W00A

FILED
SID J. WHITE
DEC 3 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

O'CONNOR DEVELOPMENT CORPORATION,

Petitioner,

vs.

CASE NO. 82,038

FIRST DCA CASE NO. 92-0946

LEON COUNTY,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

W. TAYLOR MOORE, ESQ.
2015 Delta Blvd.
P.O. Box 507
Tallahassee, FL 32302-0507
(904) 386-6665

DAVID K. MILLER, P.A.
Broad and Cassel
215 S. Monroe St., Ste. 400
P.O. Drawer 11300
Tallahassee, FL 32301
(904) 681-6810

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RESPONSE TO THE COUNTY'S STATEMENT OF THE FACTS

The numbered paragraphs below correspond to the points in the County's statement of the facts:

1. There was no challenge in the proceedings below to Petitioner O'Connor's standing, and thus no occasion to develop an extensive record on this issue. But see A-II: 573, 574 and 596 (site plans prepared for O'Connor); A-II: 625-28 (O'Connor's president's testimony at Board hearing). The Circuit Court granted relief to O'Connor. The County simply assumes that O'Connor has no standing contrary to the record and the Circuit Court's findings.

2. The County's discussion of the Planning Commission's site plan review is inaccurate. The sequence of events is as follows:

Date	Event
June 19-20, 1989	Rezoning Application (A-2 to C-2) (A-III: 759-763)
July 20, 1989	Limited Use Site Plan Application (A-2 to C-2 and CO) (A-II: 573)
Sept. 5, 1989	Limited Use Site Plan Application (A-2 to CP and CO) (A-II: 574)
Sept. 13, 1989	Planning Commission Meeting (A-II: 575, 587)
Sept. 26, 1989	Final Board Hearing, submission of Amended Limited Use Site Plan Application (A-2 to CP and A-2) (A-II: 596)

The County's suggestion that the Planning Commission never considered the third (September 5) application is contradicted by its own staff report, issued between the Planning Commission meeting on September 13 and the Board hearing on September 26. This staff report describes the requested change as one from A-2 to CP zoning, as shown on the September 5 site plan application. (A-II: 575, 577). The Circuit Court's final judgment describes this application for CP

and CO use as the one that was reviewed by the Planning Commission. (A-I: 2-3, ¶s 7-8).

Petitioner presumably had the same right to present a nonprejudicial downscaling amendment no matter which site plan the Planning Commission considered. Nevertheless, since the Planning Commission actually considered the site plan application for CP and CO use, it obviously considered the part of that application that was presented to the Board as an amended (downscaled) application at the Board hearing on September 26.

The County also attempts to improvise a new issue concerning the location of the stormwater retention pond in the A-2 area. The Planning Commission considered the applicants' proposal to include a stormwater retention pond somewhere in the southeast corner of the site. (A-II: 587, 591). County staff had already expressed its satisfaction with this feature. (A-II: 552-53; 556-59, 592-94, 619). The Board never referenced any objection that the proposed stormwater retention pond would violate A-2 zoning at the hearing (A-II: 618-25) or on remand. The Circuit Court expressly found no use inconsistency or detrimental environmental effects. (A-I: 3 at ¶ 8; A-I: 8 at ¶s 21-22).

The location of the stormwater retention pond was an issue for environmental permitting and would not affect the commercial rezoning of the other area. The site obviously could handle all stormwater requirements. The staff report's list of developable uses in A-2 and CP zoned areas does not exclude stormwater retention which would be an accessory use. Moreover, the ultimate location of the retention pond would only require a relatively small area and would not alter

the Circuit Court's key finding that all proposed office development east of the proposed roadway was deleted, thereby substantially reducing the depth of the commercial area and creating a natural buffer. (A-I: 3-4).

3 - 5. The County's references to the various amended pleadings in the Circuit Court are immaterial to this review proceeding. There is no contention, or basis to contend, that the Circuit Court abused its discretion in allowing amended pleadings, or that any prejudice to the County resulted from this procedure.

It is likewise immaterial whether the Circuit Court wanted to give Petitioner a chance to comply with the verified complaint procedure; or to give the County a chance to perfect its record and reconsider the downscaled amendment.[1]

The key factual and procedural history of this case is uncontested. Petitioner's only chance to respond to the staff report, identifying reasons for the denial recommendation, was at the final Board hearing. The amended (downscaled) version of the site plan presented at the final Board hearing contained no features that had not already been reviewed by the Planning Commission. The Board actually considered and denied this amended site plan at the final

---

[1] The Circuit Court was not required to reward the County's procedural maneuvers to avoid review of the merits. Even under the First District's faulty Parker decision, the purpose of the verified complaint procedure was to assure the County a final opportunity to consider downscaled options or improve its "free form" record for court review. See Leon County v. Parker, 566 So.2d 1315, 1317 (Fla. 1st DCA 1990), subs. op., 601 So.2d 1223 (Fla. 1st DCA 1992), reversed, 18 F.L.W. 521 (Fla. 1993). The Circuit Court's discretionary actions allowing amended pleadings and remand opportunities secured these advantages for the County, and could not possibly have prejudiced the County.

public hearing without any procedural objection. Further review by the Planning Commission was unnecessary or waived by the Board.

ARGUMENT

I. THE COUNTY'S DECISION ON THE REZONING APPLICATION WAS QUASI-JUDICIAL.

II. PETITIONER WAS NOT REQUIRED TO FILE A VERIFIED ADMINISTRATIVE COMPLAINT AS A CONDITION TO CERTIORARI REVIEW IN COURT.

The County apparently agrees that these points require reversal and abandons them. Instead, the County requests leave to assert new issues that were unreviewable or waived in the District Court. This procedure is manifestly unfair to Petitioner.

The County had a full opportunity to present its defenses to the Circuit Court. Although certiorari in the Circuit Court is supposed to be confined to the existing quasi-judicial record, the Court gave the County extra opportunities to amend its record to justify and explain its denial action. The County rejected these opportunities and insisted that its record was complete.

After the Circuit Court granted a writ of certiorari judgment, the County had a full opportunity to present its case to the District Court of Appeal. Although second-tier certiorari review in the District Court of Appeal is much more limited than a plenary appeal, the County even exceeded the limitations for normal appellate briefs, filing a 67-page petition for certiorari (presenting seven points for reversal) and a 35-page reply pleading, in addition to its 798-page appendix.

Now the County contends, for the first time, that it should be allowed on remand to reopen the record to assert numerous issues that

were either unreviewable in the District Court of Appeal, or that the County thought were unimportant and expressly waived in its petition for certiorari. See County's Petition at pp. 17-18.

The County's argument in support of this contention is that it thought the law was "so clear" on the procedural points that no other points needed to be discussed. No authority is cited that would justify reopening a final judgment for the owner simply because the government claimed not to understand the law.[2]

The County deliberately chose its defense strategy, including raising various procedural issues to avoid any court review of the merits. Petitioner has been forced to litigate for four years to overcome these procedural defenses, which have finally been recognized as meritless in Snyder, 18 F.L.W. 522, and Parker, 18 F.L.W. 521. The County now requests indefinite extra innings to attempt to replay the game, using players who were ejected or voluntarily benched. This "keep playing and change the rules until I win by attrition" strategy has no place in any court of justice.

As a practical matter, delay in enforcing development rights irreparably injures the owner-developer, as economic factors that made the application feasible, including financial and real estate

---

[2] The County's contention about the clarity of the law is mistaken anyway. Obviously, the Circuit Court believed the law was clear in the owners' favor. The County relies solely on decisions preceding the 1985 comprehensive planning law, overlooking the substantial changes wrought by that law and the modern trend to treat zoning cases as quasi-judicial, confirmed in Snyder, 18 F.L.W. 522. Likewise, the District Court's erroneous decisions in Parker were criticized by Judges Nimmons and Kahn of that court, and were inconsistent with all other court decisions on the issue.

markets, are subject to change, and the expenses of holding the vacant land and litigating with the government may never be compensated. The owner is entitled to a prompt and efficient review proceeding by writ of certiorari as the Parker decision recognized.

The County, having insisted that its contended procedural rights be strictly enforced in the lower courts to bar Petitioner's claim entirely, is in a poor position now to plead that Petitioner's procedural rights should be ignored. Issues that are not briefed are deemed abandoned. See Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1983). The County cites no contrary authority that would allow it to assert, after final decisions have been rendered, points that were unreviewable or waived in the District Court.

III. PETITIONER WAS ENTITLED TO DOWNSCALE THE APPLICATION TO MEET RECENT OBJECTIONS, AND THE BOARD WAS REQUIRED TO DECIDE THE DOWNSCALED APPLICATION AS A MATTER OF DUE PROCESS.

The County's argument on this point is irrelevant and unresponsive to the Petitioner's Brief. Specifically, the County does not address the fact that its Zoning Code does not prohibit consideration of a downscaling amendment; that even if the Code did prohibit such consideration, the Board waived the issue by hearing and deciding the downscaled application without objection from anyone, including opposing associations that were represented and heard at the noticed final public hearing (A-II: 628-37); that the Circuit Court specifically found that the Planning Commission had reviewed the application for CO-CP use that contained every feature

of the final amended application; and that finally, to construe the Zoning Code as denying Petitioner an opportunity to respond to the staff report with a nonprejudicial downscaling amendment would violate Petitioner's due process rights.

Planning Commission review was complete, and further review was unnecessary or waived. The County first suggests that the Planning Commission only considered the application to amend to C-2 zoning. This argument is inaccurate. See Response to County's Statement of the Facts, pp. 1-2, above.

Where the owner presents a rezoning application, then amends the application by downscaling to meet objections, it is universally held that the downscaling does not require any additional round of notice and public hearing. See McGee v. City of Cocoa, 168 So.2d 766 (Fla. 2d DCA 1964); Williams v. City of North Miami, 213 So.2d 5 (Fla. 3d DCA 1968); and other authorities cited on pp. 26-27 of Petitioner's Initial Brief. The County does not discuss these decisions or cite any contrary authority.

The County cites decisions holding that the zoning authority cannot impose use restrictions upon an owner's property without giving the owner any notice and opportunity to object. Petitioner has no quarrel with these decisions as adequate notice was given here. None of the decisions cited by the County even purports to address an owner's nonprejudicial downscaling amendment.[3]

---

[3] See cases cited on pp. 21-22 and 28 of the County's Brief. For example, in Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale, 354 So.2d 59 (Fla. 1978), this Court held that the owner was entitled to notice and opportunity for objection when a

The County's citation to Malley v. Clay County Zoning Commission, 225 So.2d 555 (Fla. 1st DCA 1969), deserves special discussion. In Malley, the court held that although noticed hearing requirements must ordinarily be observed in enacting a zoning ordinance, such requirements are waived if the opposing party actually appears at the hearing and registers his objection, without any challenge based on defective notice. Here the Board conducted a noticed public hearing, considered the arguments of proponents and opponents, and made a final decision without any objection based on defective notice. Thus under Malley, the Board waived any procedural objection when it elected not to remand to the Planning Commission, but preemptively decided the issue, and thereafter claimed in court that its record was complete.

Due process requirements apply in all quasi-judicial land development proceedings, and were not abandoned here. The County argues that it was not required to afford due process to Petitioner in quasi-judicial proceedings to determine Petitioner's application for rights to develop its real property. This is a surprising

---

City board considered a proposal to rezone the owner's property. These cases would seem to require that the owner be given notice of objections and the opportunity to amend its application to meet these objections at the final hearing as a due process right, as Petitioner contends here. As far as any rights of third party objectors are concerned, they had adequate notice of the scope of the project. Furthermore, they spoke at the Planning Commission and the final Board hearing, waived any further review before the Planning Commission, and were additionally protected by the post-decision intervention rights conferred by § 163.3215, Florida Statutes. The County is in no position to assert that its own action in preemptively denying the downscaled application was improper.

position for a government to take, particularly after this Court's Snyder decision, 18 F.L.W. 522, confirmed that the proceedings are quasi-judicial and the owner is entitled to fundamental due process safeguards (including a record demonstrating reasons for the denial action taken). The County cites no authority for its argument. The fact that the County still considers itself above the constraints of due process may give the Court some insight into why this lawsuit was necessary.

Quasi-judicial decisions to determine land development rights must observe both substantive and procedural due process. Substantive due process requires adherence to standards that are clearly expressed in the controlling regulations and rationally related to the public health, safety and welfare. The government cannot delegate itself unfettered discretion to decide individual land use applications based on unenacted, vague, arbitrary, ad hoc, or subjective criteria. See, e.g., North Bay Village v. Blackwell, 88 So.2d 524 (Fla. 1956) (discussing earlier cases); see also Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), cert. denied, 463 U.S. 1208 (1983) (Section 1983 case enforcing owner-applicant's constitutional due process rights); Parker v. Leon County, 6 F.L.W. Fed. D 585 (N.D. Fla. 1992) (same, citing numerous recent Florida court decisions).

An owner-applicant whose development application is arbitrarily and unreasonably denied without any lawful basis is not required to show a vested property right based on reliance on a development approval, since development approval was unlawfully denied in the

first place. However, the owner-applicant has a substantive due process right to have its application fairly evaluated under the lawfully enacted and clearly expressed regulatory standards in effect at the time. Driggers, above, 696 F.2d 1347; Parker, above, 6 F.L.W. Fed. D 585.

Procedural due process constraints apply in land use decisions. See Irvine v. Duval County Planning Comm'n, 495 So.2d 167 (Fla. 1986), approving dissenting opinion at 466 So.2d 357, 362-69 (Fla. 1st DCA). The authorities cited by the County also recognize the owner's procedural due process rights. E.g., see Gulf and Eastern Dev. Corp. v. City of Fort Lauderdale, above, 354 So.2d at 59-60. Certiorari review contemplates that procedural due process violations can be corrected in the courts. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982).

This Court's recent Snyder decision confirms that owner-initiated rezoning actions are treated the same as all other quasi-judicial proceedings, and substantive and procedural due process constraints apply.

The Circuit Court obviously did not consider these due process claims as abandoned. The Court found that the County's response did not adequately explain the reasons for denial, particularly since the referenced staff comments were conflicting and did not take into account the application as amended. The Circuit Court also found that the Board failed to fairly consider the application as reasonably amended, in violation of procedural due process, and that the County's denial was arbitrary, unreasonable and without legal

basis, and thus violated substantive due process. (A-I: 7-8). All these issues were advanced in Petitioner's complaint after remand, attaching the verified complaint. (A-II: 494-95, 497-510 passim). There is no basis to argue due process claims were abandoned.

Petitioner had a right to present a nonprejudicial amendment to its application. The County cites no authority that would allow it to ignore a nonprejudicial downscaling amendment, or more accurately, to review and decide such amendment, then contend that the amendment could not be considered. The County's zoning ordinance contains no such prohibition.

The County asserts an unsupported argument that unless its ordinance specifically confers a right to amend, it is free to invent ad hoc and post hoc procedural restrictions in each case. However, the County cannot arbitrarily deny a nonprejudicial amendment. See cases cited in Petitioner's Initial Brief at pp. 24, 26-27. Moreover, zoning decisions recognize the owner's common law right to use its property as it sees fit, and construe regulations in derogation of that right in favor of the owner. See Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553 nn. 3 and 5 (Fla. 1973); Rathkopf's The Law of Zoning and Planning, § 5.03[3] (4th ed. 1993). In the absence of any clear prohibition, the owner's right to present a nonprejudicial amendment to its application must be recognized. Finally, procedural due process requires that Petitioner be given leave to amend in response to the staff report.

There is no basis to question Petitioner's standing on the present record, and any issue concerning the feasibility of the relief to Petitioner should be determined in post-judgment proceedings. The County's argument concerning Petitioner's standing is purely speculative, since there is no record or finding that would justify any challenge to standing.

The Circuit Court's judgment was correct on the record presented and must be affirmed on that basis. The District Court of Appeal's decision was clearly contrary to law and must be reversed, both to eliminate its precedential effect for other litigants and as a predicate to providing relief to O'Connor. Any argument as to the continued appropriateness of the relief granted by the judgment can be considered in post-judgment proceedings.

The County's speculation that its settlement with the co-party Monticello Drug Company might affect O'Connor's development rights is inappropriate, because O'Connor clearly suffered an actionable loss of its own development rights that must be remedied in some way -- either by enforcing those rights, or by compensating the loss to the extent of any taking.

Finally, the County's speculation as to the effect of its settlement with Monticello Drug is particularly inappropriate because the County has initiated proceedings in the Circuit Court to rescind that settlement. If the County succeeds in rescinding the settlement, then Monticello Drug (or its successor) would have to be restored to the status quo, including restoration of all development rights under the Circuit Court's judgment in this case. See, e.g.,

Overstreet v. Atlantic C.L.R. Co., 152 So.2d 188 (Fla. 1st DCA 1963) (party seeking to rescind settlement must tender return of benefits to opposing party). In short, the County's speculation as to how relief can be fashioned for O'Connor must be determined in post-judgment proceedings after the validity of the Circuit Court's judgment on the record presented is upheld.[4]

The Circuit Court fashioned appropriate remedies for the due process violations. The County's discussion of the remedy issues again confuses procedural with substantive due process rights. If the County's action was procedurally deficient, then a remand for corrective action applying the proper procedure is an appropriate remedy, as the Circuit Court determined here in remanding the case to the County for an explanation of its denial action. See Driggers, above, 696 F.2d at 1354-55 (approving remand to explain denial).

However, once the remand was tried and no further explanation was forthcoming from the County, then the Court properly considered the merits based on the assembled record. The Court found that the County had arbitrarily denied the application that met all applicable standards of the comprehensive plan, without any justification in the record to support denial. The Court properly quashed the unlawful

---

[4] The County's suggestion that Monticello Drug accepted the District Court's decision as final is incorrect. Monticello Drug sought dismissal of the proceedings below on grounds that the settlement mooted the issue as to its claim, but the District Court denied the motion without explanation. See n. 4 of the Initial Brief; as well as the chronology in Monticello Drug's Motion dated June 3, 1993, and the Court Order dated June 29, 1993. In no way did Monticello Drug accept the decision below.

action and directed the proper result. See Driggers, above, 696 F.2d at 1348, 1356.

All owner-initiated development permit applications under the comprehensive plan's standards are now considered quasi-judicial proceedings under the 1985 comprehensive planning law and this Court's Snyder decision. The courts can require the County to follow the law set forth in its own legislative enactment (the comprehensive plan), and grant the development permit to which the owner-applicant is legally entitled.

IV. THE DISTRICT COURT OF APPEAL, UPON REVERSAL AND REMAND, SHOULD BE INSTRUCTED TO PROCEED IN CONFORMITY WITH THIS COURT'S OPINION AND ITS REVIEW LIMITED TO ANY POINTS RAISED IN THE COUNTY'S CERTIORARI PETITION THAT WERE NOT DECIDED BY THIS COURT.

This issue duplicates the arguments above. The Circuit Court applied the proper standard of certiorari review of the County's quasi-judicial record. The County was not prejudiced by any of the procedures followed, which simply responded to the County's own misconception of the proper procedure. In fact, the County obtained the advantage of repeated opportunities to perfect its record, which is not ordinarily allowed in certiorari review. The Circuit Court's judgment must be upheld unless the County's certiorari petition shows reversible error of law.

Having chosen to lead the case into a four-year procedural quagmire to delay and defeat Petitioner's claim, the County is not free now to invent new issues by reopening its administrative record,

challenging the Circuit Court's factfindings that are unreviewable under City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982), or raising other issues that were not presented to the District Court of Appeal. See generally Dober v. Worrell, 401 So.2d 1322, 1324 (Fla. 1981) (when appellate court has reviewed trial court judgment on the merits, to allow losing party to return to trial court and assert matters not previously raised makes a mockery of the "finality" concept in our system of justice).

CONCLUSION

The decision below should be reversed with instructions to the District Court of Appeal to proceed consistent with this Court's opinion under the review standard set forth in City of Deerfield Beach v. Vaillant, above, 419 So.2d 624.

RESPECTFULLY SUBMITTED this 3 day of December 1993.

W. TAYLOR MOORE
Florida Bar No. 092506
2015 Delta Blvd.
P.O. Box 507
Tallahassee, FL 32302-0507
(904) 386-6665

DAVID K. MILLER, P.A.
Florida Bar No. 213128
BROAD AND CASSEL
215 S. Monroe St., Ste. 400
P.O. Drawer 11300
Tallahassee, FL 32301
(904) 681-6810

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the counsel listed below, by United States Mail, this 3 day of December 1993.

David K. Miller
Attorney

David La Croix, Esq.
P.O. Box 293
Tallahassee, FL 32302