IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO. 2D16-3279
L.T. CASE NO. 14-005608CI-15

PINELLAS COUNTY, FLORIDA, an Independent and Chartered Florida County,

Defendant/Appellant,

v.

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

Plaintiff/Appellee. /

APPELLANT PINELLAS COUNTY'S INITIAL BRIEF (FILED UNDER SEAL)

On Appeal from a Final Judgment of the Sixth Judicial Circuit, In and For Pinellas County, Florida

Jim Bennett
Florida Bar No. 698873

Sylvia H. Walbolt
Florida Bar No. 33604
Chris W. Altenbernd
Florida Bar No. 197394
Nicholas A. Brown
Florida Bar No. 90929

Pinellas County Attorney's Office
315 Court Street
Clearwater, FL 33756
Telephone: (727) 464-3354

CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607-5780
Telephone: (813) 223-7000

Attorneys for Appellant Pinellas County

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PRELIMINARY STATEMENT

Plaintiff/Appellee The Richman Group of Florida, Inc., will be referred to as "Richman." Defendant/Appellant Pinellas County will be referred to as "the County." The Pinellas County Countywide Future Land Use Plan will be referred to as "the Plan." The Pinellas County Countywide Plan Rules will be referred to as "the Rules."

The Record on appeal will be referred to as "(R. x)," with "x" representing the Record page number(s). The Supplemental Record on appeal will be referred to as "(S.R. x)," with "x" representing the Supplemental Record page number(s).

The separately-paginated transcript of the trial will be referred to as "(Tv:x)," with "v" representing the volume number and "x" representing the page number(s). The attached Appendix will be referred to as "(App. y at x)," with "y" representing the tab number and "x" representing the page number.

The trial court ruled that the transcript of the April 2016 trial and certain trial exhibits in this matter are confidential. Accordingly, the trial transcript and certain exhibits in the appellate record have been filed under seal, as well as this brief.

All emphasis is supplied, and all internal citations and quotations are omitted unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's order declaring that Pinellas County violated substantive due process and equal protection by denying Richman's proposed amendment to the Countywide Future Land Use Plan after it had been determined that the criteria in the Rules for amending the Plan were satisfied.

The legislative, policy decision was nonetheless made to maintain the status quo under the Plan, thereby allowing this sizeable tract, which was designated for industrial uses under the Plan, to be preserved for such uses. Richman did not appeal that decision.

The facts material to the issues on this appeal are largely set forth in the trial court's order and are briefly set forth below.

A. The Special Acts confirm that the County's land use decisions are legislative.

Amendments to the Pinellas Countywide Future Land Use Plan are controlled by a Special Act. Below, both parties cited only to the 1988 version of the Special Act. (*E.g.*, R. 387; 1574-76; S.R. 9320). In its Final Judgment, however, the trial court applied the 2012 version, declaring it "became effective on April 27, 2012." (R. 7016, n.1). Although the 2012 version was approved by the Governor on that date, by its express terms it did not take effect until after the Pinellas County Metropolitan Planning Organization's reapportionment plan was also approved. 2012 Special Act §5 (App. B, at 12).

Both Acts are included in the Appendix hereto at Tabs A and B. They are not materially different for purposes of the issues presented in this appeal.

In particular, both expressly provide that the County's decisions on land use amendments are "legislative in nature." 1988 Act §10(4)(g); 2012 Act §3(§10)(3)(g). Both provide the following process for seeking an amendment to the Plan.

A local government may submit an application for amendment to the Pinellas Planning Council. 1988 Act, §10(4)(a); 2012 Act §3(§10)(3)(a). If the Planning Council recommends approval, it forwards the application to the Board of County Commissioners for a hearing in the Board's capacity as the County Planning Authority (CPA). 1988 Act, §10(4)(b), (d); 2012 Act §3(§10)(3)(c), (d).

If the CPA denies the amendment, a substantially affected person may seek a hearing before an Administrative Law Judge (ALJ) pursuant to Chapter 120, Florida Statutes. Id. The ALJ's review is limited to the facts pertaining to the subject property, the Plan, and the Rules applicable thereto. 1988 Act §10(4)(f); 2012 Act §3(§10)(3)(g). The basis for the CPA's "final decision approving or denying the proposed amendment is limited to the findings of fact of the hearing officer." 1988 Act §10(4)(d); 2012 Act §3(§10)(3)(d).

Like the Special Acts, the Rules expressly provide that decisions whether to amend the Plan are "legislative in nature." (R. 1857, §5.1.3). They provide that

any future amendments "shall be consistent with the plan criteria and standards" in the Rules. (R. 1828, §4.1). They do not, however, say that a proposed amendment consistent with the criteria shall be granted.

B. Seeking to preserve lands designated for industrial use under the Countywide Future Land Use Plan, the CPA maintains the status quo and denies Richman's requested amendment for different uses.

In June 2012, Richman contracted to purchase 34.6 acres of land in Safety Harbor (the Property). (R. 7017). Therein, Richman agreed to pursue government approvals to develop the Property, and "[a]fter a series of twelve amendments," the contract deadline for the approvals was extended to March 2014. Id.

In accordance with the Special Acts governing Pinellas County, Richman asked the Safety Harbor Commission to apply for an amendment to the Countywide Land Use Plan. Id. The proposed amendment would change the land use designations in the following manner (R. 8448 ¶3; 7019):

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**

At a February 2013 hearing before the Safety Harbor Commission, the amendment was approved by a vote of 3-2, despite "significant neighborhood

opposition" to it. (R. 7017). The City of Safety Harbor then submitted an application for the amendment to the Pinellas Planning Council, along with an analysis concluding the proposed amendment was consistent with the criteria set forth in the Countywide Rules for amending the Plan. (R. 7019).

The Council recommended approval of the amendment by a vote of 8-5. (R. 7020; 9156). The members voting to disapprove expressed concerns over the loss of industrial lands that would result under the amendment. (R. 8536; 9152-56).

Thereafter, the CPA considered Richman's proposed amendment at a May 2013 public hearing. (R. 7020). "During the hearing, three hundred and eight residents in the area surrounding the Property expressed opposition to the Amendment." Id.

The CPA discussed the dwindling industrial lands in the County available for target employment. As one Commissioner put it:

> As I said before, I don't see a compelling reason to change from IL [Industrial Limited]. We set this policy for a reason, and the few times when we have gone against that is when it was not a viable piece of property for IL and that kind of employment center that [the Economic Development Director] talked about. Our whole strategic vision was about not making decisions now that impact our county ten years from now, twenty years from now. And the reason that we put that policy into place was for the higher-paying jobs. [(R. 8856).]

Ultimately, the CPA unanimously voted to deny the amendment, citing the need "to preserve industrial lands within the County" from further erosion. (R. 7020). The CPA specifically relied on the Planning Council's Resolution 06-3,

which had been publically adopted in 2006 but never expressly incorporated into the Rules. (R. 7020; 8454 ¶28). That Resolution set forth "the need to reserve industrial parcels for target employers" in Pinellas County. (R. 8454 ¶28).

C. The administrative law judge finds the requested amendment satisfies the criteria for amending the Plan, but sends it back to the CPA for a legislative, balancing determination.

Pursuant to the Special Acts, Richman sought a hearing before an administrative law judge, and a two-day evidentiary hearing was held in August 2013. (R. 7021). In his final order, the ALJ initially and broadly stated under the heading "Statement of the Issue" that "[t]he issue to be determined in this case is whether the proposed amendment to the Pinellas Countywide Plan, changing the land use designations on 34.6 acres of land in Safety Harbor, Florida, should be approved." (R. 8445-46).

Thereafter, the ALJ more discretely explained that "the issue to be determined is 'the manner in, and extent to, which the amendment is consistent with' certain criteria in the Countywide Rules." (R. 8459 ¶43). Specifically, because the County had agreed that the proposed amendment was consistent with five of the six criteria set forth in the Rules, "the parties stipulated that only the consideration stated in Section 5.5.3.1.1 is at issue in this case." (R. 8453 ¶25).

That criterion, titled "Consistency with Countywide Rules," addresses "[t]he 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." (R. 1866, §5.5.3.1.1).

The ALJ agreed with Richman that "a criterion must appear somewhere in the Countywide Rules" to be considered in the determination of whether the amendment could be approved. (R. 8460 ¶46; 8453-54 ¶27). The ALJ further found that "Resolution 06-3 is not implemented through the Countywide Rules and, therefore, is not a source of criteria applicable to the Amendment." (R. 8454 ¶28). Ultimately, the ALJ recommended approval, finding that "the Amendment creates more points of consistency and fewer points of inconsistency than the existing IL land use classification." (R. 8460 ¶48).

"Nevertheless," the ALJ continued, "review of a proposed . . . amendment requires . . . 'a balanced legislative determination.' " (R. 8461 ¶49). Citing this Court's decision in Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997), the ALJ expressly acknowledged the CPA was now required to "mak[e] a legislative decision, which cannot be delegated to an Administrative Law Judge." (R. 8461 ¶49).

D. The CPA again denies the amendment, again determining as a policy matter that the status quo should be maintained.

Richman's proposed amendment came before the CPA for a final public hearing in January 2014. (R. 7023). The County Attorney advised the CPA that the ALJ had found that because Resolution 06-3 had never been incorporated into

the Rules, it was not part of the criteria; accordingly, the proposed amendment was consistent with the criteria. (R. 9247, at 5-7). His recollection was that the Resolution had not been added to the Rules because the CPA did not want it to be binding "countywide." (R. 7023-24; 9260, at 59-60).

Explaining that the CPA was bound by the ALJ's factual findings, the County Attorney advised the CPA it was "powerless" to enforce Resolution 06-3. (R. 7023; 9247, at 7; 9248, at 11-12). He also advised, however, that a legislative balancing determination remained to be made by the CPA whether to grant the amendment. (R. 9259-60, at 56-57).

Like the prior hearing, "numerous objectors again voiced opposition to the Countywide Amendment" at the final hearing. (R. 7023). In particular, they expressed safety concerns about increased traffic around park areas where children played and participated in after-school programs, and about the lack of the proposed development's fit with the character of the adjoining uses. (*E.g.*, R. 9252-55, at 26-27, 28-29, 31-34, 36-38). In addition, eliminating this industrial land would further reduce the few remaining areas in Safety Harbor suitable to develop for high-paying jobs. (*E.g.*, R. 9255-56, at 38-39, 42-43).

In turn, the CPA discussed amendment's lack of compatibility with planned transportation systems in the County and the changes to ingress and egress the development would force. (R. 9261, at 62, 64). The CPA also expressed concern

about the dwindling amount of industrial land in the County that could be developed for target employment. (R. 9260-63, at 58, 62, 64, 66, 67-68, 70).

This concern was based in part on studies it had commissioned, with the help of various Pinellas municipalities, over the past decade, which addressed the aggregate reduction in industrial lands throughout the County and the resulting need to preserve what remained for target employment. (T6:639, 644-50; R. 9249, at 16; 9258, at 51; 9261-64, at 61, 64, 70, 72, 76).

At the conclusion of the hearing, the CPA voted unanimously to deny the amendment. (R. 9263, at 70).

E. Instead of appealing the denial, Richman files a Section 1983 lawsuit claiming the denial violated substantive due process and equal protection.

Richman did not appeal or otherwise seek review of the CPA's January 2014 decision to deny the amendment. Richman concluded an appeal would be "futile" because the amendment had twice been denied by the CPA, and any appeal would not have been resolved by the March 2014 deadline for government approvals set forth in the latest amendment to its contract. (T1: 80, 82, 86).

Instead, Richman filed a civil action under 42 U.S.C. § 1983. (R. 54-77). Count I was a class-of-one equal protection claim asserting Richman was treated differently from similarly situated developers without a rational basis, in violation of the Fourteenth Amendment to the United States Constitution. (R. 70). Count II

claimed a deprivation of property rights under the Fifth and Fourteenth Amendments, asserting the CPA's denial amounted to an arbitrary and capricious substantive due process violation. (R. 73).

Richman asserted in its Complaint that "the CPA was legally required to approve Richman's Amendment" at the final hearing based on the ALJ Order. (R. 57 ¶5). Richman alleged the amendment was denied "based only upon significant political pressure . . . ." (R. 57 ¶6).

Richman's suit proceeded to trial in April 2016, after which the trial court entered judgment in Richman's favor on both constitutional claims. (R. 7015-44). The trial evidence will be addressed in the argument section of this brief as appropriate.

F. The trial court rules the ALJ's Order established that the CPA could not legitimately or rationally deny the amendment.

The trial court's 29-page Final Judgment repeats nearly verbatim Richman's proposed findings of fact and conclusions of law. (*See* R. 7015-44; S.R. 9319-59).

Specifically, the trial court agreed with Richman that, under the 2012 Special Act, the ALJ's findings "established that [Richman's] Countywide Amendment was consistent with all applicable criteria, and that the County's alleged basis for the 2013 denial was not legitimate/rational." (R. 7030). Then, quoting only part of this Court's express holding in Island, Inc. v. City of Bradenton Beach, 884 So. 2d 107, 108 (Fla. 2d DCA 2004), the trial court stated

that Island establishes that "no reasonable person could conclude that the Amendment should have been denied" once the criteria were satisfied. (R. 7033).

The court relied heavily on statements by the County Attorney at the final hearing regarding the ALJ's findings that the amendment was consistent with the criteria and that Resolution 06-3 was not part of the criteria. (R. 7023). It declared that, in denying the amendment, the CPA "[i]gnor[ed] . . . the County Attorney's advice . . . ." (R. 7024). It did not address the County Attorney's explicit advice that, as the ALJ had acknowledged, the CPA had legislative authority to make the ultimate balancing determination regarding the amendment. (R. 9259, at 56-57).

With respect to the equal protection claim, the trial court agreed Richman had established that its requested amendment "was not only similar to, but was the same, in all relevant respects, as at least one of the" six purported comparators advanced by Richman. (R. 7036). The court rejected a number of differences between those amendments and Richman's, saying they were "not relevant because each amendment was subject to the same Countywide Rule criteria . . . ." (R. 7026).

Based on that relevancy ruling, the court did not address the fact that all but one of the other six amendments were distant in time to Richman's—two having been resolved a decade earlier—and that all were much smaller properties than the 35-acre Property at issue here. (R. 8425).

The court also did not address the fact that the amendment closest in time and size included a binding agreement, which was not included in Richman's earlier-requested amendment, to reserve substantial industrial acreage for target employment. (T3:392). That amendment satisfied the newly-enacted criteria in the Rules with respect to the need to preserve industrial lands in the County. After its denial of Richman's amendment, the CPA had formally incorporated Resolution 06-3 into the Rules in light of the ALJ's analysis in his Order on the Richman amendment.

The court acknowledged that "overwhelming neighborhood opposition" was a "meaningful difference" from all of the purported comparators. (R. 7026). But then, declaring that "neighborhood opposition is not a legitimate basis for denying a land use application," the court said that difference too was irrelevant to Richman's equal protection claim. (R. 7027).

Finally, the court agreed Richman's evidence established that but for the CPA's denial, all necessary governmental approvals would have been obtained by the contractual deadline and the Property then successfully developed. (R. 7025). Although Richman admitted the Property would actually have been developed by a new corporation that had not yet been formed, and that Richman itself merely would have recovered a million-dollar development fee from the new corporation, the court awarded Richman $16,539,577.95 in future lost profits. (R. 7042-43).

G. The trial court summarily denies the County's new trial motion raising newly-discovered evidence of previously-undisclosed environmental contamination on the Property.

After the trial court issued its judgment for Richman, the County learned for the first time from an independent, nonparty source that the Property at issue in this case might have been environmentally contaminated. (R. 7057-60). Specifically, a former director of BayCare, which had contracted to purchase the Property but later pulled out for undisclosed reasons, contacted a Pinellas County Commissioner and said that BayCare had declined to purchase the Property because of possible soil contamination. (R. 7057-60; 7063-64).

Richman had not disclosed any such environmental issues, even though the County had in discovery requested all documents supporting Richman's fee claim for environmental testing and consultants, as well as all documents supporting its lost profits claim. (R. 7057-58, 7071-74).

The County accordingly moved for a new trial, requesting discrete discovery and an evidentiary hearing to determine whether the environmental contamination impacted the award of future lost profits. (R. 7057-60). The County attached a news article, published the month before trial and a few weeks before the discovery cut-off, reporting that BayCare had withdrawn from the contract for undisclosed reasons. (R. 7061-62). The article said the Safety Harbor Mayor thought BayCare's withdrawal was due to a "conflict" with the seller. *Id.*

Richman's response did not deny the existence of environmental problems. (R. 7065-70). Instead, Richman asserted such problems could have been discovered before trial by the use of due diligence with more specific discovery requests. (R. 7067-68).

The trial court summarily denied the motion without any hearing, finding "it does not appear that with due diligence the 'new evidence' could have not been discovered after the March 5, 2016, newspaper article and before the April 20-22, 2016, trial in this matter." (R. 7128). The court did not address the impact the evidence of environmental problems with the Property would have had on its lost profits award, which was expressly based on Richman's evidence at trial that the development would have been timely completed but for the denial of the amendment to the plan. Id.

SUMMARY OF THE ARGUMENT

The trial court erroneously concluded that the ALJ's Order established the CPA could not legitimately or rationally deny Richman's proposed amendment. The ALJ's Order does no such thing. To the contrary, the ALJ expressly, and correctly, recognized that notwithstanding his findings, the CPA had the ultimate legislative authority to deny this amendment as a balancing matter.

Under Florida Supreme Court precedent, amendments to a land use plan require a legislative, policy determination whether to retreat from the existing Plan.

The Special Acts are consistent, saying the County's land use decisions are made under its legislative authority. Although binding the CPA to the ALJ's factual findings, the Special Acts do not delegate to the ALJ the final policy decision whether to grant a land use amendment, which the trial court's erroneous ruling effectively does.

Based on its incorrect construction of the Special Acts, the trial court further ruled the CPA's decision to maintain the status quo under the Plan was not a "fairly debatable" decision as a matter of Florida law. But, when the decision of this Court cited by the trial court as purported controlling precedent for that ruling is read in its entirety—not just as partially quoted by the trial court—it establishes no such thing. No other Florida decision does so either.

Instead, under a correct application of the highly deferential standard afforded to governmental land use decisions under Florida law, the CPA's legislative, policy decision to maintain the status quo under the Plan with respect to this sizable acreage was "fairly debatable." As such, it was a lawful land use decision. This dispositive point requires reversal of the Final Judgment, without any need to reach the constitutional or damages issues.

In all events, the trial court erred in equating (1) a purported violation of state law by denying the amendment with (2) a violation of the federal Constitution by doing so. Even if the trial court were correct that ALJ's Order required the

CPA to grant the amendment as a matter of state law, the CPA's decision to maintain the status quo under the Plan was nonetheless directly and rationally grounded in the public interest, thereby satisfying substantive due process.

Further, there was no equal protection violation. Resting on its substantive due process ruling, the court reiterated that, given the ALJ's Order, there was no legitimate or rational basis for the CPA to deny the amendment. Once again, that was legal error.

Further still, when the rigorous test for establishing intentional discrimination is correctly applied, the comparators advanced by Richman were not "the same" in all relevant respects as Richman's proposed amendment simply because they satisfied the criteria for amending the Plan.

Finally, the court erred in awarding Richman future lost profits that admittedly would have been earned only by a different, yet-to-be-formed corporate entity. In addition, the County sought a new trial based on recently discovered evidence of possible environmental problems with the Property that had not been disclosed in this case. Such issues could substantially reduce or eliminate any future lost profits. The trial court erred in denying that motion without even giving the County a hearing. The only due process violation in this case is this violation of the County's right to procedural due process.

ARGUMENT

I. THE LEGISLATIVE DECISION TO MAINTAIN THE STATUS QUO UNDER THE PLAN WAS "FAIRLY DEBATABLE."

A. The standard of review.

The trial court's application of the "fairly debatable" standard is a question of law reviewed *de novo*. Martin Cnty. v. Section 28 P'ship, Ltd., 772 So. 2d 616, 619 (Fla. 4th DCA 2000). Likewise, the construction of the Special Acts governing Pinellas County and the ALJ Order are pure issues of law, subject to *de novo* review. *E.g.*, Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010).

B. Florida law does not require amendment of a land use plan merely because the criteria for amendment are satisfied.

Citing the provision of the 2012 Special Act binding the CPA to the ALJ's findings of fact, the trial court declared: "*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*." (R. 7030). That construction of the Special Acts was legal error. They did not confer authority on the ALJ to determine that a land use decision is irrational and not legitimate.

Nor, as the face of his Order shows, did the ALJ find preservation of industrial lands was not a legitimate or rational basis for maintaining the status quo under the Plan. That issue was not even before him. In resolving the issue before him, he simply found the amendment was consistent with the Rules as formally

enacted.

The ALJ acknowledged that even accepting his findings, the balancing determination whether to amend the Plan remained for the CPA to make. In turn, the CPA's legislative, policy decision to maintain the status quo for this sizeable acreage was "fairly debatable" under the highly deferential standard afforded to land use decisions. Thus, the CPA's decision was lawful under Florida law.

1. The CPA's land use decision was a legislative, policy determination not to retreat from the Plan.

Both the Special Acts and the Countywide Rules specify that the decision whether to amend the Countywide Land Use Plan is "legislative in nature." 1988 Act §10(4)(g); 2012 Act §3(§10)(3)(g); R. 1857, §5.1.3. The court dismissively called this grant of authority "dicta." (T6:642). Just the opposite is true.

Under controlling Florida Supreme Court precedent, this grant of legislative authority confirms that when CPA is considering whether to amend its comprehensive Countywide Future Land Use Plan, "it is engaging in a policy decision." Martin Cnty. v. Yusem, 690 So. 2d 1288, 1294 (Fla. 1997).

In drawing that bright line standard for amendments to land use plans, as opposed to non-legislative decisions, the Court specifically stated: "comprehensive plan amendment cases . . . require[] the County to engage in policy reformulation of its comprehensive plan and to determine whether it now desire[s] to retreat from the policies embodied in its future land use map for the

orderly development of the County's future growth." Id. at 1293-94.

Contrary to the trial court's construction of the Special Acts, then, the ALJ's findings did not require the CPA to grant this amendment as a legislative, policy matter. Instead, as the ALJ correctly recognized, the CPA still had to make a balancing determination in that regard.

With respect to the CPA's exercise of its legislative authority, the Rules only provide that any amendment to the Plan "shall be consistent" with the criteria in the Rules, thereby establishing what must be found as a factual matter in order to *alter* the Plan. The Rules do *not* also say a proposed amendment that is consistent with those criteria "shall be granted." Nor did the trial court point to any Florida decision imposing an obligation to amend a land use plan whenever the criteria for amending are satisfied.

In the absence of any clear requirement in the law mandating the amendment, the CPA's position that it could decide to maintain the status quo by reserving industrial lands under the Plan, even though the criteria for amending the Plan were satisfied, was a "fairly debatable" position with respect to the CPA's legislative, policy-making authority over proposed amendments to the Plan.

As such, this was a lawful basis for the CPA to deny the requested amendment. Simply put, even accepting all of the findings of the ALJ, the ultimate balancing decision whether to amend the Countywide Future Land Use Plan was

the sole prerogative of the CPA to make. The ALJ's own Order makes that clear.

2. The ALJ correctly recognized the CPA had legislative authority to deny this amendment, and this Court's decision in Island does not establish otherwise.

The ALJ specifically acknowledged that, notwithstanding his findings, "the review of a proposed Countywide Plan Map amendment requires a '*balanced legislative determination*' . . . *which cannot be delegated to an Administrative Law judge*." (R. 8461 ¶49). He pointed to Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997), for this requirement for an amendment to a land use plan. (R. 8461 ¶49).

In that case, the Department of Environmental Protection denied a dredge and fill permit, despite the hearing officer's findings and recommendation that the permit be granted. Save Anna Maria, 700 So. 2d at 114, 116. This Court affirmed the denial based on the Department's balancing determination and the statute, saying the ultimate decision could not be delegated to the hearing officer. Id.

The trial court summarily disregarded the ALJ's reliance on this Court's decision in Save Anna Maria, saying that decision "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." (R. 7033). But, that is exactly what the court did in ruling the ALJ's findings "established" the CPA could not legitimately deny the amendment. Under that ruling, an order of

the executive branch ALJ compelled the CPA to amend the Plan rather than maintain the status quo.

That is not the law, as Save Anna Maria makes clear. Richman was legally mistaken in telling the trial court that the ALJ's Order gave the CPA "no discretion . . . at all" to deny the amendment. (T1:24). Although the CPA was bound by the ALJ's factual findings, the ultimate legislative, policy decision whether to amend the Plan was for the CPA to make.

The ALJ so acknowledged, and correctly so. The trial court nonetheless ruled, erroneously, that the ALJ's Order required the CPA to grant this amendment.

Then, citing this Court's decision in Island, Inc. v. City of Bradenton Beach, 884 So. 2d 107, 108 (Fla. 2d DCA 2004), the trial court ruled Island establishes that the CPA's decision to maintain the status quo was not a "fairly debatable" land use decision. The face of this Court's decision shows it establishes no such thing.

Specifically, the trial court declared Island "makes clear that on a land use plan amendment such as this, *if an applicant satisfied the applicable criteria*, *the decision is not fairly debatable* because 'reasonable persons could not differ in concluding that the applicants were entitled to a small-scale amendment to the comprehensive plan . . . .' " (R. 7033) (ellipses in Final Judgment; quoting Island, 884 So. 2d at 108).

But, that truncated quote *omits* a material part of this Court's sentence, which expressly explained the basis for its holding. The omitted part of that sentence establishes why this Court held as it did in Island*:* it said the amendment should have been approved "*because their property was improperly designated preservation*." 884 So. 2d at 108.

Judge Villanti stressed in his concurrence that he joined in the majority opinion precisely because, as explained in the portion of the majority opinion the trial judge omitted in his quote, the evidence "was *unrefuted*" that the current designation had been made improperly. Id. at 108-09. And even then, Judge Casanueva, in dissent, would have affirmed "the City's legislative decision to deny the amendment," recognizing "its legitimate interests in keeping the area undeveloped to accomplish its goals . . . ." Id. at 111.

Island rests on its unique facts, which do not exist here. It does not establish that a land use plan always must be amended when the criteria for amendment are satisfied. Nor does it establish that a decision to maintain the status quo as a legislative, balancing determination in such circumstances is not "fairly debatable" under Florida law.

The Florida Supreme Court has held the "fairly debatable" standard is "highly deferential . . . requiring approval of a planning action if reasonable persons could differ as to its propriety." Yusem, 690 So. 2d at 1295. Here,

numerous participants in the decision-making process agreed the status quo should be maintained under the Plan—and with good reason.

This was, as Richman's own planning expert conceded, a request to change the Plan for a sizeable amount of land in the County. The County's decision against altering its Plan in this extensive way was not "so unreasonable and arbitrary as to not be even 'fairly debatable.' " Section 28, 772 So. 2d at 620. Instead, just as in Section 28, the "legislative planning decision by the County to 'maintain the status quo' in its comprehensive plan" should be approved by this Court as "fairly debatable." Id. at 621.

It bears emphasis that this was a legislative decision involving a proposed land use Plan change for 35 acres, *not* a quasi-judicial decision on a request for re-zoning or special exception for a single lot. The difference is critical. As explained in Board Of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993), "[g]enerally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy."

The County obviously is not suggesting the CPA has "unbridled discretion" to deny an amendment to the Plan, as Richman argued below and the trial court stated. (T4:497; R. 7034). The County is simply saying that, contrary to Richman's assertion to the trial court, the County did have some discretion in

making its legislative policymaking determination here, and it was a "fairly debatable" position under Florida law, including the Special Acts, to decide that, on balance, the status quo under the Plan should be maintained. Island in no way holds to the contrary.

Indeed, it appears clear from the carefully crafted concurrence that, had the evidence in Island not been unrebutted that the land was erroneously designated, this Court would have affirmed the denial of that amendment as "fairly debatable." The trial court wrongfully relied on Island as establishing that the denial of this amendment was not "fairly debatable."

Richman complained below that it was unfair for the CPA to deny an amendment that had been found to satisfy the criteria set forth in the Rules. But, as shown on their face, the Rules merely require compliance with the criteria in order for the CPA to be authorized to alter the Plan. Nothing guarantees an amendment will be granted if it satisfies the amendment criteria.

To the contrary, the Rules expressly confirm the CPA's legislative authority to determine whether to amend the Plan. Neither the trial court nor Richman identified any authority constraining the CPA's legislative, policy-making authority based merely on the satisfaction of the criteria for amending a land use plan. Yusem and its progeny control this land use decision and establish it was lawful.

Simply put, this was not a quasi-judicial rezoning decision, and the trial court's decision rests on a misapplication of the deferential Florida standard for a land use plan decision. (R. 7030, 7033). That legal error permeates its entire decision. Reversal of the Final Judgment is required for this reason alone, without any need to reach the federal constitutional and damages issues discussed below.

II. THE DECISION DID NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Even if Pinellas County were wrong in its legal position that it had legislative authority to deny this amendment and instead maintain the status quo under the Plan, that error of state law would not equate to a violation of federal due process.

Rather, the constitutional issue is whether the CPA's denial of the requested amendment was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," and thus violated substantive due process. Moore v. City of E. Cleveland, Oh., 431 U.S. 494, 498 n.6 (1977) (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1928)).

There was no such violation.

A. The standard of review.

Whether an alleged deprivation of rights "is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation" is a question of law reviewed de novo. Greenbriar, Ltd. v.

City of Alabaster, 881 F.2d 1570, 1577-78 (11th Cir. 1989) (quoting Rymer v. Douglas Cnty., 764 F.2d 796, 801 (11th Cir. 1985)).

B. The ALJ found the criteria for amending the Plan were satisfied, but did not find it was irrational to deny the amendment, instead leaving the legislative balancing decision to the CPA.

The words "legitimate," "rational," "arbitrary," "capricious," "basis," and "public interest" are not in the ALJ's Order. Nonetheless, the trial court said the ALJ's Order "established" that preservation of industrial lands was not a "legitimate/rational" "basis" for denial of the requested amendment. (R. 7030). The ALJ's Order does no such thing.

As the ALJ's Order shows on its face, the trial judge was flat wrong when he said that "the specific issue presented to Administrative Judge Canter was whether the County had any rational basis for denying the Amendment . . . ." (R. 7021). No such issue is set forth in the ALJ Order.

To the contrary, the ALJ specified that "the Countywide Rules expressly state[], and the parties have stipulated, that *the issue to be determined is 'the manner in, and extent to, which the amendment is consistent with' certain criteria* in the Countywide Rules." (R. 8459 ¶43).

Likewise, Richman's own Complaint herein says the "*sole issue to be determined by the ALJ* in the trial was *whether or not Richman's LUP Map Amendment was consistent with the six (6) controlling criteria*," and further, that

because the County had stipulated to five of the criteria, "the *sole remaining issue* concerning Richman's LUP Map Amendment was *whether or not Richman's Amendment was consistent* with Countywide Rule 5.5.3.1.1." (R. 67 ¶45).

In contrast to that stipulated issue, which is fully consistent with the ALJ's limited authority in this land use case, the ALJ never said he *also* was deciding whether denial of the amendment was not legitimate, rational, or in the public interest.

Read as a whole, the Order makes clear the ALJ recommended the amendment be approved based on his findings on the specific stipulated issue before him—whether the amendment in fact satisfied the disputed criterion specified in the Rules. In that regard, the ALJ concluded that, because the Planning Council's 2006 Resolution regarding the need to preserve industrial lands was not "repeated, paraphrased, or adopted by reference in the Countywide Rules," it was not "implemented through the Countywide Rules." (R. 8453-54 ¶¶27-28).

But, this finding simply meant the Planning Council's Resolution could not "act as a *criterion*" under the Rules, such that the failure to satisfy that criterion would *preclude approval* of the amendment. (R. 8454, ¶27). Instead, because the criteria were satisfied, the CPA was authorized to *grant* an amendment to the Plan. The ALJ never said, however, that preservation of industrial lands was an "irrational" "basis" for the CPA to *deny* the amendment as a legislative, policy-

making determination. That issue was not even before him.

Under the Special Acts, the CPA only was bound by the ALJ's findings of fact. Although the ALJ recommended approval of the amendment, the CPA was not bound to reach the same balancing conclusion in determining whether to amend the Plan or instead maintain the status quo. The specific grant of legislative authority to the CPA under the Special Acts makes that clear, and the ALJ expressly acknowledged the CPA had that ultimate policy-making authority.

In nonetheless ruling the ALJ's Order "established" that preservation of industrial lands was not a "legitimate/rational" "basis" for denying the amendment, the trial court relied on Everett v. City of Tallahassee, 840 F. Supp. 1528 (M.D. Fla. 1992). Richman argued, and the trial court agreed, that case is "similar" to this case because both involve "the application of an uncodified policy that never had been adopted as part of the applicable criteria." (R. 7031).

Notably, no appellate court has applied Everett's substantive due process holding with respect to the *zoning* amendment sought in that case to a legislative decision whether to amend a *land use plan*. The trial court's extension of Everett to do so here was error.

Further, just as with Island, the trial court improperly ignored the actual holding of Everett: the uncodified zoning policy applied there was held to be *unconstitutionally vague* because, although the City had allowed for exceptions to

the zoning regulations for "other factors, . . . *none of these* '*circumstances*,' '*conditions*' *or* '*factors*' *are specified either in the uncodified policy or in any legislative enactment.*" Id. at 1546.

Thus, the Everett court specifically held as follows: "*Because no standards are set forth* in the Thomasville Road Policy, the City's arbitrary and capricious use of the policy violates plaintiff's substantive due process rights." Id. The trial court here made no ruling of unconstitutional vagueness. Instead, it wrongly confused state law standards with constitutional requirements.

The ALJ simply found it was wrong under state law for the CPA to have originally concluded an unincorporated Resolution 06-3 was part of the criteria that had to be satisfied in order to amend the Plan. But, the fact that the Resolution was not part of the criteria does not establish it was *irrational*, when subsequently making the legislative, policy determination whether to amend the Plan, for the CPA to consider the importance of maintaining the designation of those lands for industrial use under the Plan. That issue had been the subject of studies and discussions by the County independent of the Resolution and, from a constitutional standpoint, this was an entirely legitimate interest of the public.

In sum, the trial court's finding of a substantive due process violation rests on an erroneous legal standard—*i.e.*, that the federal Constitution purportedly is violated when a land use decision violates state law. If that were the law, every

state law dispute about land use planning would end up as a federal civil rights lawsuit.

That is not the law, however, as "[a] due respect for the doctrine of federalism . . . discourages constitutionalizing state regulatory procedures." Crump v. Lafler, 657 F.3d 393, 400 n.4 (6th Cir. 2011).

Instead, more than an alleged violation of state law—*i.e.*, denying the amendment after the ALJ found it satisfied the criteria in the Rules—is required to establish a federal constitutional violation by a local land use decision.

C. The CPA's exercise of its legislative, policy making authority to preserve eroding industrial lands did not violate substantive due process.

Thus, even if the CPA's decision were wrong as a matter of state law, it is settled that "[a] violation of state law is not a denial of due process of law." Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (Posner, J.) (citing Herbert v. Louisiana, 272 U.S. 312 (1926)).

Particularly important, "the fact 'that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws' (or, we add, local ordinances) does not state a claim of denial of substantive due process." Id. (quoting Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982)).

Rather, so long as the decision rests on "plausible, arguably legitimate

purposes," it is not a violation of substantive due process. Dibbs v. Hillsborough Cnty., 625 F. App'x 515, 517 (11th Cir. 2015) (quoting Haves v. City of Miami, 52 F.3d 918, 923 (11th Cir. 1995)). Here, the local citizens affected by this proposed amendment advanced a number of entirely legitimate concerns, including the effect of the increased traffic on the safety of children in this specific area, the nature of the surrounding area, and the need to preserve this industrial land for target employment.

The trial court summarily dismissed the strong neighborhood opposition, without addressing the substance of the reasons for that opposition, saying public opposition was not a "legitimate basis" for denying this land use plan amendment. (R. 7027). But, once again, the trial court erroneously conflated (1) state law requirements for making quasi-judicial decisions on zoning issues with (2) the requirements of substantive due process for making legislative land use decisions as a policy matter.

As a constitutional matter, the public's articulated concerns underlying its opposition to this amendment were an entirely proper consideration by the CPA. The Seventh Circuit cogently put it as follows: "[t]he Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic (perhaps of any) government, operations which are permeated by pressure from special interests." Coniston, 844 F.2d at 467.

The Eleventh Circuit made the same point in Greenbriar, expressly *rejecting* the contention that "[c]ouncil members' attention to citizens' concerns . . . deprived their decision of a rational basis." 881 F.2d at 1579.

More recently, the Eleventh Circuit unequivocally declared in Griffin Indus. v. Irvin, 496 F.3d 1189, 1208 (11th Cir. 2007), "[l]ocal officials undoubtedly act 'rationally' " in considering a "high volume of citizen complaints" in making land use decisions. Indeed, it would be senseless to allow the public to explain their concerns at a mandatory public hearing if the CPA were required to ignore them.

Without citing any case law making significant public opposition to a land use amendment an irrational consideration as a matter of substantive due process, the trial court said the evidence at trial from both the County and Richman established this was the case. (R. 7027). The only record matters cited by the court are Richman's expert's documents addressing the purportedly comparable properties for equal protection purposes. (R. 7027). They say no such thing.

Nor did the County's evidence establish that the CPA could not legitimately take into account the public's concerns when acting in its legislative capacity. Although the CPA's Planning Director's deposition testimony touched on this point, he never announced any such prohibition; moreover, the trial court *excluded* his deposition testimony after trial, expressly stating it would not rely on it. (R. 7010).

Richman's planning expert addressed neighborhood opposition, but in context, she merely opined it was not part of the *criteria* in the Rules for amendment. Thus, Richman's counsel asked her, in her professional opinion, "how many or how aggressive the neighborhood opposition, is that a relevant factor, *is that part of the criteria?*" (T3:400). She replied that neighborhood opposition is "definitely not *part of the review criteria* that the CPA is supposed to apply, no." Id.

That opinion testimony regarding the criteria to be applied under the Rules is not probative evidence of whether consideration of public concerns is irrational as a matter of substantive due process. That is a constitutional question of law for the court. It cannot be established by expert testimony. *E.g.*, Estate of Murray v. Delta Health Group, Inc., 30 So. 3d 576, 578 (Fla. 2d DCA 2010) (expert testimony inappropriate if it applies a legal standard to a set of facts).

And, as the case law discussed above establishes, even if public opposition were not a proper state law basis to deny the amendment, it does not violate substantive due process to act on the basis of specific concerns raised by the public in opposition to a land use plan change, especially when these concerns are as widespread and serious as here. This alone defeats the trial court's substantive due process finding. Any expert views to the contrary cannot establish otherwise. *See* Federated Dept. Stores, Inc. v. Doe, 454 So. 2d 10, 12 (Fla. 3d DCA 1984) ("An

expert's opinion, if based upon an erroneous concept of law, is . . . devoid of competency.").

In addition, however, the CPA did not simply accede to public opposition, as Richman claimed in its complaint herein. There was a legitimate planning concern that these industrial lands should be preserved rather than eroded. Regardless of whether that was a specific criterion in the Rules, that is not an irrational judgment.

So too, the locational characteristics of this Property provided a rational, constitutional basis for denying the amendment. (R. 1792, §2.3.3.6.1). The trial court first equated the issue of traffic—a simple vehicle count—with the entirely different issue of transportation—access to roadways, airports, rail, and the routes thereto. The court then found that "traffic/transportation is not a relevant consideration because the County stipulated that the Richman Amendment was compliant with the 'traffic' criterion" in the Rules. (R. 7026).

But, regardless of the criteria in the Rules, as a matter of substantive due process, the particular characteristics of this Property, including the transportation infrastructure available to it, were entirely rational matters for the CPA to consider in determining to maintain the status quo under the Plan.

Finally, the trial court made much of the County Attorney's advice to the CPA regarding the legal effect of the ALJ's findings. (R. 7023-24, 7032). The court entirely ignored the County Attorney's contemporaneous acknowledgement

to the CPA of its legislative balancing authority in determining whether to enforce the existing Plan. (R. 9247, at 5; 9251, at 24; 9260, at 57). The court also ignored that counsel's advice was given in the context of warning of the prospect of litigation if the amendment was denied.

In all events, even if this Court were to agree the lawyer's advice made this land use decision improper under state law, once again, that does not create a substantive due process violation. *See cases cited supra*, at 29-31. Taking action as a matter of policy, even though that is against the advice of an attorney or other advisor, does not render that decision arbitrary or irrational.

That is especially the case where, as here, other persons in the decision-making process voted to deny this amendment. The Planning Council's recommendation to approve resulted from only an 8-5 vote. (R. 9156). The preliminary approval of the Safety Harbor Commission was only 3-2. (R. 7017).

This is not a situation, then, in which a decision was made that no one else agreed with in the decision-making process. Reasonable people could and did believe that maintenance of the status quo of industrial lands would benefit the public in the long run. Just as in Coniston, "[a]t worst, the decision here was mistaken and protectionist; it was not irrational, so the claim of a denial of substantive due process fails." 844 F.2d at 468.

III. THE DECISION WAS NOT A "CLASS OF ONE" EQUAL PROTECTION VIOLATION.

A. The standard of review.

Richman did not assert a claim of discrimination against a protected class, such as race or religion. Instead, it asserted a "class of one" equal protection claim, "which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review . . . ." Engquist v. Or. Dep't of Ag., 553 U.S. 591, 605 (2008).

Hence, the question here is whether the plaintiff has been treated differently from others similarly situated *and* whether there is no rational basis for the difference in treatment. *E.g.*, Griffin, 496 F.3d at 1202 (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

The question of whether government action lacks any rational basis is reviewed *de novo*. Griffin, 496 F.3d at 1201; *see also* Poveda v. U.S., 692 F.3d 1168, 1172 (11th Cir. 2012) ("We review constitutional challenges . . . *de novo*.").

The issue of whether a plaintiff is similarly situated to comparators in a class-of-one equal protection claim is a question of fact. DS v. East Porter Cnty. Sch. Corp., 799 F.3d 793, 799-800 (7th Cir. 2015). But where "the court's ruling . . . was based upon an erroneous interpretation of the applicable case law, [the] review is *de novo*." Bellevue v. Frenchy's South Beach Café, Inc., 136 So. 3d 640, 643 (Fla. 2d DCA 2013).

B. There was a rational basis for denying the amendment and thereby maintaining the status quo under the Plan.

The trial court expressly grounded its equal protection ruling on its substantive due process ruling, saying "[a]s the Court has ruled with respect to the due process claim . . . the County had no rational basis for denying Richman's Countywide Amendment." (R. 7036).

As demonstrated at pages 24-34 above, that is wrong as a matter of law. Even assuming the amendment should have been granted as a matter of state law in light of the ALJ's findings that the Rules' criteria were satisfied, that does not mean there was no possible rational reason for denying it.

Consequently, just as Richman's substantive due process claim fails, so too does its "class of one" equal protection claim. Coniston, 844 F.2d at 467-68 (test for a rational decision under substantive due process the same as equal protection). There accordingly is no need to address the trial court's finding of discrimination by granting other amendments to the Plan. But, that finding fails as well.

C. Mere satisfaction of the criteria does not render all of the amendments "the same."

Rather than applying the rigorous contextual analysis necessary to establish similarity of the comparators advanced by Richman, the trial court ruled 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." (R. 7026).

The trial court cited no legal authority for determining the requisite similarity of comparators in such a narrow way, and we have found none.

Instead, in order to satisfy the similarity requirement, "plaintiffs in a 'class of one' case 'must demonstrate that they were treated differently than someone who is *prima facie identical in all relevant respects* . . . .'" Griffin, 496 F.3d at 1205 (quoting Purze v. Vill. Of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)); *see also* Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006).

"This is a heavy burden, and 'when plaintiffs in class of one cases challenge the outcome of complex, multi-factored government decisionmaking processes, similarly situated entities must be very similar indeed.' " K&H Dev. Group, Inc. v. Howard, No. 3:06-CV494/MD, 2009 WL 1034971, *8 (N.D. Fla. Mar. 27, 2009) (quoting Griffin, 496 F.3d at 1205).

As the Eleventh Circuit emphasized in Griffin, "[t]oo broad a definition of 'similarly situated' could subject nearly all state regulatory decisions to constitutional review . . . and deny state regulators the critical discretion they need to effectively perform their duties." 496 F.3d at 1203. Accordingly, courts "are obliged to apply the 'similarly situated' requirement with rigor." Id. at 1207; *see also* Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1275 (11th Cir. 2008).

Rather than performing that rigorous analysis, the trial court summarily said Richman's requested amendment "was not only similar to, but was the same, in all relevant respects, as at least one of the" comparators advanced by Richman. (R. 7036). Although the court did not identify which "one" of the comparators it accepted, when the right test is applied, none are "the same" as Richman's.

1. The "overwhelming neighborhood opposition" was a "meaningful difference" from all six comparators.

Richman's own planning expert conceded that "the Richman case had a significant amount of opposition at every level," whereas "there was no opposition" in any of the comparator amendments. (T3: 395, 372). The trial court likewise acknowledged that "the overwhelming neighborhood opposition" in this case was a "meaningful difference" between the Richman amendment and Richman's comparators. (R. 7026).

The court then wholly disregarded that "meaningful difference," however, saying public opposition was not a "legitimate" basis for denying this amendment. (R. 7026-27). But, as shown above, public opposition is not an irrational basis as a constitutional matter for maintaining the status quo, especially where, as here, it is based on articulated, plausible concerns.

Furthermore, the existence of such opposition is a difference that precludes any showing of intentional discrimination, as required for Richman's class-of-one equal protection claim.

In Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 440 (4th Cir. 2002), for example, the Fourth Circuit affirmed summary judgment for the county in part due to the claimant's failure to establish "that any other . . . applicant met with the kind of public apprehension that [it]s proposed plant generated."

The Third Circuit held to the same effect in Sheddy Family Trust v. Piatt Township, 404 F. App'x 629, 632 (3d Cir. 2010), affirming a summary judgment against a class-of-one equal protection claim based in part on the claimant's failure to show the proposed comparator was "the subject of any complaint to the Township . . . ."

Here, just as in Griffin, "the suggestion that the defendants violated the Equal Protection Clause by responding to the concerns of local citizens is, under these circumstances, without merit." 496 F.3d at 1208. This undisputed difference in the comparators precluded any findings of a violation of equal protection.

2. The time and circumstances of the other amendments were entirely different.

Other differences abound as well, further precluding any such findings. Wrongly saying the criteria were "the same" at all times, the court refused to consider the different times when purported comparators' amendments were approved. In fact, as discussed *infra*, the formally adopted criteria were materially changed before the most recent of those amendments was approved.

Furthermore, temporal differences are a relevant factor in determining

similarity for equal protection purposes. As the First Circuit explained in Cordi-Allen v. Conlon, 494 F.3d 245, 253 (1st Cir. 2007) (citing Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)):

> *In the land-use context, timing is critical* and, thus, can supply an important basis for differential treatment. . . . [C]ourts must be sensitive to the possibility that differential treatment—especially differential treatment following a time lag—may indicate a change in policy rather than an intent to discriminate. *Consequently, the most reliable comparisons are likely to be from roughly the same time frame.*

It is undisputed that the CPA's decisions to grant the comparators' amendments were spread out over more than a decade: two of the six were decided in 2003, one in 2005, and another in 2007—long before Richman's 2014 denial.

The closest in time was Case 14-10, granted in the Spring of 2014 after Richman's requested amendment was denied. But the application in Case 14-10 sought the Planned Redevelopment Mixed Use (PRMU) designation, not the same cluster of designations Richman sought (Residential/Office Limited, Preservation, and Residential Medium). (T3:391-92; R. 7019). This alone is a critical difference.

As Richman's expert acknowledged, PRMU "is a plan category that allows a city and an applicant to develop a category that's kind of *unique* for that particular site, which is what they did in [Case 14-10]." (T3:391). In fact, PRMU requires a different application process, called a Special Area Plan, which creates a new land use category with specifically tailored conditions. (*See* T6:620-21; R. 1808,

§2.3.3.8.2; 1838-39, §4.2.7.1.4; 1846, §4.2.7.6).

In this regard, the applicant in Case 14-10 unconditionally reserved half of the property to target employment uses. (T3:392). Richman's expert conceded this binding condition of that amendment was a factor in approving it. (T3:392-93). As Richman made no such commitment, these two amendments were not "the same" at all. (T5:557-59).

Significantly as well, by including this binding condition, the amendment in Case 14-10 satisfied the newly-enacted, formally-adopted criterion in the Rules with respect to preservation of industrial lands—a criterion adopted *after* the denial of Richman's amendment. Thus, the trial court wrongly said the criteria were the same for these two amendments.

When the constitutional similarity analysis is properly applied, other dissimilarities become apparent as well. For example, Richman's expert admitted it was "[n]otabl[e]" that this "property was a fairly large site." (T3:321). All of the proposed comparators were much smaller.

Moreover, Richman did not establish that any of the comparators were located in the City of Safety Harbor or another geographical area experiencing the same shrinking footprint of industrial lands, much less that they eliminated industrial lands suitable for target employment following a serious market recession, as here. (R. 9255, at 40).

Richman's expert did not consider this factor in assessing similarity, saying "[w]herever you are in Pinellas County, the same criteria applies [*sic*]." (T3:399). That ignores the different policy considerations that validate different treatment at different areas and times, thereby disproving any intent to discriminate.

The trial court, however, sustained Richman's relevance objection when the County sought to adduce testimony of the composition of the CPA at different times. (T3:383-84). It declared "whoever is on those committees or review boards are going to have to follow the same rules and regulations, so I think it's immaterial who they are." Id. That ruling was wrong as a matter of law.

Constitutional law recognizes that *policy* considerations can evolve over time, warranting different treatment. *E.g.* Bell v. Dupperault, 367 F.3d 703, 708 (7th Cir. 2004) (affirming summary judgment against a class-of-one equal protection claim where the government authority "decided to increasingly scrutinize applications beginning in 1998 because of environmental concerns"); Purze, 286 F.3d at 455 (individuals not similarly situated where they "submitted their plats during different time periods" and "had their plat requests granted by different and previous Boards"); Taylor Acquisitions, LLC v. City of Taylor, 313 F. App'x 826, 837 (6th Cir. 2009) ("[T]he election of a new mayor and a new City Council—with new priorities—belies any assertion that Plaintiff and the prior developers were similarly situated.").

Finally, there was no evidence that any of the purported comparators exhibited the same favorable locational aspects like transportation, which enhanced the Property for target employment. In fact, Richman's expert failed even to consider the important transportation issue of road type because she "understood that that was not at issue in the CPA's evaluation of the site." (T3:375-76).

To the contrary, at the final public hearing, various transportation concerns that would arise if the amendment was approved, like road access, ingress and egress, and new planned transportation systems, were specifically addressed. (R. 9252, at 25; 9255, at 37; 9261, at 62, 64). There is no evidence that any transportation issues existed with the other projects.

When the legal test for a class of one equal protection claim is correctly applied "with rigor," it establishes that none of Richman's purported comparators are "prima facie identical in all relevant respects." Most fundamentally, neither substantive due process nor equal protection were violated here, as there was a rational reason under constitutional law concepts for deciding as a legislative, policy matter to maintain the status quo under the Plan. The Final Judgment should be reversed in its entirely.

IV. AT A MINIMUM, THE TRIAL COURT'S AWARD OF RICHMAN'S FUTURE LOST PROFITS SHOULD BE REVERSED.

A. <u>The standard of review.</u>

"The sufficiency of the evidence is an issue of law reviewed *de novo*."

Norman v. Padgett, 125 So. 3d 977, 978 (Fla. 4th DCA 2013).

Generally, a decision on a motion for new trial is reviewed for an abuse of discretion. Krolick v. Monroe, 909 So. 2d 910, 913 (Fla. 2d DCA 2005). But, the showing required to reverse an order denying a new trial is lower than that to reverse an order granting one. Id.

Further, when the issue does not require the weighing of evidence, such that it "can be as accurately reviewed from an appellate record as from the trial judge's bench," the abuse of discretion standard is applied "in a restricted manner." Id. at 913-14 (citing Tri-Pak Mach. v. Hartshorn, 644 So. 2d 118 (Fla. 2d DCA 1994).

Finally, whether a postjudgment motion presents a colorable claim for relief is a question of law reviewed *de novo*. Rooney v. Wells Fargo Bank, N.A., 102 So. 3d 734, 736 (Fla. 4th DCA 2012).

B. Richman conceded that the future lost profits claimed by Richman would be suffered only by a separate corporate entity to be later formed.

It is undisputed that the only amount of money Richman itself could have made from the project was a development fee of $1,033,111.00. (T1:87-94; T4:491; R. 7040). Richman had standing to seek that fee as damages to it.

But, Richman's claim for future lost profits fails as a matter of law because it indisputably is not the legal entity that suffered the alleged future loss of profits. Richman planned to create a new corporation, comprised of different principals, to

take title to the property and develop it. That entity alone would receive the expected future profits from the proposed development. That entity was not in existence, however, either at the time of the CPA's decision or at the time of trial.

Richman was not entitled to recover loss of profits that another, entirely separate, corporation might suffer in the future. Separate corporate entities, "although closely interrelated must nevertheless be treated as separate entities." Roberts' Fish Farm v. Spencer, 153 So. 2d 718, 721 (Fla. 1963). Corporate officers "cannot avail themselves of the corporate shield when it suits their purpose and discard the same when it does not appear advantageous." Ed Skoda Ford, Inc. v. P&P Paint & Body Shop, Inc., 277 So. 2d 818, 819 (Fla. 3d DCA 1973).

In particular, "[t]he corporate veil may be used as a defense but may not be removed at will by the stockholders for the purposes of seeking affirmative relief." Chaul v. Abu-Ghazaleh, 994 So. 2d 465, 467 (Fla. 3d DCA 2008).

The decision in Nunn v. Chem. Waste Mgmt., Inc., 856 F.2d 1464, 1470 (10th Cir. 1988), is squarely on-point:

> The lost profit injury, on the other hand, was not suffered by Chemical Waste. Rather, the profits were lost by a separate corporate entity, the subsidiary corporation NIES. As a matter of law, it was erroneous for the trial court to disregard the separate entity status of the defendant corporations and the injured corporation.

See also Gen. Nut. Corp. v. Gardere Wynne Sewell LLP, 727 F. Supp. 2d 377, 386 (W.D. Pa. 2010) (following Nunn); Picture Lake Campground, Inc. v. Holiday

Inns, Inc., 497 F. Supp. 858, 863 (E.D. Va. 1980) (holding in kind).

Accordingly, the evidence is insufficient as a matter of law to establish any future lost profits by Richman.

C. The trial court erroneously denied, without a hearing, the County's motion for new trial, which raised newly-discovered evidence of possible environmental contamination, casting substantial doubt on the validity of the lost profits award.

In seeking future lost profits for its as-yet-unincorporated entity, Richman contended that, had the amendment been approved by the CPA in January, it would have been promptly approved by Safety Harbor in February, and the project could then have proceeded to a successful completion.

The trial court specifically found, based on Richman's corporate representative's and expert's trial testimony, that there was nothing to preclude a timely completion of the project, had the amendment been approved by the CPA. (R. 7025). The award of future lost profits necessarily assumed that would occur.

As set forth in the CPA's motion for new trial and for relief from judgment, however, the CPA learned after trial (from non-party independent sources) that there may have been soil contamination on the property, which caused a subsequent contract purchaser engaged in target employment and planning commercial use for the Property to back out of its contract.

No environmental issue had been disclosed by Richman during discovery, despite a specific request for production of all documents supporting its claim for

fees relating to its environmental studies and property testing and all documents supporting Richman's claim for future lost profits. (R. 7073, ¶11(a), (d)).

The newly-discovered evidence strongly suggested that Richman had in its possession environmental studies showing that the property was or may have been contaminated, requiring remediation. Indeed, in response to the County's new trial motion, Richman did not deny that the Property had environmental issues; instead, it said the County could have discovered the information with more specific discovery requests. (R. 7067-68). The evidence of environmental contamination would have had a dramatic impact on any future lost profits award.

The trial court, however, denied the new trial motion without any hearing, much less the requested evidentiary hearing that was required under this Court's precedent. *See* Heidkamp v. Warren, 990 So. 2d 1, 2 (Fla. 2d DCA 2007) (post-trial motion alleging newly-discovered evidence that, if proven, would entitle party to relief requires court to conduct an evidentiary hearing).

"[W]here the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required." S. Bell Tel. & Tel. Co. v. Welden, 483 So. 2d 487, 489 (Fla. 1986). Where a party timely files a post-trial motion for new trial or relief from judgment alleging possible misrepresentations, the "credibility of [the movant]'s allegations should only be determined by the trial

court after an evidentiary hearing thereon." Rosenthal v. Ford, 443 So. 2d 1077, 1078 (Fla. 2d DCA 1984).

Without addressing the impact of the newly-discovered evidence to the trial court's finding that the project could have been completed in the specified time frame, the trial court refused to grant an evidentiary hearing. (R. 7127-30).

Instead, the trial court said "it does not appear that with due diligence the 'new evidence' could not have been discovered after the March 5, 2016, newspaper article and before the April 20-22, 2016, trial in this matter." (R. 7128). But this dubious suggestion ignores the innocuous nature of the article.

The article reported only that BayCare had backed out of the sale contract, without providing any reason whatever to suspect this was due to environmental issues with the Property. (R. 7061-62). To the contrary, the article stated the Safety Harbor Mayor thought BayCare withdrew due to a conflict with the seller. Business deals fall through for myriad reasons, and there was no reason for the County to leap to the conclusion it was an environmental issue with the Property.

That is especially the case, given that the County's requests for production from Richman of documents relating to environmental issues had not resulted in the production of any environmental reports or studies showing any problems with the Property. (R. 7057, ¶2; 7073, ¶11). In light of that lack of production and the fact that Richman was affirmatively telling the trial court that only the CPA's

denial stood in the way of development, there simply was no reason for the County to attribute BayCare's action to environmental issues on the Property.

Moreover, the article reported that BayCare refused to disclose the reason for its withdrawal, suggesting that BayCare viewed that reason as confidential and undermining the trial court's suggestion that any such information would have been voluntarily provided by non-party BayCare.

Further, the article appeared just the month before trial and only weeks before the discovery cut-off. Given the discovery efforts that had already been undertaken, it cannot be said that the County acted without due diligence in that short time period. Richman no doubt would have cried "fishing expedition" had the County sought to obtain environmental report discovery from BayCare a mere month before trial, based on a news article that suggested no such thing.

Certainly, the finding of fact of lack of diligence cannot be made without a hearing in this case. It bears emphasis that, in moving for a new trial, "[t]he requirement of due diligence . . . is not a legal absolute." Roberto v. Allstate Ins. Co., 457 So. 2d 1148, 1150 (Fla. 3d DCA 1984). "Thus, even where the due diligence requirement has not been fulfilled, if an appellate court finds that a correctable injustice has been done, that court should not hesitate to order a new trial or hearing based on all the available evidence." Cluett v. Dep't of Prof. Reg., Fla. Real Estate Comm'n., 530 So. 2d 351, 355 (Fla. 1st DCA 1988).

Accordingly, "the rules as to newly discovered evidence are not inflexible and must sometimes bend in order to meet the ends of justice . . . ." Ogburn v. Murray, 86 So. 2d 796, 798 (Fla. 1956) (en banc). Richman obtained a judgment for millions of dollars from the taxpayers of Pinellas County when it is entirely possible that the undisclosed evidence would slash the judgment to a fraction of the amount awarded.

CONCLUSION

The Final Judgment should be reversed and remanded for entry of final judgment for the County because the CPA's decision was "fairly debatable" under State law and thus a lawful land use decision. Alternatively, the judgment should be reversed and remanded for entry of final judgment because Richman failed to establish any federal constitutional violations.

Finally, this Court should at least reverse and remand for entry of final judgment in only the amount of Richman's developer fee, without any award for future lost profits, or for a new trial on damages. At a minimum, the trial court should be directed to hold an evidentiary hearing on the County's motion for new trial based on newly-discovered evidence.

[*Signature block appears on next page.*]

Dated December 1, 2016

Respectfully submitted,

/s/Sylvia H. Walbolt

JIM BENNETT
Florida Bar No. 698873
jbennett@pinellascounty.org

Pinellas County Attorney's Office
315 Court Street
Clearwater, Florida 33756
Telephone: (727) 464-3354

SYLVIA H. WALBOLT
Florida Bar No. 33604
swalbolt@carltonfields.com
CHRIS W. ALTENBERND
Florida Bar No. 197394
caltenbernd@carltonfields.com
NICHOLAS A. BROWN
Florida Bar No. 90929
nbrown@carltonfields.com

CARLTON FIELDS JORDEN BURT, P.A.
4221 W. Boy Scout Boulevard
Suite 1000
Tampa, FL 33607-5780
Telephone: (813) 223-7000

Attorneys for Appellant Pinellas County

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed through the Florida E-Filing Portal, causing e-mail service on this 1st day of December, 2016, to:

Scott A. McLaren, Esquire, scott.mclaren@hwhlaw.com
E.D. "Ed" Armstrong, III, Esquire, ed.armstrong@hwhlaw.com
Fred "Kip" C. Marshall, II, Esquire, kip.marshall@hwhlaw.com
Landis v. Curry, III, Esquire, lance.curry@hwhlaw.com
Hill, Ward & Henderson
101 East Kennedy Blvd., Suite 3700
Tampa, FL 33602
Attorneys for Appellee The Richman Group of Florida, Inc.

/s/Sylvia H. Walbolt
Sylvia H. Walbolt
Fla. Bar No. 33604

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/Sylvia H. Walbolt
Sylvia H. Walbolt
Fla. Bar No. 33604