

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH R. GILLESPIE and MELANIE)
A. GILLESPIE,)
)
Petitioners,)
)
and)
)
MARY ANN CHAP and MICHAEL LEE)
CHAP,)
)
Intervenors,)
)
vs.) Case No. 06-1234
)
CITY OF TALLAHASSEE and)
MIDYETTE, LLC,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on August 24, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Joseph R. Gillespie, pro se
Melanie A. Gillespie, pro se
2030 Midyette Road
Tallahassee, Florida 32301

For Intervenors: No appearance

For Respondent City of Tallahassee (City):

Linda R. Hudson, Esquire
Office of the City Attorney
City Hall, Box A-5
300 South Adams Street
Tallahassee, Florida 32301

For Respondent Midyette, LLC (Midyette):

Daniel E. Manausa, Esquire
Smith, Thompson, Shaw & Manausa
3520 Thomasville Road, Fourth Floor
Tallahassee, Florida 32309

STATEMENT OF THE ISSUE

The issue is whether the Type B site plan submitted by Midyette for an 18-unit town home/condominium project on the west side of Midyette Road should be approved.

PRELIMINARY STATEMENT

On February 27, 2006, the City's Development Review Committee (DRC) approved the Type B site plan submitted by Midyette for an 18-unit, multi-family residential project called Midyette Green Townhomes (hereafter "the proposed development"). On March 27, 2006, Petitioners timely filed a Petition for Quasi-judicial Proceedings with the Tallahassee-Leon County Planning Commission (Planning Commission) contesting the approval of the site plan.

On April 10, 2006, the Planning Commission referred this matter to the Division of Administrative Hearings (DOAH) to conduct a quasi-judicial evidentiary hearing in accordance with

Section 2-138 of the City's Land Development Code (LDC) and Article IX of the Bylaws of the Planning Commission (Bylaws). The referral was received by DOAH on April 12, 2006, and the case was initially assigned to Judge Johnston.

On June 20, 2006, Mary Ann Chap and Michael Lee Chap (the Chaps) petitioned to intervene. The petition was provisionally granted by Order dated June 21, 2006, and on June 30, 2006, Judge Johnston issued a Determination of Standing in which he found that the allegations in the Chaps' petition to intervene were sufficient to give them standing to participate in this proceeding. See Bylaws, art. IX, § 1(m).

The final hearing was initially scheduled for June 26, 2006, but it was rescheduled for August 24, 2006, at the City's request. The case was transferred to the undersigned on August 15, 2006.

At the final hearing, the City presented the testimony of Dwight Arnold, Eric Sawyer, and Roxanne Manning; Midyette presented the testimony of Charles Hargraves; and Petitioners presented the testimony of Sedita Cayson and Melanie Gillespie. The following exhibits were received into evidence: City Exhibits 1 through 5; Midyette Exhibits 1 and 2; and Joint Exhibits 1 through 10, 11A through 11D, and 12 through 18.

An opportunity for public comment was provided at the final hearing. See Bylaws, art. IX, § 4. No public comment was presented.

The Transcript of the final hearing was filed on September 5, 2006. The parties requested and were given 20 days from that date to file proposed recommended orders (PROs). The deadline for the PROs was extended to September 29, 2006, at the City's request.

The City and Midyette filed a joint PRO on September 28, 2006. Petitioners filed a PRO on September 29, 2006. The Chaps did not file a PRO. The PROs have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Petitioners own the property located at 2030 Midyette Road. They reside in a single-family residence on that property.

2. Midyette is the applicant for the site plan at issue in this case. It owns the property located at 2036 Midyette Road, Parcel ID No. 31-09-20-257-0000 (hereafter "the project site"), which is the site of the proposed development at issue in this case.

3. The Chaps own the property located at 2042 Midyette Road. There was no evidence as to whether the Chaps reside on

that property, or even if there is an occupied structure on the property. The Chaps did not appear at the hearing.

4. The City is the local government with jurisdiction over the proposed development. The project site is within the City limits.

B. The Proposed Development

(1) Generally

5. The proposed development is a multi-family residential project consisting of 18 town home/condominium units in three two-story buildings.

6. The proposed development includes a parking lot for the residential units and a private driveway/entrance road with curbs and gutters connecting the parking lot to Midyette Road. There will be a sidewalk adjacent to the driveway/entrance road.

7. The density of the proposed development is 7.76 units per acre.

(2) The Project Site

8. The project site is 2.32 acres. It is located on the west side of Midyette Road, between Old Saint Augustine Road and Capital Circle Southeast, approximately 1,050 feet north of Capital Circle Southeast.

9. The only development currently on the project site is a vacant house that is approximately 800 feet west of Midyette Road and an unpaved driveway that runs from Midyette Road to the

structure. The project site is heavily wooded, with a number of large oak and pine trees along the existing driveway.

10. The project site is an irregularly shaped "flag lot," as defined in LDC Section 1-2. The main body of the project site -- the flag portion -- is approximately 550 feet west of Midyette Road, and is connected to Midyette road by a narrow strip of property -- the flagpole portion -- that is approximately 29 feet wide.

11. The LDC prohibits the creation of new flag lots for multi-family development, but it does not preclude multi-family development on flag lots that predate the LDC.

12. The project site was created in 1978, prior to the adoption of the current versions of the Tallahassee-Leon County Comprehensive Plan (Plan) and the LDC.

13. Midyette purchased the project site in September 2005, and at the time it did so, Midyette was aware that a deviation from the landscape buffer standards in the LDC would be required to develop the property with multi-family units.

14. The land use classification for the project site is High Intensity Urban Activity Center (AC). The zoning designation is also AC.

15. The Plan permits residential development in the AC district "up to 45 dwelling units per acre."

16. The Zoning Code, which is Chapter 10 of the LDC, permits "residential development of complimentary intensity of 16 to 45 units per acre" in the AC district.

17. The 16-unit per acre figure in the Zoning Code is not the minimum density allowed in the AC district. Instead, according to Roxanne Manning, the land use planning supervisor for the Tallahassee-Leon County Planning Department, lower density multi-family development (such as the 7.76 units per acres proposed in this case) is allowed in the AC district if it is "complimentary" to the land uses on the surrounding properties.

18. Single-family residential development is not a permitted use in the AC district.

(3) Zoning and Land Use on Surrounding Properties

19. Petitioners' property is immediately to the north of the flagpole portion of the project site and immediately to the east of the flag portion of the project site. Petitioners' property is zoned single-family residential.

20. Petitioners' home is approximately 65 feet north of the driveway/entrance road for the proposed development.

21. The Chaps' property is immediately to the south of the project site. The Chaps' property is zoned single-family residential.

22. The property to the south of the Chaps' property is zoned AC and is developed with an affordable housing apartment complex.

23. The property to the east of the flagpole portion of the project site, across Midyette Road, is zoned AC and is part of the Koger Center office complex.

24. The property to the north of the flag portion of the project site and to the north of Petitioners' property is zoned AC and is developed with a multi-family condominium project with approximately 60 units.

25. The property to the west of the project site is zoned multi-family residential and is developed with a condominium project with approximately 200 units.

C. The City's Review and Approval of the Proposed Development

(1) Land Use Compliance Certificates

26. The initial phase of the City's development review process culminates in the issuance of a land use compliance certificate (LUC). The LUC indicates whether the proposed use is generally consistent with the LDC and identifies the type of site plan review required for the development of the proposed use.

27. LUC No. TCC050018 was issued for the project site in January 2005. The LUC authorized multi-family development on the project site "at a density not to exceed 12 units per acre."

The LUC explained that "[t]he density cannot exceed 12 units per acre because of the adjacency to low density residential to the south."

28. A previous LUC for the project site, No. TCC020016, was issued in January 2002. That LUC stated that the project site "is eligible for a total of two residential dwelling units, either two (2) single-family residences or one (1) duplex." The LUC also stated that "[t]he parcel is a 'flag' lot and non-residential or multi-family development is not allowed on a 'flag' lot."

29. Dwight Arnold, the administrator of the City's land use and environmental services department, credibly testified that the January 2002 LUC was in error because it did not take into account the fact that the project site was created prior to the adoption of the LDC and, therefore, was not subject to the prohibition of multi-family development on flag lots.

(2) Site Plan Applications and Review

30. There are four types of site plan review provided for in the LDC: Types A, B, C, and D.

31. Type A site plans are reviewed and approved or denied by the City's growth management director. Type B site plans are reviewed and approved or denied by the DRC. Types C and D site plans are not implicated in this case.

32. The DRC is composed of department heads, or their designees, from the public works, utilities, growth management, and planning departments. Mr. Arnold and Ms. Manning are both members of the DRC.

33. On October 13, 2004, Midyette submitted a Type A site plan application for the proposed development.

34. The proposed development was "shifted" or "bumped" to Type B review because a deviation from the applicable landscape buffer standard in the Zoning Code was required for Midyette to develop the project as proposed.

35. Prior to submitting the Type B site plan application, Midyette applied for and received a variance from the requirement in the LDC that it provide an eight-foot perimeter landscape area along the flagpole portion of the project site. The perimeter landscaping requirement that was the subject of the variance is different from the landscape buffer standard from which Midyette is seeking a deviation in this case. The variance was issued by the Environmental Variance Board.

36. Midyette submitted the Type B site plan application for the proposed development on January 20, 2006. The site plan was materially the same as the Type A site plan submitted in October 2004.

37. Also on January 20, 2006, Midyette submitted a request for a deviation from the landscape buffer requirements in LDC

Section 10-177 for the driveway/entrance road. The deviation request included a narrative that addressed each of the criteria in LDC Section 9-233.

38. The site plan and the deviation request were reviewed by the City's growth management, planning, utility, and public works departments. Each of those departments recommended approval of the site plan and deviation, with conditions unrelated to the landscape buffer at issue in this case.

39. On February 27, 2006, the DRC approved the Type B site plan application with the conditions recommended by the City departments. The DRC also approved the requested deviation from the landscape buffer requirements along the driveway/entrance road.

40. On March 3, 2006, Midyette submitted a revised site plan for the proposed development that incorporated the conditions imposed by the DRC. The revised site plan -- Joint Exhibit 15 and Midyette Exhibit 2 -- meets all of the conditions imposed by the DRC.

41. On March 27, 2006, Petitioners initiated this proceeding, which had the effect of transforming the DRC's approval of Midyette's site plan into a recommendation that goes to the Planning Commission with this Recommended Order for final action.

D. Landscape Buffer Standards

(1) Generally

42. Policy 1.4.11 of the Plan requires the LDC to include provisions for buffers to limit noise and visual impacts between uncomplimentary land uses that are adjacent to each other.

43. The LDC includes several provisions relating to landscape buffers that, absent a variance or deviation, the applicant must meet for a site plan to be approved. If there is a conflict between the various buffer standards imposed by the LDC, "the most restrictive or that imposing the higher standard shall prevail." See LDC §§ 5-85(1), 10-177.

44. The provisions that are most relevant to the buffering required along driveway/entrance road for the proposed development are LDC Section 5-85(k) ("landscape requirements for vehicular use areas"), LDC Section 5-85(1) ("land use buffer standards"), and LDC Section 10-177 ("buffer zones").

45. LDC Section 5-85(k) requires an eight-foot-wide landscaped area between vehicular use areas (e.g., parking lots, roads, driveways) and the side and rear property lines. This "perimeter landscaped area" is required to include shrubs or a berm to provide a visual screen between the vehicular use area and the adjacent property. Fencing is not specifically required.

46. LDC Section 5-85(1) establishes the nature and extent of the landscaping that is to be installed in the buffer zones required by the Zoning Code, LDC Section 10-177. It includes specific standards for the type and placement of landscaping, as well as specific standards for buffer fences.

47. Among other things, the buffer fence required by LDC Section 5-85(1) must be a minimum of eight feet in height "unless the applicant can demonstrate the intent of [Chapter 5 of the LDC] will be met by a fence of lesser height"; the side of the fence facing the less intensive use must have a finished appearance; and at least one-half of all required landscaping must be placed outside of the fence, on the side facing the less intensive use. See LDC § 5-85(1)(5).

48. Mr. Arnold testified that the LDC was recently amended to require all of the required landscaping to be placed within the fence. Mr. Arnold further testified that the amended requirement applies to the proposed development.

49. LDC Section 10-177 includes a matrix that defines the type of buffer zone required between properties with different zoning designations. It describes the required buffer zone as "a landscaped strip along parcel boundaries that serve a buffering and screening function between uses and zoning districts, provides an attractive boundary of the parcel or use, or both a buffer and an attractive boundary."

50. There are four types of buffer zones referenced in LDC Section 10-177: Types A, B, C, and D.

51. A Type D buffer is required where, as here, the adjacent development is single-family residential and the proposed development is multi-family residential.

52. The width of the buffer zone varies based upon the amount of landscaping provided. The narrower the buffer zone, the more landscaping that must be provided.

53. The minimum width for a Type D buffer is 30 feet, and in a buffer of that width, a minimum of 12 canopy trees, six understory trees, and 36 shrubs must be planted for each 100 linear feet of buffer.

(2) Buffering of the Proposed Development

54. The buffer areas provided by Midyette around the proposed multi-family buildings and parking lot on the flag portion of the project site meet the requirements of LDC Sections 5-85(k) and (l) and 10-177. Midyette did not request a variance or deviation for those buffer areas.

55. Petitioners and the Chaps did not contest the adequacy of the buffer areas around the development on the flag portion of the project site. The focus of their challenge is on the adequacy of the buffer area around the driveway/entrance road on the flagpole portion of the site.

56. Midyette was granted a variance from the perimeter landscaping requirements of LDC Section 5-85(k) along the driveway/entrance road (see Finding of Fact 35), but it is still required to comply with the standards in LDC Sections 5-85(1) and 10-177 in that area.

57. Thus, absent a deviation, Midyette is required to provide 30-foot Type D buffer zones along the driveway/entrance with the landscaping and fencing required by LDC Section 5-85(1).

58. Midyette requested a deviation from the landscape buffer standard along the driveway/entrance road because it is impossible for it to provide a 60-foot-wide Type D buffer -- 30 feet from Petitioners' property to the north and 30 feet from the Chaps' property to the south -- in the 29-foot-wide flagpole portion of the project site.

59. The deviation approved by the DRC relieved Midyette from providing any landscaping along the driveway/entrance road; relieved Midyette from installing a fence south of the driveway/entrance road adjacent to the Chaps' property; and required only a four-foot wood fence north of the driveway/entrance road adjacent to Petitioners' property.

60. At the final hearing, Mr. Arnold recommended that the approval of the deviation be modified to require an "8-foot fence . . . on the north and south sides of the driveway" and to

also require that the areas adjacent to the driveway/entrance road "be landscaped to the greatest extent possible and practicable."

61. Mr. Arnold acknowledged that Midyette may not be able to get all of the required plantings in the areas adjacent to the driveway/entrance road. To do so, Midyette would have to plant approximately 132 canopy trees, 66 understory trees, and 400 shrubs along the driveway/entrance road.

62. Charles Hargraves, the engineer of record for the proposed development testified that the fences could be constructed but that it "would be difficult, if not impossible, to provide 100 percent [of the required landscaping] in that area." On the latter point, Mr. Hargraves acknowledged that it may be necessary for Midyette to request a variance from the extent of the landscaping required by LDC Section 5-85(1) along the driveway/entrance road.

63. The four-foot fence shown on the site plan north of the driveway/entrance road is approximately two feet from Petitioners' property line. The sidewalk is immediately adjacent to the fence, and as a result, the only area for landscaping along the driveway/entrance road is a two-foot area between the sidewalk and the curb of the road. There is no space for landscaping south of the road because the curb is less than two feet from the Chaps' property line.

64. Mr. Hargraves testified that it is possible to locate the fence immediately adjacent to Petitioners' property line, rather than two feet inside of the property line as depicted on the site plan. Doing so would increase the planting area between the fence and the sidewalk, which is consistent with the new requirement (see Finding of Fact 48) that all of the landscaping be placed inside of the fence. The location of the fence in relation to the property line "doesn't matter" to Melanie Gillespie, the Petitioner who testified at the hearing.

65. The details of the landscaping plan are worked out at the environmental permitting stage, and that is when a variance might be considered. A request for a variance of the standards in LDC Section 5-85(1) would be considered by the Environmental Variance Board, not the DRC or the Planning Commission.

66. Mrs. Gillespie testified that the additional buffering recommended by Mr. Arnold is an improvement to the site plan, but that in her opinion it is still inadequate to protect her property from the impacts of the driveway/entrance road.

67. Mrs. Gillespie further testified that, in her opinion, nothing short of the buffer area required by the LDC should be required, even though she acknowledged that it would be impossible for Midyette to provide a 60-foot-wide buffer in the 29-foot-wide flagpole portion of the project site.

(3) The Contested Deviation

68. The City is authorized to grant deviations from any of the standards in Chapters 9 and 10 of the LDC, including the buffer standards in LDC Section 10-177. The DRC is responsible for reviewing and taking action on deviation requests.

69. The authorization to grant deviations gives the City flexibility to resolve conflicts between different provisions of the LDC that, if applied literally, might preclude development or undermine the growth management goals of the City reflected in the Plan and the LDC. On this point, Mr. Arnold testified that a deviation "gives the developer a means of getting through the [LDC] to meet compliance with other provisions of the code."

70. A deviation must be consistent with the Plan and may not create an adverse impact to the general health, safety, and welfare of the public.

71. The granting of deviations is not favored, and the applicant must show that all seven of the criteria in LDC Section 9-233 are met in order to obtain a deviation.

72. LDC Section 9-233(1) requires that the deviation "not be detrimental to the public good or the surrounding properties."

73. The noise from the traffic on the driveway/entrance road has the potential to adversely impact Petitioners' property because the road is approximately 65 feet from Petitioners'

home, and during the peak travel time, there is projected to be one car traveling along the road every four minutes.

74. The deviation, as proposed and approved by the DRC, did not adequately mitigate the impacts of the driveway/entrance road on Petitioners' adjacent property because it included only a four-foot fence and no landscaping between the road and Petitioners' property.

75. The deviation was modified at the final hearing to include an eight-foot fence and all of the landscaping required by LDC Section 5-85(1) or, if that is not possible, as much landscaping as is practicable. Those modifications will adequately mitigate the impacts of the driveway/entrance road on Petitioners' property and, as a result, the deviation will not be detrimental to Petitioners' property.

76. The addition of the fence between Petitioners' property and the project site will provide an added benefit to Petitioners because it will provide a barrier between the two properties. Currently, there is no fence separating Petitioners' property from the unpaved driveway on the flagpole portion of the project site.

77. LDC Section 9-233(2) requires the granting of the deviation to be "consistent with the intent and purpose of chapters 9 and 10 and the [Plan]."

78. The deviation, as modified at the final hearing, is consistent with the intent and purpose of the LDC and the Plan. The deviation allows for the development of the property consistent with its AC land use and zoning designations, and it adequately buffers the proposed multi-family development from the adjacent single-family uses with eight-foot fences and extensive landscaping.

79. LDC Section 9-233(3) requires the deviation to be "the minimum deviation that will make possible the reasonable use of the land"

80. The deviation, as proposed and approved by the DRC, was not the minimum deviation that makes possible the reasonable use of the land. Indeed, as recommended by Mr. Arnold and acknowledged by Mr. Hargraves, it is possible to provide eight-foot fences and some, if not all, of the required landscaping along the driveway/entrance road.

81. The deviation, as modified at the final hearing, is the minimum deviation that will make possible the reasonable use of the land consistent with its AC land use and zoning designations.

82. On this issue, it is noteworthy that Petitioners did not identify any reasonable alternative buffer requirement that could have been imposed, but rather they took the position that anything short of the buffers required by the LDC would be

inadequate even though Mrs. Gillespie acknowledged that it would be impossible to provide the required buffers in the 29-foot-wide flagpole portion of the project site.

83. LDC Section 9-233(4) requires that the standard from which the deviation is requested "will create a substantial hardship to the applicant, which hardship is not self-created or imposed."

84. LDC Section 10-177 creates a hardship on Midyette because it would be impossible to develop the project site with multi-family units as contemplated by the site's AC land use and zoning designations if the buffer requirements in that Section were applied literally to the flagpole portion of the project site. It is impossible for Midyette to provide 60-foot-wide buffer as required by LDC Section 10-177 in an area that is only 29 feet wide.

85. Midyette was not responsible for the creation of the project site as a "flag lot," and it did not request the AC land use and zoning designations on the property. Those conditions existed at the time Midyette purchased the property. Thus, the hardship created by LDC Section 10-177 was not self-created or imposed.

86. It is immaterial that Midyette was aware at the time it purchased the property that a deviation would be necessary to develop the property with multi-family units. The LDC

specifically provides a procedure for obtaining a deviation and Midyette had a reasonable expectation that it could obtain one.

87. LDC Section 9-233(5) requires there to be "exceptional topographic, soil, or other environmental conditions that are unique to the property."

88. There are no topographic, soil or environmental conditions that are unique to the flagpole portion of the project site.

89. The project site is not the only flag lot in the City, although it is unknown how many others there are.

90. The project site's configuration as a flag lot, coupled with its AC land use and zoning designations that prohibit single-family residential uses, is an exceptional circumstance that justifies a deviation.

91. LDC Section 9-233(6) requires the deviation to "provide a creative or innovative design alternative to [the] substantive standards and criteria."

92. The deviation does not propose a creative or innovative design alternative to the Type D landscaping standards in LDC Section 10-177. However, in light of the narrow width of the flagpole portion of the lot, the deviation, as modified at the final hearing, is the only reasonable alternative to the required buffer.

93. LDC Section 9-233(7) requires the impacts associated with the deviation to be "adequately mitigated through alternative measures."

94. The deviation, as proposed and approved by the DRC, did not adequately mitigate the impacts of the driveway/entrance road on Petitioners' property through alternative measures. The mitigation provided by Midyette as a condition of the variance from the perimeter landscaping requirements in LDC Section 5-85(k) -- i.e., additional plantings in the flag portion of the project site and the four-foot fence -- did not adequately mitigate the visual and noise impacts of the driveway/entrance road on Petitioners' property.

95. However, as discussed above, the potential impacts of the driveway/entrance road on Petitioners' property is adequately mitigated by the deviation, as modified at the final hearing. The driveway/entrance road will be screened from Petitioners' property by an eight-foot fence and extensive landscaping.

96. If Midyette is unable to provide all of the landscaping required by LDC Section 5-85(1) and requests a variance from the Environmental Variance Board, there is nothing to preclude that board from requiring additional mitigation -- e.g., planting specific types of trees and/or hedges to maximize screening, moving the sidewalk adjacent to the curb of the

driveway/entrance road (with a guardrail, if necessary) to maximize the planting space between the sidewalk and the fence -- in order to ensure that Petitioners' property is adequately screened from the driveway/entrance road. See LDC § 5-126(1)c.

97. In making the foregoing finding, the undersigned did not overlook Mr. Arnold's testimony that the Environmental Variance Board is not required to, and does not typically consider the impact on surrounding properties when considering a variance request because the board's focus is on the environmental impacts of the variance. However, the City Code provisions governing the Environmental Variance Board requires that a variance not be contrary to the "public interest," which would seem to include impacts on the surrounding properties resulting from an elimination of landscaping required for buffering purposes. See LDC § 2-197(a)(1), (2).

E. Other Issues

98. The final hearing in this case was properly noticed, both to the parties and the general public.

99. Notice of the final hearing was published in the Tallahassee Democrat on August 9, 2006.

100. An opportunity for public comment was provided at the final hearing.

101. No public comment was offered.

CONCLUSIONS OF LAW

102. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to LDC Section 2-138. See also Bylaws, art. IX, § 1.

103. The Planning Commission is responsible for taking final action on Midyette's site plan based upon the Recommended Order issued in this case. See Bylaws, art. IX, § 1(b)1.b.

104. Midyette has the initial burden of proof in this de novo proceeding. Bylaws, art. IX, § 5. If Midyette establishes its entitlement to approval of the site plan through the submission of substantial competent evidence, the burden shifts to Petitioners and the Chaps to "rebut the evidence submitted by [Midyette]." Id.

105. Petitioners and the Chaps were provisionally determined to have standing to participate in this proceeding, but they were required to prove their standing at the final hearing. See Bylaws, art. IX, § 1(j) and (m).

106. Petitioners proved their standing. The evidence establishes that their property is adjacent to the project site; their home is within 65 feet of the driveway/entrance road for the proposed development; and without an adequate buffer, the traffic generated by the proposed development on the driveway/entrance road will adversely affect Petitioners' use

and enjoyment of their property through visual and noise impacts.

107. The Chaps did not prove their standing. They failed to appear at the final hearing, and no evidence was presented regarding the location of the residential structure, if any, on the Chaps' property in relation to the proposed development; no evidence was presented regarding the Chaps' present use of the property; and no evidence was presented regarding the potential adverse impacts of the proposed development, with or without a buffer, on the Chaps' use and enjoyment of their property.

108. Site plan approvals are governed by LDC Section 9-153, which provides:

In deciding whether to approve, approve with conditions, or deny a site plan, the entity with authority to render such decision shall determine:

(1) Whether the applicable zoning standards and requirements have been met.

(2) Whether the applicable criteria of chapter 5 of this Code have been met.

(3) Whether the requirements of other applicable regulations or ordinances which impose specific requirements on site plans and development have been met.

109. The parties stipulated at the final hearing that the only issue to be decided in this case is whether Midyette should be granted a deviation from the Type D landscape buffer

standards along the driveway/entrance road. See Transcript, at 44-45.

110. The effect of the parties' stipulation is that if it is determined that Midyette is entitled to a deviation from the landscape buffer standards, then it follows that the proposed development satisfies the requirements of LDC Section 9-153 and should be approved.

111. For the requested deviation to be granted, Midyette must establish by a preponderance of the evidence that all seven of the criteria in LDC Section 9-233 have been met. The criteria are:

(1) The deviation will not be detrimental to the public good or to the surrounding properties;

(2) The granting of the deviation is consistent with the intent and purpose of chapters 9 and 10 and the comprehensive plan;

(3) The deviation requested is the minimum deviation that will make possible the reasonable use of the land, building, or structure;

(4) The strict application of the requirements of chapters 9 and 10 will constitute a substantial hardship to the applicant, which hardship is not self-created or imposed;

(5) There are exceptional topographic, soil, or other environmental conditions unique to the property;

(6) The deviation requested would provide a creative or innovative design alternative to substantive standards and criteria; and

(7) The impacts associated with the deviation requested are adequately mitigated through alternative measures.

LDC § 9-233.

112. The preponderance of the evidence establishes that the project site cannot be developed in a manner consistent with its existing AC land use and zoning designations without a deviation from the buffer width standards in LDC Section 10-177 along the driveway/entrance road; that the installation of eight-foot fences and extensive landscaping along the driveway/entrance road will provide an adequate buffer for the adjacent single-family residential uses; and that the deviation, as modified at the final hearing to include the eight-foot fences and the extensive landscaping, meets all of the criteria in LDC Section 9-233. See Findings of Fact, Part D(3).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Planning Commission approve the Type B site plan application submitted by Midyette, subject to:

1. the conditions recommended by the DRC;
2. a requirement that an eight-foot fence be placed immediately adjacent to Petitioner's property line (rather than

a four-foot fence several feet inside the property line) along the length of the driveway/entrance road within the flagpole portion of the project site;

3. a requirement that an eight-foot fence be placed immediately adjacent to the Chaps' property line along the length of the driveway/entrance road within the flagpole portion of the project site; and

4. a requirement that the areas north of the driveway/entrance road between the road and the fence along Petitioners' property line be landscaped in accordance with LDC Section 5-85(1) or, if that is not possible, that the area be landscaped to the greatest extent practicable subject to a variance from the Environmental Variance Board in order to maximize the screening of the Petitioners' property.

DONE AND ENTERED this 17th day of October, 2006, in Tallahassee, Leon County, Florida.



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this 17th day of October, 2006.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 calendar days from the date of this Recommended Order. See Planning Commission Bylaws, art. IX, § 10(a). Exceptions to this Recommended Order should be filed with the Clerk of the Planning Commission. Id.