STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWIN HANDTE, Appellant, vs. MONROE COUNTY PLANNING COMMISSION, BILL BRUCATO, and KEY LARGO PRODUCE, Appellees.	)	Case No. 02-0477

FINAL ORDER

On or about July 27, 2001, the Monroe County Building Department (Department) issued Permit No. 01-3-2249, based on an application filed by William I. Brucato (Brucato), d/b/a Key Largo Produce (Brucato or Key Largo Produce) to construct a walk-in cooler and interior remodeling for an existing structure of 2,700 square feet, legally described as Block 11, Lots 13 and 14, located in Largo Sound Park, 103375 Overseas Highway, Key Largo, Monroe County, Florida, hereinafter referred to as the property.

Appellant, Edwin Handte (Handte), perfected his appeal of the Department's decision to the Monroe County Planning Commission (Commission). Commission staff recommended denial of Handte's appeal.

The Commission denied Handte's appeal after a hearing on the merits. The Commission decision is memorialized in Resolution No. P81-01, adopted by the Commission on November 28, 2001. Handte seeks review of the Commission's decision to deny his appeal. This appeal was timely filed.

Handte filed a Second Amended Brief and a Reply Brief, and the Commission filed an Answer Brief. Oral argument was held on August 19, 2002, and supplemented on August 26, 2002.[1]

The Division of Administrative Hearings, by contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code (M.C.C. or Code), has jurisdiction to consider this appeal.

I.

Issues on Appeal

Handte raises three basic issues on appeal: (1) whether there is competent substantial evidence to support the Commission's Findings of Fact that Brucato's use of the property and structure, i.e., as a retail/wholesale produce facility, is not a change of the prior nonconforming use of the property by Brucato's predecessor, Julio and Donna Guzman (Guzman), d/b/a All About Beauty and A Touch of Class; (2) whether there is competent substantial evidence to support the Commission's Findings of Fact that the Guzmans did not abandon or discontinue their nonconforming use of the property and structure for six

consecutive months; and (3) whether the Commission misapplied the Code.

II.

Facts

The following facts are gathered from the evidence presented to the Commission, which are contained in the Record.[2]

On December 12, 1985, the Building and Zoning Department of Monroe County, Florida, issued a building permit to Bill Lloyd, the owner of the subject property at the time, for a sewing center, land clearing, and fill. On March 7, 1986, the Monroe County Building Department issued a Certificate of Occupancy for the building located on the property to be used as a sewing center.

The building is 2,700 square feet and metal in composition. The property is located in an Improved Subdivision District (IS-M) land use district.

The building was originally used as a sewing center, which began operation on the property from March 1986 until in or around 1993 when the Guzmans (Julio and Donna) began the operation of a beauty salon, known as All About Beauty, in or around 1993.[3] The name, "A Touch of Class," also appears in the Record, and was created in 1993, at or around the same time as All About Beauty. Retail and wholesale beauty supplies were sold by All About Beauty.

Monroe County issued occupational licenses to Donna Guzman and All About Beauty, Inc., for the business address of the property, to expire on September 30, 2001.

Donna and Julio Guzman executed a sworn affidavit[4] on April 20, 2001, stating in part:

> 1. THAT they are the owners of real property located at 103375 Overseas Highway, Key Largo, Florida 33037.
>
> 2. THAT until April 13, 2001, inventory was being stored and goods were being wholesaled and retailed by Carmen Martel, agent for All About Beauty.
>
> 3. THAT as of this date, All About Beauty maintains a current business license, bank account with First State Bank and full-time yard service and parking agreements.

In or around June of 2000, Mr. Guzman placed the property and the building on the market for sale or lease. The building remained on the market and was actively shown by real estate agent Misty Pace until April 2001, when it was purchased by Brucato. Mr. Guzman placed hurricane shutters on the property at or around the time he listed the property for sale. One door was not boarded up in order to provide access to the building.

Whether the Guzmans abandoned or discontinued the use of the property from June of 2000 until April of 2001 was the subject of much debate before the Commission and is an issue which will be resolved in this appeal. (The Commission found

that the Guzmans did not abandon or discontinue their use of the property during this time.)

As noted, the Guzmans stated that they continued to store inventory in the building until April 13, 2001. Ms. Pace confirmed this statement. During cross-examination, Ms. Pace stated that "[t]he building was never abandoned." She also stated that she had been in the building during this time and that

> . . . [h]is [Mr. Guzman] daughter continued to sell beauty supplies. There was also Mr. Guzman's furniture in there from his house that he had been selling. There was also a full canvas operation in there that included machinery. There was [sic] a lot of boxes. When we showed the property we actually had to weed through some of the stuff. The building was full of his stuff. His daughter sold the stuff. I actually opened up the door to let people in to pick up some supplies that they had paid her for from her. She called me many times.

Ms. Pace stated that "[t]here was a full canvas shop," with "rolls and rolls of canvas. There was [sic] beauty supply stations with the sinks and the shampoo stuff, and all the equipment to go with beauty supplies." Customers bought beauty supplies there, but she was unaware whether "the canvas stuff" was sold. However, Ms. Pace opened "the door for a couple of people who called. [Mr. Guzman's] daughter called and said would you -- this lady is going to pick up her stuff. It was in boxes like this. He sold everything in big boxes," i.e., beauty

supplies were sold either in boxes or sold individually. Ms. Pace "bought 15 bottles of shampoo." This was when Mr. Guzman "was selling everything out." (Prior to becoming a realtor, Ms. Pace was a hairdresser and bought supplies from Mrs. Guzman.)

Ms. Pace also bought a dresser after Mr. Guzman left. (Mr. Guzman left the furnishings and "all of his stuff," i.e., beds, mattresses, living room sets, and refrigerators, from his house in the building, which "were continuously being sold by his daughter.")

During the time the property was for sale, Ms. Pace recalls three incidents when she opened the door to let them pick up beauty supplies.

The electricity to the building was terminated on or around April or June 2000. But according to Ms. Pace, the sales continued.

The Record also contains two receipts, July 10, 2000, and December 4, 2000, for beauty supplies, such as shampoo, curlers, combs, etc. It appears these products were sold out of the property. These receipts indicated that sales tax were calculated for each sale.

These facts are contrasted with other evidence of non-use.

A Department of Revenue facsimile to Handte's counsel dated November 27, 2001, stated that the sales tax accounts for All

About Beauty, Inc., and A Touch of Class were closed on June 30, 2000.

All About Beauty, Inc., with the same principal address as the property, was a Florida corporation, but voluntarily dissolved on August 14, 2000. The State of Florida, Department of Revenue reported that the sales tax accounts for All About Beauty, Inc., and A Touch of Class were closed on June 30, 2000. The electricity was terminated on or around April or June 2000.

Handte provided an affidavit and also testified that he has been a resident of Key Largo, Florida, for 19 years; that his office is located at 103365 Overseas Highway, Block 11, Lot 15 [the property in question includes Lots 13 and 14]; and further, that the Guzman building

> was boarded up with the exception of the front door. The power was turned off, the water was turned off, there was no business use of this property since the owner left. On April 27, 2001 power was restored to this building. . . .

Handte elaborated on his affidavit during the hearing. Handte is building a house adjacent to the rear of the property. His office building is zoned IS-M, the same as the property.

Handte confirms that the building (or structure) was not abandoned, only the use. There was a for sale sign on the property before Mr. Guzman left, until April 2001. According to Handte, only the front door was not boarded up to give access to

the realtors to show the property. Handte says there was no business conducted on the property from June 2000 until April 2001.

Several neighbors offered letters and testimony to support Handte's position that the property was not being used after June 2000.

Ross Bloodworth, living within 300 feet of the Brucato's business, was a friend of Mr. Guzman and helped "him pack up all of the supplies that he had from the beauty salon business so he could return those. And the only items that were kept in that business were of his personal property from his house." Mr. Bloodworth confirmed that the electricity was disconnected in April 2000. He clarified that he assisted Mr. Guzman in "packing up some of the beauty supplies that he had in the building, but he took care of relinquishing the supplies," i.e., "[Mr. Guzman] apparently probably sent them back to the people he had purchased it for credit." But, "pretty much all the beauty supplies was [sic] gone." Mr. Bloodworth also recalled Mr. Guzman had "some things in there for a boat canvas top repair shop that he had in there."

Richard Holt rents an office from Handte next to the property. He last saw Mr. Guzman at the dumpster around June 16, 2000. He did not see anyone else occupying the

building on the property until the new owner improved the property.

Also, several neighbors objected to a produce store being located in the neighborhood and raised concerns regarding, e.g., the rot and stench which will result - a health hazard, and increases in traffic. Several others signed petitions opposing the produce store.

Brucato purchased the property from the Guzmans in April 2001. Brucato's business on the property will be the retail sale of fruits and vegetables to the public. He also offers a delivery service off premises. He also intends to actively engage in a wholesale business at the property, but it is his intention to essentially engage in retail sales on the property. Brucato has not expanded the property since the purchase.

Brucato built an air-conditioned dumpster inside the building where it is enclosed. The garbage remains there until it is emptied (trash picked-up) when it is returned inside.

Brucato expects there will be normal traffic, although he does not know how many cars will visit the property because he "just got in." He picks up his produce from Miami.

Prior to purchasing the property, Brucato received a letter dated April 6, 2001, from Martin Schultz, Senior Planner, for Monroe County, which states:

> This letter is in response to your inquiry about operating a wholesale/retail produce facility at this site. According to the official Land Use District Map, this property is zoned Improved Subdivision (IS). The commercial building is greater than 2,500 square feet, which makes this building a non-conforming use. However, after consultation with the Sixth Edition of Trip Generation, published by the Institute of Traffic Engineers, staff had determined that both the current use and your proposed use are low-intensity commercial retail uses. Therefore, this does not constitute a disallowed change in use.
>
> It is not necessary for you to receive any approval from the Planning Department. However, please remember than [sic] anything you pursue for the site that is considered "development" (including signage) will require you to submit a site plan (and associated building permit applications) and bring the site into conformity to the maximum extent possible. In addition, since the use is non-conforming, only ordinary repair and maintenance is allowed. No enlargement of the use as an addition or occupancy of additional lands is allowed.

Marlene Conaway, planning director, opined that Brucato's intended use of the property is not a change in use of the property because his use is in the same classification of intensity (retail/wholesale) of use as his predecessor. Ms. Conaway also advised that a prior use would continue as long as the property was for sale. According to Ms. Conaway, this issue "has come up a number of times" and resolved in this manner.

In Resolution No. P81-01, the Commission made the following Findings of Fact and Conclusions of Law:

1. Bill Brucatto [sic], owner of Key Largo Produce, received permit # 01-3-2249, issued by the Monroe County Building Department on July 27, 2001.

2. Based on the application submitted, we find that Edwin Handte, a nearby neighbor in Largo Sound Park, appealed the issuance of the building permit on September 4, 2001.

3. Based on the evidence and testimony submitted, we find that the IS-M land use district permits commercial retail of low- and medium intensity and office uses or any combination thereof less than 2,500 square feet of floor area as a major conditional use and that the IS-M sub-district indicator refers strictly to detached dwellings of masonry construction, not commercial buildings. Therefore we find that the building, with 2,700 square feet of floor area, in the IS-M land use district is a lawful non-conforming structure due to its size.

4. Based on the evidence and testimony submitted, we find that the building permit was issued for an interior remodel and walk-in cooler. The interior remodel and walk-in cooler does not constitute a change of footprint to the structure thus there is no enlargement to the lawful non-conforming use and therefore we find that the structure does not have to come into further compliance in the IS-M land use district.

5. Based on testimony and evidence submitted, we find that The Sewing Center, All About Beauty and now Key Largo Produce, all retail/wholesale establishments, have held occupational licenses in this building since 1986. Section 9.5-144 of the Land District Regulations states that "a nonconforming use devoted to a use permitted in the land use district in which it is located may be continued in accordance with the provisions of this section. We find that an organic produce retail/wholesale

establishment is of the same land use intensity as the Sewing Center and All About Beauty retail/wholesale establishments. Therefore we find that Key Largo Produce as a retail/wholesale establishment can continue in this building as no change of use has occurred.

6. Based on evidence and testimony submitted, we find that the owner was old and or ill and chose to sell the property and go out of business and had no intent to abandon the property or its existing uses. We conclude that testimony confirmed that the property had been listed for sale on the real estate market at the time the owner had the power disconnected. Therefore, we conclude that the non-conforming use was not abandoned per Section 9.5-144(e)(1) of the Monroe County Code; and

7. Based on sworn testimony and evidence, we find that the Growth Management staff acted reasonably in their interpretation of the Monroe County Code in accordance with past practices and previous applicants in making the determination that the use had not changed and that the use had not been abandoned since the use was either in full operation as a retail/wholesale operation or on the real estate market for sale throughout June 2000; and

8. Based on the sworn testimony and evidence submitted, we find that the applicant acted in reliance on Growth Managements staff's understanding that the a [sic] wholesale/retail low-medium intensity use would be permitted to continue at the former location of All About Beauty; NOW THEREFORE,

BE IT RESOLVED BY THE PLANNING COMMISSION OF MONROE COUNTY, FLORIDA, that the preceding Findings of Fact and Conclusions of Law support it's [sic] decision to DENY the appeal of Edwin Handte for the Planning Department approval of building permit

> # 01-3-2249 for interior remodel and walk-in cooler.

III.

Legal Discussion

The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Article XIV, Section 9.5-535, M.C.C. The hearing officer "may affirm, reverse or modify the order of the planning commission." Article XIV, Section 9.5-540(b), M.C.C. The scope of the hearing officer's review under Article XIV is:

> The hearing officer's order may reject or modify any conclusion of law or interpretation of the Monroe County land development regulations or comprehensive plan in the planning commission's order, whether stated in the order or necessarily implicit in the planning commission's determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record, and states with particularity in his order, that the findings of fact were not based upon competent substantial evidence or that the proceeding before the planning commission on which the findings were based did not comply with the essential requirements of law.

Id. "The hearing officer's final order shall be the final administrative action of Monroe County." Article XIV, Section 9.5-540(c), M.C.C.

In DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957), the Court discussed the meaning of "competent substantial evidence" and stated:

> We have used the term "competent substantial evidence" advisedly. 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 and 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 findings 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."

Id. at 916 (citations omitted.)

A hearing officer (Administrative Law Judge) acting in his or her appellate review capacity is without authority to reweigh conflicting testimony presented to the Commission or to substitute his or her judgment for that of the Commission on the issue of the credibility of witnesses. See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

The question before the undersigned is not whether the record contains competent substantial evidence supporting the

view of Handte; rather, the question is whether competent substantial evidence supports the findings made by the Commission. See generally Collier Medical Center, Inc. v. State, Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

The issue of whether the Commission "complied with the essential requirements of law" is synonymous with whether the Commission "applied the correct law." Haines City Community Development, 658 So. 2d at 530.

All of these concepts are particularly relevant here because there are conflicts in the evidence and the Commission resolved these conflicts contrary to Handte's position.

IV.

Article V of the Code regulates nonconforming uses. "The purpose of this article is to regulate and limit the continued existence of uses and structures established prior to the enactment of this chapter that do not conform to the provisions of this chapter. Many nonconformities may continue, but the provisions of this article are designed to curtail substantial investment in nonconformities and to bring about their eventual elimination in order to preserve the integrity of this chapter." Article V, Section 9.5-141, M.C.C. See also JPM Investment Group, Inc. v. Brevard County Board of County Commissioners, 818 So. 2d 595, 598 (Fla. 5th DCA 2002).

The Code expressly provides that "[n]onconforming uses of land or structures may continue in accordance with the provisions of this section." Article V, Section 9.5-143(a), M.C.C. (The Commission mistakenly cites Section 9.5-144, which pertains to "nonconforming structures" and is not applicable here. Handte does not suggest that the structure on the property was abandoned. Rather, he claims that the "nonconforming use" was abandoned. Section 9.5-143, pertaining to "nonconforming uses," is applicable here.)

"Normal maintenance and repair to permit continuation of registered nonconforming uses may be performed." Article V, Section 9.5-143(b), M.C.C. "Nonconforming uses shall not be extended" and "[t]his prohibition shall be construed so as to prevent. . . [e]nlargement of nonconforming uses by additions to the structure in which such nonconforming uses are located" or ". . .[o]ccupancy of additional lands." Article V, Section 9.5-143(c)(1)(2), M.C.C.

Further, "[a] nonconforming use shall not be changed to any other use unless the new use conforms to the provisions of the land use district in which it is located." Article V, Section 9.5.143(e), M.C.C.

Finally, "[w]here a nonconforming use of land or structure is discontinued or abandoned for six (6) consecutive months. . . , then such use may not be reestablished or resumed,

and any subsequent use must conform to the provisions of this chapter. . . ." Article V, Section 9.5-143(f)(1), M.C.C.

It appears that these land use regulations should be strictly construed. See, e.g., County Council of Prince George's County v. E.L. Gardner, Inc., 293 Md. 259, 443 A. 2d 114 (1982). See also Lee v. City of Jacksonville, 793 So. 2d 62, 67 (Fla. 1st DCA 2001)(Browning, J., dissenting)("An ordinance is construed according to the enacting body's intent, and as the ordinance affects real property, strict construction is required." (citation omitted.))

Further, it is a fundamental rule of statutory construction that statutory provisions which are part of the same act, here the Code, should be read in pari materia. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So. 2d 522 (Fla. 1973); Hernandez Investment Group, Inc. v. Monroe County, Florida, Case No. 97-4581 (DOAH Final Order June 5, 1998).

V.

The first issue to resolve is whether there is competent substantial evidence to support the Commission's findings that Brucato's intended use of the property is a continuing nonconforming use of his predecessors use.

What is a change in a nonconforming use has been the subject of debate. See, e.g., 7 Fla. Jur. 2d, Building,

Zoning, and Land Controls, Section 207, (1997); 83 Am. Jur. 2d Zoning and Planning, Sections 660-690 (1992).

Article VII of the Code provides for "land use districts." Section 9.5.231 provides for "permitted uses" and states in part: "No structure or land in Monroe County shall hereinafter be developed, used or occupied unless expressly authorized in a land use district in this division." Article VII, Section 9.5-231(a), M.C.C.

The property is located in the Improved Subdivision (IS-M) land use district. (A "land use" includes "[a] use that is permitted or permissible on the land under the plan, or element or portion thereof, of land development regulations. Article I, Section 9.5-4(L-3(c), M.C.C.) This land use district authorizes commercial retail of low and medium intensity and office uses or any combination thereof of less than 2,500 square feet of floor area as a major conditional use. Article VII, Section 9.5-242(d)(1), M.C.C. Subsection 9.5-242(d)(1) provides for a general classification of land uses (commercial retail/office uses or any combination thereof) within the land use district, based on the level of intensity and square footage, not specifically on type or kind of use.[5]

The Guzmans' previous use of the property was nonconforming because the building is 2,700 square feet, or 200 feet in excess

of the allowable limit. (Brucato does not intend to extend or add to the size of the building.)

While the details of the prior use of the property are limited, there is evidence that All About Beauty and the Sewing Center operated in the building (on the property) as retail and wholesale commercial businesses since 1986, and that these uses are categorized as low-intensity commercial retail pursuant to Section 9.5-4(C-14(a)) of the Monroe County Code. There is also evidence from Brucato that his business will be the retail sale of fruits and vegetables to the public, with sales also at wholesale.

Planning staff, including Ms. Conaway, concluded that Brucato's intended use did not constitute a change in use because the prior and subsequent uses of the property were sales at retail and wholesale. Ms. Conaway also explained that there is no change in use because both uses maintained the same level of intensity.

With respect to traffic, again the evidence is limited and in dispute, but Brucato did not believe Key Largo Produce would increase customer traffic beyond the "normal use," although he was unsure. Brucato also stated that he would not add new parking spaces nor add to the building. Further, Senior Planner Schultz advised Brucato that "after consultation with the Sixth Edition of Trip Generation, published by the Institute of

Traffic Engineers, staff has determined that both the current use and [Brucato's] use are low-intensity commercial retail uses. Therefore, this does not constitute a disallowed change in use." ("Commercial retail low-intensity means commercial retail uses that generate less than fifty (50) average daily trips per one thousand (1,000) square feet." Article I, Section 9.5-4(C-14(a)), M.C.C. (emphasis added.)) Handte produced evidence that traffic would increase, especially around the neighborhood.

It is the intent of the Code to limit the continuation of nonconforming uses under narrow circumstances. This is consistent with extant law.

Nevertheless, the Commission had the prerogative to consider and weigh all of the evidence on this issue and did so. It appears that the Commission and staff used a class of use analysis when comparing the prior uses of the property with Brucato's intended use. It does not appear that the Commission's (and staff) class of use approach is inconsistent with Subsection 9.5-143(e), where the Code provides for "permitted uses" by enumerated classifications within specified land uses districts, and specifically here regarding uses within Subsection 9.5-242(d)(1). But see Beyer v. Mayor and City Council of Baltimore City, 182 Md. 444, 34 A. 2d 765, 769 (1943)(rejecting class of use analysis where use was abandoned).

There is competent substantial evidence to support the Commission's Findings of Fact that Brucato's proposed use of the property is not a change in use. The Commission's Conclusion of Law on this issue is also supported by the record.

The next issue is whether there is competent substantial evidence to support the Commission's Findings of Fact that the Guzmans did not discontinue or abandon their use of the property after June 2000.

There is no definition of abandonment or discontinuance in the Code. However, whether property or a use of property has been abandoned or discontinued has also been the subject of debate. See, e.g., 7 Fla. Jur. 2d, Building, Zoning and Land Controls, Section 206 (1997); 83 Am. Jur. 2d, Zoning and Planning, Sections 682-690 (1992).

As a general rule, "[a]bandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property." Lewis v. City of Atlantic Beach, 467 So. 2d 751, 755 (Fla. 1st DCA 1985)(citations omitted). "Abandonment is a question of intent and he who asserts it has the burden of proving it." J.C. Vereen & Sons, Inc. v. City of Miami, 397 So. 2d 979, 981 (Fla. 3d DCA 1981)(citation omitted). Further, as noted by one court: "Discontinuance or abandonment involves more than mere cessation. It results from the concurrence of two factors: (1) an intent to abandon and (2) some overt act or

failure to act which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment." Quinnelly v. City of Prichard, 292 Ala. 178, 291 So. 2d 295, 299 (1974)(citations omitted).

Again, the evidence is in dispute. Ultimately, the Commission determined that the Guzmans did not abandon their nonconforming use, based on the Commission's findings that Mr. Guzman "chose to sell the property and go out of business and had no intent to abandon the property or its existing uses." The Commission accepted the evidence which indicated that "the use was either in full operation as a retail/wholesale operation or on the real estate market for sale throughout June 2000." The Commission also accepted the sworn testimony from Growth Management Staff, namely Ms. Conaway, that past practices had allowed for the continuation of nonconforming uses during the sale of a building or structure, where a nonconforming use transpired.

When the evidence is viewed in the light most favorable to the Commission's findings, there is competent substantial evidence to support the Commission's findings that the Guzmans continued their nonconforming, retail/wholesale operation from June 2000 through April 2001. As a result, the Commission's ultimate finding, that the Guzmans did not abandon or discontinue their nonconforming use, is supported by the record.

The Commission's Conclusion of Law regarding this issue is also supported by the record.

DECISION

Based upon the foregoing, the Commission's decision to deny Handte's appeal is AFFIRMED.

DONE AND ORDERED this 8th day of October, 2002, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
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Filed with the Clerk of the
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this 8th day of October, 2002.

ENDNOTES

[1/] During oral argument, the parties were advised that three documents referred to in the Commission Resolution were missing from the Record on Appeal (Record), page 90; items 1, 4, and 5, i.e., the building application permit, a memorandum of the Monroe County Code Enforcement Inspector Yoli Krauss; and a memorandum from Raj Shanmugam of URS referencing land intensity and change of use. The parties coordinated their efforts to locate these documents. The Commission filed a Motion to Supplement the record with these documents, which were attached to the Motion. Handte objects only to the third item, which he says was not introduced during the hearing. The Commission has not filed a response. Based on the objection and a review of the Record, the Record is supplemented only with the first two documents and not the memorandum from Raj Shanmugam.

[2]/ See Article XIV, Section 9.5-538, M.C.C. for the contents of the Record, which includes "[a]ll applications, memoranda, or data submitted to the [C]omission" and "[e]vidence received or considered by the" Commission.

[3]/ The Guzmans' use of the building/structure was a nonconforming use because the floor area was (and continues to be) 2,700 square feet, which exceeds the 2,500 square foot maximum floor area for property designated as commercial retail of low and medium intensity. See Article VII, Section 9.5-242(d)(1), M.C.C. Handte argues that Brucato has changed the use of the property and, as a result, such use is a major conditional use subject to conformity with other, more stringent criteria in the Monroe County Code.

[4]/ There was some discussion during the Commission hearing regarding whether the affidavit was before the Commission. Handte's counsel had a copy and the staff report of November 2, 2001, reflects consideration of the affidavit. Chair David C. Ritz announced that the Commission had one copy of the affidavit and it would appear that the affidavit was considered by the Commission in reaching its decision. (Record, pages 8 and 119).

[5]/ Contrary to Handte's position, the Commission properly applied the current provisions of the Code in this case. See generally Dowd v. Monroe County, 557 So. 2d 63 (Fla. 3d DCA 1990), cause dismissed, 564 So. 2d 488 (Fla. 1990).

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NOTICE OF RIGHTS

Pursuant to Article XIV, Section 9.5-540(c), M.C.C., this Final Order is "the final administrative action of Monroe County." It is subject to judicial review by common law petition for writ of certiorari to the circuit court in the appropriate judicial circuit.