

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

**CASE NO.: 2008-CA-34002
WRIT NO.: 08-72**

**EVELYN BERTOLUCCI, JOSE
BERTOLUCCI, SHELLEY GREEN,
MARETA FORREST, DON RUDD,
And WILLIAM HORNE,**

Petitioners,

v.

**ORANGE COUNTY, FLORIDA,
And KARAM DUGGAL,**

Respondents.

Petition for Writ of Certiorari from a
Decision of the Orange County Board of
County Commissioners.

S. Brent Spain, Esquire,
for Petitioners.

Joel D. Prinsell, Deputy County Attorney,
For Respondent, Orange County, Florida.

R. Duke Woodson, Esquire,
For Respondent, Karam Duggal.

Before POWELL, WHITEHEAD, and THORPE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioners, Evelyn Bertolucci, Jose Bertolucci, Shelley Green, Mareta Forrest, Don Rudd, and William Horne (Petitioners), seek certiorari review of a decision of the Orange County Board of County Commissioners (BCC), rendered November 25, 2008, approving Respondent Karam Duggal's (Duggal) application for a special zoning exception. This Court

has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. We have carefully considered Petitioners' amended petition, Respondents' joint response, Petitioners' reply, the record and the legal authorities cited by counsel.

Duggal's application for a special zoning exception sought to convert an existing residence in Petitioners' neighborhood into a religious facility. The facility would be a Hindu temple with a seating capacity of ninety and a paved parking lot with thirty-six spaces. The site of the temple would be interior to Petitioners' neighborhood of eleven single-family, one acre residences, zoned "Rural Country Estates," and designated "West Windermere Rural Settlement" on the County's Future Land Use Map. The structure would be slightly enlarged but the exterior façade would remain basically the same as the existing residence.

Duggal's application was first taken up at a public hearing before the Orange County Board of Zoning Adjustment (BZA). After considering the evidence, the BZA voted to deny the application on the basis that the proposed religious use did not meet the criteria set forth in section 38-78, Orange County Code (Code), and would adversely affect the interest of the general public.

Duggal appealed the BZA's denial to the BCC and the BCC conducted a quasi-judicial hearing. Duggal did not present any witnesses during the BCC hearing; rather, he relied upon his attorney's presentation, which consisted of his comments and two documents which are more fully discussed below. In opposition, representatives of the County's Zoning Division, Petitioners' land use planners, Petitioners' traffic engineer, and four neighbors testified recommending denial of the application. After a 3-3 vote, which would have ordinarily resulted

in a denial, the BCC chairman closed the evidentiary portion of the hearing and moved to continue the matter for a “decision only” at the November 11, 2008, hearing.

During the interim, the seventh commissioner, who was absent at the first hearing, reviewed the videotape of the hearing and conducted his own independent site investigation. At the second hearing, the seventh commissioner did not state his findings from the site investigation on the record. Rather, he simply cast the deciding vote in favor of approval of Duggal’s special zoning exception.

We agree with Petitioners and hold that these actions by the BCC denied Petitioners’ due process. *See City of St. Petersburg v. Meaton*, 987 So. 2d 755 (Fla. 2d DCA 2008), *rev. denied*, 3 So. 3d 1247 (Fla. 2009). Board members are not permitted to conduct independent site investigations during a pending contested administrative hearing without placing their findings on the record. This type of conduct is not permitted because such lack of notice to interested parties deprives them of the opportunity to contest the information gathered and prevents an adequate record in the event of an appeal. *See Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.C. 1964); *Dawson v. Zoning Bd. of Review of Town of Cumberland*, 197 A.2d 284 (R.I. 1964); *Safeway Stores, Inc. v. City of Burlingame*, 339 P.2d 933 (Cal. Ct. App. 1959).

Petitioners further contend that there was not competent substantial evidence to support the BCC’s implicit finding that the evidence on behalf of Duggal met all of the criteria for a special exception. Code section 38-78 requires that:

Subject to section 38-43 and section 30-43 of this Code, in reviewing any request for a special exception, the following criteria shall be met:

- (1) The use shall be consistent with the comprehensive policy plan.
- (2) The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

- (3) The use shall not act as a detrimental intrusion into a surrounding area.
- (4) The use shall meet the performance standards of the district in which the use is permitted.
- (5) The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.
- (6) Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted.

Specifically, Petitioners contend that there was not competent substantial evidence regarding the second and third criteria.

Duggal did not call a single witness to provide testimony at the BCC hearing. In their joint response, Respondents set forth the evidence they claim meets the competent substantial evidence test. Respondents' evidence can be summarized as follows: (1) Duggal's application for a special exception; (2) the conditions in the BCC order of approval; (3) Duggal's attorney's comments; (4) a written trip generation and traffic impact report; and (5) an aerial photo map. Respondents cite no legal authority that items (1) and (2) provide competent substantial evidence in this context. Further, an attorney's statements at a hearing or trial are not competent evidence absent a stipulation, which was absent in this proceeding. *See Nat'l Advertising Co. v. Broward County*, 491 So. 2d 1262 (Fla. 4th DCA 1986). With regards to item (4), the trip generation and traffic impact report suggests that the temple would have thirty-four daily trips and two p.m. trips during peak hours. It also suggests that the temple would generate thirty-nine trips and thirteen p.m. trips on Saturdays. Finally, the aerial photo map, item (5), reveals on its face that while there are three other churches in the surrounding area, all three have direct access from Apopka-Vineland road, a major thoroughfare. Alternatively, Duggal's facility does not have direct access from Apopka-Vineland road and requires access from Farley Street. The map illustrates two

churches on opposite sides of Apopka-Vineland. The one across from the subject property on Farley has an open ball field with no prominent structures on it.

Based on the foregoing, we conclude that there is not sufficient competent evidence to support the BCC's decision.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the BCC Order, rendered November 25, 2008, is **QUASHED**.¹

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__9__ day of __April_____, 2010.

_____/S/_____
ROM W. POWELL
Senior Judge

_____/S/_____
REGINALD WHITEHEAD
Circuit Court Judge

_____/S/_____
JANET C. THORPE
Circuit Court 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 9 day of April, 2010, to the following: **S. Brent Spain, Esquire**, 433 N. Magnolia Drive, Tallahassee, Florida 32308; **Joel D. Prinsell, Esquire**, Orange County Attorney's Officer, Post Office Box 1393, Orlando, Florida 32802-1393; and **R. Duke Woodson, Esquire**, 111 North Orange Avenue, Suite 1800, Orlando, Florida 32801-2386.

_____/S/_____
Judicial Assistant

¹ This decision is without prejudice to Duggal to file a new application, BCC to hold a new hearing consistent with this Order, and the parties to present their old evidence and any additional new evidence they see fit. If Commissioner Segal is present, he should state his findings from the site visit on the record so Petitioners can address them if they wish to do so.