

STATE OF FLORIDA  
DEPARTMENT OF COMMUNITY AFFAIRS

FILED  
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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DON AND PAMELA ASHLEY,

Petitioners,

v.

Order No.

DCA06-GM-173

DEPARTMENT OF COMMUNITY AFFAIRS  
and FRANKLIN COUNTY,

DOAH Case Nos.

05-2361GM

05-2730GM

Respondents,

and

THE ST. JOE COMPANY,

Intervenor.

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**ORDER OF REMAND**

The Administrative Law Judge ("ALJ") issued his Recommended Order in this case on June 12, 2006. The Petitioners filed a Motion For Remand which contended that the Recommended Order did not address several disputed issues of material fact listed in the Prehearing Stipulation. The Respondents and Intervenor filed a Response To The Motion For Remand which conceded that two of the disputed issues of material fact were not addressed in the Recommended Order, and joined the Petitioners in requesting a remand on those issues; but opposed remand on the other issues.

**Agreed Issues for Remand**

The Parties agree that the following disputed issues of material fact from the Prehearing Stipulation were not addressed in the Recommended Order:

9. Whether or not the Ordinance, including Infrastructure Element Policies 2.19 - 2.22 are consistent with Section 163.3177(6)(c), Florida Statutes, and

whether Policy 2.19 establishes a potable water level of service that exceeds the existing actual potable water demand, and whether that level of service is supported by the best available existing data.

19. Whether or not the Ordinance is supported by a demonstration of need for residential and non-residential land uses based upon a professionally-acceptable data and analysis as required by Sections 163.3177(6)(a) and (10)(e), 163.3177(8), Florida Statutes; and Rules 9J-5.005(2) and (7), 9J-5.006(1),(2),(4) and (5), and 9J-11.007, F.A.C.

It appears that these issues were not abandoned after the Prehearing Stipulation, since both issues were addressed in the Don Ashley Proposed Recommended Order, paragraphs 58 - 77, and in the Joint Proposed Recommended Order filed by the Respondents and Intervenor, paragraphs 3, 24 - 28, 75, and 83 - 85.

The Respondents and Intervenor concede that there is a significant amount of evidence in the record, in the form of expert testimony and exhibits, upon which to base findings of fact and conclusions of law on these issues; and that the ALJ might have inadvertently overlooked these issues. Therefore, the Motion for Remand is GRANTED for issues 9 and 19. *Memorial HealthCare Group, Inc. v. Agency for Health Care Administration*, 879 So.2d 72 (Fla. 1st DCA 2004).

The Response To The Motion For Remand asks the Department to direct the ALJ's attention to certain portions of the record for evidence relating to issues 9 and 19. The Department declines this request, and leaves to the discretion of the ALJ whether to receive supplemental pleadings after remand. The Department will not include the post-Recommended Order pleadings filed with the Department in the remand to the ALJ, since these raise issues in addition to those remanded by this order.

Contested Issues for Remand

The Petitioners contend that five additional disputed issues of material fact listed in the Prehearing Stipulation require a remand. The Respondents and the Intervenor do not agree.

1. Whether or not Ordinance 2005-20 (“the Ordinance”) is “in compliance” as defined in Section 163.3184(1)(b), Florida Statutes.

The ALJ addressed this issue throughout the Recommended Order, including his ultimate recommendation that the plan amendments at issue be found “not in” compliance.

2. Whether or not the Ordinance is “in compliance” with respect to each of the items (element, objectives, policies, and maps) set forth in DCA's May 6, 2005, staff memorandum, Sections II, A. 1, 2, 3; B. 1, C. 1; D. 1, 2; F. 1; G. 1, 2, 3 and 4, which is incorporated by reference as Exhibit A.

The ALJ's Order Of Prehearing Instructions required a Prehearing Stipulation with “A concise statement of the issues of fact that remain to be litigated.” It is doubtful that referring to the issues raised in another document created for a different purpose is sufficient to bring all these issues to the attention of the ALJ, particularly when the Prehearing Stipulation sets forth 27 specific issues of fact which remained to be litigated.

Even if the shotgun reference to a plethora of issues by reference to another document is sufficient, all the issues mentioned in the DCA staff memorandum of May 6, 2005, were either addressed in the Recommended Order or are identical with the issues remanded by this order.

4. Whether or not the Ordinance, including FLUE Policy 9.1, is consistent with Chapter 9J-5, F.A.C., including Rule 9J-5.013(3), F.A.C.

The reference to consistency with Chapter 9J-5, F.A.C., is addressed throughout the Recommended Order, including the ultimate recommendation that the plan amendments at issue

be found “not in” compliance. Consistency with Rule 9J-5.013(3), F.A.C., is addressed in paragraphs 82, 83, 84, and 85 of the Recommended Order.

5. Whether or not the Ordinance, including FLUE Policy 9.1, is consistent with Chapter 9J-5, F.A.C., including Rule 9J-5.012, F.A.C.

The reference to consistency with Chapter 9J-5, F.A.C., is addressed throughout the Recommended Order, including the ultimate recommendation that the plan amendments at issue be found “not in” compliance. Consistency with Rule 9J-5.012, F.A.C., is addressed in paragraphs 44 - 57 of the Recommended Order.

28. To what extent the interests of Petitioners Don Ashley and Pamela Ashley will be affected by this compliance determination for Ordinance 2005-20.

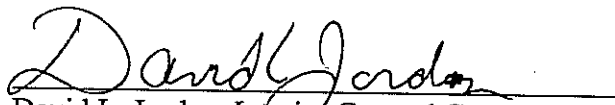
This issue is addressed in paragraph 97. As the ALJ noted, the Petitioners seek a finding that they are “adversely affected” for the purpose of establishing appellate standing under Section 120.68(1), Fla. Stat. The ALJ correctly concluded that, “It is considered to be unnecessary and premature to determine whether any party would be entitled to judicial review of the final order in this case.” Appellate standing is established when a party demonstrates that it is adversely affected by final agency action, and the ALJ’s Recommended Order is not final agency action.

The ALJ also concluded that “It is believed that such determinations, if they become necessary, can be made upon the evidence in the record.” There is no need for the ALJ to find facts regarding appellate standing, because an appellate court may make its own findings based upon its’ own review of the record. In *Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So.2d 982 at 987 (Fla. 1996), the Supreme Court of Florida reviewed the record and the Appellant’s written and oral arguments before concluding that the Appellant was not adversely affected.

WHEREFORE, it is Ordered that:

1. This case is remanded to the Administrative Law Judge.
2. The Department respectfully requests that the ALJ address disputed issues of material fact 9 and 19 as listed in the Prehearing Stipulation in a Supplemental Recommended Order or otherwise as appropriate.
3. The remainder of the Motion for Remand is denied.

DONE AND ORDERED in Tallahassee, Florida.

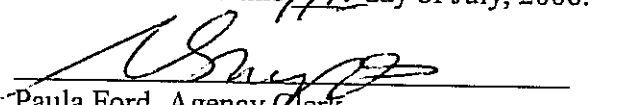
  
David L. Jordan, Interim General Counsel  
DEPARTMENT OF COMMUNITY AFFAIRS

**NOTICE OF RIGHTS**

THE PARTIES ARE HEREBY NOTIFIED THAT THEY MAY HAVE THE RIGHT TO SEEK JUDICIAL REVIEW OF THIS INTERLOCUTORY ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.100. TO INITIATE AN APPEAL, A PETITION MUST BE FILED WITH THE APPROPRIATE DISTRICT COURT OF APPEAL WITHIN THIRTY (30) DAYS OF THE FILING OF THIS ORDER WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS. A PETITION FILED WITH THE DISTRICT COURT OF APPEAL SHOULD BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22, F.S.

**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 17th day of July, 2006.

  
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