Petition for Writ of Certiorari to Review Quasi-Judicial Action: Agencies, Boards, and Commissions of Local Government: ZONING—Substantial Competent Evidence—Petition did not demonstrate a departure from essential requirements of law, and there is competent, substantial evidence to support the challenged action. The Petition for Writ of Certiorari is denied. *Robert J. Howell, Terry Hoppenjans and Myles Friedland v. Pasco County and Outlaw Ridge, Inc.*, No. 13-CA-3522-ES (Fla. 6th Cir. App. Ct. December 18, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

ROBERT J. HOWELL,
TERRY HOPPENJANS and
MYLES FRIEDLAND,
Petitioners, **UCN: 512013CA003522CAAXES**

v.

PASCO COUNTY and OUTLAW RIDGE, INC.,
Respondents.
_____/

Ralf Brookes, Esq.,
Attorney for Petitioners,

David Goldstein, Esq.,
Attorney for Respondent Pasco County,

David Smolker, Esq.,
Attorney for Outlaw Ridge.

ORDER AND OPINION

The Court finds Petitioners were afforded procedural due process in the proceedings below, and that the Pasco County Board of County Commissioners observed essential requirements of law when granting a modification to Respondent Outlaw Ridge's conditional use mining permit, and further, that the Board's findings are supported by competent, substantial evidence. The Petition for Writ of Certiorari is therefore denied.

STATEMENT OF THE CASE AND FACTS

Respondent Outlaw Ridge, Inc. (Outlaw) owns 94.53 acres of property in Pasco County (County). Petitioners are owners of real property near Outlaw's property, who live in close proximity to the location of the mine.[1] Outlaw's property is designated as Agricultural/Rural and mining is an authorized use of such property subject to conditional use approval. County issued a Conditional Use Permit on May 22, 2007, to allow sand mining on the property for a 5 year operation. (R. at 14, 357-66) County approved a rezoning petition on September 24, 2007, providing for reclamation of the property after conclusion of mining operations pursuant to a Master Planned Unit Development (MPUD), to construct 19 single family homes and a lake in the Unit. (R. at 408)

Outlaw claims it discovered the water table on the property was substantially lower than expected and therefore mining lime rock was necessary to create the lake required by the rezoning approval for the residential area pursuant to the MPUD. Outlaw applied for a modification to allow lime rock mining and extend the duration of the permit to 20 years, which was initially denied at public hearing on April 24, 2012.[2] Outlaw subsequently filed for relief pursuant to § 70.51, Fla. Stat. (Bert Harris Act). County obtained a special magistrate to conduct mediation between Outlaw and County, as provided by the Act. *See id.* § 70.51(17)(a). Notice of the mediation proceedings was provided to adjacent property owners, four of whom elected to participate, including Petitioner Howell. A settlement agreement was reached during mediation between County and Outlaw which was agreeable to other participants with the exception of Petitioner Howell. Both the Modification to the Conditional Use Permit (Permit) and the Settlement Agreement were presented to the Board of County Commissioners (Board) at a duly-noticed public hearing on May 7, 2013, and approved over Petitioners' objections.

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[1] Specifically, Petitioners state that Myles Friedland owns property located at 17207 U.S. Highway 41, Spring Hill, Florida 34610, and personally appeared at the hearing before the Board and objected to approval of the permit; Terry Hoppenjans owns property located at 19511 Bakersfield Drive, Spring Hill, Florida 35610 and appeared at the hearing and objected to the permit; Robert Howell owns property at 15638 Mahoney Drive, Spring Hill, Florida 34610 and appeared at the hearing and stated his objections.

[2] At this hearing, the Board extended the duration of sand mining but denied the application for lime rock mining.

Petitioners filed a Petition for Writ of Certiorari, or, in the alternative, an action for declaratory relief, seeking judicial review of proceedings before the Board approving the Permit and the Settlement Agreement entered between County and Outlaw. Outlaw filed a Motion to Dismiss, claiming Petitioners lack standing to challenge these actions by County. On February 14, 2014, this Court denied the Motion to Dismiss, finding Petitioners had standing to challenge the action of the Board granting the modification to the Permit, a quasi-judicial action appropriate for review by petition for writ of certiorari. The settlement agreement entered between County and Outlaw in this case is not properly challenged by the Petition for Writ of Certiorari, and we therefore do not review the challenge to the Settlement Agreement.

LAW AND ANALYSIS

On March 31, 2014, this Court held oral arguments in this matter in part on the issue raised by Respondents that the challenged action on review is legislative, rather than quasi-judicial, and therefore review by Petition for Writ of Certiorari is improper. The Court finds a Petition for Writ of Certiorari is appropriate in this matter to obtain review of the Board's action granting the modification to the Permit after noticed public hearing. The Court has jurisdiction to hear this Petition pursuant to Rule 1.630, Florida Rules of Civil Procedure and Rule 9.030(c)(3), Florida Rules of Appellate Procedure.

Generally, a local government action granting a conditional use modification or similar relief is quasi-judicial in nature. *See Rinker Materials Corp. v. Metro. Dade Cty.*, 528 So. 2d 904, n.2 (Fla. 3d DCA 1987). Respondents contend that a settlement agreement reached pursuant to § 70.001, Fla. Stat., Bert J. Harris, Jr., Private Property Rights Protection Act,[3] is a legislative action of local government, citing *Lopinto v. City of St. Augustine*, 2010 WL 3073808 (Fla. 7th Cir. Ct.) ("When a local governmental body's consideration of issues involves considerations well beyond the boundaries of the proposed development, the ultimate decision is legislative in nature") (citing *D.R. Horton, Inc.--Jacksonville v. Peyton*, 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007)).

[3] "The purpose of the Bert Harris Act is to provide relief to the owner of property that is inordinately burdened by a regulation." *Lopinto, supra*. The Act "requires the state and its political subdivisions to, inter alia, waive, modify, transfer, purchase or financially compensate the property owner by entering into a settlement agreement providing relief, as enumerated in section 70.001(4)(c)." *Id.*

Whether a challenged action is legislative or quasi-judicial is determined by "the character of the hearing," and "legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy." *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). However, "quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof." *Id.* (citing *West Flagler Amusement Co. v. State Racing Comm'n*, 165 So. 64, 65 (1935)). *See D.R. Horton, Inc.--Jacksonville*, 959 So. 2d at 398-99.

Whether the challenged action is legislative or quasi-judicial determines both the manner by which relief may be sought and the standard of appellate review. "The judicial deference inherent in the "fairly debatable" standard is suitably employed to review legislative actions," when "a governmental body makes local policy decisions," but this "deference . . . is unnecessary and inappropriate in reviewing issues which essentially involve a determination of whether the facts in the case being considered meet the criteria of a specific ordinance." *Hirt v. Polk County Bd. of County Comm'rs*, 578 So. 2d 415, 417 *(*Fla. 2d DCA 1991). "To determine the proper classification of an action, we look to two factors: (1) the nature of the petitioner's challenge and (2) the manner in which the Board went about making its decision." *Id.* (further holding that "when appellate courts have been called upon to classify governmental bodies' application of zoning ordinances, their decisions have sometimes tended to blur the distinction between legislative and quasi-judicial actions").

As in *Hirt*, Petitioners' main contention before this Court is that the Pasco County Ordinances currently in place were not complied with, or were not appropriately applied. *See id.* The Board's decision was "contingent on evidence deduced at a judicial-type proceeding," and made after "notice was given to all interested parties, evidence was received, and a verbatim record was taken," and "the proceedings were clothed with all the characteristics of a quasi-judicial proceeding." *See id.* at 417-18. *See also Lee County v. Harsh*, 44 So. 3d 239, 242 (Fla. 2d DCA 2010); *City of St. Pete Beach v.*

Sowa, 4 So. 3d 1245, 1247 (Fla. 2d DCA 2009); *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996 (Fla. 2d DCA 1993).[4]

Respondents concede that approval of the modification to the Permit was a quasi-judicial act appropriate for review by Petition for Writ of Certiorari, but contend that the Settlement Agreement approved by County constitutes legislative action, and therefore is not appropriate for such review, citing *Harris v. Goff*, 151 So. 2d 642 (Fla. 1st DCA 1963). Further, that Petitioners did not adequately challenge the approval of the settlement agreement below and may not challenge the agreement now on appeal. We recognize that when a county enters into a settlement agreement the act is generally considered legislative. *See id.* In this case, Petitioners failed to sufficiently challenge the settlement agreement on appeal, or demonstrate that such act is appropriate for review by Petition for Writ of Certiorari and we therefore do not review that action.[5] However, we do consider aspects of the settlement agreement reached between Outlaw and County, including the conditions on the Permit included in the agreement, to the extent they are a part of the record before the Court, and aid in the resolution of Petitioners' challenge to the Board's approval of the Permit.

Petitioners' main challenge before this Court is the decision of the Board, made after notice and a hearing, at which Petitioners were present and represented by counsel. Further, the Board followed the procedures generally utilized when determining whether to grant a conditional use permit, as provided by the County Code. The Board was acting in a quasi-judicial capacity, and the action is appropriate for review in this Court by Petition for Writ of Certiorari.[6]

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[4] *See also State ex rel. Volusia Jai-Alai, Inc. v. Bd. of Business Regulation*, 304 So. 2d 473, 476 (Fla. 1st DCA 1974) ("the nature of an agency action is not always clear," and when the action has "attributes of more than one generally recognized type of agency action," there are "alternative appropriate remedies" by which to challenge such actions).

[5] Although Respondents contend Petitioners are precluded from challenging the settlement agreement because they failed to raise an objection at the proceedings before the Board, we note that the County specifically stated at the public hearing that the approval of the settlement agreement was not subject to public hearing, although it was approved after public comment at the hearing on the modification to the Permit. (Transcript at 5-6)

[6] We make no holding as to whether Petitioners may attempt to challenge the settlement agreement by other means. *See Lee County*, 44 So. 3d at n.4.

When reviewing a petition for writ of certiorari, this Court reviews the record from the proceedings below to determine whether: 1) the parties were afforded procedural due process; 2) essential requirements of the law have been met; 3) whether the decision is supported by competent, substantial evidence. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Commr's*, 794 So. 2d 1270 (Fla. 2001). This Court's review is "confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based." *City of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008). "This rule controls the determination of the factual basis establishing standing to initiate a certiorari proceeding in the circuit court." *Id.* at 32-33.[7]

I. Procedural Due Process

Petitioners contend the Board denied them procedural due process by conducting settlement negotiations through alternative dispute resolution as provided by the Act, § 70.51, Fla. Stat., prior to the public hearing before the Board after which it approved the modification to the Permit and the settlement agreement.

The settlement agreement provides that *subject to approval by the Board*, "the County shall modify the April 24, 2012 Development Order to authorize for a term of 15 years lime rock mining, in addition to sand mining, and in accordance with the conditions of approval set forth in Exhibit 'A.'" Petitioners contend this constitutes illegal contract zoning, citing *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956) (a municipality may not "enter into a private contract with a property owner for the amendment of a zoning ordinance," which is "subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner"). *See Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996) (a municipality may not obligate itself to take a specific action which would bypass the necessary processes that would otherwise be required). However, the Act specifically authorizes the municipality to enter into negotiations for a settlement agreement pursuant to the provisions utilized by the

[7] This Court previously denied Respondents' Motion to Dismiss based in part on alleged lack of standing, finding Petitioners had sufficient standing to challenge the Board's approval of the Permit. *See Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972); *Rinker Materials Corp. v. Metro. Dade County*, 528 So. 2d 904, 906 (Fla. 3d DCA 1987).

County and Outlaw in this case. *See Brevard County v. Stack*, 932 So. 2d 1258 (Fla. 5th DCA 2006).

Respondents state Petitioners waived the right to challenge the settlement agreement as "contract zoning" because this argument was not raised at the hearing before the Board, and is not properly before the Court on appeal. *See Clear Channel Commc'ns, Inc. v. N. Bay Vill.*, 911 So. 2d 188, 189-90 (Fla. 3d DCA 2005). Further, the Act codifies and expands an exception to the general rule against contract zoning by providing a statutory framework for local governments to enter into settlement agreements and balance public good with the effect of regulations on individual landowners. We do not address the issue of the validity of the Act, which has previously been decided and was not raised on appeal. *See Brevard County*, 932 So. 2d 1258 (generally finding the Act constitutional). And, this case is factually distinguishable from the cases cited by Petitioners. Petitioners do not challenge an amendment of a zoning ordinance or a Master Planned Development Unit (MPUD). Rather, Petitioners allege that required procedures currently in place were not properly followed when granting the Permit.

Petitioners claim the modification to the Permit constitutes a substantial change to the MPUD, and that County did not follow the procedural requirements of Section 402.2(N) of the County Code, which provides a process for a "substantial modification," which includes a hearing before the Pasco County Development Review Committee. Petitioners claim the Board erroneously found the modification to the Permit did not qualify as a substantial modification. Respondents contend Petitioners waived the right to raise this objection before this Court by failing to request this relief at the hearing before the Board. *See Clear Channel Commc'ns, Inc.,* 911 So. 2d at 189-90; *First City Savings Corp. v. S&B Ptrs.*, 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989). It is true that this Court's review is limited to issues presented to the Board during the proceedings below. *See City of Ft. Myers v. Splitt*, 988 So. 2d 28.

Respondents claim the modification to the permit does not alter the rezoning approval which provides for eventual reclamation and residential use pursuant to the MPUD, but only extends the time period for mining and allows additional mining for lime

rock, and that the appropriate procedures were followed to obtain the modification, which are separate from zoning approval or any modifications to the MPUD.

We find Petitioners were provided adequate procedural due process in this matter. Petitioners were afforded notice and an opportunity to be heard at a public hearing before the Board at which the modification was approved, based in part on conditions reached between County and Outlaw during mediation proceedings leading up to the settlement agreement, which limit the uses of the permit. Petitioners appeared at this hearing and were represented by counsel. This was the second public hearing had on this issue. And, although the Act allows for deviations from procedures normally required by local governments in zoning matters by providing the alternative dispute resolution process, and provides that a party is not required "to duplicate previous processes in which the owner has participated in order to effectuate the granting of the modification, variance, or special exception," § 70.51(21), Fla. Stat., the record demonstrates the County complied with the procedures necessary to approve the modification to the Permit. Petitioners failed to demonstrate that the negotiations leading to the settlement agreement somehow deprived Petitioners of due process at the hearing before the Board.

II. Essential Requirements of Law

Petitioners contend that the granting of the mining permit does not meet the essential requirements of law as contained in the Pasco County Land Development Code, again raising the claim that the permit constitutes a substantial change to the MPUD, and the Board departed from essential requirements of law by failing to comply with Section 402.2(N) of the Code for a "substantial modification." This Section provides that the following are presumed to be substantial modifications to an approved master plan:

a. Any change in a site related condition that was imposed by the BCC at the public hearing;

e. A change from a residential use to a commercial use;

j. Any changes of a use not previously approved;

k. Any change that would create additional trip generation of ten (10) percent or more;

l. notwithstanding a-k above, a change of any aspect, attribute or feature of the development which might adversely impact the site or surrounding area in a manner which would be inconsistent with this Code or the Comprehensive Plan, may be considered substantial or require a hearing before the DRC (Pasco County Development Review Committee).

In this case, the MPUD is an eventual reclamation plan to be imposed upon conclusion of the current permit in place which allows for 5 years of sand mining. Petitioners contend the granting of a lime rock mining operation for a period of 15 additional years constitutes a substantial change pursuant to the sections listed above, in part due to blasting operations that were not approved pursuant to the previous permit. Petitioners also submitted evidence during the hearing that the mining would generate 396 daily vehicle trips, whereas the standard amount of daily trips for a single family zoned area is 145. Petitioners further contend that the MPUD requires a developer to submit and obtain approval from the Board of an amendment to the MPUD which intensifies development or reduces open spaced or preservation/conservation areas within an increment prior to the plan approval within the increment. Respondents counter that the use of the property has not materially changed. Second, that the evidence of additional trip generation is irrelevant because the proper comparison is between trip generation levels of the residential end use before and after the modification, which remains unchanged. Third, that the residential end use remains unchanged except as affected by the depth of the mining and duration of mining operations. The MPUD specifically lists mining as an authorized use for the property, and the property is currently used for mining purposes and is designated as Agricultural/Rural (AG/R) by the County's Comprehensive Plan, which specifically authorizes "agricultural, rural-residential uses; mining; [and] agro-industrial uses." (R. at 1, 24) By law a local government's land development code must be consistent with the local comprehensive plan. *See* §§ 164.3167(1)(c), 164.3194(b), 164.3202, Fla. Stat.

Respondents contend that any challenge to proceedings had on a modification to the rezoning approval or the MPUD, which are separate proceedings from the granting of the Permit, are not properly before this Court on appeal. There is no requirement that

an amendment to the MPUD occur prior to or simultaneous with the granting of the modification to the Permit. And, the Board's finding that the change was non-substantial was not necessary to the granting of the modification to the Permit. We agree that Petitioners failed to demonstrate departure from an essential requirement of law on this issue.[8] The County Code provides that mining is a permissible conditional interim use of the property in question, the allowance of which depends on factual findings made by the Board prior to issuance of the permit. The decision of the Board may only be overturned "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1039 (Fla. 2d DCA 2012). Petitioners failed to satisfy the burden of demonstrating the County departed from clearly established law by granting the modification to the Permit.

III. Competent Substantial Evidence supporting the Board's Findings

Petitioners claim there is no competent, substantial evidence to support approval of lime rock mining pursuant to the MPUD for the subject area, citing *Chisholm v. City of Miami Beach*, 830 So. 2d 842 (Fla. 3d DCA 2002) (denying a petition for writ of certiorari without opinion, and citing *City of Miami Beach v. Chisholm Properties South Beach, Inc.*, 830 So. 2d 842 (Fla. 3d DCA 2002) (denying review of the decision in *Chisholm Properties South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689b (Fla. 11th Cir. Ct. August 9, 2001) (finding no competent substantial evidence to support the granting of a hardship variance, when the hardship was self-imposed, the property was not unusable, and the variance conflicted with plain limitations of applicable zoning codes and the settlement agreement at issue did not protect the public interest))). We find this authority is distinguishable from the facts of this case, and Petitioners failed to demonstrate that it supports their contentions on this matter.

[8] We also find Petitioners' challenge to the Board's actions based on ex parte communications between individual Board members and the County attorney regarding the terms of the settlement agreement, which Petitioners allege violated the Sunshine Laws, § 286.011, Fla. Stat., were not properly raised before the Board, and would not apply to the challenged action before the Court. *See Sarasota Citizens For Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010); *Jennings v. Dade County*, 589 So. 2d 1337, 1341 (Fla. 3d DCA 1991).

Respondents claim Petitioners presented no competent substantial evidence at the hearing before the Board to demonstrate the adverse effects of lime rock mining to the area, but rather, only raised generalized objections and speculated as to the possible negative effects. Outlaw claims the agreement protects residents and the public in general by limiting the time when excavation, crushing, loading and blasting may occur. Blasting is limited to three blasts per month, lasting three seconds each and occurring only during business or on non-holiday weekends. The lime rock mining is limited to 15 years without possibility of extensions. The agreement also requires Outlaw to pay into a nonrefundable escrow account $510,000 for baseline inspection of homes and wells, and to mitigate any cosmetic damages which may reasonably be attributed to the blasting, with remaining funds to be used for neighborhood improvements. Concerns raised at the public hearing included compatibility with surrounding areas, geological and hydrogeological risks associated with the mining, economic impacts, reduction of property values, adverse effects on wildlife, and risk of litigation against the County.

The conditions placed on the Permit limit mining activities in an attempt to mitigate negative effects on the surrounding area or nearby residents to the extent possible. And, the record contains competent, substantial evidence that lime rock mining is consistent with conditional uses permitted by the Code and the Comprehensive Plan. The purpose of the MPUD is to permit flexible land development. *See Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988, 990 (Fla. 4th DCA 2006). We find the Board's decision is supported by competent, substantial evidence, as the modification is supported by reports considered by the Board, expert testimony, and the 41 conditions agreed upon in settlement negotiations and entered as conditions on the mining permit after the public hearing before the Board.

CONCLUSION

Petitioners were afforded adequate procedural due process in this case, and failed to meet the burden of demonstrating a departure from the essential requirements of law. Further, the Board's decision is supported by competent, substantial evidence in the record.

It is therefore ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

It is further ORDERED that the Petitioners' Motion for Attorney's Fees is DENIED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 18th day of December, 2014.

Original order entered on December 18, 2014 by Circuit Judges Stanley R. Mills, Daniel D. Diskey and Shawn Crane.