

**IN THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT, ESCAMBIA COUNTY, FLORIDA**

**RELAX HOSPITALITY, LLC, a Florida
limited liability company; and ADX
COMMUNICATIONS OF ESCAMBIA,
LLC, a Florida limited liability company,**

Petitioners,

vs.

CASE NO. 2012 CA 001261

**ESCAMBIA COUNTY, acting by and
through its BOARD OF ADJUSTMENT;
and CEJ SOUTH, INC., a Florida corporation,**

Respondents.

Opinion filed December 2, 2013

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A Petition for Writ of Certiorari was filed May 17, 2012. An Order to Show Cause was issued to Respondents May 31, 2012.

Respondent CNL Funding 2000-A, LP, a Delaware limited partnership, and a contingent seller of the parcel in question to Respondent CEJ South, Inc, a Florida Corporation, filed a Motion to Dismiss docketed June 20, 2012. Petitioners

acquiesced to the motion to dismiss in a Response docketed June 25, 2012, and that motion was granted June 27, 2012.

Respondent Escambia County filed a Response June 26, 2012. Respondent CEJ South filed a Response June 28, 2012. Petitioners' Reply Brief was filed July 2, 2012.

As Petitioners' Reply Brief was not docketed by the clerk until July 18, 2012, and although the Reply Brief does not bear the usual date stamp placed on documents received directly by this office, it likely had been delivered to the office of the undersigned and was not forwarded to the clerk until July 18.

Counsel for Respondent, CEJ, filed a Motion for Case Management Conference docketed November 29, 2012, which was noticed for hearing January 4, 2013. Another such motion was filed July 30, 2013, and noticed for hearing September 27, 2013. The court, on its own motion, has scheduled two additional case management conferences, most recently on November 27, 2013.¹

For the purposes of this opinion, Petitioners, Relax Inn and ADX Communications of Escambia, LLC, shall hereafter jointly be referred to as Petitioners; while Respondents shall be referred to as either "Escambia County" or "CEJ", respectively. Additionally, the Escambia County Board of Adjustment shall

¹ The patience of the parties while awaiting issuance of an opinion in this matter is beyond commendable. While the administrative and docket management challenges of the undersigned are among the excuses for the delay in ruling in this case, they are not acceptable, and I apologize to the parties for any adverse impact the delay in ruling may have caused.

be referred to as the “BOA”; while the Escambia County Land Development Code shall be referred to as the “LDC”.

This case has an interesting, convoluted, conflicting procedural history.

CEJ submitted a zoning verification form to the Escambia County Development Services Department to verify the parcel in question was located in a C-2 zoning district. A staff member completed the form and verified the parcel was in zone C-2 and further opined that the parcel could be used as a crematory/funeral home.

When a question was raised regarding the accuracy of the verification, the Development Services Department head determined the proposed use was not permitted in zone C-2. §2.07.01 of the LDC places responsibility on the Planning Board to interpret the LDC. The Department head informed CEJ that an interpretation of the LDC could be requested from the Planning Board.

CEJ requested an interpretation, and the Planning Board Interpretation #2012-01 concluded that a crematory was not a permitted use within zone C-2. CEJ applied for a change of use permit from a restaurant to a funeral home with a crematory. That application was denied by Department staff based upon the Planning Board Interpretation.

CEJ filed an administrative appeal to the BOA pursuant to §§2.04.00 and 2.04.01, LDC. After a lengthy hearing, the BOA concluded the denial of the request

to change the use permit base upon the interpretation of the Planning Board was “arbitrary and capricious”.

The Petition for Writ of Certiorari was timely filed from that decision. This court has jurisdiction pursuant to Article V, Section 5(b), Constitution of the State of Florida.

CEJ raises lack of standing of Petitioners in its Response. As that issue was not raised below, it was waived.

The parties agree *Haines City Community Development v. Heggs*, 658 So.2d 530 (Fla. 1995), *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957), and *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982), establish the relevant standard of review.

At the quasi-judicial administrative appeal hearing, the BOA heard extensive testimony. The issue was complicated by discussion of the fact that two permits for similar projects in zone C-2 had been previously issued without questions being raised regarding the validity of interpretation of the LDC. BOA members engaged in critical debate regarding the Board’s responsibility in this matter.

This court has no authority to conduct a *de novo* review and assess the weight of conflicting evidence presented to the BOA and has no desire to do so. *Dusseau v. Metropolitan Dade County Bd. County Com’rs*, 794 So.2d 1270 (Fla. 2001).

The parties disagree on where the focus of the review should be placed by

this court.

This court declines to accept the suggestion of Respondents, Escambia County and CEJ, justifying the decision of the BOA. To do so would require this court to ignore the specific provisions of the LDC which have been lawfully adopted by the responsible legislative body, the Escambia County Commission. The conundrum facing the BOA, while understandable, is not supported by law.

Regardless of the apparent inconsistent, previous interpretations of the LDC by Developmental Services Department staff in the past, the interpretation of the Planning Board at issue in this case was based upon the clear, unequivocal language of the LDC. The LDC expressly lists or incorporates crematories by reference in other zoning classifications as either a permitted use or as a conditional use. The Petition contains a detailed analysis of the progression of permitted and conditional uses for crematories, funeral homes, and mortuaries in the LDC zoning classifications and the varied licensing options for such facilities under Ch. 497, Fla. Stat. The LDC neither lists nor incorporates crematories in the C-2 zoning classification. Thus, it is not necessary to apply the inverse of the basic concept of statutory construction of “*expressio unius est exclusio alterius*”. The language in the LDC is clear and unequivocal as conceded by Respondent, Escambia County.

As a consequence, the matters heard by the BOA did not rise to the level of competent, substantial evidence sufficient to sustain the finding that the denial of the

request for change of use based upon the Planning Board's interpretation of the LDC was "arbitrary and capricious".

While it appears the BOA members thought the LDC should be interpreted to include crematories as a permitted or conditional use, that is an issue for the Escambia County Commission to resolve should they choose to amend the LDC. Petitioners suggest other alternatives such as an administrative application for a vested rights committee determination pursuant to §2.11.00, LDC, and there may be others. It is not within the purview of this court to either suggest or determine what alternatives should be pursued in this matter.

Accordingly, the Petition for Writ of Certiorari is granted, and the decision of the BOA is quashed. This matter is remanded for further proceedings consistent herewith.

/S/ TERRY D. TERRELL

Terry D. Terrell
Circuit Judge

A copy of this opinion was e-mailed to each attorney December 2, 2013.