IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION: AY
CASE NO.: 50-2020-CA-000010-XXXX-MB

FLAGLER WPB OWNER LLC,
Petitioner,

v.

CITY OF WEST PALM BEACH,
Respondent.
_____/

Opinion filed: May 17, 2021

Petition for Writ of Certiorari from the City of West Palm Beach City Commission

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PER CURIAM.

Petitioner Flagler WPB Owner LLC ("Flagler") filed a Petition for Writ of Certiorari challenging the City of West Palm Beach City Commission's (the "City Commission") decision to deny a rezoning ordinance that would have rezoned property owned by Flagler. Flagler argues that the City Commission's reliance on the opinion-based testimony of Flagler's neighbors was an insufficient basis to deny the rezoning ordinance and that the City Commission failed to observe the essential requirements of law. After reviewing the record below, the Court finds that the City

Commission's decision was not supported by competent substantial evidence; thus, the Petition for Writ of Certiorari must be granted.

Factual Background

Petitioner is the owner of two adjacent parcels of land located in the City: one parcel located at 3907 South Flagler Drive and another located at 3906 Washington Road (collectively the "Property"). Three individual buildings were constructed on the Property which contained a combined twenty-five (25) rental units. Petitioner submitted a request to the City seeking to rezone the Property from a Multifamily High Density Residential ("MF32") zoning district to a Residential Planned Development ("RPD") district in order to demolish the existing buildings and replace them with a nine-story multifamily building containing twenty-seven (27) units. Although Petitioner conceded that a project with a similar number of units could be built in a MF32 district, it sought to utilize the specific regulations of RPD zoning so that it could more efficiently use the Property's odd shape and create a building with aesthetics that were more harmonious with the surrounding properties. After reviewing Petitioner's application, the City's Planning & Zoning Board found that the project was consistent with the density and character of the surrounding neighborhood and that it met all the requirements for rezoning. The Board unanimously approved the project.

On August 12, 2019, the City Commission unanimously approved the rezoning ordinance, but, before the second reading of the ordinance took place, the City Commission asked Petitioner to meet with the condominium associations near the Property who voiced concerns about the project before the second reading of the ordinance took place. The City Commission took no further action at the mandatory second reading of the ordinance, and a third and final hearing on the matter was scheduled for December 2, 2019. During the final hearing, Petitioner told the City

Commission that it had made certain changes to the project to help alleviate the concerns of nearby residents such as adding more parking and setting the building back an additional twelve (12) feet.

During the public comment portion of the hearing, members of the public in attendance voiced overwhelming opposition to the project. The complaints of the public generally fell into two broad categories. The first, and most common, complaint was that the proposed development was simply too big for the Property and would be incompatible with the neighborhood. The second major complaint was that the new building would affect the views, livability, and property values of the nearby residents. While the City Commission did not make detailed factual findings, several commissioners spoke on the record prior to the vote. The commissioners echoed many of the public's concerns about the size of the development relative to the Property and one commissioner even noted the public's broad opposition to the project. Ultimately, the City Commission unanimously denied the rezoning ordinance.

Analysis

At issue before the Court on first-tier certiorari review is whether the decision of the City Commission was supported competent substantial evidence. *See Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000). Competent substantial evidence is "tantamount to legally sufficient evidence" and exists where "the evidence relied upon to sustain the ultimate finding [is] sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.*; *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). On review, the Court determines if such evidence exists, but cannot reweigh the evidence or substitute its judgment for that of the municipal body. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275–76 (Fla. 2001). Ultimately, for this Court to sustain the City Commission's decision to deny a rezoning ordinance, "it is sufficient that the record reflect substantial competent

evidence favoring continuation of the status quo." *Lee Cnty v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1008 (Fla. 2d DCA 1993); *see also Sandhu v. Town of Mangonia Park*, 24 Fla. L. Weekly Supp. 493a (Fla. 15th Cir. Ct. Oct. 25, 2016).

Petitioner argues that the City Commission lacked competent substantial evidence to deny the rezoning ordinance because its decision was based solely on the opinion-based concerns of the general public. Petitioner relies on two decisions of the Fourth District Court of Appeal: *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA 1974) and *Pollard v. Palm Beach County*, 560 So. 2d 1358 (Fla. 4th DCA 1990). In *City of Apopka*, the district court found that the county commission's denial of a special exception was improperly based on the layperson testimony of nearby landowners who expressed concerned about noise, construction, future zoning changes, and even potential damage to the aquifer. *City of Apopka*, 299 So. 2d at 659. The court stated that the purpose of public zoning or land use hearings is not "to hold a plebiscite" for the community at large, but is instead to make factual findings about how the proposed changes would actually affect the public. *Id.* at 659–60. The district court held that the opinion of laypersons does not constitute competent substantial evidence unless those opinions can be backed up by other independently articulable facts. *Id.* at 659–60. The *Pollard* court reiterated this decision and held that "the opinions of residents are not factual evidence and not a sound basis for denial of a zoning change application." *Pollard*, 560 So. 2d at 1360 (citing *City of Apopka*, 299 So. 2d at 660); *see also Metro. Dade Cnty. v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1995) ("citizen testimony in a zoning matter is perfectly permissible and constitutes substantial competent evidence, so long as it is fact-based") (emphasis added) (citing *City of Apopka*, 299 So. 2d at 659).

The City Commission, in turn, points to a litany of other cases where layperson testimony was considered to be competent substantial evidence. However, after reviewing these decisions,

the Court finds that they are distinguishable from the instant case. The objecting neighbors here are classic "Apopka witnesses" whose testimony merely stated general concerns about the appropriateness of the project and whether it belonged in the neighborhood. *See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204–05 (Fla. 3d DCA 2003). When compared to the testimony of the public in the cases relied upon by the City Commission, the objecting residents here did not rely on expert testimony or on specific, articulable facts to support their opposition to the project. *See, e.g., City of Hialeah Gardens*, 857 So. 2d at 204 n.1 (residents relied on testimony of Chief of Police and Chief Zoning Official that the construction of a new charter school at the proposed site would be dangerous due to traffic patterns); *Miami-Dade Cnty. v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 So. 2d 738, 738 n.1 (Fla. 3d DCA 2000) (reliance on zoning map to show the over-proliferation of churches); *Miami-Dade Cnty. v. Walberg*, 739 So. 2d 115, 116–17 (Fla. 3d DCA 1999) (residents provided an expert engineer and environmental consultant to show rezoning would be "facially incompatible" with the surrounding property); *Grefkowicz v. Metro. Dade Cnty.*, 389 So. 2d 1041, 1042 (Fla. 3d DCA 1980) (residents able to competently testify to the fact that rezoning would allow one commercial property would be located in an area that was solely residential).

The City Commission further argues that section 94-207(c)(2) of the City of West Palm Beach's Code of Ordinances provided it with the absolute discretion to deny the rezoning ordinance because the Property's acreage was much smaller than what is typically allowed for a RPD zoning district. The Code of Ordinances states that a RPD district must be at least ten (10) acres, but also provides that "any area of lesser size may be approved" if the property in question meets one of three criteria. City of West Palm Beach, Fla., Code of Ordinances, § 94-207(c)(2) (2019). While the language of the Code of Ordinances does provide the City Commission with

discretion to grant an exception, a rezoning decision still cannot be made arbitrarily or unreasonably. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). Under the record before this Court, the basis for the City's decision was clearly derived from the generalized complaints and concerns of the public—which cannot form the basis of the competent substantial evidence needed to deny a rezoning ordinance. *See Pollard*, 560 So. 2d at 1360. The Court's decision does not mean that the City Commission must allow the rezoning to occur, but there must articulable facts in the record, that rise to the level of competent substantial evidence, to support whatever decision the City Commission makes.

Conclusion

Based on a review of the record, the Court finds that the City Commission's decision was purely based on "generalized statements of opposition," from the public. Because the statements were not based on specific, articulable facts, the public's comments were no different from that of "Apopka witnesses" which do not rise to the level of competent substantial evidence. *See City of Hialeah Gardens*, 857 So. 2d at 204; *Blumenthal*, 675 So. 2d at 607. Since the City Commission lacked competent substantial evidence to deny the rezoning ordinance, its decision was not lawful. The Petition for Writ of Certiorari is **GRANTED**. The City Commission's December 2, 2019 decision to deny the proposed rezoning ordinance is hereby **QUASHED**.

GILLMAN, BOSSO-PARDO, and BELL, JJ., concur.