



**LLW**

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# **Appeal of Umdasch/Doka Project PZB Project Number 20-01400035**

**Filed by Marlin Industrial Park Owners Assoc., Inc.  
& Alfred Malefatto, Lewis, Longman & Walker**

# Basis of Appeal

- ▶ Marlin Industrial Park Owners Association, Inc. (“Appellant”) is appealing the Planning and Zoning Board’s approval of Project Number 20-01400035 on the following grounds:
  - ▶ The Board’s denial of the Appellant’s request to continue the hearing did not follow the requirements of the City’s Code.
  - ▶ The Applicant failed to meet its burden to show by competent substantial evidence that the Project met all the site qualitative design standards and conditional use requirements of the City’s Code.



# Umdasch Real Estate USA, Ltd was not authorized to do business with the City

- ▶ Project applicant/owner “Umdasch Real Estate USA, LTD” had not met the requirements to do business in Florida at the time of the hearing on January 6, 2021.
- ▶ Umdasch Real Estate USA, LTD is incorporated in the State of New Jersey.
- ▶ F.S. 607.1501(1) states:
  - ▶ “A foreign corporation may not transact business in this state until it obtains a certificate of authority from the department.”
  - ▶ Umdasch Real Estate did not register with the State of Florida until April 14, 2021, more than three months after the hearing.
- ▶ The City should not have considered the Project application because Umdasch was not in compliance with state law.



# 1. Board's denial of Appellant's request to continue the hearing did not comply with City Code

- City Code Section 23.2-16 (as amended by Ordinance 2020-14) states:

g) Continuance. The decision-making body may, on its own motion, continue the hearing to a fixed date, time and place. Also, the applicant or affected party shall have the right to one (1) continuance provided the request is to address neighborhood concerns or new evidence, or to hire legal counsel or a professional services consultant, or the applicant of affected party is unable to be represented at the hearing. The decision-making body will continue hearing to a fixed date, time and place. However, all subsequent continuances shall be granted at the sole discretion of the decision-making body. ...



# Appellant was entitled to one continuance

- ▶ Under City Code, a continuance is granted by the decision-making body at a public meeting.
- ▶ An affected party has the right to one continuance in order to hire legal counsel.
- ▶ Appellant submitted its request to continue the December 2, 2020 hearing on the Project application, but the hearing was postponed for lack of a quorum.
- ▶ The postponement of the Board meeting for failing to meet a quorum was not a response to Appellant's request for a continuance.
- ▶ The Board denied Appellant's request for a continuance, which should have been granted by right. As a result, Appellant was forced to present its case without the assistance of legal counsel.



## 2. Project does not meet the requirements of City Code

Applicant failed to meet its burden to show, by competent substantial evidence, that the Project meets the City's design standards or conditional use requirements. In fact, the evidence shows that:

- ▶ The site was not designed to mitigate noise and odor on Appellant's property.
- ▶ The site was not designed to have a minimum negative impact on the value of Appellant's property.
- ▶ The proposed use will produce significant air pollution and emissions which are not appropriately mitigated.
- ▶ The proposed use will produce significant noise which is not appropriately mitigated.



# Site Design Qualitative Standards

City Code Section 23.2-31

(c) *Qualitative development standards*

...

(11) *Off-street parking, loading and vehicular circulation areas.* Off-street parking, loading and vehicular circulation areas shall be located, designed and screened *to minimize the impact of noise, glare and odor on adjacent property.*

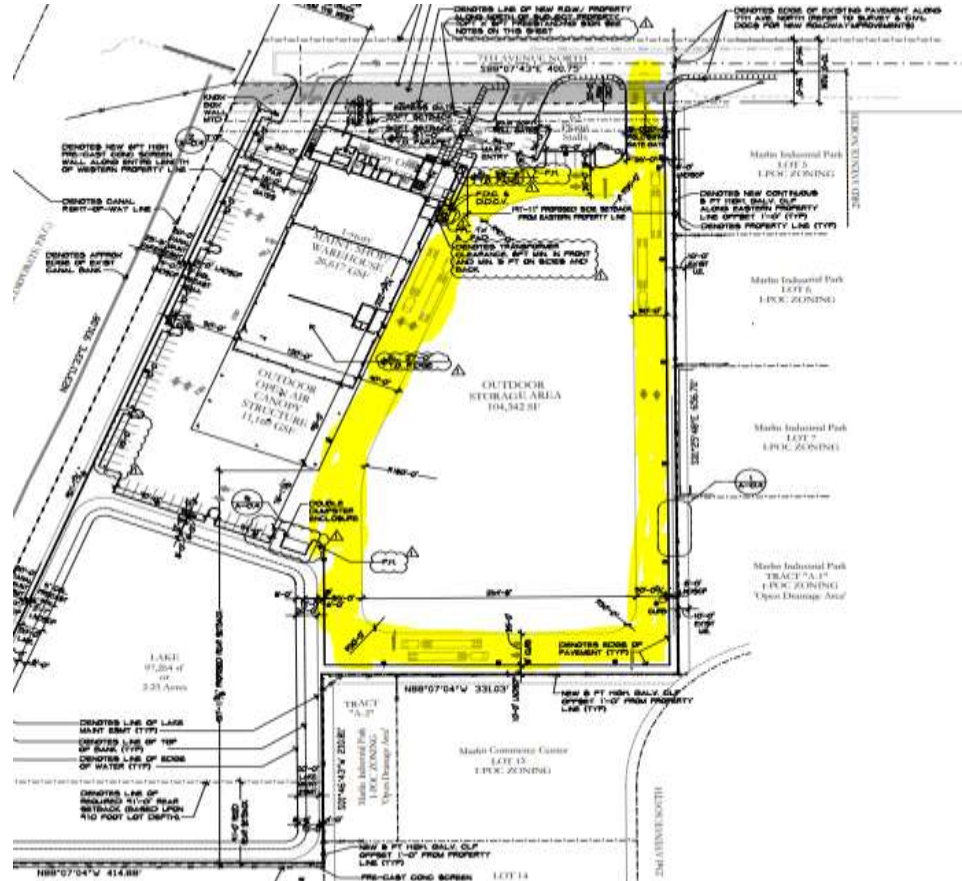
...

(13) *Protection of property values.* The elements of the site plan shall be arranged so as *to have minimum negative impact on the property values of adjoining property.*



# Vehicle circulation on the Project site

- Onsite traffic circulates around outdoor storage area.
- Traffic travels approximately 500 feet along Appellant's property line



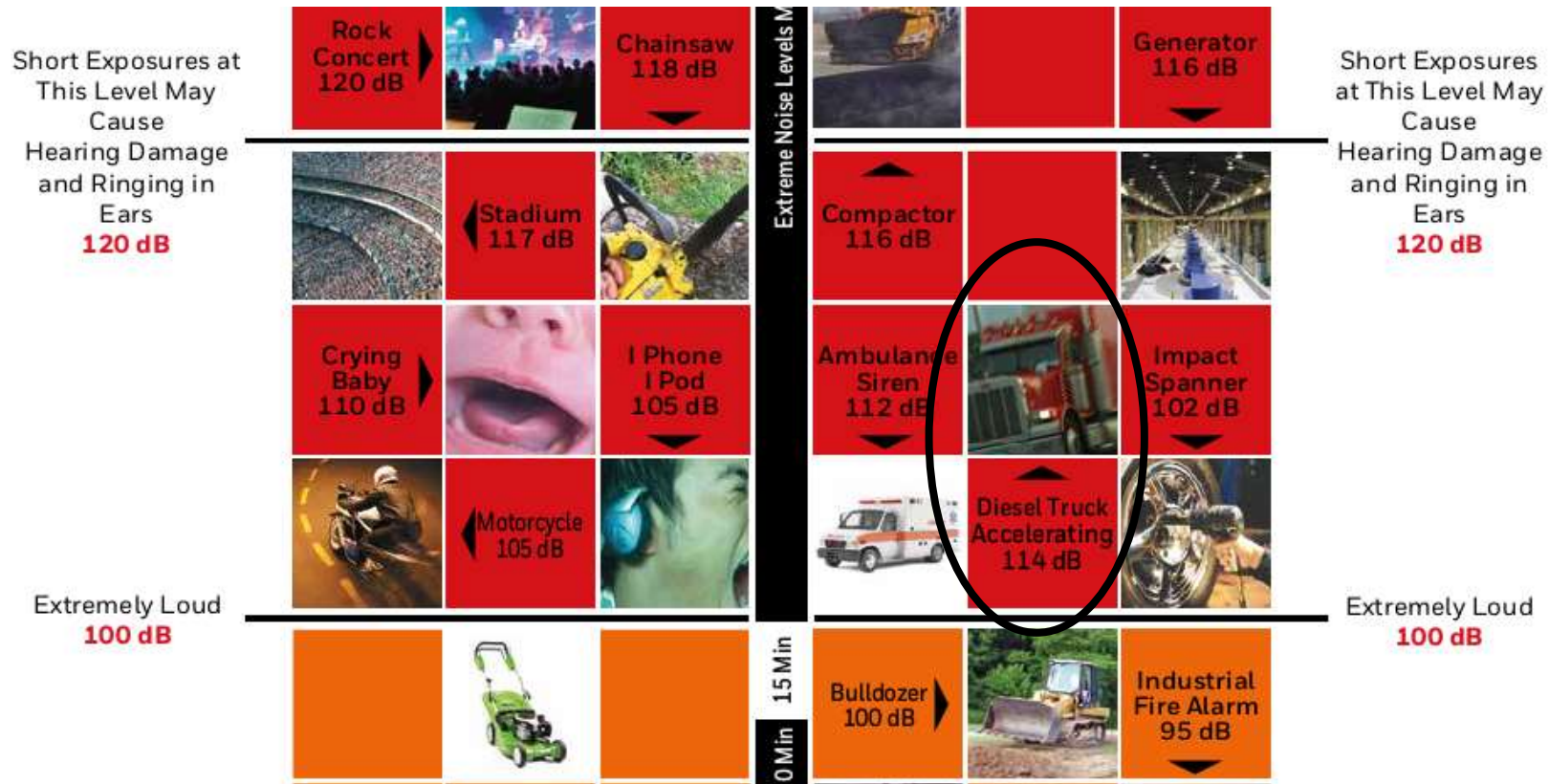


# Site design significantly impacts Appellant's property

- ▶ Applicant testified that 10 trucks per day would be accessing the site, which means trucks would be passing by Appellant's property on an hourly basis.
- ▶ Applicant sound expert's report on site noise was limited to an analysis of forklift operation only.
- ▶ However, the "Noise Thermometer" attached to the expert's report shows that the sound from an accelerating diesel truck measures 114 decibels and is "extremely loud" (slightly louder than an ambulance siren).
- ▶ "Extremely loud" trucks travelling alongside Appellant's property on an hourly basis will likely have substantially negative impact of Appellant's property values.
- ▶ Proposed screening material is not sufficient to minimize noise and odor from extremely loud trucks on Appellant's property.



# Noise Thermometer provided by expert



# Conditional Use Permit Requirements

City Code Section 23.2-29 “Conditional Use Permits”:

(e) *Specific findings for all conditional uses.* Prior to approving any conditional use, the decision making authority shall find that:

...

3.The proposed conditional use **will not produce significant air pollution emissions**, or will appropriately mitigate anticipated emissions to a level compatible with that which would result from a development permitted by right....

7.The proposed conditional use **will not generate significant noise**, or will appropriately mitigate anticipated noise to a level compatible with that which would result from a development permitted by right. **Any proposed use must meet all the requirements and stipulations set forth in section 15.24, Noise control.**



# Proposed use produces significant air pollution

- ▶ The Project's proposed use involves manufacturing of construction formwork which produces air pollution in the form of dust.
- ▶ Applicant testified that its Pompano Beach site used for same purpose is “a mess”.
- ▶ Appellant viewed satellite images of Applicant's operations in Pompano Beach and New Jersey, and testified that storage yards and roadways leading in and out of site are covered with a significant amount of white dust.
- ▶ The fact that the dust on the Pompano Beach and New Jersey sites could be viewed from satellite images indicates that the amount of dust produced by the operations is significant.



# Conditional use should not be granted if the use generates unreasonable noise

Unreasonable noise, which is defined in Section 15.24-1, is prohibited in the City when noise is:

- ▶ Equal to or greater than 65 dba between 11:00 p.m. and 8:00 a.m., Sunday through Thursday
- ▶ Greater than 85 dba between 8:00 a.m. and 11:00 p.m., Sunday through Thursday □
- ▶ Equal to or greater than 65 dba between 12:00 a.m. and 8:00 a.m., Friday through Saturday □
- ▶ Equal to or greater than 85 dba between 8:00 a.m. and 12:00 a.m., Friday through Saturday



# Proposed use will generate unreasonable noise from trucks

- ▶ In its analysis, City staff concluded that the Project was appropriately conditioned to prohibit generating noise levels that exceed 65 decibels at night and 85 decibels during the day.
- ▶ Applicant sound expert's report on noise was limited to an analysis of forklift operation only. He did not analyze the noise related to truck traffic.
- ▶ The noise thermometer that is attached as an exhibit to the expert's report states that an accelerating diesel truck measures 114 decibels, which would be considered "unreasonable noise" under the City's standards.
- ▶ The opaque fence proposed by staff as a condition is not sufficient to mitigate the noise from truck traffic on the site.



# Conclusion

- ▶ The Project should be denied because the site was not designed to mitigate noise and odor on Appellant's property and therefore would have a minimum negative impact on the value of Appellant's property.
- ▶ In addition, the conditional use should be denied because the proposed use will produce significant amounts of air pollution and noise which are not appropriately mitigated.
- ▶ In the alternative, the case should be remanded to the Planning and Zoning Board for a new hearing because the Appellant was not granted the continuance he was entitled to by right under the City's Code.

