STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHADY NOOK, LTD.,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 06-0831
	)	
CITY OF GAINESVILLE,	)	
	)	
Appellee.	)	
_____	)	

WRITTEN OPINION

Appellant, Shady Nook, Ltd., seeks review of a final development order issued by the Development Review Board (DRB) of Appellee, City of Gainesville (City), on January 23, 2006. The Division of Administrative Hearings, by contract, and pursuant to Section 30-352.1, Land Development Code (LDC), has jurisdiction to consider this appeal. Appellant submitted an Initial Brief on April 10, 2006. The City submitted an Answer Brief on April 24, 2006. Appellant submitted a Reply Brief on May 1, 2006. Finally, on April 7, 2006, the parties submitted a Record of the underlying proceedings. At the request of the undersigned, the Record was supplemented by the filing of copies of relevant portions of the LDC on April 20, 2006. Oral argument was presented by the parties during a telephonic hearing held at 3:00 p.m. on May 18, 2006.

I. Issues

Appellant raises four issues on appeal: (1) whether the DRB misconstrued Section 30-254, LDC, by not allowing Appellant to remove a 58-inch Live Oak on its property; (2) whether the DRB misconstrued Section 30-255, LDC, by requiring a permanent fifteen-foot buffer zone around two 58-inch Live Oaks on its property; (3) whether the DRB misconstrued Section 30-264(a)(1), LDC, by requiring Appellant to preserve at least fifty percent of the dripline of two 58-inch Live Oaks in their natural state; and (4) whether the conditions in the final development order are supported by competent substantial evidence.

II. Background

On October 12, 1999, Alachua County (County) approved a Planned Unit Development (PUD) known as University Towne Center. See Alachua County Resolution Z-99-48. The project site, which is owned by Appellant, comprises approximately 18.5 acres and is located at 3301 Southwest 34th Street (at the intersection of Old Archer Road (State Road 24) and Southwest 34th Street). When the PUD was approved, the site was located in an unincorporated part of the County. (A mobile home park formerly occupied the site from the 1940's until around 1996 or 1997.) The approved PUD authorized a maximum of 155,000 square feet of commercial use, to be developed in five phases. The approved intensity standard was a floor ratio of 0.2. The PUD also

approved a 70,000 square-foot "Big Box" retail development for the fifth phase.

In 2001, the property was annexed into the City. Subsequent to annexation, Appellant sought final site plan approval for the fifth and final phase of the PUD project. Because the site was now in the City, the application was submitted to that local government. Under City regulations, the project is classified as a Planned Development (PD), which is the City's nomenclature for what the County refers to in its regulations as a PUD. If Appellant does not seek to revise the County-approved PUD, the County's PUD ordinance for the project would continue to apply. However, if any modifications are sought, the City has the authority to impose new conditions consistent with its LDC. Here, certain modifications (such as downsizing the square footage and intensity of the project) are being proposed for the last phase of the project Therefore, the City may apply its own PD regulations in approving the final phase.

Appellant proposes a total build-out for the entire project of 102,469 square feet, over 50,000 square feet less than originally approved. (Approximately 54,000 square feet of space has already been constructed in the first four phases. In Phase 5, the Applicant intends to add another 48,096 square feet.) In addition, the project build-out would have a floor area ratio of

0.13, which is over thirty-three percent less intense than the development allowed under the County PUD designation. Under the proposed build-out, approximately 51.5 percent of the site would be impervious surface, whereas standard commercial developments typically have an impervious surface of seventy to eighty percent of the site.

PUD Condition 4 required Appellant to "maintain and integrate the existing tree canopy into the overall design of the PUD as much as possible," including "the preservation of live oaks and cedars . . . through orientation and design of buildings," unless it provided "a layout that better implements the design criteria set forth in these conditions which requires removal of any of these trees." Even though the County PUD approved a design for Phase 5 which included a 70,000 square-foot "Big Box" retail development, and the removal of one 32-inch and two 58-inch Live Oak trees which were located in the footprint of that building, the City takes the position that the County's prior action is not binding, and that Appellant's new design must comply with the terms of Condition 4.

Appellant's current proposal would preserve the 32-inch tree and one of the 58-inch trees; the third tree, a 58-inch Live Oak, would be removed. Under Section 30-258(a), LDC, Live Oak trees of this size are considered "Heritage" trees, which are regulated by the City and subject to special protection[1];

when an applicant proposes to remove a Heritage tree, the criteria in Section 30-254, LDC, apply and must be satisfied before the tree can be removed or relocated. There is also a mitigation requirement.

The center of the saved 32-inch tree would be approximately eight feet from a new Building D to be constructed in Phase 5, and the center of the saved 58-inch tree would be six feet from the curb. The other 58-inch tree, which lies under the footprint of Building D, would be removed and replaced offsite through mitigation. Appellant's mitigation plans exceed the LDC criteria.

After the proposed site plan was submitted to the City, it was reviewed by various City departments. Those departments submitted evaluation sheets to the City's Technical Review Committee. One evaluation was performed by the City's Urban Forestry Inspector (UFI) who, among other things, expressed concerns about the loss of one of the three trees. In her initial Site Plan Evaluation Sheet dated October 9, 2005, the UFI made the following pertinent comments:

> The 58" heritage live oak tree needs to be saved for this development.
> Two heritage live oaks that are to be protected for this development have not been preserved well.
> The 58" live oak is 12' from building "D" and this does not include the footers for the building.
> The curb and gutter is 7' and 10' from the

> root crown of the 58" live oak.
> The 58" live oak will in time decline in health due to the impaction to the root system.
> The 32" live oak tree has the same problems facing it as the 58" tree.
> No root room for 32" live oak and the tree will decline in time.
> Mitigation does not make up for the loss to Gainesville's Urban Forest.

The UFI recommended disapproval of the application.

On October 11, 2005, or two days later, the UFI prepared a second Site Plan Evaluation Sheet which contained the following comments:

> In order to preserve the two (2) heritage 58" Live Oak trees, more thought needs to be given to the layout of this plan.
>
> One of the 58" Live Oak is protected but the other 58" Live Oak is not being saved/protected.
>
> These Live Oaks are probably at least 200 years old and they need to be protected for our Urban Forest.
>
> This PD report states the heritage trees are to be preserved and the applicant must develop around the valuable trees.
>
> Tupelo Trees 15"-15"-15"-12" These trees are the largest Tupelo trees in our Urban Forest and no effort has been given in preserving these trees.
>
> Please consider changing the layout of this development in order to save/protect the 58" Live Oak tree.
>
> The City has granted several/many heritage trees to be removed for this development and this is why these trees are so important.

Because of these concerns, in her evaluation sheet, the UFI recommended that the application be approved with conditions. The second evaluation sheet was used by the City's staff in its presentation to the DRB. Although the Record does not disclose why a second report was prepared or why the recommendation was changed, counsel for the City states it is because of concessions made by Appellant after the first report was issued.

On November 10, 2005, the City's Department of Community Development (Department) recommended to the DRB that unless certain conditions were complied with, the application should be denied. (In all, four City Departments had recommended that certain conditions be imposed.) Thereafter, Appellant agreed to all conditions recommended by the staff except one recommended by the UFI (and concurred in by the staff) that the project be redesigned so that both of the 58-inch Live Oak trees would be saved. Because it did not agree with the UFI's recommended condition, on December 28, 2005, Appellant requested a quasi-judicial hearing before the DRB.

On January 12, 2006, a formal quasi-judicial hearing was conducted before the DRB. Appellant presented the testimony of Robert Walpole, a professional engineer, and Keith A. Crutcher, president of Gainesville Real Estate Management Company, the general partner of Appellant. The City presented the testimony of Lawrence Calderon, Chief of Current Planning in the

Department, and Meg Neiderhofer, City Arborist. Although affected persons were given the opportunity to speak, none came forward.

Mr. Walpole described the property as being bordered by Old Archer Road (State Road 24) on the north, Southwest 34th Street on the west, some Department of Transportation retention ponds on the south, and by Gainesville Place Village (an apartment complex) to the east. He also described the project in detail and how the Applicant intends to save the 32-inch tree and one 58-inch tree by maintaining seventy percent and fifty-nine percent, respectively, of the driplines with pervious landscape materials. He went on to explain how the Applicant had satisfied the requirements of Section 30-264(a)(1)-(4), LDC, a tree preservation regulation which establishes four criteria that must be met in order for a development plan to be given credit for preserving an existing tree. First, fifty percent of the area of the tree's dripline must be naturally preserved or provided with pervious landscape material with no trenching or cutting of the roots in the area. As noted above, to meet this criterion for the two trees to be saved, the Applicant intends to protect seventy percent and fifty-nine percent, respectively, of their driplines with pervious landscape material. It will also cut out the connecting sidewalks which are proposed to run between the trees and replace them with stepping stones.

Mr. Walpole indicated that no trenching or cutting of roots would take place during construction. Second, no damage from skinning, barking, and the like can occur. Through the use of barricades during construction, this requirement will be satisfied. Third, there must be no evidence of active infestation potentially lethal to the tree. Mr. Walpole indicated that the UFI has agreed that no infestation is present. Finally, there must be no impervious surface or grade changes within five feet of the trunk. The Applicant has agreed to comply with this requirement by placing a curb at least six feet from the center of the 58-inch tree and by leaving a distance of at least eight feet between Building D and the center of the 32-inch tree.

Mr. Walpole addressed the requirement in Section 30-254(e), LDC, that allows removal or relocation of regulated trees only "upon a finding that the trees . . . prevent the reasonable development of the site." He went on to explain that the 58-inch tree to be removed was under the footprint of Building D and saving it would render a large portion of the site not usable, resulting in a significant loss in square footage of Building D, and preventing the reasonable development of the site. Finally, he discounted the possibility (raised by a member of the DRB) of redesigning the project by building a

multi-story building since the upper floor(s) would not be leaseable.

Mr. Keith A. Crutcher, who is president of the general partner of the developer, also testified that he could not reasonably develop the property without removing one of the two 58-inch trees. He stated that by agreeing to all of the staff's recommendations, including saving the third tree, Appellant would lose 13,000 square feet of space, equating to a loss of approximately $3.8 million in value and a twenty-eight percent reduction in square footage. Viewing the 58-inch tree alone, by saving that tree, the site plan would have to be revised, the size of Building D would have to be reduced by 6,200 square feet, and Appellant would incur a loss in that building's value of around $1.7 million. Recent property sales data were submitted into the record to support this amount.

In response to the recommendation by City staff that the project should be redesigned to accommodate the tree, Mr. Crutcher stated that he had considered other design options to save the tree, but physical, financial, and legal constraints prevented its preservation. For example, the parking lot cannot be moved, as suggested by the City staff, because an existing Carraba's restaurant next door has a legal right to use it through a restrictive covenant. Further, Building D could not be moved forward because it would impair the visibility of the

remainder of the building. The lack of visibility would render the impaired portion of the building unleasable. Mr. Crutcher pointed out that another portion of the development has an eighteen-month vacancy for space due to visibility issues. By the same token, the building cannot be moved back towards the property line since this would eliminate a driveway needed for delivery trucks. He also discounted the possibility of reducing the size of the building by leasing outdoor space (as suggested by a member of the DRB) and stated that it was "not a market-driven calculation." Finally, he pointed out that the mitigation being offered for the loss of the tree exceeds the LDC requirements.

Mr. Calderon, who is Chief of the Department's Planning Division, spoke on behalf of the City staff and indicated that the Applicant had agreed to all conditions recommended by staff except the one concerning the preservation of the third tree. Therefore, the staff was revising its recommendation from denial to approval with conditions. Mr Calderon began by pointing out that a number of other trees had been lost during the construction of the project and that the two large Live Oaks in issue here should be saved. He further advised that the only issue before the DRB was whether one 58-inch tree could be removed or if Building D should be redesigned. On the issue of whether the tree prevented the reasonable development of the

property, he opined that "a simple redesign of the building [and] some modification of the parking lot" could be made so that both 58-inch trees could be saved. However, except for a statement made during a power point presentation that "we are asking . . . that the building be redesigned to extend this way and this way without losing any square footage," and a comment that "a slight shift here and there would save the trees," he offered no underlying facts to support his opinion. Finally, although given an opportunity to do so before the DRB began deliberating, the staff declined to address or rebut the specific financial, physical, and legal constraints in redesigning the site that were described by witnesses Crutcher and Walpole.

Meg Neiderhofer, City Arborist, testified that both 58-inch trees are Heritage trees and should be saved because other Live Oaks and Cedars had already been lost during the early phases of the project. She added that the tree to be removed is the "healthiest" and "most beautiful" of the three trees on the site, and that it needs to be preserved with sufficient space around its base to ensure its long-term survival. By saving the tree, the City could preserve its identity as a "city in a forest."

Although not recommended in the UFI report, Ms. Neiderhofer recommended for the first time that an area of at least fifteen

feet around both 58-inch trees be preserved on a permanent basis because she interpreted Section 30-255, LDC, as requiring that at a minimum, this amount of the radius of the dripline should be protected. (As noted above, the Applicant has proposed that the curb be six feet from the center of the 58-inch tree to be saved.) Her recommendation was based on language in the regulation which provides that during construction and development of the property, barriers shall be placed "at or outside the dripline for all Heritage . . . trees." Therefore, she concluded that this provision "would enable not just 15 feet, it would say you can't go closer than 41 feet because that's what the radius of the dripline canopy - of the canopy is. So under Section 30-255 we're well within the right of saying no closer than 15 feet." The witness conceded, however, that she works primarily with regulations which relate to her enforcement duties (inspections of tree barricades at construction sites), and not with tree preservation regulations, such as Sections 30-254 and 30-264, LDC. She also acknowledged that she had studied those provisions for the first time that day and "learned something new about the code." She further agreed that she was not applying the provision as written when she recommended a minimum fifteen-foot development setback. Finally, she noted that the City needed "to clean up the

language [in the regulations} a little bit," presumably so that they would comport with her views expressed at the hearing.

The City Arborist also referred to Section 30-264(a), LDC, as supporting an additional condition in the final development order. That provision provides credit to an applicant for preserving existing trees if the following criteria are met:

> (1) Fifty percent of the area within the dripline shall be naturally preserved or provided with pervious landscape material and shall be maintained at its original grade with trenching or cutting of roots in this area. Within this area, there shall be no storage or fill or compaction of the soil, as from heavy construction equipment, or any evidence of concrete, paint, chemicals or other foreign substances in the soil.
> (2) The tree shall not be damaged from skimming, barking, bumping and the like.
> (3) There shall be no evidence of active insect infestation potentially lethal to the trees.
> (4) There shall be no impervious surface or grade change within five feet of the trunk.

According to the City Arborist, she construed Appellant's decision to preserve fifty percent of the area within the dripline of the 58-inch trees with pervious paving as contravening the terms of Section 30-264(a)(1) because she assumed that this would require trenching and cutting of roots in the area, which would harm the trees. Thus, even though the LDC authorized the use of pervious landscape material, she concluded that it was inadequate in this case and that an area

within the dripline of both 58-inch trees should be preserved in their natural state. (This was contrary to the finding of the UFI in her Site Evaluation Sheet, who reported that "[o]ne of the 58" Live Oak is protected" even though pervious landscape materials were being used.)

At the conclusion of the hearing, the City Arborist clarified her testimony by reaffirming (and adopting) all of the comments (referred to by the witness as "statements") in the UFI report except one, which was withdrawn. The withdrawn "statement" was a conclusion by the UFI that Appellant had made no effort to preserve four Tupelo trees. The City Arborist specifically reaffirmed the "statement" in the UFI report that "[o]ne of the 58" Live Oak [trees] is protected but the other 58" Live Oak is not being saved/preserved." Presumably, this was done to make her testimony consistent with the written comments of the UFI, who did not testify at the public hearing.

The City Arborist's ultimate recommendation was that the "layout of this plan" be "modified," that both 58-inch trees be saved, and that an area equal to fifty percent of the dripline be preserved, with no construction coming closer than fifteen feet on any one side. However, she did not indicate whether the area within the dripline must be naturally preserved or whether it could be preserved with pervious landscape material.

At the conclusion of the hearing, by a 4-1 vote, the DRB adopted the staff's recommendation and approved the application with conditions.

On January 23, 2006, the Chief of Planning Division issued a letter which served as the DRB's final development order. It read in pertinent part as follows:

> I am pleased to inform you that the Development Review Board reviewed the above referenced application and granted approval with conditions. The conditions are included in the last staff report provided to you. The approval also incorporates a modification of the Urban Forestry Inspector's statements presented at the meeting. The comments were modified as follows and included in a modified version as attached.
>
> Concerning the 58" Heritage Live Oaks[:]
>
> In order to preserve the two (2) Live Oak trees, more thought needs to be given to the layout of this plan. The modified layout should incorporate the following condition. Based on the expert testimony presented tonight and included in the report, the two (2) Live Oak trees must be saved with an area preserved under each tree, equal to at least 50% of the area of the dripline with construction coming no closer than 15 feet on any side.
>
> Some items on the original comment sheet were modified base[d] on testimony presented at the meeting.
>
> One requirement was withdrawn in accordance with the testimony presented at the meeting.

On February 9, 2006, the Applicant filed its appeal from the final development order pursuant to Section 30-352.1, LDC.

III. Legal Discussion

The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Section 30-352.1, LDC. Under that provision, a hearing officer (administrative law judge) is authorized to conduct an "appellate hearing" to review a final development order rendered by the DRB.

Under Section 30.352.1(a), LDC, the scope of review is limited in the following manner:

> 1. The hearing officer's review shall be limited to the record and applicable law;
>
> 2. The hearing officer shall have the authority to review questions of law only, including interpretations of this chapter, and any rules and regulations implementing this chapter. For this purpose, an allegation that a decision of the decision-maker is not supported by competent substantial evidence in the record as a whole is deemed to be a question of law. The hearing officer may not reweigh the evidence but must decide only whether competent substantial evidence supports the decision under review.

Therefore, this appeal (in the context of the issues raised by Appellant) is limited to determining whether the DRB departed from the essential requirements of the law in reaching its decision, and whether its findings are supported by competent

substantial evidence. Due process concerns, if any, are not an issue in an administrative appeal such as this. See, e.g., Belniak v. Top Flight Development, LLC, DOAH Case No. 04-2953, at 14-15 (DOAH Nov. 23, 2004).

Section 30-352.1(3)d.1., LDC, further provides that "the [administrative law judge] must affirm each contested decision or find it to be an incorrect interpretation of the law or not supported by competent substantial evidence. The [administrative law judge] shall prepare a written opinion stating the legal basis for each ruling. The [administrative law judge] shall submit the opinion to the department, which shall distribute it to the decision-maker and the parties."

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."

An administrative law judge acting in his or her appellate review capacity is without authority to reweigh conflicting testimony presented to the DRB or to substitute his or her judgment for that of the DRB on the issue of credibility of witnesses. See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); § 30-352.1.a.2., LDC.

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 DRB. Collier Medical Center, Inc. v. Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

Finally, the issue of whether the DRB "complied with the essential requirements of law" is synonymous with whether the DRB "applied the correct law." Haines City Community Development, 658 So. 2d at 530; City of Deerfield Beach v. Valliant, 419 So. 2d 624, 626 (Fla. 1982).

In its appeal, Appellant raises two broad grounds for having the final development order reconsidered by the DRB. First, Appellant contends that the DRB departed from the essential requirements of the law by (a) misconstruing Section

30-254(e), LDC, by denying Appellant's request to remove one of the 58-inch trees after it made a showing that it could not reasonably develop the property without removing the tree; (b) misconstruing Section 30-264(1)(a), LDC, by not allowing Appellant to use pervious landscape material to preserve an area within the dripline of the 58-inch trees; and (c) misconstruing Section 30-255, LDC, by requiring a permanent fifteen-foot buffer zone around the two 58-inch trees. Second, Appellant contends that there is no competent substantial evidence to support the conditions in the final development order.

Section 30-254(e), LDC, governs requests to remove or relocate regulated trees and requires that such a request be approved if an applicant meets one of the following three criteria:

> (e) Permit approval criteria. Removal or relocation of regulated trees shall be approved by the city manager or designee upon a finding that the trees pose a safety hazard; have been weakened by disease, age, storm, fire or other injury; or prevent the reasonable development of the site, including the installation of solar energy equipment. Regulated trees shall not be removed, damaged or relocated for the purpose of locating utility lines and connections unless no reasonably practical alternative as determined by the city manager or designee is available. (Emphasis added)

Therefore, if an applicant demonstrates that a tree prevents the reasonable development of a site, the city manager

or designee "shall" approve the removal of a regulated tree. The term "reasonable development" is not defined. In statutory construction, however, statutes must be given their plain and obvious meaning. Municipal ordinances are subject to the same rules of construction as are state statutes. Rinker Materials Corporation v. City of North Miami, 286 So. 2d 552, 553-54 (Fla. 1973); Stroemel v. Columbia County, 31 Fla. L. Weekly D1251 (Fla. 1st DCA, May 4, 2006).

In the proceedings below, Appellant presented testimony by Mr. Walpole and Mr. Crutcher that unless the 58-inch tree which lies in the footprint of Building D is removed, physical, legal, and practical constraints prevent the reasonable development of the site. These constraints included a legal covenant which prevented a modification of the parking lot and a substantial financial loss ($1.7 million and a loss of 6,200 square feet of space) if Building D was reconfigured. As further explained, if "the layout of this plan" was "modified," as required by the final development order, Appellant would lose the driveway for delivery trucks, and it could not lease space which had visibility problems, was higher than the ground floor, or was outdoors. Collectively, these considerations constitute a bar to the "reasonable development" of the site, as contemplated by the plain and ordinary meaning of the words used in the regulation. Rinker, supra.

The final development order does not make a finding on this issue one way or the other. However, by making a finding that the tree should be preserved, and that the site plan should be modified in order to save the tree, the DRB implicitly ignored the requirement in the regulation that the designee shall approve the removal of the tree upon a showing that reasonable development of the site cannot occur. Therefore, the DRB departed from the essential requirements of the law by incorrectly interpreting this Section. (This conclusion is also dependent on whether there is any competent substantial evidence in the record to support a contrary determination. If there is none, as the undersigned has concluded below, then the DRB's decision should be reconsidered.)

In reaching this conclusion, the undersigned has considered the City's contention that the following portions of Subsections (f) and (g) of the same regulation must also be considered in pari materia with Subsection (e) in determining whether removal of the tree is justified:

> (f) Removal or relocation approval in conjunction with other approval. When tree removal or relocation is contemplated in conjunction with any development requiring approval of a development plan or subdivision plat by the development review board or plan board, such removal or relocation shall be considered and either approved or denied by the development review board or plan board at the same time a development plan or plat is

> approved or denied based upon the same standards for approval as specified in subsection (e) of this section.
>
> (g) Standards for tree relocation or replacement. As a condition of the granting of a permit, the applicant will be required to replace or relocate the trees being removed with suitable replacement trees . . . . In determining the required location of relocated or replacement trees that will be planted either on-site or offsite, the city manager or designee, or the development review board or plan board the developments specified in subsection 30-254(f), shall consider the needs of the intended use of the property together with a realistic evaluation of the following:
>
> (1) Existing tree coverage, including percentage of canopy.
> (2) Number of trees to be removed on the entire property.
> * * * *
> (5) Character of the site and its environs.
> * * * *
> (9) The health and desirability of existing trees.
> * * * *

Subsection (f) provides that if removal of trees is sought in conjunction with approval of a development site, as is the case here, the DRB must still use the substantive criteria in Subsection (e) in deciding whether an existing tree prevents the reasonable development of the site. Subsection (f) does not change that responsibility or alter the standards to be used.

Likewise, the criteria in Subsection (g) are factors that are used only for the purpose of "determining the required location of relocated or replacement trees that will be planted

either on-site or offsite . . . ." They are not criteria for the decision whether to allow the removal of a Heritage tree. Therefore, factors such as the existing tree coverage, the number of trees to be removed on the entire property, the character of the site, and the health of existing trees apply only when deciding where to locate the replacement trees that an applicant will plant as mitigation for the removed trees. Accordingly, it is concluded that Subsection (g) does not apply in determining whether the 58-inch tree should be removed.

Finally, assuming that the current design of the project must satisfy Condition 4 of the original PUD, given the Record below, Appellant has provided the City with "a layout that better implements the design criteria set forth in these conditions which required removal of any of these trees."

Appellant next argues that the condition in the final development order which requires that "the two (2) Live Oak trees must be saved with an area preserved under each tree, equal to at least 50% of the area of the dripline" is ambiguous (and therefore legally incorrect) since Section 30-264(a)(1), LDC, specifically allows an applicant to choose either of two methods for preserving the dripline around a tree. As noted earlier, the final development order did not specify whether the area within the dripline should be preserved in its natural state or with pervious landscape materials. However, during

oral argument, the City represented that the DRB intended to allow Appellant to choose either method for its final site plan, so long as the option chosen comports with the Code.

The correct standards for determining the manner in which the area within the dripline of an existing tree to be preserved are found in Section 30-264(a)(1), LDC, which reads as follows:

> (a) To receive credit for the preservation of an existing tree, the following requirements must be met:
> (1) Fifty percent of the area within the dripline shall be naturally preserved or provided with pervious landscape material and shall be maintained at its original grade with no trenching or cutting of roots in this area. Within this area, there shall be no storage or fill or compaction of the soil, as from heavy construction equipment, or any evidence of concrete, paint, chemicals or other foreign substances in the soil.

Under the terms of this regulation, an applicant may be credited with saving an existing tree if fifty percent of the dripline is naturally preserved or if it uses pervious landscape materials in an area comprising at least fifty percent of the dripline. In other words, an applicant has the option of preserving fifty percent of the area within a tree's dripline in its natural state or with pervious landscape materials, so long as trenching and cutting of roots does not occur. In this case, Appellant's right to use pervious landscape materials is even more compelling since the UFI report determined that Appellant's

intended use of those materials adequately protected the 58-inch tree, and the City Arborist reaffirmed that statement at the local hearing. Therefore, in order to be consistent with the Record, the final development order should provide that Appellant is entitled to provide a final site plan that meets the pervious landscape material requirements.

Appellant next argues that the DRB departed from the essential requirements of the law by requiring that it maintain a permanent fifteen-foot buffer zone around the two 58-inch trees. In recommending this condition, the City Arborist relied upon Section 30-255, LDC, which she interpreted as requiring an applicant to protect the entire radius of a tree's dripline. Because the driplines of the two 58-inch trees are forty-one feet, she reasoned that a fifteen-foot buffer was clearly authorized by the regulation.

Section 30-255, LDC, applies only to protective measures during development and construction of the property. It requires that regulated trees within fifteen feet of construction activity be protected and that the temporary protective barrier be placed at least at the dripline. The barrier zones required by the regulation are intended to be temporary and to not interfere with necessary construction, such as development within the barrier. Before construction activity begins, protective barriers are required to be placed at or

outside each Heritage tree's dripline and removed when landscaping starts. § 30-255(a) and (b)(2)(a), LDC. Before landscaping begins, the barriers may be removed during construction if "construction needs dictate a temporary removal that will not harm the tree." § 30-255(b)(5), LDC. Therefore, the regulation does not govern what may be approved as development and does not prohibit construction activity within the barrier if such construction is necessary for approved development up to five feet from a tree trunk.

Section 30-264, LDC, is entitled "Tree protection requirements generally." As the title clearly states, the regulation provides standards for protecting trees after construction of a site is completed.[2] Paragraph (a)(4) prohibits any pervious surface or grade change within five feet of the trunk of a tree that is to be protected. This means that a separation of at least five feet from the trunk to the curbing is required in order to satisfy the Code. While Appellee suggests that Paragraph (a)(4) does not conflict with its condition that a permanent minimum fifteen-foot separation be maintained, the plain language in the regulation states otherwise. By relying on an incorrect regulation (Section 30-255, LDC) as a basis for requiring a permanent fifteen-foot buffer, and ignoring the standard in Section 30-264(a)(4), LDC,

which allows a buffer of no less than five feet, the DRB departed from the essential requirements of the law.[3]

In reaching these conclusions, the undersigned has considered the City's argument that if an applicant is required under Section 30-255, LDC, to place protective barriers around a tree during construction and development so that no construction takes place within fifteen feet of a tree, it logically follows that constructed objects, such as buildings, sidewalks, or other paved surfaces, may not later exist in that area. However, the standards in Section 30-255 apply only to "tree preservation during development and construction," and do not apply after construction is completed. Otherwise, the five-foot requirement in Section 30-264(a)(4), LDC, would be completely moot and meaningless if permanent development cannot come within fifteen feet of a tree. Regulations should be construed so as to give effect to their provisions. See, e.g., Powell v. City of Delray Beach, 711 So. 2d 1307, 1309 (Fla. 4th DCA 1998).

Finally, Appellant argues that there is no competent substantial evidence to support the conditions in the final development order. These conditions include the preservation of both 58-inch trees, the preservation of an area equal to fifty percent of the dripline of each tree in their natural state, and a minimum fifteen-foot buffer between the trees and any buildings or infrastructure.

Under Section 30-254(e), LDC, the removal of a regulated tree "shall be approved" if one of the following findings is made: the tree poses a safety hazard; the tree has been weakened by disease, age, storm, fire, or injury; or the tree will "prevent the reasonable development of the site." Here, Appellant argued and proved that not being able to remove one of the two 58-inch heritage trees will prevent reasonable development of the site due to financial, legal, and physical constraints. The City did not offer any competent substantial evidence to counter those arguments. Because the only substantive criteria to govern this decision are found in Section 30-254(e), LDC, testimony by the City Arborist that the tree is "beautiful," "the strongest that the forest has to offer," and other similar testimony is irrelevant to this decision. Likewise, conclusory testimony by Mr. Calderon (without a factually-based chain of underlying reasoning) that the building (and presumably the parking lot) could be reconfigured "this way or this way" or "here and there" to allow both trees to be saved, did not rise to the level of evidence that is competent and substantial. See, e.g., City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202, 204 (Fla. 3d DCA 2003)(generalized statements made in opposition to a development proposal, even those from expert witnesses, must be disregarded); Division of Administration, Department of

Transportation v. Samter, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981)("[n]o weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning"). Therefore, there is no competent substantial evidence to support the condition that requires Appellant to preserve the second 58-inch tree (and which implicitly denied Appellant's request to remove the tree because of its inability to develop the property without removal of the tree).

Second, the condition in the final development order that the trees shall be protected by preserving fifty percent of their driplines must be interpreted to mean that Appellant may choose to preserve the existing trees by using pervious landscape materials. See Section 30-264(a)(1), LDC. This is especially true here since the staff reasoning to support this condition is based upon an erroneous application of Section 30-255, LDC. See also endnote 3, infra.

Third, the condition prohibiting construction no closer than fifteen feet from the trunk of the tree is not based on, or supported by, the LDC, or by the testimony of any witness. Section 30-255(a), LDC, does not establish a fifteen-foot construction barrier, as the City claims. As noted above, it requires that regulated trees within fifteen feet of construction activity be protected and that the temporary

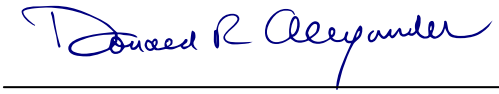
protective barrier be placed at least at the dripline. The driplines for both 58-inch trees are substantially larger than fifteen feet around the tree. Section 30-264, LDC, preserves a radius of five feet around the trunk of a regulated tree and regulates an area amounting to at least fifty percent of the tree's dripline. See § 30-264(a)(1) and (4), LDC. Likewise, testimony by the City Arborist was based on an incorrect interpretation of the LDC and cannot support the condition. (At the local hearing, when reminded that the LDC permits a five-foot separation rather than the fifteen-foot separation that was being recommended, the City Arborist agreed that she had "misspoke" and withdrew her "statement." Nonetheless, her final recommendation contained a requirement for a fifteen-foot buffer.) In view of this, it is concluded that there is no competent substantial evidence to support the condition.

In summary, the DRB departed from the essential requirements of the law by incorrectly interpreting Sections 30-254, 30-255, and 30-264, LDC, when it did not grant Appellant's request to remove the 58-inch tree, did not allow Appellant to use pervious landscape materials around the 58-inch tree, and imposed a permanent fifteen foot buffer around each tree. Finally, there is no competent substantial evidence in the Record to support these conditions.

DECISION

Based upon the foregoing, the final development order should not be affirmed. Rather, it should be reconsidered by the Development Review Board in light of this Written Opinion.

DONE AND ORDERED this 26th day of May, 2006, in Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2006.

ENDNOTES

1/ Section 30-258(a), LDC, provides that "[t]he Heritage designation is conferred on the large trees that are the major distinguishing feature of Gainesville's urban forest," and that with certain enumerated exceptions not relevant here, "[a]ll native tree species are designated Heritage trees when they reach the size of 20 inches in diameter when measured at 4 1/2 feet above ground level." Section 30-254(a)(2), LDC, also provides that "[n]o Heritage or Champion trees as defined in this article may be removed or relocated except as specifically provided in this article."

2/ That this regulation applies to post-construction activities is obvious since Subsections (b) and (c) require that in order to receive credit for preserving an existing tree, an applicant must submit proof that "such tree is healthy and has not been

seriously damaged during development," and that a tree must be "alive and healthy one year after all associated construction and development of the property is completed."

3/ Although not argued by the City, the undersigned has also given consideration to the testimony of the City Arborist who initially opined (without supporting facts) that pervious paving would require trenching and cutting of roots and therefore the preservation of the 58-inch tree in its natural state was necessary. However, by adopting the finding of the UFI, who concluded that the use of pervious landscape material would adequately protect the tree, the witness effectively recanted her testimony on this issue.

COPIES FURNISHED:

Thomas Saunders, Director
Department of Community Development
Thomas Center B
306 Northeast 6th Avenue
Gainesville, Florida 32601-5476

Karen A. Brodeen, Esquire
Fowler, White, Boggs & Banker, P.A.
Post Office Box 11240
Tallahassee, Florida 32302-1240

Daniel M. Nee, Esquire
Assistant City Attorney
200 East University Avenue, Suite 423
Gainesville, Florida 32601-5456