

LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION ACT
SPECIAL MAGISTRATE HEARING

WINDHAM DEVELOPMENT,
INC.,

Petitioner

v.

CITY OF VENICE, FLORIDA,

Respondent.

WRITTEN RECOMMENDATION

Background Summary

This matter was initiated by a Petition filed by Windham Development dated November 26, 2019, for relief pursuant to Section 70.51, Florida Statutes, the “Florida Land Use and Environmental Dispute Resolution Act.” The subject property is approximately 39.6 acres and is located in the Southeast corner of the intersection of Border Road and N. Auburn Road (the “Property”). The Petition addressed the denial by City Council of rezoning No. 17-16RZ, pursuant to an Order dated October 22, 2019 for a request to rezone property from Sarasota County Open Use Estate-1 (OUE-1) to City of Venice Planned Unit Development (PUD) (the “2019 Denial”).

The 2018 Denial

Prior to the 2019 Denial, the City Council denied a similar rezoning request for the Property after conducting a public hearing on November 28, 2018 (the “2018 Denial”). As with the 2019 Denial, the Petitioner sought relief pursuant to Section 70.51, Florida Statutes for the 2018 Denial. A Section 70.51 Special Magistrate was appointed for the 2018 Denial. The Section 70.51 Special

Magistrate (the “Magistrate”) issuing this recommendation also conducted the proceeding for the 2018 Denial.

Section 70.51 generally provides for a bifurcated two-step process. The first step provides that the Magistrate “shall act as a facilitator or mediator between the parties in an effort to effect a mutually acceptable solution....” If an acceptable solution is not reached, then the second step provides that the Magistrate, “shall consider the facts and circumstances... in order to determine whether the action by the governmental entity... is unreasonable or unfairly burdens the real property.” The considerations for determining whether the action by the governmental entity is unreasonable or unfairly burdens the real property are listed in Section 70.51(18)(a)-(h).

For the 2018 Denial, the Magistrate conducted two mediation sessions held on February 25, 2019 and May 22, 2019. On June 20, 2019 the Magistrate issued its Magistrate Statement which resulted in final proposed rezoning documents presented to City Council for consideration.

The 2019 Denial

After a series of hearings culminating on October 22, 2019, the City Council denied the mediated zoning request, as amended (the “2019 Rezoning”). In the City’s Order denying the 2019 Rezoning, the findings by City Council generally provided that the proposed stipulations are insufficient to achieve compatibility, difficult to monitor and enforce and referenced a couple of provisions in the Comprehensive Plan and Land Development Code regarding compatibility with nearby properties.

Following the 2019 Denial, Windham Development again filed a Petition for Relief pursuant to Section 70.51, Florida Statutes. A mediation session occurred on March 11, 2020, which included representatives of Fox Lea Farm and the Sawgrass Development. Although the mediation was productive, a significant portion of the discussion addressed the nature, extent and

quantity of conditions could be rationally be imposed on the rezoning by the City and what conditions could be agreed upon by the private parties in a separate agreement. In this Magistrate's opinion, the discussion regarding the conditions became unwieldy and the process moved forward to the second step provided for in the Statute -- to a proceeding held on June 22, 2020. The issue at the June 22, 2020 proceeding, was whether the 2019 Denial was unreasonable or unfairly burdens the real property and tangentially to consider what conditions are within the purview of the City Council to impose on the Property.

FINDINGS

For the reasons listed below, the Magistrate finds that the 2019 Denial was unreasonable and unfairly burdened the Property.

This recommendation primarily refers to the Staff Report provided to City Council for the October 22, 2019 hearing. As addressed in the Staff Report and discussed during the June 22, 2020 Magistrate's proceeding, the proposed rezoning is consistent with the Comprehensive Plan and in compliance with the City's Land Development Code. The proposed density of 2.15 units/acre (85 units) was reasonable, the setbacks, buffering and landscaping to the abutting properties extensive, the open space requirement met and the abutting roadways and connectors to those roadways fully functioning. As noted in the Staff Report "the layout plan provided depicts specificity and goes beyond the typical 'conceptual' plan provided with a PUD."

Compatibility

As discussed below, even when considering the unique operations of the Fox Lea Farm to the south of the Property, the 2019 Denial was unreasonable and unfairly burdened the Property.

As demonstrated by Fox Lea Farm during the various Section 70.51 proceedings, it is acknowledged that their operations are unique and susceptible to potential negative consequences caused by impacts originating from off-site sources. As provided for in the findings of the 2019

Denial (Order No. 17-16RZ), it is evident that the primary reason for the denial was the issue of “compatibility” between the proposed rezoning and the surrounding neighbors, primarily Fox Lea Farms.

This Magistrate requested the parties to the Section 70.51 proceedings submit memoranda on the issue of compatibility and how that concept is addressed in the City’s Comprehensive Plan, Land Development Code and Florida law in general. As with most comprehensive plans and land development codes, in the City’s Plan and Code, “Compatibility” is a concept that generally deals with density and intensity, bulk requirements and character or types of use issues.

Unlike the general concept of compatibility, the City has specifically adopted a Comprehensive Plan and Land Development Code that presumes a suburban residential development is appropriate for the Property and can be built on the Property.

The 2019 Rezoning proposed a large extensive buffer along the southern side (a 40 foot landscape, berm and wall, then a pond, for a total of 180 feet) and a reduction of units from 105 to 85, which is a significant accommodation to Fox Lea Farm. This is a significant reduction in the property owner’s development rights, all to mitigate the impacts of a typical suburban residential development. There is obviously some limit to what a governmental entity can restrict or impose on property, that would otherwise be more intensely developed, for the benefit of an abutting private property owner. This is especially true when the City has no standards or criteria to impose compatibility obligations on a property being rezoned. Further, there is no provision in the City’s Comprehensive Plan or Land Development Code that provides that a proposed rezoning is “incompatible” because of the possible impacts of the initial construction phase of a development, that is otherwise in compliance with all codes and permit obligations.

Conditions on the Rezoning

During the Section 70.51 F.S. proceedings, Fox Lea Farm's representatives correctly pointed out that reasonable conditions can be imposed by a governmental entity to address issues of compatibility. The tension with this rezoning before City Council, is that Fox Lea Farms demands conditions on the rezoning that significantly insure that the construction and the later use of the residential development does not negatively impact its operations. In the 2019 Denial (Order No. 17-16RZ), it was found that the proposed stipulations were "...difficult to monitor and enforce, and so numerous and extensive as to reflect the innate incompatibility of the proposed project and existing development/neighborhoods." This Magistrate disagrees with this finding/conclusion. The compatibility concept found in the City's Comprehensive Plan and Land Development Code does not provide the basis for the City to impose or obligate a property owner seeking a rezoning to agree to conditions sought by an abutting property owner, that typically would not be (or could not be) reasonably enforced by the City or is beyond what would typically be imposed by the City.

Recommendation of Alternatives

Section 70.51(19)(b) provides: "If the special magistrate finds that the development order... is unreasonable or unfairly burdens use of the owner's property, the special magistrate, with the owner's consent to proceed, may recommend one or more alternatives that protect the public interest secured by the development order...."

Subsequent to the Magistrate's finding that the 2019 Denial was unreasonable and unfairly burdens the use of the Property at the June 22, 2020 proceeding, the Petitioner has further modified the rezoning request and made the following changes to their application:

Key changes since the 2019 Denial:

- The buffer to the south has been increased to include a 118 foot landscape buffer with the wall on top of the berm, along with a pond and open space for a total of 300 feet from Fox Lea Drive to the internal east/west residential roadway.
- The fencing in the landscape buffer along Edmonton has been made consistent with the fencing along Auburn, and the landscape berm extended further east to meet the easterly berm.
- A small amenity area has been designated and is subject to a specific development condition.
- Changes have been made to some terms and language to address City staff concerns and reflect the City's new tree ordinance.

These changes are now reflected in the rezoning request (2021 Rezoning) to be presented to City Council and are addressed in an updated Staff report.

RECOMMENDATION

The 2021 Rezoning request is reasonable. The 2021 Rezoning is consistent with the comprehensive plan and land development regulations. Further, the issue of compatibility has been addressed with the reduction in density, enhanced setbacks and buffering requirements and the conditions designed to reasonably mitigate the off-site impacts created by the construction and eventual use of the Property for a typical low density, single family, suburban residential development on the unique operation of Fox Lea Farms and the abutting property owners.

The proposed conditions are reasonable and rational for the City to impose under the circumstances and can be enforced by the City utilizing established City procedures. New proposed and additional conditions that are not typically imposed by a governmental entity or that

cannot be reasonably enforced by the City, should not be considered and should not form the basis to make the conclusion that the zoning request is inherently incompatible from a Comprehensive Plan and Land Development Code perspective with the abutting uses. As currently proposed and configured, the 2021 Rezoning should not bear the additional burden of addressing all potential impacts from a typical suburban residential development on a highly sensitive abutting property owner. Therefore, the Magistrate recommends approval of the 2021 Rezoning request.



Scott I. Steady
Florida Bar No. 614173
Special Magistrate

Dated: January 12, 2021