

10-29-02

Final Order No. DCA03-GM-014

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

PALM BEACH POLO HOLDINGS, INC.,

Petitioner,

AT

DOAH Case No. 02-0173GM

v.

DCA Case No. DCA03-GM-014

THE VILLAGE OF WELLINGTON and
DEPARTMENT OF COMMUNITY AFFAIRS,

CAS-CLOS

Respondents.

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 comprehensive plan amendments adopted by Village of Wellington Ordinance No. 2001-11, 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.* (2002); and the Petitioner challenged the Plan Amendments as authorized by §163.3184(9)(a), *Fla. Stat.* (2002). A formal hearing was conducted by Administrative Law Judge ("ALJ") Charles A. Stampelos 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, and that the final order not award attorneys fees and costs against the Petitioner.

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. 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. 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).

RULINGS ON EXCEPTIONS

The Petitioner did not file exceptions to the Recommended Order, and the ALJ's recommendation that the Plan Amendments are in compliance is undisputed. However, the Village filed exceptions requesting the Department to reject certain findings of fact, to conclude that the Petitioner participated in this proceeding for an improper purpose, and to remand the case to the ALJ for further proceedings to assess costs and attorney fees.

Final Order No. DCA03-GM-014

The Village sought attorneys fees and costs against the Petitioner on several grounds. On October 29, 2002, the ALJ entered a final order denying the Villages motion for attorneys fees and costs pursuant to sections 120.569(2)(e) and 163.3184(12), *Fla. Stat.* The Village also sought an award of attorneys fees and costs pursuant to section 120.595(1), *Fla. Stat.*, which provides that the agency's final order in cases such as this proceeding must award attorneys fees and costs if the ALJ determines the nonprevailing adverse party has participated in the proceeding for an improper purpose. The Recommended Order in this case denied the Village's motion for attorneys fees and costs pursuant to section 120.595(1), *Fla. Stat.* (2002), which states,

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection and s. 120.569(2)(e). In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

The ALJ concluded that the Petitioner did not prove that the Plan Amendments are not "in compliance;" therefore, the Petitioner is a "nonprevailing adverse party." However, the ALJ further concluded that the Petitioners did not participate in this

proceeding for an improper purpose. Section 120.595(1)(e), *Fla. Stat.* (2002) states that “‘improper purpose’ means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.”

The Department has no authority to review the ALJ’s decision on a motion for attorney fees and costs. The determination that a party participated in a proceeding for an improper purpose is an issue of fact. *Burke v. Harbor Estates Associates, Inc.*, 591 So.2d 1034, 1037 (Fla. 1st DCA 1991); *Dolphins Plus v. Residents of Key Largo Ocean Shores*, 598 So.2d 324 (Fla. 3d DCA 1992). The Department has expertise in comprehensive planning issues, but has no special insight concerning whether a party has participated for an improper purpose. “Factual issues to which the agency may not rightfully claim special insight are the prerogative of the hearing officer.” *Burke*, 591 So.2d at 1037.

“[No] agency has authority to review fee and cost awards that administrative law judges make.... Only an administrative law judge or a hearing officer had authority to make awards under these provisions. A referring agency – itself ordinarily a litigant – can neither make nor reverse such awards.” *Procacci Commercial Realty, Inc. v. Dept. of Health and Rehabilitative Services*, 690 So.2d 603, 609 (Fla. 1st DCA 1997)(citations omitted). See also, *Friends of Nassau County, Inc. v. Nassau County*, 752 So.2d 42, 44 (Fla. 1st DCA 2000). This is so whether the fees and costs are awarded against the agency, *Dept. of Health and Rehabilitative Services v. S.G.*, 613 So.2d 1380 (Fla. 1st DCA 1993); *Dept. of Children and Family Services v. D.H.*, 781 So.2d 511 (Fla. 1st

DCA 2001); or against another party, *Procacci*, supra; *Friends of Nassau*, supra; *Burke*, supra; *Dolphins Plus*, supra.

Many of the cases cited above interpret attorneys fee statutes similar to section 120.595(1), but those statutes do not specify whether the ALJ's determination should be made in a final order or a recommended order. Section 120.595(1) requires the ALJ to determine the award of attorneys fees and costs in the recommended order. Since the Department must issue a final order adopting, rejecting or modifying the Recommended Order in this case, §120.57(1)(I), *Fla. Stat.* (2002), the Village reasons that the Department has the power to review the ALJ's decision on attorneys fees and costs.

However, the reasoning of the cases cited above is applicable to section 120.595(1). *Dept. of Children and Family Services v. D.H.*, supra. The Department has no special expertise to determine whether a party participated for an improper purpose, and the Department, as a litigant before the ALJ, might itself be subject to an award of attorneys fees and costs under the statute. Furthermore, section 120.595(1) provides that the ALJ determines the award of attorney fees and costs in the recommended order, not the agency which issues the final order.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been *determined by the administrative law judge* to have participated in the proceeding for an improper purpose.

* * *

(d) In any proceeding in which the *administrative law judge determines* that a party participated in the proceeding for an improper purpose, *the recommended order shall so designate and shall determine the award of costs and attorney's fees.*

§120.595(1)(b) and (d), *Fla. Stat.* (2002).

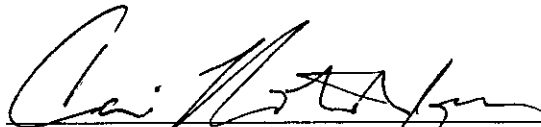
The Village's Exceptions are DENIED.

ORDER

Upon review and consideration of the Recommended Order and the Exceptions, 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 comprehensive plan amendments adopted by Village of Wellington Ordinance No. 2001-11, are determined to be in compliance as defined in §163.3184(1)(b), Fla. Stat.

DONE AND ORDERED in Tallahassee, Florida.



Colleen M. Castille, 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.

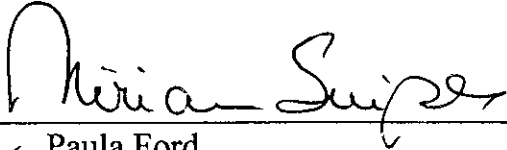
TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK.

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 Agency Clerk of the Department of Community Affairs, and that true and correct copies have been furnished to the persons listed below this 27th day of January, 2003.



for Paula Ford
Agency Clerk

By U.S. Mail:

Lawrence M. Weisberg, Esq.
6877 Southwest 18th Street
Suite 141
Boca Raton, FL 33433-7045

Thomas G. Pelham, Esq.
John H. Holley, Esq.
Fowler White Boggs Banker PA
Post Office Box 11240
Tallahassee, FL 32302

Christine Tatum, Esq.
Village of Wellington
14000 Greenbriar Boulevard
Wellington, FL 33414

Final Order No. DCA03-GM-014

By Hand Delivery:

Karen A. Brodeen, Esq.
Assistant General Counsel
Department of Community Affairs
2555 Shumard Oaks Boulevard
Tallahassee, FL 32399-2100

By Interagency Mail:

Hon. Charles A. Stampelos
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060