STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VOF, LLC, Appellant, vs. MONROE COUNTY PLANNING COMMISSION AND BRIAN AND CHRIS LANCASTER, Appellees.	)	Case No. 11-5619

FINAL ORDER

Pursuant to section 102-185(f), Monroe County Code (M.C.C.), Appellant, VOF, LLC (VOF or Appellant), seeks review of Monroe County Planning Commission (Commission) Resolution No. P29-11 rendered on September 14, 2011, which denied Appellant's appeal of Development Order 02-11 issued on March 21, 2011. The Development Order denied VOF's application for a minor conditional use permit to redevelop an existing single-family residence as a "rental management company," coupled with a guest swimming pool and related amenities. A seven-volume Record of the underlying proceeding was filed on December 12, 2011. A 140-page Supplemental Record consisting of Exhibits A and B was filed by Appellant on January 11, 2012. On February 1, 2012, Appellant submitted an Initial Brief. Monroe County (County) and Appellees, Brian and Chris Lancaster (Intervenors or the Lancasters), who own a single-family residence adjacent to the

subject property, filed separate Answer Briefs on March 20, 2012. Appellant submitted its Reply Brief on April 17, 2012. Oral argument was heard by video teleconference at facilities in Marathon and Tallahassee on May 23, 2012. The parties waived their right to file proposed final orders.

ISSUES

Appellant raises three issues on appeal: (1) whether the Commission departed from the essential requirements of the law by determining that VOF's proposed swimming pool is not part of a "resort hotel"; (2) whether the Commission departed from the essential requirements of the law by determining that VOF's proposed swimming pool is an inappropriate use in the Destination Resort (DR) zoning district; and (3) whether the Commission denied VOF due process by allowing Intervenors to present evidence at the Commission hearing on July 13, 2011. For the reasons expressed below, the Commission did not depart from the essential requirements of the law when it rendered Resolution No. P29-11, and it did not deny VOF due process during its hearing.

BACKGROUND

A lengthy procedural history dating back almost five years precedes this appeal. The subject property is located at 1128 Greenbriar Road on Duck Key in an unincorporated part of the County. Much of Duck Key's development is governed by a Development of Regional Impact (DRI) approved by the County on December 4, 1986, and includes the Hawks Cay Resort Hotel. The

DRI agreement has now expired. The parties agree, however, that the DRI is not an issue in the case. Although located on the same Key as the resort, the subject property and around 250 other "units" (many of which are used for rental purposes) are not owned by, or affiliated with, the Hawks Cay Resort Hotel.

VOF purchased the property on January 22, 2008. It consists of approximately 10,500 square feet, or around one-quarter acre; only a vacant single-family home (664 square feet), built in 1966, sits on the parcel. A small canal runs between Greenbriar Road and Indies Drive to the south; the Lancasters reside at 115 Indies Drive, which is directly across the canal from the subject property.

The property lies within the DR zoning district, which is contemplated to contain two principal uses: "single-family homes as of right" and "one or more resort hotels as the principal use . . . on sites of at least ten gross acres." § 130-32, M.C.C. Section 130-81 defines the specific uses allowed as-of-right in the district, as well as the permitted minor and major conditional uses. Section 130-81(b) provides that a resort hotel is allowed in the DR district as a minor conditional use but only if the hotel is located on a site having at least ten gross acres and has the ten features (amenities) enumerated in section 130-81(b)(1)-(10); these include, among others, a swimming pool and a commercial retail feature.

On December 14, 2007, when VOF had a contract to purchase the property, and again on February 1, 2008, VOF's agent, Mr. Craig, attended two pre-application conferences with County staff to discuss a proposal to convert the single-family residence into a guest check-in/welcome center, construct a swimming pool for the benefit and use of the owners and guests of units not affiliated with Hawks Cay Resort Hotel, and carry out related improvements, such as adding a dock area around the pool, a tiki hut, landscaping, and additional off-street parking.[1]

In response to VOF's inquiry, on March 5, 2008, the Senior Director of the Planning and Environmental Resources Department (Department) issued a Letter of Understanding. See R., 666-671. This document reflects the substance of the pre-application conference. See § 110-3, M.C.C. The Letter of Understanding concluded that the proposed redevelopment could be classified as "accessory uses/structures" in that they would be subordinate to and serve the principal structures and uses, i.e., the off-site vacation rental homes. However, the Letter of Understanding pointed out that under section 9.5-4(A-2) (now renumbered as section 101-1) an accessory use or structure must be "on the same lot [as the principal structures or use] or on contiguous lots under the same ownership." Therefore, the Letter of Understanding concluded that the accessory uses, including the pool, could not be built since the vacation rental homes to be serviced by the proposed amenities were located off-site. As

authorized by the M.C.C., VOF appealed the March 5, 2008 Letter of Understanding to the Commission, which scheduled a hearing on the appeal on July 23, 2008, but the item was tabled pending further discussions by VOF and staff.

Before the first appeal was heard, on September 25, 2008, VOF's agent took a different tack and submitted a letter to the Department asking if the land development regulations (LDRs) allowed the subject property, as a matter of right, to be used as a "rental management company use specializing in vacation rental management on Duck Key." R., 673-674. As-of-right means that except for securing a building permit, an applicant requires no special approval from the County to establish a use. The letter noted that a number of commercial retail uses were operating in the DR zoning district within the greater Marathon area, including at least six rental management companies, that were incidental to, and not directly supportive of, the principal uses allowed in the zoning district. The letter further indicated that these entities were allowed to operate with only a building permit and business license. Although Appellant contends that its letter was intended to apply to the original development proposal that was the subject of the first Letter of Understanding, the letter did not mention that the request related to the previously rejected redevelopment plan nor did it mention a swimming pool, a tiki hut, or any other recreational

use. For this reason, the County staff has consistently treated VOF's inquiry as relating only to an office.

After a pre-application conference was held, on November 24, 2008, the Department issued a second Letter of Understanding denying the request on the ground a rental management company was not an as-of-right permitted "commercial/retail use" in the DR zoning district. See R., 676-677. It also stated that while section 9.5-243 (now section 130-81) allowed such a commercial use as a minor conditional use, this was permissible only if there was a resort hotel on the subject property in the first instance. Because there was no "resort hotel" on the subject property, the second Letter of Understanding concluded that the proposed use was not permitted in the DR zoning district. The second Letter of Understanding did not discuss the use of a swimming pool on the property but simply responded to VOF's specific request for an interpretation of the County's LDRs concerning "whether or not a commercial/office use, referred to as an independent rental management company, can be approved on the [subject property as a matter of right]." R., 676. Appellant then timely appealed the second Letter of Understanding to the Commission.

Pursuant to advice from Commission counsel, the appeals of the first and second Letters of Understanding were treated as separate appeals, and they were heard as consecutive items at a lengthy Commission hearing on February 25, 2009. See R., 212-

600. Over VOF's objection, the Lancasters were allowed to intervene in opposition to both appeals. After a vote on the first appeal was taken, in an effort to streamline the second appeal and avoid repetitive matters, the parties agreed to incorporate the transcription of the first appeal, up to the motion and vote, into the transcript of the second appeal. See R., 365-366. The purpose of the "insert" was to incorporate the lengthy testimony concerning procedural issues and the history of Duck Key as a DRI presented during the first appeal; however, it was not intended to change the nature of the second appeal. No other elements of the first appeal, including the site plan for the redevelopment, were incorporated into the record of the second appeal. Finally, the parties agreed that the part of the first appeal that dealt with accessory uses was "irrelevant" to the issues raised in the second appeal. Id.

On April 8, 2009, the Commission issued Resolution No. P11-09, which upheld the first Letter of Understanding. See R., 679-683. In doing so, the Commission concluded, as did the Department below, that because the accessory and principal uses were not located on the same lot or on contiguous lots under the same ownership, the proposal did not meet the requirements of the LDRs. This decision was not appealed by VOF.

By a 4-1 vote, the Commission also issued Resolution No. P12-09 on April 8, 2009, which ruled in favor of Appellant on its appeal of the second Letter of Understanding. See R., 685-693.

As described in Resolution No. P12-09, the "precise" issue decided by the Commission was whether section 9.5-243 (now section 130-81) authorized "a proposed rental management company" on the subject property. R., 685. On this narrow issue, the Resolution determined that (a) the proposed rental management company is a "commercial retail" use within the meaning of section 130-81(b)(10); (b) this type of commercial retail use is allowed as a minor conditional use in the DR zoning district; and (c) the proposed rental management company will be operated in connection with a resort hotel. R., 692. The Resolution concluded by stating that it was approving "the administrative appeal request of [VOF] to overturn a decision . . . that a proposed rental management company may not be permitted" on VOF's property. Id. While the Resolution does not explain the basis for the Commission's conclusion that the office would serve a resort hotel, and the record is vague and confusing on this point,[2] the Commission apparently construed an unknown number of off-site rental properties on the Key, not owned or affiliated with the Hawks Cay Resort Hotel, as a "resort hotel" with whom the rental management company would be associated. The Resolution noted, however, that the proposed change in use on the property from vacant residential to commercial would require VOF to obtain a minor conditional use permit.[3] Notably, no reference is made in the Resolution to the proposed "guest swimming pool"

except in Finding of Fact 5, which recites the action taken in the first appeal memorialized in Resolution No. P11-09. R., 687.

Appellees contend the Resolution's determination that the transient rental units constituted a "resort hotel" is "patently in error." However, neither party appealed the Resolution since they believe it simply authorizes VOF to apply for a minor conditional use permit to operate a rental management office, but with no recreational uses, such as a pool, and they are willing to accept this small change on the property.

Fourteen months later, on August 24, 2010, VOF's agent submitted to the Planning Director a minor conditional use permit application. See S.R., 0003-0108. The application was subsequently revised on December 9, 2010. See S.R., 0109-140. As described in the cover letter to the application, VOF proposed to establish a "rental management company in the existing single-family structure," including certain "features and accessory uses." Among the features and accessory uses were "an accessory use swimming pool and associated equipment . . . for the use of the customers . . . [and] the employees of the company as an employment benefit." S.R., 0003. The cover letter further explained that while rental management functions would be performed on the subject property, "no key pick up or welcoming functions will occur at this site." Id. In other words, rather than the property serving as a guest check-in/welcome center, the main use would be a guest swimming pool.[4]

Under section 110-69, a minor conditional use permit application is first reviewed by the Development Review Committee (DRC), composed of several members of the County staff, which forwards a report and recommendations to the Planning Director, who then renders a development order. Any affected person dissatisfied with the development order may then appeal that decision to the Commission. See § 102-185, M.C.C. There are nine standards for consideration in determining whether a conditional use should be approved. See § 110-67(1)-(9), M.C.C.

A meeting of the DRC was conducted on January 25, 2011. See R., 158-209. Presentations were made by the County, VOF, and Intervenors. The County staff characterized the application as simply a request to build a swimming pool and rental management company at the site. The staff noted that Resolution No. P12-09 only approved a vacation rental management company, and nothing more, but that VOF had "decided to add back in the pool, and just reclassify it no longer as an accessory use, but as a component of the minor conditional use or principal use." R., 159. To be consistent with what it believed Resolution No. P12-09 authorized, the staff recommended that a development order be issued approving a permit for the rental management company, requiring a revised site plan, and removing the swimming pool and associated equipment. Because a swimming pool had been added to the application, the staff also addressed that issue. It first noted that the pool would be used by different people not

associated directly with the retail use but with the off-site rental properties, and thus it could create issues for other residents in the neighborhood, such as the Lancasters, and be inconsistent with the community character in the immediate vicinity of the use. Also, the staff briefly noted that the adverse visual effects of the pool may not have been sufficiently minimized, and that a guest swimming pool on the property may have an adverse effect on the values of adjacent properties.

VOF argued that the pool had always been a part of the second appeal, and that Resolution No. P12-09 approved the management rental office with a swimming pool as permitted uses in the DR zoning district, subject to VOF obtaining a minor conditional permit. VOF also contended that once the Commission determined that the property would be operated in conjunction with a resort hotel, and approved a rental management company as a commercial retail feature of the hotel under section 130-81(b)(10), it could rely on another part of the regulation, section 130-81(b)(6), as authority to obtain a permit for the pool as a feature of the hotel. However, in order to meet the standards for a swimming pool under that provision, there must be "active and passive water-oriented recreational facilities" available on the property, and the pool must have at least "seven square feet of water surface (excluding hot tubs and Jacuzzi) per hotel room." Assuming arguendo that a swimming pool was implicitly approved by the Commission in Resolution No. P12-09,

VOF submitted no evidence to the DRC to show that it complied with these requirements. Also, VOF could not provide the number of persons who might be using the pool.

On March 21, 2011, the Planning Director issued Development Order 02-11, which denied VOF's request for a minor conditional permit to renovate the existing single-family home, construct a swimming pool, and make other associated site improvements. See R., 655-664.

To begin with, the Development Order noted that the second administrative appeal "only concerned the vacation rental management company and a swimming pool was not considered." R., 661. It also acknowledged that Resolution No. P12-09 determined that a rental management company may be permitted on the subject property so long as it is associated with a resort hotel and meets the requirements for a minor conditional use permit. Id. As to VOF's proposed swimming pool, the Development Order referred to section 110-67, which enumerates the standards applicable to all conditional uses. In the Conclusions of Law, the Order determined that the applicant did not meet the standard in section 110-67(2), which requires that the conditional use be consistent with the community character of the immediate vicinity of the parcel proposed for the development. Id. The Order also concluded that the applicant did not meet the standard in section 110-67(3), which requires that the design of the proposed development minimize adverse effects, including visual impacts,

of the proposed use on adjacent properties. R., 662. The Order further concluded that the applicant did not meet the standard in section 110-67(4), which requires that the proposed use not adversely affect the value of surrounding properties. Id. However, the County now admits this conclusion is "not supported" by the record. See County's Answer Brief, p. 7. Finally, the Development Order observed that all of the deficiencies were related to the swimming pool but that VOF could reapply for a vacation rental management center at any time. See R., 663.

Pursuant to section 102-185, VOF timely appealed the Development Order to the Commission. See R., 631-642. The staff prepared a report dated July 1, 2011, in which it continued to support the denial of the minor conditional use permit application on the basis of its inclusion of the guest swimming pool. See R., 648-653. On July 13, 2011, the Commission conducted a hearing on the appeal. See R., 1-137. The hearing was properly noticed by the Appellant. Appellant points out that by now, the composition of the Commission had changed since Resolution No. P12-09 had been adopted in February 2009, and only two members who had heard that appeal were still on the panel.

At the outset of the hearing, argument of counsel was heard regarding the intervention of the Lancasters and the scope of the proceeding. The Lancasters had previously been granted intervenor status in the two earlier administrative appeals and had participated in the DRC meeting. Over the objection of VOF,

the Commission voted to allow the Lancasters to participate as an intervening party and to allow their expert to address, by testimony and submission of an exhibit, the issues raised in the appeal. VOF maintains that this action violates a procedural requirement in the code.

Besides the participation of the staff, the parties' counsel, and Intervenors' expert, one member of the public, Bill Crowley, who resides at 120 Indies Drive just across the canal to the south of the site, spoke briefly in opposition to the application.

As to the scope of the hearing, Appellees agreed that even though Resolution No. P12-09 was based on a faulty interpretation of the LDRs, it was now final and Appellant could convert the residence to a rental management office as a minor conditional use, but no other uses were permitted. Thus, they contended the only issue to be decided was whether to approve or deny the Development Order, which denied VOF's application for a minor conditional use permit to construct a swimming pool, but gave VOF the option to reapply for a rental management office at any time.

On the other hand, VOF argued that Resolution No. P12-09 already determined that the off-site vacation rental units constituted a "resort hotel," that a rental management office and pool were commercial retail uses expressly permitted by the LDRs in the DR zoning district, and that both uses would be operated in connection with a resort hotel. Because the Resolution had

never been appealed and these determinations were now binding, VOF argued that the Commission was required to overturn the Development Order and approve the application.

At the conclusion of the hearing, the Commission voted unanimously to uphold Development Order 02-11 and deny Appellant's appeal. That decision is embodied in Resolution No. P29-11 rendered on September 14, 2011. See R., 149-153. Prior to its vote, the Commission specifically noted that it was not considering the testimony and memorandum presented by Intervenors' expert, but was relying solely on the staff report and the record below. See R., 135. Appellant points out, however, that the Resolution contains language in a preamble whereas clause that the Commission reviewed the sworn testimony of Intervenors' expert and his memorandum, which were made a part of the record below. See R., 150-151. Appellees respond that the penultimate paragraph of the Resolution clarifies exactly what the Commission considered, i.e., "only on the record below, and the staff report with attachments[.]" R., 152.

The Resolution made the following findings of fact:

> 1. The subject property is located in a Destination Resort (DR) District.
>
> 2. The subject property has a Future Land Use Map (FLUM) designation of Mixed Use/ Commercial.
>
> 3. The tier map overlay designation of the subject property is Tier 3.

4. The proposed redevelopment plan involves converting an existing single-family residence into a rental management office, constructing a swimming pool for customers of the rental management office, redesigning off-street parking areas to accommodate the new use, and carrying out associated improvements. The use of the rental management office would serve customers in any location but the pool would be only for customers of the rental management office who are renting vacation rental units on Duck Key.

5. Following the [DRC] public meeting on January 25, 2011, the Senior Director of Planning & Environmental Resources denied the minor conditional use permit for the proposed development plan, which was memorialized in Development Order No. 02-11.

6. A resort hotel is permitted with a minor conditional use permit, provided the site contains at least 10 acres and provides several amenities listed in Section 130-81(b)(6). One of the required amenities listed in Section 130-81(b)(6) is active and passive water-oriented recreational facilities must be available, a minimum of a swimming pool, or swimming areas, at the rate of seven square feet of water surface (excluding hot tubs and Jacuzzi) per hotel room (this requirement may be converted to linear feet of shoreline swimming area at a ratio of one linear foot of beach per seven square feet of required water surface.) In order to have a swimming pool, the pool must be part of a resort hotel on the same property containing 10 acres. There is no resort hotel on the subject property. Therefore, the proposed swimming pool does not comply with the requirements of the Monroe County Code.

7. Pursuant to §102-185 of the Monroe County Code, the Planning Commission shall have the authority to hear and decide appeals from any decision, determination or interpretation by any administrative official with respect to

> the provisions of the Monroe County Land Development Code and the standards and procedures hereinafter set forth, except that the Board of County Commissioners shall hear and decide appeals from administrative actions regarding the floodplain management provisions of the Land Development Code.
>
> 8. Planning & Environmental Resources Department staff recommended upholding the decision of the Senior Director of Planning & Environmental Resources to deny the administrative appeal request.

The Resolution also made the following Conclusions of Law:

> 1. The administrative appeal request is allowed under provisions of the Monroe County Land Development Code.
>
> 2. At the February 25, 2009 public hearing regarding the second appeal, the Planning Commission made the narrow decision that the proposed rental management office may be permitted with a minor conditional use permit.
>
> 3. A swimming pool used by members of the public who are customers of the rental management office as proposed is not allowed unless it is part of a resort hotel approved under a minor conditional use permit as prescribed in Monroe County Code §130-81(b). There is no resort hotel on the subject property.

On October 14, 2011, VOF timely appealed that decision. See R., 140-142.

LEGAL DISCUSSION

Pursuant to a contract between the Division of Administrative Hearings (DOAH) and the County, DOAH has jurisdiction to consider this appeal under section 102-213. The

hearing officer "may affirm, reverse or modify the order of the planning commission." § 102-218(b), M.C.C. In rendering a final order, the hearing officer is subject to the following limitations:

> The hearing officer's order may reject or modify any conclusion of law or interpretation of the county land development regulations or comprehensive plan in the planning commission's order, whether stated in the order or necessarily implicit in the planning commission's determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record, and states with particularity in his order, that the findings of fact were not based upon competent substantial evidence or that the proceeding before the planning commission on which the findings were based did not comply with the essential requirements of the law.

Id. "The hearing officer's final order shall be the final administrative action of the county." § 102-218(c), M.C.C. The order must be rendered "within 45 days of oral argument." § 102-218(b), M.C.C.

The issue of whether the Commission "complied with the essential requirements of the law" is synonymous with whether the Commission "applied the correct law." Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

When used as an appellate standard of review, competent substantial evidence has been construed to be "legally sufficient evidence" or evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the

conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). So long as there is competent substantial evidence supporting the findings, both implicit and explicit, made by the Commission in reaching its decision, they will be sustained. See, e.g., Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000); Collier Med. Ctr., Inc. v. Dep't of Health & Rehab. Servs., 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

I. The correct interpretation of section 130-81

Section 130-81 lists the permitted uses within the DR zoning district. It reads in relevant part as follows:

> (a) The following uses are permitted as of right in the destination resort district:
>
> (1) Single-family detached dwellings, provided that the lot has sufficient land area and dimensions to meet the requirements of F.A.C. ch. 64E-6 [which relates to onsite sewage treatment and disposal systems];
>
> * * *
>
> (b) The following uses are permitted as minor conditional uses in the destination resort district, subject to the standards and procedures set forth in chapter 110, article III: one or more resort hotels provided that:
>
> (1) The hotel has restaurant facilities on or adjacent to the premises that will accommodate no less than one-third of all hotel guests at maximum occupancy at a single serving;
>
> (2) There are at least two satellite eating and drinking facilities, each accommodating at least 25 persons;
>
> (3) A separate meeting/conference and entertainment area that can also function as a banquet facility;

(4) A lobby that provides 24-hour telephone and reservation service;

(5) Active and passive recreation land-based activities are available, with a minimum of tennis courts or racquetball courts, or a spa/exercise room, provided the standards given below and at least two additional active and one additional passive recreational facility, including, but not limited to, the following:

* * *

(6) Active and passive water-oriented recreational facilities are available, a minimum of a swimming pool, or swimming areas, at the rate of seven square feet of water surface (excluding hot tubs and Jacuzzi) per hotel room (this requirement may be converted to linear feet of shoreline swimming area at a ratio of one linear foot of beach per seven square feet of required water surface):

(7) Access to U.S. 1 by way of:

a. An existing curb cut;
b. A signalized intersection; or
c. A curb cut that is separated from any other curb cut on the same side of U.S. 1 by at least 400 feet;

(8) Each hotel establishes and maintains shuttle transport services to airports and tourist attractions to accommodate ten percent of the approved floor space in guest rooms; and . . . .

(9) On-site employee housing living space is provided in an amount equal to ten percent of the approved floor area in guest rooms; and such housing shall be of any of the following types: dormitory, studio, one bedroom, two bedrooms and shall be in addition to the approved hotel density and shall be used exclusively by employees qualifying under the employee housing provisions elsewhere in this chapter; and

> (10) Commercial retail is provided at a minimum of 200 square feet to include convenience retail, food sales and gifts in one or more sites, excluding restaurants as required by subsection (b)(1) of this section, and in addition one and 1.3 square feet commercial retail per each guest room greater than 150 rooms. Additional commercial retail may consist of dive shops, boat rentals, gift shops, barber/beauty services, travel agencies, provided that there is no extension signage advertising these amenities to the general public. Water-related services and activities shall be located immediately proximate to the water unless otherwise prohibited.

Subsection (c) lists the major conditional uses allowed in the DR zoning district, but they are not relevant to this controversy.

One of the first rules of statutory construction is that the plain meaning of the statute (ordinance) is controlling. See, e.g., Beshore v. Dep't of Fin. Servs., 928 So. 2d 411, 412 (Fla. 1st DCA 2006). If the language is clear and unambiguous, as it is here, there is no need to engage in statutory construction. Id. at 412. Subsection (a) first defines the uses permitted as of right (single-family detached dwellings), while subsections (b) and (c) define the minor and major conditional uses permitted within the DR district. Notably, subsection (b) provides that the only minor conditional use permitted within the district is "one or more resort hotels," which must be located on a site containing at least ten or more gross acres and have the ten features enumerated in paragraphs (b)(1) through (10) of the regulation. See also § 130-32, M.C.C. ("Destination resorts are

contemplated to contain: (1) Single-family homes as of right; or (2) One or more resort hotels as the principal use, . . . to be located on sites of at least ten gross acres"). Paragraphs (b)(1) through (10) then list the ten required amenities for each resort hotel, provided the property contains one or more resort hotels.

The regulation goes on to provide that the several enumerated "uses" in paragraphs (b)(1) through (10) are not themselves permitted as minor conditional uses. Rather, they are mandatory features of "one of more resort hotels" and can only be developed as part of a minor conditional use on the property, i.e., a resort hotel on ten or more gross acres. Otherwise, under the guise that it is operating in connection with other unidentified rental units located elsewhere in the Key, any single-family site in the DR zoning district could be redeveloped not only as a guest swimming pool, but as a restaurant, a meeting/conference and entertainment area, a lobby providing 24-hour telephone and reservation service, a recreational facility, or any combination of the enumerated resort hotel features set forth in those paragraphs, assuming it meets the standards for those features. The result would be a nonsensical interpretation of the regulation, and it would assume that the drafters intended a patchwork of commercial, non-residential uses to emerge in single-family neighborhoods. Therefore, section 130-81(b) cannot be read as authorizing minor conditional use review, much less

approval, for a swimming pool or for any of the enumerated "uses" because the "uses" are actually mandatory features of a resort hotel. In sum, the amenities are only applicable to properties consisting of one or more resort hotels.

II. Departure from the Essential Requirements of the Law

Resolution No. P29-11 sustained Development Order 02-11 and determined, in Finding of Fact 6, that a "pool must be a part of a resort hotel on the same property containing 10 acres"; that "[t]here is no resort hotel on the subject property"; and that "the proposed swimming pool does not comply with the requirements of the Monroe County Code." R., 152. VOF contends these findings are contrary to the Code and constitute a departure from the essential requirements of the law. However, the findings are consistent with the language in sections 130-32 and 130-81(b). Section 130-32 provides that a destination resort hotel is contemplated to be located on a site containing at least ten gross acres of land; VOF's parcel is only one-quarter acre in size. Section 130-81(b) defines the only conditional use allowed in the DR district as one or more resort hotels. A guest swimming pool is a required amenity or feature of a resort hotel, not a stand-alone use to be located on an off-site parcel. Finally, the findings are consistent with section 101-1, which defines the words, terms, and phrases used in the LDRs, and makes a clear distinction between a "hotel" and a "vacation rental." A "hotel" means:

> a building containing individual rooms for the purpose of providing overnight lodging facilities for periods not exceeding 30 days to the general public for compensation with or without meals, and which has common facilities for reservations and cleaning services, combined utilities and on-site management and reception.

On the other hand, a "vacation rental or unit" means:

> an attached or detached dwelling unit that is rented, leased, or assigned for tenancies of less than 28 days duration. Vacation rental use does not include hotels, motels, RV spaces, which are specifically addressed in each district."

There is no single building on VOF's property that qualifies as a "hotel," and there is no resort hotel with the amenities listed in section 130-81(b)(1)-(10). Conversely, the transient rental units scattered throughout the Key, and which the swimming pool is intended to serve, are more akin to vacation rental units, which by definition do "not include hotels." Thus, the Commission correctly concluded in Resolution No. P29-11 that a "swimming pool used by members of the public who are customers of the rental management office as proposed is not allowed unless it is part of the resort hotel approved under a minor conditional use permit as prescribed by [section] 130.81(b). There is no resort hotel on the subject property." R., 152. In short, the Commission got it right when it sustained Development Order 02-11 by relying on the plain language in the Code.

VOF contends, however, that Resolution No. P12-09 has already conclusively determined, rightly or wrongly, that the transient rental units constitute a resort hotel; that the proposed redevelopment, including a swimming pool, will be operated in connection with the hotel; and because that determination was never appealed, it is now binding on the parties. See § 102-185(c), M.C.C. (the "failure to file such an appeal shall constitute a waiver of any rights under this chapter to appeal any interpretation or determination made by an administrative official"). But there are numerous indicia in the record to indicate that Resolution No. P12-09 did not address the swimming pool issue. First, the swimming pool was not mentioned in Mr. Craig's letter dated September 25, 2008, see R., 673-674, which started the sequence of events leading to the issuance of Resolution No. P12-09. In response to Mr. Craig's inquiry, the second Letter of Understanding specifically stated that it was considering only a request by VOF to place a rental management office on the property as a matter of right. See R., 676. Later on, during the hearing on the appeal of the second Letter of Understanding, at no time did VOF advise the Commission that anything other than a "rental management company" was being proposed for consideration, nor did VOF correct the introductory statement of staff that a swimming pool had been removed from the request. See R., 540-600. In fact, no representative of VOF even mentioned the swimming pool in the context of the second

appeal. Id. When Resolution No. P12-09 was rendered, it authorized only a "rental management company" as a minor conditional use in connection with a hotel; no mention was made of a guest swimming pool except for reciting the action taken in Resolution No. P11-09. See R., 685-693. Moreover, the Resolution states that the "precise" issue before it was whether a rental management company could be placed on the property. See, R., 685. In Development Order 02-11, rendered after the entry of Resolution No. P12-09, Conclusion of Law 5 stated that the "second administrative appeal only concerned the vacation rental management company and a swimming pool was not considered." R., 661. This understanding of the issues was reconfirmed in Resolution No. P29-11, which concluded that Resolution No. P12-09 "made the narrow decision that the proposed rental management office may be permitted with a minor conditional use permit." R., 152. Finally, while not persuasive by itself, one of the two holdover Commissioners from 2009 recalled that "in [Resolution No.] 12-09 [he didn't] believe that there was any understanding that there was to be a pool admitted, and [he] was really surprised to see this come before us again." R., 134. Collectively, these indicia support a conclusion that Resolution No. P12-09 considered only the narrow issue first presented in Mr. Craig's letter of September 25, 2008. Therefore, the Commission did not depart from the essential requirements of the law when it concluded in Resolution No. P29-

11 that "the Planning Commission made the narrow decision [in Resolution No. P12-09] that [only] the proposed rental management office may be permitted with a minor conditional use permit." R., 152.

VOF contends, however, that even if Resolution No. P12-09 did not address the issue of a swimming pool, it made a dispositive determination that the proposed commercial retail use (i.e., rental management company) would be operated in connection with a resort hotel. See R., 692. Based on this determination, VOF argues that it logically follows that a swimming pool, or for that matter any other required feature of a hotel, should be permitted on the property as of right to serve the guests of the transient units.

VOF's argument must fail for two reasons. First, Resolution No. P12-09 is limited to the facts in that case. While based on an incorrect interpretation of the LDRs, the Resolution simply held that a proposed rental management office would be operated in connection with a resort hotel, and that the conversion of the property to that use was permissible subject to VOF obtaining a minor conditional use permit. It did not authorize VOF, as a matter of right, to place any other hotel feature on the property as a conditional use. Had it intended to do so, the Resolution would have spoken to that issue. Second, even if VOF is correct that once a determination is made that a property will be operated in connection with a resort hotel, any other hotel

feature, including a pool, can then be placed on the property, VOF must still comply with section 130-81(b)(6). That provision allows swimming pools operated in connection with a resort hotel within the DR district, but only if:

> (6) Active and passive water-oriented recreational facilities are available, a minimum of a swimming pool, or swimming areas, at the rate of seven square feet of water surface (excluding hot tubs and Jacuzzi) per hotel room . . . .

There is no record evidence to show that VOF complies with this requirement. When asked about the regulation during the DRC meeting, VOF did not know the number of units or rooms that would make up the "resort hotel"; thus, the required size of the pool could not be determined. See R., 177-178. VOF contends, however, that this issue was never addressed at the Commission level and therefore it cannot be considered in this appeal. But the DRC meeting is a part of the record below, see R., 157-209, and section 130-81(6)(b) was specifically cited in Finding of Fact 17 of the Development Order. See R., 658-659. The Development Order also noted that the record was insufficient to determine whether VOF satisfied this requirement. See R., 661. These factual and legal determinations, and others, are implicitly approved in Finding of Fact 6 of Resolution P29-11. See R., 151-152.

Besides having to comply with section 130-81(b)(6), VOF must also meet the standards in section 110-67, which apply to all

conditional uses. Among them is a requirement in subsection (2) that the conditional use be "consistent with the community character of the immediate vicinity of the parcel proposed for development." There is competent substantial evidence that this standard was not met, based on the fact that any number of people not associated with the site could be using the pool at any time of the day. See, e.g., R., 160.

VOF again argues that this issue was not explicitly addressed in Resolution No. P29-11, and therefore the standards in section 110-67 cannot be considered in this appeal. But Resolution No. P29-11 upheld the decision in Development Order 02-11, which determined in Conclusion of Law 6 that the proposed pool would contravene the standard in subsection (2). See R., 661. By concluding that the application "does not comply with the requirements of the Monroe County Code," see R., 152, the Commission implicitly affirmed the determination in the Development Order that the standard was not met.

Given the foregoing disposition of the issues, it is unnecessary to reach the other arguments raised by the parties.

III. Due Process Violation

In its Initial Brief, VOF contended that the Commission denied it due process by allowing the Lancasters to present new evidence at the hearing on July 13, 2011, in contravention of section 102-185(e). More than likely because Appellees have responded in their Answer Briefs that due process concerns cannot

be addressed in this proceeding, VOF now contends in its Reply Brief that rather than raising a due process issue, it is actually asserting that the Commission failed to comply with the essential requirements of the law by not following its own procedural rules.

At the July 13, 2011 hearing, over the objection of VOF, the Commission allowed the Lancasters to intervene in support of the County's position, to present argument through their counsel, and to present testimony and one exhibit through their expert. VOF contends that this action violated section 102-185(e), which governs the appeal process for development orders, and reads as follows:

> (e) Action of the commission. The planning commission shall consider the appeal at a duly called public hearing following receipt of all records concerning the subject matter of the appeal. Any person entitled to initiate an appeal may have the opportunity to address the commission at that meeting; and argument shall be restricted to the record below except that a party appealing an administrative decision, determination or interpretation shall be entitled to present evidence and create a record before the planning commission; any appeals before the hearing officer shall be based upon and restricted to the record.

This provision allows <u>any</u> person entitled to initiate an appeal, including VOF, Intervenors, and the County, to address the Commission at its public hearing concerning the record below. Because the Lancasters were a party below, and were entitled to initiate an appeal, no error occurred in allowing them to

intervene at the Commission level and to present argument concerning "the record below." The regulation goes on to provide that only the party appealing the decision, in this case VOF, is allowed "to present evidence and create a record before the planning commission." In recognition of this limitation, the Commission noted at the conclusion of the hearing that in making its decision, it was relying only on the staff report and record below "minus the testimony of intervenor." R., 134-135. As a practical matter, VOF argues that it was impossible for the Commission to ignore the testimony and memorandum presented by Intervenors' expert. It also contends that "[t]he [resulting] prejudice to VOF is manifest." See Initial Brief, p. 38. During oral argument, VOF's counsel suggested that at a minimum, the case should be remanded to the Commission for a new hearing that comports with the requirements of section 102-185(e).

Even if the Commission did not strictly adhere to the requirements of section 102-185(e), VOF did not demonstrate how it was prejudiced by that error. VOF has failed to cite any specific testimony by the expert, or portion of his exhibit, which contradicts the Lancasters' contention that their expert was simply addressing the issues already before the Commission, and providing commentary concerning what had actually transpired in the previous administrative appeals. Whether couched as a due process violation, or a departure from the essential requirements of the law, VOF's argument is deemed to be unavailing.

DECISION

Based on the foregoing, Resolution No. P29-11, which sustained Development Order 02-11, is affirmed in all respects.

DONE AND ORDERED this 27th day of June, 2012, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2012.

ENDNOTES

1/ Guests renting units not affiliated with Hawks Cay Resort Hotel must now pay a resort fee to that hotel in order to use its swimming pool and other recreational facilities. If a swimming pool is allowed on VOF's property, guests renting units managed by VOF can use VOF's swimming pool and avoid paying a fee to the hotel.

2/ Just before voting, one Commissioner observed that because there was already "a resort hotel there," the commercial retail use could be approved. R., 599. Whether he was referring to the Hawks Cay Resort Hotel, or a cluster of transient units, is not known. Another Commissioner noted that he voted in favor of VOF because he believed that "this usage is provided for in the DR zoning [and] . . . was also contemplated by the DRI." R., 598. And a third Commissioner explained that the DRI was approved in 1986 and "changes come down through the ages and you have to open the door for [proposals such as those presented by VOF]." R., 598-599.

3/ "Conditional uses" are those uses that are "generally compatible with the other land uses permitted in a land use district, but which require individual review of their location, design and configuration and the imposition of conditions in order to ensure the appropriateness of the use at a particular location." § 110-63, M.C.C.

4/ Even though the original proposal in 2007 was described as a "guest check-in/welcome center" with related amenities, VOF later acknowledged that "no one has to come [to the property] to actually engage in that activity," and that "the majority of the ongoing rental management activities actually take place off site," with most of it done by telephone or internet. R., 178. Thus, the swimming pool is the driving force behind the application.

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NOTICE OF RIGHTS

Pursuant to article VI, section 102-218(c), M.C.C., this Final Order is "the final administrative action of the county." It is subject to judicial review by common law petition for writ of certiorari to the circuit court in the appropriate judicial circuit.