

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

HUBBARD CONSTRUCTION CO.,
d/b/a MID-FLORIDA MATERIALS CO.,
a Florida corporation,

CASE NO.: 2013-CA-008392-O

WRIT NO.: 13-55

Petitioner,

v.

ORANGE COUNTY, FLORIDA,
a political subdivision,

Respondent.

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

Clay Henderson, Esquire, for Petitioner.

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

Before MYERS, JR., S. KEST, and LEBLANC, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Hubbard Construction Co. d/b/a Mid-Florida Materials Co. (“Hubbard”), seeks issuance of a writ of certiorari to quash the Decisions of the Board of County Commissioners for Orange County, Florida (“BOCC”) rendered on June 10, 2013 and June 11, 2013 pertaining to real property owned by Hubbard. 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

Hubbard owns approximately 220 acres in the vicinity of Zellwood and Apopka and in an unincorporated area in northwest Orange County. Hubbard does business as Mid-Florida Materials Co. and operates a construction and demolition debris (“C&D”) landfill on the property. The property was first a borrow pit in the 1960's and in 1988 Hubbard was granted a permit to operate a C&D landfill on 40 acres. In 2000, the C&D landfill permit was expanded to 220 acres. The BOCC reviewed that permit as recently as January 29, 2013 which is in effect until 2017. The landfill also holds a solid waste facilities permit from the Florida Department of Environmental Protection (“FDEP”) and an environmental resource permit from the St. Johns River Water Management District.

In 2011, Hubbard filed an application for modification of its solid waste facilities permit to change the landfill classification from C&D to Class III.¹ Pursuant to the Orange County Solid Waste Management Ordinance, this process involved granting a special exception and modification of the solid waste facilities permit by the BOCC, each of which are considered development orders (lower case numbers SE-11-08-061 and SW-232027-LFCD-85/1212). On August 24, 2011, Orange County’s Development Review Committee (“DRC”) reviewed the application and required Hubbard to convene a community meeting. Thereafter, two community meetings were held and as a result of the issues raised at these meetings, Hubbard revised the

¹ Per section 32-213 of the Solid Waste Management Ordinance, C & D landfill waste includes discarded materials generally considered to be not water soluble and nonhazardous in nature. Examples of C&D waste include, but are not limited to, shingles, steel, glass, brick, concrete, asphalt material, pipe, gypsum, wallboard and lumber. A C & D landfill can also include land clearing debris, such as tree remains, and since the 2007 legislative session, vegetation in the form of yard trash.

Class III landfill waste includes combinations of yard trash and construction and demolition debris along with other debris such as paper, cardboard, asbestos, cloth, processed tires, glass, plastic, and furniture other than appliances. By definition, it includes these types of materials that are not expected to produce leachate that poses a threat to public health or the environment.

application. On September 26, 2012, the DRC reviewed the revised application and recommended its approval subject to nine conditions. On October 24, 2012, the FDEP issued a permit to Hubbard that contained findings of fact and conditions to authorize operation of a Class III landfill. On April 4, 2013, Orange County's Board of Zoning Appeals ("BZA") held a public hearing per the request of Hubbard and heard a presentation from the County's professional staff, expert testimony from Hubbard, and took public testimony. Thereupon, the BZA unanimously approved the request for the special exception subject to the nine conditions recommended by the DRC. Thereafter, a public hearing was noticed for the BOCC for June 4, 2013.

For the hearing, staff reports were prepared by Orange County's Community Environmental Development Services Department ("CEDSD") which included the amended application, technical data in support of the application, the recommendations from DRC and BZA, and the findings and recommended permit modifications from Orange County's Environmental Protection Division ("EPD"). The recommended approval by the EPD staff included recommendations for granting waivers pursuant to section 32-214(k) of the Solid Waste Management Ordinance to make the Orange County solid waste facilities permit consistent with the FDEP permit. Waivers 1, 2, and 4 were policy items while waivers 3, 5, 6 and 7 were technical and non-substantive.

In summary, the CEDSD recommended approval of the modification of the solid waste management facility permit subject to 58 conditions which included the 9 conditions recommended by the DRC and BZA and the 7 waivers recommended by the EPD staff. Notwithstanding the recommended approval from the CEDSD, DRC, BZA, and EPD staff, at the conclusion of the hearing Commissioner Brummer made a motion to deny Hubbard's application

and the motion passed by a 4 to 3 vote. On June 10-11, 2013, the BOCC issued its decisions denying Hubbard's application for the special exception and modification for the landfill.

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, 1092 (Fla. 2000) citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Further, in cases where a special zoning exception is sought, the applicant has the initial burden of showing that the application meets the statutory criteria for granting such exceptions. If the applicant is successful, then the burden of proof shifts to the opposing party (either the agency itself or a third party) to demonstrate, by competent substantial evidence that is presented at the hearing and made a part of the record, that the requested special exception does not meet such standards and was, in fact, adverse to the public interest. *Florida Power & Light Co.*, 761 So. 2d at 1091-1092, citing *Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986); *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311, 312-314 (Fla. 5th DCA 1987).

Arguments

In the Petition, Hubbard argues: 1) It was denied procedural due process because the BOCC failed to disclose ex parte communications with a registered lobbyist prior to the quasi-judicial hearing; 2) The BOCC departed from essential requirements of law as set forth in the Wekiva Protection Act and the Orange County Solid Waste Management Ordinance; and 3) The

decision of the BOCC should be reversed as the recommendations of the professional staff and boards met the initial burden of proof and there was no competent substantial evidence in the record to overcome that presumption or any specific findings of fact to support the decision of the BOCC.

Conversely, Orange County argues that: 1) Hubbard was not denied procedural due process from the BOCC's non-disclosure of ex parte communications with a registered lobbyist prior to the quasi-judicial hearing; 2) The Board did not depart from the essential requirements of the law as set forth in the Wekiva Protection Act, the Orange County Code, and the Orange County Comprehensive Plan in denying Hubbard's special exception application because: a) Hubbard did not demonstrate that its requested special exception was consistent with the County's Comprehensive Plan, or is similar and compatible with the surrounding area and the pattern of development, or would not act as a detrimental intrusion into the surrounding area and b) The BOCC was not required to provide written findings of fact in support of its decision denying Hubbard's special exception request; 3) The BOCC did not depart from the essential requirements of the law in denying Hubbard's application to modify its solid waste management permit from a C & D landfill to a Class III landfill because: a) The BOCC's decision is based on Hubbard's failure to satisfy the Orange County Code permitting criteria for waivers set forth in section 32-214(k) and b) As a matter of law, Hubbard had no right to request a waiver to increase the final elevation of the landfill in its application to modify its solid waste management permit; and 4) The BOCC's decision to deny Hubbard's special exception and application to modify its solid waste management permit is supported by competent substantial evidence.

Analysis

Hubbard's First Argument - Denied Due Process from the Non-Disclosure of Ex Parte Communications with a Lobbyist

Hubbard argues that it was denied procedural due process because the BOCC failed to disclose ex parte communications with a registered lobbyist prior to the quasi-judicial hearing. In support of this argument, Hubbard included in the Appendix to the Petition two documents consisting of a visitor meeting list and visitors' sign in meeting details for a lobbyist from June 3, 2013 that were not part of the record before the BOCC at the June 4, 2013 hearing. Orange County moved to strike these documents as not being part of the record and also argued that the proper procedure for a party to raise a claim of a due process violation due to an ex parte communication of a Board member with a lobbyist, is by filing an action for declaratory and injunctive relief in the circuit court as explained in *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991) (explaining that an allegation of a due process violation as a result of an ex parte communication between a lobbyist and a county commission may be raised in an action for declaratory and injunctive relief).

On October 7, 2013, this Court entered an Order granting Orange County's Motion to Strike the documents from Hubbard's Appendix and references to said documents in the Petition and Reply without prejudice for Hubbard to file an action for declaratory and injunctive relief in the Civil Division of the Circuit Court as outlined in *Jennings*. Accordingly, this Court's review of this argument will go no further and this Court's findings as to Hubbard's other arguments are dispositive as discussed below.

***Hubbard's Second and Third Arguments -
BOCC Did Not Follow the Essential Requirements of the Law
and the BOCC's Decision Was Not Supported by Competent Substantial Evidence***

Hubbard argues that the BOCC departed from essential requirements of law as set forth in the Wekiva Protection Act and the Orange County Solid Waste Management Ordinance and the BOCC's decision should be reversed as the recommendations of the professional staff and boards met the initial burden of proof and there was no competent substantial evidence in the record to overcome that presumption or any specific findings of fact to support the decision.

From review of the record, this Court finds that Hubbard met the initial burden of proof that the application met the statutory criteria for granting the special exception for the landfill and Hubbard complied with the requirements for modification of its solid waste facilities permit to change the landfill classification from C&D to Class III as evidenced by the many stages of the application and approval process and ultimately the evidence presented at the BOCC hearing discussed as follows: First, leading up to the BOCC hearing, the documents included the detailed technical engineering studies submitted by Hubbard's professional geologist, professional engineer, and senior project manager, and the detailed reports and approvals from the DRC, BZA, CEDSD, EPD, and the FDEP permit. These documents addressed the requirements for the special exception and modification per the applicable laws governing solid waste facilities including section 403.707, Florida Statutes, the Wekiva Parkway and Protection Act under chapter 369, Florida Statutes, the Orange County Solid Waste Management Ordinance, and Orange County's Comprehensive Plan. Further these documents show that Hubbard's application was approved with certain conditions and waivers in compliance with the applicable laws. Lastly, there were documents from the public including petitions and letters in support of Hubbard's modification request.

Next, from review of the transcript of the BOCC hearing on June 4, 2013, the testimony, reports, and power point presentations given by Orange County staff and Hubbard, are summarized as follows: Mitch Gordon, manager of the Zoning Division, presented the staff report on the special exception which included a power point presentation. He correctly stated that the standard of review was that “the applicant carries the burden, and if they do, then it shifts to any opposing parties to dispute that complaint.” He explained that there were not many differences between a C&D landfill and a Class III landfill but that upgrading to Class III requires "additional environmental protections". He explained that “the BZA found that the difference between a C&D debris landfill and a Class III landfill was negligible.”

Next, the EPD manager, Lori Cuniff, presented the staff report on the modification to the solid waste facilities permit, which also included an extensive power point presentation. She explained that a C&D landfill and a Class III landfill both take construction and demolition debris and that the difference is the source of the materials. She then walked through each of the seven waiver requests and stated the procedure under the Wekiva Parkway Act for reviewing the presumptive prohibition on new landfills within the Wekiva Study Area. She explained that the landfill was grandfathered and was offering additional protection with liners not currently required of them. She explained that FDEP agreed with their position and that the Orange County staff considered the FDEP’s review as sufficient third party review for the project. She then walked through each of the proposed technical modification requests and concluded as to the differences between C&D and Class III: “There are differences, but they're not significant and the additional environmental protections that we would get for the last three (waivers) are the reason that I'm in support of approval of the modification.”

The hearing progressed to the presentation from Hubbard's professional hydro-geologist, Jim Golden of HSA Golden Engineering, who made the initial presentation of expert testimony and a power point presentation. His presentation included a discussion on need, height, compatibility, traffic, and various environmental issues. He specifically presented on the issue of aquifer vulnerability. His team performed geological studies and borings that concluded there was no karst² topography present; to the contrary, the results of the tests confirmed a clay confining layer. He concluded the site was not a high recharge area and pointed out that the site is not within the Wekiva Protection Area and groundwater does not flow toward the Wekiva River. He also reported that the site received its FDEP permit for a Class III landfill.

After Hubbard's counsel summed up the case, the hearing progressed to short presentations from members of the public which included opinions from ten persons in favor and five persons (one waiving an opinion) in opposition of Hubbard's request. As rebuttal, Hubbard presented Jim Golden and professional engineer, Jack Smith, who again explained that extensive borings were performed to prove that there were no karst features on the site and the EPD staff concurred in their conclusion. Jack Smith also testified that the new liners would result in far less leachate which would be more protective of the aquifer.

The Mayor then closed the public hearing and recognized Commissioner Brummer who expressed his concerns and moved to deny approval of the special exception and modification of the landfill. The crux of Commissioner Brummer's concerns were: 1) There would be no liner or leachate control over the portion of the landfill where the Class III would go on the present C and

² Per section 32-213 of the Solid Waste Management Ordinance, karst terrane means those areas where karst topography with its characteristic surface and subterranean features is developed as the result of dissolution of limestone, dolomite, or other soluble rock. Characteristic physiographic features present in karst terranes include, but are not limited to, sinkholes, sinking streams, caves, large springs, stream to sink (swallets), open sinks, relic sinks with a direct connection to the aquifer, spring runs, and blind valleys.

D and there will be no leachate control and no bottom liner to cap the C & D; 2) The need for a Class III landfill; 3) The economic impact; 4) The impact on the community; and 5) The City of Apopka's concerns as to the impact on the future developments. The Mayor and the other commissioners then made comments and asked Jim Golden questions addressing the liner issue, height expansion, and the capacity of the landfill. Thereafter, the Commission voted and Commissioner Brummer's motion passed to deny Hubbard's application for the special exception and modification for the landfill.

This Court finds that the BOCC's decision to deny Hubbard's request for the special exception and modification for the landfill was not supported by competent substantial evidence as the BOCC's decision was only supported by its own opinions and some of the opinions from the public with no evidence. Thus, the BOCC and persons in opposition failed to demonstrate by competent substantial evidence that the requested special exception did not meet the statutory criteria and any other requirements and was adverse to the public interest. Instead, the record clearly shows that competent substantial evidence existed supporting the granting of Hubbard's request as discussed above. Further, the concerns expressed by the BOCC and the public including the landfill's height increase, capacity, and the liner issue were addressed and resolved in the reports, studies, and other evidence presented by Hubbard and the DRC, BZA, CEDSD, EPD, and FDEP staff throughout the application and approval process and at the hearing. Lastly, this Court's findings in this case are supported by controlling case law as addressed in *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311, 312-314 (Fla. 5th DCA 1987) (applying the standard of review that where the applicant for a special exception to construct a cement batch plant in a district zoned for light industry was willing to follow planning director's recommendations with respect to financing intersection improvements to make the special

exception request acceptable, the burden shifted to the city to prove that the special exception would adversely affect the residential neighborhood through which trucks going to and from the plant, and then holding that the denial of the special exception based on the ground that cement trucks would have to pass through the residential neighborhood, was arbitrary in light of large trucks from other businesses in the district which were permitted to use the residential streets).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Hubbard Construction Co. d/b/a Mid-Florida Materials Co.'s Petition for Writ of Certiorari is **GRANTED** and the Decisions of the Board of County Commissioners for Orange County, Florida rendered on June 10, 2013 and June 11, 2013 addressing Hubbard's applications for a special exception (case number SE-11 -08-061) and a solid waste management facility permit modification (case number SW-232027-LFCD-85/1212) are **QUASHED** and **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 30th day of April, 2014.

/S/

DONALD A. MYERS, JR.
Presiding Circuit Judge

S. KEST and LEBLANC, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Clay Henderson, Esquire**, Holland & Knight LLP, 200 S. Orange Avenue, Suite 2600, Orlando, Florida 32801 and **Joel D. Prinsell, Deputy County Attorney**, Orange County Attorney's Office, Post Office Box 1393, Orlando, Florida 32802-1393 on this 1st day of May, 2014.

/S/

Judicial Assistant