STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES ROBERT LAWSON, SR., d/b/a UNIFIED CREDIT TRUST,	)	
Appellant,	)	
vs.	)	Case No. 02-3169
MONROE COUNTY PLANNING COMMISSION,	)	
Appellee.	)	

FINAL ORDER

Appellant, James Robert Lawson, Sr. (Lawson), seeks review of Monroe County Planning Commission (Commission) Resolution No. P14-02, which denied Lawson's application, filed under Article X, Section 19-218, Monroe County Code (M.C.C.), for a beverage use permit, classification 2-APS (beer and wine package sales). Lawson's appeal was timely filed. The Division of Administrative Hearings, by contract, and pursuant to Article X, Section 19-218(i), and Article XIV, Section 9.5-535, M.C.C., has jurisdiction to consider this appeal. Lawson submitted an Initial Brief and a Reply Brief. The Commission submitted an Answer Brief. Oral argument was presented during a telephone hearing held on November 24, 2003.

I. Issues

Lawson raises two issues on appeal: (1) whether the Commission misinterpreted and misapplied Article X, Section 19-218, M.C.C.; and (2) whether the Commission's decision was supported by competent substantial evidence.

II. Background

Lawson owns real property located on the Overseas Highway (U.S. Highway 1), southbound, at mile marker 99.5 in Key Largo, Monroe County, Florida. The property also is bounded on the opposite (east) side by State Road (SR) 905 (Old State Road 4A), northbound. The property boundary to the south is adjacent to a NAPA auto parts store which also faces the Overseas Highway. To the north, the property tapers as the roads converge.

Lawson leased the property to the Eckerd Corporation (Eckerd) for construction and operation of a full-service pharmacy and retail store. On Eckerd's behalf, Lawson applied for and in June 2000 obtained the necessary minor conditional use approval under Article III, Section 9.5-68, M.C.C. In order to obtain this approval, Lawson obtained a setback variance so that all required parking spaces would be within all of the property's setbacks. Lawson also obtained a variance for a second access from the Overseas Highway at the southern end of the property for a driveway to be used both for truck deliveries at the back (south side) of the proposed Eckerd store building

and for a drive-through pharmacy facility also at the back of the store. (Also proposed were an access further north to and from the Overseas Highway into the customer parking lot and an exit to SR 905, northbound, from the delivery truck/drive-through pharmacy driveway after it wrapped around the back (southern) end of the building.) After the necessary approvals were obtained, the store was built and began operations.

III. Proceedings Below

In August 2001, Lawson applied under Article X, Section 19-218, M.C.C., for a beverage use permit, classification 2-APS (beer and wine package sales), for the property. A public hearing before the Commission was scheduled for September 26, 2001.[1] A staff report prepared by Warren Mallet, Senior Planning Technician for the Monroe County Planning Department, recommended approval, but Jill Patterson, a member of the public, testified about problems with traffic congestion and access relating to delivery trucks at the site. Specifically, she testified that delivery trucks were not using the access driveway and loading zone designated for that purpose, or were using it but then backing into the southbound Overseas Highway to exit to the south instead of following the designated driveway and exiting on the other side of the property at the designated exit into northbound SR 905. She described how these maneuvers caused traffic hazards in the driveways and parking

areas on the property, on the public highways adjacent to the property, and for newly-constructed bicycle path which passed between the property and the Overseas Highway, "at what has been known to be quite a dangerous intersection." Her testimony was supported in part by a newspaper photograph of a bicyclist heading north on the new bicycle path swerving into on-coming traffic on the Overseas Highway to get around a delivery truck parked on the bicycle path.[2] Mallet stated that he had been unaware of these problems and suggested that further consideration should be given to the matters to the issues raised by Patterson. The Commission decided to continue the public hearing until October 24, 2001.

In the meantime, Mallet revised his staff recommendation to recite the setback and access variances previously obtained by Lawson as part of the minor conditional use approval for the site. He also reported a proposal submitted by Eckerd on October 9, 2001, "to schedule all Eckerd warehouse truck deliveries to occur between the hours of 6:00 a.m. to 7:00 a.m., to reduce traffic disruption, and to instruct all vendor delivery drivers to use the proper loading zones without blocking access to the bike path, or to use the NAPA parking lot to accommodate delivery trucks." Mallet again recommended approval but conditioned upon "proper use of the access lane and loading zone as shown on the access variance originally granted"

and reconsideration of the approval if there are further violations of the access and loading requirements.

At the public hearing on October 24, 2001, Mallet presented his staff report, and Mary Boaz, a regulatory attorney for Eckerd, presented Eckerd's plans to resolve any traffic and access problems caused by delivery trucks. However, Patterson again testified (along with another member of the public) essentially to question the effectiveness of the plan. She questioned the wisdom of basing approval on the willingness of the NAPA store to allow Eckerd delivery trucks to use up to half of the NAPA parking lot during regular store hours. Patterson also testified, supported by photographs, that use of the NAPA store parking lot by Eckerd delivery trucks as proposed would be problematic due to a "stormwater retention wall at the edge of the driveway between the Eckerds and Napa [sic] property." She also testified, with the help of photographs, that trucks making deliveries to the Eckerd store continued to violate the access and loading zone requirements both before and after Eckerd made its proposal and that, even when using the designated access and loading zone, deliveries blocked the drive-through pharmacy facility, potentially causing cars waiting to use it to line up behind the truck and onto the bicycle path on the Overseas Highway.[3] Another witness described the traffic hazards peculiar to the site. Finally, the public witnesses questioned whether

it was realistic for Eckerd to think it could restrict truck deliveries to between 6:00 a.m. and 7:00 a.m.

The testimony and evidence led to extensive discussion by members of the Commission and questions directed to Boaz and the store manager, John Padilla. It was explained that Eckerd's plan was to limit deliveries by the large Eckerd-owned delivery trucks to the hours from 6:00 a.m. to 7:00 a.m.; that only those trucks would use the NAPA parking lot; and that the Eckerd trucks would back up to the low retaining wall between the Eckerd driveway and the NAPA store. Eckerd conceded that it would be difficult to control the delivery trucks of other vendors and that the addition of beer and wine sales would add five deliveries a week by large non-Eckerd delivery trucks. In addition, Eckerd ultimately conceded that it probably could not get a written agreement from the NAPA store for Eckerd delivery trucks to use the NAPA store's parking lot; the permission had been given "out of the goodness of [the NAPA store manager's] heart" and could be withdrawn at any time.

Based on the discussion, at least a majority of the Commission appeared concerned that adding beer and wine sales at the Eckerd location would exacerbate a bad situation. However, the Commission decided to continue the hearing until November 28, 2001, to allow Eckerd and staff an opportunity to present additional assurances.

On November 5, 2001, staff changed its recommendation to "denial based on the section 3, the access, traffic generation, road capacity, parking requirements."[4] Subsequently, the Commission received five additional letters from members of the public opposing Lawson's application on similar grounds.

The final phase of the public hearing on Lawson's application was continued from November 28, 2001, to February 27, 2002. At that time, Lawson presented the testimony of an expert planner named Donald Craig, an Eckerd district manager named Jay Palen, and the store manager, John Padilla. They testified to steps being taken by Eckerd to address the delivery truck problems. Craig testified that, in additional to restrictions on delivery times being given to truck drivers both orally and in writing, Eckerd had a sign posted at the back of the store warning that deliveries would be refused if parked illegally. In addition, Craig was recommending two additional signs, one on either side of the building and visible from the roadway, advising that all deliveries were to be made at the rear of the store. Palen explained that beer and wine deliveries were being consolidated to reduce the number of additional deliveries from five to three a week. Palen stated that these trucks could fit within the designated loading zone and be clear of the bicycle path and advised that a secondary loading zone also had been designated. Palen also explained the

time restrictions on delivery: all deliveries were to be made between the hours of 6:00 a.m. and noon, when two store managers were on duty to help monitor deliveries for compliance. Finally, Palen stated that Eckerd's own trucks were now using the access driveway and loading zone properly, not backing in and stopping with the front end of the truck in the bicycle path (as he apparently believed was happening during the first month of operations). Padilla essentially corroborated Palen's testimony. However, Patterson then testified that violations of the access and loading zone requirements continued. Trucks were still parking in the deceleration lane of northbound SR 905, and some trucks were backing out of the loading driveway into traffic on the southbound Overseas Highway because they were too large to negotiate the turn around the corner at the rear of the building to use the designated exit to northbound SR 905. In the discussion by Commission members that followed, one member stated that he also had personally observed a recent violation of the access and loading zone requirements (truck parked in front of the store) and another stated that he saw three passenger cars parked in the grass between the property and the Overseas Highway. The Commission voted 4-1 to deny the application, as recommended by staff.

The Commission's Resolution P14-02 denying Lawson's application was rendered on June 12, 2002. It was based on the following Findings of Fact:

1. Based on the site plan and land use district maps, we find that the proposed Alcoholic Beverage Use is an approved use in the Suburban Commercial (C) land use district, but that this location has experienced numerous problems with the delivery of products for its present use as a retail store as shown by the photographic evidence presented and the testimony of members of the public. In addition, we find that the remedial action proposed by the applicant to post signs at the delivery entrance and notify suppliers of the delivery requirements for the property will not sufficiently correct the problems connected with deliveries to this location. Therefore, we conclude that the addition of a 2-APS Alcoholic Beverage License will cause adverse effects upon the surrounding properties by exacerbating the existing problems caused by the delivery trucks presently servicing the site; and

2. Based on the application, site plan, testimony of staff, testimony of members of the public and photographic evidence presented, we find that the addition of retail sales of alcoholic beverages will entail more deliveries and cause an additional impact on the access, traffic generation, road capacity and parking on the site. Therefore we conclude that there will be adverse effects upon access, traffic generation and road capacity; and

3. Based on the application, site plan and testimony of staff, we find that while the current retail use is a permitted use, and complied with or received a variance to all the requirements of the Monroe County Land Development Regulations (LDRs) when a Certificate of Occupancy (#990947) was issued on June 6, 2001, the site use is compatible only with the existing retail store, and that no further expansion of the use by the addition of a 2-APS Alcoholic Beverage License can be permitted.

IV. Scope and Standard of Review

Article XIV, Section 9.5-540(b), M.C.C., provides:

> Within forty-five (45) days of oral argument, the hearing officer shall render an order which may affirm, reverse or modify the order of the planning commission. 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.

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

Article XIV, Section 9.5-540(b), M.C.C., does not allow the hearing officer to disturb the findings of fact of the unit of Monroe County government below (in this case, the Commission) unless they are "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." In this case, Lawson challenges the Commission's findings of fact only on the ground of competent substantial evidence.

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 on appeal is not whether the record contains competent substantial evidence supporting the view of the appellant; rather, the question is whether competent substantial evidence supports the findings made by the Commission. Collier Medical Center, Inc. v. State, Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

V. First Point on Appeal

Lawson first contends that the Commission misapplied or misinterpreted Article X, Section 19-218, M.C.C., so as to make it directly conflict with Section 562.45, Florida Statutes (2003). Specifically, Lawson contends that the ordinance should not be interpreted so as to authorize the Commission to deny Lawson's application because trucks delivering alcoholic beverages to the premises would exacerbate traffic congestion and access problems already being caused by trucks making other deliveries there.

Section 562.45(2), Florida Statutes, provides in pertinent part:

> (a) Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefore, of any licensee under the Beverage Law within the county or corporate limits of such municipality. . . .
>
> * * *
>
> (c) A county or municipality may not enact any ordinance that regulates or prohibits those activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law. Except as otherwise provided in the Beverage Law, a local government, when enacting ordinances designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state. Nothing in this section shall be construed to affect or impair the enactment or enforcement by a county or municipality of any zoning, land development or comprehensive plan regulation or other ordinance authorized under ss. 1, 2, and 5, Art. VIII of the State Constitution.

Thus, while Section 562.45(2)(c), Florida Statutes, generally preempts most authority of local governments to regulate the sale of alcoholic beverages, it reserves limited authority to local governments, including the authority to regulate the

location of the place of business where alcoholic beverages are sold, so long as ordinances enacted for that purpose treat state beverage licensees "in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state."

Article X, Section 19-218, M.C.C., provides in pertinent part:

> (a) Purpose and Intent: This section is designed and intended to provide for reasonable regulation and control over the sale of alcoholic beverages within the unincorporated areas of Monroe County by establishing an alcoholic beverage use permit procedure and providing criteria to be utilized to assure that all future proliferation of alcoholic beverage use enterprises within the unincorporated areas of the county be compatible with adjoining and surrounding land uses and the county's comprehensive plan, and that alcoholic beverage use permits not be granted where such uses will have an adverse impact upon the health, safety and welfare of the citizens and residents of the county. . . .
>
> * * *
>
> (e) Criteria: The planning commission shall give due consideration to the following factors as they may apply to the particular application prior to rendering its decision to grant or deny the requested permit:
>
> > (1) The effect of such use upon surrounding properties and the immediate neighborhood as represented by property owners within five hundred (500) feet of the premises. For the purposes of

> this section, "premises" shall mean the entire project site of a shopping center.
>
> (2) The suitability of the premises in regard to its location, site characteristics and intended purpose. Lighting on the permitted premises shall be shuttered and shielded from surrounding properties, and construction of such permitted properties will be soundproofed. In the event music and entertainment is permitted, the premises shall be air conditioned.
>
> (3) Access, traffic generation, road capacities, and parking requirements.

The Commission did not misapply or misinterpret Article X, Section 19-218. It is reasonably clear that, in deciding whether to grant Lawson's application under the ordinance, the Commission can consider exacerbation of existing traffic congestion and access problems by trucks that would deliver alcoholic beverages to the premises under criterion (3), as asserted by the Commission. It probably also could have considered those factors under criterion (2).

It is concluded that this interpretation falls within the authority of a local government under Section 562.45(2)(a), Florida Statutes, to regulate the locations of places of business where alcoholic beverages are sold.

It also is concluded that the Commission's interpretation of Article X, Section 19-218, M.C.C., does not discriminate against Eckerd, an alcoholic beverage licensee, in violation of Section 562.45(2)(c), Florida Statutes. First, to the extent that it could be considered a form of "discrimination," regulation of the "hours of business and location of place of business" where alcoholic beverages are sold is specifically authorized by Section 562.45(2)(a), Florida Statutes. Second, the Commission considers essentially the same factors in regulating non-licensees. For example, the Commission considered essentially the same factors in deciding Lawson's previous applications for access and setback variances, which were essential to his obtaining his minor conditional use approval for the Eckerd store without sale of alcoholic beverages. The Commission granted Lawson's variance and minor conditional use approval applications, but denied his beverage permit application, not so much because of the sale of alcoholic beverages in the latter case but because of the additional evidence available as to traffic congestion and access problems at the site. Implicit in the Commission's deliberations in this case was that Lawson's variances and minor conditional use might not have been approved on the evidence before the Commission in this case.

VI. Second Point on Appeal

Lawson also contends that the Commission erred in denying his application because the findings of fact supporting the Commission's decision were not based upon competent substantial evidence. But, as set out in Section III., Proceedings Below, supra, there was ample competent substantial evidence supporting the Commission's findings of fact in this case.

DECISION

Based upon the foregoing, the Commission's decision in Resolution No. P14-02 is AFFIRMED.

DONE AND ORDERED this 12th day of January, 2004, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2004.

ENDNOTES

[1]/ The Record-on-Appeal does not include a transcript of this part of the public hearing. However, Lawson included it in the Appendix to his Initial Brief, in addition to subsequent parts

of the public hearing convened on October 24 and November 28, 2001 (the latter just for purposes of considering a motion to continue the hearing again until February 27, 2002). The Commission also cited to Lawson's Appendix. As a result, the parties effectively agreed to supplement the Record-on-Appeal under Article XIV, Section 9.5-538(d), M.C.C., to include the transcripts in Lawson's Appendix.

[2]/ This photograph was described in testimony but was not included in the Record-on-Appeal.

[3]/ The photographs of the violations were in the Record-on-Appeal. The photograph of the truck blocking the drive-through facility was described as part of a "photo file" apparently relied on by staff as an "acceptable plan"; however, it was not included in the Record-on-Appeal.

[4]/ This staff report itself was not made part of the Record-on-Appeal. However, it was described in this manner in the transcript of the final phase of the public hearing on February 27, 2002, which was included in the Record-on-Appeal. The reference to "section 3" is to Article X, Section 19-218(e)(3), M.C.C. See section V., First Point on Appeal, infra.

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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.