2-10-03

Final Order No. DCA03-GM-103

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

AP

EMERALD LAKES RESIDENTS' ASSOCIATION, INC.,

Petitioner,

v.

COLLIER COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

BUCKLEY ENTERPRISES, INC.,

Intervenor.
_____/

DOAH CASE No. 02-3090GM

DCA Case No. DCA03-GM-103

CAS-CLOS

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 Collier County Ordinance No. 2002-24, 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.* (2001); and the Petitioners

challenged the Plan Amendments, as authorized by §163.3184(9)(a), *Fla. Stat.* (2001). A formal hearing was conducted by 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.

The Petitioner filed Exceptions to the Recommended Order, and the Department filed a Response, which Intervenor joined, to Petitioner's Exceptions.

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 by reviewing the Recommended Order and filing a Response to Petitioner's Exceptions urging that the Department find the Plan Amendments in compliance. 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 and Response. 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.* (2001).

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 certain limited circumstances. The Department has only limited authority to reject or modify the ALJ's findings of fact.

> 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)(*l*), *Fla. Stat.* (2001). 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. Dep't of Bus. Reg.*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Bay County Sch. Bd. v. Bryan*, 679 So.2d 1246 (Fla. 1st DCA 1996) (construing a provision substantially similar to Section 120.57(1)(*l*), *Fla. Stat.* (2001)); *see also Pillsbury v. Dep't of HRS*, 744 So. 2d 1040 (Fla. 2d DCA 1999).

The Department may reject or modify the ALJ's conclusions of law or interpretation of administrative rules, but only,

> 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.

Section 120.57(1)(*l*), *Fla. Stat.* (2001).

The label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. *Kinney v. Dep't of State*, 501 So.2d 1277 (Fla. 5th DCA 1987). Conclusions of law, even though stated in the findings of fact section of a recommended order, may be considered under the same standard as any other conclusion of law.

THE PLAN AMENDMENTS

The Plan Amendments created a new subdistrict within the Urban Mixed Use District of the Future Land Use Element ("FLUE") and changed the Future Land Use Map ("FLUM") designation of approximately 23 acres of land from Urban Residential Subdistrict to the new "Buckley Mixed Use Subdistrict." Under the old category of Urban Residential Subdistrict, the property was subject to the Density Rating System. Under this system, the maximum density of this parcel is three dwelling units per acre, excluding any applicable density bonuses. The Plan Amendments would exempt the parcel from the Density Rating System and allow a mix of uses including retail uses capped at 3,250 square feet per acre for the total project; office uses capped at 4,250 square feet per acre for the total project; and residential uses capped at 15 dwelling units per acre.

RULINGS ON EXCEPTIONS

Petitioner filed 22 exceptions. An agency is ordinarily expected to rule on each exception. *Iturralde v. Dep't of Prof'l Reg.*, 484 So. 2d 1315 (Fla. 1st DCA 1986). However, exceptions which merely reiterate positions which were repeatedly asserted before the ALJ, and which were clearly and specifically addressed in the recommended order, need not be addressed again in the agency's final order. *Britt v. Dep't of Prof'l Reg.*, 492 So. 2d 697 (Fla. 1st DCA 1986); *disapproved on other grounds*; *Dept. of Prof'l Reg. v. Bernal*, 531 So.2d 967 (Fla. 1988). To the extent that any exception is not explicitly addressed below, that exception is repetitive of other exceptions, or merely reargues positions which were asserted before the ALJ and addressed in the recommended order.

RULINGS ON EXCEPTIONS TO FINDINGS OF FACT

Weight of the Evidence

Some of the exceptions contend that the weight of the evidence does not support the ALJ's findings of fact, that the ALJ should have found additional facts suggested by the Petitioner, or simply express disagreement with the ALJ's findings of fact. The Department is not authorized to reweigh the evidence or to adopt supplemental findings of fact. Section 120.57(1)(*l*), *Fla. Stat.* (2000); *Heifitz*, *Bay County*, and *Pillsbury*, *supra*. Petitioner's Exceptions 10 and 17 are DENIED.

Competent Substantial Evidence

Most of the exceptions assert that a finding of fact is not supported by competent, substantial evidence, which would be a valid basis for rejection of that finding of fact by the Department. § 120.57(1)(*l*), *Fla. Stat.* (2001). However, as demonstrated in great

detail by the Department's Response to Petitioner's Exceptions, each finding of fact is supported by competent, substantial evidence in the record. Petitioner's Exceptions 1, 2, 3, 6, 8, 10, 11, 12, 14, 15, 16, 18, and 19 are DENIED.

Prejudice Due to Notice Abnormalities

In Exception 4, Petitioner argues that Finding of Fact 20 incorrectly asserts that the Petitioner did not suffer any prejudice as a result of the County's failure to include a map of the subject property when noticing the hearings regarding the Plan Amendments. In support of this claim, Petitioner references, without record citation, the hearing testimony of Mrs. Claire Goff and the comments of Forrest Wainscott at the May 14, 2002, meeting of the Collier County Board of County Commissioners. Petitioner asserts that due to its inability to hire an attorney before the May 14, 2002, meeting, they were unable to present evidence regarding "how severely [the Commission] was increasing density." Petitioner's Exceptions to Recommended Order at 4. The record in this case contains a transcript of Mr. Wainscott's comments before the Commission. As noted by the ALJ in Finding of Fact 19, this transcript shows that Mr. Wainscott brought this issue to the attention of the Commission:

> Approving the petition would increase the density from four units to 15 units per acre, which is essentially quadrupling the density in this 22.8 acre tract.

Buckley Ex. 10 at 176. Further, the same transcript shows that the Commission considered Mr. Wainscott's concerns:

> COMMISSIONER HENNING: I can tell you if the infrastructure is not there; the water, the sewer, the landfill, the roads, that I'm not going to approve it when it comes back, but if this is smart growth, community character, I'm willing to take a look at it when it does come back.

Id. at 179. Despite Petitioner's reference to blanket statements that they were prejudiced, the record contains competent, substantial evidence to support the ALJ's finding that Petitioner suffered no prejudice as a result of any notice irregularities. *Cf. Fla. Mining & Materials v. Mobley*, 649 So. 2d 934, 934 (Fla. 1st DCA 1995) (stating that, in a workers' compensation context, "a ruling which is supported by competent substantial evidence will be upheld even though there may be some persuasive evidence to the contrary."). Petitioner's Exception 4 is DENIED.

Equal Protection

In Exception 7, Petitioner argues that the Plan Amendments violate equal protection because the densities were determined arbitrarily. This exception must be denied for three reasons.[1] First, this exception does not logically object to any specific finding of fact. Second, this exception presents a legal equal protection argument disguised as an objection to the ALJ's findings of fact. Third, and most important, Petitioner has not shown how the Plan Amendments violate equal protection. "The constitutional right to equal protection mandates that similarly situated persons be treated alike." *Level 3 Communications, LLC v. Jacobs*, 2003 WL 747419 at 5 (Fla. March 6,

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[1] There is some question as to whether the Department can even decide a constitutional issue. See Florida Hosp. v. Agency for Health Care Admin., 823 So. 2d 844, 849 (Fla. 1st DCA 2002) ("Administrative agencies lack the power to consider or determine constitutional issues.") (citing Rice v. Dep't of Health & Rehab. Svcs., 386 So. 2d 844, 848 (Fla. 1st DCA 1980)). However, the Florida Supreme Court has held that an agency can, when faced with an "as applied" challenge to the constitutionality of a statute, "'reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue.'" Key Haven Associated Indus. V. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 158 (Fla. 1983) (quoting the district court's opinion in Key Haven Associated Indus. V. Bd. of Trs., 400 So. 2d 66, 69 (Fla. 1st DCA 1981)). In this case, Petitioner is challenging the application of the amendment process, and this agency can rule on the issue.

2003). Petitioner does not identify any class of persons that was similarly situated yet treated differently than Intervenor. Because the Plan Amendments do not abridge a fundamental right or involve a suspect class, they need only be rationally related to a legitimate state purpose. See id. The Collier County Planning Staff testified that adoption of the Buckley Mixed Use District was related to the County's goal of capturing traffic within the area. See Tr. 173-74. The Petitioner bears the burden of showing that the Plan Amendments **do not** rationally relate to a legitimate state purpose. Id. Petitioner has not made any argument that the amendment is not rationally related to a legitimate government purpose, and has not carried its burden in this case. Petitioner's Exception 7 is DENIED.

Section 163.3177(6)(a), Florida Statutes

In Exception 9, Petitioner asserts that the Plan Amendments do not comply with Section 163.3177(6)(a), Florida Statutes (2002) and represent "spot planning." Petitioner's Exceptions to Recommended Order at 6. The relevant statute states:

> Each future land use category must be defined in terms of uses included, and must include standards to be followed in the control and distribution of population densities and building and structure intensities

§ 163.3177(6)(a), Fla. Stat. (2002)[2]. The Buckley Mixed Use Subdistrict as created by the Plan Amendments satisfies this provision. The Buckley Mixed Use Subdistrict is now a part of the Collier County Comprehensive Plan, and it includes standards for density, most obviously a density standard of fifteen dwelling units per acre. Petitioner's Exception 9 is DENIED.

Exceptions Granted

In Exceptions 5 and 13, Petitioner asserts what can best be described as scrivener's errors. First, in Exception 5, Petitioner notes that the ALJ referred to an "unspecified low" determined by the Density Rating System (DRS). RO at 12. After an exhaustive search of the record, no competent, substantial evidence can be found to support this characterization of the lowest base density allowed under the DRS as "unspecified." The Department suggests that the following quote from the future land use element of the Collier County Comprehensive Plan supports the ALJ's characterization:

> Within the applicable Urban Designated Areas, a base density of 4 dwelling units per gross acre is permitted, though not an entitlement. This base level of density may be adjusted depending upon the characteristics of the project.

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[2] Both Petitioner and the Department quote section 163.3177(6)(a), Florida Statutes as amended by s. 2, ch. 2002-296, Laws of Fla., instead of the 2001 version of the statute. As such, that is the version analyzed herein. The 2001 version of the statute states:

> The future land use plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. . . . Each land use category shall be defined in terms of the types of uses included and specific standards for the density or intensity of use.

§ 163.3177(6)(a), *Fla. Stat.* (2001). The Plan Amendments at issue in this case also comply with this requirement as they outline what uses are allowed as well as maximum square footage allowed for those uses. See Emerald Lakes Ex. 1.

Buckley Ex. 12, Future Land Use Element at 25. This statement is in the form of an overview of the DRS. See id. The DRS goes on to list the ways in which the base density can be increased or decreased. See id. at 25-27. The only way the base density can be reduced from four dwelling units per acre is if the subject property is located within the Traffic Congestion Area, and the base density is then reduced by exactly one dwelling unit per acre to a low of three dwelling units per acre. See id. at 26. The ALJ acknowledges this and explains the DRS in detail in Finding of Fact 21, which is why this exception seems to hone in on a scrivener's error. See RO at 11. Petitioner's Exception 5 is GRANTED in Paragraph 1.a. below.

In Exception 13, Petitioner points out that Naples Walk Shopping Center is located on the southeast corner of the intersection of Airport-Pulling Road and Vanderbilt Beach Road, not the northeast corner, as stated by the ALJ in Finding of Fact 37. See RO at 17. The Department's Response concedes this point. See Response at 12. An exhaustive search of the record shows no competent substantial evidence to support this scrivener's error. Petitioner's Exception 13 is GRANTED in Paragraph 1.b. below.

RULINGS ON EXCEPTIONS TO CONCLUSIONS OF LAW

Petitioner set forth three exceptions to conclusions of law. None of Petitioner's exceptions referenced any particular conclusion of law. All three exceptions also repeat some of Petitioner's exceptions to findings of fact. As such, each exception has already been addressed. The two findings of fact that were altered have no bearing on Petitioner's exceptions to conclusions of law. All of the rulings below are based on the findings of fact in the Recommended Order, as modified above.

ORDER

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

1. The findings of fact and conclusions of law in the Recommended Order are adopted except as follows:

   a. The word "unspecified" is stricken from Finding of Fact 23; and

   b. Finding of Fact 37 is amended to reflect the correct location of the Naples Walk Shopping Center on the southeast corner of the intersection of Airport-Pulling Road and Vanderbilt Beach Road.

2. The Administrative Law Judge's recommendation is accepted; and

3. The comprehensive plan amendments adopted by Collier County Ordinance No. 2002-24, are determined to be in compliance as defined in §163.3184(1)(b), Fla. Stat.

DONE AND ORDERED in Tallahassee, Florida.

Colleen M. Castille

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 7th day of May, 2003.

Paula Ford
Agency Clerk

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