

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

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BOB MOSER, ROY WILSON, PAR
FORNELL, RICHARD JOLLIFFE,
SUSAN JOLLIFFE, DEBORAH FERRER,
MARIAN MAHLIK, ECKART
SCHEINGGRABER, et al.,

Petitioners,

DOAH Case No. 06-2438GM

vs.

DEPARTMENT OF COMMUNITY
AFFAIRS,

Respondent,

and

VILLAGE OF ISLAMORADA,
VILLAGE OF ISLANDS

Intervenor.

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs following receipt of a Recommended Order issued by an Administrative Law Judge of the Division of Administrative Hearings. A copy of the Recommended Order is appended to this Final Order as Exhibit A.

Background and Summary of Proceedings

On February 23, 2006, the Village of Islamorada adopted a land development regulation by Ordinance 06-03 (Regulation). The

DIVISION OF
ADMINISTRATIVE
HEARINGS

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FILED

Final Order Number DCA07-OR-069

Regulation sets forth certain requirements that must be met for existing vacation rentals to continue be used as rentals. On May 9, 2006, the Department entered a Final Order approving the Regulation.

Petitioners thereafter filed a Petition and Amended Petition for Administrative Hearing regarding the Final Order. The Department forwarded the Amended Petition to the Division of Administrative Hearings for further proceedings under Sections 120.569 & 120.57, Florida Statutes. Shortly thereafter, the Village filed for and was authorized to intervene in this proceeding.

The final hearing was scheduled for and held on October 19, 2006. A Motion in Limine filed by the Department and Village was taken up at the outset of the final hearing. This Motion was granted, which left for consideration only the question of whether the Regulation is inconsistent with the Guiding Principles.

Upon consideration of the evidence and the Proposed Recommended Order filed by the Village and the Department,¹ the Administrative Law Judge entered a Recommended Order rejecting the allegation that the Regulation is inconsistent with Guiding

¹ On December 21, 2006, Petitioners filed with the Division a "Notice of Election Not to File Proposed Recommended Order."

Principles. The Order recommends that the Department enter a final order approving Ordinance 06-03. No party filed exceptions to the Recommended Order.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge's Recommended Order as the agency's Final Order in most proceedings. To this end, the Department has been granted only limited authority to reject or modify findings of fact in a Recommended Order.

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.

Fla. Stat. § 120.57(1)(1).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether challenged findings are supported by the record in accord with

this standard, the Department may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the Administrative Law Judge as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

The Administrative Procedure Act also specifies the manner in which the Department is to address conclusions of law in a Recommended Order.

The agency in its final order may reject or modify the 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.

Fla. Stat. § 120.57(1)(1); DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987).

Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or

finding based upon the statement itself and not the label assigned.

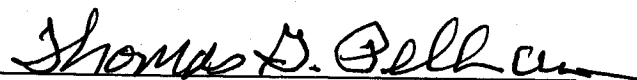
ORDER

No party filed exceptions to the Recommended Order in this proceeding. By failing to file exceptions, the parties have "expressed [their] agreement with, or at least waived any objection to, [the] findings of fact." Environmental Coalition of Florida, Inc. v. Broward County, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); see also Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993).

Upon review and consideration of the entire record of this proceeding, including the Recommended Order, it is hereby ordered as follows:

1. The findings of fact and conclusions of law in the Recommended Order are adopted.
2. The Administrative Law Judge's recommendation is accepted.
3. The Department approves Ordinance 06-03 as consistent with the Principles for Guiding Development set out in Section 380.0552(7), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.



Thomas G. Pelham, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

ANY PARTY TO THIS 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.

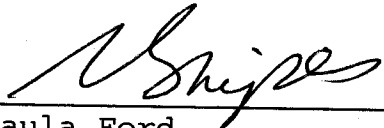
TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED 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.

MEDIATION UNDER SECTION 120.573, FLA. STAT., IS NOT AVAILABLE WITH RESPECT TO THE ISSUES RESOLVED BY THIS ORDER.

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 in the manner described, on this ~~13th~~ day of April, 2007.



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for Agency Clerk

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The Honorable J. Lawrence Johnston
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