

WCJ  
Caballero, J.

OAP  
Prescott, J.

RCE  
Figarola, J.

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CITY ATTORNEY'S OFFICE

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT,  
IN AND FOR, MIAMI DADE  
COUNTY, FLORIDA

EUROAMERICAN GROUP, INC.

APPELLATE CASE NO.:  
10-561 AP

Petitioner,

v.

CITY OF MIAMI BEACH

Respondent.

Opinion filed January 25, 2012

On appeal from a resolution rendered by the City of Miami Beach City Commission affirming a decision of the City of Miami Beach Design Review Board.

Neisen Kasdin, for Petitioner.

Jose Smith, City Attorney, Gary M. Held, First Assistant City Attorney, City of Miami Beach Office of the City Attorney, for Respondent.

Before CABALLERO, PRESCOTT, and FIGAROLA, JJ.

CABALLERO, J.

The case before this Court on appeal arises from a resolution from the City of Miami Beach City Commission affirming a decision of the City of Miami Beach Design Review Board. Appellant Euroamerican Group, Inc. owns property along the Venetian Causeway on Belle Island in Miami Beach, Florida. The property currently includes four three-story apartment buildings known as the Belle Isle Court Apartment. Appellant seeks to demolish the existing structures and build two new buildings for use as residential multi-unit rental properties (herein referred to as the "Project"). Appellant submitted an application to the City of Miami Beach

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Design Review Board in November 2008 for approval to develop the Project. Over the next eighteen months, Appellant and the City of Miami Beach Design Review Board conferred on the plans for the Project, and after multiple rounds of negotiations and numerous revisions to the Project, the Design Review Board held a public hearing and rendered a decision on the Project on July 6, 2010. As memorialized in their formal written decision, the Design Review Board approved Appellant's application for the Project subject to 70 conditions proposed by the Design Review Board staff to make the Project consistent with the City of Miami Beach Design Review Criteria, which are part of the City of Miami Beach zoning scheme. One of these conditions included reducing the height of the Southeast building of the Project from five floors to four floors, eliminating eight units from the Project.<sup>1</sup>

Appellant requested the City of Miami Beach City Commission review the Design Review Board's decision under section 118-262 of the Code of the City of Miami Beach. See § 118-262, Code of the City of Miami Beach. The City Commission, sitting in a quasi-judicial capacity, held a hearing on November 17, 2010 to review the Design Review Board's decision. Upon conducting its review pursuant to a first-tier certiorari standard, the City Commission affirmed the Design Review Board's decision, finding that the Design Review Board afforded Appellant procedural due process, followed the essential requirements of law, and that the decision was supported by competent substantial evidence. Appellant now appeals the case to this Appellate Court, contending that, with regard to the condition requiring the Southeast building to be reduced in height, the City Commission's resolution deviates from the essential requirements of law, and further that the resolution is not supported by competent substantial evidence.

#### Standard of Review

First-tier certiorari review of an action taken by a zoning authority consists of a review of the record to determine: (1) whether procedural due process was accorded; (2) whether the "essential requirements of the law" were observed<sup>2</sup>; and (3) whether the administrative findings and judgment are supported by "competent substantial evidence." City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982); see also Dusseau v. Metro. Dade C'ty Bd. Of C'ty

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<sup>1</sup> The record indicates that this condition is the only condition at issue in this case, as Appellant agreed to the other 69 conditions imposed by the Design Review Board.

<sup>2</sup> Applying the correct law is synonymous with observing the essential requirements of law. Dusseau v. Metro. Dade C'ty Bd. of C'ty Comm'rs, 794 So. 2d 1270, 1274 (Fla. 2001); Haines City Comm'ty Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

Comm'rs, 794 So. 2d 1270, 1274 (Fla. 2001); Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

On first-tier certiorari review, the circuit court should not re-weigh the evidence or substitute its judgment for that of the zoning authority. Vaillant, 419 So. 2d at 626; Bd. Of County Com'rs of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993); Dusseau, 794 So. 2d at 1275-76; Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000); DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The reviewing court may not reweigh the "pros and cons" of conflicting evidence. Dusseau at 1276. As long as the record contains competent substantial evidence to support the zoning authority's decision, its decision should be upheld and certiorari denied. Id.; see Florida Power & Light Co. 761 So. 2d at 1093-94; Heggs, 658 So. 2d at 530.

In a certiorari proceeding, the reviewing court is prohibited from performing a *de novo* review, and by law is limited to a review of the record made at the previous zoning hearing. Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 943 (Fla. 5th DCA 1988). Appellant concedes that procedural due process was afforded, but contends that the City Commission's resolution to uphold the Design Review Board's decision departs from the essential requirements of law and is not supported by competent substantial evidence.

#### Essential Requirements of Law

In the eighteen month review process for the Project, Appellant and the Design Review Board staff conferred on multiple occasions about suggested revisions to the design of the Project, and multiple versions of the Project were submitted to the Design Review Board staff for their consideration. Throughout this review process the Design Review Board staff generated multiple reports which reviewed the design of the Project, analyzed its compliance with the zoning standards as well as the Design Review Criteria, and made recommendations on modifications that would make the Project consistent with the City's zoning scheme. The Design Review Board staff made note of problems with the massing and height of the Southeast building of the Project throughout the review process, despite Appellant making significant changes to the design over time. In multiple staff reports, the Design Review Board staff recommended that the Southeast building of the Project be revised to address issues with the massing and height of the building. In the most recent staff report, written just prior to the Design Review Board hearing, the staff made the following recommendation:

[S]taff would continue to recommend that the massing and height of the southern portion of the project (east wing fronting the Venetian Causeway) be reduced by one (1) full floor, in order to create a transition from the ground level to the main 5-story building massing. As presently designed, the 5-story massing still overwhelms the low slung history Venetian Causeway bridges, which in addition to being locally designated, are listed on the National Register, and designated an American Scenic Highway. Reducing the height of the structure would help mitigate the adverse impact of the large development project.

In addition, the Design Review Board staff recommended the following condition to approving the Project:

The height of the southeast portion of the project (east wing fronting the Venetian Causeway) shall be reduced by a minimum of one (1) floor, subject to the review and approval of staff.

After holding a public hearing regarding the Project on July 6, 2010, the Design Review Board found that the Project was not consistent with the Design Review Criteria, accepted the aforesaid condition recommended by the Design Review Board staff, and approved the Project subject to compliance with the condition. Appellant challenged this condition and requested the City of Miami Beach City Commission review the Design Review Board's decision. The City Commission affirmed the Design Review Board's decision.

Appellant contends that the Design Review Board could not condition approval of the Project on the reduction in height of the Southeast building. Specifically, Appellant asserts that the Design Review Board could not reduce the height of the Project because the City of Miami Beach Design Review Criteria do not allow the Design Review Board to "trump" the objective zoning standards in Section 142-155. Furthermore, Appellant contends that "compatibility" within the Design Review Criteria does not provide the Design Review Board with the authority to regulate height. Appellant's main argument on appeal is that, since the Design Review Board lacked the authority to condition approval of the Project on a height reduction, the City Commission's resolution affirming the Design Review Board's decision departed from the essential requirements of law. Accordingly, this Court must determine whether the City Commission departed from the essential requirements of law in affirming the Design Review Board's decision.

Before delving any further into this issue, the Court must first address Appellee's assertion that Appellant has made a constitutional argument regarding the application of the Design Review Criteria. Appellee contends that Appellant's argument is not that the City departed from

the essential requirements of law, but rather that the Design Review Board could not follow the City of Miami Beach zoning scheme because the scheme itself is unconstitutional. Such constitutional arguments are not appropriate on first-tier certiorari review. See Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003)(“a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance. ...The constitutionality of the ordinance must be determined in original proceedings before the circuit court, not by way of a petition for writ of certiorari.”); First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114, 1115 (Fla. 3d DCA 2000)(“The constitutionality of the ordinance must be determined in original proceedings before the circuit court, not by way of a petition for writ of certiorari.”)

Appellant’s argument can be interpreted either as a general claim that “compatibility” can never trump objective zoning standards, or as a specific claim that “compatibility” in the Design Review Criteria does not take precedence over the objective zoning standards. Since this review is on first-tier certiorari, this Appellate Court will consider the argument only to the extent that it focuses specifically on the language and interpretation of the City of Miami Beach zoning scheme, and will not consider any constitutional arguments which may potentially be made with regard to the zoning scheme as a whole.

#### City of Miami Beach Design Review Criteria and Design Review Board

At issue in this case is the interaction between Sections 142-155 and 118-251 of the Code of the City of Miami Beach (“Code”). See §§ 142-155; 118-251, Code of the City of Miami Beach, Florida. Section 142-155 sets out the zoning standards for RM-1 zoning districts, within which Appellant’s property is located, and states that the “maximum height allowable” for buildings is 50 feet and 5 stories. See § 142-155(b), Code of the City of Miami Beach, Florida. Section 118-251 of the Code, the Design Review Criteria, provides a list of criteria the City of Miami Beach Design Review Board must consider when reviewing proposed projects. See § 118-251, Code of the City of Miami Beach, Florida.

The Design Review Criteria, located in section 118-251 of the Code of the City of Miami Beach, Florida, contain the following 17 criteria the Design Review Board must consider when reviewing an application:

- (1) The existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, trees, drainage, and waterways.

- (2) The location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping structures, signs, and lighting and screening devices.
- (3) The dimensions of all buildings, structures, setbacks, parking spaces, floor area ratio, height, lot coverage and any other information that may be reasonably necessary to determine compliance with the requirements of the underlying zoning district, and any applicable overlays, for a particular application or project.
- (4) The color, design, selection of landscape materials and architectural elements of exterior building surfaces and primary public interior areas for developments requiring a building permit in areas of the city identified in section 118-252
- (5) The proposed site plan, and the location, appearance and design of new and existing buildings and structures are in conformity with the standards of this article and other applicable ordinances, architectural and design guidelines as adopted and amended periodically by the design review board and historic preservation board and all pertinent master plans.
- (6) The proposed structure, and/or additions or modifications to an existing structure, indicates a sensitivity to and is compatible with the environment and adjacent structures, and enhances the appearance of the surrounding properties.
- (7) The design and layout of the proposed site plan, as well as all new and existing buildings shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.
- (8) Pedestrian and vehicular traffic movement within and adjacent to the site shall be reviewed to ensure that clearly defined, segregated pedestrian access to the site and all buildings is provided for and that all parking spaces are usable and are safely and conveniently arranged; pedestrian furniture and bike racks shall be considered. Access to the site from adjacent roads shall be designed so as to interfere as little as possible with traffic flow on these roads and to permit vehicles a rapid and safe ingress and egress to the site.
- (9) Lighting shall be reviewed to ensure safe movement of persons and vehicles and reflection on public property for security purposes and to minimize glare and reflection on adjacent properties. Lighting shall be reviewed to assure that it enhances the appearance of structures at night.
- (10) Landscape and paving materials shall be reviewed to ensure an adequate relationship with and enhancement of the overall site plan design.
- (11) Buffering materials shall be reviewed to ensure that headlights of vehicles, noise, and light from structures are adequately shielded from public view, adjacent properties and pedestrian areas.
- (12) The proposed structure has an orientation and massing which is sensitive to and compatible with the building site and surrounding area and which creates or maintains important view corridor(s).

- (13) The building has, where feasible, space in that part of the ground floor fronting a street or streets which is to be occupied for residential or commercial uses; likewise, the upper floors of the pedestal portion of the proposed building fronting a street, or streets shall have residential or commercial spaces, shall have the appearance of being a residential or commercial space or shall have an architectural treatment which shall buffer the appearance of the parking structure from the surrounding area and is integrated with the overall appearance of the project.
- (14) The building shall have an appropriate and fully integrated rooftop architectural treatment which substantially screens all mechanical equipment, stairs and elevator towers.
- (15) An addition on a building site shall be designed, sited and massed in a manner which is sensitive to and compatible with the existing improvement(s).
- (16) All portions of a project fronting a street or sidewalk shall incorporate an architecturally appropriate amount of transparency at the first level in order to achieve pedestrian compatibility and adequate visual interest.
- (17) The location, design, screening and buffering of all required service bays, delivery bays, trash and refuse receptacles, as well as trash rooms shall be arranged so as to have a minimal impact on adjacent properties.

See §118-251, Code of the City of Miami Beach.

Appellant claims that the Design Review Criteria do not give the City of Miami Beach the authority to regulate height through "compatibility" requirements, and cites to two cases in support of its argument - City of Tampa v. City Nat. Bank of Florida, 974 So. 2d 408 (Fla. 2d DCA 2007), also known as the *Hyde Park* Case, and Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593 (Fla. 5th DCA 1991).

City of Tampa v. City Nat. Bank of Florida

In the *Hyde Park* Case, the City of Tampa zoning authority denied a proposed high-rise project in a designated historical district on the basis that the proposed structure was too tall for its historic district location. City of Tampa v. City Nat. Bank of Florida, 974 So. 2d 408, 410 (Fla. 2d DCA 2007). The applicant appealed the City's decision, and the Thirteenth Circuit Court concluded that the historic district's design guidelines effectively "trumped" the zoning administrator's review of the project for compliance with the zoning standards. Id. at 411. On review, the Second District Court of Appeal reviewed the City of Tampa zoning scheme and agreed with the circuit court that the regulatory scheme did not allow the City to regulate the height of a proposed building based on the historic district design guidelines. Id. at 414-15. The Second District Court's decision was based primarily on a review of the interaction between

section 27-77 and 27-216 of the City of Tampa Code. Id. at 411. The court found that Section 27-77 governed the City's power to regulate height, and further found that the enabling statute for the review commission expressly stated that the historic district guidelines could not conflict with any zoning ordinances. Id. at 412-13.

Colonial Apartments, L.P. v. City of DeLand

In this case, the applicant sought to build an apartment complex on a site in DeLand, Florida. Colonial Apartments, L.P. v. City of DeLand, 577 So. 2d 593 (Fla. 5th DCA 1991). The zoning district for the site set a maximum allowable density of 16 units per acre. The applicant submitted a plan for approval that provided a density of 13 units per acre, but the city commission conditioned approval of the plan subject to a revised density of 6 units per acre. The city claimed that the plan as submitted did not satisfy certain portions of the zoning scheme and did not achieve an aesthetic and compatible relationship with the adjacent properties.

The applicant appealed the decision, and the circuit court affirmed the city's decision, holding that the city had discretion to condition plan approval on a reduction of project density. On second-tier certiorari review, the Fifth District Court of Appeal held that the plain meaning of the zoning ordinance provided for a specific density and could not be changed through the term "compatibility" as it appears in the statement of intent of the zoning ordinance. Id. at 596-98.

In rebuttal to Appellant Euroamerican Group Inc.'s argument, Appellee City of Miami Beach cites to Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So. 2d 308 (Fla. 4th DCA 1999), to support the idea that "compatibility" may be used to regulate the height of a proposed project.

Las Olas Tower v. City of Ft. Lauderdale

In this case, the applicant sought to build a 45-story condominium complex within a Central Business District ("CBD") which had both an overlay and underlying zoning district. Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So. 2d 308 (Fla. 4th DCA 1999). While the underlying district had a maximum building height of 55 feet, the overlay district for the CBD expressly stated that the height limit from the underlying district did not apply. Id. at 310-11. The city's planning and zoning board denied the application for site plan approval, claiming the proposed building was too tall. Id. at 313. The applicant challenged the use of height as a review criterion, based on the fact that the CBD overlay district removed the height limitation of the underlying zoning district. Id. The Fourth District Court of Appeal noted, however, that the development review requirements within the city's zoning scheme still applied to the plan, and one such



criterion was that “the development be compatible with, and preserve the character of, the adjacent neighborhoods....” Id. The court held that “[t]his requirement of neighborhood compatibility required a consideration of several factors, including the scale, mass, location, size and *height* of the proposed project” and also held that compatibility was a valid standard for review of site development. Id. (emphasis in original).

#### Interpreting the City of Miami Beach Zoning Scheme

Cognizant that the cases cited by the parties come to different conclusions regarding their interpretation on the applicability of “compatibility” within the respective zoning schemes, it is apparent that they do not create a general rule on the applicability of “compatibility” within zoning schemes. Instead, these cases guide this Court in interpreting the City of Miami Beach zoning scheme to determine how “compatibility” functions within the scheme. Generally, when considering the interpretation of an ordinance on first-tier certiorari review of an administrative action, the reviewing court will give judicial deference to the administrative body interpreting the ordinance so long as it is reasonable. See e.g. Rollison v. City Of Key W., 875 So. 2d 659 (Fla. 3d DCA 2004); Las Olas Tower Co., 742 So. 2d at 312; Winemiller v. Feddish, 568 So. 2d 483, 485 (Fla. 4th DCA 1990). Such deference is not absolute, however, and when an agency’s interpretation of an ordinance is unreasonable or clearly erroneous, it cannot stand. Las Olas Tower Co., 742 So. 2d at 312 (citing Legal Envtl. Assistance Found., Inc. v. Board of County Comm’rs of Brevard County, 642 So. 2d 1081, 1083-84 (Fla.1994); Woodley v. Department of Health and Rehabilitative Servs., 505 So. 2d 676, 678 (Fla. 1st DCA 1987); Kearse v. Department of Health and Rehabilitative Servs., 474 So. 2d 819, 820 (Fla. 1st DCA 1985)).

Limiting our review to the language of section 142-155 and 118-251 of the Code of the City of Miami Beach, and without considering any potential constitutional arguments, this Court is convinced that the City of Miami Beach zoning scheme contemplates that projects submitted to the Design Review Board must comply with both the stated zoning standards for the underlying zoning district as well as the “compatibility” requirements of the Design Review Criteria. This conclusion is evidenced by the language of the Design Review Criteria itself. Criterion 3 of the Design Review Criteria requires the Design Review Board to review proposed projects to ensure their compliance with the relevant zoning district. See §118-251, Code of the City of Miami Beach, Florida. Above and beyond Criterion 3, the Design Review Criteria contemplates a “compatibility” review of proposed projects. Criteria 6 and 12 requires the Design Review Board

to review a project for the purpose of determining whether a proposed structure is compatible with the environment, any adjacent structures, the building site, and surrounding area. See §118-251, Code of the City of Miami Beach, Florida. The inclusion in the Design Review Criteria of both a review of compliance with the underlying zoning district and a review for “compatibility” indicates that proposed projects must satisfy both requirements.

Because the Design Review Criteria requires that proposed structures be both compliant with the underlying zoning district and “compatible” with the adjacent structures and surrounding area, the Design Review Criteria may reasonably be interpreted to require a change in height below the maximum allowable height stated in the underlying zoning district. Accordingly, the “maximum height allowable” in section 142-155(b) of the Code is not an entitlement, but rather may be modified to comply with the “compatibility” requirements in the Design Review Criteria. Therefore, this Appellate Court finds that the City of Miami Beach City Commission adhered to the essential requirements of law in affirming the Design Review Board decision on Appellant’s Project.

#### Competent Substantial Evidence

Appellant also argues that, even if the Appellee City has the authority to reduce the height of the Southeast building of the Project based on the Design Review Criteria, there was no competent substantial evidence to support the decision. Competent substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred, and should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Fact-based testimony and recommendations from professional staff can constitute competent substantial evidence. See City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202, 204-05 (Fla. 3d DCA 2003). However, the mere presence of materials such as zoning maps, professional staff recommendations, aerial photographs, and testimony in objection, is not sufficient to be competent substantial evidence - such materials must contain relevant valid evidence which supports the Commission’s decision. See Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708, 709 (Fla. 3d DCA 2000). Appellant claims that the Design Review Board staff reports and other materials provided to the Design Review Board do not contain relevant valid evidence, and therefore do not support the condition reducing the height of the

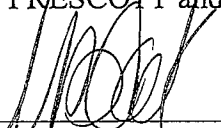
Southeast building of the Project. Appellant argues that the staff reports only make conclusory assertions that the Project "overwhelms" the Venetian Causeway.

Appellee argues, and this Appellate Court agrees, that the Design Review Board staff recommendations and record evidence contain valid evidence which supports the Commission's decision imposing the height condition on the Project. Unlike in Jesus Fellowship, Inc., where none of the materials, staff reports, or testimony supported the zoning authority's decision, the record in the instant case contains several Design Review Board staff reports which discuss the issue of the Southeast building's height and compatibility with its surroundings which support the Design Review Board's decision. Indeed, it appears that the Design Review Board relied upon these staff recommendations to impose the condition, and the City Commission determined that the Board's decision was based on the recommendations.

This Appellate Court finds that the Design Review Board staff's review of the Project materials, and its subsequent recommendations submitted through staff reports and oral testimony, constitute competent substantial evidence and contain valid relevant evidence to support the Board's decision. Since both the Design Review Board and City Commission relied upon these recommendations to make their decisions, those decisions are supported by competent substantial evidence.

THEREFORE, Appellant's petition for writ of certiorari is hereby DENIED, and the City of Miami Beach City Commission's resolution upholding the decision of the Design Review Board is AFFIRMED.

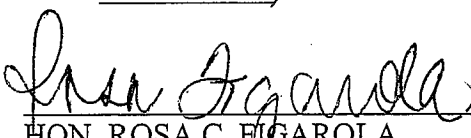
PRESCOTT and FIGAROLA, JJ., concur.

  
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HON. MARCIA B. CABALLERO  
CIRCUIT COURT JUDGE

Date: 1/24/12

  
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HON. ORLANDO A. PRESCOTT  
CIRCUIT COURT JUDGE

Date: Jan 23, 2012

  
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HON. ROSA C. FIGAROLA  
CIRCUIT COURT JUDGE

Date: 1/19/12

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