8-24-04

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

FILED
2004 DEC 29 A 11:33
DIVISION OF COMMUNITY PLANNING

COLLIER COUNTY,

Petitioner,

v.

DEPARTMEMT OF COMMUNITY AFFAIRS and CITY OF NAPLES,

Respondents.
_____/

DOAH Case No.: 04-1048GM

AT

Final Order No.: DCA04-GM-240

DRA-Clos

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 comprehensive plan amendment adopted by the City of Naples in Ordinance No. 03-10305. The ordinance, adopted on December 17, 2003, added a new Policy 1-10 in the Transportation Element of the City's Comprehensive Plan, hereinafter referred to as "the Plan Amendment."

The Department published a notice of intent to find the Plan Amendment in compliance, as defined in §163.3184(1)(b), FLA. STAT. (2003); and the Petitioner challenged the Plan Amendment, pursuant to §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 Amendment is in compliance.

ROLE OF THE DEPARTMENT

Throughout the pendency of the formal administrative proceedings, 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 recommendations 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. (2003).

Having reviewed the entire record, the Secretary accepts the recommendation of the ALJ 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.

§ 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.

§ 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 129 (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

The Petitioner filed exceptions to the Recommended Order. Respondents City of Naples and the Department filed responses to Petitioner's exceptions.

Standing – Exception 3

Petitioner's Exception 3 takes issue with the ALJ's findings of fact 9 through 14, footnote 3, and conclusion of law 49 regarding the standing of the Petitioner as an "affected person."

Section 163.3184(1)(a), FLA. STAT. (2003), defines an "affected person" to include:

> [a]djoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction.

In paragraph 9 of the Recommended Order, the ALJ found that, to demonstrate standing, the County must prove that the plan amendment "will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within [its] jurisdiction." The ALJ further found that "[t]herefore, the County must prove that the plan amendment prohibits the construction of the Golden Gate Overpass and that this prohibition will result in the substantial adverse impacts described in the statute." (Recommended Order at ¶ 9). In paragraph 10, the ALJ found that the Plan Amendment does not prohibit the construction of vehicle overpasses within the City. In paragraph 49, the ALJ concluded:

> Because the amendment does not prohibit the construction of the Golden Gate Overpass, but merely states a preference on the part of the City for "alternative planning solutions" before a vehicle overpass can be built, the substantial impacts contemplated by the statute cannot occur until the amendment is implemented. Therefore, the County lacks standing to file this action.

(Recommended Order at ¶ 49) (footnote omitted).

The Petitioner first argues that the ALJ improperly interprets section 163.3184(1)(a), within the context of this proceeding, to require that the County prove that the Plan Amendment "prohibits" construction in order to have standing. The Petitioner contends that, contrary to the ALJ's conclusion, the statute does not require a showing that the Plan Amendment will "prohibit" certain publicly funded infrastructure. The Petitioner further contends that the County was only required to show that the policy will have "an adverse effect" on the need for infrastructure, either by creating conditions that require additional infrastructure to be constructed or by increasing the public cost of needed infrastructure. (Exceptions at 6).

These arguments are without merit. Section 163.3184(1)(a) requires a showing that the Plan Amendment "will" produce substantial impacts. The ALJ's conclusion that the Petitioner was required to show that the Plan Amendment prohibits the construction of an overpass is reasonable, as it contemplates that there must be a showing that the Plan Amendment "will," in fact, produce substantial impacts. The ALJ's decision recognizes that mere speculation is not sufficient. Additionally, section 163.3184(1)(a) refers to "substantial impacts," not adverse effects.

The Petitioner further contends that it has demonstrated standing because it has expended substantial funds for the study and planning of the infrastructure to address transportation needs at the Airport Road/Golden Gate Parkway intersection. The Petitioner also contends that the ALJ found that, despite these expenditures, the County has still not satisfied the requirement to explore all feasible alternatives. According to the Petitioner, the inescapable consequence of these findings is that the Plan Amendment will require the County to undertake even more study and analysis to establish that all feasible planning alternatives have been exhausted.

These arguments are without merit. The plain language of section 163.3184(1)(a) requires a showing that the Plan Amendment will produce substantial impacts on the "increased need" for publicly funded infrastructure; there is no reference to substantial impacts on the "cost" or "expenditures" incurred due to study and planning to address transportation needs. Moreover, the Petitioner points to no record evidence that would support an argument that the Plan Amendment will require the County to undertake more study and analysis. The Petitioner only contends that this is the "inescapable consequence" of the ALJ's findings. Accordingly, the Petitioner's arguments regarding costs and expenditures for study and planning are without merit.

Finally, the Petitioner's contends that footnote 3 of the Recommended Order is unsupported by the evidence. This argument is without merit, as there is competent substantial evidence in the record to support this finding.

Therefore, based on the foregoing, Petitioner's Exception 3 is DENIED.

Remaining Exceptions

Because the conclusion that the County lacks standing is dispositive, Petitioner's Exceptions 1, 2, 4, 5, 6, and 7 are moot and are DENIED.

Even if the Petitioner had demonstrated standing, the Petitioner's remaining exceptions are without merit. In Exceptions 1, 2, 4, 5, and 6, the Petitioner argues that the ALJ accepted the evidence of the Respondents over that offered by the Petitioner, 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 Petitioner believes 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. Accordingly, the Petitioner's Exceptions 1, 2, 4, 5, and 6 are DENIED.

Finally, the Petitoner's Exception 7 challenges the ALJ's conclusion of law that the County failed to prove beyond fair debate that the Plan Amendment is not in compliance. As this Exception is based on the exceptions to the factual findings, and the factual findings are supported by competent substantial evidence, Exception 7 is 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;

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

3. The comprehensive Plan Amendment adopted by City of Naples Ordinance No. 03-10305 is 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
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

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 December, 2004.

Paula Ford, Agency Clerk
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The Honorable Donald R. Alexander
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