IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

TODD SANTORO, BIRCH OHLINGER, MARK FURLANE, and NANCY PAULIC, Petitioners Pro Se,

Petitioners,

vs. CASE NO. 21-CA-177-K

CITY OF KEY WEST, by and through the City Commission and Planning Board, RH SOUTHERNMOST, LLC, a Florida limited liability company, HISTORIC TOURS OF AMERICA, INC., a Florida Corporation,

Respondents.
_____/

OPINION

Through their Amended Petition for Certiorari (filed April 21, 2021), Petitioners challenge the Key West City Commission ("City Commission") zoning decision below, which approved modifications to a 2011 zoning decision by the City's Planning Board. The Planning Board's 2011 action had approved a conditional use allowing expansion of a restaurant. Petitioners claim that the 2011 decision, now a decade old, was ultra vires and void because the Planning Board lacked authority in 2011

under the Code of the City of Key West ("Code") to approve it. They argue here that the entire 2011 restaurant expansion approval was required to be revisited by the City Commission as a prerequisite to considering the current modifications. They also claim that, because the City Commission failed to do so, the decision below that approved the current modifications deprived them of procedural due process, was unsupported by substantial competent evidence, and violated the essential requirements of law. Notably, the record does not reflect any challenge by Petitioners to the 2011 approval until the application below seeking modifications of the Planning Board's 2011 zoning decision.

After oral argument held on September 30, 2021, The Court finds that (i) the Planning Board had the authority to approve the 2020 zoning modification request at issue, its approval was not advisory, and the Code authorized the Planning Board's decision in 2020 as well as its 2011 decision; (ii) the essential requirements of law and procedural due process were observed below in both the Planning Board's and the City Commission's

decisions, and (iii) the record contains substantial competent evidence supporting the decisions. Certiorari is therefore denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

Zoning History

Rams Head Southernmost restaurant ("Rams Head" or "restaurant") leases from RH Southernmost a portion of an irregularly shaped, multi-parcel property in the City of Key West (the "Property"). A. 57, 129.[1] Bordered by Petronia Street, Whitehead Street, and Terry Lane, and situated one block off Duval Street, the Property is divided into two zoning districts: Historic Medium Density Residential District ("HMDR") and, relevant here, Historic Neighborhood Commercial – Bahama Village Commercial Core ("HNC-3"). The HNC-3 zoning regulations, which expressly allow restaurants as conditional uses, cover the portion of the site where the restaurant sits. A. 55, 57, 63. Since 1990, City zoning regulations and approvals have allowed a restaurant on the Property. A. 57.

[1] Record citations are to the Appendix to Respondents RH Southernmost, LLC, and Historic Tours of America, Inc.'s Response to Petitioners' Amended Petition for Certiorari (filed June 25, 2021).

In 1997, the Board of Adjustment granted revised approvals to allow a 45-seat restaurant and various other commercial uses. A. 58. This approval included an express requirement that "a master plan for the site" be submitted prior to requests for any other future use. A. 199-200. In 1998, in adherence with the master plan requirement, the Planning Board approved a master site plan submitted by the then-owner of the Property, which was made of record and binding. A. 58-59, 184-188, 215-218. The approved master site plan included the 45-seat restaurant and an outdoor dining area of 2,285 square feet. A. 58-59, 184-188.

Thirteen years later, in November 2011, the Planning Board granted a conditional use zoning approval for an expanded restaurant, modifying the master site plan and allowing an additional 105 seats and an additional 2,310 square feet of outdoor dining area, all "as shown in the attached site plans dated November 1, 2011…." (Resolution No. 2011-059, hereinafter "2011 Resolution"). A. 58-60, 84-92, 145. The 2011 Resolution brought the Property's restaurant to a new total of 150 seats and 4,595 square feet of outdoor dining area. A. 58-60, 86, 145.

In March 2015, the City's planning staff administratively approved a minor revision to the site plan for the Property, this time reducing outdoor dining space by 76 square feet and relocating that space to the indoors. A. 61. This reduced the total outdoor dining area to 4,519 square feet, but did not change the combined indoor/outdoor dining area. A. 166. Additionally, the planning staff approved the relocation of the majority of the remaining outdoor dining space to a location toward the more commercialized side of the Property. A. 61.

The 2020 Zoning Application

In April 2019, Rams Head commenced restaurant operations at the Property. A. 281, 289, 419. Shortly thereafter, in 2020, RH Southernmost, as the Property owner, filed a zoning application requesting the modification of four existing zoning conditions in the 2011 Resolution. A. 75-77. The four requests were unrelated to increasing the size or scale of restaurant operation; the request sought relocation of two bicycle parking spaces, adding an hour of operation for the restaurant, relocating the trash pickup location, and deleting the requirement that the trash storage area be roofed. A. 75-77.

The City's planning staff recommended that the Planning Board approve the requests to relocate the bicycle parking spaces and eliminate the roof over the waste storage area. A. 71. Planning staff recommended modified approval to allow an 8:00 a.m. opening rather than 7:30 a.m., to which the owner consented. A. 73, 281. Planning staff recommended against relocating the waste pick-up area. A. 73.

The Zoning Hearings Below

The Planning Board held a public hearing on the application on December 17, 2020. A. 274-280. At the hearing, City planning staff reiterated their written recommendations. A. 274-280. The City's director of code compliance addressed code compliance issues regarding the Property. A. 295-296. Representatives of the restaurant, three of the Petitioners (Nancy Paulic, Mark Furlane, and Todd Santoro), and other individuals made presentations. A. 306-318, 324-327, 482, 484-485, 488-493.

At the hearing, Petitioners focused primarily on code enforcement issues, rather than on the application's four operational issues. Another individual, not a party to this action, argued that the Planning Board had no authority to grant final

approval of the application because the 2011 zoning approval for the expanded restaurant should have been processed as a "development plan" under the Code and that the Planning Board had no final authority in 2011 to approve the expanded restaurant. A. 317-318. As a consequence, the individual argued, all subsequent modifications to such plans in the intervening decade were invalid and, as a result, the Planning Board lacked authority to consider the current application a well. A. 317-318.

In response to that argument, the City planning director informed the Planning Board members that the 2011 Resolution properly approved a conditional use, that there was no "major development plan" approved for the property, and that, under the Code, amendments to conditional use approvals (including the current proposed amendments to the 2011 Resolution) were final decisions of the Planning Board unless appealed to the City Commission. A. 337-338. As a result, she stated, the current application was subject to final decision by the Planning Board, unless and until appealed to the City Commission. A. 337-338. Counsel for the Planning Board concurred. A. 337-339.

At the conclusion of the public hearing, the Planning Board approved the application in accordance with the planning staff's recommendation, modifying the 2011 Resolution to allow relocation of the bicycle parking spaces, deletion of the roof over the waste storage area, and modifying the hours of operation to allow an 8:00 a.m. opening. A. 25-29. As further recommended by staff, the Planning Board denied the request to relocate the waste pickup location. A. 25-29. The Planning Board's decision was reflected in Planning Board Resolution 2020-44 ("PB-Resolution 2020-44"). A. 25-29.

Petitioners appealed the Planning Board decision to the City Commission, now themselves arguing in their written appeal that the 2011 Resolution was void and never became final because the Planning Board lacked authority to issue it. A. 10-24. Petitioners argued that the 2011 Resolution should be considered anew by the City Commission before considering the current application, and new, additional conditions to lessen the restaurant's impact should be imposed 10 years after the fact. A. 10, 14. Finally, Petitioners argued that the current application

for modifications of the 2011 Resolution did not meet the applicable Code criteria. A. 10-15.

On February 17, 2021, the City Commission conducted a quasi-judicial hearing on Petitioners' appeal of PB-Resolution No. 2020-44. A. 373-453. Testimony was presented by Petitioners Mark Furlane, Nancy Paulic, and Todd Santoro. A. 375-378, 399, 426-428, 568-569, 576. Collectively, Petitioners reiterated the points in their written appeal.

The City's planning director informed the City Commission that "There is no existing major development plan associated with this property. The current application to review the planning board [2011] conditional use was processed properly." A. 403. She further explained that neither the 2011 nor the current application triggered development plan review because neither was for "new business activity." A. 407. Referring to the approval of the 2011 Resolution, she reiterated it was "not a major development plan," but rather was "a conditional use permit," and that what the City Commission was "currently looking at" was "a conditional use, not a major development plan." A. 409.

The attorney representing the Planning Board before the Commission concurred that the current application was to amend the 2011 conditional use zoning approval, and that no major development plan was involved. A. 412. Accordingly, he stated, the only question before the City Commission was whether the record contained substantial competent evidence to sustain the current Planning Board decision on appeal – and then pointed out the supporting record evidence. Counsel for the restaurant likewise concurred. A. 412.

Agreeing with all of those positions, the City Attorney expressly advised the City Commission:

> [T]he time has passed to appeal that original decision. You are stuck on [PB-Resolution] 2020-44, whatever it is, whatever the planning department ruled upon, whatever the planning board ruled upon. That's what's before you tonight.
>
> The applicant is trying to take it back to 2011. I think the time period in which to appeal that decision has expired. I believe I know my argument, if I was arguing on behalf of the city, it's a development order that the time period in which to appeal the development order has expired.

A. 408.

The City Commission voted to deny the appeal and to affirm the Planning Board decision in PB-Resolution 2020-44, modifying it only to restore a condition unrelated to the current Petition.

Petitioners thereafter filed a Petition and then an Amended Petition, seeking certiorari review and quashal of the decision of the City Commission in CC-Resolution 2021-025. Respondents the City of Key West and, jointly, RH Southernmost LLC, and Historic Tours of America, Inc., filed separate responses to the Amended Petition. Petitioners filed separate replies, and the Court heard oral argument on September 30, 2021.[2]

II. STANDARD OF REVIEW

A circuit court, sitting in its appellate capacity, has jurisdiction to review quasi-judicial zoning actions of local governmental authorities. Fla. R. App. P. 9.030(c)(3) & 9.100(c)(2). In reviewing a petition for writ of certiorari challenging a quasi-judicial zoning decision, the circuit court must determine '"(1) whether procedural due process is accorded, (2) whether

[2] The Court notes that Petitioners' reply briefs do not address the key issues raised by the responses to the Amended Petition, *i.e.*, (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence.'" *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) (quoting *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001)). Certiorari review is limited to the record generated in the lower tribunal. *City of Miami Beach v. East Coastline Dev., Ltd.*, 819 So. 2d 898, 900 (Fla. 3rd DCA 2002) ("Certiorari proceedings to review zoning decisions limit[] the reviewing court's scope of review strictly and solely to the record of proceedings before the City Commissioners.").

III. DISCUSSION

Planning Board Authority

Section 122-868(9) of the Code expressly provides that restaurants in the HNC-3 district (the historic neighborhood commercial zoning district where the restaurant is located), are conditional uses.

> Conditional uses in the historic neighborhood commercial district (HNC-3) are as follows:
>
> * * *
>
> (9) Restaurants, excluding drive-through.

Conditional uses are presumptively permitted uses subject to review and public hearing to determine whether their approval at a particular site meets the requisite Code criteria. *Flowers Baking Co. v. City of Melbourne*, 537 So. 2d 1040, 1041 (Fla. 5th DCA 1989) ("Once the applicant met the initial burden of showing that his application met the criteria of the city zoning code for granting such a [conditional use] permit, the burden [is] on the zoning authority to demonstrate, by substantial, competent evidence presented at a public hearing and made part of the record, that petitioner's application [does] not meet the zoning code requirements[.]").

Under Section 122-63(b) of the Code, the Planning Board has jurisdiction and authority to decide applications for conditional uses:

> Upon receipt of the comments of the development review committee, the planning department shall review the project and provide a report with recommendations to the planning board. The planning board shall consider applications for a conditional use at a regularly scheduled board meeting. *The planning board shall approve, approve with conditions or deny a proposed conditional use.*

(emphasis added). Modifications of conditional use approvals are also reviewed through the conditional use process. *See* Section 122-62(e), Code.

Petitioners urge that Section 108-196(a) should have governed, both in 2011 and in the 2020 proceedings under review here. That section reserves to the City Commission the authority to approve or deny applications for major and minor development plans. It does not abrogate or supersede Section 122-63(b) governing conditional uses:

> …The planning board's decision on a major development plan or a minor development plan for a property in the historic district shall be advisory to the city commission. The decision on a minor development in the historic district shall be placed on the city commission's consent agenda for ratification.

Petitioners' argument fails because the 2020 application, as well as the application in 2011, was not for a major or minor development plan. The section is simply inapplicable. The City planning director explained that development plans are required for a new development of property, specifically, a "new business activity." But here, the Property as a whole had included a restaurant since at least 1990, and there was a binding master site plan covering the entire Property as early as

1998. The 1998 master site plan reflected the already-existing zoning approvals for a restaurant. A full development plan was neither required nor appropriate.

The planning director specifically observed:

> It is not a major development plan. It is a conditional use permit. … *So the approval for the current business is based on a series of approvals over 20 plus years.* …

(emphasis added).

In addition to the plain language of the Code governing conditional uses, which may not be ignored, the director's interpretation of Code requirements governing conditional uses and major and minor development plans is entitled to deference. *See Rollison v. City of Key West*, 875 So. 2d 659, 663 (Fla. 3d DCA 2004) ("Interpretation [of the zoning code] was necessary for licensing, code enforcement, and in order to inform citizens regarding what uses may be made of their property."); *Paloumbis v. City of Miami Beach*, 840 So. 2d 297, 298-99 (Fla. 3d DCA 2003) ("[A]dministrative interpretation is entitled to judicial deference as long as it is within the range of possible permissible interpretations.").

Further, Petitioners' reliance on Section 108-196(a) is misplaced because the specific application below did not seek any additional development at all. It sought no additional square footage or increased restaurant seating that could possibly have invoked review as a major or minor development plan. Rather, the application below sought only modification of operational conditions imposed by the 2011 Resolution that was already more than a decade old – a decision that was never challenged when approved.

This Court's review is limited to the specific zoning decision below. It does not extend to a review of the 2011 Planning Board decision. Regardless of whether Section 108-196(a) should have been applied to the 2011 application for an expanded restaurant, as Petitioners urge, this Court lacks jurisdiction over a zoning decision that is more than a decade old. Review here is limited to the City Commission decision below. *See* Fla. R. App. P. 9.100(c); *Am. Riviera Real Est. Co. v. City of Miami Beach*, 735 So. 2d 527, 528 (Fla. 3d DCA 1999); *see also Medley Hardwoods, Inc. v. Rojas,* 4 So. 3d 1270 (Fla. 1st DCA 2009) (lack of jurisdiction over untimely petition for

certiorari); *Caldwell v. Wal-Mart Stores, Inc.*, 980 So. 2d 1226, 1228-29 (Fla. 1st DCA 2008) (similar); *Grace v. Town of Palm Beach*, 656 So. 2d 945, 946 (Fla. 4th DCA 1995) (similar).

Substantial Competent Evidence Supported the Approval

This Court, in reviewing the record on a petition for writ of certiorari, may not weigh the evidence, but rather it must look to see whether competent substantial evidence exists in the record to support the decision of the City Commission. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (on certiorari review of an administrative decision, "the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency.").

So long as the record contains substantial competent evidence supporting the decision, this Court will not review the record for contrary evidence nor reweigh the supporting evidence. *See Metropolitan Dade Cty. v. Blumenthal,* 675 So.2d 598, 606 (Fla. 3d DCA 1995).

Here, the Court finds the analysis and expert recommendation of the City's professional planning and code

enforcement staff constituted ample substantial competent evidence to support the City Commission's decision. These staff analyses provided a detailed review of the application and found that it met the Code criteria for conditional uses set forth in Section 122-62 of the Code. Specifically, staff found that three of the four requests for operational changes would be compatible, with a modification of the requested opening to from 7:30 a.m. to 8:00 a.m. By the same standard, staff recommended against relocation of the trash pickup area as not compatible or desirable for the surrounding areas. On that modified basis, they recommended approval of the application. The Planning Board and the City Commission adopted the staff recommendation.

Professional staff recommendations alone constitute competent substantial evidence supporting the decision. *See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.,* 857 So. 2d 204-205 (Fla. 3d DCA 2003) (city chief of police, public works director, and chief zoning official deemed experts whose testimony constituted substantial and competent evidence); *Metro. Dade Cnty. v. Fuller*, 515 So. 2d 1312, 1314 (Fla. 3d DCA

1987); *Hillsborough Cnty. Bd. of Cnty. Comm'rs v. Longo*, 505 So. 2d 470, 471 (Fla. 2d DCA 1987).

Further, staff's professional recommendations were bolstered by the factual information contained in the verified application by RH Southernmost, in the City staff's 2010 Zoning Verification Letter, and in the hearing testimony of the planning director and of the director of code compliance.

Finally, the Court notes that Petitioners' challenges were general, which is wholly insufficient to defeat the showing here of competent substantial evidence. Accordingly, their challenges must be rejected. *See, e.g., City of Hialeah Gardens* 857 So. 2d at 202, 204 ("generalized statements in opposition to a land use proposal, even those from an expert, should be disregarded").

Petitioners Were Afforded Due Process

The record reflects that the Petitioners were afforded procedural due process in the proceedings below. Petitioners were properly noticed of the Planning Board public hearing in 2020 and the City Commission hearing in 2021. In fact, three of the four petitioners made presentations to the Planning Board at the 2020 hearing, and all four Petitioners made presentations to

the City Commission. They were given an ample opportunity to be heard in all the proceedings.[3] The Amended Petition fails to cite any procedural rule not complied with by the Planning Board and City Commission.[4]

To the extent that Petitioners seek to argue that the Planning Board or City Commission violated their procedural due process rights by failing to take up the 2011 Resolution for de novo review and decision, their claim must fail. It is unsupported by any statute, ordinance, or case law. *See, e.g., Caldwell*, 980 So. 2d at 1228 ("An untimely appeal cannot be revived by obtaining a new order to the same effect as the original and then filing the notice of appeal within thirty days of the more recent order."); *Am. Riviera Real Est. Co.*, 735 So. 2d at 528 ("Appeal from such a quasi-judicial land use decision can only be accomplished by filing a petition for writ of certiorari in the

[3] The Court notes that two of the Petitioners, Birch Ohlinger and Nancy Paulic, testified to the City Commission that they were participants in the 2011 proceedings. A. 391-94.

[4] Petitioners argued at one point that the Planning Board deleted a condition that the Property owner had not requested and that had not been advertised, but the City Commission restored that provision and its treatment has not been argued by Petitioners here. The condition involved a matter not relevant to the current dispute, relating to local restaurant hiring requirements.

circuit court within thirty days of the rendition of the order to be reviewed."); *Grace*, 656 So. 2d at 945 ("The trial court was correct in determining that it lacked jurisdiction to review de novo the action of the town commission granting a special exception to change the use of a well-known estate from residential to a private club. The commission's decision was reviewable only by a petition for writ of certiorari filed within 30 days of the action, as the special exception was approved in a quasi-judicial proceeding.").

There Was No Departure from the Essential Requirements of Law

Section 122-63(e) of the City's Code of Ordinances, which governed the 2011 zoning application provides: "Revisions or additions to a conditional use shall be reviewed based on the criteria of Section 122-62 (b) and (c)." Section 162-62 of the City's Code of Ordinances sets forth the specific criteria for conditional use approval, including land use compatibility, sufficient site size, and infrastructure to accommodate the proposed use, hazardous waste, and, proper use of mitigative techniques.

The professional staff recommendation previously described detailed the specific criteria applicable to the application and provided substantial competent evidence of how the criteria were met. The Planning Board adopted the staff findings and recommendations and the City Commission affirmed the Planning Board decision. While Petitioners may disagree with professional staff, the Planning Board, and the City Commission, such a disagreement does not constitute a departure from the essential requirements of law. *Miami-Dade County v. City of Miami*, 315 So. 3d 115, 119 (Fla. 3d DCA 2020) ("a departure from the essential requirements of law is more than a legal error; it is one that results in a 'gross miscarriage of justice'") (quoting *Haines City Cmty. Dev.*, 658 So. 2d at 527); *Vill. of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d 19, 21 (Fla. 3d DCA 2012) ("The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential

illegality but not legal error.") (quoting *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985)).

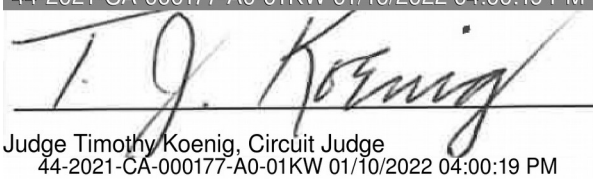
Other than the complaint that the City Commission failed to take up the 2011 Planning Board zoning action to decide it anew and de novo, the Petition does not set forth any other purported essential requirement of law that the quasi-judicial bodies below allegedly failed to observe. That asserted "failure" was not a departure from the essential requirements of law, and the essential requirements of law were met in all respects by the proceedings below.

CONCLUSION

For the foregoing reasons, this Court **DENIES** the Amended Petition for Certiorari.

DONE AND ORDERED at Key West, Monroe County, Florida this Monday, January 10, 2022.

44-2021-CA-000177-A0-01KW 01/10/2022 04:00:19 PM



Judge Timothy Koenig, Circuit Judge
44-2021-CA-000177-A0-01KW 01/10/2022 04:00:19 PM

cc:

Christopher S Carver
christopher.carver@akerman.com

cary.gonzalez@akerman.com

Nicole Villamar
nicole.villamar@akerman.com
magda.cabra@akerman.com

Shawn D. Smith, Esq.
sdsmith@cityofkeywest-fl.gov

Todd Santoro
todd@toddsantoro.com

Birch Ohlinger
birch1937@yahoo.com

Nancy Paulic
nancypaulic@yahoo.com

Mark Furlane
mark.furlane@gmail.com

Michael T Burke
burke@jambg.com
cardona@jambg.com