

SMITH
&
ASSOCIATES
ATTORNEYS AND COUNSELORS AT LAW

May 23, 2007

William G. Collins II
Indian River County Attorney
1840 25th Street
Vero Beach, Florida 32960

By Facsimile

RE: Proposed Amendments to the Table of Uses for
Industrial Districts of LDR Chapter 911

Dear Mr. Collins:

This will follow up the meeting of the Professional Services Advisory Committee held on May 17, 2007. During the meeting the Advisory Committee failed to adopt any position or recommendation with respect to the proposed changes to the allowable uses for properties within the Light Industrial (IL) zoning district. We believe the failure of the Committee to adopt a recommendation for the County Commission consideration was due largely to two factors: 1) the failure to have a quorum present of members who were eligible to vote on the issue, and; 2) the improper focus of a substantial portion of the meeting on the specific merits of the pending Ocean Concrete project, rather than a focus upon the needs of the County with respect to future land development regulations.

Further, we believe that each of these factors can and should be mitigated by re-scheduling of the Advisory Committee meeting. Because of the importance of the Advisory Committee in the development of County ordinances concerning land development regulations and because its recommendation is *required* to be made, we hereby request that such a meeting of the Advisory Board be scheduled to address the proposed ordinance change. The importance of the Advisory Committee, and the fact that it is required to make recommendations to the Board, is fully demonstrated by the language of Board Resolution 90-156 (copy attached) that originally created the Committee. That Resolution notes that the Board created the Committee to "inform and advise the Board" and to make "formal" and "professional recommendation[s]" to the Board, and at Subsections 3a-b *requires* that such recommendations be made:

- a. The Professional Advisory Committee *shall* review all ordinances (chapters) pertaining to Land Development Regulations and the Comprehensive Plan which are existing or proposed and *shall make its professional recommendation* to the Board of County Commissioners.

b. The Professional Advisory Committee *shall* review all policies, rules and regulations pertaining to said regulations and plans which are existing or proposed and *shall make its professional recommendation* to the Board of County Commissioners.

(Emphasis added.) Pursuant to basic rules of statutory construction, the use of “shall” clearly indicates a mandatory requirement. *See, e.g., State v. Goode*, 830 So. 2d 817, 823, (Fla. 2002); *McGraw v. R and R Investments, Ltd.*, 877 So. 2d 886, 892 (Fla. 1st DCA 2004). Thus, the Committee cannot abdicate its responsibility based upon a temporary lack of quorum, but instead must reschedule to a future meeting where the necessary quorum can be present, at which time the Committee can fulfill its duty to make a recommendation to the Board. Given that the Committee has 11 members plus 3 alternates, the necessary quorum can easily be obtained at such future meeting.

As you are aware, prior to the meeting three members had filed and declared a conflict of interest which precluded their ability to vote on the proposed change. In addition two other members acknowledged a voting conflict at the time of the meeting. This left only 4 members of the 11 member Committee present, which does not constitute a “quorum” for purposes of taking action. We raised the question of quorum during the meeting, but at that time you indicated that you felt the members with voting conflicts could still be counted for purposes of attaining a “quorum.” This issue was squarely addressed by Attorney General Opinion (AGO 85-40) wherein it was found that the effect of Florida’s conflict of interest law “precludes such members who are prohibited from voting from being considered to be a part of the quorum for purposes of such matter.” As noted by the Attorney General “[T]he abstention (from voting) requirement of the amended statute causes a legal infirmity as to the public officer’s authority on the matter in question and therefore has the effect, in my opinion, of eliminating that individual from being considered as part of the quorum for purposes on that matter.” Thus the requirements of Florida’s conflict of interest laws “causes the quorum to be composed of only those members of the governing body entitled to vote.” *Id.* (See copy attached)

Because no quorum was present at the meeting of the Professional Services Advisory Committee, any action, including the lack of recommendation, is void ab initio. This defect in the process can be remedied by rescheduling the meeting, at a time when a quorum can be present, and the Advisory Committee has sufficient voting members to take action.

In rescheduling the meeting, we strongly encourage that the discussion of the committee, and comments from members of the public, be restricted to a discussion of the pros and cons of the proposed change in land use regulations, as opposed to discussion of the particular merits of the Ocean Concrete project. It was readily apparent from the meeting that the entire ordinance amendment process is being abused by opponents of the Ocean Concrete project, regardless of the detriment to future County development. We believe that it is completely inappropriate to use changes to land use regulations as a means for evaluating a particular project.

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As we discussed after the meeting of the Advisory Committee, my client is very concerned that its rights are being lost in the process, as vocal opponents of a currently allowable land use seek to manipulate the process to defeat Ocean Concrete's property rights. My client has expended enormous amounts of time, energy, and money to address the comments of the Technical Review Committee in order to demonstrate entitlement to a development approval under current law. We believe that principles of fair play and equitable estoppel should preclude any efforts to now retroactively apply a change in the allowable uses of Ocean Concrete's real property. Indeed the representation of staff to the Advisory Committee was that: "Because the site plan application is active, changes to the IL district regulations will not affect that application unless special effective date provisions are added to the amendment ordinance."

Any efforts to apply a retroactive change in the allowable uses of Ocean Concrete's real property would amount to an inordinate burden on the vested right to a specific use of real property, and would be compensable under the Bert J. Harris, Jr. Private Property Rights Act, Section 70.001, Florida Statutes. Under the Act, the determination of vested rights must be made by applying the principles of equitable estoppel under the common law.

In closing, we request that a meeting of the Professional Services Advisory Committee be appropriately noticed to consider the proposed change in the IL zoning District. At such meeting, the discussion and comments should focus on the merits of the proposed change in ordinance, not on the merits of any particular project, including Ocean Concrete's project. Finally, the Advisory Committee should indicate whether it believes a change in ordinance should be applied prospectively to new applications, or should be applied retroactively to pending applications that have already been initially submitted to the Technical Review Committee.

Please let us know if you have any questions or concerns, and let us know of your decision.

Sincerely,

Geoffrey D. Smith

Attachments

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