6-18-02

FINAL ORDER NO. AC-02-004

STATE OF FLORIDA
ADMINISTRATION COMMISSION

AT

02 OCT 25 PM 2:10

ROBERT J. DENIG,

Petitioner,

v.

TOWN OF POMONA PARK,

Respondent.
_______________________________/

AC CASE NO. ACC-02-001
DOAH CASE NO. 01-4845GM

JLJ - Closed

FINAL ORDER

This cause came before the Governor and Cabinet sitting as the Administration Commission (Commission), on October 22, 2002, in consideration of the Recommended Order entered pursuant to Section 163.3187(3)(b), Florida Statutes, in Division of Administrative Hearings Case No. 01-4845GM.

ISSUE STATEMENT

The issue in this case is whether the Administrative Law Judge (ALJ) properly found that the small scale amendment enacted by the Town of Pomona Park (Town) on November 13, 2001, through Ordinance No. 01-7 (the Plan Amendment) was not "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

This matter involves a Town of Pomona Park comprehensive plan amendment that was adopted pursuant to the small scale amendment process set forth in Section 163.3187(1)(c),

Florida Statutes. The amendment proposes to change the Future Land Use Map (FLUM) designation of an eight acre portion of a thirteen acre parcel (Parcel) from Residential to Agricultural. On November 27, 2001, Petitioner, Robert J. Denig, an adjoining landowner, filed a Petition for Administrative Hearing pursuant to Section 163.3187(3), Florida Statutes, arguing that the Plan Amendment was not "in compliance."

The ALJ agreed, finding that the Plan Amendment was not supported by adequate data and analysis and was inconsistent with one provision of the Town's comprehensive plan, Future Land Use Element Policy A.1.9.3.C.1. (Rec. Order, pp. 15-16). Pursuant to Section 163.3187(3)(b)1, Florida Statutes, the ALJ has forwarded a Recommended Order to the Commission recommending that it find the amendment not "in compliance." (Rec. Order, p. 16).

The Town has filed a document containing a list of five exceptions to the findings in the Recommended Order (Notice of Exceptions) which the Commission addresses herein.

RULING ON EXCEPTIONS

Pursuant to Section 163.3187(3)(b), Florida Statutes, the Commission is authorized to take final agency action regarding small scale development amendments found to be not "in compliance." For the Commission to reject or modify any finding of fact made by the ALJ, the Commission must first determine that from a review of the entire record 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 the essential requirements of law." § 120.57(1)(*l*), Fla. Stat. Under this standard, the Commission may not reevaluate the quantity or quality of the evidence beyond a determination of whether the evidence supporting the ALJ's recommendation is competent and substantial. *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996).

Exception 1

The Town first argues that the ALJ committed legal error by conducting portions of the proceeding on a *de novo* basis, rather than acceding to the discretion of the local governing body. The Town characterizes the ALJ's findings as an "unwarranted and unlawful intrusion in the local legislative bodies' ***exclusive*** authority to make policy decisions such as those contemplated in this case." (emphasis added) (Notice of Exceptions, p. 1). The Town seems to argue that the entire process of a small scale amendment is a matter of legislative discretion.

The Florida Legislature clearly requires a *de novo* proceeding for this type of case. Under 163.3187(3)(a), Florida Statutes, any affected person is afforded the opportunity to challenge a small scale amendment by petitioning for a hearing conducted under Sections 120.569 and 120.57, Florida Statutes. The hearing procedures set forth in those statutes provide for *de novo* proceedings wherein the ALJ makes findings of fact based on the record developed before him at final hearing. The exception is rejected.

Exception 2

The Town argues that the ALJ improperly suggests that the "'fairly debatable' standard applies only to review by a court rather than an administrative proceeding" and this error "constitutes fundamental error." The exception does not identify any specific portions of the Recommended Order in which the ALJ makes such a suggestion, nor does it specifically claim that the ALJ failed to apply the "fairly debatable" standard in this proceeding.

Upon review of the ALJ's conclusions of law, it is apparent that the ALJ did not make the suggestion attributed to him in this exception. In fact, he specifically provides examples of where the "fairly debatable" standard applies in other administrative proceedings regarding plan amendments. (Rec. Order, pp. 12-13).

To the extent this exception can be construed as challenging the "preponderance of the evidence" burden and standard of proof applied by the ALJ in this case, the exception also is rejected. Section 163.3187(3)(a), Florida Statutes, provides:

> the local governments determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a **preponderance of the evidence** that the amendment is not in compliance with the requirements of this act. (Emphasis added)

This statute selects the "preponderance of the evidence" standard for small scale amendment proceedings, not the "fairly debatable" standard proposed by the Town.

Exception 3

The Town next contends that the ALJ found that the Town "did not complete any survey, study, or analysis of the Plan Amendment" and asserts that the "uncontradicted testimony of the Town Clerk and former Town Clerk was that an appropriate survey, study and analysis was completed, although not reduced to writing." (Notice of Exceptions, p. 2).

In this instance, the Town misstates the findings of the ALJ. The ALJ clearly recognized that a site visit occurred and that analyses were presented at the final hearing. (Rec. Order, pp. 5-6). However, the ALJ found these oral representations contradicted the plain language of the comprehensive plan. (Rec. Order, pp. 6-7). Additionally, the ALJ found that "no survey, study, or analysis of the Plan Amendment is reflected in the Town's files relating to the Plan Amendment, and it is found that there were none." (Rec. Order, p. 5). The Town presented no contradictory evidence for either finding. Indeed, the former town clerk, Ms. Jacob, stated under oath that no written staff report or analysis had been prepared. (Hearing Transcript, p. 34). The current town clerk confirmed this. (Hearing Transcript, p. 77, 78-9). Thus, competent

substantial evidence existed for the ALJ to make the findings set forth in paragraphs 6 through 8 of the Recommended Order. Therefore, exception 3 is denied.

Exception 4

In exception 4, the Town again clothes exception 1 in new garb. The Town alleges that the ALJ's interpretation of the Plan Amendment superimposed the ALJ's interpretation of the comprehensive plan over that of the local government that adopted the plan. (Notice of Exceptions, p.2). The exception appears to quote - without feeling any need to cite its quotations - paragraphs 8, 9, 14 and others of the Recommended Order. Specifically, the main complaint of this exception states:

> Those portions of the recommended order which interpret the local comprehensive plan as "seeming" to indicate "a need to designate more acreage for residential future land use and less for agricultural" constitutes a situation wherein the administrative law judge has superimposed his interpretation of the local comprehensive plan over that of the governing body which adopted the plan. This constitutes an unlawful intrusion upon the right of the local governing body to enact and interpret its own rules.

This exception also alludes to other passages of the Recommended Order which the Town finds equally "intrusive and unlawful." The Town neglects to cite which law. Ultimately, however, it appears the Town is once again rehashing the "fairly debatable" standard as the standard of review for its position. When reviewing the issues presented to the ALJ, the ALJ accepts the determination of the local governing body as correct unless the preponderance of the evidence establishes otherwise. *See* §163.3187(3)(a), Fla. Stat. The ALJ is to consider whether the evidence presented supports or contradicts the determination of the local governing body, not whether the local governing body considered the evidence properly.

The Town's complaint about this standard ultimately is with the statute, rather than the ALJ's Recommended Order. Exception 4 is denied.

Exception 5

Finally, the Town argues that the "portion of the Recommended Order finding that Petitioner proved by a preponderance of the evidence that the Town's Future Land Use Map Amendment is inconsistent with Future Land Use Policy A.1.9.3.C.1. is not supported by the evidence." (Notice of Exceptions, p. 2). In support of this claim, the Town points to the FLUM stating that the evidence "clearly indicates that the property immediately across the street from Petitioner's property is intended, via the map, for agricultural future land use." (Notice of Exceptions, pp. 2-3). Moreover, the Town contends that this adjacent parcel is equal to or larger than Petitioner's parcel. (Notice of Exceptions, pp. 2-3).

In considering this exception, this Commission must be mindful that it does not sit as finder of fact. Rather, the Commission simply examines the record to determine whether the ALJ's opinion is supported by competent, substantial evidence. The same preponderance of evidence standard applied because the Legislature elected not to apply the "fairly debatable" standard to issues of consistency relating to small scale amendments. The Commission also notes that the ALJ's findings are case specific and do not stand for a broad principle that residential and agricultural uses are inherently incompatible adjacent land uses. The ALJ's finding of incompatibility in the instant case turns on the small enclave character of the proposed agricultural use.

Paragraph 14 of the Recommended Order finds that the Plan Amendment "intrudes a small area of Agricultural future land use into an area that is primarily designated for Residential

[sic] land use and that is in actuality almost exclusively used for residential purposes." (Rec. Order, p. 9). Thus, although an adjacent area is designated for agricultural use, the evidence indicated that in actuality, almost all of the adjacent areas were used for residential purposes. Future Land Use Policy A.1.9.3.C.1 attempts to protect areas used for residential land use from adjacent land uses that could constitute a nuisance by providing that such areas "shall be protected from intrusion by land uses that are incompatible with residential density."

The ALJ noted that the record amply demonstrates that "the sounds and smells associated with at least some types of agricultural activity, such as the pasturing and raising of livestock and poultry, are capable of adversely affecting nearby residents and are incompatible with residential land use." (Rec. Order, p. 9). The testimony and other evidence, including an audiotape of the noises that currently emanate from the parcel, presented to the ALJ conclusively supports the ALJ's finding on this matter. There is clearly competent substantial evidence to support the ALJ's findings that the Future Land Use Map Amendment is inconsistent with Future Land Use Policy A.1.9.3.C.1.

Thus, a review of the evidence indicates that there was competent substantial evidence to support those findings and the ALJ's conclusion that the Plan Amendment was not in compliance with the comprehensive plan.[1] For the reasons stated herein, exception 5 is denied.

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[1] The ALJ noted that according to the testimony of the current and former town clerks, the current and proposed use of the parcel does not require an amendment to the comprehensive plan because the current usage of the parcel does not constitute agricultural use. Instead, "agricultural use" only refers to use of property to raise plants or animals for human consumption, which is not what the parcel owner wishes to use the property for. (Rec. Order, pp. 7-8).

ORDER

The Commission rejects the exceptions filed by the Town and accepts the Recommended Order of the ALJ. The Commission finds the Town's Plan Amendment not "in compliance" with the comprehensive plan. Therefore, pursuant to Section 163.3187(3)(c), Florida Statutes, the Plan Amendment will not take effect.

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of the order pursuant to Section 120.68, Florida Statutes, and Rules 9.030(b)(1)(c) and 9.110, Florida Rules of Appellate Procedure. To initiate an appeal of this order, a notice of appeal must be filed with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, the Capitol, Room 1801, Tallahassee, Florida 32399-0001, and with the appropriate District Court of Appeal within 30 days of the date this order is filed with the Clerk of the Commission. The notice of appeal filed with the District Court of Appeal must be accompanied by the filing fee specified in Section 35.22(3), Florida Statutes, and must be substantially in the form prescribed by Rule 9.900(a), Florida Rules of Appellate Procedure.

You **waive** your right to judicial review if the notice of appeal is not timely filed with the Clerk of the Commission and the appropriate District Court of Appeal.

Mediation under Section 120.573, Florida Statutes, is <u>not</u> available with respect to the issues resolved by this order.

DONE and ORDERED this 23rd day of October, 2002.

Teresa B. Tinker
for Donna Arduin, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission this 23rd day of October, 2002.

Barbara Leighty
Clerk, Administration Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following persons by United States mail, facsimile or hand delivery this 23rd day of October, 2002.

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