

IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

ISLANDSIDE PROPERTY OWNERS
COALITION, LLC, a Florida
limited liability company,
THE SANCTUARY AT LONGBOAT
KEY CLUB COMMUNITY ASSOCIATION
INC., a Florida non-profit
corporation, and L'AMBIANCE
AT LONGBOAT KEY CLUB CONDOMINIUM
ASSOCIATION, INC, a Florida
non-profit corporation,

Petitioners,

Case No.: 2010CA8261NC

vs.

TOWN OF LONGBOAT KEY, FLORIDA,
a municipality of the State
of Florida, KEY CLUB ASSOCIATES,
LIMITED PARTNERSHIP, a Florida
limited partnership, ISLANDSIDE
DEVELOPMENT LLC, a Delaware limited
liability company, LONGBOAT KEY
ASSOCIATION, INC., a Florida non-profit
corporation, and POSITIVE CHANGE FOR
LONGBOAT KEY, INC., a Florida non-
Profit corporation.

Respondents,

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

This cause came before the Court on a Petition for Writ of Certiorari, the Responses and Reply. Upon consideration of the briefs, the record below, the oral arguments of the parties, and otherwise fully advised, the Court finds that the Petition must be granted for the reasons set forth below.

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Background

Petitioners, Islandside Property Owners Coalition, LLC ("IPOC"), L'ambiance at Longboat Key Club Condominium Association, Inc, and The Sanctuary at Longboat Key Club Community Association, Inc. (collectively, "Petitioners") seek review of a quasi-judicial decision of the Town Commission of Respondent Town of Longboat Key ("Town") entered on June 30, 2010, adopting Ordinance 2009-25 (the "Development Order"). The Development Order amended the Outline Development Plan ("ODP") and the Land Intensity Schedule ("LIS") that govern development within the entire "Gulf Planned Development" zoning district within the Town. The Development Order also approved "Binding Concept Plans," twenty-nine separate "departures" from the Zoning Code, and numerous specific conditions of development for redevelopment of the "North Parcel" and the "South Parcel," which lie to the north and south, respectively, of Longboat Club Road.

The ODP dates back to 1976, and the ODP and LIS have been amended on a number of previous occasions. The record reflects that the Zoning Code provisions that establish the procedures, permitted uses and standards for outline development plans and "planned unit developments" have been amended at various times since 1976.

Respondents Key Club Associates, Limited Partnership and Islandside Development Corp, LLC, (collectively, "Key Club"), applied for the Development Order in the summer of 2009. Between October and December 2009, the Town's Planning and Zoning Board ("PZB") held public, quasi-judicial hearings on the application. The PZB forwarded to the Town Commission a recommendation for approval with numerous conditions.

The Town Commission held hearings on the Key Club application beginning in January 2010. Petitioners objected to a number of aspects of the proposed amendments. In February 2010, Key Club asked the Town Commission to continue the hearings so that Key Club could request amendments to the Zoning Code to support the application. The Town Commission agreed, and in May 2010, adopted amendments to the Zoning Code, including several provisions that are at issue in this case.

After the Town Commission adopted the amendments to the Zoning Code, Key Club amended its application substantially. Petitioners objected at that time that the revised application should be sent back to the PZB based on the combination of the revisions to the Zoning Code and the application itself. The Town determined to proceed with hearings on the revised application.

On May 28, 2010, Monica Simpson, the Town's Director of Planning, Zoning and Building, issued a staff report indicating

she could not recommend approval of the revised application. On June 7, 2010, the Town Commission held a hearing on Key Club's revised plan. At the conclusion of that hearing, the Commission directed staff to come back to it with major revisions to address objections raised by the staff and by various members of the public.

On June 9, 10 and June 14, 2010, the Town Commission held hearings on the staff's "Alternative Redevelopment Plan." The Town Commission approved the Alternative Redevelopment Plan on first reading and set a hearing for the second reading for June 28. Key Club responded by proposing additional major revisions on June 25, 2010. On June 28, 2010, the Town Commission commenced hearings on the second reading, took testimony, and continued the hearing until June 30, 2010, to allow it to consider Key Club's newly submitted revisions.

On June 28, 2010, Director Simpson issued a revised staff report on Key Club's June 25, revised application and proposed conditions. The June 28 Staff Report and Ms. Simpson's testimony indicated that Key Club's application and requested departures did not comply with the Zoning Code. At the conclusion of the June 30, 2010, hearing, the Town Commission voted to approve the Development Order.

Legal Standards for Certiorari Review

The Development Order in question amends the zoning regulations that control development within the GPD zoning district and on Key Club's property. The approval therefore was quasi-judicial and reviewable by certiorari. Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469, 474 (Fla. 1993). In this action, the Court acts in an appellate review capacity rather than in its traditional trial capacity involving fact-finding and initial decision-making. This "first-tier" certiorari review is mandatory rather than the discretionary common law writ of certiorari, and is "akin in many respects to a plenary appeal." Broward County v. G.B.V. International, Ltd., 787 So.2d 838, 843 (Fla. 2001). Brasota Mortgage Co. v. Town of Longboat Key, 865 So.2d 638 (Fla. 2d DCA 2004). Certiorari is a record based, appellate-type review, and the Court's consideration must be limited to issues raised on the record in the proceeding below. Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 195, 200 (Fla. 2003), citing Hormel v. Helvering, 312 U.S. 552, 556 (1941).

Pursuant to City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982), the circuit court reviews a quasi-judicial decision of a local government for three elements: (1) whether the local government provided due process, (2) whether the local government followed the essential requirements of law, and (3)

whether the local government's decision was supported by competent substantial evidence in the record made at the time of the hearing.

The Petitioners assert that the Town Commission departed from the essential requirements of law in a number of areas.

Essential Requirements of Law

The Town Commission was obligated to observe the procedural requirements of the Zoning Code. Snyder, supra. The failure to follow required procedures violates the essential requirements of law. City of Miami v. Rosen, 10 So.2d 307, 309 (Fla. 1942); Escambia County v. Bell, III, 717 So.2d 85, 88 (Fla. 1st DCA 1998). The Town Commission must make any findings of fact required by the Zoning Code. Morningside Civic Ass'n, Inc. v. City of Miami Commission, 917 So. 2d 293 (Fla. 3d DCA 2005).

The Town Commission must apply the Zoning Code correctly, consistently and constitutionally. Broward County v. G.B.V. Int'l, Ltd., 787 So.2d 838, 842-43 (Fla. 2001) (quasi-judicial decisions are "governed by local regulations, which must be uniformly administered"). The Town Commission is obligated to follow the rules of statutory construction. Rinker Materials Corp. v. City of N. Miami, 286 So.2d 552 (Fla. 1973). Where the Zoning Code is clear and unambiguous, it must be interpreted and applied as written. Id.; City of Coral Gables Code Enforcement Bd., v. Tien, 967 So.2d 963 (Fla. 3d DCA 2007).

In determining whether the Town Commission adhered to the essential requirements of law, the Court recognizes the admonition of the Third District Court of Appeal that "it is the unshirkable obligation of the courts, on whatever 'tier' of consideration, 'to say what the law is' and to effect that judgment." Auerbach v. City of Miami, 929 So.2d 693, 695 (Fla. 3d DCA 2006). This Court need not defer to a construction of the Zoning Code by the Town or Ms. Simpson if the language of the Code is clear and unambiguous. Tien, 967 So.2d at 966 ("we not required to and do not defer to an agency's construction or application of a law or ordinance where we are equally capable of reading the ordinance."). Furthermore, the Court will not defer to the Town's interpretation of the Zoning Code where the interpretation is unreasonable or clearly erroneous. Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So.2d 308, 312 (Fla. 4th DCA 1999) ("when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand").

Analysis of Petitioners' Claims

The Development Order Departs from the Essential Requirements of Law by Permitting Commercial Uses Not "Designated" For the GPD Zoning District

① Section 158.002(D) of the Zoning Code states that "All regulations shall be uniform throughout each district. . . . Each district shall designate the permitted uses." Therefore,

any uses permitted in the GPD zone district must be designated for that district. Petitioners assert and none of the Respondents denied that the Development Order permits commercial office, meeting room, spa and golf clubhouse uses on the North Parcel. For the reasons set forth below, the Court finds that the Development Order violates the essential requirements of law by permitting commercial uses on the North Parcel that are not designated for the GPD zoning district.

② Section 158.009(L) of the Zoning Code describes the GPD zone district, and indicates that it permits a "a mix of land uses set forth in the regulations of this chapter." Within § 158.009(L) there is mention of residential uses and tourism uses. ^{158.009(L) (i) - calculation of density for residential or tourism uses.} Section 158.032 of the Zoning Code indicates that tourism uses may be permitted in a planned unit development. Section 158.125 includes a "Use Table" that sets forth the uses permitted in each zoning district within the Town, including the GPD. The Use Table describes uses permitted without site plan review, with site plan review, as accessory uses, and as special exception uses. The Use Table does not include office, meeting rooms, spas or commercial recreational uses as allowable uses in

The Use Table has as "permitted uses with site plan review" the GPD. "1. Planned unit development overlays (see 158.065 through 158.071)."

Section 158.071(A) of the Zoning Code recognizes that a mix of residential and non-residential uses can encompass up to 15% of the land area in the GPD. However that section does not *(for overlays, and this is not an overlay)*

This takes you back to 158.071, as amended, which says non-residential development in the PD approved by Resolution 75-27, as amended, may be permitted to occupy up to 13.60 percent of the total land area of the PD.

expand on the "non-residential uses" designated in the other sections of the Zoning Code. Furthermore, any commercial uses not permitted in the underlying zoning district are prohibited.

The clear and unambiguous language of § 158.002(D) of the Zoning Code requires that any uses permitted in the GPD be "designated," that is, to be indicated, set apart, marked out or made known. Black's Law Dictionary, 6th Ed. Nowhere in the Zoning Code are commercial offices, meeting rooms, spas or commercial recreational uses such as the golf clubhouse set out, indicated or otherwise identified or made known to be permitted in the GPD. The Court finds that the Development Order violates Zoning Code by permitting such uses on the North Parcel and therefore departs from the essential requirements of the law.

The Development Order Departs from the Essential Requirements of Law by Changing the Lands Used for Non-Residential Uses

Ordinance 2010-16 identified fifteen percent of the lands in the GPD that were in non-residential use. Section 158.071(A), as amended by Ordinance 2010-16, states that "nonresidential development in the GPD approved by Resolution 76-7, may be permitted to occupy up to 15.00 percent of the total land area of the GPD." Under the standards of statutory construction, a statute that incorporates another statute (or ordinance) by specific reference takes that ordinance as it is on the date of the adoption of the statute, and does not include

future amendments unless that intent is specifically stated. Overstreet v. Blum, 227 So.2d 197, 198 (Fla. 1969). Here, the ordinance referenced Resolution 76-7, "as amended," but did not indicate the intent to include future amendments. Therefore, based on the language that the Town adopted in Ordinance 2010-16, the 15% of the GDP that can be used for non-residential purposes encompasses only those lands that were in non-residential use as of the date that Ordinance 2010-16 was adopted.

The record demonstrates that the Development Order altered the location of non-residential uses. The record also demonstrates that Ordinance 2009-25 was adopted after Ordinance 2010-16. Therefore, the Court finds that the Development Order violates § 158.071(A), as amended by Ordinance 2010-16, and departs from the essential requirements of law.

The Development Order Departs from the Essential Requirements of Law because It Does not Contain Findings and Conclusions Necessary to Support the Departures

Section 158.067(D) of the Zoning Code requires the Town Commission to adopt findings of fact and conclusions of law to support the approval of amended Outline Development Plans. Section 158.067(D)(3)(g) of the Zoning Code sets out in clear and unambiguous language the findings that the Town Commission must make in order to grant departures from the Zoning Code:

Departures from Article IV of this chapter and Section 158.102 the code of ordinances which would otherwise be applicable to the planned unit development if the plan were not approved, and a statement of any existing hardship and/or a clear and specific statement of how the code departures are necessary or desirable to accomplish one or more of the stated purposes of the planned unit development as set forth in Section 158.065. For a planned unit development without an underlying zoning district (PD, GPD or NPD districts), departures shall be evaluated from the requirements of the zoning district most similar to the proposed project.

The Development Order approved twenty nine separate departures from regulations governing height, setbacks, parking, open space, floor area ratio and other development standards. The Development Order included only four findings related to the departure. Three of those findings state the departures are "consistent with the intent of the Code and in the best interest of the Town." The fourth finding states the departures are

sufficiently justified and together with the Conditions Requisite for Approval set forth in Exhibit "B", will provide a development design that promotes appropriate use, facilitates adequate provision of streets, utilities and public spaces, and preserves scenic qualities of open areas, consistent and compatible with existing development in the GPD and the surrounding area.

The findings adopted in the Development Order do not satisfy the requirement for a "clear and specific statement of how the code departures are necessary or desirable to accomplish one or more of the stated purposes of the planned unit development."

They are generalized conclusions that do not meet the requirements of the Zoning Code.

The Court finds that the Development Order does not meet the requirements § 158.067(D)(3)(g) for findings required to support the departures granted, and that the Development Order therefore departs from the essential requirement of law.

The Development Order Departs from the Essential Requirements of Law because it Does Not Contain the Findings Required by § 158.067(D)(3) and 158.067(K)

Section 158.067(D)(3) of the Zoning Code requires the Town Commission to include "findings of fact and conclusions as to the standards set forth in section 158.102." Section 158.102 of the Zoning Code sets forth a number of requirements for the approval of a site plan. Section 158.067 (K) states that "[t]he town commission shall approve the planned unit development only if it finds that the planned unit development satisfies all of the requirements as set forth in section 158.095 through section 158.103." Sections 158.095 through 158.103 contain the various requirements for final site plan applications and approvals.

The Development Order contains no finding that the planned unit development, as amended, satisfies all of the requirements as set forth in section 158.095 through section 158.103. Finding "P" of the Development Order states "the Outline Development Plan amendment, subject to the Conditions Requisite

for Approval described in Exhibit "B", is consistent with the standards set forth in Section 158.102 of the Zoning Code."

Finding P is inadequate to meet the requirements of § 158.067(D)(3) or § 158.067(K). The clear language of § 158.067(D)(3) mandates that an ordinance approving an amended outline development plan include findings to address each of the standards set forth in § 158.102. The testimony of the Town's Director of Planning, Zoning and Building on June 30, 2010, establishes that the Development Order conditions and binding concept plan were insufficient to guarantee that a later final site plan would meet all of the requirements of § 158.102. In fact, the Town Attorney conceded in oral argument that the plans submitted by Key Club were insufficient to meet these standards.

The Town and Key Club argue that the findings related to site plans apply only if a final site plan is submitted concurrent with the request for an outline development plan approval or amendment. Respondents assert that there is no requirement to submit a final site plan concurrently, and Ms. Simpson testified that the findings should not be required.

The Court must reject the Respondents' position in the face of the clear and unambiguous language of the Zoning Code. The Respondents did not establish, either below or in their briefs, that submitting the information necessary to support the required findings would be unreasonable or impossible. Nor did

Respondents provide evidence or argument that the information required to support the findings was not relevant to the Town Commission's decision. The Court finds that Finding P is legally insufficient to meet the requirements of §§ 158.067(D)(3) and 158.067(K), and the Development Order therefore departs from the essential requirements of law.

The Development Order Departs from the Essential Requirements of Law Because it Does Not Provide the Parking Spaces Required by § 158.028 (D)

Section 158.028 of the Zoning Code addresses the off street parking required for new development. A table in that section identifies the number of parking spaces required for a number of different uses. In calculating and approving the number of parking spaces required by uses on the North Parcel, the Town interpreted the provisions of the Town Code to permit a reduction of required parking for the meeting center, offices and spa on the North Parcel by 50% based on the presence of the hotel on the South Parcel. This reduction was based on the following language in the entry for Tourism units/hotel motel: "1 per unit plus 50 percent of the parking spaces required for additional uses, including restaurants and shops." Ms. Simpson testified, and the Respondents argue, that the "additional uses" referenced in the table include any uses on the same site and that the Development Order approves a single site plan.

However, Ms. Simpson and others testified that the parking might be insufficient during events at the meeting center. Other sub-section of § 158.128 require safe and adequate parking. The Development Order contains a number of conditions that require assessment and the provision of additional parking in the future.

The Court agrees with Petitioners that the Town's interpretation of "additional uses" is unreasonable, and cannot include separate and distinct principal uses on a separate parcel from the hotel. The Town's interpretation of the "additional use" provision creates clear conflicts with the other provisions of the same section of the Zoning Code that require safe and adequate parking. The Town and Ms. Simpson's interpretation is therefore unreasonable, and the Court will not defer to it. Office of Fire Code Official of Collier County Fire Control & Rescue Districts v. Florida Dept. of Fin. Services, 869 So.2d 1233, 1237 (Fla. 2d DCA 2004) (courts are not required to "defer to an implausible and unreasonable statutory interpretation adopted by an administrative agency"); Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So.2d 308, 312 (Fla. 4th DCA 1999).

The Court therefore finds that the parking provided on the North Parcel does not meet the requirements of Section 158.128(D) of the Zoning Code as lawfully interpreted and

applied, and the Development Order therefore departs from the essential requirements of the law.

The Development Order Departs from the Essential
Requirements of Law because Parking Garages are not Permitted
Principal Uses

The Development Order includes two departures that allow the parking garages for the meeting center on the North Parcel and the hotel on the South Parcel to be located one foot from the adjacent buildings. This makes those garages distinct structures.

Petitioners initially argued that the garages violate § 158.127(A), which govern accessory structures, because they are too large for accessory structures under that section. Respondents apparently concede that the parking garages exceed the permitted size of an accessory structure and instead assert that the garages are independent principal uses that are not limited by § 158.128. Petitioners reply that the garages cannot be principal uses because they are not identified as any of the mix of uses permitted by the Zoning Code in the GPD zoning district.

The Court agrees with the Petitioners. Accepting the Respondents' claim that the garages are principal uses and are not subject to the limits on accessory structures, then § 158.002(D) requires parking garages to be a "designated use" in the GPD. Respondents have failed to identify any provision

of the Zoning Code that permits parking garages in the GPD zoning district. Parking garages are not identified as a permitted use in the GPD zoning district in § 158.009(L) or § 158.125. Therefore, the Court finds that the Development Order departs from the essential requirements of law by authorizing the separate parking garage uses.

The Development Order Departs from the Essential Requirements of Law Because the Planning and Zoning Board did not Review the Application Under the Amended Ordinance

Key Club revised its submitted application multiple times after it was reviewed by the Planning and Zoning Board ("PZB"). The amended application that went before the Town Commission on June 30, 2010, substantially differed from the application that was submitted in the fall of 2009. The PZB did not review the amended application that was considered and approved by the Town Commission.

Section 158.067(B)(2) provides for "an application" to be filed with the planning and zoning official. Upon receipt of "the application" from the official, § 158.067(B)(2) requires the PZB to "review the outline development plan and make recommendations to the Town Commission." Section 158.067(C) requires the Town Commission to hold a public hearing on "the planned unit development application," and Section 158.067(D) requires the Town Commission to "review the outline development

plan application and either approve it as submitted, approve it with changes, or disapprove it."

Nothing in the process set forth in § 158.067 permits or contemplates the amendment of "the application" after it is submitted to the planning and zoning official. Nothing in that section permits the Town Commission to hold a hearing on an application that has not been subject to review by the PZB.

Based on the clear and unambiguous language of §§ 158.067 (B) and (C) of the Zoning Code, the Town Commission must review and act on "the application" that was reviewed by the PZB. The amended application that was approved by the Town Commission had not been reviewed by the PZB. The Court finds the Town Commission departed from the essential requirements of law by reviewing and acting on an outline development plan application that was not subject to review and recommendation by the PZB.

Conclusion

For the reasons set forth above, the Town Commission departed from the essential requirements of law in approving the Development Order. None of these departures are immaterial or harmless. The Town Commission's departures from the requirements of the Zoning Code infringed on Petitioners' legitimate expectations under the Zoning Code, and constituted a miscarriage of justice.

Upon remand, the Town Commission may correct its failure to adopt the required findings by adopting a Development Order with the findings required by the Zoning Code, after consideration of the application by the PZB and upon amendment of the application to include sufficient parking. However, if the Town wishes to authorize the proposed meeting center, offices, spa, commercial recreation and parking garage uses, it must first amend the Zoning Code to specifically designate those uses for the GPD zoning district.

Therefore, it is ordered and adjudged that

1. The Petition for Writ of Certiorari is granted;
2. Ordinance 2009-25 is quashed; and
3. The matter is remanded to the Town Commission for such further action or proceedings as may be consistent with the Town's Zoning Code and this Order.

DONE and ORDERED in chambers, Sarasota County Judicial Center, Sarasota, Florida this _____ day of _____, 2011.

ORIGINAL SIGNED
DEC 30 2011

CHARLES E. ROBERTS

Charles E. Roberts, Circuit Judge

Copies furnished to:

Robert Lincoln, Esq.
Jim Syprett, Esq.
David Persson, Esq.
John Patterson, Esq.

- Publix required code changes
- schedule of code changes
- differences of Ky Club vs Publix -

2010-16 Fast-track
ord. done
in 6 wks