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 VIZCAYANS, INC. et al,
and
GROVE ISLE ASSOCIATION, et al,

Petitioners,

v.

APPELLATE DIVISION
CASE NO. 07-299 AP & 07-298 AP CONS.

LOWER CASE NO. 06-01060ZC, 06-01060LU
and 06-01060MU

CITY OF MIAMI and
TRG-MH VENTURE, LTD.

Respondents.

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OPINION FILED: May 7, 2008

An Appeal from the City of Miami, Miami-Dade County, Florida

STEPHEN J. DARMODY, ESQ., DARREL W. PAYNE, ESQ., DANIEL B. ROGERS, ESQ., JENNIFER A. MCLOONE, ESQ., PATRICK J. GOGGINS, ESQ., AND JOHN C.LUKACS, ESQ. for Appellant.

JORGE L. FERNANDEZ, ESQ, RAFAEL SUAREZ-RIVAS, ESQ., ELLIOT H. SCHERKER, ESQ., PAMELA DEBOOTH, ESQ., JOHN K. SHUBIN, ESQ., JEFFREY S. BASS, ESQ., for Appellee.

Before SPENCER EIG, BEATRICE BUTCHKO, AND ANTONIO MARIN, JJ.

REVERSED AND REMANDED WITH INSTRUCTIONS TO QUASH ORDERS:

MARIN, J.

In a consolidated case, Petitioners The Vizcayans, Inc., Alvah H. Chapman, Jr, Betty B. Chapman, Cathy L. Jones, Grove Isle Association, Inc., Constance Steen, Jason E. Bloch and Glencoe Neighborhood Association, Inc., (collectively, "Petitioners") petition this Court for a writ of certiorari quashing Ordinance 12912 and Resolution File No. 06-01060mu ("collectively, Orders") of the City of Miami Commission ("Commission") of May 10, 2007. These Orders granted the request to rezone a portion of the Mercy Hospital Complex and a Major Use Special Permit (MUSP) for a project known as 300 Grove Bay Residences ("Project"). It will be built by purchaser/developer Respondent TRG-MH Venture, Ltd. ("Respondent"). The Project will be located at Biscayne Bay with an approximate address of 3662 South Miami Avenue in Coconut Grove, Miami. The City of Miami is also a Respondent.

The proposed Project will be located on land owned by Mercy Hospital Complex in Coconut Grove. It had been zoned Government and Institution (G/I) and was rezoned to R-4 (high density/multifamily). The MUSP will allow for the development of three non-hospital related and non-accessory multi-story luxury high-rise residential condominiums "adjacent and in near proximity" to predominantly single-family neighborhoods.

Petitioners seek quashal, arguing that the City engaged in impermissible "spot zoning;" violated Petitioners' due process rights; departed from the essential requirements of the law in adopting the Orders; and did not base its decision granting the Orders on competent, substantial evidence. We particularly focus on the issues of spot zoning and whether due process of law was afforded.

Our review is limited to determining: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed, and (3) whether the findings and judgment are supported by competent substantial evidence.

See Broward County v. G. B. V. Intern'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001); *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Board of County Commissioners v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982); *Metro. Dade County v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995). The scope of review in certiorari proceedings of quasi-judicial local agency action is well settled. *Clay County v. Kendale Land Development, Inc.*, 969 So. 2d 1177, 1180 (Fla. 1st DCA 2007. "Whether the record also contains competent substantial evidence that

would support some other result is irrelevant." *Id; Dusseau v. Metro. Dade County Bd. of County Comm'rs,* 794 So. 2d 1270, 1275 (Fla. 2001). Contrary evidence is outside the scope of the inquiry and the reviewing court cannot reweigh the pros and cons of conflicting evidence. *Dusseau,* 794 So. 2d at 1275-76. "[W]hen considering a petition for writ of certiorari, a court has only two options--it may either deny the petition or grant it, and quash the order at which the petition is directed. *E.g. G.B.V. Intern'l,* 787 So. 2d at 843-44 (citing cases). "On first-tier certiorari review, the circuit court's task is to review the record for evidence that supports the agency's decision, not that rebuts it -- for the court cannot reweigh the evidence." *Id.*

First, it is well settled that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled. *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). However, certain standards of basic fairness must be adhered to in order to afford due process. *Id.* Minimal standards of due process include notice of the hearings and the opportunity to be heard. *Id.* "In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Id.*

Petitioners contend that because of the Mayor's *ex parte* communications, they were not informed of all the facts which the commission considered in rendering its decision. Petitioners further contend that they were excluded from the quasi-judicial process by Mayor Diaz when he engaged in improper *ex parte* discussions with the Respondent.

Ex parte communications are communications between an arbitrator and one of the contestants. *Sorren v. Kumble,* 578 So. 2d 836, 836 (Fla. 3d DCA 1991). "An impartial decision-maker is a basic component of minimum due process in an administrative proceeding." *Charlotte County v. IMC-Phosphates Co.,* 824 So. 2d 298, 300-1 (Fla. 1st DCA 2002). It is a violation of due process for a quasi-judicial officer to consider a communication *ex parte* and it creates a rebuttable presumption of prejudice unless shown otherwise by competent substantial evidence. *Jennings,* 589 So. 2d at 1341. The petitioner affected adversely is entitled to a new hearing unless it can be shown that the communication was not prejudicial. *Id.* This principle also applies to any independent investigation by a decision maker outside of the hearing record. *Cherry Communications, Inc. v. Deason,* 652 So. 2d 803, 804 (Fla. 1995).

Subsequent to the Commission's decision on April 26, 2007, Commissioner Sarnoff wrote an email to Mayor Diaz asking for a veto of both the rezoning and MUSP application. Or,

in the alternate, to veto the MUSP order and instruct the Commission to add 10 new conditions before approving the MUSP request. Mayor Diaz responded, stating: "[T]he majority of the City Commission has indicated that the public hearings on this matter have been more than sufficient, and I will honor their wishes that no further hearings be required. Instead, because I find your suggestions valid, *I have not only asked the developer to voluntarily agree to the ten (10) conditions, but I have added two (2) additional requests of my own as well.*"

Respondent contends that this claim of *ex parte* communications is waived because Petitioners did not preserve it for review. Petitioners argue that they could not and did not waive their objection to the Mayor's *ex parte* discussions by failing to object on the record to an off-the record discussion that occurred after the public hearings, and therefore, could not have been disclosed and addressed during those hearings. A review of the transcript regarding the preservation of the issue is not possible because the *ex parte* communications took place after the final hearing when the Commission's decision was rendered. "Appellate review is confined to issues decided adversely to appellant's position or issues that were preserved with a sufficiently specific objection below." *See Clear Channel Communications Inc. v. City of North Bay Village,* 911 So. 2d 188, 189-190 (Fla. 3d DCA 2005).

In *Jennings*, the Third District stated that it was cognizant of the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited *ex parte* communications regarding quasi-judicial matters they are to decide. 589 So. 2d at 1341. Such communication in a quasi-judicial proceeding does not mandate automatic reversal. *Id.* The rule is that "upon the aggrieved party's proof that an *ex parte* contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. *Id.*

Here, the Mayor engaged in *ex parte* communications with Respondent during the ten day veto period following the Commission's adoption of the Orders. Petitioners emphasize that to the extent the Mayor believed that there were adverse effects resulting from the grant of rezoning and MUSP that required mitigation through the imposition of additional conditions, the matter should have been discussed within the scope of the public quasi-judicial process and required public hearing and notice. We find that the Mayor's communications all took place after the hearings had concluded, away from public earshot, and therefore violated Petitioner's due process rights under the *Jennings* criteria.

We next determine whether the essential requirements of the law were met. The essential requirements of the law standard requires an inquiry as to whether the "correct law" was applied. *Haines City*, 658 So. 2d at 527-28; *Florida Power & Light v. City of Dania*, 762 So. 2d 1089, 1093 (Fla. 2000).

Petitioners contend that in adopting the Orders, the Commission departed from the essential requirements of law in their approval process. Petitioners argue that the rezoning of the property from Governmental/Institutional to R-4 results in impermissible spot zoning. We agree. Without reweighing the evidence, we undertake a legal analysis to determine whether the rezoning has resulted in spot zoning.

Florida courts have stated that:

> Spot zoning is the name given to the piecemeal rezoning of small parcels of land to a greater density, leading to disharmony with the surrounding area. Spot zoning is usually thought of as giving preferential treatment to one parcel at the expense of the zoning scheme as a whole. Moreover, the term is generally applied to the rezoning of only one or a few lots.

Southwest Ranches Homeowner Ass'n v. County of Broward, 502 So. 2d 931, 935 (Fla. 4th DCA 1987)(citations omitted); *Bird-Kendall Homeowners Ass'n v. Metro. Dade County Bd. Of County Comm'rs.*, 695 So. 2d 908, 909 n.2 (Fla. 3d DCA 1997)

Spot zoning occurs when a specific project is permitted even though it is inconsistent with existing land use regulations and would create disharmony in the overall neighborhood. *Southwest Ranches Homeowners Ass'n*, 502 So. 2d at 935. "Spot zoning" refers to a "rezoning which creates a small island of property with restrictions on its use different from that of surrounding properties – solely for the benefit of a particular property owner." *Id.* (*quoting City Commission of the City of Miami v. Woodlawn Park Cemetery Co.*, 533 So. 2d 1227, 1240 (Fla. 3d DCA 1989). The *Bird-Kendall* court listed four factors in deciding whether a municipality has engaged in impermissible spot zoning: 1) the size of the spot; 2) the compatibility with the surrounding area; 3) the benefit to the owner and 4) the detriment to the immediate neighborhood. 695 So. 2d at 909 n.2.

In *Bird-Kendall* the county rezoned a small, isolated portion (5%) of a larger tract of agricultural land for business use, even though there were no other business use districts in the area. The Third District held that this constituted illegal spot zoning.

Here, the City rezoned a water-front parcel of land from G/I to R-4 where there were no other R-4 zoned areas in the vicinity, or in all of Coconut Grove. During the hearing, the

Commission asked Assistant Director of the Zoning Department, Ms. Slazyk, whether the rezoning constituted spot zoning. Her response:

> Not, it does not. It meets the size requirement of Sec. 22- Article 22, section 2214 of the Code says that in order to apply for a change of zoning on a piece of property, you have to meet one of three criteria. It either has to be 40,000 square feet in size, it has to have 22 linear feet of street frontage, or it has to be an extension of an existing classification. This one meets the 40,000 square foot size. It's over six acres.

Ms. Slazyk is correct in stating the specific requirements of Section 2214 of the code can be considered before rezoning. The Commission relied on competent, substantial evidence to conclude that the land could theoretically be rezoned. However, it departed from the essential requirements of the law when failing to identify the resulting spot zoning as a consequence of the R-4 rezoning. "The circuit court is not permitted to . . . reweigh that evidence, or to substitute its judgment about what should be done for that of the administrative agency." *Lee County,* 619 So. 2d at 1003. Even if the record contains substantial competent evidence that would support a different result from the decision reached, we must affirm if there is also evidence to support the zoning board's decision. *Blumenthal,* 675 So. 2d at 606. However, the Commission departed from the essential requirements of the law in allowing the rezoning of an isolated piece of land to R-4 where no other property zoned R-4 exists in the near vicinity. The Commission essentially created a "small island" of R-4, of a size of approximately 6 acres with a different zoning scheme than any other surrounding lot. The result is lone lot zoned for high density, multifamily housing in an area of Coconut Grove with Governmental/Institutional zoning and predominantly R-1 zoning (single-family residential). We hold that the size of this lot constitutes impermissible spot zoning under the rule of *Bird-Kendall* regarding the size factor of spot zoning and therefore quash the ordinance rezoning the land to R-4.

Next, our last analysis involves the due process of the MUSP application. The courts have consistently held that ordinances which fall within the ambit of § 166.041(3), Fla. Stat. (2007) must be strictly enacted pursuant to the statute's notice provisions or they are null and void. *HealthSouth Doctors' Hosp., Inc. v. Hartnett,* 622 So. 2d 146 (Fla. 3d DCA 1993); *David v. City of Dunedin,* 473 So. 2d 304 (Fla. 2d DCA 1985); *Fountain v. City of Jacksonville,* 447 So. 2d 353 (Fla. 1st DCA 1984). The notices are mandated to protect interested persons, who are thus given the opportunity to learn of proposed ordinances; given the time to study the

proposals for any negative or positive effects they might have if enacted; and given notice so that they can attend the hearings and speak out to inform the city commissioners prior to ordinance enactment. *Coleman v. City of Key West,* 807 So. 2d 84, 85 (Fla. 3d DCA 2001). Noncompliance with the notice provisions takes away or reduces these opportunities. *Id.*

Florida follows the majority view whereby measures passed in contravention of notice requirements are invalid (null and void if not strictly enacted pursuant to the requirement of section 166.041). *Daytona Leisure Corp. v. City of Daytona Beach,* 539 So. 2d 597, 599 (Fla. 5th DCA 1989).

Petitioners argue that the City failed to provide adequate notice of the proposed rezoning and MUSP application. Respondents argue that no claim of a lack of notice can be made when the complaining party appears and participates in an administrative hearing. The record clearly shows that Petitioners attended the hearings and presented evidence in support of their objections thought expert testimony, maps, visual aids and neighborhood coalitions.

Petitioners actually contend that that the MUSP application approval was changed after the Mayor's signature and after rendition without explanation and without public hearing or comment. The effect of the change was to increase the maximum square footage of the project from 900,000 to 932,168. Petitioners consider this a unilateral change of the Order without explanation and without notice and the opportunity to be heard, thus a deprivation of basic due process. Respondents refer to this change of square footage as mere correction of error. "[A]n administrative tribunal, exercising quasi-judicial powers, enjoys the inherent authority to correct its own orders which contain clerical errors and errors arising from mistake or inadvertence." *Taylor v. Department of Prof'l Reg., Bd. Of Med. Exam'rs,* 520 So. 2d 557, 560 (Fla.1988). However, note that entry of a written judgment by a trial court containing a provision materially different from that which the court announced at trial has been considered substantive error, not a "clerical" mistake. . ." *Meyer v. Meyer,* 525 So. 2d 462, 464 (Fla. 4th DCA 1988). By analogy to *Meyer,* it is suggested that a change in text calling for a difference of 32,000 square feet amounts to a substantive error because the two figures are materially different. Therefore, we find that the changing of the square footage in approving the MUSP application without notice and the opportunity to be heard amounts to a violation of Petitioner's right to due process.

Finally, Petitioners further state that the City Code requires a specific sequence of events and a failure to follow this order results in a departure from the essential requirements of the law.

Petitioners state that there is a legitimate legal and planning objective behind such order—the changes to the overall planning tool, the City Comprehensive Plan, occurs before changes to zoning. "[U]ntil amended or abrogated, an agency must honor its rules." *Florida Wildlife Federation v. Collier County*, 819 So. 2d 200, 208 (Fla. 1st DCA 2002). "An agency action which conflicts with the agency's own rules is erroneous." *Id.* The City is bound by the procedural requirements imposed by the code and cannot renege on its promise to its citizens to uphold the code. *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978).

In describing procedures for amending the Comprehensive Plan, Section 62-31 of the City Of Miami Code states:

> Where companion applications are filed for both plan amendments and zoning amendments pursuant to subsections (a)(3) and (4), the plan amendment will be scheduled on an agenda of the planning advisory board such that the public hearing occurs prior to the public hearing by the zoning board on the zoning amendment.

Since the Zoning Board held a hearing on the rezoning application nine days before the Planning Advisory Board held a hearing on the companion application to amend the Comprehensive Plan, there was a departure from the essential requirements of the law. We hold that this departure from the essential requirements of the law was in error, and therefore a departure from the procedural requirements of the code.

In conclusion, we hold that Petitioners' writ of certiorari should be granted and the decision of the City Commission rezoning the land to R-4 and granting the MUSP application should be quashed because basic due process was not afforded, and the Commission departed from the essential requirements of the law.

Petitioners were deprived of their due process rights when the Mayor engaged in *ex parte* communications with the Respondent after the conclusion of the hearings and during the 10-day veto period. Petitioners were also denied due process rights when the MUSP was substantially altered by 32,000 square feet without notice to the Petitioners or the opportunity to be heard.

The Commission departed from the essential requirements of the law when they rezoned to R-4, thereby creating an island of isolated high-density multifamily area. The rezoning to R-4 is illegal spot zoning. The size of the lot rezoned creates an island of rezoning resulting in impermissible spot zoning under *Bird-Kendall.* The Commission also departed from the law

because the Zoning Board held a hearing on rezoning 9 days prior to when the Planning Advisory Board held its hearing on the companion application to amend the Comprehensive Plan. This improper sequence of hearing timeframes violates §62-31 of the City of Miami Code, and thus, departs from the essential requirements of the law. Accordingly, we grant the petition for writ of certiorari.

BUTCHKO, J., concurring.

EIG, J., dissenting.

I respectfully dissent from my colleagues' findings in several respects. I would not find the petitioners' due process rights were violated. Rather, petitioners received a full and fair hearing from the City Commission, and additional consideration from the Mayor in his executive capacity. I further would find that the essential requirements of the law have been observed, as the zoning change at issue does not amount to spot zoning. Finally, I would find that the city's decision was supported by competent and substantial evidence, just as the opponents position was.

The Mayor of Miami did not argue in *ex parte* communications, because he was not one of the "arbitrators" of the zoning case, as he did not participate in the hearings in any way. *Sorren v. Kumble*, 578 So. 2d 836, 836 (Fla. 3d DCA 1991). Rather, he was properly acting in an executive capacity, and lawfully governing the city by attempting to incorporate the concerns of a group of residents in a city decision. Petitioners' were hardly prejudiced by his actions; they were the beneficiaries of them.

Clearly, the project does not amount to spot zoning. In applying the four factors to identify impermissible spot zoning enunciated in *Bird-Kendall Homeowners Ass'n v. Metro. Dade County Bd. Of County Comm'rs*, 695 So. 2d 908, 909 n.2 (Fla. 3d DCA 1997), I would find the zoning is permissible. The rezoned area is sufficiently large, it is compatible with the adjacent G-I district, the benefit to owner, a non-profit hospital will be shared with the neighbors, many of whom utilize the hospitals health care services, and the detriment to the immediate neighborhood was not demonstrated to the relevant decision makers. *Town of Juno Beach v. McLeod*, 832 So. 2d 864 (Fla. 4th DCA 2002).

The clerical changes in the MUSP are not grounds to grant the petition. *Taylor v. Department of Prof'l Reg., Bd. Of Med. Exam'rs*, 520 So. 2d 557, 560 (Fla. 1988). The issue of the reversal order of hearing between the zoning and planning boards did not prejudice

petitioner's either, as both boards were only advisory, and all the issues ultimately were heard before the City Commission, where petitioners received a full and fair hearing.

The City Commission based its decision on competent, substantial evidence. The petitioners' also had competent, substantial evidence to support their opposition. In such cases, it is not proper for this court to substitute its view for the view of the city government.

Therefore, I respectfully dissent and would deny the Writ of Certiorari.