

STATE OF FLORIDA  
DEPARTMENT OF COMMUNITY AFFAIRS

AILEEN C. ALEXANDER AND JAMES  
PEARSALL, AS CO-TRUSTEES OF THE  
WILLIAM ALEXANDER, JR. IRREVOCABLE  
TRUST,

Petitioners,

v.

CITY OF NEW SMYRNA BEACH,

Respondent,

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DOAH Case No. 07-3393GM  
Final Order No. DCA07-GM-254

FILED  
2008 APR 22 A 11:26  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

**FINAL ORDER**

This matter was considered by the Secretary of the Department of Community Affairs following receipt and consideration of a Recommended Order of Dismissal issued by an Administrative Law Judge of the Division of Administrative Hearings. A copy of the Recommended Order is attached hereto as Exhibit A.

**BACKGROUND**

This matter involves a challenge to a "small scale" comprehensive plan amendment adopted by the City of New Smyrna Beach by Ordinance No. 25-07, pursuant to Section 163.3187, Florida Statutes,<sup>1</sup> and hereinafter referred to as the "Plan Amendment." The Plan Amendment changed the Future Land Use Map designation of a less-than-10-acre parcel from High Density Residential to Medium Density Residential.

The Petitioners challenged the Plan Amendment by filing a Petition with the Division of Administrative Hearings, as authorized by Section 163.3187(3), Florida

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<sup>1</sup> Unless otherwise indicated, all statute citations refer to the 2007 codification of the Florida Statutes, and all rules refer to the current codification of the Florida Administrative Code.

Statutes. The City then filed a Motion to Dismiss, alleging in part that the Petition was not filed within thirty days of the adoption of the Ordinance, as required by law. The Administrative Law Judge (ALJ) disposed of the motion without a hearing, as provided for by Rule 28-106.204(1), Florida Administrative Code, and submitted a Recommended Order to the Department. In the Recommended Order, the ALJ recommended that the Department enter a final order dismissing, with prejudice, Petitioners' untimely challenge to the Plan Amendment. Petitioners subsequently filed exceptions to the Recommended Order. The City filed a response to Petitioners' exceptions.

#### ROLE OF THE DEPARTMENT

The Plan Amendment was not reviewed by the Department and the Department was not a party to the DOAH proceeding. Fla. Stat. § 163.3187(3)(a). Therefore, the ban on *ex parte* communications imposed by Section 120.66, Florida Statutes, does not apply to employees of the Department.

The Department has reviewed the entire record of this proceeding, including the Recommended Order, in light of the exceptions. Based upon that review, the Department may adopt the Recommended Order as the final order of the agency, or may reject or modify the conclusions of law and findings of fact contained therein.

The Secretary accepts the recommendation of the ALJ as to the disposition of this case.

## STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

The Administrative Procedure Act contemplates that the Department may only reject or modify a Recommended Order under certain limited circumstances. The Department has limited authority to reject or modify the ALJ's findings of fact.

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).** The Department cannot reweigh the evidence considered by the ALJ, and cannot reject findings of fact made by the ALJ if those findings of fact are supported by substantial competent evidence in the record. See Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) and Bay County School Board v. Bryan, 679 So.2d 1246 Fla. 1st DCA 1996)(construing a provision substantially similar to Section 120.57(1)(l), Florida Statutes (2002)); see also Pillsbury v. Department of Health and Rehabilitative Services, 744 So. 2d 1040 (Fla. 2d DCA 1999).

The Department may reject or modify the ALJ's conclusions of law or interpretation of administrative rules, but only those

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.

§ 120.57(1)(l), Fla. Stat.

The label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. Battaglia Properties, Ltd. v. Florida Land and Water Adjudicatory Comm'n, 629 So.2d 161 (Fla. 5th DCA 1993); Kinney v. Department of State, 501 So.2d 1277 (Fla. 5th DCA 1987). Conclusions of law, even though stated in the findings of fact section of a recommended order, may be considered under the same standard as any other conclusion of law.

#### RULINGS ON EXCEPTIONS

The Petitioners timely filed exceptions to the Recommended Order, which exceptions Petitioners characterize as Legal Arguments I, II, and III in their Amended Verified Motion for Rehearing and Written Exceptions to Recommended Order of Dismissal. Petitioners Legal Argument I is further divided into parts A, B, and C.

#### Petitioners' Legal Argument I

In Legal Argument I, Petitioners claim that the ALJ incorrectly found in the Recommended Order that the City memorialized the passage of Ordinance No. 25-07 on June 20, 2007, and infer that this allegedly erroneous finding of fact may somehow have figured into the ALJ's conclusion that the Petition was untimely filed. See Exceptions to Recommended Order, pages 3-5. Petitioners cite the following language from the Recommended Order which they claim demonstrates that the ALJ found that the City memorialized the passage of Ordinance No. 25-07 on June 20, 2007:

In this case, it is undisputed that the City memorialized the passage of Ordinance No. 25-07 in its records pursuant to City Code Section 2-54, but Petitioners allege that the City did not do so until some point after June 20, 2007.

Recommended Order, Endnote 8.

Petitioners have misstated or misinterpreted this finding. The ALJ was merely

observing that neither the City nor the Petitioners disputed that the vote had been memorialized at some point in time, and that Petitioners specifically alleged that that point in time had occurred after June 20, 2007. The ALJ did not find that the Ordinance had been memorialized on June 20, 2007. This portion of Petitioners' first exception is without support in the Recommended Order and is rejected.

The ALJ fully addressed the date of adoption of the Ordinance elsewhere in the Recommended Order. In this Order, the ALJ concluded that it was irrelevant, in determining the date of adoption of the Ordinance, whether passage of the Ordinance was memorialized on, or after, June 20, 2007. Referring to City Code Section 2-54, the ALJ found that "[t]he only thing that is required for an ordinance to be adopted by the City is the affirmative vote of three members of the City Commission," which in the instant case took place on June 20, 2007. Recommended Order, Paragraph 19. Furthermore, the ALJ found that the date on which the passage of an ordinance was entered upon the minutes, an act required by Section 2-54, "does not establish a condition precedent for adoption of an ordinance by the City; it simply describes how the passage of an ordinance is to be memorialized in the City's records." Recommended Order, Paragraph 20.

In parts A through C of Legal Argument I, Petitioners simply reiterate positions which were previously asserted in Petitioners' Response to Order to Show Cause and which have already been addressed in the Recommended Order. Therefore, the exceptions set forth in Petitioners' Legal Argument I need not be addressed again in the agency's final order. Britt v. Depart. of Prof'l. Reg., 492 So.2d 697 (Fla. 1st DCA 1986); disapproved on other grounds; Dept. of Prof'l. Reg. v. Bernal, 531 So.2d 967 (Fla. 1988).

For all of these reasons, the exceptions in Petitioners' Legal Argument I are

DENIED.

Petitioners' Legal Argument II

In Legal Argument II, Petitioners largely reiterate an equitable tolling argument previously asserted in Petitioners' Response to Order to Show Cause and which has already been addressed in the Recommended Order. Therefore, this exception need not be addressed again in the agency's final order. *Britt v. Depart. of Prof'l. Reg.*, 492 So.2d 697 (Fla. 1st DCA 1986); *disapproved on other grounds; Dept. of Prof'l. Reg. v. Bernal*, 531 So.2d 967 (Fla. 1988).

The ALJ's findings of fact are supported by competent, substantial evidence in the record.

Petitioners' Legal Argument II is DENIED.

Petitioners' Legal Argument III

In Legal Argument III, Petitioners largely reiterates positions taken in Petitioners' Response to Order to Show Cause and which have already been addressed in the Recommended Order.. Therefore, this exception need not be addressed again in the agency's final order. *Britt v. Depart. of Prof'l. Reg.*, 492 So.2d 697 (Fla. 1st DCA 1986); *disapproved on other grounds; Dept. of Prof'l. Reg. v. Bernal*, 531 So.2d 967 (Fla. 1988).

The ALJ's findings of fact are supported by competent, substantial evidence in the record.

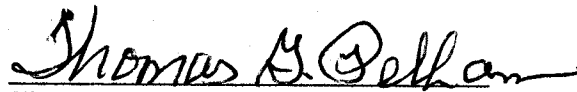
Petitioners' Legal Argument III is DENIED.

ORDER

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

1. The findings of fact and conclusions of law in the Recommended Order are adopted.
2. The Administrative Law Judge's recommendation is accepted; and
3. Petitioners' untimely challenge to the small-scale comprehensive plan amendment adopted by City of New Smyrna Beach Ordinance No. 25-07 is dismissed.

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**

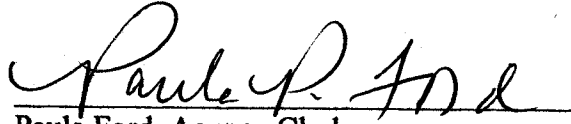
ANY PARTY TO THIS FINAL ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(C) AND 9.110.

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.

**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 the true and correct copies have been furnished to the persons listed below this 21<sup>st</sup> day of April, 2008.



Paula Ford, Agency Clerk  
DEPARTMENT OF COMMUNITY AFFAIRS  
2555 Shumard Oak Blvd.  
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