STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICK WILLIAMS, ASHLEY WILLIAMS, GUY BUELL, ALFRED FISCH, and ROBIN HINCHEE,	)	
Appellants,	)	
vs.	)	Case No. 08-5170
BELLEVIEW BILTMORE, LLC, CLEARWATER DEVELOPMENT BOARD, and THE CITY OF CLEARWATER,	)	
Appellees.	)	

FINAL ORDER

This is an appeal of the decision of the Community Development Board (CDB) of the City of Clearwater (City) to approve the Flexible Development application (Application) of Belleview Biltmore, LLC (Developer). The decision permits development of a 38-unit hotel with accessory uses. The dispute in this case involves the approval of a 4981-square-foot restaurant as one of the accessory uses of the proposed hotel.

I. Jurisdiction and Record

The jurisdiction of the Division of Administrative Hearings arises by contract with City and Code Sections 4-501.B.1 and 4-505. Oral argument on this appeal took place on March 3, 2009, at City Hall in Clearwater before the undersigned Administrative Law Judge. Pursuant to Code Section 4-505.B, the

Administrative Law Judge received the record before the CDB, including the transcript of the proceedings of the CDB on September 16, 2008, at which the CDB issued the Flexible Development Approval.

II. Issues

The two issues raised by Appellants are whether competent substantial evidence existed to support the CDB's findings that the proposed restaurant is an accessory use to the proposed hotel and the site plan meets the parking design standards of the Code.

III. Standards of Review

A. Competent Substantial Evidence

The definition of competent substantial evidence is simple. When review is limited by this standard, "legitimate disagreements as to weight and credibility of the evidence presented below" are irrelevant, and the court's task is merely to determine "whether evidence exists to support the . . . findings [below]." Crist v. Jaber, 908 So. 2d 426, 432 (Fla. 2005).

B. Departure from Essential Requirements of Law

A departure from the essential requirements of law is a phrase that has not commanded a single definition over time. In Haines City Community Development v. Heggs, 658 So. 2d 523, 527n.7 (Fla. 1995), the Court noted that a departure from the

essential requirements of law has known seven separate definitions. However, at least for circuit-court review of a decision of an administrative agency, the Heggs Court held that the review is: "1) whether procedural due process is accorded; 2) whether the essential requirements of law have been observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence." 658 So. 2d at 530. For district-court review of a decision of the circuit court, though:

> The standard of review for certiorari . . . effectively eliminates the substantial competent evidence component. The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. . . . [T]hese two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of law. . . . This standard, while narrow, also contains a degree of flexibility and discretion.[14] For example, a reviewing court is drawing new lines and setting judicial policy as it individually determines those errors sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari. This may not always be easy since the errors in question must always be viewed in the context of the individual case. It may also be true that administrative decisions may be more difficult, since care must be exercised to determine the nature of the administrative proceeding under review, and to distinguish between quasi-judicial proceedings and those legislative in nature. . . .

[14] One critic has noted:

> Some errors are so fundamental as to clearly fall within the term [i.e., depart from the essential requirements of law so as to justify common law certiorari]; others clearly do not fall within any reasonable interpretation. The vagueness of the phrase, however, means that there is a large grey area. Properly conceived, the discretion often mentioned in relation to common law certiorari should be exercised in this grey area. This should not be unprincipled or arbitrary discretion but should depend on the court's assessment of the gravity of the error and the adequacy of other relief. A judicious assessment by the appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy, but will preserve the function of this great writ of review as a "backstop" to correct grievous errors that, for a variety of reasons, are not otherwise effectively subject to review. [Citing William A. Haddad, "Writ of Certiorari in Florida," in The Florida Bar, Florida Appellate Practice, § 18.3 (3d ed. 1993).]

658 So. 2d at 530-31.

Although the Heggs Court treats both procedural due process and departure from the essential requirements of law as a departure from the essential requirements of law, an appellant must raise both points separately to preserve them for review.

Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 200 (Fla. 2003).

An erroneous ruling constitutes a departure from the requirements of law when it results in a miscarriage of justice, Tedder v. Florida Parole Commission, 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003), even when the ruling is a failure to apply the correct law. State v. Farino, 915 So. 2d 685, 686 (Fla. 2d DCA 2005). See also Department of Highway Safety and Motor Vehicles v. Hofer, 34 Fla. Law Weekly D583 (Fla. 2d DCA 2009).

IV. Facts and Procedural History

The subject parcel, which is located on Sand Key and fronts the Gulf of Mexico, is currently developed as a two-story grill and bar that seats approximately 175 customers in an area otherwise composed of high-rise residential condominiums. The parcel is 1.38 acres, consisting of 0.96 acres zoned Commercial District that are landward of the Coastal Construction Control Line (CCCL) and 0.42 acres zoned Open Space/Recreational and Preservation districts that are seaward of the CCCL. Located on the west side of Gulf Boulevard, the irregularly shaped parcel formerly was part of the Cabana Club residential condominium to the north and, as developed in the early 1980s, served as the clubhouse and members-only restaurant for the Cabana Club condominiums. Split off from the larger parcel and conveyed in the early 1990s, at which time litigation resulted in a

determination that the subject parcel was a buildable lot, the parcel operated as a public restaurant with 49 existing parking spaces and no association with any hotel until 1998, when it closed.

In 2000, the owner tried unsuccessfully to obtain redesignation and rezoning of the parcel to permit a ten-story, 20-unit residential condominium project. In 2002, the owner obtained a Flexible Development approval for a restaurant open to the general public. As currently developed, the restaurant operating on the parcel consists of 7054 square feet of enclosed floor area and 1916 square feet of outdoor seating with an occupational license permitting a maximum of 305 seats. The present restaurant has banquet facilities.

In analyzing the Application, the City of Clearwater's Development Review Committee (DRC) noted that, pursuant to Code Table 2-704, the minimum lot area and width for overnight accommodation uses ranges from 20,000-to-40,000 square feet and 100-to-`200 feet, respectively. The subject parcel is 41,965 square feet, but only 88.41 feet wide along Gulf Boulevard. Although a legally recognized lot, its width does not meet the Code requirements for any commercial use.

The DRC noted that Code Table 2-704 requires one parking space per unit for overnight accommodation uses, so that the proposed development would require 38 spaces. The DRC

acknowledged that the Planning Department had determined that the proposed 4981-square-foot restaurant would be an accessory to the hotel "based on the relationship of the Cabana Club [proposed hotel] with the Belleview Biltmore Hotel." The DRC noted that transportation to the Cabana Club would include shuttle service from the Belleview Biltmore Hotel, and the restaurant, although open to the public, would give "priority" to guests of the Cabana Club hotel or Belleview Biltmore Hotel. Developer had submitted a Parking Demand Study to the Traffic Operations Section of the City of Clearwater's Engineering Department, which had accepted the projection that 56 spaces would meet demand on the highest peak days. The DRC observed that Developer had also stated an intent to employ parking attendants, who could stack-park vehicles in the available spaces.

In deciding to allow the Application to proceed to the CDB, the DRC found that, among other things: 1) "the proposed hotel will be operated by the same hotel operator of the Belleview Biltmore Hotel in the Town of Belleair, providing guests of the Belleview Biltmore Hotel with a beachfront experience"; 2) the proposed development requires 38 parking spaces, and Developer proposed 56 parking spaces for the hotel; and 3) accessory uses do not require additional parking. The DRC concluded that the proposed development met all applicable requirements for a Level

Two approval, pursuant to Code Section 3-913. Among the Conditions of Approval recommended by the DRC was a deed restriction "requiring common operation and management" of the subject hotel and the Belleview Biltmore Hotel "in order to maintain the operational, management and marketing characteristics" of the two hotels. If common operation and management ends, "this site shall be required to reduce the size of the accessory restaurant to a square footage more in line with a 38-room/unit hotel, acceptable to the Planning Department."

The CDB met at 1:00 p.m. on September 16, 2008, to consider the recommendation of the DRC to issue the Flexible Development approval for the hotel and restaurant. Composed of volunteer members, the CDB adhered to apparent rules of procedure and attempted to give all interested persons an opportunity to be heard, within the constraints of the time set aside for the proceeding.

Among City's employees testifying at the CDB proceeding were Planning Consultant Wayne Wells and Traffic Engineer Humanchu Patney. Among Developer's representatives testifying at the CDB proceeding were Richard Heisenbottle, a registered architect; Ed Mazur, a professional engineer specializing in site engineering; Lloyd Chapman, a traffic engineer; and Vicky Gagliano, a parking consultant employed by Timothy Haahs and

Associates, the parking consultant for the project. Among Appellants' representatives testifying at the CDB proceeding were Sue Murphy, an expert in land-use planning, zoning, and site-plan analysis employed by P&M Consulting Group, and Ronald Oxtal, an expert in the appraisal and evaluation of real estate. CDB determined that all of these persons were experts.

At the start of the proceeding, Mr. Wells read to the CDB the condition, cited above, concerning the deed restriction and joint operation and management of the proposed hotel and the Belleview Biltmore Hotel. (Tr., pp. 38-40.)

After Mr. Heisenbottle and an appraiser testified, Mr. Mazur testified with a slide showing the traffic circulation of the proposed project. While showing this slide, he stated that the project "meets all Code requirements." (Tr., p. 63.) Mr. Chapman testified that he performed a traffic study and found that the proposed development would have less traffic impact than the existing use, so he projected "no traffic problem" from the proposed development. (Tr., p. 66.)

Ms. Gagliano focused most particularly on parking. She testified that she calculated shared parking demand based on a peak hour of 9:00 p.m. on Saturday. She testified that a beachfront hotel typically has low parking demand because most customers arrive by taxi or shuttle. Using peak-hour occupancy of 90 percent and a drive-ratio of 70 percent, Ms. Gagliano

projected a demand by the hotel of 24 peak-hour spaces. (Tr., p. 67.) Treating the restaurant as an accessory use to the hotel, Ms. Gagliano used a hotel-capture rate of 70 percent, which she testified was "typical and customary for the industry," and projected a demand by the restaurant of 14 peak-hour spaces. (Tr., p. 68.)

For special events, even though the proposed development would lack banquet facilities, Ms. Gagliano testified that the contingency plans are for valet stack-parking would increase the capacity from 56 spaces to 67 spaces and for use of the Belleview Biltmore's 1200 spaces with shuttle service between the two properties. (Tr., p. 69.)

Ms. Murphy testified that the 165 restaurant and bar-and-grill seats in a 4981-square-foot restaurant and a 1096-square-foot bar and grill area by the pool are not accessory to the 38-room hotel. (Tr., p. 86.) Ms. Murphy testified that the Code defines an accessory use as subordinate to the principal use and on the same property and subordinate in extent to the principal use. Because of the ratio of restaurant seats to hotel rooms, Mr. Murphy testified that the restaurant was not accessory to the hotel. Based on a survey that she had conducted of quality hotels in the area, the ratio of restaurant seats to hotel rooms was 0.97 to 1, not the 4.34 to 1 proposed by Developer. (Tr., p. 87.) Ms. Murphy testified that the

restaurant was not an accessory use to the Belleview Biltmore Hotel, which is six miles from the proposed development, because the two uses are not on the same property, as required by the Code. She testified that the condition read by Mr. Wells concerning the deed restriction acknowledged that staff believed that the accessory definition could not be met without considering the Belleview Biltmore Hotel as a principal use, together with the proposed 38-unit hotel. (Tr., p. 88.)

Ms. Murphy testified that the contingent valet parking would violate the Code by blocking drive lanes and parking spaces. (Tr., pp. 88-89.) She also expressed disbelief in the above-identified assumptions used by Ms. Gagliano. (Tr., p. 89.) Ms. Murphy presented photographs depicting widespread illegal parking in the vicinity of an area hotel. She testified that the Code required, under flexible development standards, 35-75 spaces for a restaurant of the size of the proposed restaurant.

Lastly, Ms. Murphy testified that the proposed parking layout does not meet the stacking requirements of the Code because it fails to observe a minimum of 40 feet of depth from the curb. She questioned whether the parking problems would not pose safety problems for Gulf Boulevard because vehicles would queue-up in the roadway trying to enter the parking area.

Appellants' counsel argued to the CDB that the proposed restaurant requires 75 parking spaces, not the 14 that Developer is offering, because the restaurant fails to qualify as an accessory use to the 38-unit hotel. (Tr., p. 100.) He contended that the intent of the Code's permission of accessory uses is to allow for shared use of infrastructure (Tr., p. 101.), or, in this case, to recognize that persons using the restaurant will already have parked in connection with their use of the hotel. However, Appellants' counsel argued that this will not be possible with restaurant patrons coming from a principal use six miles away. (Tr., p. 102.) Appellants' counsel pointed out that the Code requires that an accessory use be located on the same property as the principal use, as well as be subordinate to, and serve, the principal use. (Tr., p. 103.) Appellants' counsel characterized the above-identified deed restriction as an admission that the restaurant is not an accessory use to a 38-unit hotel without consideration of the 448-room Belleview Biltmore Hotel (Tr., p. 104.)

Michel Nardi, a Clearwater attorney, next addressed the CDB. Having been granted party status and previously having stated that he was not appearing in a representative capacity, Ms. Nardi testified that he has resided on Sand Key since 1991, at which time very little beach existed in front of the subject parcel. (Tr., p. 109.) Expressing concern that overflow

parking from the proposed restaurant would occupy Sand Key Bay Park, Ms. Nardi testified that such use of the park parking spaces might violate an agreement entered into by City and the Florida Department of Environmental Protection, in connection with a beach nourishment project constructed in the 1990s. Ms. Nardi testified that he had chaired the original task force organized by the Sand Key Civic Association for developing the plan that would provide public parking and enhanced public access to the beach, so as to overcome state agency objections to including Sand Key in a larger Pinellas County beach nourishment project. (Tr., pp. 111-13.)

Todd Pressman, who represented himself, as a nearby property owner, and several other persons, who are also nearby property owners, all of whom had been given party status by the CDB. Mr. Pressman presented two letters. One letter was from Steve Ellison, a member of the American Institute of Certified Planners, whose analysis of accessory use was the same as that of Ms. Murphy (Tr., p. 123), and the other letter was from Mike Raysor, a transportation consultant and Florida professional engineer, whose analysis of parking was the same as that of Appellants' counsel and Ms. Murphy. (Tr., p. 125.)

After the conclusion of the presentation of direct testimony, by narration, of the above-described persons, and others who addressed issues not relevant to the present appeal,

the CDB Chair opened the proceeding to cross-examination. Developer's counsel first cross-examined Ms. Murphy, after which Mr. Heisenbottle also asked her some questions. During the latter's cross-examination, an issue arose concerning the percentages, based on area, for accessory uses. Mr. Heisenbottle then cross-examined Mr. Wells on this point, and Mr. Wells testified that all accessory uses of structures--if not a permitted use--shall not cumulatively exceed ten percent of the gross floor area of the principal use, but 25 percent with staff approval. (Tr., pp. 138-39.)

Mr. Heisenbottle cross-examined Ms. Nardi about the impact, if any, of the proposed development on the ability of City to conform to its beach nourishment contract. (Tr., p. 144-46.)

Next, the CDB Chair allowed cross-examination by persons with party status. Appellants' counsel cross-examined Mr. Heisenbottle, who testified that the proposed restaurant, at nearly 5000 square feet, "certainly is perhaps" more than would be necessary for a 38-room hotel, but added that the smaller hotel is connected with the 425-room Belleview Biltmore Hotel. Admitting that the proposed restaurant is "larger than what is typical for a typical 38-room hotel," Mr. Heisenbottle testified that there is no such thing as a typical 38-room hotel, and the accessory use is well within the 10-25 percent range, to which

Mr. Wells had testified, so it is permitted by the Code. (Tr., p. 148.)

Appellants' counsel then cross-examined Ms. Gagliano. His attempt to cross-examine her using a parking study that she had prepared for the same client in connection with the use, if any, of a hotel capture rate for the restaurant at the Belleview Biltmore, was prevented when counsel for the CDB, City and Developer objected because the study was not part of the evidentiary record before the CDB and, according to Developer's counsel, this cross-examination was outside the scope of direct. Although the use of such material in cross-examination was clearly not improper, nor was it outside of the scope of direct examination, the CDB complied with the advice of its counsel and excluded the material. (Tr., pp. 153-55.) This ended the cross-examination of Ms. Gagliano by Appellants' counsel, who then cross-examined Mr. Wells.

When asked if the proposed restaurant is larger than normal for a 38-room hotel, Mr. Wells testified that the relevant definitions do not set any limits, (Tr., p. 156.), but he conceded that he previously had indicated in his comments to the DRC that the proposed restaurant appeared to be larger than normal for a 38-room hotel. (Tr., p. 157.) Mr. Wells declined to justify the inclusion of the above-identified deed restriction on the ground that the size of the proposed

restaurant precluded that it could be an accessory use to the 38-room hotel unless the larger Belleview Biltmore were considered. (Tr., pp. 157-58.) However, he admitted that the Code requires that the principal use to which the accessory use relates must be at the same location. (Tr., pp. 158-59.) Mr. Wells testified that a 20,000-square-foot restaurant could not be an accessory use to a 38-room hotel.

At this point, the cross-examination ended, and the CDB received public comments. After receiving numerous public comments, the CDB listened to closing argument from planning staff. In his comments, Mr. Wells explained that City could enforce a deed restriction in case the common management and operation of the proposed hotel and the Belleview Biltmore Hotel ended. (Tr., p. 201.) He also indicated that he did not have documentation concerning recent parking violations in the area of the subject parcel. Following this argument, Appellants' counsel and Developer's counsel presented brief closings.

The CDB chair expressed his concern about, among other things, the adequacy of the parking, given the likelihood of restaurant customers driving to the their destination. He suggested a condition of approval prohibiting "special events or holiday parties," which would increase parking demands. (Tr., p. 213.) However, he had to leave the meeting immediately after making these comments. Another CDB member approved of the

proposed development and suggested that Developer would ensure that it not have a parking problem, given the amount of its likely investment. (Tr., pp. 216-17.) Another CDB member agreed. (Tr., p. 217.) A third CDB member admitted that initially he was "concerned about parking," but the comments and testimony "has sort of changed my mind on that," and he now favored the proposal. (Tr., p. 218.) After another CDB member voiced his agreement, (Tr., p. 218), another CDB member stated that this property is a "bastard," meaning that the owner has "attempted to rezone it as residential high, which would have fit in with the adjacent properties[, but i]t was denied." The proposed restaurant remained "an issue in my mind" due to the parking, as customers would likely use cars to go to the restaurant. This member correctly identified the parking capacity by numbers of spaces, with and without valet-conducted stacking, and conceded that it, "Still may not . . . be enough. I don't know." (Tr., p. 219.) This member concluded by saying that he would support 2.63 seats per room, but realized that that might not be economically feasible. (Tr., p. 221.)

Another CDB member asked the other members how they felt about conditions suggested by the Chair concerning the seawall and CCCL before he had to leave the meeting. (Tr., p. 223.) She did not mention the condition prohibiting special events or holiday parties. After a brief discussion of the CCCL, a CDB

member--not the one who concluded that he did not know if the proposed parking was enough--stated, "I do agree with parking. My biggest concern with this is parking. . . . I agree that [Developer] is not going to put this caliber of a project on the table and not be willing to handle the parking." (Tr., pp. 224-25.) This member noted that the restaurant could receive considerable pedestrian traffic, and he welcomed the prospect of people walking to restaurants, perhaps up the beach. The member said he was disinclined to regulate the number of seats that the restaurant could contain. (Tr., pp. 224-25.) This member asked a question about another means of access to the parking area, in order to address stacking in more detail, but some members of the large audience became unruly and shouted comments adverse to the proposed development. (Tr., pp. 226-28.) The CDB discussion moved on to other parking issues following these interruptions. Another CDB member noted that the removal of the existing banquet facility would alleviate parking concerns and predicted that area residents would love the resort when it is finished. (Tr., p. 230.)

The CDB then took up a motion to approve the proposal. A brief discussion followed concerning a condition about the CCCL. After resolving this issue, the CDB unanimously approved the application and adjourned the meeting at 6:07 p.m.

V. Law and Analysis

A. Accessory Use

In the present case, Appellants challenge two determinations of the CDB in granting the Flexible Development Application: 1) that the proposed restaurant is an accessory use and 2) that the proposed parking otherwise met the applicable Code requirements.

Code Section 3-201.B defines an accessory use as:

> 1. The accessory use is subordinate to and serves an established and conforming principal use.
>
> 2. The accessory use and structure is subordinate in area, extent, and purpose to the principal use.
>
> 3. The accessory use contributes to the comfort, convenience or use of the principal use.
>
> 4. The accessory use and structure is located on the same property as the principal use and located behind the front edge of the principal structure.
>
> 5. The accessory use(s) and structure, unless otherwise allowed as a permitted use in the zoning district, shall not cumulatively exceed ten percent of the gross floor area of the principal use. Such structures may be permitted up to 25 percent of gross floor area of the principal use through a Level One (flexible standard) approval process. . . .

The record suggests that the Planning Department and DRC thought that they could include the Belleview Biltmore Hotel as

part of the principal use with the proposed 38-room hotel. This conclusion was erroneous because Code Section 3-201.B.4 requires that the accessory use be located on the same property as the principal use. Even if this misconception of law had permeated the CDB proceeding, and it did not, it would not have been a departure from the essential requirements of law because it would not have resulted in a miscarriage of justice. As discussed below, the conclusion that the proposed restaurant is an accessory use is possible even when considered solely in relationship to the proposed 38-room hotel and without regard to the Belleview Biltmore.

As Appellants argue, the accessory-use requirements are conjunctive, so the proposed restaurant must meet all of them. However, the relevant accessory-use requirements are subjective in nature and invite the exercise of judgment by the CDB, so that it is difficult for Appellants to show that no evidence supports the CDB's determinations on this point.

The Code requires only that the proposed restaurant be "subordinate" to and serve the proposed 38-room hotel; contribute to the comfort, convenience, or use of the proposed hotel; and be subordinate in area, extent and purpose to the proposed hotel.

There is no doubt that the proposed restaurant will serve the proposed hotel; will contribute to the comfort, convenience,

or use of the proposed hotel; and will be subordinate in area to the proposed hotel. "Extent" lacks any clear meaning, so it is impossible to invalidate the CDB's determination on this basis. The main questions are whether the proposed restaurant will be subordinate in purpose to the proposed hotel and whether, in general, the proposed restaurant will be subordinate to the proposed hotel.

The meaning of "extent" is problematic. According to the Merriam-Webster online dictionary, the most applicable definition is: "a) the range over which something extends: SCOPE <the extent of her jurisdiction>[;] b) the point, degree, or limit to which something extends <using talents to the greatest extent>[; or] c) the amount of space or surface that something occupies or the distance over which it extends: MAGNITUDE <the extent of the forest>[.]" The last definition could be applied here. Although it is similar to area, it could mean footprint, so that, in the case of a high-rise hotel and outparcel building, the two footprints could be compared. However, this result could place undue emphasis on a sprawling pool-and-cabana operation, due to its large footprint, at the expense of a more intense high-rise hotel operation.

The better definition, in this case, may be the first: the range over which something extends, where the something is hours of operation. Obviously, a nightclub that operates during hours

that the hotel front desk is closed raises questions of the subordination of the nightclub operation relative to the hotel, just as would a 24-hour restaurant operating in a hotel with limited front desk hours. Here, though, the reverse applies: the hotel front desk will always be open, and the restaurant will have more limited hours.

Appellants seize on admissions that the proposed restaurant is relatively large for a hotel the size of that proposed. This fact does not preclude the existence of evidence of subordination in purpose, in extent, or in general. Repeated testimony from staff and Developer's witnesses, especially Ms. Gagliano, support the CDB's determination of a subordinate relationship of the proposed restaurant to the proposed hotel, including, in particular, the source of business. Appellants object that this testimony is conclusory, but the open-ended nature of the Code's requirements are satisfied by such conclusory testimony based on the experience of the witness.

Appellants argue that the primary business of the proposed restaurant will be drawn from sources outside of the proposed hotel. Although the greater weight of the evidence would support this argument, some evidence suggests otherwise. Moreover, the CDB was free to determine that the proposed restaurant is an accessory use to the proposed hotel, even if the primary business of the proposed restaurant were drawn from

sources outside of the proposed hotel. Nothing in the Code requires the interpretation that Appellants have given the requirements of subordination in general and subordination of purpose or extent in particular.

It is true that the existence of considerable business from outside the hotel suggests a certain independence on the part of the restaurant that may be inconsistent with its subordinate role with respect to the hotel. But such independence does not dictate a finding that the proposed restaurant cannot qualify as an accessory use to the proposed hotel. The ultimate point is the relationship between the proposed restaurant and the proposed hotel, not the relationship between the proposed restaurant and its revenue sources. The restaurant may derive most of its revenues and profits from outside the hotel, but point is whether the hotel remains dominant over the restaurant.

Under the subjective standards in the Code, for instance, a multi-service marina might be the principal use when compared to a fueling service located within the marina, even though the fueling service derived a majority of its revenues and profits from passing boaters who never otherwise used the other marina services. The point is that the fueling service serves the marina, even though the fueling service derives most of its revenues and profits from nonmarina sources.

Appellants' other argument is that the evident purpose of the accessory-use provisions of the Code is, as relevant to this case, to relieve certain uses of meeting parking requirements because they will share parking facilities with the principal use. This is a good argument if the City, in its legislative capacity, considers revising its Code concerning accessory uses. This argument would support more quantitative, less subjective Code provisions that would better serve the functional purpose of an accessory-use exception to parking requirements. But, in an adjudicative case such as this, with the CDB acting in a quasi-judicial capacity, this argument has traction only in interpreting ambiguous Code provisions, of which there is none. More likely, this argument betrays Appellants' frustration with the open-ended nature of the applicable Code standards, but the Code is what it is, not what Appellants would wish it to be, and Appellants must take the Code as they find it. Their function-based argument, however appealing, cannot be applied to unambiguous Code provisions that are indisputably subjective and qualitative and invite the application of the experience of the Planning Department and CDB.

B. Parking

Code Section 3-1406.B addresses "off-street loading and vehicle stacking spaces":

> B. Stacking spaces: Provisions must be made for stacking and transition of incoming traffic from a public street, such that traffic may not back-up into the public street system.
>
> 1. The minimum distance between a state right-of-way and the first parking space or aisleway in a parking lot shall be as set forth in the Florida Department of Transportation . . . Driveway Handbook.
> 2. The minimum distance between all other rights-of-way and the first parking space or aisleway in a parking lot shall be as outlined in the following table:
>
> | Number of Spaces | Minimum Stacking Distance |
> |---|---|
> | 50 or fewer | 20 feet |
> | 51 or more | 40 feet |
>
> * * *
>
> 6. Additional stacking may be required as a condition of site plan approval. The length of the stacking area may be reduced when supported by a traffic study.

In the record, the jurisdiction of the relevant segment of Gulf Boulevard--whether state or county--is not entirely free of ambiguity. However, the only references to state jurisdiction are incidental, as in designating the road as "SR 699" for identification purposes, not for jurisdictional purposes. It would appear that the more consistent treatment below of the relevant segment was that it is under county jurisdiction. Because Appellants have not directly challenged this determination, but in fact advance it in their proposed final

order, the relevant Code provisions address county roads and, in this case, would require 40 feet under the above-cited table.

Again, the applicable Code provisions vest considerable discretion in the CDB. Early discussion of the parking issue suggest that some CDB members placed considerable trust in their expectation that Developer would not invest in a project with serious parking problems, but later discussion focused somewhat more on the parking solution contained in the proposal. Moreover, the CDB displayed independence in approaching the parking issue. CDB members considered imposing an additional condition prohibiting special events or restricting the number of restaurant seats, but implicitly rejected such a condition as impracticable.

Mr. Mazur testified that the proposed project met the Code requirements. Although he testified about many aspects of infrastructure, he made this representation while showing the CDB a slide about traffic circulation in the immediate vicinity of the subject parcel--an obvious factor in addressing the concerns of Appellants in this issue. Mr. Chapman's testimony seemed more directed toward trips, which is more indirectly involved in Appellants' concerns. Ms. Gagliano focused specifically on parking, although on the adequacy of the number of spaces, not the adequacy of stacking.

It is not entirely clear from at least one site plan that the 40-foot stacking requirement is not met. If not, though, the CDB could have relied on the valet parking as assurance that this margin between the highway and the aisleway or first parking space would be maintained. In any event, the traffic analyses offered by Mr. Mazur, Mr. Chapman, and particularly Ms. Gagliano also would have supported any decision by the CDB to shorten the stacking distance due to its determination that Developer had adequately addressed the peak-hour onsite parking demands of the proposed hotel and restaurant. Late in a long proceeding, as one CDB member seemed about to discuss stacking itself, audience unruliness distracted the members, who moved on to another aspect of parking--such things happen.

C. Conclusion

Code Section 4-404 requires Developer in a Level Two case "to demonstrate to the [CDB] that all required criteria for approval are met." The CDB was dealt a difficult hand--analyzing a proposal for the development of a narrow parcel separated years earlier from an adjoining parcel and later determined to be buildable--and played it as best it could--conducting a proceeding that allowed all interested persons a reasonable opportunity to try to inform and persuade its members. In their discussion, the members addressed the important points, evidencing their serious consideration of the

testimony presented to them. Obviously impressed by the expertise that Developer had brought to bear on the development problems presented by the subject parcel, the CDB exercised its discretion, as provided by the relevant provisions of the Code, to approve the proposal.

Based on the foregoing, the CDB's approval is affirmed.

DONE AND ORDERED this 13th day of April, 2009, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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this 13th day of April, 2009.

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NOTICE OF RIGHT OF JUDICIAL REVIEW

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