STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SMART PLANNING AND GROWTH COALITION, Appellant, vs. MONROE COUNTY PLANNING COMMISSION, Appellee, and HINOTE CONSTRUCTION, Intervenor.	)	Case No. 03-4722 (Resolution P29-03)
HINOTE CONSTRUCTION, Appellant, vs. MONROE COUNTY PLANNING COMMISSION, Appellee.	)	Case No. 03-4722 (Resolution P30-03)

PARTIAL FINAL ORDER
(FINAL AS TO RESOLUTION P29-03)

This proceeding (Case No. 03-4722), which was filed with the Division of Administrative Hearings (DOAH) on December 16, 2003, involves two distinct appeals from two separate actions taken by the Monroe County Planning Commission (Commission) on April 23, 2003, and rendered on September 10, 2003: one appeal

taken by Smart Planning and Growth Coalition (Smart Growth) from the Commission's Resolution P29-03, granting an Application for Commercial Floor Area Sender Site Transfer, filed by John C. Moore (Moore); and the other an appeal taken by Hinote Construction (Hinote) from the Commission's Resolution P30-03, denying Hinote's Application for Transfer of Development Rights to receive the transfer of commercial floor area from Moore (so as to avoid application of the Non-residential Rate of Growth Ordinance (NROGO) to its Walgreen Pharmacy project.) However, both appeals were referred to DOAH as a single consolidated appeal with a single record-on-appeal. As a result of the manner in which this appeal was referred to DOAH, and the procedural complexities set out in the following Section I, Procedural Background, this Partial Final Order disposes of just one of the two appeals--Smart Growth's appeal from the Commission's Resolution P29-03. Further proceedings are required before the other appeal--Hinote's appeal from the Commission's Resolution P30-03--can be disposed of with finality.[1]

I. Procedural Background

On January 16, 2004, an Order Dropping Parties was entered, granting Smart Growth's Motion to Drop Hinote Construction and Arnie Diaz as Appellants, notwithstanding Hinote's own appeal from the Commission's Resolution P30-03.

On January 23, 2004, Hinote filed a Petition to Intervene, and a telephone conference was scheduled for January 29, 2004, to consider Hinote's Petition to Intervene, as well as other aspects of the procedural posture of the case, including Moore's status.

In the meantime, on January 26, 2004, Smart Growth filed a Motion to Enforce Automatic Stay to Cease Construction Activity undertaken by Hinote pursuant to a building permit issued by Monroe County subsequent to the filing of the subject appeals and requested that it also be heard during the telephone conference on January 29, 2004. On January 28, 2004, the Commission filed a Response of no objection to either the Petition to Intervene or the Motion to Enforce Automatic Stay to Cease Construction Activity.

During the telephone conference on January 29, 2004, it was confirmed: (1) that Smart Growth did not intend to drop Hinote as an appellant in Hinote's own appeal from Resolution P30-02, but only in Smart Growth's appeal from Resolution P29-03; (2) that Moore (whose attorney participated in the telephone conference) was not automatically an appellee under the Commission's procedures and chose not to participate as an intervenor in Smart Growth's appeal; and (3) that there was no objection to Hinote's intervention in Smart Growth's appeal, which was granted. An Order reflecting those matters was

entered January 30, 2004; and the caption of this case was amended, as reflected above, consistent with these procedural rulings. However, it was noted that, since Hinote had not filed an initial brief in its appeal from the Commission's Resolution P30-03, and the time to file had expired, Hinote's appeal was subject to being dismissed involuntarily.[2]

Smart Growth's Motion to Enforce Automatic Stay to Cease Construction Activity, which was also considered during the telephone conference on January 29, 2004, sought an order "instructing Hinote Construction Corporation to immediately cease all construction activity until this case is decided." But while Section 9.5-542, Monroe County Code (M.C.C.) automatically stays the effectiveness of any development order to be reviewed, it does not grant the hearing officer jurisdiction to issue an injunction or otherwise take action to enforce a stay.

Section 9.5-541, M.C.C., provides:

> Upon the application of any party, the hearing officer may grant relief under this article or impose sanctions for the failure of a party to comply with this article,[3] including the striking of untimely, irrelevant or scandalous portions of a brief or the record or the dismissal of an appeal, as the interests of justice may require.

However, it was concluded that this provision also did not grant the hearing officer jurisdiction to issue an injunction or

otherwise take action to enforce a stay. In addition, it was concluded that the effectiveness of the Commission's Resolution P29-03 was not altered by construction activities by Hinote under the authority of a subsequent building permit; to the contrary, the effectiveness of Resolution P29-03 remained stayed under Section 9.5-542, M.C.C. On the other hand, the legality of the subsequent building permit was not the subject of this appeal. Other relief or sanctions under Section 9.5-541, M.C.C., were not deemed appropriate under the facts presented.

After extensions of time were requested and granted, Smart Growth's Initial Brief, Hinote's Answer Brief, and Smart Growth's Reply Brief were filed; and oral argument on Smart Growth's appeal from Resolution P29-03 was scheduled for April 14, 2004, in Key Largo, Florida.

Since Hinote had not filed an initial brief, or requested an extension of time to do so, and the time for filing had long since expired, an Order Dismissing Hinote Appeal was entered on March 18, 2004.[4] On April 5, 2004, Hinote filed a Motion to Vacate Order Dismissing Appeal, with the Commission's concurrence, as well as a Joint Motion for Entry of an Order Consistent with the Parties' Settlement Agreement. The former stated: "Appellant and Appellee have previously agreed to settle their differences regarding the Planning Commission's decision and entered into a Settlement Agreement authorizing the

issuance of a building permit for the project." The latter stated: "In furtherance of the parties' Settlement Agreement, Appellee agrees that an Order should be entered consistent with the Settlement Agreement approving the receipt of commercial floor area by the Walgreen's Pharmacy site."[5] On April 9, 2004, Smart Growth filed a Motion to Intervene/Motion in Opposition, but the other parties did not receive their service copies prior to oral argument on April 14, 2004, and argument on the pending motions was deferred to give the other parties an opportunity to review Smart Growth's filing and reply/respond in writing. Hinote's Response was filed on May 6, 2004; the Commission has not filed a response. Smart Growth submitted a letter from counsel dated May 12, 2004, which added to its argument that jurisdiction over the Hinote appeal has been lost. Hinote requested oral argument, which was heard by telephone on May 21, 2004.

II. Hinote Appeal

As indicated, Hinote's appeal from the Commission's Resolution P30-03 was dismissed approximately a month before oral argument was to take place because the time for filing an initial brief was long past due, none had been filed, and it was assumed that Hinote no longer wished to pursue its appeal. On April 5, 2004, Hinote filed its Motion to Vacate Order Dismissing Appeal, with the Commission's concurrence, and a

Joint Motion for Entry of an Order Consistent with the Parties' Settlement Agreement.

There is no provision in the Monroe County Code for rehearing of a hearing officer's final order. Contrast Fla. R. App. P. 9.330.[6] Nonetheless, contrary to Smart Growth's contention, jurisdiction over Hinote's appeal has not been lost. In Taylor v. Dept. of Prof. Reg., Bd. of Medical Examiners, 520 So. 2d 557 (Fla. 1988), the district court of appeal certified the following question to the Supreme Court as one of great public importance:

> Does an administrative agency exercising its quasi-judicial power in a license revocation proceeding have the inherent authority to change or modify its final order within a reasonable time after filing it so that the time for taking an appeal begins to run from the date of filing the amended order?

Id. at 558. The Court assumed jurisdiction and answered in the affirmative, "but emphasize[d] that it applies only to clerical errors or inadvertent mistakes in an agency order." Id. In this case, it was an inadvertent mistake to enter the Order Dismissing Hinote Appeal without first issuing an order to show cause to ascertain that Hinote did not intend to pursue its appeal.[7] If Hinote intended to pursue its appeal, it would be error to dismiss the appeal for failure to file an initial brief. See Krebs v. State, 588 So. 2d 38, 38 (Fla. 5th DCA 1991); Teal v. State, 503 So. 2d 448, 449 (Fla. 2d DCA 1987);

Caudle v. State, 478 So. 2d 358, 361 (Fla. 1st DCA 1985); Winstead v. Adams, 363 So. 2d 807 (Fla. 1st DCA 1978). While the Order Dismissing Hinote Appeal was entered upon the belief that Hinote did not intend to pursue its appeal, this belief was mistaken. Hinote brought this mistake to the attention of the hearing officer within a reasonable time of the Order Dismissing Hinote Appeal. It is concluded that, under Taylor, the hearing officer retains jurisdiction to correct the inadvertent mistake by vacating the Order Dismissing Hinote Appeal.[8]

Hinote and the Commission not only seek to vacate the Order Dismissing Hinote Appeal, they seek reinstatement of the appeal only for purposes of entry of an "Order Consistent with the Parties' Settlement Agreement"--i.e., "approving the receipt of commercial floor area by the Walgreen's Pharmacy site."[9] As indicated during the telephone conference, it is not believed that the entry of an order recognizing the merits of an appeal based upon a settlement is appropriate. For one thing, the hearing officer has no jurisdiction to enter such an order under Section 9.5-540, M.C.C. At best, the appeal could be reinstated in order to be dismissed because it was settled, or in order for Hinote to voluntarily dismiss. Cf. Fla. R. App. P. 9.340. It could be that the practical result of either of those procedural courses of action would be essentially the same as involuntary dismissal for failure to prosecute the appeal.[10] But counsel for

Hinote indicated during the telephone hearing that Hinote would rather reinstate its appeal for a determination on the merits.[11]

Reinstatement of Hinote's appeal requires consideration of Smart Growth's Motion to Intervene. Citing Kruer v. Bd. of Trustees of the Internal Improvement Trust Fund, 647 So. 2d 129 (Fla. 1st DCA 1994), Hinote contends that Smart Growth has no standing to intervene because it did not demonstrate that it will suffer injury in fact which is of sufficient immediacy and of the type or nature the proceeding is designed to protect. But Hinote concedes that Smart Growth would have standing under Section 9.5-69(e), M.C.C., to appeal from a Commission decision granting Hinote's application for receiver site approval.[12] Hinote contends that the Code's liberal provision on standing for purposes of appeal should not be extended to intervention. This contention is not accepted. It would be illogical for the same status and interest to confer standing to appeal from an adverse Commission decision but not to intervene in an appeal by an adverse party from a favorable Commission decision.[13]

For these reasons, Hinote's Motion to Vacate Order Dismissing Appeal, with the Commission's concurrence, is granted; the Joint Motion for Entry of an Order Consistent with the Parties' Settlement Agreement is denied; Hinote's appeal is reinstated; Smart Growth is granted the right to intervene as an appellee; and Hinote's initial brief shall be served within 20

days, with subsequent briefs and oral argument to follow as provided in Sections 9.5-539 and 9.5-540, M.C.C.

III. Smart Growth Appeal

A. Facts

Moore's application was for sender-site approval for 5,790 square feet in commercial floor area. The 5,790 square feet represented the floor area of a restaurant named Marvin's which was built in 1968 and operated into the early 1980s. At some point in time later in the 1980s, Marvin's closed. The restaurant building has been vacant since Marvin's closed.

In 1999, the façade of the restaurant building was decorated for use as a movie set. A dispute subsequently arose and was litigated between Moore and Monroe County as to whether Moore had the right to make the movie set improvements although the structure was not in compliance with the County's floodplain regulations. On July 11, 2002, Moore and the County entered into a Stipulated Settlement Agreement that the structure located on the property was not "substantially damaged," as the term was defined in the County's floodplain regulations and that Moore had the right to make improvements to the structure, not to exceed $115,000, which the parties agreed was less than the threshold for "substantial improvement." In addition, it was agreed that Moore would have to either demolish the structure (with appropriate permits) or obtain an after-the-fact permit

for the improvements made in connection with the movie production on the property. In any event, it was agreed that Moore's proposed development on the property would have to "remain within the footprint of the existing improvements and shall comply with all applicable requirements of *Monroe County Code.*" (Italics in original.)

On December 7, 2000, Hinote applied for a minor conditional use approval to build a 17,145 square-foot Walgreen's Pharmacy in an Urban Commercial district in Key Largo, Florida. After a hearing on March 28, 2001, the Commission adopted Resolution P21-01, rendered on May 9, 2001, which recognized and found that Hinote's proposal was "subject to the proposed Non-Residential Rate-of-Growth Ordinance (NROGO)" and concluded that "NROGO must have been adopted . . . and the proposed development must meet all the requirements thereof." Resolution P21-01 granted Hinote's application, with conditions, including the condition that no building permit could be issued until adoption of and compliance with NROGO.

B. Scope of Hearing Officer Appellate Review

Hearing officer appellate review is provided for in Article XIV, M.C.C.[14] The hearing officer "may affirm, reverse or modify the order of the planning commission." § 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." § 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 acting in an appellate review capacity under the Monroe County Code 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.

C. Standing

No issue has been raised as to Smart Growth's standing to appeal from Resolution P29-03, and the parties explicitly agreed during oral argument that Smart Growth has standing to appeal from Resolution P29-03 under Section 9.5-69(e), M.C.C. As

indicated in Endnote 12, supra, that section actually applies to appeals from Commission decisions on major conditional use approval applications, whereas Resolution P29-03 was a Commission decision granting an application for minor conditional use approval. Smart Growth actually has standing under Sections 9.5-521(e)-(f) and 9.5-68(f), M.C.C..

D. First Point-on-Appeal

Section 9.5-124.3(10)a.i., M.C.C., provides in pertinent part: "Non-residential floor area shall . . . [b]e lawfully established . . . ." Smart Growth's appeal is based on the contention, on various grounds, that Moore's floor area is not "lawfully established." But none of the grounds have merit.

First, Smart Growth contends that there was no competent, substantial evidence to support the Commission's decision because the structure and use of the floor area at Moore's sender site had been abandoned, making the decision a departure from the essential requirements of law. According to Smart Growth's argument, as a non-conforming use or structure, Moore's sender site had to be registered under Section 9.5-142, M.C.C., and that, in any event, its nonconforming use was terminated by abandonment under Section 9.5-143(f)(1), M.C.C. Smart Growth points out that Policy 101.8.7 of Monroe County's Comprehensive Plan prohibits "the re-establishment of non-conforming uses which have been discontinued or abandoned."

The evidence was clear that Moore's sender site was used as a 5,790 square-foot restaurant in the early 1980s. Land development regulations (LDRs) adopted for Monroe County in 1986 included Section 9.5-235, M.C.C., which provides for a Sub Urban Commercial District (SC), which was the designation give to Moore's sender site. SC allowed commercial retail of less than 2,500 square feet in floor area or, under certain conditions and as a minor conditional use, over 2,500 square feet and up to a maximum of 10,000 square feet in floor area. See § 9.5- 235(a)(1) and (b)(1), M.C.C. According to Smart Growth, there was no evidence that Moore's sender site ever received a minor conditional use approval to exceed 2,500 feet in floor area.

Smart Growth's argument does not give proper consideration to Section 9.5-143(a), M.C.C., which provides: "Nonconforming uses of land or structures may continue in accordance with the provisions of this section." In addition, Section 9.5-2(c), M.C.C., provides:

> Existing Uses: All uses existing on the effective date of this chapter which would be permitted as a conditional use under the terms of this chapter shall be deemed to have a conditional use permit and shall not be considered nonconforming.

These provisions made the use of Moore's sender site a lawful conditional use.[15]

Smart Growth contends that Moore's sender site became "unlawful" because it was not registered under Section 9.5-142, M.C.C. That Section requires registration of nonconforming uses and structures within one year of service of individual notice by mail to all owners of record of the adoption of the comprehensive plan and the requirement to register; it also provides that failure to register within a "year after adequate legal notification shall constitute a waiver of the right to claim nonconforming use status." But since the use of Moore's sender site essentially was "grandfathered" as a conditional use in 1986 by operation of Section 9.5-2(c), M.C.C., it became a conforming use, not a nonconforming use. As a result, Section 9.5-142, M.C.C., had no application.[16]

Similarly, Smart Growth argues that the use of Moore's sender site was terminated through abandonment by operation of Section 9.5-143(f)(1), M.C.C. But Section 9.5-143(f)(1) addresses <u>non</u>conforming uses, while Moore's sender site is a conforming use by operation of Section 9.5-2(c), M.C.C.

Also in similar manner, Smart Growth argues that transfer of floor area development rights from Moore's sender site should be prohibited because Section 9.5-143(d), M.C.C., provides:

> Relocation: A structure in which a nonconforming use is located may not be moved unless the use thereafter shall conform to the limitations of the land use district into which it is moved.

But, again, the use of Moore's sender site is a conforming use, not a nonconforming use, by operation of Section 9.5-2(c), M.C.C.[17]

Smart Growth also resorts to Section 9.5-144(e)(1), M.C.C., which deals with abandonment of a "nonconforming structure." (Emphasis added.) It bears repeating that, even if the structure on Moore's sender site was not nonconforming for some reason, it was not nonconforming due to its square footage, by operation of Section 9.5-2(c), M.C.C.; rather, its square footage was a lawful conforming conditional use, regardless of Section 9.5-144(e)(1), M.C.C.

There was evidence in the record-on-appeal that the structure on Moore's sender site became nonconforming because it was below the flood control elevation established by the Federal Emergency Management Administration (FEMA) and adopted by Monroe County. But the FEMA nonconformity of the structure did not make the use nonconforming under Section 9.5-235(a)(1) and (b)(1), M.C.C. (relating to square footage of commercial retail in SC). In addition, under Section 9.5-144(e)(1), M.C.C., abandonment of a nonconforming structure does not make the use unlawful; rather, it requires the structure "be removed or converted to a conforming structure." See also Monroe County Comprehensive Plan Policy 101.8.12, to the same effect. If a

structure can be converted to a conforming structure, there is no logical reason why it could not be rebuilt as a conforming structure. In this case, whether termed a conversion or a rebuild, the structure could have been raised above the flood control elevation. If a structure can be converted or rebuilt, the use clearly remains lawful. As a result, floor area can be transferred from the Moore sender site under Section 9.5-124.3(10)a.i., M.C.C.

The foregoing interpretations of the Monroe County Code were recognized in the Settlement Agreement entered into between Moore and the County in 2002, allowing Moore to either demolish the structure on the sender site or obtain after-the-fact permits for improvements, not to exceed $115,000, which Moore and the County agreed was less than the threshold for "substantial improvement" under the County's floodplain regulations, which would be prohibited in a FEMA-nonconforming structure. In addition, the Settlement Agreement provided that Moore's proposed development would have to "remain within the footprint of the existing improvements . . . ." This recognized Moore's right to maintain the "grandfathered" conditional use of all 5,790 square feet of floor area in retail commercial. Far from being ultra vires, as argued by Smart Growth, the Settlement Agreement comports with the proper interpretation of the Monroe County Code.

E. Second Point-on-Appeal

Smart Growth's second point-on-appeal is that its due process rights were violated when the Commission refused to allow Smart Growth, as part of its opposition to Moore's sender site application, to challenge the Commission's Resolution P21-01. As indicated in Section II, Hinote Appeal, Resolution P21-01 approved Hinote's application for a minor conditional use for its proposed Walgreen's Pharmacy site, with conditions. It was adopted on March 28, and rendered on May 9, 2001.

To the extent that Smart Growth couches this argument in terms of procedural due process, it is beyond the scope of hearing officer appellate review under Article XIV, M.C.C. See subsection B., Scope of Hearing Officer Appellate Review, under Section II, Hinote Appeal.[18] However, couched in terms of an incorrect conclusion of law or interpretation of Monroe County's LDRs, or compliance with essential requirements of law, the argument could be considered in this appeal.

In this point-on-appeal, Smart Growth essentially contends that Resolution P21-01 was at issue and should have been considered in part because, by its own terms, it was subject to the as-yet-to-be-adopted NROGO and would have to meet all requirements of NROGO once adopted. But meeting NROGO requirements does not re-open Hinote's Walgreen's Pharmacy site

review for consideration of issues that were resolved by Resolution P21-01.

Smart Growth also contends that the Commission erred in refusing to allow Smart Growth to raise questions as to whether conditions imposed in Resolution P21-01 have been met, including the condition requiring Hinote to submit a revised traffic study. But meeting NROGO requirements does not involve consideration of Resolution P21-01's conditions. The Commission properly determined that the proceedings on Moore's and Hinote's NROGO applications were not the proper time or place to consider such questions.

Smart Growth also contended that, in adopting Resolution P21-01, the Commission failed to consider whether Hinote's minor conditional use application for its Walgreen's Pharmacy site met all the general "standards applicable to all conditional uses" under Section 9.5-65, M.C.C.--in particular, consistency with the Monroe County Comprehensive Plan and "with the community character of the immediate vicinity of the parcel proposed for development." See § 9.5-65(a)-(b), M.C.C. But, again, the proceedings on Moore's and Hinote's NROGO applications were not the proper time or place to consider such questions. Instead, those issues should have been raised by direct appeal from Resolution P21-01. Cf. § 9.5-521(c), M.C.C. Having failed to

avail itself of its appellate rights, Smart Growth waived those issues.

Finally, and perhaps most importantly, Moore's application for sender site approval stands on its own and, unlike Hinote's application for receiver site approval, is not directly tied to Hinote's Walgreen's Pharmacy site. As previously indicated, approval of Moore's application would allow transfer of Moore's floor area anywhere in Monroe County. For that reason, Resolution P21-01 is not even relevant to Moore's application.

For these reasons, the Commission not only applied the correct law, thereby complying with essential requirements of law, but it also correctly interpreted the applicable law and LDRs.

F. Conclusion

Smart Growth's appeal from Resolution P29-03, which granted Moore's sender site approval application, is denied; and Resolution P29-03 is affirmed.

DONE AND ORDERED this 2nd day of June, 2004, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2004.

ENDNOTES

1/ It is suggested that, in the future, some of the procedural difficulties of this case could be avoided or lessened by referring separate-but-related appeals taken by different appellants to DOAH separately for assignment of separate DOAH case numbers, with consolidation of the separate appeals by the hearing officer while the cases are pending at DOAH, and with subsequent preparation of a consolidated record-on-appeal for both consolidated appeals.

2/ Hinote contends that it apprised the hearing officer during the telephone hearing that Hinote and the Commission were settling its appeal from Resolution P30-03 by an agreement to grant Hinote's application for sender site approval. But no such specific advice is of record or recollected.

3/ The article referenced is the Article XIV, Hearing Officer Appellate Article, which includes Sections 9.5-535 through 9.5-542, M.C.C.

4/ The Order Dismissing Hinote Appeal stated that the caption was being amended to delete reference to the Hinote appeal, but the previous caption has been reinstated in this Partial Final Order since the Partial Final Order addresses both appeals.

5/ The referenced Settlement Agreement was reached in a state circuit court case filed by Hinote against Monroe County apparently to compel issuance of building permits in accordance with another Resolution of the Commission, Resolution P21-01, which approved a major conditional use approval after review of Hinote's proposed Walgreen's Pharmacy project. The Settlement Agreement itself provided for issuance of building permits for the project but stated, in pertinent part: "2. Prior to receiving a Certificate of Occupancy for the project, Hinote Construction Company shall submit . . . proof . . . that the transfer of 3,300 square feet of commercial floor area has been completed either through transfer from another donor site, allocation from NROGO or through successful conclusion of any and all appeals of the transfer from the donor site approved in Planning Commission Resolution P29-03."

6/ Even if there were a 15-day period of time to seek rehearing, as provided in the Florida Rules of Appellate Procedure, Hinote would have missed the deadline, which would have expired on April 2, 2004.

7/ Section 9.5-541, M.C.C., provides that an appeal should not be dismissed "without affording the appellant at least one (1) opportunity to correct the offending error." The Order entered on January 30, 2004, gave Hinote an opportunity to do so by filing an initial brief. Hinote chose not to and did not apprise the hearing officer of its intentions prior to entry of the Order Dismissing Hinote Appeal.

8/ Citing Prime Orlando Properties, Inc. v. Dept. of Business Reg., etc., 502 So. 2d 456, 459 (Fla. 1st DCA 1986), Hinote also argues that jurisdiction has not been lost because the Order Dismissing Hinote Appeal did not dispose of the case without leaving any question open for determination or, in other words, did not "mark . . . the end of judicial labor." This argument is plausible only because two appeals were consolidated into one for referral to DOAH. Nonetheless, the Order Dismissing Hinote Appeal, which amended the caption to delete reference to the Hinote Appeal, probably would have to be viewed as final as to the Hinote appeal.

9/ As indicated in Endnote 5, supra, the Settlement Agreement actually did not agree to "approving the receipt of commercial floor area by the Walgreen's Pharmacy site." Rather, the parties' purported "settlement" of Hinote's appeal from Resolution P30-03 actually is embodied in the language of the

Joint Motion for Entry of an Order Consistent with the Parties' Settlement Agreement, which is said to be "[i]n furtherance of the parties' Settlement Agreement . . . ."

10/ It is possible that all of these procedural options would give rise to the necessity to return to the Commission for entry of a new resolution granting the Hinote application and the possibility of an appeal by Smart Growth.

11/ During the telephone hearing on May 21, 2004, counsel for Smart Growth declined to enter into an agreement for remand to the Commission for entry of a resolution granting Hinote's application; accordingly, that option was not presented to counsel for Hinote for consideration.

12/ Hinote also concedes Smart Growth's standing under that section to appeal from Resolution P29-03 granting Moore's application for sender site approval. See section III., Smart Growth Appeal, infra. Actually, Section 9.5-69(e) applies to appeals from Commission decisions on major conditional use approval applications, whereas Resolutions P29-03 and P30-03 were Commission decisions on applications for minor conditional use approval. See § 9.5-124.3(10)d.i., M.C.C. Smart Growth would have standing to appeal from a resolution granting Hinote's application under Section 9.5-521(f), M.C.C. Section 9.5-68(f), M.C.C., states: "The public hearing on an application for minor conditional use . . . shall be conducted by the planning commission in accordance with the provisions of section 9.5-521(e)." Section 9.5-521(f), M.C.C., states: "Any person participating as an appellant or appellee at the hearing described in subsection (e) of this section may request an appeal of that decision under the hearing officer appellate article of these regulations . . . ." Section 9.5-4(P-5) defines "person" to mean "an individual, corporation, governmental agency, business trust, estate, trust, partnership, association, two (2) or more persons having a joint or common interest, or any other legal entity." It is not clear from the record-on-appeal who requested the public hearing before the Commission on Hinote's application for receiver site approval, but it is clear that Smart Growth participated.

13/ Having decided that Smart Growth's participation in the minor conditional use approval proceeding before the Commission gives it standing to intervene in Hinote's appeal, it is not necessary to decide Smart Growth's contention that the record-on-appeal supports its standing under the Kruer decision as well. It is pointed out, however, that it clearly would be

easier for Smart Growth to establish Kruer standing to appeal from a Commission decision granting an application for approval to receive and use development rights at a particular location (i.e., for Hinote's Walgreen Pharmacy project on Key Largo), so that injury to Smart Growth could be more readily ascertained, than from Resolution P29-03, which granted Moore's application for approval to send his commercial floor area development rights anywhere in the County, so that injury to Smart Growth would appear to be much more speculative.

14/ By contract between DOAH and Monroe County, these appeals are referred to DOAH for assignment of an Administrative Law Judge to act as the hearing officer under Article XIV.

15/ Smart Growth suggests that Section 9.5-2(c) is inconsistent with the caveat in Section 9.63(a), M.C.C., that "designation of a use in a land use district as a conditional use does not constitute an authorization or an assurance that such use will be approved." But Section 9.5-63(a) does not apply to a use that already has received "grandfathered" approval through application of Section 9.5-2(c), M.C.C.

16/ In addition, there is no evidence in the record-on-appeal as to whether Moore's sender site was registered, or whether the owner was given "adequate legal notification." For that reason, the record-on-appeal would not have established a waiver under Section 9.5-142, M.C.C., in any event.

17/ In addition, Section 9.5-143(d), M.C.C., would not apply to Moore's sender site application because it only addresses the limitations of the land use district into which the structure is moved.

18/ Procedural due process could be raised by Smart Growth in a petition for a writ of certiorari with the appropriate circuit court. See City of Deerfield v. Valiant, 419 So. 2d 624, 626 (Fla. 1982).

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NOTICE OF RIGHTS
(AS TO RESOLUTION P29-03)

Pursuant to Article XIV, Section 9.5-540(c), M.C.C., this Partial Final Order is "the final administrative action of Monroe County" as to the Planning Commission's Resolution P29-03 and, to that extent, is subject to judicial review by common law petition for writ of certiorari to the circuit court in the appropriate judicial circuit.