IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2018-AP-00104

DIVISION: AP-A

NEPTUNE BEACH, FL REALTY, LLC, a Florida limited liability company,

Petitioner,

v.

CITY OF NEPTUNE BEACH, FLORIDA,

Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This cause comes before the Court on Neptune Beach, FL Realty, LLC's (the "Petitioner") Petition for Writ of Certiorari, filed on September 26, 2018, pursuant to Florida Rule of Appellate Procedure 9.100(c). On November 20, 2018, the City of Neptune Beach, Florida (the "City") filed its Response to the Petition for Writ of Certiorari. On December 10, 2018, the Petitioner filed its Reply. The Court held oral arguments on April 16, 2019.

FACTUAL BACKGROUND

The Petitioner is the owner of real property located at 500 and 572 Atlantic Boulevard in Neptune Beach, Florida (the "Property"). The Property is zoned C-3, allowing intensive commercial activity. After a series of amended applications, the Petitioner filed an application for a special exception for a planned unit development for 175 apartments, 74 hotel rooms, and 33,100 square feet of commercial space on the Property.

At the City's July 18, 2018, Community Development Board ("CDB") meeting, the Petitioner submitted affidavits and expert testimony regarding the application meeting the eight requirements in section 27-160 of the City's land development regulations for a special exception. City Staff, the Chief of Police, and various citizens also presented testimony regarding the application for special exception. At the close of the presentation of evidence, the CDB unanimously recommended denial of the application.

At the August 13, 2018, hearing, the City Council unanimously accepted the recommendation of the CDB and denied Petitioner's application. This Petition ensued.

APPLICABLE LAW

Section 27-160 of the City's land development regulations sets forth the necessary findings for the issuance of special exceptions:

> The community development board may not recommend for approval a special exception unless it makes a positive finding, based on substantial competent evidence, on each of the following, to the extent applicable:
>
> (1) The proposed use is consistent with the comprehensive plan;
>
> (2) The proposed use would be compatible with the general character of the area, considering the population density; the design, density, scale, location, and orientation of existing and permissible structures in the area; property values; and the location of existing similar uses;
>
> (3) The proposed use would not have an environmental impact inconsistent with the health, safety and welfare of the community;
>
> (4) The proposed use would not generate or otherwise cause conditions that would have a detrimental effect on vehicular traffic, pedestrian movement, or parking inconsistent with the health, safety and welfare of the community;
>
> (5) The proposed use would not have a detrimental effect on the future development of the area as allowed in the comprehensive plan;
>
> (6) The proposed use would not result in the creation of objectionable or excessive noise, light, vibration, fumes, odors, dust or physical activities inconsistent with existing or permissible uses in the area;

(7) The proposed use would not overburden existing public services and facilities; and

(8) The proposed use meets all other requirements as provided for elsewhere in this Code.

STANDARD OF REVIEW

When reviewing a petition for writ of certiorari challenging a local government's quasi-judicial determinations, a court must determine: (1) whether procedural due process was afforded, (2) whether the essential requirements of the law were followed, and (3) whether the findings of the local government were supported by competent substantial evidence. Broward Cnty. v. G.B.V. Intern., Ltd., 787 So. 2d 838, 843 (Fla. 2001); City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). The Court will review each of these factors in-turn.[1]

COMPETENT SUBSTANTIAL EVIDENCE

Petitioner claims the CDB and City Council's decisions to deny the special exception application were not supported by competent substantial evidence.

The Court finds there was competent substantial evidence presented at both the CDB and City Council hearings to establish that the proposed use would be incompatible "with the general character of the area, considering the population density; the design, density, scale, location, and orientation of existing and permissible structures in the area; property values; and the location of existing similar uses." § 27-160(2), Code of Ordinances, City of Neptune Beach (2018). Namely, various property owners testified the residential-zoned areas in the City are almost entirely comprised of low-density, single family homes and that the proposed apartment complex would therefore be incompatible with the general character of the area. This fact-based testimony was undisputed and constitutes competent substantial evidence on which the CDB and

[1] For the sake of clarity, this Court finds it appropriate to consider the competent substantial evidence factor first and then to analyze the due process and essential requirements of the law factors.

City Council could have based their decisions. See Metropolitan Dade Cnty. v. Sec. 11 Prop. Corp., 719 So. 2d 1204, 1205 (Fla. 1998) ("This fact-based testimony regarding the aesthetic incompatibility of the project with the surrounding neighborhood, coupled with the site plan, elevation drawings, and the aerial photograph constituted substantial competent evidence supporting the denial of the exception.").

Sufficient competent substantial evidence is found in the record. For example, the recommendation of the CDB, unanimously accepted by the City Council, was based, at least in part, on the written "Required Findings Needed to Issue a Special Exception" forms completed and signed by each member of the CDB. All five members of the CDB recommended denial of the special exception.

Moreover, the Court is not authorized to reweigh the evidence and substitute its judgements for those of the City. Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000) (holding that the circuit court erred on first-tier certiorari review by "reweigh[ing] the evidence and decid[ing] anew the merits of the special exception application"); Marion Cnty. v. Priest, 786 So. 2d 623, 626 (Fla. 5th DCA 2001) ("[W]hen the facts are such that a zoning authority has a choice between two alternatives, it is up to the zoning authority to make the choice, not the circuit court.").

Accordingly, the Court finds there was competent substantial evidence on which the CDB and City Council could have based their decisions to deny the special exception.

PROCEDURAL DUE PROCESS

Petitioner maintains the City failed to provide procedural due process during the CDB and City Council hearings on its special exception application.

Public Statements by Quasi-Judicial Decision Makers Evincing Bias or Partiality Against Petitioner's Application for Special Exception

First, Petitioner claims some quasi-judicial decision makers on the City Council prejudged the application based on public statements made prior to the hearing. Specifically, Petitioner points to a Facebook post made by City Councilor Rory Diamond, stating "Just so you all know where I stand, I am not going to vote in favor of apartments. I'm open minded to all sorts of other ideas, but the residents have made their position crystal clear on there just being one big apartment building." Petitioner also takes issue with Mayor Elain Brown telling citizens who opposed the application that she had "the same concerns that you have," and that "we [the City Council] were here for you." Mayor Elain Brown further said "When you represent the character of the community and you say in court that it does not meet the character, we have won that in court before."[2]

The Court finds the above-mentioned statements do not evince sufficient bias against Petitioner or partiality with respect to Petitioner's application so as to render the proceedings violative of due process. City Councilor Rory Diamonds' Facebook post merely shows he would not support a special exception proposing an apartment complex, which is in-line with the competent substantial evidence suggesting that an apartment complex would be incompatible with the low-density residential character of the City. Likewise, Mayor Elain Brown's statements establish that she would be hesitant to approve any proposed use on the Property that would be incompatible with the low-density residential character of the City—as were many citizens. These statements fall well short of the types of conduct that have previously been found to violate a party's due process rights in quasi-judicial proceedings. See, e.g., Seminole Enter.,

[2] Petitioner also challenges the sufficiency of City Councilor Rory Diamond's and Mayor Elain Brown's disclosures regarding *ex parte* communications relating to the special exception application. Both decision makers indicated they met and spoke with countless people regarding the application process, including Petitioner and members of the public. That neither specifically disclosed the post or video footage found on Facebook does not render their disclosures invalid or otherwise create a presumption of prejudice.

Inc. v. City of Casselberry, 811 So. 2d 693, 696-97 (Fla. 5th DCA 2001) ("[The petitioner] has established more than mere political bias or an unfriendly political atmosphere. In effect, it was denied the right to challenge, through cross-examination, the testimony of the principal witness against it. The evidentiary rulings by [the mayor-hearing officer] were not merely erroneous but rather reflect a bias so pervasive as to have rendered the proceedings violative of the basic fairness component of due process."); Ridgewood Props., Inc. v. Dept. of Comm. Affairs, 562 So. 2d 322, 323 (Fla. 1990) (holding due process rights were violated when single person was "prosecutor, witness, and ultimate judge of the facts and law").

Furthermore, the Court is reluctant to restrain elected public officials from discussing matters of public concern with their constituents even though those officials may later make quasi-judicial determinations related to those matters. See Izaak Walton League of Am. V. Monroe Cnty., 448 So. 2d 1170, 1171 (Fla. 3d DCA 1984) ("[T]he law is clear that political officeholders may not be prevented from performing the duties they have been elected to discharge merely because . . . they have previously expressed, publically or otherwise, an opinion on the subject of their vote." (footnotes omitted)); Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 493 (1976) ("[A] decisionmaker [is not] disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'").

Failure to Disclose Evidence in Opposition Prior to Hearing

Second, Petitioner argues it was not afforded due process because certain evidence in opposition to the application was not provided to Petitioner before the City Council hearing. Petitioner, however, has not cited any legal authority holding or otherwise suggesting that the

City violated Petitioner's due process rights by not disclosing all the evidence that would be presented in opposition to the application prior to the hearing. See Lee Cnty. v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) ("[T]he quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled. Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure." (quoting Jennings v. Dade Cnty., 589 So. 2d 1337, 1340 (Fla. 3d DCA 1993))).

Failure to Make Detailed Written Findings

Third, Petitioner maintains the City improperly failed to make detailed written findings supporting its decision to deny the application. Contrary to Petitioner's argument, the City was not required by make any detailed written findings: "A circuit court, conducting certiorari review of a local government's quasi-judicial decision on a development application, may uphold the decision even in the absence of supportive factual findings, so long as the court can locate competent substantial evidence consistent with the decision . . . ." Alachua Land Investors, LLC v. City of Gainesville, 15 So. 3d 782, 782 (Fla. 1st DCA 2009); see also Bd. Of Cnty. Com'rs of Brevard Cnty. v. Snyder, 627 So. 2d 469, 476 (Fla. 1993) ("While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling.").

Accordingly, the Court finds the City afforded Petitioner procedural due process.

ESSENTIAL REQUIREMENTS OF THE LAW

Petitioner claims the CDB and City Council failed to follow the essential requirements of the law in denying its application.

Section 27-160 of the City's land development regulations outlines the eight positive findings the CDB must make in order to recommend approval of a special exception application. The record establishes the CDB and City Council appropriately analyzed Petitioner's application under section 27-160.

Accordingly, the Court finds the City followed the essential requirements of the law.

Therefore, it is **ORDERED AND ADJUDGED** that Petitioner's Petition for Writ of Certiorari, filed on September 26, 2018, is **DENIED**.

DONE AND ORDERED in Jacksonville, Duval County, Florida on MAY 13, 2019.

ROBERT M. FOSTER
Senior Circuit Judge

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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail or electronic service on _____, 2019.

_____,
Deputy Clerk

Case No.: 16-2018-AP-00104-AXXX
/tbc