

NOT FINAL UNTIL TIME EXPIRES
TO FILE RE-HEARING MOTION,
AND, IF FILED, DISPOSED OF.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

THE ORIGINAL FILED

FRIENDS OF THE OLETA RIVER, INC.,
A Florida not-for-profit corporation, MATTHEW
ANDERSON, CHARLES M. BARON, BILL
CAMPBELL, JACK LIEBERMAN, KIMBERLY
LUMPKIN, ELENA CASTRO-MORAN and
PHILLIP MARZO,

ON OCT 16 2014

IN THE OFFICE OF
CIRCUIT COURT MIAMI-DADE CO.
CIVIL DIVISION

Petitioners,

APPELLATE DIVISION

CASE NO: 13-343 AP

LOWER CASE NO: R2013-47

v.

CITY OF NORTH MIAMI BEACH,

Respondent,

and

BRAHA DIXIE, LLC.,

Intervenor.

Opinion filed: October, 2014.

On Petition for Writ of Certiorari from the City Council of the City of North Miami Beach.

Stuart Reed of Law & Mediation, LLC, for Petitioners.

Darcee S. Siegel, City Attorney for the City of North Miami Beach, for Respondent.

Rod A. Feiner, of Coker & Feiner, for Intervenor.

Before COHEN, THOMAS, and GORDO, JJ.

CITY ATTORNEY'S OFFICE
CITY OF NORTH MIAMI BEACH

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PER CURIAM.

By petition for writ of certiorari, the Petitioners ask the Court to quash the development orders issued by the Mayor and City Council of North Miami Beach in Resolution No. 2013-47, which approved the Intervenor's conditional use for a 10-story hotel and a site plan approval for a commercial mixed-used development on property zoned B-2.

FACTUAL AND PROCEDURAL HISTORY

Braha Dixie LLC ("Intervenor") is the owner of 4.32 acres of property, located in the City of North Miami Beach, Florida.¹ To the south of the property is commercial property zoned B-1; to the north of the property is the entrance to Greynolds Park; to the west of the property are multi-family apartments in a RM-23 zoned district; and to the east of the property is West Dixie Highway, along with Biscayne Boulevard, with B-2 commercial zoned property adjacent to these two roadways. The Intervenor filed an application for a site plan and conditional use approvals to permit a hotel use and bar/lounge.

On August 20, 2013, the City of North Miami Beach ("Respondent") held a quasi-judicial public hearing. As noted in the hearing transcript, the city clerk asked the city council members to disclose if any ex-parte communications occurred. Each city council member provided a response. Thereafter, the Respondent's Director of Public Services, a professional engineer and planner, an architect of the project, and a traffic expert provided testimony in support of the Intervenor's site plan and conditional use applications. Friends of the Oleta River, Inc., Matthew Anderson, Charles M. Baron, Bill Campbell, Elena Castro-Moran, Jack Lieberman, Kimberly Lumpkin, Philip Marzo, ("Petitioners") objected to the Intervenor's site

¹ The mailing address of the subject property is 17400 West Dixie Highway, North Miami Beach, Florida.

plan and conditional use applications. Documentary evidence, such as traffic studies and a staff report were also presented at the hearing. At the close of the public hearing, the City Council voted unanimously to approve the conditional use for a hotel and the site plan. The approval of the Intervenor's site plan and conditional use application was implemented through the City of North Miami Beach's Resolution No. 2013-47. Thereafter, Petitioners sought certiorari review to quash Resolution No. 2013-47.

STANDARD OF REVIEW

In reviewing the decision of quasi-judicial action of an administrative body, the circuit court must determine whether the decision is supported by competent substantial evidence, whether the essential requirements of the law have been observed, and whether due process has been accorded. *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001); *Florida Power & Light Co. v. City of Dania Beach*, 761 So. 2d 1089, 1092 (Fla. 2000); *City of Deerfield Beach v. Valiant*, 419 So. 2d 624, 626 (Fla. 1982).

ANALYSIS

In the petition for certiorari, Petitioners argue that (1) there was no competent, substantial evidence that the hotel approved by the city council meets the conditional use review standard of §24-175(B) of the North Miami Beach City Code, (2) there was no competent, substantial evidence to show that the proposed hotel use would not have a substantial detrimental effect on neighborhood property values, (3) the site plan is unapprovable because it is inconsistent with the goals, policies and objectives of the North Miami Beach Comprehensive Plan's conservation element and future land use element, which violates the essential requirements of law, (4) the approved site plan violates essential requirements of law because it erroneously includes plans for bars and lounges, despite the fact that bars and lounges were not approved at the hearing, (5)

the city violated essential requirements of the applicable law regarding disclosure of ex parte communications and (6) due process was violated regarding full disclosure of the substance of ex parte communications as required by a city resolution. We grant the petition for certiorari because Respondent failed to afford due process to Petitioners by failing to follow its own resolution regarding the disclosure of ex parte communications.²

In *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), the Third District addressed the issue of the effect of an ex parte communication arising from a quasi-judicial proceeding of the county commission. The *Jennings* Court held that the allegation of a prejudicial ex parte communication in a quasi-judicial proceeding before the county commission would enable the aggrieved party to maintain an equitable cause of action to establish its claim. *Id.* at 1342. Subsequent to the *Jennings* decision, the Florida legislature enacted section 286.0115 of the Florida Statutes. If a county or municipality adheres to certain procedures by adopting an ordinance or resolution in accordance with section 286.0115(1)(c) of the Florida Statutes, then the presumption of prejudice arising from ex parte communications with local public officials shall be removed.

Section 286.0115(1)(c)(1) of the Florida Statutes provides:

The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the *subject* of the communication and the *identity* of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter.

(Emphasis added).

² By failing to follow its own resolution, Respondent departed from the essential requirements of the law. See *Rosa Hotel Developers, Inc. v. City of Delray Beach*, 10 Fla. L. Weekly Supp. 600b (Fla. 15th Cir. Ct. June 12, 2003).

In 1995, the Respondent adopted Resolution No. R95-24, which established procedures for all ex parte communications received by potential decision makers in quasi-judicial matters including but not limited to members of the city council and members of the planning and zoning board. In pertinent part, section 2 of Resolution No. R95-24 provides:

- (a) The subject matter of any ex-parte communications, together with the identity of the person, group or entity making the communication shall be disclosed and made a part of the record on file with the city prior to final action on the matter.
...
- (d) Any ex-parte communication or activity received or occurring regarding an anticipated or pending quasi-judicial matter and not physically made a part of the record on file with the city and available for public inspection prior to the public hearing on the matter shall be orally stated and disclosed on the record at the public meeting prior to the vote on the matter. Persons who have contrary opinions to those expressed in any ex-parte communication shall be given reasonable opportunity to refute or respond to the communication.
- (e) The substance of any ex-parte communication with a public official of the City which has been properly disclosed pursuant to the procedures set forth herein shall not be presumed prejudicial to the action to which it relates.

Petitioners contend that the city council members' disclosures regarding ex parte communications made on the record were not sufficient to meet the requirements of Resolution No. R95-24 because they failed to reveal any substantive details of their ex parte communications. Petitioners argue that Respondent violated the public's due process right to know what statements were made to the quasi-judicial body that may have influenced their decision. Conversely, Respondent argues that the city council members disclosed the subject of all ex parte communications and the identity of those with whom the communications were made. Further, Respondent contends that the disclosure of the general subject matter complies with due process because it informs the members of the public about the subject matter on which

the conversation took place. For the reasons stated below, we find merit in Petitioners' arguments that due process was not afforded to them at the public hearing.

At the commencement of the council meeting, Respondent's city clerk informed the council members that there was a *Jennings* disclosure on the item. Each council member stated that they had spoken to individuals. (Trial Tr. 3:20-25, 4:1-25, 5:1-2, Aug. 20, 2013). However, the council members did not disclose the subject matter of any ex parte communications. Without disclosing the subject matter of any ex parte communications, the Petitioners were not given the reasonable opportunity to refute or respond to the communications. See Resolution No. R95-24, § 2(d).

In addition, one of the Petitioners addressed his concern about ex parte communications:

[Baron]: Under Section 2D, Resolution R95024 it says that any ex-parte communication or activity received or occurring during an anticipated or pending quasi-judicial matter and not physically made a part of the record on file with the City and available for public inspection prior to the public hearing on the matter, shall be orally stated and disclosed on the record at the public meeting prior to the vote on this matter.

Persons who have contrary opinions to those expressed in any ex-parte communication should be given a reasonable opportunity to refute or respond to the communication.

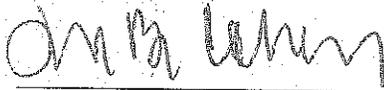
Now, when you all just say, "Yes, I spoke to somebody", that does not disclose one iota of those conversations. So how can you rebut, how can anybody here at the meeting rebut what was said in those conversations? It is totally impossible. You are violating your own code. Huge point in litigation, and we object strenuously to you violating your own City of North Miami Beach law on that.

(Trial Tr. 88:8-25, 89:1-7).

The record evidence does not demonstrate that Respondent followed its own disclosure requirements as provided in Resolution No. R95-24.³ Resolution No. R95-24 provides that the

³ We are aware that one of the council members informed the public that she did meet with representatives prior to rezoning, but deliberately chose not to return a single phone call this time around. As such, the council member felt that she did not need to make a *Jennings* disclosure at

subject matter of any ex parte communication, *together* with the identity of the person, group or entity making the communication shall be disclosed. We find that the subject matter of the ex parte communications was not disclosed. As such, Respondent's failure to follow its own procedural safeguards regarding ex parte communications did not afford the Petitioners a reasonable opportunity to refute or respond to the communication. *See* Resolution No. R95-24, § 2(a), (d), and (e). The basic notion of due process was not afforded to the Petitioners.⁴ For these reasons, the petition for certiorari is GRANTED. We further find that the record does provide competent, substantial evidence that the proposed hotel use would not have a substantial detrimental effect on neighborhood property values and that the site plan is consistent with the goals, policies and objectives of the North Miami Beach Comprehensive Plan's conservation element and future land use element.



JERI B. COHEN
CIRCUIT COURT JUDGE



WILLIAM THOMAS
CIRCUIT COURT JUDGE



MONICA GORDO
CIRCUIT COURT JUDGE

the hearing on August 20, 2013. (Trial Tr. 126: 4-12).

⁴ At oral argument and in its Response, Respondent raised the concern: "Must an elected official make detailed notes during every conversation in order to satisfy the disclosure rules?" Upon review of the record evidence, the disclosures by the council members did not address the subject matter of *any* of the ex parte communications. Instead, the record evidence demonstrates that each council member stated the identity but not the subject matter of the ex parte communication as required by Resolution No. R95-24.

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