

4-29-04

Final Order Number DCA04-GM-156

STATE OF FLORIDA  
DEPARTMENT OF COMMUNITY AFFAIRS

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DIVISION OF ADMINISTRATIVE  
HEARINGS

TOPPINO'S, INC.,

Petitioner,

v.

DOAH Case No. 02-0418GM

DEPARTMENT OF COMMUNITY  
AFFAIRS,

Respondents.

AP

JLJ-CWS

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs following receipt of a Recommended Order issued by an Administrative Law Judge of the Division of Administrative Hearings. A copy of the Recommended Order is appended to this Final Order as Exhibit A.

Background

The issue in this proceeding is whether Monroe County's small scale comprehensive plan amendment 2002-02, adopted by Ordinance 037-2001 ("Amendment"), is consistent with the Principles for Guiding Development for the Florida Keys Area of Critical State Concern ("Guiding Principles"), as required by Section 380.0552(7), Florida Statutes (2003).

Following issuance of a Final Order finding the Amendment to be inconsistent with the Guiding Principles, Petitioner, the owner of the property that is the subject of the Amendment,

filed a Petition for Administrative Proceeding ("Petition") challenging the Department's determination. The Petition alleged that the Amendment should be found consistent with the Guiding Principles. The Petition was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge and further proceedings under Chapter 120, Florida Statutes. Administrative Law Judge J. Lawrence Johnston was assigned by the Division and, after a formal administrative hearing conducted on February 25-26, 2004, entered his Recommended Order. Administrative Law Judge Johnston recommends that the Amendment be rejected as not being consistent with the Principles for Guiding Development for the Florida Keys Area of Critical State Concern.

#### Role of the Department

Throughout the pendency of this formal administrative proceeding, the Department's litigation staff has contended that the Amendment is not consistent with the Principles for Guiding Development. Since the issuance of the Recommended Order, the Department has assumed two roles.

The attorneys and staff who advocated the Department's position in the formal administrative proceeding continue to perform that function. The Secretary of the Department and agency staff who took no part in the formal administrative proceeding perform a second and separate role. The Secretary

and this agency staff are charged with reviewing the entire record in light of Petitioner's Exceptions to the Recommended Order and the Responses thereto, and determining whether the Recommended Order should be adopted, rejected, or modified.

Based upon this review, the Secretary accepts the recommendation of the Administrative Law Judge as to the disposition of this proceeding, and adopts the Recommended Order as final agency action as set forth herein.

Standard of Review of Recommended Order and Exceptions

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge's Recommended Order as the agency's Final Order in most proceedings. To this end, the Department has been granted only limited authority to reject or modify findings of fact in a 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 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)(1), Florida Statutes.

Absent a demonstration that the underlying administrative proceeding departed from the essential requirements of law,<sup>1</sup> “[a]n ALJ’s findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred.” Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the Department may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the Administrative Law Judge as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

The Administrative Procedure Act also specifies the manner in which the Department is to address conclusions of law in a Recommended Order.

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 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.

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<sup>1</sup> No party has alleged that this administrative proceeding departed from essential requirements of law.

Section 120.57(1)(1), Florida Statutes; DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned to a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or findings based upon the statement itself and not the label assigned.

Summary of the Amendment and Challenge

The Amendment adopted by Monroe County Ordinance 037-2001 contains one amendment to the future land use map of the Monroe County Year 2010 Comprehensive Plan. Petitioner alleges that the Department's determination of inconsistency is incorrect as the Amendment is either neutral or positively consistent with the Principles for Guiding Development. The Administrative Law Judge entered Findings, Conclusions, and an ultimate Recommendation rejecting these arguments.

RULING ON EXCEPTIONS

After entry of the Recommended Order, Petitioner filed Exceptions to the Recommended Order with the Department.

The Department filed Responses to Petitioner's Exceptions.

Exception One

Exception One is directed at Finding of Fact 31, and the application and interpretation of Section 9.5-252(c)(3)h, Monroe County Code. The ALJ found that accepting Petitioner's interpretation of this section would result in the section having little application and, in effect, defeat its stated purpose. Petitioner argues that Finding of Fact 31 must be rejected because it is not based on competent substantial evidence as to the interpretation of the section. Alternatively, Petitioner argues that these findings are more appropriately classified as conclusions of law.

Petitioner's exceptions, however, relate not to a conclusion on the proper interpretation of the Monroe County Code, but to the ALJ's finding as to the end result if the Petitioner's factual interpretation is accepted. Such a reasonable inference is correctly identified as a finding of fact. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Moreover, there is ample competent, substantial evidence in the record supporting the ALJ's finding. See Pet. Ex. 1, p. 4 and Tr. at 26, 170.

Notwithstanding the above, the issue of consistency with the Monroe County Code, including the incorporation of the Air Installation Compatible Use Zone ("AICUZ"), does not change the outcome of this case given the ALJ's Conclusion of Law 66. The

ALJ found that, even assuming the Amendment is inconsistent with Goal 501, Objective 501.1, and Policy 501.1.1 of the Monroe County Code, the Amendment is neutral as to Monroe County's "capabilities for managing land use and development so that local government is able to achieve these objectives with continuation of designation as a critical area of state concern." See Guiding Principle (a). Conclusion of Law 66 is neither rejected nor modified by this Final Order.

Accordingly, Exception One is DENIED.

Exception Two

Exception Two is directed at Finding of Fact 37, and is based upon Petitioner's suggestion that no competent, substantial evidence was submitted regarding the reduction of noise outside buildings. Contrary to Petitioner's assertion, competent, substantial evidence was submitted to support Finding of Fact 37. T. 123-25, 145.

Petitioners further challenge the second sentence of Finding of Fact 37 on the apparent assumption that the sentence is based upon the ALJ's finding of "continuous jet aircraft noise." Petitioner contends that this assumption is contrary to other findings. While there is no suggestion in the Recommended Order that this assumption forms the basis for the finding, it is reasonable to infer "continuous" operations of the facility

with an average of forty operations per day and 74,000 total take-offs or landings in 2003. T. 130.

Notwithstanding the above, the issue of consistency with the Monroe County Code, including the incorporation of the AICUZ, does not change the outcome of this case given the ALJ's Conclusion of Law 66, which has neither been rejected nor modified by this Final Order.

Accordingly, Exception Two is DENIED.

Exception Three

Exception Three is directed at Finding of Fact 52, and suggests that the finding is not based upon competent, substantial evidence and is contrary to the plain language of the Amendment. The ALJ correctly found that there was no evidence that either the comprehensive plan or any ordinance would require Toppino's or any other developer to develop affordable housing within the AICUZ boundary. Petitioner has not pointed to any evidence which would refute this finding.

Accordingly, Exception Three is DENIED.

Exception Four

Exception Four is directed at Conclusion of Law 64, and is based upon Petitioner's position that "it is the clear intent of the Ordinance . . . to specify any required restrictions under a separate LDR" and therefore, the Ordinance is consistent with the Monroe County Code. However, Petitioner points to no



evidence that would support this "intent." The ALJ correctly found that the parcel subject to the Amendment is located within AICUZ zone CNR-2, which requires restrictions on new residential development according to the Monroe County Code. The ALJ further found that neither the Amendment, nor the LDR, include any restrictions on the new designation of the property. Therefore, it is reasonable to conclude that the Amendment is inconsistent with the Monroe County Code. The ALJ's conclusion is more reasonable than Petitioner's conclusion.

Notwithstanding the above, the issue of consistency with the Monroe County Code, including the incorporation of the AICUZ and any restrictions associated therewith, is moot based upon the ALJ's Conclusion of Law 66, which is neither rejected nor modified by this Final Order.

Accordingly, Exception Four is DENIED.

Exception Five

Exception Five is directed at Conclusion of Law 68, and raises the same issues raised in Exception Three.

Accordingly, Exception Five is DENIED.

Guiding Principle (d)

In Conclusion of Law 67, the ALJ implies that in order to be inconsistent with Guiding Principle (d), the Amendment itself must threaten continued operation of the NASKW. If this were true, the Department could not find any amendment that

encroaches on the NASKW inconsistent with Guiding Principle (d) unless it was the proverbial straw that broke the camel's back and resulted in the closure of the NASKW. The Department concludes that a more reasonable interpretation is to prevent incremental actions that do not contribute to sound economic development and instead allow a piecemeal encroachment on the NASKW. This Amendment is just such an action. See Finding of Facts 43-50 (finding residential encroachment impacts operation and continued existence of NASKW).

The Department concludes that the potential economic impact from reduction or elimination of operations of Key West Naval Air Station ("NASKW") exceeds any benefits gained through this Amendment. Accordingly, Conclusion of Law 68 is modified to conclude that the Amendment is inconsistent with Guiding Principle (d). The Department finds that its conclusion is as reasonable as or more reasonable than that proposed by the ALJ.

Exception Six

Exception Six is directed at Conclusion of Law 69, and relies upon a commitment that is not part of the Amendment. There is no evidence to support the suggestion that the Amendment is conditioned upon the installation of a sewage treatment plant. Petitioner's suggestion that the "proposed project" is consistent with Guiding Principle (e) does not equate to the Amendment being consistent with that Principle.

The ALJ's conclusion is more reasonable than that proposed by Petitioner.

Accordingly, Exception Six is DENIED.

Exception Seven

Exception Seven is directed at Conclusion of Law 70, and alleges that the Amendment is conditioned upon the provision of affordable housing. In addition to rejecting Exception Three, the Department agrees with the ALJ's conclusion that "there was no evidence from which it could be concluded that the FLUM change itself was positively consistent with Guiding Principle (g)." Guiding Principle (g) relates to the historic heritage of the Keys. The ALJ's conclusion is more reasonable than that proposed by Petitioner.

Accordingly, Exception Seven is DENIED.

Exception Eight

Exception Eight is directed at Conclusion of Law 71, and suggests that there was a lack of evidence of any negative impact on the NASKW. Petitioner's argument focuses solely upon economic impacts. However, Guiding Principle (h) addresses protection of "the value, efficiency, cost-effectiveness and amortized life" of the KWNAS. Findings of Fact 43-50 and competent, substantial evidence in the record support the ALJ's Conclusion that the Amendment adversely affects the value, efficiency and cost-effectiveness of NASKW. T. 98-101, 137,

139-40, 154-55, 159. The ALJ's conclusion is more reasonable than that proposed by Petitioner.

Accordingly, Exception Eight is DENIED.

Exception Nine

Exception Nine is directed at Conclusion of Law 72 which concludes that the Amendment is inconsistent with Guiding Principle (j), affordable housing. This issue has been addressed in Exception Three above. The Department finds that the ALJ's conclusion that there is no evidence that the Amendment is anything other than neutral regarding affordable housing is as reasonable as that of the Petitioner.

Accordingly, Exception Nine is DENIED.

Exception Ten

Exception 10 is directed at Conclusion of Law 73 and suggests that because the current land use designation allows for some residential use, then the allowance of more residential use cannot be inconsistent with Guiding Principle (l). Whether prior residential development has been allowed to encroach on the KWNAS is not relevant as to whether the Amendment is inconsistent with Guiding Principle (l), "to protect the public health, safety, and welfare of citizens." This Conclusion is supported by Finding of Fact 45. The ALJ's conclusion is more reasonable than that proposed by Petitioner.

Accordingly, Exception Ten is DENIED.

Exception Eleven

Exception Eleven again raises the issue of the condition of affordable housing, but extends the argument to include a commitment for certain units for a specific purpose, i.e., use by qualifying Sheriff's office, School Board, and local hospital employees. There is no evidence that supports the proposition that the Amendment itself commits certain units for those specific purposes. The ALJ's conclusion is more reasonable than that proposed by Petitioner.

Accordingly, Exception Eleven is DENIED.

Exception Twelve

Exception Twelve argues that based upon Petitioner's prior arguments the Amendment is not inconsistent with two Guiding Principles. Based upon the discussions above, the Department concludes that the Amendment is inconsistent with Guiding Principles (d), (h) and (l). See Exceptions 3, 8 and 10, above. The Department finds that its conclusion is as reasonable as or more reasonable than that of the ALJ.


Accordingly, Exception Twelve is DENIED, however, Conclusion of Law 75 is hereby modified to reflect that the Amendment is inconsistent with Guiding Principles (d), (h) and (l).

Exception 13

Exception 13 addresses the ALJ's Conclusion of Law 77 in which he determines that the Amendment is, on balance, inconsistent with the Guiding Principles. Petitioner argues that based upon its exceptions this conclusion is not based upon competent, substantial evidence. However, based upon the above responses, and the other findings of the ALJ that are based upon competent substantial evidence in the record, the Department agrees with the ALJ's conclusion that on balance, the Amendment is inconsistent with the Guiding Principles as a whole.

Accordingly, Exception Thirteen is DENIED.

DONE AND ORDERED in Tallahassee, Florida.




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Thaddeus L. Cohen, Secretary  
DEPARTMENT OF COMMUNITY AFFAIRS  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

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 in the manner described, on this 9th day of August, 2004.

*for*   
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Agency Clerk

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