposition to the Amendment. At the conclusion of the May 7, 2013, hearing, the CPA unanimously denied the Amendment. The reason given for the CPA's denial was "to preserve industrial lands within the County . . . as described in PPC Resolution 06-3." (Pl. Exs. 128; 130. pp 37 – 39 (where residents speak/object); 155, p. 2).

The 2012 Act, section 10(3)(d)[3] and section 5.1.3.9 of the Countywide Rules provide that any substantially affected person may seek an administrative review if the

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[3] Chapter 2012-245, Section 10, "Countywide plan repeal, readoption, and amendment" states in subsection 3:

COUNTYWIDE PLAN MAP AMENDMENTS.—

(a) Amendments to the adopted countywide plan map relating to a land use designation for a particular parcel of property may be initiated by the local government that has jurisdiction over the subject property. Amendments to any standard, policy, or objective of the countywide plan strategies or the rules may be initiated by the council or any local government.

(b) The [Pinellas Planning] council shall have 60 days after the day an application is filed with the council to act on that amendment and forward the recommendation to the countywide planning authority. Action by the council may include recommendation for approval, denial, continuation, or an alternative compromise amendment, any of which shall constitute action by the council within the stipulated 60-day period. Provision for the council to make a recommendation for an alternative compromise amendment shall be as approved and set forth in the rules.

(c) All amendments shall be transmitted to the countywide planning authority with a recommendation by the council. A vote of a majority plus one of the entire countywide planning authority is required to take any action on the proposed amendment that is contrary to the council's recommendation. A recommendation shall be received by the countywide planning authority before it takes action on an amendment.

(d) After action by the countywide planning authority, any substantially affected person, the council, or the local government that initiated the plan amendment may seek a hearing pursuant to chapter 120, Florida Statutes. Any substantially affected person may participate in the hearing. At the conclusion of the hearing, the hearing officer [or Administrative Law Judge's] recommended order shall be forwarded to and considered by the countywide planning authority in

CPA denies an amendment that was recommended for approval by the PPC. Under these provisions, Richman and the County proceeded to a two-day evidentiary hearing before Administrative Judge Canter on August 27-28, 2013. The issue to be decided was whether the Richman's Amendment was consistent with the six section 5.5.3 criteria. (Pl. Exs. 113, pp. 1-2 and Findings 25-26; 51, p. 5-4; 77, p. 13; 52).

Prior to the ALJ trial, the County stipulated that the Amendment was compliant/consistent with sections 5.5.3.1.2 through 5.5.3.1.6 of the applicable criteria. Accordingly, the specific issue presented to Administrative Judge Canter was whether the County had any rational basis for denying the Amendment under section 5.5.3.1.1 of the Countywide Rules, entitled "Consistency with Countywide Rules."[4] (Pl. Ex. 113, ¶ 25).

On November 18, 2013, Administrative Judge Canter entered his Findings of Fact, Conclusions of Law, and Recommended Order. Administrative Judge Canter's Findings stated in part:

> 25. Of these six criteria, the parties stipulated that only the consideration stated in Section 5.5.3.1.1 is at issue in this case. . . .
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> . . . .
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> 27. As set forth in the Conclusions of Law, in order for a provision of the Countywide Plan to be implemented through the Countywide Rules so that the provision can act as a criterion applied by the CPA in the approval or denial of a proposed amendment to the Countywide Plan Map, the provision must be repeated, paraphrased, or adopted by reference in the Countywide Rules.

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a final hearing. The basis for the countywide planning authority's final decision approving or denying the proposed amendment is limited to the findings of fact of the hearing officer [or Administrative Law Judge]. This paragraph shall only apply to amendments to the countywide plan map.

(e) The council may contract with the Division of Administrative Hearings to provide the hearing officers required by this act. The council shall be responsible for compensating the division for costs incurred by the division in the hearing process. Except as provided in paragraph (d), the council and the countywide planning authority are not subject to chapter 120, Florida Statutes.

(f) An administrative hearing under paragraph (d) is limited to a review of the facts pertaining to the subject property, the countywide plan map, and the rules applicable thereto. An administrative hearing is not the appropriate forum for a constitutional challenge.

(g) Decisions by the countywide planning authority, acting in its capacity under this act, are legislative in nature. Decisions made by the countywide planning authority may be challenged in a court of competent jurisdiction.

[4] **5.5.3.1.1 Consistency with the Countywide Rules.** The manner in, and extent to, which the amendment is consistent with Article 4, Plan Criteria and Standards of these Countywide Rules and with the Countywide Plan as implemented through the Countywide Rules.

> 28. In this regard it is noted that Resolution 06-3 of the Pinellas Planning Council, which discussed the need to reserve industrial parcels for target employers, was referred to in the Council's Agenda Memorandum and discussed in the public hearing before the CPA. However, Resolution 06-3 is not implemented through the Countywide Rules and, therefore, is not a source of criteria applicable to the Amendment.
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> . . . .
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> 35. Following the CPA's denial of the Amendment, the staff of the Pinellas Planning Council undertook a review of its current policies regarding the preservation of industrial lands and recommended amending the Countywide Rules to identify industrial properties "worthy of preserving" and to develop criteria for the evaluation of proposed amendments to convert industrial land. These recommendations highlight the current lack of adequate guidance in the Countywide Rules.
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> 36. The determination by the CPA that the Amendment is inconsistent with the Countywide Rules is based primarily on three propositions which are contrary to the preponderance of evidence. First, that the Richman parcel is being reserved for IL uses. The preponderance of the evidence shows that the parcel is inappropriate for several authorized IL uses and the CPA wants the parcel reserved only for a few target employers.
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> 37. Second, that the IL designation is not inconsistent with the McMullen-Booth Road [Scenic Non-Commercial Corridor ("SNCC")]. The identification of preferred land uses in the corridor would have no effect unless it was a factor to be considered by the CPA when it reviews proposed amendments to the Countywide Plan Map. The IL designation within the McMullen-Booth SNCC is inconsistent with the goal of the corridor and is a factor (not a requirement) in favor of changing current IL designation to another designation that qualifies as a Mixed Use.
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> 38. Third, that the Richman parcel is part of a "consolidated area" for industrial uses in a location "consistent with surrounding uses" as described in Section 2.3.3.6.1. The preponderance of the evidence shows that this is not a consolidated area for industrial uses. It was once a consolidated area, but past land use decisions have eliminated more than half the industrial acreage. If Richman had proposed to consolidate its parcel with the IL parcel south of 10th Street South to create a large, integrated warehousing and distribution operation served by rail, the proposal would have been consistent with the core purpose for IL lands as expressed in Section 2.3.3.6.1. The impracticability of such a proposal, however, highlights the problem with the current IL designation for the Richman parcel.

(Pl. Ex. 113, ¶¶ 25 – 38). Administrative Judge Canter rejected the County's contention that "industrial land preservation" was part of the criteria applicable to Richman's

Countywide Amendment, and ruled that "industrial land preservation" was not a legitimate reason/rational basis for denying the Amendment. (Pl. Exs. 113, ¶¶ 25 – 38; 4, pp. 4 – 7, 10 – 12, 17 – 18).

The Countywide Amendment was then scheduled for a second hearing before the CPA to occur on January 14, 2014. The 2012 Act, section 10(3)(d) mandates that the Administrative Law Judge's "recommended order shall be forwarded to and considered by the countywide planning authority in a final hearing. The basis for the countywide planning authority's final decision approving or denying the proposed amendment is limited to the findings of fact of the hearing officer [or Administrative Law Judge]." Likewise, section 5.1.3.10 of the Countywide Rules provides: "[f]inal action by the CPA subsequent to any administrative hearing shall be based upon the findings of fact of the administrative hearing officer." (Pl. Exs. 51, p. 5–4; 77, p. 13).

At the January 14, 2014, CPA hearing, numerous objectors again voiced opposition to the Countywide Amendment. The County Attorney advised the CPA that as a result of Administrative Judge Canter's Findings, the CPA was not free to deny the Amendment based on their previously stated intent ("industrial land preservation"), and that the CPA was "bound by" the Findings. The County Attorney further advised CPA members that they were "powerless" to enforce PPC Resolution 06-3 (which called for preservation of industrial lands), because it was never adopted into the Countywide Rules. The County Attorney further explained that pursuant to Administrative Judge Canter's binding Findings, the existing industrial LUP Map designation for the Property was not consistent with the six criteria set forth in section 5.5.3 of the Countywide Rules, while Richman's Amendment was "very consistent" with that criteria. (Pl. Ex. 4, pp. 3-7, 10-12, 17-18, 45-47, 56-60).

The County Attorney also advised the CPA that if they denied Richman's Amendment, the case "would be ripe" for the County to be sued in Circuit Court. Commissioner Welch then explained his view that the CPA's failure to adopt the "preservation of industrial lands policy" was a "technical glitch," and that he was "sticking with" his prior vote to deny the Amendment. The County Attorney responded that the CPA's failure to adopt the industrial lands policy was not a technicality, but that

"the reason the CPA did not want to put [the policy] in the plan is [that the CPA] did not want to be bound by [the policy] at the Countywide level." (Pl. Ex. 4, pp. 46-47, 58-60).

Commissioner Roche then expressed his view:

> what concerns me about an act of this nature is the precedence that this would set going forward, thus putting the Board in a position that we are adhering to the letter of the comprehensive plan ... reversing this decision [i.e., approving the Amendment] would in effect set a precedent that we will stand by the letter of the law in the comprehensive plan. ... As far as going through with a lawsuit or fear of a lawsuit, I don't care. We've spent money defending or fighting for the will of the people and I have no problem spending some defending it.

(Pl. Ex. 4, pp. 64-65). Commissioner Morroni commented concerning his vote:

> [T]he people here who have been against it, they have been through a long, arduous ordeal. They have always been professional. They've been informative. They have always handled themselves in a good way and they've been united. There's nobody other than the applicant who's in support of this thing. So I'm not changing my vote either.

(Pl. Ex. 4, p. 67).

Although Commissioner Morroni stated that he had "always spoken in favor of saving our industrial," the evidence of his voting record on Countywide LUP Map amendments establishes that on a least three separate occasions (amendments 3-62, 3-67, and 14-10), Commissioner Morroni voted in favor of LUP Amendments that changed LUP designations from industrial to residential. (Pl. Ex. 4, pp. 66-67; Pl. Ex. 61, p. 14; Pl. Ex. 107 (showing unanimous vote for amendment 3-67)).

Ignoring Administrative Judge Canter's Findings, the 2012 Act, section 10(3)(d), Countywide Rule section 5.1.3.10, and the County Attorney's advice, the CPA again unanimously denied the Amendment. (Pl. Ex. 4, p. 68).

On January 28, 2014, two weeks after the CPA's January 14, 2014, denial of Richman's Amendment, in Ordinance 14-06, Pinellas County created new section 5.5.3.1.7, "Reservation of Industrial Land" criteria that applies to the CPA's review of Countywide LUP Map amendments. This new criterion allowed the CPA to consider the need to preserve industrial lands when considering a Countywide LUP Map amendment. This newly created section 5.5.3.1.7 was not in existence at the time the

CPA denied the Amendment on May 7, 2013, or when the CPA denied the Amendment the second time on January 14, 2014. (Pl. Exs. 113, ¶ 35; 167, pp. 4-7; 166, p. 38, item 26).

The Governmental Approval Deadline in Richman's purchase contract was March 31, 2014. The preponderance of the evidence establishes that had Richman been allowed to move forward with the Project, Richman would have completed the Project consistent with Richman's successful completion of three other similar apartment projects in the Tampa Bay area that Richman was developing at the same time as it planned to develop its Safety Harbor Project. These projects were identified as Epic at Gateway, Sedona, and Amalfi (the "3 Similar Projects"). (Pl. Ex. 152). Further, the preponderance of evidence establishes that but for the CPA's denial of the Countywide Amendment on January 14, 2014, Richman would have obtained approval of the City Applications prior to the contractual Government Approval Deadline and completed the Project, just as Richman had completed the 3 Similar Projects. (Pl. Exs. 127, pp. 4 – 8; 152).

The 2012 Act, section 10(3)(g) provides that an adverse CPA decision subsequent to a favorable ALJ ruling "may be challenged in a court of competent jurisdiction." It appears that Richman determined the best avenue to proceed legally was to bring the current action based on a violation of constitutional rights as any other method of review in all probability would not be completed before the March 14, 2014, Governmental Approval Deadline in Richman's purchase contract.

Twenty other Countywide LUP Map amendments were filed between 2003 and 2015 where, as here, the applicant sought to amend the LUP Map designation from an industrial designation to a category allowing for the development of a residential project. Of these twenty applications, the CPA considered/voted on eighteen proposed amendments, seventeen of which were approved. Only one such LUP Map amendment, Richman's Countywide Amendment, was denied. (Pl. Ex. 106).

At the non-jury trial, Richman called Ms. Cynthia Tarapani to testify on land planning issues. Ms. Tarapani previously served as the Planning Director for the City of Clearwater. She has more than thirty-five years of land planning experience and has prosecuted over seventy-five Countywide LUP Map amendments through the

Countywide process. Given the County's stipulation and Administrative Judge Canter's Findings that Richman's Amendment satisfied the criteria of sections 5.5.3.1.2 – 5.5.3.1.6, and that the only relevant criterion to be evaluated was criterion 5.5.3.1.1, Ms. Tarapani testified that six of the above-referenced seventeen approved amendments were indistinguishable from the Richman Amendment concerning their relevant characteristics. Those six Countywide LUP Map amendments are as follows: 3-62; 3-67; 5-49; 6-53; 12-9; and 14-10 (hereinafter, the "Six Other Amendments"). (Pl. Exs. 107, 108A-N).

In response, the County pointed out factual differences between the Richman Amendment and these Six Other Amendments. However, the differences identified by the County related to: traffic/transportation issues; the fact that the Six Other Amendments were located in different municipalities than the Richman Amendment; the distance between the referenced amendments; the time period between the amendments; and other characteristics that are not relevant from a planning perspective. Traffic/transportation is not a relevant consideration because the County stipulated that the Richman Amendment was compliant with the "traffic" criterion in Countywide Rule section 5.5.3.1.2. The municipality involved, the date of the amendment, and the distance from the Richman Property are not relevant because each amendment was subject to the same Countywide Rule criteria, no matter the date of the amendment, where the real property, or what municipal jurisdiction was involved. (Pl. Exs. 106, 107, 108A-N).

The only meaningful difference Ms. Tarapani could identify as a reason for denial of the Richman Amendment was the overwhelming neighborhood opposition. Ms. Tarapani noted that there existed no such opposition to the Six Other Amendments, and, therefore, Ms. Tarapani testified that in her professional opinion, neighborhood opposition was the reason for the CPA's denial of the Richman Amendment. In that regard, concerning the CPA's approval of amendment 14-10, Commissioner Morroni explained at the 14-10 CPA hearing that:

> [L]ook at the difference between this item and the Safety Harbor [Richman] item. I mean, you had so much support from the community here [on 14-10]. You had support from the businesses that were around here.

(Pl. Ex. 59, p. 28). Both Ms. Tarapani and the County's Planning Director testified that neighborhood opposition is not a legitimate basis for denying a land use application. (Pl. Exs. 106, 107; 108A-N)

The evidence establishes that because the Six Other Amendments were approved, and Richman's Amendment was denied, the CPA treated the Six Other Amendments differently (and more favorably) than the Richman Amendment. Further, the preponderance of the evidence establishes that because the relevant characteristics of the Richman Countywide Amendment and the Six Other Amendments were indistinguishable in relevant respects, there exists no rational basis for the difference in treatment afforded the Richman Amendment as compared to the Six Other Amendments.

Evidence was introduced at the non-jury trial concerning the value of the 2.8 acre office portion of the Property that Richman planned to market once entitled for 25,000 square foot of office space. Based on a broker opinion of value performed by Mark Klein, CCIM, the evidence established that the value of the 2.8 acres office parcel was $1,250,000.00 as of January 14, 2014, and that the 2.8 acre parcel would reasonably have sold prior to the end of 2014. (Pl. Ex. 93).

**Conclusions Of Law**

42 U.S.C. section 1983 provides:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage ... subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ...

The statute "reflects a congressional judgment that a 'damages remedy ... is a vital component of any scheme for vindicating cherished constitutional guarantees.'" *Gomez v. Toledo*, 446 U.S. 635, 538 (1980) (quoting *Owen v. City of Independence*, 445 U.S. 636 (1980)). "As remedial legislation, section 1983 is to be construed generously to further its primary purpose." *Id.* at 639, quoting *Owen*, 445 U.S. at 636; *see also Dennis v. Higgins*, 498 U.S. 439, 443 (1991) ("broad construction of § 1983 is compelled by the statutory language"); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) ("[w]e have repeatedly held that the coverage of [section 1983] must be

broadly construed"); *Monell v. N.Y. City Dep't of Social Servs*, 436 U.S. 658, 684 (1978) (section 1983 should be "liberally and beneficently construed").

Florida recognizes four section 1983 challenges a plaintiff may bring for deprivations of constitutionally protected property rights in the land-use context: (i) just compensation; (ii) due process takings; (iii) arbitrary and capricious due process;[5] and (iv) equal protection. *Eide v. Sarasota County*, 908 F.2d 716, 720 (11th Cir. 1990) (applying Florida law); *Executive 100 v. Martin County*, 922 F.2d 1526, 1536 (11th Cir. 1991) (applying Florida law). The instant case deals with the latter two causes of action; equal protection (Count I) and arbitrary and capricious due process (Count II). The equal protection claim in Count I requires a ruling as to whether the County had a rational basis for denying the Countywide Amendment. Because the "rational basis" question is the principal issue involved in the arbitrary and capricious due process claim in Count II, the due process claim in Count II shall be addressed first.

**Arbitrary and Capricious Due Process Claim – Count II**

Richman's "arbitrary and capricious" due process claim arises out of the County's deprivation of Richman's constitutionally protected property rights under the Fifth and Fourteenth Amendments to the United States Constitution. "To prove an arbitrary and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously" in depriving the constitutionally protected property right. *Eide*, 908 F. 2d at 722. Damages resulting from the unconstitutional deprivation are an appropriate remedy. *Id.*

There is a two prong analysis for arbitrary and capricious due process challenge under section 1983. First, a federal constitutionally protected property interest must have been deprived, and second, the deprivation must have the stature of a constitutional violation. *Everett v. City of Tallahassee*, 840 F. Supp. 1528, 1542-43 (N.D. Fla. 1992).

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[5] An "arbitrary and capricious due process claim" is a non-takings due process claim. *Eide v. Sarasota County*, 908 F.2d 716, 722 n.9 (11th Cir. 1990); *City of Jacksonville v. Wynn*, 650 So. 2d 182, 187 (Fla. 1st DCA 1995); *Everett v. City of Tallahassee*, 840 F. Supp. 1528, 1542 (N.D. Fla. 1992) ("The right not to be subject to 'arbitrary or capricious' action by a state ... is commonly referred to as a 'due process right.'"). The phrase "arbitrary and capricious due process claim" is used by the courts to avoid confusing the cause of action with a due process takings claim. *See also Doty v. City of Tampa*, 947 F. Supp. 468, 472 (M.D. Fla. 1996).

The first question, whether a constitutionally protected property interest exists, is an issue controlled by state law. Property interests are not created by the U.S. Constitution, but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 223 (1985).

A federal constitutionally protected interest in land use application exists where, under state law, "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Walz v. Town of Smithtown*, 46 F. 3d 162, 168 (2d Cir. 1995). Entitlement focuses on the issuing authority's discretion, i.e., whether it was required to approve the application upon determining "that certain objectively ascertainable criteria have been met." *545 Halsey Lane v. Town of Southampton*, 45 F. Supp. 3d 257, 266 (E.D.N.Y. 2014).

Florida has long recognized that a constitutionally protected property right "to own land and put it to lawful use" exists as a "fundamental American freedom." *Moore v. City of Tallahassee*, 928 F. Supp. 1140, 1145 (N.D. Fla. 1995) (citing *State of Washington v. Roberge*, 278 U.S. 116, 121 ("the right ... to devote ... land to any legitimate use is property within the protection of the Constitution."); *see also Villas of Lake Jackson, Ltd. v. Leon Cnty.*, 121 F. 3d 610, 614 (11th Cir. 1997) (applying Florida law) (holding entitlement to a state created property interest "may indeed constitute property subject to the arbitrary and capricious due process protections [of] the federal Constitution."). To that end, a land-use application that fully complies with existing regulations constitutes a property interest subject to federal due process protection. *Gardens Country Club, Inc. v. Palm Beach Cnty.*, 712 So. 2d 398, 404 (Fla. 4th DCA 1998)[6].

With respect to the second issue (whether a deprivation constitutes a Constitutional violation) a deprivation has Constitutional stature if the plaintiff proves "that the government has acted arbitrarily and capriciously." *Eide*, 908 F. 2d at 722; *see*

[6] In *Gardens*, the court rejected reliance on *McKinney v. Pate*, a case relied upon by the County, in arbitrary and capricious due process land-use cases. 20 F.3d 1550 (11th Cir. 1994). In holding that due process protections extended to the subject property interest, the *Gardens* court identified the limitations of *McKinney*. *McKinney* itself ruled that its analysis would be "inappropriate for legislative acts" and restricted its own application to executive acts like the employment decision at issue in that case. 20 F.3d at 1557 n.9.

*also Everett*, 840 F. Supp. at 1543 (holding section 1983 claim exists where defendant has "arbitrarily or irrationally interfered" with a constitutionally protected interest).

In the instant case, it is undisputed that in 2013, the CPA denied Richman's Countywide Amendment for the stated reason that the CPA sought "to preserve industrial lands within the County . . . as descried in PPC Resolution 06-3."

Administrative Judge Canter's Findings establish that PPC Resolution 06-3 was not a rational basis for denying Richman's Countywide Amendment. Administrative Judge Canter's Findings also established that "industrial land preservation" is not part of the criteria applicable to a Countywide LUP Map amendment and; therefore, is not a rational basis for denying Richman's Countywide Amendment. Finally, Administrative Judge Canter's Findings established that the Amendment was consistent with the six applicable section 5.5.3 criteria, while the existing Industrial LUP designation for the Property is not consistent with that criteria.

The 2012 Act, section 10(3)(d) and Countywide Rule section 5.1.3.10 provide that the CPA was bound by Administrative Judge Canter's Findings. Thus, once Administrative Judge Canter entered his Findings, Richman had established that its Countywide Amendment was consistent with all applicable criteria, and that the County's alleged basis for the 2013 denial was not legitimate/rational. Accordingly, as of January 14, 2014, Richman had established that it possessed a constitutionally protected property interest in its Countywide Amendment. *See Walz*, 46 F. 3d at 168 (holding federally protected property interest exists when, absent the denial of due process, "there is either a certainty or a very strong likelihood that the application would have been granted."); *see also Moore*, 928 F. Supp. at 1145 (holding that the right to a land use approval is constitutionally protected as a "fundamental American freedom"); *Gardens*, 712 So. 2d at 404 (holding under Florida law, a compliant land use application is subject to federal due process protection). The County's reliance on cases applying the land use law of states other than Florida is unavailing. *See Roth*, 408 U.S. at 577; *Ewing*, 474 U.S. at 223, *Walz*, 46 F. 3d at 168; *Halsey Lane*, 45 F. Supp. 3d at 266.

In 2014, when the CPA re-heard the Countywide Amendment, "The basis for the countywide planning authority's final decision approving or denying the proposed amendment is limited to the findings of fact of [Administrative Judge Canter]." 2012 Act,

section 10(3)(d). Ignoring those Findings, the mandates of the 2012 Act, their own Countywide Rules, as well as the advice of their own attorney, the CPA rendered its final decision, again denying the Amendment on the stated basis of "industrial land preservation." Administrative Judge Canter's binding Findings already had established this reason was not a legitimate or rational basis for the denial. Because the CPA applied a non-existent criterion to deny Richman's Amendment, the County acted arbitrarily and capriciously in violation of Richman's Constitutional right to due process protections. *Executive 100*, 922 F. 2d at 1541; *Everett*, 840 F. Supp. at 1543.

The *Everett* case is similar to the instant case. 840 F. Supp. 1528 The plaintiff in *Everett* brought an arbitrary and capricious section 1983 due process claim seeking damages against the City of Tallahassee. The plaintiff, just as Richman has done here, based its arbitrary and capricious due process claim on the alleged unconstitutional application of an uncodified policy to deny its otherwise valid land use application. *Id.* at 1543. In *Everett*, the City of Tallahassee's Planning Commission had recommended adoption of a specific policy for the management of development on Thomasville Road. *Id.* at 1532. However, the proposed policy was never adopted by the City Council. *Id.* When the plaintiff's land use application was ultimately denied, the City Council identified the uncodified "Thomasville Road Policy" as the sole reason for its denial. *Id.* at 1537

Because the Tallahassee City Council relied on an un-adopted policy to deny the plaintiff's application, the Northern District of Florida ruled that the City's denial was an arbitrary and capricious exercise of power that violated the plaintiff's federally protected due process rights, thereby entitling the applicant to damages under 42 U.S.C. section 1983. *Id.* at 1545-46. The same logic applies in this case, where Richman was subject to the application of an uncodified policy that never had been adopted as part of the applicable criteria.

The County argues that Richman must prove an "improper motive" to recover on its due process claim. As the court held in *Everett*, however, proof that a governmental body used an unadopted criterion as an alleged basis to deny a land use application is sufficient to satisfy the "motive" requirement of Richman's arbitrary and capricious due process claim. *Id.* at 1545-46; *see also Eide*, 908 F.2d at 722 ("To prove an arbitrary

and capricious due process claim, a plaintiff need only prove that the government has acted arbitrarily and capriciously.").

Further, the CPA was advised by the County Attorney, in no uncertain terms, that under the 2012 Act and the Countywide Rules, they were not free to deny the Amendment based on their previously stated intent to "preserve industrial lands." Despite this advice, the stated basis for the final decision denying the Amendment was again "preservation of industrial lands."

The evidence establishes that the CPA's final decision was based on a desire to appease the Safety Harbor residents, whose forceful opposition was brought to bear throughout the Countywide amendment process. The County can point to no legal authorities suggesting that Richman is required to prove malice or ill will towards Richman; only that the CPA's conduct was "arbitrary and capricious." Richman's evidence establishes the County's arbitrary and capricious conduct in this case. *See Everett*, 840 F. Supp. at 1528; *Eide*, 908 F. 2d at 716; *Exec. 100*, 922 F. 2d at 1536; *Moore*, 928 F. Supp. at 1140.

The County also argues that because the LUP amendment decision is legislative, the CPA was free to ignore the 2012 Act, Administrative Judge Canter's Findings, and the Countywide Rules. Relying on *Martin County v. Yusem*, 690, So. 2d 1288 (Fla. 1997), the County's argument is that the CPA had unbridled legislative discretion to deny the Amendment despite the limits imposed by the 2012 Act and Countywide Rules. Florida law is clear that even though a decision may be legislative in nature, limits on the discretion afforded the legislative body in making the decision can be imposed. *See Town of Ponce Inlet v. Pacetta*, 63 So. 2d 840, 842 (5th DCA 2011) (holding, in a comprehensive LUP map amendment case, that "this case is distinguishable from *Yusem*, which involved a governing board's routine exercise of its normally broad discretion in enacting legislation . . . Here, the [b]oard had nothing to debate, and its perfunctory action in adopting the ordinance does not merit the deference that would be afforded to a board's legislative determination that one of multiple available courses of action would best serve the needs of the public.").

The County focuses on paragraph 49 of Administrative Judge Canter's Order, which states that while the "CPA is bound by factual findings made by the ALJ, the CPA

is not bound by the balance struck by the ALJ." But this paragraph does not mean that the CPA, in denying the Richman Amendment, could ignore Administrative Judge Canter's Findings. Instead, paragraph 49 simply stands for the fundamental point that, under the separation of powers doctrine, an agency's final decision on a regulatory matter "cannot be delegated" to an ALJ. *See Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113, 117 (Fla. 2d DCA 1997). Thus, while the CPA had to make the final decision to grant or deny the Richman Amendment, it was bound by – and could not ignore – Administrative Judge Canter's Findings. The CPA's decision to ignore those Findings, violate the 2012 Act, and the denial of the Richman Amendment was arbitrary and capricious.

The County emphasizes that the "fairly debatable" test applicable to legislative acts is deferential. However, controlling precedent from the Second District Court of Appeal makes clear that on a land use plan amendment such as this, if an applicant satisfies the applicable criteria, the decision is not fairly debatable because "[r]easonable persons could not differ in concluding that the applicants were entitled to a small-scale amendment to the comprehensive plan . . . ." *Island, Inc. v. City of Bradenton Beach*, 884 So. 2d 107, 108 (2d DCA 2004). Here, the County concedes that Richman's Amendment met all the applicable criteria and Administrative Judge Canter's Findings confirm this fact, as well as the fact that the existing LUP Map designation of "Industrial Limited" was inconsistent with the criteria. Given these facts, no reasonable person could conclude that the Amendment should have been denied, eliminating any argument that the CPA's denial of the Amendment was "fairly debatable." *Id.*

The County points to the two Safety Harbor City Commissioners who voted against Richman's application for a City LUP Map amendment, claiming these votes demonstrate that reasonable people might differ on Richman's entitlement to the Countywide Amendment from the County.

The six Countywide criteria are different than the criteria that apply to the separate City LUP Map amendment in the City of Safety Harbor. (Pl. Exs. 51, pp. 5 – 12; 113, ¶ 24; 155). Because the criteria for a City LUP amendment and a Countywide LUP are different, the fact that the two Safety Harbor City Commissioners voted against

Richman's application for a City LUP Map amendment is irrelevant on the "fairly debatable" issue.

If this Court were to adopt the County's argument that it had unbridled discretion to deny the Countywide Amendment, the Special, Act, the Countywide Rules and Administrative Judge Canter's Findings would be rendered meaningless. This result is contrary to the "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence and part of the statute if possible, and words in a statement should not be construed as mere surplusage." *Hechtman v. Nations Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999).

Accordingly, the Court concludes that Richman has established that the County violated its due process rights protected by the Fifth and Fourteenth Amendments to the U.S. Constitution when the CPA issued its final decision denying the Countywide Amendment, and that Richman is entitled to damages resulting from that violation. *Everett*, 840 F. Supp. at 1545-46.

**Equal Protection Claim – Count I**

Richman also seeks relief for violation of its Constitutional guarantee of equal protection under 42 U.S.C. section 1983. This claim arises out of the same act as Richman's arbitrary and capricious due process claim: the County's denial of Richman's Countywide Amendment.

Section 1983 equal protection claims in the land-use context have been recognized and decided by Florida courts, specifically the Second District Court of Appeal. *City Nat'l Bank of Fla. v. City of Tampa*, 67 So. 3d 293, 297 (Fla. 2d DCA 2011). Such causes of action are known as "class of one" equal protection claims. *Id.* Plaintiffs in class of one equal protection claims must establish that they have been intentionally treated differently from another similarly situated, without a rational basis for such disparate treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Because this is a "class of one" case, Richman must first establish that its Countywide Amendment was similarly situated to at least one "comparator" Countywide amendment that was treated differently than Richman's Amendment. Second, Richman must prove that the County had no rational basis for treating Richman's Countywide

Amendment differently from the comparator amendment(s). *City National*, 67 So. 3d at 297; *Olech*, 528 U.S. at 564.

In *Olech*, the United States Supreme Court explained that the underlying purpose of the Fourteenth Amendment's equal protection clause is "to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute, or by improper execution through duly constituted agents." *Id.* at 564 (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441 (1923)). Importantly, the "intentional discrimination" in *Olech* did not involve any malicious conduct or heightened level of culpability, only that the municipality required the plaintiff in that case to provide a thirty-three foot easement as a condition to the provision of municipal water service, while other applicants were provided water in return for only a fifteen foot easement. *Id.* at 563.

The United States Supreme Court held that this conduct alone constitutes "intentional discrimination" sufficient to constitute a section 1983 equal protection violation, even in the absence of any "subjective ill will" or other heightened level of culpability. *Id.* at 565. It was determined that a section 1983 equal protection violation had occurred even though the defendant municipality relented and connected the plaintiff to water service in return for the fifteen foot easement only three months later. *Id.* Accordingly, if a governmental entity intentionally treats two similarly situated parties differently, the "intentional discrimination" element of a class of one claim is satisfied. *Id.*; *City Nat'l*, 67 So. 3d at 297 (same); *Dibbs v. Hillsborough County*, 67 F. Supp. 3d 1340, 1349 (M.D. Fla. 2014) (holding no proof of ill will or malicious intent necessary to prove "class of one" section 1983 equal protection claim); *Pete's Towing Co. v. City of Tampa*, 2008 WL4791821 (M.D. Fla. Oct. 29, 2008) (same).

Here, the CPA was advised by the County Attorney of the effect of the 2012 Act, Administrative Judge Canter's binding Findings, and the Countywide Rules. The CPA was advised that they were not free to rely on the uncodified and unadopted "industrial preservation policy" to deny the Richman Amendment. Despite these admonitions by the County Attorney, the CPA intentionally denied the Richman Amendment while it had approved others similarly situated. Accordingly, the evidence establishes that Richman

has met its burden of establishing "intentional discrimination" as that term is defined by the U.S. Supreme Court. *See Olech*, 528 U.S. at 565; *City Nat'l*, 67 So. 3d at 297.

As to whether Richman has proven that any of the Six Other Amendments are similarly situated to its Countywide Amendment, comparators in a class of one equal protection case "need not share every characteristic" in order to be similarly situated. Instead, "they need only be alike in relevant respects." *Log Creek, LLC. v. Kessler*, 717 F. Supp. 2d 1239, 1243 (N.D. Fla. 2010). This test "does not demand identicality. It simply requires that class of one plaintiffs demonstrate that their comparators are similar in relevant respects." *Cordi-Allen v. Conlon*, 494 F. 3d 245, 254-55 (1st Cir. 2007).

In order to establish a "class of one" equal protection violation, Richman must prove "the existence of at least one comparator who was more favorably treated despite being similarly situated . . . ." *Kuder v. City of Rochester*, 992 F. Supp. 2d 204, 211 (W.D.N.Y. 2014); *Purze v. Village of Winthrop* Harbor, 286 F. 3d 452, 455 (7th Cir. 2002) (only one comparator necessary to prove "class of one" section 1983 claim). The evidence establishes that Richman's Countywide Amendment was not only similar to, but was the same, in all relevant respects, as at least one of the Six Other Amendments discussed herein. Although the County points to certain factual differences between the LUP amendments and the properties involved, the test is are the comparators "similarly situated in relevant respects." *Log Creek*, 717 F. Supp. 1239, 1243 (N.D. Fla. 2010); *Cordi-Allen*, 494 F.3d at 255. The evidence demonstrates that the Richman Amendment was the same, in all relevant respects, to one or more of the Six Other Amendments identified by Ms. Tarapani.

The County approved all of the Six Other Amendments, while denying Richman's Amendment. Thus, the County treated Richman differently from its comparators. As the Court has ruled with respect to the due process claim in Count II, the County had no rational basis for denying Richman's Countywide Amendment. Further, given that the relevant characteristics of the Richman Amendment and its comparators were the same, there is no rational basis for distinguishing between these amendments.

The County argues that one of the comparators, amendment 14-10, was decided after Richman's Countywide Amendment, and that this fact alone precludes the possibility of any discrimination. The County points to no legal authorities supporting

this contention. Further, the definition of "intentional discrimination" from the U.S. Supreme Court in *Olech* (treatment of one similarly situated comparator different from another) demonstrates that the County's argument lacks merit.

Therefore, the Court concludes that Richman has established that the County violated its Constitutional guarantee of equal protection secured by the Fifth and Fourteenth Amendments when the CPA denied the Countywide Amendment in 2014, and that Richman is entitled to damages resulting from that violation. *City Nat'l*, 67 So. 3d at 297; *Village of Willowbrook*, 528 U.S. at 564.

**Exhaustion/Futility of Remedies**

A party is not required to pursue a legal or administrative remedy when doing so would be futile. *Metro. Dade Cnty. v. Fontainebleau Gas & Wash, Inc.*, 570 So. 2d 1006, 1006 (Fla. 3d DCA 1990) ("At the outset we observe that the county commission has entertained this matter and determined it would devote all its resources to stopping the gas station's construction. Therefore, the futility of requiring any further administrative action is apparent."); *Bruce v. City of Deerfield Beach*, 423 So. 2d 404, 406 n.2 (Fla. 4th DCA 1982) (same); *City of Miami Beach v. Jonathon Corp.*, 286 So. 2d 516, 518 (Fla. 3d DCA 1970) (same). Further, a plaintiff is not required to exhaust available state remedies prior to filing a section 1983 action. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 (1982); *Howlett By and Through Howlett v. Rose*, 571 So. 2d 29 (Fla. 2d DCA 1990).

The 2012 Act, section 10(3)(g) states that the applicant may challenge a "final decision" of the CPA in a court of competent jurisdiction. Although Richman could have pursued a petition for writ of certiorari or appeal, the evidence establishes that Richman could not meaningfully avail itself of this remedy given the March 31, 2014 Government Approval Deadline. Therefore, Richman chose to bring this action on the basis of constitutional violations. Accordingly, Richman's claim is ripe for adjudication.

**Consistency of Claims/Avoiding Windfall**

Richman has proven that it is entitled to recover on both 42 U.S.C. section 1983 theories of liability: arbitrary and capricious due process violation and violation of equal protection. However, Richman is only entitled to recover once for its damages caused by the County's Constitutional violations. Therefore, Richman is limited to recovering

the damages outlined below despite proving entitlement to recovery on both of its claims. *Fisher Island Holdings, LLC v. Cohen*, 983 So. 2d 1203 (Fla. 3d DCA 2008); *Chua v. Hilbert*, 846 So. 2d 1179 (Fla. 4th DCA 2003).

**Damages**

"The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." *Mercury Motors Exp., Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981); *see also First Specialty Ins. Co. v. Caliber One Indem. Co.*, 988 So. 2d 708, 713 (Fla. 2d DCA 2008). Once liability is established, an injured party is entitled to compensatory damages as a matter of right. *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965).

Richman seeks damages in the form of lost profits it would have earned had the County allowed Richman to proceed with the Project. Richman's damages evidence is supported by the fact that Richman has experience and a track record of successfully developing apartment communities similar to the Project within Florida. In fact, in the 2013 time frame when Richman was pursuing the Safety Harbor Project, Richman also was developing the 3 Similar Projects: Amalfi, Epic at Gateway, and Sedona. Richman's extensive experience with apartment development, as well as the financial results (and profitability) of the 3 Similar Projects, were utilized to calculate Richman's lost profits. Florida law has long held that a business may recover its lost profits where the business claimant can establish the amount of its lost profits with "reasonable certainty." *W. W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd*, 545 So. 2d 1348, 1351 (Fla. 1989); *4 Corners Ins., Inc. v. Sun Publ'ns of Fla.*, 5 So. 3d 780 (Fla. 2d DCA 2009). Lost profits are an appropriate measure of damages under 42 U.S.C. section 1983. *J&B Entm't v. City of Jackson, Miss.*, 720 F. Supp. 2d 757 (S.D. Miss. 2010) (holding City liable for lost profits in section 1983 case); *see also Flores v. Pierce*, 617 F. 2d 1386 (9th Cir. 1980) (holding recovery of lost profits appropriate where government wrongfully delayed issuance of liquor license).

To establish "reasonable certainty," a claimant "must prove that a reasonable person would be satisfied that the amount of lost profits ... is not simply the result of speculation or guessing. Instead, (claimant) must prove that there is some standard by which the amount of lost profits may be established." *Id.* "The mind of a prudent

impartial person should be satisfied that the damages are not the result of speculation or conjecture." *Shadow Lakes, Inc. v. Cudlipp Const. & Dev. Co. Inc.*, 658 So. 2d 116, 117 (Fla. 2d DCA1995); Fla. Std. Jury Instr. (Contract and Business Cases) 504.3 (establishing lost profits with "reasonable certainty," means "that a reasonable person would be satisfied" that there is "some standard by which the amount of lost profits [has been] established." Reasonable certainty does not require "mathematical precision[.]").

The Second District Court of appeal has held that lost profits are not required to be established with one-hundred percent certainty or mathematical precision. There must exist only a "reasonable basis for determining the amount of the loss." *4 Corners Ins., Inc. v. Sun Publ'ns of Fla., Inc.*, 5 So. 3d 780, 783 (Fla. 2d DCA 2009). To that end, "uncertainty as to the precise amount of the lost profits will not defeat recovery so long as there is a reasonable yardstick by which to estimate damages." *Nebula Glass Int'l v. Reichold, Inc.*, 454 F. 3d 1203, 1217 (11th Cir. 2006). *Asgrow-Kilgore*, 301 So. 2d at 445; *Wharfside*, 545 So. 2d at 1351. This is known as the "yardstick method" of proving lost profits, which is typically employed where the wrongful conduct prevented the injured business from establishing an earnings record by which to show its lost profits. *4 Corners*, 5 So. 3d at 783.

At the non-jury trial, Richman called Henry Fishkind, Ph.D., an economist, to testify on the issue of damages. Dr. Fishkind presented evidence through an economic analysis of lost profits that Richman would have earned if Richman had been allowed to proceed with the Project. Based upon data provided by sources typically relied upon in the industry (such as the Florida Department of Business and Professional Regulation, REIS, CoStar, the Pinellas County Property Appraiser's Office, the City of Clearwater's Planning Department, and the Florida Research and Economic database), Dr. Fishkind determined that the relevant market for Richman's product had an average vacancy rate of less than 5%, and that demand for luxury apartments within the market was strong, with a weighted average rent per square foot of $1.16. (Pl. Exs. 94, p. 13; 95, p. 7).

The evidence demonstrated that there would be sufficient demand for Richman's apartment product at an average rent per square foot of $1.30. Dr. Fishkind tested this analysis against the actual results produced by Richman for Richman's 3 Similar Projects. Richman's results on the 3 Similar Projects confirmed the accuracy of Dr.

Fishkind's economic analysis for the subject Project. Further, based on Richman's experience with the 3 Similar Projects, the evidence demonstrated that financial stabilization of the Project would have occurred in late 2015. (Pl. Exs. 94, pp. 3, 25; 95, pp. 6, 9; 102 pp. 3, 7).

The above rental rate analysis was then utilized to establish an annual net operating income ("NOI") of $2.7 Million at stabilization. Based on the NOI for the Project at stabilization, Dr. Fishkind established a market value of the apartment portion of the Project of $49,320,625.00 utilizing the direct income capitalization approach, and a market-based capitalization rate of 5.5%. The direct income capitalization approach is the standard method of valuing an apartment project in the industry. (Pl. Exs. 95, pp. 12-15; 102, pp. 4-7).

Dr. Fishkind testified that in order to arrive at an accurate estimate of damages for the Project as of January 14, 2014, development costs must be subtracted from the value of the project, while the value of the entitled office portion of the Project and the developer fee must be accounted for. In arriving at the cost Richman would have incurred in developing the apartment Project, Dr. Fishkind testified that the starting point was the financial pro forma analysis prepared by Richman (Pl. Ex. 59) prior to January 14, 2014, which was based upon Richman's experience in developing comparable apartment communities. Dr. Fishkind then compared this development cost pro forma to the actual costs incurred by Richman in the 3 Similar Projects (*see* Pl. Exs. 179-181), and concluded that an accurate calculation of development cost for the apartment portion of the Project was $35,469,746.00. This Project cost included a developer fee of $1,033,111.00. (Pl. Exs. 159; 179; 180; 181; 95, pp. 11 – 12; 102, p. 5).

Because Richman would also have held (and sought to market) the $1,250,000.00 entitled office parcel as of January 14, 2014, this value must be included to accurately calculate Richman's damages. Also, because Richman would have developed the apartment portion of the Project itself, Richman would have earned the $1,033,111.00 developer fee, which must be added to arrive at Richman's losses. Finally, Richman planned to borrow 70% of the Project costs and planned to "lease up" the apartments in phases, allowing Richman to earn income during the time Richman was developing the apartments. The initial trial testimony indicated that Richman

utilized first-time "security deposits" as a source of funds to pay development costs. However, after looking into the matter further, Richman testified that it separately escrows security deposits, and does not utilize these monies to fund development. After making this adjustment and accounting for the timing of all cash flows, Dr. Fishkind explained that the loss incurred by Richman as a result of being unable to entitle the office parcel and develop the apartments totaled $14,811,440.00 as of January 14, 2014, using a market-based discount rate of 11% to discount the future cash flow to present value as of the January 14, 2014, valuation date. Dr. Fishkind testified that these damages are calculated within a reasonable degree of economic certainty, and that he is "very confident" in this calculation. Comparing the projected return on the Safety Harbor Project to Richman's 3 Similar Projects, the percent profit on the Safety Harbor Project is 10% less than that Richman earned on the Sedona project, and also less than that earned on Epic at Gateway. (Pl. Ex. 102, p. 3).

Although there were some errors in Dr. Fishkind's report, these errors were the result of a miscommunication about the amount of development costs Richman intended to finance on the Project, the aforementioned mistake concerning the use of security deposits as income, and a typographical error on one of the tables in the report. The evidence establishes that these input errors were corrected. There exists no evidence of any mistake in Dr. Fishkind's methodology or his final damage calculation of $14,811,440.00.

The County called Cynthia Stephens, Ph.D., an economist, to testify on the issue of damages. Dr. Stephens testified that she was given the Safety Harbor cost proforma (Exhibit 159), as well Exhibits 179, 180, and 181 showing the actual performance of Richman's 3 Similar Projects. Dr. Stephens testified that she was unable to conclude with reasonable certainty what Richman's loss is because she did "not know what [Richman] earned on the capital that they didn't invest in this [P]roject," and that she did not have data "to review the factual history of the business to determine the track record . . . to then compare to what actually occurred. . . ." The preponderance of the evidence establishes the Richman's damages calculation of $14,811,440 is based upon actual performance data of Richman's 3 Similar Projects supplied to both Drs. Fishkind and Stephens, and is, therefore, reliable. Further, Dr. Stephens' testimony concerning a

lack of information as to what Richman may have earned on the capital Richman did not invest in the Project is not relevant, and relates to a potential mitigation defense that the County never properly raised in this case. Accordingly, the Court finds that the principal amount of damages suffered by Richman is $14,811,440.

The County contends that Richman is not the correct party that is entitled to recover lost profits damages. The County relies on testimony from Richman's corporate representative indicating that after approval of the Countywide Amendment, Richman planned to create a new single purpose entity to take title to the Property, build the apartments, and earn the profit. The County argues that this not-yet-created legal entity (or Richman's equity investors) is/are the real party in interest, defeating Richman's damages claim.

The County's argument is unsupported by any legal authorities and ignores the fact that at the time of the County's denial of the Amendment, Plaintiff Richman (not the single purpose entity or any equity investor) held all of the rights in the purchase contract (to buy the Property) and all the rights in the City and County entitlement applications. As of January 14, 2014, then, Richman had the right to buy the Property, entitle the Property, develop the apartments, sell the office parcel, and earn the income from all these activities. No other party held any such rights. The fact that Richman planned to assign some of these rights after January 14, 2014 is irrelevant to the issue of which party suffered the loss on that date.

Richman has met its burden of establishing its lost profits damages with "reasonable certainty," as that term is defined under Florida law. Richman's track record and experience in developing apartment communities (and in paying the costs/earning the income associated with these developments, including the 3 Similar Projects) provide the necessary "yardstick" to meet the test of reasonable certainty. Accordingly, the Court rules that Richman is entitled to recover the principal amount of $14,811,440 as its damages in the instant case.

**Interest**

Pre-judgment interest on $14,811,440.00 from the date of Richman's losses (January 14, 2014) is calculated as follows pursuant to Florida Statutes section 55.03;

a) from January 14, 2014, to March 31, 2016, the interest rate is 4.75%. Interest during this time period equals $1,555,505.54

b) from April 1, 2016, to June 29, 2016, the interest rate is 4.78%. Interest during this period equals $172,632.41.

Therefore, pre-judgment interest totals $1,728,137.95 through and including June 29, 2016.

Accordingly, it is

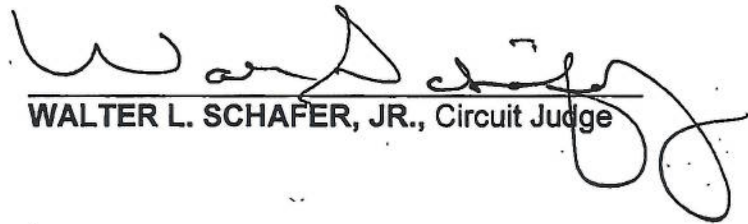
**ORDERED AND ADJUDGED** that **Final Judgment is entered** in favor of Plaintiff, Richman Group of Florida, Inc., and against Defendant, Pinellas County, Florida.

**IT IS FURTHER ORDERED AND ADJUDGED** that Plaintiff, Richman Group of Florida, Inc., shall recover the principal amount of its damages of $14,811,440.00; pre-judgment interest through June 29, 2016, in the amount of $1,728,137.95; **for a total in interest and damages** against Defendant, Pinellas County, Florida, of $16,539,577.95, **for which let execution issue.**

**IT IS FURTHER ORDERED AND ADJUDGED** that jurisdiction is reserved to determine Plaintiff's reasonable attorney's fees and taxable costs for this litigation, if appropriate, upon the filing by Plaintiff of a timely motion. <u>See</u> Fla. R. Civ. P. 1.525.

**IT IS FURTHER ORDERED AND ADJUDGED** that jurisdiction is reserved to enter any and all further orders necessary in this matter.

**DONE AND ORDERED** in Chambers, in Clearwater, Pinellas County, Florida, this 29th day of June, 2016.



**WALTER L. SCHAFER, JR.,** Circuit Judge

STATE OF FLORIDA-PINELLAS COUNTY
I hereby certify that the foregoing is a true copy as the same appears among the files and records of this court.
This JUN 2 9 2016
KEN BURKE
Clerk of Circuit Court
By
Deputy Clerk

Copies furnished to:

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