

8-4-03

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

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ADMINISTRATIVE
SERVICES

JOHN ABBE, PETER HEIN,
FRED KLEIN, AND PROPERTY
MANAGEMENT OF KEY WEST, INC,

At

Petitioners,

FINAL ORDER NO.: DCA03-GM-260
DOAH CASE NO.: 02-4534

v.

DEPARTMENT OF
COMMUNITY AFFAIRS,

REM-CLOS

Respondent

and

CITY OF KEY WEST; TRUMAN
ANNEX RESIDENTS, INC; AND
MARTHA DUPONT,

Intervenors.

_____ /

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs (Department) following receipt and consideration of a Recommended Order issued August 4, 2003, by Administrative Law Judge (Judge) Robert E. Meale. A copy of the Recommended order is appended to this Final Order as Exhibit A.

ISSUE

The Judge's recommendation addressed the issue of whether the Department's approval of the City of Key West's (City) Ordinance 02-06 is consistent with the Principles for Guiding Development for

the City's Area of Critical State Concern.

BACKGROUND

The Department's April 2, 2002 Final Order found that City Ordinance 02-06 is consistent with the Principles for Guiding Development of the City of Key West Area of Critical State Concern, as set forth in Rule 28-36.003(1), Florida Administrative Code (Principles). City Ordinance 02-06 was identical to City Ordinance 98-31 that limited transient rentals in Key West. The Third District Court of Appeal in Coleman v. City of Key West, 807 So. 2d 84 (Fla. 3rd DCA 2001) found that City Ordinance 98-31 was null and void for failure to comply with the notice requirements of section 166.041(3)(c)(2), Florida Statutes. The City later adopted Ordinance 02-06.

On May 3, 2002, Petitioners challenged the Department's final order approving City Ordinance 02-06. Petitioners alleged that City Ordinance 02-06 was inconsistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern. §380.0552, Fla. Stat. and Fla. Admin. Code R. 28-36.003.

Administrative Law Judge Robert E. Meale (Judge) of the Division of Administrative Hearings conducted a formal hearing regarding the matters raised by the parties. The Judge submitted his August 4, 2003 Recommended Order to the Department for consideration. Judge Meale recommended that the Department enter a

final order finding City Ordinance 02-06 consistent with the Principles. Petitioners filed fourteen (14) exceptions to the Recommended Order dated August 19, 2003. Truman Annex Residents, Inc. and Martha duPont's submitted responses to the exceptions dated August 29, 2003. The City also filed responses to the exceptions dated August 29, 2003.

Department's Recommended Order Standard of Review

The Administrative Procedure Act assumes that the Department will adopt the Recommended Order except under limited circumstances. *Brookwood-Walton County Convalescent Center v. Agency for Health Care Administration*, 845 So. 2d 223, 229 (Fla. 1st DCA 2003). The Department is granted only narrow authority to reject or modify findings of fact in the Recommended Order. §120.57(1)(1), Fla. Stat.

The Department is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion. Moreover, the Department will avoid the temptation to view the evidence as a whole and change findings made by the Judge. *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281, 1282 (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)(1), Florida Statutes) and *Pillsbury v. Department*

of Health and Rehabilitative Servs., 744 So. 2d 1040 (Fla. 2nd DCA 1999) (same). The Department will not in this case reject or modify the Judge's findings, substitute its findings, or make new findings. *Gross v. Department of Health*, 819 So. 2d 997, 1020 (Fla. 5th DCA 2002). Consequently, the Department adopts the recommended order as the final Department order. §120.57(1)(l), Fla. Stat. *Brookwood* at 229.

Department's Exception Consideration

The Department allowed each party 15 days in which to submit written exceptions to the recommended order. §120.57(1)(k), Fla. Stat.

Petitioners' John Abbe et al. Exceptions

The Department need not rule on an exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. §120.57(1)(k), Fla. Stat. Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the Judge as the finder of fact. *Heifetez* at 1281. The mere fact that what is essentially a factual determination is labeled a conclusion of law, whether labeled by the Judge or a party, does not make it so, and the Department will not avoid its obligation to honor the

Judge's findings of fact by categorizing or accepting a categorization of a finding as a conclusion of law. *Pillsbury* at 1041.

The Petitioners' exceptions simply reiterate positions that were raised in the formal administrative proceeding below, considered by the Judge, and specifically addressed in the Recommended Order. While the Department must normally rule on each exception, it need not address in its final order exceptions that merely reargue matters that were raised and addressed by the Judge.

See *Iturralde v. Department of Professional Regulation*, 484 So. 2d 1315 (Fla. 1st DCA 1986); *Britt v. Department of Professional Regulation*, 492 So. 2d 697 (Fla. 1st DCA 1986).

Department's Rulings on
Petitioners' Findings of Fact Exceptions

1. Exception one is DENIED.
2. Exception two is DENIED.
3. Exception three is DENIED.
4. Exception four is DENIED.
5. Exception five is DENIED.
6. Exception six is DENIED.
7. Exception seven is DENIED.
8. Exception eight is DENIED.
9. Exception nine is DENIED.

10. Exception ten is DENIED.
11. Exception eleven is DENIED.
12. Exception twelve is DENIED.
13. Exception thirteen is DENIED.

Department's Ruling on

Petitioners' Conclusion of Law Exception

14. Exception fourteen is DENIED.

Truman Annex Residents, Inc.,

Martha duPont's, and City of Key West

Exception Responses

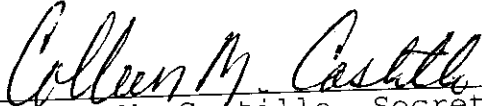
The Department lacks authority to consider exception responses dated more than fifteen (15) days after the August 4, 2003 recommended order. §120.57(1)(k), Fla. Stat. Moreover, the Department need not consider the exception responses since it has denied the Petitioners' exceptions. Consequently, Petitioners' requests to strike the exception responses are now moot. See *Florida Association of Nurse Anesthetists v. Department of Professional Regulation, Board of Dentistry*, 500 So. 2d 324 (Fla. 1st DCA 1986), review denied by 509 So. 2d 1117 (Fla. 1987), where the hearing officer's conclusion that appellant lacked standing to challenge the proposed rules controlled and rendered moot any question of the rule's validity.

ORDER

Upon review and consideration of the Judge's August 4, 2003 Recommended Order, it is hereby ordered that:

1. The Recommended Order's findings of fact are ADOPTED;
2. The Recommended Order's conclusions of law are ADOPTED;
3. The Judge's recommendation is ACCEPTED; and
4. City of Key West Ordinance 02-06 is found consistent with the Principles for Guiding Development in the City, as set forth in Rule 28-36.003(1), Florida Administrative Code.

DONE AND ORDERED in Tallahassee, Florida on September 19, 2003.



Colleen M. Castille, 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 22nd day of Sept., 2003.

for Miriam Suipes
Paula Ford
Agency Clerk

By First Class U.S. Mail:

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