Case No. SC06-1204

IN THE SUPREME COURT OF FLORIDA

ELIZABETH J. NEUMONT, et al.,
Plaintiffs/Appellants,

v.

STATE OF FLORIDA and
MONROE COUNTY, FLORIDA,
Defendants/Appellees.

On Certification from the United States
Court of Appeals for the Eleventh Circuit
Case No. 04-13610

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ISSUE PRESENTED FOR REVIEW

As set out below, the case comes to this Court on certification from the United States Court of Appeals for the Eleventh Circuit. The one issue presented for review is the following question certified by the Eleventh Circuit:

> Whether, for purposes of Florida Statutes section 125.66(4)(b), a "substantial or material change" in a proposed ordinance during the enactment process (that is, the kind of change that would require a county to start the process over) is confined to a change in the "original general purpose" of the proposed ordinance, or whether a substantial or material change includes (1) a change to the "actual list of permitted, conditional, or prohibited uses within a zoning category," or (2) a change necessary to secure legislative passage of the ordinance?

Appendix ("App.") A at 6 (attached hereto), *reprinted in Neumont v. Florida*, 451 F.3d 1284, 1287 (11th Cir. 2006) (per curiam).[1]

STATEMENT OF THE CASE

The following part sets forth (A) the nature of the case, (B) the course of proceedings and disposition in previous tribunals, and (C) the statement of facts.

A. Nature of the Case.

In this action, Plaintiffs/Appellants Elizabeth J. Neumont and all others similarly situated ("Plaintiffs") attack Monroe County Ordinance 004-1997 under both federal and Florida law. With respect to federal law, Plaintiffs claim that Ordinance 004-1997 (which generally bans short-term vacation rentals of property in Monroe County) was enacted in a manner that deprived Plaintiffs of their property without due process of law, was prematurely enforced in the same manner, and (both on its face and as applied) effected a taking of private property without just compensation —all in violation of the Fourteenth Amendment to the United States Constitution. *See* Record Excerpts in the United States Court of Appeals for the Eleventh Circuit ("R.E.") Tab B at 26-27, 30-34, 39-43 (Second Amended Complaint).[2]

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[1] As exemplified by this citation, materials found in the attached Appendix are cited by tabbed exhibit letter and internal page number.

[2] As exemplified by this citation, materials found in the Record Excerpts filed in the Eleventh Circuit are cited by tabbed exhibit letter and internal page number.

With respect to Florida law, Plaintiffs claim that Ordinance 004-1997 is void ab initio because it was enacted in violation of Florida Statutes § 125.66(4)(b) (2005); that the Ordinance was prematurely enforced (before March 16, 2000) in violation of Florida Statutes § 380.05(6) (2005); and that Monroe County's ban on short-term vacation rentals (of which Ordinance 004-1997 was the last in a series of implementations) effected a taking of private property without just compensation in violation of Article X, § 6(a) of the Florida Constitution. *See* R.E. Tab B at 21-22, 35-39.

As the case comes to this Court on certification from the Eleventh Circuit, it involves only the issue whether enactment of Ordinance 004-1997 violated Florida Statutes § 125.66(4)(b). *See supra* p. 1.

B. Course of Proceedings and Disposition in Previous Tribunals.

Plaintiffs filed this class action on May 21, 1999 in the United States District Court for the Southern District of Florida. *See* R.E. Tab A (Docket Entry 2). In the first two years of proceedings, the district court dismissed Defendant/Appellee State of Florida as a party and granted class certification to Plaintiffs. *See id.* (Docket Entry 62); *Neumont v. Florida*, 198 F.R.D. 554 (S.D. Fla. 2000).[3] During this period, Plaintiffs learned through discovery that Monroe County had published and considered multiple drafts of what became Ordinance 004-1997, and that these drafts were

[3] Because the State of Florida did not further participate in this case after being dismissed in 2000, this brief will not again refer to the State.

inconsistent with one another in crucial respects; for example, vacation rentals were changed from permitted to prohibited uses (or vice versa) within zoning categories. Subsequently, Plaintiffs filed a Second Amended Complaint against Monroe County alone, asserting the various federal and state claims set forth above. The complaint sought declaratory relief, injunctive relief, and money damages as to all claims.

The action then moved on to several rounds of summary judgment proceedings. In one that culminated in an order filed on May 21, 2003, the district court rejected Plaintiffs' claim that Ordinance 004-1997 is void ab initio because the process of its enactment violated Florida Statutes § 125.66(4)(b). *See generally* R.E. Tab F, *reprinted in Neumont v. Monroe County*, 280 F. Supp. 2d 1367 (S.D. Fla. 2003). As relevant here, the court ruled that Monroe County had complied with the statute because "there were no substantial or material changes made to the Ordinance" during the enactment process. *Id.* at 11. In various other rounds, the district court granted summary judgment to Monroe County on all of Plaintiffs' remaining claims, federal and state. *See* R.E. Tab E, *reprinted in Neumont v. Monroe County*, 242 F. Supp. 2d 1265 (S.D. Fla. 2002); R.E. Tab G. Based on these summary judgment rulings, the district court dismissed Plaintiffs' complaint with prejudice and entered a final judgment in favor of Monroe County on June 21, 2004. *See* R.E. Tab D.

In their ensuing appeal to the United States Court of Appeals for the Eleventh Circuit, Plaintiffs immediately moved to certify to this Court two questions—one as

to Florida Statutes § 125.66(4)(b) and the other as to Florida Statutes § 380.05(6)—pursuant to Article V, § 3(b) of the Florida Constitution. *See* Appellants' Motion to Certify State-Law Questions to the Florida Supreme Court and to Postpone Briefing Pending Certification at 2, 20 (filed Sept. 17, 2004). In addition to the question that was actually certified, Plaintiffs sought to certify the following question:

> Whether, for purposes of Florida Statutes § 380.05(6), a "challenge to the [state land planning agency's final] order is resolved pursuant to chapter 120" upon completion of *administrative* review, or whether a challenge is resolved pursuant to chapter 120 only upon exhaustion of later *judicial* review pursuant to Florida Statutes § 120.68.

The Eleventh Circuit ordered that Plaintiffs' motion to certify be carried with the case, and so the parties duly filed their briefs on the merits and orally argued the matter. The Eleventh Circuit issued its opinion on June 14, 2006, granting Plaintiffs' motion to certify with respect to Florida Statutes § 125.66(4)(b):

> Among their claims, Plaintiffs contend that Monroe [County] violated Florida Statutes section 125.66 when it made changes to the Ordinance during the enactment process. Because no controlling Florida Supreme Court authority seems to exist on this question, we certify the issue to the Florida Supreme Court.

App. A at 3 (footnotes omitted); *see also supra* p. 1 (quoting certified question).[4]

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[4] In this part of its opinion, *see* App. A at 3 n.2, the Eleventh Circuit observed that the Second Amended Complaint, *see* R.E. Tab B at 37-39, inadvertently referred to § 166.041 rather than to § 125.66. The parties long ago corrected this "scrivener's error" by an agreed-upon order, *see* R.E. Tab A (Docket Entry 149), and the district court well understood that Plaintiffs were relying on § 125.66 as the statutory basis for their claim that Ordinance 004-1997 was void ab initio, *see* R.E. Tab F at 8-15.

C. Statement of Facts.

As is apparent from the foregoing, this action "focuses on a Monroe County Ordinance (Ordinance 004-1997)." R.E. Tab E at 1. The Ordinance was adopted on February 3, 1997 and enforced in earnest beginning the following year; it confirms "restrictions on certain uses of property as vacation rentals." *Id.* at 2; *see also* App. A at 2. Plaintiffs are a certified class of "property owners in Monroe County subject to the Ordinance." R.E. Tab E at 2. Although Plaintiffs originally named the State of Florida as a defendant, they now seek relief solely against the County. As they relate to the certified question and the enactment of the Ordinance, the relevant facts (which are largely a matter of public record) were distilled by the district court into twenty-seven undisputed facts. *See* R.E. Tab F at 3-8. Following are the highlights; a chart detailing the twists and turns of the enactment process outlined below may be found in Appendix B hereto.

Monroe County first publicly advertised the proposed ordinance, as required by Florida Statutes § 125.66(4)(b)(2), on November 7-9, 1996; at that time (and until the first hearing on December 10, 1996) the only version of the ordinance available for public review was a draft dated September 17th. *See* R.E. Tab F at 5 (Undisputed Facts 6-10). The version actually considered at the first hearing in December was not completed until that day, and it was not distributed to the county commissioners until after the hearing began—or to the public until the next day. *See id.* (Undisputed

Fact 10); App. C at 24:24-25:5. The December 10th draft differed from the September 17th draft in many respects vis-à-vis zoning categories, including the fact that the earlier one "prohibited vacation rentals in some select [zoning] districts and allowed an option to create[] a sub-district where vacation rentals would be *permitted*," while the later draft "*eliminated* the sub-district option." R.E. Tab F at 6 (Undisputed Fact 11(b)) (emphasis added). As the Eleventh Circuit observed, at their first hearing, the county commissioners "discussed a different and previously unavailable draft of the Ordinance, which substantially added to the quantity of regulations and the difficulty of meeting the Ordinance's regulatory burdens." App. A at 4.

The second hearing, which took place on February 3, 1997, considered yet another version of the proposed ordinance, namely, a draft dated January 29th but not made available to the public until January 31st; the hearing also considered—and the county commissioners ultimately adopted—additional changes found on a so-called "Errata Sheet" that was not made available to the public until the hearing. *See* R.E. Tab F at 5-7 (Undisputed Facts 4, 14-16); *see also* App. A at 4 (observing that at the second hearing, the county commissioners "discussed a draft of the Ordinance which was unavailable to the public until three days before the hearing" and "also considered and adopted at the hearing certain previously unpublished changes to the draft Ordinance, including an additional prohibition against vacation rentals in the Commercial Fishing Residential District").

Ordinance 004-1997 was officially enacted at the second hearing after further changes to zoning categories were made as a result of exchanges among the county commissioners after the close of all public discussion. *See* R.E. Tab F at 7-8 (Undisputed Facts 20-25). The differences between the Ordinance as officially enacted and earlier drafts made available to the public included the following significant changes to various zoning categories: (1) although earlier drafts *permitted* vacation rentals in "Sparsely Settled Residential Districts," the enacted version *prohibited* such rentals; (2) although earlier drafts made *no mention whatever* of the "Commercial Fishing Residential District," the enacted version *prohibited* vacation rentals in that district; and (3) although earlier drafts expressly *permitted* vacation rentals in thirteen of the twenty-two "Commercial Fishing Districts," the enacted version *dropped all references* to such districts. *See id.* at 7-8 (Undisputed Facts 20-27); App. A at 4; App. B.

SUMMARY OF ARGUMENT

Under Florida Statutes § 125.66(4)(b), a county ordinance is subject to special notice requirements if it proposes to change the "actual list of permitted, conditional, or prohibited uses within a zoning category." When an ordinance of this kind undergoes changes during the lengthy enactment process prescribed by statute, a county must begin the enactment process anew if the changes are "substantial or material."

1. A "substantial or material change" in a proposed ordinance during the enactment process includes any change that would trigger the application of Section

125.66(4)(b) in the first place, namely, a change to the "actual list of permitted, conditional, or prohibited uses within a zoning category." This conclusion is consistent with judicial precedent recognizing that to prohibit what was previously permitted is to change the use of property "substantially." This conclusion is also consistent with the legislative history of Section 125.66, as it was comprehensively revised in 1995. Finally, this conclusion is compelled by procedural due process considerations, because a rule under which a county could advertise and hold hearings regarding one particular change to permitted or prohibited uses within a zoning category—and then actually enact different changes to those uses—would render the constitutionally required "notice" worthless and the "opportunity" to be heard illusory.

2. A "substantial or material change" in a proposed ordinance during the enactment process also includes any change necessary to secure legislative passage of the ordinance. Such a change is by definition a cause-in-fact of passage, and (as tort law recognizes) a factor that *causes* a result is necessarily a "*substantial* factor."

3. A "substantial or material change" in a proposed ordinance during the enactment process cannot be confined to a change in the "original general purpose" of the ordinance. That standard, proposed in a 1982 opinion of the Florida Attorney General, cannot be reconciled with the text of Section 125.66(4)(b) or the decisions of the courts of Florida and other jurisdictions, none of which uses the term *purpose*. Finally, a *purpose*-based standard provides no real notice or opportunity to be heard.

ARGUMENT

As comprehensively amended in 1995, Florida Statutes § 125.66(4) now provides in relevant part:

> Ordinances or resolutions that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances or resolutions initiated by the county that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure:
>
> . . . .
>
> (b) In cases in which the proposed ordinance or resolution changes the actual list of permitted, conditional, or prohibited uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more, the board of county commissioners shall provide for public notice and hearings as follows:
>
> 1. The board of county commissioners shall hold two advertised public hearings on the proposed ordinance or resolution. . . .
>
> 2. The required advertisements shall be [of specified size, placement, and form].
>
> 3. In lieu of publishing the advertisements set out in this paragraph, the board of county commissioners may mail a notice to each person owning real property within the area covered by the ordinance or resolution. . . .

As the Eleventh Circuit recognized, Section 125.66(4)(b) imposes "notice requirements for proposed ordinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category." App. A at 5; *see also* R.E. Tab F at 4 (Undisputed Fact 3) ("Each Monroe County Land Use District is a 'zoning category'

within the meaning of § 125.66(4).”). Under Florida law, “strict compliance with the notice requirements of the state statute is a jurisdictional and mandatory prerequisite to the valid enactment of a zoning measure,” such that “[f]ailure to follow the state statutory notice requirements render[s] a zoning ordinance void.” App. A at 5; *see also, e.g., Webb v. Town Council*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000) (citing, *inter alia*, *Ellison v. City of Fort Lauderdale*, 183 So. 2d 193, 195 (Fla. 1966)).

The federal courts agreed with the parties that Ordinance 004-1997 is subject to these notice requirements. *See* App. A at 4; R.E. Tab F at 4-5 (Undisputed Facts 3-4). The federal courts also agreed with the parties that “under Florida law, Monroe [County] would be required to renew the enactment process if ‘substantial or material changes’ were made to the Ordinance during the enactment process.” App. A at 5; *see also* R.E. Tab F. at 9. But the parties dispute, and the federal courts were unable to resolve, just what constitutes a *substantial or material change* to a proposed ordinance. That is the question for this Court. As a question of statutory interpretation, review is de novo. *See Cline v. State*, 912 So. 2d 550, 555 (Fla. 2005).

As explained below, the plain language of Section 125.66(4)(b), as seen in the light of of long-standing caselaw in the land-use context, along with procedural due process considerations, compel the conclusion that a substantial or material change in a proposed ordinance includes any change to the “actual list of permitted, conditional, or prohibited uses within a zoning category.” These same factors also compel

the conclusion that any change necessary to secure legislative passage of a proposed ordinance likewise constitutes a substantial or material change. On the other hand, to confine the "substantial or material" category merely to changes in the "original general purpose" of a proposed ordinance would depart from the statutory text and eviscerate the due process-like protections that the Legislature specifically afforded to property owners and other interested citizens.

I. A "Substantial or Material Change" in a Proposed Ordinance During the Enactment Process Includes Any Change to the "Actual List of Permitted, Conditional, or Prohibited Uses Within a Zoning Category."

The "substantial or material" standard has a long pedigree in Florida caselaw. *See McGee v. City of Cocoa*, 168 So. 2d 766, 768 (Fla. 2d DCA 1964) (holding that a "zoning amendment must conform substantially to the proposed changes," but the amendment at issue "was not of such substantial and material nature as to require a new notice"), *quoted in Williams v. City of North Miami*, 213 So. 2d 5, 7-8 (Fla. 3d DCA 1968); *accord* Op. Att'y Gen. Fla. 82-93, at 3 (1982) (concluding that "if any substantial or material changes or amendments are made during the process of enacting a municipal ordinance, the enactment process . . . must begin anew with full compliance with the [applicable] reading and notice requirements"). More recently, courts have used the adverb *substantially* to describe the nature of the changes that trigger a county's obligation to "renew" the process of enacting a land-use ordinance:

"The law is well settled that notice must adequately inform as to what changes are proposed, and the actual change *must conform substantially* to the proposed changes in the notice." *Love Our Lakes Association v. Pasco County*, 543 So. 2d 855, 857 (Fla. 2d DCA 1989) (emphasis added), *quoted in Webb v. Town Council*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000).

Crucially, *substantially* is the very same adverb that courts have consistently used to describe the very kinds of legislative changes that trigger heightened notice requirements in the first place. That is, "courts have generally held that municipal ordinances which *substantially impair the use of land* are invalid if they were not enacted with the formality required under [the applicable statute]." *3299 North Federal Highway, Inc. v. Board of County Commissioners*, 646 So. 2d 215, 223 (Fla. 4th DCA 1994) (emphasis in original), *rev. dismissed*, 699 So. 2d 690 (Fla. 1997).[5] This use of the term *substantially* dates back at least to *City of Sanibel v. Buntrock*, which ruled that "[i]f an ordinance *substantially* affects land use, it must be enacted under the [heightened notice] procedures which govern zoning and rezoning." 409 So. 2d 1073, 1075 (Fla. 2d DCA 1981) (emphasis added), *rev. denied*, 417 So. 2d 328 (Fla.

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[5] In this context, courts treat interchangeably decisions that construe Section 125.66 (which governs *county* ordinances) with those that construe Section 166.041 (which governs *municipal* ordinances). *See, e.g., 3299 North Federal Highway*, 646 So. 2d at 223 (opining that "legislative staff and the courts have looked to municipal ordinance cases for guidance" concerning county ordinances and that such cases "should be considered in construing a county ordinance"). We do the same.

1982); *see also, e.g., Daytona Leisure Corp. v. City of Daytona Beach*, 539 So. 2d 597, 599 (Fla. 5th DCA 1989) ("[w]here an ordinance substantially affects land use . . . , it must be enacted under the procedures that govern zoning and rezoning").

This equivalence provides the key to answering the certified question: Any zoning change that is *substantial* enough to trigger the statutory notice requirements in the first place is *substantial* enough to trigger a governing body's duty to renew the ordinance enactment process in midstream. But precisely what kind of zoning changes trigger the notice requirements in the first place? As for counties, the text of Section 125.66(4)(b) tells us plainly: any and all "changes [to] the actual list of permitted, conditional, or prohibited uses within a zoning category." Accordingly, intra-enactment amendments that change "the actual list of permitted, conditional, or prohibited uses within a zoning category" are *substantial or material changes* that compel a county to start over with the notice and hearings prescribed by the statute.

This reading of Section 125.66(4)(b) accords with the "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005). As set forth below, this reading of the statute is also consistent with precedent, consistent with the legislative history of the statute, and compelled by procedural due process considerations.

A. This Conclusion Is Consistent with Precedent.

As recognized by the Fifth District Court of Appeal, to prohibit what was previously permitted is to "substantially change" the use of property. *Daytona Leisure Corp.*, 539 So. 2d at 599. Indeed, to say otherwise is "patently wrong," if not "sheer sophistry." *Id.* If that precept is true, is it not also true that to amend an ordinance to prohibit what a previous draft would have permitted is to "substantially change" the ordinance? It is, and by parity of reasoning, to amend an ordinance to permit what a previous draft would have prohibited is likewise to "substantially change" the ordinance. But these propositions are simply applications of the more general principle that to amend an ordinance by changing its "list of permitted, conditional, or prohibited uses within a zoning category" is to "substantially change" the ordinance.

An example may help to illustrate this point. As outlined in the Statement of Facts (p. 8), earlier drafts of Monroe County Ordinance 004-1997 *permitted* vacation rentals in "Sparsely Settled Residential Districts," but the enacted version *prohibited* such rentals. Under *Daytona Leisure Corp.*, 539 So. 2d at 599, a free-standing legislative change of this kind would be said to "substantially change" the use of vacation rental property. Is it not reasonable to say, as well, that the amendment changing the status of vacation rentals in Sparsely Settled Residential Districts from permitted to prohibited "substantially changed" Ordinance 004-1997? Plaintiffs submit that it is indeed reasonable to say so.

B. This Conclusion Is Consistent with the Legislative History of Section 125.66.

The Legislature comprehensively revised Section 125.66 in 1995 as part of Chapter 95-310 of the Laws of Florida. This chapter was generally intended to "provide[] some uniformity regarding the public notice requirements for the enactment of various types of local ordinances." Fla. H.R. Comm. on Community Affairs, HB 2055 (1995) Final Bill Analysis 4 (May 16, 1995), *reproduced at* App. E; *see also American Home Assurance Co.*, 908 So. 2d at 369 (describing legislative history as "a basic and invaluable tool of statutory construction"). In particular, the Legislature replaced language under which these due process-like notice requirements were triggered by ordinances that would "rezone private real property" with language under which such requirements are triggered by ordinances that would "change the actual list of permitted, conditional, or prohibited uses within a zoning category." *Compare* § 125.66(5), Fla. Stat. (repealed 1995), *with* § 125.66(4), Fla. Stat. (enacted 1995).

In this light, it is reasonable to infer that this new and presently operative statutory language—changes to "the actual list of permitted, conditional, or prohibited uses within a zoning category"—is an effort more precisely to define the "rezon[ing]" that triggers heightened notice requirements. If so, it is also reasonable to infer that the newly enacted language likewise defines the circumstances that trigger the well-established judicial principle that a "zoning amendment must conform substantially to the proposed changes" or a governing body must "renew" the enactment process.

McGee, 168 So. 2d at 768; *see also* Final Bill Analysis, *supra*, at 4 (explaining that Chapter 95-310 was enacted in response to caselaw that had "expanded the applicability of the rezoning ordinance enactment procedures").

C. This Conclusion Is Compelled by Procedural Due Process Considerations.

Perhaps most importantly, the foregoing construction of Section 125.66(4)(b) flows from the constitutional principle of procedural due process, which "requires both reasonable notice and a meaningful opportunity to be heard." *N.C. v. Anderson*, 882 So. 2d 990, 993 (Fla. 2004); *cf. Fountain v. City of Jacksonville*, 447 So. 2d 353, 356 n.3 (Fla. 1985) (recognizing the close relationship between "due process" and "compliance with statutory requirements" for enacting ordinances).

When applicable, the statute requires public advertisement of a proposed ordinance and no fewer than two public hearings (at least one to be held on a weekday after 5:00 p.m.) over spaced intervals. The obvious purpose of the statute in so requiring is to make reasonably certain that every person whose property use would be affected in a significant way has notice and an opportunity to be heard about the proposed ordinance. *See N.C.*, 882 So. 2d at 993 ("The notice must be reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). If a county could advertise and hold hearings regarding one particular change to permitted or prohibited uses within a zoning category and then—*at the very last minute, in the final public hearing*—

actually enact different changes to those uses, it would render the "notice" worthless and the "opportunity" to be heard illusory.

For example, a property owner who reads an advertised notice that the county proposes to enact an ordinance adding to the list of *permitted* uses within the zoning category governing his property might reasonably conclude that he has no interest in opposing the ordinance and so forego attending a public hearing. If the county were allowed to amend the ordinance at the last minute to add to the list of *prohibited* uses within that zoning category, the owner's calculus obviously would be wholly different; however, in the absence of further notice or additional public hearings, he would have no practical opportunity to be heard on the matter. Conversely, a person who had notice that the county proposed an ordinance burdening his neighbor's property with additional *prohibited* uses would effectively be denied opportunity to heard in opposition to a last-minute addition of *permitted* uses for that property.

As a third example, closer to the present case, a property owner or neighbor might reasonably acquiesce in the addition or deletion of one permitted or prohibited use (e.g., *long-term* vacation rentals) but object strenuously to the addition or deletion of another permitted or prohibited use (e.g., *short-term* vacation rentals). The interpretation of Section 125.66(4)(b) advanced by Plaintiffs would ensure that this citizen was actually informed about the latter proposed change and had a meaningful opportunity to participate in the public debate on it. Contrast this desirable—indeed,

constitutional—outcome with what actually happened during the enactment of Monroe County Ordinance 004-1997.

Recall that the draft actually considered at the first hearing, which took place on December 10, 1996, was not completed until that day and was not distributed to the county commissioners until after the hearing began (or to the public until the following day). *See* R.E. Tab F at 5 (Undisputed Fact 10); App. C at 24:24-24:5. One result was the following exchange between a concerned citizen and her government:

> Ms. Shenkavich: All right. I planned to review for you several things that I found in the plan which I thought was the latest date. It's [dated] September 17th and it was given to me by the Planning Department. *My comments are obsolete.*
>
> Mayor Douglass: Thank you very much.
>
> Ms. Shenkavich: I need a new plan, please.
>
> Mayor Douglass: *Surprised you, did we*?

App. C at 52:2-11 (emphasis added). This was hardly the "meaningful" opportunity to be heard that procedural due process contemplates.[6]

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[6] For another example of Monroe County's failure to afford a meaningful opportunity to be heard, consider the treatment of "Commercial Fishing Districts." Drafts of the Ordinance consistently allowed vacation rentals in thirteen of these districts. But after closing the last public hearing, the county commissioners voted to eliminate all references to these districts, leaving their legal status in limbo. *See* R.E. Tab F at 7-8 (Undisputed Facts 22-24). When County Attorney Jim Hendrick "explained" that this amendment left property owners in these districts "exactly where they are now," Commissioner Mary Kay Reich responded: "But nobody seems to know where they are now." App. D at 216:3-9.

For all of these reasons, a "substantial or material change" in a proposed ordinance during the enactment process includes any change identified by the text of Section 125.66(4)(b), that is, any change to the "actual list of permitted, conditional, or prohibited uses within a zoning category."

II. A "Substantial or Material Change" in a Proposed Ordinance During the Enactment Process Also Includes Any Change that Was Necessary to Secure Legislative Passage of the Ordinance.

Intra-enactment amendments that change the actual list of permitted, conditional, or prohibited uses within a zoning category should not be thought to exhaust the class of amendments that should be deemed "substantial or material." The federal district court in *Lamar Advertising, Inc. v. City of Lakeland*, 189 F.R.D. 480, 490 (M.D. Fla. 1999), rightly observed that "change may be substantial . . . without being substantive." Therefore, that court concluded that a city "made a substantial change to the original Proposed Ordinance . . . when it divided [that] ordinance in two." *Id.* at 491. *Lamar* also suggested, rightly we submit, that a change would be substantial or material if it was necessary to secure legislative passage of the ordinance—as was the case with respect to Ordinance 004-1997.[7] *See id.* at 490.

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[7] Considered in the light most favorable to Plaintiffs (the non-movant), the summary judgment evidence showed that certain last-minute changes were made to garner the votes of County Commissioners Freeman and London at the February 4, 1997 hearing at which Ordinance 004-1997 was enacted. *See* R.E. Tab N at 15 & n.29. Since the ordinance passed by only a 3-2 vote, *see* R.E. Tab F at 7 (Undisputed Fact 18), it is apparent that the changes were necessary to secure passage.

We think this conclusion inheres in the very meaning of the term *substantial*. A change that was necessary to secure passage of the ordinance is, by definition, a change that was a "but for" cause of such passage. Borrowing the language of tort law, a factor that *causes* a result is necessarily a "*substantial* factor." *See, e.g., Time Insurance Co. v. Berger*, 712 So. 2d 389, 392 (Fla. 1998) (per curiam); *cf. State v. Hubbard*, 751 So. 2d 552, 567 (Fla. 1999) (Anstead, J., specially concurring) ("the State may prove 'cause-in-fact' causation by demonstrating that the defendant's conduct was a 'substantial factor' in bringing about the harm"). Accordingly, a change to a proposed ordinance that, by itself, was the catalyst for the ordinance's passage is a *substantial* change. Proving that any particular change was "necessary" for legislative passage as a matter of fact is conceivably a difficult task. As a matter of law, however, the principle is sound and should be affirmed by this Court.

III. A "Substantial or Material Change" in a Proposed Ordinance During the Enactment Process Is *Not* Confined to a Change in the "Original General Purpose" of the Ordinance.

The federal district court did not accept the foregoing interpretation of Section 125.66(4)(b); the court rejected it in favor of a conclusion drawn by a 1982 opinion of the Florida Attorney General. *See* R.E. Tab F at 10 (quoting Op. Att'y Gen. Fla. 82-93, at 2 (1982)). In the passage on which the district court relied, the Attorney General opined that "the *original general purpose* of a measure cannot be changed by amendment on passage," such that "amendments can be made during passage of

an ordinance when the amendment is not one changing the *original purpose*." *Id.* (emphasis added). In this view, intra-enactment changes to an ordinance are "substantial or material" *only if* they alter the "original general purpose" of the ordinance.

With all due respect to the district court and the Attorney General, this cannot be right. As explained below, their interpretation of Section 125.66(4)(b) cannot be reconciled with the "basic rule of statutory construction provid[ing] that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005). Nor can such an interpretation be reconciled with the decisions of the courts of Florida or other jurisdictions.

First, the word *purpose* simply does not appear in Section 125.66. But what does appear in the statute (no fewer than four times) is the phrase "actual list of permitted, conditional, or prohibited uses within a zoning category." An interpretation focused exclusively on *purpose* "would render [that phrase] meaningless" and thereby "disregard basic tenets of statutory construction that are elements of mainstream Florida law." *Id.* By contrast, Plaintiffs' interpretation would give "significance and effect . . . to every word, phrase, sentence, and part of the statute." *Id.*[8]

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[8] One can hardly fault the Attorney General for failing to take account, in 1982, of a phrase added to Section 125.66 in 1995. *See supra* Section I.B (pp. 16-17). Even so, this very fact highlights the point that the nearly 24-year-old opinion is obsolete in light of intervening statutory and judicial developments.

Second, the "original general purpose" standard set forth in the 1982 Attorney General opinion and adopted by the district court cannot be reconciled with the decisions of the Florida courts. To Plaintiffs' knowledge, none of those decisions uses the term "purpose," let alone "general purpose." On the contrary, they consistently employ a cognate of "substance," such that any post-notice amendment "must conform *substantially*" to the original noticed ordinance in order for the governing body to avoid starting the enactment process anew. *See Webb*, 766 So. 2d at 1244; *Love Our Lakes*, 543 So. 2d at 857; *City of Coral Gables v. Deschamps*, 242 So. 2d 210, 212 (Fla. 3d DCA 1970) (citing other cases).

Third, the "original general purpose" standard is inconsistent with the judicial decisions of other courts. Even the cases cited in the Attorney General opinion propose standards *other than* changes to purpose. As the opinion itself describes them, those cases hold that the duty to renew the ordinance enactment process is triggered by "substantial" changes to an ordinance, by changes to its "basic character," and by "material change[s] in the subject treated." Op. Att'y Gen. Fla. 82-93, at 2 (citing *B&B Vending Co. v. City of El Paso*, 408 S.W.2d 545 (Tex. Civ. App. 1966); *Jefferson v. City of Anchorage*, 513 P.2d 1099 (Alaska 1973)), *quoted in* R.E. Tab F at 10.

More recent cases are in accord. Thus, in *Free State Recycling Systems Corp. v. Board of County Commissioners*, 885 F. Supp. 798, 801-05 (D. Md. 1994), a federal district court applied a Maryland statute that imposed a standard very much like

that imposed by Section 125.66(4)(b): "Where there has been a substantial difference between the proposed zoning text amendment as advertised and as ultimately proposed to be passed by the local legislative body, that body must readvertise the new and substantially different proposed ordinance and have a [new] hearing in regard to it." 885 F. Supp. at 805 (emphasis added). The district court in *Free State Recycling* found "substantial" differences between the noticed and the enacted ordinances where, as here, the county considered multiple drafts but only made those drafts available to the public at the last minute, *see id.* at 803-05; the county made still more changes at the very hearing at which the ordinance was adopted, *see id.* at 805; property owners "found themselves facing a multitude of additional zoning obstacles" because of the amendments; *id.* at 808; and the county gave no indication to the public that any of these changes were in the works, *see id.* at 808-09. *See also Glazebrook v. Board of Supervisors*, 587 S.E.2d 589 (Va. 2003) (sustaining a challenge to county ordinance for failure to satisfy statutory requirements as to notice).

Finally, a standard under which a court can find that a change is not substantial or material merely because the ordinance continued to concern "the regulation of vacation [rental] use" despite numerous amendments, R.E. Tab F at 11, is really no standard at all. Under such a loose test, to proffer a stark example, an ordinance that would *prohibit* brothels in residential zones could be amended—at the very last minute, without further notice, and without additional hearings—into an ordinance that

would *permit* brothels in residential zones. After all, both the original ordinance and the amended one could be said to concern "the regulation of brothel use."

Therefore, a "substantial or material change" in a proposed ordinance during the enactment process cannot be limited merely to a change in the "original general purpose" of the ordinance.

CONCLUSION

For the foregoing reasons, this Court should rule that, for purposes of Florida Statutes § 125.66(4)(b), a "substantial or material change" in a proposed ordinance during the enactment process—i.e., the kind of change that requires a county to start the process over—includes both (1) any change to the "actual list of permitted, conditional, or prohibited uses within a zoning category"; and (2) any change necessary to secure legislative passage of the ordinance.

Dated: August 4, 2006.

Respectfully submitted,

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I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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APPENDIX

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