

STATE OF FLORIDA  
DEPARTMENT OF COMMUNITY AFFAIRS

FILED  
2010 APR -2 A 11:32  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DUNN CREEK, LLC, )  
)  
Petitioner, )  
)  
vs. )  
)  
CITY OF JACKSONVILLE and )  
DEPARTMENT OF COMMUNITY )  
AFFAIRS, )  
)  
Respondents, )  
)  
and )  
)  
VALERIE BRITT, )  
)  
Intervenor. )  
)

Case No. 07-3539GM

**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 May 14, 2007, the City of Jacksonville (City) adopted an amendment to its comprehensive plan by Ordinance No. 2007-383-E, which changed the land use designation on the Future Land Use Map (FLUM) of the City's Comprehensive Plan (Plan) for an 89.52 acre parcel, which is owned by Petitioner Dunn Creek, LLC ("Dunn"), located on the south side of Starratt Road from Low Density Residential

(LDR) to Residential-Professional-Institutional (RPI) ("Dunn Amendment"). On the same date, the City adopted numerous other changes to the FLUM by separate ordinances.

The Department reviewed all of the FLUM Amendments ("Amendments") and published a Notice of Intent to find seventeen (17) of the Amendments, including the Dunn Amendment, not "in compliance" as such amendments lacked sufficient transportation impact data and analysis to support the changes in land use. The Department filed a Petition for Formal Administrative Hearing, as to the Amendments which were not "in compliance", with the Division of Administrative Hearings (DOAH) and the case was assigned DOAH Case Number 07-3539GM. Of the seventeen map amendments that were challenged, only the Dunn Amendment remains at issue. All others have been settled by the parties or resolved by formal hearing.

On July 16, 2007, Intervenor, Valerie Britt (Britt), filed with the Department a Petition to Intervene in support of the Department's position. On August 9, 2007, Dunn filed a Petition to Intervene aligned with the City. Intervention was authorized for both parties.

The case was abated for a period of time pending efforts to reach a settlement. Subsequently, all parties entered into a settlement agreement (Agreement) to resolve the matter, which generally called for the adoption of a remedial amendment capping the amount of development on the property through an asterisk to the Plan. The proposed Agreement was presented to the City in September 2008 as Ordinance No. 2008-627, while the remedial amendment was presented as Ordinance No. 2008-628. After consideration of the matter, the City voted to revise the Agreement and adopt a remedial

**FINAL ORDER NUMBER DCA10-GM-009**

amendment that changed the land use on the property back to its original LDR FLUM designation. Although Dunn objected to these changes, the City adopted Ordinance Nos. 2008-627-E and 2008-628-E approving the revised compliance agreement and a new remedial amendment. On December 18, 2008, the Department issued a Cumulative Notice of Intent finding Ordinance No. 2007-383-E, as remediated by Ordinance No. 2008-628-E, to be "in compliance."

On January 8, 2009, Dunn filed a Motion to Amend Petition to Intervene pursuant to Section 163.3184(16)(f), Florida Statutes (2009), for the purpose of challenging the remedial amendment. The parties were then realigned, as required by Section 163.3184(16)(f)1., Florida Statutes.

A final hearing was scheduled for October 5 and 6, 2009, in Jacksonville, Florida. During a prehearing conference, the parties agreed to conduct the final hearing by telephone on October 5, 2009.

On September 11, 2009, Dunn filed a Suggestion of Mootness and Motion to Dismiss Petition, as to the Dunn Amendment, contending that the Legislature's enactment of Chapter 2009-96, Laws of Florida, removed the Department's authority to review and challenge FLUM amendments in the City for the maintenance of Level of Service (LOS) of affected roadways and therefore rendered this proceeding moot. The Department and the City opposed Dunn's request for relief, and on September 8, 2009, they jointly filed a Motion to Relinquish Jurisdiction arguing that there were no disputed issues of material fact and that the matter should be resolved by the Department in an informal proceeding. On September 25, 2009, the City filed a Notice of Supplemental Authorities. A ruling was reserved on those filings. At the final hearing, the ALJ

permitted the parties to file extrinsic evidence regarding the legislative intent of Chapter 2009-96, Laws of Florida. On November 3, 2009, Dunn filed its Notice of Supplemental Evidence of Legislative Intent and a response was filed by the City on November 20, 2009.

Upon consideration of the evidence and post-hearing filings, the ALJ entered a Recommended Order rejecting all of the allegations raised by the Petitioner, denying Dunn's Suggestion of Mootness and Motion to Dismiss Petition, and denying the City and the Department's Motion to Relinquish Jurisdiction. No exceptions to the Recommended Order were filed.

**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 the essential requirements of law, "[a]n ALJ's findings cannot be rejected unless

**FINAL ORDER NUMBER DCA10-GM-009**

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 City*, 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**

Accordingly, it is hereby ordered as follows:

1. All of the Administrative Law Judge's Findings of Fact and Conclusions of Law are adopted.
2. The Administrative Law Judge's Recommendation is accepted.
3. The amendment to the City of Jacksonville's Comprehensive Plan adopted by Ordinance No. 2008-628-E, which remediates Ordinance No. 2007-383-E, is hereby deemed to be in compliance.

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**

EACH PARTY IS HEREBY ADVISED OF ITS RIGHT TO SEEK JUDICIAL REVIEW OF THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)8) AND 9.110.

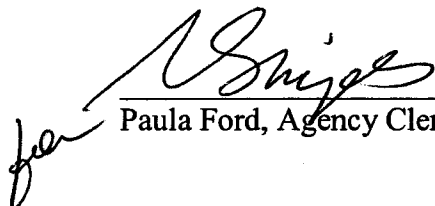
TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399 2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED 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 Final Order has been filed with the undersigned designated Agency Clerk, and that true and correct copies have been furnished to the persons listed below by the method indicated this ~~14~~ day of April 2010.

  
\_\_\_\_\_  
Paula Ford, Agency Clerk

**U.S. MAIL:**

T.R. Hainline, Jr., Esq.  
Rogers Towers, P.A.  
1301 Riverplace Boulevard  
Suite 1500  
Jacksonville, Florida 32207

Dylan T. Reingold, Esq.  
City Hall at St. James  
117 West Duval Street, Suite 480  
Jacksonville, Florida 32202

Valerie Britt  
378 Tilefish Court  
Jacksonville, Florida 32225

**HAND DELIVERY:**

Lynette Norr, Esq.  
Department of Community Affairs  
2555 Shumard Oak Boulevard, Suite 325  
Tallahassee, Florida 32399

**INTERAGENCY MAIL:**

The Honorable D.R. Alexander  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060