



MEMORANDUM

Office of the City Attorney

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TO: Mayor and City Commissioners

DATE: September 12, 2005

FROM: City Attorney

SUBJECT: Board of Adjustment

At the August 22, 2005 City Commission meeting, the City Commission asked the City Attorney to prepare a memorandum addressing the options the Commission would have if it disagreed with a decision rendered by the Board of Adjustment.

The Board of Adjustment was created by City Ordinance. The Board's duties are set forth in Section 30-354, Gainesville Code of Ordinances. The Board consists of five members appointed by the City Commission for a term of three years and the members hold office until her/her successor has been appointed.

Among other duties, the Board decides appeals where it is alleged that an administrative official of the City made an error in any order, requirement, decision or determination relating to the enforcement of the land development code or building chapters. (There are some exceptions). The Board can review or affirm, or may modify the order, requirement, decision or determination of the administrative official of the City, "and to that end shall have the powers of the administrative official from whom the appeal is taken". §30-354(d)(4). The Board exercised this power in Banana Planet, Inc. Petition No. 10APP-05BA.

As the Board is created by ordinance of the City Commission, the Commission has the ability to change the composition, procedures or duties of the Board by ordinance. Indeed, the Commission can, by ordinance, dissolve the Board, and take back the Board's duties or assign them to another Board. (See Section 4.03 of the City Charter, attached as Exhibit "1".) However, the City Commission does not have the power to set aside a decision of the Board unless provided for in the ordinance. There is no provision for the City Commission to do so in the current ordinance. (See Section 30-354, Code of Ordinances, attached as Exhibit "2".)

If a party disagrees with the decision of the Board, a request for a rehearing can be filed with the Board. Section 30-354(m) provides that a rehearing may be requested by the petitioner or agent, the City Manager or designee, the City Commission, or an affected person who presented oral or written testimony or evidence at the initial hearing. That request must be filed within 10 days of the decision of the board and will be considered at the next meeting of the Board.


If the Board denies the request for rehearing, or upon further consideration, upholds the initial order or enters a different order, the denial of the request for rehearing or the subsequent order may be appealed. Section 30-354 (n) provides that "[a]ny affected person aggrieved by a

decision of the board may appeal the decision to a court of competent jurisdiction within 30 days of the date of the decision”.


An appeal from the Board of Adjustment would be in the form of a Petition for Writ of Certiorari asking the Circuit Court to review the quasi-judicial action of the Board. The Court's review would be a three part standard: (1) whether the Board accorded procedural due process; (2) whether the Board observed the essential requirements of law; and (3) whether the Board's decision was supported by competent, substantial evidence. The reviewing court does not reweigh conflicting evidence presented before the Board, it “merely examines the record below to determine whether the lower tribunal had before it competent, substantial evidence to support its findings and judgment”. DeGroot vs. L. S. Sheffield, 95 So. 2d 912, 916-17 (Fla. 1957). The Court must uphold the agency's decision if the three parts are met, even “if the agency's findings were based upon conflicting evidence and even though the court itself might have reached a different conclusion on the same evidence”. Board of Trustees v. Sistrunk, 310 So.2d 405, 406 (Fla. 3d DCA 1975).

In order to appeal this decision, a written transcript of the hearing must be obtained and filed together with all of the evidence placed before the Board. Parties would then file written briefs and may ask for oral argument before the Court. The final decision of the Circuit Court is then appealable to the District Court of Appeal but on a very limited basis of review.

Prepared by:


Elizabeth A. Waratuke,
Litigation Attorney

Submitted and
Approved by:


Marion J. Radson,
City Attorney

Attachments (2)

EAW/cgow

ARTICLE IV. BOARDS AND COMMITTEES

4.01. Boards and committees.

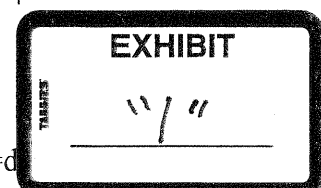
The commission may create advisory boards and committees as it deems necessary. The members of all boards and committees shall serve without compensation, shall consult with and advise the commission and the various departments, and shall perform all duties and powers prescribed by ordinance or resolution.

4.02. City plan board.

- (1) The commission shall create one or more city plan boards which shall:
 - (a) Plan for the proper development and growth of the city.
 - (b) Prepare comprehensive plans or elements or portions of plans to guide future development and growth.
 - (c) Make recommendations pertaining to comprehensive plans or elements or portions of plans.
 - (d) Monitor and oversee the effectiveness and status of the comprehensive plan, and recommend changes in the comprehensive plan as are from time to time required.
 - (e) Review proposed land development regulations and land development codes, or amendments thereto, and make recommendations as to the consistency of each proposal with the adopted comprehensive plan or element or portion of the plan.
 - (f) Perform all other functions, duties, and responsibilities assigned to it by the commission.
- (2) Each board shall issue reports and hold public hearings as required by law. The commission may not take final action on any matter pending before a board until the board has completed its report in accordance with law.
- (3) The commission may not declare itself as the city plan board with responsibility under this section.

4.03. Building and land development regulatory boards.

- (1) *Creation and composition.* The commission may, by ordinance, create one or more building and land development regulatory boards. Each member of a building and land development regulatory board shall be appointed by the commission and may not be an official or an employee of the city. The commission may designate a city plan board to serve as a building and land development regulatory board.
- (2) *Powers and duties.* A building and land development regulatory board may:
 - (a) Hear and decide appeals alleging an error in any order, requirement, decision, or determination made by an administrative official of a department in the enforcement of any building or land development regulation.



(b) Hear and decide any special exception under the jurisdiction of the board as prescribed by a building or land development regulation.

1. The board may not grant a special exception unless it finds that the grant is in harmony with the purpose and intent of any building or land development regulation and will not adversely affect the public interest.

2. The board may qualify any special exception with appropriate conditions and safeguards.

3. The board may prescribe a reasonable time limit within which the action for which the special exception is required must be begun or completed, or both, after which the special exception automatically expires if the time limit has not been strictly satisfied.

(c) Grant variances to a regulation that are not contrary to the public interest when, owing to special conditions, a literal enforcement of the regulation would result in unnecessary and undue hardship. The board may prescribe appropriate conditions and safeguards in conformity with any building or land development regulation. The board may prescribe a reasonable time limit within which the action for which the variance is required must be begun or completed, or both, after which the variance automatically expires if the time limit has not been strictly satisfied. A variance to a building or land development regulation may not be granted unless the board first finds:

1. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings similarly situated;

2. That the special conditions and circumstances do not result from the actions of the applicant;

3. That the requested variance will not confer on the applicant any special privilege that is denied by the regulation to other lands, buildings, or structures in the same land use category;

4. That literal interpretation of the regulation would deprive the applicant of rights commonly enjoyed by other properties in the same land use or zoning category under the terms of the regulation and would work unnecessary and undue hardship on the applicant;

5. That the variance granted is the minimum variance required to make possible the reasonable use of the land, building, or structure; and

6. That the variance is in harmony with the general intent and purpose of the regulation and that such variance will not be injurious to the abutting lands or to the area involved or otherwise detrimental to the public welfare.

(3) The commission may grant, by ordinance, any additional powers and duties to a building and land development regulatory board in accordance with applicable law.

(4) The board may not grant any variance, special exception, or appeal which is not consistent with either the comprehensive plan or element or portion of the plan, or with the building or land development regulations, except as permitted under paragraph (2) (c).

(5) A violation of conditions and safeguards prescribed under the terms of a granted variance or special exception constitutes a violation of the building or land development regulations.

Sec. 30-354. Board of adjustment.

(a) *Created.* The board of adjustment is hereby created and shall consist of five members appointed by the city commission. After the initial appointments each member shall be appointed for a term of three years and shall hold office until his/her successor has been appointed and qualified. Vacancies shall be filled for the unexpired term of any member whose office becomes vacant. Terms shall expire November 1 of the year the term expires.

(b) *Residency requirements for members.* Members of the board of adjustment shall be and remain bona fide residents of the city. If at any time any members of the board of adjustment fail to be and remain a resident of the city, the person shall be automatically disqualified and removed from the board.

(c) *Officers and rules.* The board of adjustment shall elect a chairperson from its membership, and adopt rules for the conduct of its affairs which shall be in full force and effect when approved by the city commission.

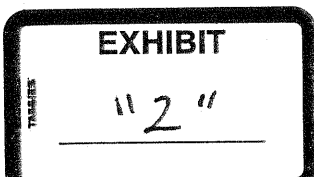
(d) *Powers and duties.* The board of adjustment shall have the following powers and duties under this chapter and building chapter provisions of the city:

(1) *Administrative review.* Unless otherwise specified in the Code of Ordinances, the board of adjustment shall have the power and duty to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official of the city in the enforcement of the land development code or building chapters. The board shall not have the power or duty to hear and decide appeals from any order, requirement, decision, or determination when such are made as part of, or are inherent in, a Chapter 2, Article V, Division 8, notice of violation, or Division 6, civil citation, issued by a code enforcement officer or sworn law enforcement officer, unless otherwise provided in this Code of Ordinances. This shall not preclude hearing and deciding requests for special exceptions or variances, which may include matters also at issue in a notice of violation or civil citation. Public notice shall be given in the manner specified in subsections 30-354(j) and (l).

(2) *Special exceptions.*

a. The board of adjustment shall have the power and duty to hear and decide only such special exceptions as are specifically authorized by the terms of the Code of Ordinances; to decide such questions as are involved in determining whether special exceptions should be granted; and to grant special exceptions with such conditions and safeguards as are appropriate under the Code of Ordinances; or to deny special exceptions when not in harmony with the purpose, intent and requirements of the Code of Ordinances.

b. A special exception is hereby defined as a granting of permission for



a use or action where specific provisions for such special exceptions are made in the Code of Ordinances. Such exceptions would not be appropriate generally or without restriction throughout the zoning district or other section of the Code of Ordinances but, if controlled as to number, area, location or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, prosperity or general welfare.

c. A special exception shall not be granted by the board of adjustment unless and until:

1. A written application for a special exception is submitted indicating the section of the zoning ordinance under which the special exception is sought and stating the grounds on which it is requested.

2. Notice of public hearing on the special exception shall be given in the manner prescribed in subsections 30-354(k) and (l).

3. The public hearing shall be held whereat any party may appear in person, or by agent or attorney.

4. The board of adjustment shall make findings that it is empowered under the section of the Code of Ordinances described in the application to grant the special exception, and that the granting of the special exception, with any appropriate conditions and safeguards that the board may deem necessary, will not adversely affect the public interest.

d. In reaching its conclusion and in making the findings required in subsection (d)(2)c.4. of this section, the board of adjustment shall consider and weigh the intent, factors and standards delineated in the applicable portion of the Code of Ordinances, and shall show in its record such factors as were considered and the disposition made thereof. Further, the board shall find in the case of any of these factors and standards, where they may be relevant and applicable, and in the case of other factors which the board may find relevant and applicable, that the purposes and requirements for granting the special exception have been met by the applicant.

e. In granting any special exception, the board of adjustment may prescribe appropriate conditions and safeguards in conformity with the standards herein set out and in conformity with the Code of Ordinances. Violation of such conditions and safeguards, when made a part of the terms under which the special exception is granted, shall be deemed a violation of the Code of Ordinances punishable under applicable sections of the Code of Ordinances. In the granting of a special exception, the board of adjustment may prescribe a time limit within which the action for which the special exception is granted shall begin or be completed, or both. Failure to begin or complete, or both, such action within the time limit shall void the special exception.

f. The board of adjustment shall not entertain any petition for a special exception within two years after the denial of a request for the same special exception for the same property.

(3) *Variances generally.*

a. The board of adjustment shall have the power and duty to authorize upon appeal from the decision of the administrative official in specific