

Florida Real Property and Business Litigation Report

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Manuel Farach

Lewis v. Innova Investment Group, LLC, Case No. 2D18-2116 (Fla. 2d DCA 2019).

A party who unequivocally surrenders property in a Chapter 13 bankruptcy proceeding is estopped from challenging a foreclosure proceeding in state court; *Fischer v. HSBC Bank USA*, 257 So. 3d 512, 515 (Fla. 2d DCA 2018), is distinguished.

Seawatch at Marathon Condominium Association, Inc. v. The Guarantee Company of North America, USA, Case Nos. 3D18-1450, 3D18-1340, & 3D18-1337 (Fla. 3d DCA 2019).

Paragraph 4.2 of the standard American Institute of Architects A312 surety bond form permits the surety to select the defaulting principal as the contractor to finish the project despite an objection from the owner.

Mt. Plymouth Land Owners' League, Inc. v. Lake County, Florida, Case No. 5D19-780 (Fla. 5th DCA 2019).

A county is bound by its own ordinances, and may not permit a communications tower in contravention of the setbacks in its land development regulations when the regulations do not authorize variances in this instance.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MACK D. LEWIS,)
)
 Appellant,)
)
 v.)
)
 INNOVA INVESTMENT GROUP,)
 LLC, and SHAREESE LEWIS,)
)
 Appellees.)
 _____)

Case No. 2D18-2116

Opinion filed October 2, 2019.

Appeal from the Circuit Court for
Polk County; Steven L. Selph, Judge.

James N. Charles of Law Office James N.
Charles, Celebration, for Appellant.

Matthew Estevez of Matthew Estevez,
P.A., Doral, for Appellee Innova Investment
Group, LLC.

No appearance for Appellee Shareese
Lewis.

ATKINSON, Judge.

Mack D. Lewis appeals the Final Summary Judgment of Foreclosure entered in favor of Innova Investment Group, LLC (Innova). On the day before the foreclosure sale, Mr. Lewis filed a petition in United States Bankruptcy Court, Middle

District of Florida, under chapter 7 of the bankruptcy code. After issuing an order to show cause, we took judicial notice of the statement of intentions and the order of discharge entered in Mr. Lewis' bankruptcy case. In the statement of intentions, Mr. Lewis elected to surrender the subject property. Innova contends that Mr. Lewis is estopped from challenging the foreclosure judgment because he agreed to surrender the subject property in his bankruptcy case. We agree and dismiss the appeal as moot.

Borrowers, like Mr. Lewis, who have surrendered real estate in their bankruptcy cases, cannot subsequently contest a mortgage foreclosure action involving that property. See, e.g., Sayles v. Nationstar Mortg., LLC, 268 So. 3d 723, 727 (Fla. 4th DCA 2018) (holding that the borrower was judicially estopped from contesting standing in the foreclosure action because Sayles surrendered the property in her bankruptcy case); Clay Cty. Land Tr. v. HSBC Bank USA, N.A., 219 So. 3d 1015, 1016 (Fla. 1st DCA 2017) (concluding that after stipulating to the surrender of the properties in the bankruptcy proceeding, the land trust was estopped from challenging the foreclosure); see also In re Failla, 838 F.3d 1170, 1178 (11th Cir. 2016) ("Because the Faillas filed a statement of intention to surrender their house, they cannot contest the foreclosure action."); In re Metzler, 530 B.R. 894, 899 (Bankr. M.D. Fla. 2015) ("[T]his [c]ourt concludes that relinquishing property and making it available to the secured creditor—i.e., 'surrendering' the property—means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property.").

This court recently found error in the application of the doctrine of judicial estoppel to prohibit a defendant from raising a standing defense when judicially noticed documents did "not reflect . . . the surrender of the . . . property." Fischer v. HSBC Bank

USA, Nat'l Ass'n for Deutsche Alt-A Sec., Inc., Mortg. Loan Tr., Series 2006-AR1, 257 So. 3d 512, 515 (Fla. 2d DCA 2018). But unlike the debtor in Fischer, Mr. Lewis clearly and unambiguously declared in his statement of intentions his election to surrender the subject property. See Sayles, 268 So. 3d at 727 ("Unlike Fischer, however, there is no uncertainty of the property's surrender in this case."). As a result, Mr. Lewis is judicially estopped from contesting the foreclosure judgment, thereby rendering this appeal moot. See Clay Cty., 219 So. 3d at 1016 (holding that an appeal from a foreclosure judgment was moot after the parties entered into a stipulation in the land trust's bankruptcy case providing for the surrender of all interest in the subject properties); Rivera v. Bank of Am., N.A. ex rel. BAC Home Loans Servicing, L.P., 190 So. 3d 267, 267 (Fla. 5th DCA 2016) (dismissing a foreclosure appeal where the debtor had admitted in his bankruptcy case that "he owed a non-contingent, undisputed mortgage debt to Appellee, and he surrendered the mortgaged property to Appellee").

Dismissed.

NORTHCUTT and SILBERMAN, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed October 2, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1450, 3D18-1340, & 3D18-1337
Lower Tribunal No. 17-233-M

Seawatch at Marathon Condominium Association, Inc.,
Appellant/Cross-Appellee,

vs.

The Guarantee Company of North America, USA, et al.,
Appellees/Cross-Appellants.

Appeals from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Duane Morris LLP, and Joseph A. Battipaglia, and Michael J. Shuman, for appellant/cross-appellee.

Etcheverry Harrison, LLP, and Edward Etcheverry, and Jeffrey S. Geller (Fort Lauderdale); Ferguson Skipper, P.A., and David S. Maglich, and Douglas R. Bald (Sarasota), for appellees/cross-appellants.

Before **SALTER, MILLER, and GORDO, JJ.**

MILLER, J.

Appellant, Seawatch at Marathon Condominium Association, Inc. (“Seawatch” or “Owner”), appeals, and Guarantee Company of North America, USA (“Guarantee” or “Surety”) and Complete Aluminum General Contractors, Inc. (“CAGC” or “Principal”), cross-appeal, a final declaratory judgment. Following the default of the Principal on a multi-million dollar construction contract, the Surety rendered an election under the terms of the applicable standard performance bonds. The Owner filed suit, seeking a declaration regarding its rights and responsibilities. In the final judgment, the lower tribunal determined that, under the terms of the bonds, the takeover Surety was permitted to utilize the defaulting Principal as its completion contractor. The court further found the Surety was not required to maintain a Florida contracting license, and its election was conditional as it added unstipulated terms. Thus, notwithstanding its reluctant embroilment in litigation, the Surety remained obligated under the bonds. For the reasons explicated below, we discern no error and affirm.

FACTS AND PROCEDURAL HISTORY

The relevant facts are undisputed. On October 23, 2014, Seawatch entered into a \$5.4 million construction contract, engaging CAGC to serve as the contractor for the renovation of three condominium buildings located in Marathon, Florida. Guarantee executed three standard American Institute of Architects A312 surety

bonds to secure CAGC's performance under the construction contract, for the benefit of Seawatch.

In 2017, after discovering certain defects in the renovations, Seawatch declared CAGC in default and effected a termination of the contract. Thereafter, Seawatch requested Guarantee to "promptly make an election under Paragraph 4" of the performance bonds.

Following the satisfaction of specified conditions precedent, under Paragraph 4, the Surety was required to promptly, at its own expense, exercise one of the following series of options:

- 4.1 Arrange for the CONTRACTOR, with consent of the OWNER, to perform and complete the Contract;
or
- 4.2 Undertake to perform and complete the Contract itself, through its agents or through independent contractors; or
- 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the OWNER for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution by the OWNER and the contractor selected with the OWNER'S concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the Bonds Issued on the Contract, and pay to the OWNER the amount of damages as described in paragraph 6 in excess of the Balance of the Contract Price incurred by the OWNER resulting from the CONTRACTOR Default; or

- 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances;
- 4.4.1 After investigation, determine the amount for which it may be liable to the OWNER and, as soon as practicable after the amount is determined, tender payment therefore to the OWNER; or
- 4.4.2 Deny liability in whole or in part and notify the OWNER citing reasons therefore.

Over the course of the next several months, Guarantee and Seawatch exchanged documentation and arranged a meeting, but failed to consummate a mutually agreed upon resolution to effect project completion. Eventually, Guarantee transmitted correspondence to Seawatch, announcing its formal election to assume and complete the contract under the provisions of Paragraph 4.2. Guarantee enclosed a draft of the proposed “Election and Agreement under Paragraph 4.2 of the Performance Bond” (“Takeover Agreement”). In the proposed agreement, Guarantee advised Seawatch that its completion team consisted of:

- a. CAGC, as completion contractor;
- b. J.S. Held, as a construction consultant, . . . ;
- c. L.W. Construction Concepts . . . , as a subcontractor . . . ; and
- d. Any and all subcontractors, suppliers, materialmen and/or design professionals deemed necessary . . .

Seawatch rejected the Takeover Agreement, contending that it materially modified the original project terms, and that language within the performance bonds prohibited Guarantee from retaining CAGC as its completion contractor.

Shortly thereafter, Guarantee sent Seawatch a revised Takeover Agreement. Although Guarantee altered some of the objectionable provisions, it reiterated its intention to retain CAGC.¹ Three days later, Seawatch filed its claim for declaratory relief, seeking a judicial imprimatur on its contention that, in the absence of consent by Seawatch, Guarantee was prohibited from hiring CAGC as the completion contractor under the performance bonds. Seawatch further asserted that in the event of a takeover, Guarantee was required to assume the role of general contractor. Accordingly, as Guarantee did not hold a contracting license, it was prohibited from electing the remedy provided in Paragraph 4.2.

Conversely, CAGC and Guarantee contended that Paragraph 4.2 imposed no restrictions on the selection of completion contractors and agents. Therefore, Guarantee sought to extricate itself from its assumption of the project, asserting that Seawatch had materially breached the performance bonds by refusing to accept CAGC's role in the completion of the project.

The lower tribunal determined that under the "clear and unambiguous language" set forth in Paragraph 4.2, Guarantee was within its rights to hire CAGC as a completion contractor, and rejected the argument that Guarantee was required to possess a contracting license. The court further found that Guarantee "did not

¹ The revised Takeover Agreement continued to include certain objectionable reservation of rights provisions.

make a legally sufficient election to proceed under Paragraph 4.2 of the [bonds],” as it conditioned the election upon Seawatch signing the Takeover Agreement. The instant appeal and cross-appeal ensued.

STANDARD OF REVIEW

“Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citation omitted). The Court “view[s] the facts in a light most favorable to the nonmoving party and conduct[s] a de novo review of such a judgment.” Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass’n, Inc., 127 So. 3d 1258, 1268 (Fla. 2013) (citation omitted).

LEGAL ANALYSIS

I. Selection of Completion Personnel

On appeal, Seawatch challenges the use of CAGC as a completion contractor under the terms of the performance bonds. “The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor.” Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992) (citation omitted). In the event of contractor default, “the surety [under the bond] performs the work, mitigates loss by its performance, and pays the subcontractors and suppliers.” In re Modular Structures, Inc., 27 F.3d 72, 74 n.1 (3d Cir. 1994).

“As a general proposition, contracts of suretyship are regarded as analogous to contracts of insurance in that the various rules of construction governing insurance policies are applicable.” Travelers Indem. Co. v. Mercer, 250 So. 2d 283, 285 (Fla. 4th DCA 1971) (citing 30 Fla. Jur. Suretyship and Guaranty §11). “The cardinal rule of contractual construction is that when the language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning.” Columbia Bank v. Columbia Developers, LLC, 127 So. 3d 670, 673 (Fla. 1st DCA 2013) (citing Ferreira v. Home Depot/Sedgwick CMS, 12 So. 3d 866, 868 (Fla. 1st DCA 2009) (“Contracts are to be construed in accordance with the plain meaning of the words therein, and it is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties.”)).

Here, the delineated election set forth in Paragraph 4.2 is clear and unambiguous. In the event of default, the surety is permitted to “[u]ndertake to perform and complete the Contract itself, through its agents or through independent contractors.” Unlike the election set forth in Paragraph 4.1, the provision, by its express language, does not reflect any requirement of mutual assent in the selection of the completion team. Accordingly, by its plain terms, “Paragraph 4.2 places no restrictions on whom [Guarantee] can use to complete the project.” St. Paul Fire & Marine Ins. Co. v. VDE Corp., 603 F.3d 119, 123 (1st Cir. 2010) (citation omitted).

Nonetheless, Seawatch attempts to “graft the owner consent provision contained in Paragraph 4.1 onto the performance option actually selected by [Guarantee], Paragraph 4.2.” St. Paul Fire & Marine Ins. Co. v. City of Green River, 93 F. Supp. 2d 1170, 1178 (D. Wyo. 2000), aff’d 6 F. Appx. 828 (10th Cir. 2001). However, such a reading cannot sustain intellectual muster, as “[t]o replace [the conjunction] ‘or’ with ‘and’ would require that we ignore the ordinary and natural meaning of the terms,” and defeat the obvious distinction in the delineated election options. See Wal-Mart Stores E., L.P. v. N. Edgefield Organized Neighbors, Inc., No. M2013-01351-COA-R3CV, at *4 (Tenn. Ct. App. Dec. 17, 2013) (declining to find “or” and “and” interchangeable where the context did not suggest such an intention). Moreover, as aptly observed by the First Circuit Court of Appeals, in construing an identical contract:

The absence of a consent requirement in Paragraph 4.2, and the presence of such a requirement in Paragraphs 4.1 and 4.3, sensibly reflects the different obligations assumed by a surety electing to proceed under each of these provisions. In choosing to proceed under Paragraph 4.2, which requires the surety to *undertake* to perform and complete the construction contract, [the surety] “assumed primary responsibility to complete the contract, and with that responsibility came the freedom to assemble the project team of its choosing.” Green River, 93 F. Supp. 2d at 1177; see also Richard S. Wisner & James A. Knox, Jr., The ABCs of Contractors’ Surety Bonds, 82 Ill. B.J. 244, 246 (1994) (explaining that when a surety elects to take over and complete the project, it directly assumes the contractor’s underlying contractual obligation to complete the project). Once the surety has elected to perform under Paragraph 4.2, the surety and the obligee . . . negotiate

an agreement, commonly called the “takeover agreement,” which is “the critical document for the completing surety and obligee in defining their future rights and obligations and in establishing a clear understanding of the scope of remaining work to be completed.” Philip L. Bruner & Patrick J. O’Connor, Jr., 4A Bruner & O’Connor on Construction Law § 12:80 (2009). Following negotiation of the takeover agreement, the surety awards a completion contract to a contractor. Id.

In contrast, a surety electing to proceed under Paragraph 4.1 must *arrange for* the original contractor to perform and complete the construction contract with the owner’s consent, by financing the original contractor’s continuing performance. See Wisner & Knox, at 245-46. Under this provision, the surety “does not assume primary responsibility for completing the contract, and the owner is required to maintain an ongoing contractual relationship with the terminated contractor.” Green River, 93 F. Supp. 2d at 1177; see also Wisner & Knox, at 246. Thus, “[w]hile it makes sense that the owner would have the right to object to such a ‘shotgun wedding’ to the contractor it just terminated [under Paragraph 4.1], it does not follow that the [owner] would have this right when the surety assumes primary contractual responsibility [under Paragraph 4.2].” Green River, 93 F. Supp. 2d at 1177.

VDE Corp., 603 F.3d at 123-24.

Finally, “[i]t is common practice for a surety undertaking to complete the project itself to hire the original contractor, as [Guarantee] elected to do here.” Id. at 124 (citations omitted); see also Fidelity & Deposit Co. v. Jefferson Cty. Comm’n, 756 F. Supp. 2d 1329, 1336 (N.D. Ala. 2010) (holding that by its express terms, Paragraph 4.2 places “no restrictions on whom [the Surety] can use to complete the

project”) (citing Green River, 93 F. Supp. 2d at 1177).² “By completing the project itself, the surety obtains greater control than it would have had if it elected to require the obligee to complete, because the surety can select the completing contractor or consultants to finish the project as well as control the costs of completion.” Bruce C. King, Takeover and Completion of Bonded Contracts by the Surety, 27 Brief 22, 25 (1997). Accordingly, we decline to import an unopened requirement into the contract.

II. Sufficiency of the Election Under the Performance Contract

On cross-appeal, Guarantee and CAGC contend that the trial court erred by concluding that Seawatch did not materially breach the performance bonds by refusing to allow CAGC to serve as the completion contractor under the Paragraph 4.2 election and by seeking court intervention. “A material breach occurs where the covenant not performed is of such importance that the contract would not have been made without it.” Green River, 93 F. Supp. 2d at 1178 (quoting Dragon Constr., Inc. v. Parkway Bank & Tr., 678 N.E.2d 55, 58 (Ill. App. Ct. 1997)); see Covelli Family, L.P. v. ABG5, L.L.C., 977 So. 2d 749, 752 (Fla. 4th DCA 2008) (“To constitute a

² We reject Seawatch’s contention, without further elaboration, that Guarantee must be a licensed general contractor in order to avail itself of the election provision set forth in Paragraph 4.2. See § 489.128(3), Fla. Stat. (2019) (distinguishing between surety and contractor); see also Richard S. Wisner & James A. Knox, Jr., The ABCs of Contractors’ Surety Bonds, 82 Ill. B.J. 244, 246 (1994) (explaining that, in exercising a takeover and completion option, “[t]he surety does not undertake the construction itself”).

... material breach, a party's nonperformance must 'go to the essence of the contract.'") (quoting Beefy Trail Inc. v. Beefy King Int'l, Inc., 267 So. 2d 853, 857 (Fla. 4th DCA 1972)). Nonetheless, when there is a disagreement as to the meaning of terms in a contract, one party's offer to perform in accordance with his interpretation is not itself an anticipatory breach, as "[s]uch a [breach] . . . must be distinct, unequivocal, and absolute." Mori v. Matsushita Elec. Corp. of Am., 380 So. 2d 461, 463 (Fla. 3d DCA 1980); see Alvarez v. Rendon, 953 So. 2d 702, 709 (Fla. 5th DCA 2007) ("An anticipatory breach of contract occurs before the time has come when there is a present duty to perform as the result of words or acts evincing an intention to refuse performance in the future."). "If the offer appears to be made in the good faith belief that the offeror's interpretation is correct, that will be evidence of his continued adherence to the agreement." Pac. Coast Eng'g Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889, 894 (9th Cir. 1969) (citations omitted).

Here, the parties genuinely disagreed in their interpretation of the bond agreement. Thereafter, Seawatch promptly sought judicial intervention through its declaratory action. As the filing of a declaratory relief action is not, under these circumstances, a breach of any express provision of the bond agreement, and Guarantee's election was conditioned upon the acceptance of the revised proposed Takeover Agreement, we agree with the trial court's conclusion that Seawatch did not materially breach the bond agreement so as to relieve Guarantee from its

obligations thereunder. See, e.g., Atlas Assurance Co. v. McCombs Corp., 194 Cal. Rptr. 66 (Cal. Ct. App. 1983) (“Absent other facts, the mere filing of an action to declare the insurer’s rights and duties relative to an insurance policy cannot form the basis of breach of the duty of good faith and fair dealing); see § 86.011, Fla. Stat. (2019) (The circuit court “may render declaratory judgments on the existence, or nonexistence: (1) [o]f any immunity, power, privilege, or right; or (2) [o]f any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future.”).

Accordingly, we affirm the well-reasoned order of the lower tribunal.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MT. PLYMOUTH LAND
OWNERS' LEAGUE, INC. AND
VANESSA LYNNE THORNTON,

Petitioners,

v.

Case No. 5D19-780

LAKE COUNTY, FLORIDA,

Respondent.

_____ /

Opinion filed October 4, 2019

Petition for Certiorari Review of Order
from the Circuit Court for Lake County,
Lawrence J. Semento, Judge.

David A. Theriaque and S. Brent Spain, of
Theriaque & Spain, Tallahassee, for
Petitioners.

Melanie Marsh, County Attorney, Tavares,
for Respondent.

JACOBUS, B.W., Senior Judge.

This second-tier certiorari petition concerns the planned construction on county-owned land of a 350-foot public safety communications tower by the Lake County Office of Public Safety and the county's rezoning application, filed in April 2018, which also requested waivers of mandatory setback requirements from residences and other communications towers. The setbacks were mandated by the Lake County Land

Development Regulations (LDRs) 3.13.09(B)(4) and 3.13.10(A). The rezoning application was opposed by the Mt. Plymouth Land Owners' League and Vanessa Lynne Thornton (Petitioners) on aesthetic grounds and the undisputed fact that it did not comply with the mandatory setbacks. It was first considered by the Lake County Planning and Zoning Board, which recommended it be denied even though its staff had recommended approval. In September 2018, the Lake County Board of Commissioners promulgated an ordinance granting the rezoning application along with the waiver of the mandatory setbacks. The ordinance reduced the setbacks to the actual distances between the proposed tower and the nearest residence and the proposed tower and the nearest communications tower.

Petitioners sought certiorari relief in the circuit court arguing, among other things, that the rezoning application departed from the essential requirements of law by violating the mandatory setbacks in the LDRs and that the Board of Commissioners was not authorized to grant variances, as that power was expressly given solely to the Lake County Board of Adjustment by LDRs 13.03.01(B)¹ and 14.15.01.² The circuit court denied the petition, finding that relief from the mandatory setbacks could be granted through a variance. It held that the plain language in the third sentence of LDR 14.15.01,

¹ LDR 13.03.01(B) provides that the Board of Adjustment "[s]hall have" the power "[t]o hear and grant Variances and Waivers as provided for in Section 14.15.00."

² LDR 14.15.01 recognizes that strict application of the LDRs is not always appropriate. The second sentence of LDR 14.15.01 states that "[t]he Board of County Commissioners finds that it is appropriate in such cases to adopt a procedure to provide relief to persons and entities subject to the Land Development Regulations." The next sentence provides that "[t]he Board of Adjustment is authorized to grant variances to requirements of the Land Development Regulations and adopted ordinances concerning Planned Unit Development (PUD) zoning districts consistent with the rules contained in these regulations."

specifically the word "authorized," did not deprive the Board of Commissioners of the power to grant variances, but "implies merely the authorization" of the Board of Adjustment to grant them as well. The circuit court relied on the definition of "authorize" in Black's Law Dictionary, which is "to empower another,"³ and the fact that "authorize" is synonymous with "license."

The instant petition for second-tier certiorari reasserts that the LDRs vested the Board of Adjustment with sole authority to grant variances from the mandatory setbacks. The petition concludes that the Board of Commissioners lacked that power because it is bound by its own LDRs. We grant the petition and quash the order below.

Our review on second-tier certiorari is narrower than the circuit court was permitted on the first-tier petition in that there is no review for competent, substantial evidence. Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010) (quoting Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995)). Second-tier certiorari review "is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law,' or, as otherwise stated, departed from the essential requirements of law." Id.; accord Nader v. Dep't of High. Saf. & Motor Veh., 87 So. 3d 712, 723 (Fla. 2012) (quoting Heggs, 658 So. 2d at 530–31). A second-tier certiorari petition should only be granted "when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." Custer Med. Ctr., 62 So. 3d at 1092 (citing Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003)).

In 1993, the Board of Commissioners adopted the LDRs by ordinance as required by section 163.3202, Florida Statutes (1993). LDR 13.01.01 reserves the power to

³ *Authorize*, Black's Law Dictionary (10th ed. 2014).

amend the LDRs and the zoning map to the Board of Commissioners. Therefore, the Board of Commissioners has the power to grant rezoning with or without conditions. LDR 14.00.04(D). But the power to rezone is distinct from the power to grant zoning variances and waivers. See Orlando v. Comtois, 223 So. 2d 560, 560–61 (Fla. 1st DCA 1969) (citing Josephson v. Autrey, 96 So. 2d 784, 787 (Fla. 1957) (en banc)). LDR 13.01.01 contains no mention of the power to grant variances and waivers. Nor is there any mention of this power belonging to the Board of Commissioners elsewhere in the LDRs. Instead, LDRs 13.03.01 and 14.15.01 give the Board of Adjustment, which is appointed by the Board of Commissioners, the power to grant variances and waivers from the requirements imposed by the LDRs. LDR 14.15.05 requires that applications for variances and waivers shall be filed with the county. It further provides that when the application is complete, the Board of Adjustment "[s]hall conduct a public hearing to consider the variance application." Appellate jurisdiction over the Board of Adjustment is given not to the Board of Commissioners but instead to the circuit court. LDR 14.15.06(B).

The plain language of the LDRs, as they existed in 2018,⁴ clearly omits any role for the Board of Commissioners in granting variances and waivers from the requirements of the LDRs. The second sentence in LDR 14.15.01, concerning the findings of the Board of Commissioners, merely expresses the Board of Commissioners' intent to adopt a procedure for granting variances and waivers. Nothing in the plain language of LDR

⁴ Although LDR 14.15.01 was amended by the Board of Commissioners in January 2019, with the intent of giving the Board of Commissioners the power to grant variances or waivers, this after-the-fact amendment is not applicable to this petition. See Pfeiffer v. City of Tampa, 470 So. 2d 10, 18 (Fla. 2d DCA 1985) (citing Foley v. State, 50 So. 2d 179, 184 (Fla. 1951)); Ocean's Edge Dev. Corp. v. Town of Juno Beach, 430 So. 2d 472, 474 (Fla. 4th DCA 1983).

14.15.01 reserves any role for the Board of Commissioners in that procedure. In fact, the Board of Commissioners is cut out of the procedure altogether by LDRs 14.15.05 and 14.15.06(B), in that the Board of Adjustment is required to hold the hearings on the applications for variances and waivers, and the circuit court hears appeals from the Board of Adjustment. The county is bound by the language of its own ordinances and regulations. See Parkway Towers Condo. Ass'n v. Metro. Dade Cty., 295 So. 2d 295, 295–96 (Fla. 1974); see also Everett v. City of Tallahassee, 840 F. Supp. 1528, 1539–41 (N.D. Fla. 1992); Miami-Dade Cty. v. Omnipoint Holdings, Inc., 863 So. 2d 375, 376 (Fla. 3d DCA 2003) ("Neither a quasi-judicial body nor a reviewing circuit court is permitted to add to or detract from these criteria (the local regulations) when making its assigned determination."); Carroll v. City of Miami Beach, 198 So. 2d 643, 645 (Fla. 3d DCA 1967) ("It is our opinion that the City is bound by the express terms of its own ordinance . . .").

Accordingly, the petition for second-tier certiorari is granted. The circuit court departed from the essential requirements of law by applying the wrong law in that it disregarded the plain and unambiguous language in LDRs 13.01.01, 13.03.01(B), 14.15.01, 14.15.05, and 14.15.06(B), and improperly construed the word "authorized" in LDR 14.15.01 in isolation from the other LDRs. See Halifax Hosp. Med. Ctr. v. State, 44 Fla. L. Weekly S149, S150 (Fla. Apr. 18, 2019) (noting that "words, phrases, clauses, sentences, and paragraphs" of ordinances must not be construed in isolation but must be read in context of entire provision (quoting Trafalgar Woods Homeowners Ass'n v. City of Cape Coral, 248 So. 3d 282, 284 (Fla. 2d DCA 2018))); see also DMB Inv. Tr. v. Islamorada, Vill. of Islands, 225 So. 3d 312, 318 (Fla. 3d DCA 2017); BMS Enters. LLC

v. City of Fort Lauderdale, 929 So. 2d 9, 11 (Fla. 4th DCA 2006).⁵

PETITION GRANTED; ORDER BELOW QUASHED.

EDWARDS and HARRIS, JJ., concur.

⁵ Our granting of this petition for certiorari affects only the waivers of the setbacks and has no effect on the rezoning decision.