

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPITAL CITY HOTELS, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 02-4237
)
 CITY OF TALLAHASSEE and AHG)
 HOTELS, LLC,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 10, 2002, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles R. Gardner, Esquire
Gardner, Wadsworth, Duggar,
Bist & Weiner, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308-7914

For Respondent: Linda R. Hurst, Esquire
(City) City Hall, Second Floor
300 South Adams Street
Tallahassee, Florida 32301-1731

For Respondent: James Marshall Conrad, Esquire
(AHG) Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302-0391

STATEMENT OF THE ISSUE

The issue is whether AHG Hotels, LLC's application for a Type B site plan and deviation should be approved.

PRELIMINARY STATEMENT

This matter began on September 11, 2002, when the Development Review Committee of Respondent, City of Tallahassee, approved a site plan filed by Respondent, AHG Hotels, LLC, which authorizes the construction of a 122-room, five-story hotel on a 2.23-acre parcel located just southeast of the intersection of Interstate 10 and Thomasville Road in Tallahassee, Florida. The Development Review Committee also approved a deviation from the development standards found in the Zoning Code and allowed the applicant to exceed a four-story height limitation.

On October 10, 2002, Petitioner, Capital City Hotels, Inc., which owns a hotel near the site of the proposed construction, filed its Petition for Formal Proceedings with the Tallahassee-Leon County Planning Commission challenging the deviation decision. Pursuant to that entity's By-Laws, the matter was then referred to the Division of Administrative Hearings on October 24, 2002, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

The matter was scheduled for a final hearing on December 10, 2002, in Tallahassee, Florida. At the final hearing, Petitioner presented the testimony of Cochran A. Scott, Jr., its managing partner. Respondent, AHG Hotels, LLC, presented the testimony of Thomas C. O'Steen, a land planning consultant; Timothy C. Metzner, owner of the property; and Royce J. Carter, a principal in AHG Hotels, LLC. Also, it offered Applicant's Exhibits 1-10, which were received in evidence. In addition, by agreement of counsel, Applicant's Exhibit 11 was received in evidence after the hearing had ended. Respondent, City of Tallahassee, presented the testimony of Dwight R. Arnold, Jr., environmental services administrator in the growth management department, and Wade L. Pitts, III, land use administrator in the growth management department. Also, it offered City Exhibits 1-12, which were received in evidence.

The Transcript of the hearing was filed on December 27, 2002. Proposed Findings of Fact and Conclusions of Law were filed by Respondents and Petitioner on January 13 and 14, 2003, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

a. Background

1. On September 11, 2002, the Development Review Committee (DRC) of Respondent, City of Tallahassee (City), approved a Type B site review application authorizing the construction of a Hampton Inn & Suites by Respondent, AHG Hotels, LLC (AHG). The DRC also granted AHG's request for a deviation from development standards contained in Section 10.6RR of the City's Zoning Code by allowing AHG to exceed the four-story height limitation and to add a fifth floor to the structure. Two other deviation requests by AHG were determined to be either inapplicable or exempt from Zoning Code requirements because of vesting, and thus they are not at issue here.

2. On October 10, 2002, Petitioner, Capital City Hotels, Inc. (Petitioner), which owns and operates a Hilton Garden Inn near the proposed construction, timely filed a Petition for Formal Proceedings to contest the approval of the deviation request. On October 15, 2002, a determination of standing as to Petitioner was issued by the Tallahassee-Leon County Planning Commission (Commission), which will issue a final order in this matter.

3. As stipulated by the parties at hearing, the only issue is whether AHG failed to satisfy three of the seven criteria that must be met in order for the DRC to grant a deviation. Those disputed criteria are found in paragraphs (iii)-(v) of Section 23.3 of the City's Code of Ordinances (Code) and provide as follows:

(iii) The deviation requested is the minimum deviation that will make possible the reasonable use of the land, building, or structure; and

(iv) The strict application of the requirements of this chapter will constitute a substantial hardship to the applicant, which hardship is not self-created or imposed; and

(v) There are exceptional topographic, soil, or other environmental conditions unique to the property;

The parties agree that all other criteria for the site plan and deviation have been satisfied by AHG. In addition, a related request by AHG for a technical amendment to the boundaries of the parcel will be granted by the DRC, assuming that AHG obtains a favorable ruling in this case.

b. History of the Property

4. The property which is the subject of this case is identified as lot of record 454 and fronts on the west side of Lonbladh Road, lies south of Raymond Diehl Road and several hundred feet east of Thomasville Road, and is just southeast of the major intersection of Interstate 10 and Thomasville Road in Tallahassee. The zoning for the property is

Commercial Parkway (CP), a mixed-use zoning district which applies to areas exhibiting an existing development pattern of office, general commercial, community facilities, and intensive automotive commercial development abutting urban area arterial roadways with high traffic volumes. Among the numerous permitted uses in that land use category are hotels and motels.

5. The property is part of a 7.1-acre site originally owned by Kingswood Land Partners, Ltd. (Kingswood). In January 1990, Kingswood obtained from the City a minor subdivision approval, dividing the 7.1 acres into three lots of record, including lot of record 454. The three lots consisted of a 2.44-acre lot running along most of the western portion of the property with the exception of a small area on the southern end, a 1.68-acre lot on the northeast portion of the property, and a 2.98-acre lot on the southeast portion of the property (lot of record 454).

6. In November 1990, Kingswood received from the City a verification of vested status (vested rights certificate) for the 7.1-acre site. The vested rights certificate provided that the 7.1-acre site was exempt from the consistency and concurrency provisions of the Tallahassee-Leon County Comprehensive Plan (Plan) and was vested for an 89,887 gross

square foot commercial non-medical office building and a 135-unit hotel/motel.

7. In 1991, Kingswood utilized the vesting for a 135-unit, five-story hotel and constructed what is now known as the Cabot Lodge on the 2.44-acre lot. It also constructed on part of the southeastern 2.98-acre lot a paved area with parking places.

8. In 1992, Kingswood conveyed to Twin Action Hotels, Inc. (Twin Action) the 2.44-acre lot which included the Cabot Lodge Hotel, but not the paved parking area on the 2.98-acre lot. The same year, Kingswood also conveyed to New Horizons Unlimited, Ltd. (New Horizons) the remaining two lots, which two lots were vested for a commercial non-medical office six-story building of 89,887 gross square feet.

9. At the time of the conveyances of the New Horizons property and the Cabot Lodge property to New Horizons and Twin Action, respectively, these parties entered into a Grants of Reciprocal Easements dated June 23, 1992, recorded in Official Records Book 1570, at page 1072 of the Public Records of Leon County, Florida.

10. Around 1994, the Florida Department of Transportation acquired .333 acres of the northernmost lot owned by New Horizons for a project which included realigning and four-laning Raymond Diehl Road and relocating the

eastbound entrance ramp to Interstate 10, immediately in front of the Cabot Lodge lot. This acquisition reduced the New Horizons 1.68-acre lot to 1.347 acres.

11. On October 14, 1998, the City approved a vested rights transfer request submitted by New Horizons, which provided that the New Horizons property could be used for a 107-room, four-story business hotel and 59,162 gross square feet of commercial non-medical offices, instead of the vested 89,887 gross square feet of commercial non-medical offices.

12. Since the acquisition by New Horizons of the two remaining lots, that property has remained vacant and unimproved with the exception of the westernmost portion immediately south of the Cabot Lodge building, on which is located pavement and parking spaces. The parking spaces are not legally available to Cabot Lodge for use.

13. The property located immediately west of the Cabot Lodge 2.44-acre lot is property which is referred to as the Thomasville Road Executive Park (Executive Park) property. On an undisclosed date, this property was divided into three separate lots by a minor subdivision approval consisting of Parcel A on which was constructed the Unisys Building and parking spaces, Parcel B which is now improved with a Hilton Garden Inn owed by Petitioner, and Parcel C which remains undeveloped.

14. In 1996, Petitioner filed its site plan application to develop Parcel B. Included in the site plan application was a request for a technical amendment to adjust the boundary lines between Parcels A and B of the Executive Park property. Like AHG has done here, Petitioner also requested a deviation to the then height limitation of 45 feet, requesting that the City allow it to build the building 50 feet high, rather than the required 45 feet. Although the property on which the Hilton Garden Inn is now located was vested for a three-story commercial office building, subject to CP zoning, the City agreed that the vesting could also be used for a hotel use consisting of four stories rather than three stories.

15. The City granted Petitioner's request to allow it to build a four-story hotel on Parcel B. It also granted Petitioner a height deviation so that the midpoint or peak of the roof would be not higher than 50 feet. However, the top of the roof is 59 feet, 6 inches. The facility has 99 rooms.

16. No objection was made by Cabot Lodge, Unisys, or New Horizons to Petitioner's application for approval of its site plan, the technical amendment adjustment to boundary parcels, the use of the property for a four-story hotel instead of a three-story office building, or the granting of a height deviation.

17. In April 2002, AHG entered into a contract with New Horizons for the purchase of 2.23 acres of the southeastern property owned by New Horizons for approximately \$1.5 million. The 2.23 acres is part of the 2.98-acre lot of record known as lot 454.

c. The application

18. On July 5, 2002, AHG filed with the DRC its site plan application to construct a 122-room, five-story hotel on the 2.98-acre lot. On the same day, it filed a Deviation from Development Standard Request asking that it be allowed to construct a five-story hotel on the parcel rather than being limited to a four-story hotel, as required by the development standards for the CP zoning district in which the property is located.

19. New Horizons has also requested a technical amendment to the boundaries of the 1.68-acre lot and the 2.98-acre lot that would result in the 2.98-acre lot on which the hotel will be built being reduced to 2.23 acres. The DRC intends to approve that request, assuming that AHG prevails in this proceeding.

20. AHG's site plan uses the largest footprint for construction of the hotel building that is allowed under current applicable Code restrictions relating to the amount of impervious surface allowed to be constructed on a 2.23-acre

lot, as well as the required amount of green space which must be maintained.

21. If current zoning rules and regulations are strictly applied, AHG would be unable to have more than approximately 107 rooms in the hotel, utilizing the maximum footprint and only four stories on the 2.23 acres. The only way to accommodate the construction of 122 rooms is to obtain a deviation from the current restriction of four floors and allow a fifth floor to be built.

22. The proposed height of construction of the five-story hotel will be 53 feet, 10 inches, except for several small areas of parapet walls which will be no higher than 58 feet, 4 inches.

23. The subject site is relatively flat, with no excessive slopes, and it has no remarkable features from an environmental standpoint. It is unique in the sense that it is flat, barren land. It does not have wetlands, pristine water bodies, or other protected conditions. Also, it has no endangered plant species requiring special protection, no patriarch trees, no protected trees, and no native forests.

d. Should the Deviation be Approved?

24. A deviation under Section 23.3 is an amendment to a "set requirement" in the Code, such as a setback or height restriction. Between 60 and 75 percent of all applications

filed with the DRC for a site plan approval are accompanied by a request for a deviation from a development standard, which are standards prescribed for each zoning district in the Code. One such development standard for the CP District is a four-story height limitation on structures found in Section 10.6RR of the Zoning Code.

25. The DRC is a four-person committee comprised of representatives from the City's Utility Department, Public Works Department, Growth Management Department, and Planning Department; it is charged with the responsibility of deciding whether to grant or deny a deviation request. For at least the last six years, and probably much longer, the DRC has consistently applied and interpreted the deviation standards in Section 23.3 in the same manner.

26. Although Section 23.3 provides that "the granting of deviations from the development standards in this chapter is not favored," they are not discouraged since more than half of all applicants cannot meet development standards due to site characteristics or other factors. Rather, the intent of the provision is to prevent wholesale deviations being submitted, project after project. Requests for a deviation are always approved, when justified, in order to give both the City and the applicant more flexibility in the development process. Here, AHG's application was treated the same as any other

applicant. This case represents the first occasion that an approval of a deviation has been appealed.

27. After an application for a deviation is filed, it is forwarded to all appropriate City departments as well as members of the DRC. Each reviewing agency is requested to provide information to the DRC members on whether or not the request should be recommended for approval. In this case, no adverse comments or recommendations were made by any City Department. After reviewing the Department comments, and the justification submitted by AHG, the DRC approved the deviation.

28. Under Section 5.1 of the Code, the City's land use administrator, Mr. Pitts, has the specific responsibility to interpret all zoning and development approval regulations, including Section 23.3, which provides the criteria for granting a deviation. That provision has an apparent inconsistency between the first two sentences: the first sentence includes a phrase that all criteria set forth thereafter must be met to approve a deviation while the second sentence appears to provide that only the conditions necessary to granting a particular deviation must be met.

29. In resolving this apparent inconsistency, Mr. Pitts does not construe the Section as requiring that all seven criteria must be met in every case. Instead, even though all

criteria are reviewed by the DRC, only those that are applicable must be satisfied. If this were not true, the DRC "would grant very few deviations as part of [its] site plan or subdivision regulation [process]," and the intent of the Section would be undermined. For example, in order to justify a deviation, the DRC does not require that an applicant show that there are exceptional topographical soil features if, as here, there are no exceptional environmental features on the property. This interpretation has been consistently followed over the years, is a reasonable and logical construction of the language, and is hereby accepted.

30. As a part of its application, AHG submitted a narrative justifying the granting of a deviation under each of the seven criteria. To satisfy the first disputed criterion, AHG indicated in its application that "[t]his deviation is the minimum allowed to make reasonable use of the property and to compete with adjacent hotels who enjoy the same height opportunity."

31. AHG's use of the property is consistent with adjoining developments, including the neighboring Cabot Lodge, which is five stories high and has 135 rooms, and the Hilton Garden Inn, which was originally vested for an office building, but was allowed by the DRC to construct a four-story hotel.

32. There is no other property available to AHG at this site on which to construct a hotel. The evidence shows that New Horizons initially offered to sell AHG only 2.05 acres; when AHG advised that anything less than 2.23 acres would render the project financially unfeasible, New Horizons "very reluctantly" agreed to sell an additional .18 acres. Because New Horizons intends to build a restaurant on its remaining 2.097 acres, any further reduction in the acreage would reduce its highest and best use of the property. Thus, AHG does not have the option of purchasing more property to expand its hotel laterally, as Petitioner suggests, rather than by adding a fifth floor.

33. In addition, AHG does not have the ability to reduce the size of its hotel rooms in order to squeeze more rooms out of a four-story structure. This is because Hampton Inn (the franchisor) will not grant a franchise for a new hotel unless the franchisee agrees to build a hotel with prototypical room sizes. The present design of the hotel meets the minimum size required.

34. There is no evidence that there is any other minimum deviation that could be granted which would make possible the use of the property for construction of 122 rooms under the standards set forth by Hampton Inn, the franchisor. Thus, the only practical adjustment that can be made is to obtain a

height deviation. Accordingly, the criterion has been satisfied.

35. To satisfy the second disputed criterion, AHG stated in its narrative that "[t]he strict application of this requirement would place this property and proposed hotel at a competitive disadvantage by a lower number of available rooms."

36. Through testimony of an AHG principal, it was established that in order for AHG to make reasonable use of its property, the addition of a fifth floor is necessary. The evidence shows that as a general rule, a developer can only afford to pay approximately \$10,000.00 per room for land cost. In this case, based on the 2.23 acres, at a purchase price of \$1,500,000.00 and a hotel with 122 rooms, the projected land cost is \$12,000.00 per room. This is the maximum that can be paid for land and still make AHG's project economically feasible. The strict application of the Zoning Code will make the project financially unfeasible, which will create a substantial hardship to AHG. The hardship is not self-created or imposed.

37. At hearing, Petitioner's representative contended that "there are some companies who would find it financially feasible" to construct a four-story hotel with fewer rooms on the same site. However, the more persuasive evidence on this

issue was presented by the AHG principal and shows the contrary to be true.

38. The evidence further shows that the granting of the deviation will result in an almost equal efficiency factor of the total square footage of building versus the total square footage of the site when comparing AHG's proposed project to the neighboring Cabot Lodge. On the other hand, strict application of the Zoning Code could result in a substantially less and disproportionate efficiency factor of AHG's property as compared to the adjoining Cabot Lodge. This is because the highest point of the proposed Hampton Inn and Suites is 58 feet, 6 inches, with the majority of the hotel being 51 feet high. The adjoining five-story, 135-room Cabot Lodge has its highest point at 55 feet, 6 inches, with the majority of the building at 46 feet high. The Hilton Garden Inn has the highest roof with its maximum height at 59 feet, 6 inches, which runs across the entire peak of the roofline.

40. To satisfy the final disputed criterion, AHG indicated in its application that "[t]he absence of any environmental features on this property, or any adjacent environmental features that might be impacted[,] help support the deviation."

42. As noted above, the property in question is unique in the sense that it is flat, treeless, and has no remarkable

environmental features. If a site is devoid of environmental features, as it is here, the DRC has consistently interpreted this provision as having no application in the deviation process. This is the same interpretation used by the DRC when it approved Petitioner's application for a height deviation in 1996 to construct the Hilton Garden Inn. Like AHG's property, Petitioner's property was also devoid of environmental features. Therefore, this criterion does not apply.

43. Even assuming arguendo that this provision applies, the addition of a fifth story to a four-story building has no impact whatsoever on the environmental characteristics of the site.

44. Finally, there is no evidence that the deviation request is inconsistent with the Plan, or that the deviation will have any adverse impact to the general health, safety, and welfare of the public. Indeed, as to any Plan implications that might arise through the construction of a hotel, the evidence shows that the project is wholly consistent with the purpose and intent of the CP land use category, which is to promote higher intensity and density in CP-zoned land and to discourage urban sprawl.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto

pursuant to Article XXIV, Sections 24.1 et. seq., Tallahassee Code of Ordinances.

46. Section 24.3.C. provides in part that a decision of the DRC

become[s] final fifteen (15) calendar days after [it is] rendered unless a party files a notice of intent to file a petition for formal proceedings in accordance with the bylaws and completes the application by filing a petition for formal proceedings within thirty (30) calendar days after the decision is rendered.

47. Here, a Petition for Formal Proceedings was timely filed by Petitioner. Once a standing determination is made, as it was here, Section 24.3.C. provides that the Commission shall "conduct [de novo] quasi-judicial proceedings in accordance with section 24.6 below." Therefore, a decision on whether the application should be approved should not be based solely on the evidence considered by the DRC on September 11, 2002, as Petitioner implicitly suggests, but rather it must be based on all evidence presented at the de novo hearing.

48. Among other things, Section 24.6.B. authorizes the Commission to "contract with the Division of Administrative Hearings for [administrative law judges] to conduct hearings on petitions for formal proceedings filed pursuant to subsection 24.3.C. above." In this case, the Commission has opted to refer the matter to the Division of Administrative Hearings.

49. While Section 24.6. fails to address the burden of proof in a Commission site plan proceeding, Section 23.3 does provide that the "applicant shall have the burden of demonstrating through a preponderance of the evidence that all conditions necessary to granting the deviation have been met." This is consistent with the general rule that the party seeking the affirmative of the issue should logically bear the burden of proving by a preponderance of the evidence that it is entitled to the requested relief. See, e.g., Durward Neighborhood Assoc., Inc. et al. v. City of Tallahassee et al., DOAH Case No. 98-4234 (City of Tall.-Leon Cty Plan. Comm., October 5, 1999). Thus, AHG is required to present a prima facie case of entitlement to a deviation, taking into account the objections raised by Petitioner.

50. Article XXIII of the Code (Sections 23.1, 23.2, and 23.3) governs the process for obtaining a deviation to development standards. Relevant to this controversy are the following provisions of Section 23.3 of the Code:

The granting of deviations from the development standards in this chapter is not favored and such requests may only be granted upon a showing that all criteria set forth below have been met. The applicant shall have the burden of demonstrating through a preponderance of the evidence that all conditions necessary to granting the deviation have been met. The entity with the authority to approve, approve with conditions, or deny a subdivision or site plan shall grant a

deviation under this section only upon demonstration that:

* * *

(iii) The deviation requested is the minimum deviation that will make possible the reasonable use of the land, building, or structure; and

(iv) The strict application of the requirements of this chapter will constitute a substantial hardship to the applicant, which hardship is not self-created or imposed, and

(v) There are exceptional topographic, soil, or other environmental conditions unique to the property;

* * *

51. In addition, Section 23.1 provides in part that a deviation "shall be granted only upon demonstration and a finding of consistency with the Comprehensive Plan and no adverse impact to the general health, safety, and welfare of the public."

52. The preponderance of the evidence supports a conclusion that AHG has satisfied all criteria for a deviation, and that the deviation is consistent with the Comprehensive Plan and will not adversely impact the general health, safety, and welfare of the public. This being so, AHG's applications for a Type B site plan and a height deviation should be approved.

RECOMMENDATION

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

RECOMMENDED that the Tallahassee-Leon County Planning Commission enter a final order granting AHG's Type B site plan review application and its application for a deviation from the height restriction for the CP land use category.

DONE AND ENTERED this 22nd day of January, 2003, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2003.

COPIES FURNISHED:

Charles R. Gardner, Esquire
Gardner, Wadsworth, Shelfer,
Duggar & Bist, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308-7914

Linda R. Hurst, Esquire
City Hall, Second Floor
300 South Adams Street
Tallahassee, Florida 32301-1731

John Marshall Conrad, Esquire
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302-0391

Jean Gregory, Clerk
Tallahassee-Leon County Planning Commission
City Hall
300 South Adams Street
Tallahassee, Florida 32301-1731

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this matter.