STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioners,

vs.

CITY OF NEW SMYRNA BEACH,

Respondent.

Case No. 07-3393GM

RECOMMENDED ORDER OF DISMISSAL

This case came before Administrative Law Judge T. Kent Wetherell, II, based upon the Motion to Dismiss filed by Respondent on August 2, 2007; the response to the Order to Show Cause filed by Petitioners on August 28, 2007; the amended response to the Order to Show Cause filed by Petitioners on August 29, 2007; and Respondent's response to Petitioners' amended response, filed August 30, 2007.

APPEARANCES

For Petitioners: Wendy Shay Temple, Esquire
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For Respondent: Frank B. Gummey, Esquire
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ISSUE

The issue is whether Petitioners' challenge to the small scale comprehensive plan amendment adopted by Respondent through Ordinance No. 25-07 was timely filed.

PRELIMINARY STATEMENT

On July 23, 2007, Petitioners filed a Petition and Request for Hearing (the petition) with the Division of Administrative Hearings (DOAH). The petition was filed "pursuant to Sections 163.3187(3)(a), 120.569 and 120.57, Florida Statutes (2005)," and challenged the small scale comprehensive plan amendment adopted by the City of New Smyrna Beach (City) through Ordinance No. 25-07.

On August 2, 2007, the City timely filed a motion to dismiss the petition. Among other things, the motion argues that the petition should be dismissed because it was filed more than 30 days after the challenged plan amendment was adopted by the City.[1] An Order to Show Cause was entered on August 7, 2007, because it appeared from a review of the case file that the petition was not timely filed, and Petitioners were directed to "show cause in writing as to why the petition should not be dismissed." The deadline for responding to the Order to Show Cause was twice extended at Petitioners' request.

Petitioners filed a Verified Response to Order to Show Cause and Incorporated Memorandum of Law on August 28, 2007, and

an amended response on August 29, 2007.[2] The City and the Department of Community Affairs (Department) were given an opportunity to file responses to Petitioners' filing. The City filed a response to Petitioners' amended response on August 30, 2007. The Department did not file a response.

The filings adequately set forth the parties' respective positions on the issue of law that is before the undersigned for resolution. The filings have been given due consideration. No hearing is necessary to rule on the motion to dismiss. See Fla. Admin. Code R. 28-106.204(1).

FINDINGS OF FACT[3]

1. The City Commission passed Ordinance No. 25-07 by a vote of four to zero at a public meeting held on June 20, 2007.

2. The ordinance amends the City's comprehensive plan by changing the future land use map (FLUM) designation of 6.923 acres of property from High Density Residential to Medium Density Residential.

3. Petitioners own property that is subject to the FLUM amendment. The effect of the amendment is to reduce the allowable density on Petitioners' property.

4. Petitioners allege in their petition that the FLUM amendment is not in compliance with Chapter 163, Florida Statutes, for a variety of reasons.

5. The petition states that it was filed pursuant to Section 163.3187(3)(a), Florida Statutes.

6. The petition was faxed to DOAH for filing on Friday, July 20, 2007.

7. The fax header on the petition shows that its first page was received by DOAH at 5:17 p.m. on July 20, 2007, and that its last page was received by DOAH at 5:23 p.m. on that date.

8. The petition was preceded by 157-page Appendix to Petition and Request for Hearing (the appendix), which included notices, excerpts from meeting transcripts, and some of the other documents referred to in the petition.[4]

9. The fax header on the appendix shows that its first page was received by DOAH at 3:09 p.m. on July 20, 2007,[5] and that its last page was received by DOAH at 5:08 p.m. on that date.

10. The petition and the appendix were docketed as having been filed with DOAH on Monday, July 23, 2007, which was the next regular business day after July 20, 2007.

11. Petitioners' attorney alleges in the amended response to the Order to Show Cause that she made inquiry to the DOAH clerk's office on July 20, 2007, and was informed that she would be "'safe' in ensuring timely filing" if transmission of the petition and the appendix was started "by 3:00 p.m." She does

not allege what point in the day she contacted the clerk's office, nor does she identify whom she spoke with.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction to hear challenges to small scale plan amendments pursuant to Section 163.3187(3), Florida Statutes. (2007).[6]

13. Section 163.3187(3)(a), Florida Statutes, provides in pertinent part:

> Any affected person may file a petition with the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57 to request a hearing to challenge the compliance of a small scale development amendment with this act within 30 days following the local government's adoption of the amendment . . . .

14. Florida Administrative Code Rule 28-106.104 provides in pertinent part:

> (1) In construing these rules or any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing.
>
> * * *
>
> (3) Any document received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.
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> * * *
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> (7) If an agency allows documents to be filed by electronic mail or facsimile

> transmission, the following paragraphs apply:
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> * * *
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> (b) Any party who elects to file any document by electronic mail or facsimile transmission shall be responsible for any delay, disruption, or interruption of the signals and accepts the full risk that the document may not be properly filed with the clerk as a result.
>
> (c) The filing date for a document transmitted by electronic mail or facsimile shall be the date the agency clerk receives the complete document.

15. Petitioners' petition was not "filed" until July 23, 2007, because it was received by DOAH after 5:00 p.m. on July 20, 2007. Indeed, the petition was not even transmitted to DOAH until after 5:00 p.m. on July 20, 2007.

16. The appendix does not meet the requirements of a petition for administrative hearing; it is not even close to meeting the requirements in Florida Administrative Code Rule 28-106.201(2), as argued by Petitioners in their amended response to the Order to Show Cause. See also §§ 120.54(5)(b)4., 120.569(2)(c), Fla. Stat. Moreover, even if the appendix could somehow be considered the petition in this case, it was not timely filed since its last page was not received by DOAH until after 5:00 p.m. on July 20, 2007.

17. Petitioners do not contest the filing date of the petition being July 23, 2007. Instead, they argue that the

petition was timely when it was filed on that date because the challenged plan amendment was not adopted by the City for purposes of Section 163.3187(3)(a), Florida Statutes, until some point after June 20, 2007. Petitioners rely primarily on Payne v. City of Miami, 913 So. 2d 1260 (Fla. 3d DCA 2005), in support of this argument.

18. In Payne, the court reversed the Department's final order dismissing a challenge to a small scale plan amendment adopted by the City of Miami. Id. at 1261. The court held that because the City of Miami's charter authorized the mayor to review and veto ordinances adopted by the city commission, an ordinance is not adopted by the City of Miami until after the expiration of the mayor's veto period. Id. Accordingly, the court held that 30-day period for challenging the plan amendment at issue in Payne commenced upon the expiration of the mayor's veto period, not the passage of the amendment by the city commission. Id.

19. Petitioner's reliance on Payne in this case is misplaced because, as Petitioners concede in their responses to the Order to Show Cause (at page 5), the City's charter and code of ordinances do not give the City's mayor the right to review or veto ordinances passed by the City Commission. The 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. See City Code § 2-54 ("The affirmative vote of three members of the city commission shall be necessary to adopt any ordinance or resolution or motion."). As a result, the date that the City Commission passes the ordinance amending the comprehensive plan is the date that the amendment is adopted by the City for purposes of Section 163.3187(3)(a), Florida Statutes.

20. Petitioners argue that in order for an ordinance to be adopted by the City, the ordinance must not only be passed by the requisite vote of the City Commission but also that the vote must be "entered upon the minutes." In support of this argument, Petitioners cite language from City Code Section 2-54, which provides that "[t]he passage of all ordinances, resolutions and motions shall be taken by a 'Yes' or 'No' and entered upon the minutes."[7] This language 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.

21. The failure to comply with the requirements of City Code Section 2-54 may render an ordinance invalid or unenforceable. See B.M.Z. Corp. v. City of Oakland Park, 404 So. 2d 133 (Fla. 4th DCA 1981). However, it does not change the date that the ordinance was adopted by the City. Indeed, in a subsequent decision, it was held that the failure to properly

record the passage of an ordinance in the minutes was a deficiency that could be corrected nunc pro tunc to the date of the ordinance's adoption.[8] See B.M.Z. Corp. v. City of Oakland Park, 715 So. 2d 735, 736 n.1 (Fla. 4th DCA 1982).

22. In sum, and as a matter of law, the challenged plan amendment was adopted by the City for purposes of Section 163.3187(3)(a), Florida Statutes, on June 20, 2007, when the City Commission passed Ordinance No. 25-07.

23. Petitioners' petition was untimely because it was filed 33 days after the date that the challenged plan amendment was adopted by the City. See § 163.3187(3)(a), Fla. Stat.

24. Section 120.569(2)(c), Florida Statutes, provides that a petition "shall be dismissed if . . . it has been untimely filed." See also Whiting v. Dept. of Law Enforcement, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) ("Late filing is presumed to constitute a waiver of rights.").

25. The decision to wait until the afternoon of the last day of the filing period to fax-file the petition and the decision to fax the lengthy appendix before the petition may constitute excusable neglect; however, it is settled that excusable neglect does not save an untimely petition for hearing. See Aleong v. Dept. of Business & Professional Reg., 2007 Fla. App. LEXIS 11414, at *4 (Fla. 4th DCA July 25, 2007); Patz v. Dept. of Health, 864 So. 2d 79 (Fla. 3d DCA 2003);

Whiting, 849 So. 2d at 1151; Cann v. Dept. of Children & Family Servs., 813 So. 2d 237, 239 (Fla. 2d DCA 2002).

26. The doctrine of equitable tolling can save an untimely petition for hearing. See § 120.569(2)(c), Fla. Stat.; Cann, 813 So. 2d at 239.

27. The doctrine of equitable tolling has been applied in at least one prior case under Section 163.3187(3)(a), Florida Statutes. See Parker v. The Estuaries Limited Liability Company, 2002 Fla. Div. Adm. Hear. LEXIS 1465, at ¶ 101 (DOAH Dec. 17, 2002), adopted, Final Order No. DCA03-GM-012, at *4-5 (DCA Feb. 27, 2003).

28. The doctrine of equitable tolling only applies "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights in the wrong forum." Machules v. Dept. of Administration, 523 So. 2d 1132, 1134 (Fla. 1988).

29. The untimely filing of a petition for hearing by counsel is not an extraordinary circumstance that justifies the application of the doctrine of equitable tolling. See Aleong, 2007 Fla. App. LEXIS 11414, at *3-4 (citing cases).

30. This case is strikingly similar to Whiting. In that case, the petitioner attempted to fax-file his petition for hearing on the last day of the filing period but his attempts were unsuccessful and he completed the fax on the following day.

See Whiting, 849 So. 2d at 1151. The court affirmed the agency's dismissal of the petition as untimely. Id. The court held that the petitioner's "mistaken belief as to when the time period ended" and the fact that the agency's fax "was not available to him at the time he wanted to fax his [petition]" did not support a claim of equitable tolling. Id.

31. Petitioners argue that they did not "elect to wait or sit on [their] rights" and that the completion of their attempt to fax-file the petition on July 20, 2007, distinguishes this case from Whiting because in that case the petitioner "elected" to fax his petition for filing on the day after the deadline when his attempts to fax it to the agency on the day of the deadline were unsuccessful. A similar argument -- that equitable tolling should apply simply because the "preparation and mailing of a petition for hearing within the 21-day period evidences [the petitioner's] intent not to waive its right to hearing -- was expressly rejected in Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993). The following comments made by the court in that case are equally applicable here: "There is nothing extraordinary in the failure to timely file in this case. Quite to the contrary, the problem in this case is the too ordinary occurrence of a party's attorney failing to meet a filing deadline." Id.

32. Petitioners' responses to the Order to Show Cause do not offer an explanation that, if proven, would implicate the doctrine of equitable tolling and excuse the late-filed petition. Indeed, even if as Petitioners allege in the amended response to the Order to Show Cause, Petitioners' attorney was told by someone in the DOAH clerk's office that she would be "safe" if she started transmission of the petition and appendix "by 3:00 p.m.," the incontrovertible facts on the face of the petition and the appendix show that the transmission of the appendix did not start until after 3:00 p.m. and that the transmission of the petition did not start until after 5:00 p.m.

33. Where, as here, a petition is not timely filed and the doctrine of equitable tolling does not apply, the petition must be dismissed. See § 120.569(2)(c), Fla. Stat.; Whiting, supra.

34. Dismissal of a petition is without prejudice "unless it conclusively appears from the face of the petition that the defect cannot be cured." § 120.569(2)(c), Fla. Stat.

35. The untimely filing of the petition cannot be cured and, therefore, granting Petitioners leave to file an amended petition would serve no purpose. Cf. Kalmanson v. Lockett, 848 So. 2d 374, 381 (Fla. 5th DCA 2003) (plaintiff need not be given an opportunity to amend complaint if amendment would be futile).

36. In light of this ruling, it is not necessary to address the City's alternative arguments in its motion to dismiss.

37. A final order of dismissal will need to be issued by the Department to dispose of this case because DOAH does not have final order authority in proceedings under Section 163.3187, Florida Statutes. See § 163.3187(3)(b), Fla. Stat.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order dismissing with prejudice Petitioners' untimely challenge to the small scale comprehensive plan amendment adopted by the City through Ordinance No. 25-07.

DONE AND ENTERED this 11th day of September, 2007, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2007.

ENDNOTES

[1]/ The motion also argues that the petition should be dismissed because it was filed by an attorney who, at the time, was not eligible to practice law in Florida and because Petitioners "made their election of remedies" by initiating three circuit court proceedings related to the matters at issue in this case.

[2]/ The amended response was e-filed with DOAH on August 29, 2007, and the original document was also mailed to DOAH. The original was received by DOAH and filed on September 6, 2007. The City filed a motion to strike the amended response that was filed on September 6, 2007. The motion is denied because that document is merely a copy of the previously-filed amended response.

[3]/ These "findings" are based upon the allegations in the petition, as supplemented by the Petitioners' responses to the Order to Show Cause. All of the relevant, well-pled factual allegations in those documents must be accepted as true at this stage of the proceeding. See St. Francis Parkside Lodge of Tampa Bay v. Dept. of Health & Rehabilitative Servs., 486 So. 32, 34 (Fla. 1st DCA 1986).

[4]/ The appendix does not include a copy of the challenged plan amendment or Ordinance No. 25-07 through which the amendment was adopted, and those documents were not attached as exhibits to the petition as alleged in the petition. The appendix does include a copy of Ordinance No. 26-07, but that is a rezoning ordinance not an amendment to the City's comprehensive plan.

[5]/ Petitioners allege in their amended response to the Order to Show Cause that "Petitioners began transmission of its [sic] Appendix and Request for Hearing prior to 3:00 p.m." That allegation need not be accepted as true because it is conclusively shown to be false based upon the information reflected on the face of first page of the appendix. Specifically, that page contains fax headers showing that it was transmitted from "Dean Mead Orlando" at 3:05 p.m. and that it was received by DOAH at 3:09 p.m.

[6]/ All statutory references in this Recommended Order of Dismissal are to the 2007 version of the Florida Statutes unless otherwise indicated.

[7]/ Similar language is included in Section 166.041(4) and (5), Florida Statutes, which provide in pertinent part:

> (4) A majority of the members of the governing body shall constitute a quorum. An affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution . . . . On final passage, the vote of each member of the governing body voting shall be entered on the official record of the meeting . . . .
>
> (5) Every ordinance or resolution shall, upon its final passage, be recorded in a book kept for that purpose and shall be signed by the presiding officer and the clerk of the governing body.

[8]/ 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.

COPIES FURNISHED:

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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. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.