

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA M. STOUGH, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 PANORAMA ON CLEARWATER BEACH, )  
 LLC, EVANGELINE P. SAMARKOS, AS ) Case No. 09-3949  
 TRUSTEE OF THE EVAGELINE P. )  
 SAMARKOS REVOCABLE TRUST UAD, )  
 MICHAEL A. SAMARKOS, VICTORIA )  
 HARKEY, COMMUNITY DEVELOPMENT )  
 BOARD and CITY OF CLEARWATER, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

FINAL ORDER

Appellant, Patricia Stough, seeks review of a development order issued by the City of Clearwater Community Development Board on June 17, 2009, following a quasi-judicial, public hearing held on June 16, 2009. The development order approved the "flexible development" application of Panorama on Clearwater Beach, LLC, Evangeline P. Samarkos, as Trustee of the Evangeline P. Samarkos Revocable Trust UAD, Michael Samarkos and Victoria Harkey (Applicants) for an 88-unit hotel in Clearwater.

This appeal is taken pursuant to Section 4-505 of the City's Community Development Code (Code), which provides that a decision of the Community Development Board may be appealed to a hearing officer to conduct a proceeding in which the burden is

upon the appellant to show that the Board's decision cannot be sustained by substantial competent evidence in the record or that the decision departs from the essential requirements of law.

Under a contract between the City and the Division of Administrative Hearings, an administrative law judge of the Division was assigned to act as the hearing officer for this appeal. A pre-hearing conference was held to determine the record on appeal and to establish the schedule for submittal of the parties' briefs.

On September 29, 2009, oral argument was received at a hearing held by video teleconference at sites in Tallahassee and Tampa. The hearing officer attended in Tallahassee. All other participants attended at the Tampa site. Under Section 4-505B of the Code, all persons who were granted party status by the Community Development Board may present oral argument. In this case, oral argument in opposition to the decision on appeal was presented by Patricia Stough, John Grubb, Joseph Quinn, and Ann Quinn. Oral argument in support of the decision was presented by the Leslie Dougall-Sides, counsel for the City, Gina Grimes, counsel for the Community Development Board, and Ed Hooper, representing the Applicants. The hearing was open for attendance and observation by members of the general public.

Following the hearing, a joint proposed final order was submitted by the Appellees. No post-hearing writing was submitted by the Appellant.

#### The Factual Record

The development site is on 0.60 acres and comprises eight parcels located between Avalon Street and Kendall Street, in Clearwater.

The site is largely vacant. All previously existing structures were removed except for a dwelling on the eastern portion of the site, facing Kendall Street. The site has a future land use designation of Resort Facilities High (RFH) under the City of Clearwater Comprehensive Plan. The site is within the Tourist zoning district, which allows hotel uses.

North of the site is property that is zoned Tourist and Open Space/Recreation (OS/R) and occupied by a City parking lot and attached dwellings. South of the site is property zoned Tourist and developed with overnight accommodations and an automobile service use. The properties to the east are zoned Tourist and include a motel, a restaurant, retail sales and services, and attached dwellings. The property to the west is zoned OS/R and is a City parking lot that separates the development site from the beach and Gulf of Mexico.

The Community Development Board approved the Applicants' request to develop an 88-room hotel with 1,482 square feet of

accessory uses, including a conference room, an exercise room, and a restaurant/bar. The first three levels of the hotel comprise the parking garage, which will provide 94 parking spaces.

The Board's approval also allows a reduction to the lot width along Kendall Street from 150 feet to 100 feet, a reduction to the front (south) setback from 15 feet to 10.8 feet (to the proposed building) and zero feet (to the proposed sidewalk), a reduction to the front (north) setback from 15 feet to 10 feet (to the proposed building) and zero feet (to the proposed pavement), a reduction to the side (west) setback from 10 feet to five feet (to the proposed building) and zero feet (to the proposed pavement), a reduction to the side (east) setback from 10 feet to five feet (to the proposed building), a reduction to the rear (south) setback from 20 feet to five feet (to the proposed building), an increase to the building height from 35 feet to 72 feet (to the top of roof deck) and 86.5 feet (to the elevator equipment), an increase of the permitted density from 30 units to 88 units, and an extension of the duration of the development order from one year to two years.

Section 2-803 of the Code, entitled "Flexible development," establishes the permitted uses and the minimum setbacks, lot areas, lot widths, and other criteria that apply within the Tourist zoning district. The site is also within the Old Florida District of "Beach by Design," a special area plan adopted by the City which has development guidelines that supplement the Code.

The maximum density normally permitted under the RFH future land use category for hotels is 50 units per acre, which on the Applicants' 0.6 acres would result in 30 units. However, a Hotel Density Reserve program was established in Beach by Design as a means to encourage the construction of new, mid-size, mid-priced hotels on the beach in response to the loss of hotel rooms since 2002. The Hotel Density Reserve allows the transfer of units to a site up to a maximum density of 150 units per acre.

Based on the size and proposed amenities of the proposed hotel, it is expected to have "mid-priced" rates when compared to rates charged by other hotels in the City and region. No competent evidence was presented to demonstrate that the proposed hotel could not be reasonably characterized as a mid-priced hotel project.

The Community Development Board approved a transfer of 58 units to the site, for a total of 88 units and a resulting density of 146.7 units per acre.

The height of the proposed hotel (72 feet) complies with Section II.A.1. of Beach by Design, which establishes a height limit of 75 feet for a hotel in the Old Florida Character District. The City staff determined that the height was not inconsistent with the purpose and intent of the Old Florida District because the hotel would be located close to Rockaway Street where there are other resort uses. The proposed building

height allows for the intended transition of building heights from the Destination Resort District south of the Old Florida District to the residential neighborhoods north of the Old Florida District.

The proposed hotel site complies with the minimum lot area in Section 2-803 of the Code.

Section 2-803 establishes a minimum lot width for overnight accommodations as 100 to 150 feet. The proposed lot width along Avalon Street is approximately 200 feet. Along Kendall Street, the proposed lot width is 100 feet. The City staff determined that the proposed lot width along Kendall Street would not cause the building to be out-of-scale with other buildings in the vicinity.

Section II.A.2. of Beach by Design requires a front setback of 15 feet and side and rear setbacks of 10 feet. However, Section II.A.4. permits setbacks to be reduced up to 5 feet, "if the decreased setback results in an improved site plan, landscaping areas in excess of the minimum required and/or improved design and appearance." A minimum five-foot unobstructed access must be maintained along the entire side setback to ensure unimpaired access to mechanical features of the building.

The proposed hotel has two frontages, on Avalon Street and Kendall Street. The proposed development would have a front setback of 10 feet from Avalon Street and 10.8 feet from Kendall Street. The side setbacks are 5 feet. The rear setback is 5 feet.

The front setback reductions would place the proposed hotel 5 feet closer to Avalon Street and 4.2 feet closer to Kendall Street. The west side setback reduction would place the hotel 5 feet closer to a City parking lot. The east side (northern) setback reduction would place the hotel 5 feet closer to a two-story development consisting of a restaurant, office, retail, and attached dwellings which have no setback from the boundary they share with the hotel site. The east side (southern) setback reduction would place the hotel 5 feet closer to the two-story Snowflake Motel which is set back only 2 feet from the property line it shares with the hotel site. The south (rear) setback reduction would place the hotel 5 feet closer to a one-story building.

Section II.A.6. of Beach by Design requires a 10-foot landscape buffer along the street frontage. The proposed hotel's Kendall Street frontage would have a 10.8-foot landscape buffer and the Avalon Street frontage would have a 10-foot landscape buffer. In addition, the side and rear setback areas would be landscaped. Therefore, the proposed landscaping would exceed the requirements of Beach by Design. The City staff also characterized the off-street parking garage as a "more efficient" design. The side (east) setback will provide the required five feet of unobstructed access to the mechanical features of the building.

Section II.A.3. of Beach by Design also establishes a building "stepback" requirement. A stepback means "a horizontal

shifting of the building massing toward the center of the building." The required setback ratio is 1 foot of setback for every 2 feet of building height above 35 feet. For a building 72 feet in height the setback would be 18.5 feet.

Section II.A.4. allows a reduction in the setback requirement of up to 5 feet "if the decreased setback results in an improved site plan, landscaping areas in excess of the minimum required and/or improved design and appearance." The proposed hotel would be allowed to reduce the setback by 3.5 feet on the two fronts (on Avalon and Kendall Streets), for a resulting setback of 15 feet.

The City's Planning Department Manager, Robert Tefft, testified at the hearing as an expert witness. It was Mr. Tefft's opinion that the proposed development complied with all applicable provisions of the Code and Beach by Design, including the height, setback, and setback requirements. Mr. Tefft determined that the proposed development qualified for the setback and setback reductions because the reductions resulted in an improved site plan and landscaping in excess of minimum requirements.

The City staff and the Board determined, in accordance with requirement of Section 3-913(2) of the Code, that the proposed development would not significantly impair the value of adjacent



lands or buildings. No competent evidence was presented that property values would be impaired.

The Applicants requested a two-year development order due to market conditions. Section 4-407 of the Code requires an application for a building permit to be submitted within one year of project approval, "unless otherwise specified." The Applicants requested and the Board approved a one-year extension, so that the Applicants would have two years to apply for a building permit.

Appellant Stough owns property near the development site. She appeared at the public hearing and spoke in opposition to the project. Ms. Stough is an architect, but she did not submit a resume to the Board, which is required of expert witnesses pursuant to Section 4.206D of the Code.

Ms. Stough objected to building height, the reduction of setbacks, the density, the expected room rates not being "mid-priced," adverse effect on property values, and inconsistency with the intended Old Florida District.

Ann and Joseph Quinn, and John Grubb were granted party status by the Board. The Quinns own the Snowflake Motel, which is adjacent to the site. They objected to the proposed hotel blocking their view of the Gulf, the 5-foot setback, vehicle fumes, and noise. They believe that the proposed development would destroy the value of their property. Mr. Grubb objected to the loss of his view and the diminution of his property value.

He thinks the development is too dense and that it would not be a mid-priced hotel.

Members of the general public spoke for and against the proposed development.

At the conclusion of the hearing, the Board voted to approve the application, adopting the findings of fact and conclusions of law stated in the staff report with the conditions of approval.

On June 17, 2009, a development order was issued to memorialize the Board's action.

#### Conclusions of Law

No procedural errors were raised by the Appellant. No procedural errors appear in the record. There was no departure from the essential requirements of law.

In her Appeal Application and in her briefs, Appellant Stough raises a number of issues that she did not raise before the Board. Appellant did not raise before the Board the issues that she describes in paragraphs 1 (lack of coordination between City departments), 2a (landscaping, sidewalks, visibility triangle, pedestrian access), 2d (landscaping, drainage plans), 3 (floor area ratio), 4 (sidewalks, pedestrian access), 5 (parking garage openings, screening), 7 (development agreement duration), 9 (architecture, energy efficiency), 11 (infill criteria), and 12 (standards for flexibility) of her Initial Brief.

Appellant's statement to the Board that the proposed project is too dense or intense a use of the site is too general a statement to constitute a meaningful notification or identification of the specific matters cited above. Such a general statement does not provide the Board with a reasonable opportunity to consider the criteria associated with these specific issues, to seek input or opinions from the City staff or other witnesses at the hearing, or to discuss and resolve the disputes. It is fundamental that an issue not raised below cannot be raised for the first time on appeal. See First Savings Corp. of Texas v. S & B Partners, 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989); Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 943 (Fla. 5th DCA 1988).

The balance of Appellant's issues raised on appeal, regarding building height, setbacks, stepbacks, and guidelines in Beach by Design are claims that the Board's decision is not supported by substantial competent evidence in the record. In each case, Appellant's claims are based on her dispute with the evidence in the record that was presented to the Board by the City staff and other competent witnesses.

On appeal, the hearing officer cannot reweigh the evidence presented to the Board and determine, for example, that certain contrary evidence was more persuasive. Nor does it matter whether the evidence could have supported a different decision

by the Board. The only question that matters is whether the decision that was made by the Board is supported by competent substantial evidence in the record. See City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202 (Fla. 3rd DCA 2003).

In explaining the "competent substantial evidence" standard, the Supreme Court of Florida stated that the issue "is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision." Dusseau v. Metro. Dade County, 794 So. 2d 1270, 1275-76 (Fla. 2001). Competent substantial evidence is evidence that a reasonable mind would find adequate to support the conclusion reached. See Degroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

#### DETERMINATION

Because the Appellant did not meet her burden to show that the decision of the Community Development Board cannot be sustained by substantial competent evidence in the record or that the decision of the Board departs from the essential requirements of law, the decision of the Board to approve the Applicants' flexible development, subject to the conditions identified in the development order, is AFFIRMED.

Pursuant to Section 4-505D of the Community Development Code, an affirmation of the Board's decision shall be the final action of the Board.

DONE AND ORDERED this 5th day of November, 2009, in  
Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of November, 2009.

COPIES FURNISHED:

Leslie K. Dougall-Sides, Esquire  
City of Clearwater  
Post Office Box 4748  
Clearwater, Florida 33758-4748

Gina K. Grimes, Esquire  
Hill Ward & Henderson  
3700 Bank of America Plaza  
101 East Kennedy Boulevard  
Tampa, Florida 33602

Patricia Stough  
1634 San Roy Drive  
Dunedin, Florida 34698

Ed Hooper  
Post Office Box 4268  
Clearwater, Florida 33756

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 4-505D of the Community Development Code by appealing to the appropriate court by a petition for certiorari.