STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY KATE BELNIAK,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 04-2953
	)	
TOP FLIGHT DEVELOPMENT, LLC, and CITY OF CLEARWATER,	)	
	)	
	)	
Appellees,	)	
	)	

FINAL ORDER

Appellant, Mary Kate Belniak, seeks review of a Development Order (DO) rendered by the City of Clearwater Community Development Board (Board) on July 26, 2004. The Division of Administrative Hearings (DOAH), by contract, and pursuant to Article 4, Division 5, Section 4-505 of the Community Development Code (Code), has jurisdiction to consider this appeal. Oral argument was presented by the parties on October 11, 2004, in Clearwater, Florida. Appellant and Appellees, Top Flight Development, LLC (Top Flight) and City of Clearwater (City), have submitted Proposed Final Orders.

STATEMENT OF THE ISSUE

The issue is whether to approve, approve with conditions, or deny Top Flight's development application approved by the Board on July 26, 2004. That decision approved a Flexible

Development application to permit a reduction on the side (east) setback from 10 feet to 5.85 feet (to pavement) and an increase of building height from 35 feet to 59 feet from base flood elevation of 13 feet MSL (with height calculated to the midpoint of the roof slope) in association with the construction of 62 multi-family residential (attached) units at 1925 Edgewater Drive, Clearwater, Florida.

PRELIMINARY STATEMENT

This matter began on September 25, 2003, when Top Flight filed a Flexible Development application with the City seeking approval of a site plan which increased the building height (from 50 to 75 feet) of a seven-story condominium (including covered parking) to be constructed on a 2.572-acre site at 1925 Edgewater Drive, Clearwater, Florida. The application was scheduled for consideration by the Board at meetings conducted on March 16, April 20, May 18, and July 20, 2004, and approval was given at the meeting on July 20, 2004. At that meeting, testimony and statements were given by Michael H. Reynolds, a City Planner III; Robert Aude, an architect employed by Top Flight; four property owners who were given party status and opposed the application: Appellant, Tracy Spikes, Dean Falk, and Richard Mabee; four individuals who supported the application; and fifteen individuals who opposed the application. On July 26, 2004, a DO was rendered memorializing

the Board's action and approving the application with certain modifications to the original design and subject to eighteen conditions.

Under Article 4, Division 5, Section 4-505 of the Code, a decision by the Board may be appealed to a hearing officer (administrative law judge). On August 3, 2004, Appellant, who resides near the project site, filed her Appeal Application seeking to overturn the decision. Borrowing from language in Sections 4-504.C and 4-505.C of the Code, Appellant contended that the decision misconstrued or incorrectly interpreted the provisions of the Code; that the decision is not in harmony with the general intent and purpose of the Code; that the decision is detrimental to the public health, safety, and general welfare; that the decision cannot be sustained by the evidence before the Board; and that the decision departs from the essential requirements of the law. Because Section 4-505.C, and not Section 4-504.C, governs this appeal, only the last two grounds are relevant. As later clarified by her counsel, Appellant contends that she was not afforded procedural due process in several respects and that the Board committed errors so fundamental as to render approval of the project void. She also contends that there is no evidence to support the Board's decision. As further clarified by counsel, Appellant is concerned only with the proposed height of the condominium.

On August 19, 2004, the Appeal Application, along with the Record-on-Appeal, was referred by the City to DOAH with a request that an administrative law judge serve as a hearing officer on the appeal. By Order dated October 11, 2004, Appellant's unopposed Motion to Supplement Record was granted, and the videotapes of the four Board meetings and an exhibit submitted by Appellant at the meeting on July 20, 2004, were made a part of the record.

Pursuant to a Notice issued on August 31, 2004, oral argument on the appeal was heard on October 11, 2004, in Clearwater, Florida. Appellant and Appellees participated in the oral argument and were represented by counsel. Although three other individuals had been given party status by the Board, except for Appellant, none requested the right to participate in this appeal. At the hearing, the Record-on-Appeal was received in evidence.

On October 29 and 31 and November 4, 2004, respectively, the City, Appellant, and Top Flight filed Proposed Final Orders which have been considered by the undersigned in the preparation of this Final Order. In addition, Top Flight has filed a copy of the Transcript of the Board's July 20, 2004, meeting. Transcripts of the other meetings were not provided. However, videotapes of those meetings (without a transcription) have been made a part of this record.

Finally, even though this matter is an appeal of a Level Two decision, which requires that the undersigned sit in an appellate review capacity, Section 4-505.D requires that "[t]he decision of the hearing officer shall include findings of fact, conclusions of law, and a determination approving, approving with conditions, or denying the requested development application." Notwithstanding this incongruity, in accordance with that requirement, the Final Order has been prepared in that format.

FINDINGS OF FACT

1. On September 25, 2003, Top Flight filed a Flexible Development Application for Level Two approval of a comprehensive infill for redevelopment of properties located on the southeast corner of the intersection of Sunnydale Drive and Edgewater Drive and just north of Sunset Pointe Road in Clearwater, Florida. A Comfort Suites motel is just north of the property, while a Chevron gasoline station sits on the south side. The property is located within the Tourist zoning district, which allows condominiums as a permitted use. The project, as originally proposed, involved the construction of a seventy-seven unit, seven-story (including covered parking), luxury condominium on a 2.572-acre tract of land now occupied by 32 motel units and 9 rental apartments with ancillary structures, which the developer intends to raze.

2. The original application requested a deviation from the requirement in the Code that structures in the Tourist zoning district not exceed 35 feet in height. Under flexible development standards for that zoning district, however, a structure may be built to a maximum height of between 35 and 100 feet. (Although the City staff is authorized to approve requests for a deviation up to a maximum height of 50 feet without a hearing, Top Flight was requesting a flexible deviation to allow the building to be constructed an additional 25 feet, or to a height of 75 feet. This was still less than the 100 feet allowed under flexible development standards.)

3. On December 24, 2003, Top Flight filed a second application which amended its earlier application by seeking a reduction of the front yard setback on Sunnydale Drive from 25 feet to 17 feet to allow the placement of balcony support columns within the setbacks. Without a deviation, the Code requires a minimum 25-foot front yard setback. The second application continued to seek a deviation in height standards to 75 feet.

4. Because of staff concerns, on February 5, 2004, Top Flight filed a third Flexible Development application for the purpose of amending its earlier applications. The matter was placed on the agenda for the March 16, 2004, meeting of the Board.

5. At the meeting on March 16, 2004, the City's staff recommended that certain changes in the design of the building be made. In order to make these suggested changes, Top Flight requested that the matter be continued to a later date. That request was granted, and the matter was placed on the agenda for the April 20, 2004, meeting.

6. At the April 20, 2004, meeting, Board members again expressed concern over the height of the building, the lack of stair stepping, and the bulk, density, and height. Because of these concerns, Top Flight requested, and was granted, a 90-day continuance to address these concerns. Appellant, who was present at that meeting, did not object to this request. The matter was then placed on the agenda for May 18, 2004, but because of a notice problem, it was continued to the July 20, 2004, meeting.

7. During the April 20, 2004, meeting, the Board allowed Top Flight's architect, Mr. Aude, and a City Planner III, Mr. Reynolds, to make their presentations prior to asking if any persons wished party status. (Section 4-206.D.3.b. provides that, as a preliminary matter, the chair of the Board shall "inquire of those attending the hearing if there is any person who wishes to seek party status.") Mr. Reynolds was not sworn, even though Section 4-206.D.3.d requires that all "witnesses shall be sworn." After the presentations by Mr. Aude and

Mr. Reynolds, Appellant was given party status. Therefore, Appellant could not cross-examine the two witnesses immediately after they testified. However, Appellant did not request the right to examine those witnesses nor did she lodge an objection to the procedure followed by the Board. Also, assuming that Mr. Aude and Mr. Reynolds were treated as experts by the Board, there is no indication that either witness submitted a resume at the hearing. (Section 4-206.D.5.a. requires that "[a]ny expert witness testifying shall submit a resume for the record before or during the public hearing.") However, no objection to this error in procedure was made by any person, including Appellant.

8. Based on the concerns of staff and Board members at the April 20, 2004, meeting, and to accommodate objections lodged by nearby residents, Top Flight modified its site plan by reducing the height of the building from 75 to 59 feet (which in turn reduced the height of the building from six stories over parking to four) and increasing the number of parking spaces. Other changes during the lengthy review process included decreasing the side (rather than the front) setback from a minimum of 10 feet to 5.85 feet and preserving two large oak trees on the property. The proposed height was significantly less than the maximum allowed height in the Tourist district (100 feet), and the proposed density of 59 units was also considerably less than the maximum allowed density on the property (30 units per acre,

or a total of 77 on the 2.57-acre tract). The application, as amended, was presented in this form at the July 20 meeting. Documents supporting the various changes were filed by Mr. Aude in February, March, April, May, and June 2004, and are a part of the record.

9. At the hearing on July 20, 2004, Mr. Reynolds and Mr. Aude again testified in support of the application, as amended. The staff report prepared by Mr. Reynolds was made a part of the record. (Section 4-206.G provides that the record shall consist of, among other things, "all applications, exhibits and papers submitted in any proceeding.") The report found that "all applicable Code requirements and criteria including but not limited to General Applicability criteria (Section 3-913) and the flexibility criteria for attached units (Section 2-803.B) have been met." The Board accepted this evidence as the most persuasive on the issue. The Board further accepted the testimony of Mr. Aude, and a determination in the staff report, that the project would be compatible with the character of the neighborhood. In doing so, it implicitly rejected the testimony of Appellant, and other individuals, that the height of the building was inconsistent with the character of the neighborhood. Finally, the Board accepted Mr. Reynolds' recommendation that the application should be approved, subject to eighteen conditions. The vote was 4-2 for approval.

10. During the July 20, 2004, meeting, Mr. Reynolds was cross-examined by another party, Mr. Falk. Although given the right to do so, Appellant did not question the witness. All parties, including Appellant, were given the opportunity to cross-examine Mr. Aude, but none sought to do so. The parties were also given the opportunity to ask questions of Top Flight's counsel, who gave argument (but not evidence) on behalf of his client. Although members of the public, and Appellant, were limited in the amount of time allowed for statements to three minutes, all persons who gave testimony or made statements that day, including Appellees, were urged by the chair to limit their remarks. Finally, Top Flight's counsel was allowed to make a closing argument at the meeting, at which time he used a demonstrative exhibit (a "chart" containing the names of area residents who supported the project), which was shown to Board members. (The same information can be found in the City files, which are a part of this record and contain correspondence from numerous area residents, some supporting, and others opposing, the project.) Although Appellant was not shown a copy of the document, the record does not show that she objected to the use of a demonstrative exhibit, or that she requested to see a copy.

11. Mr. J. B. Johnson was appointed to the Board sometime after the April 20, 2004, meeting. At the July 20, 2004,

meeting, he made the following statement concerning Top Flight's application:

> I can't speak for everybody here. Some people have lived here a short period of time. In view of every word that I have heard, every word that I have read, and I've been keeping up with this for several months because several months ago I had telephone calls from your area.
>
> I don't know how you could satisfy everybody. It's impossible, but I do know this, this is a great project. One that would be good for the City. One for the area, good for the area and I will support this.

Appellant has not cited to any evidence showing that Mr. Johnson did not review the record of the prior meetings or the application file before he cast his vote. Further, Appellant did not object to Mr. Johnson's participation.

12. On July 26, 2004, the Board entered its DO memorializing the action taken on July 20, 2004, which approved Top Flight's application. In the DO, the Board made the following findings/conclusions supporting its decision:

> 1. The proposal complies with the Flexible Development criteria per Section 2-803.B
>
> 2. The proposal is in compliance with other standards in the Code including the General Applicability Criteria per Section 3-913.
>
> 3. The development is compatible with the surrounding area and will enhance other redevelopment efforts.

13. The decision also included 18 Conditions of Approval and a requirement that an application for a building permit be made no later than July 20, 2005.

14. On August 3, 2004, Appellant filed her Appeal Application seeking a review of the Board's decision. The Appeal Application set out two relevant grounds (without any further specificity): that the Board's decision was not supported by the evidence, and that the Board departed from the essential requirements of the law. On August 19, 2004, the City referred the Appeal Application to DOAH. The specific grounds were not disclosed until Appellant presented oral argument and filed her Proposed Final Order.[1]

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Article 4, Division 5, Section 4-505 of the Code. Under that provision, the hearing officer may approve, approve with conditions, or deny the requested development application. The appeal process is described in more specificity in subsections B., C., and D. of the section as follows:

> B. At the hearing, the record before the community development board shall be received by the hearing officer. Additionally, oral argument may be presented by the appellant, applicant, city, and any

> other person granted party status by the community development board.
>
> C. The burden shall be upon the appellant to show that the decision of the community development board cannot be sustained by the evidence before the board, or that the decision of the board departs from the essential requirements of law.
>
> D. The persons entitled to present oral argument as set forth in subsection B. above may submit proposed final orders to the hearing officer within 20 days of the hearing. The hearing officer shall render a decision within 45 days of the hearing. The decision of the hearing officer shall include findings of fact, conclusions of law, and a determination approving, approving with conditions, or denying the requested development application.

16. While Section 4-505.C of the Code simply requires that the Board's decision be sustained by "the evidence," as opposed to "competent substantial evidence," the discussion of that term by the court in Degroot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957), is helpful. See Sobeleski v. City of Clearwater and Mariani, DOAH Case No. 02-3637 (DOAH Jan. 13, 2003). In Degroot, the court discussed the meaning of "competent substantial evidence" as follows:

> 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."

(While Section 4-206.D.4 provides that "[t]he burden of proof is upon the applicant [at the quasi-judicial Board hearing] to show by substantial competent evidence that he is entitled to the approval requested," this provision is referring to the standard of proof at the hearing and not the standard of review for appeals under Section 4-505.)

17. A hearing officer acting in his or her appellate review capacity is without authority to reweigh conflicting testimony presented to the Board or to substitute his or her judgment for that of the Board on the issue of credibility of witnesses. See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

18. The issue of whether the Board's decision "depart[ed] from the essential requirements of the law" is synonymous with whether the Board "applied the correct law." Id. at 530. Therefore, contentions that procedural due process violations have occurred during the Board's review and hearing process must

be raised in another forum. This is because appeals from the Board are limited by the Code to a two-part review - whether the Board's decision can be sustained by the evidence, and whether the decision of the Board departed from the essential requirements of the law, that is, whether the Board applied the correct law. § 4-505.D. Moreover, the decision here is considered the final administrative action of the Board and is "subject to judicial review by common law certiorari to the circuit court." Id. Circuit court review of an administrative agency decision is governed by a three-part standard of review, including "whether procedural due process is accorded." Haines City, 650 So. 2d at 530. Therefore, a contention that procedural due process was not accorded Appellant should be presented to the circuit court.

19. Finally, the question on appeal is not whether the record contains evidence supporting the view of Appellant; rather, the question is whether the evidence supports the findings (both implicit and explicit) made in the Board's decision. Collier Medical Center, Inc. v. Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

20. As clarified by counsel at the oral argument and later in his Proposed Final Order, but not stated in the Appeal Application filed with the Board, Appellant contends that a

number of due process violations allegedly occurred, either at the April 20 or July 20 meetings, or both. They include allegations that the Board gave Appellant only three minutes to speak; that party status was given Appellant at the April 20 meeting only after the presentation of evidence by the Board and Top Flight; that the Board failed to disclose an ex parte statement (a demonstrative exhibit) submitted by Top Flight's counsel at the July 20 hearing, as required by Section 4-206.D.2.c.; that one witness (Mr. Reynolds) was not sworn prior to testifying, as required by Section 4-206.D.3.d.; that two experts (Mr. Reynolds and Mr. Aude) did not submit resumes at either meeting, as required by Section 4-206.D.5.a.; and that at the April 20 meeting parties were not allowed to cross-examine all witnesses or to present evidence, as allowed by Section 4-206.D.5. Appellant also asserts that the DO did not contain findings of fact and conclusions of law, as required by Section 4-206.D.6, and that one member of the Board, Mr. J. B. Johnson, who voted in favor of the project, was appointed to the Board after the April 20, 2004, meeting and did not hear the testimony and statements made during earlier meetings. For the reasons previously stated, these contentions should be addressed to a circuit court, if Appellant chooses to do so.[2]

21. While characterized as a due process violation, Appellant's contention that the DO fails to include findings of

fact and conclusions of law, as required by Section 4-206.D.6.a. and b., is more likely a contention that the decision of the Board constitutes a departure from the essential requirements of the law. As to this claim, the DO contains a mixture of findings of fact and/or conclusions of law, albeit bare-bones, which arguably satisfy the Code requirement that a Level Two decision be in writing and that it contain "findings of fact in regard to any questions of fact presented during the proceedings," "conclusions of law in regard to any applicable provisions of the comprehensive plan and the community development code," and "[a]pproval or approval with conditions." See § 4-206.D.6.a.-c. (The cited section does not require any more specificity than that enumerated above.)

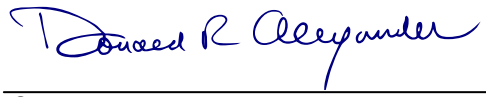
22. Appellant also contends that "Top Flight did not provide substantially competent evidence to support the Board's decision." To sustain this contention, there must be no evidence in the record to support the DO. The staff report accepted by the Board as being persuasive on the issue concluded that the application was consistent with all flexible development criteria in Section 2-803.B, which contains the standards and criteria that must be met in order to approve an application. It also found that the proposal was in compliance with all other standards in the Code, including the general applicability criteria in Section 2-913. (That section contains

the general standards for Level One and Level Two approval conditions and applies only to conditions attached to the approval.) Finally, the report found that the development was compatible with the surrounding area and would enhance other redevelopment efforts. While there may have been conflicting evidence on some of these issues, the Board resolved these conflicts in favor of Top Flight. Therefore, Appellant has failed to show that the decision "cannot be sustained by the evidence before the [B]oard." § 4-505.C.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Community Development Board's Development Order rendered on July 26, 2004, is AFFIRMED.

DONE AND ORDERED this 23rd day of November, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

1/ Section 4-502.B requires that appeals of all applications other than Level One approval shall be "filed with the city clerk in a form specified by the community development coordinator identifying with specificity the basis for the appeal." (Emphasis added). Assuming that this provision applies to the instant appeal, Appellant failed to comply with these requirements.

2/ Even assuming arguendo that due process contentions are cognizable in this forum or that they constitute a departure "from the essential requirements of the law," the alleged procedural errors still do not rise to a level that would warrant denying the application or remanding the proceeding to the Board to conduct another hearing. More importantly, the record does not show that Appellant, or any other person or party, objected to any ruling by the chair or requested that the Board enforce a particular procedural requirement. See, e.g., Castor v. State, 365 So. 2d 701, 703 (Fla. 1978)(a contemporaneous motion or objection is required so that the trial court (administrative board) has an opportunity to correct an alleged error). Therefore, if any errors in procedure did occur, they have been waived by Appellant. Compare City of Jacksonville v. Huffman, 764 So. 2d 695 (Fla. 1st DCA 2000). In addition, the errors that Appellant complains of appear to be de minimus in nature and did not affect the fairness of the proceeding. For example, the fact that Appellant may have been given three minutes to testify, while a City Planner and architect were given five minutes each, or that two witnesses, one of whom is a City Planner and presumably well-known to Board members, did not submit formal resumes, do not appear to be so material as to affect the outcome of this proceeding. (In fact, the record shows that nineteen persons were allowed to testify in opposition to the project at the July 20 meeting, while only six, including Mr. Reynolds and Mr. Aude, appeared in support of the project; thus, the total time allotted the opponents exceeded that of the proponents.) Likewise, Appellant has failed to demonstrate that Mr. Johnson did not review the entire file before voting at the July 20 meeting, and Appellant did not object to his participation. The record also shows that Appellant did not object to the Board allowing two proponents to give testimony at the April 20 meeting before granting her party status. Indeed, the videotape of that meeting reflects that Board counsel advised the chair that any person given party status after the two witnesses testified would have the right "to conduct cross-examination of the persons who previously testified." Appellant apparently chose not to do so.

At the July 20 meeting, the same two persons testified concerning the final amended version of the application, which was ultimately approved, and Appellant was given the opportunity to cross-examine those witnesses. Next, even if the testimony of Mr. Reynolds is ignored because he was not sworn, his staff report would still remain a part of the record and continue to form a basis for the Board's decision. Finally, the "ex parte" communication seen by the Board members (a demonstrative exhibit) during the July 20 meeting appears to be nothing more than a list of area residents who supported the application and merely duplicated information already found in the City files.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Pursuant to Article 4, Division 5, Section 4-505.D of the Code, this decision shall be final, subject to judicial review by common law certiorari to the circuit court.