

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

EDWARD J. POPKINS, JR.,  
EDWIN ALLEN CROWDER,  
ROGER HUTCHINS,

CASE NO.: 2014-CA-012422-O

Petitioners,

v.

CITY OF ORLANDO, POLLACK SHORES  
REAL ESTATE GROUP, LLC,  
PRINCETON CENTER, LLC,

Respondents.

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Petition for Writ of Certiorari  
from the Decision of the City Council  
for the City of Orlando, Florida.

Ralf Brookes, Esquire  
Attorney for Petitioners.

David B. King, Esquire and  
Vincent Falcone III, Esquire  
Attorneys for Respondent, City of Orlando.

Scott A. Glass, Esquire  
and James Johnston, Esquire  
Attorneys for Respondent, Pollack Shores Real Estate Group, LLC.

Michael P. McMahon, Esquire  
Attorney for Respondent, Princeton Center, LLC.

Before MYERS, JR., S. KEST, and THORPE, JJ.

**PER CURIAM.**

**FINAL ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI**

Petitioners, Edward J. Popkins, Jr., Edwin Allen Crowder, and Roger Hutchins  
("Petitioners"), seek issuance of a writ of certiorari to quash the Decision of the City Council for

the City of Orlando, Florida (“City”) rendered on November 3, 2014 that approved the Rezoning Ordinance No. 2014-47 pertaining to the redevelopment of certain real property in Orlando. 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.

### ***Summary of Facts and Procedural History***

On April 21, 2014, Pollack Shores Real Estate Group, LLC (“Pollack Shores”), as agent for several property owners, applied to amend the City’s Comprehensive Plan and to rezone a portion of property bounded by Edgewater Drive, West Princeton Street, and West Smith Street (the “Property”) into a planned development. Upon receiving Pollack Shores’ application, professional staff for various City departments reviewed the application and investigated the Project and City staff consolidated the information received from these departments into a detailed report analyzing the various zoning and other requirements applicable to the Project. Accordingly, the staff report recommended approval of the application subject to Pollack Shores compliance with several conditions relating to design, transportation, engineering, fire control, and other issues.

On June 17, 2014, the Municipal Planning Board (“MPB”) considered Pollack Shores’ application, reviewed the staff report with a presentation by staff, and received testimony from Pollack Shores and residents both for and against the Project. The MPB then voted to recommend approval of the rezoning and comprehensive plan amendment with conditions. The MPB’s recommended approval was not appealed.

On September 15, 2014, the City Council held its first reading and a public hearing on the Rezoning Ordinance. The City’s planning director presented the opinion of the City’s professional staff, explained the MPB’s recommendation, and addressed questions from the City Council. Also, a representative of Pollack Shores spoke next and discussed the multiple meetings

that Pollack Shores held with the community in College Park and the changes made in response to community input and testified about the specifics of the Project, including the site plan, traffic calming devices, pedestrian friendly features, and streetscaping. After Pollack Shores and the City's planning director responded to additional questions, residents spoke both for and against the Project including the Petitioners who are owners and residents of nearby property. Because there was inadequate time to hear from all speakers, the City Council continued the hearing until its next meeting. On September 29, 2014, the City Council reconvened the hearing, and members of the public concluded their testimony. Next, representatives of Pollack Shores and Princeton Center testified in favor of the Project and made themselves available for questions. The City Council then discussed the Rezoning Ordinance.

On November 3, 2014, the City Council held its second reading and conducted a further public hearing. The City's planning director testified first, explaining the history of the application and reiterating the recommendations of staff and the MPB to adopt the Rezoning Ordinance. After testimony and debate at the November 3, 2014 hearing, the City Council approved the Rezoning Ordinance.

### ***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 competent substantial evidence. *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)). Also, under section 162.11, Florida Statutes, a circuit court reviewing a final administrative order cannot engage in de novo review and must limit its review to the record created before the enforcement board.

### *Summary of Arguments & Analysis*

Upon review of all arguments and the extensive record in this appeal, this Court finds that Petitioners were provided due process and the City Council's findings and decision did not depart from the essential requirements of the law and were supported by competent substantial evidence as summarized below.

#### *I. Whether Petitioners Were Afforded Due Process:*

Petitioners argue that they were denied due process asserting: 1) the Assistant City Attorney made statements at the November 3, 2014 that were prejudicial and biased and 2) lack of a second recommendation from the MPB for the amendment of the rezoning ordinance. Upon review of the transcript from the November 3, 2014, this Court finds that Petitioners in their argument have taken the Assistant City Attorney's statements out of context. Such statements were not a directive for the City Council to approve the application as the statements were properly within the scope of the Assistant City Attorney's duties. *City of Sunny Isles Beach v. Publix Super Markets, Inc.*, 88 So. 3d 224, 228 (Fla. 3d DCA 2011) (holding that giving advice and clarifying legal issues at an agency hearing does not violate due process).

Petitioners' failed to preserve for appeal their argument as to the lack of a second recommendation from the MPB for the amendment of the Rezoning Ordinance. At the November 3, 2014 hearing, Petitioners only asserted that the Rezoning Ordinance should have gone back to a first reading after the proposal of amendments. They did not claim that the City Council should have sent the application back to the MPB before a first reading. Accordingly, this argument is barred from appellate review. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); *Florida Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001).

Second, even if this argument was preserved for appeal, there is no requirement that a zoning ordinance be sent back to the MPB when the City Council adopts an amendment. Per sections 65.140 and 58.362 of the Land Development Code, the MPB is an advisory board and the City Council is the final decision maker for planned development rezoning applications and is free to accept, reject, or modify the recommendation of the MPB. There is no due process violation as the record reveals that the MPB hearing properly occurred before the City Council took final action on Pollack Shores' application. *See Neumont v. State*, 967 So. 2d 822, 829-30 (Fla. 2007) (holding that public notice and the hearing process must restart only when there is a substantial or material change that alters the original purpose of a proposed land use ordinance so that it renders the advertised title inaccurate or misleading). In the instant case, there were no changes to the Rezoning Ordinance between readings that substantively altered the original purpose of the Rezoning Ordinance so as to render its title inaccurate or misleading. Accordingly, based on the record and the applicable ordinances, Petitioners fail to show that the City denied them procedural due process by not obtaining a second recommendation from the MPB.

***II. Whether the City Council Followed the Essential Requirements of the Law:***

Petitioners argue that the City Council did not follow the essential requirements of the law because the planned development and Rezoning Ordinance; 1) lack unified control; 2) lack vertical mixed use to include a building consisting of commercial use on the ground floor with residential use on the above floors.; 3) violate the transect (height and density) provisions of the Edgewater Drive Special Plan; 4) violate density bonus requirements; and 5) violate other provisions of the Land Development Code including provisions addressing cohesiveness and compatibility.

***Unified Control:*** The record reveals that the planned development has unified control in compliance with section 58.363 of the Land Development Code as evidenced by the affidavits submitted by Pollack Shores that were signed by the owners of every parcel within the Property including Princeton Center. The affidavits appointed Pollack Shores as the agent with full and complete permission to act on the property owners' behalf for seeking land development approval.

***Mixed Use:*** In addition to vertical mixed use, section 62.309 of the Land Development Code provides horizontal mixed use i.e., distinct buildings having different land uses within an overall planned development. Also, the Edgewater Drive Special Plan does not prohibit horizontal mixed use developments and the broadly defines mixed use. Accordingly, the City has the authority to allow vertical and/or horizontal mixed use. Further, as allowed in section 58.364 of the Code, the Rezoning Ordinance provides that 1) the Property may be developed in multiple phases, but each phase must be developed in a manner that allows the individual phases to function independently of each other and 2) if the commercial redevelopment is not undertaken immediately, the facade on all four sides of the commercial site building must be renovated before the final certificate of occupancy is issued by the City for the residential use. Lastly, the City Council's interpretation, application, and enforcement of its own code should be given great deference by the reviewing court. *See Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002).

***Transect Provisions:*** Petitioners' argument lacks merit because notwithstanding the recommendations of City staff and the MPB to grant Pollack's Shores' request to exceed the transect limits with a conditional use permit, the City Council rejected the request and required strict compliance with the Edgewater Drive Special Plan.

***Density Bonus Requirements:*** Petitioners argue that the bonus granted to Pollack Shores lacks clear and convincing evidence that the proposed design, intensity, and mix of uses will result in a superior product that is compatible with the surrounding neighborhood and produce more desirable impacts than the same development without a bonus. From review of the record, the density bonuses granted by the City Council were below the maximum density bonus allowed per section 58.1101 of the Land Development Code. Further, this Court in appellate review cannot go further to reweigh evidence and make findings of fact as to whether the Project is not superior, compatible, or desirable. Instead, the City Council as the finder of fact was responsible for weighing the evidence. *City of Deland v. Benline Process Color Company, Inc.*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (holding that the circuit court acting in its appellate capacity departed from the essential requirements of law when it reevaluated the credibility of evidence and reweighed conflicting evidence that was before the code enforcement board); *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001).

***Other Alleged Violations of the Land Development Code:*** Petitioners discuss in general the goals stated in sections 58.360 and 58.361 of the Land Development Code that include providing efficient and economic use of land, creating an environment of stable character compatible with surrounding developments, etc. Petitioners argue that the Rezoning Ordinance violates these goals. However, these goals are not affirmative requirements for planned developments and Petitioners' argument lack specificity as to how these goals were violated. The actual requirements for planned developments, by contrast, are in sections 58.362 through 58.369 of the Code. Accordingly, Petitioners fail to show any violation of the Land Development Code. Lastly, as discussed above, this Court in appellate review cannot reweigh the evidence by

making qualitative decisions as to whether the planned development complies with the goals such as providing cohesiveness and compatibility.

***III. Whether the City's Decision to Adopt the Rezoning Ordinance was Supported by Competent Substantial Evidence:***

Petitioners argue that the testimony from the planning staff and the Pollock Shores representative was insufficient to provide specific rather than merely conclusory competent substantial evidence. This Court finds that the information in the application, the City's professional staff report including a detailed investigation and information from various City departments, including Land Development, Urban Design, Transportation Planning, Engineering, Fire, Police, and Parks, together with the testimony before the City Council, constitute competent substantial evidence for the City Council's decision that the Project satisfies the requirements of the Land Development Code. *See City of Hialeah Gardens v. Miami Dade Charter Found., Inc.*, 857 So. 2d 202, 205 (Fla. 3d DCA 2003) (finding that staff testimony, together with the "application, site plan, and traffic study," qualified as competent substantial evidence); *Palm Beach Cnty. v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989) (holding that "[p]rofessional staff reports analyzing the proposed use and recommending approval of the proposed zoning" were competent substantial evidence"). Lastly, as the Court in *Dusseau* explained, "[a]s long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau*, 794 So. 2d at 1276.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioners' Amended Petition for Writ of Certiorari is **DENIED**.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 10th day of September, 2015.

/S/  
**DONALD A. MYERS, JR.**  
**Presiding Circuit Judge**

S. KEST and THORPE, JJ., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Ralf Brookes, Esquire**, 1217 E. Cape Coral Parkway, # 107, Cape Coral, Florida 33904; **David B. King, Esquire** and **Vincent Falcone III, Esquire**, King, Blackwell, Zehnder & Wermuth, P.A., P.O. Box 1631, Orlando, Florida 32802-1631; **Scott A. Glass, Esquire** and **James Johnston, Esquire**, Shutts & Bowen, LLP, 300 S. Orange Avenue, Suite 1000, Orlando, Florida 32801; and **Michael P. McMahon, Esquire**, Akerman, LLP, 420 S. Orange Avenue, Suite 1200, Orlando, Florida 32801, on this 11th day of September, 2015.

/S/  
Judicial Assistant