

IN AND BEFORE A SPECIAL MAGISTRATE,
IN AND FOR ORANGE COUNTY, FLORIDA

REAMS ROAD WINDERMERE
DEVELOPMENTS, LLC,

Petitioner,

File No. 24-1194

Case No. PSP-21-12-374

v.

ORANGE COUNTY, FLORIDA

Respondent.

SPECIAL MAGISTRATE'S RECOMMENDATION

This dispute originated under the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA") in accordance with section 70.51, Florida Statutes (2024). The overall intent of FLUEDRA is to provide the parties with an alternative dispute resolution mechanism in quasi-judicial proceedings for development orders and enforcement orders. FLUEDRA is a voluntary process, and the special magistrate is called upon to facilitate a resolution between the property owner and the government agency issuing the development order. Peninsular Properties Braden River, LLC v. City of Bradenton, Florida, 965 So.2d 160 (Fla. 2d DCA 2007). Here, the dispute concerns a development order from the Orange County Board of County Commissioners ("BOCC"), denying the approval of a Preliminary Subdivision Plan ("PSP") that was submitted by the Petitioner/Owner, Reams Road Windermere Developments, LLC ("RRWD"). The Petitioner filed its Request for Relief on September 11, 2024. The Respondent, Orange County, filed its Response on September 23, 2024. A Joint Pre-Hearing Stipulation was submitted by the parties and references to the stipulations are incorporated herein. The Joint Pre-Hearing Stipulation and the Special Magistrate's Prehearing Order are attached hereto as Exhibit 1. In addition, as part of the Special Magistrate's considerations for this Recommendation, the video recordings from the Orange County Board of County

Commission meeting on August 13, 2024 for Agenda Item (Case # PSP 21-12-374 – Windermere Springs PD/Windermere Springs Townhomes PSP), and from the meeting on September 10, 2024 regarding Agenda Item 24-1221 (Case# CDR 23-11-323 - Patterson PD) were viewed by the Special Magistrate.

BACKGROUND

The subject property involved in this FLUEDRA proceeding is 4.95 acres in size. The property is located along Reams Road, southeast of Summerlake Park Boulevard, in the Horizon West Lakeside Village. The address for the subject property is 13651 Reams Road. The subject property was purchased in February 2021 for \$1,170,000 by Reams Road Windermere Developments, LLC (“RRWD”). [Stipulated Facts 1 and 2]. At the time of purchase, the subject property had the proper zoning (P-D) and entitlements for 21 townhomes. After purchasing the subject property, RRWD engaged in the initial application and permitting process with Orange County on a preliminary subdivision plan, seeking the approval of the Windermere Springs Townhomes Preliminary Subdivision Plan (“PSP”) relating to the 21 townhomes. [Stipulated Fact 3]. During this process RRWD participated and cooperated with Orange County in “13 rounds” of comments requested by the County over the course of two and half years. [Pet. Exhibit A].

The application and submittal process through Orange County involved a review and subsequent approval of the PSP by Orange County's Technical Review Group (“TRG”). On May 8, 2024, TRG issued a Summary Report approving the plan with comments and Standard Conditions of Approval. [Petitioner's Exhibit C]. Within the Summary Report under the heading Site Analysis, and below the subheading labeled “Comprehensive Plan (CP) Consistency, the Report states:

The subject property has an underlying Future Land Use designation of Village and a zoning of PD. The FLU and zoning are consistent and a rezoning or FLU amendment are not required. (Emphasis added.) (Pg. 2 of Petitioner's Exhibit C).

The Summary Report includes subheadings under “Special Information” for Community Meeting Summary, Environmental, Transportation Planning, Water/Wastewater/Reclaim,

and Schools. Also included in the Summary Report are 29 Conditions under the heading of Standard Conditions of Approval (for DRC Consideration). [Pg. 4 of Pet. Exhibit C].

On July 19, 2024, the Development Review Committee (“DRC”) for Orange County issued a 10-page Memorandum recommending the approval of the Windermere Springs (PD)/Windermere Springs Townhomes PSP (PSP-21-12-374). [Stipulated Fact 4 and Petitioner’s Exhibit D]. The Memorandum was addressed to Mayor Jerry L. Demmings and the County Commissioners, and the subject line of the Memorandum referred to the August 13, 2024, Public Hearing for the Windermere Springs Townhomes Preliminary Subdivision Plan.

On August 13, 2024, the BOCC held a meeting and Agenda Item 24-986 was the item concerning the PSP approval request from RRWD. A motion to deny the request was made and voted on, and the BOCC denied the approval of the PSP. [Stipulated Fact 5].

RRWD filed a Request for Relief pursuant to Section 70.51, Fla. Stat., seeking relief from the denial of the request for the approval of the Preliminary Subdivision Plan (PSP-21-12-374). [Stipulated Fact 6].

FACTS

August 13, 2024 - BOCC Meeting

Turning to the BOCC meeting held on August 13, 2024, regarding the PSP, Commissioner Wilson opened the discussion with the property having been rezoned prior to her coming on board with the current BOCC. Commissioner Wilson went on to state that she believed the prior rezoning was inconsistent with the comprehensive plan. (See lines 3-10, Page 5 of Pet. Exhibit R). Commissioner Wilson also stated that she felt the BOCC was creating a safety public hazard due to the extended period of time that the road improvements for Reams Road have been in the “design phase”. Commissioner Wilson added that Reams Road was also under water following Hurricane Ian. [Lines 11-18, Page 5, Pet. Exhibit R). Commissioner Wilson then made a motion to deny the request for approval of the PSP. [Line 5, Page 5, Pet. Exhibit R].

Commissioner Moore, who voted Nay on the motion for denial, asked the following question to the Deputy County Attorney, Georgiana Holmes:

“If the land use was already approved and we’re just today asked to approve the PSP, legally, does that leave this board in any kind of precarious situation because we’re voting no based on, it sounds like, what was done back, six, seven years ago?” (Emphasis added.) [Lines 3-9, Page 6, Pet. Exhibit R].

Commissioner Moore also inquired as to the legal ramifications since the county had “already approved their right to build”. [Lines 17-21, Page 6, Pet. Exhibit R].

Commissioner Uribe, the second Nay on the motion for denial, inquired as to whether the flooding that Commissioner Wilson was concerned about was “actually on [the subject] property.” Moreover, Commissioner Uribe states on the record that she felt that the BOCC was “unsure of said denial and the implications legally on the county”. [Lines 11-18, Page 12, Pet. Exhibit R]. The questions raised by Commissioners Moore and Uribe both appear to focus on the fact that the BOCC, sitting in its quasi-judicial review capacity, had a review responsibility that was limited to the PSP application and not on the zoning of the property and consistency with the comprehensive plan, which was already approved back in 2017.

Commissioner Scott then asked Commissioner Wilson to restate her position regarding the motion for denial and Commissioner Wilson stated:

Because I believe it is inconsistent with the comprehensive plan. And that because it's at the PSP stage does not refute the fact that even in the beginning it was inconsistent with the comprehensive plan. It's fruit of the poisonous tree if we're three stages—steps down the line and it is – continues to be inconsistent with the comprehensive plan. (Emphasis added.) [Lines 17-24, Page 10, Pet. Exhibit R].

Commissioner Wilson gave input as to her concern of “putting residents at risk out there by continuing to clear and continuing to build”, and that the schools are overcapacity. [Lines 25, Page 10, Lines 1-3, Page 11, Pet. Exhibit R].

In sharp contrast to the statements from Commissioner Wilson, John Weiss, Deputy County Administrator for Orange County, stated in response to Commissioner Uribe’s inquiry for staff input, that the PSP had gone through DRC review, and that the PSP was reviewed against all of Orange County’s development regulations and codes, and the application submittal had a staff recommendation of approval. [Lines 7-13, Page 13, Pet.

Exhibit R]. Mr. Weiss further stated the subject property's PSP is *consistent* with prior future land use entitlements and the rezoning that occurred back in 2017. Mr. Weiss concluded that these factors were the reasons why staff for Orange County recommended approval of the PSP. [Lines 14-19, Page 13, Pet. Exhibit R]. According to Mr. Weiss there were no waivers included in the request and that the approval of up to 21 townhomes all met "the County's codes and regulations". [Line 20-23, Page 13, Pet. Exhibit R].

Commissioner Bonilla inquired about school concurrency and John Weiss responded through his comments that any school concurrency shortcomings will be addressed through mitigation payments made to Orange County. [Pages 14-17, Pet. Exhibit R].

A motion to deny the request was made by Commissioner Wilson and Commissioner Scott seconded the motion. There were 5 Ayes and 2 Nays on the final vote denying the owner's application for the PSP.

Special Proceeding

Upon receiving the denial from the BOCC, RRWD filed its Request for Relief and Orange County filed its Response to the Request for Relief. Orange County's Response to the Request for Relief states that the denial of the PSP was based upon the BOCC promoting "consistency and compatibility, and to ensure [that] the health safety and welfare of its citizens".

In accordance with the provisions set forth in section 70.51, Fla. Stat., the parties agreed to move forward with mediation. The parties also agreed to participate in a special proceeding on the same day should the mediation impasse. The Special Magistrate facilitated the mediation, and the mediation resulted in an impasse. A special proceeding immediately followed the mediation.

During the special proceeding, the Petitioner presented the testimony of three (3) witnesses: Tim McCormick, P.E. (engineer with Harris Civil Engineers, LLC), Taranvir Bahia (owner representative), and Joe Gianuzzi (representative of Federal Finance). Orange County presented the testimony of one (1) rebuttal witness: John Weiss, Deputy County Administrator.

Harris Civil Engineers was the Applicant on behalf of RRWD. At the special proceeding, testimony was elicited from Tim McCormick, P.E., and his testimony supported and outlined the timeline and actions taken by RRWD. [See Pet. Exhibit A]. Mr. McCormick testified as to the history of the application and submittal processes that took place with Orange County for obtaining the approval of the PSP. Mr. McCormick's testimony was credible and supported by the exhibits that were offered and admitted into evidence by the Special Magistrate. Specifically, Exhibits A through H were offered into evidence through Mr. McCormick and are part of the record in the special proceeding. Mr. McCormick also gave testimony about the various iterations of the PSP that were submitted to and reviewed by Orange County, as well as some of the changes that needed to be addressed concerning privacy, safety concerns, wetland impacts, landscaping plans, access, and stormwater design. Mr. McCormick testified that the stormwater that would be generated by the proposed development of 21 townhomes would be managed and treated on the subject property.

Mr. McCormick gave testimony about the Capacity Encumbrance Letter ("CEL") that was submitted to Orange County to address traffic concurrency and school concurrency. His testimony included the decision that was made to continue forward with the CEL after it was denied by the BOCC to keep the development moving forward. [Pet. Exhibit E]. Mr. McCormick testified about the Roadway Agreement Committee and the need to enter into a proportionate share agreement for mitigating traffic concurrency. Further testimony by Mr. McCormick included school concurrency and the number of students that are generated by the proposed project.

Mr. Taranvir Bahia gave credible testimony about the purchase of the property, the investment-based expectations for the property, the history of the prior entitlements of the property, the expenses, and the history of the process for seeking approvals of the PSP from Orange County. Petitioner's Exhibits J through S were offered into evidence through Mr. Bahia's testimony. Mr. Bahia testified that since the time of purchasing the property there have been additional expenses of over \$1 million dollars invested into the property. [Pet. Exhibit N]. Mr. Bahia testified about the land which was previously conveyed by the predecessor in title to Orange County for the right of way needed for the Reams Road

improvements. [Pet. Composite Exhibit K]. Mr. Bahia testified that he personally never met with Commissioner Wilson, but did have a very brief Zoom video conference with a staff person of Commissioner Wilson's prior to the hearing on the PSP. He stated that the staff person had no substantive input or questions relating to the PSP request and seemed perplexed about the reason for the Zoom conference in general.

The last witness for the Petitioner, Mr. Joe Gianuzzi, gave credible testimony regarding the financing surrounding the subject parcel and the need to utilize all 21 of the entitled units to enable the investment to be financially feasible. Mr. Gianuzzi testified about another development on Reams Road known as the "Patterson PD", that received approval for a substantial change for an additional 94 apartments on the development. [Pet. Exhibits L and P]. Of note, the substantial change for the Patterson PD was approved under Case# CDR 23-111-323, with a 2-5 vote on a motion made by Commissioner Wilson to deny the approval as inconsistent with the Comprehensive Plan. Commissioner Uribe made a motion to approve the request for the additional units and the motion passed 6-1, with Commissioner Wilson as the only Nay vote. [Pet. Exhibit P]. The Patterson PD is located less than .5 mile to the east of the RRWD property on Reams Road. [Pet. Exhibit L].

John Weiss, the rebuttal witness for Orange County, gave credible testimony about the general scope of his responsibilities as the Deputy County Administrator. Mr. Weiss testified about Reams Road and some of the safety and flooding issues affecting the road following the hurricane. Mr. Weiss testified about the general timeline for the road improvement project for Reams Road and the completion date of 2027. Mr. Weiss gave testimony about the Patterson PD approval of the additional 94 units and stated that the timing of the construction of the units may have been part of the reason for its approval. Of note, there are 380 existing apartment units, and with the additional 94 units, there are a total of 598 units. Nothing in the conditions for the approval of the Patterson PD limits when the construction of the units can begin. [Pet. Exhibit P]. Respondent's Exhibit A was offered and admitted into evidence through Mr. Weiss. Respondent's Exhibit A is a Staff Report relating to the proposed road improvements for Reams Road from south of Summerlake Park Boulevard to Taborfield Avenue.

ANALYSIS

Standard of Review

The ultimate decision of a special magistrate in a FLUEDRA 70.51 special proceeding is “whether the action by the governmental entity or entities is unreasonable or unfairly burdens the real property”. 70.51(17)(b), Fla. Stat. (2024). In order for the special magistrate to reach the decision of the agency action as being unreasonable or unfairly placing a burden on the real property, it is important to determine what standard of review was applied by the BOCC during the August 13, 2024 meeting. Because the review of a PSP application is a quasi-judicial process, the standard of review to be employed by the BOCC is competent substantial evidence. In the Snyder case, the Florida Supreme Court held that “rezoning actions which can be viewed as *policy application*, rather than *policy setting*, and which have an impact on a limited number of persons or property owners are quasi-judicial in nature and are properly reviewable by petition for certiorari, on such review they are subject to *strict scrutiny* and to the *substantial evidence standard*. (Emphasis added.) Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (1993). The BOCC had a responsibility to apply the quasi-judicial standard of review of competent and substantial evidence in reviewing the PSP request, rather than the “fairly debatable” standard, also discussed in Snyder. *Id.* at 471. Fairly debatable is the standard of review when the reviewing agency is operating within its “legislative” capacity. Of note during the August 13, 2024 BOCC meeting, Commissioner Wilson mentions “substantial and competent information” as the basis for making her motion for denial. [Line 10-11, Page 8, Pet. Exhibit R]. “Substantial evidence” is highlighted in the Pollard decision, wherein a special exception was denied by Palm Beach County, and then certiorari was denied by the circuit court. Pollard v. Palm Beach County, 560 So.2d 1358 (Fla. 4th DCA 1990). “Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred”. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957).

The Fourth District went further and held:

In employing the adjective “competent” to modify the word “substantial,” we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521 (1944).

Unlike Pollard, there were no special exceptions or waivers being sought by RRWD in the submittal to Orange County. [Lines 20-23, Page 5, Pet. Exhibit R]. The request before the BOCC was a “straight” PSP approval request that had been vetted through Orange County TRG and the DRC over the period of over two (2) years which had a recommendation of approval by staff.

CONCLUSION

The traffic volume and flooding concerns along Reams Road that were brought up during the August 13, 2024 BOCC meeting can be readily acknowledged when viewed broadly along a stretch of Reams Road. But these same infrastructure concerns are apparent throughout an exhaustive list of roads within Orange County, and even more exhaustive list throughout Florida. Commissioner Wilson remarked how she believes how the zoning on the property was not consistent with the comprehensive plan, along with a reference to a “time machine”, presumably having to do with the fact that the property was rezoned back in 2017, some 7 years prior to the August BOCC meeting. However, the PSP application that was before the BOCC on August 13, 2024, concerned a singular property owned by RRWD, with proper zoning, future land use, and entitlements, all of which were approved and in place years before the August 13, 2024 BOCC meeting.

In addition, the discussions relating to traffic concurrency and school concurrency during the meeting were given due consideration in the TRG Summary Report and the Staff Report of the DRC, which both recommended approval of the PSP. These same issues were also adequately and specifically addressed by the Deputy County Administrator

during the meetings for the PSP approval for RRWD, and during the September 19 meeting on the approval of the additional 94 units requested in the Patterson PD.

In the matter at hand, the staff recommendations of approval presented ample *competent substantial evidence* for consideration by the BOCC. The Staff recommendations of approval in both the TRG Summary Report dated May 8, 2024, and the DRC Interoffice Memorandum (Staff Report), dated July 19, 2024, address the issues of transportation and school concurrency. The Summary Report, under the "Site Analysis" heading, provides (under the subheading "Comprehensive Plan (CP) Consistency):

The subject property has an underlying Future Land Use designation of Village and zoning of PD. The FLU and zoning are consistent and a rezoning or FLU amendment is not required. (Emphasis added.)

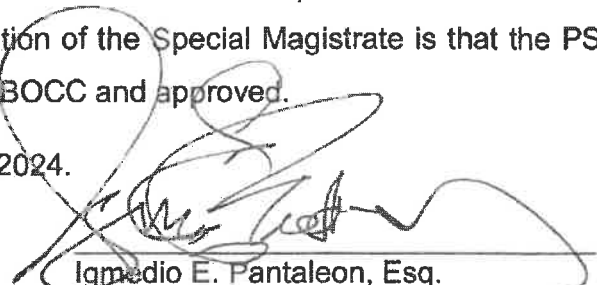
The Summary Report from the TRG, under "Transportation Planning" section, references the Right of Way Conveyance that was granted by RRWD's predecessor in title, the Land Use Plan (LUP-17-08-251) that was approved by the DRC, and the requirement for an additional payment under the Adequate Public Facilities Agreement ("APF") needed to satisfy the deficit. This section also refers to the impact fee credits that RRWD will receive for the conveyance of the right of way for Reams Road. The Staff Report addresses the requirements of a Capacity Encumbrance Letter ("CEL") regarding transportation capacity, and the need for a Proportionate Share Agreement with Orange County to "remedy the deficiencies". Under the subsection "Schools" the Summary Report refers to Orange County Public Schools staff having reviewed the proposed request (PSP) and "did not identify any issues or concerns". [Page 4, Pet. Exhibit C].

The Staff Report from the DRC also refers to Transportation under Section O, wherein the Staff Report states that the project "has satisfied the Adequate Public Facilities (APF) deficit. The Staff Report also indicates that the development will require a Capacity Encumbrance Letter, and that deficiencies must be addressed through a Proportionate Share Agreement. Testimony during the special proceeding supported that RRWD would be pursuing any deficiencies through mitigation payments. John Weiss gave testimony at the August 13, 2024, meeting that tracks the substance of the DRC report regarding transportation concurrency.

The Special Magistrate is permitted to examine circumstances “uses authorized for and restrictions placed on similar property”. Section 70.51(18)(g), Fla.Stat. The Special Magistrate is also permitted to examine “[a]ny other information determined relevant by the special magistrate.” Section 70.51(18)(h), Fla.Stat. The fact that the Patterson PD received an approval by this same BOCC for an additional 94 apartments units on a property not .5 mile away from the RRWD property, is one of the considerations in this Recommendation. Any timing of construction distinctions that might be implied are not apparent in any of the conditions imposed on the Patterson PD by Orange County. Notably, it might be argued that construction can begin on the additional 94 units at any time following the approval since there is a balance of approved units that are part of the overall 598 units that have not yet been built. The concerns of safety, flooding, transportation concurrency, and school concurrency, relating to Reams Road were also raised and discussed during the meeting on September 10, 2024, by the BOCC for the Patterson PD, yet the 94 additional apartment units were approved by the BOCC. The approval of the 94 additional apartment units for the Patterson PD amounts to multiples of the 21 units included within the PSP sought by RRWD. During the Commission Meeting for the Patterson PD, Commissioner Uribe makes a relevant remark that traffic and flooding of roads also occur in her District in Orange County. [Video recording of BOCC meeting on September 10, 2024, re: Patterson PD]

It is the opinion of the Special Magistrate that the action taken by the BOCC on August 13, 2024, in denying the application for the Preliminary Subdivision Plan for the Windermere Springs Townhomes PSP, was unreasonable and unfairly burdens the property. The staff recommendation and the reports that were submitted to the BOCC were based upon competent substantial evidence and the request should have been approved for the PSP. The recommendation of the Special Magistrate is that the PSP application should be put back before the BOCC and approved.

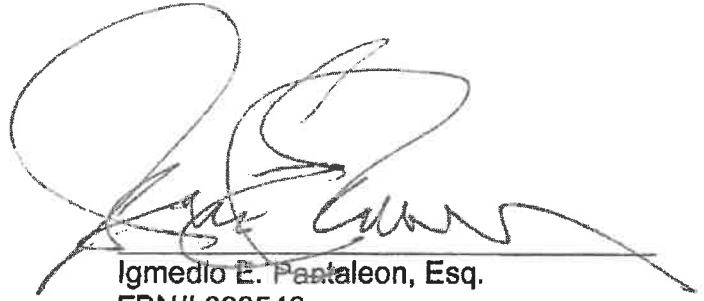
Submitted on this 15th day of November 2024.



Imedio E. Pantaleon, Esq.
Special Magistrate

Copies furnished to:

Lee Bernbaum, Esquire
Alison Yurko, Esquire
Department of Legal Affairs

A handwritten signature in black ink, appearing to read 'Igmedio E. Pantaleon', written over a horizontal line.

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