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

ROGER HOLT AS TRUSTEE OF
THE ROGER HOLT REVOCABLE
TRUST U/T/D SEPTEMBER 28, 2011
AND JOSEPH E. HOLT, SR., AS
TRUSTEE OF THE J.E. HOLT LIVING
TRUST U/T/D AUGUST 27, 1993,

Petitioners,

v.

ORANGE COUNTY,
a political subdivision of the
State of Florida,

Respondent.
_____/

Case No.: 2018-CA-7274-O

Appeal from a final decision of the
Orange County Board of Commissioners.

Victor L. Chapman, Esq.,
for Petitioners.

Joel D. Prinsell, Esq.,
Deputy County Attorney, &
Erin E. Hartigan, Esq.,
Assistant County Attorney,
for Respondent.

Before HARRIS, MARQUES, and BLACKWELL JJ.

PER CURIAM.

Petitioners, Roger Holt and Joseph E. Holt, Sr., seek a writ of certiorari to review a final decision of the Orange County ("County") Board of County Commissions ("BCC") which denied their application for an excavation permit to construct a borrow pit in Orange County, Florida, following a public hearing held June 5, 2018. This Court has jurisdiction pursuant to Fla.

R. App. P. 9.030(c)(3) and Fla. R. App. P. 9.100(c) and (f), as well as Sec. 16-23(d) of the Orange County Code ("O.C.C."). For the reasons discussed below, this Petition for Writ of Certiorari is **DENIED**.

RELEVANT FACTS

Petitioners own substantial property in Orange County, Florida. On July 15, 2015, Petitioners applied for an excavation permit from the County to develop a portion of their property into a borrow pit from which they would extract sand and other fill material to be used in various approved County project sites over a five-year period.

The subject land was zoned "A-2 agricultural" which includes "borrow pits, excavation and fill" as permitted uses under that classification. Section 38-79 of the O.C.C. details the conditions for permitted uses of property. Subsection 57 of this section explains that "borrow pits, and excavation and fill activity shall be a permitted use subject to meeting the requirements of chapter 16 (Excavation and Fill)."

Petitioners undertook a three-year-long application process, during which time the application was under consideration by County officials and staff. The process included at least two community meetings in which nearby residents were allowed to voice their concerns. The application underwent multiple changes and additional submissions of material in order to accommodate staff and community concerns. The culmination of this process was the preparation of a County staff report which recommended to the Mayor and BCC that the permit should be approved, subject to certain specified conditions.

On June 5, 2018 at a public hearing, the BCC considered Petitioners' application for a permit. At the hearing, members of County staff presented their report recommending approval of the application and noted the staff's conclusion that the submitted plans were "in conformance

with the requirements of O.C.C. Ch. 16 (Excavations and Fill).” Counsel for Petitioners also spoke on behalf of the proposal before the BCC. The BCC also provided time for residents of the community to speak and offer their concerns regarding the proposed project.

The residents primarily raised concerns regarding the proposed access road that would be built for the project. The access road would stretch from S.R. 520 across several parcels of property owned by Petitioners to the excavation site. A major point of contention was the proposed use of a perpetual easement in favor of Petitioners for the access road to cross another road which served as a sort-of driveway for a number of area residents. These residents worried about the effect of dozens upon dozens of dump trucks crossing what was essentially their driveway. Additionally, residents voiced concerns about the amount of dust that would be generated by the trucks hauling fill up and down the access road and the effects on neighbors with chronic respiratory illness.

The BCC focused on whether the proposed access road was in the best possible location and were similarly concerned about the access road crossing the residents’ driveway. The BCC spent considerable time reviewing the submitted project site maps and other application materials which demonstrated the proposed location of the access road.

In addition, members of the BCC were concerned about the traffic of dump trucks on S.R. 520. The permit application noted that it had negotiated with the Florida Department of Transportation (“FDOT”) regarding the allowable means of ingress and egress onto and from the highway. Petitioners’ application included a proposed permit from FDOT for the construction of a deceleration, turn lane onto the access road from S.R. 520. However, FDOT had not approved of a median-cut which would have allowed direct turn-in for the trucks, and instead the proposed plan would require the trucks to make a U-turn at an adjacent intersection which also served as

the only entrance to the residential neighborhood. A number of members of the BCC expressed their dissatisfaction with this result.

The hearing culminated with a motion by Commissioner Thompson. The motion noted dissatisfaction with the proposed access point on S.R. 520, as well as concern with the many trucks that would be crossing area residents' driveway and a "sheer disruption of lifestyle." The motion recommended denial of the permit application. The motion was seconded by Commissioner Siplin and was passed unanimously. This Petition ensued.

DISCUSSION

Standard of Review

Certiorari review is the appropriate manner for review of quasi-judicial acts such as building permits, site plans, and development orders. *Broward Cnty v. G.B.V. Int'l*, 787 So. 2d 838, 842 n.4 (Fla. 2001). In such cases this Court's review is limited to determining (1) whether procedural due process is accorded, (2) whether there has been a departure from the essential requirements of the law, and (3) whether the administrative findings and judgment are supported by competent, substantial evidence. *Dusseau v. Metro. Dade Cnty Bd. Of Cnty Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001).

Procedural Due Process was Afforded

Petitioners' principal argument regarding due process is that portion of O.C.C. Ch. 16 is unconstitutionally vague. The contested subsection of the O.C.C. states: "[t]he board of county commissioners may approve the permit application and may include any conditions necessary to ensure compliance with these regulations or may deny the permit." According to Petitioners, this language grants the BCC "unfettered discretion to approve or deny a permit for use of property that is proper under the application zoning code."

Notwithstanding Respondent's contention that this argument amounts to a prohibited substantive due process claim, this reading of the O.C.C. is misguided. Section 38-79(57) states that "borrow pits, and excavation and fill activity shall be a permitted use subject to meeting the requirements of chapter 16 (Excavation and Fill)." This subsection's use of the word "shall" demonstrates that the B.C.C.'s may deny such a permitted use only where the activity fails to meet "the requirements of chapter 16." Consequently, the B.C.C.'s discretion is not "unfettered" in this respect and the contested language does not afford the B.C.C. the opportunity to deny the application on the basis of whim or caprice. *See Fla. Mining & Materials Corp. v. Port Orange*, 518 So. 2d 311, 313 (Fla. 5th DCA 1987) (*citing Effie, Inc. v. City of Ocala*, 428 So. 2d 506 (Fla. 5th DCA 1983), *rev. denied*, 444 So. 2d 416 (Fla. 1984)).

On the other hand, Petitioners only assert a failure to afford procedural due process for the first time in their Reply. Petitioners point to the fact that Respondent only raised the issue of compliance with a specific subsection of O.C.C. (Section 16-8(2)) explicitly for the first time in their Response and claim that, because the issue was never raised, addressed, or mentioned explicitly during the BCC hearing, Petitioners were deprived of a meaningful opportunity to be heard in response to those issues. *Key Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001). While it may be true that there was no explicit reference to any specific portions of Chapter 16 during the BCC hearing, it is uncontested that the hearing was focused on Petitioners' application for a permit and that any and all provisions of Chapter 16 would be relevant in that proceeding.

Further, the BCC clearly raised concerns about the traffic on both the proposed access road and on S.R. 520 both of which were relevant at least to O.C.C. Section 16-8(6) which states "additional traffic control measures may be required" and "additional improvements to the

existing roadway (including, but not limited to, turn lanes…) may be required." Accordingly, Petitioners were afforded both notice of the hearing, which they attended, and a fair opportunity to be heard. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

No Departure from the Essential Requirements of the Law

To constitute a departure from the essential requirements of law for the purposes of certiorari, the violation must result in a "miscarriage of justice." *State v. Pettis,* 520 So. 2d 250, 253-54 (Fla. 1988). Petitioners contend that the BCC departed from the essential requirements of the law by failing to make any factual findings or to provide any reason for the denial in its written denial letter and did not satisfy its burden to show Petitioners failed to meet the requirements of O.C.C. Ch. 16.

It is true that the written decision letter provided by the BCC does not include any findings of fact or reasoning for the denial. The decision letter merely makes reference to the motion made by Commissioner Thomson to deny the application, and the unanimous vote that followed. However, this lack of specificity does not necessarily amount to a departure from the essential requirements of law. The Florida Supreme Court has consistently refrained from implementing a rule requiring "written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts." *Broward County v. G.B.V. Intern., Ltd.,* 787 So. 2d 838, 846 (Fla. 2001). Instead, the Florida Supreme Court has reiterated that "in order to sustain the board's action . . . it must be shown that there was competent substantial evidence presented to the board to support its ruling." *Board of County Commissioners v. Snyder,* 627 So.2d 469, 476 (Fla.1993). Accordingly, the BCC's decision to not include any findings of fact or reasoning is not sufficient, in its own right, to amount to a departure from the essential requirements of the law.

Petitioners next argue that they had satisfied their initial burden of showing that their application complied with the regulations of O.C.C. Chapter 16. Petitioners point principally to the recommendation of the staff report as evidence that they had complied and that therefore the burden had shifted to the BCC to show that Petitioners had not satisfied the standards of Chapter 16, or that the project was not in the public interest. Petitioners claim that the BCC did not even attempt to meet its burden and instead departed from the essential requirements of the law by continuing to require Petitioners to carry the burden of showing compliance with applicable County permit requirements, as well as to prove that the permit was in the public interest.

Petitioners rely heavily on the analysis of the burden shifting issue in cases involving applications for special exceptions. *See Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986). The Florida Supreme Court in *Irvine* approved of the Fourth DCA's definition of the difference in the burdens between rezoning cases and special exception cases. The Fourth DCA explained that "a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards in the zoning ordinance that such use would adversely affect the public interest." *Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478, 480 (Fla. 4th DCA 1975). This definition for special exception demonstrates its similarity to the situation in the instant case where O.C.C. Section 38-79(57) mandates that property zoned A-2 be permitted for use as a borrow pit subject to Chapter 16.

However, under O.C.C. Section 16-23(2), the BCC is the final arbiter in the process of deciding whether a permit application has complied with Chapter 16. The recommendations of staff are just that: recommendations. Accordingly, even if we assume that the county staff's recommendation of approval satisfies Petitioners' initial burden of establishing compliance with

Chapter 16, the BCC may still lawfully deny the application. In order to be lawful, the denial must be related to some failure of the application to comply with Chapter 16 and, on review by certiorari, must be supported competent substantial evidence. As discussed in greater detail below, we conclude that both of these conditions are met.

The concerns raised by the BCC as the basis for its denial were not merely "speculative concerns of the individual commissioners without any objective criteria" as claimed by Petitioners. Instead, the concerns were related to an area in which the BCC had explicit authority to explore and "require" additional improvements under O.C.C. Section 16-8. Subsection (6) grants the BCC the discretionary authority to require "additional traffic control measures" or "additional improvements to the existing roadway." Although this subsection was not referenced explicitly, the BCC's concern regarding the traffic on S.R. 520 and the proposed use of a U-turn, and their preference for other options, is clearly one of the discretionary additional requirements the BCC "may" impose.

Although we do not have the benefit of a written summary of reasons in the decision letter, the record does include the reasons enumerated by Commissioner Thompson upon her motion to deny the application. The Commissioner stated "because I have concerns about the crossing of people's driveway . . . because I have concerns about FDOT's decision about that U-turn . . . and because of the just sheer disruption of lifestyle . . . I'm going to move that we deny the requested action." This motion was seconded and passed unanimously, and the reasons therefore are record evidence of the reason for the denial. *See Snyder*, 627 So.2d at 476. This rationale can be considered a discretionary choice by the BCC to require additional measures. Because at least one of the stated reasons is related to an explicit part of the requirements of

O.C.C. Section 16-8(6), the BCC did not depart from the essential requirements of the law by denying the application on these grounds.

BCC's Decision Supported by Competent Substantial Evidence

The BCC's decision to deny the application was supported by competent substantial evidence in the form of the site maps and materials provided by Petitioners themselves, as well as the testimony of area residents at the public hearing. It is clear from the record that the Commissioners spent considerable time reviewing the proposed access to the excavation site. The BCC could reasonably conclude on the basis of the provided evidence that reliance on a U-turn, rather than a median cut through, was insufficient. In making this conclusion, the BCC relied on the provided evidence regarding the potential number of trucks and trips that would be made. The fact that this evidence was provided in the permit application and the staff's report, does not mean that the BCC could not rely on it to arrive at a different conclusion than the staff recommendation. Petitioners' contention that there was no competent substantial evidence beyond the "unsworn testimony" of the area residents neglects the fact that the Commissioners decision was supportable by the evidence included in the application and staff report.

Further, the mere fact that the testimony of area residents at the public hearing was "unsworn" is not enough to conclude that their testimony could not be considered competent or substantial evidence. As explained by the Florida Supreme Court:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. ... In employing the adjective 'competent' to modify the word 'substantial, ' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and

> material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The area residents testified regarding the impact of the access road passing over another road that operated as a driveway. There was limited testimony regarding the impact of having trucks performing U-turns at the intersection that also served as the primary entrance to the community. To the extent that this testimony was relevant to the BCC's consideration of additional traffic measures or potential required changes to existing roadways it constituted competent substantial evidence to support the BCC's decision.

CONCLUSION

Accordingly, for the reasons described above, we conclude that Petitioners were afforded procedural due process, that the decision of the BCC did not involve a departure from the essential requirements of the law, and that it was supported by competent, substantial evidence. Therefore, we **DENY** the petition for writ of certiorari.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida this ___ day of _____, 2020.

_____
JENIFER M. HARRIS
Presiding Circuit Judge

MARQUES and BLACKWELL, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opinion has been furnished on this ____ day of _____ 2020, to **Victor L. Chapman, Esq.**, Barrett, Chapman, & Ruta, P.A., 18 Wall Street, Orlando, FL 32801 at bcrservice@bcrlaw.net and victior@bcrlaw.net; **Joel D. Prinsell, Esq & Erin E. Hartigan, Esq.**, Orange County Attorney's Office, 201 S. Rosalind Ave., 3rd Floor, P.O. Box 1393, Orlando, FL 32802-1393 at joel.prinsell@ocfl.net, erin.hartigan@ocfl.net, and sheri.crooke@ocfl.net.

_____
Judicial Assistant