

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ISLAND ESTATES CIVIC)	
ASSOCIATION,)	
)	
Appellant,)	
)	
vs.)	Case No. 05-2475
)	
COMMUNITY DEVELOPMENT BOARD,)	
CITY OF CLEARWATER and SKIFF)	
POINT OF CLEARWATER, LLC,)	
)	
Appellees.)	
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FINAL ORDER

This case involves an appeal of the Development Order issued by the City of Clearwater (City) authorizing Skiff Point of Clearwater, LLC (Applicant), to construct a five-story, 15-unit residential condominium (the Project) on a 0.5 acre parcel at the end of the cul-de-sac on Skiff Point (the Property). The appeal was brought by Island Estates Civic Association (Association), a civic association whose boundaries include the Property.

The Division of Administrative Hearings (DOAH), by contract and pursuant to Sections 4-501.B.1 and 4-505 of the City's Community Development Code (Code), has jurisdiction over this appeal. Oral argument was held in this case on September 21, 2005, before Administrative Law Judge T. Kent Wetherell, II.

At the oral argument, the record of the proceedings before the Community Development Board (Board) was received and argument was presented by the parties. See Code § 4-505.B.¹ As allowed by the Code, argument was also presented by several of the individuals who had been granted "party status" by the Board: Frank Dame, Neil Spillane, Kevin Barry, and Carroll Lovett. Id. The parties filed briefs detailing their respective positions, and they were also afforded the opportunity to file proposed final orders, which they did. See Code § 4-505.D. Additionally, Mr. Spillane filed a letter in which he responded to the arguments presented in the Appellees' briefs. Due consideration has been given to the parties' written submittals and oral arguments.

Code Section 4-505.D was recently amended to eliminate the requirement that the Final Order include findings of fact. See City Ordinance No. 7413-05, § 21 (effective May 5, 2005). The Final Order is only required to include "conclusions of law and a determination approving, approving with conditions, or denying the requested development application." Code § 4-505.D. A brief procedural history and overview of the Project is also included to provide the context necessary to evaluate the issues raised in the Association's appeal.

I. Procedural History and Project Overview

On March 10, 2005, the Applicant filed a sworn flexible development application seeking approval of the Project as a "residential infill project." The Project requires Level Two approval under the Code because it proposes reductions in the minimum setbacks and an increase in the maximum height specified in the Code.

The Property is composed of two pie-shaped lots. The width of the Property varies from 70 feet in the front to 250 feet in the rear along the Intracoastal Waterway. The average width of the lot, as calculated by City planning department staff, is 160 feet.

The Property is zoned Medium High Density Residential (MHDR). The immediately adjacent parcels and the entire "finger" of land around Skiff Point on which the Property is located are also zoned MHDR. All of the parcels on Skiff Point are developed with multi-family residential attached dwellings, except for one parcel which is developed with a single-family residence. Attached, condominium-style dwelling units "dominate" Skiff Point.

The "finger" of land around Dolphin Point, which is to the south of the Property, is also zoned MHDR and is developed with multi-family residential attached dwellings. The "finger" of land around Palm Island Southwest, which is to the north of the

Property, is zoned Low Medium Density Residential and is developed with single-family residences.

The Property is currently developed with two residential buildings, comprised of a two-story building and a one-story building containing a total of six attached dwelling units. Those buildings will be demolished to construct the Project.

The adjacent parcel immediately to the north of the Property is developed with a three-story condominium building with nine units. The adjacent parcel immediately to the south of the Property was developed with a two-story multi-family residential building, but it was represented at the oral argument that that building was recently demolished. There is conflicting testimony in the record as to whether the structures on the adjacent properties are elevated above the base flood elevation, as is required under the Code for new construction.

The Project will have parking on the ground floor, which is consistent with the condominium on the immediately adjacent parcel to the north of the Property as well as other condominiums in the Skiff Point/Dolphin Point area of Island Estates. The condominium units in the Project will be on the four floors above the parking.

All of the parking for the Project will be on-site. No deviation from the parking requirements in the Code was requested, and the 24 on-site parking spaces exceed the

requirements of the Code by one space. There will be deed restrictions requiring owners of the units in the Project to park on-site.

The Project will have a Mediterranean-style design, which is consistent with the condominium on the parcel immediately to the north of the Property. The Project will also have extensive landscaping and underground utilities.

The total height of the Project will be 71 feet, but for purposes of calculating height under the Code, the Project will be 49 feet. The Code calculates height from the base flood elevation, rather than ground level, and excludes certain aesthetic features on the roof.

The Project is considerably higher than the 30-foot to 35-foot buildings on the immediately adjacent properties, but the Project's height is not inconsistent with the development in the surrounding neighborhood. The analysis prepared by the Applicant's planner identified several buildings within 500 feet of the Project that are over four stories in height, and she testified that the Skiff Point/Dolphin Point area of Island Estates "is dominated by buildings that are multi-story, particularly those that are over four stories in height."

The application was considered by the Board at three separate meetings: April 19, 2005; May 17, 2005; and June 21, 2005. The Board heard testimony at each of the meetings from

City planning department staff, the Applicant, and persons and groups (including the Association) with "party status". The testimony was sworn,² and the opportunity for cross-examination was provided at each meeting. The Board also heard "public comment" on the Project at each meeting from individuals who did not have "party status."

At the conclusion of the April meeting, the Board granted the Applicant's request for a continuance so that the Applicant "could take some time to discuss this with the neighbors and maybe have a plan that may meet the Board's concerns, also." No changes were made to the Project after the meeting.

At the conclusion of the May meeting, the Board voted on a motion to deny the application. The vote was three to three, and because four votes are necessary for the Board to take action, consideration of the Project automatically carried over the Board's next meeting.

At the conclusion of the June meeting, a motion to deny the application failed by a vote of four to two. A subsequent motion to approve the application passed by the same vote. The motion for approval was based upon the proposed findings of fact and conclusions of law in the staff report prepared by the City planning department.

The staff report, which was prepared by planner Mark Parry in advance of the April meeting, recommended approval of the

Project. The staff report was updated prior to the May and June meetings, but no substantive changes were made in the report or to the staff recommendation of approval.

The staff report included an analysis of the Project as well as findings that the Project was consistent with each of the criteria in Code Sections 2-404.F. and 3-913. In making those findings, the planning department staff received input from other City departments (e.g., fire, utilities, stormwater, traffic, etc.) that reviewed the application. The Project received favorable endorsements from the other City departments, and no problem areas were identified.

Among other things, the staff report states that the Project's setbacks "are comparable to other developments in the area" and that "[t]he proposed building of four stories over ground level parking is consistent with other developments in the area." Consistent with those statements, Mr. Parry testified at the June Board meeting that "staff has found that the request for increased height is compatible with the surrounding neighborhood" and that there are other buildings in the area that are taller than 30 feet, which is the height requirement from which the Applicant is seeking a deviation.

Mr. Parry and other members of the City planning department staff (e.g., Mr. Thompson and Ms. Clayton) also testified at the Board meetings and were subject to cross-examination regarding

the staff report and the Project's compliance with the applicable criteria in the Code. Representatives of the Applicant, including attorney Troy Purdue, architect Robert Resch, engineer Housh Ghovaei, and planner Ethel Hammer, also testified at the Board meetings and were subject to cross-examination regarding the nature of the Project, the character of the adjacent and surrounding development, and the Project's compliance with the applicable requirements in the Code.

Extensive testimony was presented by individuals opposed to the Project at each of the Board meetings. The testimony primarily focused on the incompatibility of the Project with the development on the adjacent parcels and the inconsistency of the Project with the character of the surrounding area because of its height and bulk.

On June 23, 2005, the City issued a Development Order approving the flexible development application for the Project with conditions. The "bases for approval" set forth in the Development Order are that the Project complies with the requirements of Code Sections 2-404.F and 3-913 and that the Project "is compatible with the surrounding area and will enhance other redevelopment efforts."

On or about June 30, 2005, the Association timely filed an Appeal Application contesting the Development Order and the

Board's approval of the Project. The appeal was transferred to DOAH on July 12, 2005.

II. Scope of Appeal and Standard of Review

In this appeal, the burden is on the Association to show that:

[1] the decision of the [Board] cannot be sustained by substantial competent evidence before the board, or [2] that the decision of the board departs from the essential requirements of law.

City Code § 4-505.C.

The scope of review in this appeal is limited to those two issues. See, e.g., Belniak v. Top Flight Development, LLC, Case No. 04-2953, at 14-15 (DOAH Nov. 23, 2004).

The Association does not argue that the Board's approval of the Project departs from the essential requirements of law. It only argues that the Board's decision is not supported by competent substantial evidence.

When used as an appellate standard of review (as is the case in Code Section 4-505.C), competent substantial evidence has been construed to be "legally sufficient evidence" or evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

In determining whether the Board's decision is supported by competent substantial evidence, the undersigned is not permitted to second-guess the wisdom of the Board's decision, reweigh conflicting testimony presented to the Board, or substitute his judgment for that of the Board as to the credibility of witnesses. See, e.g., Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); Belniak, supra, at 13-15. Moreover, it is immaterial that the record contains evidence supporting the view of the Association so long as there is competent substantial evidence supporting the findings (both implicit and explicit) made by the Board in reaching its decision. See, e.g., Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000); Collier Medical Center, Inc. v. Dept. of Health & Rehabilitative Servs., 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Belniak, supra, at 15.

On these points, the Florida Supreme Court has admonished that:

the 'competent substantial evidence' standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has not training or experience -- and is inherently unsuited -- to sit as a roving 'super agency' with plenary oversight in such matters.

Dusseau v. Metropolitan Dade County, 794 So. 2d 1270, 1275-76 (Fla. 2001).

III. Analysis of the Association's Arguments
and Conclusions of Law

The "basis of appeal" set forth in the Appeal Application filed by the Association was that the Project failed to comply with Code Section 4-204.F (Criteria Nos. 1 and 7), Code Section 3-913 (Criteria Nos. 1, 3, 4, 5, and 6), and Code Section 4-404; and that the Board failed to comply with its procedural rules by not allowing cross-examination at the June meeting. In its initial brief, the Association argued that the Project fails to comply with Code Section 4-204.F.6 (in addition to Criteria Nos. 1 and 7), all six criteria in Code Section 3-913 (not just the five criteria identified in the Appeal Application), and Code Section 4-404. The Association's briefs do not discuss the cross-examination issue. At oral argument, the Association also argued that the Project fails to comply with the Code Section 2-1602, which relates to the Island Estates Neighborhood Conservation Overlay District (IENCOD).

The Association is deemed to have abandoned the cross-examination issue by not raising the issue in its briefs.³ The Association is also deemed to have waived any argument regarding the Project's compliance with Code Sections 4-204.F.6 and 3-913.2 by not specifically referencing those Code provisions in its Appeal Application.⁴ See Code § 4-502.B. (requiring Appeal

Application to "identify[] with specificity the basis for the appeal"). Similarly, the Association is deemed to have waived any argument regarding the Project's compliance with Code Section 2-1602, by not identifying that issue in its Appeal Application and/or by not raising the issue in its briefs.⁵

The Association's remaining arguments will be discussed in turn.

A. Code § 2-404.F. (Criteria No. 1 and 7)

Code Section 2-404.F sets forth the "flexibility criteria" that must be met in order for a residential infill project to be approved with variations from the development standards in Code Section 2-404, Table 2-404. The criteria include:

1. The development or redevelopment of the parcel proposed for development is otherwise impractical without deviations from one or more of the following:
intensity; other development standards.

* * *

7. Flexibility in regard to lot width, required setbacks, height and off-street parking are justified by benefits to community character and to the immediate vicinity of the parcel proposed for

development and the City of Clearwater as a whole.

Code § 2-404.F.

The record contains competent substantial evidence that development of the Property would be impractical without the deviations in the height or setback requirements in the Code. For example, there was testimony that the irregular shape of the Property and its location at the end of a cul-de-sac make development of the Property difficult without deviations from the Code, and that reducing the height of the Project would result in more building coverage on the Property, which in turn would reduce the view corridors across the Property.

Additionally, there is competent substantial evidence that reducing the number of units in the Project was not a viable alternative to the deviations that were requested. On this point, the sworn application states that financial viability was a consideration in the design of the Project, and City planning department staff testified that "the area has generally been undeveloped, and what [the Applicant] would be doing [is] more appropriately develop[ing] the site according to the underlying land use and the zoning criteria."

The record also contains competent substantial evidence that the deviations from the setback and height requirements in the Code are justified by benefits to "community character" and

to the immediate vicinity of the Property. For example, there is testimony and evidence in the record that the Project will have greater setbacks than the buildings currently on the Property, that the Project will have underground utilities (rather than the existing, "unsightly" overhead power lines described by Mr. Spillane in his testimony at the Board's April meeting) and extensive landscaping, and that the Project will have less lot coverage and better view corridors than an alternative design with a lower building. Additionally, there is testimony in the record that the neighborhood is in transition and that the Project would enhance the area because, according to City planning department staff, "it is an attractive looking building."

On these points, it is immaterial for purposes of the undersigned's review that there was extensive testimony from representatives of the Association and others opposed to the Project regarding the negative impacts on the "community character" of Skiff Point because of the Project's size and bulk. It was the Board's duty to weigh the conflicting testimony and evidence on this subjective criteria, and the undersigned is without authority to reweigh that testimony and evidence. See Dusseau, 794 So. 2d at 1275-76.

B. Code § 3-913 (Criteria No. 1, 3, 4, 5, and 6)

Code Section 3-913 identifies the "general standards" that must be met for a Level Two use to be approved. The application must "meet each and every one of the . . . criteria." The criteria at issue in this appeal provide:

1. The proposed development of the land will be in harmony with the scale, bulk, coverage, density, and character of adjacent properties in which it is located.

* * *

3. The proposed development will not hinder or discourage the appropriate development and use of adjacent land and buildings or significantly impair the value thereof.

4. The proposed development is designed to minimize traffic congestion.

5. The proposed development is consistent with the community character of the immediate vicinity of the parcel proposed for development.

6. The design of the proposed development minimizes adverse effects, including visual, acoustic and olfactory and hours of operation impacts, on adjacent properties.

Code § 3-913.

There was conflicting testimony presented to the Board regarding the Project's compliance with the criteria in Code Section 3-913. However, as noted above, it was the Board's duty to weigh the conflicting testimony on these subjective criteria,

and the undersigned is without authority to reweigh that testimony. See Dusseau, 794 So. 2d at 1275-76.

The record contains competent substantial evidence regarding the Project's compliance with each of the criteria in Code Section 3-913, particularly those subjective criteria relating to the Project's "harmony" with the adjacent properties and its consistency with the "community character" of Skiff Point. For example, the staff report states that "[t]he proposed building of four stories over ground level parking is consistent with other developments in the area." Similar testimony was presented by City planning department staff and the Applicant's planner at the June Board meeting. There is also testimony in the record that the Project will have "no adverse affects" on the values of adjacent properties and will improve view corridors, and that the Project is respectful of and adheres to the existing character of the neighborhood and the adjacent properties. As to minimization of traffic congestion, there is testimony in the record from City planning department staff and representatives of the Applicant that the Project meets the parking requirements in the Code and that the Project's on-site parking will be an improvement to the existing parking situation on the Property.

In making these conclusions, the undersigned did not overlook the Association's argument that the evaluation of the

Project's compatibility with the "community character" and its "harmony" with surrounding development under Code Section 3-913 should be limited to the existing development on the parcels abutting the Property (as compared to existing development in Island Estates in the general vicinity of the Property, or as the City and the Board argued in their brief and at oral argument, the development potential of the abutting properties). Even though some of the testimony and evidence in the record focuses on the compatibility of the Project with the existing development in the broader Skiff Point/Dolphin Point area of Island Estates, there is also testimony and evidence regarding the compatibility of the Project with the development on the abutting parcels. For example, Mr. Parry testified at the June Board meeting that, in his expert opinion, the proposed five-story building is compatible with the three-story condominium building on the parcel immediately to the north of the Property. Thus, even if the Association's interpretation of Code Section 3-913 is correct, there is competent substantial evidence to support the Board's ultimate findings that the Project satisfies the criteria in that section of the Code.

C. Code § 4-404

Code Section 4-404 requires an applicant for a Level Two approval to "demonstrate to the [Board] that all required criteria for approval are met." That section does not impose

any additional requirements beyond those found elsewhere in the Code.

The Association's argument on this issue simply makes reference in a summary fashion to the criteria in Code Section 3-913 that the Association argues were not met by the Applicant. Because, as discussed above, there is competent substantial evidence to support the Board's determination that Project complies with Code Section 3-913 (as well as Code Section 2-404.F), the Association's argument regarding the Project's non-compliance with Code Section 4-404 is rejected.

IV. Determination

Based upon the foregoing, the Board's decision is affirmed, and it is determined that the flexible development application for the Project is approved with the conditions set forth in the Development Order.

DONE AND ORDERED this 13th day of October, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 13th day of October, 2005.

ENDNOTES

1/ The "record before the community development board" is defined by Code Section 4-505.A, but with the agreement of the parties, the record received at the oral argument also included the transcripts of the Board hearings in the Appendix prepared by the parties as part of this appeal. Three photographs were tendered at the oral argument by Neil Spillane, one of the individuals who had been granted "party status" by the Board. According to Mr. Spillane, he showed the photographs to the Board during its hearings on the Project. The City, the Board, and the Applicant objected to the photographs being part of the record upon which the undersigned's decision will be based because the photographs were not part of the record upon which the Board made its decision. The photographs were apparently not handed to the City Clerk at the Board's hearing, which according to counsel for the City, is required for a document to become part of the record before the Board. The objection was sustained at the oral argument, and Mr. Spillane's tender of the photographs was treated as a proffer so that the photographs would be included in the record of this appeal in the event of subsequent judicial review. However, the photographs have not been considered by the undersigned in preparing this Final Order. Upon reflection, the tender of the photographs should have been treated as a motion to supplement the record, but the ruling would have been the same. See Code § 4-505.A (motion to supplement the record must be filed "within 10 days of filing the notice of appeal").

2/ The transcripts included in the Appendix filed as part of this appeal do not reflect that any of the witnesses, except for the Applicant's planner, were sworn prior to their testimony. However, it was represented at oral argument, that the Board's practice is to swear all individuals who intend to make presentations to the Board en masse at the start of the meeting, and that the practice was followed in this case.

3/ In making this conclusion, the undersigned did not overlook the fact that the cross-examination issue was raised in Mr. Spillane's letter. Aside from the fact that Mr. Spillane is not a direct party to this appeal, his letter is tantamount to a reply brief, and it is well-settled that issues raised for the

first time in a reply brief will not be considered. See, e.g., Williams v. State, 845 So. 2d 987, 989 (Fla. 1st DCA 2003). Furthermore, the Board's alleged failure to provide cross-examination is effectively a procedural due process claim, which is beyond the scope of this appeal. See Belniak, supra, at 14-15. Finally, the record does not support the claims in Mr. Spillane's letter, but rather shows that he and others with "party status" conducted extensive cross-examination of City staff and the witnesses presented by the Applicant, including attorney Troy Purdue when he presented factual testimony at the April and May Board meetings.

4/ Even if it was concluded that the issue had not been waived, the Association's argument that the Project failed to comply with Code Section 2-404.F.6 would be rejected because, as discussed in connection with Code Section 2-404.F.7, there is competent substantial evidence in the record that the Project will enhance "community character."

5/ Even if it was concluded that the issue had not been waived, the Association's argument that the Project failed to comply with Code Section 2-1602 would be rejected. Mr. Parry testified at the May Board meeting that "when it comes to multi-family dwellings, the [IENCOD] pretty much defaults back to the MHDR district section within the Code for things light height, setbacks and all of your site plan parameters" Moreover, there is competent substantial evidence in the record that the Project satisfies the "additional development standards" in Code Section 2-1602.H and that the Project is consistent with "the protection of the existing established character within the [IENCOD]" under Code Section 2-1602.A. On the latter point, for example, the Applicant's planner, Ms. Hammer, testified based upon her analysis that the Skiff Point/Dolphin Point area of Island Estates "is dominated by buildings that are multi-story, particularly those that are over four stories in height" and City planning department staff testified that the proposed five-story building is compatible with the adjacent three-story building and that the Project will enhance the "community character." The Applicant's attorney, Mr. Purdue, provided testimony consistent with that of Ms. Hammer at the May Board meeting.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final and is subject to judicial review by filing a petition for common law certiorari with the appropriate circuit court in accordance with Section 4-505.D of the City of Clearwater Community Development Code.