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DRA-CLOS

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

FLORIDA WILDLIFE FEDERATION, INC.,
and FRIENDS OF MANTANZAS, INC.,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS
and ST. JOHNS COUNTY,

Respondents,

and

D.D.I., INC.,

Intervenor.

_______________________________________/

DOAH Case No. 03-2164GM

Final Order No. DCA04-GM-112

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 St. Johns County Ordinance No. 2003-31, 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. (2003), and the Petitioners challenged the Plan Amendments, as authorized by §163.3184(9)(a), FLA. STAT. (2003). A formal hearing was conducted by Administrative Law Judge ("ALJ") Donald R. Alexander 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.

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. 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. 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. (2003).

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. (2003)

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. 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)(l), Fla. Stat. (2003). See also, *Pillsbury v. Dept. of Health and Rehabilitative Services*, 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 those,

> . . . 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. (2003)

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. Department 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.

RULINGS ON EXCEPTIONS

Affected Persons

Petitioners' exceptions 1 through 6 take issue with the ALJ's findings of fact and conclusions of law regarding whether the petitioners are "affected persons." The Department's litigation staff also filed an exception that disagrees with the ALJ's conclusions of law on this issue.

Section 163.3184(1)(a), FLA. STAT. (2003), provides in pertinent part,

> "Affected person" includes ... persons ... owning or operating a business within the boundaries of the local government whose plan is the subject of the review....

The Petitioners contend that they are "affected persons" because they "operate a business" in St. Johns County. The business activities of Petitioners are set forth in Findings of Fact 13 through 18 of the Recommended Order, and include environmental education and advocacy, fund raising, and field trips. These activities also include the sale of merchandise, although the ALJ found such sale to be "only incidental to the primary purpose" of the organizations.

The ALJ concluded that these activities are insufficient to demonstrate that either Petitioner conducts a business in St. Johns County, because such activities do not have the trappings of "traditional" business activities. Conclusion of law 71. The ALJ focused on the absence of an occupational license, office, tax returns, and the like, and determined that "traditional" business activities include the maintenance of an office, possession of an occupational license, and a telephone listing. Conclusions of law 68 & 70. The ALJ reasoned that pursuit of some form of a trade, profession, vocation, or similar endeavor is necessary for one to conduct a business. Conclusions of law 66 & 70.

The Department respectfully disagrees with the ALJ. The definition of "affected person" makes no distinction between different classifications of businesses. It simply states that an "affected person" may be someone who "own[s] or operat[es] a business within the boundaries of the local government whose plan is the subject of review." §163.3184(1)(a), FLA. STAT. (2003).

The ALJ's conclusion is not supported by judicial and administrative precedent. In *St. Joe Paper Co. v. Dept. of Community Affairs*, 657 So. 2d 27 (Fla. 1st DCA 1995), the First District stated:

> 1000 Friends asserts that it . . . qualified as an affected person operating a business within the boundaries of the local government . . . . 1000 Friends notes that it did participate in the local planning process and that such

> involvement is within the declared purpose of its corporate existence. In this context, such participation may constitute a business activity. But the section 163.3184(1)(a) definition is not satisfied merely by conducting some business activity in connection with the comprehensive planning process, as the statute specifies that one must be "owning or operating a business within the boundaries of the local government" to qualify as an affected person in this regard. Even though representatives of 1000 Friends physically appeared in Walton County during the local planning process, such incidental and transient presence does not suffice under section 163.3184(1)(a). Rather, the statute contemplates a more substantial local nexus, of a type which might make the business potentially subject to the constraints of the local comprehensive plan. 1000 Friends' involvement in the planning process does not meet this standard, and does not qualify as the operation of a business within the county, as contemplated by section 163.3184(1)(a).

657 So. 2d. at 28-29. The Court explicitly ruled that participation in local government activities in furtherance of declared corporate purposes, as both Petitioners in this case have proven, "may constitute a business activity." *Id.* In the instant case, the ALJ did not focus on the degree of involvement by the Petitioners in the local planning process, and, based on the ALJ's findings of fact, at least one of the Petitioners appears to have had the necessary local nexus.

In *1000 Friends of Florida, Inc. v. Dept. of Community Affairs*, Final Order No. DCA01-GM-257 (Dept. Comm. Affairs Dec. 28, 2001), DOAH Case No. 01-0781GM, the Department concluded that a not-for-profit organization could be an affected person on the grounds that it operated a business.

> In this case, there was persuasive evidence that both [1000] Friends and, especially, Audubon [Society] operated a business in the Village (as well as elsewhere). The nature of both their businesses is different from that of a more "classic" commercial enterprise, but so long as the threshold local presence or nexus exists, Section 163.3184(1)(a) does not discriminate based on the kind of business operated.

Id., ¶ 91. *See also, Sierra Club v. St. Johns County*, 2002 WL 1592234, DOAH Case No. 01-1851 (Dept. Comm. Affairs July 30, 2002).

Therefore, the Department rejects the ALJ's conclusion of law that an affected person must operate a particular type of business in order to qualify as an "affected person" pursuant to section 163.3184(1)(a), FLA. STAT. (2003). This is a conclusion of law over which the Department has substantive jurisdiction. The Department's substituted conclusion of law is as or more reasonable than the ALJ's conclusion of law.

The Department's exception, and Petitioners' exceptions 4 and 6 are GRANTED with respect to whether Petitioners constitute "affected persons." Petitioners' exceptions 1, 2, 3 and 5, which ask the Department to reject several findings of fact regarding the details of the Petitioners' business activities and to remand for additional findings of fact, are DENIED. Accordingly, the last sentence of paragraph 15, the last sentence of paragraph 18, the last half of paragraph 66 beginning with the phrase "Since the word 'business' is not defined...," the last three sentences of paragraph 68, and the last sentence of paragraph 69 are rejected. Paragraphs 70 and 71 are rejected, and replaced with:

> The definition of "affected person" makes no distinction between different types of businesses. It simply states that an "affected person" may be someone who "own[s] or operat[es] a business within the boundaries of the local government whose plan is the subject of review." §163.3184(1)(a), FLA. STAT. (2003). Therefore, based on the facts found by the ALJ, the Department concludes that the Petitioners are "affected persons."

Granting these exceptions does not require remand to the ALJ or further modification of the Recommended Order since, despite his ruling on the standing issue, the ALJ addressed the Petitioners' claims. Conclusion of law 71.

Standard of Proof

Petitioners' exception 9 asserts that the ALJ should have applied the "preponderance of the evidence" standard of proof, rather than the "fairly debatable" standard of proof. Conclusion of law 72. The Petitioners acknowledge that Chapter 163 instructs the ALJ to apply the fairly debatable standard of proof when, as in this case, the Department has published a notice of intent to find a comprehensive plan amendment "in compliance." §163.3184(9)(a), FLA. STAT. (2003).

The Petitioners argue that the Department's notice of intent in this case is faulty, because the County failed to include certain relevant data and analysis documents in the transmittal of the proposed plan amendment to the Department. The Petitioners further argue that these documents would have influenced the Department to include more objections in its ORC report on the proposed amendment, and to ultimately find the plan amendment not in compliance, thus giving the Petitioners the "preponderance of the evidence" standard of proof.

The ALJ concluded that Chapter 163 "provides no mechanism for inquiry into the Department's procedure for formulating its preliminary action," and that "the standard of proof is determined by the Department's Notice of Intent, and not by the rigor of its review." Conclusion of law 75. The Petitioner's proposal is not as reasonable as the ALJ's conclusion of law. *Zemel v. Lee County*, 15 FALR 2735, 1992WL880139 (DCA 1993), *aff'd*, 642 So. 2d 1367 (Fla. 1st DCA 1994).

Petitioner's exception 9 is DENIED.

Remaining Exceptions

The remainder of Petitioner's exceptions argue that the ALJ accepted the evidence of the Respondents over that offered by the Petitioners, or that the ALJ accepted the evidence of the Respondents despite contradicting evidence, or that the ALJ failed to make a finding of fact that the Petitioners believe was supported by the Petitioner's evidence. The Department cannot reweigh the evidence or make supplemental findings of fact. *Prysi v. Dept. of Health*, 823 So.2d 823 (Fla. 1st DCA 2002); *Lawnwood Med. Ctr. v. Agency for Health Care Admin.*, 678 So.2d 421 (Fla. 1st DCA 1996). The ALJ's findings of fact are supported by competent, substantial evidence in the record.

Furthermore, these exceptions merely reiterate positions which were repeatedly asserted before the ALJ, and which were clearly and specifically addressed in the Recommended Order. Therefore, these exceptions need not be addressed again in the agency's final order. *Britt v. Depart. 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).

Petitioners' exceptions 7, 8, 10, 11, 12, 13, 14, 15, 16 and 17 are DENIED.

ORDER

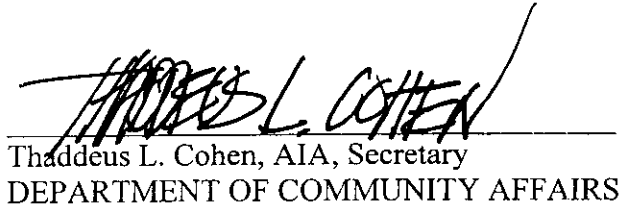
Upon review and consideration of the entire record of the proceeding, including the Recommended Order, it is hereby ordered that:.

1. The findings of fact and conclusions of law in the Recommended Order are adopted, except as indicated above.

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

3. The comprehensive plan amendments adopted by St. Johns County Ordinance No. 2003-31, are determined to be in compliance as defined in §163.3184(1)(b), Fla. Stat.

DONE AND ORDERED in Tallahassee, Florida.



Thaddeus L. Cohen, AIA, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS

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 16th day of July, 2004.

for Paula Ford, Agency Clerk
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Thomas W. Reese, Esq.
2951 61st Avenue South
St. Petersburg, FL 33712-4539

Debra A. Swim, Esq.
1323 Diamond Street
Tallahassee, FL 32301-4718

Geoffrey B. Dobson, Esq.
66 Cuna Street, Suite A
St. Augustine, FL 32084-3684

Isabelle Christine Lopez, Esq.
Assistant County Attorney
Post Office Box 349
St. Augustine, FL 32085-0349

Marcia Parker Tjoflat, Esq.
Scott G. Schildberg, Esq.
Pappas Metcalf Jenks & Miller, P.A.
245 Riverside Avenue, Suite 400
Jacksonville, FL 32202-4327

Shaw P. Stiller, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

The Honorable Donald R. Alexander
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

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

7/16/04

Miriam Snipes **Date**
Deputy Agency Clerk