STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAP PROPERTIES OF SW FLORIDA-1, INC.,	)	
Appellant,	)	
vs.	)	Case No. 04-2417
MONROE COUNTY PLANNING COMMISSION,	)	
Appellee.	)	

FINAL ORDER

Appellant, GAP Properties of SW Florida-1, Inc. (GAP), seeks review of Monroe County Planning Commission (Commission) Resolution No. P17-04 (Resolution) dated March 24, 2004. The Division of Administrative Hearings (DOAH), by contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code (M.C.C.), has jurisdiction to consider this appeal. GAP submitted an Initial Brief. The Commission submitted an Answer Brief. Oral argument was presented during a telephone hearing held on October 29, 2004.

I. Issues

Appellant raises three issues on appeal: (1) whether the Commission's Conclusion of Law determining that the Key-Tex Shrimp Building Condominium Association, Inc. (Key-Tex) (in which GAP owns a unit and is the subject of this appeal) must

obtain approval of a subdivision plat pursuant to Section 9.5-81, M.C.C., is erroneous and should be rejected or modified; (2) whether there is competent substantial evidence to support the Commission's Findings of Fact in paragraphs 6, 7, and 8 of the Resolution that (a) the intensity on the Key-Tex property has been increased since the property was converted to a dockominium, and (b) the Key-Tex property was not a marina prior to September 15, 1986, and is not deemed to have major conditional use approval pursuant to Section 9-5.2(c), M.C.C.; and (3) whether interpretations by the Monroe County (County) Director of Planning and Environmental Resources concerning the definition of a "marina," as defined in Section 9.5-4(M-5), M.C.C., and the filing of a subdivision plat under Section 9.5-81(a), M.C.C., are erroneous and should be rejected or modified.

II. Background

The property in question is located on Stock Island in an unincorporated portion of the County near mile marker 3. It is zoned as Maritime Industries District (MI) under Section 9.5-250, M.C.C., a zoning district which allows commercial fishing as a matter of right and a marina as a major conditional use. Since well before 1986, the property in question was owned by Key-Tex Shrimp Company, Inc., which operated a "fish house" engaged in commercial fishing operations, including off-loading, packing, and distributing seafood products, such as shrimp. On

December 11, 2002, a Declaration of Condominium Establishing Key-Tex Shrimp Docks, A Condominium, was recorded in the County's public records. The effect of this was to cause the 1,110-foot dock to be subdivided into twenty-one separate units, numbered as Units 1-21, creating what is known as a dockominium. (This type of ownership arrangement occurs when a land condominium also includes submerged bay bottom.)

On March 27, 2003, another Declaration of Condominium establishing the Key-Tex Shrimp Building Condominium, Inc., was recorded in the County's public records. This declaration took Unit 20 from the previously recorded Declaration of Condominium and divided it into five additional units, numbered as Units 20A through 20E. Therefore, there now exist twenty-five units on the parcel previously known as the Key-Tex Shrimp Docks, with each unit possessing a separate real estate (RE) number, which is used by the local tax assessor's office for the purpose of identification, transferring ownership, and tax assessments.

On August 8, 2003, GAP purchased Unit 20B from Key-Tex Shrimp Company, Inc. On August 26, 2003, a licensed electrical contractor, acting on behalf of GAP, filed application number 03-1-03856 with the County seeking a building permit authorizing GAP to "[i]nstall and wire three marine grade elect[ric] pedestals" on GAP's property. The application was submitted in the names of Key-Tex Shrimp Company, Inc., Appellant's

predecessor-in-title, and Joe O'Connell, president of Key-Tex Shrimp Building Condominium Association, Inc., which acts as agent for the condominium unit owners in dealing with the local government. The pedestals were to have 50-amp, 30-amp, and 20-amp marine-style receptacles and were to receive power from existing panels in an existing building. Once installed, they would be used by boats docking at GAP's property to secure "shore power," that is, electrical power, cable television, telephone service, and other similar services while they were docked.

By letter dated September 23, 2003, the County's Director of Planning and Environmental Resources, K. Marlene Conaway, denied the application for the following three reasons:

> 1. The site plan submitted shows the scope of work is proposed on a single parcel. This site was analyzed in a pre-application meeting of April 30, 2001[,] and our records indicate the Key-Tex shrimp docks as one parcel with two buildings and accessory docks. The current records from the Property Appraiser maps indicate the subdivision of this property into Lots 1-21 and A-D.
>
> 2. The application submitted is for work located on a parcel that has been subdivided without benefit of plat approval. Pursuant to [Section] 9.5-81(b), "No building permit, except for a single-family detached dwelling and accessory uses thereto, shall be issued for the construction of any building, structure or improvement unless a final plat has been approved in accordance with the provisions of this division and recorded on

> the lot on which the construction is proposed." The Monroe County Property Appraiser's records indicate there are more than twenty-five parcels located on the subject property.
>
> 3. The property historically has supported Commercial Fishing Uses and Retail/ Manufacturing Uses allowed as of right pursuant to [Section] 9.5-250(a). The change of use to a Marina use requires approval pursuant to [Section] 9.5-250(c)(2). In the Letter of Understanding, dated May 4, 2001, the Monroe County Planning Department notified the property owner that any change in use would require Major Conditional Use approval.

The letter went on to say that in order to remedy this matter, "an application for a major conditional use and plat approval are required," and that "[t]he proposed improvements can be considered through the development review process of a major conditional use."

On October 31, 2003, GAP filed its Application for Administrative Appeal to Planning Commission appealing the decision of September 23, 2003, to deny its application number 03-1-03856. The bases for the appeal were that plat approval was not required for the creation of land condominiums in the County; that major conditional use approval was not required because the property was functioning as a marina prior to September 15, 1986, and therefore, it was deemed to have major conditional use approval under Section 9-5.2(c), M.C.C.; and that GAP's due process rights would be violated if the

Commission relied on new reasons, other than those cited in Ms. Conaway's letter, for denying the application. (The latter ground was apparently raised because Appellant believed that Ms. Conaway also intended to rely upon a letter dated October 7, 2003, from the County's Director of the Growth Management Division to further bolster her decision.)

On March 10, 2004, the Commission conducted a quasi-judicial hearing on GAP's appeal. At the hearing, GAP presented the testimony of seven witnesses: Andy Griffiths, Larry Foltz, John Strothenke, Hugh Spinney, and Karl Walters, all residents of the area; Alice Petrat, a principal in GAP; and Catherine Harding, an expert. Ms. Conaway testified on behalf of the County Planning Department staff.

Appellant's witnesses presented testimony mainly on the issue of whether the Key-Tex property functioned as a marina (as opposed to a commercial fishing house) prior to September 15, 1986, when the current land development regulations were adopted. If it was operating as a marina prior to that date, then the property would be deemed to have a major conditional use under the "deemer clause" in Section 9.5-2(c), M.C.C., which provides that "[a]ll uses existing on the effective date [September 15, 1986] 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."

In construing the term "marina," as defined in Section 9-5.4(M-5), M.C.C., the Commission accepted Ms. Conaway's interpretation that a marina contemplated "pleasure boats," rather than commercial fishing vessels. Consistent with this interpretation, the Commission accepted evidence by the witnesses that the property had functioned only as a commercial fishing venture (that is, a commercial fishing dock) prior to September 15, 1986, and that it was now being used as a marina by multiple owners. For example, Mr. Foltz testified that prior to 1986, during the winter months (November to April or May), the property was used full-time as a fishing house. During the summer months, the docks were rented for fishing purposes, all services rendered were consistent with commercial fishing purposes, and there were no pleasure boats, dry storage, or non-fisherman live-aboards.

Mr. Strothenke also testified that before 1986, the property consisted mainly of fishing boats, longline boats, and other fishing vessels, and that the facility did not launch, store, or haul boats.

Finally, Appellant's expert witness, Ms. Harding, indicated in her report that she found nothing that would indicate that the property had been functioning as a marina prior to the cut-

off date in 1986. She also acknowledged that an increase in intensity would require a major conditional use permit.

Because the property is now being used as a marina and Section 9.5-250(c)(2), M.C.C., provides that a marina is permitted only as a major conditional use within a MI zoning district, the Commission concluded that the application could not be approved without a major conditional use permit.

As a further ground for denying the application, during the review process, Ms. Conaway determined (although she did not specifically say so in her letter of September 23, 2003) that the intensity of the use on the property had increased. On this issue, the Commission accepted the testimony of Ms. Conaway that County electric records indicated that prior to the conversion of the Key-Tex property to a dockominium, there had been fifteen pedestals on the property. There are now twenty-three pedestals, and Appellant seeks to add another three.

The Commission also accepted Ms. Conaway's testimony that (a) by increasing the number of pedestals, more boats would be docking at the facility, and (b) by creating slips (in contrast to the parallel parking of boats which had previously occurred at the dock), the number of boats that could dock at the facility would likewise increase. The Commission agreed with Ms. Conaway's conclusion that an increase in the number of boats using the dock equates to an intensification of use, and that

this constituted "development" within the meaning of Section 9.5-4(D-8), M.C.C., and triggered the development (major conditional use) approval process.

Finally, in reviewing the application, Ms. Conaway noted that the two RE numbers on the application were incorrect, and that the property had actually been subdivided into a dockominium, with each owner having a separate RE number. Because there were now multiple units, she concluded that plat approval was required before a permit could be issued. In this vein, the Commission accepted her recommendation that the condominium declarations filed by Key-Tex require plat approval and recording under Section 9.5-81(a)(1), M.C.C., which requires plat approval for "[t]he division of land into three (3) or more parcels."

At the conclusion of the hearing, the Commission voted 4-1 to deny the application. This decision was memorialized by Resolution No. P17-04 dated March 24, 2004. The Resolution made the following Findings of Fact and Conclusions of Law:

> 1. Based on testimony of the Planning and Environmental Resources staff, the issue of the public hearing was whether the Planning Department's decision denying GAP Properties of SW Florida[-1], Inc. and Key-Tex Shrimp Building Condominium building permit application # 03-1-03856 on August 25, 2003, for the installation of three marine grade

electric pedestals for a property should be reversed; and

2. Based on Monroe County Code Section 9.5-24(a)h [sic] of the Land Development Regulations (LDRS) the Planning Director has the authority to render interpretations of the plan and the LDRS; and

3. As a matter of law, it is the appellant's burden to provide evidence and testimony that the conclusion reached by the Planning Director is inaccurate; and

4. Based on the Orange West, LTD verses [sic] City of Winter Garden, District Court of Appeal of Florida Fifth District case [528 So. 2d 84 (Fla. 5th DCA 1988)] concerning platting and condominium law, and legal opinions received, we find that the Key-Tex Shrimp Dock properties have been subdivided and were subject to the platting requirements in Section 9-5.81; and

5. Based on Monroe County Section 9.5-81(b) we find that no building permit, except for single-family detached dwellings and accessory uses thereto, shall be issued for the construction of any building, structure or improvement unless a final plat has been approved in accordance with the provisions of this division and recorded for the lot on which the construction is proposed; and

6. Based on testimony of staff and witnesses we find that the Key-Tex property docks and buildings have been divided into boat slips and by providing slips for dockage of boats, rather than tying up parallel to the dock, the intensity of use has increased; and

7. Based on testimony and documents received we find that insufficient evidence has been presented to determine that the historical use of the site was as a marina; and

8. Based on Monroe County Code Section 9.5-4(C-12) the definition of Commercial Fishing and testimony of staff and witnesses, we find the historical use of the property is commercial fishing and a change of use to Marina (M-5) will require a Major Conditional Use; and

9. Based on Monroe County Code Section 9.5-250 Maritime Industries, we find that a Major Conditional Use is required before the use of the property may be changed from commercial fishing, an as of right use, to a marina; and

10. Based on Monroe County Code Section 9.5-4(D-8) Development has occurred on the Key-Tex Shrimp Dock properties without the required development approval process being followed; and

11. The Planning Commission concludes that the sworn testimony of all witnesses were insufficient both individually, and collectively, with the record to rise to the level of substantial and competent evidence and such evidence ultimately does not meet the burden of proof and demonstrate beyond a predominance [sic] of evidence that the decision made by the Planning Director was incorrect. Furthermore, the Planning Commission concludes that the sworn testimony of these witnesses was inconsistent, as admitted on the record, possibly due to the significant lapse of time, but taken in its totality the testimony and evidence offered, after being evaluated and weighed, is insufficient to meet and establish the burden of proof imposed on the appellant; and

12. The Planning Commission concludes that the sworn testimony submitted by the appellant failed to meet the burden of proof of demonstrating that the Planning Director made the wrong decision in denying a permit to the applicant.

On June 23, 2004, Appellant filed its Administrative Appeal of Resolution No. P17-04 (Appeal). The Appeal was forwarded by the County to DOAH on July 23, 2004. As noted above, Appellant contends that the Commission's legal conclusion that the Key-Tex condominium was required to submit a subdivision plat was erroneous and should be modified or rejected; that the Commission's findings that the intensity of use had increased, and that the property was not operating as a marina prior to September 15, 1986, were not supported by competent substantial evidence and should be modified or rejected; and that Ms. Conaway's interpretations regarding the definition of a marina and the filing of a plat for a dockominium were erroneous and should be modified or rejected. As further clarified by Appellant's counsel at hearing, by its third ground, Appellant essentially seeks a ruling that the Planning Director may not offer legal opinions at Commission meetings, and that her participation at Commission hearings, if at all, should be limited to presenting her previously prepared decision.

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 [administrative law judge] "may affirm, reverse or modify the order of the planning commission." Art. XIV,

§ 9.5.540(b), M.C.C. The scope of the hearing officer's review under Article XIV is as follows:

> 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 the law.

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

In Degroot v. Sheffield, 95 So. 2d 912, 915 (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."

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

GAP first contends that the Commission erred in concluding (in paragraph 4 of the Resolution) that Key-Tex's properties "have been subdivided and are subject to the platting requirements in Section 9.5-81." Subsections (a) and (b) of that regulation provide in part that

> (a) Except as provided in subsections (b) and (c) of this section, plat approval shall be required for:

> (1) The division of land into three (3) or more parcels; or
>
> (2) The division of land into two (2) or more parcels where the land involved in the division was previously divided without plat approval within the prior two (2) years; or
> . . .
>
> (b) No building permit, except for single-family detached dwellings and accessory uses thereto, shall be issued for the construction of a building, structure or improvement unless a final plat has been approved with the provisions of this division and recorded for the lot on which the construction is proposed.

The foregoing regulation mandates that an owner apply for, and obtain, plat approval when dividing a parcel of property into three or more parcels, or two or more parcels if the parcel has been previously subdivided.

A parcel of land is defined in Section 9.5-4(P-1), M.C.C., as

> 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.

When the dockominium was formed, Appellant created twenty-five separate units, or parcels of land, within the meaning of Section 9.5-4(P-1). By doing so, Appellant created the need for plat approval in accordance with Section 9.5-81, M.C.C.

In reaching this conclusion, it is noted that traditional multi-family, multi-story condominium conversions do not trigger the requirement for a new plat because they do not involve the division of land. Rather, they involve the division of airspace. Land condominiums, however, may result in a division of land (through the condominium declarations themselves) and implicate the need for planning and subdivision review. This is because, in a sense, they create new lots. Here, the Key-Tex conversion created numerous individual condominium units, which in turn raise a number of land use issues, such as parking, floor space ratios, building permit allocation implications, and change or intensification of use. By implicating these land use considerations, Key Tex has subjected itself to land development regulations, including Section 9.5-81, M.C.C., which address these concerns. Compare Orange West, Ltd. v. City of Winter Garden, 528 So. 2d 84, 86 (Fla. 3d DCA 1988)("[w]here development of a condominium project constitutes a division of a parcel of land, the developer is subject to municipal regulations and ordinances"); City of Miami v. Rocio Corporation, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981)(the Condominium Act does not expressly or by implication preempt the subject of condominium conversion to state government). Therefore, for purposes of land use regulation (but not form of ownership), the conversion of the Key-Tex property into a

dockominium, with a resulting division of land, requires approval under Section 9.5-81, M.C.C.

Appellant next contends that there is no competent substantial evidence to support the Commission's finding that the property was not operating as a marina prior to September 15, 1986. To resolve this issue, reference to the definitions of marina and commercial fishing is necessary. Section 9.5-4(c)(C-12), M.C.C., defines "commercial fishing" as

> the catching, landing, processing or packaging of seafood for commercial purposes, including the mooring and docking of boats and/or the storage of traps and other fishing equipment and charter boats and spo[r]t diving uses.

On the other hand, a "marina" is defined in Section 9-5.4(M-5), M.C.C., as

> a facility for the storage (wet and dry), launching and mooring of boats together with accessory retail and service uses, including restaurants and live-aboards, charter-boat and sport diving uses, except where prohibited, but not including docks accessory to a land-based dwelling unit limited to the use of owners or occupants of those dwelling units.

Appellant contends that so long as a facility is used for the storage, launching, and mooring of <u>any</u> type of boat, including one used for commercial fishing, the facility qualifies as a marina. Under this interpretation, so long as Key-Tex Shrimp Company, Inc., launched, stored, and moored a

boat used for commercial fishing purposes, and it provided an accessory service, such as selling fuel, nets, ropes, and chains for commercial fishing boats (which it did), it was using the property as a marina prior to September 15, 1986.

Conversely, the Commission takes the position that a commercial fishing house and a marina are mutually exclusive, and that the latter use contemplates such activities as the docking of pleasure boats, vessel storage, vessel launching, non-fisherman live-aboards, and restaurants. The Commission also points out that by defining the two terms separately in the land development regulations, the County intended that there would be two separate categories of use, and that one use (marina) is not inclusive of the other (commercial fishing).

As written, Section 9.5-4(M-4), M.C.C., provides that in order to constitute a marina, a facility must (a) be used for storing, launching, and mooring boats (which would obviously include boats engaged in the commercial fishing business, since the definition makes no distinction between the types of boats which qualify for this provision), and (b) provide accessory retail and service uses typically associated with a marina, such as restaurants, non-fisherman live-aboards, charter boat operations, and sport diving uses. This construction of the term is consistent with the Commission's interpretation of the regulation and will be used in resolving this dispute.

There is competent substantial evidence to support the Commission's finding that while Key-Tex Shrimp Company, Inc., met the first part of the definition by storing, launching, and mooring boats, it did not provide accessory retail and service uses typically associated with a marina, such as a restaurant, charter boat operations, and sport diving uses, nor did non-fisherman live-aboards stay on the premises. Therefore, it was not operating as a marina prior to September 15, 1986, and is not deemed to have a major conditional use under Section 9.5-2(c), M.C.C. Findings of Fact 7-9 are hereby sustained.

Finding of Fact 6 of the Resolution states that "the Key-Tex property docks and buildings have been divided into boat slips and by providing slips for dockage of boats, rather than tying up parallel to the dock, the intensity of use has increased." By implication (but without saying so in the Resolution), the Commission also found that after the conversion of the property to a dockominium, the number of pedestals had increased from fifteen to twenty-three (with three more being sought by the instant application), and this constituted further evidence of an increase in intensity of use on the property. Appellant challenges these findings.

Article XIV, Division 3, Sections 9.5-261 et seq., M.C.C., set forth the density and intensity standards for all land uses. Section 9.5-261, M.C.C., provides that no property can be

developed, used, or occupied at an intensity or density greater than the standards set out in the Division without complying with the development approval process.

There are no intensity standards in Division 3 that limit the number of boats that may be docked at a marina, or measure intensity by the number of electrical outlets (pedestals) on the property. Rather, intensity is logically measured by the size of the dock. Therefore, even if Key-Tex has increased the number of boats that may dock at the facility by creating new slips, or has increased the number of pedestals since the property was converted, there will be no change in intensity under current M.C.C. standards. Therefore, it is concluded that there is no competent substantial evidence to support the Commission's finding on this issue, and that Finding of Fact 6 must be rejected.

Finally, as clarified by counsel during oral argument, Appellant requests the entry of a final order which definitively spells out that the Planning Director may not offer "legal advice" at Commission meetings, and that her participation in the process should end after she makes a preliminary determination on a pending application. Counsel has cited no authority for granting this type of relief.

Clearly, the Planning Director may offer advice to the Commission during its decision-making process. See § 9.5-24(h),

M.C.C. (planning director has the duty to "render interpretations of the plan, this chapter or the boundaries of the official land use district map"). Importantly, Appellant was given the opportunity to present contrary evidence and to cross-examine Ms. Conaway at the quasi-judicial hearing. At the same time, if a party believes that the Planning Director has given erroneous advice, or made an erroneous decision, as Appellant asserts, it has the right to file an appeal under the M.C.C. Given these procedural safeguards, Appellant's contention is rejected.

DECISION

Based upon the foregoing, the Commission's decision in Resolution No. P17-04 is AFFIRMED.

DONE AND ORDERED this 10th day of November, 2004, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

According 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.