Final Order Number DCA08-GM-220

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

CAROL RUNYAN, et al.,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

DOAH Case No. 07-2239GM

Respondent,

and

CITY OF ST. PETERSBURG and SEMBLER FLORIDA, INC.,

Intervenors.
_____/

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 15, 2007, the City of St. Petersburg adopted an amendment to its comprehensive plan by Ordinance 679-L (Amendment). The Amendment changed the future land use designation of 17.98 acres from Institutional to a combination of Residential Office Retail (2.98 acres), Residential Office General (2.98 acres) and Residential Urban (12.02 acres). The

Department reviewed the Amendment and, on April 16, 2007, published a Notice of Intent to find the Amendment "in compliance."

On May 2, 2007, Petitioners filed a Petition for administrative hearing regarding the Notice. The City and Sembler Florida, Inc. were thereafter granted leave to intervene. In July 2007, several of these original Petitioners filed notices of voluntary dismissal. The remaining Petitioners thereafter filed an Amended Petition.

The final hearing was scheduled for and held on August 8 & 9, 2007. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order rejecting all of the allegations raised in the Amended Petition. The Order recommends that the Department find the Amendment "in compliance." Petitioners filed one exception, to which the City, Department and Sembler all filed separate responses.

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)(l).

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)(l); 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.

RULING ON EXCEPTION

Petitioners take exception to the portion of paragraph 42 of the Recommended Order underscored below:

> Taking all of the evidence and the City's plan into consideration, including Sections 1.2.2.3, 1.2.2.5, and 1.3.1.2 of the General Introduction, it is found that Petitioners did not prove beyond fair debate that FLUE Policy LU3.17 [or] Objective LU4.2 . . . apply to the FLUM amendments at issue . . . . [emphasis added]

The City's FLUE Policy LU3.17 states in full as follows:

> The City has an adequate supply of commercial land use to meet existing and future needs. Future expansion of commercial uses shall be restricted to infilling into existing commercial areas and activity centers, except where a need can be clearly identified.

The City's FLUE Objective LU4 states in pertinent part as follows:

> The Future Land Use Plan and Map shall provide for the future land use needs identified in this Element:
>
> * * *
>
> 2. Commercial - additional commercial acreage is not required to serve the future needs of St. Petersburg. An oversupply exists based upon the standard of 1 acre of commercial land for every 150 persons in the community.
>
> * * *
>
> 4. Mixed Use - developments are encouraged in appropriate locations to foster a land use pattern that results in fewer and shorter automobile trips and vibrant walkable communities.

Petitioners argue that those portions of the Amendment that redesignate two small parts of the subject parcel from Institutional to Residential Office Retail (R/O/R) and Residential Office General (R/OG)[1] are inconsistent with these plan provisions because they increase commercial uses when the

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[1] Petitioners did not challenge the portion of the Amendment that redesignated over half of the subject property from Institutional to Residential Urban.

adopted plan states that there is no need for any additional commercial uses in the City.[2] Respondent and Intervenors argued and the Administrative Law Judge agreed that the R/O/R and R/OG categories are mixed use land use categories and not commercial categories and, therefore, the cited plan provisions do not apply to those two categories.

This finding is based entirely on the premise that the R/O/R and R/OG categories are mixed use and the commercial land use categories are not. A mixed use land use category is one "involving combinations of types of uses for which special regulations may be necessary to ensure development in accord with the principles and standards of the comprehensive plan and this act." **Fla. Stat.** § 163.3177(6)(a). "If used, policies for the implementation of such mixed uses shall be included in the comprehensive plan, including the types of land uses allowed, the percentage distribution among the mix of uses, or other objective measurement, and the density or intensity of each use." **Fla.**

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[2] The Institutional land use category currently assigned to the parcel allows "[n]on-residential uses permitted in the land development regulations . . . [at] a floor area ratio of 0.55." Ex. B at LU-11. This floor area ratio is higher than found in either the R/O/R or R/OG land use categories and applies to the entire parcel. Accordingly, the land use redesignation actually reduces the amount of non-residential use. However, from this record it cannot be determined whether the non-residential uses allowed in the land development regulations includes commercial (such as office).

Admin. Code r. 9J-5.006(4)©).

The R/O/R and R/OG land use categories are labeled as mixed use categories in the City's comprehensive plan and do allow for "combinations of types of uses."[3] Thus, on the face of the comprehensive plan, these categories are mixed use.[4] While not labeled as such in the City's plan, the two principle commercial categories also "allow" mixed uses. The "Central Business District" category allows "a mixture of higher intensity retail, office, industrial, service and residential uses up to a floor area ratio of 3.0 and a net residential density not to exceed the maximum allowable in the land development regulations." Ex. B at LU-7 (emphasis added). In addition to allowing "the full range of commercial uses," the "Commercial General (CG)" category also allows all "Public/Semi-Public" uses. Public/Semi-Public is a

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[4] It should be noted that neither of these categories contain the required percentage mix or other objective measurement for the mix of uses. Because of this non-compliance with applicable rule criteria, neither category requires that development utilize more than one of the allowable uses. Tr. I at 33 & 35. The City readily admits that a parcel designated R/O/R or R/OG could be developed entirely as commercial. Id. The testimony at the final hearing was "[t]hat . . . within a mixed use category like R/OG and R/OR [sic], we tend to get a single use like a retail store . . . . " Tr. I at 49. A mall - undoubtedly a pure commercial use - in the "Tyrone Activity Center" was developed on property designated R/O/R. Tr. II at 222.

separate land use in the City's plan. See LU-7 & LU-11.[5] It is reasonable to infer based upon the City's testimony at the final hearing that development under these categories could utilize only one or more than one land use. See Tr. I at 33.

It is clear from the record that the City does not apply any of these categories as truly mixed or single use. Development under the R/OG or R/O/R categories could be purely commercial. Development under the CBD category could be purely residential. Given the manner in which these categories are described in the plan and implemented by the City, the applicability or non-applicability of FLUE Policy LU3.17 and Objective LU4.2 cannot be based simply upon the label given a category in the comprehensive plan.

Additionally, the two subject provisions apply to commercial uses in general and not any land use categories in particular.[6] Both the R/O/R and R/OG land use categories allow commercial uses. Thus, the plain language of the City's plan compels the conclusion that these provisions apply to any land use category

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[5] Public/Semi-Public Uses include, among other things, schools and government and medical facilities. See LU-19 (FLUE Policy LU3.27).

[6] Policy LU3.17 references "commercial land use," "commercial uses," and "commercial areas." Ex. B at LU-17. Objective LU4 references "commercial acreage" and "commercial land." Ex. B at LU-20. Neither plan provision references either of City's commercial land use categories.

that allows commercial uses. This conclusion is as or more reasonable than the conclusion by the Administrative Law Judge that these provisions do not apply.[7] See **Fla. Stat.** § 120.57(1)(l). Accordingly, Petitioners' exception is granted.

As found by the Administrative Law Judge, "even if those Plan provisions applied, Petitioners did not prove beyond fair debate that the FLUM amendments at issue to not constitute 'infilling into existing commercial areas' or 'infilling . . . of existing commercially[-]designated frontages,' or that 'a need can[not] be clearly identified." Finding of Fact 42. Thus, granting this exception does not alter the ultimate conclusion that the amendment is "in compliance."

ORDER

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

1. Petitioners' exception is GRANTED. Finding of Fact 42, which is actually in relevant part a conclusion of law, is modified to read as follows:

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[7] 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). The portion of Finding of Fact 42 to which Petitioners take exception is actually a conclusion of law; to wit, whether certain provisions of the City's plan are applicable to a plan amendment.

42. Taking all of the evidence and the City's Plan into consideration, including Sections 1.2.2.3, 1.2.2.5, and 1.3.1.2 of the General Introduction, it is found that ~~Petitioners did not provide beyond fair debate that~~ FLUE Policy LU3.17, Objective LU4.2, ~~or~~ and Objective LU18 apply to the FLUM amendments at issue~~; even if those Plan provisions applied, Petitioners did not prove beyond fair debate that~~. T~~t~~he FLUM amendments at issue are consistent with these provisions because they~~do not~~ constitute "infilling into existing commercial areas" or "infilling . . . of existing commercially designated frontages," or ~~that~~ "a need can~~[not]~~ be clearly identified." All but one witness testified that~~, if those Plan provisions applied,~~ the FLUM amendments would constitute commercial infill under the pertinent Plan provisions; the lone dissenter was using what he called a "narrow definition" of infill and agreed that the FLUM amendments would constitute commercial infill using the broader definition held by the majority view. There also was ample evidence that there was a clearly identified need for the FLUM amendments, especially when considered with the unchallenged RU FLUM amendment.

2. In all other respects, the findings of fact and conclusions of law in the Recommended Order are adopted.

3. The Administrative Law Judge's recommendation is accepted.

4. The City of St. Petersburg Amendment to its comprehensive plan, adopted by Ordinance 679-L, is determined to be "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.

Thomas G. Pelham

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

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 1st day of August, 2008.

for Paula Ford
Agency Clerk

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