IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

TJCV LAND TRUST, HARVEY SCHNEIDER, TRUSTEE,

Petitioner,

v.

ROYAL PALM REAL ESTATE HOLDINGS, LLC; ROYAL PALM PROPERTIES, LLC and DAVID W. ROBERTS,

Respondents,

and

CITY OF BOCA RATON, FLORIDA,

Additional Respondent. [1]

CASE NO.

L.T. CASE # 502015CA009676XXXXMB

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TJCV LAND TRUST, HARVEY SCHNEIDER, TRUSTEE'S PETITION FOR WRIT OF CERTIORARI

Petitioner TJCV LAND TRUST, HARVEY SCHNEIDER, TRUSTEE (the "Trust"), through counsel, petitions this Court to issue a writ of certiorari directed to the Appellate Division of the Circuit Court quashing its June 6, 2016 Order. That Order granted the Petition of Respondents, ROYAL PALM ESTATE HOLDINGS,

[1] The City of Boca Raton, Florida (the "City") is named as an additional respondent pursuant to Fla. R. App. P. 9.020(g)(4) and 9.100(b)(1). In the proceedings below, the interests of the Petitioner and the City were aligned.

LLC, ROYAL PALM PROPERTIES, LLC and DAVID W. ROBERTS ("Respondents"), seeking certiorari review of a Boca Raton City Council resolution. (*See*, App. 1.) The resolution in question had affirmed the decision of the Boca Raton Planning and Zoning Board to approve a site plan for construction of a Religious Center. (*See*, App. 2.)

The issuance of a writ of certiorari is necessary and justified because: (1) the circuit court applied the wrong law and ignored the plain language of the City Code when it overturned the City Council's decision to approve the site plan; and (2) the circuit court denied due process of law by relying on arguments not raised by Respondents in their petition for writ of certiorari or in the administrative proceedings before the City. Accordingly, the Order departed from the essential requirements of law, caused a substantial and material injury to Petitioner, and resulted in a miscarriage of justice.

BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 4 of the Florida Constitution and Fla. R. App. P. 9.030(b)(2)(B), which authorize District Courts of Appeal to issue writs of certiorari to review final orders of circuit courts acting in their review capacity. *See, generally, Miami-Dade Cnty. v. Omnipoint Holdings*, 863 So. 2d 195 (Fla. 2003).

STATEMENT OF FACTS

The Trust owns a vacant parcel of land consisting of 0.84 acres located at 770 East Palmetto Park Road, Boca Raton, Florida (the "Property").[2] The City's Comprehensive Plan designates Palmetto Park Road an "urban major arterial roadway." (App. 6, p. 3.) The Property is zoned within the B-1 Local Business District with a commercial future land use designation under the City's Comprehensive Plan. (*Id.*)

The Trust sought the City's approval for the construction of a two-story Religious Center consisting of a synagogue/sanctuary, daily chapel, social hall, children's playroom, kitchen, bookstore/gift shop, administrative offices, an open covered plaza, uncovered sculpture garden, and two parking structures, including an underground parking garage. (*Id.*, pp. 3-4; App. 4.) The facility was also planned to include an exhibition space called the "My Israel Center," containing interactive exhibits about the history of Israel and the Jewish people. (*Id.*) The Trust maintained that the Religious Center, including the exhibition space which constitutes a "museum," is a "place of public assembly" under the code. (*Id.*)

[2] A small triangular portion of the Property (0.03 acres) is residentially zoned but was not included in the plan for the Religious Center. (App. 6, p. 3.)

Prior to constructing the Religious Center, the Trust was required to obtain a site plan approval[3] from the City's Planning and Zoning Board. City Code § 28-51. Accordingly, the Trust submitted a site plan application for the Religious Center – prepared by a professional architect – to the City's Development Services Department.

On March 19, 2015, the Planning and Zoning Board considered the site plan in accordance with City Code § 28-54. (App. 5.) At the conclusion of the hearing, and after review of the application and supporting materials, the Planning and Zoning Board voted unanimously (6-0) to approve the site plan for the Religious Center, with certain conditions involving an additional handicapped parking space. (*Id.*, pp. 192-93.)

After the City Council remanded the matter to provide the Trust an opportunity to supplement and/or clarify its application, on May 7, 2015, the Planning and Zoning Board again considered the site plan in accordance with the

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[3] In contrast to zoning and rezoning, significantly less discretion is involved in determining whether to approve or deny a site plan application. *Park of Commerce Assoc. v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994) ("No legislative discretion was involved in determining whether the property owner complied with regulations set out in a local ordinance."); *Park of Commerce Assoc. v. City of Delray Beach*, 606 So. 2d 633, 634 (Fla. 4th DCA 1992) ("... site plan review cannot be legislative in nature because a city cannot unreasonably withhold approval once the legislatively adopted legal requirements have been met."); *City of Lauderdale Lakes v. Corn*, 427 So. 2d 239, 242 (Fla. 4th DCA 1983) ("The same reasoning applies to approval of site plans. ... No element of discretion remains once the legal requirements have been met.").

Boca Raton City Code. (App. 7.) At the conclusion of the hearing, and after review of the site plan application and supporting materials, the Planning and Zoning Board voted (5-1) to approve the site plan. (App. 8, p. 3.) The site plan approval for the Religious Center was formally rendered by adoption of Planning and Zoning Board Resolution No. 2015-07. (App. 3.)

On June 5, 2015, Respondents appealed the Planning and Zoning Board Resolution to the City Council pursuant to City Code § 28-56. (App. 9.) On July 28, 2015, the City Council considered the appeal and, at the conclusion of the hearing, voted unanimously (5-0) to affirm Planning and Zoning Board Resolution No. 2015-07 and to approve the site plan for the Religious Center. (App. 10, p. 157.) The City Council's decision on the site plan was formally rendered by adoption of the resolution that was the subject of Respondents' petition for writ of certiorari filed in the circuit court. (App. 2.)

The Circuit Court's Order Granting Certiorari

Respondents filed a petition for first-tier certiorari review in the circuit court. (App. 11.) Both the City and the Trust filed responses to the petition. (App. 12; App. 13.) The circuit court, acting through a three-judge panel sitting in its appellate capacity, reached its decision based on two grounds.

First, the circuit court addressed Respondents' contention that the My Israel Center component of the Religious Center, as a museum, is not a permitted use in

the B-1 Local Business District. The circuit court recognized that the City Code allows as a permitted use "places of public assembly," which the City Code defines as including "any area, building or structure *where people assemble for a common purpose*, such as social, *cultural*, recreational and/or religious *purposes*." City Code § 28-2 (emphasis added). And there has never been any doubt that the proposed My Israel Center is a place where people assemble for common social, cultural, or religious purposes. Nonetheless, the circuit court concluded that because the My Israel Center is a museum, it is not a permitted use in the B-1 Local Business District – even if it fits the Code's definition of a "place of public assembly."

To reach this conclusion, the circuit court employed principles of statutory construction in an effort to harmonize the regulations governing B-1 Local Business Districts with other portions of the City Code. Specifically, the circuit court looked to the regulations governing the VC Village Center District,[4] which identify both "museums" and "places of public assembly" as permissible uses. The circuit court concluded that, because that provision of the City Code listed the two uses separately, those uses must be mutually exclusive in other portions of the City Code, including the one involved here. Accordingly, "museums" cannot qualify as "places

[4] The VC Village Center District, occurring on only one parcel of land (initially containing three lots) in Boca Raton, was created in 2006. *See*, Boca Raton, Fla., Ordinance No. 4908 (Feb. 28, 2006); *see, also,* Boca Raton Zoning Map, http://www.ci.boca-raton.fl.us/pages/sites/default/files/Uploaded_PDF/pz/Updated%20ZONING%20MAP%20Main%20Color%20for%20WEB.pdf.

of public assembly" under the Code. The circuit court also rejected the alternative argument that the My Israel Center is a permitted accessory use to the primary use of the Religious Center as a synagogue.

Second, the circuit court held that, even if the My Israel Center qualified as a "place of public assembly" and, therefore, as a permissible use in the B-1 Local Business District, it would need to comply with the parking requirements applicable to "places of public assembly" under the parking regulations. The circuit court rejected the City's view that the more specific parking regulations applicable to "museums" should apply.

NATURE OF THE RELIEF SOUGHT

Petitioner requests that this Court quash the circuit court's Order granting certiorari.

SUMMARY OF ARGUMENT

The Order must be quashed on certiorari review because the circuit court applied the wrong law and denied procedural due process. The circuit court applied the wrong law because it failed to give effect to the plain language of the zoning ordinance governing the B-1 Local Business District. Where the language of the applicable law is unambiguous, courts may not resort to rules of statutory construction – even to harmonize provisions of the same act, let alone provisions of the same overall Code – to ascertain an intent that deviates from the plain language.

The circuit court's resort to such harmonization principles violated well-established law.

Moreover, the circuit court's construction of the Code contradicts its plain text and structure. The City Code contains numerous zoning provisions, including those regulating the VC District, that identify general categories of permissible use and then also list specific uses that are encompassed within the broader category. The City Code does not treat all enumerated uses as mutually exclusive, and the circuit court's decision to impose a rule of mutual exclusivity renders the Code incoherent and nullifies several of its provisions. By distorting the Code in such a way the circuit court departed from the essential requirements of the law.

The same structure applies to the parking regulations under the City Code. In numerous provisions, the Code provides a parking requirement for a general category of permissible uses as well as separate requirements for specific uses encompassed within the general category. There is nothing anomalous, therefore, about recognizing that a "museum" is a "place of public assembly" under the zoning code but subject to its own specific parking requirements under the parking regulations. In reaching that conclusion, the City simply applied the well-established legal principle that specific provisions control over general ones. The circuit court was obliged to defer to that reasonable interpretation (indeed, the only

reasonable interpretation) of the City's own ordinances, and it applied the wrong law in failing to do so.

The circuit court also denied procedural due process because it never afforded the Trust the opportunity to address its arguments about mutual exclusivity by comparison to the VC Village Center District and the parking regulations. The circuit court reversed on the basis of those arguments even though the arguments were not raised by Respondents in their petition or considered in the administrative proceedings under review. Reversing on the basis of arguments raised by neither party is a denial of due process and a departure from the essential requirements of law.

ARGUMENT

A. STANDARD OF REVIEW

On certiorari review, this Court will determine "whether procedural due process has been afforded and whether the circuit court applied the correct law." *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002); *see, also, Dusseau v. Metropolitan Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). Second-tier certiorari review is necessary where, as here, the circuit court "failed to apply the correct law." *Jesus Fellowship v. Miami-Dade Cnty.*, 752 So. 2d 708, 711 (Fla. 3d DCA 2000). Certiorari is warranted if the circuit court *either* applied an incorrect legal standard *or* failed

to afford procedural due process. *See, e.g., Monroe Cnty. Code Enf't v. Carter*, 14 So. 3d 1019, 1021 (Fla. 3d DCA 2009) ("Here, the circuit court afforded the property owner due process. However, the circuit court applied the wrong law in this case.") (Internal citation omitted.)

The requirement that the circuit court must have "'applied the correct law' is synonymous with 'observing the essential requirements of law.'" *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *see, also, Dep't of Highway Safety & Motor Vehicles v. Kurdziel*, 908 So. 2d 607, 609 (Fla. 2d DCA 2005); *Department of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657, 658 (Fla. 5th DCA 2001) ("The standard of certiorari review this court must utilize in reviewing a decision of the circuit court sitting in its appellate capacity is to determine whether the circuit court afforded procedural due process to the litigants and whether the essential requirements of law have been observed.").

A ruling departs from the essential requirements of law "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice."[5] *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983). As the Florida Supreme Court has explained, "'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court,

[5] In the instant case, the miscarriage of justice is significant in that the Trust is unable to proceed with the development of the Religious Center.

statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). This includes, of course, a claim that the circuit court did not afford procedural due process in the manner of its decision-making.

B. CERTIORARI IS NECESSARY IN THIS CASE BECAUSE THE CIRCUIT COURT APPLIED THE WRONG LAW

1. The Circuit Court Failed to Give Effect to the Plain Meaning of the City's Zoning Code.

"The correct law applicable in this case is that the ordinance should be given its plain meaning and that any doubts should be construed in favor of a property owner." *Colonial Apartments v. City of DeLand*, 577 So. 2d 593, 598 (Fla. 5th DCA 1991). Where a statute – or an ordinance[6] – is "clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Lee Cnty. Elec. Co-op. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002). Under such circumstances, it is improper for a court to veer from the plain language in an effort to harmonize one provision of the law with other

[6] *See, Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973) ("Municipal ordinances are subject to the same rules of construction as are state statutes.").

provisions in the same act – let alone with other provisions in the same municipal code:

> Notwithstanding that the plain meaning of a term used by the Legislature ***may not artfully harmonize one provision of a law with others in the same act*** or may not fully carry out a court-perceived intent as to the statute's operation, ***an adjustment is appropriately made by legislative and not judicial redrafting***. Respect for the separation of governmental powers requires no less.

Heredia v. Allstate Ins. Co., 358 So. 2d 1353, 1355 (Fla. 1978) (emphasis added). Thus, the court must confine its analysis to the provision at issue and give effect to that provision's plain meaning. *See, e.g.*, *City of Ocala v. Green*, 988 So. 2d 114, 116 (Fla. 5th DCA 2008) ("When the language of a statute is clear and unambiguous and conveys a clear and definite construction, there is no need for a court to resort to the rules of statutory interpretation; rather, the court must give the statute its plain and obvious meaning."); *State Farm Mut. Auto. Ins. Co. v. Kuhn*, 374 So. 2d 1079, 1080-81 (Fla. 3d DCA 1979) ("The well established principle of law is that where the words used and the grammatical construction employed in a statute are clear and they convey a definite meaning, the legislature is presumed to have meant what it said and, therefore, it is unnecessary to resort to the rules of statutory construction.").[7]

[7] This demand that courts adhere to the legislature's plain language is borne, in its essence, of the conviction that "the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute." *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). But, "[e]ven where a

The circuit court failed to follow this well-established legal principle and, as a result, failed to give effect to the plain meaning of the City Code. The circuit court held that museums are not permitted in B-1 Local Business District zoning areas. Yet, City Code § 28-777 specifically authorizes a "place of public assembly" as a permissible use in B-1 districts, and museums fall squarely within the definition[8] of "place of public assembly," which is defined as follows:

> ***any area***, building or structure ***where people assemble for a common purpose, such as social, cultural, recreational and/or religious purposes***, whether owned and/or maintained by a for-profit or not-for-profit entity, ***and includes, but is not limited to***, public assembly buildings such as auditoriums, theaters, halls, private clubs and fraternal lodges, assembly halls, ***exhibition halls***, convention centers, and places of worship, ***or other areas***, buildings or structures ***that are used for religious purposes or assembly*** by persons.

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court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Florida Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 902 n. 8 (Fla. 4th DCA 2010) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992).

[8] When a term is defined in a regulation, there is no ambiguity and a court does not have the authority to redefine it. *Baker v. State*, 636 So. 2d 1342, 1343-44 (Fla. 1994) ("Where the legislature has used particular words to define a term, the courts do not have the authority to redefine it.") (internal citation omitted); *see, BDO Seidman, LLP v. Banco Espirito Santo Intern., Ltd.*, 26 So. 3d 1, 3 (Fla. 3d DCA 2009); *cf.*, *Barco v. School Bd. of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008) (When a term is not otherwise defined within a statutory scheme, "[i]t is appropriate to refer to dictionary definitions when construing" its meaning.).

City Code § 28-2 (emphasis added). The plain language of § 28-2 encompasses museums – and, especially, a facility such as the My Israel Center – as an area where people assemble for cultural and religious purposes. The facility plainly serves a "cultural" purpose as "relating to the habits, beliefs, and traditions of a certain people"[9] because it is designed for visitors to view exhibits about the traditions of Israel and the Jewish people. As an adjunct to the religious sanctuary, the exhibition space plainly serves a religious purpose as well.

There cannot be any serious dispute as to whether a museum such as the My Israel Center is an "area" where "people assemble" for "cultural ... and/or religious purposes." There is no ambiguity in these terms. Significantly, the circuit court did not hold that § 28-2 – or any provision of the City Code – was ambiguous, and Respondents even maintained that the City Code contained "clear and unambiguous language."[10] Yet the circuit court never considered whether the My Israel Center or museums in general fall within the plain meaning of the statutory definition of "place of public assembly."

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[9] *Cultural*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/cultural.

[10] App. 11, p. 9; *see, also*, *Id.*, p. 14 ("Applicant's Site Plan ... ignores the unambiguous language of the CITY's Code."); *Id.*, p. 16 (noting "the clear and unambiguous terms of the CITY Code").

Instead, the circuit court found it dispositive that the term "museum" was not listed in § 28-2 as an illustrative example of a "place of public assembly." The circuit court, however, failed to acknowledge that the list of examples is preceded by the phrase "includes but is not limited to." Courts considering such statutory language recognize that the specifically enumerated uses are illustrative rather than exhaustive. *See, e.g.*, *Pro-Art Dental Lab v. V-Strategic Grp.*, 986 So. 2d 1244, 1257 (Fla. 2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *Hicks v. State*, 890 So. 2d 459, 463 (Fla. 2d DCA 2004) (noting that the addition of the phrase "including, but not limited to" prevents a statutory enumeration from being "a list of specific prohibitions"). In fact, such statutory language indicates that the general category should not even be limited to items of the same kind as those specifically enumerated.[11] In other words, the phrase necessarily *enlarges* the category beyond the class of enumerated items. That said, it would be difficult to conclude that an

[11] *See, Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1202 (6th Cir. 1996) (explaining that "[n]umerous courts have found that the use of the words 'including, but not limited to,'" reflect an intent that the general words should not be construed "as applying only to things of the same general class as those enumerated"); *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir. 1995) ("[S]ince the phrase 'including, but not limited to' plainly expresses a contrary intent, the doctrine of *ejusdem generis* is inapplicable."); *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97, 104 (9th Cir. 1976) ("[T]he phrase 'including but not limited to' ... is often used to mitigate the sometimes unfortunate results of rigid application of the ejusdem generis rule.").

"exhibition hall"[12] is in a different class than a "museum"[13] – or even that the terms are conceptually distinct.[14]

Given that a museum falls squarely within the general definition of "place of public assembly" in City Code § 28-2, and that the "includes but is not limited to" language expands that definition beyond the enumerated items, it is apparent that the City and the property owner were correct that a museum is a "place of public assembly" and, therefore, a permissible use in the B-1 district.[15] By rejecting that interpretation, the circuit court ignored the clearly established principle that an ordinance be given its plain meaning and, therefore, failed to give effect to the ordinance. Statutes and ordinances "also constitute 'clearly established law,'" and for that reason "a district court can use second-tier certiorari to correct a circuit court

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[12] "[A] hall in which pictures, sculptures, or other objects of interest are displayed." *Exhibition hall*, COLLINS ENGLISH DICTIONARY, http://www.collinsdictionary.com/dictionary/english/exhibition-hall.

[13] "[A] place or building where objects of historical, artistic, or scientific interest are exhibited, preserved, or studied." *Museum*, COLLINS ENGLISH DICTIONARY, http://www.collinsdictionary.com/dictionary/english/museum.

[14] The distinction almost evaporates when considering the limited exhibition space devoted to the My Israel Center within the Religious Center.

[15] Even if there were some doubt about this conclusion, "doubts should be construed in favor of a property owner" (*Colonial Apartments*, 577 So. 2d at 598) and the City's interpretation of its own Code is entitled to deference (*BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998) ("[A]n agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous.")). Here, the circuit court rejected the interpretation on which both the City and the property owner agreed.

decision that departed from the essential requirements of statutory law." *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 727 (Fla. 2012); *see, also, Colonial Apartments*, 577 So. 2d at 596 (using second-tier certiorari to correct a circuit court decision that departed from "the rather straightforward pronouncement of the ordinance"). Such a correction is necessary here.

2. The Circuit Court's Attempt to Harmonize the City Code Provisions Ignores the Relevant Portions of the Code and Departs From the Essential Requirements of the Law.

Instead of giving effect to the plain meaning of City Code § 28-777 governing B-1 districts, the circuit court looked to other sections of the Code that purportedly distinguish between "places of public assembly" and "museums" and read that distinction back into § 28-777. As noted above, that approach was legally erroneous. But, even if it were appropriate to look beyond the plain language of § 28-777, the conclusion the circuit court drew from its analysis of the section governing the VC Village Center District (§ 28-1242) was contrary to the text of that provision as well. The circuit court found it significant that in enumerating the many permissible uses in the VC District, § 28-1242 lists "places of public assembly" in one clause and lists "museums" in a separate clause. This, according to the circuit court, proves that "museums" are not "places of public assembly" because if "museums" were part of that larger category, there would be no need to list "museums" separately. Whatever

surface appeal this reasoning may have at first glance, an examination of § 28-1242 quickly reveals that it is unfounded.

The premise of the circuit court's reasoning is that each of the individual permissible uses set forth in § 28-1242 are necessarily distinct – that there is no overlap or redundancy within the list. Yet, the very clause on which the circuit court relies reveals this is not the case. One item on the list is "[p]laces of public assembly." City Code § 28-1242(2)(e). That term is defined explicitly to include "any area, building or structure where people assemble for ... social ... purposes." City Code § 28-2. According to the circuit court's reasoning, then, § 28-1242 would never list "social centers" as a distinct item; "social centers" are already explicitly subsumed within "places of public assembly." Yet, despite the fact that "social centers" unambiguously qualify as "places of public assembly," § 28-1242 goes on to list "social centers" separately from "places of public assembly." It does so in the very same clause that lists "museums." *See*, City Code § 28-1242(2)(g) (listing "[m]useums, libraries, social centers").

There is no doubt, then, that the circuit court's core premise was wrong: § 28-1242 does, in fact, list separately a specific use that is otherwise covered by the general provision for "places of public assembly." Thus, whether "museums" are also listed separately provides no insight into whether museums do or do not constitute "places of public assembly."

In fact, multiple zoning provisions of the City Code list out separately some items that are also part of a larger listed category. For example, § 28-477, dealing with R-3-B Residential Districts, lists one permissible use as "homes, centers and schools for care, boarding or teaching of children." City Code § 28-477(d). As indicated, schools for the teaching of children are explicitly included in that section. Yet the section also lists "public, private and parochial nursery, kindergarten, elementary and high schools" as a separate permissible use. City Code § 28-477(f).

Similarly, § 28-847 lists the permissible uses in a B-4 General Business District. The first item on that list is "any use permitted in a B-2 district." City Code § 28-847(a). Those uses permitted in a B-2 district include "[p]ersonal service shops" and "[t]elecom web-hosting facilities. §§ 28-847(l) & (z). Under the circuit court's logic, there is absolutely no need for § 28-847 to include "personal service shops" and "telecom web-hosting facilities" as separate items on the list of permissible uses in a B-4 district. But the section does just that. *See*, City Code §§ 28-847(j) & (k).

These examples make clear that the drafters of the zoning ordinances did not choose to avoid overlap in categories. For that reason, the specification of an item in one clause does not suggest – much less prove – that the item is not also covered by a separate, more general clause. Once this feature of the City Code is

recognized, there is nothing left of the circuit court's reasoning, and it inescapably follows that the proper interpretative inquiry focuses exclusively on the plain language of the statutory definition of "places of public assembly."

3. The Circuit Court's Reading of the Parking Ordinances Similarly Distorts the City Code and Departs From the Essential Requirements of the Law.

The circuit court also based its decision on the fact that the City Code section dealing with parking has different minimum parking requirements for the specific use of "museums" versus the general category of "places of public assembly."[16] This, according to the circuit court, proves that museums do not constitute "places of public assembly." Here, again, this reasoning fails on examination of the operative section. Not surprisingly, the Code has several instances in which it sets

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[16] The general provision for places of public assembly requires "1 motor vehicle parking space for each 3 seats, plus 1 motor vehicle parking space for each 25 square feet of additional, gross floor area provided for public assembly purposes. ***If places of public assembly include accessory and/or related public assembly uses*** for which parking is required pursuant to this section 28-1655, ***parking shall be provided for all square footage***, including square footage utilized for accessory or additional uses on the parcel; ***provided, however, if such uses operate non-concurrently, minimum parking shall be determined based upon the maximum parking demand created by the non-concurrent use with the greater parking requirement.***" City Code § 28-1655(h) (emphasis added).

A separate provision, dealing only with museums, requires "1 motor vehicle parking space for each 500 square feet of gross floor area up to 5,000 square feet, plus 1 motor vehicle parking space for each additional 1,000 square feet, plus 1 motor vehicle parking space for each employee at maximum shift, plus 1 motor vehicle parking space for each 175 square feet of floor area for any museum store greater than 1,000 square feet of customer service area." City Code § 28-1655(gg).

parking requirements for a broad use category, but then carves out one particular use (otherwise included within the general category) for special parking requirements.

For example, § 28-1655(1)(p) sets forth the minimum parking requirements for "restaurants." There is no doubt that a "fast food restaurant" is a "restaurant," and, absent some specific provision setting forth other parking requirements, a "fast food restaurant" would be governed by the general "restaurant" requirements. In fact, though, the Code contains a separate set of minimum parking requirements for "fast food restaurants." *See*, City Code § 28-1655(q). Under the circuit court's reasoning, the specification of "fast food restaurants" necessarily means that "fast food restaurants" are not "restaurants." But if that were true, no fast food restaurant could ever operate at all; the Code lists "restaurants" as a permissible use but never lists "fast food restaurants." Plainly, then, the circuit court's analysis conflicts with the structure of the City Code and contradicts the intention of its drafters.

The "fast food restaurant" example shows that the Code's carving out of a particular use for specific parking requirements in no way suggests that the particular use is not otherwise part of the general use category. That is precisely the case here: that the Code includes specific requirements for "museums" in no way suggests that "museums" do not fit the broader definition of "places of public assembly."

This same structure is reflected in the Code's treatment of hospitals. Section 1655(1)(e) sets the minimum parking requirements for "hospitals." There is no question that a "mental hospital" generally qualifies as a hospital in the zoning code; otherwise, there could be no "mental hospitals" because there is no such permissible use other than the "hospital" use. Once again, however, the minimum-parking-requirement section of the Code treats "mental hospitals" differently. City Code § 28-1655(1)(f). That does not mean that "mental hospitals" are not "hospitals"; it simply means that one kind of "hospital" is treated differently for purposes of the minimum parking requirement.[17]

So, too, the fact that "museums" are singled out from other "places of public assembly" for minimum parking requirements in no way suggests that "museums" do not generally come under the definition of "places of public assembly." This realization not only exposes the defect in the circuit court's determination that "museums" are not "places of public assembly," it also reveals the flaw in the

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[17] Similarly, no zoning district specifically includes "furniture store" as a permitted use. A furniture store is authorized where the City Code permits "[r]etail sales and services" (City Code §§ 28-1242(1)(a) & (2)(b)), or "[c]ommercial and retail uses" (City Code § 28-1251.3(d)). Yet, the City Code mandates different parking requirements for "retail stores" than for "furniture stores." *Compare*, City Code § 28-1655(1)(u) (applying to "[r]etail stores, service agencies and brokerage firms"), *with* City Code § 28-1655(1)(v) (applying to "[f]urniture, motor vehicle salesrooms, wholesale stores"). Again, to apply the circuit court's logic would mean that "furniture stores" are not "retail stores" and, therefore, furniture stores are not allowed anywhere in Boca Raton.

circuit court's conclusion that there is some inherent inconsistency between the City recognizing that "museums" are "places of public assembly" under the zoning code permitted use list and recognizing that "museums" happen to be singled out within that category for special parking requirements. That determination is no more problematic than the City concluding that "mental hospitals" are "hospitals" for purposes of determining permissible uses, but are a distinct category for parking-requirement purposes. And it is exactly the same as the City concluding that a "fast food restaurant" qualifies as a "restaurant" for permissible-use requirements, but is treated as a separate subcategory for purposes of parking requirements.

Applying the circuit court's approach to the City Code, however, would render these provisions incoherent. By adopting an interpretative approach fundamentally at odds with the structure of the City Code, the circuit court departed from the essential requirements of that law.

C. CERTIORARI IS NECESSARY BECAUSE THE CIRCUIT COURT FAILED TO DEFER TO THE CITY'S REASONABLE INTERPRETATION OF ITS OWN REGULATIONS

Under Florida law, the circuit court was required to defer to the City's interpretation of its ordinances pursuant to the principle that an agency's interpretation of the statute it is charged with enforcing is entitled to deference and will be approved on appeal unless it is clearly erroneous. *BellSouth Telecomms.*, 708

So. 2d at 596. As this Court has explained, "a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration." *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). The failure to apply that deference standard is a legal error properly subject to reversal on second-tier certiorari review. *Kaklamanos*, 843 So. 2d at 890; *Jesus Fellowship*, 752 So. 2d at 709.

The circuit court concluded that the City's interpretation according to which a museum is a "place of public assembly" was clearly erroneous – though, as explained above, that conclusion conflicts with the plain language and structure of the City Code. The City's decision to interpret its zoning regulations in accordance with plain meaning and the recognition that its permissible-use categories sometimes overlap was unquestionably reasonable – and the circuit court erred by failing to defer to that reasonable interpretation.

With regard to the City's interpretation of its parking regulations, the circuit court did not even bother to find that the City's decision was clearly erroneous; it simply rejected the City's interpretation without applying the proper deference standard. According to the City's interpretation, parking regulations applicable to the more specific category of "museums" should control over parking regulations applicable to the more general category of "places of public assembly." That the specific controls the general is a clearly established rule of statutory interpretation.

See, e.g., *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms."); *State v. Leukel*, 979 So. 2d 292, 295 (Fla. 5th DCA 2008) ("A specific statute controls over a general statute."). It is hard to imagine what could be "clearly erroneous" about relying on this established principle.

As outlined above, the City Code contains many parking requirements for specific uses that are, for the purpose of determining permissible uses, part of more general categories of permissible uses under the zoning code. *See, supra,* Section B.3. For that reason, the circuit court was plainly wrong to conclude that the specification of parking requirements for "museums" implied that museums could not be considered "places of public assembly" for purposes of a permitted use list. It also means that the City's decision to apply the specific parking requirements for museums over the general parking requirements for places of public assembly was the only reasonable interpretation of the parking code.

In particular, City Code § 28-1655 lists a number of specific uses and provides for the rate or method of calculating the required off-street parking for each use. City Code § 28-1655(h) governs parking requirements for "places of public assembly." *See, supra,* n. 16. A more specific provision, City Code § 28-1655(gg), provides off-street parking requirements for "museums." *See, supra,* n. 16. The City

correctly applied both provisions. The City correctly applied § 28-1655(gg) to calculate the amount of parking spaces required for the museum component of the Religious Center because it is the more *specific* provision governing the minimum off-street parking requirements for that component – just as the parking rule for "fast food restaurants" applies even though there is a general parking rule for restaurants. *See*, *McKendry*, 641 So. 2d at 46.

As Deputy City Manager George Brown explained to the City Council, "In the parking code for the City ... there is a parking section for ... place of public assembly. In addition to that ... there's a specific call out for museum parking." (App. 10, p. 96.) The Deputy City Manager further noted that the City "looked upon the My Israel Center as a museum and there is a specific parking provision for museum that was applied to that." (App. 10, p. 97.)

If a component of a proposed use is a "museum," then parking for that component is properly calculated as a "museum." At the same time, the City properly applied the more general "places of public assembly" provision in § 28-1655(h) for the synagogue/sanctuary, daily chapel, and social hall components of the Religious Center because the City Code does not contain particularized provisions directed to parking requirements for these specific uses.

The City's interpretation is not only reasonable; it is plainly correct. The circuit court erred not only by failing to defer to that interpretation, but by imposing

an interpretation of the parking regulations contrary to the text. According to the circuit court, if the museum component of the Religious Center could be deemed a "place of public assembly" and, therefore, a permitted use within the B-1 district, it would necessarily follow that the parking regulation for "places of public assembly – and not the more specific regulation for "museums" – must apply to that component. That reading ignores the well-established principle that specific provisions control over general provisions – and it renders specific provisions of the parking code a nullity.

In short, the circuit court failed to apply the correct law and consequently departed from the essential requirements of law in its application of the parking regulations. The City's interpretation of its own City Code was not unreasonable or clearly erroneous and should have been upheld by the circuit court.

D. BY RELYING ON LEGAL THEORIES NOT CONTAINED IN RESPONDENTS' PETITION OR IN THE ADMINISTRATIVE PROCEEDINGS BELOW TO OVERTURN THE CITY COUNCIL'S APPROVAL OF THE APPLICATION, THE TRUST WAS DEPRIVED OF DUE PROCESS

The circuit court's decision must be reversed not only because it so clearly contradicts the operative law, but also because the Trust was never afforded the opportunity even to address (and conclusively refute) the argument that the circuit court found dispositive: the comparison to the listed permissible uses in the VC Village District. That argument was not raised by Respondents in their Petition for

Writ of Certiorari or in their Reply Brief. Nor was the argument raised by Respondents in the administrative proceedings over the site plan application. The Trust was substantially prejudiced by this denial of due process because it was deprived of the opportunity: (1) to object to the Court's improper resort to statutory construction principles in the face of an unambiguous ordinance; and (2) to explain that the listing of permissible uses in the VC Village Center District does not reflect a legislative attempt to distinguish between "places of public assembly" and "museums."

"An appellate court's reversal based on an unpreserved error, on a ground not argued in a brief, amounts to a denial of due process, which is a departure from a clearly established principle of law." *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 868-69 (Fla. 4th DCA 2012). The "tipsy coachman doctrine" permits an appellate court to *affirm* "on a ground other than that raised below, and argued on appeal, where there is support for the alternative theory ... in the record before the trial court." *Id.* at 869 (internal quotation marks omitted). But this Court has emphasized that "[t]he tipsy coachman doctrine does not permit a reviewing court to *reverse* on an unpreserved and unargued basis." *Id.* (emphasis added).

The Trust was prejudiced by the circuit court's attempt to construe B-1 zoning regulations by analyzing regulations contained in *another* zoning district for a

separate reason. Because the argument was first raised in the circuit court's final opinion, the Trust had no opportunity to make part of the record any materials relevant to how and when the City came to adopt the VC Village Center District regulations. Even if the argument set forth above relying on the text of the Code were not decisive, the Trust could have shown that the recent creation of the VC Village Center District does not alter the definition of "place of public assembly" in B-1 districts.[18]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari review and quash the Order of the circuit court.

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[18] *See*, Boca Raton, Fla., Ordinance No. 4908 (Feb. 28, 2006) (creating the VC Village Center District).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served pursuant to Rule 2.516, Fla. R. Jud. Admin., via eDCA Notice to John R. Eubanks, Jr. (jeubanks@blesmlaw.com), *Attorney for Respondents Royal Palm Real Estate Holdings, LLC, Royal Palm Properties, LLC and David W. Roberts*, 605 N Olive Avenue, Second Floor, West Palm Beach, FL 33401; and Diana Grub Frieser, City Attorney (dgfrieser@ci.boca-raton.fl.us), *Attorney for City of Boca Raton*, 201 W Palmetto Park Road, Boca Raton, FL 3343 on this 6th day of July 2016.

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