

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

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

**ROBERT WATT,
Petitioner,**

-vs-

**REF: 19-000013AP-88A
UCN: 522019AP000013XXCI**

**THE CITY OF CLEARWATER,
Respondent.**
_____ /

Opinion Filed _____

Petition for Writ of Certiorari from
Decision of City of Clearwater to
Enter into a Hotel Density Development
Agreement

Robert Watt
Petitioner

Michael P. Fuino, Esq.
Attorney for Respondent.

PER CURIAM

Petitioner, Robert Watt, seeks certiorari review of the February 7, 2019 decision of Respondent, City of Clearwater, to enter into a hotel density development agreement with Decade Properties. Upon review of the briefs, the record on appeal, and the applicable case law, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The petition is denied.

STATEMENT OF FACTS

In 2001, in response to a consistent downward trajectory in the economics and aesthetics of Clearwater Beach, the City enacted Ordinance 6689-01 adopted a community redevelopment plan entitled Beach by Design. The goal of the ordinance and plan were to revitalize the city's beach tourist district by incentivizing the development of new "destination resorts" in a specific area of Clearwater Beach, a limited area fronting the Gulf of Mexico. At the time, hotel development was limited to 40 rooms per acre. In order to stimulate the desired catalytic resort projects, Beach by Design was developed. The Beach by Design plan established a limited pool ("Destination Resort Density Pool") of 600 additional hotel rooms to be made available for use by developers within a limited geographical area for a period of ten years. The plan allowed developer of certain destination resorts to exceed density restriction by applying to utilize the Density Pool of 600 hotel units for use in developing the resorts. The Density Pool was limited to a specific geographical area. Section A.6.1.4 of the City's Comprehensive Plan restricted the use of the Destination Resort Density Pool to a specific, limited geographical area, stating"

The use of the density pool of additional hotel rooms established in Beach by Design: A Preliminary Design for Clearwater Beach and Design Guidelines is permitted in the following areas:

1. The Land located between Mandalay Avenue and the Gulf of Mexico between Rockaway Street and Papaya Street; and
2. The land located south of the Pier 60 parking lot and north of the southerly lot lines of Lots 77 and 126 of the Lloyd-White-Skinner Subdivision between South Gulfview Boulevard and Coronado Drive.

This geographical limitation on the Destination Resort Density Pool is also found in Beach by Design, which clearly requires that the Destination Resort Density Pool be used only for true destination resorts fronting the Gulf of Mexico.

In 2008, the City enacted Ordinance 7925-08 which amended the Beach by Design and created a separate and distinct number of hotel units named “Hotel Density Reserve”. This was to incentivize the development and redevelopment of mid-priced boutique hotels to allow for affordable accommodations on Clearwater Beach. The ordinance identified the previous limited pool of 600 units as the “Destination Resort Density Pool” and the newly created reserve was identified as “Hotel Density Reserve”. The ordinance did not place any geographic restrictions on the Hotel Density Reserve. Section A.1.6.4 of the City’s Comprehensive Plan was not amended to place a geographical restriction on the Hotel Density Reserve.

On January 17, 2019, the City Council Board Meeting addressed agenda item 8.11 which was to provide direction on the proposed development between Decade Properties, the property owned, and the City of Clearwater, providing for the allocation of 27 units from the Hotel Density Reserve under Beach by Design and confirmed a second public hearing in City Council Chambers before City Council on February 7, 2019. At the City Council Board Meeting, Mark Parry, of Planning and Development with the City of Clearwater, described the proposal for the construction of a new hotel on the property now occupied by the Chart House Hotel. The record reflects that members of the City Council asked questions of staff and the representatives of the applicant, Decade Properties. The members of the public were allowed to address the proposal. There was no public comment in support of the proposal. Those opposed to the proposal were allowed three minutes each or could allow their allotted time to be credited to one speaker. Upon conclusion of the discussion, the City’s staff was directed to develop a proposed Development Agreement to grant 27 additional units to Decade Properties and a second public hearing was scheduled for February 7, 2019.

At the February 7, 2019 City Council Board Meeting the agenda item was for the City Council to approve or disapprove a Development Agreement between Decade Properties, the property owner, and the City of Clearwater that provided for the allocation of 27 units from the Hotel Density Reserve pursuant to Beach by Design. Members of the public were present to voice their opposition to the proposal. Members of the City Council asked questions of the applicant as well as of staff. Upon conclusion of the discussion, the proposal was put to a vote of the City Council and the Development Agreement to grant 27 additional units to Decade Properties passed by a vote of three in favor, two opposed.

Petitioner filed this Petition for Writ of Certiorari to challenge the alleged violation of the City's Comprehensive Plan for development by approving the Development Agreement between the City of Clearwater and Decade Properties as well as challenging an alleged voting conflict of some members of the City Commission.

STANDARD OF REVIEW

This Court in its appellate capacity has jurisdiction to review this matter under Florida Rule of Appellate Procedure 9.100. We must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings. See *Falk v. Scott*, 19 So.3d 1103, 1104 (Fla. 2d DCA 2009). The reviewing court “above all cannot reweigh the “pros and cons” of conflicting evidence.” *Id.* at 1104. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So.2d 1270, 1276 (Fla. 2001).

DISCUSSION

Petitioner has filed a Petition for Writ of Certiorari seeking review of the City of Clearwater's decision to enter into a development agreement. The appropriate remedy to challenge a development agreement is through an action for injunctive relief. Development agreements are governed by Fla. Stat. §§ 163.3220-163.3243. The statutes provide that any aggrieved or adversely affected person can challenge compliance with a development agreement and the local government's comprehensive land use plan, but the statute states that the challenge must be through an action for injunctive relief.

The circuit court sitting in its appellate capacity may only affirm or quash the local government's decision. "The appellate court has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular order or judgment." *Broward County v. GBV Intern, Ltd.*, 787 So.2d 838, 844 (Fla. 2001) citing *Tamiami Trail Tours v. Railroad Commission*, 174 So.2d 451, 454 (Fla. 1973).

Procedurally, Petitioner has sought an incorrect remedy to challenge the development agreement.

Petitioner has also incorrectly sought relief through the petition for writ of certiorari to challenge the alleged voting conflict of the members of the City Commission. Petitioner alleges several members of the City Council had ethical conflicts due to prior political campaign donations and being involved in similar business activities. Petitioner did not allege these ethical conflicts at either of the public hearings on the proposed development between Decades Properties and the City of Clearwater for allocation of the additional hotel rooms from the hotel density reserve. Petitioner did not raise those arguments at the hearings and as such he is barred from raising the

argument before this Court. Petitioner did not “preserve” that argument and the rule of preservation prohibits reviewing courts from considering new arguments for the first time on appeal that were not raised and considered by the lower tribunal. *Castor v. State*, 365 So.2d 701 (Fla. 1978). Additionally, even if the allegations of ethical conflicts had been raised in the lower proceedings, a petition for writ of certiorari is not the correct pleading to challenge the alleged voting conflict. Fla.Stat. §112.3175(b)(3). A circuit court sitting in its appellate capacity cannot issue either a judgment or a decree in a certiorari petition challenging a local government’s decision.

Notwithstanding the procedural deficiencies, the Court addresses the merits of Petitioner’s issues raised in the Petition. Petitioner argues that the City Planning Department was remiss in its approval of Decade Properties application as the planning department ignored the inconsistencies in the zoning area of Clearwater Point. The City’s Comprehensive Plan states that the maximum density for properties with land-use categories of Resort Facilities High (which the property herein is categorized) in Clearwater Beach is controlled by the Beach by Design. The Beach by Design created a distinct and separate group of hotel units called the “Hotel Density Reserve”. This group is distinct from the Destination Resort Density Pool which has a geographic limitation. The Hotel Density Reserve has no geographic limitations. Additionally, the Comprehensive Plan was not amended to place a restriction on the Hotel Density Reserve. See Clearwater City Ordinance 7925-08; Comprehensive Plan Section A.1.6.4. The only restriction of the Density Reserve is that it be in the Beach by Design planning area. Additionally, the planning staff and planning director at the public hearing testified that the Density Pool and Density Reserve are two separate density allocations.

Petitioner incorrectly asserts the Council generally dismissed the residents' reasons for their opposition to the Development Agreement between Decade Properties and the City of Clearwater. The City Council held two public hearings, received numerous emails and letters which the Council acknowledged and allowed the public to voice their opposition to the Development Agreement. There is nothing in the record, other than the approval of the Development Agreement by the City Council by a vote of three to two that supports Petitioner's assertions.

Petitioner argues that the Council Meetings were biased in favor of the applicant and against the Public. There was no testimony or evidence presented that the Council Meetings or the Commissioners were biased for or against any of the participants. Additionally, as this issue was not raised during the public hearings, the issue is not preserved and this Court is prohibited from reviewing issues not raised in the lower tribunal. See *Castor*.

Petitioner's additional arguments are without merit. The Court's review on first-tier certiorari review is limited to whether due process was afforded, was there a departure from the essential requirements of law and was the decision supported by substantial competent evidence. Procedural due process is the method for ensuring fair treatment through the proper administration of justice when substantive rights are at issue. *J.B. v Fla. Department of Children and Family Services*, 768 So.2d 1060 (Fla. 2000). As cited by Respondent, "In the land-use context, the requisite level of procedural due process is much less stringent than in the judicial context. The proceeding need only be "essentially fair" which requires that there is notice and an opportunity to be heard. The Petitioner was afforded both. The City Council conducted two public hearings, with notice to the public, and provided a forum for the Petitioner to voice his opposition to the Development Proposal. Petitioner argues that his time to speak was limited and the Council asked

no questions of him or other members of the public. Fla. Stat. §286.0115 governs public access to quasi-judicial proceedings on local government land use matters. Section 286.0115(2)(b) provides that a person “who is not a party or a party-intervenor shall be allowed to testify before the decision making body, subject to control by the decisionmaking body, and may be requested to respond to questions from the decisionmaking body.” In the case at bar, Petitioner was given an opportunity to address the decisionmaking body, the City Council, but there is no requirement that the Council ask questions of the speakers.

The City Council’s decision to approve the development proposal did not depart from the essential requirements of law. A departure from the essential requirement of law is quite narrow and deferential to a local government’s decision. It is not de novo review. *City of Jacksonville Beach v. Marisol Land Development, Inc.*, 706 So.2d 354 (Fla. 1st DCA 1998). “A departure from the essential requirements of law 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.” *Haines City Community Development v. Heggs*, 658 So.2d 523, 527 (Fla. 1995). Petitioner asserts that there was a voting conflict due to prior political campaign donations and members the City Commission and the applicant of the being involved in similar business activities. There was no evidence or testimony presented at either public hearing to sustain Petitioner’s assertion. Additionally, Fla. Stat. §112.3143(d) prohibits a municipal officer from voting on a measure that will inure to the special gain or loss of either himself; a principal that has retained him; or a relative or business associate. There was no evidence of special gain or loss to any of the city commissioners, a principal retained by the city commissioners or a relative or business associate of the city commissioners.

Petitioner posits that the development proposal violates the City's Comprehensive Plan. There are two categories of additional hotel units. The Density Pool has geographical restrictions. The Density Reserve under Beach by Design, created by city ordinance 7925, does not have geographical limitations. The proposed development comports with the City's comprehensive plan which provides that property with a land-use category of Resort Facilities High, would be controlled by Beach by Design.

Petitioner's position that the decision by the City Commission to approve the development proposal is not supported by the evidence. Competent evidence has been defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 3d DCA 2003). The City conducted two public hearings, the City's planning staff reviewed the application and testimony established the application is consistent with the City's land development regulations and Beach by Design. The recommendation and testimony of staff and staff's written report constitute "strong evidence" to support a land-use decision. See *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So.2d 202, 205 (Fla. 3d DCA 2003); *Metro-Dade County v. Fuller*, 515 So.2d 1312, 1314 (Fla. 3d DCA 1987) confirming that professional staff reports analyzing a proposed use constituted competent substantial evidence.

There was no public testimony in support of the proposed development. There was strong public testimony in opposition to the proposed development, but that does not mean that the City Commission did not have competent substantial evidence before it to support its decision approving the proposed redevelopment.

Petitioner's remaining arguments, such as redeveloping and improving the existing hotel would result in an increased crime rate, that the proposed redevelopment would reduce

property values and sales in Clearwater Point, or that the increased traffic from the proposed development are not supported by the evidence in the record and are without merit.

CONCLUSION

This Court concludes that based on the facts and the analysis set for above, procedural due process was accorded and the City Council's February 7, 2019 decision to enter into a hotel density development agreement with Decade Properties is supported by competent substantial evidence, the essential requirements of law have been observed and procedural due process was afforded. The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida this _____ day of December, 2020.

Original Order entered on December 9, 2020, by Circuit Judges Jack R. St. Arnold, Patricia A. Muscarella, and Sherwood Coleman.

Copies furnished to:

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