STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWIN HANDTE,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 08-2279
	)	
FORRER VENTURES CAPITAL, LLC and MONROE COUNTY PLANNING COMMISSION,	)	
	)	
Appellees.	)	
	)	

FINAL ORDER

This case is the appeal of Edwin Handte (Handte, or Appellant) from a decision of the Monroe County Planning Commission (Commission). By contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code (M.C.C. or Code), the Division of Administrative Hearings (DOAH) has jurisdiction to consider this appeal.

On or about October 25, 2007, the Monroe County Building Department (Department) issued Permit 073-03088, to Forrer Ventures Capital, LLC (Forrer, or Applicant), to reconfigure the interior of an existing 2,700 square foot structure for showrooms, offices, conference room, and baths (one handicap) for use in a home electronics retail business, and to install handicap parking (without an increase in parking area), in accordance with approved plans, at Block 11, Lots 13 and 14,

located in Largo Sound Park, 103375 Overseas Highway, Key Largo, Monroe County, Florida (the Property). Handte appealed the Department's decision to the Commission under Article XII, Section 9.5-521, M.C.C.

Truncated Planning Commission Hearing

At the appeal hearing before the Commission, the staff of the Commission presented the testimony of two witnesses and a report recommending dismissal of Handte's appeal to the Commission. The bases for staff's recommendation were: the clarity of Monroe County Comprehensive Plan Future Land Use Element (FLUE) Policy 101.4.3; the Property's existing lawful use for "light retail"; no expansion of the square footage of the building on the Property; and Administrative Interpretation No. 01-109 exempting applications for interior renovations from the requirement to bring a nonconforming property into compliance with applicable Code provisions "whenever there is a change of use or a substantial improvement." After hearing argument of counsel, the Commission decided not to hear Handte's evidence because it would not sustain his appeal. At that point, the hearing before the Commission was terminated, and on March 4, 2008, the Commission adopted Resolution P15-08, which denied Handte's appeal.

Planning Commission's Resolution P15-08

The Planning Commission's Resolution P15-08 was based on findings of fact as to: (1) the Property's Future Land Use Map (FLUM) designation of Residential Medium; (2) Comprehensive Plan FLUE Policy 101.4.3; (3) the Property's current land use district (zoning) of Improved Subdivision-Masonry (IS-M); (4) the historic use of the property, as established in an appeal taken by Handte in 2002; Article VII, Section 9.5-242(e), M.C.C.; the current owner's acquisition of the Property; the application and issuance of a building permit for interior renovations for use as a home electronics store, without any increase in the footprint or floor area; and no change in the intensity of the historical commercial retail use of the Property (density not applying to commercial properties).

The Planning Commission's Resolution P15-08 was based on conclusions of law that: (1) FLUE Policy 101.4.3 "allows substantial improvement to non-conforming uses in the Residential Medium (RM) Future Land Use Category if the intensity, floor area, density and type of use remain the same as before the 1996 Land Development Regulations"; (2) Article VII, Section 9.5-242(e), M.C.C., "limiting non-conforming uses to be substantially improved only if limited to Two Thousand Five Hundred (2,500) Square feet is inconsistent with the

Comprehensive Plan and cannot be enforced"; and building Permit 073-03088 was lawfully issued.

The Commission's Resolution did not mention Administrative Interpretation No. 01-109.

Scope of Appellate Review

Under Article XIV, Section 9.5-540(b), M.C.C., the hearing officer "may affirm, reverse or modify the order of the planning commission." "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." Id.

Issues on Appeal

Appellant raises three issues in this appeal: (1) the Commission failed to comply with the essential requirements of law by denying Handte an evidentiary hearing[1]; (2) there was no competent, substantial evidence to support the Commission's

decision because the hearing before the Commission was truncated, and he was not allowed to present evidence; and (3) the use of Administrative Interpretation 01-109 departed from the essential requirements of law because it nullified the requirements of the land development regulations (LDRs) and Comprehensive Plan regarding nonconformities.

As to the third issue raised on appeal, while cited in the staff report, Administrative Interpretation 01-109 relates to Article V, Section 9.5-146, M.C.C., which addresses "nonconforming signs and all uses that are nonconforming due to failure to comply with the standards of article VII, divisions 9, 10, 11, 12 and 13," none of which apply to this case. For that reason, it is irrelevant. Appellees do not rely on it as support for the Commission's decision, which does not mention it.

Although the second issue raised by Handte is framed in terms of competent, substantial evidence, it actually makes the same argument as the first issue on appeal--namely, that the Commission failed to comply with the essential requirements of law by truncating Handte's appeal hearing.

Compliance with Essential Requirements of Law

Under Article XIV, Section 9.5-540(b), M.C.C., compliance with the essential requirements of law relates to the modification or rejection of findings of fact.

Handte contends that the Commission's finding of no change in the intensity of the historical commercial use of the Property must be rejected because there was no evidentiary hearing on the question. His Initial Brief argued that the IS-M land use district authorizes only up to medium intensity commercial retail. See Art. VII, § 9.5-242(d)(1), M.C.C. Similarly, the Initial Brief argued that, in addition to a building permit, a new minor or major conditional use permit was required because Article III, Section 9.5-63, M.C.C., provides: "Only those uses which are authorized in article VII, division 2, or those nonconforming uses which are damaged or destroyed, and are permitted to be reestablished in article V, may be approved as conditional uses." But the record-on-appeal is clear that these issues were not presented to the Commission below. To the contrary, the issues raised on appeal to the Commission assumed no change in the intensity of the commercial use of the Property as a result of the construction authorized by Permit 073-03088. There is no indication in the record-on-appeal that Handte intended to introduce evidence that the construction authorized by Permit 073-03088 would result in a change in the intensity of the commercial use of the Property.

Counsel for Handte argued orally that Handte had no reason to raise an issue as to the intensity of Forrer's commercial use of the Property before the Commission because Handte had no

reason to know that the Commission would deny his appeal based on FLUE Policy 101.4.3. But FLUE Policy 101.4.3 was not relevant to claims under Article VII, Section 9.5-242(d)(1), and under Article III, Section 9.5-63, M.C.C.

For these reasons, Handte waived the issue of intensity of use by not raising it as a basis for his appeal to the Commission; he did not preserve the issue for this appeal; and he did not establish that the Commission applied the incorrect law or otherwise failed to comply with the essential requirements of law by not considering evidence on intensity of use. See Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. 1996); Pullen v. State, 818 So. 2d 601 (Fla. 1st DCA 2002); Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993).

Besides the finding of no change in the intensity of the historical commercial use of the Property, Handte does not seek to have any particular finding of fact of the Commission rejected. Rather, he seeks to add findings of fact as to the nature of the improvements authorized by Permit 073-03088. Specifically, Handte intended to present evidence to support his position that the work authorized by the building permit at issue would have constituted a substantial improvement and more than 50% of the value of the Property.[2] In addition, Handte intended to prove that the Applicant intends to install brick

pavers and asphalt outside the rear door of the building, where there was once a loading dock, and which likely will be used as a loading dock. He contends that it was a departure from the essential requirements of law for the Commission to deny him the opportunity of a full evidentiary hearing to determine those facts.

As stated in Ivey v. Allstate Insurance Co., 774 So. 2d 679, 682 (Fla. 2000), quoting with approval Stilson v. Allstate Insurance Co., 692 So. 2d 979, 982 (Fla. 2d DCA 1997), a departure from the essential requirements of law "is something more than a simple legal error" and the reviewing tribunal "should examine the seriousness of the error and use its discretion to correct an error 'only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.'" It also has been held that a departure from the essential requirements of law occurs when the lower tribunal does not “appl[y] the correct law." Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

As to Handte's evidence on the Applicant's intention to install brick pavers and asphalt outside the rear door of the building, it is clear that no brick pavers or asphalt were included in Permit 073-03088. For that reason, evidence as to the applicant's intention to install them is irrelevant to the issuance of Permit 073-03088, and the Commission did not apply

the incorrect law or otherwise fail to comply with the essential requirements of law by not considering this evidence.

On the other hand, if Handte's evidence on the extent of the improvements authorized by Permit 073-03088 could have sustained his appeal, the Commission would have failed to comply with the essential requirements of law by not holding a full evidentiary hearing. Article XII, Section 9.5-521(e), M.C.C., provides that "a party appealing an administrative decision, determination or interpretation shall be entitled to present evidence and create a record before the planning commission . . . ." Whether those facts would sustain Handte's appeal depends on conclusions of law and interpretations of the LDRs and Comprehensive Plan, which the hearing officer's order may reject or modify. See Art. XIV, § 9.5-540(b), M.C.C. The pertinent Comprehensive Plan provisions and LDRs relate to nonconforming uses and structures.

Nonconformity of Applicant's Use and Structure

Article VII of Chapter 9.5 of the Code provides for "land use districts," and Section 9-5.231 provides for "permitted uses." "No structure or land in Monroe County shall hereinafter be developed, used or occupied unless expressly authorized in a land use district in this division." Art. VII, § 9.5-231(a), M.C.C.

It is undisputed that the applicant's building is located in the IS-M land use district. This land use district authorizes, as a major conditional use, any combination of low and medium intensity commercial retail and office uses of less than 2,500 square feet of floor area. See Art. VII, § 9.5-242(d)(1), M.C.C. For that reason, commercial retail use of Forrer's 2,700 square-foot building is nonconforming. Alternatively, it is possible that the building could be viewed as a nonconforming structure due to its floor area.

General Plan and LDR Limitations on Non-Conformities

Monroe County Comprehensive Plan FLUE Objective 101.8 states that the County "shall eliminate or reduce the frequency of uses which are inconsistent with the applicable provisions of the land development regulations and the Future Land Use Map, and structures which are inconsistent with applicable codes and land development regulations." The policies under Objective 101.8 have been implemented through the LDRs in Article V of Chapter 9.5, M.C.C.

Article V of the Code regulates both nonconforming uses and nonconforming structures: "The purpose of this article is to regulate and limit the continued existence of uses and structures established prior to the enactment of this chapter that do not conform to the provisions of this chapter. Many nonconformities may continue, but the provisions of this article

are designed to curtail substantial investment in nonconformities and to bring about their eventual elimination in order to preserve the integrity of this chapter." Art. V, § 9.5-141, M.C.C. See also JPM Investment Group, Inc. v. Brevard County Board of County Commissioners, 818 So. 2d 595, 598 (Fla. 5th DCA 2002).

"Nonconforming uses of land or structures may continue in accordance with the provisions of this section." Art. V, § 9.5-143(a), M.C.C. "Normal maintenance and repair to permit continuation of registered nonconforming uses may be performed." Art. V, § 9.5-143(b), M.C.C. "Nonconforming uses shall not be extended" and "[t]his prohibition shall be construed so as to prevent . . . [e]nlargement of nonconforming uses by additions to the structure in which such nonconforming uses are located" or ". . . [o]ccupancy of additional lands." Art. V, § 9.5-143(c)(1)-(2), M.C.C. With certain exceptions that would not apply, "if a structure in which a nonconforming use is located is damaged or destroyed so as to require substantial improvement, then the structure may be repaired or restored only for uses which conform to the provisions of the land use district in which it is located." Art. V, § 9.5-143(e)(2), M.C.C.

"A nonconforming structure devoted to a use permitted in the land use district in which it is located may be continued in

accordance with the provisions of this section." Art. V, § 9.5-144(a), M.C.C. "Normal maintenance and repair of registered nonconforming structures may be performed." Art. V, § 9.5-144(b), M.C.C. "Nonconforming structures which are used in a manner conforming to the provisions of this chapter may be enlarged or extended provided that the nonconformity is not further violated." Art. V, § 9.5-144(c), M.C.C. "Any part of a nonconforming structure which is damaged or destroyed to the extent of less than fifty (50) percent of the fair market value of such structure may be restored as of right if a building permit for reconstruction shall be issued within six (6) months of the date of the damage." Art. V, § 9.5-144(e)(2), M.C.C. However, with certain exceptions that would not apply, "any nonconforming structure which is damaged or destroyed so as to require substantial improvement may be repaired or restored only if the structure conforms to the provisions of the land use district in which it is located." Id.

Comprehensive Plan Policy 101.4.3

The Commission concluded that Monroe County Comprehensive Plan FLUE Policy 101.4.3 requires the issuance of Permit 073-03088. Appellees concur with the Commission.

FLUE Policy 101.4.3 provides:

> The principal purpose of the Residential Medium land use category is to recognize those portions of subdivisions that were

> lawfully established and improved prior to the adoption of this plan and to define improved subdivisions as those lots served by a dedicated and accepted existing roadway, have an approved potable water supply, and have sufficient uplands to accommodate the residential uses. Development on vacant land within this land use category shall be limited to one residential dwelling unit for each such platted lot or parcel which existed at the time of plan adoption. However, Monroe County shall adopt Land Development Regulations which allow nonresidential uses that were listed as a permitted use in the Land Development Regulations that were in effect immediately prior to the institution of the 2010 Comprehensive Plan (pre-2010 LDR's), and that lawfully existed on such lands on January 4, 1996 to develop, redevelop, reestablish, and/or substantially improve provided that the uses are limited in intensity, floor area, density and to the type of use that existed on January 4, 1996 or limited to what the pre-2010 LDR's allowed, whichever is more restricted [sic]." Lands within this land use category shall not be further subdivided. [9J-5.006(3)(c)1 and 7]

Ordinance 034-2005

Monroe County adopted Ordinance 034-2005 to implement FLUE Policy 101.4.3 (and other similar Comprehensive Plan policies applicable to other residential land use categories). Codified as Article VII, Section 9.5-242(e), M.C.C., which pertains to the Improved Subdivision District of the LDRs, the relevant part of Ordinance 034-2005 provides:

> The following lawfully established nonresidential uses . . . which were rendered nonconforming by the 2010

> comprehensive plan, but listed as permitted uses in the [LDRs] that were in effect immediately prior to the institution of the 2010 Comprehensive Plan (pre-2010 LDRs) and lawfully existed on such lands on January 4, 1996, which are damaged or destroyed may be permitted to be redeveloped, make substantial improvements, or be reestablished as an amendment to a major conditional use, subject to the standards and procedures set forth in article III, division 3.[3]
>
> (1) Commercial retail of low- and medium-intensity or office uses or any combination thereof of less than two thousand five hundred (2,500) square feet of floor area, provided that:
>
> [a.-h. certain locational and other requirements are met, which it appears the Property can meet];
>
> i. The use is limited in intensity, floor area, density and to the type of use that existed on January 4, 1996 or limited to the permitted uses and/or the provisions for minor or major conditional uses allowed in the pre-1996 LDRs for this district, whichever is more restrictive.

(Emphasis added.)

FLUE Policy 101.4.3, Plan, and LDRs

The Commission concluded: that FLUE Policy 101.4.3 and Article VII, Section 9.5-242(e), M.C.C., conflict in that the LDR has a "less than 2,500 square feet of floor area" restriction; and that FLUE Policy 101.4.3 controls and governs. Appellees concur, citing Section 163.3194(1)(b), Florida Statutes (2007), for the proposition that the Comprehensive Plan

provision controls and governs, not the conflicting LDR. Handte concedes the conflict between the FLUE Policy and Article VII, Section 9.5-242(e), M.C.C.[4] However, he contends that FLUE Policy 101.4.3 requires LDRs to take effect and that Article VII, Section 9.5-242(e), M.C.C., prohibits the issuance of Permit 073-03088, as would the Article V LDRs if the building permit would authorize substantial improvements to the Property.

Actually, Article VII, Section 9.5-242(e)(1), M.C.C., applies only in the event that a structure is "damaged or destroyed"; it does not apply directly to the facts of this case since the Property subject to Permit 073-03088 has not been damaged or destroyed. (Similarly, Article V, Sections 9.5-143(e)(2) and 9.5-144(e)(2), M.C.C., apply when a property is damaged or destroyed.)

Under the applicable LDRs in Article V, Chapter 9.5, M.C.C., which implement FLUE Objective 101.8 and the FLUE policies under that Objective, Forrer would be allowed to perform normal maintenance and repair. Art. V, §§ 9.5-143(b) and 9.5-144(b), M.C.C. Forrer would not be allowed to extend the Property's nonconformity--i.e., enlarge it by addition or occupancy of additional land. Art. V, §§ 9.5-143(c)(1)-(2) and 9.5-144(c), M.C.C. It is not clear whether those LDRs would allow Forrer to substantially improve the Property through interior renovations that do not enlarge the structure or

increase intensity of the use. However, in view of the prohibitions in the context of damage or destruction in Article V, Sections 9.5-143(e)(2) and 9.5-144(e)(2), as well as the 2,500 square foot floor area restriction in Article VII, Section 9.5-243(e)(1), M.C.C., it does not appear that substantial improvement of the Property through interior renovations would be allowed by the LDRs even if the improvements would not enlarge the structure or increase intensity of the use.

FLUE Policy 101.4.3 Not Self-Executing

It has been held: "The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960). See also Florida Hosp. Waterman Inc. v. Buster, 984 So. 2d 478, 485-86 (Fla. 2008); Notami Hosp. of Florida, Inc. v. Bowen, 927 So. 2d 139, 144 (Fla. 1st DCA 2006). By analogy (albeit imperfect, of comprehensive plan provisions to state constitutional provisions), FLUE Policy 101.4.3 would be self-executing if it is sufficiently clear. In light of the Policy's express mandate that it be implemented through LDRs, together with the apparent conflict between the

LDRs (including not only Article VII, Section 9.5-243(3), M.C.C, but also the Article V LDRs that implement FLUE Objective 101.8 and the FLUE policies under that Objective) and the Commission's interpretation of FLUE Policy 101.4.3, it cannot be concluded that FLUE Policy 101.4.3 is self-executing or that it controls over conflicting LDRs.

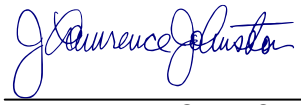
Handte argues in part that FLUE Policy 101.4.3 is not self-executing because LDRs are necessary to establish the "intensity, floor area, [and] density" limitations mentioned in FLUE Policy 101.4.3. Arguably, the Policy itself establishes those limitations, being those "that existed on January 4, 1996, or limited to what the pre-2010 LDR's allowed, whichever is more restricted [sic]." But such an interpretation would conflict with the 2,500 square feet floor area restriction placed in Article VII, Section 9.5-243(e), M.C.C., which is the LDR adopted to implement FLUE Policy 101.4.3. In addition, FLUE Policy 101.4.3 does not make clear that there is no limit to the extent of the substantial improvements it would allow--in this case by way of interior renovations.

Since FLUE Policy 101.4.3 is not self-executing, it does not conflict with the LDRs. Under the Comprehensive Plan provisions and the LDRs adopted to date, Permit 073-03088 should not be issued if it would authorize substantial improvements to the Property.

DECISION

For these reasons, the Commission did not apply the correct law, and failed to comply with the essential requirements of law, when it did not allow Handte to present evidence as to the extent of the improvements authorized by Permit 073-03088; and the Commission's decision to deny Handte's appeal without giving him the opportunity to present such evidence is REVERSED.

DONE AND ORDERED this 22nd day of October, 2008, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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 22nd day of October, 2008.

ENDNOTES

[1]/ Handte contended in his Initial Brief that there was no evidentiary hearing and that there were no findings of fact in Resolution P15-08. In his Reply Brief, Handte conceded that findings of fact were made, but he contended that they were invalid because the hearing before the Commission was truncated, and he was not allowed to present evidence.

[2]/ Appellees do not concede that Permit 073-03088 would authorize substantial improvements. Rather, they take the position that Permit 073-03088 must be issued under FLUE Policy 101.4.3 regardless whether substantial improvements would be

authorized. It is noted, however, that the Code not only defines "substantial improvement" as costing fifty percent or more of the assessed value of a property, but it also states: "For purposes of this definition, substantial improvement is considered to occur when the first alteration of any wall, ceiling, floor or other structural part of the building commences, whether or not that alteration affects the external dimension of the structure." Art. I, § 9.5-4(S-19), M.C.C. Permit 073-03088 authorizes the demolition of the existing drop ceiling and all interior walls.

[3]/ Understanding the circular "standards and procedures set forth in article III, division 3" is difficult. Article III, Division 3, of Chapter 9.5 of the LDRs deals extensively with conditional uses and includes a provision for amendments to conditional use permits "only pursuant to the standards and procedures established for its original approval or as otherwise set forth in this article." Art. III, § 9.5-73, M.C.C. Article III of Chapter 9.5, M.C.C., also includes Section 9.5-63, which provides: "Only those uses which are authorized in article VII, division 2, or those nonconforming uses which are damaged or destroyed, and are permitted to be reestablished in article V, may be approved as conditional uses." Article VII, Division 2, of Chapter 9.5, M.C.C., includes the LDRs on permitted uses in land use districts, which lead back to Article VII, Section 9.5-242(e)(1), M.C.C.

[4]/ Both before the Commission and in his Initial Brief in this appeal, Handte agreed to the applicability of Article VII, Section 9.5-242(e), M.C.C., to the Property, and agreed that it conflicts with FLUE Policy 101.4.3. In his Reply Brief, Handte questioned the applicability of Article VII, Section 9.5-242(e), M.C.C., to the Property because it refers to the "Suburban Residential Land Use District" instead of the "Improved Subdivision District." However, Handte's attempt to raise the issue in his Reply Brief is untimely, the issue having been waived and not preserved for this appeal. See Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. 1996); Pullen v. State, 818 So. 2d 601 (Fla. 1st DCA 2002); Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993). In any event, the reference to the "Suburban Residential Land Use District" appears to have been an inadvertent scrivener's error. It is clear that it was meant to pertain to the "Improved Subdivision District."

COPIES FURNISHED:

Nicole Petrick, Planning Commission Coordinator
Monroe County Growth Management Division
2798 Overseas Highway, Suite 400
Marathon, Florida 33050

Lee Robert Rohe, Esquire
Lee R. Rohe, P.A.
25000 Overseas Highway, Suite 2
Summerland Key, Florida 33042

Nicholas W. Mulick, Esquire
Nicholas W. Mulick, P.A.
91645 Overseas Highway
Tavernier, Florida 33070

Derek V. Howard, Esquire
Monroe County Attorney's Office
1111 12th Street, Suite 408
Key West, Florida 33040

NOTICE OF RIGHTS

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