

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KOHUT FAMILY TRUST,

Appellant,

vs.

Case No. 16-0853

CITY OF CLEARWATER AND COMMUNITY
DEVELOPMENT BOARD,

Appellees.

FINAL ORDER

Appellant, Kohut Family Trust, appeals a development order rendered by the City of Clearwater Community Development Board on January 22, 2016. The Division of Administrative Hearings ("DOAH"), by contract with the City of Clearwater and pursuant to Section 4-505 of the Community Development Code, assigned Administrative Law Judge Bram D.E. Canter to serve as Hearing Officer for the appeal. Oral argument was presented by the parties on April 8, 2016, and they submitted proposed orders on April 28, 2016.

APPEARANCES

For Appellant Kohut Family Trust:

Edward C. Castagna, Jr., Esquire
Nicole A. Kerr, Esquire
611 Druid Road East, Suite 702
Clearwater, Florida 33756

For Appellee City of Clearwater and Community Development Board:

Camilo A. Soto
Assistant City Attorney
City of Clearwater
Post Office Box 4748
Clearwater, Florida 33758-4748

Jay Daigneault, Esquire
Trask Daigneault, LLP
1001 South Fort Harrison Avenue, Suite 201
Clearwater, Florida 33756

For Appellee/Applicant Clearwater Marine Aquarium, Inc.:

Brian J. Aungst, Jr. Esquire
Macfarlane Ferguson & McMullen, P.A.
625 Court Street, Suite 200
Clearwater, Florida 33756

For Appellee/Party Island Way Grill, Inc.:

Michael C. Foley, Esquire
Macfarlane Ferguson & McMullen, P.A.
625 Court Street, Suite 200
Clearwater, Florida 33756

STATEMENT OF THE ISSUES

The issues to be determined in this appeal are whether the decision of the Community Development Board ("CDB") to approve Flexible Development Application FLD2015-10040 filed by Appellee Clearwater Marine Aquarium, Inc. ("the Aquarium"), cannot be sustained by substantial competent evidence before the Board, or that the decision of the Board departed from the essential requirements of law.

PRELIMINARY STATEMENT

On September 30, 2015, the Aquarium submitted its application to the City of Clearwater ("City") to expand the Aquarium by adding a parking garage, two buildings, and dolphin tank. On January 19, 2016, the CDB conducted a public hearing on the Aquarium's application. At the hearing, comments were received from the City Planner, Matt Jackson; from the Aquarium's attorney, Brian Aungst, Jr.; and from three entities who requested and were granted party status by the CDB: Peter Kohut; Island Way Grill, Inc., by and through its attorney Michael Foley; and Steven Traum. All parties were given an opportunity at the public hearing to present witness testimony, exhibits, and to cross-examine witnesses. Members of the public also spoke at the hearing. At the conclusion of the discussion, the CDB approved the Aquarium's application.

On January 22, 2016, the City rendered a Development Order, which included findings of fact and conclusions of law, memorializing the CDB's approval of the Aquarium's application. On February 2, 2016, the Appellant filed an appeal of the Development Order. The City transmitted the Appeal Application and record before the CDB to DOAH for assignment of a Hearing Officer to receive oral argument, consider the parties' proposed orders, and issue a Final Order.

FINDINGS OF FACT

1. The Aquarium is the owner of a 4.53-acre site, consisting of three parcels, located at 249 Windward Passage in Clearwater, Florida ("the property").

2. The site is on a small island near Clearwater Beach, known as Island Estates. A single roadway, called Island Way, provides ingress and egress to Island Estates.

3. The Aquarium property is zoned Commercial. The property is designated Commercial General in the Future Land Use Element of the City of Clearwater Comprehensive Plan.

4. The area around the Aquarium property is developed with attached dwellings, offices, a marina, an automobile service station, a restaurant, and a retail plaza with building heights ranging from one to six stories.

5. On September 30, 2015, the Aquarium filed a Flexible Development Application for a Comprehensive Infill Redevelopment Project to develop two buildings, a dolphin pool, and a parking garage.

6. To be approved, the proposed development must meet "flexibility standards" set forth in the City's Community Development Code.

7. The application required a Level Two approval. Under Section 4-206 of the Community Development Code, a Level Two approval requires that notice of the application be mailed to

owners of properties "within a 200-foot radius of the perimeter boundaries of the subject property."

8. The notice mailed by the City identifies (by parcel number) only one of the three parcels which comprise the Aquarium site.

9. The City Clerk mailed notice of the Aquarium's application to owners of parcels located within 200 feet of the single parcel identified in the notice. The calculation of 200 feet was not made from the boundaries of the Aquarium's combined three-parcel property.

10. Whether the mailed notice conformed with Section 4-206 was not an issue raised before the CDB. The record does not show the reason the calculation was made in the manner it was made, whether it was consistent with the City's interpretation of the applicable code requirement, or whether it was based on the location of the proposed structures. There is no evidence in the record about what additional property owners, if any, would have received notice if the boundaries of the entire site had been used.

11. Section 4-206 of the Community Development Code also requires that a sign be posted on the "parcel proposed for development." The record does not show whether the sign was posted.

12. Appellant Kohut Family Trust received mailed notice of the Aquarium's application by and through Peter Kohut at his residential address.

13. On January 12, 2106, Mr. Kohut attended a town hall meeting about the Aquarium's application, held at St. Brendan's Church on Island Estates. Mr. Kohut stated that he sent e-mails and through word-of-mouth was able to get about 55 people to attend the town hall meeting. At the town hall meeting, an Aquarium representative presented information about the proposed project and answered questions.

14. On January 19, 2016, the CDB conducted a public hearing on the Aquarium's application. Mr. Kohut appeared at the public hearing, requested and was granted party status by the CDB, and made a presentation to the CDB.

15. Mr. Kohut did not mention the Kohut Family Trust in his presentation to the CDB and did not request party status for the Kohut Family Trust.

16. Mr. Kohut told the CDB that "the only notification that was given was given by the civic organization to its members." Because Mr. Kohut knew he had received mailed notice, Mr. Kohut likely meant that the only detailed information about the Aquarium's proposed project was provided at the town hall meeting.

17. Mr. Kohut was provided an opportunity to present witnesses, introduce evidence, and to cross-examine witnesses at the public hearing. He did not introduce any exhibits or present any witnesses.

18. Mr. Kohut objected, generally, about increased traffic and lowered property values and, specifically, about his desire for curbs and gutters. Mr. Kohut did not identify any specific criterion for approval of the Aquarium's application that he believed would not be met.

19. The City Planner, Matt Jackson, was accepted by the CDB as an expert witness in the areas of zoning, site plan analysis, planning in general, and the City's landscape ordinance. Mr. Jackson discussed the Aquarium's application and stated his opinion that it complied with all applicable Community Development Code and Comprehensive Plan requirements. Mr. Jackson was cross-examined by Mr. Kohut.

20. The Aquarium's attorney made a presentation to the CDB in support of the application and introduced the testimony of engineers Al Carrier and Robert Pergolizzi. The CDB accepted Mr. Carrier as an expert witness in the areas of civil engineering, land use planning, and planning in general. The CDB accepted Mr. Pergolizzi as an expert witness in the areas of planning, land use, and traffic impact studies. Mr. Pergolizzi was cross-examined by Mr. Kohut.

21. The attorney for Island Way Grill, Inc., obtained party status for his client and made a presentation in support of the Aquarium's application.

22. Steven Traum obtained party status and made a presentation to the CDB. Mr. Traum did not appear for oral argument on April 8, 2016, and did not file a proposed order.

23. On January 22, 2016, the City entered a Development Order memorializing the CDB's approval of the Aquarium's application.

CONCLUSIONS OF LAW

24. Appellant has the burden to demonstrate that the decision of the CDB cannot be sustained by substantial competent evidence before the Board, or that the decision departs from the essential requirements of the law. See § 4-505.C, Comm. Dev. Code.

25. The Hearing Officer cannot re-weigh conflicting testimony presented to the CDB or substitute his judgment for that of the CDB on the issue of credibility of witnesses. See Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

26. The issue is whether there is substantial competent evidence for the CDB's decision, not whether there is substantial competent evidence to support a contrary position. See Educ. Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of App., 541 So. 2d 106, 108 (Fla. 1989).

27. Appellant presented no evidence to the CDB tending to prove that any applicable development criterion was not met.

28. Appellant did not meet its burden to show the decision of the CDB cannot be sustained by substantial competent evidence before the board.

29. During oral argument, Appellant confined its argument to its contention that the notice was insufficient and the decision of the CDB thereby departed from the essential requirements of the law. Appellant argued that the notice was insufficient because (1) the mailed notice only identified one parcel rather than all three parcels comprising the Aquarium site, (2) the City mailed the notice only to owners of properties located 200 feet from the single identified parcel, and (3) there is no evidence in the record showing that a sign was posted on the Aquarium property.

30. There are three reasons Appellant's claim of insufficient notice must fail. First, the errors which Appellant alleges were made in the notice provided by the City and applicant were not raised before the CDB. They were raised for the first time at oral argument. Therefore, these claims of error were waived. See Goodson v. Fla. Dep't Bus. & Prof'l Reg., 978 So. 2d 195, 196 (Fla. 1st DCA 2008).

31. An appellant's burden to show the decision on appeal is not supported by substantial competent evidence does not mean the

appellant can search through the record after an appeal is filed and then, for the first time, assert that the record does not show how the appellee complied with some of the requirements for approval. This is true whether the assertion is that a required landscape plan is not in the record or that it contains no evidence of sign-posting. Whether the record on appeal includes a landscape plan or proof of sign-posting is not the same as the CDB's determination that there was no landscape plan submitted by the applicant or that no sign was posted. That is why appellants must raise their claims of error before the CDB.

32. Second, Appellant waived its claim of insufficient notice because its representative received notice, attended the hearing, was granted party status, and participated in the quasi-judicial proceeding. See Malley v. Clay Cnty Zoning Comm'n, 225 So. 2d 555, 557 (Fla. 1st DCA 1969); City of Jacksonville v. Huffman, 764 So. 2d 695, 698-97 (Fla. 1st DCA 2000) (Right to assert a defect in notice may be waived if the party appeared at the hearing and availed himself of the opportunity to fully and adequately present objections.)

33. Appellant's contends he was unaware of the scope of the proposed project because the mailed notice only made reference to one of the three parcels which comprise the Aquarium site. If Appellant had made this claim to the CDB, it could have been explored by cross-examination. That is why the claim should have

been raised before the CDB. The claim is not credible based on the information Mr. Kohut had prior to the public hearing.

34. Third, Appellant did not show that notice was insufficient. The record does not show that the 200-foot calculation was done wrong, that someone did not receive notice, or that the sign was not posted.

35. Appellant did not meet its burden to show that the decision of the CDB departs from the essential requirements of law.

DETERMINATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the decision of the CDB is AFFIRMED.

DONE AND ORDERED this 20th day of May, 2016, in Tallahassee, Leon County, Florida.



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 20th day of May, 2016.

COPIES FURNISHED:

Brian J. Aungst, Jr., Esquire
Michael C. Foley, Esquire
Macfarlane Ferguson & McMullen, P.A.
625 Court Street, Suite 200
Clearwater, Florida 33756
(eServed)

Edward C. Castagna, Jr., Esquire
Nicole A. Kerr, Esquire
Suite 702
611 Druid Road East
Clearwater, Florida 33756
(eServed)

Camilo A. Soto, Assistant City Attorney
City of Clearwater
Post Office Box 4748
Clearwater, Florida 33758-4748
(eServed)

Jay Daigneault, Esquire
Trask Daigneault, LLP
Suite 201
1001 South Fort Harrison Avenue
Clearwater, Florida 33756
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

Pursuant to Article 4, Division 5, Section 4-505.D of the Code, this decision shall be final, subject to judicial review by common law certiorari to the circuit court.