12-23-03

Final Order No. DCA04-GM-006

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

GREGORY L. STAND,

Petitioner,

AP

v.

DOAH CASE No. 03-2980GM

ESCAMBIA COUNTY,

CAS-CLU5

Respondent.
_____/

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 a "small scale" comprehensive plan amendment adopted by Escambia County Ordinance No. 2003-03, hereinafter referred to as the "Plan Amendment."

The Petitioner 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. The Petitioner filed Exceptions to the Recommended Order.

ROLE OF THE DEPARTMENT

The small-scale Plan Amendment at issue in this case was not reviewed by the Department, and the Department was not a party to the DOAH proceeding. §163.3187(3)(a), FLA. STAT. (2003). Therefore, the ban on *ex parte* communications imposed by section 120.66, FLA. STAT. (2003), would normally not apply to any employees of the Department. However, the Department is presently a respondent in the "large-scale" plan amendment case, *Gregory L. Strand v. Department of Community Affairs and Escambia County,* DOAH Case No. 03-4415GM, which involves the same parties and similar issues as this case. Therefore, the Department employees engaged in advocacy in DOAH Case No. 03-4415GM have not communicated with the Secretary regarding the merits of this case.

The Secretary of the Department, and agency staff who have taken no part in the formal proceedings in DOAH Case No. 03-4415GM, 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 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).

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.

> 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.* (2002). See also, *Pillsbury v. Department 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 PLAN AMENDMENT

The Plan Amendment will change the land use designation of an 8.98 acre parcel from Low Density Residential to Commercial. Findings of fact 3, 14 & 23.

RULINGS ON EXCEPTIONS

Reweighing the Evidence

The Petitioner asks the Department to reject a portion of finding of fact 20 because it is not relevant. The Petitioner further asks the Department to restate findings of fact 24 and 29 to make those findings "more accurate." The Petitioner also contends that additional findings of fact are required. 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 Md. Ctr. V. Agency for Health Care Admin.*, 678 So.2d 421 (Fla. 1st DCA 1996).

The Exceptions to findings of fact 20, 24 and 29, and the portion of the Exceptions under the heading "Additional Findings of Fact Required" are DENIED.

Accurate Quotation

The Petitioner correctly points out that finding of fact 26 omits one word each from quotations of Goal 11.A. and Policy 11.A.1.2.

The Exception to finding of fact 26 is GRANTED, and finding of fact 26 is modified by paragraphs 1.A. and 1.B. of the Order below.

Development versus Land Use

The main issue raised by the Petitioner is whether the Plan Amendment is consistent with the text of the Escambia County Comprehensive Plan. The Petitioner

argued that wetlands are located on the parcel affected by the Plan Amendment, and that the Coastal Managment and Conservation Element forbids commercial uses in wetlands. Although the ALJ found that wetlands "likely exist" on the parcel, finding of fact 10, the ALJ determined that the provisions cited by the Petitioner apply to development orders and do not apply to the Plan Amendment. The ALJ concluded that:

> [W]hen read as a whole, it appears that the County intended Policy 11.A.2.6a through e to apply to decisions of the County regarding development applications and not to changes in future land use designations or categories in a FLUM. Petitioner did not prove by a preponderance of the evidence that the Plan Amendment is inconsistent with Goal 11.A., Objective 11.A.1, Policies 11.A.1.2, 11.A.2.6, and 11A.2.7.
>
> Conclusion of law 46.

This ultimate conclusion by the ALJ is based on a detailed analysis of Policy 11.A.2.6 in conclusion of law 44. The Petitioner contends that the ALJ's analysis of Policy 11.A.2.6 is erroneous. The Petitioner asserts that the Policy clearly applies to future land use map ("FLUM") amendments. However, Policy 11.A.2.6 commences with the phrase, "Development in wetland areas ... shall be subject to the following provisions...." The ALJ's conclusion that Policy 11.A.2.6 applies to development applications, and not to FLUM amendments, is more reasonable than the theory advanced by the Petitioner.

The Exception to finding of fact 44 is DENIED.

Data and Analysis

The ALJ stated that, "Further, Petitioner did not prove by a preponderance of the evidence that the County did not have sufficient surveys, studies, or data regarding the parcel when the Plan Amendment was adopted." Conclusion of law 47.

The Petitioner contends that the evidence is undisputed that the County did not prepare its own studies or gather its own data to delineate wetlands when the Plan Amendment was adopted, and that the Planning Board and Board of County Commissioners were not provided with the analyses that existed at the time of adoption. The ALJ made several findings of fact regarding the data and analysis that was available to the County. Findings of fact 16 through 23. Those findings of fact either were not challenged by the Petitioner's Exceptions, or the exceptions directed at some of the findings have been denied. The ALJ's conclusion flows from those findings of fact, since it applies the statutory standard of proof to those facts.

However, the Department rejects the portion of conclusion of law 47 which implies that the County must have had sufficient data at the time of adoption of the Plan Amendment. Even if the Petitioner had convinced the ALJ that the County did not have sufficient data and analysis when the Plan Amendment was adopted, the Petitioner would not have established a ground for finding the Plan Amendment not in compliance. A plan amendment must be based upon the "best available existing data." FLA. ADMIN. R. 9J-5.005(2)(c). The key point is whether the data and analysis that existed and was available on the date of adoption support the Plan Amendment, not whether the County actually had that data and analysis in its possession on that date. As the Hearing Officer stated in *Zemel v. Lee County*, 15 FALR 2735, 1992 WL 880139 (DCA 1993):

> 139. The extent to which a local government must identify in its plan, use, or even be aware of data or analysis at the time of the adoption of the plan or plan amendment raises similar issues as those involved as to whether a party may rely on new data. If an affected person may challenge a plan or plan amendment based on analysis and available existing data, even though the local government was unaware of such data and analysis at the

time of adoption, then the local government may defend a plan challenge based on analysis and available existing data meeting the same standards, even though the local government was unaware of such data and analysis at the time of adoption. The same provisions of the Act and Chapter 9J-5 govern both parties.

140. On the one hand, allowing a local government or affected person to refer to analysis or existing data not in fact used while adopting the plan or plan amendment could tend to impair public participation. As noted above, Section 163.3177(8) requires the local government to make available to the public copies of "surveys and studies" used in the preparation of the plan or plan amendment. A local government that waits until the Section 163.3184(9) or (10) proceeding to identify the data and analysis upon which the plan or plan amendment is based hardly serves the principles of public participation. Likewise, allowing an affected person to wait until the Section 163.3184(9) or (10) proceeding to identify the data and analysis upon which the challenge is based serves the principles of public participation no better.

141. On the other hand, no real purpose is served by sustaining a challenge to a plan or plan amendment because the local government did not identify supporting data and analysis when submitting the plan for review to DCA, if analysis or existing data in fact are available to support the plan or plan amendment or to achieve consistency with a specific data or analysis criterion.

* * *

144. ... [T]here is insufficient authority in the Act or Chapter 9J-5 to render a plan or plan amendment inconsistent with the general criterion of supporting data and analysis or criteria concerning specific items of data or analysis if appropriate analysis and existing data are first disclosed at the final hearing.

Therefore, Petitioner's Exception to conclusion of law 47 is DENIED. However, the Department's substituted conclusion of law is more reasonable than the ALJ's conclusion of law. Therefore, conclusion of law 47 is modified by paragraph 1.C. of the Order below.

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:

A. The second sentence of finding of fact 26 is modified to read:

Material here and under the heading "Coastal Management," Goal 11.A. provides: "Protect people and property by limiting public expenditures in areas subject to destruction by natural disasters and by restricting development activities that would damage or destroy coastal resources."

B. The last sentence of finding of fact 26 is modified to read:

Policy 11.A.1.2., "Future Land Use Element Resource Protection Policies," provides: "Limit the specific impacts and cumulative impacts of development or redevelopment upon wetlands, water quality, water quantity, wildlife habitats, living marine resources or other natural resources."

C. The following sentences are added to the end of conclusion of law 47:

Furthermore, the County was required to demonstrate at the final hearing whether the Plan Amendment was supported by the best available existing data. Rule 9J-5.005(2)(c), FLORIDA ADMINISTRATIVE CODE. The County's awareness of supporting data at the time of Plan Amendment adoption is not relevant to the issues in this case. *Zemel v. Lee County*, 15 FALR 2735, 1992 WL 880139 (DCA 1993).

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

3. The Escambia County small-scale comprehensive plan amendment adopted by Ordinance No. 2003-03 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 28th day of January, 2004.

Paula Ford
for Agency Clerk

By U.S. Mail:

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