

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NEMISHAWN, INC.,)	
)	
Appellant,)	
)	
vs.)	Case No. 11-1531
)	
DONNA MAXA, GILBERT JANNELLI,)	
CITY OF CLEARWATER, AND CITY OF)	
CLEARWATER COMMUNITY)	
DEVELOPMENT BOARD,)	
)	
Appellees.)	
_____)	

FINAL ORDER

This is a hearing officer appeal under section 4-505 of the City of Clearwater Community Development Code (Code), from a decision of the Community Development Board (CDB) of the City of Clearwater (City) under section 4-404 of the Code. Briefs have been filed and considered, oral argument has been heard, and proposed orders have been filed and considered.

The CDB denied a Level Two approval of the Flexible Development Application (Application) for a Comprehensive Infill Redevelopment Project (CIRP) filed by Appellant, Nemishawn, Inc. (Nemishawn), for its two-acre property at 1315 Cleveland Street. The Application contemplated that Nemishawn's existing building on the property would be occupied and used by a tenant, WorkNet Pinellas, Inc. (WorkNet), which is one of 24 regional workforce

boards created in Florida to carry out the federal Workforce Investment Act of 1998 and the Florida Workforce Innovation Act (chapter 445, Florida Statutes), and which the City's Community Development Coordinator (CDC) had determined to be a "governmental use."

At the CDB hearing on February 15, 2011, the City's Staff Report was presented. It recommended approval, with conditions, including conditions proposed by Nemishawn that no facilities or services would be provided for walk-in jobseekers, that no resource room would be open to the public, and that no services provided by agencies or programs referring jobseekers to WorkNet would be performed onsite.

After hearing the evidence, the CDB found that it could not "concur with staff's determination that WorkNet Pinellas is a governmental use." No other findings were made. The CDB's single conclusion of law was that the Application "does not comply with Community Development Code Section 2-704.C." This conclusion of law was not explained.

To succeed on appeal, Nemishawn must "show that the decision of the [CDB] cannot be sustained by substantial competent evidence . . . or that the decision . . . departs from the essential requirements of law." § 4-505.C., Cmty. Dev. Code. The bases for Nemishawn's appeal are: first, that the CDB's decision departed from the essential requirements of law

because the CDB had no authority to contradict staff's determination of use; and, second, that the CDB's determination of use is not sustained by the evidence.

A decision would depart from the essential requirements of law if it violated due process requirements (which is not an issue in this case), or applied the incorrect law. See Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) The CDB did not apply the incorrect law when it determined use. The CDC's determination that the project was for a governmental use was part of staff's recommendation to the CDB to approve the Application. See § 4-404, Cmty. Dev. Code. In considering the recommendation and making its decision, the CDB is not prohibited from interpreting and applying code provisions, such as the definition of governmental use. Cf. also § 5-201, Cmty. Dev. Code (the CDB reviews and decides applications for Level Two approvals).

Nemishawn argues that the CDC's authority under division 7 of the Code to administratively interpret code provisions is exclusive and that an appeal of the CDC's administrative interpretation to the CDB under section 4-501.A.1. is the CDB's only authority to interpret and apply code provisions. This argument is rejected. The CDB's jurisdiction under section 4-501.A.1. actually supports its authority to interpret and apply

code provisions in reviewing and deciding applications for Level Two approvals.

Competent substantial evidence is evidence that a reasonable mind would find adequate to support the facts found and conclusions reached; it need not result in the best decision, or even a wise decision, in the view of an appellate court. See Dusseau v. Metro. Dade Cnty., 794 So. 2d 1270, 1275-76 (Fla. 2001); Degroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957); City of Hialeah Gardens v. Miami-Dade Charter Found., Inc., 857 So. 2d 202 (Fla. 3d DCA 2003).

The Code defines "governmental use" as:

a building, use or structure owned or occupied by a federal, state, or local government agency and serving as an agency office, police station, fire station, library, post office, or similar facility, but not including a vehicle storage yard, jail, sanitary landfill, solid waste transfer or disposal facility, wastewater treatment facility, hazardous waste treatment or storage facility, food irradiation facility, educational or health institution, university, military facility, residential care home, housing for persons who are participating in work release programs or who have previously served and completed terms of imprisonment for violations of criminal laws, or other type of public facility.

§ 8-102, Cmty. Dev. Code.

The record-on-appeal does not contain competent substantial evidence to support a finding that Nemishawn's proposed use by

its tenant, WorkNet, is not a governmental use. WorkNet is a workforce board created by statute to carry out the federal Workforce Investment Act of 1998 and the Florida Workforce Innovation Act. See § 445.007, Fla. Stat. It entered into an interlocal agreement with Pinellas County as a "public agency" under section 163.01, Florida Statutes. As such, it is

a political subdivision, agency, or officer of this state or of any state of the United States, including, but not limited to, state government, county, city, school district, single and multipurpose special district, single and multipurpose public authority, metropolitan or consolidated government, a separate legal entity or administrative entity created under subsection (7), an independently elected county officer, any agency of the United States Government, a federally recognized Native American tribe, and any similar entity of any other state of the United States.

§ 163.01(3)(b), Fla. Stat. The evidence that WorkNet is a federal section 501(c)(3) corporation that receives funding from governmental agencies and files federal tax returns, and that WorkNet provides counseling and some training for jobseekers, in addition to connecting the unemployed with prospective employers, does not alter WorkNet's legal status as a "public agency" and does not support a finding that it is not a "governmental use" under the Code.

The CDB's conclusion of law was that the Application "does not comply with Community Development Code Section 2-704.C."

Paragraph 5 of section 2-704.C. requires that CIRPs "be compatible with adjacent land uses [and] not substantially alter the essential use characteristics of the neighborhood" It also requires a demonstration of compliance with one or more of objectives a. through f.

Nemishawn's property is zoned for the commercial use proposed in the Application, which staff found to be compatible with and an improvement on the essential use characteristics of the neighborhood ("a mixed land use pattern of residential housing interspersed with pockets of poorly maintained rental properties and outdated strip commercial [that] struggles with a negative image of crime due to the location of problematic uses such as day labor facilities, old motels and social service agencies that provide services to the homeless population."). See Nostimo, Inc. v. City of Clearwater, 594 So. 2d 779, 781 (Fla. 2d DCA 1992) (if area is zoned for the use, the use is compatible with the surrounding area). Staff also found that Nemishawn's Application complied with the visions, goals, objectives, and policies of the Clearwater Downtown Redevelopment Plan and the policies of the East Gateway Character District portion of that plan.

The CDB's contrary conclusion of law was based on citizen concerns about compatibility and consistency with the East Gateway Character District policies and Downtown Redevelopment

Plan. Relevant fact-based testimony and evidence presented by citizens, whether or not they are qualified as experts, can be competent, substantial evidence; generalized citizen concerns and opinions, which often are speculative and based on fear and similar emotions, and based not on substantiated facts, are not competent, substantial evidence. See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc., 857 So. 2d 202 (Fla. 3rd DCA 2003); Marion Cnty. v. Priest, 786 So. 2d 623 (Fla. 5th DCA 2001); Metro. Dade Cnty. v. Section II Prop. Corp., 719 So. 2d 1204 (Fla. 3rd DCA 1998); Metro. Dade Cnty. v. Blumenthal, 675 So. 2d 598, 607 (Fla. 3d DCA) (en banc, adopting dissent), review dismissed, Blumenthal v. Metro. Dade Cnty., 680 So. 2d 421 (Fla. 1996). In this case the testimony and evidence in opposition to the Application were of the latter kind, in large part based on misunderstandings, and unreasonable under the conditions of approval proposed by Nemishawn and incorporated in staff's recommendation.

While not explicit in its decision, it appeared from the record-on-appeal that the CDB disagreed with staff's determination of governmental use because WorkNet seemed more like a "social/public service agency." Section 2-704.R.2. provides that a social/public service agency cannot be located within 1,500 feet of another such agency. But the CDB did not find that WorkNet was a social/public service agency and did not

find or conclude that the Application did not comply with section 2-704.R.2.

For these reasons, Nemishawn's appeal and Application are granted, with the conditions attached to staff's recommendation. See § 4-505.D., Cmty. Dev. Code (the hearing officer can "approve, approve with conditions, or deny the requested development application.").

DONE AND ORDERED this 28th day of June, 2011, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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NOTICE REGARDING JUDICIAL REVIEW

This Final Order is subject to judicial review by common law certiorari to the circuit court. See § 4-505.D., Cmty. Dev. Code.