STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALACHUA LEADERSHIP ALLIANCE-CITIZENS HELPING US ALL, INC.; ROBERT A. PEREZ; THALIA GENTZEL; AND MADALENE RHYAND,	)	
Petitioners,	)	
vs.	)	Case No. 04-2872RU
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondent.	)	

FINAL ORDER

On October 21, 2004, an administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners: David J. Russ, Esquire
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Gainesville, Florida 32601

For Respondent: Shaw P. Stiller, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
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STATEMENT OF THE ISSUE

The issue in the case is whether a statement made by a representative of Respondent Department of Community Affairs in a letter to legal counsel for Petitioners, and statements made

in a Final Order of Dismissal entered by Respondent, constitute unpromulgated rules in violation of applicable Florida law.

PRELIMINARY STATEMENT

By Petition filed with the Division of Administrative Hearings (DOAH) on August 16, 2004, Petitioner alleged that a letter dated July 20, 2004, in which Respondent declined to initiate administrative proceedings against the City of Alachua under the provisions of Subsection 163.3191(11), Florida Statutes (2004), constituted an "illegal rule." Subsection 163.3191(11), Florida Statutes (2004), permits Respondent to initiate an administrative proceeding against a local government that fails to timely adopt comprehensive plan amendments related to the local government's "Evaluation and Appraisal Report."

By Notice of Hearing dated August 20, 2004, the hearing was scheduled to commence on September 16, 2004.

By Motion to Dismiss filed September 3, 2004, Respondent asserted that the Petition failed to comply with the requirements of Subsection 120.56(4), Florida Statutes (2004). By Order dated September 8, 2004, the Motion to Dismiss was granted without prejudice and Petitioner was directed to file an amended petition.

On September 22, 2004, Petitioner filed an Amended Petition Challenging Agency Statements and Unadopted Rules alleging that Respondent's refusal to initiate enforcement proceedings against

the City of Alachua under Subsection 163.3191(11), Florida Statutes (2004), the June 20, 2004, letter referenced previously, and Respondent's August 31, 2004, Final Order of Dismissal related to Petitions for Hearing and for Rulemaking, constituted invalid unadopted rules.

The Amended Petition Challenging Agency Statements and Unadopted Rules specifically identified the challenged statements as follows:

> The statements in the letter and order constitute statements that should have been but have not been adopted by rule because they establish the right of affected persons to receive relief through the agency's prosecution against local governments to force them to adopt timely amendments to their comprehensive plans based on EARs.

By Notice of Hearing dated September 24, 2004, the hearing was scheduled to commence on October 21, 2004.

At the hearing, Petitioner presented the testimony of three witnesses and had Exhibits numbered 1 through 8 and 11 admitted into evidence. Respondent presented the testimony of one witness and had Exhibits numbered 1 through 20 admitted into evidence.

At the close of the hearing, the record remained open for five days to permit the filing of Petitioner's Exhibits identified as 9, 10, and 12 that were not available at the

hearing. The exhibits were never filed and have not been considered in the preparation of this Final Order.

The one-volume Transcript of the hearing was filed on November 15, 2004. Based on an unopposed motion filed by Respondent, by Order Granting Extension dated November 23, 2004, the deadline for filing proposed final orders was December 7, 2004. Respondent's Proposed Final Order was timely filed. Petitioner's Proposed Final Order was filed on December 8, 2004.

FINDINGS OF FACT

1. Petitioner Alachua Leadership Alliance-Citizens Helping Us All, Inc. (ALA-CHUA), is a corporation created to represent the interests of certain citizens within the community, to "share information with the community," and to be "a citizen's watchdog group overlooking the expenditures" of funds. ALA-CHUA holds regular meetings, attends public meetings, and initiates litigation. ALA-CHUA president Tamara Kay Robbins and ALA-CHUA member Eileen McCoy testified at the hearing.

2. Petitioners Robert A. Perez, Thalia Gentzel, and Madalene Rhyland, did not testify at the hearing.

3. Respondent is the state agency charged with administration of the Local Government Comprehensive Planning and Land Development Regulation Act ("Act"), Chapter 163, Part II, Florida Statutes.

4. As stated at Subsection 163.3161(2), Florida Statutes (2004), the purpose of the Act is to "utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development." The Act requires local governments to adopt comprehensive plans that address numerous areas of responsibility.

5. As set forth at Subsection 163.3191(1), Florida Statutes (2004), each local government is required to adopt an evaluation and appraisal report ("EAR") to assess "the progress in implementing the local government's comprehensive plan" and identifying portions of the plan that require updating.

6. Subsection 163.3191(9), Florida Statutes (2004), requires that Respondent establish a schedule for adoption of EARs that provides "each local government at least 7 years from plan adoption or last established adoption date for a report. . . ."

7. After the EAR is completed, it is submitted to Respondent for a "sufficiency determination" as required at Subsection 163.3191(6), Florida Statutes (2004). Once Respondent determines an EAR to be sufficient, the local government is required to adopt within 18 months from the sufficiency determination, EAR-related comprehensive plan amendments. Subsection 163.3191(10), Florida Statutes (2004),

provides that the 18-month deadline may be extended for six months by Respondent for "good and sufficient cause" and may again be extended if the additional extension would "result in greater coordination between transportation and land use, for the purposes of improving Florida's transportation system."

8. Subsection 163.3191(11), Florida Statutes (2004), provides as follows:

> The Administration Commission may impose the sanctions provided by s. 163.3184(11) against any local government that fails to adopt and submit a report, or that fails to implement its report through timely and sufficient amendments to its local plan, except for reasons of excusable delay or valid planning reasons agreed to by the state land planning agency or found present by the Administration Commission. Sanctions for untimely or insufficient plan amendments shall be prospective only and shall begin after a final order has been issued by the Administration Commission and a reasonable period of time has been allowed for the local government to comply with an adverse determination by the Administration Commission through adoption of plan amendments that are in compliance. The state land planning agency may initiate, and an affected person may intervene in, such a proceeding by filing a petition with the Division of Administrative Hearings, which shall appoint an administrative law judge and conduct a hearing pursuant to ss. 120.569 and 120.57(1) and shall submit a recommended order to the Administration Commission. The affected local government shall be a party to any such proceeding. The commission may implement this subsection by rule.

9. Section 14.202, Florida Statutes (2004), identifies that the Administration Commission is the Governor and the Cabinet. The sanctions available to the Administration Commission include various restrictions on the eligibility for and provision of certain state funds to non-complying local governments.

10. The City of Alachua (City) is a local government with responsibility for adoption of a comprehensive plan.

11. According to the Respondent's letter to City Mayor James A. Lewis dated December 29, 1998, the City's EAR was determined to be sufficient by the Respondent.

12. The 18-month deadline for the City to adopt EAR-related comprehensive plan amendments expired at the end of June 2000.

13. There were no deadline extensions granted by Respondent to the City.

14. The City failed to meet the 18-month deadline for the adoption of EAR-related comprehensive plan amendments.

15. By letter dated June 30, 2004, to Thaddeus Cohen, Secretary of the Department of Community Affairs, David Jon Russ (counsel for Petitioners) asked Respondent to initiate proceedings against the City of Alachua under the provisions of Subsection 163.3191(11), Florida Statutes (2004), by no later than July 8, 2004.

16. By letter dated July 20, 2004, David L. Jordan, Deputy General Counsel for Respondent, advised Mr. Russ that Respondent "respectfully declines your request to seek sanctions against the City."

17. The letter further states as follows:

> The City transmitted proposed EAR-based amendments on May 12, 2004, and the Department issued its Objections, Recommendations, and Comments ("ORC") report on July 16, 2004. Although the ORC report raises some objections to the proposed EAR-based amendments, the Department believes that the City can revise the amendments to resolve those objections. Therefore, the City is on course to adopt sufficient plan amendments to implement the EAR.
>
> The Department will not commence litigation to force the City to perform a duty that the City is already performing.

18. Subsection 163.3184(7), Florida Statutes (2004), provides that a local government has 120 days from the date of the ORC report to adopt (or adopt with changes) the EAR-based amendments. Accordingly, the deadline for the City to adopt the amendments was November 15, 2004. The City adopted the EAR-based amendments on September 13, 2004.

19. In response to the Jordan letter dated July 20, 2004, on August 16, 2004, Petitioners filed with Respondent a Petition for Hearing on Decision Affecting Substantial Interests and for Rulemaking, stating that Petitioners "demand a hearing before DOAH, a recommended order finding the action illegal, a final

order adopting it, and rule-making by the Department." The Petition indicates that Petitioners desire a hearing on Respondent's decision not to initiate administrative proceedings against the City and to require Respondent to initiate rulemaking related to Subsection 163.3191(11), Florida Statutes (2004).

20. On August 31, 2004, Respondent entered a Final Order Dismissing Petition, in which Petitioners' requests were dismissed with prejudice. The Final Order was not appealed.

21. As grounds for the dismissal of the request for hearing, the Final Order of Dismissal stated that Petitioners failed to "identify any interest protected by pertinent substantive law that will suffer injury by virtue of the Department's decision not to seek sanctions against the City" and that Petitioners failed to identify any substantive right protected under Section 163.3191, Florida Statutes (2004).

22. As grounds for dismissal of the request for rulemaking, the Final Order noted that Subsection 163.3191(11), Florida Statutes (2004), vests authority for adoption of rules related to implementation of the subsection in the Administration Commission, and that Respondent had no authority to initiate rulemaking.

23. The evidence presented at the hearing established that Respondent's general policy is to encourage and negotiate with

non-complying local governments, and that various types of technical and financial assistance is available to local governments, depending on the circumstances, to enable such compliance.

24. The evidence further established that Respondent would initiate Subsection 163.3191(11) proceedings against a non-complying local government if the local government failed to proceed into compliance after receiving appropriate technical and financial assistance from Respondent.

25. As of the date of the hearing, Respondent has not initiated Subsection 163.3191(11) proceedings against a local government for failing to timely adopt EAR-based comprehensive plan amendments. There is no evidence that any local government has failed to come into compliance with applicable comprehensive plan requirements after receiving assistance from Respondent.

26. There is no evidence that Respondent has made any statement indicating that it would never initiate proceedings against any local government under the provisions of Subsection 163.3191(11), Florida Statutes (2004).

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.56(4), Fla. Stat. (2004).

28. Subsection 120.56(4)(a), Florida Statutes (2004), provides that a person "substantially affected by the agency statement" may challenge the statement as an unpromulgated rule. Petitioners have failed to establish facts sufficient to demonstrate that they are substantially affected by the statements at issue in this case and have therefore failed to establish standing to maintain this proceeding.

29. To establish standing to maintain a challenge under Section 120.56, Florida Statutes (2004), an organization must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members. Florida Home Builders Assn. v. Dept. of Labor and Employment Sec., 412 So. 2d 351, 353-354 (Fla. 1982).

30. As to Petitioner ALA-CHUA, the evidence is insufficient to establish standing to challenge the statements. ALA-CHUA allegedly includes between 20 and 70 members. Two ALA-CHUA members (ALA-CHUA president Tamara Kay Robbins and member Eileen McCoy) testified at the hearing, as to "injuries" allegedly suffered related to land use decisions made by the City during the period of time the EAR was due and uncompleted.

No other ALA-CHUA members testified, and there was no credible testimony as to impacts on other members. The evidence in this case fails to establish that a substantial number of ALA-CHUA members were "substantially affected."

31. Even assuming that the evidence established that a substantial number of ALA-CHUA members were "substantially affected" by the challenged statements, there is insufficient evidence to establish any injury related to the agency statements to maintain standing. The asserted injuries include concerns expressed by Ms. Robbins and Ms. McCoy about groundwater, infrastructure, and transportation issues related to a 1,900-acre industrial-zoned property (the "Waco" property) upon which the City has and is continuing to permit development. There is no credible evidence that Respondent's refusal to initiate an administrative proceeding under Subsection 163.3191(11), Florida Statutes (2004), would have prevented or altered the City's actions related to the Waco property.

32. Petitioners Robert A. Perez, Thalia Gentzel, and Madalene Rhyland did not attend or testify at the hearing. The only evidence offered at the hearing related to Petitioners Perez, Gentzel, and Rhyland was the hearsay testimony of other witnesses. The evidence related to Petitioners Perez, Gentzel, and Rhyland is not sufficient to support a Finding of Fact. See § 120.57(1)(c), Florida Statutes (2004).

33. Assuming that standing had been established, Petitioner has the burden, in the absence of a statutory directive to the contrary, of establishing by a preponderance of evidence that the cited statements constitute unpromulgated rules. Dravo Basic Materials Co., Inc., v. Department of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992); Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). The burden has not been met.

34. The Amended Petition Challenging Agency Statements and Unadopted Rules identified the challenged statements as follows:

> The statements in the letter and order constitute statements that should have been but have not been adopted by rule because they establish the right of affected persons to receive relief through the agency's prosecution against local governments to force them to adopt timely amendments to their comprehensive plans based on EARs.

35. The statements in the letter and order do not constitute "rules." Subsection 120.52(15), Florida Statutes (2004), in relevant part defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. (emphasis supplied)

36. The statements challenged in this case are not statements of "general applicability." Other than as to Respondent's lack of rulemaking authority related to Subsection 163.3191(11), Florida Statutes (2004), the statements have no applicability outside the context of this case.

37. As stated in Environmental Trust v. State, Dept. of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998):

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.

38. Petitioner's Petition for Hearing on Decision Affecting Substantial Interests was dismissed with prejudice by Respondent's August 31, 2004, Final Order Dismissing Petition, from which no appeal was taken.

39. There is no evidence that Respondent has made any statement, or otherwise indicated, that it would never initiate proceedings against any local government under the provisions of Subsection 163.3191(11), Florida Statutes (2004). To the

contrary, the evidence establishes the circumstances under which the agency would decide to initiate such proceedings.

40. Had the evidence established that Petitioners had standing and that the challenged statements were unpromulgated rules, the burden would have shifted to Respondent to demonstrate that rulemaking was not feasible and practicable. § 120.56(4)(b), Fla. Stat. (2004). Here, Subsection 163.3191(11), Florida Statutes (2004), clearly vests authority for adoption of related rules in the Administration Commission. Respondent has no authority to promulgate rules to implement Subsection 163.3191(11), Florida Statutes (2004).

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Amended Petition Challenging Agency Statements and Unadopted Rules is dismissed.

DONE AND ORDERED this 7th day of January, 2005, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of January, 2005.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.