IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 03-1759
4TH DCA CASE NO.: 4D02-1818

LESTER SMULL,

Petitioner,

v.

TOWN OF JUPITER, a Florida municipal corporation,

Respondent.
_____/

AMENDED ANSWER BRIEF TO INITIAL BRIEF ON JURISDICTION

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RESPONDENT, Town of Jupiter ("RESPONDENT" or "Town"), by and through its undersigned counsel, hereby files this Answer Brief to PETITIONER, LESTER SMULL's ("Petitioner" or "Smull"), Initial Brief on Jurisdiction and states:

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the facts as set forth in the decision of the Fourth District Court of Appeal in *Smull v. Town of Jupiter*, 28 F.L.W. D2064 (Fla. 4th DCA Sept. 3, 2003), which are as follows:

"[Petitioner] Smull applied to the Town for a building permit to construct canopy over his marina slip. After the Town's Planning and Zoning Division rejected the application, Smull appealed the decision to the Town Council. The Council held a quasi-judicial hearing on Smull's appeal on December 7, 1999. At the hearing, Smull's counsel informed the Council that Smull obtained approval for the canopy from the condominium association in which he lived and that the association had amended its declaration to accommodate Smull's canopy. The Council then granted Smull's appeal and approved the building permit. No written ruling was prepared or filed with the Town Clerk to memorialize the decision.

Subsequently, the condominium association notified the Town that it withdrew its approval of Smull's canopy and vacated the amendment to the declaration. At a meeting on January 4, 2000, the Town Council voted to reconsider its approval of

Smull's building permit. It did not actually conduct a hearing or render a new decision on that date. Instead, it sought to reschedule a hearing on the issue. Smull then filed a petition for writ of prohibition contending that the Council had no jurisdiction to reconsider its prior ruling. The trial court granted the Town's motion for summary judgment, concluding that the Town had jurisdiction over Smull's appeal when it ordered the rehearing. Thus, the Council had the inherent power to reconsider its previous vote. Smull [appealed] that ruling." *Smull, supra.*

The two issues raised by Smull on appeal in the Fourth District were: (1) whether the Town had the authority to reconsider one of its decisions only during the session in which the decision was made; and (2) whether the reconsideration must be completed within the time provided in the Town Code to appeal the decision. The Fourth District held that the Town, acting in its quasi-judicial power, had the inherent power to reconsider its ruling, citing *Mills v. Laris Painting Co*., 125 So. 2d 745 (Fla. 1961). The Fourth District also held that the Town could reconsider its decision at any time prior to the time that an appeal from the decision has been taken or before the decision has become final by lapse of time without an appeal, citing *Vey v. Bradford Union Guidance Clinic Inc*., 399 So. 2d 1137, 1138 (Fla. 1st DCA 1981)(quoting *Mills*, 125 So. 2d at 748). The Fourth District held that the time for invoking an appeal

was governed by the Florida Rules of Appellate Procedure, and not the time specified in the Town Code. *Smull, supra*.

The Petitioner contends that the Fourth District's decision in *Smull v. Town of Jupiter* 28 F.L.W. D2064 (Fla. 4th DCA Sept. 3, 2003), conflicts with *Sarasota County v. Webber*, 658 So.2d 1069 (Fla. 2nd DCA 1995), because *Webber* limits a deliberative body's reconsideration of a vote to the same session in which the vote was taken. The Petitioner also contends that the Fourth District's *Smull* opinion conflicts with this Court's decision in *Mills v. Laris Painting Co.*, 125 So. 2d 745 (Fla. 1961), because *Smull* "expands" this Court's holding in *Mills*.

SUMMARY OF THE ARGUMENT

The Fourth District's opinion in *Smull*, which held that a town council (administrative agency) has the inherent authority to reconsider its actions before an appeal has been taken or before the time for an appeal has expired, is a correct application of the precedent established by this Court in *Mills v. Laris Painting Co.*, 125 So. 2d 745 (Fla. 1961). Although the *Mills* decision was based upon a different set of facts, the legal rationale for the Court's holding in *Smull* was correctly followed by the Fourth District, and is a logical application of the legal principles of *Mills*.

In addition, the Fourth District correctly rejected the Petitioner's argument that the town council could only reconsider its decisions during the same session in which

the decision was made. Contrary to the Petitioner's contention, *Sarasota County v. Webber*, 658 So.2d 1069 (Fla. 2nd DCA 1995), does not limit a governing body's ability to rehear a matter to the same session in which it initially voted. Although the *Webber* case involved the issue of a rehearing of a decision during the initial session, the court's ruling did not limit the power to rehear a matter to only the same session. In fact, *Webber* does not address the legal question of whether a rehearing could occur at a subsequent meeting as that question was not before the court.

Consequently, neither the *Mills* or the *Webber* opinions are in express and direct conflict with Smull, and there is no basis for jurisdiction of this case.

ARGUMENT

The Fourth District correctly followed the general rule of law which this Court established in *Mills v. Laris Painting Co.*, 125 So. 2d 745 (Fla. 1961), holding that administrative agencies have the inherent or implied power comparable to that possessed by courts to reconsider their actions, provided they exercise this power before an appeal has been lodged or before such order becomes final by lapse of time without appeal. *Smull* at 2065. Because the Town was acting in its quasi-judicial capacity, its decision was essentially a judicial one, and it possessed the inherent power to reconsider its ruling. The Fourth District determined that the Town Council

had not relinquished jurisdiction at the time it decided to reconsider Smull's administrative appeal.

The Petitioner contends that the Fourth District erred in relying on *Mills, supra*, and essentially contends that both *Mills, supra*, and *Smull, supra*, conflict with *Sarasota County v. Webber*, 658 So.2d 1069 (Fla. 2nd DCA 1995). The Petitioner contends that *Webber* stands for the proposition that a county commission, acting in a quasi-judicial capacity, may only reconsider its vote on quasi-judicial action during the same session. In *Webber*, a zoning variance was heard before the Sarasota Board of County Commissioners (Board) at two hearings. At the conclusion of the second hearing, the Board voted three to two to approve the variance and then recessed for five minutes. Following the recess, one of the Board members who had voted in favor of the variance, made a motion to re-open the hearing. The Board member who changed his vote stated that during the recess he asked another member to clarify the motion, and then after hearing this, he determined that he had misunderstood what he was voting on. This prompted the confused Board member to move for reconsideration of the vote. The hearing was then re-opened and after discussion, the Board voted three to two to deny the variance.

As a result, the issue on appeal involved the "propriety of the board's reopening the public hearing to reconsider its vote within minutes after it approved respondent's

variance." *Id*. at 1071. The Second District specifically addressed whether the Board violated procedural due process rights by reopening the hearing, requesting and hearing new evidence, and then, voting to deny the variance during the same session without providing notice of the reopened hearing. *See Id*. The Second District Court of Appeal resolved this issue by stating that the reconsideration of the first vote was proper and did not violate due process because under parliamentary law, the Board may reopen a hearing during the same session. The appeal also framed the issue of law as whether the Board departed from the essential requirements of the Sunshine Law by discussing the previously approved variance during a recess. *Id*. at 1072. There is no language in the *Webber* opinion which can be construed as holding that an administrative body may only conduct a rehearing during the quasi-judicial session in which it initially voted. Rather, the Second District reached only the question of whether the Board could properly reopen the variance hearing during the same session, given the specific facts presented.

To accept, the Petitioner's interpretation of *Webber* (limiting rehearings to the same session), would be contrary to long standing legal precedent. See *Mills v. Laris Painting Co.*, 125 So.2d 745, 748 (Fla. 1961); *Peoples Gas v. Mason*, 187 So.2d 335 (Fla. 1966), (wherein the Florida Supreme Court acknowledged that Florida is among those jurisdictions holding that...agencies do have inherent power to reconsider final

orders which are still under their control). *Metro. Dade County v. Rockmatt Corp*., 231 So.2d 41 (Fla. 3rd DCA 1970) (the court upheld the right of a zoning board to hold a rehearing); *Vey v. Bradford Union Guidance Clinic, Inc.* , 399 So.2d 1137 (Fla. 1st DCA 1981); *See also* McQuillin Mun. Corp. §25.274 (3rd Ed); 2 Fla Jur 2d §332; Antieau on Local Gov't. Law, 2nd Ed., Vol 4 §57.03[3]; 73 C.J.S. *Public Administrative Bodies and Procedure* §156; Op. Att'y Gen. 85-27 (1985) (City's Code Enforcement Board had the inherent authority, as a [quasi] judicial agency, to hold a rehearing so long as it takes such action before the time allowed for appeal has expired.)

Finally, it should be recognized that even assuming the issue presented in *Webber* was analogous to the issue presented to the Fourth District's *Smull* opinion, the Fourth District would still be required to follow this Court's holding in *Mills, supra*. However, as explained hereinabove, there is no express or direct conflict between *Webber* and *Smull* because the District Courts were presented with different questions of law to resolve on appeal.

In sum, the Fourth District's opinion is not inconsistent with or in conflict with the *Webber*. Conflict jurisdiction based upon an express and direct conflict between *Smull* and *Webber*, 658 So.2d 1069 (Fla. 2nd DCA 1995), should therefore be denied.

The Petitioner's assertion of an express and direct conflict between *Smull* and *Mills v. Laris Painting Co.*, 125 So. 2d 745 (Fla. 1961) is also incorrect. Assuming arguendo, that *Smull* did expand this Court's holding in *Mills*, the mere extension or application of the *Mills* opinion to a different set of facts does not create a jurisdictional conflict. Courts must frequently expand or apply the decisions of superior courts in order to resolve questions of law because invariably no two cases present the same set of facts. Consequently, even if the Fourth District has expanded upon *Mills*, this does not necessarily create a conflict. The application of the *Mills* decision in the context of the facts in *Smull* is nothing more than an example of the natural evolution of the "living law."

The Petitioner attempts to create a conflict with *Mills* by arguing that because the Town is not an administrative agency (within the meaning of the Administrative Procedures Act), the general rule of law (that administrative agencies have the inherent or implied power comparable to courts to rehear, reopen or reconsider its previous action) does not apply. However, there is ample authority holding that city councils, sitting as quasi-judicial boards, are "administrative agencies". *See e.g. Florida Power and Light v. Dania*, 761 So. 2d 1089 (Fla. 2000); *Education Dev. Ctr., v. West Palm Beach*, 541 So. 2d 106 (Fla. 1989); *Cherokee Crushed Stone v. City of Miramar*, 421 So. 2d 684 (Fla. 4th DCA 1982); *City of Miami v. Stegman* , 158 So.2d

583 (Fla. 3rd DCA 1963). Furthermore, Fla. R. App. P. 9.020(a)(3) provides that 'administrative action' includes quasi-judicial decisions by any administrative body, agency, board or commission not subject to the Administrative Procedures Act." *See Smull* at 2065; *see also* Fla. R. Civ. P. 1.630(b) (writs directed to a governmental or administrative agency). Therefore, the Fourth District correctly rejected the Petitioner's contention that because the Town Council is not defined by the Administrative Procedures Act as an "administrative agency," *Mills* does not apply.

Finally, the Petitioner suggests that there is an express and direct conflict between the *Smull* and *Mills* by contending that *Mills* only allows a deliberative body to conduct a rehearing to correct a clerical error. This argument ignores the express language in *Mills* which addresses the question of whether a decision may be vacated or modified based upon either a mistake or newly discovered evidence. *Mills, supra*. The Florida Supreme Court did not limit its ruling to permit the rehearing of only decisions which are the result of a clerical error. *See Id*.

CONCLUSION

The arguments advanced by the Petitioner are the same that were unsuccessfully presented to the Fourth District Court of Appeal and the Fifteenth Judicial Circuit Court . The Petitioner has unnaturally attempted to stretch the concept of "express and direct conflict" to include cases which presented different District Courts with distinct fact patterns and different issues of law. The purpose and intent of "conflict jurisdiction" would be thwarted if this Court were to accept the Petitioner's arguments that an "express and direct" conflict exists between the *Smull* opinions and the opinions in *Mills v. Laris Painting Co.*, 125 So.2d 745 (Fla. 1961), and *Sarasota County v. Webber*, 658 So.2d 1069 (Fla. 2nd DCA 1995). Based upon the foregoing, the Respondent respectfully request that this Court find that conflict jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), does not exist and that this Court deny certiorari review of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ___ day of November, 2003 to Robert W. Wilkins, Esq., Attorney for Petitioner, Berrocal & Wilkins, P.A., 801 Maplewood Drive, Suite 22-A, Jupiter, Florida 33458.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure.

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