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DCA Final Order No.: DCA03-GM-012

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

AP

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DIVISION OF ADMINISTRATIVE HEARINGS

JULIE PARKER,

Petitioner,

vs.

DOAH Case No. 02-2658

CAS-CWS

ST. JOHNS COUNTY,

Respondent,

and

THE ESTUARIES LIMITED LIABILITY COMPANY, a Florida limited liability company,

Intervenor.
_____/

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs ("the Department") following receipt of a Recommended Order and a Supplemental Recommended Order issued by the Administrative Law Judge ("ALJ") of the Division of Administrative Hearings "DOAH"). A copy of those orders are attached as Exhibits A and B.

PROCEDURAL BACKGROUND

At issue in this proceeding is a St. Johns County comprehensive plan amendment which was adopted pursuant to the small scale development amendment process set forth in Section 163.3187(3), Florida Statutes. The amendment was adopted on May 28, 2002, by Ordinance No. 2002-31.

Within thirty days of the ordinance's adoption, Julie Parker ("the Petitioner") challenged the amendment by filing a request for an administrative hearing with the Department. St. Johns County ("the County") moved to dismiss the petition on the grounds that Section 163.3184(3)(a), Florida Statutes, required it to be filed with DOAH, not the Department. Intervenor Estuaries Limited Liability Co. ("Estuaries"), which owns the property that is the subject of the amendment, also filed a motion to dismiss. The motions were denied. The Petitioner later filed an amended petition with leave of the ALJ.

A formal hearing was conducted by ALJ Donald Alexander of DOAH. Following the hearing, the ALJ submitted his Recommended Order to the Department for further agency action pursuant to Section 163.3184(3)(b), Florida Statutes . The ALJ recommended that the Department enter a final order determining that the plan amendment is in compliance.

The County filed a set of exceptions to the Recommended Order, which were joined in by Estuaries. The Petitioner also filed a set of exceptions, as well as a response to the County's exceptions.

Upon review of the exceptions, the Department entered an Order of Remand for supplemental findings of fact and conclusions of law relative to one of Parker's issues. The ALJ accepted jurisdiction and issued an order in which he provided the parties an opportunity to submit for his consideration supplemental proposed recommended orders on that issue. Supplemental proposed recommended orders were filed by the Petitioner, and jointly by the County and Estuaries.

In his Supplemental Recommended Order, the ALJ again recommended that the amendment be found to be in compliance. The Petitioner filed a set of exceptions directed at the

Supplemental Recommended Order. A joint response to those exceptions was filed by the County and Estuaries.

STANDARD OF REVIEW

The Administrative Procedure Act, Chapter 120, F.S., requires agencies to accept the ALJ's findings of fact and conclusions of law, except under certain limited circumstances.

Section 120.57(1)(*l*), F.S., provides the standard of review of findings of fact in the Recommended Order. It provides, in relevant part:

> 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.

The Department cannot reweigh the evidence considered by the ALJ. The Department cannot reject findings of fact made by the ALJ unless there is no competent, substantial evidence in the record of support the findings. 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)(1), F.S.

The agency also has limited authority to reject or modify the ALJ's conclusions of law. Section 120.57(1)(*l*), F. S., provides that:

> 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 its 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.

The label assigned to a statement is not dispositive as to whether that statement is a conclusion of law or a finding of fact. *Sapp v. Florida State Board of Nursing*, 384 So. 2d 254 (Fla. 2d DCA 1980); *Leapley v. Board of Regents*, 423 So. 2d 431 (Fla. 1st DCA 1982); *Heifetz v. Department of Business Regulation,* 475 So. 2d 1277 (Fla. 1st DCA 1985); *Kinney v. Department of State*, 501 So. 2d 129 (Fla. 5th DCA 1987). It is the true nature and substance of the ALJ's statement that controls an agency's authority to reject a finding of fact or modify a conclusion of law. *J.J. Taylor Companies, Inc. v. Department of Business and Professional Regulation*, 724 So. 2d 192 (Fla. 1st DCA 1999).

RULINGS ON EXCEPTIONS

The County's Exceptions

The County first takes exception to conclusions of law 88, 100, and 101 in the Recommended Order, wherein the ALJ re-affirms his earlier ruling on the petition's timeliness and asserts that DOAH has jurisdiction over this proceeding. As discussed above, the County and Estuaries take the position that the petition was untimely filed because it was not received by DOAH, the correct filing venue, until after the expiration of the thirty day petition deadline established in Section 163.3184(3)(a). The petition instead was timely filed within the thirty day filing "window" with the Department.

In raising this argument, the County does not cite to any case law in support of its position. There is, however, legal authority to support the conclusion that filing an initial pleading in the wrong forum does not defeat meeting that pleading's filing deadline. In *Alfonso v. Department of Environmental Regulation*, 616 So. 2d 44 (Fla. 1993), the Florida Supreme Court held that the remedy for filing a notice of appeal or a petition for certiorari in the wrong

court would be the transfer of that document to the correct court, not dismissal. Under the circumstances of the instant case, it would not be necessary to apply a higher standard than the Florida Supreme Court set for invoking appellate jurisdiction. The Department agrees with the ALJ that the petition was timely filed.

The exception is rejected.

In paragraph 11 of its exceptions, the County argues that DOAH lacks jurisdiction over this amendment because counties are excluded from the Chapter 120 definition of "agency." That argument is based on an erroneous reading of the definition of "agency" in Section 120.52(1)(c), Florida Statutes, which states in pertinent part:

> Each other unit of government in the state, **including counties** and municipalities, to the extent they are expressly made subject to this act by general or special law or judicial decisions. (Emphasis supplied)

Counties and municipalities are expressly subject to this administrative hearing procedure through Section 163.3187((3).

The exception also appears to argue that the Department lacks jurisdiction to enter this final order. In support of its position, the County cites to the first sentence in Section 163.3187(3):

> The state land planning agency shall not review or issue a notice of intent for small scale development amendments which satisfy the requirements of paragraph (1)(c).

That sentence refers to proposed agency action, not final agency action, and merely makes clear the fact that the Department does not publish notices of intent in this particular expedited amendment process. The legal authority of the Department to enter this final order is discussed and provided elsewhere in the statute, to wit, Section 163.3187(3)(b)1.

The exception is rejected.

Finally, the County argues that the petition should be dismissed because it does not substantially comply with the petition content requirements in Rule 28-106.201(4), F.A.C., specifically those that the County describes as requiring the identification of "the agency action, specific rule and statutory relief requested." Although the Recommended Order did not discuss the issue of the petition's sufficiency and it is not clear that the County is entitled to raise this issue before the Department at this time, it is concluded that the petition substantially complies with the rule. The petition identifies the challenged ordinance, enumerates the applicable rules and statutes which entitle the Petitioner to relief, and requests relief in the form of a final order finding the amendment not in compliance. (Even if the petition did not meet the content requirements of the rule, the Department would not dismiss the petition. Under Rule 28-106.201, F.A.C., the remedy for a petition's substantial noncompliance is dismissal with the opportunity to amend. No purpose would be served at this late juncture in the proceedings in requiring an amended petition.)

The exception is rejected.

The Petitioner's Exceptions

Finding of Fact 13

The Petitioner argues that the portion of this finding which characterizes the area proximate to the property as "densely developed" is not supported by competent, substantial evidence. In support of this exception, she refers to testimony presented by Patrick Hamilton regarding Butler Beach.

This Petitioner reads information into the finding that is not there. The ALJ did not

identify by name the area he refers to as being "densely developed," how proximate it is to the subject property, or which direction from the subject property it is located. The record indicates that there are densely developed residential areas close to the subject property. The testimony of Melvine McCall shows such development patterns nearby in Treasure Beach, Hawaiian Isles, and the Mickler Subdivision. The finding, as written, is supported by competent, substantial evidence.

The exception is rejected.

Finding of Fact 15

This exception takes issue with the ALJ's statement that the County took the position that a total of 116 units would be allowed on the property. The exception overlooks the fact that this statement was qualified in the finding as representing the County's position "at least as of a June 11, 1999, letter...." This finding is supported by competent, substantial evidence provided by Scott Clem, who testified that the letter informed Mr. Davenport that a total of 116 units would be allowed on the property, and by the letter itself, which was admitted into evidence as County Exhibit 44a.

The exception is rejected.

Finding of Fact 16

In this exception, the Petitioner argues that the ALJ erroneously found that the amendment was supported, in part, by the data and analysis which supported the May 2000 EAR-based amendments. In support of this exception, she notes that the data and analysis used in support of those earlier amendments was not introduced into evidence and was not adopted by the subject amendment.

The challenged statement appears to refer to testimony provided by Scott Clem, the County's director of growth management services. He testified that the subject property is located within a development area boundary, which was retained by the County on its Future Land Use Map pursuant to the 2002 EAR-based amendments. According to Mr. Clem, the decision to continue locating the property within a development area boundary was based on data and analysis used to support the EAR-based amendments. That data and analysis was not introduced at the hearing. As the second sentence in this finding of fact is based on hearsay, it is not based on competent, substantial evidence. The granting of this exception does not trigger the need to revise any of the other findings of fact or conclusions of law. There is other data and analysis that supports the amendment.

The exception is granted. The second sentence in Finding of Fact 16 is stricken.

Finding of Fact 27

The Petitioner takes exception to the sentence in which the ALJ concludes that Judge Traynor's order approving the settlement agreement is accepted as binding authority. The Petitioner argues that this statement is actually a conclusion of law and is legally erroneous.

The Department must be guided by the true nature of a finding or conclusion, not its title. See Pillsbury v. DHRS, 705 So.2d I agree that this statement is a mislabeled conclusion of law. As the substance of this legal conclusion already is contained in Conclusion of Law 103, this sentence is stricken, rather than re-labeled, and there is no need to address whether this statement is erroneous. (The reason for upholding Conclusion of Law 103 is discussed below in the exception to that conclusion.)

The exception is accepted to the extent it argues that the statement is a mislabeled conclusion of

law. The rest of the exception is rejected.

Finding of Fact 44

The Petitioner argues that this finding of fact contains mislabeled conclusions of law and those conclusions are erroneous. The disputed portions of this finding concern the issue of whether the off-site lift stations should be included in the property's acreage figure for purposes of determining whether the small scale amendment process could be used.

I agree that the last three sentences of this finding constitute conclusions of law and find that they should be re-labeled as such. However, I do not agree with the Petitioner's argument that off-site lift stations should be applied to the small scale acreage threshold. It would be unreasonable to construe Section 163.3187(1)(c)1., Florida Statutes, as requiring local governments and applicants to calculate pro rata share impacts of off-site utilities, determine proportionate acreage based on those impacts, and apply those figures to the small scale acreage calculations.

The exception is accepted only as to the mislabeling of the last three sentences of Paragraph 44. The sentences are re-labeled as conclusions of law. The other arguments in the exception are rejected.

Finding of Fact 45

The Petitioner argues that this finding contains conclusions of law and those conclusions are incorrect. I find that only the first sentence in this paragraph constitutes a finding of fact. The remainder of the paragraph discusses the legal effect of a conservation easement and whether the 8.51 acres of that easement should be added toward the small scale acreage threshold. Those are legal conclusions and should be re-labeled. As to whether those 8.51 acres should be

considered a visual amenity for the subject property, ergo a "use" within the meaning of Section 163.3187(1)(c)1., Florida Statutes, the ALJ's rejection of that argument is affirmed.

The exception also notes that the ALJ failed to consider off-site stormwater discharges. The Department rejects the argument that such facilities must be included in the small scale acreage calculation as a matter of law.

The exception is accepted only as to the re-labeling of the conclusions of law. The rest of the exception is rejected.

Finding of Fact 46

This exception argues that this finding contains mislabeled conclusions of law which are erroneous and that the findings of fact are unsupported by competent, substantial evidence. In this paragraph, the ALJ discusses testimony concerning off-site road improvements, but does not render any conclusion as to whether such improvements should be taken into consideration in the small scale acreage calculation. As he reaches no legal conclusions, there is no mislabeled conclusion of law.

The findings of fact contained in this paragraph are supported by competent, substantial testimony. As the ALJ indicates in this paragraph, Mr. Clem provided this testimony. The Department cannot reweigh the ALJ's assessment of the testimony.

The exception is rejected.

Finding of Fact 50

The Petitioner erroneously alleges that this finding contains a conclusion of law. She also mistakenly reads this finding as concluding that data in existence is automatically the best available data. The ALJ did not offer any determination as to whether the data was the best

available. The finding is supported by competent, substantial evidence.

The exception is rejected.

Finding of Fact 78

The Petitioner alleges that in this finding: 1) the ALJ implies that she has improperly challenged the site plans through this proceeding; and 2) there are mislabeled conclusions of law. As to her first argument, the Department has no authority to reject a finding of fact or conclusion of law because it may give rise to implications. As to the argument that the finding contains conclusions of law, I agree that the last three sentences of Paragraph 78 are in fact conclusions of law. The findings of fact in the first two sentences are supported by competent, substantial evidence and are upheld.

The exception is accepted to the extent the last three sentences are mislabeled conclusions of law. Those sentences are re-labeled as conclusions of law. As they are reasonable, they are accepted.

The rest of the exception is rejected.

Finding of Fact 79

This exception is directed at the portion of the finding which states that proposed site plans "are not incorporated into the FLUM amendment and are not subject to challenge here." I agree that the ALJ's statement that site plans "are not subject to challenge here" is a mislabeled conclusion of law. That portion of the paragraph is hereby stricken. As to the portion of the sentence that they "are not incorporated in the FLUM amendment," that is a factual observation, not a legal conclusion. That finding of fact is supported by competent, substantial evidence. No proposed site plan was adopted in the amendment package.

The exception also takes issue with an evidentiary ruling of the ALJ which excluded

testimony. The Department has no authority to overturn such rulings.

The exception is rejected in part and accepted in part.

Finding of Fact 83

This exception claims that the last sentence in this paragraph is an incorrect conclusion of law. That sentence reads:

> The May 2000 EAR-Based Plan Amendment Goals, Objectives and Policies must be read in their entirety and individual provisions cannot be read in isolation.

This statement follows the quotation of plan Policy A.1.11.6, in which the County recognizes its "intent that the Plan be construed as a whole" and "potentially competing Objectives and Policies be construed together."

Mr. Clem testified that the May 2000 EAR- based amendment is a comprehensive update of the earlier plan and constitutes the current plan's text. The challenged statement simply paraphrases Policy A.1.11.6 in the context of the updated plan. As the statement offers a legal interpretation of the policy, I accept the exception insofar as the mislabeling of the sentence as a finding of fact. As this legal conclusion correctly interprets the policy, it is accepted.

The exception is accepted as the mislabeling of the conclusion of law and rejected on the other grounds.

Finding of Fact 85

The Petitioner argues that this paragraph contains a conclusion of law and is contrary to an evidentiary ruling during the hearing. In this finding, the ALJ simply recites testimony of Mr. Clem concerning Policy E.1.3.11. His testimony is accepted in Finding of Fact 87 by the ALJ as being reasonable. Finding of Fact 85 does not similarly weigh Mr. Clem's testimony, include

any legal conclusions, or discuss whether the policy is ambiguous. As Mr. Clem presented the testimony attributed to him in this finding, it is supported by competent, substantial evidence. The exception is rejected.

Finding of Fact 86

In this exception, the Petitioner claims that Private Property Rights Objective A.1.16 was improperly considered by the ALJ because she was not placed on notice of it being at issue. Reading Findings of Fact 85-87 together, it is apparent that the ALJ considered this objective and its implementing policies when evaluating Policy E.1.3.11. Under Policy A.1.11.16, quoted in Finding of Fact 83, such a balancing approach is required. When the Petitioner challenged the amendment as being not in compliance, she necessarily placed into consideration plan provisions not enumerated in her petition.

The exception is rejected.

Finding of Fact 87

The statement that Mr. Clem's "interpretations are not unreasonable" is challenged as being a conclusion of law, erroneous, based upon an improper legal opinion, and applying an improper deference to the County in the interpretation of its own plan. As the ALJ is commenting on his assessment of Mr. Clem's testimony, the statement correctly is labeled a finding of fact. The Department cannot re-weigh the testimony and reject that finding, as the Petitioner urges. With respect to the last two objections to this statement, there is no indication that the ALJ relied on Mr. Clem's interpretation because of his legal knowledge or in deference to the County. The finding is supported by competent, substantial evidence and is upheld.

The exception is rejected.

Conclusion of Law 92

The Petitioner challenges the following statement:

> For the reasons stated herein, Parker did not prove that the FLUM amendment was not "in compliance.

This exception is based on the mistaken belief that this sentence opens up the entire order for re-argument and provides an additional opportunity to resubmit for ruling the arguments in her proposed recommended order. The sentence in dispute, however, merely builds on the ALJ's findings of fact and other conclusions of law, and concludes that the Petitioner did not meet her legal burden. As the ALJ's findings of fact and conclusions of law that lead to this conclusion have not been overturned, this statement is correct.

The exception is denied.

Note: Within this exception, the Petitioner argues that she raised the issue of floodprone area analysis under Rule 9J-5.006(2)(e), F.A.C., but "[t]he ALJ completely ignored this issue." Upon review of the Recommended Order and the pleadings, the Department concurred and remanded this issue to the ALJ for further consideration. This portion of the exception was acknowledged through an Order of Remand.

Conclusion of Law 97

In this paragraph, the ALJ concludes that the Petitioner did not prove that the amendment was not supported by data and analysis. This conclusion is based on Findings of Fact 47-66.

The exception is denied.

Conclusion of Law 99

The Petitioner takes issue with the conclusion wherein the ALJ determines that the amendment is not inconsistent with the May EAR-based amendments when construed as a whole. This conclusion is located under the category "Internal Consistency" and addresses Policy A.1.11.6, which requires that the County's plan be so construed. It is not based on an interpretation of Chapter 163, Part II, Florida Statutes, and is not an incorrect application of that law, as urged by the Petitioner.

The exception is rejected.

Conclusions of Law 102, 103, and 104

In these exceptions the Petitioner argues that the settlement agreement should be inapplicable in this proceeding. The Department has no legal authority to overturn such conclusions, however. Under Section 120.57(1)(*l*), Florida Statutes, an agency may reject a conclusion of law only with regard to matters over which it has substantive jurisdiction. The Department has no substantive authority over the matters that were before Judge Traynor and were resolved through the settlement agreement.

The exception is denied.

Finding of Fact 39

This exception challenges the statement that a notice of rights "is not required [in Ordinance 2002-31] for the reasons set forth in the Conclusions of Law." The Petitioner argues that this statement is a conclusion of law and notes that there is no separate conclusion of law as to notice.

In this statement, the ALJ describes the ordinance, but does not draw a legal conclusion. He also indicates an intent to further discuss notice requirements in his conclusions of law. As

the Petitioner correctly notes, there is no separate conclusion of law addressing this point. In order to remedy the lack of a legal conclusion, the following is added to the end of Conclusion of Law 100:

> Under Section 163.3187, Florida Statutes, no notice of rights is required to be included in an ordinance adopting a small scale development plan amendment.

The exception is granted in part.

Small scale amendment status

In the last exception, the Petitioner "takes exception to any conclusion that this amendment constitutes a small scale amendment." No specific conclusion is identified. The conclusion that the amendment qualifies as a small-scale amendment is implicit in the ALJ's references to Section 163.3187(3)(a), Florida Statutes. The Department concurs with that conclusion. The factual basis upon which this conclusion is made is Findings of Fact 40-46, which are supported by competent, substantial evidence.

The exception is rejected.

The Petitioner's Exceptions to Supplemental Recommended Order

Finding of Fact 5

This exception takes issue with the statement that "Ms. Bishop did not state that data and analysis, relative to potential flooding and drainage, was unavailable to the County when the Plan Amendment was adopted." The Petitioner argues that it was improper for the ALJ to make this observation and to infer anything from this testimony.

The Department does not read the challenged statement as broadly as the Petitioner does

and only has the authority to reject a finding of fact if it is unsupported by competent, substantial evidence. In the exception, the Petitioner does not dispute what Ms. Bishop did not say. The hearing transcript reflects the fact that Ms. Bishop did not testify that such data and analysis was unavailable when the amendment was adopted. The statement is supported by competent, substantial evidence.

The exception is rejected.

Findings of Fact 7-18

In each of these exceptions, the Petitioner argues that the finding is irrelevant, of no probative value, and cannot be relied upon to support an inference that the amendment is in compliance. The exceptions do not allege that the contents of the findings are not supported by competent, substantial evidence.

Each of the challenged findings discusses a specific document or witness' testimony. The ALJ provides record citation(s) to each finding. The exhibits and testimony referred to in those citations constitute competent, substantial evidence that support their respective findings of fact.

The exceptions are denied.

Conclusion of Law 21

The exception argues that this conclusion is actually a finding of fact. In this finding, the ALJ comments that there is evidence of occasional flooding and of the applicant submitting certain data and analysis to the County. I agree that this is a mislabeled finding of fact. Rather than strike the paragraph, it is accepted as a finding of fact.

The exception is granted.

Conclusions of Law 22

In the Supplemental Recommended Order, there are two conclusions of law numbered 22. Both address whether there is an adequate analysis of potential flood and drainage conditions for the subject property. The ALJ concludes that the analysis submitted to the water management district for approval of a stormwater management system also is adequate for purposes of approving the subject plan amendment. He also notes that the Petitioner did not adequately rebut this evidence.

The Petitioner argues that these conclusions are mislabeled findings of fact. The Department agrees. It finds that these findings of fact are supported by competent, substantial evidence, however.

The exceptions are accepted only with regard to the mislabeling of both paragraphs 22. The rest of the exception is rejected.

Conclusion of Law 23

This conclusion simply states that the Petitioner did not meet her legal burden. This conclusion is supported by the findings of fact and conclusions of law in the Recommended Order and Supplemental Recommended Order.

The exception is rejected.

ORDER

Upon review and consideration of the complete record of the proceeding, the Recommended Order, the Supplemental Recommended Order, exceptions to the Recommended Order and Supplemental Order, responses to exceptions, and the Order dated August 9, 2002, it is hereby ordered that:

1. The findings of fact and conclusions of law in the Recommended Order and Supplemental Recommended Order are adopted, except as rejected or modified in this Final Order;

2. The ALJ's recommendation for the issuance of a final order finding the County's amendment to be in compliance is accepted; and

3. The comprehensive plan amendment adopted by St. Johns County by Ordinance No. 2002-31 is determined to be in compliance.

DONE AND ORDERED on this 27 day of February, 2003, in Tallahassee, Florida.

Colleen M. Castille, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Blvd.
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

The parties are hereby notified that they may have the right to seek judicial review of this interlocutory determination pursuant to Section 120.68, Florida Statutes, and Rules of Appellate Procedure 9.030(b)(1)(C) and 9.100. To initiate an appeal, a petition must be filed with the appropriate district court of appeal within thirty days of the filing of this determination with the Department's clerk of agency proceedings. A petition filed with the district court of appeal should be accompanied by the filing fee specified in Section 35.22, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following persons listed below on this 27th day of February, 2003.

for Paula Ford, Agency Clerk
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FILING AND ACKNOWLEDGEMENT
FILED, on this date, with the designated Agency Clerk, receipt of which is hereby acknowledged.

Miriam Snipes
Deputy Agency Clerk

2/27/03
Date