

1-23-04

Final Order No. DCA04-GM-041

FILED
MAR-2 2011-42
DIVISION OF
ADMINISTRATIVE
HEARINGS

**STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS**

T & P ENTERPRISES OF BAY COUNTY,
INC., a Florida corporation, and EDGAR
GARBUETT, individually,

Petitioners,

AP

DOAH CASE No. 03-2449GM

RAH-CLOS

v.

BAY COUNTY, FLORIDA,

Respondent,

and

BARBARA S. HINSON,

Intervenor

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 Small Scale Comprehensive Plan Amendment No. SSA 03-07 adopted by Bay County Ordinance No. 03-06, hereinafter referred to as the “Plan Amendment.”

The Petitioners challenged the Plan Amendment by filing a Petition with the Division of Administrative Hearings, as authorized by §163.3187(3), FLA. STAT. (2003). A formal hearing was conducted by an Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”). 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 Amendment is in compliance. None of the parties filed exceptions to the Recommended Order.

THE PLAN AMENDMENT

The Plan Amendment will change the land use designation of an 2.35 acre parcel from Seasonal Resort to Residential. Findings of fact 5 & 22. The Seasonal Residential category provides a “functional mix of compatible seasonal/resort land uses where the clientele are predominately seasonal or temporary visitors and tourists.” Finding of fact 11. The applicants for the change to Residential sought to protect the character of their neighborhood from high-rise development, bars, T-shirt shops and noise. Finding of fact 15.

ROLE OF THE DEPARTMENT

The small-scale Plan Amendment at issue in this case was not reviewed by the Department prior to adoption, and the Department was not a party to the

DOAH proceeding. §163.3187(3)(a), FLA. STAT. (2003). The Secretary of the Department, and agency staff reviewed the record of the final hearing and the Recommended Order. Based upon that review, the Secretary of the Department must either enter a final order consistent with the ALJ's recommendations finding the small-scale Plan Amendment in compliance, or determine that the Plan Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action. §163.3187(3)(b)2., FLA. STAT. (2003).

The Secretary accepts the recommendation of the Administrative Law Judge as to the disposition of this case. However, the Department rejects one conclusion of law in the Recommended Order. The ALJ stated that:

42. Wendy Grey, Petitioners' expert witness, testified that the configuration of the Plan Amendment is not consistent with those portions of the Goal Statement in the Future Land Use Element of the Plan that express the County's goals "to promote an orderly and efficient pattern of growth and development" and "to promote compatibility between land uses and reduce the potential for nuisances." Ms. Grey opined that leaving some properties designated SR surrounded by Residential properties does not promote an orderly and efficient pattern of growth and development.

43. That portion of the Goal Statement referring to an orderly and efficient pattern of growth and development was taken directly from the intent sections of Chapter 163, Part II, Florida Statutes, and Chapter 9J-5, Florida Administrative Code. The language governs the overall planning process of allocation of future land uses based upon infrastructure, natural resource protection and efficiency in terms of using existing infrastructure. It is based upon the purpose of the Growth Management Act to manage the extent, distribution and timing of future growth, discourage urban sprawl, and maximize existing infrastructure. *These are terms of art under the Growth*

Management Act, and have nothing to do with drawing the polygons on the map. (emphasis supplied).

The last sentence of paragraph 42 is incorrect. Promotion of “an orderly and efficient pattern of growth and development,” “compatibility between land uses,” and reduction of “the potential for nuisances” should be part of the determination of the boundaries of the future land use map districts in the comprehensive plan. Therefore, the Department rejects that last sentence of paragraph 42.

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 label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. *Battaglia Properties, Ltd. v. FLWAC*, 629 So.2d 161 (Fla. 5th DCA 1993); *Kinney v. Dept. of State*, 501 So.2d 129 (Fla. 5th DCA 1987). The Department’s conclusion of law is more reasonable than the ALJ’s conclusion of law.

Rejection of the last sentence of paragraph 42 does not require further modification of the Recommended Order. The ALJ goes on to factually determine in paragraphs 44 and 45 that the Plan Amendment is consistent with the Goal Statement described in paragraphs 42 and 43. Also, the ALJ correctly stated the standards for drafting the future land use map in a later portion of the Recommended Order:

68. A comprehensive plan is composed of several elements including but not limited to a future land use element. § 163.3177, Fla. Stat. The future land use element designates "proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation,

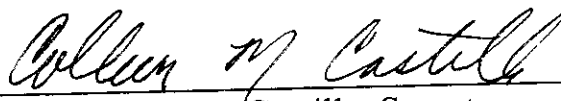
conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land." § 163.3177(6)(a), Fla. Stat. The FLUM is a component of the future land use element of the plan as "[t]he proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives." *Id.* In other words, "[t]he FLUM is a pictorial depiction of the future land use element and is supplemented by written 'goals, policies, and measurable objectives.' The FLUM must be internally consistent with the other elements of the comprehensive plan." Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 at 208. (Fla. 2001)(citations omitted.)

ORDER

Upon review and consideration of the 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 the last sentence of paragraph 42 is rejected;
2. The Administrative Law Judge's recommendation is accepted; and
3. Bay County Small Scale Comprehensive Plan Amendment No. SSA 03-07 adopted by Bay County Ordinance No. 03-06 is determined to be in compliance as defined in §163.3184(1)(b), FLA. STAT.

DONE AND ORDERED in Tallahassee, Florida.



Colleen M. Castille, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS

NOTICE OF RIGHTS

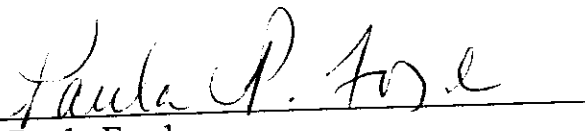
ANY PARTY TO THIS FINAL ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.110.

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 27th day of February, 2004.



Paula Ford
Agency Clerk

By U.S. Mail:

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