Final Order Number DCA09-GM-232

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

THE JENSEN BEACH GROUP, INC.; ANTHONY J. PARKINSON, MICHAEL CILURSO; CINDY AND DAVID BULK; CAMDEN GRIFFIN; GLENDA BURGESS; JOSEPH BURGESS; THOMAS FULLMAN; MARGUERITE HESS; HENRY COPELAND; and JACQUELINE TRANCYNGER,

Petitioners,

vs.

DOAH Case No. 07-5422GM

MARTIN COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

REILY ENTERPRISES, LLC, WILLIAM REILY and NANCY REILY,

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 August 7, 2007, Martin County adopted an amendment to its Comprehensive Plan by Ordinance 757 (Amendment). The Amendment

changed the future land use designation of 13.7 acres from Mobile Home to Low Density Residential. The Department reviewed the Amendment and published a Notice of Intent to find it "in compliance."

On October 24, 2007, Petitioners filed a Petition for Administrative Hearing regarding the Amendment. Reily Enterprises, LLC, William Reily and Nancy Reily filed for and were granted leave to intervene in support of the County and Department.

The final hearing was held on May 13-15, 2008. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order rejecting all of the allegations raised by Petitioners. The Order recommends that the Department find the Amendment "in compliance." Petitioners, Intervenors and Respondents all 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)(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 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.

RULINGS ON EXCEPTIONS

PETITIONERS' EXCEPTIONS

Petitioners' Exceptions fall into two groups; preliminary exceptions and substantive exceptions. The Exceptions will be addressed separately under these headings.

Preliminary Exceptions

Preliminary Exception One: Appearances

Petitioners note that under "Appearances" on page one of the

Recommended Order the word "Petitioner" should be "Petitioners."

Preliminary Exception One is GRANTED.

Preliminary Exception Two: Witnesses

This Exception notes that the word "Directory" should read "Director" in the title assigned to witness Terry Hess.

Preliminary Exception Two is GRANTED.

Preliminary Exception Three: Exhibits

Petitioners' Preliminary Exception Three reads in full "Petitioners' Exhibits 8, 10, 11, 12, and 32 were rejected." The Recommended Order accurately lists the exhibits that were admitted but contains no findings regarding rejected exhibits. Thus, this Exception requests that the Department make a supplemental finding of fact on an issue about which the Administrative Law Judge made no findings. It is improper for an agency to make such findings. See Florida Power and Light v. State, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

Additionally, because the parties did not order a transcript of the final hearing, the Department has no basis for making supplemental findings regarding evidentiary rulings made at that hearing. See Florida Dept. of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987).

Preliminary Exception Three is DENIED.

Substantive Exceptions

Substantive Exceptions One through Eleven

In their eleven Exceptions, Petitioners offer a complete rewrite of several Findings of Fact and Conclusions of Law as well as the Recommendation in the Recommended Order. Each Exception is deficient in two respects.

As noted above, the Exceptions simply present a rewrite of portions of the Recommended Order. The Exceptions to Findings of Fact do not assert that the Findings are not supported by competent substantial evidence in the record. The Exceptions to the Conclusions of Law do not assert that the substituted Conclusions are as or more reasonable that those in the Recommended Order. No Exceptions contend that the proceeding below did not comply with the essential requirements of law. Because the Exceptions do not identify any legal basis upon which they may be granted, the Department may deny these Exceptions without the need for an explicit ruling. **Fla. Stat.** § 120.57(1)(k).

Even if the Exceptions were crafted in accordance with the above-cited requirement, the Department would still lack any authority to grant them. The Findings and Conclusions in the Recommended Order are based on the proceeding below, including the testimony at the final hearing. Petitioners assert in their

Exceptions that the testimony actually supports different Findings and Conclusions. However, no party ordered a transcript of the final hearing and it is not part of the record before the Department. The failure to include the transcript in the record precludes the Department from rejecting or modifying the Findings and Conclusions cited in the Exceptions. See Edwards v. Department of Health and Rehab. Servs., 592 So. 2d 1249, 1250 (Fla. 4th DCA 1992); Florida Dept. of Corrections v. Bradley, 510 So. 2d 1122, 1123-24 (Fla. 1st DCA 1987).

Petitioners' Exceptions One through Eleven are DENIED.

INTERVENORS' AND RESPONDENTS' EXCEPTIONS

Intervenors and Respondents categorize their Exceptions in three groups; typographic errors, clarification changes, and substantive changes. The Exceptions will be addressed separately under these headings.

Typographic Errors

Exception One: Appearances.

This Exception is the same as Petitioners' Preliminary Exception One and is GRANTED.

Exception Two: Statement of the Issue

Intervenors and Respondents next note that the word "Number" should follow "Ordinance" under Statement of the Issue.

Typographic Exception Two is GRANTED.

Exception Three: Finding of Fact 15

Intervenors and Respondents point out that the word "Home" should follow "Mobile" in the last sentence of Finding of Fact 15.

Typographic Exception Three is GRANTED.

Clarification Changes

Exception One: Finding of Fact 7

Intervenors and Respondents suggest that certain citations to policies of the Martin County Comprehensive Plan are incomplete. The policies in this Finding are re-typed verbatim from the Martin County Comprehensive Plan, including the manner in which citations are set forth. See Martin County Ex. 2.

Clarification Exception One is DENIED.

Exception Two: Findings of Fact 1 and 14

These two Findings refer to the Amendment site as "Pitchford's Landing." Intervenors and Respondents assert that these references need to be changed because the Amendment affects only a portion of a larger proposed development which is known in its entirety as Pitchford's Landing.

While there may be a larger development of which this amendment is only a part, there are no findings that this Amendment changed the future land use designation of any property other than the 13.7 acres. The 13.7 acre parcel has consistently

been referred to as "Pitchford's Landing." The adoption ordinance for the Amendment itself refers to "Comprehensive Growth Management Plan Amendment #06-19, Pitchford's Landing . . . ." Martin County Ex. 1 at 2 (emphasis added).

Clarification Exception Two is DENIED.

Substantive Changes

Exception One: Findings of Fact 11-13

Findings of Fact 11 through 13 recount Martin County's efforts to address the loss of mobile home sites during the real estate boom of 2001-2005, which culminated in an interim moratorium on the conversion of such sites. Intervenors and Respondents argue that because this effort involved "another comprehensive plan amendment, not the one under review," it should be rejected as irrelevant.

It is certainly worth noting that the Administrative Procedure Act does not list relevance as a basis upon which an agency may reject a Finding of Fact. Thus, the Exception may be summarily denied on this basis.

Moreover, the issue appears to be factually relevant. Petitioners raised the issue of the interim moratorium in their Petition for Administrative Hearing. The issue was not the subject of any motion to strike and, thus, remained a relevant factual issue for the final hearing.

The disputed Findings regarding the interim moratorium are supported by competent, substantial evidence, as they come almost verbatim from Martin County Exhibit 11. To the extent that relevance may somehow provide a basis to reject a finding of fact that is supported by competent, substantial evidence, the County has tried this issue by consent and waived any claim of relevance by offering this evidence into the record. There is no indication that Intervenors raised any relevance objection to this document being admitted into the record and, therefore, they have also waived the issue.[1]

Substantive Exception One is DENIED.

Exception Two: Finding of Fact 19

Intervenors and Respondents next request that the Department add "transportation" to the public services with sufficient capacity to support the Amendment as set forth in Finding of Fact 19. They assert that the evidence demonstrates that transportation facilities would be sufficient and thus should be added to the list.

The list of facilities in Finding of Fact 19 is not exhaustive: "The data and analysis supporting the FLUM Amendment

---

[1] The docket contains "Intervenors' Notice of Objections to Petitioners' Exhibits" filed May 7, 2008, but does not have any document noting any objections to the County's exhibits. As the parties did not order a transcript, it is unknown whether any relevance objection was raised at the final hearing.

included the existence of other public services with sufficient capacity, such as fire protection, hospitals, parks and recreational facilities, and schools." Recommended Order at 11 (emphasis added). Accordingly, the Finding is supported by competent, substantial evidence and there is no basis to modify it. See **Fla. Stat.** § 120.57(1)(l).

Substantive Exception Two is DENIED.

Exception Three: Conclusion of Law 34

Intervenors and Respondents finally note that the Administrative Law Judge omitted mention of the state and strategic regional policy plans as bases for Petitioners' challenge in the final sentence of Conclusion of Law 34. This omission appears to be a typographical error.

Substantive Exception Three is GRANTED.

ORDER

Accordingly, it is hereby ordered as follows:

1. Based on the rulings set forth above, the Recommended Order is modified in the following respects:

a. Under "Appearances" on page one of the Recommended Order the word "Petitioner" is changed to "Petitioners."

b. The word "Directory" is changed to "Director" in the title assigned to witness Terry Hess on page three of the Recommended Order.

c. The word "Number" is inserted following "Ordinance" under Statement of the Issue on page two of the Recommended Order

d. The word "Home" is inserted following "Mobile" in the last sentence of Finding of Fact 15.

e. In Conclusion of Law 34, the words "state comprehensive plan, strategic regional policy plan" are inserted after "Florida Statutes."

2. All other Findings of Fact and Conclusions of Law are adopted.

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

4 The amendment to the Martin County comprehensive plan adopted by Ordinance Number 757 on August 7, 2007, 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)©) 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 12th day of June, 2009.

Paula Ford
Agency Clerk

U.S. Mail

Virginia P. Sherlock, Esquire
Howard K. Heims, Esquire
Littman, Sherlock & Heims, P.A.
Post Office Box 1197
Stuart, Florida 34995-1197

David A. Acton, Esquire
Martin County Administrative Center
2401 Southeast Monterey Road
Stuart, Florida 34996-3322

Tim B. Wright, Esquire
Wright, Ponsoldt & Lozeau
1002 Southeast Monterey Commons Blvd.
Suite 100
Stuart, Florida 34996-3340

Hand Delivery

Richard Shine, Esquire
Assistant General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Interagency Mail

The Honorable J. Lawrence Johnston
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060