

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL G. PRESTON,

Petitioner,

vs.

Case No. 17-6226

GULFVIEW LODGING, LLP; COMMUNITY
DEVELOPMENT BOARD; AND CITY OF
CLEARWATER,

Respondents.

_____ /

FINAL ORDER

Petitioner, Michael G. Preston (Preston), appeals a development order rendered by the City of Clearwater Community Development Board on October 19, 2017. 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 Francine M. Ffolkes to serve as Hearing Officer for the appeal. Oral argument was presented on December 15, 2017, and the parties submitted proposed final orders on January 3 and 4, 2018.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined in this appeal are whether the decision of the Community Development Board (Board) to approve Flexible Development Application FLD2017-07012 filed by Gulfview Lodging, LLP (Gulfview), cannot be sustained by substantial competent evidence before the Board, or that the decision of the Board departs from the essential requirements of law.

PRELIMINARY STATEMENT

On July 28, 2017, Gulfview submitted its application to the City of Clearwater (City) to build a proposed 88-room hotel in the tourist zoning district for the property located at 355 South Gulfview Boulevard and 348 Coronado Drive. On

October 17, 2017, the Board conducted the quasi-judicial public hearing on Gulfview's application. At the hearing, expert testimony was received from Mark Parry, AICP , who is a senior planner with the City; Sue Ann Murphy, AICP, for Gulfview; and Istvan Peteranecz, AIA, who is the architect for Gulfview. The Board also heard comments from assistant director of Planning & Development, Gina Clayton; Marilyn Healy, attorney for Gulfview; Camilo Soto, attorney for the City; Jay Daigneault, attorney for the Board; and Paul Gionis, attorney for Preston. Preston was granted party status and his attorney made a presentation to the Board. Preston's attorney requested a continuance citing lack of proper notice and insufficient time to review and prepare for the public hearing. Preston did not introduce any testimony or other evidence regarding the application.

All parties were given an opportunity at the public hearing to present witness testimony, exhibits, and to cross-examine witnesses. A member of the public also spoke at the hearing. At the conclusion of the hearing and after discussion, the Board approved Gulfview's application based on the evidence in the application, the expert testimony, and the Staff Report. On October 19, 2017, the City rendered a Development Order, which included findings of fact, conclusions of law and conditions of approval, memorializing the Board's decision. On October 31, 2017, Preston filed an appeal of the Development Order. The

City transmitted the Appeal Application and record before the Board to DOAH for assignment of a Hearing Officer to conduct a hearing to receive the record before the Board and hear oral argument.^{1/} Thereafter, the parties submitted proposed final orders, which were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The 0.59-acre project site is located at the northeast corner of South Gulfview Boulevard and Fifth Street and wraps around the McDonald's parking lot and Frenchy's Beach Café (Frenchy's) to the west. The project site includes two parcels owned by Gulfview, and 2,195.09 square feet of the South Gulfview Boulevard right-of-way, which will need to be vacated by the City. Gulfview's proposal is to demolish all structures currently on the project site and build a seven-floor hotel with 150 units per acre, which would be 88 rooms if the City vacates the 2,195.09 feet of right-of-way.

2. Gulfview's application for development approval was filed with the City on July 28, 2017, including design plans. The subject property is zoned Tourist (T) District with an underlying Future Land Use Plan (FLUP) category of Resort Facilities High (RFH). The subject site is located in the Beach Walk district of *Beach by Design*.^{2/} The maximum permitted density for the site pursuant to *Beach by Design* is 150 units

per acre. The application contemplates a subsequent vacation process for the 2,195.09 square feet of City right-of-way.

3. On July 20, 2017, the City Council approved the allocation of up to 59 units from the Hotel Density Reserve under *Beach by Design* (Case No. HDA2017-04001) and adopted a resolution to the same effect (Res. No. 17-19). Preston's attorney admitted that he attended the July 20, 2017, City Council hearing that resulted in the July 28, 2017, Hotel Density Reserve Development Agreement (Development Agreement) between Gulfview and the City. Preston's attorney attended the July 20 City Council hearing on behalf of Frenchy's, but conceded to the Board and at oral argument that Frenchy's is located on the land owned by Preston, as trustee, and Preston is the sole shareholder of Frenchy's.

4. The Development Agreement was recorded in Book 19727, Page 2465-2503 of the Public Records of Pinellas County, Florida, on August 2, 2017. The Development Agreement includes Exhibit "B"-- the same set of design plans that were filed with Gulfview's July 28, 2017, application for development approval. Section 6.2.4 of the Development Agreement specifically states:

The overall number of proposed units density provided for by this Agreement (88 units) is contingent upon the proposed vacation of the 2,195.09 square feet of South Gulfview Boulevard right-of-way within the Beach Walk district. The City shall process a right-of-way vacation ordinance to vacate the

2,195.09 square feet of South Gulfview Blvd. right of way within the Beach Walk district conditioned upon submission of a complete set of building plans for construction of the improvements shown on Exhibit "B". Regardless of whether or not the vacation is granted the maximum permitted density of the property may not exceed 150 units per acre.

5. Gulfview's application requires a Level Two approval. Under Section 4-206 of the Community Development Code, a Level Two approval requires mailing of a notice of application to owners of properties "within a 200-foot radius of the perimeter boundaries of the subject property." The notice mailed by the City identifies both the north parcel and the south parcel by address and parcel number. The notice also describes the quasi-judicial public hearing process before the Board and ends with an invitation "to discuss any questions or concerns about the project and/or to better understand the proposal and review the site plan" with the assigned planner. The City Clerk mailed notice of Gulfview's application to owners of parcels located within 200 feet of the two parcels identified in the notice, including Preston. Preston does not dispute receiving the notice. Section 4-206 of the Community Development Code also requires the posting of a sign on the "parcel proposed for development." Preston does not dispute that the sign was posted.

6. Preston objected that the mailed and posted notices did not reference the proposal to vacate 2,195.09 square feet of right-of-way. He argued that if he had known more than "a few days ago" when he received the Staff Report ahead of the October 17, 2017, Board meeting that the right-of-way was proposed to be vacated, he would have had expert witnesses at the hearing to give "an equal presentation" in response to Gulfview's presentation. Preston requested a continuance citing lack of proper notice and insufficient time to prepare for the public hearing. Preston did not introduce any testimony or other evidence regarding the application.

7. Preston's primary objection to the project was vacation of the right-of-way and he wanted the opportunity to present witnesses regarding that issue. Vacating the right-of-way is a separate process and the hearing before the Board is not the proceeding in which the right-of-way vacation is decided. However, the substantial competent record evidence shows that Preston had actual notice as early as July 20, 2017, that the proposed project contemplated vacating 2,195.09 square feet of right-of-way.

8. Preston's other objection was that Gulfview's design plans did not meet the requirements of *Beach by Design's* Beach Walk District overlay. Preston argued to the Board that the hotel's proposed design did not meet the redevelopment goals for

addition of facilities and amenities generally described as areas for outdoor dining, outside cafes, and other seaside amenities.^{3/} However, although Preston had actual notice of the hotel design plans as early as July 20, 2017, he did not introduce any expert testimony or other evidence to support those objections.

9. The Staff Report states that *Beach by Design* proposed to create a great beach front, known as "Beach Walk," by relocating South Gulfview Boulevard from the existing right of way.

Beach by Design recognized that the redevelopment and revitalization of the properties that front on South Gulfview were and, to a certain extent, still are generally constrained by several factors including small parcel sizes and the Coastal Construction Control Line. As a result, most of the motels and hotels which existed along the east side of South Gulfview would have limited opportunities for redevelopment even if Clearwater Beach were repositioned in the tourism market place. *Beach by Design* proposed to relocate South Gulfview to the west of its current alignment in order to achieve multiple purposes. First, it would create a drive with a real view of the Beach and the Gulf of Mexico. Second, it would allow the City to vacate the east 35 feet of the existing right of way in favor of the properties along the eastern frontage of existing South Gulfview as an incentive for appropriate redevelopment. Many of those existing properties would substantially benefit from an additional 35 feet of depth which could be used for the addition of facilities and amenities such as

safe and comfortable areas for outdoor dining.

The creation of Beach Walk and the realignment of South Gulfview Boulevard have all been realized. Several segments of the South Gulfview Boulevard have already been vacated and many of the properties along South Gulfview Boulevard have, in the years since the initial adoption of Beach by Design, been redeveloped with hotels. As noted, this proposal also includes a vacation of a portion of the South Gulfview Boulevard right-of-way which will facilitate the redevelopment of the subject site with a new hotel playing an important role in the ongoing renewal and revitalization of the Beach. Specifically, the vacation will allow for the location of an outdoor seating area providing a strong link between Beach Walk and the proposed hotel as supported by Beach by Design. Therefore, the proposal is consistent with this provision.

(Emphasis added).

10. The Staff Report concluded that the proposed project is consistent with applicable provisions of the Community Development Code, applicable components of the City's Comprehensive Plan, the Beach Walk District of *Beach by Design*, and the Design Guidelines of *Beach by Design*. Mark Parry, Senior Planner with the City, testified that "the proposed number of units, 88, is contingent on vacation of that right-of-way," and if the right-of-way is not later vacated, it "would knock out about eight units." Mr. Parry also testified that the proposed project provides amenities and an outdoor seating area as specified by *Beach by Design*. Preston only conducted a very

short cross-examination of Mr. Parry, despite having party status to do so.

11. Sue Ann Murphy, an experienced land use planner, also testified that the proposed development complied with all applicable Community Development Code, Comprehensive Plan and *Beach by Design* requirements. The project architect, Istvan Peteranecz, AIA, was accepted by the Board as an expert. Mr. Peteranecz answered questions from Board members regarding the design of the proposed hotel's main entrance, including the porte cochere and public seating area adjacent to the Beach Walk and immediately south of Frenchy's. Preston did not cross-examine Ms. Murphy or Mr. Peteranecz, despite having party status to do so.

12. Substantial competent evidence in the record supports the conclusion that the proposed project is consistent with applicable provisions of the Community Development Code, applicable components of the City's Comprehensive Plan, the Beach Walk District of *Beach by Design*, and the Design Guidelines of *Beach by Design*.

13. At the conclusion of the public hearing, the Board acknowledged Preston's pending request for continuance and proceeded with discussion. After extensive discussion among the Board members, a motion was made and seconded for the Board "to approve case number FLD2017-07012 based on the evidence, the

testimony presented, and the application, the staff report, and at today's hearing, and to adopt the findings of fact and conclusions of law stated in the staff report with all of the conditions of approval, as listed." The motion carried.

14. On October 19, 2017, the City entered a Development Order memorializing the Board's decision. The Development Order includes a Finding of Fact that "[t]he total lot area includes 2,195 square feet of the South Gulfview Boulevard right-of-way which would need to be vacated by the City," and includes a Condition of Approval that "application for a building permit be submitted no later than October 17, 2019, unless time extensions are granted." The City represented at oral argument that if the proposed development is not consistent with the Development Order (e.g., if the approximately 2,195 square feet of the South Gulfview Boulevard right-of-way is not vacated), Gulfview will not be able to get a building permit without going through a minor amendment process for a less intense project.

CONCLUSIONS OF LAW

15. Preston has the burden to demonstrate that the decision of the Board 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, Clearwater Cmty. Dev. Code.

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

17. Preston did not present any evidence to the Board tending to prove that any applicable development criteria were not met. Preston did not carry his burden to show the decision of the Board cannot be sustained by substantial competent evidence before the Board.

18. During oral argument, Preston argued that the mailed and posted notices were insufficient, that the Board ignored his motion for continuance, that the project did not meet certain *Beach by Design* criteria, and that the Development Order should be expressly conditioned on the vacation of the right-of-way. Preston's proposed final order confined his argument to insufficient notice and the motion for continuance as procedural due process issues, and the Development Order as not complying with the essential requirements of law.

19. Preston argued that the notice was insufficient because the mailed notice identified two parcels comprising the project site and did not provide an address or parcel identification for the 2,195.09 square feet which may later be vacated. However, vacation of the right-of-way is a process

that cannot be decided by the Board. It is a separate process that occurs in a hearing before the City Council, where the City Council will give due consideration to any objections that are proposed and "determine the matter affirmatively or to the contrary at its discretion." See Clearwater Code of Ordinances § 28.05(4).

20. Section 4-206.C of the Community Development Code requires the notice of public hearing to include "the address of the property." The right-of-way does not have an "address" separate and apart from the addresses provided in the notice. In any event, Preston had actual notice as early as July 20, 2017, about the proposal to vacate 2,195.09 square feet of right-of-way as part of the proposed development. Preston also had the opportunity based on the mailed notice to be adequately informed of the details regarding Gulfview's application and site plans prior to the October 17, 2017, hearing before the Board. See Marion Cnty. v. Kirk, 965 So. 2d 330, 332 (Fla. 5th DCA 2007); Massey v. Charlotte Cnty., 842 So. 2d 142, 146 (Fla. 2d DCA 2003) ("Procedural due process requires both fair notice and a real opportunity to be heard.").

21. The quality of due process required in a quasi-judicial hearing is not the same as that of a full judicial hearing. See Jennings v. Dade Cnty., 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Quasi-judicial proceedings are not

controlled by strict rules of evidence and procedure. Id. However, in a quasi-judicial proceeding the standard of review for the decision on a motion for continuance is the same as in a judicial proceeding, i.e., whether the refusal to grant the continuance is an abuse of discretion. When the Board discussed and voted to approve Gulfview's application, it implicitly ruled on Preston's pending request for continuance. See Sieracki v. Pizza Hut, 599 So. 2d 678 (Fla. 1st DCA 1992) (reflecting that an appellate court may discern a lower court's implicit ruling on a particular issue); see also Clearwater v. Studebaker's Dance Club, 516 So. 2d 1106 (Fla. 2d DCA 1987). Preston had actual notice as early as July 20, 2017, about the proposal to vacate 2,195.09 square feet of right-of-way and fair notice of the October 17, 2017, hearing. Therefore, the Board did not abuse its discretion by not granting Preston's request for continuance.

22. Preston waived his claim of insufficient notice because he received fair notice, attended the hearing, was granted party status, participated in the quasi-judicial proceeding, and availed himself of the opportunity to fully and adequately present his objections. 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 (Fla. 1st DCA 2000). Therefore, his claims of prejudice are not supported by the

substantial competent record evidence or the actions of the Board. See Schumacher v. Town of Jupiter, 643 So. 2d 8 (Fla. 4th DCA 1994) (“[T]he record reflects that appellant, through counsel, had substantial and continuous knowledge of the pending proceedings and did appear at the final hearing . . . and [did] express his objections.”).

23. Preston argued that the Development Order under review does not comply with the essential requirements of law because it does not mandate vacation of the right-of-way as a condition of approval. Preston did not provide any legal authority to support adding such a mandate as a condition of approval. The City represented at oral argument that if the proposed development is not consistent with the Development Order (e.g., if the approximately 2,195 square feet of the South Gulfview Boulevard right-of-way is not vacated), Gulfview will not be able to get a building permit without going through a minor amendment process for a less intense project. This amendment process is contemplated in the Code. See § 4-506.F, Clearwater Cmty. Dev. Code.

24. Preston did not meet his burden to show that the decision of the Board departs from the essential requirements of law.

DETERMINATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the decision of the Community Development Board is AFFIRMED.

DONE AND ORDERED this 6th day of February, 2018, in Tallahassee, Leon County, Florida.



FRANCINE M. FFOLKES
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of February, 2018.

ENDNOTES

^{1/} The City provided DOAH with an electronic record that was duplicated in hard copy by Preston's counsel and provided as a tabbed binder at oral argument. The City objected. That objection is overruled and the tabbed binder is being returned to the City as part of the record because the tabs were referenced during oral argument.

^{2/} *Beach by Design*: A Preliminary Design for Clearwater Beach and Design Guidelines, Adopted by Ordinance No. 6689-01 (February 15, 2001); Amended by Ordinance No. 8497 (January 16, 2014).

^{3/} *Beach by Design*, pp. 23, and 59-60.

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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.