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

IVAN and MALA LINDSAY,
Petitioners,

CASE NO.: 2012-CA-12164-O
WRIT NO.: 12-59

v.

CITY OF WINTER GARDEN, FLORIDA,
Respondent,
and

WATERSIDE AT JOHN'S LAKE, LLC,
Intervenor.
_____/

Petition for Writ of Certiorari from the
Decision of the City Commission
for the City of Winter Garden, Florida.

Douglas W. Ackerman, Esquire and
Kyle A. Stevens, Esquire, for Petitioners.

A. Kurt Ardaman, Esquire and
Daniel W. Langley, Esquire, for Respondent.

Michael V. Elsberry, Esquire and
Rebecca E. Rhoden, Esquire, for Intervenor.

Before LUBET, EGAN, ROCHE, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, Ivan and Mala Lindsay ("Lindsays"), seek issuance of a writ of certiorari to quash the decision of the City Commission for the City of Winter Garden, Florida ("Commission") rendered on June 28, 2012 pertaining to real property owned by Waterside at John's Lake, LLC ("Waterside"). 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.

Summary of Facts and Procedural History

This action arose from an approval of an application to rezone approximately 75.94 acres of certain real property ("Property") located on the north side of Marsh Road, east of Williams Road, and west of Avalon Road, CR 545, in Winter Garden, Florida. In March 2011, Waterside's predecessor in interest, Centerline Homes Enterprises Five, LLC ("Centerline") entered into a contract to purchase the Property with the intention of developing it principally for high-end, single-family residential homes ("the Project"). At the time Centerline entered into the contract to purchase the Property, the Property was zoned as "NZ", which meant that the Property had not been zoned since it was annexed into Winter Garden. The Property was designated as part of the "Urban Village" on the Future Land Use Map of Winter Garden's Comprehensive Plan at the time Centerline's purchase contract was executed.

Specifically, in order to develop the Property, Centerline filed an application requesting Winter Garden to rezone the Property from NZ to City Planned Unit Development ("PUD") ("First Application"). Winter Garden's Planning and Zoning Division evaluated the Project for compliance with its Code of Ordinances and Comprehensive Plan. Upon finding that the requested rezoning was consistent with the Future Land Use Map of the Comprehensive Plan and complied with the Code of Ordinances, it prepared a Staff Report that recommended approval of an ordinance rezoning the Property to City PUD. Subsequently, the Planning and Zoning Board ("P & Z") unanimously voted to approve Centerline's application and to adopt the required ordinance.

A public hearing was held addressing Centerline's application and included testimony offered on behalf of the Project and testimony in opposition from adjacent property owners, the Lindsays. Upon conclusion of the hearing, the Commission determined that the requested rezoning was consistent with the Comprehensive Plan and complied with the Code of Ordinances, as well as all other controlling documents. As such, on November 10, 2011, the Commission conducted its first reading to approve Ordinance 11-35 which rezoned the Property to City PUD.

Also at the time Centerline filed its application, the "City PUD" designation was the PUD for the "Urban Village" designation set forth on the Future Land Use Map of the Comprehensive Plan ("First Application"). According to Winter Garden, in order to avoid litigation and any confusion over the title of the PUD, (City vs. Urban Village), and to reconcile its land development regulations with its Comprehensive Plan, on January 26, 2012, the Commission enacted Ordinance 12-02 which established the "Urban Village PUD" zoning designation.

On February 9, 2012, the Commission, after conducting its second reading, enacted Ordinance 11-35. Thereafter, on February 16, 2012, the Lindsays filed suit in the circuit court, *Lindsay v. City of Winter Garden*, case no. 2012-CA-2643, that contained both a petition for certiorari and a consistency challenge under section 163.3215, Florida Statutes (2012), relating to Ordinance 11-35 and a claim that Ordinance 12-02 was not lawfully adopted based upon alleged deficiencies in the pre-adoption advertisement thereof.

Subsequently on April 29, 2012, Centerline submitted its second application requesting Winter Garden to rezone the Property to the new Urban Village PUD classification ("Second

Application"). Again, the Planning and Zoning Division evaluated the Project for compliance with the Winter Garden's Code of Ordinances and Comprehensive Plan and found that the requested rezoning was consistent with the Future Land Use Map of the Comprehensive Plan and complied with the Code of Ordinances. Based upon its evaluation of the Project, the staff prepared a Staff Report recommending approval of an ordinance rezoning the Property to the Urban Village PUD designation and the P & Z Board then unanimously voted to approve Centerline's application and adopt the Urban Village PUD ordinance for the Property.

Also, while Winter Garden was evaluating Centerline's Second application, it repealed Ordinance 12-02 through the enactment of Ordinance 12-24. Ordinance 12-24 amended certain sections of Article V of Chapter 118 in the Winter Garden Code of Ordinances which relate to PUDs and created the classification "Urban Village PUD" as named in its Comprehensive Plan.

After a public hearing on this Second Application held on June 28, 2012, which again included testimony offered both on behalf and in opposition to the Project, the Commission determined that the requested rezoning was consistent with the Comprehensive Plan and complied with the Code of Ordinances, as well as all other controlling documents. As such, the Commission repealed Ordinance 11-35 and replaced it with Ordinance 12-29 pursuant to Ordinance 12-24, which rezoned the Property to the Urban Village PUD designation.

In the related civil action, on July 9, 2012, the Trial Court dismissed the First Amended Complaint based on the repeal of Ordinances 11-35 and 12-02 and the improper joining of a petition for writ of certiorari with the original lawsuit. Thereafter, on July 12, 2012, the Lindsays

filed a Second Amended Complaint in the related civil action which is still pending and on July 23, 2012 they filed the subject Petition in this action.

Summary of Arguments

In the Petition, the Lindsays argue that the Winter Garden Commission's approval of the Second Application was not based on competent substantial evidence and departed from the essential requirements of the law by violating several sections of the Winter Garden's Ordinances that will be discussed further herein.

Conversely, Winter Garden and Waterside argue that the Winter Garden Commission's approval of the Second Application did not depart from the essential requirements of law and was based on competent substantial evidence.

Standard of Review

Where a party is entitled to seek review in the circuit court from a quasi-judicial decision of local government, the circuit court is limited in its review to determining: (1) whether due process of law was accorded; (2) whether the essential requirements of law were observed; and (3) whether the decision is supported by competent substantial evidence. *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000); *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

The burden is on the petitioner to show that a challenged decision of local government is illegal. *Phil's Yellow Taxi Cab Co. of Miami Springs v. Carter*, 134 So. 2d 230, 232 (Fla. 1961). In order to constitute a departure from the essential requirements of law, there must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983).

Discussion

The Lindsays argue that the Winter Garden Commission departed from the essential requirements of the law by violating several sections of Winter Garden's Code of Ordinances, specifically under Chapter 118 governing zoning as follows:

I. Section 118-7(c) under Article 1 requires that unless specifically permitted otherwise by the city commission, no application for amendment shall be considered within six months from the time the property described in such application has been decisively acted upon as a result of a previous application:

The Lindsays claim that the Commission violated this ordinance because it approved the First Application through Ordinance 11-35 on February 9, 2012 that was decisively acted upon and then on June 28, 2012, less than six months later, the Commission approved the Second Application through Ordinance 12-29 which amounted to decisive action upon the identical parcels of property.

In response, Winter Garden and Waterside first argue that the Second Application was not an amendment as regulated by this section of the Code and second, from the reading of this ordinance the words "unless specifically permitted otherwise by the city commission" provides authority to the Commission to ignore the time constraints set forth in Section 118-7(c); thus, the Commission did not depart from the essential requirements of law when it approved the Second Application.

This Court's analysis: This Court concurs with Winter Garden and Waterside that from the plain meaning of this ordinance, the Commission had the authority to review the Second Application within six months from its review of the First Application. Further, a municipality's interpretation and application of applicable statutes, code ordinances, and other applicable regulations is entitled to great deference by the reviewing court and the court will not depart

from the contemporaneous construction of such statutes and codes unless the construction is clearly erroneous. *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002).

II. Sections 118-1063(b)(2),(5), and (6) under Chapter 118, Article V governing required general design principles for urban village planned unit development (UVPUD):

A. Section 118-1063(b)(2) requires that all development within the urban village future land use classification shall follow the general design principle of developing an integrated park and trail system to facilitate pedestrian travel and recreation:

The Lindsays claim that there is no record evidence in the Second Application that develops an integrated park and trail system, but instead the Application only consists of one solitary park and a trail that is situated outside of the neighborhood. The Lindsays further argue that the testimony provided by their expert witness, Thomas G. Pelham, demonstrates that the proposed small park (.92 acres) located near the western end of the long linear site plan is not convenient to many of the residences.

In response, Winter Garden and Waterside argue that there was more than sufficient competent substantial evidence before the Commission that evidenced the Project's compliance with this design principle, specifically as contained in the Staff Report provided by the Planning and Zoning Division with findings as follows:

> The project is a pedestrian friendly design and provides internal access to the future commercial core.
>
> The Project includes a waterside community park accessible through sidewalks which connect to properties located to the east and the west and [a] multi-purpose trail located along the property frontage on Marsh Road.
>
> The Project provided pedestrian facilities on the exterior of the project (marsh Road [SIC]) as well as interior to the project and has provided for strong interconnection between the project and adjacent development.
>
> The project includes construction of a 10 foot wide multi-purpose trail extending the length of the property frontage on Marsh Road to enhance pedestrian circulation.

> The project includes an open space/recreational park.
>
> The project has taken the necessary steps to connect both vehicles and pedestrians to the other portions of the urban village.
>
> Care was taken in the design to allow for pedestrian and vehicular access to the commercial core of the Urban Village.
>
> The project has internal and external pedestrian and bicycle facilities that will eventually tie into the overall system.
>
> The Project provided safe and adequate pedestrian and bicycle routes that would provide access to surrounding areas, including schools, parks, commercial areas and other destinations.
>
> Recreational facilities are identified within the proposed UVPUD project to include a 10 foot wide multi-purpose trail along Marsh Road, and a waterfront community park with a gazebo and park benches.
>
> The Project includes 1.70 acres of recreational area.
>
> The project is providing a water front park to comply with the need for recreation.
>
> The proposed UVPUD includes a multi-purpose trail along Marsh Road and a fully integrated network of sidewalks which will connect and provide cross access between properties located to the east and west.

Further, Winter Garden and Waterside argue that there is nothing in this ordinance that requires the Project to contain more than one park or that the park be convenient to all of the residences.

B. Section 118-1063(b)(5) requires that all development within the urban village future land use classification shall follow the general design principle of creating a mixed-use character through the integration of a diversity of uses:

The Lindsays argue that there is no record evidence that the Second Application creates a mixed-use character through a diversity of uses, but instead, the Application consists of one single use for single family residences and Thomas Pelham's testimony demonstrates that the Second Application does not include or address what will take place on the remainder of the acreage in the urban village future land use and what is planned for and developed on those properties is speculative. The Lindsays further argue that segregating residential from other non-

residential uses without providing for a mixture and integration of non-residential uses within the urban village future land use classification does not create or ensure a mixed-use or integrated development pattern.

In response, Winter Garden and Waterside acknowledge that there are no mixed uses in the Project, but point out that the evidence before the Commission was that this design principle was not applicable to the Second Application because the Project is part of the residential component of an overall urban village, which will include other uses; therefore, the inclusion of other uses in the Project is not necessary. Further, Winter Garden and Waterside point out Section 118-1063(h) that states:

> Consistent with the goal of ensuring the entirety of lands designated with the urban village future land use designation developing in such a way as to meet the goals and policies of the comprehensive plan, the city commission shall have the flexibility in deciding whether to require a mixture of residential and nonresidential uses and a variety of housing types and lot sizes within individual urban village planned unit developments based on anticipated development patterns.

Accordingly, Winter Garden and Waterside argue that the Commission, in contemplation of other uses in future developments within the urban village land development category, was authorized to approve the Second Application even though there were no mixed uses contained in the Project.

C. Section 118-1063(b)(6) requires that all development within the urban village future land use classification follow the general design principle of creating a focus center within the urban village:

The Lindsays argue that there is no record evidence to demonstrate that the Second Application creates a focus center within the urban village nor does it create an urban village at all and Thomas Pelham's testimony demonstrates that the Application lacks the integrated, mix of uses and a village center with commercial and retail uses typical of any urban village.

Moreover, the Lindsays argue that Ordinance 12-29 does not ensure that there will be a village center or an integrated mixture of diverse uses on the remainder of the 657 acres designated urban village and the future planning and development of those lands is speculative. Lastly, the Lindsays argue that to the extent the City argues that this requirement is not applicable to the Second Application, Section 118-1063(b) clearly states that "all development" within the urban village future land use classification shall follow those design criteria.

In response, Winter Garden and Waterside argue the Commission did not err in approving the Second Application because the evidence from the Staff Report was that this design principle was not applicable to the Second Application because the proposed UVPUD will be part of the residential community surrounding a future commercial village center which will be located west of the subject property. Further, Winter Garden and Waterside point out that because the Project is not within the village center, which is to be located west of the Property, there was no requirement that it create a focus center that will instead be part of the overall development when completed. As such, Winter Garden and Waterside conclude that the record before the Commission contained competent substantial evidence that the Project complied with the design principles set forth in Section 118-1063(b).

This Court's analysis: From review of the record and the plain meaning of the ordinances as discussed above addressing the general design principles for the UVPUD, this Court finds that the Commission did not depart from the essential requirements of the law and the detailed findings in the Staff Report addressing these ordinance provisions provided competent substantial evidence supporting the Commission's approval of the Second Application. Also, specifically as to the arguments addressing the lack of a mixed–use plan or focus center, this Court concurs with Winter Garden and Waterside and finds that because the

Project is part of the residential component of an overall urban village, which will include other uses, as confirmed in the Staff Report, it was reasonable for the Commission to approve the Application without inclusion of those uses. Lastly, specifically as to the lack of a mixed-use plan, as Winter Garden and Waterside correctly point out, Section 118-1063(h) provides the Commission flexibility in deciding whether to require mixed-use within an individual UVPUD based on the anticipated development pattern.

III. Sections 118-1063(c)(d)(e) under Chapter 118, Article V governing urban village planned unit development (UVPUD):

A. Section 118-1063(c) requires that the UVPUD provide a compact, integrated development pattern with a park or central feature that is located within a one-fourth mile walking distance of the majority of residences in each neighborhood:

The Lindsays argue that there is no record evidence that the Second Application that provides a compact, integrated development pattern with a park or central feature located within a one-fourth mile walking distance of the majority of residences in each neighborhood and the expert testimony shows that the Second Application fails to comply with this requirement.

In response, Winter Garden and Waterside argue there was competent substantial evidence in the Staff Report before the Commission showing that the Project complied with this ordinance including that the proposed UVPUD includes a waterfront community park which is centrally located within the UVPUD site. Furthermore, the evidence from the Staff Report was that the Project met the requirement that most of the dwelling within a neighborhood be within a five-minute walk of the center, averaging one-quarter of a mile, as set forth under the Comprehensive Plan.

B. Section 118-1063(d) provides in order to ensure adequate housing diversity, an urban village planned unit development should generally contain a variety of housing types which may include both attached and detached housing product with ownership and rental opportunities, as well as live/work housing:

The Lindsays correctly point out that it is undisputed that the Second Application contains no variety of housing types, but instead, contains one type of housing being upscale single-family detached residences. Thus, the Lindsays argue that the Application does not provide for attached, multi-family or rental housing, nor does it provide for or ensure that those other types of housing will be developed on the remainder of the acreage in the urban village future land use classification.

In response, Winter Garden and Waterside acknowledge there is not a variety of housing types in the Project. However, they argue that per Section 118-1063(h), as discussed above, the Commission has the authority to approve individual urban village PUDs that do not have such variety. Accordingly, it was within the Commission's authority to approve the Second Application even though the Project envisioned thereunder only contains single family detached residential units.

C. Section 118-1063(e) requires that the street network shall be designed to create a hierarchy of interconnected streets and traffic calming solutions to allow travel through and between neighborhoods and beyond the urban village planned unit development. Roadway cross sections shall be designed to accommodate multiple modes of transportation:

The Lindsays argue that there is no record evidence that the Second Application creates a hierarchy of interconnected streets and traffic calming solutions. Instead, per their expert witness, Patricia Tice, there is only one type of street and therefore no "hierarchy". Thus, the Second Application fails to comply with this requirement.

In response, Winter Garden and Waterside argue there was competent substantial evidence from the Staff Report that the Project complies with this ordinance. Specifically, the

Staff Report finding stating that "the proposed UVPUD will provide cross access connections to properties located to the east and west, a round-a-bout at the main entrance on Marsh Road, and internal streets are all interconnected with no cul-de-sacs or dead ends." Further, they point out that the Staff Report also included that the round-a-bout at the main entrance was a "traffic calming solution", as called for in Section 118-1063(e), as it will "slow and calm traffic on Marsh Road."

This Court's analysis: From review of the record and the plain meaning of the ordinances as discussed above addressing the park or central feature, housing diversity, and hierarchy of interconnected streets and traffic calming solutions for the UVPUD, this Court finds that the Commission did not depart from the essential requirements of the law and the detailed findings in the Staff Report addressing these ordinance provisions provided competent substantial evidence supporting the Commission's approval of the Second Application. Also, again per Section 118-1063(h), the Commission has the flexibility in deciding whether to require a variety of housing types and lot sizes within an individual UVPUD based on the anticipated development pattern.

IV. Section 118-834(b)(6) under Chapter 118, Article V, requiring that vehicle and pedestrian circulation systems shall generally be included on the preliminary development plan with the zoning application:

The Lindsays argue that there is no record evidence that the Second Application includes a pedestrian circulation system, but instead, the expert testimony demonstrates that there is no such system.

In response, Winter Garden and Waterside argue that the Lindsays misstate the record evidence. Winter Garden and Waterside point out the Staff Report findings as discussed above

under section II. A., addressing an integrated park and trail system, and point out additional Staff Report findings as follows:

> The Project includes cross access connection to the properties located to the east and west of the subject property for vehicular and pedestrian access, additionally the proposed UVPUD features a multipurpose trail along the property frontage on Marsh Road.
>
> The Project is providing pedestrian, bicycle and vehicular circulation to the adjacent properties.

Accordingly, Winter Garden and Waterside conclude that there was more than sufficient competent substantial evidence before the Commission that the preliminary development plan submitted with the Second Application contains the required vehicular and pedestrian circulation systems, as required under Section 118-834(b)(6).

This Court's analysis: From review of the record and the plain meaning of the ordinances as discussed above requiring that the vehicle and pedestrian circulation systems shall generally be included on the preliminary development plan, this Court finds that the Commission did not depart from the essential requirements of the law and the detailed findings in the Staff Report addressing these ordinance provisions provided competent substantial evidence supporting the Commission's approval of the Second Application.

V. Sections 110-201(c) and 110-204(b) under Chapter 110, Article IV governing design standards for streets and blocks in subdivisions:

A. Section 110-201(c) requires that minor streets shall be so laid out that their use by through traffic is discouraged:

The Lindsays argue that there is no record evidence that the Second Application lays out the streets so as to discourage their use by through traffic, but instead, the Second Application and their expert testimony demonstrate that the primary through street shown on the plan is

nearly straight and provides no impediment to through traffic in the eastbound direction and only a minor impediment in the westbound direction.

In response, Winter Garden and Waterside point out that the Second Application is for the Property to be rezoned from a no-zoning designation to the urban village land use designation. Therefore, per the Staff Report, they argue that the sections of the Code of Ordinances relating to subdivisions do not apply at the rezoning stage of approval, but instead apply later in the process. Accordingly, they conclude that even if there was no evidence in the record that the Project complies with the requirements contained in Sections 110-201(c) and 110-204(b), such absence would have no impact in the legality of the Commission's approval of the Second Application.

B. Section 110-204(b) requires that the blocks in subdivisions shall not exceed 1,400 feet or be less than 500 feet in length:

The Lindsays argue that there is no record evidence that the Second Application restricts its block lengths to 1,400 feet or less and the expert testimony and site plan clearly demonstrate that some blocks in the development greatly exceed 1,400 feet.

In response, Winter Garden and Waterside argue that there is no such evidence because the preliminary plan accompanying the Second Application does not give any indication of the lengths of the blocks that will ultimately be approved. Rather, the preliminary plan is a conceptual plan demonstrating the vision of the Project and not the specific dimensions thereof.

This Court's analysis: This Court finds that from review of the ordinances and Staff Report, it was reasonable to find that the sections of the Code of Ordinances relating to subdivisions do not apply at the rezoning stage of approval, but instead apply later in the process.

Conclusion

In conclusion, from review of the record including the detailed findings in the Staff Report and the testimony presented at the June 28, 2012 hearing, specifically from Winter Garden's Community Development Director, Ed Williams, this Court finds that the Commission complied with the applicable ordinances and there was competent substantial evidence in support of the Commission's decision to approve the Second Application and to allow implementation of the plan by enacting Ordinance 12-29. *Palm Beach County v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989) (confirming that professional staff reports analyzing a proposed use provided competent substantial evidence).

Further, the Commission was in the best position to weigh the evidence presented from the parties. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (holding certiorari review by the appellate court does not include reweighing or evaluating the evidence presented before the tribunal or agency whose order is under examination); *Dusseau v. Metropolitan Dade County Bd. of County Commissioners*, 794 So. 2d 1270, 1275-1276 (Fla. 2001) (holding that the competent substantial evidence standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency; rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters).

Accordingly, based on the foregoing, this Court finds that: 1) Due process was accorded to the Lindsays throughout the application and hearing process; 2) The essential requirements of law were followed by the Winter Garden Commission; and 3) The decision by the Winter Garden Commission was supported by competent substantial evidence.

Therefore, it is hereby **ORDERED AND ADJUDGED** that Petitioners, Ivan and Mala Lindsay's Petition for Writ of Certiorari is **DENIED**. .

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 3rd day of July, 2013.

/S/_____
MARC L. LUBET
Circuit Court Judge

/S/_____
ROBERT J. EGAN
Circuit Court Judge

/S/_____
RENEE A. ROCHE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Douglas W. Ackerman, Esquire and Kyle A. Stevens, Esquire**, Kirwin Norris, P.A., 15 West Church Street, Suite 301, Orlando, Florida 32801, dwa@kirwinnorris.com, kas@kirwinnorris.com, tat@kirwinnorris.com; **A. Kurt Ardaman, Esquire and Daniel W. Langley, Esquire**, Fishback, Dominick, Bennett, Ardaman, Ahlers, Langley & Geller LLP, 1947 Lee Road, Winter Park, Florida 32789, ardaman@fishbacklaw.com, dlangley@fishbacklaw.com michelle1@fishbacklaw.com; **Michael V. Elsberry, Esquire and Rebecca E. Rhoden, Esquire**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Post Office Box 2809, Orlando, Florida 32802-2809, michael.elsberry@lowndes-law.com, rebecca.rhoden@lowndes-law.com on this 3rd day of July, 2013.

/S/_____
Judicial Assistant