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City Attorney Packet to DRB

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MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229

Box 46

TO: Development Review Board **DATE:** January 9, 2012

FROM: Marion J. Radson, City Attorney

SUBJECT: Petition DB-11-145 SUB (Grace Market Place); Development Review Board Meeting of January 12, 2012

In preparation for the Board meeting on January 12, 2012, I am providing you with a copy of the "Final Order Dismissing (the) Amended Petition for Writ of Certiorari" rendered by the Circuit Court on December 30, 2011 in the case styled Nalbandian Properties, LLC, Ropen Nalbandian v City of Gainesville. In this case the Petitioners, Nalbandian Properties, LLC and Ropen Nalbandian challenged the rezoning of the property by the city commission to Planned Development. The decision of the court upheld the decision of the city commission when it rezoned the property.

As board counsel, I am advising the Board to take notice of this decision with particular reference to the court's findings as to the interpretation and application of the City's Comprehensive Plan and application to the Planned Development Zoning and Land Development Code. Mr. Sanders on behalf of his clients raised similar issues at the previous meeting of the Board when this item was first heard.

As to consistency with the City's Comprehensive Plan, the Court finds that "(a) review of the City's Comprehensive Plan reveals that retail, office, service and residential uses (uses which comprise the Homeless Center PD) are specifically allowed in the Industrial Land Use category as described in the Plan. The Court further finds that ..."a review of the Plan and regulations at issue do not reveal support for Nalbandian's argument that the uses allowed in a PD zoning district in the Industrial Land Use category are only those uses allowed in the "I-1", "I-2" and "W" zoning districts." The Court concludes "...that the uses in the PD rezoning for the Homeless Center are uses that are allowed by the City's Comprehensive Plan and therefore in accord with the essential requirements of law."

As to the provision in the City's Comprehensive Plan that allows for 25% of industrial area to contain "non-industrial uses", the Court finds that the interpretation of City Staff is reasonable that the Comprehensive Plan refers to 25% of "industrial area" within the City. As stated in the Court decision, "(City) Staff testified that they determined the 25% threshold by counting the number of parcels in the City that were Industrial Land Use." The Court concludes that the City's interpretation is reasonable and in accord with the essential requirements of law.

While this decision is not yet final pending a possible appeal, the findings and conclusions of the Court are relevant to the considerations of this Board in this hearing.

cc:

Erik Bredfeldt, Planning & Development Director
Ralph Hilliard, Planning Manager
Lawrence Calderon, Lead Planner

Attachment (1)

COPY

IN THE EIGHTH JUDICIAL CIRCUIT COURT
IN AND FOR ALACHUA COUNTY, FLORIDA

NALBANDIAN PROPERTIES, LLC, ROPEN NALBANDIAN,

Petitioners,

v.

CITY OF GAINESVILLE, a political Subdivision of the State of Florida,

Respondent.
_____/

CASE NO.: 01-2010-CA-6288

DIVISION: W

FINAL ORDER DISMISSING AMENDED PETITION FOR WRIT OF CERTIORARI

THIS ACTION came before the Court on an Amended Petition for Writ of Certiorari filed on December 15, 2010. This Court issued its Order to Show Cause why relief should not be granted on January 19, 2011. The Court has reviewed the amended petition, appendix, and hearing transcripts, the Respondent's response, and the Petitioners' reply. The Court has also had the benefit of oral argument which took place on November 7, 2011. Having considered the written and oral submissions of the parties, as well as the record, this Court concludes that certiorari relief should be, and is, denied.

FACTS AND PROCEDURAL HISTORY

Petitioners, Nalbandian Properties, LLC and Ropen Nalbandian (collectively referred to as "Nalbandian"), seek review of the Gainesville City Commission's October 7, 2010 decision to rezone a 9.78 acre parcel of land from General Industrial District (I-2) to Planned Development (PD) in order to develop a One-Stop Homeless Center ("Center") on the property. The Center as designed would allow the City to provide such services as residences for destitute people in the

form of dormitories, campgrounds, tents and Katrina cottages, a food distribution center for the needy, medical services, gardens for agricultural purposes, sale of the agricultural goods on site, a thrift shop, and offices for administrative purposes (App. G, pp. 1-2, App. N, pp. 19-21).

The City's Plan Board heard the City's Petition to rezone the property from I-2 to PD on February 1, 2010 (App. N). The City Plan Board voted 4 to 1 to approve the rezoning (App. N, pp. 73-78). The City Commission then considered the rezoning in two public hearings, March 4, 2010 and October 7, 2010, and voted 7-0 to approve the rezoning (App. O, App. Q). Nalbandian appeared at all public hearings in order to oppose the rezoning action. Upon approval of the petition, Nalbandian timely invoked this court's certiorari jurisdiction.

STANDARD OF REVIEW

As a guiding principle, a reviewing court's consideration in a certiorari proceeding is confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based. Dade County v. Marca, S.A., 326 So. 2d 183, 184 (Fla. 1976).

The standard of review for first tier certiorari review consists of three prongs as set forth in City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 625 (Fla. 1982):

> Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.

A local government agency affords due process when it provides affected parties with notice of the proceeding and an opportunity to be heard and cross examine any witnesses. See Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). A quasi-judicial decision is not governed by the same rules of procedure as is a full judicial hearing. Jennings, 589 So. 2d at 1340.

A departure from the essential requirements of the law has occurred when the lower tribunal violates a clearly established principle of law, thereby resulting in a miscarriage of justice. Housing Authority of City of Tampa v. Burton, 874 So. 2d 6, 8 (Fla. 2d DCA 2004). See also Jones v. State, 477 So. 2d 566, 569 (Fla. 1985) ("The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error").

Petitioners have not raised a challenge to the evidence, so the third prong is not implicated in this proceeding.

DISCUSSION

Petitioners argue that the order should be quashed because (1) they were not afforded procedural due process in the proceedings before the City, and (2) the City departed from the essential requirements of the law when it erroneously interpreted its own Comprehensive Plan and implementing land use regulations.

A. Standing

Before addressing the merits of the case, however, this Court must address the issue of whether Petitioners have standing before this Court. When standing is raised as an issue, as it has been by the Respondent in this case, "the trial court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation". Alachua County v. Scharps, 855 So. 2d 195, 198 (Fla. 1st DCA 2003). Standing must also be established to maintain a petition for writ of certiorari. See e.g., Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940 (Fla. 5th DCA 1988); City of Ft. Myers v. Splitt, 988 So. 2d

28 (Fla. 2d DCA 2008). A court should determine the standing of a party to bring an action before reaching the merits of the action. Scharps, 855 So. 2d at 198.

A reviewing court is confined strictly and solely to the record below when it determines whether a "factual basis establishing standing to initiate a certiorari proceeding in the circuit court," has been demonstrated. City of Ft. Myers, 988 So. 2d at 32-33. In other words, the circuit court is limited to the record created before the lower tribunal when determining whether the petitioner has established standing under the applicable test articulated in Renard v. Dade County, 261 So. 2d 832, 837 (Fla. 1972). See City of Ft. Myers, 988 So. 2d at 32. The applicable test for standing established in Renard is as follows:

> An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good share in common with all citizens.

The record below demonstrates that petitioners own property located across a major thoroughfare, and approximately 2000 feet from the road leading to the proposed Homeless Center site. (App. N, pp. 39-41, App. O, pp. 6-7; App. G, p. 1). Moreover, there is evidence that a bus stop for the Homeless Center will be built directly across the street from Nalbandian's property.

The record is sufficient to demonstrate that Nalbandian has standing as an aggrieved or adversely affected person who has a legally recognizable interest in these proceedings. This Court finds that the Petitioner has standing to maintain this action.

B. Consistency with Comprehensive Plan

To the extent that Nalbandian has argued that the City's rezoning of the subject property is inconsistent with the City's Comprehensive Plan, that argument must be disregarded by this Court. A challenge to an action's consistency with a comprehensive plan is not available in a certiorari action, but must rather be brought in a de novo action pursuant to section 163.3215, Florida Statutes. The Court notes that Nalbandian has brought such an action, and that it is currently pending.

C. Due Process

Nalbandian argues that they were not afforded their right to procedural due process because the City Commission did not act as an impartial body in conducting its review of the instant proceedings.

A fact finder must be neutral and detached, and must maintain the impression of impartiality for all who attend the proceeding. Department of Highway Safety and Motor Vehicles v. Pitts, 815 So. 2d 738, 743-44 (Fla. 1st DCA 2002).

Nalbandian argues that the City Commission could not conduct an independent and impartial review of an application that was itself submitted by the City. However, Nalbandian has not cited to authority for this proposition. There is, however, some authority for the proposition that a governmental body may participate in decision making activities regarding a matter in which the city has an interest. See e.g., Hortonville Joint School District No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482, 495-96 (1976) (finding no due process violation where the particular governmental body was involved in the events leading to its decision where state law vested the governmental or policy making functions exclusively in that body.)

Further, this court finds that the alleged bias of the individual commission members does not rise to the level of a departure from the role of a neutral arbiter. Even if one commissioner has

arguably departed from his or her neutral role, such action will not serve to invalidate the decision of the Commission as a whole. Matthews v. Columbia County, 294 F.3d 1294, 1297 (11th Cir. 2002). See also Mason v. Village of El Portal, 240 F.3d 1337, 1340 (11th Cir. 2001). Further, a Board member need not be disqualified merely because he is familiar with the facts of a case, or has taken a public position on a policy issue related to the dispute. See Hortonville Joint School District No. 1, 426 U.S. at 493.

The Court has reviewed the comments of the Commissioners, as it must, in the context of the full record. All Commissioners stated on the record that they could be fair and impartial and would judge the petition on the merits and the evidence before them. (App. O, pp. 50-58). While certain comments, taken in isolation, suggest that individual Commissioners had some familiarity with the proposal before them, the record does not demonstrate bias that rises to the level of a due process violation.

D. Essential Requirements of the Law

Lastly, Nalbandian argues that the City departed from the essential requirements of the law when it erroneously interpreted its own Comprehensive Plan (Oral Argument Transcript, p. 22). Nalbandian argues that the City's application of law was incorrect because the City "cannot use a PD zoning district to basically bootstrap uses that aren't allowed in that land use category ...". (Oral Argument Transcript, p. 31).

The City's Comprehensive Plan governs the permissible land uses for all properties in the city. The Comprehensive Plan is a statutorily mandated legislative plan which controls and directs the use and development of property within the City's jurisdictional boundaries. *See e.g., Citrus County v. Halls River Dev., Inc.*, 8 So.3d 413, 420-21 (Fla. 5th DCA 2009). The Comprehensive Plan is, in turn, implemented by the City's land development regulations, which

set forth the regulatory standards for implementing the goals, objectives, and policies of the Comprehensive Plan.

Each property in the City has a land use designation and a zoning district designation, which provide for more specific governance of the land through the City's land development regulations. The zoning district assigned to a property must be consistent with the land use established in the City's Comprehensive Plan.

The City of Gainesville's Comprehensive Plan establishes the land use on the 9.78 acre parcel at issue as "Industrial" (App. G, p.2). As provided in the City's Comprehensive Plan, the Industrial Land Use category allows, among other uses, "retail, office, service, and residential uses" when such uses are "designed sensitively" and "when such non-industrial uses are no more than 25% of industrial area". (App. I, p. A-17). The Comprehensive Plan lists 6 zoning districts permitted in the Industrial Land Use category, one of which is PD (App. I, p. A-44). The City's land development regulations list 7 zoning districts permitted in the Industrial Land Use category, one of which is PD (App. J, p.4).

A review of the City's Comprehensive Plan reveals that retail, office, service and residential uses (uses which comprise the Homeless Center PD) are specifically allowed in the Industrial Land Use category as described in the Plan. The City's Comprehensive Plan identifies the uses in the Industrial Land Use category as "... those areas appropriate for manufacturing, fabricating, distribution, extraction, wholesaling, warehousing, recycling and other ancillary uses, and when designed sensitively, retail, office, service and residential uses ..." (emphasis added) (App. I, p. A17).

Nalbandian argues that the PD zoning district is a "secondary" zoning district and that the PD zoning district cannot be used to "bootstrap" uses that are not allowed in the "primary"

zoning districts for the land use category. However, the record before this court does not demonstrate that the City Land Development Code or Comprehensive Plan designates zoning districts allowed in a land use as "primary" or "secondary", "conventional" or "ancillary", or otherwise establishes any hierarchy among the zoning districts. The record shows that "I-2" and "PD" are two equally allowable zoning districts in the Land Use Category and listed among the 6 allowed in the category. (App. I, p. A-44). Moreover, a review of the Plan and regulations at issue do not reveal support for Nalbandian's argument that the uses allowed in a PD zoning district in the Industrial Land Use category are only those uses allowed in the "I-1", "I-2" and "W" zoning districts.

The City's Comprehensive Plan specifically contemplates that retail, office, service and residential uses are allowed in the Industrial Land Use category when designed "sensitively". The record reflects that the PD zoning category provides for this sensitive design. Section 30-21 sets forth the Purpose and Intent of the Zoning Category of Planned Development. (App. K, p. 1) That section provides in relevant part

> Purpose. It is the purpose of this district to provide a method for landowners or developers to submit unique proposals which are not provided for or allowed in the zoning districts otherwise established by this chapter. In particular, these provisions allow a mix of residential and nonresidential uses and/or unique design features which might otherwise not be allowed in the district, but they must conform to all aspects of the comprehensive plan. (App. K, p. 1) (emphasis added)

The cases cited by Nalbandian, Dixon v. Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000) and Saadeh v. City of Jacksonville, 969 So. 2d 1079 (Fla. 1st DCA 2007), address provisions that are unique to the Jacksonville Code. Specifically, the Jacksonville code appears to designate some zoning districts as "primary" and other zoning districts as "secondary" districts, whose uses are controlled by the primary districts. Dixon, 774 So. 2d at 765-66,

Saadeh, 969 So. 2d at 1083. Gainesville's Comprehensive Plan does not distinguish between the zoning districts allowed in the land use category, nor does it provide that the uses in one zoning district are controlled by the uses in another zoning district.

Further, Dixon v. Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000) involved a challenge to the consistency of a development order with Jacksonville's Comprehensive Plan. The land uses established in Jacksonville's Comprehensive Plan listed primary uses and secondary uses allowed in that land use. A hotel (the building of which was the purpose of the rezoning to PUD) was not permitted in the land use category established by the Comprehensive Plan as a primary use. The City argued that a hotel was a secondary use to the primary uses although a hotel was not listed as an allowed secondary use. The Court found that the hotel was not an allowed use in the land use category as established in the Comprehensive Plan.

Likewise, Saadeh v. City of Jacksonville, 969 So. 2d 1079 (Fla. 1st DCA 2007), also a consistency challenge, held that the land use of the property in Jacksonville's Comprehensive Plan did not permit a private club in that land use category, again under either the primary or permissible secondary uses. It should be noted that this Court's certiorari review is a narrow one, much different in degree and scope then the de novo nature of a consistency challenge under Chapter 163.

The uses allowed in a particular PD development must be consistent with the Land Use designation of the development. A PD with an Industrial Land Use designation may integrate retail, office, service, and residential uses, as the Comprehensive Plan allows such uses when they comprise "no more than 25% of industrial area," and are "designed sensitively". (App I, p. A-17).

Nalbandian argues that City staff has erroneously interpreted the provision of the Plan that allows for 25% of industrial area to contain "non-industrial" uses. Nalbandian argues that the only logical interpretation allows for 25% of an individual industrial "parcel" to contain "non-industrial" uses, while the rest of the individual parcel must be industrial.

The Comprehensive Plan refers to 25% of "industrial area". City Staff testified that they interpreted that section to mean "industrial area" in the City. They looked at the amount of Industrial area in the City and determined whether, if the subject parcel was to be used for residential, office, retail and service, the industrial land used for those purposes would exceed 25% of the total Industrial land area in the City. Staff testified they determined the 25% threshold by counting the number of parcels in the City that were Industrial Land Use. (App. G, p. 3, App. N, pp. 32-33, App. O, p. 25, App. O, pp. 92, 96-97). City Staff also testified that even if Nalbandian's interpretation was used, less than 25% of that individual parcel (the 9.78 acres which was subdivided from the overall 65 acre parcel for purposes of rezoning) was being used for residential, office, service and retail. (App. G, p. 1, App. O, p. 25, pp. 72-73, 92, 96-97).

This Court cannot say that City Staff's interpretation is unreasonable. Courts do use strict scrutiny to determine whether a development order is consistent with the Comprehensive Plan "where the issue is relatively easily subject to examination for strict compliance with the plan". Dixon, 774 So. 2d at 764. However, in a situation in which the resolution of the issue of consistency is dependent upon interpretation of the terms of the Comprehensive Plan, the court still affords great weight to an agency's interpretation of its statutes. See B.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252, 257 (Fla. 1st DCA 1990):

> As previously noted, the above-cited cases, which address the application of strict scrutiny to a zoning action which is facially inconsistent with the plan, are distinguishable from the instant case, in which resolution of the issue of consistency is heavily dependent upon interpretation of the terms of the plan.

> It is well established that the construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight and should be upheld unless clearly unauthorized or erroneous.

The Court concludes that the City's interpretation of the term "25% of Industrial area" is reasonable and therefore in accord with the essential requirements of law. The Court further concludes that the uses in the PD rezoning for the Homeless Center are uses that are allowed by the City's Comprehensive Plan and therefore in accord with the essential requirements of law.

It is ORDERED AND ADJUDGED that extraordinary relief is DENIED, and the Writ of Certiorari is DISMISSED.

DONE AND ORDERED in Chambers, Alachua County, Florida on this 30 day of December 2011.

ORIGINAL SIGNED BY
MARTHA ANN LOTT
CIRCUIT JUDGE

MARTHA ANN LOTT, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Elizabeth A. Waratuke, Esquire, P.O. Box 490, Station 46, Gainesville, FL 32627, Karl J. Sanders, Esquire, 200 West Forsyth Street, Suite 1300, Jacksonville, FL 32202, Michael M. Bajalia, Esquire and Chris Harris, Esquire, 501 Riverside Avenue, 7th Floor, Jacksonville, FL 32202 on this 30 day of December 2011.

ORIGINAL SIGNED BY
TRAVIS D. KING
JUDICIAL ASSISTANT

Travis D. King Judicial Assistant