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AP

Final Order No. DCA00-GM-297

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

JOHN ABBE, et al., JERRY COLEMAN, and JOHN F. ROONEY,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent,

and

THE CITY OF KEY WEST and HENRY AND MARTHA DUPONT,

Intervenors.

DOAH CASE Nos. 99-0666GM LJS
99-0667GM
99-1081DRI

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs ("the Department") following receipt and consideration of a Recommended Order issued by an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings. A copy of the Recommended Order is attached hereto as Exhibit A.

BACKGROUND

This matter involves review of a land development regulation adopted by the City of Key West, a local government located within the City of Key West Area of Critical State Concern, on November 10, 1998, by Ordinance No. 98-31, hereinafter referred to as "the Transient Rental Ordinance" or "the Ordinance." The Department must approve land development regulations which are consistent with the Principles for Guiding Development of the Area of Critical State Concern, and must reject land development regulations which are not consistent with the Principles. §380.05(6), *Fla. Stat.* (2000).

Pursuant to the requirements of §§120.569 and 120.57(1), *Fla. Stat.* (2000), a formal hearing was conducted by Administrative Law Judge Larry J. Sartin of the Division of Administrative Hearings. Following the hearing, the ALJ submitted his Recommended Order to the Department. The ALJ recommended that the Department enter a final order approving the Ordinance as consistent with the Principles for Guiding Development of the City of Key West Area of Critical State Concern.

The Abbe Petitioners and Jerry Coleman filed Exceptions to the Recommended Order, and the Department's litigation staff and Intervenors Dupont filed Responses to Exceptions.

The Coleman exceptions pointed out that the Recommended Order stated that Coleman Exhibit 32 was accepted into evidence, but not provided to the ALJ. Coleman Exhibit 32 was a copy of the City of Key West Land Development Regulations, and the Coleman exceptions contended that the ALJ would have made a different recommendation if Coleman Exhibit 32 had been available. The Department's examination of the exhibits revealed that Coleman Exhibit 32 was included in the large box of exhibits received from the ALJ. The Department remanded the case to the ALJ, and requested, "that the ALJ examine Coleman Exhibit 32, and make such modifications to the Recommended Order as he deems appropriate."

The ALJ accepted the remand, and issued a Supplemental Recommended Order, a copy of which is attached hereto as Exhibit B. The Supplemental Recommended Order struck the sentence, "Coleman Exhibit 32 was not provided to the undersigned," and made no other changes to the Recommended Order. The Abbe Petitioners filed renewed Exceptions which repeated verbatim their first set of Exceptions. Coleman filed one additional Exception to the Supplemental Recommended Order.

ROLE OF THE DEPARTMENT

Throughout the pendency of the formal administrative proceedings, the Department's litigation staff contended that the Ordinance is consistent with the Principles for Guiding

Development of the City of Key West Area of Critical State Concern. After the ALJ issued his Recommended Order, the Department assumed dual roles in this matter. On the one hand, the attorney and staff who advocated the Department's position throughout the formal proceedings reviewed the Recommended Order and filed Responses to Exceptions urging that the Ordinance is consistent with the Principles.

On the other hand, the Secretary of the Department and agency staff who took no part in the formal proceedings have reviewed the entire record and the Recommended Order in light of the Exceptions and Responses. Based upon that review, the Secretary of the Department must either enter a Final Order finding the Ordinance consistent with the Principles for Guiding Development, or reverse the position of the Department throughout the proceedings by determining that the Ordinance is not consistent.

Having reviewed the entire record, the Secretary of the Department accepts the recommendation of the Administrative Law Judge as to the disposition of this case.

STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

The Administrative Procedure Act contemplates that the Department will adopt the Recommended Order except under certain limited circumstances. The Department has only limited authority to reject or modify the ALJ's findings of fact.

> Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.
>
> Section 120.57(1)(*l*), *Fla. Stat.* (2000)

The Department cannot reweigh the evidence considered by the ALJ, and cannot reject findings of fact made by the ALJ if those findings of fact are supported by competent substantial evidence in the record. Heifitz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA

1985); and Bay County School Board v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996), construing a provision substantially similar to Section 120.57(1)(*l*), *Fla. Stat.* (2000). See also, Pillsbury v. Department of Health and Rehabilitative Services, 744 So. 2d 1040 (Fla. 2d DCA 1999).

The Department may reject or modify the ALJ's conclusions of law or interpretation of administrative rules, but only those,

> . . . conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.
>
> Section 120.57(1)(*l*), *Fla. Stat.* (2000)

See also, Deep Lagoon Boat Club, Inc. v. Sheridan, Case No. 2D00-573 (Fla. 2d DCA Feb 21, 2001).

The label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. Kinney v. Department of State, 501 So.2d 1277 (Fla. 5th DCA 1987). Conclusions of law, even though stated in the findings of fact section of a recommended order, may be considered under the same standard as any other conclusion of law.

THE CHALLENGED LAND DEVELOPMENT REGULATION

The City of Key West land development regulations, as modified by the Ordinance, defines "transient rental accommodations or transient lodging" as,

> Any unit, group of units, dwellings, building, or group of buildings within a single complex of buildings, which is 1) rented for a period or periods of less than 30 days or 1 calendar month, whichever is less; or which is 2) advertised or held out to the public as a place rented to transients, regardless of the occurrence of an actual rental. Such a short-term rental use of or within a single family dwelling or a multi-family dwelling (each also known as a "residential dwelling") shall be deemed a transient living accommodation. Finding of Fact 62.

The Ordinance forbids unlicensed transient rentals. Finding of Fact 63. The Ordinance allows transient rental of properties which already have transient occupational licenses. Finding of Fact 64.

RULINGS ON EXCEPTIONS TO FINDINGS OF FACT

The Abbe Petitioners filed 76 exceptions, and Petitioner Coleman filed 74. An agency is ordinarily expected to rule on each exception. Iturralde v. Department of Professional Regulation, 484 So. 2d 1315 (Fla. 1st DCA 1986). However, exceptions which merely reiterate positions which were repeatedly asserted before the ALJ, and which were clearly and specifically addressed in the recommended order, need not be addressed again in the agency's final order. Britt v. Department of Professional Regulation, 492 So. 2d 697 (Fla. 1st DCA 1986). To the extent that any exception is not explicitly addressed below, that exception is repetitive of other exceptions, or merely reargues positions which were asserted before the ALJ and addressed in the recommended order.

Weight of the Evidence

Many of the exceptions contend that the weight of the evidence does not support the ALJ's findings of fact, or that the ALJ should have found additional facts suggested by the Petitioners. The Department is not authorized to reweigh the evidence or to adopt supplemental findings of fact. Section 120.57(1)(*l*), *Fla. Stat.* (2000); Heifitz, Bay County, and Pillsbury, supra. Therefore, Coleman Exceptions 1, 2, 2B, 2C, 3, 4, 5, 6, 7, 8, 9, 11, 17, 19, 20, 21, 22, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66 are DENIED.

Unexplained Exceptions

Several exceptions simply ask the Department to reject a finding of fact or conclusion of law without giving a reason. A statement that the law and the record do not support a finding or

a conclusion is not sufficient to support an exception. Coleman Exceptions 68 - 73 and Abbe Exceptions 10 are DENIED.

Exceptions to Findings of Fact Based Upon Disputed Conclusions of Law; Abbe Exceptions 11, 16, 17, 31, Colernan Exceptions 14, 26, 67

Several exceptions ask the Department to reject findings of fact which the Petitioners contend are irrelevant based on their legal theory of the case. Even if the Department accepted the Petitioner's legal theory, the Department may not reject or modify a finding of fact based upon rejection or modification of a legal conclusion. Section 120.57(1)(*l*), *Fla. Stat.* (2000). Abbe Exceptions 11, 16, 17 and 31, and Coleman Exceptions 14, 26 and 67 are DENIED.

duPont Neighbors; Abbe Exception 2

The ALJ found that, "The properties on both sides of the duPonts' residence are used as Transient Rentals." Finding of fact 9. The Abbe Petitioners contend that this finding is not supported by competent substantial evidence.

In their Response to Abbe Exceptions, the Intervenors duPont concede that Martha duPont testified that one transient rental was located next door to her residence, and that another was located nearby, but did not testify that two transient rentals were located next to her residence. Tr. 519 - 520.

Abbe Exception 2 is GRANTED, and the Recommended Order is modified by paragraph 1B of the Order below.

Standing of Abbe Petitioners and Coleman; Abbe Petitioners Exceptions 24, 25 and Coleman Exceptions 23, 24

The ALJ found that the parties had not stipulated to the standing of the Abbe Petitioners and Coleman. Finding of fact 72. The Petitioners contend that this finding is not supported by the record. However, the transcript of the hearing indicates that the Respondent and the

Intervenors stipulated to certain facts, but did not stipulate that the Petitioners will suffer an immediate injury as a result of the Transient Rental Ordinance. Transcript 1465 to 1470.

The ALJ also determined that the Transient Rental Ordinance does not cause an immediate injury to the Abbe Petitioners and Coleman, because they did not have a legal right to use their property for transient rentals even before the enactment of the Transient Rental Ordinance by the City. "Neither a reasonable interpretation of the existing land development regulations nor the 50% Rule legalizes such use." Finding of fact 73. The Petitioners correctly point out that this is a conclusion of law. However, the ALJ's conclusion of law is more reasonable than the interpretation advanced by the Petitioners.

In any event, the ALJ found that the Transient Rental Ordinance has a real effect on the Petitioners, since,

> the City has allowed the Abbe Petitioners and Mr. Coleman to continue to use their properties as Transient Rentals, legally or not, and that, without the City's taking some action, the Abbe Petitioners and Mr. Coleman would continue to do so. Finding of fact 74.

Therefore, the ALJ concluded that the Abbe Petitioners and Coleman had proven that they had standing to initiate and participate in this proceeding. Finding of fact 75 and conclusion of law 170. Abbe Petitioners Exceptions 24, 25 and Coleman Exceptions 23 and 24 are DENIED.

Standing of Hirsch and Property Management of Key West, Inc.; Abbe Exceptions 1, 26 and 68

The ALJ found that no evidence was presented concerning the identity of Hirsch or Property Management of Key West, Inc. Finding of fact 1. Therefore the ALJ concluded that those Petitioners had not demonstrated standing to initiate or participate in this proceeding. Finding of fact 78 and conclusion of law 171. The Abbe Petitioners point out, and the Department's litigation staff concurs, that the parties stipulated that both Hirsch and Property Management are engaged in the business of managing and renting short-term vacation rentals within the city limits of Key West. Tr. 1469 - 1470.

Accepting this stipulated fact, it is clear that Hirsch and Property Management have the same basis for standing as the other Abbe Petitioners and Coleman. In the absence of the Transient Rental Ordinance, the City would have allowed Hirsch and Property Management to continue the business of managing and renting short-term vacation rentals. This conclusion of law is as or more reasonable than the ALJ's conclusion of law concerning the standing of Hirsch and Property Management to initiate and participate in this proceeding. Abbe Exceptions 1, 26 and 68 are GRANTED, and the Recommended Order is modified by paragraphs 1A, C, D & E of the Order below.

Historic Significance of Tourism in Key West; Abbe Exceptions 3, 4, 9, 13, 14, 35, 36, 38

The Abbe Petitioners contend that the evidence failed to support the ALJ's findings concerning the historic nature of transient rentals in Key West. For example, the ALJ found that,

> The evidence failed to prove . . . that the types of rentals historically undertaken in the City constitute a part of the significant "history" of the City, at least not in the context of the historical significance of the City addressed in the City's Plan. Nor were the historical rentals testified to during the hearing of the scale and scope of the rentals that now exist in the City. Finding of fact 29.

Although there is evidence in the record to support the Abbe Petitioner's viewpoint, there is also competent substantial evidence in the record to support the ALJ's findings of fact. See, Testimony of Kenneth Metcalf. Indeed, the Abbe Petitioners specifically ask the Department to reweigh the testimony cited by the ALJ in support of his finding. Finding of fact 29, citing the testimony of Wilhelmina Harvey, Joe Crusoe, Robert Lastres, Vincent Catala, and Olivia Rowe. This the Department may not do. §120.57(1)(*l*), *Fla. Stat.* (2000). Abbe Exceptions 3, 4, 9, 13, 14, 35, 36 and 38 are DENIED.

Historic Character of Old Town; Abbe Exceptions 32, 34, 66, and Coleman Exception 30B

The Abbe Petitioners contend that the ALJ erred in finding that the City's comprehensive plan provisions are concerned with the historic significance of structures, rather than with their

alleged historic use as transient rentals. The Petitioners allege that these findings are not supported by competent substantial evidence.

However, Policy 1-2.3.9 of the City's comprehensive plan, and the testimony of Ken Metcalf provide competent substantial evidence to support the ALJ's findings. Abbe Exceptions 32, 34 and 66 and Coleman Exception 30B are DENIED.

Affordable Housing; Abbe Exceptions 15, 37, 40, 41, 50, 51, 52, 53, 54, 57, 58, 75; Coleman Exceptions 30A, 47

The Petitioners contend that there is no evidence to support the ALJ's finding that, "(The) demand for tourist accommodations, especially the demand for Transient Rentals, has adversely impacted the need and demand for residential housing in the City." Finding of fact 37. This fact formed the basis for several other findings and conclusions, which the Petitioners have also challenged.

However, the ALJ's findings concerning the relationship of demand for transient rentals and the supply of residential housing and affordable housing are supported by the testimony of Dr. Nicholas.

Abbe Exceptions 15, 37, 40, 41, 50, 51, 52, 53, 54, 57, 58, 75 and Coleman Exceptions 30A and 47 are DENIED.

The "50% Rule"; Abbe Exceptions 18, 19, 20, 23, 28, 29, 30, 39; Coleman Exception 12, 15, 16

Throughout the proceeding before the ALJ, the Petitioners contended that the 1986 definition of "tourist and transient living accommodations" applied only to a residence that was used as a 28-day short-term visitor accommodation for at least 50% of the year. Findings of fact 45 to 47. The ALJ rejected the Petitioner's position, and held that reliance on the so-called 50% rule was unreasonable. The ALJ adopted proposed findings of fact 39 through 45 of the Joint Proposed Recommended Order submitted by the City and the Department, which stated:

39. There are various other reasons for rejecting the "50% Rule." First, the "50% Rule" takes the phrase "principally available to . . . visitors" from the Former Transient Definition and, by inference, uses it to define "residential" uses or activities. There is no text in either the City's comprehensive plan or land development regulations related to residential structures or uses that incorporates the concept of "principally available."

40. Second, in defining future land use districts, the City's comprehensive plan, discussed infra, consistently and repeatedly treats residential uses for permanent and seasonal residents and transient lodging as separate uses. The "50% Rule" conflicts with these comprehensive plan provisions.

41. Third, the "50% Rule" is inconsistent with the description of "guest house" in the Former Transient Definition. A guest house was defined as "any place wherein tourists, transients, travelers or persons desiring temporary residence are provided with sleeping and sanitary facilities." (e.s.) A single-family home or other residential property rented or available for rental to tourists for periods of less than 28 days fell within this description of "guest house" in the Former Transient Definition, and would therefore be subject to all licensing, permitting, and zoning requirements for guest houses, despite the claim of exemption under the "50% Rule."

42. Fourth, the "50% Rule" is inconsistent with that part of the Former Transient Definition that defines transient living accommodations as "commercially operated housing." It is difficult to characterize the transient rental of residential property as purely residential or purely commercial because the use has both housing and commercial characteristics. However, a transient residential rental use can occur on a daily or weekly basis and is more like the rental of a hotel or motel unit, rather than the long-term lease or permanent occupancy of residential property. It is essentially a commercial use. The "50% Rule" interpretation, which assumes that transient residential use is essentially residential, is inconsistent with the defined commercial nature of transient rentals.

43. The City's current land development regulations, which implement the comprehensive plan, also define transient lodging of all types as a commercial activity, not a residential activity. § 5-21.2, City land development regulations, definition of "land use classifications," subsection C.8. (Coleman Ex. 32) The "50% Rule," which assumes that a transient rental is a residential use, is inconsistent with the City's current regulations.

44. Regulating the transient use of residential properties was specifically considered by the City's planning consultants in drafting the City's current comprehensive plan. The transient use of residential properties was intended to be prohibited in the City's traditional residential neighborhoods.

45. The logical extension of Petitioners' argument in support of the "50% Rule" is that a residential property may be used for any purpose, e.g., a seasonal restaurant, an auto or bike repair shop, or any other commercial use, so long as the

use is for less than half a year. That is illogical and is not supported by the evidence in this case.

The exceptions essentially assert that the ALJ's findings of fact concerning the 50% rule are not supported by competent substantial evidence. However, the ALJ's findings are supported by the comprehensive plan (DCA Ex 5), the land development regulations, and the testimony of Kenneth Metcalf, Pritham Singh and Sullins Stuart. Abbe Exceptions 18, 19, 20, 23, 28, 29, 30, 39 and Coleman Exceptions 12, 15 and 16 are DENIED.

Economic Impact; Abbe Exceptions 5, 6, 21, 55, 59, 60, 61, 62, 63, 71; Coleman Exceptions 2B and 46

The ALJ found that the loss of availability of unlicensed transient rental units will not have a lasting adverse impact on tourism in the City. Finding of fact 21. The Petitioners assert that this finding, and several others based upon it, is not supported by competent substantial evidence.

The ALJ's findings of fact concerning the economic impact of the Transient Rental Ordinance are supported by the Pallini Report (City Exhibit 1), and the testimony of Frank Pallini and Dr. James Nicholas. Abbe Exceptions 5, 6, 21, 55, 59, 60, 61, 62, 63, 71 and Coleman Exception 46 are DENIED.

Compatibility of Transient and Permanent Residents; Abbe Exceptions 41 - 49, 56, 67

The Abbe Petitioners contend that the ALJ's findings of fact concerning the compatibility of transient and permanent residents are not supported by competent substantial evidence. The ALJ found that the increase in transient rentals results in crowding, findings of fact 118, that crowding causes permanent residents to leave the community, finding of fact 119 and 120, and that the community's identity can be harmed if tourism becomes too dominant, finding of fact 122. These findings are supported by the testimony of Dr. James Nicholas, Dr. Virginia Cronk, and Dr. Andrew Holdnak. Abbe Exceptions 41 - 49, 56 and 67 are DENIED.

Consideration of LDRs; Coleman Exceptions 1, 2B, 6, 9, 14, 26

These exceptions are based on the statement in the original Recommended Order that Coleman Exhibit 32, the land development regulations of the City of Key West, was not provided to the ALJ. The ALJ reviewed Coleman Exhibit 32 on remand, and made no changes to the findings of fact or conclusions of law relating to the land development regulations. Coleman Exceptions 1, 2B, 6, 9, 14 and 26 are DENIED.

Exceptions to Ultimate Findings of Fact; Abbe Exceptions 33, 64, 74

The Abbe Petitioners assert that the ALJ erred in finding that the Transient Rental Ordinance is consistent with Principles A, E and H, finding of fact 98 and 160, and that,

> the adoption of the Ordinance strengthens the City's capabilities for managing land use and development in the City, positively impacts the public safety, health, and welfare of the City, and will ultimately enhance the economy of the City. Finding of fact 189.

These exceptions are apparently based upon other exceptions to specific findings of fact. Those other exceptions have been denied. Abbe Exceptions 33, 64 and 74 are also DENIED.

RULINGS ON EXCEPTIONS TO CONCLUSIONS OF LAW

Consistency with the Comprehensive Plan; Abbe Exceptions 7, 8, 12, 27; Coleman Exceptions 2C, 3, 4, 18, 22 and 29

The Petitioners assert that the ALJ's interpretation of certain comprehensive plan policies are improperly labeled findings of fact, and that the ALJ's interpretation is incorrect.

The Petitioners are correct that the ALJ's "findings" are really conclusions of law, but the interpretations urged by the Petitioners are not as reasonable as the ALJ's conclusions of law. Abbe Exceptions 7, 8, 12, 27 and Coleman Exceptions 18 and 29 are DENIED.

De Novo Review; Abbe Exceptions 22, 65, 69, 70, 76 and Coleman Exceptions 2, 2A & 21

The Petitioners contend that the ALJ should have critiqued the Department's review of the Transient Rental Ordinance up to, and including, the "final order" published in the Florida

Administrative Weekly which commenced this proceeding. However, the ALJ is certainly correct that, "(b)ecause no final agency action has been taken, this proceeding was a de novo proceeding," conclusion of law 177; and that "(a)ll that is at issue is the ultimate decision required by the Department in this case: whether the Ordinance is consistent with the Principles," conclusion of law 179.

> An agency's free-form action is regarded as preliminary, irrespective of its tenor. The petition for a formal 120.57(1) hearing, as in this case, commences a de novo proceeding. §120.57 proceedings "are intended to formulate final agency action, not to review action taken earlier and preliminarily." Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981) (citations omitted).

See also Moore v. HRS, 596 So.2d 759 (Fla. 1st DCA 1992). Even where a challenger contends that the agency erred in approving a permit on the grounds that the application did not contain all the required information, evidence may be submitted at the hearing that was not contained in the application.

> Any additional information necessary to provide reasonable assurance that the proposed facility would comply with the applicable air emission standards could be properly provided at the hearing. McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977) (a petition for a formal 120.57 hearing commences a de novo proceeding, and because the proceeding is intended to formulate final agency action and not to review action taken earlier and preliminarily, the hearing officer may consider changes or other circumstances external to the application). Hamilton County Board of County Commissioners v. DER, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991).

The Abbe Petitioners also contend that the ALJ erred in stating, "The Department, with the Administrative Law Judge sitting as the head of the Department, is considered to be formulating its final agency action through this proceeding." Conclusion of Law 178. However, the ALJ correctly characterized his role in the formal hearing. "Formal proceedings must be conducted either by the agency head or, at the agency's election, by a hearing officer of the

Division of Administrative Hearings." McDonald v. Department of Banking and Finance, 346 So.2d 569, 578 (Fla.1st DCA 1977).

See also, Rathkamp v. DCA, 21 FALR 1902 (Dept. Comm. Aff. 1998), aff'd., 740 So. 2d 1209 (Fla. 3d DCA 1999).

Abbe Exceptions 69, 70 & 76 are DENIED.

Coleman Exception to Supplemental Recommended Order

The ALJ entered a prehearing order limiting the issues which could be heard in this matter. See, last un-numbered paragraph on page 5 of the Recommended Order. The ALJ concluded that the only ultimate issue in this case is: whether the Ordinance is consistent with the Principles for Guiding Development. Conclusion of law 179. Coleman contends that the ALJ should have considered an additional issue. Coleman asserts that the ALJ improperly excluded evidence of deficiencies in the City's public notice for the Transient Rental Ordinance.

The Legislature has authorized the Department to approve or reject land development regulations in areas of critical state concern. §380.05(6) & (10), *Fla. Stat.* (2000). The standard for the Department's decision is whether the land development regulation "is consistent with the principles for guiding development of the area specified under the rule designating the area." §380.05(6), *Fla. Stat.* (2000). The ALJ correctly limited the case to this ultimate issue. Coleman's concerns regarding the City's public notice for the adoption of the Transient Rental Ordinance can be adequately addressed by the Circuit Court in the pending case mentioned in Coleman's Exceptions.

Coleman's legal theory is not as reasonable as the ALJ's conclusion of law. Coleman's Exception to the Supplemental Recommended Order is DENIED.

Deference to Local Government; Abbe Exceptions 72, 73

The Abbe Petitioners contend that the ALJ erred by concluding that,

187. When the legislative intent of Chapter 380, Florida Statutes, is taken into account, it is clear that this is not the type of land use decision the State is most concerned with. Because the Ordinance does no harm to the natural environment and waters of the City ACSC, the State's interest in the City ACSC is protected by the Ordinance.

188. The crucial issue is essentially a local one. Consequently, some deference should be afforded the City to make this difficult choice.

The ALJ's conclusion logically follows from the guidance provided by the legislative intent section of chapter 380, §380.021, *Fla. Stat.* (2000). The primary emphasis of the Legislature in enacting the Environmental Land and Water Management Act is the protection of the natural resources and waters of the State. The Department is the agency responsible for ensuring that local governments make decisions that do not conflict with this intent. It is not necessary that the Department ensure that every land planning action of a local government positively enhance the natural resources and waters of the local government's area of critical state concern. Rathkamp v. DCA, 21 FALR 1902 (Dept. Comm. Aff. 1998), aff'd., 740 So. 2d 1209 (Fla. 3d DCA 1999).

The legal conclusion that not all local government land development regulations address the issues and resources protected by the Principles for Guiding Development of an Area of Critical State Concern was also reached in Berg v. Department of Community Affairs, 14 FALR 2376 (DOAH 1992). The Berg final order dismissed a challenge to a proposed and an emergency rule which approved a moratorium on development adopted by the City of Key West. The Berg Hearing Officer stated,

> In evaluating Petitioner's arguments, it is important to keep in mind the legislative objectives behind rulemaking in this case. The Area of Critical State Concern program is intended to protect invaluable environmental and natural resources of regional or statewide importance through DCA oversight of land development regulations which are adopted by local governments located within Areas of Critical State Concern. Section 380.05, Florida Statutes. To assert that local governments in Areas of Critical State Concern cannot adopt moratoria without the delay caused by the rulemaking process would impose an unnecessary

bureaucratic obstacle to the enactment of new City ordinances or policies. The policy decisions inherent in a local government's decision to impose a building moratorium should not be subject to challenge and review pursuant to Chapter 120, Florida Statutes, simply because the property in question has been designated an Area of Critical State Concern. Berg, at 2391.

The Department agrees with the ALJ's conclusion that the crucial issue is essentially a local one. Abbe Exceptions 72 and 73 are DENIED.

ORDER

Upon review and consideration of the entire record of the proceeding, including the Recommended Order, the Exceptions to the Recommended Order, and the Responses to Exceptions, it is hereby ordered that:

1. The findings of fact and conclusions of law in the Recommended Order are adopted, except:

A. Finding of fact 1 is modified to state:

1. All of the Petitioners in Case No. 99-0666GM (hereinafter referred to as the "Abbe Petitioners") are involved in the rental of real property in Key West, Monroe County, Florida.

B. The second sentence of finding of fact 9 is modified to state:

Two properties located near the duPont's residence are used as Transient Rentals.

C. Finding of fact 78 is rejected.

D. The third sentence of conclusion of law 170 is modified to state:

Therefore, the Ordinance will have an immediate and adverse effect on all of the Abbe Petitioners and Mr. Coleman.

E. Conclusion of law 171 is rejected.

2. The Administrative Law Judge's recommendation is accepted; and

3. The Transient Rental Ordinance, a land development regulation adopted by City of Key West Ordinance 98-31, is APPROVED as consistent with the Principles for Guiding Development of the City of Key West Area of Critical State Concern.

DONE AND ORDERED in Tallahassee, Florida.

Steven M. Seibert, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

NOTICE OF RIGHTS

ANY PARTY TO THIS FINAL ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.110.

TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.900(a). A COPY OF THE NOTICE OF APPEAL MUST BE FILED WITH THE APPROPRIATE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

YOU **WAIVE** YOUR RIGHT TO JUDICIAL REVIEW IF THE NOTICE OF APPEAL IS NOT TIMELY FILED WITH THE AGENCY CLERK AND THE APPROPRIATE DISTRICT COURT OF APPEAL.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the undersigned designated Agency Clerk, and that true and correct copies have been furnished to the persons listed below, on this 13th day of March, 2001.

Paula Ford
Agency Clerk

By U.S. Mail:

Jeffrey Bell, Esquire
Ritter, Chusid, Bivona, and Cohen
7000 West Palmetto Park Road, Suite 400
Boca Raton, FL 33433

Jerry Coleman
201 Front Street, Suite 204
Key West, FL 33040

John F. Rooney, Esquire
208-10 Southard Street
Key West, FL 33040

Jerrell Phillips,Esq.
Post Office Box 14463
Tallahassee, FL 32317-4463

David J. Audlin, Jr., Esquire
Eaton Street Professional Center
524 Eaton Street, Suite 110
Key West, FL 33040

Robert Tischenkel, City Attorney
City of Key West
Post Office Box 1409
Key West, FL 33041

By Interagency Mail:

Barbara Leighty, Clerk
Growth Management and Strategic Planning
The Capitol, Suite 2105
Tallahassee, FL 32399

Hon. Larry J. Sartin
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

By Hand Delivery:

Andrew S. Grayson, Esquire
Assistant General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100