

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

**JOSEPH NEUMAN, SUNSHINE STATE
PUPS, LLC, MICHAEL SCHOEFF, and
CRYSTAL NEUMAN,**

Petitioners,

v.

CASE NO: 2016 CA 000427 NC

CITY OF NORTH PORT,

Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

This cause came before the Court on Petitioners' petition for writ of certiorari, the response thereto of the City of North Port ("City"), and the Petitioners' reply. The Court has jurisdiction. *Fla. Const. Art. V, Sec.5(b); Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Upon consideration of these filings, the record below, and otherwise being fully advised, the Court grants certiorari because the Petitioners were not accorded procedural due process in the proceedings below.¹

Factual Background

On November 5, 2014, Petitioner Joseph Neuman ("Neuman"), on behalf of Petitioner Sunshine State Pups, LLC, filed with the City an application for special exception to allow the use of a puppy kennel on property located at 1668 Tropicair Boulevard in the Agricultural (AG) zone district. The property is owned by Petitioner Michael Schoeff ("Schoeff").

¹ In their petition, the Petitioners argue the City's denial of their application for special exception was not supported by competent substantial evidence and that the City did not accord them procedural due process. Because the due process claim is meritorious, the Court need not reach the evidence claim.

By an affidavit of violation dated December 8, 2014, Schoeff was cited for violating the City's Unified Land Development Code ("ULDC") by erecting a shed on the Tropicaire property without a permit. On March 17, 2015, the City issued an affidavit of compliance in that case signifying that corrective action had been taken.

By a separate affidavit of violation dated February 6, 2015, Schoeff was cited for violating the ULDC by kenneling puppies for commercial gain on the Tropicaire property. The affidavit described the "violation corrective action" as "contact Planning Administration . . . for more information on filing for a special exception for this property." After a hearing held March 26, 2015, a Code Enforcement Special Magistrate found Schoeff in violation and assessed an administrative fine of \$25 per day until the property is brought into compliance.

On March 3, 2015, the City, through City Attorney Mark Moriarty, filed a civil action in the Twelfth Judicial Circuit Court seeking declaratory, injunctive, and monetary relief against the Petitioners. In ten counts, the complaint alleged violations of various federal, state, county, and city laws in relation to puppy kenneling on the Tropicaire property. On April 24, 2015, three days before the City Commission hearing on the special exception application, the City voluntarily dismissed seven of the ten counts.

On March 19, 2015, after a public hearing, the City's Planning and Zoning Advisory Board recommended denial of the special exception application.

The public hearing on the special exception application was held before the City Commission on April 27, 2015. Mayor Rhonda Y. DiFranco introduced the agenda item as a quasi-judicial matter and immediately recused herself from participation "to assure a fair proceeding free from potential bias or prejudice." Vice-Mayor Jacqueline Moore thereafter chaired the hearing.

Immediately after Mayor DiFranco's recusal, City Attorney Moriarty requested that outside counsel, Maggie D. Mooney-Portale, take his seat at the dais, explaining "I think the commission has asked me to litigate this matter on its behalf, so I can't serve as your legal advisor for this matter, but Ms. Mooney from the Persson Cohen law firm can." Thereafter, Ms. Mooney-Portale served as legal advisor to the City Commission.

Vice-Mayor Moore next polled the commissioners to disclose any ex parte communications pertaining to the special exception application. Commissioner Cheryl Cook responded, "Staff." Commissioner Tom Jones reported none. Commissioner Linda M. Yates responded, "Staff as well as David Samuels, Ms. Wendy Scott, Ms. Karen Ankerstam." Commissioner Yates also disclosed that she viewed the applicants' website and that someone at an earlier board meeting had provided a folder of information to all the commissioners during a public comment period. Finally, Vice-Mayor Moore reported conversations with staff and Ms. Mooney-Portale. When polled by Ms. Mooney-Portale, each commissioner stated he or she could fairly and impartially consider the evidence submitted during the hearing.

Sherry Willette-Grondin, a planner with the Planning Division of the City's Department of Neighborhood Development Services, testified regarding the special exception application and its evaluation by City staff. A written staff report, and Ms. Willette-Grondin's testimony, stated the application met the ULDC's criteria for a special exception permitting the puppy kenneling use, subject to 29 specified conditions.² Ms. Willette-Grondin noted that the City Commission makes the determination of whether to grant or deny an application for special exception.

Mr. Moriarty next spoke in opposition to the application for special exception. Mr. Moriarty prefaced his remarks by stating, "I am not your city attorney for this matter. Ms. Mooney-

² See Petitioners' Exhibit 3, 03/26/15 staff report on special exception application SPX-14-158.

Portale is. I'm here providing you legal argument in support of denial of this application.” Mr. Moriarty argued the proposed puppy kenneling use is a commercial business use prohibited in the AG district. Mr. Moriarty argued that even assuming the puppy kenneling use were eligible for treatment as a special exception, the application did not meet the ULDC's criteria for a special exception. Prior to the hearing, Mr. Moriarty filed a document entitled, “motion in support of denial of application SPX-15-158.”³

Upon completion of Mr. Moriarty's presentation, Ms. Willette-Grondin instructed the City Commission,

Ms. Mayor, you've heard from your staff. And as the applicant is approaching to the dais, I just want to remind . . . this commission about your duty and obligation here tonight because, as I think you just heard, there are—your staff has taken two different interpretations of your code. And largely what is going to be asked of you is to make a decision based on competent substantial evidence presented to you here tonight of which the applicant is getting ready to submit sworn testimony to you of which two members of your staff just provided sworn testimony to you. And you're going to be asked to make a very difficult decision. And I just want to remind you that the decision that you make, it has to be based on competent substantial evidence in the record today.

Counsel for the Petitioners, Kevin Russell, began his presentation in favor of the application by questioning Mr. Moriarty's role in the proceedings: “I need to ask the Chair, and if the Chair can't answer, maybe counsel, who was he? He said he wasn't the city attorney. So what was he? Was he a friend of the board? Was he a resident? I'm trying to understand, as you and I would say, standing. Why was he allowed to speak?”

Ms. Mooney-Portale replied, “My understanding of Mr. Moriarty's role is that he represented the code enforcement board, and he is city staff on this matter who happens to be a lawyer.” Mr. Russell interposed an objection to Mr. Moriarty's statement, arguing he did not

³ See Petitioners' Exhibit D to the special exception hearing.

understand Mr. Moriarty's role in the hearing and that it constituted legal argument and not competent substantial evidence.

Mr. Russell represented that the Petitioners agreed with the Planning Division's written report and stated they would comply with all 29 conditions for granting the special exception.

Mr. Russell objected, maintaining that the City Commission could not be fair and impartial in evaluating the application for special exception because they had approved filing the civil action against the Petitioners in circuit court. Mr. Russell argued the complaint falsely alleged the Petitioners violated the Animal Welfare Act, the Florida Deceptive and Unfair Trade Practices Act, and Sarasota County animal ordinances. In support, Mr. Russell submitted and referenced emails showing that as early as May 2014, City employees were informed that no USDA license was required in the instance of the Petitioners.⁴ With regard to the voluntarily dismissed claims, Mr. Russell argued,

[t]hen last Friday, April 24th, with little fanfare, seven of the ten counts in the original complaint were dropped but not the allegations of wrong-doing, just the counts. Count 1: failure to obtain and provide an official certificate of veterinary inspection pursuant to law. Dropped. Count two failure to obtain an official veterinary inspection for dogs sold to consumers pursuant to state law. Dropped. Count three failure to obtain a certificate of vaccination for the dogs pursuant to local law. Dropped. Count four failure to obtain and provide license tags pursuant to local law. Dropped. Count five failure to provide consumers with written consumer notice. Dropped. Count six failure to obtain United States Department of Agriculture license. Dropped. Count ten misrepresentations of the puppies' origins and breeding history and AKC status. Dropped. Why were they dropped? Because they were false. But you voted five-oh to file the lawsuit.

And that's what the Planning and Zoning Board and the magistrate had in front of him when he made his decision. So it's difficult to imagine any member of the commission being fair and impartial in this quasi-judicial hearing after reading the complaint that you filed against my clients prior to this administrative proceedings.

⁴ See 05/8/14 email from Jarred Fegan to Wendy Scott and 10/20/14 email from Scott Williams to Wendy Scott, part of Petitioners' Exhibit A to the special exception hearing.

Mr. Russell submitted and read into the record a series of emails between Mayor DiFranco and an opponent of the Petitioners' puppy kenneling operation, Karen Ankerstar.⁵ Mr. Moriarty objected to the admission of the emails, arguing "The mayor has resigned or recused herself from this discussion. This is irrelevant." Mr. Moriarty requested a standing objection to the DiFranco-Ankerstar emails, which was noted on the record by Ms. Mooney-Portale.

Mr. Russell submitted and summarized for the record two emails, dated November 25 and 26, 2014, from Ms. Ankerstar to the City Manager and the Director of Neighborhood Development Services.⁶ The emails were copied to Mayor DiFranco and Commissioners Cook and Yates, and read:

November 25, 2014

Can you please update me with what is going on with Joe and Crystal Neuman, who have relocated JUST the puppies to 1668 Tropicaire in the City of Northport.

- 1) They once again do NOT have a permit for the shed.
- 2) It is against Sarasota County Animal Law to have dogs or cats on a vacant property, which this is.
- 3) The zoning on this property does NOT allow for the sale of anything, including puppies.

The Neumans have been blatantly breaking the law in Northport since January. They flaunt a website that promotes this:

flforidapups.com

They obviously are still in business.

Mr. Neuman lied to Mr. Robinson at the last hearing saying they are no longer selling puppies and that their website was shut down, both of which were, and are false.

Attached are a couple photos of inside the shed where the puppies are kept, alone on the property, without water at the time of the photo. A far cry from the cute little photos on their website, deceiving the consumer. These people know zoning rules,

⁵ The emails were obtained through a public records request made to the City by Mr. Russell. *See* Petitioners' Exhibits E and G to the special exception hearing.

⁶ *See* Petitioners' Exhibit F to the special exception hearing.

as they previously had a commercial business, “Puppys R Us” on Tamiami Trail in Sarasota, again selling puppies from puppy mills. Now they are doing the same on a rented residential property. In my opinion they are making a mockery of the Northport officials and continue to do as they please, no matter what the zoning or any other laws state.

Please advise me of what is being done to stop this flagrant law-breaking.

Kindest regards,

Karen Ankerstar

November 26, 2014

I did not take the photos I attached in my previous email- I am not stupid. Someone sent them to me anonymously.

After learning of the photos, the Petitioners reported to the North Port Police that someone entered their property without authorization to take the photos.

Mr. Russell argued that the only competent substantial evidence before the City Commission was the planning staffs’ report that the application met the ULDC criteria for a special exception. Mr. Russell also argued that the civil action filed by the City, influenced by ex parte communications received from opponents of the puppy kenneling use, deprived the Petitioners of due process by tainting the administrative process against them.

After the evidence was closed, a motion to deny the application for special exception was made and seconded. In support of the motion, Commissioner Cook stated, “While Mr. Russell had every right to defend his client, I have no problem with the evidence he presented. However, I think that our city attorney made our case for us. I’m very comfortable with the facts that he brought out. And we all saw the—we all saw the presentation; so I don’t need to reiterate what he said at this point.” The motion to deny the application was unanimously approved.

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 substantial competent 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); and *City of Deerfield Beach v. Valliant*, 419 So.2d 624 (Fla.1982). With regard to the due process determination,

A participant in a quasi-judicial proceeding is clearly entitled to *some* measure of due process. See *Cherry Communications, Inc. v. Deason*, 652 So.2d 803 (Fla.1995) (while administrative proceedings need not match the judicial model, an impartial decision maker is a basic component of minimum due process); *Charlotte County v. IMC–Phosphates Co.*, 824 So.2d 298 (Fla. 1st DCA 2002) (an impartial decision maker is a basic component of minimum due process in an administrative proceeding). The issue of what process is due depends on the function of the proceeding as well as the nature of the interests affected. *Woodard v. State*, 351 So.2d 1096 (Fla. 3d DCA 1977), *cert. denied*, 358 So.2d 135 (Fla.1978).

Florida Water Services Corporation v. Robinson, 856 So. 2d 1035, 1039 (Fla. 5th DCA 2003). In the analogous context of an administrative quasi-judicial proceeding to revoke a license or permit, “[t]he presiding official should be judicial in attitude and demeanor and free from prejudgment and from zeal for or against the licensee or permittee.” *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So. 2d 693,696 (Fla. 5th DCA 2001) (quoting 9 McQuillin, Municipal Corporations, Sec. 26.89 (3rd Ed.)).

Discussion

The Petitioners first assert the City’s filing a civil action for injunctive and other relief before the advisory board and City Commission hearings on the special exception inappropriately swayed the advisory board and displays the City Commission’s “self-evident” prejudice and

prejudgment against the Petitioners. The City responds the Petitioners knowingly commenced the commercial puppy kennel use on the Tropicaire property without the necessary City approvals and filing a civil action to stop the violation served the purpose of promoting the public health, safety and welfare.

As discussed in *Tranon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla.1985), local governments have discretion whether and how to prosecute violations of their zoning ordinances to promote the public health, safety and welfare. A city's discretion to file, prosecute, or voluntarily dismiss a zoning enforcement action is analogous to a prosecutor's discretion to file, prosecute, settle, or dismiss a criminal or civil lawsuit. *Id.* at 922. In relation, local governments have a number of options in attempting to obtain compliance with local code provisions. Chapter 162, Florida Statutes (the "Local Government Code Enforcement Boards Act") nowhere prohibits a local government from enforcing its codes by other means. *See* Section 162.13, Florida Statutes (providing that Act's provisions are supplemental and do not prohibit other means of obtaining compliance with local codes).

In the present case, the record shows that in October 2014 the Petitioners moved their puppy kennel use from another residential property within the City (also the subject of code enforcement proceedings) to the Tropicaire property. This was followed in November 2014 by the application for special exception. Although not authorized to do so, the Petitioners operated the puppy kennel on the Tropicaire property. In early February 2015, the City commenced the administrative code enforcement proceeding to enforce the ULDC against the Petitioners. In early March 2015, the City filed in circuit court its civil action against the Petitioners. Three days before

the City Commission hearing on the special exception, the City voluntarily dismissed seven of the ten counts of the civil action.⁷

The Court finds the Petitioners' right to due process in the administrative proceedings on their special exception application was not violated by the City's filing and partially dismissing a civil action against them. The City has wide discretion in selecting the mechanisms for enforcing its codes. Petitioners operated the puppy kennel use on the Tropicaire property without authority from the City and no legal requirement constrained the City from filing its civil enforcement action while the special exception application was pending. Similarly, the City has wide discretion in determining whether to voluntarily dismiss some or all claims alleged in a civil enforcement action. Legal claims may be voluntarily dismissed for a variety of reasons and not only because, as argued by Petitioners, the claims were knowingly false when made.

The Petitioners next argue that City Attorney Moriarty's relinquishment of his role as legal advisor to the City Commission so he could litigate in opposition to the special exception *on the City Commission's behalf* demonstrates the City Commission prejudged the application in violation of Petitioners' right to due process. As discussed below, the Court agrees.

A local governing board acts in a quasi-judicial capacity when it determines whether or not to grant a special exception from zoning provisions. *See Board of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469, 474 (Fla.1993) (zoning decisions, including those approving or disapproving a request for a variance or a special exception, resulting from proceeding in which zoning provisions are applied to a specific property affecting a limited number of people, are quasi-judicial in nature). The governing board serves its quasi-judicial role by applying factual findings to applicable code provisions. *See id.* Similar to a judge, the governing board should be an

⁷ The remaining counts alleged Petitioners' failure to obtain a city business tax receipt, violation of the ULDC, and failure to comply with the Florida Building Code.

impartial decision maker free from bias or prejudice. *See Florida Water Services Corporation v. Robinson*, 856 So. 2d at 1039. That is, the governing board is to be the neutral decision maker and not a *party* positioned for or against the special exception application.

The record in this case supports a finding that the City Commission was not the impartial decision maker required under principles of due process. The City's Department of Neighborhood Development Services report dated March 26, 2015, stated the application met the ULDC's criteria for a special exception, subject to 29 specified conditions. On April 17, 2015 — ten days before the City Commission hearing — City Attorney Moriarty submitted his motion in opposition to the special exception application. The motion, as if filed by an opposing party, clearly argues a position counter to the City planning staff's report.⁸

At the commencement of the City Commission hearing, Mr. Moriarty announced he was stepping aside as the City Commission's legal advisor because, "I think the commission has asked me to litigate this matter on its behalf." Mr. Moriarty began his litigation against the special exception by filing the motion in opposition. During the hearing, as counsel representing a party opposed to the special exception, Mr. Moriarty objected to the admission of emails between Mayor DiFranco and an opponent of Petitioners' puppy kenneling operation, Karen Ankerstar.⁹ During the deliberative portion of the hearing, Commissioner Cook stated in support of denial of the special exception that "our city attorney made our case for us." As the impartial decision maker, the City Commission did not have a "case" to make. The role of opponent to the special exception application should have been filled by someone other than the City Commission.

⁸ The motion commences with, "COMES NOW, the City Attorney and files this motion in support of denial of Application SPX-14-158 for a Special Exception to allow for the use of a puppy kennel in the Agricultural "AG" Zoning District." The motion is signed by Mr. Moriarty as City Attorney.

⁹ Mr. Moriarty's objection as to relevance is well taken since Mayor DiFranco had recused herself from the proceeding due to the potential appearance of bias or prejudice. Accordingly, the Court does not consider the DiFranco-Ankerstar emails in its analysis.

The City states that City Attorney Moriarty recused himself from the role of legal advisor to the City Commission due to the pending civil action in circuit court against the Petitioners. Citing *Cherry Communications*, the City apparently argues Petitioners' due process rights were not violated because one attorney acted as legal advisor to the City Commission while another attorney served as prosecutor. However, examination of *Cherry Communications* shows it is inapposite to the issue in this case.

In *Cherry Communications*, the court reviewed an administrative order of the Public Service Commission (PSC) revoking Cherry Communications' (Cherry) certificate to provide interexchange services in Florida. During the revocation hearing, one PSC attorney served as prosecutor and another served as the PSC's legal advisor. After the hearing, the prosecuting attorney met with the PSC during its deliberations and submitted advisory memorandums, much of which the PSC adopted in a final order revoking Cherry's certificate. On appeal, Cherry argued this post-hearing procedure violated its due process rights. Although commending the PSC's separation of the prosecutor and legal advisor functions, the court held Cherry's due process rights were violated when the PSC invited the prosecutor to participate in its deliberations. *Cherry Communications, Inc. v. Deason*, 652 So.2d at 805.

The present case does not involve an allegation that the prosecution was given special access to the City Commission's deliberations. Instead, the issue is whether the record in this case contains sufficient indicia that the City Commission assumed the role of a party to the special exception proceeding rather than acting as the impartial decision maker required by law. The Court finds that it does and that the Petitioners were not accorded due process of law. It is, thereupon,

ORDERED AND ADJUDGED that the petition for certiorari is **GRANTED**, the final order of the City Commission denying the application for special exception is **QUASHED**, and this matter is **REMANDED** to the City Commission for further proceedings.

DONE AND ORDERED in Sarasota, Sarasota County, Florida on this 10th day of November, 2016.



Brian A. Iten, Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished via U.S. Mail to **Mark Moriarty, City Attorney**, City of North Port, 4970 City Hall Boulevard, North Port, FL 34287 and **W. Kevin Russell, Esq.**, 14295 So. Tamiami Trail, North Port, FL 34287 on this 14 day of November, 2016.



Judicial Assistant