IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

Case No.: 1D19-2137

L.T. No.: 16-2018-AP-104

NEPTUNE BEACH, FL REALTY, LLC,

Petitioner

vs.

CITY OF NEPTUNE BEACH, FLORIDA

Respondent
_____/

REPLY

Petitioner, Neptune Beach, FL Realty, LLC, (hereafter the "Petitioner") files this Reply to Respondent's Response filed on July 9, 2019 (the "Response").

Paul M. Harden, Esq.
Florida Bar # 192557
Paul_harden@bellsouth.net
Zachary Miller, Esq.
Florida Bar #0059331
Zach_Miller@bellsouth.net
501 Riverside Avenue Suite 901,
Jacksonville, Florida 32202
Attorneys for Petitioner

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I. JURISDICTION OF THE COURT.

This Court has jurisdiction of this matter pursuant to Article I, Sec. 21 of the Florida Constitution and Rule 9.030(b)(2)(B).

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW.

Petitioner relies on its Statement of Facts provided in its Second Tier Petition for Writ of Certiorari.

III. SUMMARY OF ARGUMENT

Respondent incorrectly argues that its failure to provide transcripts to the Circuit Court prevents this Court from addressing the Circuit Court's failure to follow the correct law. The Response misrepresents the applicable law on special exceptions. The Response fails to rebut that Respondent's Comprehensive Plan (the "Plan") requires densities only suitable for multi-family development on the property at-issue and instead claims that the application conflicts with the Plan without pointing to any record evidence as support. The Response incorrectly argues that a quasi-judicial officer can pre-judge an application and fail to disclose statements regarding said pre-judgment on the basis that hypothetical future litigation may overturn approval of said application.

A. TRANSCRIPTS ARE NOT REQUIRED TO REVIEW THE CIRCUIT COURT'S FAILURE TO FOLLOW THE CORRECT LAW

Respondent asserts that it was incumbent upon Petitioner to provide the Court with transcripts of the proceedings below. *Pages 6-7, Response*. On

certiorari review of special exceptions, as a matter of law, it is the burden of the quasi-judicial body – not the applicant- to provide the evidence to the Circuit Court on which the lower tribunal based its decision. *Irvine v. Duval Cty. Planning Com*., 466 So. 2d 357, 366 (Fla. 1st DCA 1985).

In fact, Respondent failed to file with the Circuit Court record evidence from the lower tribunal which supported the denial of the special exception. Only five (5) months after Respondent filed its response to the original petition for writ of certiorari, and four (4) months after Petitioner filed its reply, and on the eve of oral argument did Respondent attempt to supplement the record to the Circuit Court, which the Circuit Court denied. EXHIBIT Q.

Rule 9.220, Florida Rules of Appellate Procedure (which is referenced in Rule 9.100(g) as to a petitioner's appendix) provides,

> The purpose of an appendix is to permit the parties to prepare and transmit copies of **those portions of the record deemed necessary to an understanding of the issues presented**. It may be served with any petition, brief, motion, response, or reply but shall be served as otherwise required by these rules. In any proceeding in which an appendix is required, if the court finds that the appendix is incomplete, it shall direct a party to supply the omitted parts of the appendix. No proceeding shall be determined until an opportunity to supplement the appendix has been given. (emphasis added).

The issue on second tier certiorari review is whether the Circuit Court failed to follow the essential requirements of law, which is synonymous with whether the Circuit Court followed the correct law. *Orange City v. Shay*, 649 So.2d 343 (Fla.

5th DCA 1995).The portion of the record "deemed necessary to an understanding of the issues presented" are the legal issues contained in the order of the lower court. Where a case concerns a pure question of law the absence of a transcript of the proceedings in the lower tribunal does not require affirmance of the lower tribunal's ruling. *Rittman v. Allstate Ins. Co*., 727 So. 2d 391, 394 (Fla. 1st DCA 1999)[1]. Where the legal issue is determined by referencing the pleadings, filed supporting documents, motions, etc, the absence of a transcript does not compel affirmance. *Doan v. Amelia Retreat Condo. Ass'n*, 604 So. 2d 1292, 1294 (Fla. 1st DCA 1992), and *Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344, 348 (Fla. 4th DCA1992).

The Circuit Court held that the relevant criteria for denial of a special exception are those standards contained in Sec. 27-160, Land Development Code (the "LDC"). EXHIBIT P. That "issue presented" is evident from the order of the Circuit Court (the "Order"). The Circuit Court's holding demonstrates a failure to follow the correct law, which is that the standard for denial of a special exception is that the special exception is adverse to the public interest.

The Circuit Court held that testimony from lay persons that, "the residentially-zoned areas in the City (sic) are almost entirely comprised of low-density, single family homes and that the proposed apartment complex would

[1] Appellee West concedes the preceding as correct. *Page 12, Answer Brief.*

therefore be incompatible with the general character of the area" was competent substantial evidence. EXHIBIT P. This portion of the Order demonstrates a failure of the Circuit Court to follow the correct law – which is that the standard for denial of a special exception is whether said exception is adverse to the public interest. Furthermore the Order evidences that the Circuit Court ignored the legal mandate that testimony from lay persons is not competent or substantial. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So. 2d 202, 204 (Fla. 3d Dist. 2002)'; *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 31 (Fla. 1st DCA 2010); *Apopka v. Orange Cty.*, 299 So. 2d 657 (Fla. 4th DCA 1974); *Pollard v. Palm Beach Cty.*, 560 So. 2d 1358 (Fla. 4th DCA 1990) and *Jesus Fellowship, Inc. v. Miami-Dade Cty.*, 752 So. 2d 708 (Fla. 3d DCA 2000).

It is also evident from the Order and the record presented to the Circuit Court that the Circuit Court failed to apply the correct law as to due process, expressly holding that statements from a quasi-judicial officer evidencing clear bias against Petitioner's application do not "evince" impartiality." EXHIBIT P. The law is clear that due process requires impartiality for decision makers. *Verizon Bus. Network Servs. ex rel. MCI Communs., Inc. v. Dep't of Corr*., 988 So. 2d 1148 (Fla. 1st DCA 2008). The Circuit Court's error as to the applicable law is evident from the Order's citation to *Izaak Walton League v. Monroe Cty.*, 448 So. 2d 1170 (Fla. 3d DCA 1984) which concerns the conduct of elected officials acting in a

legislative capacity. The Circuit Court's confusion as to these two distinct standards is clear from the Order.

Respondent's argument that certiorari review of the Order is unavailable due to a lack of a transcript is legally incorrect but also ignores that it was the legal requirement of Respondent to provide record competent substantial evidence to the Circuit Court that supported the decision to deny the special exception.

B. RESPONDENT AGREED THAT THE APPLICABLE STANDARDS ARE IN SECTION 27-244, LDC

Respondent's staff presented to the CDB and City Council, in its staff report, that the relevant standards for the burden for Petitioner's application are contained in Section 27-244, LDC. EXHIBIT G. Respondent reiterated to the Circuit Court that the applicable standards are those contained in Section 27-244, LDC. EXHIBIT R. Specifically, Respondent provided to the Circuit Court, "Section 27-244 of the City's [LDR] sets forth the various criteria and requirements for a Planned Unit Development." *Page 5, Initial Response*.

Respondent also expressly argued to the Circuit Court that Section 27-160 applies to the CDB's "recommendation." *Pages 27, 31 Initial Response*.

Respondent, in an attempt to support the Circuit Court's failure to follow the essential requirements of law, now backtracks on what it believes to be the applicable LDC sections. *Page 11, Response*.

Respondent argues, for the first time, that these portions of the LDC should

be read *in pari materia*. *Page 10, Response*. Respondent ignores that Section 27-244, LDC is specific to PUDs while Section 27-160, LDC is general and that the maxim of *in pari materia* is outweighed by the rule of statutory interpretation that a specific provisions in a land development code controls over a general provision. *Surf Works, LLC v. City of Jacksonville Beach*, 230 So. 3d 925, 931-932 (Fla. 1st DCA 2017) citing *Cone v. State, Dep't of Health*, 886 So. 2d 1007, 1010, 1012 (Fla. 1st DCA 2004).

Notably, Respondent does not rebut the argument that a denial based upon the ambiguous standard of, "not in the general character of the area" (*Page 12, Petition*) is so vague that it gives Respondent unbridled discretion to deny any special exception it wishes. Respondent's silence as to this issue demonstrates that either Respondent is unaware that quasi-judicial decisions require definite standards that are easily ascertainable by an applicant or Respondent is aware but prefers its decisions to be mere pretext based upon vague qualities and standards.[2]

The Circuit Court's ruling that Respondent's denial could be based upon criteria in Sec. 27-160, LDC is incorrect (it must be based upon a finding of adverse impact to the public) and Respondent's argument in support of the Circuit Court is disingenuous given their previous arguments, as well as, ignores the correct law as to statutory interpretation.

[2] Such as multi-family is not in character in an area wherein the allowed density only permits multi-family.

C. RESPONDENT MISREPRESENTS THE INITIAL BURDEN AS TO SPECIAL EXCEPTIONS.

Respondent argues that Petitioner did not produce prima facie evidence that the application complied with the applicable standards for the initial burden. *Page 13, Response*. Again, Respondent fails to understand the nature of quasi-judicial decisions and what exactly specific terms mean with respect to special exceptions.

The law as to special exceptions is the applicant must make a *prima facie* showing that the special exception meets the criteria for its initial burden. *Irvine* at 365. "Prima facie" in this context, is defined as, "a party's production of enough evidence to allow the fact-trier to inter the fact at-issue and rule in the party's favor." *Nationstar Mortg., LLC v. Wing*, 210 So. 3d 216 (Fla. 5th DCA 2017) citing Black's Law Dictionary (10th ed. 2014). After this showing, the special exception can be denied only if the voting body has competent substantial evidence that the special exception is adverse to the public interest. *See Irvine at 365.*

Respondent's professional planning staff issued a report (citing to the applicable LDC sections) demonstrating that the application met the initial prima facie burden. EXHIBIT G. Respondent believes (incorrectly) that evidence (which it has difficulty articulating) rebutted said report. *Page 2, Response*. This underscores Respondent's poor understanding of the process for special exceptions. It is irrelevant if there is competing evidence as to the initial burden; all that is required is some evidence. In this case, it is Respondent's own staff that

provided the evidence[3]. EXHIBIT G. By law this report constitutes competent substantial evidence and demonstrates that Petitioner has met its burden. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*. 857 So. 2d 202, 205, (Fla. 3d Dist. 2003); *Palm Beach County v. Allen Morris Co*., 547 So. 2d 690, 694 (Fla. 4th Dist. 1989); *Hillsborough County Bd. of County Comm'rs v. Longo*, 505 So. 2d 470, 471 (Fla. 2d Dist. 1987); *Metropolitan Dade County v. Fuller*, 515 So. 2d 1312, 1314 (Fla. 3d Dist. 1987); *City of Tampa v. Madison*, 508 SO. 2d 754 (Fla. 2d Dist. 1987); and *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 710 (Fla. 3d Dist. 2000).

As a matter of law Petitioner met its initial burden. Respondent's reliance on layperson testimony to counter this burden is contrary to the law applicable to special exceptions.

D. RESPONDENT MISREPRESENTS PETITIONER'S ARGUMENT AS TO COMPENTENT SUBSTANTIAL EVIDENCE.

Respondent claims that Petitioner is asking to evaluate the evidence in the record. *Page 14, Response*. Respondent's argument is an attempt to obfuscate the fact that the Circuit Court applied the wrong law in holding that the testimony of

[3] It is telling that Respondent in its brief does not take issue with the staff report or its conclusions, as to do so would require Respondent to argue that its reviewing staff's findings are neither competent nor substantial.

laypersons that only low-density residential development is appropriate constituted competent substantial evidence.

The law is clear that in order to deny an application for special exception the quasi-judicial body must have competent substantial evidence that the special exception will have an adverse effect on the public. *Planning Com. of Jacksonville v. Brooks*, 579 So. 2d 270, 273 (Fla. 1st DCA 1991) citing *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th DCA 1975).

The Circuit Court failed to identify competent substantial evidence that demonstrates the required adverse effect standard, therefore the Circuit Court failed to follow the correct law.

It is telling that Respondent is silent as to the fact that if the Circuit Court's reasoning is correct that such testimony constitutes competent substantial evidence then any special exception for any use that is not low density residential could be denied because it is "incompatible with the general character of the area." This would mean that any and all uses allowed by special exception that are not low density single family homes should be denied because the "general character"- based on the testimony of laymen- is only single family. Specifically it means that the thirteen (13) uses allowed by special exception in the C-3 Zoning District (the zoning district of Petitioner's property) are disallowed because they are not single family residences and therefore not compatible with the general character of

Neptune Beach.

Respondent has no rebuttal to the fact that using the "general compatibility" as the defining metric means the allowance of multi-family, per the LDC and the densities permitted by right in the Plan, per the Order, is a fiction and the only residences allowed, even in high density areas under the Plan, are single family. Respondent does not address that the Plan designation for the property at-issue would not allow for low-density residential development. How can testimony that only low-density residential is compatible with the general character be competent if Respondent's Plan does not allow low-density residential for the property subject to Petitioner's application?

Respondent is silent as to the ramifications of the Order because the holdings contained therein render the ability to develop anything other than low-density single family residential a fiction, renders the densities allowed by right in the Plan a fiction and unlawfully makes the applicable standard for a special exception to be "Whatever those who testify in opposition want." The foregoing is why, as a matter of law, courts have continually held that general and conclusory statements from the public cannot constitute competent substantial evidence as to special exceptions. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc*., 857 So. 2d 202, 204 (Fla. 3d Dist. 2002)'; *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 31 (Fla. 1st DCA 2010); *Apopka v. Orange Cty.*, 299 So. 2d 657 (Fla. 4th

DCA 1974); *Pollard v. Palm Beach Cty.*, 560 So. 2d 1358 (Fla. 4th DCA 1990) and *Jesus Fellowship, Inc. v. Miami-Dade Cty.*, 752 So. 2d 708 (Fla. 3d DCA 2000).

Petitioner is not asking this Court to reweigh any evidence, it is asking this Court to direct the Circuit Court and Respondent to identify the record evidence demonstrating what adverse effect the special exception will have on the public. After almost a year of litigation, neither has done so.

E. RESPONDENT ARGUMENTS CONTRADICT LEGALLY MANDATED REQUIREMENTS FOR DUE PROCESS

As to the non-disclosed ex parte communications, in particular those of a council member writing that he would never support apartments in this location, Respondent's argument that said comments are fine because they simply reflect a belief that Petitioner's application is inconsistent with the Plan. *Pages 16 and 18, Response*.

Again, Respondent does not identify: HOW the application conflicts with the Plan or what record evidence demonstrates how it is conflicts with the Plan. The Respondent also has no rebuttal to the fact that the Plan expressly designates the property at-issue for densities which require multi-family. Exhibit B.

Setting aside how Respondent's argument is contradicted by inconvenient facts (including the report of its own staff), due process requires a quasi-judicial officer to be free from pre-judgment. That is, the councilman cannot make

comments about Petitioner's application until said councilman has heard evidence ON THE APPLICATION.

Respondent, strangely, cites to *Pinecrest Lakes, Inc. et. al. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001), as support, arguing that the councilman's comments were for the protection of the applicant because if the application was approved it would be torn by down by court order. *Pages 16-17, Response*.

By Respondent's logic a quasi-judicial official may pre-judge an application, before having any evidence (competent or otherwise) and declare they will vote "no" on said application (but not disclose this declaration as *ex parte*) because of the possibility that someone may prevail on a Section 163.3125 action.

Respondent's reasoning would allow any quasi-judicial officer to pre-judge any application, make statements to score political points on said application, fail to disclose said statements and then vote accordingly to those prejudgments, and then seek cover under the potential that a third party may be successful in de novo litigation.

The fallacy of Respondent's reasoning is evident and should be disregarded by this Court.

IV. CONCLUSION

The arguments offered by Respondent in its Response have no basis in fact or law. Based on the foregoing and those arguments in the Petition of Writ of

Certiorari to this Court, Petitioner respectfully requests this Court enter an Order granting the Petition, quashing the Order of the Circuit Court denying the Petition and ordering the Circuit Court to follow the essential requirements of law in reviewing the quasi-judicial decision of the City of Neptune Beach. *See Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1990); *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478 (Fla. 4th DCA 1975), and *Debes v. City of Key W.*, 690 So. 2d 700, (Fla. 3d DCA 1997).

RESPECTFULLY SUBMITTED AND FILED the 6th day of August 2019.

CERTIFICATES OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Clifford B. Shepard, Esq., counsel for Respondent, by e-mail (cshepard@shepardfirm.com) on the 6th day of August, 2019.

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/s/ Paul M. Harden
Paul M. Harden, Esq.
Florida Bar # 192557
Paul_harden@bellsouth.net
Zachary Miller, Esq.
Florida Bar #0059331
Zach_Miller@bellsouth.net
501 Riverside Avenue Suite 901,
Jacksonville, Florida 32202

I HEREBY CERTIFY, pursuant to Florida Rules of Appellate Procedure 9.100(b)(3), that a copy of the foregoing was served on the Honorable Robert Foster, 501 West Adams Street, Room 7047 Jacksonville, Florida 32202 by U.S. Mail, this 6th of August, 2019.

/s/ Paul M. Harden
Paul M. Harden, Esq.
Florida Bar # 192557
Paul_harden@bellsouth.net
Zachary Miller, Esq.
Florida Bar #0059331
Zach_Miller@bellsouth.net
501 Riverside Avenue Suite 901,
Jacksonville, Florida 32202

CETIFICATE OF COMPLIANCE WITH FLORIDA RULES OF APPELLATE PROCEDURE 9.100(l)

I HEREBY CERTIFY that this motion complies with the font and formatting requirements set forth at rule 9.100(l), Florida Rules of Appellate Procedure.

/s/ Paul M. Harden
Paul M. Harden Esq.