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

CASE NO. 1D21-____

KEVIN PETTWAY, JENNIFER WOLFE, NANCY MURREY-SETTLE, and FRED POPE,

Petitioners,

vs.

L.T. Case No. 2020-AP-3
(formerly 2016-CA-4872)

CITY OF JACKSONVILLE, a municipal corporation, and SALEEBAS-2216 OAK STREET, LLC,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI

BOBEK & BOBEK

Barry A. Bobek
Florida Bar No. 301272
barry@bobekandbobek.com
503 East Monroe Street
Jacksonville, Florida 32202
Telephone: (904) 632-2010

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
Dimitrios A. Peteves
Florida Bar No. 123903
dpeteves@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimle: (904) 503-0441

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Rules

Other Authorities

INTRODUCTION

The City of Jacksonville rezoned property in its historic Riverside neighborhood to allow construction of a 150-seat restaurant called The Roost. Petitioners live near the property and petitioned the circuit court for a writ of certiorari to quash the City's rezoning ordinance. The circuit court denied the petition, and Petitioners now seek second-tier certiorari review in this Court.

This Court should quash the circuit court's decision because the circuit court did not apply the correct law. Had it applied the correct law, the circuit court would have necessarily concluded that the ordinance violates both the City's zoning code and Florida caselaw regarding planned unit developments. This miscarriage of justice jeopardizes Petitioners' homes and qualities of life.

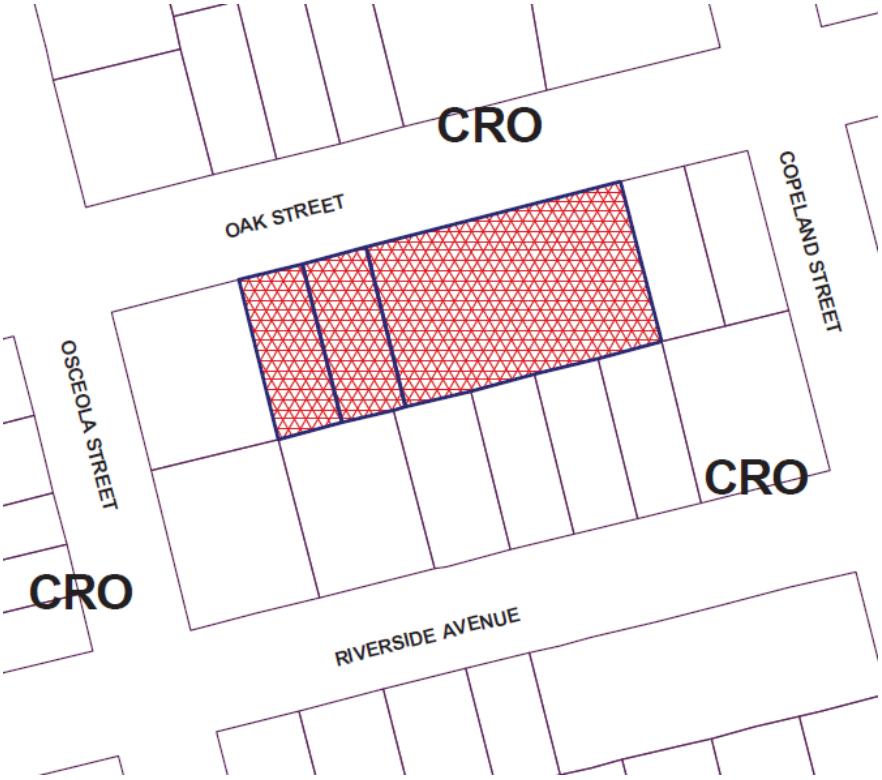
BASIS FOR JURISDICTION

Petitioners invoke this Court's certiorari jurisdiction to review the July 28, 2021 final order entered in the circuit court's review capacity. *See* Art. V, § 4(b)(3), Fla. Const.; Fla. R. App. P. 9.030(b)(2)(B). This petition, filed on August 26, 2021, is timely. *See* Fla. R. App. P. 9.100(c)(1).

STATEMENT OF THE CASE AND FACTS

A. The subject property.

The subject property is located at 2220, 2242, and 2246 Oak Street in Jacksonville, Florida. (A:41.) It is within the "Historical Residential Character Area of the Riverside/Avondale Zoning Overlay," as defined in the City's zoning code.[1] (A:41.) The property is owned by Saleebas-2216 Oak Street, LLC (Saleebas). (A:41.) The following image depicts the location of the property:



(A:291.)

[1] The City's code is available at: https://library.municode.com/fl/jacksonville.

B. Passage of Ordinance 2016-55-E.

In 2016, Saleebas applied to rezone the property from "commercial residential office" (CRO) to "planned unit development" (PUD). (A:41–54.) The purpose of the application was to expand an existing fitness center, build a 150-seat restaurant, and develop 3,000 square feet of office space. (A:41–42, 52.)

The Planning and Development Department recommended that the application be approved with twelve conditions. (A:272–91.) The department's report was forwarded to the Planning Commission. (A:272.) The commission also recommended that the application be approved, although with different conditions. (A:295–97.)

Petitioner Kevin Pettway then requested that the Land Use and Zoning Committee conduct a formal review of the application. (A:338–39, 356.) The council thus held a lengthy public hearing. (A:301–05.) And it, too, recommended that the application be approved, although again with different conditions. (A:305.)

The full City Council later met and voted to approve the application by passing Ordinance 2016-55-E. (A:188–89, 243–70.) The ordinance was finally rendered on June 20, 2016. (A:199, 349.)

C. Proceedings in the circuit court.

On July 20, 2016, Petitioners petitioned the circuit court for a writ of certiorari to quash the City's ordinance. (A:4–32.) Saleebas moved to intervene, which the court permitted. (A:182–87.)

The circuit court later dismissed the petition as untimely. (A:190–93.) However, this Court quashed the circuit court's decision and held that the petition was timely filed. (A:194–202.)

Saleebas then responded to the merits of the petition, and Petitioners filed a reply. (A:205–38, 306–30.) The City filed a motion to dismiss, to which Petitioners also responded. (A:370–79.)

The circuit court ultimately denied the petition on the merits. (A:381.) Petitioners timely moved for rehearing, thereby tolling rendition of the court's decision. (A:382–88); *see also* Fla. R. App. P. 9.020(h)(1)(B), 9.330(a)(1).

On July 28, 2021, the circuit court granted Petitioners' motion for rehearing and substituted a new decision in place of its prior decision. (A:389). Once again, however, the court denied the petition on the merits. (A:389.)

NATURE OF RELIEF SOUGHT

Petitioners ask this Court to quash the circuit court's July 28, 2021 decision denying their petition for writ of certiorari.

STANDARD OF REVIEW

This case is before this Court on second-tier certiorari review. Under existing precedent, "[t]he scope of [a] district court's review on second-tier certiorari is limited to whether the circuit court (1) afforded procedural due process, and (2) applied the correct law." *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003).

That said, Petitioners agree with Judge Brad Thomas that this precedent should be reconsidered in light of Article V, Section 21 of the Florida Constitution. *See Evans Rowing Club, LLC v. City of Jacksonville*, 300 So. 3d 1249, 1250–54 (Fla. 1st DCA 2020) (B.L., Thomas, J., concurring specially) (explaining that "the current deferential and restrictive review of second-tier certiorari cases involving local land use decisions should be replaced with plenary de novo review"); *accord Neptune Beach FL Realty, LLC v. City of Neptune Beach*, 300 So. 3d 140, at *1–3 (Fla. 1st DCA 2020) (unpublished) (B.L., Thomas, J., concurring specially). Petitioners therefore adopt

Judge Thomas's reasoning in his *Evans* concurrence. If this Court concludes that it must deny this petition because of the standard of review, Petitioners request that this Court pass upon and certify a question of great public importance as proposed by Judge Thomas in *Evans*, or a question determined by this Court.

ARGUMENT

This Court should grant certiorari because (I) the circuit court did not apply the correct law, and (II) the circuit court's decision results in a miscarriage of justice.

I. The circuit court did not apply the correct law because it denied the petition despite the City's failure to apply the correct law.

On first-tier certiorari review of a zoning decision, the circuit court must determine whether the local government observed "the essential requirements of the law"—that is, whether it "applied the correct law." *See Miami-Dade*, 863 So. 2d at 198–99; *accord Haines v. City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). "Although termed 'certiorari' review, review at this level is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000).

Accordingly, if a local government does not apply the correct law when it passes a zoning ordinance, and the circuit court denies a petition to quash the ordinance on that basis, the circuit court fails to apply the correct law. *E.g.*, *Saadeh v. City of Jacksonville*, 969 So. 2d 1079, 1082–83 (Fla. 1st DCA 2007) (holding that the circuit court departed from the essential requirements of the law because it denied a petition to quash a rezoning ordinance that was inconsistent with the City of Jacksonville's comprehensive plan); *Alvey v. City of North Miami Beach*, 206 So. 3d 67, 69–70 (Fla. 3d DCA 2016) (explaining that the circuit court "must have applied the wrong law" because it denied a petition to quash a city resolution for which "the City failed to consider and apply its own Code"). That is exactly what happened here. Specifically, the City did not apply the correct law as to restaurants and parking, but the circuit court nonetheless denied Petitioners' petition to quash the City's ordinance.

A. The City did not apply the correct law as to restaurants.

The City's planning department acknowledged that a restaurant "is not permissible by right or by Zoning Exception in the Historic Residential Character Area." (A:62.) Indeed, the zoning code does not

list a restaurant as one of the few permitted uses or even a use by exception in Historic Residential Character Areas. *See* Jacksonville, Fla., Code § 656.399.18. Significantly, this is not an omission by oversight. The same section allows restaurants in "Office, Commercial, and Urban Transition Character Areas"—which the property does not occupy—but even then only up to 60 seats. *Id.* § 656.399.18(II)(d)(9).

Nevertheless, despite the undisputed fact that the property is in a Historic Residential Character Area (A:41), the City allowed Saleebas to construct a 150-seat restaurant on the property. In doing so, the City did not apply the correct law.

To begin, the City did not apply section 656.399.18, which lists the permitted and excepted uses for Historic Residential Character Areas. A restaurant—let alone a 150-seat restaurant—is not a listed use; thus, it was necessarily prohibited. *E.g.*, *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017) ("Under the canon of construction *expressio unius est exclusio alterius*, we conclude that the Legislature purposefully excluded items not included in a list."); *Okposio v. Barry Univ. (Main Campus)*, 252 So. 3d 1290, 1292 (Fla. 1st DCA 2018) (concluding that "the Legislature purposefully

excluded libraries from the definition of 'public accommodations' by not including them therein"); *see also generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012) ("[T]he principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression.").

Petitioners are not aware of any provision in the City's zoning code that would allow the City to ignore section 656.399.18. In fact, the code provides that "[i]n the event a court . . . determines that there is an irreconcilable conflict or inconsistency between the Zoning Code and [the Riverdside/Avondale Zoning Overlay] *the more restrictive condition* or term most closely associated with the remedial purpose of [the zoning overlay] shall be construed to apply where lawfully possible." Jacksonville, Fla., Code § 656.399.18 (emphasis added). Section 656.399.18 is within the zoning overlay, which controls any less-restrictive provision.

Saleebas's attorney, Steve Diebenow, suggested in a memorandum to the City's planning department that a restaurant was a permissible use because "[planned unit developments] permitting restaurants exist in the Riverside/Avondale Historic

District today." (A:83 (footnote omitted).) But "two wrongs do not make a right." *Mondy v. Mondy*, 428 So. 2d 235, 238 (Fla. 1983). Moreover, Mr. Diebenow conceded that the examples he cited were "prior to the adoption of the Overlay." (A:83 n.16.) Because section 656.399.18 is a condition of the zoning overlay, any like uses prior to the adoption of the overlay are irrelevant.

Regardless, even if a restaurant was somehow rendered a permissible use by rezoning the property to a planned unit development, the City still did not apply the correct law. As this Court explained in *Saadeh*, the City's zoning code "does not permit a property owner to pursue development, through a PUD District, that is inconsistent with the types of uses generally allowed in the land use category." 969 So. 2d at 1085. That is precisely what the City did here. (*See* A:168, testimony of Saleebas's expert witness, Michael Saylor ("[W]hen we enact a PUD . . . we start with a clean slate. . . . In a way, we do make it up as we go.").)

B. The City did not apply the correct law as to parking.

The City's ordinance incorporates Saleebas's written description for the property, which states that the property will have 59 parking spaces. (A:35, 42.) This includes 24 on-street parking spaces and 35

off-street parking spaces. (A:42.) Yet, the City's zoning code requires a minimum of 80 spaces—all of which must be *off*-street.

As stated in the zoning code, the fitness center and office space must have at least three parking spaces for every 1,000 square feet of gross floor area. Jacksonville, Fla., Code § 656.604(f)(1). Further, the restaurant must have at least one parking space for every four patron seats plus one parking space for every two employees on a peak hour shift. *Id.* § 656.604(d)(2). Accordingly, the number of parking spaces is calculated as follows:

Property	**Spaces**
Building 1 (existing fitness center)	
$\frac{6{,}588 \text{ sq. ft}}{1{,}000 \text{ sq. ft}} \times 3 \text{ spaces}$	19.8
Building 2 (expansion of fitness center)	
$\frac{2{,}000 \text{ sq. ft}}{1{,}000 \text{ sq. ft}} \times 3 \text{ spaces}$	6
Building 2 (restaurant):	
$\frac{150 \text{ seats}}{4} + \frac{14 \text{ employees}}{2}$	44.5
Building 3 (office space):	
$\frac{3{,}000 \text{ sq. ft}}{1{,}000 \text{ sq. ft}} \times 3 \text{ spaces}$	9
Total (rounded up)[2]:	**80**

[2] "[T]he fraction equal to or greater than one-half shall require a full off-street parking or loading space." Jacksonville, Fla., Code § 656.603(g).

The correctness of these calculations is undisputed. After all, these same calculations are found both in the planning department's report and Saleebas's written description. (A:45–46, 71–72.) What's more, because the property is in a Historic Residential Character Area, all 80 of the parking spaces must be off-street. Jacksonville, Fla., Code § 656.399.13(4) ("All parking requirements in Historic Residential Character Areas shall be met *on site*." (emphasis added)). The department therefore acknowledged that "if the identical project were developed new on a greenfield site from the ground up, a total of 80 off-street parking spaces would be required." (A:72.)

Nevertheless, the City ignored the off-street parking requirement and ultimately concluded that fewer parking spaces were required based on section 656.603(a)(1) of the zoning code. (*See* A:70–71.) That section states: "Conforming buildings and uses existing as of September 5, 1969, may be modernized, altered or repaired without providing additional off-street parking or off-street loading facilities if there is no increase in area or capacity." Jacksonville, Fla., Code § 656.603(a)(1).

The problem with the City's analysis is that the City did not apply the correct law. There were no conforming buildings and existing uses, so section 656.603(a)(1) was inapplicable by its plain terms.[3] Indeed, the department correctly noted that the property had been "largely vacant" since the mid-1990s. (A:62.)

Accordingly, the correct law to apply is section 656.399.13(5), which states: "Non-conforming site characteristics such as number of parking spaces and landscaping requirements for non-residential uses that are located in a Historic Residential Character Area shall be required to bring the existing non-conforming site characteristics into compliance upon reoccupation of the structure when such use ceases for more than 6 months." Jacksonville, Fla., Code § 656.399.13(5). In other words, because the property is in a Historic

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[3] To be sure, Building 1 was being used as a fitness center when Saleebas applied to rezone the property. But it was not conforming—section 656.399.13(4) requires that all parking spaces be *off*-street, and the fitness center has only *on*-street parking. (*See* A:46 (noting only eighteen "existing on-street parking [spaces").) The planning department similarly acknowledged that the fitness center failed to comply with a condition governing its use. (A:62.)

In any event, the fitness center accounts for only 26 of the 80 spaces. *Supra*, § I.B., at 11. That still leaves a required 54 spaces, all of which must be off-street.

Residential Character Area and had been largely vacant for more than 6 months, it must be brought into compliance with applicable parking rules. Here, the applicable parking rules require the property to have 80 off-street parking spaces. *Supra*, § I.B., at 11–12.

To the extent there was any doubt about the interrelation of these two provisions, the code makes clear that section 656.399.13(5) controls. *See* Jacksonville, Fla., Code § 656.399.15 ("[T]he parking requirements of this Zoning Overlay shall supersede any conflicting parking requirements set forth in Part 6 of the Zoning Code."). Further, as the code makes clear, parking requirements in Historic Residential Character areas must be "strictly enforced." *Id.* § 656.399.13(2).

In sum, the City did not apply the correct law as to parking. The correct law is section 656.399.13(5)—not section 656.603(a)(1). Had it applied the correct law, the City would have required the property to provide 80 off-street parking spaces.

II. The circuit court's error results in a miscarriage of justice.

"The departure from the essential requirements of the law necessary for granting a writ of certiorari is something more than a simple legal error." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So.

3d 1086, 1092 (Fla. 2010). "Rather, a district court should exercise its discretion to grant review only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Id.*

As this Court previously noted, "[t]he phrase 'miscarriage of justice' as it applies in a zoning case has not been expressly defined." *City of Jacksonville v. Taylor*, 721 So. 2d 1212, 1214 (Fla. 1st DCA 1998), *review denied*, 732 So. 2d 328 (Fla. 1999). After reviewing prior caselaw, this Court suggested that—at least with respect to zoning decisions—"the failure to apply the correct law. . . by itself, constitute[s] a miscarriage of justice." *Id.* This Court therefore found a miscarriage of justice where the circuit court's "statement of the law [was] not consistent with the local zoning ordinance." *Id.* at 1214. Here, too, the circuit court's decision results in a miscarriage of justice because it is not consistent with the City's zoning code.

The Florida Supreme Court has also indicated that "the gravity of the error and the adequacy of other relief" factor in to whether a miscarriage of justice exists. *Custer*, 62 So. 3d at 1092 (citation and emphasis omitted). Here, Petitioners have no other avenue for relief.

Further, the circuit court's error is particularly grave because it jeopardizes Petitioners' homes and qualities of life.

"The sanctity of the citizen's home is a basic tenet of Anglo–American jurisprudence . . . ." *Jardines v. State*, 73 So. 3d 34, 45 (Fla. 2011). Indeed, "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (citation omitted). Courts should therefore be "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *See U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 501 (1994). Simply put, "[n]othing is more sacred to one than his home." *Wags Transp. Sys. Inc. v. City of Miami Beach*, 88 So. 2d 751, 752 (Fla. 1956).

Petitioners all live near the property at issue in this case. Their homes are within one block of the property. (A:351–57, 367–69.) Petitioner Kevin Pettway even lives directly across from the property—"facing the site in question" and only 43 feet away. (A: 355, 367.)

Like others, Mr. Pettway acknowledged that "noise, odor, congestion, and parking difficulties . . . will inevitably result from a

large restaurant on a residential street." (A:356.) Specifically, he noted that the proposed restaurant will have two dumpsters behind it, emphasizing the horrible odors they will emit. (A:367 ("I'm pretty sure, anybody who has walked behind a restaurant in Florida, in the summer, knows what that smells like. . . . There is very little that will affect a person's qualify of life more than the stench of rotting food.").)

Mr. Pettway also identified the noise issues that will result from increased traffic, garbage removal, and patrons of the restaurant:

> At 6:30 every morning, including weekends, we will see the arrival of a dramatically increased number of cars and people, disrupting the lives and sleep of nearby residents. Crashing dumpsters from waste removal will jolt residents awake, while slamming car doors, noisy patrons, and delivery trucks parked in the Oak Street thoroughfare will keep them that way.
>
> According to the DOT, that's 725 arrivals and departures a day or 5,075 a week that we will be listening to, with every dog in hearing announcing each and every one from morning until midnight. And come midnight, we can also look forward to happy, intoxicated and loud patrons, not only in the parking lot, but also moving through our streets as they return to their automobiles while the rest of us try to sleep.

(A:367.)

Mr. Pettway further emphasized the parking issues in the area. He noted that "the stretch of Oak Street . . . completely fills with

parked cars due to the customers of [the fitness center] and the tenants who live in the many multifamily homes." (A:367.) As a result, people regularly park in Mr. Pettway's driveway. (A:367.) Saleebas's development of the property will only cause more problems for residents, "who will no longer be able to find parking near their homes." (A:367.) Mr. Pettway also noted that the lack of convenient parking will lead to a reduction in property values. (A:367.)

Another resident, Bonnie Pope, explained that parking became such an issue when the fitness center was first developed that people began parking on her lawn. (A:369.) In fact, she had "several cars at one time parked on [her] lawn." (A:369.)

Petitioner Jennifer Wolfe touched on the issue of predictability. (A:368.) She noted that she "bought in a CRO area," and she expected "that a CRO is going to stay CRO and that the laws and the coding and the ordinances of a CRO will be retained." (A:368.) She did not expect to be "subjected to a 150-seat, overly intense, full bar, outside seating, 32 outside seats [restaurant]." (A:368.)

Courts have likewise emphasized the issue of predictability when it comes to zoning. As the Florida Supreme Court long ago

explained, residents have a "right to continuation" of the zoning conditions that existed when they bought their homes "in the absence of a showing that the change requisite to an amendment had taken place." *Hartnett v. Austin*, 93 So. 2d 86, 90 (Fla. 1956). Local governments that fail to apply their zoning laws "not only disregard valid laws, they deprive others living in the neighborhood and surrounding areas of the valid application of ordinances that ensure the landscape of the neighborhood is kept in conformity with orderly growth and development." *Wolk v. Bd. of Cnty. Comm'rs*, 117 So. 3d 1219, 1224 (Fla. 5th DCA 2013).

In a recent zoning case, this Court held that a miscarriage of justice occurs when a person "complies with the law in seeking to utilize the highest and best use of their property, and the governing authority refuses to apply the correct law to thwart the citizen so as to deprive him of the ability and right to enjoy the lawful highest and best use of his land." *Surf Works, L.L.C. v. City of Jacksonville Beach*, 230 So. 3d 925, 930 (Fla. 1st DCA 2017). The opposite is also true. That is, where a governing authority refuses to apply the correct law in granting a rezoning application, a miscarriage of justice occurs

because the neighboring residents are deprived of their expectations regarding their homes and qualities of life.

In conclusion, district courts have broad "flexibility and discretion" to determine when an error is serious enough to result in a "miscarriage of justice." *See Haines*, 658 So. 2d at 530–31; *accord Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 727 (Fla. 2012). This Court should exercise that discretion here to hold that the circuit court's error results in a miscarriage of justice because it jeopardizes Petitioners' homes and qualitifes of life.

CONCLUSION

This Court should grant this petition and quash the circuit court's July 28, 2021 decision. If this Court concludes that it must deny this petition because of the standard of review, Petitioners request that this Court pass upon and certify a question of great public importance as proposed by Judge Thomas's concurrence in *Evans*, 300 So. 3d at 1254, or such other question determined by this Court. *See* Art. V, § 3(b)(4), Fla. Const.

CREED & GOWDY, P.A.

/s/ Dimitrios A. Peteves
Bryan S. Gowdy
Florida Bar No. 176631
bgowdy@appellate-firm.com
Dimitrios A. Peteves
Florida Bar No. 123903
dpeteves@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimle: (904) 503-0441
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the word count limitation of Rule 9.100, Florida Rules of Appellate Procedure, in that it contains 3,803 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/ Dimitrios A. Peteves
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed with the Clerk of Court on August 26, 2021, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

Zachary Miller
zach_miller@bellsouth.net
Paul M. Harden
paul_harden@bellsouth.net
jennifercherry@bellsouth.net
LAW OFFICES OF PAUL M. HARDEN
501 Riverside Avenue, Suite 901
Jacksonville, Florida 32202
Telephone: (904) 396-5731
Attorneys for Saleebas-2216 Oak Street, LLC

Steven Diebenow
sdiebenow@dmphlaw.com
DRIVER, MCAFEE, PEEK & HAWTHORNE
1 Independent Drive Suite 1200
Jacksonville, Florida 32202
Telephone: (904) 982-4425
Attorney for Saleebas-2216 Oak Street, LLC

Jason Teal
jteal@coj.net
Craig Feiser
cfeiser@coj.net
OFFICE OF GENERAL COUNSEL,
CITY OF JACKSONVILLE
117 W. Duval Street, Suite 480
Jacksonville, Florida 32202
Telephone: (904) 630-1700
Attorney for City of Jacksonville

M. Scott Thomas
MSThomas@burr.com
Rachel Cocciolo
RCocciolo@burr.com
MSalinas@burr.com
BURR & FORMAN, LLP
50 N. Laura Street, Suite 3000
Jacksonville, Florida 32202
Telephone: (904) 232-7200
Attorneys for Saleebas-2216 Oak Street, LLC

Hon. Meredith Charbula
smeeks@coj.net
DUVAL COUNTY COURTHOUSE
501 W Adams Street, Room 7062
Jacksonville, FL 32202-7062
Telephone: 904-255-1279

Hon. Tatiana Radi Salvador
tsalvador@coj.net
DUVAL COUNTY COURTHOUSE
501 W Adams St Rm 7004
Jacksonville, FL 32202-7004
Telephone: 904-255-2400

/s/ Dimitrios A. Peteves
Attorney