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November 23, 2021

By email

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**Subject: 986 Sundrop, LLC 's Response in Opposition to McBride
Motion in Limine**

Appellant/Petitioner, 986 Sundrop, LLC, by and through undersigned counsel, hereby partially responds to the Motion in Limine filed by Mitchell McBride on behalf of Gary and Lorraine McBride, and respectfully requests the City Council, if it deems it necessary to rule on the motion, deny the motion.

In support, and without waiving additional argument at any hearing, Appellant states:

**1. The Motion in Limine Fails to State the Correct Principles of
Law**

Mr. McBride has cited to cases wholly inapplicable to the City Council's consideration of the Appeal. For example, the *Haines City Community Development* case is an analysis of a **Circuit Court's**

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appellate review of a **County Court's** eviction action. That case does not involve the criteria guiding a local government quasi-judicial proceeding. The arguments of Mr. McBride are misguided as he incorrectly argues the standard of review used by the courts when reviewing the quasi-judicial proceedings of local governments such as the City Council, instead of the standard of review of the actual local governments.

The appropriate standard of review was outlined in Appellant's Notice of Appeal. Thus, at the outset, as a threshold matter, as the Motion in Limine relies upon an incorrect standard, it should be denied.

2. Robert Mulhere May Provide Expert Testimony and is Able to Provide Competent and Substantial Evidence

Section 3(b) of the City of Marco Island Quasi-Judicial Proceedings rules clearly provides the ability for the City Council to receive expert opinions, once certain disclosure requirements are met. Section 3(c)(4) requires experts and consultants to be disclosed. Here, Appellant properly and timely disclosed its intent to provide expert testimony and analysis from Robert Mulhere, a licensed and professional planner who has been qualified and testified as an expert in prior City of Marco Island hearings.

Expert planners routinely are determined to have provided competent and substantial evidence during land-use proceedings. *See Parker Fam. Tr. I v. City of Jacksonville*, 804 So. 2d 493, 497 (Fla. 1st DCA 2001); *St. Johns Cty. v. Owings*, 554 So. 2d 535, 537 (Fla. 5th DCA 1989); *Ardissone Condo. Ass'n v. City of*

Naples, Case No. 13CA3069 (Fla. 20th Cir. Ct. Oct. 24, 2014). The cases, cited by Mr. McBride in subsections III. A. and B. of his Motion, involve Florida trial courts as the fact finder, not Florida local government quasi-judicial councils or boards deciding land use matters. Thus, the cases cited in the Motion are of no help in determining whether a planner may provide expert testimony in this matter. The City Council, in this quasi-judicial proceeding is a different type of fact finder than a Florida trial court judge. And, as noted by Judge Wolf: “[s]ince every rezoning is potentially subject to challenge in circuit court, a prudent party would be forced to make a record in every quasi-judicial proceeding. The complexities of modern day rezonings potentially requires expert testimony in every case.” *Parker Fam. Tr. I*, 804 So. 2d at 499 n.1.

Here, Robert Mulhere, as an expert planner, like the planners in *Ardissonne*, *Parker Family Trust*, and *Owings*, will provide competent and substantial evidence and to deny Appellant the ability to provide this expert testimony would deny Appellant due process, the ability to create a record and preserve legal arguments.

Therefore, the expert testimony of Robert Mulhere should be heard and accepted as competent and substantial evidence.

3. Exhibit 13 Must Not Be Excluded

Section 3(d)(3) of the City of Marco Island Quasi-Judicial Proceedings rules states: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient by itself to support a finding.”

Mr. McBride argues that Appellant's Exhibit 13 is hearsay and "must be excluded". That argument contravenes the plain language of the rules for this proceeding. The exhibit clearly may be used and thus should not be excluded.

Sincerely,

/s/ Zachary W. Lombardo

/s/ Lenore T. Brakefield

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Copies to client, City Attorney A. Gabriel, City Senior Planner M. Holden, City Director of Community Affairs D. Smith, Attorney for Purported Affected Property Owners N. Snyder, Attorney for Purported Affected Property Owners M. McBride