

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

**WARREN WEISER/ELIAS
CHOTAS, AGENTS FOR CREC/
BELL UNIVERSITY PLAZA, LLC,**
Petitioner,

vs.

**CASE NO.: 2008-CA-9806
WRIT NO.: 08-35**

**ORANGE COUNTY BOARD OF
COUNTY COMMISSIONERS,**
Respondent,

and

SILVER CITY CINEMAS, LLC,
Intervenor.

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

Darryl M. Bloodworth, Esquire, and
Nichole M. Mooney, Esquire,
for Petitioner.

Joel Prinsell, Deputy County Attorney,
for Respondent.

Scott A. Glass, Esquire, and
James F. Johnston, Esquire,
for Intervenor.

Before POWELL, LEBLANC, and RODRIGUEZ, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Warren Weiser/Elias Chotas, Agents for CREC/Bell University Plaza, LLC
("CREC/Bell" or "Petitioner"), seeks certiorari review of Respondent's, Orange County Board of
County Commissioners (BCC), decision, dated April 16, 2008. 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.

Background

Intervenor, Silver City Cinemas, LLC (“Silver City”), purchased a 1.35 acre tract within a shopping center at a major intersection. The shopping center is surrounded by other commercial and residential properties. The property which Silver City bought contained an existing eight screen movie theater with additional interior retail shopping space. CREC/Bell owns the remainder of the shopping center. Silver City’s tenant is Full Sail University (“Full Sail”), an institution offering educational programs and degrees to people in the entertainment industry.

Silver City applied for a special zoning exception with the Orange County Board of Zoning Adjustment (“BZA”) because it wanted to convert the interior retail space into classrooms and administrative offices and, together with the theater, use the facility for its educational programs and occasional public presentations unrelated to its educational use.¹ There was to be no change to the exterior of the building. Following a public hearing, the BZA approved the special exception with certain conditions. CREC/Bell appealed the BZA decision to the BCC. After conducting a three-hour public hearing, reviewing numerous evidentiary exhibits, and listening to testimony of fourteen witnesses and comments of legal counsel, the BCC voted unanimously to approve the special exception. The BCC entered a written order with thirteen conditions on April 16, 2008.²

¹ Under the Orange County Code of Ordinances, a shopping center is zoned C-1 (residential/commercial), a college/university use is permitted within a C-1 zoned area, and a vocational school is a special exception within a C-1 zoned area.

² Under current law, such a written order is not required to contain findings of fact. See Bd. Of County Comm’rs of Brevard County v. Synder, 627 So. 2d 469, 476 (Fla. 1993).

CREC/Bell timely filed a Petition for Writ of Certiorari seeking review of the BCC's decision. This Court has considered CREC/Bell's Petition, BCC's Response, Silver City's Response, CREC/Bell's Reply, all appendices and the transcript of the proceedings.

Standard of Review

Where a party is entitled to seek review in the circuit court from a quasi-legal administrative action, 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 agency's decision is supported by substantial competent evidence.³ City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982); Dusseau v. Metro. Dade County Bd. of Comm'rs, 794 So. 2d 1270 (Fla. 2001); Orange County v. Butler, 877 So. 2d 810 (Fla. 5th DCA 2004). A departure from the essential requirements of law occurs when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93 (Fla. 1983). Competent substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support the conclusion reached. De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957). The court's task under the third prong of the Valliant test is straight-forward – it must scrutinize the record to determine the evidentiary support for the agency's decision. See Dusseau, 794 So. 2d 1270.

“Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the ‘pros and cons’ of conflicting evidence.” Dusseau, 794 So. 2d at 1276. The court cannot judge the credibility of the evidence or substitute its judgment for that of the agency. Haines City Comty. Dev. v. Heggs, 658 So. 2d 523 (Fla. 1955). As the Florida Supreme Court noted in Dusseau,

³ Petitioner does not assert that due process was denied.

The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience— and is inherently unsuited— to sit as a roving 'super agency' with plenary oversight in such matters.

794 So. 2d at 1276.

CREC/Bell's Contentions

CREC/Bell's attack on the validity of the BCC grant of the special exception is based on its contentions that: (1) the essential requirements of law were disregarded when the BZA's favorable report and recommendation was passed by an invalid 3-2 vote, contrary to Code section 30-43(4); (2) there was not substantial competent evidence of compliance with (a) Code section 38-78, relating to the criteria for special exceptions, (b) Code sections 38-1476, 38-1477 and 38-1478, relating to parking requirements, and (c) Code section 30-43, requiring a finding of lack of detriment to the public interest; and (3) the evidence showed the special exception violated Orange County's Comprehensive Use Plan.⁴

Analysis

We agree that the BZA committed legal error in recommending approval of Silver City's application on a 3-2 vote instead of a 4-2 vote as required by the Code. However, we do not find that the error was so prejudicial as to rise to a miscarriage of justice. The BZA's report was not binding on the BCC. Although there is no doubt the BZA report was accorded some deference, it was merely one piece of many pieces of evidence to be considered and weighed along with all

⁴ Subsequent to the filing of CREC/Bell's petition and reply, CREC/Bell withdrew a portion of its argument – that the BCC departed from essential requirements of law. The argument was that the BZA's favorable recommendation was illegal because it was based on a 3-2 vote, not a 4 member majority vote as required by Code section 30-43(4). It was determined that this section had been amended in 2008 to require only a majority vote; however, there must be a quorum of at least 4 members.

the other exhibits and witness testimony. None of the Commissioners made any reference to the BZA report during the hearing, so we think it reasonable to conclude that the report did not influence the BCC's decision such that we should quash its order granting the special exception on this ground.

As for competent substantial evidence, we do not deem it necessary to recite in detail the evidence presented at the hearing before the BCC. Aside from the BZA hearing report and recommendation, the BCC considered Silver City's application, the county zoning staff report and its visual aids, and Full Sail and CREC/Bell's land records and parking agreements.⁵ The county zoning staff's visual aids contained, among other things, a zoning map, numerous aerial and site photographs, plat detail, and Silver City's site plan. Four witnesses testified on behalf of Silver City and Full Sail in favor of the application, one of whom was Mr. Gordon of the county zoning staff. Ten witnesses testified on behalf of CREC/Bell objecting to the application. Eight of the witnesses objecting to the application were neighborhood residents, five of whom provided live testimony and three by affidavit.⁶

Conclusion

After careful review and consideration of CREC/Bell's petition for writ of certiorari, BCC's response, Silver City's response, CREC/Bell's reply, all indices, evidence, exhibits, and the transcript of the proceedings, and the applicable legal authorities, we find that due process was afforded, the essential requirements of law were adhered to, and there was substantial

⁵ A county staff recommendation, where made a part of the record, is evidence which the ultimate zoning authority is entitled to consider. However, the recommendation is not binding upon the zoning authority and, standing alone, the report is not sufficient to constitute competent substantial evidence to sustain the authority's decision. See Hall v. Korth, 244 So. 2d 766, 768 (Fla. 3d DCA 1971).

⁶ As to whether the BCC considered the public interest, there will always be claims that a special exception would have some degree of negative impact on the surrounding area. In this case, we note that the BCC imposed five conditions specifically designed to address the residential neighbors' objections: (1) limiting hours of operation from 8:00 a.m. to 1:00 a.m.; (2) requiring classes to be held at certain intervals; (3) requiring a full-time security guard during all hours of operation; (4) requiring an assembly area be provided for the students; and (5) prohibiting horseplay and other similar actions by students.

competent evidence to support the BCC's granting of the special exception. Therefore, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this __8__ day of ____September_____, 2009.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
BOB LEBLANC
Circuit Court Judge

_____/s/_____
JOSE R. RODRIGUEZ
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 8 day of September , 2009, to the following: **Darryl M. Bloodworth, Esquire, and Nichole M. Mooney, Esquire**, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Post Office Box 2346, Orlando, Florida 32802-2346, **Joel Prissnell, Esquire**, Orange County Attorney's Office, Post Office Box 1393, Orlando, Florida 32802, and **Scott A. Glass, Esquire, and James F. Johnston, Esquire**, Shutts & Bowen, LLP, 300 S. Orange Avenue, Orlando, Florida 32801.

_____/s/_____
Judicial Assistant