

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENIS POTIRIS,)
)
 Petitioner,)
)
 vs.) Case No. 05-0943GM
)
 DEPARTMENT OF COMMUNITY)
 AFFAIRS and VILLAGE OF)
 WELLINGTON, FLORIDA,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

On March 11, 2005, the Department of Community Affairs (DCA) referred to the Division of Administrative Hearings (DOAH) a Petition for Formal Administrative Hearing to Challenge the "In Compliance" Proposed Agency Determination (Petition). The Petition was directed to a Comprehensive Plan Amendment adopted by the Village of Wellington (Village) by Ordinance No. 2004-30. It was assigned DOAH Case No. 05-0943GM and later was scheduled for final hearing on May 2-3, 2005.

Petitioner's Standing

On March 22, 2005, the Village filed a Motion to Dismiss the Petition for lack of standing (and other reasons). On Petitioner's motion, the time allotted by Florida Administrative Code Rule 28-106.204(1)¹ for filing responses

was extended to April 11, 2005. Petitioner timely filed a Response in Opposition; DCA did not file a response.

Based on the filings, it was ruled that Petitioner alleged in a conclusory fashion that he had standing as an "affected person," as defined by Section 163.3184(1)(a), Florida Statutes, but that he did not explain how, as required by Rule 28-106.201(2)(b). It appeared from Petitioner's Response in Opposition that he was attempting to explain that he was an "affected person" under Section 163.3184(1)(a) because he was "operating a business within the boundaries of" the Village. Instead, paragraph 5 of the Petition alleged only that Petitioner practices planning in Palm Beach County, worked in the Village for four months in 2001, and has since "spent enormous amount[s] of time and energy in research and public advocacy on land use issues in Wellington, speaking at public hearings, writing to the press, assisting concerned homeowners, and was a co-founder of a grass roots initiative that [resulted] in a petition drive against 'the amendment' [that] collected over 900 signatures by Wellington residents"; and that the amendment at issue "represents a breakdown of the comprehensive plan regulation to the detriment of the public interest and by extension to the petitioner's advocacy interest for the rule of law in land use plan in Wellington" It was ruled that Petitioner did not allege, and it

could not be inferred from his allegations, that he "is operating a business within the boundaries of" the Village. See St. Joe Paper Co. v. Department of Community Affairs, 657 So. 2d 27 (Fla. 1st DCA 1995), review denied, 667 So. 2d 774 (Fla. 1996). In part based on that ruling, and because it did not "conclusively [appear] from the face of the petition" that Petitioner could not allege that he "is operating a business within the boundaries of" the Village, the Petition was dismissed with leave to amend to cure the defect. Cf. Fla. Admin. Code R. 28-106.201(4). However, the ruling noted that "simply representing an 'affected person' in a comprehensive plan amendment matter was not enough to make a planner an 'affected person' able to petition under Section 163.3184(9)(a), Florida Statutes."

On April 25, 2005, Petitioner filed an Amended Petition. On April 27, 2005, DCA filed a Motion to Dismiss the Amended Petition for lack of standing. The next day, the Village filed a similar Motion to Dismiss the Amended Petition. At that point, the final hearing scheduled to commence May 2, 2005, was cancelled pending a ruling, and Petitioner and Bart Novack were given until May 6, 2005, to respond, and their responses have been considered.

The Amended Petition specifically alleged that Petitioner "is operating a business within the boundaries of" the

Village. However, it also explained the allegation: "The Petitioner's business consists of providing professional planning services to local interests regarding property located in Wellington." The Amended Petition alleges Petitioner's personal residential address in the City of West Palm Beach and does not allege a personal or business address within the boundaries of the Village. In his Response to Pending Motions to Dismiss, filed May 6, 2005, Petitioner concedes having no business office in the Village but elaborates and argues:

In the land use related consulting business the location of the office has no relation to the actual business. The business that may be affected by jurisdictional action is associated with the location of properties within the jurisdiction. In order to provide land use related services for properties in Wellington, a consultant is not required to have an office in Wellington.

Petitioner having been given the opportunity to cure the defect in the original Petition, and Petitioner having alleged the factual basis for his alleged status as an "affected person" under Section 163.3184(1)(a), it is now possible to rule on Petitioner's standing as a matter of law.

Accepting all of Petitioner's factual allegations as true, as required at this stage of the proceeding, it is ruled as a matter of law that Petitioner would not be "operating a business within the boundaries of" the Village. Petitioner

may have consulting clients in the Village, and may give planning advice regarding property in the Village, but that is not enough to make him an "affected person" operating a business in the Village. See St. Joe Paper Co. v. Department of Community Affairs, supra. Petitioner's allegations can be distinguished from the kinds of businesses being operated by not-for-profit organizations within the local government's boundaries in cases where they were accorded standing as an "affected person" on that basis. Cf. The Sierra Club, et al. v. St. John County, et al., Final Order No. DCA02-GM-189, DOAH Case Nos. 01-1851GM and 01-1852GM, 2002 WL 1592234, at *25 (DOAH May 20, 2002; DCA July 30, 2002)(Sierra Club was, for example, conducting meetings, fundraising activities, and outings, and participating in governmental decisions, in the County); 1000 Friends of Florida, Inc. and Audubon Society of the Everglades, Inc. v. Department of Community Affairs, Case No. 01-0781GM (DOAH Oct. 2, 2001; DCA Dec. 28, 2001) (1000 Friends of Florida and Audubon Society of the Everglades were found to "operate a business" in the Village of Wellington for purposes of establishing standing by virtue of similar environmental, advocacy, and educational activities, and participation in government decisions); Dept. of Community Affairs v. Lee County, Final Order No. ACC-96-002, DOAH Case No. 95-0098GM, ER FALR 96:118, 1996 WL 1059844, at #32 (DOAH

Jan. 31, 1996; Admin. Comm'n July 25, 1996)(RGMC had offices in Lee County, conducted educational programs in Lee County, and had 157 members residing throughout Lee County, most or all of whom owned property in Lee County).

Bart Novack

On April 6, 2005, Bart Novack (Novack) requested to be added/joined as a Petitioner. The request was supplemented on April 7, 2005. On April 13, 2005, the Village filed a Motion to Strike/Dismiss Novack's April 6, 2005 Request to be Added/Joined as Untimely (Motion to Strike/Dismiss). Novack filed a Reply on April 26, 2005.² No other argument on the Village's Motion to Strike/Dismiss was filed in the time allotted by Florida Administrative Code Rule 28-106.204(1).

As the Village's Motion to Strike/Dismiss states, Bart Novack's request to be added/joined as Petitioner was filed too late under Section 163.3184(9) and must be dismissed.

It appears from the allegations in Novak's request that he is an "affected person," as defined by Section 163.3184(1)(a), Florida Statutes. Although Section 163.3184(9) does not expressly provide for intervention, it is at least arguable that his request could be treated as a petition to intervene under Rule 28-106.205. However, even if so treated, as an intervention petition, it would be subordinate to and dependent on the Amended Petition. See

Humana of Florida, Inc. v. Dept. of Health and Rehabilitation Services, 500 So. 2d 186 (Fla. 1st DCA 1986), rev. denied, 506 So. 2d 1041 (Fla. 1987). See also Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates, Inc., 857 So. 2d 207, 210-211 (Fla. 1st DCA 2003). Dismissal of the Amended Petition would require dismissal of Novack's request, if treated as an intervention petition.³

RECOMMENDATION

Based upon the foregoing, it is

RECOMMENDED that DCA enter a final order dismissing the Amended Petition, as well as Bart Novak's request, and determining the Village's Plan Amendment (Ordinance 2004-30) to be "in compliance."

DONE AND ENTERED this 13th day of May, 2005, in Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2005.

ENDNOTES

1/ All rules refer to rules in the current Florida Administrative Code. All statute sections refer to the 2004 codification of the Florida Statutes.

2/ On April 28, 2005, the Village filed a Motion to Strike/Dismiss Novack's Reply, which is denied.

3/ On May 2, 2005, Novack filed a document entitled "Affirmation Disqualification" seeking disqualification of counsel of record for the Village on the ground that Novack intended to call them as witnesses. This Recommended Order of Dismissal moots Novack's request for disqualification of counsel. On May 6, 2005, Novack filed a document entitled "Affidavit in further support Raising Issues." Nothing in it would change anything in this Recommended Order of Dismissal.

COPIES FURNISHED:

Thaddeus Cohen, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Heidi Hughes, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

Richard E. Shine, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Denis Potiris
134 Greymon Drive
West Palm Beach, Florida 33405

Quentin E. Morgan, Esquire
Brinkley, McNerney, Morgan, Solomon & Tatum, LLP
200 East Las Olas Boulevard, Suite 1900
Fort Lauderdale, Florida 33301

Bart Novack
15670 Cedar Grove Lane
Wellington, Florida 33414

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the final order in this case.