1-11-01 AP

DCA FINAL ORDER NO. DCA01-GM-028

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

1000 FRIENDS OF FLORIDA, INC.,
Petitioner,
v.

DEPARTMENT OF COMMUNITY AFFAIRS, and THE CITY OF STUART,

DOAH CASE NO. 00-3041 TLJ

Respondents,
_____/

FINAL ORDER

Background

This matter involves a petition filed by 1000 Friends of Florida, Inc. ("1000 Friends"), which challenged the "in compliance" finding of the Department of Community Affairs ("Department") regarding amendments to the City of Stuart Comprehensive Plan ("Plan") adopted on April 10, 2000, by Ordinance 1702-99 ("Amendments"). The amendments at issue comprise the addition of Policies A8.19 and A8.20 to the Plan's Intergovernmental Coordination Element. They were adopted to comply with the requirements in Section 163.3177(6)(h)a., Florida Statutes, regarding joint planning areas.

The Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH") held a final administrative hearing and entered a Recommended Order in which he recommended that a final order be entered finding the City's plan amendments to be not in compliance. The Recommended Order was forwarded to the Department of Community Affairs for further disposition pursuant to Section 163.3184(9), Florida Statutes. Exceptions to

the Recommended Order were filed by the City of Stuart ("City"), the Department of Community Affairs ("Department"), and 1000 Friends. The Department and Collier County ("County") filed responses to 1000 Friends' exceptions.

STANDARD OF REVIEW

The Administrative Procedure Act, Chapter 120, Florida Statutes, requires agencies to accept the ALJ's findings of fact and conclusions of law, except under certain limited circumstances.

Section 120.57(1)(*l*), Florida Statutes, provides the standard of review of findings of fact in the Recommended Order. It provides, in relevant part:

> 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.

The Department cannot re-weigh the evidence considered by the ALJ. The Department cannot reject findings of fact made by the ALJ unless there is no competent, substantial evidence in the record to support the findings. *Heifetz v. Department of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985); and *Bay County School Board v. Bryan*, 679 So.2d 1245 (Fla. 1st DCA 1996), construing a provision substantially similar to Section 120.57(1)(1), Florida Statutes.

The agency also has limited authority to reject or modify the ALJ's conclusions of law. Section 120.57(1)(*l*), Florida Statutes, provides that:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which its 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.

The label assigned to a statement is not dispositive as to whether that statement is a conclusion of law or a finding of fact. *Sapp v. Florida State Board of Nursing*, 384 So. 2d 254 (Fla. 2d DCA 1980); *Leapley v. Board of Regents*, 423 So. 2d 431 (Fla. 1st DCA 1982); *Heifetz v. Department of Business Regulation,* 475 So. 2d 1277 (Fla. 1st DCA 1985); *Kinney v. Department of State*, 501 So. 2d 129 (Fla. 5th DCA 1987). It is the true nature and substance of the ALJ's statement that controls an agency's authority to reject a finding of fact or modify a conclusion of law. *J.J. Taylor Companies, Inc. v. Department of Business and Professional Regulation*, 724 So. 2d 192 (Fla. 1st DCA 1999).

MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE

Following the issuance of the Recommended Order, 1000 Friends filed a request to amend its petition in order to conform with the evidence. The motion was filed with the Department on February 7, 2001. The purpose of the motion is "to add the additional claim that Policy A8.19 and Policy A8.20 are vague...." The alleged vague language is the phrase "likely to occur," which appears in Policy A8.19 and is applicable to related Policy A8.20.

In support of the motion, 1000 Friends notes that its attorney referred to vagueness in his opening statement and when eliciting testimony. As there was no objection to any of those references, 1000 Friends contends that the issue was tried by the parties through implied consent.

The Department's attorney responsed that the motion should be denied on the grounds of prejudice and the Department's lack of authority to rule on such a motion. In support of the latter argument, he cites *Department of Corrections v. Saulter,* 742 So. 2d 368 (Fla. 1st DCA 1999) for the proposition that an agency cannot rule on a motion if the Uniform Rules of Procedure does not expressly provide for the consideration of such a motion. The main question at bar in *Saulter* addressed the situation where an agency had adopted a procedural rule regarding a type of motion that was not within the scope of the Uniform Procedural Rules. In the instant case, the Department has not adopted any rule concerning motions to conform the pleadings to the evidence. Accordingly, the Department will review the motion as being filed under Uniform Rule of Procedure 28-106.204, F.A.C., which generally addresses motions.

The issue of whether to consider this vagueness issue was addressed in Conclusions of Law 28-37 of the Recommended Order. The ALJ ruled that the issue was waived, but nevertheless addressed the merits of 1000 Friends' allegation and found that the phrase was not vague. Although the ALJ was not asked to rule on a motion to conform the pleadings with the evidence, he made sufficient findings upon which to determine whether granting such a motion is appropriate. In Conclusion of Law 31, the ALJ found that the vagueness issue was not discrete from 1000 Friends' main argument

> that Policy A8.19 is not "in compliance" because it does not require the annexation JPA to include <u>all</u> areas where annexations could possibly occur, so that annexations outside the annexation JPA would be possible.

As the vagueness issue is related to one that already had properly been placed at issue, there was no apparent need for opposing counsel to raise an objection when vagueness was

mentioned by 1000 Friends' attorney. In cases where testimony was relevant to issues which were properly pled, it has been held that the newly raised issues could not have been the subject of well-taken objection and it cannot be found that the parties tried the issues by implied consent. *National Aircraft Services, Inc., v. Aeroserv International, Inc.*, 544 So. 2d 1063 (Fla. 3d DCA 1989); *Schopler, D.D.S., v. Smilovits*, 689 So. 2d 1189 (Fla. 4th DCA). The motion is denied.

RULINGS ON EXCEPTIONS
1000 Friends' Exceptions

Exception No. 1- Conclusion of Law 29

In this exception, 1000 Friends requests that the Department overrule the ALJ's legal conclusion that 1000 Friends waived the issue of Policy A8.19's vagueness. The Department is without jurisdiction to grant this request. The question of whether a party waived an issue is a purely legal one that lies wholly within the province of the ALJ. The Department has no legal authority to reject an ALJ's application of judicial principles in his conclusions of law. *See Deep Lagoon Boat Club, Inc., Ltd., v. Sheridan*, 26 Fla. L. Weekly D562 (Fla. 2d DCA Feb. 21, 2001). Under Section 120.57(1)(*l*), Florida Statutes, an agency may reject a conclusion of law only with regard to matters over which it has substantive jurisdiction. The exception is denied.

Exception Nos. 2 and 3-Conclusions of Law 30 and 32-37

In Conclusion of Law 30, the ALJ noted that even if the issue of Policy A8.19's vagueness were considered, 1000 Friends did not prove that Policy A8.19 is not "in compliance" on that basis because that policy "is clear enough to guide establishment of the annexation JPA." 1000 Friends takes issue with the ALJ's implicit conclusion that Section 163.3177(6)(h)1., Florida Statutes, requires that implementing policies merely provide guidelines for identifying annexation

JPAs. 1000 Friends maintains that this conclusion is improper because Section 163.3177(6)(h)1.a., Florida Statutes, is more specific, ergo the more controlling provision, with respect to the requirements of identifying JPAs. Under that provision, 1000 Friends argues, JPAs must be identified "in a meaningful and measurable way" such that policies "establish procedures to identify in the plan the area where annexation will be limited after joint planning occurs."

In responding to this argument, it is noted that in conclusions of law 32-37 the ALJ addressed the degree of certainty required by Section 163.3177(6)(h)1.a. for identifying JPAs. He did not construe its requirements to be as strict as 1000 Friends maintains them to be. In conclusion 33, the ALJ noted that the level of predictability sought by 1000 Friends "would be difficult, if not practically impossible" because the City would be required to predict with pinpoint accuracy where all future annexations will occur.

The Department agrees with the ALJ's conclusions. As the ALJ noted, local governments have no way of "predicting with absolute certainty" the location of parcels which will be the subject of future voluntary annexation requests. Coupling this unwieldy reality with a requirement to secure an interlocal agreement as to those boundaries, as urged by 1000 Friends, would impose an unreasonable burden on local governments to draw "hard" boundary lines for annexations. That was not the intent of Section 163.3177(6)(h)1.a., which only requires the adoption of procedures for identifying and implementing JPAs.

The Department disagrees with 1000 Friends' argument that planning is required before an annexation may be approved. Contrary to 1000 Friends' assertions, this interpretation does not present a conflict between Chapters 171 and 163, Florida Statutes. Neither chapter mandates

comprehensive planning as a prerequisite to annexation. Rather, Chapter 171 indicates that a parcel may be annexed prior to planning by the annexing municipality. In Section 171.062, Florida Statutes, the legislature determined that the county's comprehensive plan and land development regulations would control a newly annexed parcel until the annexing municipality adopts a comprehensive plan. This statutory provision is self-executing and does not require an interlocal agreement to govern the period of time during which the annexed property operates under the county's plan. The exceptions are denied.

Exception No. 4- Conclusion of Law 35

1000 Friends argues that the ALJ misconstrued Section 163.3211, Florida Statutes, by concluding in Paragraph 35 that it "does not apply to Chapter 171, which deals with annexation, not regulation of land." That statute states the legislature's intent with respect to conflict with other laws and mandates that Chapter 163, Part II, Florida Statutes, controls over "provisions of law relating to local governments having authority to regulate the development of land...." Fla. Stat. § 163.3211. The Department agrees with the ALJ's interpretation of the law, which is based upon a plain reading of the law. The exception is denied.

Exception No. 5- Conclusion of Law 40

1000 Friends takes exception to the ALJ's conclusion that Policy A8.20 was not adopted to meet the requirements for joint planning area procedures contained in Section 163.3177(6)(h)1.a., Florida Statutes. That conclusion is supported by the record, however. Robert Pennock, the City's planning consultant who drafted the two policies at issue, testified that the task of establishing joint planning area procedures was primarily addressed in Policy A8.19.

As to Policy A8.20, Mr. Pennock specifically testified:

> The purpose of Policy A8.20 is to address actual instances of annexations and to smooth and facilitate the process and the interaction between the City and County when these annexations occur....

(Transcript, page 71)

The Department also disagrees with 1000 Friend's contention that Section 163.3177(6)(h)1.a., Florida Statutes, nevertheless operates as a limitation on Policy A8.20 because that policy "involves joint planning for annexation." Section 163.3177(6)(h), Florida Statutes, contains the minimum content requirements for intergovernmental coordination elements. Section 163.3177(6)(h)1.a. requires that procedures for joint planning areas be included in that element. It does not govern every policy that involves joint planning areas. The requirements of that statutory provision may be met in a single policy among many within the intergovernmental coordination element. The exception is denied.

Exception No. 6- Conclusion of Law 26

This exception is directed at the portion of Paragraph 26 in which the ALJ concludes that the identification of joint planning areas may be accomplished by interlocal agreement. 1000 Friends maintains that both the procedures for joint planning and the identification of joint planning areas must be included in the intergovernmental coordination element. The Department disagrees with this argument. Joint planning agreements are addressed in Section 163.3171(3), Florida Statutes, which specifically authorizes local governments to jointly exercise the powers granted under the provisions of Chapter 163, Part II, Florida Statutes, through the adoption of an interlocal agreement. This is a broad grant of authority. There is no requirement in Chapter 163,

Part II, Florida Statutes, that the identification of future annexation areas be accomplished through comprehensive plans, as opposed to interlocal agreements. The exception is denied.

The City and the Department's Exceptions

Conclusions of Law 26-27, 38, 41, and Recommendation

The City and the Department both take issue with the ALJ's interpretation of the requirements of Section 163.3177(6)(h)1.a., Florida Statutes, which led to his conclusion that Policy A8.19 is not "in compliance." According to the ALJ's legal analysis, all joint planning policies, including those adopted through an optional interlocal agreement, must be incorporated into the comprehensive plans of the City and the County. That interpretation is discussed in Conclusions of Law 26 and 27; referenced in Conclusions of Law 38 and 41; and is the sole basis for the ALJ's not "in compliance" recommendation as to Policies A8.19 and A8.20.

In resolving this issue, the ALJ also construed Section163.3171, Florida Statutes, which addresses various types of voluntary interlocal agreements. Under Sections 163.3171(1) and (3), a city may engage in extra-jurisdictional planning for areas that may be annexed in the future by following an interlocal agreement procedure set forth therein. There is no requirement in that statute that the interlocal agreement approved by the city and county also be incorporated into the county and the city's comprehensive plans. It was error for the ALJ to conclude that all joint planning policies must become part of the applicable city and county's comprehensive plans.

Section 163.3177(6)(h), Florida Statutes, does not suggest any attempt to require the incorporation of interlocal agreements into comprehensive plans. That statute's requirements comprise minimum content requirements for the intergovernmental coordination elements of

comprehensive plans. Those requirements must be met within the body of the plan itself, however they do not expand in the event of a voluntary interlocal agreement. The City does not argue that Policy A8.19 would allow Section 163.3177 requirements to be met through an interlocal agreement. It simply asserts the right to avail itself of the extra-jurisdictional planning options provided under Section 163.3171, Florida Statutes, which are not incorporated into the minimum plan content requirements of Section 163.3177, Florida Statutes. Those minimum requirements have been met.

The Department recognizes that the result of some joint planning efforts contemplated by Policy A8.19 may need to be reflected in the comprehensive plans of the agreeing local governments. The law does not require, however, that all joint policymaking be reflected in the comprehensive plans. The Department, in interpreting the provisions of Sections 163.3171 and 163.3177(6)(h)1. in the manner to give them both the greatest effect, finds that the provisions of Policy A8.19 are in compliance as a first step in a multi-step process. The Policy establishes as the second step either the adoption of Joint Planning Areas into the City and County comprehensive plans, or the adoption of an interlocal agreement pursuant to Section 163.3171, Florida Statutes. Depending on the content of the Joint Planning Area agreements, there may be a third step whereby the City and County adopt amendments to their comprehensive plans and land development regulations necessary to implement the Joint Planning Area as set forth in the interlocal agreement. This further step will be necessary for the City to exercise planning jurisdiction outside its boundaries as permitted by Section 163.3171.

Pursuant to Section 120.57(1)(*l*), Florida Statutes, the Department finds that its

conclusions reached herein are more reasonable that those reached by the ALJ in conclusions of law 26, 27, 38, and 41. The Department's conclusions encourage local governments to enter into interlocal agreements and do not impose additional plan content requirements upon local governments who choose to do so. The legislature did not intend interlocal agreements to add to the minimum plan content requirements of Section 163.3177, Florida Statutes. Accordingly, the exceptions are granted. Conclusions of law 26 and 27, and the last sentence in conclusion of law 38 are stricken. The last sentence in conclusion of law 41 shall read: For these reasons it is concluded that Policy A8.20 is "in compliance." The ALJ's recommendation that Policies A8.19 and A8.20 be determined to be not "in compliance" is rejected.

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 the Exceptions, it is hereby ordered that:

1. The findings of fact and conclusions of law in the Recommended Order are adopted, except as rejected or modified in this Final Order;
2. The ALJ's recommendation that the Department submit this matter to the Administration Commission for the issuance of a final order finding Policies A8.19 and A8.20 not "in compliance" is rejected; and
3. Policies A8.19 and A8.20, which were adopted by the City of Stuart by Ordinance No. 1702-99, are determined to be "in compliance."

DONE AND ORDERED in Tallahassee, Florida.

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

NOTICE OF RIGHTS

The parties are hereby notified of their right to seek judicial review of this Order of Remand 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, a Notice of Appeal must be filed with the Department's Agency Clerk, 2555 Shumard Oak Boulevard, Tallahassee, Florida 32399-2100, and with the appropriate District Court of Appeal within thirty (30) days of the filing of this Order of Remand with the Department's Agency Clerk. A Notice of Appeal filed with the District Court of Appeal should be accompanied by the filing fee specified in Section 35.22, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by the method indicated to the following persons listed below on this 18th day of May, 2001.

for Paula Ford, Agency Clerk
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Blvd.
Tallahassee, FL 32399-2100
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FILING AND ACKNOWLEDGEMENT
FILED, on this date, with the designated Agency Clerk, receipt of which is hereby acknowledged.

Miriam Snipes 5/18/01
Miriam Snipes **Date**
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