10-24-03

Final Order Number DCA04-GM-021

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

ANNA CURRENT,

Petitioner,

AT

v.

DOAH Case No. 03-0718GM

TOWN OF JUPITER and
DEPARTMENT OF COMMUNITY
AFFAIRS,

JLJ-Closed

Respondents.
_____/

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 Town of Jupiter comprehensive plan amendment 2002-02, adopted by Ordinance 62-02 (Amendment), is "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

Following publication of a Notice of Intent to find the Amendment in compliance, Anna Current filed with the Department a Petition for Administrative Hearing, and alleged that the Amendment should be found not in compliance. This 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 July 30, 2003, entered his Recommended Order. Administrative Law Judge Johnston recommends that the Amendment be found in compliance.

Role of the Department

Throughout the pendency of this formal administrative proceeding, the Department's litigation staff has supported the Notice of Intent and contended that the Amendment is in compliance. 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. A second and separate role of the Department is performed by the Secretary of the Department and agency staff who took no part in the formal administrative proceeding. 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.

Fla. Stat. § 120.57(1)(l).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law,[1] "[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

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[1] No party has alleged that this administrative proceeding departed from essential requirements of law.

(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.

Fla. Stat. § 120.57(1)(l); *DeWitt v. School Board of Sarasota County*, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned 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 Town of Jupiter Ordinance 62-02 contains four amendments to the text of the Town comprehensive plan, one amendment to the transportation map series, and one amendment to the future land use map series. Petitioner alleges that the Amendment should be found not in compliance because there were procedural flaws in its adoption, and the Amendment itself is not supported by data and analysis. 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 with the Department Exceptions and a number of corrections and amendments to those Exceptions. As held in the Department's Order on Motions Regarding Petitioner's Exceptions and Responses,[2] Petitioner's First Amended Exceptions to Recommended Order, dated November 26, 2003, are the only Exceptions that will

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[2] A copy of this Order on Motions is appended to this Final Order as Exhibit B.

be considered by the Department in this Final Order. The Exceptions and Corrected and Amended Exceptions filed prior to November 26, 2003, are deemed superceded by the First Amended Exceptions.

Respondents Town and Department each filed independent Responses to the First Amended Exceptions.

Introduction and Overview

The first five (5) pages of Petitioner's First Amended Exceptions, titled "Introduction and Overview of the Case and Summary of Exceptions," contain a narrative of Petitioner's position with respect to the adoption process for the Amendment and a general discussion of public participation in growth management. This Introduction does not specifically identify any disputed portion of the recommended order by paragraph or page number, and does not include citations to the record.

Accordingly, the Department need not and does not rule on this portion of Petitioner's Exceptions. **Fla. Stat.** § 120.57(1)(k).

Exception One

This Exception is segregated in subparts, each of which is addressed below.

Part One: Denial of Motion of Official Recognition

Petitioner first takes exception "to the ALJ's decision to

deny official recognition of certain documents which Petitioner's counsel request be officially recognized in a post-hearing filed Expedited Motion to Request Official Recognition." Exceptions at 6.[3] While the denial of this Motion is mentioned on page six (6) of the Recommended Order, the "conclusion" of the Administrative Law Judge to deny official recognition is contained in his Order on Official Recognition dated September 5, 2003, not the Recommended Order. Written exceptions are to be directed "to the recommended order," not other rulings or conclusions of the Administrative Law Judge. **Fla. Stat.** § 120.57(1)(k). Accordingly, the Department is without authority to consider this exception.

Even if the conclusion regarding official recognition was in the Recommended Order, the Department is without jurisdiction to grant this exception. "In administrative hearings, official recognition is the functional equivalent of judicial notice." Florida Administrative Practice (6th Edition 2001), *Administrative Adjudication*, § 4.34 at page 4-28. Official recognition, like judicial notice, is a purely evidentiary[4]

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[3] These documents include Department newsletters published periodically from 1986 through 1994, and excerpts from handouts apparently prepared for two "Continuing Legal Education" courses in 1993.

[4] The provisions governing judicial notice are found in Sections 90.201 -.207, Florida Statutes, all of which are within

matter over which the Department has no substantive jurisdiction. *See Barfield v. Department of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001)(agency erred in rejecting Administrative Law Judge's ruling on hearsay because it lacks substantive jurisdiction over evidentiary matters). Accordingly, the Department is without jurisdiction to grant this exception.

Part Two: Agency Policy and Precedent

Petitioner next asserts that the agency has the inherent authority to consider its "statements of policy and precedents" that were subject of the Motion for Official Recognition discussed immediately above. Exceptions at 7. The two cases cited in the Exceptions, however, do not support such a broad conclusion.

In *Gessler v. Department of Business and Professional Regulation*, the issue was whether the agency had properly compiled and indexed its orders so that Appellant Gessler could "compare his case and the punishment imposed with other cases that may be similar." 627 So. 2d 501, 503 (Fla. 4th DCA 1993). The court did not discuss or rule upon the propriety of all of these matters being officially recognized or otherwise made part of the record, but rather focused only on the agency's failure to comply with the indexing requirements of Section 120.53, Florida

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the Florida Evidence Code. *See* § 90.101.

Statutes, and whether any disciplinary proceedings against Appellant Gessler should be stayed pending agency compliance with those requirements. Similarly in *Plante v. Department of Business and Professional Regulation*, the only other case cited by Petitioner, the issue before the court was whether the agency had erred in refusing to consider penalties it had imposed in prior instances in a disciplinary proceeding. 716 So. 2d 790, 791-92 (Fla. 4th DCA 1998).

Under this authority, the Department has the ability to consider its previous final orders in taking final agency action in this matter. *See Health Quest Realty XII v. Department of Health and Rehab. Servs.*, 477 So. 2d 576, 577 n.3 (Fla. 1st DCA 1985) (agency may recognize its own orders). Numerous such orders are referenced in the Recommended Order and the Exceptions and Responses thereto, and have been considered in this Final Order.

The Department does not have, however, blanket authority to take the next step urged by Petitioner and recognize all "statements of policy" or the like.[5] These agency statements are not rules or final agency action under Chapter 120, Florida Statutes, and, therefore, are not legal authority upon which the

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[5] Petitioner has not identified a specific "policy" or "precedent" that would directly support her argument.

Department may rely in taking final agency action. *See* **Fla. Stat.** § 120.54. To the extent these matters may be relevant, they would be additional evidence. At this point, the agency may not reopen the record to consider additional evidence that was not before the administrative law judge, and then make additional findings of fact. *See Lakewood Medical Center, Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421, 425 (Fla. 1st DCA 1996); *Health Care and Retirement Corp. of America v. Department of Health and Rehab. Servs.*, 489 SO. 2d 789,92 (Fla. 1st DCA 1986)(agency properly denied motion to supplement record). The court in *Plante*, one of the cases upon which Petitioner relies, recognized this limitation. The court in *Plante* directed the agency to <u>consider</u> its own precedents that were cited in a post-hearing submission when setting the proper licensing penalty, and to <u>not consider</u> additional evidence that was cited in that same document. 716 So. 2d at 792.

<u>Part Three: All Agency Statements</u>

Petitioner next requests

> that DCA take official recognition of <u>all</u> of the Department's policies, practices and precedents in reviewing local plans and plan amendments for compliance with §163.3181 public participation requirements and §163.3174 nctice of publication and public hearing requirements. This would include past reviews of the Town's plan amendments in cases other than the instant case.

Exceptions at 7. Petitioner notes that she would not object to a remand to the Division of Administrative Hearings, if necessitated by this request. *Id.*

This request is contrary to the same case law cited immediately above, and would lead to an outcome expressly disapproved by the First District Court of Appeal.

> [T]o allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures Act.

Collier Med. Center v. Department of Health and Rehab. Servs., 462 So. 2d 83, 84 (Fla. 1st DCA 1985)(citation omitted).

Part Four: Document from the Internet

Finally, Petitioner requests that the Department recognize a document that is posted and available on the Department's website. Exceptions at 8. This request raises the same issue addressed above; that is, the introduction of additional evidence after the conclusion of the administrative hearing.

For the reasons set forth above, Exception One is DENIED.

Exception Two

Exception Two is directed at Findings of Fact 31 and 32, and the effect of Town Resolution 58-87. This Resolution was adopted on December 1, 1987, "to implement . . . [minimum] criteria as

established by [DCA] . . . pending the enactment of permanent provisions by Ordinance . . . ." Recommended Order at 14 (Finding of Fact 30). Petitioner argues that this Resolution establishes public participation requirements greater than those currently adopted in State law, and that the Town must follow these heightened standards for an amendment to be found "in compliance." Petitioner argues that Finding of Fact 31 must be rejected on this basis.

Part One: Competent Substantial Evidence

The only competent, substantial evidence in the record is that Resolution 58-87 was adopted in 1987 for purposes of establishing public participation requirements consistent with then-existing law, and that it has not been amended since. *See* Tr. at 133; Petitioner Ex. 31. Accordingly, there is no basis to grant this Exception as to the factual findings with respect to Resolution 58-87.

Part Two: Compliance with Resolution 58-87

Petitioner's argument that the amendments must be measured against Resolution 58-87 to determine whether they are "in compliance" is founded on a faulty legal premise. Comprehensive plans and amendments are "in compliance" if they are consistent with the rules and statutory provisions listed in Section 163.3184(1)(b), Florida Statutes. The Resolution does not fall

within this definition and, therefore, whether the Town complied with its requirements is irrelevant to the instant proceeding.

Part Three: The Town Charter

The Administrative Law Judge's Finding that the Town's home rule charter superseded Resolution 58-87 is actually a Conclusion of Law over which the Department has no substantive jurisdiction. *See Barfield v. Department of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

Exception Two is DENIED.

Exception Three

Petitioner next takes Exception to the use of the word "unfounded" in Finding of Fact 41 in reference to the issues raised in this challenge, alleging that it is not supported by competent, substantial evidence. Petitioner does admit that certain unfounded issues "may" have been raised, but notes that they were all expressly waived in the Proposed Recommended Order. Exceptions at 11. The Department concurs that any "unfounded" issues were expressly abandoned in the Proposed Recommended Order. However, the Administrative Law Judge's Finding that there were such issues is supported by competent, substantial evidence, and the admission that such issues were raised and waived. *See, e.g.*, Tr. at 21-25.

Exception Three is DENIED.

Exception Four

This Exception is directed towards the following portion of Conclusion of Law 50:

> Although Section 163.3181 and Rule 9J-5.004 both appear to direct local governments to adopt procedures, not compel conduct in accordance with the procedures, Petitioner contends that plan amendments are not "in compliance" if the local government does not follow the adopted procedures (and minimum procedural requirements reflected in the statute and rule) in amending its comprehensive plan.

The Administrative Law Judge's Conclusion that these provisions direct local governments to adopt procedures to ensure public participation is consistent with the plain language of the cited rule and statutory provision. The conclusion that these procedures are not part of the Department's statutory review to determine whether an amendment is "in compliance" is also well-founded in the statute, as recognized in a recent Final Order. *See Emerald Lakes Residents' Assoc., Inc. v. Collier County*, DOAH Case No. 02-3090GM (DCA Final Order May 9, 2003). A contrary conclusion would not be as or more reasonable.[6]

Exception Four is DENIED.

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[6] In any event, Ms. Current actively participated in the adoption process for this Amendment beginning with early contacts with the Department of Community Affairs, and continuing through her written comments to the Town Council at the adoption hearing. *See* Findings of Fact 22 & 26.

Exception Five

In calendar year 2001, the Department repealed former Rule 9J-5.005(8), Florida Administrative Code. *See* Conclusion of Law 56. The notice of proposed rulemaking for this repeal stated that "redundant provisions" were being repealed. *See* Conclusion of Law 57. In this Exception, Petitioner apparently takes issue with the following portion of Conclusion of Law 57 relating to this repeal:

> But the meaning and significance of the language in the notice of proposed rulemaking is not clear; and it cannot be concluded that consistency with a requirement that local governments follow statutory, rule, and local procedures for ensuring public participation in the preparation and adoption of government's adoption procedures remains a part of compliance review, notwithstanding the repeal of former Rule 9J-5.005(8) [emphasis in original].

The issue argued by Petitioner in this Exception is the essentially the same one as forwarded in Exception Four; that is, whether public participation procedures are part of the Department's statutory review to determine whether an amendment is "in compliance." This argument is rejected for the same reasons set forth immediately above.

Exception Five is DENIED.

Exception Six

In this last Exception, Petitioner contends that the

Department should reject the following portion of Conclusion of Law 56:

> Subsequent decisions appear to give effect to the repeal [of Rule 9J-5.005(8)] by eliminating compliance review for consistency with a requirement that certain procedures be followed.

As authority for this contention, Petitioner cites *Brevard County v. City of Palm Bay*, DOAH Case Nos. 00-1956GM & 02-0391GM.

The *Brevard County* Order actually stands for the a conclusion contrary to the one argued by Petitioner. Conclusion of Law 70 in the Recommended Order of the *Brevard County* proceeding, which was adopted by the Department in its Final Order, rules that procedural requirements regarding public notice and hearing under Section 163.3174, Florida Statutes, are not a compliance criterion. This Conclusion is consistent with the Conclusion herein challenged by Petitioner.

Exception Six is 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 accepted;

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

3. The comprehensive plan amendments adopted by Town of Jupiter Ordinance No. 6202 are determined to be in compliance as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.

Heidi Hughes, Interim 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 RULES 9.030(1)(c) AND 9.110, FLORIDA RULES OF APPELLATE PROCEDURE.

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 THIRTY (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 RULE 9.900(a), FLORIDA RULES OF APPELLATE PROCEDURE. A COPY OF THE NOTICE 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 in the manner described, on this 7th day of April, 2004.

for Paula Ford
Agency Clerk

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