**NOTICE OF PROCEEDINGS PURSUANT TO SEC. 70.51, FLORIDA STATUTES**

**NOTICE IS HEREBY GIVEN** of the intention of the Special Magistrate to hold a Mediation beginning at **9:00 a.m. on June 11, 2019 at the Offices of the County Administrator and of the County Attorney, 221 S. Palafox Place, Fourth Floor, Pensacola, Florida, 32502** and an Evidentiary Hearing beginning at **9:00 a.m. on July 10, 2019 and July 11, 2019, in the Escambia County Central Office Complex, Room 104, 3363 West Park Place, Pensacola, Florida**, to consider the following Request for Relief under Section 70.51, Florida Statutes, the Florida Land Use and Environmental Dispute Resolution Act:

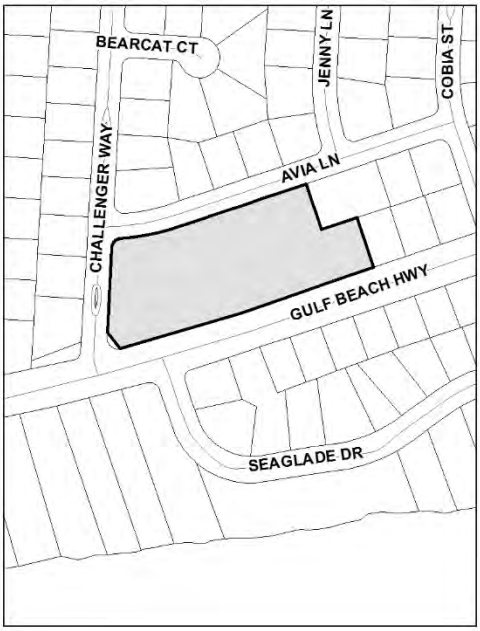
| | |
|---|---|
| Case No.: | AP-2017-02 |
| Location: | 11400 Blk Gulf Beach Highway |
| Requested by: | David Theriaque, Agent for Teramore Development, LLC and Shu Shurett and Leo Huang, Owner |

Please see the attached Request for Relief filed by the applicant.

Any person who wishes to appeal any decision made by Escambia County with respect to any matter considered at such meeting or hearing, will need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. If you have any questions, please contact the Development Services Department at 595-3475. **Please view our website daily for notice of meeting cancellation(s).**

BOARD OF COUNTY COMMISSIONERS
ESCAMBIA COUNTY, FLORIDA

Below map is for display purposes only.



THERIAQUE & SPAIN LAW FIRM
CELEBRATING 23 YEARS

REPLY TO: TALLAHASSEE

March 14, 2019

**VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY**

Honorable Luman May, Chairman
Escambia County Board of
County Commissioners
221 Palafox Place,
Pensacola, Florida 32502

**Re:** ***Request for Relief Pursuant to Section 70.51, Florida Statutes, from Decision of the Escambia County Board of Adjustment Denying Administrative Appeals***

Dear Chairman May:

Our law firm represents Shu Cheng Shurett, Leo Huang, and Teramore Development, LLC ("Teramore"), in regard to the above-referenced matter. Pursuant to the Florida Land Use and Environmental Dispute Resolution Act, Section 70.51, *Florida Statutes* (2018):

> Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner's real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.[1]

***This letter shall serve as a formal request for relief pursuant to the Florida Land Use and Environmental Dispute Resolution Act, and must be forwarded to a Special Magistrate mutually agreed upon by Shu Cheng Shurett, Leo Huang, Teramore, and Escambia County, Florida ("County") within ten (10) days after the County's receipt of this letter.***[2] The matter shall then proceed to mediation with the Special Magistrate, and, if necessary, an informal hearing.[3]

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1 § 70.51(3), Fla. Stat.

2 *See id.* at § 70.51(4).

3 *See id.* at § 70.51(17)(a)-(c).

**TALLAHASSEE**
433 NORTH MAGNOLIA DRIVE
TALLAHASSEE, FLORIDA 32308
(850) 224-7332
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**WINDERMERE**
9100 CONROY WINDERMERE ROAD, SUITE 200
WINDERMERE, FLORIDA 34786
(407) 258-3733
FAX: (407) 264-6132

www.theriaquelaw.com

Shu Cheng Shurett and Leo Huang own property with Parcel Identification Number 23-3S-31-2001-0000-000 in Escambia County, Florida ("Property"). Teramore has a purchase contract for the Property. Shu Cheng Shurett, Leo Huang, and Teramore, therefore, qualify as an "owner" for purposes of the Florida Land Use and Environmental Dispute Resolution Act.[4]

Teramore desires to construct a retail store located along Gulf Beach Highway on the Property, which is designated as MU-S (Mixed-Use Suburban) on the County's Future Land Use Map and zoned C (Commercial) pursuant to the County's LDC. The Mixed-Use Suburban future land use category and the Commercial zoning district both authorize "retail sales" as a permissible use.

Teramore's proposed retail store would consist of a one (1) story, 9,100 square foot building with a maximum height of twenty-two (22) feet, including any rooftop apparatus. Further, the proposed retail store would be developed on only 1.25 acres of a heavily-vegetated 3.4-acre site, with the remainder of the property (*i.e.*, 2.15 acres or more than 63% of the site) being left undeveloped and serving as a natural vegetative buffer to surrounding uses. (*See* Exhibits "A," "B," and "C").

On July 24, 2017, Horace Jones, as the County's Director of Development Services, concluded that Teramore's proposed retail store was not compatible and did not meet certain locational criteria in the County's LDC. (A copy of Mr. Jones' July 24 letter is attached hereto as Exhibit "D."). On August 7 and 8, 2017, Shu Cheng Shurett, Leo Huang, and Teramore filed Administrative Appeals of Mr. Jones' July 24 decision. On October 18, 2017, the Escambia County Board of Adjustment ("BOA") denied the above-referenced Administrative Appeals.

On November 16, 2017, Shu Cheng Shurett, Leo Huang, and Teramore (collectively, "Petitioners") sought judicial review of the BOA's decision to deny their Administrative Appeals. On August 3, 2018, Escambia County Circuit Court Judge Scott Duncan ruled in favor of the Petitioners and entered an "Order Granting Petition for Writ of Certiorari" ("Court Order"), concluding, in part, as follows:

> The record presented to this Court reveals that the BOA's denial of the Petitioner's [sic] Administrative Appeal ***was not supported by competent substantial evidence***.
>
> * * * *
>
> The Court finds the BOA's decision to find that Petitioners' proposed retail store is not compatible with existing and potential uses is not supported by competent substantial evidence. ***The***

---

[4] *See id.* at § 70.51(2)(d).

> ***evidence presented at the hearing in support of the County's request that the proposed use be denied can only be characterized as speculative and conclusory***. The record reveals that the Planning Official's determination that the proposed development did not meet the criteria set forth in (e)(5) was not supported by any facts or evidence. . . . The record indicates that the County simply disagreed with the Petitioners' expert without presenting facts that contradicted the opinions set forth in her compatibility analysis. . . . ***The County's opinion that the proposed development was not compatible and would not achieve long term compatibility was simply a bald conclusion and without more has no evidentiary value***.

(Court Order at page 4-5) (citation omitted) (emphasis supplied).

> The Court also finds that the BOA ***departed from the essential requirements of law*** by ignoring the code's language that a petitioner's compatibility analysis provides competent substantial evidence of unique circumstances regarding the potential uses of a parcel that were not anticipated by the alternative criteria. . . . Nothing in the plain language of Section 3-2.10(e)(5) of the County's LDC authorizes the County Staff or the BOA to simply disregard the Petitioner's compatibility analysis. . . . The County never considered that proposition when rendering its opinion, and neither did the BOA when it rejected the Petitioners' appeal. ***This is not a mere simple legal error, but rather a failure to apply the plain language of the Code***.
>
> * * * *
>
> For the reasons set forth above, ***the Court finds that the BOA's decision denying the Petitioners' Administrative Appeal was not supported by competent substantial evidence, and that the BOA departed from the essential requirements of the law***.

(Court Order at page 7) (emphasis supplied).[5] Consequently, the Circuit Court quashed the BOA's October 18 decision.

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[5] A copy of the Court's Order is attached hereto as Exhibit "E."

On February 20, 2019, the BOA conducted another quasi-judicial hearing on the Administrative Appeals. Rather than granting the Administrative Appeals in accordance with the Court Order, the BOA allowed the County Staff to present "new" evidence and then voted again to deny the Administrative Appeals by a four (4) to two (2) vote. (A copy of the BOA's Final Order is attached hereto as Exhibit "F.").

By conducting a second *de novo* hearing on our clients' Administrative Appeals, the BOA violated the Florida Supreme Court's decision in *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838 (Fla. 2001), wherein the Florida Supreme Court stated:

> When the order is quashed, as it was in this case, it leaves the subject matter . . . pending before the . . . commission . . . and ***the parties stand upon the pleadings and proof as it existed when the order was made. . . .***

*Id.* at 844 (emphasis supplied); *see also Tamiami Trail Tours, Inc. v. R.R. Comm'n*, 174 So. 451, 454 (Fla. 1937) ("When the order is quashed, as it was in this case, it leaves the subject matter, that is, the controversy pending before the tribunal, commission, or administrative authority, as if no order or judgment had been entered and the parties stand upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not been entered.").

More recently in *Department of Highway Safety & Motor Vehicles v. Azbell*, 154 So. 3d 461 (Fla. 5th DCA 2015), the Fifth District Court of Appeal rejected the department's argument that it was entitled to conduct a new evidentiary hearing after the circuit court on certiorari review had determined that the department's decision was not supported by competent substantial evidence. In so doing, the Fifth District held:

> Petitioner contends that the law is "well settled" that "when a circuit court determines that there has been an evidentiary error in an administrative hearing ***and/or*** that there is not substantial competent evidence in the record to support the administrative order, the circuit court is limited to quashing the administrative order and remanding the matter to Petitioner for further proceedings." It cites three precedents from this court in support of this proposition. ***Contrary to Petitioner's representation, however, none of the cited authorities supports the latter part of its argument – that a new hearing is required when the evidence is lacking because of the unexcused failure of Petitioner to present sufficient proof.***
>
> * * * *

> All of these cases involved situations where the merits of the controversy were not reached because one party or the other was denied the right to present pertinent evidence. ***The instant case involves a simple failure by Petitioner to meet its evidentiary burden***. To grant a new hearing in situations like this simply affords Petitioner another bite at the apple and could result in an endless series of hearings until it finally presents sufficient evidence to support suspension. ***Absent circumstances where Petitioner is prevented from presenting material evidence it should only get one opportunity to present its proof***. *See Doll v. Dep't of Health*, 969 So.2d 1103, 1107 (Fla. 1st DCA 2007), and cases cited therein (in administrative proceeding, upon failure of agency to present sufficient proof of costs, no entitlement to second opportunity).

*Azbell*, 154 So. 3d at 462 (emphasis supplied); *cf. St. Joe Paper Co. v. Connell*, 299 So. 2d 92, 93 (Fla. 1st DCA 1974) ("A second bite at the apple may not be granted simply because the plaintiffs have failed to meet their burden of proof. The flame has flickered out!").

Accordingly, Shu Cheng Shurett, Leo Huang, and Teramore respectfully submit that the BOA's Final Order denying the Administrative Appeal is unreasonable and unfairly burdens the use of the Property. I appreciate your prompt attention to this matter. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

David A. Theriaque

David A. Theriaque

Enclosures

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of this Request for Relief has been provided by overnight delivery to the **Honorable Luman May, Chairman**, 221 Palafox Place, Pensacola, Florida 32502; and that a true and correct copy of this Request has been furnished by Electronic Mail to the **Honorable Luman May, Chairman** (district3@myescambia.com), County Attorney Alison Rogers (aarogers@co.escambia.fl.us), Assistant County Attorney Kristan Hual (kdhual@myescambia.com), and Assistant County Attorney Meredith Crawford (mdcrawford@myescambia.com) on this 14th day of March 2019.

David A. Theriaque

DAVID A. THERIAQUE, ESQUIRE


We worked with the local residents on this design early on through phone calls and community meetings. Those that were willing to work with us helped create our building and site design. For that reason we feel confident the end product will appease the majority of those in the community.

The building will be full masonry as depicted in the attached elevation and renderings, a design that includes about $140,000 in upgrades above the standard Dollar General Prototype.

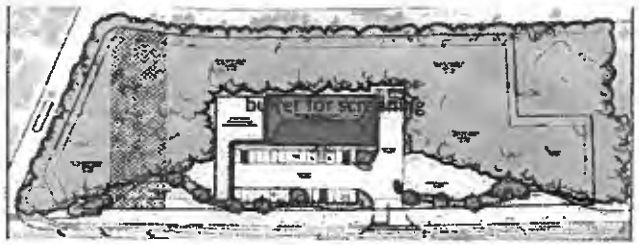
These upgrades include masonry on all four sides including a combination of complimentary materials to break up and enhance the appearance. Those upgrades and materials include:

**BUILDING UPGRADES**

- Storefront vestibule to add depth to break up the front wall
- Hardi Lap
- Hardi Plank
- Painted Split Face Block
- Inset shutters
- Brick – Incl. Wainscott and Soldier Courses to enhance design
- Triple Step Coping
- Upgraded Modern Storefront Canopy
- Full Parapet Screening on all four sides. Despite incorporating the extensive natural landscape buffers to screen the view from surrounding residences, we have also included parapets to screen the roof on all four sides.
- Enhanced lighting package to include downward direct full cutoff lights. This is to limit light spillover and control the light ensuring the light is shielded on the horizontal plane. In other words you won't be able to see the bright bulb unless you're standing right underneath the fixture

**SITE UPGRADES**

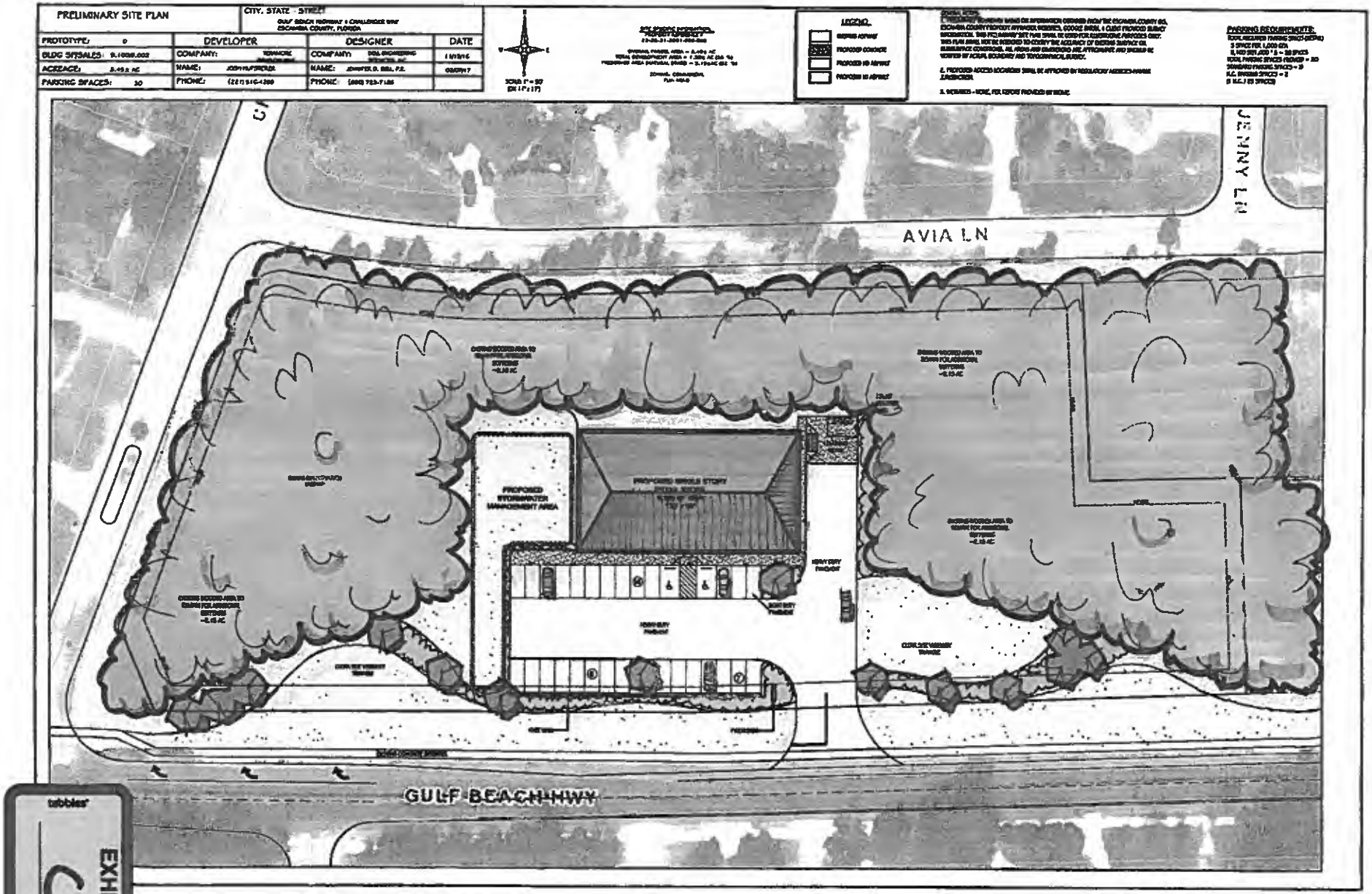
- Upgraded Dumpster Enclosure to match Building Façade
- 3' Knee Wall Along front Parking Bay to block headlights
- Approximately 2.15 acres dedicated to preserve a natural



tabbies EXHIBIT A

EXHIBIT B

# Rendering reflecting Building Upgrades


PRELIMINARY SITE PLAN
CITY, STATE - STREET
PROTOTYPE: 0
BLDG SIZE/SALES: 9,100SF.002
ACREAGE: 2.45± AC
PARKING SPACES: 30
DEVELOPER
COMPANY:
NAME:
PHONE:
DESIGNER
COMPANY:
NAME:
PHONE:
DATE
LEGEND
PROPOSED CONCRETE
PROPOSED NO ASPHALT
PROPOSED NO ASPHALT
PARKING REQUIREMENTS:
AVIA LN
GULF BEACH HWY
PROPOSED STORMWATER MANAGEMENT AREA
PROPOSED SINGLE STORY
tabbies
EXHIBIT
C

**Horace L. Jones, Director**
**Development Services**

Applicant Information:

Name: Teramore Development, LLC Date: July 24, 2017

Address: 11400 Blk. Gulf Beach Highway, Pensacola, FL Parcel ID #: 23-3S-31-2001-000-000

Phone: (229) 516-4286 Other: Email: develop@teramore.net

Section of the LDC to be interpreted: Sec. 3-2.10(e)

Address of proposed development for Compatibility Analysis: 11400 Blk. Gulf Beach Highway

**Response to Request for Interpretation and/or Confirmation of Compatibility:**

The applicant has submitted a Land Use Compatibility Analysis for a proposed Dollar General located at 11400 block of Gulf Beach Highway. The property is zoned Commercial and has a FLU of Mixed-Use Suburban (MU-S). The applicant has requested a confirmation of compatibility from the Planning Official pursuant to Sec. 2-2.7 of the LDC.

The proposed development is **NOT COMPATIBLE**. The proposed development does not meet the Location Criteria prescribed by the LDC.

Pursuant to Sec. 3-2.10(e) of the Land Development Code, all new nonresidential uses proposed within the commercial district that are not part of a planned unit development or not identified as exempt by the district shall be on parcels that satisfy at least one of the following location criteria: (1) Proximity to intersection. Along an arterial or collector street and within one quarter mile of its intersection with an arterial street. (2) Proximity to traffic generator. Along an arterial or collector street and within a one-quarter mile radius of an individual traffic generator of more than 600 daily trips, such as an apartment complex, military base, college campus, hospital, shopping mall or similar generator. (3) Infill development. Along an arterial or collector street, in an area where already established non-residential uses are otherwise consistent with the Commercial district, and where the new use would constitute infill development of similar intensity as the conforming development on surrounding parcels.

EXHIBIT
tabbies
D

Additionally, the location would promote compact development and not contribute to or promote strip commercial development. (4) Site design. Along an arterial or collector street, no more than one-half mile from its intersection with an arterial or collector street, not abutting a single-family residential zoning district (RR, LDR or MDR), and all of the following site design conditions: a. Any intrusion into a recorded subdivision is limited to a corner lot. b. A system of service roads or shared access is provided to the maximum extent made feasible by lot area, shape, ownership patterns, and site and street characteristics. c. Adverse impacts to any adjoining residential uses are minimized by placing the more intensive elements of the use, such as solid waste dumpsters and truck loading/unloading areas, furthest from the residential uses. (5) Documented compatibility. A compatibility analysis prepared by the applicant provides competent substantial evidence of unique circumstances regarding the potential uses of parcel that were not anticipated by the alternative criteria, and the proposed use, or rezoning as applicable, will be able to achieve long-term compatibility with existing and potential uses. Additionally, the following conditions exist: a. The parcel has not been rezoned by the landowner from the mixed-use, commercial, or industrial zoning assigned by the county. b. If the parcel is within a county redevelopment district, the use will be consistent with the district's adopted redevelopment plan, as reviewed and recommended by the Community Redevelopment Agency (CRA).

Gulf Beach Highway is designated as a major urban collector street. However, the proposed development is not within one-quarter mile of an intersection with an arterial street. The proposed development is not within one quarter mile radius of an individual traffic generator of more than 600 daily trips. The proposed development is not in an area where already established nonresidential uses are otherwise consistent and where the new development would constitute infill development of similar intensity. The proposed development is not more than one-half mile from its intersection with an arterial or collector street, not abutting a single-family residential zoning district. The compatibility analysis provided by the applicant does not show unique circumstances that were not anticipated by the alternative criteria. The proposed use will not serve to achieve long-term compatibility with existing and potential uses. The proposed development is surrounded by existing residential uses and established residential development.

***This confirmation of compatibility is not final authorization or denial of any requested development and the applicant must complete the County development review process prior to proceeding.***

Date: July 24, 2017 Signature: H. Jones

Horace L. Jones, Director, Development Services

Additional pages attached: ____ yes X no

Filing # 76001034 E-Filed 08/06/2018 10:33:49 AM

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

TERAMORE DEVELOPMENT, LLC,
SHU CHENG SHURETT, and LEO
HUANG,

Petitioners,

vs. Case No. 17-CA-1778

ESCAMBIA COUNTY, FLORIDA,

Respondent.
_____/

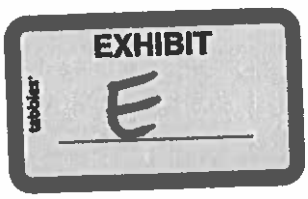
**ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

This case is before the Court on the Amended Petition for Writ of Certiorari ("Amended Petition") that the Petitioners filed on January 5, 2018. Respondent Escambia County, Florida ("County"), filed its Response on February 1, 2018. The Petitioners filed their Reply on March 5, 2018. The Court conducted oral argument on May 7, 2018.

FACTUAL BACKGROUND

The subject property is a 3.4-acre vacant parcel that is zoned Commercial (C) with a future land use designation of Mixed-Use Suburban (MU-S). The surrounding areas are zoned Low Density Residential (LDR) and High Density Residential (HDR), and the surrounding land uses are single family residential. The Petitioners proposed to build a 9,100-square foot retail store on the site to, in turn, lease to the Dollar General Corporation.

In mid-2017, the Petitioners requested confirmation of compatibility from the County's Planning Official with regard to the proposed retail store pursuant to Section 3-2.10(e)(5) of the County's Land Development Code (LDC), which provides:



> All new non-residential uses proposed within the commercial district that are not part of a planned unit development or not identified as exempt by the district shall be on parcels that satisfy at least one of the following location criteria:
>
> * * * *
>
> (5) Documented compatibility. A compatibility analysis prepared by the applicant provides competent substantial evidence of unique circumstances regarding the potential uses of parcel that were not anticipated by the alternative criteria, and the proposed use . . . will be able to achieve long-term compatibility with existing and potential uses. . . .

The Petitioners submitted a compatibility analysis prepared by a certified land use planner in support of the request. In the compatibility analysis, the Petitioners' land use planner analyzed the proposed retail store and factors such as the surrounding uses, building setbacks, building height, building orientation, building mass, open space ratios, buffers, lighting, noise, and hours of operation in evaluating whether the proposed retail store would be "compatible" with the surrounding area. On July 24, 2017, the Planning Official issued a written decision concluding the proposed development, which is surrounded by existing residential uses, did not satisfy the alternative location criteria (1-4), and the Petitioners' written analysis did not provide evidence of "unique circumstances" that were not anticipated by the alternative criteria so as to otherwise conclude that the proposed use would achieve long-term compatibility with the surrounding existing residential uses. The Petitioners timely appealed the Planning Official's compatibility determination to the Board of Adjustment (BOA) pursuant to the County's LDC ("Administrative Appeal"). On October 18, 2017, the BOA conducted a quasi-judicial hearing on the Petitioners' Administrative Appeal. The BOA heard testimony from the Petitioner's expert land use planner, Allara Gutcher, whom they recognized as an expert witness. The BOA also heard testimony from Teramore's corporate representative, the County's Planning Official,

the County's Planning Manager, and several citizens from the surrounding area of the proposed development. At the conclusion of the October 18 hearing, the BOA unanimously voted to deny the Petitioners' Administrative Appeal and to uphold the Planning Official's determination that Teramore's proposed retail store is not "compatible." Thereafter, the Petitioners timely sought certiorari review of the BOA's October 18, 2017 decision in this Court.

LEGAL ANALYSIS

Upon first tier review of a quasi-judicial proceeding, a court must determine whether the Petitioners were accorded procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1092 (Fla. 2000) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). Such review is not *de novo*. Rather, a circuit court is limited to reviewing the record that was created before the lower tribunal. Florida Power & Light Co. v. City of Dania, 761 So. 2d at 1092.

Petitioners did not contest whether they were accorded procedural due process. However, Petitioners do contest whether the essential requirements of the law have been observed and whether the BOA's decision was supported by competent substantial evidence. They argue that because the essential requirements of law were not observed and competent substantial evidence did not exist to support the BOA's decision, the Court should quash the denial of Petitioners' administrative appeal.

Frankly, the code provision at issue in this case is difficult to comprehend and lacks clarity in how it should be applied in many respects.[1] It never defines what a "compatibility analysis" should contain or who is qualified to prepare such analysis, but yet explicitly states that

[1] The Petitioner has not asserted that the code provision is ambiguous.

such "compatibility analysis" is competent substantial evidence of unique circumstances regarding the potential uses of parcel that were not anticipated by the alternative criteria. It can be argued also that the code provision does not communicate to property owners sufficient notice of what the County expects in a compatibility analysis, other than if you have one, it constitutes competent substantial evidence to support your application, until, like in this case, the County says it does not. Better said in Park of Commerce Associates v. City of Delray Beach, 606 So.2d 633, 635 (Fla. 4th DCA 1992), "(P)roperty owners are entitled to notice of the conditions they must meet in order to improve their property in accord with the existing zoning and other development regulations of the government. Those conditions should be set out in clearly stated regulations. Compliance with those regulations should be capable of objective determination in an administrative proceeding."

The record presented to this Court reveals that the BOA's denial of the Petitioner's Administrative Appeal was not supported by competent substantial evidence. Competent substantial evidence is that which is "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). "For the action to be sustained, it must be reasonably based in the evidence presented." Town of Indialantic v. Nance, 400 So. 2d 37, 40 (Fla. 5th DCA 1981). "Surmise, conjecture or speculation have been held not to be substantial evidence." Fla. Rate Conference v. Fla. R.R. and Pub. Utils. Comm'n, 108 So. 2d 601, 607 (Fla. 1959).

The Court finds the BOA's decision to find that Petitioners' proposed retail store is not compatible with existing and potential uses is not supported by competent substantial evidence. The evidence presented at the hearing in support of the County's request that the proposed use be denied can only be characterized as speculative and conclusory. The record reveals that the

Planning Official's determination that the proposed development did not meet the criteria set forth in (e)(5) was not supported by any facts or evidence. The Planning Official did render an opinion that the development was not compatible, but never set forth any specific evidence to support such opinion. The record indicates that the County simply disagreed with the Petitioners' expert without presenting facts that contradicted the opinions set forth in her compatibility analysis. Additionally, the County's witnesses and the BOA itself never considered or applied the code's decree that a compatibility analysis was competent substantial evidence which supported the Petitioner's request. Further, other than its disagreement with the Petitioner's expert that the proposed use would be able to achieve long-term compatibility with existing and potential uses, the County never presented objective facts to support its disagreement. The County's opinion that the proposed development was not compatible and would not achieve long term compatibility was simply a bald conclusion and without more has no evidentiary value. Arkin Const. Co. v. Simpkins, 99 So. 3d 557, 561 (Fla. 1957).

In contrast, the Petitioner brought forth specific evidence in support of its application. The Petitioner's expert, who had put together hundreds of compatibility analyses in her career, prepared a compatibility analysis as contemplated by the code and gave testimony in support of such analysis at the hearing. In such analysis, and in her testimony, she also opined that the Petitioner's proposed use of the property would be able to achieve long-term compatibility with existing and potential uses; such opinion meeting the criteria set forth in (e)(5). As will also be addressed in another portion of this Order, the code language itself demands the BOA to find that the compatibility analysis is competent substantial evidence of unique circumstances regarding the potential uses of parcels that were not anticipated by the alternative criteria (i.e. (e)(1)-(4)). The County never introduced any specific evidence why the Petitioners' compatibility should be

rejected. Rather, the County's evidence was that it simply did not agree with the Petitioners' compatibility analysis. In fact, the County's witness never directly answered the question posed by Petitioners' counsel as to whether the proposed use (a commercial venture in a commercial zone) could coexist with the surrounding residential uses in a stable fashion over time such that no use, activity or condition is unduly negatively impacted. (See App. 076-080).

While the BOA affirmatively stated it based its decision on the expert testimony, and not the citizen testimony, the County argues that part of the competent substantial evidence supporting the BOA's decision did indeed come from the citizen testimony. The Court certainly understands the complaints and fears of these witnesses. However, the testimony of the citizens who spoke against the proposed use cannot constitute competent substantial evidence based upon existing case law.[2] The First District Court of Appeal has held that lay witnesses' speculation about potential traffic problems, light and noise pollution, and general unfavorable impacts of a proposed land use are not considered competent substantial evidence. Katherine's Bay, LLC v. Fagan, 52 So.3d 19, 30 (Fla. 1st DCA 2010). Similarly any lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. Further, while there were speakers who identified themselves as real estate agents, their testimony cannot be considered as expert opinions as to whether the proposed use would cause devaluation of property. Such witnesses did not identify themselves as appraisers of real property and did not base their testimony on specific real estate sales and listings, opinions of brokers and other real estate agents, and information as to the general status of the local economy. See Trustees of Central States Southeast and Southwest Areas, Pension Fund v. Indico Corp., 401 So.2d 904, 906 (Fla. 1st DCA 1981). Based on the evidence the BOA

[2] The Florida Supreme Court has stated that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by the Florida Supreme Court. Stanfill v. State, 384 So.2d 141, 143 (Fla. 1980).

could consider, the Court finds there was no competent substantial evidence justifying the BOA's decision to deny the Petitioners' administrative appeal.

The Court also finds that the BOA departed from the essential requirements of law by ignoring the code's language that a petitioner's compatibility analysis provides competent substantial evidence of unique circumstances regarding the potential uses of a parcel that were not anticipated by the alternative criteria. It is not for this Court to add or subtract words or requirements from a code provision. Anderson Columbia v. Brewer, 994 So.2d 419, 421 (Fla. 1st DCA 2008). Nothing in the plain language of Section 3-2.10(e)(5) of the County's LDC authorizes the County Staff or the BOA to simply disregard the Petitioner's compatibility analysis. The Code sets forth the established principle that a compatibility analysis must be viewed as competent substantial evidence. The County never considered that proposition when rendering its opinion, and neither did the BOA when it rejected the Petitioners' appeal. This is not a mere simple legal error, but rather a failure to apply the plain language of the Code. To be clear, this Court is not ruling at this time that a compatibility analysis automatically entitles the Petitioner the relief it seeks. However, the Court believes the Code mandated the BOA to apply the standards set forth in the Code when it rendered its decision, and by failing to do so the BOA departed from the essential requirements of the law that applied to this case.

For the reasons set forth above, the Court finds that the BOA's decision denying the Petitioners' Administrative Appeal was not supported by competent substantial evidence, and that the BOA departed from the essential requirements of the law. Accordingly, it is hereby ORDERED and ADJUDGED that:

1. The Petitioners' Amended Petition for Writ of Certiorari is GRANTED;

2. The BOA's decision denying the Petitioners' Administrative Appeal is QUASHED; and

3. The Court reserves jurisdiction to award costs, if appropriate, upon proper motion by the Petitioners as the prevailing party in this appellate proceeding.

DONE AND ORDERED in Chambers in Escambia County, Florida, this _____ day of _____ 2018.

eSigned by CIRCUIT COURT JUDGE J. SCOTT DUNCAN in 2017 CA 001778 on 08/03/2018 18:47:49 yw76gVXG

SCOTT DUNCAN
CIRCUIT COURT JUDGE

Conformed copies via e-mail to:

David A. Theriaque, Esquire (Counsel for Petitioners)
S. Brent Spain, Esquire (Counsel for Petitioners)
Kristin D. Hual, Esquire (Counsel for Respondent)

Horace L. Jones, Director
Development Services

February 25, 2019

David A. Theriaque, Esquire
433 North Magnolia Drive
Tallahassee, FL 32308

RE: Notification of Board of Adjustment (BOA) Action on February 20, 2019, Case #AP-2017-02, Appeal of a Compatibility Decision by the Planning Official – Address: 11400 Blk Gulf Beach Hwy.

Mr. Theriaque:

This letter is to inform you of the Board of Adjustment's action on February 20, 2019, in the above referenced appeal. At the conclusion of the hearing, a motion was made and seconded to deny the appeal based upon the evidence presented at the hearing and uphold the Planning Official's compatibility determination. With six members voting, the motion passed by a majority vote with four in favor and two opposed.

This letter has been notarized should you choose to record it in the Public Records of Escambia County in accordance with Section 28.222(3)(a), Florida Statutes.

Please feel free to contact me should you have any questions or comments.

Sincerely,

Andrew D Holmer
Division Manager

cc: Teramore Development, LLC
Shu Cheng Shurett & Leo Huang
Front Counter Planners

STATE OF FLORIDA
COUNTY OF ESCAMBIA

Andrew D Holmer, who is personally known to me acknowledged the foregoing letter before me this 25th day of February, 2019.

Kayla Renae Meador
Signature of Notary Public

Kayla Renae Meador
Name of Notary Printed

[Notary Seal]

KAYLA RENAE MEADOR
Commission # GG 044191
Expires November 7, 2020
Bonded Thru Troy Fain Insurance 800-385-7019

My Commission Expires: 11/7/2020 Commission Number: GG044191

EXHIBIT
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# DEVELOPMENT SERVICES
# ADMINISTRATIVE APPEAL WORKSHEET

**Board of Adjustment** **6. A.**

**Meeting Date:** 02/20/2019

## I. SUBMISSION DATA:

**APPLICANT:** David Theriaque, Agent for Teramore Development, LLC and Shu Shurett and Leo Huang, Owners

**DATE OF ADMINISTRATIVE DECISION:** July 24, 2017

**DATE OF APPEAL APPLICATION:** August 7, 2017

**PROJECT ADDRESS:** 11400 Blk. of Gulf Beach Hwy.

**PROPERTY REFERENCE NO.:** 23-3S-31-2001-000-000

**ZONING DISTRICT:** Commercial

**FUTURE LAND USE:** Mixed-Use Suburban

## III. REQUESTED APPEAL::

On July 24, 2017, the Escambia County Planning Official issued a determination of land use compatibility in relation to a request from Teramore Development, LLC.

The determination was that a proposed Dollar General store would not be compatible based on location criteria found in Section 3-2.1 of the county Land Development Code.

The submitted administrative appeal seeks to overturn the decision of the planning official in this matter.

## III. RELEVANT APPEAL AUTHORITY:

**Land Development Code of Escambia County, Florida (Ordinance 96-3 as amended), Section: 2.04.00 & 2.04.01**

Sections 2.04.00, Appeal of Administrative Decisions and 2.04.01, Procedures for the Appeal of Administrative Decisions of the Escambia County Land Development Code (Ordinance No. 96-3 as amended), provide the relevant authority for the BOA's review of administrative decisions.

A. The BOA is authorized to hear and to rule upon any appeal made by those persons aggrieved by administration of this Code. An administrative decision, or staff interpretation, shall not be reversed, altered, or modified by the BOA unless it finds that:

1. A written application for the appeal was submitted within 15 days of the administrative decision or action indicating the section of this Code under which said appeal applies together with a statement of the grounds on which the appeal is based; and

2. That the person filing said appeal has established that the decision or action of the administrative official was arbitrary and capricious; or

3. An aggrieved party who files an appeal of a decision of the DRC approving or approving with conditions a development plan application, must show, by competent substantial evidence that:

(i) The decision of the DRC is not in compliance with the Comprehensive Plan or the Land Development Code;

(ii) Their property will suffer an adverse impact as a result of the development approval decision;

(iii) The adverse impact must be to a specific interest protected or furthered by the Comprehensive Plan or the Land Development Code; and

(iv) It must be greater in degree than any adverse impact shared by the community at large.

4. In the event the owner, developer, or applicant is aggrieved or adversely affected by a denial of a development plan application or the imposition of conditions, the owner, developer or applicant filing the appeal must show, by competent substantial evidence, that the denial of the development plan or the imposition of conditions is neither required nor supported by the Comprehensive Plan or the Land Development Code or the application of technical design standards and specifications adopted by reference in the Code, or Concurrency Management Procedures and is, therefore, arbitrary and capricious.

## IV. BACKGROUND INFORMATION

The request by Teramore Development, LLC for land use compatibility was denied on July 24, 2017, by Escambia County Planning Official, Horace Jones.

The Administrative Appeal was filed with the Board of Adjustment on August 7, 2017, within the 15 day deadline provided in the LDC.

The case was added to the agenda for the scheduled October 18, 2017 BOA meeting.

At the October 18, 2017, BOA meeting, the Board voted 5-0 to deny the appeal of the Planning Officials Determination. The Board amended their findings to add that their decision was based on competent and substantial evidence presented by the expert witnesses.

At the October 17, 2018, BOA meeting, the Board granted a continuance to the Nov. 14, 2018 BOA meeting.

At the February 20, 2019, a motion was made and seconded to deny the appeal based upon the evidence presented at the hearing and uphold the Planning Official's compatibility determination. With six members voting, the motion passed by a majority vote with four in favor and two opposed.

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**Attachments**

AP-2017-02
Order Granting Petition for Writ of Certiorari Signed by Judge Duncan 8-3-18
Notice of Expert and Supplemental Authority Filed by Meredith Crawford
Attachment to Notice of Expert and Supplemental Authority
Letter from David Theriaque dated 11/9/18
Transcripts from 10/18/17 BOA Meeting
Notice of Continuance

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