

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID J. RUSS,)	
)	
Petitioner,)	
)	
vs.)	
)	
TALLAHASSEE-LEON COUNTY and)	Case No. 97-2950GM
DEPARTMENT OF COMMUNITY AFFAIRS,)	
)	
Respondents,)	
)	
and)	
)	
SCHOOL BOARD OF LEON COUNTY,)	
)	
Intervenor.)	
_____)	

RECOMMENDED ORDER OF DISMISSAL

This cause came on to be heard, pursuant to notice, before the Division of Administrative Hearings by designated Administrative Law Judge Don W. Davis on August 20, 1997, in Tallahassee, Florida, upon the joint motion of Respondents and Intervenor, to dismiss further proceedings in this case.

The following appearances were entered:

For Petitioner
David J. Russ:

David J. Russ, Esquire
6823 Donerail Trail
Tallahassee, Florida 32308

For Respondent
Leon County:

James W. Linn, Esquire
Cari L. Roth, Esquire
Post Office Box 10788
Tallahassee, Florida 32302

and

Herbert W.A. Thiele, Esquire
Julie Lovelace, Esquire
Leon County Attorney's Office
Leon County Courthouse
Room 443E
301 South Monroe Street
Tallahassee, Florida 32301

For Respondent
City of Tallahassee:

Linda Hurst, Esquire
City Hall
300 South Adams Street
Tallahassee, Florida 32301

For Respondent
Department of Community Affairs:

Sherry A. Spiers, Esquire
2555 Shumard Oak Boulevard
Department of Community Affairs
Tallahassee, Florida 32399-2100

For Intervenor
Leon County School Board:

Deborah Minnis, Esquire
Ausley and McMullen
Post Office Box 391
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

Whether Petitioner David Russ has standing to bring these proceedings.

PRELIMINARY STATEMENT

By joint motion filed August 14, 1997, Respondents and Intervenor seek dismissal of the Petition Challenging Plan Amendments and Findings of Compliance.

The gravamen of the motion is that Petitioner Russ lacks standing to bring this proceeding in that he is not an "affected

person" within the definition set forth in Section 163.3184(1)(a), Florida Statutes.

At the hearing upon the joint motion, Respondents and Intervenor presented testimony of three witnesses and two exhibits, in addition to affidavits attached to the joint motion. Petitioner Russ testified in his own behalf. No transcript of the hearing was provided. The parties waived the submission of proposed findings of fact.

FINDINGS OF FACT

1. Petitioner Russ did not submit oral comments to the local governments between the time of the transmittal hearing for the plan amendment at issue in this case and the adoption of the plan amendment.

2. Petitioner Russ testified that he faxed letters to Tallahassee City Commissioner Ron Weaver and Leon County Commissioner Gary Yordan during the required time period, but this assertion is not corroborated by any other testimony or exhibits. Although Petitioner Russ testified that he used paper-printed original documents to effectuate the fax of the written comments or letters, he did not present any documentary evidence in corroboration. He presented no documents or other evidence of attempts to follow-up or confirm receipt of his faxed comments by the local governments.

3. A reasonable, diligent and thorough search by those personnel charged with responsibility for maintaining

correspondence files of City Commissioner Ron Weaver and Leon County Commissioner Gary Yordan, as well as the joint city/county planning department, was conducted in order to locate the written comments purportedly faxed to the local governments by Petitioner

Russ. No documents, relating to those written comments and allegedly sent during the comment period for the plan amendment, have been found.

4. Petitioner Russ admitted at the hearing that he possesses copies of all correspondence and pleadings generated by himself in this challenge to the amended plan with exception of those initial written comments.

5. In the course of his testimony, Petitioner Russ speculated with regard to his inability to corroborate his assertion that he did fax written comments. That speculation included his supposition that computerized copies of the documents in his computer may have been lost through possible destruction of the files during a computer repair or renovation, or that he might have saved the documents on a floppy disk which has subsequently been misplaced.

6. The overwhelming evidence clearly and convincingly establishes that the documents are not, and have never been, in the possession of the local governments in this case. Such evidence results in the finding that contrary testimony, absent some extrinsic corroboration that the documents were submitted, cannot be credited.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this proceeding. Section 120.57 and Chapter 163, Florida Statutes.

8. Communications in the era of cyberspace and the information highway include electronic transmission of documents. Further, electronically transmitted documents share a common definition with conventional written documents under the Florida evidence code. Section 90.951, Florida Statutes. It would therefore appear that cases involving disputes over receipt of documents sent through electronic technology should be resolved in the same manner as conventionally mailed documents; through a fact finding inquiry or evidentiary hearing such as the instant proceeding.

9. The mailing of an item creates a presumption that the item was indeed received, but the presumption is a rebuttable one. Additionally, mere denial of receipt is inadequate to overcome the presumption. Scutieri v. Miller, 584 So. 2d 15,16 (Fla. 3rd DCA 1991). Consequently, Respondents and Intervenor were given, and utilized, their opportunity to offer proof in support of the local governments' denials of receipt of Petitioner Russ's written comments. That proof creditably and convincingly established that the local governments in this matter did not receive the purported correspondence of Petitioner Russ. That proof was not effectively refuted because Petitioner Russ was unable to corroborate his assertion that he had submitted the required written comments.

10. In order for Petitioner Russ to maintain these proceedings, he must meet "standing" requirements of Section

163.3184(1)(a), Florida Statutes, which requires, in pertinent part, that an "affected person" shall:

have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

11. Absent creditable proof to establish his submittal of the required written comments or their receipt by the local governments, Petitioner Russ has not met the standing requirement of submitting written comments within the specified time frame. He does not possess standing to maintain this challenge to the plan amendment which is the subject of this proceeding.

RECOMMENDATION

It is recommended that a final order be entered in this case, Division of Administrative Hearings Case Number 97-2750GM, finding that Petitioner Russ is without standing to maintain these proceedings and dismissing his Petition Challenging Plan Amendments And Findings of Compliance.

DONE AND ENTERED this 22nd day of August, 1997, at Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will

issue the Final Order in this case.