STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA BARROSO, Appellant, vs. MONROE COUNTY PLANNING COMMISSION and KEY LARGO OCEAN RESORT CO-OP, INC., Appellees.	)	Case No. 07-5390

FINAL ORDER OF DISMISSAL

Appellant Maria Barroso seeks review of Monroe County Planning Commission Resolution P35-07, approved by the Planning Commission on August 24, 2007. The Division of Administrative Hearings, by contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code, has jurisdiction to consider the appeal and to issue a final order.

Leave to intervene as an Appellant was granted to Key Largo Ocean Resort Co-op, Inc. (KLOR), a cooperative under Chapter 719, Florida Statutes (2007). Appellant KLOR was the applicant for the site plan approval, which is the subject of this appeal.

Resolution P35-07

Resolution P35-07 approved the application of KLOR for an amendment to a major conditional use permit to demolish all existing structures and redevelop all infrastructure, amenities,

and redevelop all existing RVs, park models, and mobile home residences on property located at 94825 Overseas Highway, Key Largo, with 285 single-family permanent dwelling units, accessory uses, gatehouse, office building, community center, and grill/pub area, subject to numerous conditions stated in the resolution. For simplicity, the subject of Resolution P35-07 will be referred hereafter in the same way it has been referred to by the parties, as a site plan approval.

Issues Raised on Appeal

On September 20, 2007, Appellant filed a timely "application for appeal," stating the following basis for the appeal:

> Planning Commission Resolution No. P35-07 is in direct contravention of and violates the Monroe County Code, the Monroe County Comprehensive Plan, the principles for guiding development as provided in Chapter 380, Florida Statutes, and the terms and conditions of development Agreement approved by the Monroe County, Florida Board of County Commissioners Resolution 242-2006, dated June 21, 2006. Moreover, a representative of Key Largo Ocean Resort misrepresented to the Commission that it had obtained the requisite statutory consent required by Section 719.1055(1), Florida Statutes, to the proposed site plan. [Appellant] reserves the right to amend and supplement this application for appeal with additional information and grounds.

On January 28, 2008, Appellant moved to abate the appeal to allow the circuit court, in a pending case involving these same

parties, to rule on whether KLOR's application for approval of the site plan was ultra vires, null, and void. Appellant's motion was granted and the appeal remained abated until April 29, 2008, when the Administrative Law Judge set a briefing schedule because the expected ruling of the circuit court had been put off.

Appellant filed her Initial Brief on May 19, 2007. Two issues were raised by Appellant: (1) whether the Planning Commission failed to comply with the essential requirements of law because it was based on a material misrepresentation made by KLOR's attorney; and (2) whether Appellant has standing. No issue was raised regarding whether Resolution P35-07 violated any of the applicable provisions of the Monroe County Code.

Before the deadline for filing answer briefs, the Planning Commission filed a motion to dismiss the appeal, arguing that Appellant failed to raise reviewable issues in its Initial Brief. Appellant filed a response stating that her claim that Resolution P35-07 was based on a material misrepresentation is a proper issue for review because it is a claim that the Planning Commission failed to comply with the essential requirements of law.

The Alleged Misrepresentation

At the public hearing before the Planning Commission held on July 25, 2007, one of the issues raised by persons opposed to

the proposed site plan was that it had not been properly approved by the cooperative unit owners within KLOR. Their claim of invalidity was based on Section 719.1055, Florida Statutes (2007), which prohibits an amendment to the cooperative documents which materially changes the configuration or size of any cooperative unit, or makes other material changes identified in the statute, unless all unit owners approve the amendment. Appellant and some other unit owners claim that the site plan approved by Resolution P35-07 makes the kinds of material changes which all unit owners must approve, but such approval was not obtained.

The other parties did not concede that approval of the site plan requires the agreement of 100 percent of the cooperative unit owners. Whether 100 percent approval is required is one of the issues to be resolved in the case that is pending in the circuit court.

In his presentation to the Planning Commission, the attorney for KLOR made the following statement:

> The law requires when a co-op changes in material fashion the ownership interest of the property that it be put to a vote of the shareholders. I'm always the one that gets to keep the original ballots. I've been holding original ballots for elections now for a couple of years. These are the original ballots of the site plan that was sent out in March of '02 and '03.
> I will tell you there is a difference. At that time, we put a tennis court where the

> waste plant was because we thought the Key Largo Waste Plant would be in effect. We've had to change that. Other than that, the lots and sizes and everything were the same. There are 285 members, shareholders, that have to vote. 51 voted against it. That's 85 percent approval.

Appellant claims this is a misrepresentation because the cooperative unit owners did not vote on the site plan approved by Resolution P35-07. In the discussion quoted above, however, KLOR's counsel did not say that the cooperative unit owners voted on the site plan that was before the Planning Commission. He made clear that the vote he was referring to was for an earlier site plan.

Appellant further claims that the alleged misrepresentation was material because the Planning Commission's decision was based on this misrepresentation. Appellant's evidence for this second claim is the following statement made at the public hearing by the chairman of the Planning Commission:

> We understand that 85 percent of the people in this park have agreed to do this and that's the way our country operates, that's the way we operate, that's majority rule, and I'm afraid that's going to be hard for some of you, but that's the way life is.

Appellant asserts that this statement shows that the commissioners believed that the cooperative unit owners had voted on the proposed site plan. However, it is reasonable to infer that the chairman's statement merely reflects what he was

told by KLOR's attorney, that 85 percent of the unit owners had agreed to an earlier site plan that was similar. Furthermore, as explained below, the chairman's comment is not material.

Matters Outside the Record

Appended to Appellant's Initial Brief are three documents that are not part of the record created by the Planning Commission. Appellant refers to these documents, in part, as proof of factual issues presented in its Initial Brief. The appended documents are (1) a motion filed in the circuit court, (2) a transcript of the circuit court hearing on the motion, and (3) the court's order on the motion. These documents are not part of the record on review and their inclusion with the Initial Brief was improper. No consideration was given to the documents by the Administrative Law Judge.

Legal Discussion

The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Article XIV, Section 9.5-535, of the Monroe County Code. Under Section 9.5-540(b), the scope of the hearing officer's review is stated as follows:

> The hearing officer's order may reject or modify any conclusion of law or interpretation of the Monroe County land development regulations or comprehensive plan in the planning commission's order, whether stated in the order or necessarily implicit in the planning commission's

> determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record, and states with particularity in his order, that the findings of fact were not based upon competent substantial evidence or that the proceeding before the planning commission on which the findings were based did not comply with the essential requirements of law.

A hearing officer (administrative law judge) acting in his or her appellate review capacity is without authority to reweigh conflicting testimony presented to the Planning Commission. See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

The question on appeal is not whether the record contains competent substantial evidence supporting the view of the appellant; rather, the question is whether competent substantial evidence supports the findings made by the Planning Commission. Collier Medical center, Inc. v. Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

The question of whether the Planning Commission departed from the essential requirements of law is the same as whether the Planning Commission failed to apply the correct law. Haines City Community Development, 658 So. 2d at 530. The correct law to be applied in this particular case, which was not discussed by Appellant, are the Monroe County Code criteria applicable to the amendment of a major conditional use permit.

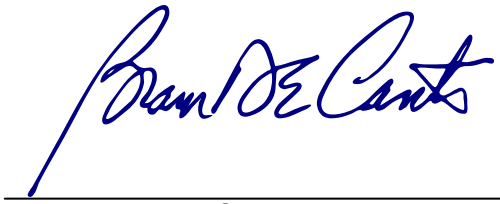
Appellant does not identify any criterion that the Planning Commission failed to properly apply. Appellant does not allege nor does the record show that there is any provision of the Monroe County Code that requires, as a condition for the amendment of a major conditional use permit, that an applicant demonstrate that it has properly obtained the approval of its unit owners, association members, board of directors, or any other entity. Even assuming that Appellant is correct that the statement of KLOR's attorney was a misrepresentation, it was not a material misrepresentation because it did not involve a criterion that governed the Planning Commission's decision.

There is no finding of fact in the Planning Commission's decision that Appellant claims is unsupported by competent substantial evidence. There is no interpretation of the Monroe County Code or other legal conclusion in the Planning Commission's decision that Appellant claims to be in error.

DECISION

Based on the foregoing, the appeal of Maria Barroso is DISMISSED.

DONE AND ORDERED this 25th day of June, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 25th day of June, 2008.

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NOTICE OF RIGHTS

Pursuant to Article XIV, Section 9.5-540(c), Monroe County Code, this Final Order is the final administrative action of Monroe County. It is subject to judicial review by common law certiorari to the circuit court in appropriate judicial circuit.