

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOROTHY PARKER,)	
)	
Appellant,)	
)	
vs.)	Case Nos. 03-2397
)	03-2398
MONROE COUNTY PLANNING)	03-2399
COMMISSION,)	
)	
Appellee,)	
)	
and)	
)	
TAYLOR POINT DEVELOPMENT)	
CORPORATION and ESTATE OF)	
KONSTANTINOS "GUS" BOULIS,)	
)	
Intervenors.)	
_____)	

FINAL ORDER

Appellant, Dorothy Parker (Parker), seeks review of Monroe County Planning Commission (Commission) Resolution Nos. P20-03, P21-03, and P22-03, approved by the Commission on March 26, 2003.¹ Parker's appeals were timely filed. The Division of Administrative Hearings, by contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code (M.C.C.), has jurisdiction to consider these consolidated appeals. Parker submitted an Initial Brief and a Reply Brief. The Commission and Intervenors submitted separate Answer Briefs. Oral argument

was presented during a telephone hearing held on November 17, 2003.

I. Issues

Parker raises four issues on appeal: (1) whether the Commission departed from the essential requirements of law by approving a transfer of 1,800 square feet of commercial floor area without consideration of a master plan for Key Largo in violation of Monroe County Comprehensive Plan (Plan), and Monroe County's NROGO (non-residential rate of growth ordinance), Article IV, Section 9.5-124(a)(5), M.C.C., and Plan Objective 101.20 and Policy 101.20.1; (2) whether the Commission erred in failing to require an affidavit of ownership from The Quay Restaurant (The Quay), the sender site, and whether the Commission violated procedural due process when it incorrectly referred to Section 9.5.265 instead of Section 9.5-124 in the published legal notice of hearing; (3) whether the Commission erred in authorizing the transfer of 1,800 square feet of commercial floor area to the receiver site pursuant to Article IV, Section 9.5-124(10)b.vi., M.C.C., which requires, in part, that the receiver site not be "located in a 'V' Zone pursuant to Section 9.5-124.8(a)(8)"; and (4) whether the Commission erred in approving a Major Conditional Use application by not requiring a variance for the site plan's parking, fire turning radius, and side yard setbacks.

II. Background

On or about January 28, 2003, Taylor Point Development Corp. (Taylor Point), by its agent, Donald L. Craig, A.I.C.P., The Craig Company, filed an application to transfer 1,800 square feet of commercial floor area from The Quay Restaurant (the sender site) on Key Largo, Monroe County, Florida. (Record on Appeal (R:) (R: 223, 345.))

The sender site has approximately 9,925 square feet of non-residential floor area, and was not in operation at the time the application was filed. The application refers to the sender site property owner as "KB Holdings." The application contains a document entitled "Sender Site Attachment A" (R: 225), which provides in part:

- PROOF OF OWNERSHIP: The owner of land who transfers non-residential floor area shall prepare an affidavit of ownership and an affidavit of intent to transfer in conformance with a form provided by the director of planning. The affidavit shall be filed with the director of planning at least thirty (30) days prior to the submission of an application for Transfer of Commercial Floor Area which will be reviewed as a Minor Conditional Use.

No such affidavits accompanied this application.

On or about January 28, 2003, a second application was filed on behalf of the receiver site and a Minor Conditional Use was requested. The applicant's name is Taylor Point Development Corp., and the application was filed by Mr. Craig. The receiver

site property owner is listed as Taylor Point Development Corp. The legal description of the receiver site property is provided: "See attached survey. A portion of Lots 8 & 10, Section 11, Township 61 South, Range 32 East on Key Largo, Model Land Company Plat." See (R: 258, 269) and discussion below. The street address is 10380 Overseas Highway, Key Largo, Florida. The existing use of the receiver site was listed as "conference rooms, ancillary offices and incomplete conference center." The gross floor area in square feet of the receiver site was represented to be 10,960 square feet.

The instructions to this receiver site application included, in part: "PROOF OF OWNERSHIP OF RECEIVING SITE: deed, lease or appending sale contract." (R: 259.) Included with the application was an authorization form signed under oath by Joan Wagner, a Personal Representative. (R: 261.) This authorization form stated, in part: "I, Joan Wagner, do hereby authorize Donald L. Craig and The Craig Company to act on my behalf in all matters pertaining to the filing of NROGO minor and any other conditional use applications for the transfer of Commercial Floor area from the "Quay" restaurant located on Key Largo to the Taylor Point Conference Center also located in Key Largo, Florida." Id.

The receiver site application also contains a Quit-Claim Deed executed October 1, 1994, by Twin Harbors, Inc. to Taylor

Point Development Corp., for land described as follows: "LOTS 1, 2, 3 AND 4 OF TAYLOR'S POINT, ACCORDING TO THE MAP OR PLAT THEREOF, AS RECORDED IN PLAT BOOK 4, PAGE 148 OF THE PUBLIC RECORDS OF MONROE COUNTY, FLORIDA." (R: 266.) (The receiver site property legal description provides, in part: "A portion of Lots 8 and 9, Section 11, Township 61 South, Range 39 East on Key Largo, according to Model Land Company's Plat. . . . AND ALSO KNOWN AS: Lots 1 through 4. . . ." (R: 269, 298, 328.)

On or about February 3, 2003, Mr. Craig filed a third application for development approval for a Major Conditional Use. (R: 290.) The applicant's name and property owner are listed as Taylor Point Development Corp. The application indicates that the present use of the property is "[c]onference rooms, offices, incomplete building" and the proposed use of the property is listed as "12,760 sq. ft. conference center and offices." (R: 291.) This application also references the NROGO transfer applied for on January 28, 2003. Numerous documents are attached to this application, including but not limited to proof of ownership, which consists of the Quit-Claim Deed mentioned above. A location map, photographs, sealed and signed survey, a revised site plan (R: 329), floor plans, and other documents accompanied the application. (R: 292.)

Jeff Stuncard, Senior Planner, prepared separate memoranda to the Development Review Committee regarding the sender and

receiver site applications. (R: 234-235, 270-272.)

Mr. Stuncard, in conjunction with Niko Reisinger, biologist, prepared a separate Memorandum to the Development Review Committee regarding the third application for the requested Major Conditional Use. (R: 360-366.)

On March 12, 2003, the Development Review Committee unanimously approved the transfer of the commercial floor area of 1,800 square feet from the sender site, The Quay, to the finished structure at Taylor Point. (R: 236-238, 273-275.) On March 25, 2003, the Development Review Committee unanimously recommended to the Commission approval of the Major Conditional Use for the Taylor Point Development Corp. to complete ancillary offices and a conference center. (R: 367-371.)

On March 11, 2003, Mr. Stuncard prepared two separate memoranda (for the Commission) regarding the sender and receiver site applications which were almost identical to the memoranda he prepared for the Development Review Committee. (R: 239-240, 276-278.)

Mr. Stuncard's Memorandum regarding the sender site application reflects that the applicant was requesting a transfer of floor area of 1,800 square feet of commercial floor area from The Quay, which has 9,925 square feet of non-residential floor area, and is currently not in operation. (R: 239.) Mr. Stuncard, under the heading "Staff Review," states:

The application requests approval of the transfer of 1,800 sq. ft. of non-residential floor area from property located on the North 1/2 of Tract 8 and Tracts 9 & 10, Second Amended and Revised Plat of Lee Shores, Plat Book 2, Page 97, MM 102, Key Largo, to property located on a portion of Lots 8 & 10, Section 11, Township 61 South, Range 39 East on Key Largo, Model Land Company Plat, MM 103.8, Key Largo. The records of the Monroe County Property Appraiser indicate that the building on the sender site was built in 1958. It served as the Quay restaurant until recently closing. Any development on the receiver's site would require additional Major Conditional Use approval.

Staff recommended approval of the transfer of floor area from the sender site as requested with two conditions which required demolition of the sending site structure prior to the issuance of a building permit for the non-residential floor area on the receiver site. (R: 240.)

Mr. Stuncard also issued a Memorandum (for the receiver site application) with respect to the transfer of the 1,800 square feet of commercial floor area from the sender site to the receiver site. In particular, under the section noted "Staff Review," the Memorandum states:

The application requests approval of the transfer of 1,800 sq. ft. of non-residential floor area from property located on the North 1/2 of Tract 8 and Tracts 9 & 10, Second Amended and Revised Plat of Lee Shores, Plat Book 2, Page 97, MM 102, Key Largo, to property located on a portion of Lots 8 & 10, Section 11, Township 61 South, Range 32 East on Key Largo, Model Land Company Plat, MM 103.8, Key Largo. The

records of the Monroe County Property Appraiser indicate that the southernmost building on the receiver site was built in 1972. It currently serves as conference and office space. The second building on the site, which is unfinished, is at the northern end of the property and is 7,436 square feet. The Property Appraiser records do not indicate that the building is on-site because the structure never received a certificate of occupancy. Any development on the receiver site would require additional Major Conditional Use approval.

1. 9.5-124.3.a.(10)b. The receiver site evaluated for site conditions meets the following criteria:

- i. Has existing lawfully established non-residential floor area and is an infill site; and
- ii. Is located in the same ROGO subarea as the sender site; and
- iii. Is not a commercial retail high intensity use that will generate more than 150 trips per 1,000 square feet of floor area; and
- iv. Is not located on Big Pine Key, No Name Key or within a CARL acquisition area; and
- v. Receives no negative environmental points when evaluated; and
- vi. Is not located in a "V" zone; and
- vii. Is not located in a coastal barrier resources system; and
- viii. Is not located in an offshore island/conservation land protection area.

The receiver structure is the 3,524 square foot building closest to U.S. 1. It is not in the "V" zone and has not received any negative environmental points.

(R: 277.)

Staff recommended approval of the floor area transfer to the receiver site with three conditions, including the

demolition as described above, and the recordation of the transfer of ownership and all other legal documents prior to the issuance of a development order. (R: 278.)

On March 21, 2003, Mr. Stuncard and Mr. Reisinger prepared a Memorandum to the Commission regarding the application for the Major Conditional Use filed on behalf of Taylor Point Development Corp. (R: 372-378.) The proposed use and size of the project is described as follows:

The applicant is proposing to complete a conference facility at its Taylor Point site at Mile Marker 103.8, adjacent to the Marriott Hotel. The proposed project will consist of the existing building which will be modified to provide additional conference room space and ancillary offices, and the existing building to the north (bayside) will be completed. Presently, the construction of the building, which was authorized by a vested rights order dating from 1998, has been halted.

The proposed redevelopment will be accomplished in two (2) stages involving the use of transferable non-residential floor area made available through the county's "NROGO" system. Specifically, 1,800 square feet of commercial floor area now located in the Quay Restaurant at Mile Marker 102 will be transferred to the site. The 1,800 square feet will be transferred to the Taylor Point site to the building closest to US 1, where it will be used to provide conference space and ancillary support offices. The 1,800 square feet already on the second floor of this building will be internally transferred to the building whose construction has been halted.

Existing on site at the present time is approximately 7,426 square feet of restaurant and conference center, which is incomplete, and the operating building of 3,524 square feet.

(R: 372.)

Staff reviewed the application for compliance with the requirements of Article IV, Section 9.5-65, M.C.C., which are applicable to all conditional uses. (R: 374.) In part, staff determined that the "dimensions of the required parking spaces" were not in compliance with Section 9.5-351(a). Staff also determined that the minimum yards and shoreline setback requirements were "in compliance and require staff discussion." (R: 122, 375.) Staff noted regarding this item: "The building and access road that are there were approved and constructed in their current location, and vested by Resolution #194-1998."

Id. See also (R: 351-352.)

Relevant here, staff made the following Findings of Fact and Conclusions of Law:

1. Based on the plans submitted, the required number of parking spaces is being met, however only 14 of these spaces meet the required 8'6" X 18' dimensions. This leaves 24 spaces with inadequate dimensions. This issue must be addressed prior to the issuance of a building permit.
2. Based on the plans submitted, two (2) handicap spaces must be located on the site. One (1) of these spaces is represented and one (1) is not. A revised site plan must show the additional handicapped parking

space prior to the issuance of a building permit.

3. Based on the plans submitted, one (1) 10' X 25' loading zone is required. This has not been depicted, but must be shown on the site plan prior to the issuance of a building permit.

4. Based on the plans submitted, clear site triangles need to be provided for both directions of US 1 prior to the issuance of a building permit.

* * *

11. Based on the plans submitted and the comments of the Monroe County Traffic Consultant, a revised site plan must show the vehicle maneuverability within the site prior to the issuance of a building permit.

(R: 376-377.)

Staff recommended approval of the Major Conditional Use application with conditions reflecting the above Findings of Fact and Conclusions of Law, including that the applicant must "meet the parking space dimension requirements, or receive a variance prior to the issuance of a building permit"; that "[t]he applicant must meet the handicapped parking space requirement prior to the issuance of a building permit"; and that "[t]he applicant must add the required clear site triangles to the site plan prior to the issuance of a building permit." Vehicle maneuverability and a loading zone meeting the requirements previously mentioned must be met prior to the issuance of a building permit. (R: 377-378.)

On March 26, 2003, a hearing was held before the Commission to consider the three applications. (R: 1-214.) After hearing testimony from members of the public, including but not limited to Jill Patterson and Ms. Parker, and after considering other evidence, and argument of counsel who represented the applicant and Ms. Parker, the Commission approved each of the applications. The Commission's decisions were memorialized in three separate resolutions, Resolution Nos. P20-03, P21-03, and P22-03. (R: 220-223, 254-256, 285-288.)

In particular, in Resolution No. P20-03, the Commission conditionally approved Taylor Point Development Corp.'s request for an application for a Minor Conditional Use for the transfer of existing non-residential floor area from the sender. The Commission noted, in part, that "[t]he applicant produced an *Affidavit of Ownership and Intent to Transfer letter* signed by Ace Blackburn, Jr., on March 26, 2003. It was determined by the Director of Planning [Marlene Conaway] that this notarized document meets the requirements of ownership." (R: 220.) See also (R: 202-211.) The same statement is set forth in Commission Resolution No. P21-03, regarding the receiver site application decision. (R: 254.)

In a separate "WHEREAS" portion of Resolution No. P21-03, the Commission stated: "the receiver site has two (2) structures that total 10,960 square feet of nonresidential floor

area. The receiver structure is the existing, finished 3,524 square foot building closest to US 1. The other structure is the existing, unfinished 7,436 square foot building closest to Florida Bay." (R: 254.) With respect to the requirements of Article IV, Section 9.5-124.3.a.(10)b.vi., the Commission found "the receiver structure is the 3,524 square foot building closest to U.S. 1, which is not in the 'V' Zone, and has not received any negative environmental points." (R: 255.) In Resolution Nos. P20-03 and P21-03, the Commission adopted the conditions recommended by staff. (R: 222, 256.) (Resolution No. P20-03 was unanimously approved, whereas Resolution No. P21-03 was approved 4 to 1.)

In Resolution No. P22-03, the Commission conditionally approved the Taylor Point Development Corp.'s request for a Major Conditional Use application for the completion of a conference facility. (R: 285.) The Commission makes a statement regarding the affidavit of ownership and affidavit of intent to transfer letter referred to above in this Resolution. (R: 285.) The Commission also noted in a "WHEREAS" clause:

[T]he proposed redevelopment will be accomplished in two (2) stages involving the use of transferable non-residential floor area made available through the County's "NROGO" system. 1,800 square feet of commercial floor area will be transferred to the Taylor Point site (to the building closest to US 1) where it will be used to provide conference space and ancillary

support offices. The 1,800 square feet already on the second floor of this building will be internally transferred to the unfinished building (closest to the bay).

(R: 285.)

Additionally, the Commission made the following Findings of Fact and Conclusions of Law:

1. Based on the plans submitted, the required number of parking spaces is being met. Two (2) of the spaces are to be located on the adjacent parcel, which is within 300' of the subject property.
2. Based on the plans submitted, several of the parking spaces may have inadequate dimensions at the entrance to the space due to the existing columns of the structure.
3. Based on the plans submitted, two (2) handicapped spaces must be located on the site.
4. Based on the plans submitted, one (1) 10' X 25' loading zone is required.
5. Based on the plans submitted, clear site triangles need to be provided for both directions of U.S. 1.

* * *

12. Based on the plans submitted and the comments of the Monroe County Traffic Consultant, a revised site plan must show the vehicle maneuverability within the site.

* * *

14. No enlargement or expansion of the existing footprint of the building is permitted.

(R: 286-287.)

In light of the Commission's Findings of Fact and Conclusions of Law, the Commission, in approving the Major Conditional Use application, also imposed several conditions, including but not limited to the following:

1. A variance to the parking space dimensions is granted for the entrance to the spaces where impeded by the existing columns for the structure. The remainder of the space must meet the minimum parking space dimensions.

* * *

3. The applicant must meet the handicapped parking space requirement by providing two (2) handicapped parking spaces on the revised site plan prior to the issuance of a building permit.

4. The applicant must meet the loading zone requirements prior to the issuance of a building permit.

5. The applicant must add the required clear site triangles to the site plan prior to the issuance of the building permit.

* * *

12. A revised site plan must show the vehicle maneuverability within the site plan prior to the issuance of a building permit.

* * *

14. No enlargement or expansion of the existing footprint of the building is permitted.

(R: 287.)

The Commission unanimously approved the requested Major Conditional Use application. (R: 288.)

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 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).

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.

Parker contends that the Commission departed from the essential requirements of law when it did not require compliance with Objective 101.20 and Policy 101.20.1 of the Plan and Article IV, Section 9.5-124(a)(5) of the NROGO.

Objective 101.20 of the Plan provides: "Monroe County shall address local community needs while balancing the needs of all Monroe County communities. These efforts shall focus on the human crafted environment and shall be undertaken through the Livable CommuniKeys Planning Program." Policy 101.20.1 provides in part that "Monroe County shall develop a series of Community Master Plans. Master Plans will be developed in accordance with the following principles . . ."

Article IV, Section 9.5-124(a)(5), M.C.C. provides: "(a) *Purpose and intent:* The purposes and intent of the non-residential rate of growth ordinance are: . . . (5) To allocate the non-residential floor area annually hereunder, based on the goals, objectives and policies of the comprehensive plan and the Livable CommuniKeys master plans." (Emphasis in original.)

Essentially, Parker argues that the Commission cannot approve a transfer of existing non-residential, here, commercial

square footage floor area unless and until Monroe County adopts a master plan pursuant to Objective 101.20 and Policy 101.20.1.

It is undisputed that Monroe County has not adopted a master plan for Key Largo pursuant to this Objective and Policy. However, adoption of a master plan is not required as a condition precedent to approval of a transfer of commercial floor area as contemplated here under NROGO. The plain language of the Plan provisions indicates that the intent is to require consideration of community needs in light of developed master plans when they are developed.

Further, Article IV, Section 9.5-124.3(a)(10)a.-d., M.C.C., sets forth the criteria to be considered for eligibility for the "[t]ransfer off-site of existing non-residential floor area" and these criteria do not require consideration of a master plan. The general purpose and intent section in Article IV, Section 9.5-124(a)(5), M.C.C., should not be read to create an additional criterion for approval of the transfer of commercial floor area as approved by the Commission.

Second, Parker contends that the Commission erred in approving the transfer from the sender site, The Quay, without a proper affidavit of ownership provided with the sender site application.

The former owner of The Quay was Konstantinos "Gus" Boulis, who died in 2001. His estate is in probate in circuit court.

As noted above, the sender site application requires an affidavit of ownership of the person who transfers non-residential floor area. The affidavit is to be filed with the Director of Planning. (There is no cited provision of the Monroe County Code which requires an affidavit of ownership for the sender site in an application requesting the transfer of non-residential (commercial) floor area.)

The sender site application was signed under oath by Mr. Craig on January 28, 2003. Mr. Craig is the agent for the applicant, Taylor Point Development Corp. Mr. Craig, as the agent for Taylor Point Development Corp., also signed the receiver site application under oath on January 28, 2003. On January 23, 2003, Ms. Joan Wagner, a Personal Representative for the Estate of Konstantinos "Gus" Boulis, executed under oath, an "Authorization Form" which authorized Mr. Craig and "The Craig Company to act on [her] behalf in all matters pertaining to the filing of NROGO minor and any other conditional use applications for the transfer of Commercial Floor area from the 'Quay' restaurant located on Key Largo to the Taylor Point Conference Center also located on Key Largo, Florida." This affidavit accompanied the receiver site application.

This issue was discussed at length during the Commission meeting. Consideration of the sender site application was continued to allow the applicant's attorney to provide the

Commission with an appropriate affidavit of ownership. When consideration was resumed, the applicant's attorney produced a sworn affidavit of Ace J. Blackburn, Jr., who stated that he is a Personal Representative of the Estate of Gus Boulis, with the case involving the estate pending in the circuit court in Broward County, Florida, Case No. 2001-882; that The Quay Key Largo restaurant property is an asset of the Estate subject to administration; that on behalf of the Estate and other Personal Representatives, "it is the intent of the owner of the Quay Key Largo restaurant to transfer 1800 square feet of commercial development off-site to the Taylor Point Development Corp. site in Key Largo, Florida"; and that "[t]he Estate's agents, including Nicholas W. Mulick, Esq. and Donald L. Craig, are fully authorized to take all reasonable steps to effectuate the transfer of the square footage." (R: 424.) This affidavit is mentioned by the Commission in Resolution Nos. P20-03 and P21-03, reciting, in part, that "[i]t was determined by the Director of Planning that this notarized document meets the requirements of ownership." (R: 202-211, 220, 254.) See Art. IV, §§ 9.5-42, 9.5-44, 9-5.62, and 9-5.64, M.C.C. This statement and the implicit finding that there was sufficient evidence presented of ownership and authorization are supported by competent, substantial evidence.

Parker also contends that the "published legal notice" for the Commission hearing incorrectly referenced Section 9.5-265, instead of Section 9.5-124, which resulted in a denial of procedural due process. (Section 9.5-265 pertains to transferable residential development rights not commercial, and Section 9.5-124 pertains to NROGO (non-residential rate of growth ordinance).)

The Record on Appeal does not contain any hearing notice, a point discussed during oral argument. Therefore, it is difficult to determine if the notice of hearing was impermissibly defective. But see (R: 3) in which Commission counsel John Wolfe introduced the item for consideration and stated in part: "Minor conditional use application. The Quay Restaurant is requesting a transfer of commercial floor area as permitted in Section 9.5-265 of Monroe County Code. Square footage of 1,800 will be transferred from the sender site, the Quay Restaurant, to the receiver site." See also (R: 78.) Compare with (R: 18-19) argument of Jill Patterson. The Planning Director, Ms. Conaway, stated that the citation to Section 9.5-265 "was an administrative error." (R: 93.) The incorrect cite is mentioned by Mr. Wolfe and Ms. Patterson. In context, it is clear that the request is to transfer commercial floor area and not residential development rights.

Nevertheless, Parker did not ask to continue the hearing based on a lack of notice or a defect therein and, in fact, participated in the hearing and was represented by counsel. If there was a defect in the hearing notice, and there is no finding made herein that there was, it was waived by Parker. See City of Jacksonville v. Huffman, 764 So. 2d 695 (Fla. 1st DCA 2000); Schumacher v. Town of Jupiter, 643 So. 2d 8 (Fla. 4th DCA 1994), rev. denied, 654 So. 2d 919 (Fla. 1995).

Next, Parker argues that the Commission erred in approving the transfer of the 1,800 square feet of commercial floor area from the sender site to the receiver site in light of Article IV, Section 9.5-124.3(a)(10)b.vi. which states: "*Criteria for redevelopment of non-residential floor area off-site: In order to redevelop off-site, a receiver site shall be evaluated for site conditions and shall meet all of the following criteria:*

. . . vi. Is not located in a 'V' zone pursuant to subsection 9.5-124.8(a)(8)." (Emphasis in original.) (Subsection 9.5-124.8(a)(8) pertains to coastal high hazard area and assigns points which are intended to discourage development in a coastal high hazard area.) Staff evaluated this issue and stated that "[t]he receiver site has 10,960 square feet of non-residential floor area. The site has two (2) structures. One is the existing conference room and ancillary offices, which consists of 3,524 square feet and the other structure is the existing,

but unfinished conference space. It is 7,436 square feet in size." (R: 276.) Staff also considered Subsection 9.5-124.3(a)(10)b.vi. as it applied to the receiver site application, and determined that "[t]he receiver structure is the 3,524 square foot building closest to U.S. 1. It is not in the 'V' Zone and has not received any negative environmental points." (R: 277) (This statement was adopted by the Commission in Resolution No. P21-03. (R: 255.)) See also (R: 372) in which staff analyzes this issue in the context of the application for the Major Conditional Use application, in part, as follows:

The proposed redevelopment will be accomplished in two (2) stages involving the use of transferable non-residential floor area made available through the county's "NROGO" system. Specifically, 1,800 square feet of commercial floor area now located in the Quay Restaurant at Mile Marker 102 will be transferred to the site. The 1,800 square feet will be transferred to the Taylor Point site to the building closest to US 1, where it will be used to provide conference space and ancillary support offices. The 1,800 square feet already on the second floor of this building will be internally transferred to the building whose construction has been halted.

Existing on site at the present time is approximately 7,436 square feet of restaurant and conference center, which is incomplete, and the operating building of 3,524 square feet.

(R: 372.)

Article IV, Section 9.5-124, M.C.C, defines "site" to mean "the parcel(s) of land or parcels required to be aggregated

under section 9.5-256 to be developed or from which existing non-residential floor area is to be transferred or received."

(Emphasis added.) "*Parcel of land* means any quantity of land and water capable of being described with such definiteness that its location and boundaries may be established, which is designated by its owner or developer as land to be used or developed as a unit, or which has been used or developed as a unit." Art. IV, § 9.5-4(P-1), M.C.C. (Emphasis in original.)

The Taylor Point property consists of four (4) lots as set forth in a deed and survey. (R: 266; 269.) There is competent, substantial evidence to support the Commission's implicit finding that the receiving structure is located on Lot 1 (and in the "A" zone), on a separate and independent site and parcel from parts of Lots 2-4, a portion of which is located in the "V" zone. The Commission's Resolution No. P21-03 approves the transfer of the commercial floor area to the receiver site, not the contemplated subsequent transfer of this floor area to the unfinished building closest to the bay, see (R: 254-255), notwithstanding the Commission's statement in the fourth "WHEREAS" clause of Resolution No. P22-03 that "the proposed development will be accomplished in two (2) stages. . . ." (R: 285.) See also Commission Answer Brief, p. 12. No decision is reached herein regarding whether the 1,800 square feet of floor area may be transferred as an "internal transfer." Id.

Finally, Parker contends that the Commission erred in approving the Major Conditional Use application without requiring a variance for parking, fire turning radius, and side yard setbacks. Parker contends that such approval violates procedural due process because of "a lack of notice and a real opportunity to be heard." Parker Initial Brief, p. 17.

Parking is planned for underneath the building. The underneath space is open except for columns, which are depicted in a revised Site Plan dated February 4, 2003. (R: 329.)

Staff determined that the required number of parking spaces was met, except that "only 14 of these spaces meet the required 8'6" X 18' dimensions," which "leaves 24 spaces with inadequate dimensions." Staff noted that this "issue must be addressed prior to the issuance of a building permit" (R: 376), and specifically noted that the "dimensions of required parking spaces," pursuant to Section 9.5-351(a), were not in compliance. (R: 374.)

During the hearing, Mr. Craig explained that this issue, and comments made during the hearing, referred to the support columns depicted on the Site Plan. (R: 128, 329.) (Mr. Craig also referred to a revised Site Plan of March 17, 2003, in order to respond to comments from staff, but the March 17, 2003, revised Site Plan was not substituted for the February 4, 2003, revised Site Plan. (R: 138-139.)) But for the columns, the

proposed planned parking spaces would meet code requirements. Art. IV, § 9.5-351(a), M.C.C. In order to protect the columns from being hit by a motor vehicle, Mr. Craig requested a decrease in the width of several parking spaces from eight and one-half feet to eight feet. Mr. Craig also stated that if the Commission felt the columns were not in need of protection which he did not recommend, then the parking spaces would be eight and one-half feet wide. (R: 129.) It was Mr. Craig's position that the Commission could waive the eight and one-half foot requirement. (R: 134.)

The Commission inquired of Mr. Stuncard regarding reducing the width of only the parking spaces affected by the columns. Mr. Stuncard supposed that decision would be within the Commission's discretion. (R: 180.) Mr. Stuncard received additional clarification from the Commission that "allowing the entryway of each space to not meet the minimum, as long as the remainder of the spaces do." (R: 183.)

This parking space issue was discussed by the applicant, analyzed by staff, commented upon and objected to by Ms. Parker and Ms. Patterson, and resolved by the Commission when the Commission approved the Major Conditional Use. The Commission did not depart from the essential requirements of law.

Regarding the application for a Major Conditional Use, the applicant is not requesting to alter the footprint of the

existing structure. The Commission conditionally approved a project (a Major Conditional Use) to complete a conference facility. (R: 285.) In particular, the Commission expressly stated: "No enlargement or expansion of the existing footprint of the building is permitted." (R: 287 at paragraph 14.)

Notwithstanding, there is conflicting evidence on the setback issue, and it is a subject of some confusion, see, e.g., (R: 131, 142, 149, 159.) For example, Frederick H. Hildebrandt's boundary survey indicates that the east side of the "C.B.S. Building" has a boundary note of 4.50 feet on the northeast corner and 4.63 feet on the southeast corner, which indicates an encroachment on the five foot side yard setback. (R: 269, 328.) The revised Site Plan of February 4, 2003, reflects a five foot side yard setback and a rear setback, but with no discernable encroachment. (R: 329.)

The setback issue was evaluated by staff and presented to the Commission, with Ms. Patterson raising the issue. See, e.g., (R: 149, 380.)

Staff determined that the yards and shoreline setbacks were in compliance. (R: 122, 375.) See also p. 10, supra. This determination appears to be based on the vested rights determination in Resolution No. 194-1998 (R: 351-352). Id. During the hearing, questions were raised regarding the vested rights determination and not specifically resolved, (R: 173-179,

190-200), except for the Commission's conditional approval of the Major Conditional Use application for the completion of a conference facility and the Commission's express determination that the existing footprint of the building may not be enlarged or expanded. (R: 188, 287.) It appears that the Commission did not consider the project as new construction, id., and Article IV, Section 9.5.281, M.C.C., (minimum yard setbacks) "[a]pplies to new construction only."² The Commission did not depart from the essential requirements of law.

Finally, Parker does not cite to a specific provision of the Monroe County Code which prohibits, absent a variance, a fire turning radius within a setback.

DECISION

Based upon the foregoing, the Commission's decisions in Resolution Nos. P20-03, P21-03, and P22-03 are AFFIRMED.

DONE AND ORDERED this 1st day of December, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 1st day of December, 2003.

ENDNOTES

^{1/} Parker filed separate applications in order to appeal each Resolution. Each appeal was assigned a separate case number, i.e., DOAH Case Nos. 03-2397, 03-2398, and 03-2399, which were consolidated. Ultimately, one consolidated Record on Appeal, consisting of three volumes, was filed and considered in this appeal. Order, July 17, 2003. Without objection Taylor Point Development Corporation and Estate of Constantine "Gus" Boulis were granted leave to intervene. Order, July 24, 2003.

^{2/} The expiration of the vested rights determination is mentioned in Appellant's Statement of the Case and Facts in the Initial Brief, page 8, footnote 4, but no legal argument is made. The Commission, in its Answer Brief, relies, in part, on the vested rights determination. Commission Answer Brief, p. 13. In the Reply Brief, Appellant, in response to the Commission's Answer Brief, argues for the first time that "[o]nce vested rights were extinguished, the present day requirements of the Code, including the variance provisions, should apply." Reply Brief, p. 11-12. See Snyder v. Volkswagen of America, Inc., 574 So. 2d 1161 (Fla. 4th DCA 1991)("An issue raised for the first time on appeal in appellants' reply brief, even though properly preserved for appeal, will not be considered by this court." (Citations omitted.)) See also Art. XIV, § 9.5-539(d), M.C.C. No decision is reached regarding the issue raised in the Reply Brief.

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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.