

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EXCHANGE ASSOCIATES OF GEORGIA, )  
LP, )  
 )  
Appellant, )  
 )  
vs. ) Case No. 09-5339  
 )  
CITY OF GAINESVILLE, )  
 )  
Appellee. )  
\_\_\_\_\_ )

FINAL ORDER

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 Plan 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 November 16, 2009, a telephonic hearing was held to receive oral argument. The attorney for the City of

Gainesville attended at a site in Gainesville that was open for attendance and observation by members of the general public.

The Record Evidence

The Exchange Shopping Center is located at the corner of 13th Street and 39th Street in Gainesville. The shopping center includes three buildings: a Publix supermarket with attached strip mall, a Dunkin Donuts, and a Jiffy Lube. The shopping center was developed pursuant to a special use permit that was issued in the past.

The Appellant seeks to modify the shopping center special use permit by removing the Dunkin Donuts parcel from the area subject to the special use permit. The application also requests authorization to remove a four-inch holly tree and a portion of a hedge.

The Appellant has always been forthright in stating that its purpose in separating itself from the shopping center special use permit is to allow the Appellant to thereafter seek City approval for a "monument" sign on 13th Street to advertise Dunkin Donuts. The proposed sign was shown in the application.

The application indicated that the Applicant/Appellant was requesting, among other things, a "lot split" or subdivision of the shopping center. The report of the City's planning staff states that "[t]he property owner is now requesting an amendment to the existing Special Use Permit to reduce the size of the

original parcel, to add new signage, to remove trees which are part of the screening and buffering along NW 13th Street and to create a separate lot for one of the free-standing buildings existing on the southeast portion of the development."

It was not made clear by the parties why the Applicant/Appellant could not request to modify the shopping center special use permit to allow the Dunkin Donut sign or request to exclude the Dunkin Donuts site from the shopping center special use permit, without the need to divide the shopping center site to create a separate Dunkin Donuts parcel. Nevertheless, there appeared to be agreement that Dunkin Donuts could not obtain the kind of sign that it wanted unless a separate Dunkin Donuts parcel were created.

Under Section 30-235(b) of the Code, an application to modify the boundaries of an approved special use permit must be processed as a new special use permit and acted on by the Plan Board, an administrative board of citizen volunteers. In considering whether to approve an application for a special use permit, the Plan Board is to consider the evidence presented in a quasi-judicial public hearing and the report of the Department of Community Development. Section 30-234(h) of the Code states that the Plan Board "shall act on the application based on the findings required in Section 30-233." Section 30-233 states:

No special use permit shall be approved by the city plan board unless the following findings are made concerning the proposed special use:

- (1) That the use or development complies with all required regulations and standards of this chapter and all other applicable regulations.
- (2) That the proposed use or development will have general compatibility and harmony with the uses and structures on adjacent and nearby properties.
- (3) That necessary public utilities are available to the proposed site and have adequate capacity to service the proposed use and development.
- (4) That the use or development is serviced by streets of adequate capacity to accommodate the traffic impacts of the proposed use.
- (5) That screening and buffers are proposed of such type, dimension and character to improve compatibility and harmony of the proposed use and structure with the uses and structures of adjacent and nearby properties.
- (6) That the use or development conforms with the general plans of the city as embodied in the city comprehensive plan.
- (7) That the proposed use or development meets the level of service standards adopted in the comprehensive plan and conforms with the concurrency management requirements of this chapter as specified in article III, division 2.

However, applications for lot splits are presented to and acted on by the "director of planning and development services or designee" pursuant to Section 30-189(b)(4), and minor subdivisions are presented and acted on by the City's technical review committee under Section 30-189(a)(4). The Plan Board cannot grant lot splits or subdivisions.

The application was filed with the City's Department of Community Development. The Department's Technical Review Committee issued a report to the Plan Board. The report evaluated each of the seven special use permit criteria in Section 30-233 and recommended approval of the application subject to seven conditions.

At the Plan Board hearing on July 9, 2009, City planners Lawrence Calderon and Ralph Hilliard presented the planning staff's comments and its recommendation for approval of the application. The only other speakers were the Applicant/Appellant's representative, David Hass, and its engineer, Sergio Reyes.

At the hearing, Mr. Calderon stated that the Applicant was asking to create a new parcel. Mr. Hilliard stated that "our recommendation is based on it meets the requirement of the code to create that additional parcel." Mr. Reyes stated that they were seeking "to split the property" and "[h]ere is the parcel that we are subdividing."

Plan Board member Ackerman stated that "there's a reason why these large shopping centers are restricted to a single sign. It's to try to reduce the sheer amount of clutter." Mr. Ackerman made a motion to "deny petition PB0991SUP." Upon the suggestion of the Vice Chair, Mr. Wells, Mr. Ackerman added that the motion was based "on the grounds that it does not meet the conditions and the finding of fact of the center." Mr. Wells later stated that "the motion as made indicates that this board does not find that the -- the conditions of the special use permit have been met."

The Applicant/Appellant asked for clarification of the reasons for denial, but the Vice Chair only repeated that "it did not meet the conditions of the special use permit." At that point, Mr. Dawson commented:

[T]his plan board has the wherewithal and the support in our land development code to deny this application because we feel that there is a certain amount of control that's imposed by the existing special use permit. That is, there is a special use permit for the Exchange development already. It controls that whole development area, including the Dunkin' Donuts, and including the Jiffy Lube that's next door, including the Publix, including Steak and Pasta Works and all those other businesses that are in there. So I think if we're saying that this splitting out this parcel creating this additional special use permit would not appropriately control the design and external effects of this development, I think that's something that we need to include in the motion.

Just before the vote was taken, there was a request to restate the motion and Mr. Ackerman responded, "Restating the motion, I move that we deny petition PB0991SUP." On September 3, 2009, the City issued a written Notice of Denial of Request to Modify Special Use Permit, which included no statement of the reasons for the denial.

#### The Issues Raised on Appeal

The Appellant raises three issues on appeal. The first issue raised by the Appellant is whether the decision of the Plan Board should be reversed for failing to properly apply the special use permit criteria in the Code. The Appellant contends that the Plan Board was limited to applying the seven criteria in Section 30-233, but it based its decision on signage issues, even though no sign application was pending before the Plan Board.

The second issue raised on appeal by the Appellant is whether the Plan Board's decision should be reversed because it is not supported by competent substantial evidence in the record. The Appellant contends that the only evidence in the record supports the approval of the special use permit application; no evidence supports the denial.

The third issue raised by the Appellant is whether the Plan Board's decision should be reversed because the Plan Board did not state the reasons for the denial, as required by the Code.

The City argues that the Plan Board has no jurisdiction to approve a lot split or subdivision of the shopping center. The City contends that its planning staff erred in presenting the matter to the Plan Board. Although this jurisdictional issue was not raised before the Plan Board, the hearing officer is directed to base his review of the Plan Board's decision on the "the record and applicable law." There appears to be no bar to a determination by the hearing officer that the applicable law, when applied to the record evidence, shows a lack of jurisdiction in the Plan Board.

The City's argument that the Plan Board lacked jurisdiction to review and act on the request to split or subdivide the shopping center is supported by the plain wording of the relevant sections of the Code. The Appellant agrees that the Plan Board has no jurisdiction to approve a lot split or subdivision, but contends that any references made to lot splits or subdividing were references to future actions, not the requested action that was before the Plan Board. However, there are several statements made by the City and the Applicant that would lead a reasonable person to believe that the Plan Board was being asked to create a separate Dunkin Donuts parcel.



Section 30-234(h)(2) of the Code requires that, when the Plan Board denies an application for a special use permit, it must include a "statement of the reasons for denial." The City argues that it is sufficient if the reasons for denial can be deduced from the comments of individual board members during their discussion. That argument is not persuasive because the point of view of a member of a decision-making body cannot be ascribed to the entire body or to a majority of its members if the point of view is not reflected in the official motion that is passed. Because the Plan Board's reasons are not stated in the motion, it is mere speculation to say that the Plan Board members cast their votes on the basis of a particular reason expressed by a board member during an open discussion among the members.

The City cites case law holding that due process of law does not require local government boards to make written findings. Those cases, however, do not address the situation that exists here, where the Code expressly requires findings of fact in order to approve a special use permit and, in the case of a denial, a statement of the reasons for denial. In this case, neither the motion for denial nor the written notice of denial included the required statement of the reasons for the denial.

DECISION

Because the Plan Board was without jurisdiction to consider the lot split or subdivision of the shopping center, and the final decision of the Plan Board does not include the required statement of the reasons for the denial of the special use permit, this case is referred back to the Plan Board for reconsideration.

DONE AND ORDERED this 19th 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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of November, 2009.

COPIES FURNISHED:

Elizabeth A. Waratuke, Esquire  
City of Gainesville  
Post Office Box 1110  
Gainesville, Florida 32602

Linda Loomis Shelley, Esquire  
Fowler, White, Boggs, Banker, P.A.  
Post Office Box 11240  
Tallahassee, Florida 32302-3240

Karen A. Brodeen, Esquire  
Fowler White Boggs Banker, P.A.  
101 North Monroe Street, Suite 1090  
Post Office Box 11240  
Tallahassee, Florida 32302-1240

Daniel M. Nee, Esquire  
City of Gainesville  
200 East University Avenue, Suite 425  
Gainesville, Florida 32601-5456

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.