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

Styx, LLC, a South Carolina limited liability company,

and

The Teale, LLC, a Florida limited liability company,
Petitioners,

v.

The School Board of Osceola County, Florida,
Respondent.
_____/

CASE NO. 2020-AP-000012-AP

Petition for Writ of Certiorari from the decision of the School Board of Osceola County.

Scott A. Glass, Esquire
for Petitioners.

Thomas P. Callan, Esquire; and Frank C. Kruppenbacher, Esquire
for Respondent.

Before KRAYNICK, WOOTEN and CARSTEN, J.J.

PER CURIAM

Styx, LLC and The Teale, LLC ("Petitioners") timely seek certiorari review of the decision of the School Board of Osceola County ("School Board") to deny Petitioners' application for an alternative educational system impact fee. We have jurisdiction under Florida Rule of Appellate Procedure 9.030(c)(3). The Petition for Writ of Certiorari is denied.[1]

[1] We dispense with oral argument. Fla. R. App. P. 9.320.

FACTUAL AND PROCEDURAL HISTORY

Petitioners purchased two properties to develop existing motels on the property into "zero-bedroom apartment" buildings. The development would result in 300 "zero-bedroom apartment" units. Under Section 24–39 of the Osceola County Code, developers for "all residential construction occurring within the county . . . shall pay [an] educational system impact fee." Consequently, Petitioners were required to pay such a fee. Typically, the fees are established by a study conducted every three years. However, a developer may apply for an alternative educational impact fee, in which the fee is commensurate with the development's actual impact on the school system. On June 21, 2019, Petitioners submitted their Alternative Impact Fee Request pursuant to Section 24–41 of the Osceola County Code.

In their application, Petitioners submitted an "Educational Impact Fee Alternative Calculation for Zero-Bedroom Housing Units" ("Study"). The Study supported an educational impact fee of $552 per unit. In a letter dated July 19, 2019, the educational impact fee consultant of the School Board, Tindale Oliver & Associates, Inc. ("Tindale Oliver"), indicated it had reviewed and verified the Study and recommended that the School Board accept this calculation. Based on Petitioners' Study, the total alternative impact fee due was $165,600.00.

Subsequently, in November 2019, the Director of Planning Services with the School Board, Rhonda Blake, sent an email to Tindale Oliver for "an updated opinion." Ms. Blake requested this update based on new data from a separate development, The Backlot Apartments, which markets itself as renting "zero-bedroom apartments." Tindale Oliver responded that applying the educational impact fee rate for townhouses to the development was appropriate. The townhouse rate was $7,591.00 per unit. Given Petitioners' planned construction of 300 units, the total impact fee would be $2,277,300.00.

In February 2020, a meeting was held regarding Petitioners' application. The School Board deferred a decision to allow time for negotiation of a mutual agreement. Between February 2020 and April 2020, the parties entered into negotiations to reach an agreement on the educational impact fee. A proposed agreement was drafted, and Tindale Oliver again changed its opinion to say the alternative fee in the proposed agreement was reasonable. The agreement was submitted to the School Board for consideration at the next meeting regarding Petitioners' application.

Shortly before the next meeting, the School Board issued its "Emergency Policy Relating to School Board Meetings" in response to the COVID-19 pandemic. The emergency policy required all School Board meetings to be held virtually. Additionally, public comment was to be made via pre-submitted written comments, and while each comment would be read aloud at the meeting, no such comment would be read for more than three minutes. Petitioners were subject to this requirement but did not object[2] to this procedure.

On April 21, 2020, the School Board meeting was held virtually, with all School Board members able to communicate[3] via an undisclosed virtual platform. At this meeting, the School Board had two items on the agenda related to Petitioners: one was to decide whether to deny Petitioners' application for an alternative impact fee, and the other was to determine whether to adopt the proposed agreement. When the meeting started, Superintendent Pace read aloud two comments submitted by Petitioners. Superintendent Pace first read a portion of a letter submitted by Petitioners' attorney; after three minutes, she stopped reading. Then, she read a letter by the

[2] Petitioners' response to the procedure was, "[b]ut for the current Covid-19 pandemic and the reasonable restrictions imposed to address the same, the undersigned would appear in person at the Board's April 27th meeting and submit such prior written presentation and exhibits into the official record. As this is not possible, I respectfully request that the same be considered incorporated by reference herein and made a part of the official record of the Board's April 27th meeting."

[3] School Board members were able to virtually "raise a hand" to indicate they had a comment or question.

principal of Petitioners, Ryan Hyler, and it was read in its entirety within three minutes. Petitioners could not, and did not, make any further statements at the meeting.

After discussion by the School Board members, a vote was held on whether to accept or reject the proposed agreement, and the School Board voted 3–2 to reject the proposed agreement. The School Board then engaged in further discussion on whether to deny Petitioners' application. Finally, the School Board voted 4–1 to deny Petitioners' application for an alternative educational impact fee. By voting to deny the application, the School Board accepted the recommendation in Tindale Oliver's updated opinion letter to charge Petitioners an impact fee based on the townhouse rate.

On May 21, 2020, pursuant to the School Board's vote, Superintendent Pace issued the School Board's final decision. The present Petition for Writ of Certiorari followed on May 22, 2020.

STANDARD OF REVIEW

Under first-tier certiorari review, the Court is limited to determining: 1) whether procedural due process was accorded; 2) whether there was a departure from the essential requirements of the law; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

ANALYSIS

I. While procedural due process was not accorded, Petitioners failed to preserve the error for appellate review.

Petitioners argue they were denied due process when they were denied the opportunity to speak and present evidence at the April 21, 2020, meeting. Due process requires notice and an opportunity to be heard. *Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7, 9 (Fla. 5th DCA

2010) (citing *LaChance v. Erickson*, 522 U.S. 262 (1998)). Petitioners do not allege lack of notice and instead argue that the School Board abridged their opportunity to be heard.

In the present case, the procedures employed did not afford Petitioners due process. During the meeting in which the Petitioners' application for an alternative educational impact fee was discussed, the Petitioners were only allowed to watch the proceeding as a member of the public and pre-submit a public comment. However, as parties whose rights were affected by official action, they should have been able to present evidence, cross-examine any witnesses, be informed of all the facts upon which the School Board acted, and respond to any concerns, comments, or opinions raised by the School Board members during the meeting. *See Kupke v. Orange Cty.*, 838 So. 2d 598, 599 (Fla. 5th DCA 2003) (finding a farmer was not accorded due process when he was prevented from presenting evidence or cross-examining witnesses regarding the nature of farm equipment stored on his property).

Regardless, Petitioners failed to preserve this error for review. Because this Court is acting in its appellate capacity, its review is confined to issues "decided adversely to [Petitioners'] position, or issues that were preserved **with a sufficiently specific objection below.**" *Clear Channel Commc'ns., Inc. v. City of N. Bay Vill.*, 911 So. 2d 188, 189–90 (Fla. 3d DCA 2005) (emphasis added). "[A] contemporaneous objection [puts] the trial judge on notice of a possible error, [affords] an opportunity to correct the error early in the proceedings, and [prevents] a litigant from not challenging an error so that he or she may later use it for tactical advantage." *Id.* at 190 (citing *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 185 (Fla. 3d DCA 2005)).

Petitioners did not object to the School Board's procedure at the April 21, 2020, meeting. Specifically, before the meeting, Petitioners state:

> But for the current Covid-19 pandemic **and the reasonable restrictions imposed to address the same**, the undersigned would appear in person at the Board's April

> 27th meeting[4] and submit such prior written presentation and exhibits into the official record. As this is not possible, I respectfully request that the same be considered incorporated by reference herein and made a part of the official record of the Board's April 27th meeting."

Petitioners' statement did not make a sufficiently specific objection regarding the procedure and, if anything, suggests they found such procedure reasonable under the circumstances. Petitioners' statement would not put the School Board on notice of a procedural error nor offer the School Board the chance to correct the deficiency. Thus, the Court finds Petitioners did not sufficiently and specifically object to the procedure employed, and their argument was not preserved for appellate review. *See Anderson v. Sch. Bd. Of Seminole Cty*, 830 So. 2d 952, 953 (Fla. 5th DCA 2002); *Augustin v. State Unemployment Appeals Comm'n.*, 906 So. 2d 1238, 1239 (Fla. 4th DCA 2005).

II. The School Board did not depart from the essential requirements of the law.

Petitioners next argue that the School Board has departed from the essential requirements of the law. A departure from the essential requirements of the law is more than a simple legal error; there must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 531 (Fla. 1995). "Failure to observe the essential requirements of law means . . . the commission of an error so fundamental in character as to fatally infect the judgment and render it void." *Id.* at 527.

A. Osceola County Code

First, Petitioners rely on Section 24–41 of the Osceola County Code ("the Code") in support of their argument that the School Board departed from the essential requirements of the law, which provides the regulatory standard for calculating an alternative educational system

[4] While Petitioners wrote "April 27th" the meeting actually took place on April 21, 2020.

impact fee. While there are multiple approved methods of calculating the alternative fee, the relevant method is:

> [A]n independent source provided that: (1) The independent source is a generally accepted standard source of demographic and education planning; **or (2) The independent source is a local study supported by a database adequate for the conclusion contained in such Study and performed pursuant to a generally accepted methodology of education planning.**

§24–41(b), Osceola Cty. Code (2020). Petitioners contend their application satisfied the requirements of the Code, and therefore it should not have been denied.

The Code is a local regulation, and local regulations govern a quasi-judicial decision granting or denying an application and must be uniformly administered. *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 376 (Fla. 3d DCA 2003). Accordingly,

> Once the petitioner[s] met the initial burden of showing that [their] application met the statutory criteria for granting such applications, "the burden was upon the [agency] to demonstrate, by competent substantial evidence presented at the hearing and made a part of the record, that the application requested by petitioner[s] did not meet such standards.

Irvine v. Duval Cty. Planning Comm'n., 495 So. 2d 167, 167 (Fla. 1986). Petitioners argue that the School Board has departed from the essential requirements of the law because it did not demonstrate by competent substantial evidence that the application failed to meet the regulatory standards from the Code.

As a preliminary matter, Petitioners did not meet their initial burden, and therefore the burden never shifted to the School Board. The Superintendent, pursuant to Section 24–41 (e) and (f) of the Code, determines if the data, information, and assumptions made by the Petitioners satisfy the regulatory standards. §24–41(e)–(f), Osceola Cty. Code (2020). While the consultant, Tindale Oliver, initially recommended accepting the findings of Petitioners' Study, the School Board could, and did, reject this recommendation. Additionally, staff with the School Board contacted Tindale Oliver later to request "an updated opinion" that is "based on actual data that is now

available since the original review." The request suggests the School Board had concerns about Petitioners' Study meeting the regulatory standards.

Nevertheless, even if Petitioners did meet their burden, the School Board demonstrated by competent substantial evidence that the Study did not meet the standard. Competent substantial evidence is evidence relied upon that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The Court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. *Marion Cty. v. Priest*, 786 So. 2d 623, 627 (Fla. 5th DCA 2001). Accordingly, when the facts give an agency a choice between alternatives, it is the agency's prerogative to make that choice. *Miami-Dade Cty. v. Walberg*, 739 So. 2d 115, 118 (Fla. 3d DCA 1999) (quoting *Metro. Dade Cty. v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1997)).

At the meeting, School Board members relied on the updated opinion[5] of Tindale Oliver in deciding to reject Petitioners' application. Tindale Oliver was the expert consultant of the School Board, and its opinion was adequate to support that Petitioners' application failed to meet the regulatory standards. The Court finds it is competent substantial evidence to support Respondent's decision.

B. Florida Statute Section 163.31801(7) (2020) did not apply at the April 21, 2020, meeting.

Next, Petitioners argue that the School Board departed from the essential requirements of the law by failing to adhere to Section 163.31801(7), Florida Statutes (2020):

> In any action challenging an impact fee or the government's failure to provide required dollar-for-dollar credits for the payment of impact fees . . . the government has the burden of proving by a preponderance of the evidence that the imposition or amount of the fee or credit meets the requirements of state legal precedent and this Section. The court may not use a deferential standard for the benefit of the government.

[5] Recommending Petitioners be charged at the townhouse rate.

§163.31801(7), Fla. Stat. (2020). Petitioners contend the School Board has not met the burden established in this statute; however, Section 163.31801 does not apply here.

Legislative intent controls when construing statutes in Florida, and that intent is determined primarily from the plain meaning of the statutory language. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). Additionally, "effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005).

The first line of Section 163.31801(7) states that it applies "[i]n any action challenging an impact fee." §163.31801(7), Fla. Stat. On April 21, 2020, the meeting was not an "action challenging an impact fee" but a quasi-judicial proceeding to determine what amount to charge Petitioners as an impact fee. Furthermore, the statute also states, "[t]he **court** may not use a deferential standard for the benefit of the government." §163.31801(7), Fla. Stat. (emphasis added). When considering the statute as a whole, it is clear that "any action" refers to those actions brought in court and not the administrative, quasi-judicial proceeding at issue here. Accordingly, Section 163.31801(7) is inapplicable to the case at hand, and the Court holds that the School Board did not depart from the essential requirements of the law.

III. The School Board's decision was supported by competent substantial evidence.

Petitioners last argue that the School Board's decision was not supported by competent substantial evidence. This argument is premised on the fact that the School Board was presented with multiple reports and ultimately relied on one unfavorable to Petitioners. When presented with a choice of factual alternatives, the School Board must make that choice, and this Court will not

reweigh the evidence or substitute its judgment for that of the School Board. *Walberg*, 739 So. 2d at 118; *Priest*, 786 So. 2d at 627.

The School Board based its decision on expert Tindale Oliver's second letter that indicated the appropriate impact fee should be at the townhouse rate. The record also reflects that Tindale Oliver's "updated opinion" was "based on actual data that is now available since the original review." The Court finds Tindale Oliver's opinion is competent substantial evidence to support the School Board's decision to reject Petitioners' application for an alternative impact fee.

Petitioners did not preserve their due process argument for appellate review. The Court holds the School Board did not depart from the essential requirements of the law, and its decision is supported by competent substantial evidence. Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on this 15TH day of November, 2021.

eSigned by KRAYNICK, MICHAEL S
on 11/15/2021 10:19:05 ILgLozHY

MICHAEL KRAYNICK
Presiding Circuit Judge

WOOTEN and CARSTEN, J.J., concur.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the Scott A. Glass, Esquire; Shutts & Bowen LLP, 300 S. Orange Ave., Suite 1600, Orlando, FL 32801 at sglass@shutts.com; Thomas P. Callan, Esquire; Callan Law Firm, P.A., 921 Bradshaw Terrace, Orlando, FL 32806 at tcallan@callanlaw.com; and Frank C. Kruppenbacher, Esquire; Frank C. Kruppenbacher, P.A., 1218 Guernsey St., Orlando, FL 32804 at fklegal@hotmail.com on this 15TH day of November, 2021.

/s/ Anita Berrios

Judicial Assistant