STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BLACK DIAMOND HOMEOWNERS ASSOCIATION, INC., BLACK DIAMOND PROPERTIES, INC., and JERRY AND ANN KERL,	)	
Appellants,	)	
vs.	)	Case No. 01-1119
CITRUS COUNTY and THE BROWN SCHOOLS OF FLORIDA, INC.,	)	
Appellees.	)	
MARVIN QUERY,	)	
Appellant,	)	
vs.	)	Case No. 01-1120
CITRUS COUNTY and THE BROWN SCHOOLS OF FLORIDA, INC.,	)	
Appellees.	)	

RECOMMENDED ORDER

Pursuant to notice, these matters were heard on May 30, 2001, in Inverness, Florida, by Donald R. Alexander, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issues are whether the following decisions of the Director of Development Services of Citrus County on May 9, July 21, and July 25, 2000, are correct: (1) that the Brown School of Florida, Inc.'s proposed use of certain property in Citrus County, Florida, did not constitute a change in use as described in Sections 2021 through 2023 of the Citrus County Land Development Code and is consistent with Rezoning Ordinance No. 86-A38; and (2) that the proposed construction of a fence on the property complied with the Citrus County Land Development Code.

PRELIMINARY STATEMENT

This matter began on May 9, 2000, when the Director of the Department of Development Services of Appellee, Citrus County, advised Appellee, the Brown Schools of Florida, Inc., that its proposed use of certain property in Citrus County, Florida, as a "psychotherapeutic hospital" did not constitute a change of use as described in the Citrus County Land Development Code, and that it could commence operations at that location. After objections in the form of two appeals were lodged by Appellants, Black Diamond Homeowner's Association, Inc., Black Diamond Properties, Inc., and Jerry and Ann Kerl (Case No. 01-1119), and Marvin Query (Case No. 01-1120), further documentation was requested from the school. On July 21, 2000, a letter by the Director of the Department of Development Services concluded that the "proposed operations by the Brown Schools of Florida are within the perameters of the binding zoning conditions of [Planned Development] Z-86-29" and that the application should be granted. On the same day, the school requested authority to construct a 10-foot high chain link fence on a portion of the property. By letter dated July 25, 2000, the Director of Department of Development Services concluded that the fence was a "minor modification of the Approved Development" and was

in accordance with the Land Development Code. All three decisions have been appealed by Appellants.

When the appointed local Hearing Officer assigned to hear these cases resigned to accept a position as County Attorney, the matters were referred by Citrus County to the Division of Administrative Hearings on March 21, 2001, pursuant to a contract between the two entities.

After the two cases were consolidated, by Notice of Hearing dated April 3, 2001, a final hearing was scheduled on May 30, 2001, in Inverness, Florida. On May 25, 2001, the cases were transferred from Administrative Law Judge Don W. Davis to the undersigned.

At the final hearing, and as required by Section 2500 of the Land Development Code, the parties presented oral argument in support of their respective positions. Thus, there was no testimony or cross-examination of witnesses. However, the documents submitted to the Director of the Department of Development Services, which consist of Exhibits 1-40, were made a part of this record. Finally, by agreement of the parties, the undersigned has accessed relevant portions of the Citrus County Land Development Code on the Internet at www.bocc.citrus.fl.us.

There is no transcript of the hearing. The time for filing Proposed Findings of Fact and Conclusions of Law was

extended to July 20, 2001. The same were timely filed by all parties except Citrus County and have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. The property which is the subject of this dispute is located at 2804 West Marc Knighton Court, one mile north of the intersection of County Roads 486 and 491, and just south of the community of Beverly Hills in Citrus County, Florida. Appellee, the Brown Schools of Florida, Inc. (the Brown Schools), has entered into a contract to lease the land from its owner for the purpose of operating a State-licensed "residential child-caring facility." Appellants, Black Diamond Homeowner's Association, Inc., Black Diamond Properties, Inc., Jerry and Ann Kerl, and Marvin Query, have objected to the proposed use on numerous grounds. As residents or owners of property adjacent to the subject property, Appellants have standing to bring these appeals.

2. The property was originally zoned agriculture. In 1986, Community Care Systems, Inc. (Community Care), which then had a contract to purchase the property from a principal of Black Diamond Properties, Inc., applied to Appellee, Citrus County (County), to rezone 30.9 acres from "A-1 General

Agriculture" to a "Planned Development-Commercial" land use classification. The stated purpose of the application was to permit the construction and operation of a private psychiatric hospital for alcohol and drug rehabilitation. The application reflected that the owner's sole intended use of the property was as a 60,000 square feet psychiatric hospital licensed under Chapter 381, Florida Statutes, which would "provide comprehensive psychiatric treatment for people of all ages."

3. Under the 1986 version of the County's Land Development Code (Code), private hospitals were only authorized in the commercial land use districts. There was no separate "Institutional" land use district. Thus, the Code dictated that the original facility could only be used as a private psychiatric hospital in a commercial zone. Since an application for straight commercial rezoning on the property would have been inconsistent with the County's then existing land use plan, the only way in which the property could be used for a private psychiatric facility was if the property was classified and zoned as "Planned Development-Commercial." Although the Code was amended in 1990 to include new land use districts, including a "Public/Semi-Public/Institutional" district, hospitals are permitted only in a "General Commercial distict, while "Institutional" uses that are not hospitals are not allowed in a "General Commercial" District.

In any event, the 1986 ordinance and final development plan were not amended by the changes to the Code in 1990.

4. The Brown Schools points out that at the time the rezoning application was filed, the 1986 Code contained a Commercial, Residential, Institutional and Office (CRIO) land use district which allowed, among other things, the construction of "public or private hospitals," if they met certain conditions, and "[a]dult congregate living facilities and other group homes, supervised living facilities meeting all county and State requirements." However, in its rezoning application, Community Care did not seek an institutional use nor request a CRIO use. Thus, the cited provision has no application here, and there is no indication in the record that it was even considered by the County in making the decisions under appeal.

5. When the rezoning application was filed, Community Care held Certificate of Need No. 2870 issued in 1984, which authorized construction of a facility with 51 short-term psychiatric beds and 37 long-term substance abuse beds for the treatment of adults, including geriatric patients.

6. The minutes of the Citrus County Board of County Commissioners (Board) meeting held on August 26, 1986, at which the zoning modification was approved, reflect that concerns were raised by abutting citizens of Beverly Hills,

who belonged to a group known as United Residents of Beverly Hills (URBH), relative to the facility's future uses. To achieve the necessary zoning approvals, Community Care expressly reassured URBH members by letter dated July 7, 1986, that it would not accept court commitments, "criminally insane," or special problem cases such as "fire setters"; that admissions would be voluntary or by short term civil commitment papers; that patient referral would be by direct request of the patient (self-referral), by physician or other local health professional, by transfer from local general hospitals, and by law enforcement if no charges are pending against the patient; that the property would not be used to house onsite felons or violent patients; and that the building would be low profile and without bars, windows, fences, or gates. Thus, it is clear from Community Care's own acknowledgement that the facility was never intended to be used to accept law enforcement referrals, court commitments, or other non-voluntary commmitments, much less the violent or criminally insane individuals.

7. Having received the above representations from the applicant, the Board incorporated both a URBH letter and the Brown Schools' letter of July 6 as a part of Ordinance No. 86-A38, which approved the zoning change application (Z-86-29) subject to certain conditions. That Ordinance expressly

limited and conditioned the uses allowed on the property to the uses approved in the Ordinance. The operative section at issue regarding this appeal is Condition 2, which required that:

> 2. Approval be limited to a 60,000 square foot (88 bed) psychiatric care facility in accordance with state guidelines.

8. Thereafter, a facility was constructed and Community Care operated a psychiatric care hospital on the property under various names until sometime in 1997, when Community Care (then operating the facility under the name of Heritage Hills Hospital of Beverly Hills) voluntarily ceased to provide services and vacated the premises. By operation of law, the Certificate of Need automatically expired when it was returned to the Agency for Health Care Administration (AHCA) on June 12, 1998.

9. The property was sold in 1999 to BCK of Ocala, LLC. That owner then entered into a lease of the property with the Brown Schools on an undisclosed date in 1999 or early 2000.

10. On March 23, 2000, the Brown Schools filed a "Pre-Application Review" with the County's Community Development Division and met with County staffers in an effort to gain approval for their facility. A preapplication is filed "before submittal of an application for development order,"

and once one is filed, under Section 2210 of the Code a preapplication conference is then held with County staffers

> to acquaint the applicant with substantive and procedural requirements of this LDC, provide for an exchange of information regarding the applicable elements of the Comprehensive Plan, the LDC, and other development requirements, arrange such technical and design assistance assistance as will aid the applicant in interpretation of requirements, and to otherwise identify policies and regulations that create opportunities or pose significant constraints for the proposed development.

The same section provides that the purpose of the conference is "not to grant any preliminary approval except to agree that the proposed use of the property is appropriate according to the Comprehensive Plan and to determine whether it is reasonable to expect that the proposed development can be accommodated on the site in full compliance with requirements of this LDC."

11. The preapplication reflected that the project name was "The Brown School Locked Adolescent Facility." Also, a handwritten notation by a County staffer at the bottom of the preapplication indicates that "no change of use/no construction [is] contemplated," and that the applicant "must meet conditions of Z-86-29 - copy given to applicant." An Email prepared by a County staffer on March 14, 2000, or shortly before the preapplication was filed, reflected that

the intended use of the property was a "[l]ocked facility for children and adolescents."

12. On May 5, 2000, the Brown Schools notified the County by letter that "[w]e are aware of the original conditions in which the facility was permitted and we will not be changing its use."

13. In response to that representation, by letter dated May 9, 2000, the County's Director of the Department of Development Services (Director), who reviews both preapplications and development order applications, advised in part as follows:

> Pursuant to the preapplication meeting of March 23, 2000, and your correspondence of May 5, 2000, please accept this letter as confirmation that the proposed change does not constitute a Change of Use as described in Sections 2021 through 2023. As noted in your letter, the Brown Schools of Florida are bound by the original planned development approved conditions. Should at a future date you desire to modify the structure, grounds, operation, or any of the conditions, a new review by Citrus County will be needed and may warrant a public hearing as provided in Section 2224 of the LDC.

In reaching those conclusions, it is assumed the Director considered Section 2021 of the Code, which defines a "change in use" as "any change of the purpose or activity for which a piece of land or its buildings is designed, arranged, or intended, or for which it is occupied or maintained."

14. The letter also specifically refers to the Brown Schools' plan to operate the property as a "psychotherapeutic hospital for children," and it asked that the applicant provide a copy of its "Florida DC&F permit/authorization . . . for inclusion in [the County's] file as confirmation that [the] operation is approved by the State as well." At that point in time, however, no documentation had been submitted in the process concerning the Brown Schools' operations and programs to support the decision made by the County, although such information had been submitted to the Department of Children and Family Services (DCF), the state agency which licenses adolescent facilities.

15. In information submitted to DCF to obtain a license, the Brown Schools expressly stated that they would be accepting sexual offenders, in addition to juveniles charged with felonies. In fact, one of the criteria under the client profile for those admitted to the Brown Schools' sexual offenders program is that the individual "[m]ay have completed more intensive levels of acute care, hospitalizations, had multiple failed residential placements or may have failed at outpatient services."

16. The documents submitted to DCF also reflect that the Brown Schools is not operating a "psychiatric hospital," as originally represented to the County, but rather it is

operating something more akin to a juvenile detention center. Indeed, one of its stated missions is to "[e]nhance the public safety by providing protection for the community from juveniles charged with felonies." A part of the facility will be dedicated to providing services under a contract with the State of Florida for competency restoration. Such a prerequisite is necessary for admission to the Brown Schools' competency restoration program. Under this program, clients or their parents do not decide when they can leave, and the clients are only discharged when they are determined to be competent to stand trial, or when it is determined that they will never gain such competency. This lack of freedom illustrates that the intended use of the facility is as a detention facility, and not as a private psychiatric hospital. Obviously, the Brown Schools is not licensed, nor does it meet the statutory requirements for operation, as a psychiatric hospital.

17. On June 5 and 6, 2000, Appellants in Case Nos. 01-1119 and 01-1120 filed separate, but similar, appeals of the May 9 letter under Section 2500 of the County Land Development Code (Code) and asked for "an interpretation of the intended, described Brown School use." On June 9, 2000, the Director requested an opinion from the County Attorney on whether his May 9 letter constituted action which triggered

the provisions of Section 2500. In a memorandum dated July 17, 2000, the County Attorney concluded that it did not for the following reasons:

> It is my opinion that since no application has been filed nor development order issued or a request for determination made that your letter of May 9th is non-appealable by the terms of the Land Development Code. Section 2210 entitled Preapplication is merely a conference held before submittal of an application for a development order.
>
> * * *
>
> It is not an action taken by the Director which could lead to an appeal pursuant to Section 2500.

Based on this advice, the Director took the position that he had not made a final determination on the Brown Schools' compliance with the zoning conditions and therefore refused to accept the appeals. Thus he did not forward the two appeals of the May 9 letter to a local hearing officer to begin the appeals process.

18. By letter dated June 7, 2000, and in direct response to the concerns raised by Appellants, the Director provided the Brown Schools with a copy of the Appellants' appeals and requested that Appellee provide him with a copy of the DCF license, contracts, and any other supporting documents. Also, for the first time, the Director specifically requested documentation on the planned operation and programs at the facility since Appellants had questioned whether "the facility

will be in compliance with the original zone change compliance conditions."

19. In response to the Director's letter, on June 9, 2000, the Brown Schools provided the Director with a copy of its DCF license, contract with the State of Florida, and revised program information. The program information was revised (from that described in the application) after the appeals were taken to reflect a change in program titles and other terminology from that originally used. For example, the "Sexual Offender Program" was changed to "Sexual Abuse Treatment (SAT) Program," but the substance of the program remains the same.

20. In order to receive a license to operate its institution from the DCF, the Brown Schools was required to demonstrate that it had received final zoning approval. Even though the Director represented in his June 7, 2000, letter that final zoning approval had not been made, the Brown Schools represented to the DCF that it had received final zoning approval by submitting the May 9 letter. In reliance on that letter, on May 30, 2000, the DCF issued the Brown Schools a license to operate a residential child-caring facility. The license was issued under Section 409.175, Florida Statutes (1999), which specifically provided that "child-caring facilities do not include hospitals."

21. Beginning on July 1, 2000, the Brown Schools began placing juvenile offenders at their facility, and these residents have remained there during the pendency of these appeals.

22. On July 21, 2000, the Director issued a 3-page letter which constituted his final determination on the matter. That letter is found in three exhibits, including Exhibit 18. The Director concluded that the Brown Schools' proposed use of the property was consistent with the applicable zoning conditions. In his letter, the Director focused on Condition 2 of the zoning ordinance, and whether the intended use was in conformity with the requirement that the property be used only for a "60,000 square foot (88-bed) psychiatric care facility in accordance with State guidelines." Of relevance here were the following conclusions:

> [Condition 2] specifically utilizes the term "facility" and not hospital, and the term "State guidelines" rather than specific Florida statutes, administrative codes, or state programs. This is a significant distinction and a core basis of this determination. The County cannot administratively expand, contract, or modify the language or intent of the condition when it uses plain and obvious terms. (Rinker Mat. Corp. vs. City of N. Miami). The Board's limitations to the zone change were those spelled out in the adopted conditions - not those discussed

either within or outside the public hearing process by the applicant at that time.

The second core issue is whether the proposed Brown operation can be considered a psychiatric care facility. The original developer, Community Care Systems, Inc., provided comprehensive psychiatric treatment for people of all ages with acute emotional, behavioral, and chemical dependency problems. The facility operated as a hospital and so was governed by the then Florida Department of Health and Rehabilitative Services as a hospital, subject to the provisions of the Health Facility and Services Development Act. These regulations served as the state guidelines referenced in Condition 2.

The Brown Schools of Florida proposed operation for the Marc Knighton Court facility is a residential child caring facility as licensed by the Florida Department of Children and Families. Florida Statute (Chapter 409) provides the definition of a residential child caring agency (facility implied within the definition) that is broad in scope recognizing a number of types, including maternity homes, group homes, emergency shelters, and wilderness camps. Therefore, unlike the DHRS license obtained by Community Care Systems, Inc., which clearly established compliance with Condition #2, obtaining of the DCF license does not in and of itself serve the same role.

To ascertain compliance with the psychiatric care definer of Condition #2, I must look to the Brown Schools' proposed program and the draft contract with the DCF. The program summary from the Brown Schools of Florida lists four program types: Sexual Abuse Treatment Program, Child and Adolescent Residential Treatment [P]rogram (male and female], and

Residential Treatment Program for Developmentally Delayed Youth.

They all share the use of an inter-disciplinary treatment team centered around the psychiatric evaluation, treatment and community integration of the client(s). This is similar in scope to some of the original hospital's programs, though in the Brown Schools case it is oriented to children referred/placed by the State as opposed to private placement.

The draft contract, specifically Attachment 1, Section A, 2d, reaffirms these programs and the desired goals. While there is a difference from the original Community Care Systems operation, the fact remains that the supporting documentation provided by the Brown Schools of Florida clearly establishes that psychiatric care is a principle (sic) component of their operation and, as such, must be taken as face value compliance with Condition #2 of the Zone Change.

Much has been made of the fact that the Brown School operation will treat youth who have been found incompetent to proceed. This is an issue outside the purview of land use and, in fact, the attorney representing the original applicant in 1986 made the same observation that these types of issues were not land use related.

The determination of incompetency lies solely within the State of Florida through its judicial officers or their designees. It is neither feasible nor appropriate for local government through its police powers to try to regulate these matters.

Secondly, much has been made of the potential for the Brown Schools program to evolve into a juvenile detention facility, whole or in part due to the generality of the DCF license. Whether this can occur is

> open to debate, but Florida case law on this matter is clear. Conetta vs. City of Sarasota has established that one cannot presume violations of the Code for the purpose of denial. Rather, the appropriate approach on this issue is to take corrective enforcement action after a documented violation occurs.

Timely appeals of this letter were filed by Appellants.

23. By letter dated July 21, 2000, the Brown Schools requested a "minor modification to [the] Land Development Code" for the installation of a 10-foot high chain link fence with two-foot overhead fencing at a 45-degree angle. Although suggested otherwise by Appellants, the fence was not a perimeter fence around the entire facility, but only a fence to enclose a play yard, since a perimeter fence between at least part of the facility and the adjacent property had already been constructed by one of the Appellants.

24. On July 25, 2000, a County staffer responded to this request by holding that the fence "shall be considered a minor modification of the approved Plan Development No. Z-86-29 in accordance with the provisions of Section 2224.B of the Citrus County Land Development Code." The cited Section of the Code allows the Director to approve "minor changes in the . . . previously approved Planned Developments (PD) as long as they are in harmony with the originally approved . . . PD." After a site plan was submitted, the County issued a permit for the

fence. This decision has also been appealed by Appellants on the grounds that the original site plan contained no fences, and the Board approved the zoning change in 1986 only after the applicant represented that no fences would be erected. The construction of the fence has been stayed during the pendency of these appeals.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 2500 of the Code.

26. Subsection 2500G. of the Code provides the following guidelines for an administrative law judge (or local hearing officer) in an appeal of a decision by the County's Director of the Department of Development Services:

> When a decision is appealed the Hearing Officer assigned to hear the appeal shall conduct the hearing in compliance with the following procedures as supplemented where necessary:
>
> 1. The Hearing Officer's review shall be limited to the record and applicable law.
>
> 2. The Hearing Officer shall have the authority to review questions of law only, including interpretations of this LDC and any constitution, ordinance, statute, law, or the rule or regulation of binding legal force. For this purpose, an allegation that a particular application before the decisionmaker is not supported by competent substantial evidence in the record as a whole is deemed to be a question of law.

> The Hearing Officer may not reweigh the evidence but must decide only whether any reasonable construction of the evidence supports the decision under review.

27. Subsection 2500H. of the Code provides the following guidelines for the disposition of an appeal:

> 1. The Hearing Officer must affirm each contested decision or find it to be in error. The Hearing Officer shall prepare a written opinion stating the legal basis for each ruling.
>
> 2. When the Hearing Officer affirms a contested decision pertaining to a final action of a decisionmaker, that action shall be deemed to be the final action of the decisionmaker and shall be subjected to no further review under this LDC. The Hearing Officer shall submit the opinion to the decisionmaker, the parties, and the department involved.
>
> 3. When the Hearing Officer finds any decision to be in error, that decision shall be referred back to the decision-maker, the parties, and the department involved.

28. Under these circumstances, and notwithstanding any ambiguity in the Code, a Recommended Order is an appropriate disposition of these cases, particularly since the Director must "reconsider" his earlier decision whenever, as here, the reviewing tribunal finds the lower decision "to be in error." See Florida Rock Industries v. Citrus County, DOAH Case No. 99-0147 (Citrus County, July 14, 1999)(because any decision is referred back to the Citrus County Department of Development

Services for entry of a final order, a recommended order is appropriate).

29. Within the foregoing perameters, several broad principles apply here. First, the legal issue herein involves one of construction of an ordinance which is not ambiguous. Under these circumstances, legal issues of statutory construction are reviewable de novo and no deference is given to the local government's interpretation. Dixon et al. v. The City of Jacksonville et al., 774 So. 2d 763, 765 (Fla. 1st DCA 2000). In addition, the parties agree that because the decision under review is quasi-judicial in nature, in order to be sustained, the decision must be in accord with the essential requirements of the law, the decision must be supported by competent substantial evidence, and the local government must adhere to the requirements of procedural due process. See, e.g., Educational Development Center v. City of West Palm Bch., 541 So. 2d 106, 108 (Fla. 1989). Whether the County has observed the essential requirements of the law turns on whether the Director applied the correct law in the instant case. Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995)(concluding that "applied the right law" is synonymous with "observing the essential requirements of the law").

30. Appellants first contend that the Director departed from the essential requirements of the law and failed to adhere to the requirements of due process by failing to forward their appeals of the May 9 decision to a local hearing officer. Had they been forwarded, absent "imminent peril to life or property," a stay of the proceedings would have occurred, and the Brown Schools could not have commenced operations unless and until a favorable decision was reached in those appeals.

31. The Director's decision to not forward the two appeals to a hearing officer was based on a memorandum dated July 17, 2000, prepared by the then County Attorney. The memorandum basically concluded that the filing of a preapplication by the Brown Schools did not constitute the filing of an application or the issuance of a development order within the meaning of the Code so as to trigger the provisions of Section 2500. Rather, he concluded that the filing simply entitled the applicant to a conference between the County and the applicant for the purposes described in Section 2210 of the Code.

32. Section 2500 authorizes "decisions of the Director" to be appealed subject to certain requirements described in Subsections 2500A.-D. While it is true that no application was ever filed and no development order issued, the May 9

decision did provide "confirmation [to the Brown Schools] that the proposed change does not constitute a Change in Use as described in Sections 2021 through 2023," an interpretation vigorously disputed by Appellants. The practical effect of the letter was to advise the Brown Schools that no application for development was required since no change in use had occurred. It also had the effect of permitting the "development" of land (as defined in Subsection 1500F. of the Code) that was arguably inconsistent with the Comprehensive Plan, the Code, and the zoning on the property. Under these circumstances, Appellants were entitled to have the correctness of the "decision" resolved by an impartial hearing officer, as contemplated by the Code, before the intended use began. By failing to follow the requirements of the Code, the Director departed from the essential requirements of the law, and he failed to adhere to the requirements of due process.

33. Appellants next contend that the Director departed from the essential requirements of the law in four respects. First, they assert that he erred by permitting the Brown Schools to use the property as a juvenile detention center in contravention of the terms of Condition 2 of Ordinance No. 86-A38. They also contend that, since the intended use of the property is different from that originally approved, the County failed to require compliance with the major

modification provisions found in Section 2224(B) of the Code. Appellants further argue that the Brown Schools' use of the property represents a change in use under Section 2020 of the Code, and that the decision of the Director to sustain that use is a departure from the essential requirements of the law. Finally, Appellants contend that the decision of the Director permits development on the property, but does not require that the Brown Schools obtain a development order, as contemplated by the Code. For the reasons expressed below, these contentions, which are all interrelated, are found to have merit.

34. As a "core basis" for his July 21 decision, the Director relied upon the fact that because the Board used the term "facility" rather than "hospital" in the zoning ordinance, the Board did not intend to limit the use of the property to only psychiatric hospitals, but rather it intended to allow any "facility" with a psychiatric component. The use of the term "facility" rather than "hospital" in Condition 2, however, was both logical and consistent with the statutory scheme then governing hospitals. When Community Care received its Certificate of Need in 1984, hospitals were governed by the Health Facilities and Health Services Planning Act (Act), then codified in Chapter 381, Florida Statutes (1983). Consistent with the title of the Act, a hospital was defined

as a "health care facility." See Section 381.493(3)(g), Florida Statutes (1983), which defined a "health care facility" as including "a hospital, skilled nursing facility, intermediate care facility, ambulatory surgical center, or freestanding hemodialysis center." By using the term "facility" in Condition 2, it must be assumed that even under the most liberal interpretation of the term, the Board intended to permit only those institutions which were then defined as a "facility" in Section 381.493(3)(g) to use the property, and to exclude all other uses, including a child-caring facility, or anything similar to the facility now being operated by the Brown Schools.

35. In addition, the use of the term "state guidelines" in Condition 2 rather than a specific statutory provision or administrative rule is not surprising, particularly since state laws or rules are frequently renumbered, repealed, or modified from time to time, and a specific statutory or rule reference could quickly become outdated. By way of illustration, hospitals are now licensed under Chapter 395, Florida Statutes (2000), rather than Chapter 381, Florida Statutes, and any reference to the latter statute in Condition 2 would have resulted in both confusing and outdated language.

36. The decision of July 21 also assumed that the Brown Schools' operation "can be considered a psychiatric care

facility," based on the information contained in the draft contract with DCF and the program summary submitted to the Director. While admittedly there is a psychiatric component to the program, the whole context of the program compels a conclusion that the Brown Schools intends to operate an involuntary juvenile detention facility cloaked under the guise of solely providing psychiatric services to children.

37. Further evidence that the Board intended to severely limit the uses allowed on the property is found in the minutes and record of its meeting on July 26, 1986. Before it adopted Ordinance No. 86-A38, the Board accepted representations from the applicant that admissions to the hospital would be voluntary or by short term civil commitment papers; that there would be no court commitments, criminally insane, or special problem cases; that there would be no violent or dangerous type patients treated at the facility; that patient referral would be self-voluntary, by physician, or other local health professional, or by transfer from local general hospitals, and by law enforcement if no charges were pending. By accepting such representations from the applicant, and making them a part of the Ordinance, it is evident that the Board intended to avoid such uses as the detention of violent juveniles, and that it never intended to allow the facilities on the property

to be used to accept law enforcement referrals, court commitments, or other non-voluntary commitments.

38. It is clear, then, that the purpose of the rezoning was to permit the construction and operation of a private psychiatric hospital, and that the Board intended to severely limit the uses allowed on the property as a result of the concerns voiced at the Board meeting where the zoning ordinance was adopted. Accordingly, the only reasonable construction of the evidence is that the applicable zoning ordinance prohibits the use of the property as a juvenile detention center. By construing the Ordinance and Condition in a different manner, the Director departed from the essential requirements of the law.

39. At the same time, the Brown Schools' intended use of the property is for operations that are new and different from uses approved in the approved planned development, and that the new use constitutes development. "Development" is defined in relevant part in Subsection 1500F. of the Code as "the making of any material change in the use or appearance of any structure or land." A "change in use" is defined in Section 2021 as "any change of the purpose or activity for which a piece of land or its buildings is designed, arranged or intended, or for which it is occupied or maintained." Therefore, any change of the purpose or activity is deemed a

change in the use of land and such a change constitutes development. If a change in use is determined to be inconsistent with the existing zoning classification, as it is here, then the change must be approved through the "development order" process under the Code.

40. The current and proposed use of the property by the Brown Schools is "development" and presents an example of a "change in use." As noted above, the permitted use of the property according to Condition 2 is limited to a 60,000 square foot (88 bed) psychiatric care facility in accordance with State guidelines. Because the Brown Schools are essentially operating a juvenile detention center on the property, which constitutes a major modification of the previously approved plan of development, the Director departed from the essential requirements of the law by not requiring the applicant to seek approval for the change through the "development order" process in the Code.

41. In summary, by permitting the Brown Schools to operate in violation of the applicable controlling zoning ordinance terms, and allowing a new change in use and development on the property without requiring the applicant to follow the development order process, the Director did not apply the correct law, and he departed from the essential requirements of the law. No reasonable construction of the

evidence supports a contrary conclusion. Therefore, the July 21 decision should be reconsidered.

42. In addition to the foregoing reasons, the record also shows that the May 9 decision is not supported by competent substantial evidence. For an action to be sustained under the competent substantial evidence standard of review, "it must be reasonably based [on] the evidence presented." Town of Indialantic v. Nance, 400 So. 2d 37, 40 (Fla. 5th DCA 1981), approved, 419 So. 2d 1041 (Fla. 1982). In the case at bar, the May 9 decision was based solely on oral assertions made at a preapplication meeting and a one-page letter from the applicant. No other written information was provided regarding the true nature of the Brown Schools' operations prior to the issuance of the decision. As it turned out, the oral and written information submitted by the Brown Schools prior to the May 9 decision was not wholly accurate.

43. Likewise, the July 21 decision was predicated on program information submitted by the Brown Schools which clearly established the presence of a criminal element in every aspect of the Brown Schools' programs given the nature of the competency restoration program. The criminal element was not contemplated, and was specifically rejected, by the Board when adopting the applicable zoning ordinance. Thus, the intended use conflicted with the applicable zoning

conditions and the intent of the Board in adopting the site-specific conditions. Accordingly, the Director did not have sufficient competent evidence upon which to base his decision.

44. Appellants' final contention is that the letter of July 25, which allowed the Brown Schools to erect a chain-link fence on the property, also constituted a major modification of the approved planned development for two reasons: the original site plan submitted in 1986 did not include a perimeter fence, and the Board approved the zoning only after accepting a representation from the applicant that the hospital building would be "without bars, gates or fences." Given these considerations, which were not contradicted, it is concluded that the erection of a fence constitutes a modification of a final development plan within the meaning of Section 2224C.9., since it represents a "change in a condition specifically required by the [Board] as part of the final approval." Therefore, in this respect, the Director departed from the essential requirements of the law, and his decision of July 25 should be reconsidered.

45. In reaching the above conclusions, the undersigned has considered a contention by the Brown Schools that if the property is restricted to a licensed hospital, then the facility must remain vacant until AHCA determines that additional hospital psychiatric beds are needed in Citrus

County, and the occupant of the property obtains a Certificate of Need. They go on to argue that such a result may constitute a temporary or permanent taking of their property. However, because this matter is not a concern in a land use proceeding, it need not be reached.

46. Finally, by letter filed on August 1, 2000, counsel for Appellants in Case No. 01-1119 has suggested that the Code does not authorize the filing of exceptions to this Recommended Order, notwithstanding a reservation of such rights found in the Brown Schools' Proposed Recommended Order. Since the County administers the Code, that decision is reserved for the County when this matter is reconsidered. Parenthetically, however, it is noted that exceptions were filed by the parties in the only other contract case referred by the County to the Division of Administrative Hearings (DOAH Case No. 99-0147).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Director of Development Services reconsider his decisions of May 9, July 21, and July 25, 2000, for the reasons expressed in this Recommended Order.

DONE AND ENTERED this 15th day of August, 2001, in Tallahassee, Leon County, Florida.

_____
DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 15th day of August, 2001.

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