10-16-02 1/3/03

Final Order No. DCA02-GM-340

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DIVISION OF ADMINISTRATIVE HEARINGS

AP

DRA-CLOS

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

SALLY O'CONNELL; DONNA MELZER; and MARTIN COUNTY CONSERVATION ALLIANCE,

Petitioners,

v.

DOAH CASE No. 01-4826GM

DEPARTMENT OF COMMUNITY AFFAIRS and MARTIN COUNTY,

DCA Case No. DCA02-GM-340

Respondents,

and

DICK BLYDENSTEIN and ECONOMIC DEVELOPMENT COUNCIL OF MARTIN COUNTY,

Intervenors.

______________________________________/

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 a challenge to Martin County comprehensive plan amendments 00-1, 01-7 and 97-2 adopted by Ordinance No. 598, hereinafter referred to as "the Plan Amendments."

The Department published a notice of intent to find the Plan Amendments "in compliance," as defined in §163.3184(1)(b), *Fla. Stat.* (2001); and the Petitioners challenged the Plan Amendments, as authorized by §163.3184(9)(a), *Fla. Stat.* (2001). A formal hearing was conducted by Administrative Law Judge ("ALJ") Donald R. Alexander 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 determining that the Plan Amendments are in compliance.

The Petitioners and Martin County each filed Exceptions to the Recommended Order, and Respondents and Intervenors filed Responses to Petitioners' Exceptions.

ROLE OF THE DEPARTMENT

Throughout the pendency of the formal administrative proceedings, the Department's litigation staff contended that the Plan Amendments are in compliance. After the ALJ issued his Recommended Order, the Department assumed two functions in this matter.

The attorney and staff who advocated the Department's position throughout the formal proceedings continued to perform that function by reviewing the Recommended Order and filing a Response to Petitioner's Exceptions urging that the Department find the Plan Amendments in compliance. The other role is performed by the Secretary of the Department and agency staff who took no part in the formal proceedings, and who have reviewed the entire record and the Recommended Order in light of the Exceptions and Response. Based upon that review, the Secretary of the Department must either enter a final order consistent with the ALJ's recommendations finding the Plan Amendments in compliance, or determine that the Plan Amendments are not in compliance and submit the Recommended Order to the Administration Commission for final agency action.

§ 163.3184(9)(b), *Fla. Stat.* (2002).

Having reviewed the entire record, the Secretary 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.* (2002)

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. *Heifetz 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.* (2002). 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.* (2002)

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 PLAN AMENDMENTS

The Plan Amendments represent a policy change by the County, and make textual amendments to the Economic Element and the Future Land Use Element (FLUE) of the Plan to change the methodology for determining the need for commercial land within the County. Findings of fact 1, 12 - 14. None of the Exceptions are directed to this portion of the Plan Amendments.

The Plan Amendments also change the future land use designations of a 27.8 acre parcel known as the Blydenstein parcel from Mobile Home Residential (8 dwelling units per acre) to General Commercial; and of a 2.99 parcel know as the Seven J's parcel from Medium Density Residential (8 dwelling units per acre) to General Commercial. Findings of fact 1, 15 and 16.

RULINGS ON EXCEPTIONS

The Petitioners and the County filed 40 pages of exceptions directed to the 26 page Recommended Order. 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); *disapproved on other grounds*; *Dept. of Prof'l Regulation v. Bernal*, 531 So.2d 967 (Fla. 1988). 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.

RULINGS ON EXCEPTIONS

I. Minor Errors

The County points out several minor errors in the Recommended Order, such as the adoption date and the numerical designation of the Plan Amendments. No other party filed a response to the County's exceptions, and the record reveals that these are clearly inadvertent minor errors.

County Exceptions 1, 2, 3, 4, 5 and 6 are GRANTED, and the Recommended Order is modified in paragraphs 1A through F in the Order below.

II. Standing of Martin County Conservation Alliance, Inc.

The County contends that finding of fact 10 relating to the standing of Petitioner Martin County Conservation Alliance, Inc. ("MCCA") is not supported by competent substantial evidence. A review of the record indicates that the County is partially correct. The Department has not found support in the record for the portion of finding of fact 10 which states, "The parties have stipulated ... that a substantial number of MCCA members own businesses within the County."

However, the remainder of finding of fact 10 is the ALJ's assessment of the testimony of Sally O'Connell, Donna Melzer and Margaret Hurchalla. The Department cannot reweigh the evidence as suggested by the County; that is the task for the ALJ. Similarly, since the County's

exception to conclusion of law 46 is based upon the County's view of the facts, the County's suggested revision to the conclusion of law is not as reasonable as the ALJ's conclusion. County Exception 8 is GRANTED in paragraph 1G in the Order below, and County Exceptions 7 and 11 are DENIED.

III. The Calculation of "Need"

The Petitioners contended at the final hearing that there was no demonstrated need for the Blydenstein or Seven J's plan amendments, findings of fact 34 and 41, because "the County undercounted the commercial land inventory used in projecting future need...." Finding of fact 21. Several exceptions were directed to the ALJ's findings and conclusions regarding "need."

A. The Effect of the Martin County Land Development Regulations

The ALJ found that the Martin County Comprehensive Plan does not allow commercial uses within the Industrial land use category; that the County's land development regulations ("LDRs") permit commercial uses on Industrial lands; and that "the County (at the urging of the Department) intends to review (and perhaps repeal) these regulations in 2003...." Finding of fact 26.

The County contends that the phrase "(and perhaps repeal)" is not supported by competent substantial evidence. The County is correct that the phrase does not appear in the record. However, the concept that the County might repeal LDRs that are not consistent with the Plan is a logical extrapolation of the evidence. The County has a duty to adopt LDRs that are consistent with the Plan. §163.3194(1)(b) & (3), *Fla. Stat.* (2002). The ALJ's finding of fact does not limit the County's options in resolving the inconsistency; the ALJ simply points out the most obvious solution. The ALJ also noted a second option, to "possibly create a new mixed-use category." Finding of fact 26.

County Exception 10 is DENIED.

The Petitioners contend that the County's inventory of available commercial land should have included a portion of the land designated as Industrial, since the County's LDRs and actual practice allow commercial uses on Industrial land. However, the local comprehensive plan is superior to the land development regulations, §163.3194(1)(b) & (3), *Fla. Stat.* (2002); and the Martin County Comprehensive Plan does not allow commercial use on parcels designated as Industrial. Finding of fact 26 and Joint Exhibit 6, p 4-88 to 90. If the County has issued

development orders that permit commercial use of land designated as Industrial, those development orders may be challenged by aggrieved and adversely affected parties. §163.3194 and .3215, *Fla. Stat.* (2002). The ALJ's conclusion that land designated as Industrial need not be included in the inventory of available commercial land is more reasonable than the legal theory proposed by the Petitioners.

Petitioners Exception 6 are DENIED.

B. <u>Witham Field</u>

The Petitioners contend that 30 acres of vacant land located at the Witham Field airport were incorrectly omitted from the County's inventory of available commercial land. The ALJ found that the omission was appropriate because the land is designated Institutional. Finding of fact 31. The Institutional land use designation does not include general commercial uses. Joint Exhibit 6, p. 4-90 & 91. Therefore, the ALJ correctly concluded that under the Plan vacant airport land is not available for commercial use. *Dixon v. City of Jacksonville*, 774 So. 2d 763 (Fla. 1st DCA 2000). If the County is allowing commercial development on land designated as Institutional, the development orders for that commercial development can be challenged pursuant to §163.3215, *Fla. Stat.* (2002).

Petitioners Exception 7 is DENIED.

C. <u>West Jensen DRI</u>

The County contends that there is no competent substantial evidence to support the statement in finding of fact 25 that, "The West Jensen DRI is an approximately 180-acre residential/commercial development ...." The Department found no evidence in the record to support a specific size for the West Jensen DRI.

County Exception 9 is GRANTED, and finding of fact 25 is modified in paragraph 1H in the Order below.

The ALJ found that there are 70 undeveloped commercial acres in the West Jensen DRI, and that the County did not include these acres in its inventory of available commercial land. The ALJ determined that the omission of the DRI acreage was appropriate

> ... because the property is dedicated under a master plan of development, and therefore it would be inappropriate to include it as vacant inventory. On this issue, the more persuasive evidence shows that the treatment of undeveloped land in a DRI (subject to a master plan of development) is a "close call" in the words

of witness van Vonno, and that it is just as professionally acceptable to exclude this type of undeveloped land from vacant commercial inventory as it is to include it. Finding of fact 25.

The Petitioners contend that the ALJ should have accepted the testimony of Department planners Wilburn and Gauthier that the exclusion of vacant commercial land in a DRI from the inventory of vacant commercial land is not professionally acceptable. Tr. Vol. VI, p 812-815, Vol. XI, p 1495-1510, Petitioners Exhibit 58, p 36. However, Mr. Wilburn's testimony was ambiguous on this point, and Mr. Gauthier testified that he was unfamiliar with the details of the Plan Amendments. Petitioners Exhibit 58, p 14, 26 and 27. The ALJ found the testimony of Martin County Growth Management Director van Vonno more persuasive. Tr. Vol. IX, p 1157-1167. The Department may not reject any finding of fact that is based on competent substantial evidence. Section 120.57(1)(l), Fla. Stat.

Petitioners Exception 5 is DENIED.

D. The Significance of "Need"

Most of Petitioners exceptions are directed to the ALJ's overall analysis of "need." The Petitioners contend that a future land use map amendment cannot be in compliance unless there is a demonstrated need for the amendment. As the Petitioners point out, the statute requires:

> The future land use plan shall be based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; the need for redevelopment, including the renewal of blighted areas and the elimination of nonconforming uses which are inconsistent with the character of the community.... §163.3177(6)(a), *Fla. Stat.* (2002).

The issue raised by this case is whether two future land use map amendments which would increase the supply of vacant commercial land in the County by 31 acres are in compliance. Even if the County presently has an oversupply of vacant commercial land, the addition of 31 acres to that oversupply is a small addition, and other factors such as the character of the land might outweigh the oversupply of commercial land. As the ALJ stated,

> Notwithstanding a lack of numerical need, that consideration is not the sole factor in determining whether the amendment should be approved.... [I]n addition to need, the County considers such factors as the suitability of the property for

change, locational criteria, and community desires in making this determination. Finding of fact 36.

This finding is supported by the testimony of several of the expert planning witnesses, including the Department's Chief of the Bureau of Local Planning.

> Q. Does a future land use map change have to be needed in order to be found in compliance?
> A. There are many different contexts of the application for consideration of need. So need needs to be looked at in concert with a number of other factors.
> My own view and previous testimony is that need is not a precise tool, that is less useful in the area of small amendments within established urban areas. Need is a more general tool that's useful for basic sizing of urban designated areas. I can report to you what my understanding and practice has been, and experience is. It's really important to look at need in the context of the particular amendment and its location and other planning objectives. It's not a precise test.
> Q. Is that to say then that it would be possible for a map amendment to be found in compliance even if that amendment is not needed?
> A. It is possible in my view for a map amendment to be approved, depending upon the nature of the amendment, the location of the amendment and other planning objectives, even if it were beyond a pure numerical need calculation.
> Petitioners Exhibit 58, p 16 & 17.

The ALJ found several planning considerations in favor of the two future land use map amendments. Findings of fact 36 - 43. The ALJ's conclusion that these considerations outweigh the oversupply of vacant commercial land is more reasonable than the Petitioner's theory. Petitioners Exceptions 1, 2, 3, 4, 8 and 9 are DENIED.

IV. <u>Internal Consistency</u>

The Petitioners point out that the Martin County Comprehensive Plan requires that "all requests for amendments to the future land use map shall include a general analysis of the availability and adequacy of public facilities...." Joint Exhibit 6, p 4-38. The ALJ found that the County staff performed "a general analysis of the availability of public facilities." Finding of fact 38. The Petitioners contend that the general analysis was not sufficient to demonstrate that adequate public facilities will be available to support the two map amendments, and therefore the two map amendments are internally inconsistent with the Plan.

The Plan policy cited by the Petitioners requires no more than a general analysis. The ALJ determined that a general analysis was performed, and concluded that "the greater weight of

the evidence supports a finding that the amendment is internally consistent." Finding of fact 43. The ALJ's conclusion is more reasonable than the Petitioner's theory.

Petitioners Exception 10 is DENIED.

V. The Adoption Ordinance

The Ordinance which adopted the Plan Amendments includes the following provision:

> Special acts of the Florida Legislature applicable only to incorporated areas of Martin County, County ordinances and County resolutions or parts thereof, and other parts of the Martin County Comprehensive Growth Management Plan in conflict with this ordinance are hereby superceded by this ordinance to the extent of such conflict. Conclusion of law 49.

The Petitioners contend that the Plan Amendments might conflict with other portions of the Plan, and therefore would supercede those portions to the extent of such conflict. The Petitioners do not point out any such conflicts, or whether any portion of the Plan would be superceded.

The ALJ concluded that the provision is simply part of the enacting Ordinance which adopted the Plan Amendments, and therefore is not subject to compliance review. A provision of an enacting ordinance which clearly negated or modified the adopted plan or plan amendments might be a valid subject for a compliance proceeding such as this. The Department accepts the ALJ's legal conclusion that the validity of this provision, which has no clear effect on the Plan or the Plan Amendments, is not a proper subject for compliance review.

Petitioners Exception 11 is DENIED.

ORDER

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

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

A. The references to "97-4" in findings of fact 1 and 8, and in the Recommendation are changed to "97-2";

B. The references to "00-01" in findings of fact 1, 8, 12, and 35, and in the Recommendation are changed to "00-1";

C. The references to "01-07" in findings of fact 8 and 15, and in the Recommendation are changed to ""01-7;"

D. The reference to "Seven J" in findings of fact 1, 3, 16, 41 and 42, and subtitle "g" on page 23, are changed to "Seven J's;"

E. The reference to the date of adoption on page 2 is changed from "September 20, 2001" to "September 25, 2001;"

F. The reference to "a member" on page 4, line 11 is changed to "the executive director;"

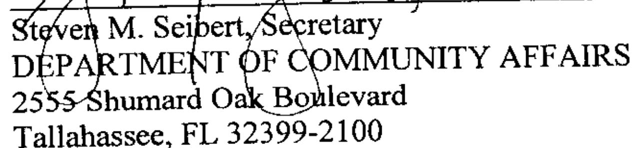
G. The portion of the fifth sentence of finding of fact 10 which states, "and that a substantial number of MCCA members own businesses within the County" is deleted;

H. The third sentence of finding of fact 25 is modified to state, "The West Jensen DRI is large residential/commercial development with a large commercial component;"

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

3. Comprehensive plan amendments 00-01, 01-07 and 97-4 adopted by Martin County Ordinance No. 598, are determined to be in compliance as defined in §163.3184(1)(b), *Fla. Stat.*

DONE AND ORDERED in Tallahassee, Florida.



Steven M. Seibert, Secretary
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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.

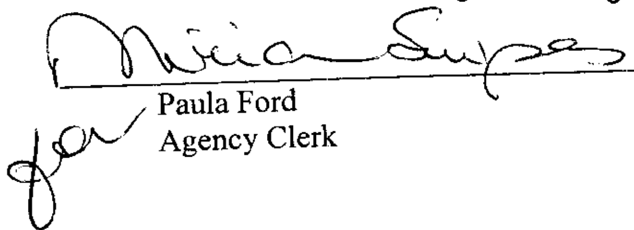
TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED 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 Agency Clerk of the Department of Community Affairs, and that true and correct copies have been furnished to the persons listed below this 3rd day of January, ~~2002.~~ 2003



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