


MEMORANDUM

To: City Commission

From: Robert M. Fournier, City Attorney 

Re: Legal authority of St. Armands Business Improvement District to file Applications for Comprehensive Plan Amendment and for Zoning Text Amendments (ZTA)

Date: February 28, 2022

The City Commission has received a letter dated February 2, 2022 from Kenneth Metcalf, AICP, Director of Planning and Development Services at the law firm of Stearns Weaver Miller, Weissler Alhadeff & Sitterson, P.A.. The letter states that it was written on behalf of the owners of the Lido Beach Resort, Sandcastle Resort at Lido Beach, Lido Beach Holiday Inn and Longboat Key Club Resort (i.e. Ocean Properties, Ltd.). The letter is captioned "Objections to Proposed Comprehensive Plan Amendment and Land Development Code Amendment Submitted by the St. Armands Business Improvement District."

The St. Armands Business Improvement District has filed Application 21-PA-04 seeking an amendment to the Comprehensive Plan to allow an increase in the maximum height of structures within the Commercial Tourist (CT) zone district and on the City owned Fillmore Drive surface parking lot off St. Armands Circle. The St. Armands Business Improvement District has also filed Application 22-ZTA-01 seeking various amendments to the Zoning Code, specifically to the Commercial Tourist (CT) zone district regulations. The February 2, 2022 letter from Mr. Metcalf questions the legal authority of the St. Armands Business Improvement District (hereafter the "BID") to file these two applications.

Mr. Metcalf's letter asserts that the City of Sarasota Ordinance that expressly enumerates the powers of the BID, does not empower the BID to file applications for amendments to the City of Sarasota Comprehensive Plan or applications to request amendments to the City Zoning Code. The letter notes that the enumeration of the powers of the BID contained in the applicable ordinance is followed by the following sentence: "The (Business Improvement) District shall only have those powers specifically enumerated above and shall not have any implied or incidental powers arising from said enumerated powers." The letter concludes that the BID has "exceeded its lawful authority" in filing the

Applications for a Comprehensive Plan Amendment and for a Zoning Text Amendment and in "supporting them (i.e. the two applications) through its advocacy." For the reasons set out below, I agree with the statement in the letter that the BID does not have the authority to file applications for Comprehensive Plan Amendments or for Zoning Text Amendments. However, I am not prepared to agree that the BID lacks the authority to advocate for (or against) these amendments, or for or against other applications for proposed amendments that might come before the City Commission in the future.

The City created the BID pursuant to the authority conferred by Section 163.511 *Florida Statutes*. Once created, the BID is authorized to perform any of the sixteen (16) separate functions that are listed in subsections (1) through (16) of Section 163.514 *Florida Statutes*, unless prohibited by ordinance from doing so. Section 163.511(1)(h) specifically provides that when a municipality creates a business improvement district by ordinance, that such ordinance can prohibit the use of any district power that is authorized in subsections (1) through (16) of 163.514 *Florida Statutes*.

The BID was originally created by Ordinance 02-4382. This ordinance has been subsequently amended by Ordinance 07-4742 and by Ordinance 15-5127. Ordinance 15-5127 contains the most recent enumeration of the powers that the City Commission has given to the BID. In comparing the list of powers authorized in this ordinance with the "menu" of powers the City Commission had to select from those powers set out in Section 163.514 *Florida Statutes*, it appears that the ordinance authorizes the BID to fully exercise 11 out of the 16 powers listed in the statute and to partially exercise two out of the 16 powers listed in the statute [Section 163.514(3) and (5)]. It also appears that Ordinance 15-5127 does not grant authority to the BID to exercise the remaining three powers listed in subsections (13), (15), and (16) of Section 163.514. None of the 16 powers enumerated in Section 163.514 specifically mentions anything about any authority to file an application for a Comprehensive Plan amendment; an amendment to the land development regulations of the jurisdiction or any other type of application for development approval.

Because there is no explicit authority granted to the BID to file these applications, if such authority exists, it must be implicit authority, that is conferred by implication from the grant of some other power. Section 163.514(17) *Florida Statutes* states that a business improvement district created by municipal ordinance may also "exercise all lawful powers incidental to the effective and expedient exercise of the foregoing powers," thereby allowing an argument to be made that a

district might have certain powers not specifically listed that can be reasonably implied from the powers it has been specifically granted. However, the City of Sarasota has specifically rejected the idea contained in subsection (17) that the BID may have implied powers by the following statement found in Ordinance 15-5127. "The District shall only have those powers specifically enumerated above and shall not have any implied or incidental powers arising from enumerated powers." Thus, the City has opted for an approach in which the powers of the BID listed in the enabling ordinance are to be strictly or narrowly construed rather than construed more broadly. As a practical matter though, it may not make a difference because even if the powers given to the BID by Ordinance 15-5127 are broadly construed, I do not think that the power to file applications for Comprehensive Plan Amendments and Zoning Text Amendments is "incidental" to any of the powers listed in the Ordinance or that it is implicitly conferred by any of these powers.

A fact that also supports this conclusion is that the City of Sarasota's application for development approval form allows for the application to be signed by the "Property Owner, Lessee, or Contract Purchaser," or the Agent for one of the foregoing. This suggests that such applications are typically filed by a property owner, a long term lessee or a contract vendee who has the property under contract to purchase. The application for a Comprehensive Plan Amendment filed by the BID indicates that the BID had the status of "Contract Purchaser," which is doubtful since the BID has not been given the authority to own real property. I do not believe that the Florida Legislature or the City Commission ever intended that the BID could or would be used to shield the identity of private property owners in the district who may want to file applications for comprehensive plan amendments or applications to amend land development regulations. I believe that either these amendments should be filed by individual property owners who want to develop their properties if the amendments are approved; or alternatively that the BID may request the City to initiate and process such amendments.

The argument that the BID also lacks the authority to advocate for the proposed Comprehensive Plan Amendment and the proposed Zoning Text Amendment, as I understand it, is based on the U.S. Supreme Court's opinion in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 585 U.S. ____, 138 S.Ct. 248, 201 L.Ed.2d 924, (2018). This is a labor law decision. There was an Illinois law that allowed a public employer to require those of its employees who did not join the public employees union nonetheless to pay fees to it because they benefitted from the union's collective bargaining agreement. The Supreme Court in the *Janus* decision held this law violated the First

Amendment. The Court reasoned that the collection of such "agency fees" from non-consenting public employees was tantamount to requiring those individuals to endorse union ideas or positions that they did not agree with, which is counter to First Amendment principles. The argument by extension here is that property owners within the business improvement district who pay the extra millage on their property tax bills each year to the BID may not necessarily agree with positions taken by the BID in the context of these applications. However, if the BID cannot be the applicant and is not processing the applications, then this argument might not be viable. In any event, I am not going to take the position at this time that the BID may not take a position on a Comprehensive Plan Amendment or a Zoning Text Amendment that would impact the district.

In conclusion, it is my recommendation that the processing of Applications 21-PA-04 and 22-ZTA-01 should be suspended. However, these applications can be submitted and processed by the City, provided that the prior approval of the City Commission to do so is obtained. Also, an owner of property within the area affected by the proposed amendment could file an application for a Comprehensive Plan Amendment.