IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

GERMAN BRITTO and CLAUDIA CARDENAS,

Petitioners,

CASE NO.: 2006-CA-011264-O
WRIT NO.: 06-098

v.

ORANGE COUNTY, FLORIDA, a Charter County and a political subdivision of the State of Florida,

Respondent.

_____/

Petition for Writ of Certiorari
from the Orange County Board
of County Commissioners

Martin S. Friedman, Esq.,
for Petitioner.

Joel D. Prinsell, Esq., Deputy County Attorney,
for Respondent.

Before Lauten, Roche, McDonald, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

I. NATURE OF CASE

Petitioners, German Britto ("Britto") and Claudia Cardenas (Cardenas") (collectively "Petitioners" or "the Brittos")[1] seek relief from a decision of the Orange County Board of

[1] The Petitioner, Claudia Cardenas is the wife of Petitioner German Britto. (Board Hr'g Tr. 18, Oct. 24, 2006.) They will be referred to collectively in this memo as "the Brittos."

County Commissioners ("Board"). That administrative determination upheld a decision of the Orange County Environmental Protection Division. ("EPD").

II. FACTS

Petitioners are the owners of property in Orange County known as 14742 Bicky Road which is located just south of the Route 417 Greenway and east of Boggy Creek Road, about 1/4 mile north of the Orange-Osceola border.

In August 2002, EPD sent Petitioners a Warning Letter concerning their placement of a fill road through protected wetland on their property. The Brittos subsequently built, at least partially, a single family home and a pole barn and also installed a septic system, all of which the EPD claimed were in the wetland area. When the parties could not agree to a resolution of their dispute, EPD brought the matter before a special Code Enforcement Magistrate who directed the Brittos to submit a conservation area determination ("CAD"), obtain a conservation area impact permit, remove all fill material from their property and pay fines. The Magistrate's decision was not appealed.

The Brittos hired a professional engineer, Frank Rich, to assist with their CAD application. Mr. Rich has over thirty years of experience and had performed between fifty and one hundred CAD applications and permits in Orange County in the three years preceding the hearing. Mr. Rich conducted two site visits to the Brittos' property and in February 2005, his conclusions were submitted with the Brittos' CAD application. Later that month, EPD conducted its own field investigation and adjusted its CAD line. The boundary lines of the CAD area, as established by EPD, still differed from those determined by Mr. Rich, and the Brittos appealed the CAD to the Orange County Board of Commissioners.

At the Board hearing, German Britto recounted the history, from his perspective, of his ownership of the subject property, his efforts to build a home there and focused upon the dispute

with EPD which is the subject of this suit. Mr. Rich also testified in support of the Brittos' appeal. The third witness for the petitioners was Jerry Wood, an engineer.

Mr. Rich gave a presentation which concluded that the EPD determination of the conservation area boundaries - one of which went through the petitioners' house - was incorrect . Despite this, Mr. Rich stated that the boundary lines he had chosen were "pretty close to those arrived at by the EPD." (Board Hr'g Tr. 68, Oct 24, 2006.)

Mr. Wood testified that his presentation was not "just an appeal of the CAD line, this is an appeal of the CAD process, not only its methodology but what they came up with. And that goes to the deep heart of how this entire operation of Orange County wetlands and conservation area are actually operated." (Board Hr'g Tr. 27.) In his testimony, Mr. Wood opined that the EPD acted without authority in this matter, that the Brittos' property was exempt from the Environmental Protection Ordinance and that the Orange County "conservation ordinance" is superseded by state law. Mr. Wood also took issue with the manner in which the County conducted its CAD.

Testifying on behalf of the County was Lori Cunniff, manager of EPD. She told the Board that the subject property was designated as a Type II wetland and explained that this designation is assigned to lands where "impacts are allowable." (Board Hr'g Tr. 6.) While Ms. Cunniff observed that the conservation area boundary proposed by Mr. Rich was very close to the County's version, she continued that maintaining the County's line was preferable because she did not want to "go through this all the time, I don't want every applicant coming in and arguing over the wiggling of lines." (Board Hr'g Tr. 96-97.) Ms. Cunniff also stated that the EPD would be willing to make a recommendation to the Special Magistrate handling an

enforcement action against the Brittos that the fines against them be "reduced or removed." (Board Hr'g Tr. 100.)

At the close of the public portion of the hearing and immediately prior to introducing a resolution accepting the Board's position, Commissioner Linda Stewart stated that: "I have talked to Lori [Cunniff] about this - she came into my office . . . um . . . I think [EPD] did a good job . . . as good a job as they could do to make this determination." (Board Hr'g Tr. 88.)

The Board decided to uphold the conservation area determination of EPD and "accepted the classification and landward extent of wetland as determined by staff and presented to the Board of County Commissioners on October 24, 2006 and further directed that mitigation will be onsite." (Resp. Supp. App. 75.)

The Brittos filed a petition for a writ of certiorari with this court and seek review of the Board's determination.

III. PARTIES' POSITIONS

Petitioners argue that they were denied due process of law because their rebuttal case was "limited" by the Board (Pet. Writ. Cert. 10) and because one of the Commissioners had spoken with an EPD staff member prior to the hearing. Next, the Petitioners contend that the Board "failed to observe the essential requirements of the law because OCEPD clearly and unambiguously lacked legal authority" to enforce the Orange County Wetlands Ordinance. (Pet. Writ. Cert. 17.) Another reason advanced in support of this argument is that Orange County utilized CAD procedures called for by local ordinance rather than the "method mandated by state law." (Pet. Writ. Cert. 20.) The Board also failed to follow the essential requirements of the law, Petitioners contend, because it "refused to recognize that petitioners' land is exempt" from

operation of the Orange County Wetlands Ordinance. (Pet. Writ. Cert. at 23.) Finally, Petitioners urge that the Board's findings of fact and decision are "not supported by competent, substantial evidence." (Pet. Writ. Cert. 25.)

The Board responds that any time limitation placed upon the Petitioners' rebuttal case was not unfairly limited and that Petitioners were given a "fair shake" by the Board. (Resp. Pet. Writ Cert. 14.) Next, the Board asserts that this is not an appropriate proceeding for determination of whether a commissioner had ex parte contact with a member of EPD staff. Instead, the Board argues, Petitioners must bring a separate, independent action, such as one for declaratory judgment or for injunctive relief, in order to have this issue resolved. In addition, the Board asserts that EPD had authority to implement and enforce the Wetlands Ordinance, that its findings and conclusions in making its wetlands determination were supported by the record and that it correctly applied the law in making them. Finally, the Board contends that the issue of whether or not the Petitioners' property was exempt for the Wetlands Ordinance was not properly before the Board because the proper procedure was for Petitioners to seek an exemption.

IV. DISCUSSION

A. Ex Parte Communications

1. Propriety of Certiorari Review

The Board contends that the issue of Commissioner Stewart's ex parte communication with the EPD Manager - a witness - cannot be raised in this certiorari proceeding but can only be asserted in a separate, independent action. The Board has not pointed to any case so holding and we reject this argument. Citing *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991),

the Board argues that for the Brittos to raise the issue of Commissioner Stewart's ex parte communication with an EPD employee, they "must file *an original equitable action* such as an action for declaratory relief and injunctive relief in the circuit court. . . ." (Resp. Pet. Writ Cert. 15.) *Jennings* does not say that a party alleging improper ex parte communications in an administrative preceding "must" file an independent action, as the Board claims. Rather, the *Jennings* panel held that a party making such allegations is "entitled" to file an original, equitable action. *Jennings v. Dade County*, 589 So. 2d at 1342. Several circuit court decisions have considered, in post-*Jennings* certiorari proceedings, the issue of ex parte communications made during local administrative hearings. In *Power U Center for Social Change, Inc. v. Miami City Commission*, 14 Fla. Law Weekly Supp. 814a (Fla. 11th Cir. Ct. July 9, 2007), the Eleventh Judicial Circuit granted a petition for a writ of certiorari, in part, because the local commission engaged in ex parte communication which it failed to disclose before or during the public hearing and therefore "violated the petitioners' due process rights under *Jennings* . . . ." *Id.* *See also The Vizcayans, Inc. v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. May 7, 2008) (certiorari petition alleging improper ex parte communications violated petitioner's due process rights, granted); *Skilled Rehab. Servs. v. Dade County*, 3 Fla. L. Weekly Supp 321a (Fla. 11th Cir. Ct. July 28, 1995) (certiorari petition alleging improper ex parte contacts denied).

We conclude, therefore, that the instant certiorari proceeding is an appropriate vehicle for Petitioners to challenge Commissioner Stewart's ex parte communications with the EPD Manager.

We next turn to the merits of Petitioners' argument concerning ex parte communications.

2. The Merits

The Brittos point out, correctly, that Lori Cunniff, EPD Manager, contacted Commissioner Stewart at some point prior to the public hearing. Following the parties' presentations of their respective cases and after the public portion of the hearing had been closed, Commissioner Stewart mentioned this ex parte communication for the first time. "I have talked to Lori [Cunniff] about this - she came into my office... um ... I think they [EPD] did a good job . . . as good a job as they could to make this determination." (Board Hr'g Tr. 88.) Almost immediately after this remark, Commissioner Stewart moved to adopt the wetlands boundaries as established by EPD.

The Brittos rely upon *Jennings* which held that proof of an ex parte communication by a quasi-judicial officer creates a rebutable presumption of prejudice unless proven otherwise by that officer. *Jennings v. Dade County*, 589 So. 2d at 1341. Here, the Board has offered nothing to offset the *Jennings* presumption of prejudice. The Board complains that the current record will not resolve the question concerning whether the ex parte contact was prejudicial and therefore this issue can only be addressed in an independent action complete with discovery. We disagree. In the first place, the Brittos benefit from the presumption of prejudice without making any showing other than the occurrence of an ex parte communication. Secondly, the *Jennings* case was decided eighteen years ago. The Board must be well aware that an ex parte communication will result in a presumption of prejudice. Commissioner Stewart had every opportunity to attempt to create a record at the hearing prior to the Brittos completing their case or, at the least, prior to the close of the public portion. Instead, she first mentioned her contact with Ms. Cunniff, in a conclusory manner, after the close of the public portion of the hearing.

Commissioner Stewart made no effort to rebut the presumption of prejudice which arose from her communications with Ms. Cunniff . The County cannot now take advantage of its own failure to confront the *Jennings* presumption.

In view of the Board's failure to address the presumption of prejudice arising from Commissioner Stewart's ex parte communication with Ms. Cunniff, the Court concludes that it must grant the petition for certiorari and remand the case to the Board for a new hearing.

The Court also notes that in 1995 the Florida Legislature adopted section 286.0115, Florida Statutes, to deal with what it perceived to be problems presented by the *Jennings* case for local elected public officials. At the time of this enactment, the Legislature expressed concern that "local elected public officials have been obstructed or impeded from the fair and effective discharge of their sworn duties and responsibilities due to expansive interpretations of *Jennings v. Dade County*, a decision rendered by the Third District Court of Appeal." Preamble to 95-352, Laws of Florida.[2]

Section 286.0115 provides, in part, that "[a]ny person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public

[2] Section 286.0115(1)(a) provides that a county or municipality may adopt an ordinance or resolution "removing the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications with such officials pursuant to this subsection or by adopting an alternative process for such disclosure." §286.0115(1)(a), Fla. Stat. (2006). There is no evidence here that Orange County has ever adopted such an ordinance or resolution. In this respect, the case sub judice is like *Power U Center for Social Change, Inc. v. Miami City Commission*, 14 Fla. Law Week. Supp. 814a (Fla. 11th Cir. Ct. July 9, 2007). In that case, as here, the municipality had not adopted an ordinance concerning ex parte communications by a member of a local administrative body. The Eleventh Judicial Circuit held that the failure to disclose an ex parte communication prior to an administrative hearing required granting a petition for a writ of certiorari because the ex parte contact had not been disclosed and therefore the presumption of prejudice was not removed.

official is a member." §286.0115(1)(c) (2006). At the same time, section 286.0115, Florida Statutes, "requires public officials to disclose ex-parte communications in order to assure an adverse party the opportunity to confront, respond and rebut any such disclosures so as to prevent any appearance of impropriety." *City of Hollywood v. Hakanson*, 866 So. 2d 106 (Fla. 4th DCA 2004). In order for an affected party to be able to refute or respond to the ex parte communication, disclosure of that communication must be made "before or during the public meeting at which a vote is taken . . . ." §286.0115(1)(c)(4), Fla. Stat. (2006). In *Power U Center for Social Change, Inc. v. Miami City Commission*, an ex parte communication "was disclosed as a comment after the public hearing just before the ... Commission voted." *Power U Ctr. for Soc. Change, Inc. v. Miami City Comm'n*, 14 Fla. Law Weekly Supp. 814 (11th Cir. Ct. July 9, 2007). The Eleventh Circuit held that this lack of disclosure "failed to comply with section 286.0115(1)(c)(4), Fla. Stat. (2006)" and therefore the "Commission violated Petitioners' due process rights under *Jennings* as the presumption of prejudice was never removed by any statute or any procedure because Petitioners had no opportunity to object or rebut the [communication] which was not properly disclosed." *Id.*

Here, Commissioner Stewart did not disclose her ex parte communication with Ms. Cunniff until after the conclusion of the public portion and immediately prior to introducing her resolution which was followed by discussion by the Commission. As a result, Petitioners were not afforded an opportunity to object to or rebut or even learn the substance of the communication between Commissioner Stewart and Ms. Cunniff.

V. CONCLUSION

Accordingly, it is hereby **ORDERED and ADJUDGED** that:

1. The Petition for a Writ of Certiorari of the Petitioners, German Britto and Claudia Cardenas, be and hereby is **GRANTED**; and

2. The decision of the Orange County Board of Commissioners be and hereby is **QUASHED** and the matter **REMANDED** for a new hearing before the Orange County Board of County Commissioners wherein the Petitioner will have the opportunity to contest, respond to and rebut the ex parte communication.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this ___13th____ day of _____Oct_____, 2009.

_/S/_____
FREDERICK J. LAUTEN
Circuit Judge

_/S/_____
RENEE A. ROCHE
Circuit Judge

__/S/_____
ROGER J. McDONALD
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this __13th___ day of ____Oct_____, 2009, to the following:

1) Martin S. Friedman, Esquire, ROSE, SUNDSTROM & BENTLEY, LLP, 2180 West State Road 434, Suite 2118, Longwood, Florida 32779; and

2) Joel D. Prinsell, Esquire, DEPUTY COUNTY COUNSEL, Orange County Administration Center, P.O. Box 1393, Orlando, Florida 32802-1393.

__/S/_____
Judicial Assistant