Final Order Number DCA08-GM-320

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

LESEMAN FAMILY LAND PARTNERSHIP; WALTER E. MURPHREE, JR.; and DEBRA C. TREECE,

Petitioners,

vs.

CLAY COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

KINGSLEY BEACH, LLC; KINGSLEY VENTURES DEVELOPMENT COMPANY, LLC; and AVERY C. ROBERTS,

Intervenors.
_____________________________/

DOAH Case No. 07-5755GM

FILED
2008 OCT 20 A 11: 36
DIVISION OF ADMINISTRATIVE HEARINGS

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 September 25, 2007, Clay County adopted an amendment to its comprehensive plan by Ordinance 2007-53 (Amendment). The Amendment changed the future land use designation of 47.06 acres from Rural Residential to Rural Fringe. The Department reviewed

the Amendment and published a Notice of Intent to find it "in compliance."

On December 10, 2007, Petitioners[1] filed a Petition for Formal Administrative Hearing regarding the Amendment. Kingsley Beach, LLC, Kingsley Ventures Development Company, LLC and Avery C. Roberts filed for and were granted leave to intervene in support of the County and Department.

The final hearing was held on March 13 & 14, 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 timely filed Joint Exceptions to the Recommended Order, to which the Department and Intervenors filed a Joint Response. Clay County filed an independent Response.

<u>Standard of Review of Recommended Order</u>

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.

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[1] Two of the original Petitioners voluntarily dismissed their Petitions prior to the final hearing.

> 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.

RULINGS ON EXCEPTIONS

Exception One: Findings of Fact 23 & 43.

Finding of Fact 23 provides in full as follows:

> The comprehensive plan does not contain a description of the Rural Fringe land use category or a statement of the County's specific intent with regard to this category, other than its cap on residential density. The lack of detail in the plan makes the task of determining whether the amendment is in compliance more difficult.

The first sentence of this Finding is supported by competent, substantive evidence in the record. See Joint Ex. 1, FLUE, p. 5.[2] The second sentence is a reasonable inference from the first. To illustrate, a determination that a particular future land use map amendment was in compliance with the Rural Reserve category would be less challenging given the great detail about the Rural Reserve category found in FLUE Policy 3.1.1 regarding everything from location to buffering to open space.[3] Thus, there is no basis in the record to reject Finding of Fact 23.

Finding of Fact 43 provides in full as follows:

> Petitioners' contention that there is insufficient data and analysis to show that the Rural Fringe land use category is consistent with the conditions of the property is contrary to the record which contains ample data and analysis on this point.

This Finding is also based on the competent, substantial evidence set forth in Findings of Fact 24-42. Thus, there is no basis in

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[2] Importantly, "Petitioners acknowledge that the Clay County Comprehensive Plan ('Plan') does not contain a description of the Rural Fringe land use category." Joint Exceptions at 2.

[3] While the Rural Fringe category is not described in any detail in the comprehensive plan, it does meet the minimum criteria for a land use category in that it sets forth the allowable use (residential) and the density standard (1-3 dwelling units per acre). See Joint Ex. 1, FLUE, p. 5; **Fla. Stat.** § 163.3177(6)(a)("[e]ach future land use category must be defined in terms of uses included, and . . . population densities").

the record to reject Finding of Fact 43.

Petitioners argue that these two Findings are "inconsistent which means one is not supported by competent substantial evidence and both must therefore be rejected." Joint Exceptions at 2. However, the two Findings are not inconsistent. The first notes that the compliance determination will be difficult; the second concludes that the record contains ample data and analysis to support a finding of "in compliance." Just because a compliance determination may be difficult does not make it impossible.

Petitioners' Joint Exception One is DENIED.

<u>Exception Two</u>: Finding of Fact 28 & Conclusion of Law 52

Petitioners take exception to the second-to-last sentence in Finding of Fact 28, which provides as follows:

> This policy [FLUE 2.3] appears to apply only to the expansion of an existing urban service area into adjacent undeveloped lands, and not to the creation of a new urban service area.

Future Land Use Element Policy 2.3 provides in full as follows:

> Urban service areas may be expanded to include undeveloped land in or near existing urban areas provided that the Clay County Health Department has determined that connection to a central system is required in the public interest due to public health consideration. Services and facilities must be guaranteed through 'agreements to serve' by the Clay County Utility Authority.

> Expansion of the urban service area shall require a plan amendment.

Joint Ex. 1, FLUE, p. 3. Petitioners contend that the Administrative Law Judge erred in finding that the creation of a new urban service area is not subject to this Policy and that such expansions need not demonstrate that central water and sewer service exists or is planned. Policy 2.3, on its face, applies only to the expansion of existing urban service areas. Given this plain language, it is logical to find the Policy inapplicable to the creation of new urban service areas.

Moreover, to find this Policy applicable to all urban service areas would mandate that all such areas must be served or be planned to be served by central services. While Petitioners' expert testified that urban service areas in general must be served or planned to be served by central services, the Clay County comprehensive plan does not contain such a requirement. To the contrary, the plan explicitly contemplates that some portions of urban service areas will not be served by central services. Future Land Use Element Policy 2.4 provides in pertinent part as follows:

> All development, including development of vacant residential lots, within the Urban Service Areas shall be served by central water and wastewater services, if available. Onsite sewage treatment and disposal systems will be allowed within the Urban Service Areas if central sewer is not available.

Joint Ex. 1, FLUE, p. 4 (emphasis added). Additionally, the plan provides for a density bonus for lands within the urban service area if they have central water and sewer, which contemplates that some of these lands will not have central services.

Petitioners' Joint Exception Two is DENIED.

<u>Exception Three</u>: Finding of Fact 30

Petitioners take exception to the first sentence of Finding of Fact 30, which provides as follows:

> Petitioner object to the amendment, in part, because they believe the Rural fringe designation is only permitted in areas where central water and sewer facilities are available.

Petitioners argue that their objection is that the Rural Fringe future land use category should be applied only to lands where central services are available <u>or are planned to be available</u>.

Petitioners' position on this issue is set forth in the Prehearing Stipulation as follows:

> Urban Service Areas are defined as areas which have, or are planned to have, urban services, in particular central water and sewer, within an established timeframe.

The testimony of Petitioners' expert witness is consistent with the Prehearing Stipulation. There is no competent, substantial evidence in the record to support the first sentence of Finding of Fact 30 in the Recommended Order and it must be modified.

Petitioners' Joint Exception Three is GRANTED.

Exception Four: **Finding of Fact 32**

Petitioners take exception with the fourth full sentence of Finding of Fact 32 which provides as follows: "The County staff report regarding the 2003 amendment also recommended denial." The staff report noted that "[i]f this agreement [for the extension of services] is not reached, this property cannot be changed to Rural Reserve . . . ." Pet. Ex. 21, p. 4. The Administrative Law Judge's Finding is a fair inference from this report.

Petitioners' Joint Exception Four is DENIED.

Exception Five: **Findings of Fact 33 & 41; Conclusions of Law 53 & 54.**

Petitioners take exception to several Findings and Conclusions "all of which essentially find or conclude that central water and sewer services are not mandatory for expansion of the urban service area . . . ." This argument was addressed and rejected in the disposition of Exception Two above.

Petitioners raise one new argument in this Exception that was not raised in Exception Two. Petitioners note that a 2003 Clay County staff report on a plan amendment represented that a future land use map amendment to designate a parcel "Rural

Reserve" could not be approved because that category is required to be in an Urban Service Area and central water and sewer were not available to the parcel. Petitioners argue that this affirmative representation that central water and sewer are required for land use categories that must be within an Urban Service Area is the correct interpretation of the comprehensive plan.

The County planner responsible for that report testified at the final hearing that the representation regarding central water and sewer was in error. The Administrative Law Judge weighed the evidence and found the County's interpretation that central services are not required to be "not unreasonable."

The Department agrees with Petitioners that a local government may not "summarily change its position on interpretation of its comprehensive plan . . . ." Joint Exceptions at 5-6. However, a local government's "interpretation" cannot stand when in conflict with the plain language of the comprehensive plan. See Department of Community Affairs v. Leon County, DOAH Case No. 07-3267GM. As explained above in the ruling on Exception Two, the Clay County comprehensive plan contemplates some development on lands within designated Urban Service Areas without central services.

Petitioners' Joint Exception Five is DENIED.

Exception Six: **Findings of Fact 35 & 36.**

Petitioners take exception to the second sentence of Finding of Fact 35 and all of Finding 36, which provide as follows:

> The County might be able to interpret the Comprehensive Plan as Petitioners urge, to prohibit the creation of a new urban service area where central water and sewer facilities are unavailable.
>
> Petitioners assert that the County's rationale for the Amendment would allow urban service areas to be placed anywhere on the FLUM, but there are no other areas on the Clay County FLUM like the Kingsley Lake Community.

Petitioners argue that these Findings "place the constitutional validity of the underlying approval by the County at issue." Joint Exceptions at 6-7. However, the Department has no authority to consider or determine constitutional issues. See Florida Hosp. v. Agency for Health Care Admin., 823 So. 2d 844 (Fla. 1st DCA 2002).

Petitioners Joint Exception Six is DENIED.

ORDER

Accordingly, it is hereby ordered as follows:

1. Exception 3 is GRANTED and Finding of Fact 30 is modified as follows:

> Petitioner object to the amendment, in part, because they believe the Rural fringe designation is only permitted in areas where central water and sewer facilities are available or are planned to be available.

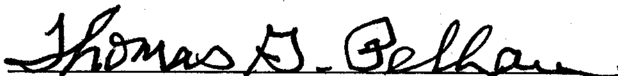
2. All other Exceptions are DENIED.

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

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

5. The amendment to the Clay County comprehensive plan adopted by Ordinance No. 2007-53 is hereby deemed to be "in compliance."

DONE AND ORDERED in Tallahassee, Florida.



Thomas G. Pelham, Secretary
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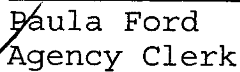
CERTIFICATE OF FILING AND SERVICE

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 17th day of October, 2008.



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