

Village of Palmetto Bay Zoning Analysis
Palmer Trinity Private School, Inc.
Zoning agenda item: VPB-07-012-B
August 29, 2012

ATTACHMENT B
11TH JUDICIAL CIRCUIT COURT
OPINIONS AND MANDATES
ET AL.

NOT FINAL UNTIL TIME EXPIRES
TO FILE MOTION FOR REHEARING,
AND IF FILED, DISPOSED OF

OFFERED 12/22/11
Norm S. Lindsey 12/22/11
Joel H. Brown 12/22/2011

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

APPELLATE DIVISION
CASE NO. 10-259 AP

LT RESO. NOS. 2010-48 and 2011-53

PALMER TRINITY PRIVATE
SCHOOL, INC.,
Petitioner,
vs.

VILLAGE OF PALMETTO BAY,
FLORIDA, et al.,
Respondents.

FILED FOR REHEARING
2011 DEC 22 PM 12:05
DADE COUNTY FLA.
CIVIL #05

Opinion filed December 22, 2011

Stanley B. Price, Esq. and Eileen Ball Mehta, Esq., Bilzin Sumberg, Price & Azelrod, LLP, for Petitioner.

Raoul G. Cantero, Esq., and Evan M. Goldenberg, Esq., White and Case LLP,¹ and Eve A. Boutsis, Esq., Figueredo & Boutis, P.A., for Respondent.

Tucker Gibbs, Esq. for Intervenors, Concerned Citizens of Old Cutler, Inc. and Betty Pegram.

(Before JOEL BROWN, C.J., JOSEPH FARINA AND NORMA S. LINDSEY, JJ.)

**ON MOTION TO ENFORCE MANDATE OR,
IN THE ALTERNATIVE, FOR EXTRAORDINARY RELIEF**

(PER CURIAM) This Court returns for the fifth time to a dispute between Petitioner, Palmer Trinity Private School, Inc. ("Palmer Trinity"), and Respondent,

¹ On September 9, 2011, Counsel filed its Notice of Appearance of Additional Counsel.

The Village of Palmetto Bay, Florida (the "Village"). The genesis of this dispute is an application, originally submitted for approval in 2006 (the "2006 Application"), for rezoning and request for special exception and non-use variances concerning expansion and further development on Palmer Trinity's property.

This matter is now before the Court on Palmer Trinity's Motion to Enforce Mandate (the "Instant Motion"). The Mandate was issued March 3, 2011 (the "Mandate"), following this Court's decision on Palmer Trinity's Petition for Writ of Certiorari, cited as *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 18 Fla. L. Weekly Supp. 342a (11th Cir. App. Feb. 11, 2011) (the "Decision").

We have jurisdiction. *See Art. V, § 5*, Florida Constitution; *Rules 9.030(c) and 9.100*, Fla. R. App. Pro. (Fla. 2011); *Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Financial Corp.*, 328 So.2d 825 (Fla. 1975); *Metropolitan Dade County v. Dusseau*, 826 So.2d 442 (Fla. 3d DCA 2002); *Milton v. Paragon Investment Corp.*, 503 So.2d 1312 (Fla. 3d DCA 1987); *City of Miami Beach v. Arthree, Inc.*, 300 So.2d 65 (Fla. 3d DCA 1973).

Procedural and Factual Background

Palmer Trinity has owned and operated a private school on 22.5 acres of land located within the Village ("Parcel A") for almost five decades. In 2003, Palmer Trinity purchased an additional 32.5 acres also located within the Village ("Parcel B"). When Palmer Trinity filed the 2006 Application under the Miami-Dade County Code to rezone Parcel B, it also sought a special exception to increase the student

enrollment from 600 to 1400 and certain variances concerning further development on both Parcels.²

In 2008, the Village held a hearing on the 2006 Application. Consideration of the rezoning request was bifurcated from the request for special exception to increase student enrollment and for variances concerning further development. At the 2008 hearing, the Village adopted Ordinance 08-06 denying the requested rezoning. Palmer Trinity appealed this denial in a petition for certiorari review to the Circuit Court, acting in its appellate capacity, which upheld, without opinion, the Village's decision. Palmer Trinity then took an appeal to the Third District Court of Appeal which reversed the Circuit Court appellate panel, thereby overturning the Village's denial of the rezoning request. *See Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. 3d DCA 2010) ("*Palmer I*").³

After the Third District issued its decision in *Palmer I*, Palmer Trinity modified its site plans and requests for special for exceptions to, among other things, reduce the requested number of students from 1400 to 1150. On May 4, 2010, in accordance with the mandate from the Third District in *Palmer I*, the Village approved the requested rezoning by adopting Ordinance 2010-09. The Village also heard the other site plan modification and special request components of the 2006

² As a result of the incorporation of the Village as a municipality, the 2006 Application was transferred from the County to the Village.

³ The Third District held that the circuit court appellate division's decision affirming the Village's denial of Palmer Trinity's rezoning request constituted a departure from the essential requirements of the law resulting in a miscarriage of justice "[b]ecause the Village relied on Palmer Trinity's intended use of the property in denying the rezoning request," 31 So.3d 260, 263. The District Court further stated that "[a] zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights." *Id.* (Citations omitted.).

Application (the "Modified Application"). At the conclusion of the hearing, the Village adopted Resolution 2010-48 (the "Original Resolution"), approving the Modified Application with conditions, including a reduction in the number of students from 1150 to 900, and a 30-year prohibition on Palmer Trinity's ability to seek further development approvals.

Palmer Trinity timely filed its Petition for Writ of Certiorari (the "Original Petition") to invoke this Court's jurisdiction. On February 11, 2011, this Court issued its Decision quashing the provisions in the Original Resolution relating to the 30-year prohibition on future development and the 900 student cap on enrollment and remanding to the Village for proceedings in accordance with the Decision. The Mandate issued on March 3, 2011.

On April 12, 2011, Palmer Trinity filed a Motion to Enforce Mandate which this Court granted on May 5, 2011. Thereafter, on May 18, 2011, the Village filed a Motion for Clarification as to this Court's Order dated May 5, 2011 ("Motion for Clarification"), wherein the Village stated that it understood

the Court's Orders to direct the Village to ... hold a public hearing, the record of which shall include but not be limited to all the evidence already in the record for a final decision as to the entire application - - not just as to the two items litigated on appeal, which decision is to be made based on competent substantial evidence; and (3) hear the entire application and rule according to all evidence presented at the hearing because, the zoning conditions contained in the resolution are inter-related, with no severability provision.

Motion for Clarification as to this Court's Order dated May 5, 2011 at 4.

The Village further asserted that the "Village resolution did not have a severability provision, so the entire matter is to be heard at public hearing." *Id.* at n.

1, *citing Auerbach v. City of Miami*, 929 So.2d 693, 694 (Fla. 3d DCA 2006). On June 1, 2011, this Court issued an Order granting the Village's Motion for Clarification ("Order on Clarification") wherein it instructed that *Auerbach* did not state that, absent a severability clause in a resolution, the entire matter must be reheard.

Then on July 12, 2011, Palmer Trinity filed its Renewed, Emergency Motion to Enforce Mandate or, Alternatively, to Enjoin and Prohibit Respondent from Violating the Express Mandate of this Court, wherein it argued that the Village intended to violate this Court's orders at a public hearing scheduled for July 19, 2011. Then on July 15, 2011, the Village filed its opposition wherein it stated that Petitioner's concerns were "unfounded" and specifically quoted from a memorandum from counsel advising as follows:

4. The Village Attorney, then recommended the Village Council to take the following action:

the Village Council should rely upon the evidence and proof obtained during its original hearing of May 4, 2010, and thereby rely upon the existing record, rather than proceed forward with a new hearing and upon new proof.

Memorandum at Page 3, third paragraph (emphasis added).

Village of Palmetto Bay's Opposition to the Emergency Motion to Enforce Mandate as Village is Acting Consistent with the Law and this Court's Rulings at Par. 4. (Emphasis in original). Thereafter, on July 18, 2011, this Court entered its Order Denying Petitioner's Renewed, Emergency Motion to Enforce Mandate or, Alternatively, to Enjoin and Prohibit Respondent from Violating the Express Mandate of this Court.

On July 19, 2011, the Village held a public hearing to address the Mandate and adopted Resolution 2011-53, amending and incorporating Resolution 2010-48 (the "Amended Resolution"). Thereafter, on August 26, 2011, Palmer Trinity filed the Instant Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief. On September 9, 2011, the Village filed its Motion to Consider Petitioner's Filing as a New Petition for Writ of Certiorari or, in the Alternative, for a 60-Day Extension of Time to Respond to It. Also, on September 12, 2011, Respondents, Concerned Citizens of Old Cutler, Inc. and Betty Pegram (the "Intervenors"), filed their Motion Requesting that Petitioner's Motion/Petition be Considered as a New Petition for Writ of Certiorari or, in the Alternative, Requesting a 60-Day Extension of Time to Respond to Petitioner's Motion/Petition.

On September 12, 2011, Palmer Trinity filed its Response to the Motions of the Village and the Intervenors, opposing their requests and stating that it would not object to a 10-day extension of time. On September 14, 2011, this Court entered its Order denying the Motions of the Intervenors and the Village and ordering that they respond within thirty days. On October 14, 2011, the Village and Intervenors filed their Responses, and, on October 31, 2011, Palmer Trinity filed its Reply.

Conclusions of Law

The standard of law applicable here was set forth by the Florida Supreme Court in *Blackhawk Heating & Plumbing Co., Inc. v. Data Leasing Financial Corp.* as follows:

A trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so. If the trial court fails or refuses to comply with the appellate court's mandate, the latter may, generally

speaking, take any steps or issue any appropriate writ
necessary to its judgment.

328 So.2d 825, 827 (Fla. 1975) (All internal citations omitted).⁴ “Upon the issuance of a mandate from an appellate court, the lower court’s role becomes purely ministerial, and its function is limited to obeying the appellate court’s order or decree. A trial court does not have discretionary power to alter or modify the mandate of an appellate court in any way, shape or form.” *Metropolitan Dade County v. Dusseau*, 826 So.2d 442, 444 (Fla. 3d DCA 2002) (All internal citations omitted.); *Milton v. Keith*, 503 So.2d 1312 (Fla. 3d DCA 1987).

In the Instant Motion, Palmer Trinity claims that the Village violated the Mandate and this Court’s subsequent orders in capping enrollment at 600 students, the same level that existed prior to the filing of both the 2006 Application and the Modified Application. Palmer Trinity further argues the inconsistency in the Village’s actions in adopting the Amended Resolution which approves the Modified Application, thereby requiring Palmer Trinity to, among other things, expand the physical size of its school, build a perimeter wall and landscape buffer, and construct three new turn lanes, all for the purpose of accommodating 1150 students, but prohibits the addition of any new students. And, Palmer Trinity contends that “the Village’s “token” compliance on remand falls far short of compliance with the letter and spirit of this Court’s Mandate.” *Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief* at 18.

⁴ For a general discussion, see *Cracking the Code: Interpreting and Enforcing the Appellate Court’s Decision and Mandate*, 32 Stetson L. Rev. 393 (Winter 2003).

On the other hand, the Village contends that it complied with the Mandate because “[t]his Court directed the Village to take only two steps: remove the 30-year prohibition for future development; and remove the 900-student cap” and that it did so. *Respondent, Village of Palmetto Bay’s Response to Petitioner’s Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief* at 11-12. The Village further asserts that “it strictly adhered to the Mandate’s plain language” by removing the 900-student cap. *Id.*

Palmer Trinity counters with the argument that the Village’s obligation on remand extends beyond “mere technical compliance” and asserts that the Village, in quashing the 900 student cap and replacing it with a 600 student cap, violated both the letter and spirit of the Mandate. *Reply to Responses to Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief* at 3-4.

The Intervenors additionally contend that Palmer Trinity did not appeal the denial of its request for 1150 students in its Original Petition for Certiorari, and has, thereby, waived its right to contest, in the Instant Motion, the 600 student cap on enrollment.

The applicable language is found in this Court’s Decision of February 11, 2011; in the Mandate entered March 3, 2011; and, in its Order on Clarification entered June 1, 2011; as set forth below, respectively:

The Decision specifically stated, in pertinent part:

The facts herein are analogous to those presented in *Jesus Fellowship [v. Miami-Dade County, Florida, 752 So.2d 708, 710. (Fla. 3d DCA 2000)]*. In that case, the Third District quashed a circuit court decision which affirmed a decision of the Miami-Dade County Commission denying a portion of a church’s

zoning application. In the zoning application at issue therein, the church sought to rezone land in a residential area to permit expansion of the church's religious facilities and to permit a private school and day care center. Although the County Staff had recommended approval of 524 students, the Commission approved the rezoning but limited the number of students to 150 as a result of a "suggestion" by the opponents' attorney after the close of the evidentiary hearing.

Here, as in *Jesus Fellowship*, the first mention of even the reduction in the number of students permitted occurred after the close of the evidentiary portion of the public hearing. And like the "suggestion" by the opponent's counsel in *Jesus Fellowship*, the 900 number here materialized in the form of a motion for which no discussion on the record had been had nor foundation had been laid. Other than the brief discussion between the Mayor and Council Person Stanczyk, wherein the 900 number was admittedly arbitrary, there is no mention of that number, nor any mathematical calculation from which it could have been derived, contained in either the record or transcript preceding the adoption of the Resolution. Neither the testimony of Mr. Alvarez, nor of any of the individuals living in the neighborhood surrounding the school, provides a competent substantial basis for the 900 student cap on enrollment. Accordingly, this Court holds that the 900 student cap is not supported by competent substantial evidence.

For the reasons set forth above, the provisions contained in Resolution 2010-48 relating to the 30 Year Prohibition on any future development or applications for development approvals and the 900 student cap on enrollment are QUASHED and this matter is REMANDED to the Village of Palmetto Bay for proceedings in accordance with this decision.

Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, 18 Fla. L. Weekly Supp. 342a at 6-7 (Fla. 11th Cir. App. February 11, 2011).

The Mandate specifically stated:

YOU ARE HEREBY COMMANDED
that such further proceedings be had
in said cause in accordance with the
opinion of this COURT attached hereto

Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, Florida, et al.,
Appellate Division, Case No. 10-259 AP
LT Reso. Nos. 2010-48 and 2011-53

Order on Motion to Enforce Mandate, or in the Alternative, for Extraordinary Relief
and incorporated as part of this order,
and with the rules of procedure and laws
of the STATE OF FLORIDA.

*Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, Florida, Concerned
Citizens of Old Cutler, Inc. and Betty Pegram*, Mandate, Case No. 10-259 (Fla. 11th
Cir. App. Mar. 3, 2011).

The Order on Clarification stated, in pertinent part:

Accordingly, the Court finds that the original opinion in this matter issued February 11, 2011 is clear and unambiguous. The Village of Palmetto Bay shall forthwith commence the required proceedings to remove the two quashed conditions from the Resolution or otherwise render those conditions ineffectual and take no further action that would be inconsistent with this Court's prior Order of May 5, 2011 and this Order.

Order on Respondent's Motion for Clarification as to this Court's Order of May 5, 2011 at 2.

There is no dispute that the Modified Application included a request for special exception to increase student enrollment from 600 -- the level that existed prior to the 2006 Application -- to 1150. There is no dispute that the Village approved the Modified Application with a condition that capped student enrollment at 900. And, there is no dispute that this Court's Decision quashed the 900 student cap. Finally, there is no dispute that the Mandate commanded the Village to commence further proceedings in accordance with this Court's Decision. The issue now before the Court, for the fourth time, centers on what constitutes compliance with the Decision and Mandate and, for the first time, whether the Village did so in

adopting the Amended Resolution. For the reasons set forth below, this Court finds that it did not.

As set forth above, this Court's Decision quashed the provisions contained in the Original Resolution relating to the 900 student cap on enrollment. *Palmer Trinity Private School*, 18 Fla. L. Weekly Supp. 342a, *supra* at 7. In addition, the Order on Clarification directs the Village to "remove the two quashed conditions from the Resolution or otherwise render those conditions ineffectual and take no further action that would be inconsistent with this Court's prior Order of May 5, 2011 and this Order." *Order on Respondent's Motion for Clarification as to this Court's Order of May 5, 2011, supra*.

Black's Law Dictionary defines "cap" as "[a]n upper limit, such as a statutory limit on the recovery in a tort action or on the interest a bank can charge." *Black's Law Dictionary* at 235 (9th Edit. 2009). Similarly, in layman's terms, "cap" is defined as "an upper limit (as on expenditures): ceiling." *Merriam-Webster Dictionary* (Online Edit. 2011). Clearly, the plain meaning of the language in the Decision and in the Order on Clarification requires the Village to remove the 900 student cap, limit or ceiling on enrollment, not further reduce it. This is particularly so because the Village approved, with conditions, the Modified Application, which requested a maximum student enrollment of 1150. One of those conditions, *i.e.*, the one that capped student enrollment at 900, is the subject of the Instant Motion, and was, indisputably, quashed by this Court's Decision.

The Order on Clarification dictates that the Village "otherwise render those conditions [the 30-year prohibition on future development and the 900-student cap]

ineffectual and take no further action that would be inconsistent with this Court's prior Order of May 5, 2011, and this Order." *Order on Respondent's Motion for Clarification as to this Court's Order of May 5, 2011* at 2. Accordingly, any language in the Amended Resolution which has the effect of reducing the maximum number of students allowed below 1150 simply does not render the 900 student cap "ineffectual" and is, thus, inconsistent with the Mandate.

As set forth above, the Village specifically contends that it complied with the Mandate because "[t]his Court directed it to take only two steps: remove the 30-year prohibition for future development; and remove the 900-student cap" and that it did so. *Respondent, Village of Palmetto Bay's Response to Petitioner's Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief* at 11-12. The Village further asserts that "it strictly adhered to the Mandate's plain language" by removing the 900-student cap. *Id.* at p. 11.

Likewise, as set forth above, "the *provisions* contained in Resolution 2010-48 *relating to* the 30 Year Prohibition on any future development or applications for development approvals and *the 900 student cap on enrollment*" were quashed. *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 18 Fla. L. Weekly Supp. 342a 7 (Fla. 11th Cir. App. February 11, 2011) (Emphasis supplied). Therefore, any provision in the Original Resolution relating to reducing or limiting the maximum number of students allowed to 900, and certainly, to below 900, is within the four corners of the Decision. Hence, in order to strictly adhere to the Mandate's plain language, the Village must remove or otherwise render ineffectual

all of the provisions in the Amended Resolution which have the effect of reducing the maximum number of students allowed from 1150 to 900 or to below 900.

The Intervenors additionally oppose the Instant Motion on the grounds that Palmer Trinity waived the right to now contest the 600 student cap on enrollment. Indeed, the Intervenors claim that Palmer Trinity failed to appeal the specific language in the Original Resolution denying its request to increase student enrollment to 1150. And furthermore, according to the Intervenors, Palmer Trinity “made a knowing calculation to appeal only the two conditions:” the 900-student cap and the 30-year limitation on development applications. *Respondents, Concerned Citizens of Old Cutler, Inc. and Betty Pegram’s Response to Petitioner’s Motion to Enforce Mandate or in the Alternative for Extraordinary Relief* at 7.

The Intervenor’s position is based on the premise that Palmer Trinity only appealed the second sentence contained in Section 4.B.3. of the Original Resolution and not the first sentence. Section 4.B.3 states in its entirety:

3. The request to increase the non-public school number of students to 1150 is denied. A condition to allow expansion to 900 students is granted.

Resolution No. 2010-48, Sec. 4.B.3. (Emphasis in original).

Respondents, Concerned Citizens of Old Cutler, Inc. and Betty Pegram’s Response to Petitioner’s Motion to Enforce Mandate or in the Alternative for Extraordinary Relief at 6-7, 16. The Intervenors assert that “[w]hile memorialized in one resolution, each request stands on its own merit” *Id.* The Intervenors go on to argue that:

When petitioner appealed only the two conditions, it chose to accept the remaining conditions. It understood that once

it failed to appeal the remaining conditions, or chose not to
appeal the entire resolution, it accepted those conditions.

Id. at 16.

The Intervenor's waiver argument falls short. Palmer Trinity never requested a special exception or condition to increase the number of students from 600-900, nor made a motion to do so. Rather, Palmer Trinity sought, in the Modified Application, a special exception to increase the number of students from 600 to 1150. And, in response, the Village approved the Modified Application with a condition capping student enrollment at 900, otherwise referred to throughout these proceedings by the parties and this Court as the "900 student cap." As set forth above, neither the Village, nor the Intervenors, dispute that Palmer Trinity appealed this specific condition. Finally, this Court agrees with Palmer Trinity's statement that

To argue that Palmer Trinity somehow appealed the 900-student condition independent of what it conditioned and, in doing so, made a "knowing calculation" to place itself in a far worse position, is to refute it. CCOCI [Intervenor's] Response at 7.

Reply to Responses to Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief at 8.

As the clear and unambiguous language of this Court's Decision states, "the 900 number here materialized in the form of a motion for which no discussion on the record had been had nor foundation had been laid." *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 18 Fla. L. Weekly Supp. 342a at 7. Thus, the argument that Palmer Trinity did not appeal a specific sentence contained in the Original Resolution and has now waived its objection to the reduction in student

Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, Florida, et al,
Appellate Division, Case No. 10-259 AP
LT Reso. Nos. 2010-48 and 2011-53

Order on Motion to Enforce Mandate, or in the Alternative, for Extraordinary Relief
enrollment to the level that existed prior to the filing of both the 2006 Application
and the Modified Application must fail.

For the reasons set forth above; in this Court's Decision of February 11, 2011; and, this Court's Order on Clarification of June 1, 2011, all of the provisions contained in Resolution 2011-53 Amending Resolution 2010-48 and Resolution No. 2010-48 (Amended 07/19/2011) which have the effect of reducing the maximum number of students allowed from 1150 to 900, or to below 900, are not in compliance with the Mandate. Based on the foregoing, this Court declines to address any of the other arguments raised. Accordingly, Petitioner Palmer Trinity Private School Inc.'s Motion to Enforce Mandate is hereby GRANTED and this matter is REMANDED to the Village of Palmetto Bay, Florida for proceedings in accordance with this Order and the Court's Mandate of March 3, 2011.

Palmer's Trinity's request for Attorney's Fees and Costs is DENIED without prejudice. The Intervenor's Motion for Oral Argument is DENIED.

COPIES FURNISHED TO COUNTY
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NOT REPRESENTED BY COUNSEL.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. 10-259 AP
LOWER COURT CASE NO. 2010-48

PALMER TRINITY PRIVATE
SCHOOL, INC.,

Petitioner,

vs.

VILLAGE OF PALMETTO BAY,
FLORIDA, et al.,

Respondents.

**ORDER DENYING PETITIONER'S RENEWED, EMERGENCY MOTION TO
ENFORCE MANDATE OR, ALTERNATIVELY, TO ENJOIN AND PROHIBIT
RESPONDENT FROM VIOLATING THE EXPRESS MANDATE OF THIS COURT**

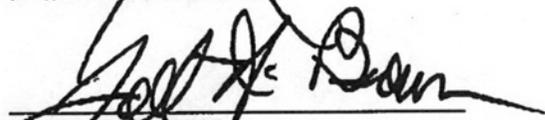
Upon consideration by the Court, Petitioner's Renewed, Emergency Motion to Enforce Mandate or, Alternatively, to Enjoin and Prohibit Respondent from Violating the Express Mandate of this Court is hereby **DENIED**.

JOSEPH P. FARINA, JOEL H. BROWN, C.J., and NORMA LINDSEY, JJ. CONCUR

It is so ordered this 18th day of July 2011.



JOSEPH P. FARINA



JOEL H. BROWN



NORMA LINDSEY

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. 10-259 AP
LOWER COURT CASE NO. 2010-48

PALMER TRINITY PRIVATE
SCHOOL, INC.,

Petitioner,

vs.

VILLAGE OF PALMETTO BAY,
FLORIDA, et al.,
Respondents.

Upon consideration by the Court, Respondent's Motion for Clarification as to this Court's Order Dated May 5, 2011 is hereby: GRANTED.

This Court entered an order granting Petitioner's Motion to Enforce Mandate on May 5, 2011. In its Motion, Petitioner, Palmer Trinity Private School, Inc. ("Palmer Trinity"), had argued that the "Village should be instructed that "proceedings in accordance with this decision [the Court's February 11, 2011 opinion]" means that the Village should take appropriate action to remove the two quashed conditions from the Resolution or otherwise render those conditions ineffectual." Petitioner's Motion to Enforce Mandate at p. 20.

On May 18, 2011, in response to the Court's Order of May 5, 2011, Respondent, Village of Palmetto Bay, Florida, et al. (the "Village"), filed its Motion for Clarification as to this Order. In its Motion, the Village contended that it understands the Court's May 5 Order to direct the Village to "act consistent with the Panel's direction striking of the 30 year prohibition as contrary to law" and "hold a public hearing, the record of which shall include but not be limited to all the evidence already in the record for a final decision as to the entire application - not just as to the two items litigated on appeal," Respondent's Motion for Clarification at p. 4. The Village bases its understanding of the May 5 Order on its assertion that the Resolution at issue "did not have a severability provision, so the entire matter is to be heard at public hearing." *Id.* at Note 1, citing Auerbach v. City of Miami, 929 So.2d 693, 694 (Fla. 3d DCA 2006). In Auerbach, the resolution at issue contained a severability clause. However, the Auerbach opinion does not state that, absent a severability clause in a resolution, the entire matter must be reheard.

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DADE COUNTY, FLA.
CIVIL #85

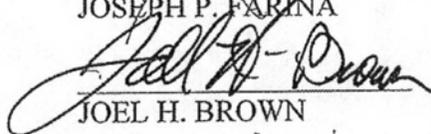
Accordingly, the Court finds that the original opinion in this matter issued February 11, 2011 is clear and unambiguous. The Village of Palmetto Bay shall forthwith commence the required proceedings to remove the two quashed conditions from the Resolution or otherwise render those conditions ineffectual and take no further action that would be inconsistent with this Court's prior Order of May 5, 2011 and this Order.

JOSEPH P. FARINA, JOEL H. BROWN, C.J., AND NORMA S. LINDSEY, JJ.
CONCUR

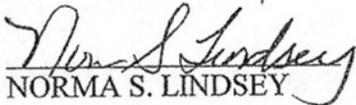
It is so ordered this 1st day of June, 2011.



JOSEPH P. FARINA



JOEL H. BROWN



NORMA S. LINDSEY

CC: STANLEY B. PRICE, ESQ.
EILEEN BALL MEHTA, ESQ.
EVE A. BOUTSIS, ESQ.
W. TUCKER GIBBS, ESQ.

MANDATE

FROM CIRCUIT COURT
APPELLATE DIVISION
ELEVENTH JUDICIAL CIRCUIT
MIAMI-DADE COUNTY, FLORIDA

APPELLATE CASE #:10-259 AP

THE ORIGINAL FILED
ON MAR 03 2011
IN THE OFFICE OF
CLERK OF THE COURT

PALMER TRINITY PRIVATE SCHOOL, INC.

vs.

VILLAGE OF PALMETTO BAY, FLORIDA, CONCERNED CITIZENS
OF OLD CUTLER, INC. AND BETTY PEGRAM

This cause having been brought to this Court by appeal, and after due consideration the court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this COURT attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the STATE OF FLORIDA.

Lower Tribunal Case Number(s): 2010-48

WITNESS the Honorable Mark King Leban, Administrative Judge of the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit of Florida and the seal of the said Circuit Court at Miami, this 3RD day of March, 2011.

A True Copy
Attest

Harvey Ruvin
Clerk of Courts

By:

Jacqueline Abu-Nassar
Deputy Clerk

NOT FINAL UNTIL TIME EXPIRES
TO FILE MOTION FOR REHEARING,
AND IF FILED, DISPOSED OF

Norma Lindsey
2-9-11
~~2/10/11~~
Joel B. Brown
2/10/2011

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

APPELLATE DIVISION
CASE NO. 10-259 AP
ZONING RESOLUTION NO. 2010-48

PALMER TRINITY PRIVATE
SCHOOL, INC.,
Petitioner,
vs.

VILLAGE OF PALMETTO BAY,
Appellee.

Opinion filed February 11, 2011

On appeal from a decision of the Village of Palmetto Bay, Florida.

Eileen Ball Mehta, Esq. for Petitioner.

Eve A. Boutsis, Esq. for Respondent.

Tucker Gibbs, Esq. for Intervenors, Concerned Citizens of Old Cutler, Inc. and
Betty Pegram.

Before JOEL BROWN, C.J., JOSEPH FARINA AND NORMA S. LINDSEY, JJ.

(PER CURIAM)

This appeal arises out of the adoption of Zoning Resolution No. 2010-48
(the "Resolution") by the Village of Palmetto Bay (the "Village"). Petitioner,
Palmer Trinity Private School, Inc. ("Palmer Trinity"), seeks by way of certiorari
review to quash and remove two provisions incorporated into Condition 4.4 of the

2011 FEB 11 PM 12:11
DADE COUNTY, FLA.
CIVIL #101
JACQUELINE ABRAHAM

Resolution, specifically: (1) the cap on the permissible number of students at the school at 900; and (2) the imposition of a thirty-year (30) prohibition on the filing of any applications for development approvals on the school's 55-acre site. We have jurisdiction pursuant to Article V, Section 5, Florida Constitution, and Rules 9.030(c) and 9.100 of the Florida Rules of Appellate Procedure.

Palmer Trinity argues that the above provisions are unlawful and should be quashed and removed from the Resolution in that: (1) the cap on the number of students permitted at the school was arbitrary, not supported by competent substantial evidence, and departed from the essential requirements of law; and (2) the thirty-year prohibition on future development applications violated Palmer Trinity's due process rights because it constituted a *de facto* moratorium for which neither notice nor opportunity to be heard was given, that the Village departed from the essential requirements of law in approving the prohibition, and that the Village failed to support the thirty-year prohibition with substantial competent evidence.

The Village disagrees and seeks to dismiss Palmer Trinity's Petition. For the reasons set forth below, we QUASH the two provisions contained in the Resolution, as set forth above, adopted by the Village and REMAND to the Village with instructions to conduct further proceedings on this matter in accordance with this decision.

Procedural and Factual Background

Palmer Trinity has owned and operated a private school on 22.5 acres of land located within the Village ("Parcel A") for almost five decades. In 1988,

Palmer Trinity applied for and obtained approval of a modification of its site plan for the purpose of increasing its enrollment to 600 students. In 2003, Palmer Trinity purchased an additional 32.5 acres also located within the Village ("Parcel B") that was zoned half Agricultural ("AU") and half Estate Single Family per Five Acres ("EU-2"). Parcel B had an Estate Density Residential ("EDR") future land use designation, allowing for less than 2.5 dwelling units per acre. In 2006, Palmer Trinity filed an application (the "Application") under the Miami-Dade County Code to rezone Parcel B to Estate Modified Single Family allowing for one home per 15,000 square feet ("EU-M"). As part of the Application, Palmer Trinity also sought a special exception to increase the student enrollment from 600 to 1400 and certain variances concerning further development on both Parcel A and B. As a result of the incorporation of the Village as a municipality, the Application was transferred from the County to the Village.

In 2008, the Village held a hearing on the Application. Consideration of the rezoning request was bifurcated from the other requests in the Application. At the 2008 hearing, the Village adopted Ordinance 08-06 denying the requested rezoning. Palmer Trinity appealed this denial in a petition for certiorari review to the Circuit Court, acting in its appellate capacity, which upheld, without opinion, the Village's decision. Palmer Trinity then took an appeal to the Third District Court of Appeal which reversed the Circuit Court, thereby overturning the Village's denial of the rezoning request. *See Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. 3d DCA 2010) ("*Palmer I*").

After the Third District issued the decision in *Palmer I*, Palmer Trinity revised its plans, eliminating some of the previously requested non-use variances and reducing its requested student enrollment from 1400 to 1150. Palmer Trinity also voluntarily offered to expand its student population from 600 to 1150 in gradual increments over a fifteen year period. In addition, the proposed site plan was modified to reflect the reduced student enrollment request of 1150, the proposed new development on Parcel B was redesigned and relocated toward the center, setbacks were increased and additional landscaping was added.

On April 28, 2010, the Village conducted a public hearing on the first reading of the rezoning component of the Application. On May 4, 2010, the Village conducted a public hearing on second reading of the rezoning request and approved the rezoning by adopting Ordinance 2010-09. Also at that hearing, the Village heard the request for the special exceptions and site plan modification components of the Application.

Prior to the hearing, the professional staff of the Village (the "Village Staff") reviewed the Application and recommended approval with certain conditions (the "Recommendation"). The Recommendation contained a total of approximately 80 conditions, one of which, as set forth below, was included in the Resolution and forms the basis of this appeal. The Village Staff specifically recommended that Palmer Trinity's request for a special exception to expand the school onto Parcel B and to increase the student enrollment from 600 to 1150 be approved. The 900 number, which the Village later adopted, was not mentioned in the Recommendation.

As part of its Recommendation, the Village Staff included Condition 4.2, which required Palmer Trinity to “record an acceptable and approved restrictive covenant running with the land for specific conditions which covenant shall exist for 30 years, and automatically renew for 10 year periods, thereafter.” Condition 4.4 of the Recommendation further provides:

4.4 Cap on Intensity of Uses and Student Population.

Applicant shall limit future development and agrees that it shall not seek any further development approvals to increase the intensity of uses, to increase lot coverage, square footage, heights of structures, or exceed 1150 students for 30 years following the recording of this covenant. Specifically, no buildings shall exceed two (2) stories or a roof elevation of 35 feet in height measured from finished floor.

At the May 4, 2010 hearing, the Village’s Planning Director (the “Director”) presented the Recommendation. The Director stated that Condition 4.4 was “a condition running with the land as to conditions in perpetuity, no modifications as to uses, increases, increases as to square footage or students for 30 years.” (the “30 Year Prohibition”). Although various other individuals addressed the Village Council, there was no other testimony or evidence presented with respect to the 30 Year Prohibition. With respect to the 1150 student cap on enrollment, the Village’s expert traffic consultant, Joseph Corradino, reviewed the traffic study included in Palmer Trinity’s Application and recommended approval, finding that, based on 1150 students, the Application satisfied the relevant traffic level of service standards.

Palmer Trinity’s counsel objected to several of the conditions contained in the Recommendation, including Condition 4.4, which contained the 30 Year

Prohibition, as being “overreaching.” Palmer Trinity’s counsel then presented its requests for the special exceptions and introduced documentary evidence along with lay and expert witnesses.

The Village Attorney presented an Overview of Zoning Law as a guide to the Village Council. The County Manager also engaged special council who addressed the Village Council regarding their duties and obligations as quasi-judicial officers. The attorney for Concerned Citizens of Old Cutler, Inc. (“CCOCI”) and Betty Ingram, Intervenors, presented argument and testimony from several individuals and introduced, Mr. Mark Alvarez, a planner, as an expert. Other individual witnesses spoke both for and against the Application. The Village Council then allowed Palmer Trinity an opportunity for rebuttal.

At the conclusion of the evidentiary portion of the hearing, the Village Council began its deliberations. Several amendments to the conditions recommended by the Village Staff were made. Council Person Stanczyk made a motion to reduce the number of students permitted to 900. This was the first time the number 900 was ever mentioned at the public hearing or in the entire record preceding the public hearing. Thereafter, the Mayor and Council Person Stanczyk had a brief discussion as to whether the 900 number was arbitrary. At the conclusion of the hearing on May 4, 2010, the Village adopted the Resolution with conditions, including the reduction in the number of students from 1150 to 900, with Council Member Stanczyk voting against. The only modification to the language of the version of Condition 4.4 contained in the Recommendation to the language in the version of Condition 4.4, as included in the Resolution, was the

reduction in the number of students permitted from 1150 to 900. The language providing for the 30 Year Prohibition on Palmer Trinity's ability to seek further development approvals remained the same. Specifically, Condition 4.4 in the Resolution states:

4.4 Cap of Intensity of Uses and Student Population.
Applicant shall limit future development and agrees that it shall not seek any further development approvals to increase the intensity of uses, to increase lot coverage, square footage, heights of structures, or exceed 900 students for 30 years following the recording of this covenant. Specifically, no buildings shall exceed two (2) stories or a roof elevation of 35 feet in height measured from finished floor.

Subsequent to the Village's adoption of the Resolution, Palmer Trinity filed its timely Petition to invoke this Court's jurisdiction.

Conclusions of Law

First tier certiorari review of a quasi-judicial zoning decision, such as the Resolution at issue here, is a matter of right. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 198 (Fla. 2003). A three-part standard governs this Court's review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Id.* at 199.

A. The 30 Year Prohibition

While it is not the function of the court to rezone property, "[r]estrictions on private property must be kept within the limits of necessity for the public welfare or it will be recognized as an unlawful taking." *Burritt v. Harris*, 172 So.2d 820, 822 and 823 (Fla. 1965).

In *Cap's-On-The-Water, Inc. v. St. Johns County, et al.*, 841 So.2d 507, 508 (Fla. 5th DCA 2003), cited by the Village, the Court held that the standard applicable to the imposition of conditions on a special use in an application for development is whether the use should be controlled "in relation to the neighborhood." The Court explained:

We note, however, that in the application of this provision, the conditions imposed must bear a relationship to the goal of compatibility between the special use and the surrounding area. Should the owners decide to challenge the conditions as unreasonable restrictions, the court can consider whether the conditions are whimsical or capricious. Conditions on a use, just like exceptions to a rule, can swallow or drown the use which was intended to be approved in the first place. Owners are entitled to fair play; their properties, which may represent their life fortunes, should not be subjected to whimsical or capricious conditions.

Id. at 508-509.

In support of the 30 Year Prohibition, which prohibits Palmer Trinity from even asking for additional development approvals for the next thirty years – that is, until 2040 -- the Village argues that the condition is necessary to “manage the possibility of increased noise and nuisances that would be incompatible with the health, safety and welfare of the community.” *See Village’s Response to Petition for Writ of Certiorari at 49.* Moreover, the Village claims that “[i]t sought to develop trust.” *Id.* Palmer Trinity counters that such a restriction constitutes an illegal and *de facto* moratorium on development, and is an arbitrary, *ad hoc* decision that is an unacceptable and unconstitutional means of restricting private property rights.

Irrespective of the label attached, there is simply no legal authority cited to support such an extreme and unreasonable restriction on a private property owner.

Thus, the 30 Year Prohibition constitutes a departure from the essential requirements of law. This is so because neither the Village Council nor the current residents of the area surrounding Parcel B can know what the future holds. There are a myriad of potential circumstances - - unknown and even unimaginable at this time -- which could arise in the future which could necessitate Palmer Trinity asking for additional development approvals.¹ Without the ability to see into the future, the Village cannot know what the neighborhood will be like and, hence, what would be compatible or incompatible. Indeed, the Village's contention that the 30 Year Prohibition is necessary to "manage the *possibility* of increased noise and nuisances that would be incompatible with the health, safety and welfare" imposes an unreasonable restriction on Palmer Trinity, particularly in light of the fact that the circumstances sought to be managed may or may not occur. (Emphasis added.)

In addition, the Village cited no legal authority to regulate land use based on a municipality's desire for trust with a landowner. In as much, the 30 Year Prohibition leaves no room for trust because it operates as an out right ban on Palmer Trinity's ability to even ask for additional development approvals. Accordingly, the Court holds that the provision in Condition 4.4 of the Resolution, which not only prohibits development, but *even* applications for development, for the next 30 years constitutes a departure from the essential requirements of law and should be quashed.

1. Thirty years ago today, the internet was not available for use by the general public and there were no cellular telephones.

B. The 900 Student Cap on Enrollment

Palmer Trinity argues that the 900 student cap contained in Condition 4.4 of the Resolution is not supported by competent substantial evidence and constitutes a departure from the essential requirements of law. We agree. The record contains no mention of the 900 number at the May 4, 2010 hearing until after the close of public comment when the Mayor, Council, and Village Counsel had the following exchange:

COUNCIL MEMBER STANCZYK: Yeah and I'm having a little trouble again. The original student number that was listed as a recommendation was 1150, and I would like to reduce it to 900, staged incrementally over the entire term of the project. I'd like to make that as a motion.

MAYOR FLINN: That's a tough one. I mean, I don't know how we can just arbitrarily do that, but - -

COUNCIL MEMBER STANCZYK: Well, 1150 was an arbitrary number.

MAYOR FLINN: Well, 1150 is what they voluntarily dropped to, but - -

COUNCIL MEMBER STANCZYK: Well - -

MAYOR FLINN: But, anyway, is there a second for that?

VICE MAYOR PARISER: I'll second it.

MAYOR FLINN: All right, it's been seconded. Any discussions on it?

COUNCIL MEMBER FELLER: Read the motion.

MAYOR FLINN: Reduce to 900 students.

COUNCIL MEMBER FELLER: In discussion by - - I had gotten a number, by state number or by density or some numbers. Theoretically, what is the maximum the school would be allowed to by the total acreage? Is there such a thing, Eve?

MS. BOUTSIS: Under the special exception process, they have to meet certain numbers. The answer is over 2,000.

COUNCIL MEMBER FELLER: It's over 2,000.

MAYOR FLINN: I think it was 2100 at one point. All right all in favor indicate by saying aye.

COUNCIL MEMBERS: Aye.

MAYOR FLINN: Any opposed?

COUNCIL MEMBER FELLER: Nay.

COUNCIL MEMBER TENDRICH: Nay.

MAYOR FLINN: Three/two. All right next item.

See Transcript of May 4, 2010, Hearing at pp. 297:16 – 299:12.

The Village relies upon the testimony of Mr. Mark Alvarez, the planner retained by the Intervenors, and the comments by neighboring residents with respect to traffic and noise. The only specific testimony offered by Mr. Alvarez that could arguably support the Village's position is his statement that "[t]he school, and what I'm going to point out, is I believe that the use, as a school, is not consistent with what the Village's comprehensive plan says." *See May 4, 2010 Hearing Transcript at p. 168.* He further testified that school would be "increasing the population density of Parcel B well above "what's expected for that zoning category." *Id. at 183:7-17.* Palmer Trinity contends that Mr. Alvarez' testimony does meet the standard for competent substantial evidence.

The Florida Supreme Court has defined competent substantial evidence as follows:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

An applicant seeking a special exception must demonstrate to the decision-making body that its proposal is consistent with the county's land use

plan; that the uses are specifically authorized in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. *See Jesus Fellowship v. Miami-Dade County, Florida*, 752 So.2d 708, 710. (Fla. 3d DCA 2000). If an applicant meets this burden, then the request must be granted unless the opponent carries its burden to demonstrate that the applicant's request does not meet the standards and are in fact adverse to the public interest. *Id.*

The facts herein are analogous to those presented in *Jesus Fellowship*. In that case, the Third District quashed a circuit court decision which affirmed a decision of the Miami-Dade County Commission denying a portion of a church's zoning application. In the zoning application at issue therein, the church sought to rezone land in a residential area to permit expansion of the church's religious facilities and to permit a private school and day care center. Although the County Staff had recommended approval of 524 students, the Commission approved the rezoning but limited the number of students to 150 as a result of a "suggestion" by the opponents' attorney after the close of the evidentiary hearing.

Here, as in *Jesus Fellowship*, the first mention of even the reduction in the number of students permitted occurred after the close of the evidentiary portion of the public hearing. And like the "suggestion" by the opponent's counsel in *Jesus Fellowship*, the 900 number here materialized in the form of a motion for which no discussion on the record had been had nor foundation had been laid. Other than the brief discussion between the Mayor and Council Person Stanczyk, wherein the 900 number was admittedly arbitrary, there is no mention of that number, nor any mathematical calculation from which it could have been derived,

contained in either the record or transcript preceding the adoption of the Resolution. Neither the testimony of Mr. Alvarez, nor of any of the individuals living in the neighborhood surrounding the school, provides a competent substantial basis for the 900 student cap on enrollment. Accordingly, this Court holds that the 900 student cap is not supported by competent substantial evidence.

For the reasons set forth above, the provisions contained in Resolution 2010-48 relating to the 30 Year Prohibition on any future development or applications for development approvals and the 900 student cap on enrollment are QUASHED and this matter is REMANDED to the Village of Palmetto Bay for proceedings in accordance with this decision.

**COPIES FURNISHED TO COUNSEL
OF RECORD AND TO ANY PARTY
NOT REPRESENTED BY COUNSEL.**

NOT FINAL UNTIL TIME EXPIRES
TO FILE MOTION FOR REHEARING,
AND IF FILED, DISPOSED OF

Norma Lindsey
2-9-11
~~Joseph Farina~~ 2/10/11
Joel Brown

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

2/10/2011

APPELLATE DIVISION
CASE NO. 10-259 AP
ZONING RESOLUTION NO. 2010-48

PALMER TRINITY PRIVATE
SCHOOL, INC.,
Petitioner,

vs.

VILLAGE OF PALMETTO BAY,
Appellee.

Opinion filed February 11, 2011

On appeal from a decision of the Village of Palmetto Bay, Florida.

Eileen Ball Mehta, Esq. for Petitioner.

Eve A. Boutsis, Esq. for Respondent.

Tucker Gibbs, Esq. for Intervenors, Concerned Citizens of Old Cutler, Inc. and
Betty Pegram.

Before JOEL BROWN, C.J., JOSEPH FARINA AND NORMA S. LINDSEY, JJ.

(PER CURIAM)

This appeal arises out of the adoption of Zoning Resolution No. 2010-48
(the "Resolution") by the Village of Palmetto Bay (the "Village"). Petitioner,
Palmer Trinity Private School, Inc. ("Palmer Trinity"), seeks by way of certiorari
review to quash and remove two provisions incorporated into Condition 4.4 of the

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MIAMI-DADE COUNTY COURTS
DADE COUNTY, FLA.
CIVIL #101

APPELLATE DIVISION

Resolution, specifically: (1) the cap on the permissible number of students at the school at 900; and (2) the imposition of a thirty-year (30) prohibition on the filing of any applications for development approvals on the school's 55-acre site. We have jurisdiction pursuant to Article V, Section 5, Florida Constitution, and Rules 9.030(c) and 9.100 of the Florida Rules of Appellate Procedure.

Palmer Trinity argues that the above provisions are unlawful and should be quashed and removed from the Resolution in that: (1) the cap on the number of students permitted at the school was arbitrary, not supported by competent substantial evidence, and departed from the essential requirements of law; and (2) the thirty-year prohibition on future development applications violated Palmer Trinity's due process rights because it constituted a *de facto* moratorium for which neither notice nor opportunity to be heard was given, that the Village departed from the essential requirements of law in approving the prohibition, and that the Village failed to support the thirty-year prohibition with substantial competent evidence.

The Village disagrees and seeks to dismiss Palmer Trinity's Petition. For the reasons set forth below, we QUASH the two provisions contained in the Resolution, as set forth above, adopted by the Village and REMAND to the Village with instructions to conduct further proceedings on this matter in accordance with this decision.

Procedural and Factual Background

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Palmer Trinity applied for and obtained approval of a modification of its site plan for the purpose of increasing its enrollment to 600 students. In 2003, Palmer Trinity purchased an additional 32.5 acres also located within the Village ("Parcel B") that was zoned half Agricultural ("AU") and half Estate Single Family per Five Acres ("EU-2"). Parcel B had an Estate Density Residential ("EDR") future land use designation, allowing for less than 2.5 dwelling units per acre. In 2006, Palmer Trinity filed an application (the "Application") under the Miami-Dade County Code to rezone Parcel B to Estate Modified Single Family allowing for one home per 15,000 square feet ("EU-M"). As part of the Application, Palmer Trinity also sought a special exception to increase the student enrollment from 600 to 1400 and certain variances concerning further development on both Parcel A and B. As a result of the incorporation of the Village as a municipality, the Application was transferred from the County to the Village.

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Prohibition, as being "overreaching." Palmer Trinity's counsel then presented its requests for the special exceptions and introduced documentary evidence along with lay and expert witnesses.

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Irrespective of the label attached, there is simply no legal authority cited to support such an extreme and unreasonable restriction on a private property owner.

Thus, the 30 Year Prohibition constitutes a departure from the essential requirements of law. This is so because neither the Village Council nor the current residents of the area surrounding Parcel B can know what the future holds. There are a myriad of potential circumstances - - unknown and even unimaginable at this time -- which could arise in the future which could necessitate Palmer Trinity asking for additional development approvals.¹ Without the ability to see into the future, the Village cannot know what the neighborhood will be like and, hence, what would be compatible or incompatible. Indeed, the Village's contention that the 30 Year Prohibition is necessary to "manage the *possibility* of increased noise and nuisances that would be incompatible with the health, safety and welfare" imposes an unreasonable restriction on Palmer Trinity, particularly in light of the fact that the circumstances sought to be managed may or may not occur. (Emphasis added.)

In addition, the Village cited no legal authority to regulate land use based on a municipality's desire for trust with a landowner. In as much, the 30 Year Prohibition leaves no room for trust because it operates as an outright ban on Palmer Trinity's ability to even ask for additional development approvals. Accordingly, the Court holds that the provision in Condition 4.4 of the Resolution, which not only prohibits development, but *even* applications for development, for the next 30 years constitutes a departure from the essential requirements of law and should be quashed.

1. Thirty years ago today, the internet was not available for use by the general public and there were no cellular telephones.

B. The 900 Student Cap on Enrollment

Palmer Trinity argues that the 900 student cap contained in Condition 4.4 of the Resolution is not supported by competent substantial evidence and constitutes a departure from the essential requirements of law. We agree. The record contains no mention of the 900 number at the May 4, 2010 hearing until after the close of public comment when the Mayor, Council, and Village Counsel had the following exchange:

COUNCIL MEMBER STANCZYK: Yeah and I'm having a little trouble again. The original student number that was listed as a recommendation was 1150, and I would like to reduce it to 900, staged incrementally over the entire term of the project. I'd like to make that as a motion.

MAYOR FLINN: That's a tough one. I mean, I don't know how we can just arbitrarily do that, but - -

COUNCIL MEMBER STANCZYK: Well, 1150 was an arbitrary number.

MAYOR FLINN: Well, 1150 is what they voluntarily dropped to, but - -

COUNCIL MEMBER STANCZYK: Well - -

MAYOR FLINN: But, anyway, is there a second for that?

VICE MAYOR PARISER: I'll second it.

MAYOR FLINN: All right, it's been seconded. Any discussions on it?

COUNCIL MEMBER FELLER: Read the motion.

MAYOR FLINN: Reduce to 900 students.

COUNCIL MEMBER FELLER: In discussion by - - I had gotten a number, by state number or by density or some numbers. Theoretically, what is the maximum the school would be allowed to by the total acreage? Is there such a thing, Eve?

MS. BOUTSIS: Under the special exception process, they have to meet certain numbers. The answer is over 2,000.

COUNCIL MEMBER FELLER: It's over 2,000.

MAYOR FLINN: I think it was 2100 at one point. All right all in favor indicate by saying aye.

COUNCIL MEMBERS: Aye.

MAYOR FLINN: Any opposed?

COUNCIL MEMBER FELLER: Nay.

COUNCIL MEMBER TENDRICH: Nay.

MAYOR FLINN: Three/two. All right next item.

See Transcript of May 4, 2010, Hearing at pp. 297:16 – 299:12.

The Village relies upon the testimony of Mr. Mark Alvarez, the planner retained by the Intervenors, and the comments by neighboring residents with respect to traffic and noise. The only specific testimony offered by Mr. Alvarez that could arguably support the Village's position is his statement that "[t]he school, and what I'm going to point out, is I believe that the use, as a school, is not consistent with what the Village's comprehensive plan says." *See May 4, 2010 Hearing Transcript at p. 168.* He further testified that school would be "increasing the population density of Parcel B well above "what's expected for that zoning category." *Id. at 183:7-17.* Palmer Trinity contends that Mr. Alvarez' testimony does meet the standard for competent substantial evidence.

The Florida Supreme Court has defined competent substantial evidence as follows:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

An applicant seeking a special exception must demonstrate to the decision-making body that its proposal is consistent with the county's land use

plan; that the uses are specifically authorized in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. See *Jesus Fellowship v. Miami-Dade County, Florida*, 752 So.2d 708, 710. (Fla. 3d DCA 2000). If an applicant meets this burden, then the request must be granted unless the opponent carries its burden to demonstrate that the applicant's request does not meet the standards and are in fact adverse to the public interest. *Id.*

The facts herein are analogous to those presented in *Jesus Fellowship*. In that case, the Third District quashed a circuit court decision which affirmed a decision of the Miami-Dade County Commission denying a portion of a church's zoning application. In the zoning application at issue therein, the church sought to rezone land in a residential area to permit expansion of the church's religious facilities and to permit a private school and day care center. Although the County Staff had recommended approval of 524 students, the Commission approved the rezoning but limited the number of students to 150 as a result of a "suggestion" by the opponents' attorney after the close of the evidentiary hearing.

Here, as in *Jesus Fellowship*, the first mention of even the reduction in the number of students permitted occurred after the close of the evidentiary portion of the public hearing. And like the "suggestion" by the opponent's counsel in *Jesus Fellowship*, the 900 number here materialized in the form of a motion for which no discussion on the record had been had nor foundation had been laid. Other than the brief discussion between the Mayor and Council Person Stanczyk, wherein the 900 number was admittedly arbitrary, there is no mention of that number, nor any mathematical calculation from which it could have been derived,

contained in either the record or transcript preceding the adoption of the Resolution. Neither the testimony of Mr. Alvarez, nor of any of the individuals living in the neighborhood surrounding the school, provides a competent substantial basis for the 900 student cap on enrollment. Accordingly, this Court holds that the 900 student cap is not supported by competent substantial evidence.

For the reasons set forth above, the provisions contained in Resolution 2010-48 relating to the 30 Year Prohibition on any future development or applications for development approvals and the 900 student cap on enrollment are QUASHED and this matter is REMANDED to the Village of Palmetto Bay for proceedings in accordance with this decision.

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