

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WAL-MART STORES EAST, L.P.,            )  
  )  
    Appellant,                            )  
  )  
vs.    )  
  )  
CITY OF GAINESVILLE,                )     Case No. 09-4240  
  )  
    Appellee,                            )  
  )  
and    )  
  )  
JOHN HUDSON,                            )  
  )  
    Intervenor.                         )  
\_\_\_\_\_  
  )

FINAL ORDER

Appellant, Wal-Mart Stores, East, LP (Wal-Mart), seeks review of a quasi-judicial decision of the City of Gainesville Development Review Board rendered on July 9, 2009, which denied Wal-Mart's development plan application. No written order was issued by the Board.

This appeal is taken pursuant to Section 30-352.1 of the City's Land Development Code (Code), which provides that a decision of the Land Development Board may be appealed to a hearing officer whose review must be limited to the record and applicable law. The hearing officer may not reweigh the evidence but must decide only whether competent substantial evidence supports the decision under review.

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 October 5, 2009, oral argument was received at a hearing held in Gainesville. The hearing was open for attendance and observation by members of the general public.

Section 30-161(a)(2) of the Code provides that, in the review of a development plan application, the Development Review Board shall consider "[w]hether the proposed development is consistent with the comprehensive plan, the land development code, applicable special area plans and other applicable regulations."

#### The Record Evidence

Wal-Mart's application requested approval of a 186,000-square-foot "Supercenter" department store, a 14,000-square-foot garden center, and two outparcel buildings of 3,000 and 5,000 square feet on a 32-acre parcel at the corner of N.W. 34th Street and N.W. 23rd Street in Gainesville.

The Wal-Mart site has a future land use designation under the Gainesville Comprehensive Plan of Mixed-Use Medium-Intensity. Policy 4.1.1 of the Future Land Use Element requires

that buildings in this land use category face the street and have "modest (or no) front setbacks."

The Wal-Mart site is zoned Mixed Use-2 (MU-2) under the Code. The purposes and objectives of the MU-2 zoning district are set forth, respectively, in Section 30-65(a) and (b) of the Code. The stated purposes of the MU-2 district are to provide a mix of retail, professional, service, and residential uses, and to reduce vehicular trips by providing for basic needs and employment opportunities within close proximity to residential areas in a "compact urban form." Two objectives of the zoning district are to coordinate with adjacent residential areas, provide for minimal overlap in market areas, and promote pedestrian and non-automotive access within the district and from surrounding residential areas.

Section 30-65(d) of the Code contains requirements applicable to developments over 50,000 square feet in size within the MU-2 zoning district. The "dimensional requirements" of Section 30-65(d)(2) apply to "[a]ll principal and accessory structures." The maximum front yard setback is set forth in Section 30-65(d)(2)3.:

Front Yard. The maximum setback shall be the average setback of existing development in the same face [sic] block face; however, when there is no existing development in the same block face, the setback shall be between 15 and 80 feet.

The term "block face" in Section 30-65(d)(2)3. is defined elsewhere in the Code:

Block face means a unit of property abutting a common street, on both sides of such street, and lying between the two nearest intersecting or intercepting streets or nearest intersecting or intercepting street and railroad right-of-way or waterway, golf course, campus, park or other designated open space. Whenever a block face exceeds 1,320 feet without intersecting or intercepting streets or railroad rights-of-way, waterways, golf courses, campuses, parks or other designated open spaces, it shall be divided into equal segments of no more than 1,320 feet each. Whenever application of the above criteria results in a division of a single parcel between two block faces, the parcel shall be included in the block face in which it primarily falls.

The City planning staff determined that the block face for the Wal-Mart development is N.W. 23rd Street, from the entrance on N.W. 34th Street to N.W. 62nd Avenue. Because there is no existing development on the block, the staff determined that the 15-to-80-foot front setback requirement is applicable. However, Wal-Mart proposes to locate its Supercenter about 290 feet from N.W. 23rd Street.

The City planning staff stated in an August 2008 site plan evaluation report that, if outparcel buildings were developed on the Wal-Mart site within 15 to 80 feet of N.W. 23rd Street, Wal-Mart's Supercenter would not have to meet the front setback requirement:

In order to comply with this [front setback] requirement, it is possible to locate buildings in front of the Walmart along NW 23rd Street. Specifically, staff recommends locating two outparcel buildings within the 15'-80' setback - one near the southernmost entrance to the parking area from NW 23rd Street and one at the corner of NW 23rd Street and NW 62nd Avenue. In the case of developments with outparcels in the MU-2 district, the outparcel buildings are then required to meet the yard setback requirements.

In a January 2009 site evaluation report, the staff repeated this position:

In the case of developments with outparcels in the MU-2 district, only the outparcel buildings are required to meet the yard setback requirements (Section 30-65(d)(4)). Although there are two outparcels on the development plans, there are no buildings shown on these outparcels, and so it is difficult to evaluate whether the setback requirements will indeed be met.

\* \* \*

Planning staff recommends that some sort of measure be included with these plans that ensures that the outparcel buildings are actually constructed.

The front set-back issue was discussed at a non-quasi-judicial, conceptual review hearing of the Development Review Board held on February 12, 2009. Scott Wright, a City planner, told the Board that "the Code is not incredibly clear on that," but informed the Board that he believed the Supercenter did not have to be located within 80 feet of the street. A memorandum

from a City commissioner who disagreed with the staff's determination regarding the front setback requirement was read to the Board.

In March 2009, Wal-Mart provided additional supporting documentation to the City staff. With regard to the front setback issue, Wal-Mart stated its agreement with the staff's determination that the block face was the entrance on 34th Street to N.W. 62nd Avenue, and the determination that there was no existing development on the block. Wal-Mart stated further that, to comply with the front setback requirement, it proposed to develop two outparcel buildings within 80 feet of N.W. 23rd Street.

In April 2009, the planning staff produced another site plan evaluation report. The staff took the same position that it had previously taken on the front setback requirement. The report indicates that Section 30-65(d)(3) was a basis for the staff's determination. That section states:

Multiple structures. The use of multiple structures shall be considered on a case-by-case basis during development plan approval. Approval shall be conditioned upon findings by the development review board or city plan board that all such structures are compatible with the uses and purposes of the center and surrounding uses and traffic patterns and are safely incorporated into the overall transportation system for the center.

The planning staff reasoned that, if there are multiple buildings on a site, the appropriate setback is subject to a case-by-case consideration. Nevertheless, the staff continued to advise Wal-Mart that the two outparcel buildings would have to comply with the 15-to-80-foot front setback requirement.

The Development Review Board held a quasi-judicial hearing on May 14, 2009, to consider Wal-Mart's application for development plan approval. The planning staff recommended approval of the development plan, with conditions.

Mike Hetzberg, a planner for Wal-Mart, testified that there was nothing in the Land Development Code that indicates which building has to meet the front setback requirement.

Mr. Hertzberg agreed that the "multiple structures" provision of the Code was applicable to Wal-Mart's development plan and allowed for a deviation from the front setback requirement for the Supercenter.

Rachel Swaysland, a planner testifying on behalf of Intervenor John Hudson, testified that Wal-Mart's development plan violated Section 30-65(d)(2) of the Code because that provision requires that all principal and accessory structures comply with the 15-to-80-foot front setback requirement. Ms. Swaysland also discussed the basis of her opinion that the development plan was inconsistent with comprehensive plan policies and Land Development Code provisions that are intended

to prevent overlapping market areas and to promote pedestrian connectivity and integration with surrounding land uses.

Some Board members expressed support for the project and others expressed concerns about the "big box" and automobile-oriented design of the project, the lack of pedestrian-friendly elements, and the setback of the Supercenter. A motion to approve Wal-Mart's development plan failed to pass. A motion was then made to continue the hearing to allow Wal-Mart an opportunity to make changes to the project that would address the Board's concerns. That motion passed.

Mr. Wright, the City planner, asked the Board for clarification as to whether "you are expecting that the principal building should meet that 15-to-80-foot setback that we've been discussing." One Board member answered affirmatively. Another Board member said, in essence, "not necessarily," but wanted a more pedestrian-oriented design.

In the planning staff's June 2009 site plan evaluation report, the outcome of the Board's May hearing was characterized as providing "direction to improve the development plan by enhancing pedestrian features and connectivity." The June report repeated the staff's determinations about the block face, the 15-to-80-foot front setback requirement, and the Board's discretion to allow the Supercenter to be located farther than 80 feet from the street because of the "multiple structures"



provision of the Code. The staff again recommended approval with conditions.

On July 9, 2009, the Development Review Board held its second quasi-judicial hearing on Wal-Mart's development plan. Mr. Wright made a presentation to the Board in which he repeated his belief that, when multiple buildings are proposed, the Board has the ability to approve the location of the buildings on a case-by-case basis:

Obviously, the main building does not meet the front setback requirement, but it's staff's interpretation that this proposed - the proposed outparcel buildings meeting the setback is allowed by the Code, and that, basically, it is at the DRB's discretion to allow this - this type of arrangement.

At the hearing, Wal-Mart's attorney, Ron Carpenter, showed the Board a site plan which placed the Supercenter within 80 feet of the street. He then explained why Wal-Mart believed that design was not a good one and why Wal-Mart was seeking approval of a development plan that located the Supercenter 290 feet from the street. Mr. Carpenter described the changes Wal-Mart had made to make the development plan more pedestrian-oriented, which included increasing the size and route of a walkway, using larger trees in the landscaping, and adding gazebos and more extensive sidewalks and crosswalks.

In his remarks to the Board, Mr. Carpenter stated "We adopt staff's recommendations and staff comments." It is reasonable

to infer that Mr. Carpenter was referring to the 14 statements under "Recommendations/Requirements/Comments" in the planning staff's June 2009 site plan evaluation report. These statements included the staff's determinations about the block face.

Mack McCuller, the attorney for Intervenor John Hudson, repeated Mr. Hudson's earlier objections about the inconsistency of Wal-Mart's development plan with the comprehensive plan and Code because the Supercenter did not comply with the front setback requirement, the plan lacked a pedestrian orientation, the plan was for a large-scale, single use rather than a mixed use, and the Supercenter would result in overlapping trade areas (would not be neighborhood-serving). Regarding the front setback requirement, Mr. McCuller pointed out that Section 30-65(d)(2) of the Code made the setback requirement applicable to all principal structures.

With regard to the "multiple structures" provision of the Code, Section 30-65(d)(3), Mr. McCuller noted that the provision does not expressly allow any deviation from the front setback requirement. He argued that the case-by-case discretion referred to in this section was directed only to compatibility among the multiple structures; the discretion was not directed to the dimensional requirements of the Code. He also pointed out that, if Wal-Mart were correct, and the Board has the

discretion to waive the front setback requirement, then the Board also has the discretion to deny such a waiver.

John Hudson's planner, Gene Boles, testified that the Supercenter was not a mixed use as required for the Mixed-Use Medium-Intensity future land use category or the MU-2 zoning district. Mr. Hudson testified about how the activities associated with the Supercenter would not be compatible with nearby residential uses.

Members of the general public spoke for and against Wal-Mart's development plan.

The members of the Development Review Board then expressed their own views, including the view that the project was not consistent with the comprehensive plan, the principal building did not comply with the front setback requirement, the design was not "walkable," would create unacceptable noise levels, was not an appropriate design, and was not integrated with surrounding land uses. The Board voted to deny Wal-Mart's development plan.

#### The Issues Raised on Appeal

The issues raised on appeal by Wal-Mart do not address all of the reasons for denial that were presented to and discussed by the Development Review Board.

## I. Block Face

The first issue raised by Wal-Mart on appeal is whether the Development Review Board's decision is based on an erroneous interpretation of the term "block face." Wal-Mart argues that, if the Board had applied the block face definition correctly, the 15-to-80-foot front setback requirement would not have been applicable. Wal-Mart contends that its proposed development plan complies with the Code when the block face definition is correctly applied.

This block face issue is being raised here for the first time. The issue was not raised before the Development Review Board and the Board had no opportunity to consider the issue when it made its decision to deny Wal-Mart's development plan.

The planning staff explained in each of its site plan evaluation reports how it determined the block face for Wal-Mart's development plan. Wal-Mart never objected to the staff's determination. In fact, Wal-Mart expressly adopted it.

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).

Furthermore, the argument made by Wal-Mart is not purely a matter of law. Whether Wal-Mart's development plan would comply

with the Code under the theory advanced by Wal-Mart requires facts, and probably disputed facts, that are not in the record.

## II. Multiple Structures

The second issue raised by Wal-Mart is whether the Board's decision is based on an erroneous interpretation of Section 30-65(d)(3), the multiple structures provision. Wal-Mart contends that the staff's interpretation of Section 30-65(d)(3) is correct and would have required the Board to approve Wal-Mart's development plan.

There is no legal principle that a decision-making body acts unlawfully when it fails to adopt an interpretation of law preferred by its staff. The Development Review Board can read the plain wording of the Section 30-65(d)(3), consider the section in pari materia with related provisions of the Code, and apply an interpretation that is reasonable. See Sullivan v. Fla. Dept. of Env'tl. Prot., 890 So. 2d 417, 420 (Fla. 1st DCA 2004) (an agency interpretation that is within the range of possible and reasonable interpretations should be affirmed).

The interpretation advanced by the planning staff cannot be characterized as necessary or obvious. When the related provisions of the Code are considered in pari materia, the interpretation of Section 30-65(d)(3) as not allowing a deviation from the front setback requirement is a reasonable interpretation of the section.

Furthermore, if the Board has the discretion to allow a deviation from the front setback requirement, as argued by Wal-Mart, the Board also has the discretion to deny a deviation. It does not matter whether another decision could have been made 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 Metro. Dade County v. Blumenthal, 675 So. 2d 598, 606 (Fla. 3d DCA 1995).

#### DECISION

Because the record contains competent substantial evidence to support the decision of the Development Review Board to deny Wal-Mart's development plan, the Board's decision is AFFIRMED.

Pursuant to Section 30-353.1(a)(3)d.2. of the Land Development Code, an affirmation of the Board's decision shall be deemed final action of the Board.

DONE AND ORDERED this 28th day of October, 2009, in  
Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 30.352.1(b) of the Land Development Code by appealing to the appropriate court within 30 days of the order by an action in the nature of a writ of certiorari.