

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT  
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 09-19AP

CARILLON COMMUNITY RESIDENTIAL  
ASSOCIATION, INC. and KEN HOFER,  
Petitioner,

vs.

SEMINOLE COUNTY, FLORIDA,  
AHG GROUP, LLC, and UNIVERSITY OF  
CENTRAL FLORIDA FOUNDATION, INC.  
Respondents.

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**ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI**

THIS CAUSE comes before the Court on Amended Petition for Writ of Certiorari, filed on April 29, 2009. Having reviewed the petition, the responses, Seminole County's Amended Response, the reply, the record provided and attached to the petition and responses, and the applicable law, and upon due consideration, the Court finds as follows:

Petitioner is challenging the Seminole County Board of County Commissioners' ("BCC") decision to approve an amendment to the Carillon Planned Unit Development ("PUD"). Petitioner asserts that the BCC denied them due process of law and departed from the essential requirements of law.

On or about April 3, 2007, the Developers submitted an application for a major amendment to the PUD. The amendment sought to amend the Final Master Plan for the PUD to allow for a four story UCF student housing complex, two parking garages, a religious/student center and 53,977 square feet of commercial/retail use. On January 27, 2009, the BCC held a

hearing on the major amendment. At the start of the hearing, counsel for Petitioners inquired as to whether the BCC would swear witnesses and permit cross-examination. The BCC indicated that it was not their practice to swear witnesses and permit cross-examination and that it would be following said practice.

During the hearing, the Developers presented a revised Final Master Plan. The revisions were the result of requests made at the Planning and Zoning Commission's meeting on January 7, 2009. Counsel for Petitioners objected to the last-minute changes and requested a continuance. The BCC noted the objection but continued with the hearing.

The applicable standard of review by a circuit court of an administrative agency decision is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).

#### Violation of Due Process Claims

The Petitioners assert that the BCC denied them due process by not swearing the witnesses, not permitting cross-examination of the witnesses and by denying Petitioners' request for a continuance because the applicant presented a revised plan at the hearing. With regard to the BCC's failure to swear the witnesses, there is no requirement that the witnesses at such quasi-judicial hearings be sworn. Zephyrhills Retail, LLC v. The City of Zephyrhills, Florida, 2007 WL 1976086 (Fla. Cir. Ct. 6<sup>th</sup> Jud. Cir., March 15, 2007) (citing City of St. Petersburg v. Cardinal Industries Development Corp., 493 So.2d 535 (Fla. 2d DCA 1988)).

With regard to cross-examination, Petitioners cite to several cases that reference the right

to cross-examine witnesses as an aspect of due process. Most of those cases reference the following language from Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3<sup>rd</sup> DCA 1991), “In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.” Id. at 1340.

However, Jennings did not involve a denial of an opportunity to cross-examine witnesses but the effect of an ex parte communication upon the decision from a quasi-judicial hearing. Therefore, this language is dicta. Similarly, the cases cited by the Petitioners that relied upon Jennings did not address whether a denial of an opportunity to cross-examine witnesses constituted a denial of due process. In fact, the Petitioners do not cite a single case in which the court held that a denial of an opportunity to cross-examine witnesses at a quasi-judicial hearing like the one at issue in this case constituted a denial of due process.

“[T]he quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled. ... A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard.” Id. at 1340. The parameters of notice and an opportunity to be heard “are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.” Massey v. Charlotte County, 842 So. 2d 142, 146 (Fla. 2d DCA 2003).

In order to determine what process is constitutionally required, at least three factors are relevant: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the government’s interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. In the case at bar, while arguably the Petitioners’ enjoyment of their property will be

impacted by the official action, they are not being deprived of the use of their property, whereas, the Developers have a compelling interest in developing the property in question. The risk of an erroneous deprivation is low. The Petitioners were able to present their witnesses. Furthermore, while the BCC did not permit for cross-examination, it did permit questions to be directed to the Board, which in turn would address the questions to the appropriate individuals. Thus, while the questioning might not have been in the form the Petitioners preferred, they were provided with an opportunity to present questions to the Developers' witnesses. Finally, land use hearing are not in the same form as traditional adversarial hearings during which opposing parties are clearly delineated and those entitled to cross-examine witnesses can be clearly identified. Rather, land use hearings are public hearings during which any member of the public has a right to participate. At the hearing in question, in addition to the witnesses for the Developers and the Petitioners, twenty-five community members spoke at the hearing. It would be impractical to grant each interested party the right to cross-examine the witnesses at such a hearing, especially in light of the fact that the BCC provides a procedure by which the witnesses can be questioned. As such, the Petitioners have failed to demonstrate that they were denied due process when they were prohibited from cross-examining the witnesses.

Finally, the Petitioners have failed to establish that the failure to grant a continuation to review the revised plans violated their right to due process. The changes were minor and were reviewed during the hearing.

#### Departure from the Essential Requirements of Law Claims

The Petitioners asserts that the BCC departed from the essential requirements of law because: (1) the PUD amendment failed to meet the requirements of the county's land development code (LDC); (2) the BCC was required to process and adopt a rezoning ordinance

in order to approve the PUD amendment; (3) the student housing component does not comply with the county's C-1 development standard; and (4) the PUD amendment does not require compliance with the upland buffer requirements in the county's LDC for property within the Econlockhatchee River Basin. "A ruling constitutes a departure from 'the essential requirements of law' when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.'" Clay County v. Kendale Land Development, Inc., 969 So.2d 1177, 1180 (Fla. 1<sup>st</sup> DCA 2007) (quoting Combs v. State, 436 So.2d 93, 96 (Fla.1983)).

First, the Petitioners asserts that the PUD amendment failed to meet the requirements of the LDC because it lacked an earthmoving concept plan and a complete fire protection plan as required by the LDC and contained a traffic impact study that did not comply with the LDC. Whether the information contained in the application was sufficient to meet the LDC requirements with regard to the earthmoving concept plan, the fire protection plan and the traffic impact study is a factual determination to be made by the BCC. It is not within the purview of this court to re-weigh the evidence. See, e.g., Town of Manalapan v. Gyongyosi, 828 So. 2d 1029, 1033 (Fla. 4<sup>th</sup> DCA 2002).

Second, the Petitioners assert that a rezoning ordinance was required. The Petitioners argue that because the Developers sought to change the conditions of the existing PUD, pursuant to Section 20.02(d) of the LDC, "A change in the zoning classification assigned to a parcel of property shall be accomplished by means of the enactment of an ordinance in accordance with state law." However, Section 30.21 of LDC, which sets forth the zoning classifications in Seminole County, lists PUD – Planned Unit Development District as a classification. Section 30.451(b) of the LDC provides, "Relation to zoning districts. An approved PUD shall be considered to be a separate zoning district in which the final master plan, as approved,

establishes the restrictions, regulations, and district description according to which the development shall occur.” The Developers are not seeking to change the classification from a PUD, but rather are seeking to amend the PUD. Moreover, the staff report on the PUD amendment indicates that the proposed uses under the amendment are for multi-family residential and commercial uses and that the original PUD rezone in 1987 provided for multi-family, commercial and industrial use. Thus the proposed uses under the amendment are consistent with the uses approved as part of the original PUD rezone. Section 30.448 sets forth the procedure for a major amendment to the PUD, which was followed in this case. Therefore, the Petitioners have failed to demonstrate that the Developers are seeking a change in the zoning classification of the property, which would require an ordinance. As such, the Petitioners have failed to demonstrate that the BCC has departed from the essential requirements of law.

Third the Petitioners assert that the student housing component does not comply with the county’s C-1 development standards. However, Section 30.451(b) of the LDC provides, “Relation to zoning districts. An approved PUD shall be considered to be a separate zoning district in which the final master plan, as approved, establishes the restrictions, regulations, and district description according to which the development shall occur.” Therefore, the C-1 development standards only applied to Parcels 201/401 and 202, Lot 2 because the version of the PUD existing prior to the amendment at issue here required that the C-1 development standards apply. The purpose of the amendment was to change the standards applying to those parcels. Therefore, the Petitioners have failed to demonstrate that the BCC departed from the essential requirements of the law.

Finally, the Petitioners assert that the PUD amendment does not require compliance with the upland buffer requirements in the LDC for property within the Econlockhatchee River Basin.

There was evidence presented at the hearing that the project did not impact the Econlockhatchee River and that the BCC staff concluded that there were no issues with regard to the Econlockhatchee Basin and the PUD amendment. There was no clear evidence contained in the record that the property in question is within the Econlockhatchee River Basin such that Section 30.1085(b)(6) would apply. Furthermore, the PUD amendment sought setback waivers. It is not within the purview of this court to re-weigh the evidence. Moreover, to the extent a legal error may have been made regarding the upland buffer requirements, the Petitioners have failed to demonstrate that a miscarriage of justice has occurred. As such, the Petitioners have failed to demonstrate that the BCC has departed from the essential requirements of law.

Accordingly, it is

**ORDERED AND ADJUDGED** that the petition is DENIED.

**DONE AND ORDERED** in chambers at Sanford, Seminole County, Florida, this 25 day of September, 2009.

  
CLAYTON B. SIMMONS, CIRCUIT JUDGE

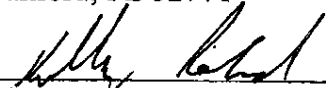
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