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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

CHARLES OSBORNE, BERNARD KNIGHT, and MARY JO KNIGHT,

Petitioners,

v.

TOWN OF BEVERLY BEACH and DEPARTMENT OF COMMUNITY AFFAIRS

Respondents.
_____/

DOAH Case No. 03-4758GM BPC Closed

Final Order No. DCA05-GM-213

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 Town of Beverly Beach Comprehensive Plan Amendment 03-1, initially adopted by Ordinance 2003-ORD-6 and amended by Ordinance 2004-ORD-6, hereinafter referred to as "the Plan Amendment."

The Department published a notice of intent to find the Plan Amendment "not in compliance," as defined in §163.3184(1)(b), FLA. STAT. (2005); and Charles Osborne, Bernard Knight and Mary Jo Knight intervened, as authorized by §163.3184(10)(a), FLA. STAT. (2005). The Department and the Town entered into a compliance agreement, the Department published a cumulative notice of intent finding the Plan Amendment "in compliance," and the parties were realigned pursuant to §163.3184(16), FLA. STAT. (2005). A formal hearing was conducted by Administrative Law Judge ("ALJ") Bram D. E. Canter 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 Amendment is in compliance.

ROLE OF THE DEPARTMENT

Subsequent to the publication of the cumulative notice of intent, the Department's litigation staff contended that the Plan Amendment is 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 recommendation finding the 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. § 163.3184(9)(b), FLA. STAT. (2005).

Having reviewed the entire record, the Secretary accepts the recommendation of the Administrative Law Judge as to the disposition of this case.

THE PLAN AMENDMENT

The Plan Amendment changes the future land use map designation of 14.5 acres from Conservation/Spoil Area to Low Density Residential. Finding of fact 7. Although Low Density Residential allows 5 dwelling units per acre, the Plan Amendment further limits the total gross density of the 14.5 acres to 28 residential dwelling units. Findings of fact 9 and 10.

STANDARD OF REVIEW

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. (2005)

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. (2005). 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. (2005)

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

Exceptions to Findings of Fact

Petitioners exceptions 1, 2, 3, 5 and 6 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.

Further, the Petitioners misapprehend the role of the ALJ at a *de novo* hearing. As stated in exception 6, the Petitioners base most of their case on the theory that the data and analysis utilized by the Town and transmitted to the Department contained "significant omissions and deficiencies." For example, in exception 2 the Petitioners contend that the Town's use of incorrect data concerning extent of the 100-year floodplain while preparing the *proposed* plan amendment demonstrates that the *adopted* plan amendment is not in compliance. The Town admitted at the hearing that the data in the proposed amendment package was inaccurate, and the parties stipulated to the admission of evidence concerning the extent of the 100-year floodplain. Finding of Fact 22. Thus, it appears that the best available data on the extent of the 100-year floodplain was presented to the ALJ.

The purpose of the *de novo* final hearing is to give all parties the opportunity to present the best available data. Formal administrative proceedings are not limited to evidence which was actually considered by the agency, or conclusions which were reached by the agency, prior to the formal hearing.

> An agency's free-form action is regarded as preliminary, irrespective of its tenor. The petition for a formal 120.57(1) hearing, as in this case, commences a *de novo* proceeding. §120.57 proceedings "are intended to formulate final agency action, not to review action taken earlier and

> preliminarily." *Florida Depart. of Trans. v. J.W.C. Co., Inc.*, 396 So.2d 778, 785 (Fla. 1st DCA 1981) (citations omitted).

See also *Moore v. HRS*, 596 So.2d 759 (Fla. 1st DCA 1992). Even where a challenger contends that the agency erred in approving a permit on the grounds that the application did not contain all the required information, the applicant may submit evidence at the hearing that was not contained in the application.

> Any additional information necessary to provide reasonable assurance that the proposed facility would comply with the applicable air emission standards could be properly provided at the hearing. *McDonald v. Depart. of Banking and Finance*, 346 So.2d 569, 584 (Fla. 1st DCA 1977) (a petition for a formal 120.57 hearing commences a *de novo* proceeding, and because the proceeding is intended to formulate final agency action and not to review action taken earlier and preliminarily, the hearing officer may consider changes or other circumstances external to the application). *Hamilton County Board of County Commissioners v. DER*, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991).

Exceptions 1, 2, 3, 5, and 6 are DENIED.

Exception to Conclusions of Law

In exception 4, the Petitioners contend that the ALJ cited Policy E.1.4.3 as the relevant policy for review of the Plan Amendment for correct treatment of natural resources, even though the Petitioners assert that section A.3.1 is the relevant provision. Objective A.3.1 provides, "Protect the Town's natural and historic resources from destruction or encroachment by development upon the adoption of the Plan."

However, the ALJ did consider Objective A.3.1 in paragraph 59 of the Recommended Order. The ALJ determined that since the Petitioners did not demonstrate that adverse impacts will result from the Plan Amendment, no inconsistency with Objective A.3.1 was established.

Exception 4 is DENIED.

To the extent that any portion of the Petitioner's exceptions are not addressed above, the exceptions merely reiterate positions which were repeatedly asserted before the ALJ, and which were clearly and specifically addressed in the Recommended Order.

Therefore, the exceptions need not be addressed further in this 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).

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;

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

3. The Town of Beverly Beach Comprehensive Plan Amendment 03-1, initially adopted by Ordinance 2003-ORD-6 and amended by Ordinance 2004-ORD-6, is determined to be in compliance as defined in §163.3184(1)(b), Fla. Stat.

DONE AND ORDERED in Tallahassee, Florida.

THADDEUS L. COHEN

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 19th day of Nov., 2005.

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

Robert J. Rigio, Esq.
Rigio & Mitchell, P.A.
400 South Palmetto Avenue
Daytona Beach, FL 32114

Sidney N. Newell, Esq.
Post Office Box 819
Bunnell, FL 32110

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

Sidney F. Ansbacher, Esq.
Upchurch, Bailey & Upchurch, P.A.
Post Office Drawer 3007
St. Augustine, FL 32085-3007

The Honorable Bram D. E. Canter
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060