6-30-03

STATE OF FLORIDA
FLORIDA BUILDING COMMISSION

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DIVISION OF
ADMINISTRATIVE
HEARINGS

TRG-AQUAZUL, LTD., and
ALFONSO FERNANDEZ-FRAGA,

Petitioners,

DCA Case #: DCA03-BC-216
DOAH Case #: 03-1524BC

v.

MMP-CLS

BROWARD COUNTY, and THE
BROWARD COUNTY BOARD OF
RULES AND APPEALS,

Respondents.

FINAL ORDER

THIS CAUSE has been brought before the Florida Building Commission on the Petition of TRG-AQUAZUL, LTD., and ALFONSO FERNANDEZ-FRAGA hereinafter referred to collectively as Petitioners. The Petitioners challenge the validity of two local technical amendments to the Florida Building Code adopted by the Respondent, BROWARD COUNTY BOARD OF RULES AND APPEALS. The Division of Administrative Hearings held the Final Hearing of this cause on May 28, 2003, before Michael M. Parrish, Administrative Law Judge, and a transcript of the proceedings has been filed. The Administrative Law Judge entered a Recommended Order on June 30, 2003, a copy of which is attached hereto as Exhibit A. Petitioners and Respondent BROWARD COUNTY BOARD OF RULES AND APPEALS, each filed exceptions to the recommended order on July 15, 2003.

Standard of Review of Recommended Order and Exceptions

The Administrative Procedure Act contemplates that the Commission will adopt the Recommended Order entered by the Administrative Law Judge except under limited circumstances. The Commission can reject or modify a finding of fact only if the finding is not supported by substantial, competent evidence or was based on a proceeding that failed to comply with the essential requirements of law. §120.57(1)(l), Fla. Stat. (2002). Findings of fact cannot be rejected or modified based on the rejection or modification of a conclusion of law. Id. The Commission is not authorized to reweigh conflicting evidence and the finding should not be rejected if the record evidence supports the finding. Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985).

The Commission may only reject conclusions of law in a recommended order pertaining to conclusions of law and interpretation of administrative rules that lie within the Commission's substantive jurisdiction. §120.57(1)(l), Fla. Stat. (2002). The Commission, for example, is not permitted to reject conclusions regarding the admissibility of evidence. The Commission's conclusion of law must be as or more reasonable than that of the Administrative Law Judge which has been rejected or modified.

The label assigned to a statement in a recommended order, either finding of fact or conclusion of law, is not dispositive as to its nature. Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). The standard to be applied depends on the content of the statement. Rejection or modification of conclusions of law or findings of fact require particular findings and conclusions in the final order. §120.57(1)(l), Fla. Stat. (2002).

Based on the proceedings held in this cause and the testimony, evidence and argument offered therein, it is **ORDERED** as follows:

Rulings on Exceptions

1. Exceptions 1, 2, 3, 4, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 43, 46, 47, 48, 49, 52, 58, 59, 60, 62, 65, 66, 67 68, and 74 object to the Administrative Law Judges' failure to accept certain findings of fact proposed by the Petitioner.

Chapter 28-106.217(1), Florida Administrative Code, provides that "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders . . .." An agency's authority to deviate from findings and conclusions is extremely limited as set forth above. An agency is not authorized to supplement findings of fact in a recommended order. See Florida Power and Light Co. v. State, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997), and cases cited therein. The Petitioners' exceptions fail to allege that the Administrative Law Judge's findings are defective pursuant to the criteria for evaluation established by law. These exceptions are not exceptions to the findings of fact in the recommended order, rather a blanket indictment of the Administrative Law Judge's recommendation that is not authorized by rule or statute. The substantive issues tangentially raised by these exceptions are also ruled upon below. Therefore, the exceptions are rejected.

2. Exceptions 5, 6, 8, 9, 27, 39, 41, 42, 44, 45, 50, 51, 53, 54, 55, 56, 57, 61, 63 and 64 recite that the Administrative Law Judge accepted findings proposed by the Petitioner but conclude that an erroneous conclusion was reached based on those facts. To the extent that the

issues are appropriately raised as exceptions to the purportedly erroneous conclusions, this Order disposes of them in due course. However, these exceptions fail to identify any ground to question the findings themselves and are therefore rejected.

3. Exceptions 69 and 70 object to the preliminary statement in the Recommended Order. Chapter 28-106.217(1), Florida Administrative Code, provides that "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders . . .." Exceptions are not authorized to the Preliminary Statement. The exceptions are therefore rejected.

4. Exception 71 objects to the findings contained in paragraphs 1-3 of the Recommended Order regarding Broward County's status generally. Each of these findings are supported by competent substantial evidence. See Exhibit to Stipulation, paragraph 5, and Broward County Exhibit #1. The exception is therefore rejected.

5. Exception 72 objects paragraph 4 of the Recommended Order finding that Broward County has not voted to adopt any local amendments to the Florida Building Code. The finding is supported by competent, substantial evidence. See Stipulation, page 2, paragraph 5. This exception is therefore rejected.

6. Exception 73 objects to paragraphs 5 and 6 of the Recommended Order pertaining to the authority of BORA pursuant to the Broward County Charter. The finding is supported by competent, substantial evidence. See Broward County, Exhibit #1, page 17, Broward County Exhibit #2, page 20, and BORA Exhibit #13. This exception is therefore rejected.

7. Exception 75 objects to paragraph 13 of the Recommended Order pertaining to introductory comments regarding BORA's initiation of the amendment process. The finding is

supported by competent, substantial evidence. See Stipulation Exhibit, page 5, paragraphs 20-1, Hearing Transcript, pages 186, 194, 224, and Depositions of Robert Andrews, James DiPietro, and Steven Feller. This exception is therefore rejected.

8. Exception 76 takes exception to paragraph 14 of the Recommended Order that characterizes the amendments at issue as historically a part of the South Florida Building Code and BORA's intent to maintain the status quo. The finding is supported by competent, substantial evidence. See Hearing Transcript, page 219 and Depositions of Robert Andrews, James DiPietro, and Steven Feller. This exception is therefore rejected.

9. Exceptions 77 and 78 object to paragraphs 15 and 16 of the Recommended Order regarding the appointment of a subcommittee to the Mechanical Committee for the purpose of advising BORA. These findings are supported by competent, substantial evidence. See Hearing Transcript, pages 162-65, 186, 194 and Depositions of Robert Andrews, James DiPietro, and Steven Feller. This exception is therefore rejected.

10. Exception 79 objects to paragraph 29 of the Recommended Order regarding BORA's perceived need for a county-wide compliance review board. The finding is supported by competent, substantial evidence. See Hearing Transcript, pages 41, 60-1. This exception is therefore rejected.

11. Exceptions 80, 83, 85, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, and 102 object to the Administrative Law Judge's failure to incorporate Petitioners' Proposed Conclusions of Law. The Recommended Order explicitly acknowledges receipt and consideration of the Proposed Recommended Orders in this cause. See Recommended Order, page 4. Petitioners

have failed to cite any authority for the proposition that parties are, under any circumstances, entitled to incorporation of their proposed conclusions of law in Recommended Orders. Chapter 28-106.217(1), Florida Administrative Code, provides that "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders . . .." Therefore, these exceptions are not authorized and are rejected.

12. Exceptions 81, 82, 84, 86, 87, 88, and 94 cite the Administrative Law Judge's acceptance of Petitioners' proposed conclusions but object to what is generally alleged to be an erroneous application thereof. The Petitioners' exceptions fail to allege that the Administrative Law Judge's conclusions are defective pursuant to the criteria for evaluation established by law. These exceptions are not exceptions to the conclusions in the recommended order identified, rather a blanket indictment of the Administrative Law Judge's recommendation that is not authorized by rule or statute. The substantive issues tangentially raised by these exceptions are also ruled upon below. Therefore, the exceptions are rejected.

13. Exception 109 objects to paragraph 49 of the Recommended Order pertaining to Sunshine Law violations alleged to have been committed by the Respondents in relation to adoption of the amendments at issue. The Administrative Law Judge rejected Petitioners' arguments on three grounds; that the issue was not appropriately raised by the Pleadings; that the Division of Administrative Hearings does not have jurisdiction to determine or remedy violations of the Sunshine Law; and that enforcement of the Sunshine Law is not a function of the Building Commission. The first two grounds cited by the Administrative Law Judge, characterized as rules of pleading and DOAH's jurisdiction, are not within the substantive jurisdiction of the

Florida Building Commission. As cited as the third ground, enforcement of the Sunshine Law is not within the substantive jurisdiction of the Florida Building Commission. The Commission is not authorized to reject or modify this conclusion. The exception is therefore rejected.

14. Exceptions 103 through 108 and 110 through 120 generally pertain to the conclusions regarding the interrelationship between Broward County and BORA in the context of adoption of local technical amendments to the Florida Building Code. In consideration of Chapter 553, Florida Statutes, the special acts of the legislature pertaining to BORA and the Broward County Charter, the Administrative Law Judge concluded that Broward County was not authorized to adopt amendments to the Florida Building Code, that authority having been reserved solely and exclusively to BORA and that BORA, the local government or local governing authority as referenced in Chapter 553, was authorized to adopt local technical amendments in the absence of a countywide compliance review board. The Administrative Law Judge expressly considered the alternative interpretation of the law proposed by the Petitioners, that the literal application of the statutory criteria mandated creation of a countywide compliance review board by interlocal agreement prior to adoption of any local technical amendment to the Code which could only be accomplished by Broward County. In light of the charter provisions divesting the Board of County Commissioners and municipalities from amending building codes or otherwise enacting provisions in conflict with the codes authorized by BORA, the Judge concluded that no entity in Broward County would be authorized to amend the codes, a result that was contrary to the expressed intent of the statute and absurd.

Ultimately, the Administrative Law Judge found that Broward County was not a proper

party to the proceeding and that BORA had authority to adopt the amendments in question. The Judge concluded that the countywide compliance review board would not serve any substantial purpose in a county where only one entity has authority to amend the Code. In the factual context presented, the Administrative Law Judge's conclusions are more reasonable than any alternative. The exceptions are therefore rejected.

15. Petitioners object to paragraph 64 of the Recommended Order concluding that meetings of committees and subcommittees prior to adoption by BORA of the subject amendments were not subject to the notice provisions of 553.73(4)(b)1. The Administrative Law Judge based his conclusion on the character of the preliminary meetings at which no final action could be taken, the effective date of the statutory notice requirements that fell after the date of the subject meetings, and that a properly noticed meeting was held to adopt the amendments. The Administrative Law Judge's conclusion is more reasonable than any alternative. The exception is therefore rejected.

16. Exceptions 121 and 122 are not related to Conclusions or Findings, rather to the recommendation. Chapter 28-106.217(1), Florida Administrative Code, provides that "[p]arties may file exceptions to findings of fact and conclusions of law contained in recommended orders . . .." Therefore, these exceptions are not authorized and are rejected.

17. Exception 123 relates to the extent of the remedy afforded to the Petitioner rather than to a conclusion or finding. The specific issue raised does not appear to have been squarely placed before the Administrative Law Judge for resolution by the Petition. Chapter 28-106.217(1), Florida Administrative Code, provides that "[p]arties may file exceptions to findings

of fact and conclusions of law contained in recommended orders . . .." Therefore, these exceptions are not authorized and are rejected.

18. BORA takes exception to the Recommended Order to the extent that it places the burden of proof on BORA in these proceedings. BORA contends that section 553.73(4)(b)8., Florida Statutes (2002), is limited in application to proposed amendments. No such limitation is expressed in the statutory provision, and requiring the local amending entity to justify its action is consistent with the statutory intent of restricting local amendments. See Florida Home Builders Association, Inc., et al., vs. City of Daytona Beach, et al., DOAH Case No. 03-0131BC, 40-45, (RO issued April 29, 2003). Therefore, the alternative offered by BORA is less reasonable than that of the Administrative Law Judge. The exception is therefore rejected.

19. BORA takes exception to the Administrative Law Judge's reliance on the Home Builders case for the definition of local need, and asserts that BORA's interpretation of the statutory term is entitled to deference. The Commission recently ruled that the interpretation of the statutory meaning of the term "local need" recommended by the Administrative Law Judge in the Homebuilders case was appropriate. See Florida Home Builders, Final Order at 4-5 (Final Order entered on July 23, 2003). On issues pertaining to Chapter 553, the Commission's interpretation is that which is entitled to deference rather than BORA. BORA has failed to identify any authority for the proposition that an entity of local government can supercede the authority of a state agency with substantive jurisdiction of a statutory provision. Therefore, the exception is rejected.

20. BORA takes exception to the conclusion that the subject amendments are invalid

based on non-compliance with section 553.73(4)(b)1., Florida Statutes. Paragraph 65 of the Recommended Order recites requirements of the statute that did not take effect until after the date of adoption of the subject amendments. Section 553.73(4)(b)1., Florida Statutes (2001), states:

> (b) Local governments may, subject to the limitations of this section, adopt amendments to the technical provisions of the Florida Building Code which apply solely within the jurisdiction of such government and which provide for more stringent requirements than those specified in the Florida Building Code, not more than once every 6 months, provided:
> 1. The local governing body determines, following a public hearing which has been advertised in a newspaper of general circulation at least 10 days before the hearing, that there is a need to strengthen the requirements of the Florida Building Code. The determination must be based upon a review of local conditions by the local governing body, which review demonstrates that local conditions justify more stringent requirements than those specified in the Florida Building Code for the protection of life and property.

To the extent that BORA's exception addresses paragraph 65 of the Recommended Order, the exception is accepted and that conclusion is rejected and the foregoing statutory language substituted therefore. The Commission specifically finds that the application of the statutory language cited above is more reasonable that application of the statutory language cited by the Administrative Law Judge. BORA's exception alleges that there is no requirement for a determination on the record. However, the substituted language still requires that BORA determine that there is a need based on local conditions to justify more stringent requirements. The discussion of the amendment upon adoption is a matter of record that has been introduced as evidence in this cause, and the Administrative Law Judge's finding that there was no discussion of local conditions is supported by competent substantial evidence. See Exhibit 11 to

Depositions, Tab 32 of Master Exhibit List.

The Commission modifies the conclusion at paragraph 69 to the extent that it determines that the long history of smoke control regulation in Broward County is not a local condition. On its face, the condition is of an isolated nature, and there was no testimony that the condition was generally applicable or widespread. The Commission concludes that there was no competent, substantial evidence to support the finding and conclusion that the historical nature of smoke control in Broward County was not a local condition, and that this conclusion is more reasonable than that of the Administrative Law Judge. However, the Commission also concludes that the record was insufficient as presented to establish that the tradition of smoke control provisions in Broward County justified the amendments under challenge.

The Administrative Law Judge's conclusion that BORA failed to comply with the requirements of applicable law to adopt the subject amendments is more reasonable than the alternative offered. Therefore, except to the extent identified above, BORA's exception is rejected.

Disposition

The Commission concludes that the Recommended Order, as modified hereby, appropriately disposes of all issues of fact and law raised by the parties. Therefore, the Commission adopts the Recommended Order as modified and finds that the subject amendments to the Florida Building Code adopted by BORA for application in Broward County, Florida, fail to comply with the requirements of Section 553.73(4)(b), Florida Statutes (2001). The amendments are therefore determined to be invalid and unenforceable.

DONE AND ORDERED in Coral Gables, Miami-Dade County, State of Florida.

Raul L. Rodriguez, AIA, Chair
Florida Building Commission
Department of Community Affairs
Sadowski Building
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

EACH PARTY IS HEREBY ADVISED OF ITS RIGHT TO SEEK JUDICIAL REVIEW OF THIS FINAL 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. MEDIATION UNDER SECTION 120.573, FLA. STAT., IS NOT AVAILABLE WITH RESPECT TO THE ISSUES RESOLVED BY THIS ORDER.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of the foregoing Final Order has been filed with the Commission Clerk and a true and correct copy hereof has been furnished to the following by the method indicated on this 14th day of August, 2003.

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Commission Clerk

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