IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

CHRIS PATTON,
an individual
Petitioner,

Case No.: 18-CA-3800

vs.

TOWN OF FORT MYERS BEACH, FLORIDA
a Florida municipal corporation, TPI, et al.
Respondents.
_____/

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Certiorari," filed August 8, 2018, pursuant to Article V, Section 5, Florida Constitution (1968); and Fla. R. App. P. 9.100(b),(c) and 9.190(b)(3) and the Court having reviewed the petition, the applicable law, and the record, the Court finds as follows:

PROCEDURAL HISTORY

1. Petitioner filed the petition seeking to quash and remand a decision of the Town of Fort Myers Beach ("Town/Respondent") rendered by signature of the Mayor on July 9, 2018 after a hearing held on May 21, 2018.

2. Petitioner requested an order Quashing and Reversing the decision below for failure to afford procedural due process, failure to comply with essential requirements of law, and failure to establish that the rezoning was supported by competent substantial evidence.

3. On August 8, 2018, Petitioner Chris Patton filed this Petition for Writ of Certiorari and Appendix.

4. On August 23, 2018, the Court issued an Order to Show Cause directing Town to respond within 30 days.

5. On August 28, 2018, TPI-FMB I, LLC; TPI-FMB, LLC; and TPI-FMBIII, LLC

("TPI/Intervenor") filed a Motion to Intervene. On September 6, 2018, the Court granted an Agreed Order, which allowed TPI to become a party, and participate in the Certiorari proceedings as a Respondent ("Intervenor").

6. On September 14, 2018, Respondent, Town of Fort Myers Beach ("Town") filed its Response. On September 21, 2018, TPI filed its Response to Petitioner's Petition and Appendix.

7. On October 31, 2018, Petitioner filed a Reply, and Petitioner filed a Request for Oral Argument, which was denied by this Court on April 26, 2019.

8. On May 7, 2019, this Court issued an Order Directing the Parties to Supplement Pleadings. On May 28, 2019, the parties filed Supplemental Memorandum of Law.

FINDINGS OF FACT

9. On March 8, 2017, the developer and owner of the Property ("TPI") submitted the original specifications for the Margaritaville Resort ("Project") to the Town as part of a rezoning application ("TPI Rezoning Application"), which sought the rezoning of three of the Project's six parcels of land. The Project's main address is 1160 Estero Beach Boulevard and it includes adjacent properties in the 'downtown core' of Fort Myers Beach. Petitioner resides at and owns real property located at 153 Primo Drive, Fort Myers Beach, Florida; which is less than 2,000 feet from the Project.

10. On January 23, 2018, after receiving review comments and recommendations from the Town, the developer submitted the final Project specifications.

11. On February 13, 2018, Town's Local Planning Agency ("LPA") conducted a public hearing to consider the TPI Rezoning Application. At the conclusion of the hearing, the LPA

recommended approval of the TPI Rezoning Application by a 5-2 vote, subject to certain recommendations.

12. On April 9 and 10, 2018, at a public hearing, the Town Council for Town ("Town Council") heard the TPI Rezoning Application and approved the Rezoning Application on first reading.

13. On May 21, 2018, at a public hearing, the Town Council heard the TPI Rezoning Application on second reading, which resulted in the final approval of Ordinance 18-04. The rezoning approval by the Ordinance included four deviations from the Town's Land Development Code ("LDC"). The Motion to Approve the Ordinance's conditions required revisions, and was not immediately signed.

14. On July 9, 2018, the Ordinance was signed by the Mayor of the Town and rendered to the Town's Clerk. The Ordinance approved the rezoning of the three subject parcels for commercial planned development containing a 254 unit hotel, aquatic venue and beach club, restaurants, tiki bar, retail sales, and consumption on premises. (Petitioner App. Ex. A. p.1; Ex. E, p.231).

FINDINGS OF LAW

15. The applicable standard of review by a Circuit Court of an Administrative Agency decision is limited to:

a. whether procedural due process was accorded;

b. whether the essential requirements of law have been observed; and

c. whether the administrative findings and judgment are supported by competent substantial evidence.

The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).

16. Petitioner claimed that the Court has subject matter jurisdiction to review quasi-judicial actions, and that the date of rendition is the date when a signed written order is filed with the clerk, *citing* 5220 Biscayne Blvd. LLC v. Stebbins, 937 So.2d 1189 (Fla. 3d DCA 2006). The record reflects that the Ordinance was not signed by the Mayor of the Town and rendered to the Town Clerk until July 9, 2018. Petitioner filed the instant action on August 8, 2018, within 30 days of the date the approval was signed by the Mayor and rendered to the Clerk. (Petitioner App. Ex. B). Therefore, the Court finds that Petitioner timely filed the Petition for Writ of Certiorari.

17. Petitioner argued that she has standing because she resides in a single family home located at 153 Primo Drive, Fort Myers Beach, Florida. Further, that based on the location of her residence to the development, she will be directly and adversely affected by the Town rezoning the subject parcels. This is due to the Project's increased height, increased intensity, increased traffic, lack of sufficient off-street parking, and the increase in amplified music, visual and audible noise. In support of her positon Petitioner cited to Renard v. Dade County, 261 So. 2d 832 (Fla. 1972) and City of St. Petersburg, BD. OF Adjustment v. Marelli, 728 So. 2d 1197, 1198 (Fla. 2d DCA 1999). Petitioner contended that she will suffer special injury from the development due to her location in close proximity that differs from someone on the south side of the island far

removed from the direct impacts, and cited to Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc., 744 So.2d 1242, 1243–44 (Fla. 5th DCA 1999).

18. Respondent argued that Petitioner lacked standing because she must show special damages peculiar to herself and differing in kind from damages suffered by the community as a whole, and cited to Renard, City of Fort Myers v. Splitt, 988 So.2d 28 (Fla. 2d DCA 2008), and Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940 (Fla. 5th DCA 1988). Respondent and Intervenor contended that Petitioner's testimony under public comment before the Town Council did not establish "a special interest" exceeding the general interest of general public. Further, that it did not reflect that Petitioner will suffer the type of special damages contemplated by Renard because Petitioner has not demonstrated that she will suffer damages differing in kind from the community as a whole, *citing* Splitt, 988 So.2d at 32. Intervenor also argued that Petitioner's standing must be determined based upon the record of proceedings which are the subject of review and not based upon the allegations in the Petition, *citing* Splitt, at 33.

19. The test for standing in rezoning cases is found in Renard, and proximity to a particular use of land has been found to satisfy this test exceeding the general interest in community good shared in common with all citizens; however, when determining standing, the courts "should not only consider the proximity of the property, but the type and scale of the challenged project in relation to Petitioner's property." Rinker Materials Corp. v. Metropolitan Dade County, 528 So.2d 904, 906-907 (Fla. 3d DCA, 1987). See also, City of St. Petersburg, BD. OF Adjustment v. Marelli, 728 So.2d 1197, 1198 (Fla. 2d DCA 1999); and Wingrove Estates HOA, 744 So.2d at 1243–44 (holding that neighboring property owners affected by zoning changes have standing to challenge

those changes). The Court notes that in Alvey v. City of North Miami Beach, 206 So.3d 67 (Fla. 3d DCA 2017), the Circuit Court granted certiorari review of the case that involved objectors living in a nearby residential neighborhood who challenged the City of Miami's approval of a zoning variance for a multi-story residential building because the project was inconsistent with the Comprehensive Plan. Here, unlike in Splitt, Petitioner did not voluntarily abandon any Comprehensive Plan consistency challenge to the Ordinance at the public hearings. The record reflects that Petitioner presented testimony at the public hearings that included her concern for Respondent's noncompliance with the density and height restrictions as they related to the Comprehensive Plan. (April 9 T. 120-122; May 21 T. 27-30). Therefore, the Court finds that Petitioner has standing.

20. Petitioner argued that she is a nearby residential property owner, who will be adversely affected by the Rezoning Ordinance. Petitioner contended that the denial of a meaningful opportunity to be heard and present expert opinion evidence before the quasi-judicial Board violates fundamental procedural due process. Petitioner claimed that the Town limited the speakers, including expert opinion testimony by those opposed to the project, to only three (3) minutes, which is an insufficient amount of time to present expert opinion testimony of expert planners, and cited to Hernandez-Canton v. Miami City Com'n, 971 So.2d 829 (Fla. 3d DCA 2007).

21. Respondent and Intervenor argued that in the quasi-judicial proceeding before the Town, the Petitioner is a participant and not a party; therefore, Petitioner does not have the same rights as a party, and cited to Carillon Community Res. v. Seminole County, 45 So.3d 7, 10 (Fla.

5th DCA 2010). Respondent contended that Petitioner's reliance on Hernandez is misplaced because that case refers to the total time for each party to present their case, and that there was no such time restriction in the proceedings at issue here, and cited to Stranahan House, Inc. v. City of Fort Lauderdale, 967 So.2d 1121, 1125 (Fla. 4th DCA 2007). Intervenor claimed that the Town codified the three-minute time limit in the Rules of Civility for Public Participation of Resolution 18-01 "[t]o allow time to hear all points of view, speakers are allotted 3 minutes." (Town App. Ex. A). Intervenor argued that Petitioner is only afforded the requisite due process of a participant, and does not have a direct interest that will be affected by the Town's official action; therefore, Petitioner is only entitled to notice and an opportunity to be heard, *citing* Carillon, 45 So.3d at 11.

22. The Court finds that a quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice and an opportunity to be heard. See Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991) (internal citations omitted). The Court finds that the Petitioner was provided adequate due process at the hearings. Petitioner spoke at both Council meetings, she did not object to being limited to three minutes, she did not request additional time, and she failed to use the entire three minutes allotted to her. (April 9 T. 120-122; May 21 T. 27-30). The Court notes that the Town code provided "public comment shall be limited to three minutes." (Town App. Ex. A). The Court further notes that public participants have no due process rights at a zoning hearing. *See* Administrative Code 2-6, Sec. 2.4.B and Carillon, 45 So.3d at 10. Petitioner was able to attend two different hearings where she was given the opportunity to voice her concerns, and express any objections to the Project. The fact that Petitioner was not able to present expert testimony, or to cross-examine witnesses does not

automatically mean that she was denied due process. The extent of procedural due process varies with the nature of the proceeding involved, and there is no single test to determine if due process has been met. Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982) (internal citation omitted). The Court finds persuasive Carillon, which held that neighboring landowners have a due process right to attend and be heard at open public hearings on a zoning issue, but had no other due process rights. Here, the Town heard testimony from town staff, the parties, the public, private businesses, and Petitioner. (Intervenor App. April 9-10 T. 1-537; Petitioner's App. Ex. E). The Court finds that Petitioner is not a party under the Administrative Code, had no due process rights in the proceeding below beyond being permitted to attend and be heard. The Court notes that Petitioner was given a full and fair opportunity to be heard as a participant and to raise her objections to the Rezoning Application and proposed development. The Court finds Petitioner's due process rights were not violated and Petitioner was afforded due process, which was consistent with the rules codified by the Town.

23. Petitioner argued that the following four deviations authorized by the Ordinance violate essential requirements of the LDC and overall zoning scheme of the Town, and the Town's decision was not supported by competent substantial evidence:

a. hotel room density exceeds the maximum density for hotel rooms authorized in sections 34-103 and 34-632 of the LDC;

b. building heights for the buildings to be located on parcel 1 and parcel 2 of the project exceed the maximum building height in the Comprehensive Plan and authorized in sections 34-631 and

34-675(b)(2) of the LDC;

c. floor area ratios for the buildings to located on parcel 1 and parcel 2 exceed the floor area ratios in the Comprehensive Plan and authorized in 34-675(c) of the LDC; and

d. off street parking fails to meet the minimum off-street on-site parking requirements set forth in the Town LDC.

24. The Court finds the approval of the Rezoning Application, with conditions and deviations, complied with the LDC, and the Town properly applied its own LDC. The Court notes that the development deviations were discussed in the staff report of February 13, 2018. (Town App. Ex. D). Intervenor contended that Petitioner's primary argument is that at least three of the four deviations from the LDC are inconsistent with the Comprehensive Plan. Florida law is well established that questions of plan consistency cannot be raised by Certiorari but instead must be asserted by De-Novo lawsuit pursuant to §163.3215, Fla. Stats., and cited to Stranahan House.

25. The allowable intensity section of the LDC, §34-1803, for hotel/motels, the number of guest units may be increased if "exceptional circumstances" are found to exist by Town. The Court notes that the report provided relevant planning policies that supported the finding of exceptional circumstances. (Petitioner App. Ex. D). As to Deviation #1, Ordinance 18-04 references LDC §34-1803, which reflects that under Deviation #1 the increase in the number of rooms is authorized "due to exceptional circumstances and unique public benefit on record." (App. May 21, 2018, T. 72, 237-238).

26. As Respondent contended, the Town made specific findings in Ordinance 18-04

that Deviation #1, Deviation #2 from LDC §34-675 (b), and Deviation #3 were partially approved due to the exceptional circumstances presented by coordinated redevelopment of several critical parcels in the downtown zoning district in furtherance of policies in the Comprehensive Plan; protecting public health, safety and welfare; and design guidance provided by the Old San Carlos Blvd/ Crescent St Master Plan (Petitioner App. Ex. E., pp.232, 237-238). After review of Ordinance 18-04 by the Court, the Court finds the proposed development, as limited by the 27 special conditions contained in the Ordinance, is compatible with the surrounding area, including building height, traffic flow and intensity of use. (Petitioner App. Ex. E). Further, Ordinance 18-04 appropriately determines that deviation from the limitations set forth in LDC §34-675 is appropriate based upon the requirements as expressed in LDC §34-216.

27. As to Deviation #3, the Court agrees with Respondent that the floor area ratio of 1.55 was allowed for all three parcels under Deviation #3; although nothing was going to be built on parcel 3. (Petitioner App. Ex. E p.85-87). The Town's decision of Deviation #1 is interwoven with Deviations #2 and #3, and the LDC does not contain mandatory limitations on floor area ratio for all "by right" development on the subject parcels. As such, the Court finds that the rezoning under commercial planned development was authorized under LDC §34-636.

28. As to the issue of parking, Respondent argued that the issue for the Comprehensive Plan is addressed in condition 15 of Ordinance 18-04; which requires identification of 359 off-street parking spaces within the area defined for parking on parcel 1 and parcel 3. Respondent contends that condition 13 of Ordinance 18-04 addresses transportation and access features on the master concept plan of the Comprehensive Plan. As such, the Town properly applied its own land

development code and did not depart from the essential requirements of law (May 21 T. 255-257).

29. The Court finds that the Town did not depart from the essential requirements of the law when it decided to approve Ordinance 18-04. See Ivey v. Allstate Insurance Co., 774 So.2d 679, 682 (Fla. 2000). Certiorari review is appropriate when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Id. This case does not present a miscarriage of justice. Petitioner is correct that the LDC has restrictions that the Project is going to exceed. However, such deviation was permitted upon the Town finding that exceptional circumstances existed to support the Town's approval of the Ordinance.

30. Upon review of the Project's overall plan, which includes four different parcels, a crossover bridge, beachfront development, view corridors, bayside development, FEMA requirements, parking needs, and public access to the facility, the Court finds competent substantial evidence in the record below that supports the Town's finding of exceptional circumstances, which allowed it to apply the provisions that allow deviations to support the approval of Ordinance 18-04. (Petitioner App. Ex. E., pp.72, 74-80, 85-87, 89, 234-238). The Court may not re-weigh the evidence or substitute its judgment for that of Town on the issue of whether or not the proposed project satisfies exceptional circumstances. Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) (internal citations omitted).

31. Respondent argued that neither the LDC nor the Comprehensive Plan define "exceptional circumstances" and it is left to the discretion of the Town to decide on the value of the offered public benefit or exceptional circumstances determined on a case-by-case basis. As Intervenor argued, the Town Council reviewed multiple staff reports, reports from the Applicant,

recommendations of the LPA, listened to 22 hours of presentations, heard public comment, held two separate hearings spanning three days, and made affirmative findings in the approval process. (Petitioner App. Ex. A p.1-2; April 9-10 T; May 21 T). As Intervenor argued, for Deviations 1-3, the Spikowski Report addressed the following: blighted conditions, economic boost, unobstructed views of the beach, on-site parking, higher base elevation for additional flood protection during hurricanes, and consistency with the Town's Comprehensive Plan. Further, there was extensive discussion during both hearings regarding off-street parking, and the Town Council concluded that the project would satisfy the parking space requirements of the LDC. (Intervenor App. April 9 T. 57-60).

32. The Court finds that based on the extensive reports, numerous presentations, testimony presented and submitted into the record, review of the supporting documents, recommendation from the LPA, two quasi-judicial hearings, and input from the Applicant's consultants, the Town Council relied upon competent substantial evidence to support its approval of the Ordinance 18-04. (May 21 T. 234-239). The Court also notes that the Town considered the provisions in the LDC, the Comprehensive Plan, the Ordinance, and it applied its own LDC. Therefore, unlike in Alvey, there was competent substantial evidence that the Town relied upon to approve Ordinance 18-04.

33. To the extent that Petitioner is challenging the Town's Ordinance 18-04 on the basis that it is in conflict with the Comprehensive Plan, such claim is not cognizable in a Petition for Writ of Certiorari. Petitioner must bring such claim in an action for declaratory or injunctive relief pursuant to §163.3215, Fla. Stats. See Stranahan House, Inc. v. City of Fort Lauderdale, 967 So.2d

1121, 1125–26 (Fla. 4th DCA 2007); Little Club Condominium Ass'n v. Martin County, 259 So. 3d 864, 868 (Fla. 4th DCA 2018); and Bush v. City of Mexico Beach, 71 So.3d 147 (Fla. 1st DCA 2011); See also, Seminole Tribe of Fla. v. Hendry County, 106 So.3d 19, 22–23 (Fla. 2d DCA 2013). Further, Certiorari is a discretionary Writ available where no other remedy exists. Broward County v. G.B.V. Intern., Ltd., 787 So.2d 838, 842 (Fla. 2001) (citing DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). Here, Petitioner availed herself of another remedy by filing a Declaratory Action, pursuant to §163.3215, Fla. Stats., in this Court in the case of Patton v. Town of Fort Myers Beach, Lee County Case No. 18-CA-3805. Therefore, Petitioner cannot seek additional review through this Petition for Certiorari. See Little Club, 259 So.3d at 868.

34. To the extent that Petitioner is construed to have argued that Intervenor's offer to dedicate land or offer a fully constructed parking lot is "tit-for-tat" or exchange for value that constitutes impermissible contract zoning in violation of the Florida Constitution, Petitioner's claim is not actionable in a Writ of Certiorari. Rather said claim should be brought in a Declaratory or Injunctive suit. See Section 163.3215, Florida Statutes; and Chung v. Sarasota County, 686 So.2d 1358, 1360 (Fla. 2d DCA 1996).

WHEREFORE, the Court finds the Town's approval of the deviations and rezoning was consistent with the Town's LDC, applied the correct law, and was supported by competent substantial evidence in the record. As to any alleged inconsistency with the Comprehensive Plan, such challenge is properly brought through a De Novo Action under Section 163.3215, Florida Statutes. The record reflects that Petitioner Voluntarily Dismissed her Declaratory Action, Lee County Case No. 18-CA-3805, on June 30, 2019, which renders the issue of plan consistency moot.

It is hereby,

ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers in Fort Myers, Lee County on this 11 day of September, 2019.

Alane C. Laboda
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Ralf Brookes, Esq.**, 1217 E Cape Coral Parkway, Suite 107, Cape Coral, FL 33904, ralf@ralfbrookesattorney.com; ralfbrookes@gmail.com; **John S. Turner, Esq.**, Peterson Law Group, P.O. Box 670, Fort Myers, FL 33902-0670, jpetersonpa@gmail.com, johnt@fmbgov.com; **Russell Schropp, Esq.**, Henderson, Franklin, Starnes & Holt, P.A., 1715 Monroe Street, P.O. Box 280, Fort Myers, FL 33901, Russell.schropp@henlaw.com; Robert.shearman@henlaw.com; Courtney.ward@henlaw.com; **John Raymond Herin, Jr., Esq.**, 2 S Biscayne Blvd., Ste 2750, Miami, FL 33131, jherin@foxrothschild.com; htilis@foxrothschild.com; jmiranda@foxrothschild.com; **Robert B. Burandt, Esq.**, 1714 Cape Coral Parkway East, Cape Coral, FL 33904, robert@capecoralattorney.com; burandtlaw@capecoralattorney.com; **Michelle Mayher**, Town Clerk of Fort Myers Beach, 2525 Estero Blvd, Fort Myers Beach, FL 33931; and **Court Administration (XXXI)**, 1700 Monroe St., Fort Myers, FL 33901, this 11 day of September, 2019.

By: _____
Judicial Assistant