

IN THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
GENERAL CIVIL DIVISION

SAM CALCO and JAY MUFFLY,
Petitioners,

Circuit Civil Case No.: 22-CA-7322
Division: H

v.

HILLSBOROUGH COUNTY,
Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE is before the court seeking to quash the County's quasi-judicial approval of a proposed rezoning of certain real property from agricultural single-family conventional to planned development (PD). The requested rezoning would allow the development of a convenience store and gas station on U.S. Highway 41 in Lutz. (Doc. 3). Petitioners raise two issues in support of their petition. First, they contend that they have been denied procedural due process on two bases: a) because they were not notified of the hearing, and b) because opponents' ability to present testimony against the project was unfairly limited under the County's land development code. Second, they challenge the finding that the project is consistent with the County's comprehensive plan. The Court has reviewed the petition (Doc. 3), the response (Doc. 28), reply (Doc. 35), related appendices and applicable law, and heard arguments of counsel in oral argument held March 1, 2023. Because Petitioners received adequate procedural due process, and because certiorari is unavailable to review either the challenge to the fairness or constitutionality of the land use code or the development order's alleged inconsistency with the comprehensive plan, the petition is denied.

The Property that is the subject of the contested rezoning is a nearly three-acre parcel in Lutz at 18601 North US Highway 41. It is near the intersection of North U.S. Highway 41 and Sunset Lane. The Highway 41 / Sunset Lane intersection has substantial existing commercial development. The Property is on the north side of the highway within an area currently comprised of suburban scale neighborhood commercial, residential, and agricultural uses. An aerial photograph of the site and surrounding properties shows that to the west is property zoned Planned Development (PD) and used for a self-storage facility, and to the south is property also zoned PD with a Walgreens Pharmacy. South of the Walgreens is property zoned Commercial Neighborhood (CN). The property to the north is either vacant or used for single-family homes, and the property to the east is vacant. The owner sought to rezone the property to allow for the development of a 7-11 convenience store and gas station.

Proceedings to rezone property in Hillsborough County are comprised of two parts. §§10.03.03, 10.03.04, Hillsborough County Code. The first proceeding is before a zoning hearing master (ZHM). §10.03.03. During the ZHM proceeding the case is made for, or against a proposed project. Similar to, but much less formal than, a trial, parties may be represented by counsel, testify, call and cross-examine witnesses, and submit documentary evidence. *Id.* The code sets forth the parameters for the proceeding, including the notice required, and the time allotted for parties and participants. §§10.03.02D-G.; 10.03.03 B, Hillsborough County Code, respectively. Participation in this level of the proceeding is often, but not always, a prerequisite to a party or participant's ability to address the BOCC in the next phase of the proceeding. §10.03.04 E.

The second prong of the proceeding is before the Board of County Commissioners (BOCC). §10.03.04, Hillsborough County Code. Typically, the BOCC considers only matters in the record. §10.03.04 D.1. It may take additional evidence if circumstances warrant. §10.03.04 D.2. Or it may remand the matter back to the ZHM to consider additional evidence. §10.03.04 E.3. As with the proceeding before the ZHM, the code sets forth the order of proceedings, including the time allotted to each speaker. §10.03.04 E.2.(a-g). Parties of record, whether they are proponents or opponents of the project, receive 10 minutes total. §10.03.04 E.2.(d-e).

Petitioner Muffly lives about a half mile from the Property by roads. Petitioner Calco lives nearly two miles from the Property by roads. Based on their distance from the subject property, neither Petitioner was entitled to receive formal notice of the hearings on the rezoning application. § 10.03.02(E)(1), Hillsborough County Code (requiring notice to property owners within 500 feet of the subject property). Because the BOCC remanded the matter back to the ZHM to obtain more evidence, four hearings were held on the rezoning. Although neither petitioner received formal notice of the application to rezone the Property, general notice was posted on the Property. Both petitioners appeared for and fully participated in all four hearings. They were represented by counsel, offered testimony, presented witnesses, including an expert witness, and submitted documents into the record. Ultimately, the BOCC approved the requested rezoning unanimously.

In reviewing quasi-judicial decisions of administrative boards, the circuit court must determine whether Petitioners were afforded due process, whether competent, substantial evidence supports the decision, and whether the decision comports with the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982). In so doing, the court is not permitted to reweigh evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275 (Fla. 2001). Moreover, the court is to examine the record for evidence to support the underlying decision; evidence that may refute the decision is outside the scope of the court's review. *Id.* "When the facts are such as to give the [City] Commission a choice between alternatives, it is upon the [City] Commission to make that choice—not the circuit court." *Metro Dade County v. Blumenthal*, 675 So. 2d 598, 606 (Fla. 3d DCA 1995).

In support of quashal of the rezoning approval, Petitioners argue that Hillsborough County's rezoning process denies them procedural due process on two bases: because they received no notice of the proceeding, and because their ability to participate in the

proceeding before the BOCC is strictly time limited. In addition, Petitioners assert that the requested rezoning should be quashed because it is inconsistent with the comprehensive plan.

DUE PROCESS

In a certiorari proceeding, the circuit court is to determine whether a petitioner received *procedural* due process. Procedural due process requires the provision of fair notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001). “[T]he notice must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.’” *Id. Citing Mathews v. Eldridge*, 424 U.S. 319, 222 (1976). Specifics involved in procedural due process are not evaluated by fixed rules of law, but, rather, by the requirements of a particular proceeding. *Keys*, 795 So. 2d at 948 (internal citations omitted). Due process is flexible. *Id.*

Not everyone is entitled to receive notice under the code. Petitioners, who live no closer than a half mile from the Property, were not within the radius of property owners the applicant was required to notify. As noted earlier, only owners of property within a 500-foot radius are entitled to receive notice by mail. §10.03.02 D., Hillsborough County Code. Because Petitioners were not entitled to receive direct notice under the code, however, they could not have been denied due process because they were not formally notified. Despite not receiving formal notice, both petitioners appeared and fully participated in the underlying proceedings.

Petitioners also argue that the code unfairly limits participation before the BOCC by restricting presentations to evidence already of record. Under the code, the BOCC may not receive new evidence. §10.03.04, Hillsborough County Code. Petitioners say that this practice deprives them of due process by restricting their opportunity to address their elected officials on matters that concern them, specifically, zoning changes that affect their community. Indeed, at least one board member was sympathetic to Petitioners’ position, indicating that county staff was studying the issue.¹

Petitioners suggest that the procedures depart from the essential requirements of law, but not because the BOCC failed to apply the code or even that the code was applied incorrectly, either regarding notice or the allotted time to present evidence. Rather, Petitioners assert that application of the codified notice and time constraints in the code unfairly limit their ability to address their elected officials on matters important to them. In short, they maintain the procedures are unfair. Although the court understands Petitioners’ position, their argument is more a *substantive* than *procedural* due process issue. Circuit courts may review substantive due process issues, but they may not do so

¹ If new evidence is discovered and meets the criteria for the BOCC to accept new evidence, the matter is usually remanded to the ZHM for further proceedings unless remand is waived by the applicant. §10.03.04D.(8,9), Hillsborough County Code.

in certiorari. *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 782 (Fla. 2d DCA 1992) (Certiorari review may only properly consider the *procedural* due process afforded; *substantive* due process must be determined in a declaratory action.) (emphasis added) (internal citations omitted). Thus, where there was no violation of the code alleged, neither the challenge to the adequacy of notice nor allotted time is properly before the court.

INCONSISTENCY WITH THE COMPREHENSIVE PLAN

Petitioners also argue that the development order is inconsistent with the County's comprehensive plan. As with substantive due process claims, claims that a development order is *inconsistent* with the comprehensive plan are not reviewable in certiorari. State law requires challenges to a finding that a proposed development is consistent with the comprehensive plan to be brought as a *de novo* action for declaratory, injunctive, or other relief. See §163.3215(1), (3), Fla. Stat. (stating that a *de novo* action is the *exclusive* method to challenge a finding of comp plan consistency) See *also Stranahan House, Inc. v. City of Ft. Lauderdale*, 967 So. 3d 1121, 1126 (Fla. 4th DCA 2007) ("issues of plan inconsistency are not appropriately brought in a petition for certiorari"); *accord Bush v. City of Mexico Beach*, 71 So. 3d 147, 150 (Fla. 1st DCA 2011).

The Court declines to discuss any remaining issues. It is therefore

ORDERED that the petition for writ of certiorari is **DENIED**.

DONE AND ORDERED in Tampa, Hillsborough County, Florida on May 17th, 2023.

Electronically Conformed 5/17/2023
Helene Daniel

Helene L. Daniel, CIRCUIT JUDGE

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