

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502014CA002127XXXXMB

CITIZENS FOR THOUGHTFUL GROWTH,
WEST PALM BEACH, INC., NANCY
PULLUM, and DONNA LOU MCCORMACK
Petitioners,

v.

CITY OF WEST PALM BEACH, and
FLAGLER INVESTORS, LLC,
Respondents.

Opinion filed: **DEC 22 2014**

Petition for Writ of Certiorari from the City Commission for the City of West Palm Beach,
Florida

For Petitioners:

Robert D. Critton, Jr., Esq.
Santo DiGangi, Esq.
Critton, Luttier and Coleman
303 Banyan Blvd., Suite 400
West Palm Beach, FL 33401
rcrit@bclclaw.com
sdigangi@bclclaw.com
czaguirre@bclclaw.com

For Respondent City of West Palm Beach:

Douglas N. Yeargin, Esq.
Christopher Van Hall, Esq.
Office of the City Attorney
401 Clematis St., 5th Floor
West Palm Beach, FL 33401
yeargind@wpb.org
cvanhall@wpb.org

For Respondent Flagler Investors:

Elliot H. Scherker, Esq.
Brigid F. Cech Samole, Esq.
Greenberg Traurig, P.A.
Wells Fargo Center, Suite 4400
333 Southeast Second Ave.
Miami, FL 33131
scherkere@gtlaw.com
cechsamoleb@gtlaw.com
miamiappellateservice@gtlaw.com

Mark F. Bideau, Esq.
Greenberg Traurig, P.A.
777 South Flagler Drive, Suite 300 E
West Palm Beach, FL 33401
bideaum@gtlaw.com
thomasd@gtlaw.com

J. Michael Burman, Esq.
Justus W. Reid, Esq.
Dana L. Spader, Esq.
Reid Burman
222 Lakeview Ave., Suite 1160
P.O. Drawer 2926
West Palm Beach, FL 33401
jmb@reidburmanlaw.com
jwr@reidburmanlaw.com
dls@reidburmanlaw.com
asb@reidburmanlaw.com

PER CURIAM.

Petitioners challenge an ordinance and a resolution approved by the City Commission of the City of West Palm Beach for a high-rise condominium building on a property commonly known as the “Chapel by the Lake.” Petitioners have raised a number of issues; however, we reject all but one issue without discussion. The only issue meriting discussion is whether the City Commission departed from the essential requirements of the law in granting a waiver of the City of West Palm Beach Zoning Code Section 94-207(c)(2), without the support of certain findings from the City of West Palm Beach Planning Board. Petitioner argues that Zoning Code Section 94-207(c)(2) clearly and unambiguously states that its requirements may not be waived without such findings by Planning Board, and therefore the City Commission departed from the essential requirements of the law. We agree and remand for further proceedings.

Factual Background

The Chapel by the Lake site is 3.211 acres. Respondents seek to build a high-rise apartment complex on the site, a project which would require the site to be rezoned to

Residential Planned Development (“RPD”). However, under Zoning Code Section 94-207(c)(2), RPD zoning requires a minimum of ten acres. Accordingly, Respondents submitted for City approval (1) “Ordinance #4487-13,” a request to change the zoning designation of the entire property from Community Service Planned Development to Multifamily High Density Residential, with a further rezoning to RPD, and (2) “Resolution #252-13,” a request to approve waivers, development regulations and conditions for the RPD to be built. Among the requested waivers was “Waiver Request #1,” which sought a waiver of Zoning Code Section 94-207(c)(2).

On July 16, 2013, the Planning Board considered the application and voted to deny Ordinance #4487-13 and Resolution #252-13, and, by implication, Waiver Request #1. The Planning Board made no findings. A series of changes to the proposed building followed, although a waiver of Zoning Code Section 94-207(c)(2) was still required. On January 21, 2014, after a public hearing during which Petitioners were only given three minutes to present any argument, the City Commission unanimously approved the final version of the application, including Waiver Request #1. Petitioners now appeal the approval of Ordinance #4487-13 and Resolution #252-13, arguing that Waiver Request #1 was improperly granted without Planning Board findings or approval.

Discussion

We find that the City Commission erred by approving a waiver of Zoning Code Section 94-207(c)(2) despite lacking any of the required findings from the Planning Board. Zoning Code Section 94-207(c)(2) provides that “[t]he minimum area required for a [RPD] district shall be ten acres.” A smaller area may only be approved for RPD zoning “upon findings by the planning board and the city commission that one or more of the following conditions exist” in the proposed area:

- (a) Particular circumstances justify such reduction.
- (b) Requirements for residential planned development zoning and the benefits to be derived from such zoning can be derived in such lesser area.
- (c) Permitting such lesser area for residential planned development zoning is in conformity with the comprehensive plan.

Id. (emphasis added). Petitioners argue that the clear and unambiguous language of the Zoning Code requires approval by both the City Commission and the Planning Board before a waiver of Zoning Code Section 94-207(c)(2) can be granted. Respondents counter that despite the language of the Zoning Code, the Planning Board is generally an advisory body and therefore its findings or approval are not required.¹

“Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration.” *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). “Of course, that deference is not absolute, and when the agency’s construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand.” *Id.* The burden of showing an agency’s construction is clearly erroneous “is satisfied if it is shown that the agency’s construction clearly contradicts the unambiguous language of the rule or if it is arbitrary or unsupported by evidence.” *Citizens of State of Fla. v. Wilson*, 568 So. 2d 1267, 1271 (Fla. 1990) (internal quotation marks and citations omitted).

Zoning Code Section 94-207(c)(2) states that the ten-acre requirement for RPD zoning may only be waived “upon findings by the planning board and the city commission.” (emphasis added). This language is clear and unambiguous – the City Commission cannot grant a waiver of Zoning Code Section 94-207(c)(2) without one or more of the specified findings by the

¹ Respondents accuse Petitioners of “sandbagging” on this issue. This argument is disingenuous, as Petitioners’ ability to debate and comment on the application was so severely limited. Additionally, the issue of the Planning Board’s role here did, in fact, come before the City Commission when the question was posed as to whether the matter needed to go back to the Planning Board before coming before the City Commission.

Planning Board. Nevertheless, the City Commission interprets this section of the Zoning Code as not actually requiring Planning Board findings or approval, because the rest of the Zoning Code consistently relegates the Planning Board to an advisory role. This interpretation contradicts the unambiguous language of Zoning Code Section 94-207(c)(2), and is therefore clearly erroneous. *See Citizens of State of Fla.*, 568 So. 2d at 1271. Where a city's interpretation of its own zoning code is clearly erroneous, as is the case here, it cannot stand. *See Las Olas Tower Co.*, 742 So. 2d at 312.

Respondents are correct in that the Planning Board generally serves in a recommendatory capacity with regard to the City Commission. Except for the provision at issue here, the Zoning Code generally states that the Planning Board serves in an advisory role.² However, Section 94-207(c)(2) explicitly deviates from this advisory role, giving both the Planning Board and the City Commission equal power to essentially veto RPD zoning for areas less than ten acres. This is not an aberration; the Zoning Code contains several other instances of such deviation.³

The City created the Zoning Code and is required to adhere to it. Citizens and applicants should be entitled to rely on its plain and unambiguous language. If Respondents disagreed with the Planning Board, they could have appealed to the City Commission. *See* Zoning Code § 94-37(e) (“Any person aggrieved or affected by a decision of the planning board may appeal to the city commission. Appeals shall be filed in writing with the planning and zoning administrator

² *See, e.g.*, Zoning Code § 94-31(a) (“The city commission shall . . . consider . . . amendments to these regulations, provided that the city commission has first obtained the recommendation of the planning board”); Zoning Code § 94-31(b)(3) (“The functions and powers of the planning board shall include . . . (c) To recommend whether or not specific proposed developments conform to the principles and requirements of the comprehensive plan as to growth and improvement; . . . (l) To provide advice and recommendations to the city commission on each application for a change to the official zoning map”).

³ *See, e.g.*, Zoning Code § 94-206(b)(6) (“upon an affirmative recommendation of the planning board, the city commission may allow additional uses within a planned community district”) (emphasis added); Zoning Code § 94-206(b)(7) (“an area of lesser size may be approved for a planned community zoning upon findings by the planning board and the city commission that one or more of the following conditions exist”) (emphasis added); Zoning Code § 94-207(d)(2) (“an area of lesser size may be approved for commercial planned development zoning upon findings by the planning board and the city commission of the following”) (emphasis added); Zoning Code § 94-344(4) (“design and layout of all subdivisions of land shall be approved by the city engineer, the planning board and the city commission”) (emphasis added).

within ten days from the date of the decision by the planning board.”). Rather than seek an appeal, Respondents bypassed the Planning Board and submitted the new plans directly to the City Commission in derogation of the code.

Petitioners have thus demonstrated that the City Commission departed from the essential elements of the law by approving a waiver of Zoning Code Section 94-207(c)(2) despite a complete absence of the required findings from the Planning Board. Accordingly, the Petition for Writ of Certiorari is GRANTED, the City Commission’s approval is QUASHED, and the case is remanded for further proceedings consistent with the foregoing.

BROWN, HAFELE, and OFTEDAL, JJ., concur.