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FILED

FINAL ORDER NO. DCA02-GM-220

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STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

DIVISION OF ADMINISTRATIVE HEARINGS

MARY J. BARTLETT, ROBERT S. INGLIS, HELEN THOMAS, PAUL LUSSIER, JOAN LUSSIER, and WANDA NEGRON,

AT

Petitioners,

Case No.01-4914GM

vs.

JLJ-CLOS

MARION COUNTY,

Respondent,

and

DINKINS AND DINKINS, INC.,

Intervenor.
_____/

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs ("the Department") following the 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 a small-scale comprehensive plan amendment adopted by Marion County ("the County") by Ordinance No. 01-S27, hereinafter referred to as "the Plan Amendment."

A hearing was conducted by ALJ J. Lawrence Johnston 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 Amendment is in compliance.

The Petitioners filed Exceptions to the Recommended Order.

ROLE OF THE DEPARTMENT

The Department did not participate in the formal administrative proceedings relating to this Plan Amendment. The Secretary of the Department and agency staff perform the role of reviewing the entire record and the Recommended Order in light of the Exceptions. Based upon that review, the Secretary of the Department must either enter a final order consistent with the ALJ's recommendations finding the Plan Amendment in compliance, or determine that the Plan Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action. *See* **Fla. Stat.** §§163.3187 (3)(b)2.

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 limited circumstances. The Department possesses only narrow authority to reject or modify findings of fact in the Recommended Order.

> 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 final order, that the findings of fact were not based upon competent substantial evidence or that the proceedings upon which the findings were based did not comply with the essential requirements of law.

Fla. Stat. § 120.57(1)(l). 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); *see also 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), Florida Statutes) *and Pillsbury v. Department of Health and Rehabilitative Services*, 744 So. 2d 1040 (Fla. 2nd DCA 1999)(same).

The Department's authority is somewhat broader to reject or modify the ALJ's conclusions of law and interpretations of administrative rules, but only as to 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 or administrative rule is as or more reasonable than that which was rejected or modified.

Fla. Stat. § 120.57(1)(l); *see Deep Lagoon Boat Club, Inc. v. Sheridan*, 784 So.2d 1140 (Fla. 2nd DCA 2001).

The label assigned 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 finding of fact section of a recommended order, may be considered under the same standard as any other conclusion of law.

THE PLAN AMENDMENT

The Plan Amendment changed the Future Land Use Map ("FLUM") designation of 2.375 acres of land from Urban Reserve to Commercial. Recommended Order, p. 5.

RULINGS ON EXCEPTIONS

Petitioners' Exception 1; Statement of the Issue

This exception does not address either a Finding of Fact or Conclusion of Law. As previously stated, the Department can rule on only Findings of Fact and Conclusions of Law.

Petitioners' Exception 1 is DENIED.

Petitioners' Exception 2; Particular attention to Findings of Fact

This exception does not request the Department reject any portion of the Recommended Order.

Petitioners' Exception 2 is DENIED.

Petitioners' Exception 3; Finding of Fact 14

The ALJ found that the Intervenor, "...agreed to allow parcel access across the back (north) of the Amendment Parcel to the property fronting State Road 40 to the west, in the event of future development of those properties." Recommended Order, p. 12.

Petitioners contend that there may be no end to commercial development since the Intervenor owns land across 82nd Court adjacent to the subject parcel. Basically, Petitioners are requesting the Department to enter a supplemental finding of fact based on this statement. The Department cannot supplement the findings of fact. *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277 (Fla. 1st DCA 1985).

There is competent, substantial evidence in the record to support the ALJ's Finding of Fact, and there is no evidence to the contrary. Petitioners are merely restating an argument that was presented to, and rejected by the ALJ.

Petitioners' Exception 3 is DENIED.

Petitioners' Exception 4; Finding of Fact 21

The ALJ found that the Florida Department of Transportation ("FDOT"), "...was in the process of acquiring large parcels [of land] for needed retention areas...." The evidence showed that there was discussion at the County Commission meeting that FDOT intended to acquire land for retention ponds.

Evidence provided by Petitioners in the form of letters state that FDOT has construction plans for State Road 40, but as yet had no maps available for public viewing. Petitioners' Exhibit 22.

Petitioners are rearguing points from the hearing and in essence, are asking the Department to reweigh the evidence presented. The Department cannot reweigh evidence that was already considered by the ALJ. *Heifetz v. Department of Business Regulation*, supra.

Petitioners' Exception 4 is DENIED.

Petitioners' Exception 5; Finding of Fact 24

The ALJ found that the County is working with the Golden Ocala development on the construction of a regional wastewater

treatment plant that may have the capacity to serve the subject parcel. Petitioners contend that there was no evidence to support this fact.

The Small Scale Future Land Use Map Amendment Report indicates that the County reasonably believed that there would be no deficiency in the provision of sanitary sewer for the subject property. Petitioners' Exhibit 6. The Florida Department of Environmental Protection had a concern that the Golden Hills Mobile Home Park would not have adequate capacity to serve the sanitary sewer needs of the subject property. Petitioners' Exhibit 7. The ALJ agreed with this evidence, but weighed it against expert testimony regarding the provision of sewer treatment by a private entity. Recommended Order, p. 16. Petitioners' Exhibit 5.

Once again, Petitioners are rearguing points from the hearing and in essence, are asking the Department to reweigh the evidence presented. The Department cannot reweigh evidence that was already considered by the ALJ. *Heifetz v. Department of Business Regulation*, supra.

Petitioners also contend that the County's expert made a false statement under oath. Petitioners have provided no evidence to support this contention. Further, it is within the prerogative of the ALJ to ascertain the veracity of expert witness testimony, and by so doing, assign it appropriate

probative value. *Heifetz v. Department of Business Regulation*, supra.

Finally, Petitioners are attempting to introduce new evidence in the form of an e-mail, that was apparently not considered by the ALJ. The Department cannot use new evidence in order to supplement the findings of fact in the Recommended Order. *Heifetz v. Department of Business Regulation*, supra.

Petitioners' Exception 5 is DENIED.

Petitioners' Exception 6; Finding of Fact 29

Petitioners contend that the County Commission was lied to by Intervenors, and apparently was not provided with full information regarding the subject property. While citing to Finding of Fact 29, Petitioners failed to reference the entire Finding of Fact which concludes with the statement, "...considering **all the information presented**, it was not proven that the County Commission based its decision on misinformation." Recommended Order, p. 18. [Emphasis added]. As required, the ALJ considered and weighed all of the testimony and evidence presented to him.

Once again, Petitioners are trying to reargue issues and are attempting to have the Department reweigh evidence and testimony presented at the hearing and already considered by the ALJ. As stated previously, the Department is not permitted to do so.

Petitioners' Exception 6 is DENIED.

Petitioners' Exception 7; Finding of Fact 31

Petitioners claim in this exception that the ALJ stated traffic counts can be "changed." The Finding of Fact actually states,

> Staff used 2000 traffic counts that did not take into account all of the increased traffic as a result of the opening of the new school south of the Amendment Parcel. But the County's Planning Director explained that the traffic analysis required for a land use designation change does not have to be as rigorous and accurate as the analysis required at the time of concurrency determination. At that time, Intervenor probably will be required to conduct a detailed and up-to-date traffic analysis that would take into account actual traffic counts related to the new school.

Recommended Order, p. 19.

Petitioners also make an unsubstantiated statement that there was the suggestion, "...that it is all right to lie to the County Commission as long as it is a little lie." There is however, no evidence to support this statement.

Once again, Petitioners cannot ask the Department to reweigh any evidence presented and considered by the ALJ, as requested in this exception.

Petitioners' Exception 7 is DENIED.

ORDER

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

1. The findings of fact and conclusions of law in the Recommended Order are ADOPTED;
2. The Administrative Law Judge's recommendation is ACCEPTED; and
3. The challenged plan amendment, Ordinance No. 01-S27, is determined to be IN COMPLIANCE.

DONE AND ORDERED in Tallahassee, Florida.

Steven M. Seibert, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 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) 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 this Order has been filed with the undersigned Agency Clerk and that a true and correct copy of this Order has been furnished to the persons listed below by the method indicated this 6th day of August, 2002.

Paula Ford
Agency Clerk

By First Class U.S. Mail:

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