STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEYERHAEUSER NR,

Petitioner,

vs. Case No. 20-0581

CITY OF GAINESVILLE,

Respondent.
_____/

FINAL ORDER

Petitioner, Weyerhaeuser NR Company (Petitioner), appealed the denial of its petition to rezone certain property from Alachua County Agriculture (A) to City of Gainesville Planned Development District (PD). On December 5, 2019, the City Commission of the City of Gainesville (City) held a quasi-judicial hearing on the petition and entered the denial order on January 16, 2020. The Division of Administrative Hearings (DOAH), by contract with the City and pursuant to section 30-3.58 of the City's Land Development Code (LDC), assigned Administrative Law Judge Francine M. Ffolkes to serve as Hearing Officer for the appeal. The parties submitted briefs on February 25, 2020, and March 6, 2020. Petitioner submitted the record on appeal (ROA) on March 16, 2020.[1] Oral argument was presented on July 21, 2020, at which time the parties waived the LDC's seven calendar days requirement for rendering this Final Order.[2]

[1] On February 26, 2020, the City filed a motion to strike Petitioner's ROA to which Petitioner responded on March 2, 2020. After reviewing the motion, the response, and the video of the quasi-judicial hearing held on December 5, 2019, the undersigned issued an Order on March 10, 2020, that denied the City's motion to strike. Thereafter, on March 16, 2020, Petitioner filed its entire ROA consisting of Bates numbers ROA 0001 through ROA 3413. Record references in this Final Order are to the ROA filed on March 16, 2020.

[2] At the oral argument, the undersigned requested and allowed post argument responses dealing with two issues. Those filings were made by the parties on August 6, 7, 13, and 14, 2020.

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STATEMENT OF THE ISSUES

The issues to be determined in this appeal are: (1) whether Petitioner was afforded procedural due process; (2) whether the City failed to observe the essential requirements of law; and (3) whether the City's decision was supported by competent substantial evidence.

BACKGROUND

Petitioner is the successor-in-interest to approximately 1,779 acres of land previously owned by Plum Creek Land Company. The property is generally located north of U.S. 441 and Northwest 74th Place, east and west of State Road 121 and County Road 231, and south of Northwest 121st Avenue. On April 24, 1992, the City annexed 460 acres of the property into the City. On February 12, 2007, the property

owner voluntarily annexed into the City the remaining approximately 1,319 acres. At the time of both annexations, the property had an Alachua County land use designation of Rural/Agricultural and a zoning designation of Alachua County A.

On January 1, 2009, the City adopted the following land use designations for specified portions of Petitioner's property: Conservation, Single-Family, Residential Low-Density, and Planned Use District (PUD) Overlay. The 2009 City ordinance required that Petitioner timely apply for and obtain City PD zoning on the PUD portion of the property within 18 months. Failure to meet the deadline would void the PUD Overlay and that portion of the property would retain the land use designation of City Agriculture. This ordinance was codified in Policy 4.3.4 of the Future Land Use Element (FLUE) of the City's Comprehensive Plan (Comp Plan). Over time, the City adopted many extensions of the 18-month PD rezoning deadline.

FLUE Policy 4.3.4 also contained detailed requirements for environmental protection and development. In particular, all wetlands, wetland buffers, floodplain, and upland habitat areas were to be designated as Conservation Management Areas (CMAs), and managed through adoption of Conservation Management Plans (CMPs) approved by the City. In July of 2017, Petitioner proposed and the City approved a Natural Area Resource Assessment (NARA) and 22 recommended CMAs totaling 1,161 acres of Petitioner's 1,779-acre property.

Petitioner filed its petition to rezone approximately 744 acres of its property on June 15, 2017. The petition sought to rezone portions of the Single-Family, Residential Low-Density, and PUD areas from Alachua County A to City PD zoning for the "Gainesville 121 Planned Development." Areas within the PD boundary designated as CMAs were labeled Conservation Management District (CON) with uses allowed "as indicated in the approved CMP for the CMAs." City staff determined the petition to be complete, prepared a staff report and placed the

matter on the October 26, 2017, City Plan Board meeting agenda for a public hearing. The staff report recommended approval of the rezoning petition and found the petition consistent with the City's Comp Plan and LDC. However, the staff report recommended two conditions be placed on any approval. The two conditions concerned perpetual silviculture activities within lands designated as wetlands and wetland buffers by the NARA report. The staff report included the following staff position on the posture of the rezoning petition:

> CONSERVATION DISTRICT: The applicant has proposed to omit the large portions of the Gainesville 121 property from the PD rezoning action currently proposed. However, staff has determined, and the Comprehensive Plan dictates, that in order to review the planning parcel holistically the Conservation districts must be included as a part of the PD rezoning. The very nature of the proposed development, where "neighborhoods weave in and out of the environment" suggests that PD District and the CON districts must be evaluated as integral parts of overall Gainesville 121 Planned Development.

The City Plan Board approved a motion recommending approval of the rezoning petition and replaced the staff's two conditions with one recommended condition. The recommended condition stated that "[t]he rezoning of Gainesville 121 to Planned Development does not become effective until a Management Plan that addresses continued silviculture activities is adopted for the Conservation Management Areas located within the PD." The rezoning petition was scheduled and advertised to be heard by the City Commission on January 18, 2018. Petitioner's agent disputed whether the rezoning petition it had prepared included requests to rezone areas to PD and CON zoning, as advertised. Thus, the item was removed from the City Commission's January 18, 2018, agenda.

The record correspondence reflected that the City expected to review the PD rezoning and CON zoning for Gainesville 121 concurrently. *See* ROA 2515-2520, 2530, and 2533. On May 16, 2018, Petitioner submitted a proposed CMP that the

City reviewed and provided comments. Petitioner responded to those comments on July 27, 2018. The City review of the proposed CMP continued for several months, apparently through retained consultants. Finally, in March 2019, Petitioner met with City staff. The meeting was followed by two letters in which Petitioner agreed to modify the proposed CMP to exclude silviculture as a perpetual use in the approved CMA. Petitioner's second letter dated June 3, 2019, was particularly concerned that the advertised City Commission agenda item for a June 6, 2019, public hearing needed clarification. *See* ROA 2537-2538. The letter also reflected that Petitioner did not expect to apply for CON rezoning until after CMP approval. *See* ROA 2537-2538.

The Gainesville 121 PD rezoning issue was not addressed until the City Commission's July 18, 2019, meeting. On July 18, 2019, the City Commission heard a set of options presented by City staff:

> 1. Direct staff to prepare a City-initiated land use amendment and related rezoning petition to designate the entire property to the City of Gainesville Agricultural land use and the accompanying Agricultural zoning district; or
>
> 2. take no action to extend the deadline whereby the PUD land use portion of the site would revert to an Agricultural land use designation; or
>
> 3. direct staff to begin the process for advertising a public hearing on the PD zoning application for a future Commission meeting.

The City Commission approved option number one. Petitioner availed itself of the judicial process to force the City to schedule a hearing on its rezoning petition. The quasi-judicial hearing was scheduled for December 5, 2019. A new City staff report was prepared for the December 5, 2019, hearing. The new staff report noted continuing concerns with the proposed CMP with regard to perpetual silviculture

activities. The new staff report presented the City staff's analysis of the rezoning petition in light of applicable LDC rezoning criteria. The new staff report did not make a recommendation. Instead, it presented three options for consideration by the Commission: deny, approve with conditions, or approve.

At the December 5, 2019, hearing, the City Commission heard evidence and argument from Petitioner's representatives, the City's interim director, Andrew Persons, and members of the public. After conducting the hearing, the Commission voted to deny the rezoning petition and its decision was reduced to a written order rendered on January 16, 2020.

On January 23, 2020, Petitioner filed a notice of appeal under LDC section 30-3.58 seeking administrative review of the City's denial of its rezoning petition.

STANDARD OF REVIEW

This appeal is an administrative remedy governed by the City's LDC. The undersigned may either affirm the order or remand the decision back to the City Commission with specific issues for the City Commission to address. Section 30-3.58 of the City's LDC also sets forth the following appeal criteria:

> The hearing officer shall affirm the board decision unless an appealing party with standing demonstrates that any one of the following three requirements was not met. The hearing officer shall use established Florida law as it relates to this standard of review.
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> 1. The appealing parties were afforded procedural due process, which includes:
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> a. Notice of the board hearing that is the subject of the appeal;
>
> b. A fair hearing before an impartial decision-maker;

c. An opportunity to be heard and present evidence at the hearing; and

d. The opportunity to cross-examine any witnesses.

2. The reviewing board observed the essential requirements of law.

a. A departure from the essential requirements of law is something more than mere legal error. A decision made according to the form of the applicable law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an act that amounts to a departure from the essential requirements of law.

b. The hearing officer shall examine the seriousness of any error and exercise discretion only when there has been a violation of a clearly established principle of law that results in a miscarriage of justice.

3. The reviewing board's decision was supported by competent substantial evidence.

a. Competent substantial evidence means such evidence that may establish a substantial basis from which the fact at issue can be reasonably inferred, or material and relevant evidence that a reasonable mind could accept as adequate to support a conclusion. The opinions and recommendations of experts, including city staff, are deemed expert testimony and constitute competent substantial evidence. Citizen testimony during any public comment portion of a hearing may constitute competent substantial evidence if it is fact-based and not a mere generalized statement of support or opposition.

b. The hearing officer may not reweigh the evidence or substitute his or her judgment for that of the reviewing board, but rather shall rule upon only whether the reviewing board's decision was supported by any competent substantial evidence.

SUMMARY OF ARGUMENTS AND ANALYSIS

Due Process

Petitioner argued that it was denied procedural due process because the CMP was inappropriately considered together with the rezoning petition rather than given a separate notice and hearing. However, the ROA clearly shows that the City

staff, Plan Board, and Commission expected to review the PD rezoning and CON zoning for Gainesville 121 concurrently. The record also shows that Petitioner was made aware of this expectation. The City's interpretation of its LDC also supports its position. Specifically, LDC section 30-8.11C, the portion of the LDC that protects natural resources, requires rezonings to be reviewed for compliance with the LDC provisions protecting regulated natural resources. *See Las Olas Tower Co. v. City of Ft. Lauderdale,* 742 So. 2d 308, 312 (Fla. 4th DCA 1999)(reflecting that reviewing court should defer to the interpretation given by the local government of its own code).

Petitioner also argued that the City Commission was not an impartial decision-maker. In this regard, courts have set a high bar for a showing that an elected official lacked impartiality. For example, the official has to show a bias so pervasive that a lack of impartiality was abundantly clear. *See Seminole Entertainment, Inc. v. City of Casselberry,* 811 So. 2d 693 (Fla. 5th DCA 2001)(reflecting that due process was violated where petitioner was denied cross-examination of principal witness, and mayor's evidentiary rulings reflected a bias so pervasive as to violate basic fairness).

Elected officials have a presumption of honesty and integrity with their decision-making power. *See Hortonville Jt. Sch. Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482 (1976). An elected official is not impartial simply because they took a position, even in public, on a policy issue related to the dispute in the absence of a showing that the official is not capable of judging a controversy fairly. *Id* at 493.

Petitioner's assertion of impartiality points to the City Commission's decision to separately direct City staff to initiate an application to consider changing the land use and zoning designations for the Weyerhaeuser Property. Without more, this argument fails to overcome the presumption of honesty and integrity accorded to the officials that make up the City Commission. Also, case law establishes that a

local government may consider its own petition for land use changes and that of the property owner at the same time. *See City of Gainesville v. Cone,* 365 So. 2d 737 (Fla. 1st DCA 1978).

Essential Requirements of Law

The issue of whether the City complied with the essential requirements of the law is synonymous with whether the City "applied the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). The bulk of Petitioner's argument is disagreement with the determinations of the City as it applied the "correct law," i.e., the rezoning criteria of LDC section 30-3.17A through J, and the additional criteria for PD rezonings in LDC section 30-3.17A through J. Under the standard of review, "[a] decision made according to the form of the applicable law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an act that amounts to a departure from the essential requirements of law."

Petitioner argued that the City departed from the essential requirements of law by considering the CMP in conjunction with the PD rezoning petition. As previously discussed, the City staff's interpretation of the LDC criteria and communications with Petitioner, were consistently that the PD rezoning and CON zoning for Gainesville 121 would be reviewed concurrently.

Petitioner also asserted that the City staff's written analysis and the City's denial improperly applies provisions of the Comp Plan. Here again, Petitioner fails to recognize that the rezoning petition is required to be found consistent with the Comp Plan. *See* § 163.3194, Fla. Stat.; *Franklin Cty. v. S.G.I. Ltd.,* 728 So. 2d 1210 (Fla. 1st DCA 1999)(holding a local government may disapprove a development application if it finds that it is inconsistent with any of the objectives or policies in its comprehensive plan).

Thus, the City's denial made according to the form of the applicable law and the rules prescribed for rendering it, was not an act that amounted to a departure from the essential requirements of law.

Competent Substantial Evidence

Petitioner argued that the City's denial was not supported by competent substantial evidence in three main areas: (1) the conclusions regarding the CMP; (2) the conclusions regarding auto-centricity and transportation choices; and (3) the conclusions regarding urban sprawl and sustainable, compact, and dense development.

Competent substantial evidence does not refer to the quality, character, convincing power, or even the weight of the evidence. *See Scholastic Book Fairs, Inc., Great Am. Div. v. Unemployment Appeals Comm'n,* 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996). Rather, competent substantial evidence means such evidence that may establish a substantial basis from which the fact at issue can be reasonably inferred, or material and relevant evidence that a reasonable mind could accept as adequate to support a conclusion. *See De Groot v. Sheffield,* 95 So. 2d 912, 914 (Fla. 1957). This administrative review is limited to determining whether any competent substantial evidence exists in the record to support the City's decision. *See Lee Cty. v. Sunbelt Equities, II, Ltd., P'ship,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). In addition, the undersigned may not reweigh the evidence or substitute her judgment for that of the City. *See Lantz v. Smith,* 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

First, Petitioner argued that there was no competent substantial evidence to support the City's finding that the PD rezoning petition and its proposed CMPs allowed perpetual silviculture within portions of wetlands and wetland buffers and conservation land use areas. The City determined that such allowance was inconsistent and in conflict with the requirements of LDC sections 30-3.14B, C, and

H; sections 30-3.17A, D, F, and G; and specified policies in the Comp Plan. Even though Petitioner expressed its willingness to modify the CMP proposal, such a modification was not formally accomplished in a manner that allowed the City to deem the CMP modified and conclude that the City staff's concerns about perpetual silviculture were resolved. City staff's analysis and opinions of record were directed to and support the City's conclusions regarding the following applicable rezoning criteria: the character of the district and its suitability for particular uses; the proposed rezoning in relation to surrounding properties and other similar properties; consistency with the goals, objectives, and policies of the Comp Plan; external compatibility; usable open spaces, plazas, and recreations areas; and environmental constraints.

Thus, competent substantial evidence supported the City's determination that the PD rezoning and CON zoning petition was inconsistent with, and in conflict with, the requirements of LDC sections 30-3.14B, C, and H; sections 30-3.17A, D, F, and G; and specified policies in the Comp Plan.

Second, Petitioner argued that no competent substantial evidence supported the City's conclusion that the petition was auto-centric and lacked transportation choices; lacked external connections to basic needs and services; allowed non-clustered and non-compact development with insufficient development density and intensity; and did not support the provision of new public transportation services such as a new bus route to the area. The City determined these issues caused inconsistency with the rezoning criteria of LDC sections 30-3.14A, B, and H, and sections 30-3.17A, D, E, and J.

As the City pointed out in its argument, Petitioner cited to some of the same evidence in the record that supported the City's conclusion. Petitioner then argued for a different conclusion than the one reached by the City. As discussed above, the

undersigned may not reweigh the evidence or substitute her judgment for that of the City. *See Id.*

Third, Petitioner argued that no competent substantial evidence supported the City's conclusion that the petition was inconsistent with the City's established policy goals of prohibiting urban sprawl; directing the achievement of sustainable, compact, and dense development patterns; and requiring the protection and promotion of transportation choices. City staff's analysis and expert opinions of record support the City's conclusion.

Thus, competent substantial evidence supported the City's determination that the petition was inconsistent with the City's established policy goals of prohibiting urban sprawl; directing the achievement of sustainable, compact, and dense development patterns; and requiring the protection and promotion of transportation choices.

DISPOSITION

In this appeal, Petitioner failed to demonstrate: (1) that Petitioner was not afforded procedural due process; (2) that the City failed to observe the essential requirements of law; and (3) that the City's decision was not supported by competent substantial evidence. Therefore, the City Commission's denial of the PD rezoning and CON zoning petition, PB-17-65 ZON, is AFFIRMED.

DONE AND ORDERED this 5th day of May, 2021, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

Pursuant to Section 30-3.58 of the City of Gainesville Land Development Code, this decision shall be final, and may be subject to judicial review as provided in law.